Submission on Bill C-26

Amendments to the *Canada Transportation Act*, the *Competition Act*, and other statutes

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

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I. EXECUTIVE SUMMARY

1. The *Competition Act* is legislation of general application and as such is an inappropriate repository for industry-specific (indeed company-specific) regulations. Such regulation is more appropriately left to legislation specific to the industry in question (i.e. the *Canada Transportation Act*).

2. Providing exceptional powers to deal with this particular situation implies that the *Competition Act* is deficient from an enforcement point of view (both substantively, in relation to abuse of dominant position and procedurally, in relation to the procedure for securing interim orders or injunctions). This has not been demonstrated to be the case.

3. The proposed legislation would confer upon the Commissioner an extreme set of powers. These not only constitute a bad precedent in the field of competition law, but they will also likely undermine public confidence concerning the adequacy of the existing law. We anticipate that an attempt will be made to ensure that such powers are made more generally applicable.

4. The proposed controls could more effectively and appropriately be dealt with by orders issued under proposed sections 64.2 and 64.4 of the *Canada Transportation Act* or by consent orders under section 105 of the *Competition Act*.

5. There does not appear to be any justification for exempting from the *Competition Act* collaborations among travel agents to enable them to bargain collectively with a major domestic airline (i.e., Air Canada).

6. The Minister's power to review airline mergers under the proposed provisions of section 64 *et seq* of the *Canada Transportation Act* should be confined to merger transactions involving the acquisition of control, directly or indirectly, of one domestic airline by another.

7. The proposed special exemption from the confidentiality provisions of the *Competition Act* is unnecessary.

8. Permitting the Governor in Council to expand on the *Competition Act*'s definition of "anti-competitive acts" by regulation is both unnecessary and undesirable from a policy perspective.

9. The proposed power for the Commissioner to issue temporary orders constitutes an unwarranted interference with due process. It raises serious questions concerning its legality and constitutionality which may lead to lengthy court challenges even if the power is ultimately upheld.

10. The ability of the Commissioner to issue such orders *ex parte*, without providing notice or an opportunity to be heard, is wrong in principle.

II. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the Section) is pleased to have the opportunity to comment on Bill C-26, An *Act* to Amend the *Canada Transportation Act*, the *Competition Act*, the *Competition Tribunal Act* and the *Air Canada Public Participation Act*. The Bill implements the federal government's policy

concerning the restructuring of Canada's air transportation industry, arising out of Air Canada's acquisition of Canadian Airlines International Limited (CAI).

The submissions and comments which follow are primarily focused on the proposed amendments to the *Competition Act* and the related amendments to the other statues insofar as they have a bearing on competition law matters.

III. OVERVIEW OF RELEVANT PROPOSED AMENDMENTS

A. Proposed Amendments to the *Canada Transportation Act*

- Authorizes the Governor in Council to approve mergers and acquisitions of airline undertakings after review by the Minister of Transport, the Commissioner of Competition (the Commissioner) and the Canadian Transportation Agency (proposed section 56.2).

B. Proposed Amendments to the *Competition Act*

- Exempts agreements among travel agents respecting commissions on sales of airline tickets paid by a carrier with 60% of domestic service activity from sections 45 (conspiracy) and 61 (price maintenance) of the *Competition Act* (proposed section 4.1).

- Exempts the Minister of Transport's requests for disclosure of information collected by the Commissioner from the general duty of confidentiality under section 29 of the *Competition Act*. The Minister may use that confidential information only for the purposes of a review of a proposed merger or acquisition of an air transportation undertaking under the proposed new sections 56.1 or 56.2 of the *Canada Transportation Act* (proposed section 29.1).

- Grants the Governor in Council a new regulation-making power, on the recommendation of the Ministers of Industry and Transport, to specify anti-competitive acts or conduct of a domestic air carrier. It enlarges the definition of an "*anti-competitive act*" in section 78 of the *Competition Act* to include such acts as are specified in those regulations (proposed sections 78(1)(j) and 78(2)).

- Prohibits the Competition Tribunal (the Tribunal) from taking action against a merger which is certified to have been approved under proposed new section 56.2(6) of the *Canada Transportation Act* (proposed paragraph 94(c)).

- Gives the Commissioner new powers to make temporary orders in regard to anti-competitive acts affecting domestic airline services (proposed section 104.1). These include the following:

  Permitted scope of orders: The Commissioner may make an order prohibiting a person operating a domestic airline service from doing any act or thing that could, in the Commissioner's opinion, constitute an *anti-competitive act* or requiring such a person to take any steps which the Commissioner considers necessary to prevent injury to competition or harm to another person (proposed section 104.1(1))

  Conditions precedent: The Commissioner must have commenced an inquiry under section 10(1) of the *Competition Act* to determine whether the conduct is reviewable under section 79 (abuse of dominant position). The Commissioner must consider that, in the absence of a temporary order: (i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur; or (ii) a person is likely to be eliminated as a competitor, or suffer a significant loss of market share or revenue or other harm that cannot be adequately remedied by the Tribunal.

No notice necessary: The Commissioner is not required to give notice to any person or to receive any representations before making a temporary order (proposed section 104.1(2)), but must "promptly" thereafter give notice to "every person against whom it was made or who is directly affected by it" (proposed section 104.1(3)).

Duration: A temporary order has effect for 20 days (proposed section 104.1(4)), and may be extended for one or two periods of 30 days each or may be revoked (proposed section 104.1(5)). However, if an application is made to the Tribunal under proposed section 104.1(7) to have a temporary order varied or set aside, then the temporary order has effect until the Tribunal makes an order under that section.

Hearing to vary or set aside: At the hearing of an application to consider whether to vary or set aside a temporary order, the Tribunal must provide the applicant, the Commissioner and any person directly affected by the temporary order with "a full opportunity to present evidence and make representations before the Tribunal makes an order" (proposed section 104.1(10)).

Temporary order not reviewable in any court: Proposed section 104.1(11)(a) provides that "a temporary order made by the Commissioner shall not be questioned or reviewed in any court" and then purports expressly to exclude any power in a court to judicially review or exercise a prerogative remedy that would "question, review, prohibit or restrain the Commissioner in the exercise of the jurisdiction granted by this section".

Enforceable as a Tribunal order: A temporary order made by the Commissioner is "enforceable in the same manner as an order of the Tribunal" (proposed section 104.11(13)).

Proceed expeditiously with hearing: When a temporary order is in place, the Commissioner is obliged to "proceed as expeditiously as possible to complete the investigation arising out of the conduct in respect of which the temporary order was made" (proposed section 104.11(14)).

Blanket immunity: There is essentially blanket immunity provided to officials for "anything done or omitted to be done in good faith under this section" (proposed section 104.11(15)).

C. Amendments to the *Competition Tribunal Act*

A member of the Tribunal sitting alone is authorized to hear and dispose of any application for review against a temporary order issued by the Commissioner for the purpose described above (proposed section 11(1)).

IV. GENERAL PRINCIPLES

The Section has significant concerns about the proposed legislation on two levels. Our concerns about the general principles of the legislation are set out immediately below. We also have specific comments on particular provisions of the Bill, which are set out in the next section.

The following are our general comments on the proposed legislation:

1. The *Competition Act* is legislation of general application pertaining to virtually all segments of business activity throughout the country. We think it is wrong, in principle,

to include specific provisions in the *Act* which have application only in one highly narrow and specialized industry situation. The *Competition Act* sets out general minimum standards of competitive behaviour which are expected to be adhered to by all businesses. Generally, specific exceptional rules creating higher hurdles for particular persons (arguably, in this case, only one company) should not be contained in the *Competition Act*. This is particularly the case where, as here, the federal government has constitutional authority over the industry and has relevant legislation dealing with this industry (i.e., the *Canada Transportation Act*). It would be more appropriate to include such provisions in this latter statute.

Bill C-26 was prompted by the merger of Air Canada and CAI and is intended to deal with its consequences. While it may not be a fair statement to observe that the "horse is already out of the barn" (since the legislation is intended to have retrospective effect in regard to that merger), it is very hard to imagine another circumstance when these provisions would ever have application, except insofar as they relate to the conduct of Air Canada.

2. We have difficulty accepting that this situation justifies departing from the competitive ground-rules which otherwise apply across-the-board to all industries. The proposed exceptional treatment of the airline industry proposed by these amendments strongly implies that the current provisions of the *Competition Act* are insufficient to control the behaviour of a firm holding a dominant market share. In particular, it suggests that the provisions of the *Competition Act* relating to such matters as interim orders and injunctions are inadequate to deal with the anti-competitive behaviour of firms in that position. We are not aware of any decided case dealing with abuse of dominant position which suggests that these provisions are insufficient. Indeed, every one of these cases has resulted in orders requested by the Commissioner being issued against the dominant party.

3. As mentioned below, many of the proposed amendments represent extreme provisions to which objection would be taken were they not limited in their application to the airline industry. We are concerned about the precedent being set by the inclusion of such provisions in the *Competition Act*. In fact, we are aware that a private member is preparing a bill to extend the Commissioner's powers to issue temporary orders, as proposed in this Bill, to all abuse of dominance situations. As discussed below, we believe these provisions raise significant concerns and we are anxious that they not be established as the new standard. Inevitably, the inclusion of such provisions in the *Competition Act* calls into question the effectiveness of the existing law. It will likely precipitate a demand for similarly extreme measures in regard to other publicly unpopular businesses and perhaps even beyond.

4. The situation being addressed by Bill C-26 is unlikely to be repeated. For that reason, amendments to legislation of general application are, in our Section's view, a totally inappropriate response. The only situation which calls for attention is the negative competitive consequences of the merger involving Air Canada and CAI. In our view, the preferable response would have been simply to provide for the undertakings – and any other matters which the Minister of Transport or the Commissioner wished to address – in the orders contemplated by the proposed new sections 56.2 and 56.4 of the *Canada Transportation Act*. Alternatively, some of these same concerns could have been addressed (and still can be addressed) by an appropriate consent order issued by the Tribunal pursuant to section 105 of the *Competition Act*. This is possible since the transaction in question is a merger and a merger may be subject to a consent order procedure under section 105 of the *Competition Act*, where the merger is challenged within three years following its completion. In addition, the first *Gemini* case[1] provides a precedent for the kind of detailed regulation of a specific

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1 *Director of Investigation and Research* v. *Air Canada et al*, (1989) 27 C.P.R. (3d) 476.

industry activity through consent order. This case laid down a code of acceptable competitive behaviour in the airline computer reservation business.

In our opinion, either of these responses would be preferable to amending the *Competition Act* in the manner contemplated by Bill C-26.

5. We are also concerned that the consultation between the Minister of Transport and the Commissioner, as contemplated by Bill C-26, may effectively politicize the Commissioner's role within government. This would erode the long-standing and valued independence of the Commissioner's office. The Minister may effectively override the Commissioner's views concerning the negative effects of a merger by agreeing with some but not all of the Commissioner's concerns. This may tempt the Commissioner to form conclusions which will be consistent with the Minister's views.

6. We consider that the thrust of many of the proposed new provisions significantly curtails due process and, at the very least, sets a bad precedent in the field of competition law. The Supreme Court of Canada in *Hunter v. Southam*[2] said the Restrictive Trade Practice Commission's powers of investigation effectively prevented it from acting judicially when authorizing search warrants in investigations. Even if the Bill's proposed powers for the Commissioner to act as both judge and prosecutor are not held to be unconstitutional, they are so close to the line that they effectively invite constitutional challenge. The exercise of such powers may therefore be tied up in the courts for years.

The proposed legislation also sets a disturbing example of where legislative reform might be headed. Such draconian measures undermine the integrity of the *Competition Act* which, in other respects, provides a careful balancing of the interests

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2 [1984] 2 SCR 135.

of consumers and business participants in a regime where competition law enforcers are constrained by the requirements of due process.

7. We agree with the submissions made by Charles River Associates[3] on the issue of predatory pricing. Their submission exemplifies one of our points that the existing law is sufficient to deal with such situations. Specifically, we agree with Charles River Associates that disturbance of the present legal environment is unnecessary and likely to have a chilling effect on legitimate competitive activity, thereby depriving consumers of important benefits of competition.

V. SPECIFIC COMMENTS

A. *Canada Transportation Act*

The Section does not have a problem with the proposed section 56.1 of the *Canada Transportation Act* which would add a further level of review in regard to mergers involving an airline undertaking. It also does not object to the related amendment proposed to section 94 of the *Competition Act*, enabling the Minister of Transport to prevent the Tribunal from issuing an order against a merger when the Minister has approved it pursuant to subsection 56.2(6) of the *Canada Transportation Act*. However, we think there is an undesirable lack of clarity concerning those cases which will be required to be notified to the Minister of Transport and the Canadian Transportation Agency under section 56.1(1). As presently drafted, the provision applies to any transaction required to be pre-notified under the *Competition Act* that involves an air transportation undertaking. This would not necessarily be limited in its application to the acquisition of control of an air transportation undertaking or the acquisition of such an undertaking. For example, the acquisition of a hotel chain by an air transportation

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3 Submission of Charles River Associates (Margaret Sanderson and Michael Trebilcock) dated February 22, 2000 to the House of Commons Transport Committee.

undertaking might be pre-notifiable under the *Competition Act* and, at the same time, that filing may be said to be "in respect of a transaction that involves an air transportation undertaking". However, the transaction would not involve the *acquisition* of an air transportation undertaking.

Under subsection 56.2(2), the Commissioner is required, as soon as feasible following the receipt of a notification of the merger, to report to the Minister of Transport on any concerns regarding potential prevention or lessening of competition. There is no requirement that any specific *degree* of prevention or lessening of competition be likely to occur. This contrasts with the merger provisions under section 92 of the *Competition Act* where enforcement action against a merger requires that there be a *substantial* prevention or lessening of competition. In the view of the Section, a similar standard should apply here, at least insofar as competition law considerations are to have a bearing on the ultimate decision made by the Minister of Transport.

As noted above, sections 56.2 and 56.4 would appear to provide appropriate authority for the issuance of detailed orders binding upon Air Canada arising out of its merger with CAI. Such orders could presumably deal with the concerns which prompted the inclusion of amendments to the *Competition Act*, without the necessity for making those amendments. In the Section's view, that would be the preferable approach. Alternatively, as discussed above, the parties could perhaps proceed by way of consent order under section 105 of the *Competition Act* (provided of course that the Minister of Transport has not taken action under the proposed section 94(b) of the *Competition Act*).

We think there are some drafting deficiencies which need to be addressed in regard to proposed subsections 64(1.1) to (4) and proposed section 66:

(i) We can imagine the new provisions respecting discontinued service being avoided by an airline gradually reducing the service capacity from one week to the next, such that it is never less than 50% of the preceding week's capacity.

(ii) We think section 66 should deal with unreasonable rates charged by the dominant airline service on particular routes not just where it is the *only* carrier serving that route but also where, for example, the only other carrier serving the same route does so only infrequently (e.g., once a week) such that the first carrier effectively has a monopoly on the route.

(iii) Proposed subsection 66(3) is unnecessarily restrictive in limiting the Canadian Transportation Agency to only what is referred to in paragraphs (a) to (c) of that subsection and in particular in paragraph (c) to "any other information that may be provided by the *licensee*". In the Section's view, the Agency should not be so limited in its review but should be authorized to consider any other information it considers relevant. By inference, the Agency would not be permitted to consider such other matters where they are not mentioned in paragraphs (a) to (c), even when they are considered relevant by the Agency.

B. Amendments to the *Competition Act*

i) Travel agents

The Section does not support exempting agreements and arrangements among travel agents respecting commissions in the sale of airline tickets by a carrier with 60% of domestic service activity from the application of section 45 (conspiracy) and section 61 (price maintenance) of the *Competition Act*. This proposal is, we think, peculiar and unwarranted. It is true that the *Competition Act* currently contains exemptions for collective bargaining activities of employees and fishers but these are of long-standing character. It is difficult to distinguish the situation of travel agents from that of other service

industry participants who have no similar immunity but similarly fragmented membership. To authorize price fixing on the part of travel agents seems contrary to the interests of consumers.

Secondly, the exemption appears to operate presumptively in favour of the collective negotiation by travel agents in relation to all airlines. The exception is where the airline procures from the Tribunal a certificate that the airline and its affiliates account for less than 60% of the "revenue passenger-kilometres" of all domestic services over the 12 months immediately prior to the application. This puts the onus on the airline of having to go to the expense and trouble of obtaining such a certificate. At the very least, if the travel agents wish to bargain collectively under the authority of this exemption, they ought to be the ones to be required to obtain a certificate confirming that the airline in question satisfies this requirement.

ii) Confidentiality

Proposed section 29.1 of the *Competition Act* provides an exemption from the general duty of confidentiality. It allows the Minister of Transport to request, receive and use confidential information from the Commissioner for the purposes of reviewing a proposed merger or acquisition involving an airline undertaking under sections 56.1 or 56.2 of the *Canada Transportation Act*. It is arguable that this particular exemption is not necessary, as section 29 presently permits the communication of information to Canadian law enforcement agencies. The Minister of Transport arguably falls within this category, in the context of his or her responsibilities to review a merger under section 56.1 or 56.2.

Under the existing provision, the Commissioner has the discretion not to turn over confidential information to other Canadian law enforcement agencies. There is no such discretion in proposed section 29.1, if a request is made by the Minister of Transport. This is inappropriate.

We would also note that the obligation to provide relevant information concerning a merger is not reciprocal. While the Commissioner is obliged to turn over information of this character, there is no similar obligation on the Minister to share relevant information with the Commissioner.

By opening up this channel of communication at the instance of the Minister of Transport, we have concerns that the Commissioner's independence under the *Competition Act* may be seen to be compromised.

Finally, under the new provision, there does not appear to be any requirement that the merging parties be notified of the disclosure of confidential information which has been made to the Minister of Transport. We believe there should be such an obligation.

iii) Definition of anti-competitive acts

The expression "*anti-competitive act*" is defined by section 78 of the *Competition Act*. The proposed amendment would allow the Cabinet to further define specific anti-competitive acts by regulation – an executive action which lacks many of the protections of the Parliamentary process. Given that the term as presently defined in section 78 is not exhaustive, other forms of behaviour than those listed may qualify as anti-competitive. This interpretation has in fact been confirmed by the Tribunal. Accordingly, it is difficult to justify the inclusion of such a provision, particularly where it involves a statutorily defined term amended by regulation.

There is also nothing in proposed subsection 78(2) which restricts the Governor-in-Council in the exercise of this power to identify conduct as anti-competitive. This is important because the Commissioner is authorized to issue temporary orders where he or she thinks such an act has been committed. There is no requirement that the act also be likely to prevent or lessen competition substantially.

It has been suggested that any anti-competitive acts that may be included by regulation will focus on predatory behaviour by a dominant air carrier (i.e., Air Canada). However, such behaviour, if it were likely to give rise to a significant prevention or lessening of competition, would undoubtedly be covered by the present provisions of the *Competition Act*. To the extent that the new provisions would expand the definition of predatory to include behaviour which would not otherwise qualify, we believe this would be undesirable. It would reduce the incentive to lower prices, which is of benefit to consumers, and would undermine the current approach taken by the Competition Bureau in enforcing the predatory pricing provisions.[4]

iv) Commissioner's new power to make temporary orders

Undoubtedly, the most troubling aspect of the proposed Bill, is the sweeping new power of the Commissioner to make temporary orders. Such orders may prohibit a person operating a domestic airline service from doing anything that, in the opinion of the Commissioner, could constitute an anti-competitive act. They may require this person to take such steps as the Commissioner considers necessary to prevent injury to competition or harm to another person.

This provision is presumably intended to control the sort of behaviour against which the Tribunal would have power to issue a remedial order under section 79. However, unlike section 79 orders, there is no requirement that the party against whom the order is made must control that business – either substantially or completely, throughout Canada or any area thereof. There is also no requirement that the party be engaged in a *practice* of anti-competitive acts or that the practice have, or be likely to have, the effect of preventing or lessening competition *substantially* in a market. Indeed, it appears that the Commissioner is authorized to act under the section to prevent harm to a competitor or other person irrespective of whether any of these other requirements has been satisfied.

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4 This is in keeping with the submission of the Charles River Associates, *ibid*.

In other words, the Commissioner would appear to be authorized to make temporary orders in circumstances where the Tribunal would not have jurisdiction to make an order under section 79.

A second point of real concern relates to the Commissioner's power, under subsection (2) of proposed section 104.1, to issue such orders without providing any notice to the affected party and without permitting that party to make representations. This is significant because the Commissioner's temporary order is enforceable in the same manner as an order of the Tribunal and because the section contains provisions which purport to insulate the Commissioner's orders from court review.

It is highly unusual for administrative officials not to be required to give any notice to, or to hear any representations from, a party to be affected by the order. Elsewhere in the *Competition Act*, the extraordinary power to issue interim injunctions is reserved to the Federal Court (section 33(1)). The Commissioner's interim orders are to be enforceable in the same manner as Tribunal orders, which are in turn enforceable in the same manner as orders of a superior court of record (subsection 8(2) of the *Competition Tribunal Act*). The breach of a temporary order issued by the Commissioner will similarly be an offence punishable by fine or incarceration (see section 74 of the *Competition Act*). It is thus possible that a person could be imprisoned for breach of a temporary order of the Commissioner even where that person has been given no prior notice and has had no opportunity to be heard concerning the question of whether the order should have been issued. There is, of course, a subsequent right to appeal the Commissioner's temporary order to the Tribunal but that does not change the fact that, at the initial stage, there is no requirement of notice or of a hearing.

Ordinary principles of natural justice and procedural fairness require that a person whose rights or interests may be affected by an order be given notice and an opportunity to make representations, either orally or in writing, before the order is made. Parliament or a

legislature may derogate from administrative law principles of natural justice or fairness, subject to only the constraints of the *Canadian Charter of Rights and Freedoms.* Apart from *Charter* considerations, the proposed legislation raises important policy concerns in its derogation from these basic principles of natural justice and fairness. The power to issue injunctions, the breach of which carries the possibility of imprisonment, is extraordinary. This is even more the case where that power may be exercised by an administrative official such as the Commissioner (ordinarily a law enforcement officer) rather than a court, and without any requirement of notice or a hearing. In this connection, it is worth recalling Chief Justice Dickson's statement in the *Hunter v. Southam*[5] case in regard to the role of the Restrictive Trade Practices Commission:

> "In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under [the *Combines Investigation Act*]. This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the *Act*) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the [Commission] passing on the appropriateness of a proposed search under [the *Act*] is caught up by the maxim *nemo judex in sua causa*. He simply cannot be the impartial arbiter necessary to grant an effective authorization."

Putting aside the ordinary administrative law principles of natural justice and fairness, the proposed legislation also raises potential *Charter* issues. Since there is a possibility of imprisonment for breach of an order of the Commissioner, the "liberty" interest under section 7 of the *Charter*[6] is engaged.[7] Accordingly, that potential deprivation of liberty

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5 *Hunter v. Southam op. cit.* fm 2 at page 164.

6 Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

7 See *Re ss. 193 and 195.1 of the Criminal Code* (Prostitution Reference), [1990] 1 S.C.R. 1123 at pp. 1140, 1215 (the "possibility of imprisonment" is a deprivation of liberty under section 7).

must be in accordance with the "principles of fundamental justice" in order for the legislation to be constitutional. The Supreme Court of Canada has said much about the meaning of the "principles of fundamental justice", but at a minimum, it is clear the protection includes the concept of procedural fairness.[8] It is also clear that the requirements of procedural justice vary according to the context in which they are invoked,[9] and that those requirements "can be attenuated when urgent and unusual circumstances require expedited court action".[10] Thus, the Supreme Court has held that in certain circumstances, an *ex parte* injunction issued by a court will not offend the principles of fundamental justice – for instance, where the delay necessary to give notice might result in an immediate and serious violation of rights.[11]

Whether a court would find this proposed legislation constitutional would depend on the court's contextual assessment of whether the circumstances in which a temporary order may be made are sufficiently urgent and unusual. The legislation establishes a standard of "likely" injury to competition and "likely" exit of a competitor from the market if a temporary order is not made. On its face, this would appear to be a high standard; however, much would depend on how this test is actually applied by the Commissioner. Given that a temporary order is effective for only 20 days in the first instance, the Commissioner must presumably be satisfied that it would be "likely" that there would be injury to competition or the exit of a competitor in the following 20 days. One wonders whether, if such injury or exit is so imminent, a temporary order would have any effect at all. A court is also likely to consider that the temporary injunctive order is being issued by an administrative official, rather than a court – thus lacking the ordinary judicial safeguards.

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8 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

9 *R. v. Lyons*, [1987] 2 S.C.R. 309.

10 *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1995), 122 D.L.R. (4th) 1 at p. 45 (S.C.C.), *per* La Forest J.

11 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

While it is difficult to predict whether a court would find these extraordinary powers to be constitutional, it is clear that they do raise important *Charter* concerns relating to procedural fairness under section 7.

Whether the proposed legislation would ultimately be determined to be constitutional is not necessarily the only relevant question. We assume that the government has closely reviewed this question and concluded that the proposed legislation will withstand scrutiny. However, even if this is ultimately the result, it seems to us there are sufficient questions concerning its legality as to invite a court challenge, which may then result in the legislation being mired in litigation for years.

We are also concerned that a temporary order is enforceable in the same manner as an order of the Tribunal. Orders of the Tribunal – a quasi-judicial body – are enforceable in the same manner as orders of a superior court of record (s. 8(2) of the *Competition Tribunal Act*). The Tribunal also has a power to find a person in contempt of the Tribunal and to impose a punishment that is "appropriate in the circumstances" (s. 8(3) of the *Competition Tribunal Act*). Failure to comply with an order of the Tribunal is punishable by fine or imprisonment for up to 5 years (s. 74 of the *Competition Act*). The proposed legislation would appear to confer these severe enforcement powers on the Commissioner in enforcing temporary orders. A party challenging the legislation could argue that the proposed provision invests the Commissioner with some of the powers of a superior court of record. This potentially infringes the judicature provisions – and in particular section 96 – of the *Constitution Act, 1867*. Courts have established that a legislature may not confer on a body other than a superior court judicial functions analogous to those functions performed by superior courts.[12] Such a conferral is all the more objectionable if the

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12 See *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725; see also generally P.W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 1, pp. 7-24 – 7-44 "Implications of the Constitution's Judicature Sections".

administrative body (here the Commissioner) does not even exercise adjudicative functions.

The third concern about the temporary order power is that temporary orders of the Commissioner are not reviewable by the courts (proposed section 104.1(11)). A party challenging the legislation could argue that it runs afoul of section 96 of the *Constitution Act, 1867*, which protects superior court review of administrative tribunals.[13] This principle was recently reaffirmed by the Supreme Court of Canada, which confirmed that section 96 guarantees a core of superior court jurisdiction that cannot be abridged by Parliament or a legislature. The core of a superior court's jurisdiction arguably includes the power of judicial review by prerogative writ.[14] In *MacMillan Bloedel v Simpson*, Lamer C.J. for a majority of the Court, noted that "powers which are the 'hallmarks of superior courts' cannot be removed from those courts". These powers could arguably include the power to review decisions of the Commissioner in proposed section 104.1(11) of Bill C-26.

A further potential difficulty concerns how the proposed provision is intended to operate with the appeal provisions under the *Competition Tribunal Act*. Proposed section 104.1(11)(a) provides that "a temporary order made by the Commissioner shall not be questioned or reviewed in any court", but also provides that there may be a hearing before the Tribunal to vary or set aside the Commissioner's order (proposed section 104.1(7)). Section 13 of the *Competition Tribunal Act* provides that an appeal lies to the Federal Court of Appeal from "any order" of the Tribunal. Is the proposed amendment therefore intended to preclude review by a court notwithstanding section 13? The categorical language of the proposed amendment would appear to suggest so, but such a conclusion

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13 *Crevier v. Attorney-General of Quebec*, [1981] 2 S.C.R. 220.

14 *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, a decision which Professor Hogg has described as "rather a clear affirmation that a superior court's power of judicial review for jurisdictional error cannot be taken away in any circumstances by either the federal Parliament or a provincial Legislature": see Hogg, *Constitutional Law of Canada*, looseleaf, p. 7-44.

would mean that the government has intended that there be neither judicial review nor appeal from the Tribunal's review of the Commissioner's order. This is a surprising conclusion.[15] At the very least, there is significant ambiguity in the proposed legislation which merits clarification.

We also have concerns about the following procedural aspects of the issuance of temporary orders by the Commissioner:

(a) The order is described as "temporary", but in fact the Commissioner may extend the order beyond its original 20-day period for up to two further periods of 30 days each without any further act or authorization beyond giving notice of the extension to the person affected. A temporary order may therefore continue for upwards of 80 days or almost three months. We believe this is excessive.

(b) The person against whom the temporary order is made has the burden of applying to the Tribunal to have the temporary order varied or set aside. In doing so, that person is required to demonstrate that none of the conditions set out in paragraph (1)(b) existed or were likely to exist, failing which the Tribunal is obliged to continue the temporary order in effect for such duration as it determines up to a maximum of 60 days.

(c) Unlike the circumstances in which the Commissioner may issue a temporary order, the appeal of that order by the affected party must be on notice to the Commissioner and others who receive notice of the order in the first instance. At the hearing of the application, the Tribunal is obliged to provide the Commissioner "and any other person directly affected by the temporary order" with a full

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15 Of course, even if there is an appeal to the Federal Court of Appeal under section 13 of the *Competition Tribunal Act* from the Tribunal's decision to review a temporary order, the argument is still there that the exclusion of judicial review would *still* be unconstitutional for the reasons set out earlier.

opportunity to present evidence and make representations before the Tribunal makes any order. These rights are in fact much broader than those given to any intervener in other Tribunal proceedings.

(d) Subsection (15) purports to confer complete immunity on the government, the Minister, the Commissioner and any other person employed in the public service of Canada acting under the direction of the Commissioner for anything done in connection with proceeding under this section "in good faith". This provision, when taken with the privative clause in subsection (11), provides significant latitude to the Commissioner to issue orders under section 104.1 without concern regarding liability for any violation of the rights of parties.

We understand that an impetus for this provision has to do with difficulties which have been encountered in obtaining interim orders from the Tribunal under the *Competition Act*'s current procedural requirements, which sometimes prevent prompt action from being taken in urgent circumstances. However, we believe the proper approach is to modify the rules pertaining to the obtaining of interim orders from the Tribunal, rather than going through this alternative procedure. The proposed power not only places the Commissioner in the role of both police officer and judge, but also clearly trenches upon on the legal rights of the parties affected by orders of this type.

VI. CONCLUSION

The Section objects to virtually all of the provisions of Bill C-26 which would amend the *Competition Act* and other statutes as they affect competition law matters. We therefore urge this Committee to recommend deleting these portions of the Bill. In our view, the only real need to be addressed relates to the specific arrangements which should apply as a consequence of the Air Canada/CAI merger. This, in our view, can be most effectively accomplished by an order made pursuant to the provisions of proposed sections 56.2 or

56.4 of the *Canada Transportation Act* or by a consent order pursuant to section 105 of the *Competition Act*.