

SUBMISSION

by

**THE RAILWAY ASSOCIATION OF
CANADA**

to

**The Standing Senate Committee on
Banking, Trade and Commerce**

on

**Bill C-249,
An Act to amend the Competition Act**

THE RAILWAY ASSOCIATION OF CANADA

The Railway Association of Canada, with its 60 members, represents virtually all railways operating in Canada – the large Class 1 railways (CN and Canadian Pacific Railway), short line and regional railways, inter-city passenger and commuter rail service providers and tourist train operators. We are pleased to have this opportunity to comment on Bill C-249 that if passed would amend the Competition Act (the Act).

EFFICIENCIES

For a small country such as Canada, innovation is the key to remain a competitive player globally. In the North American rail transportation sector, Canadian railways (Class 1s and short lines) not only compete head to head among themselves but also with U.S. counterparts of significantly more wealth and means. Mergers are sometimes the only innovative way to gain efficiencies and to remain in business.

Canada's competition law should put in place a framework that fosters a competitive business climate conducive to innovation. The modifications brought by Bill C-249 might have the opposite effect, because they will likely have a chilling effect on Canadian business, preventing or at least discouraging the pursuit of merger agreements, even if they could generate efficiencies for the economy in general.

The case for the amendment proposed by Bill C-249 has simply not been made. In its report of April 2002¹, the Standing Committee on Industry, Science and Technology (SCOI), commenting on Section 96 of the Act, recommended that the Government of Canada establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the Act. In its response of October 2002, the Government said that:

“it will commission a study on the treatment of efficiencies in merger review internationally and submit the findings of this benchmarking exercise to a parliamentary committee”.² (emphasis added)

Then, at the end of March 2003, without any study being commissioned by the government, SCOI studied Bill C-249, a private member's Bill that deals with this issue. Without all due respect for the work of this committee, and the quality of the presentations submitted by a few witnesses, their study might not be what the government had in mind.

The passing of this private Bill preempted a yet-to-be-conducted more comprehensive study. In fact, the government is currently conducting via the Public Policy Forum consultations on potential amendments to the Act. The review of efficiencies should

¹ Recommendation 28, A plan to Modernize Canada's Competition Regime, April 2002

² Government response to the Report of the House of Commons Committee on Industry, Science and Technology, October 2002, p.9

have been included in these consultations but was not because the House had already dealt with the issue. To act in a consistent manner, the government should commission the aforementioned study, and then submit its report to a parliamentary committee, presumably at the same time as the findings of the current consultations.

The amendment brought by Bill C-249, as adopted, literally removes from the Act the exception currently contained in Section 96(1). As drafted, the Tribunal is not directed not to make an order under Section 92 any more if there are efficiency gains, but rather only to consider these efficiency gains in assessing if there is a substantial prevention of lessening of competition.

Moreover, this assessment is inflexible and gives more importance to benefits to consumers over benefits to the goods or service producers and the overall economy.

Proposed mergers that would have increased the net wealth of Canadians would be blocked because they do not meet a stringent consumer welfare standard. Canadian merger policy, which is devoted to economic efficiency, would be used – at least on occasion – to frustrate that goal.

This is not aligned with existing jurisprudence and moves away from the current position that efficiency is a major objective of Canadian merger policy, as stated by Section 1.1 of the Act that clearly states:

“The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices” (emphasis added)

As drafted, the amendment basically amends the purpose of the legislation to give the objective of providing consumers with competitive prices and products choices priority over all other objectives. Can this be done without a major study being conducted? We doubt so. It is likely for that reason that Bill C-249 has not received the support of the many stakeholders (legal, economics and business communities) who closely follow the evolution of competition law and policy in Canada.

In addition, such change in policy seems to go against the intention of the federal government expressed in the September 2002 Speech from the Throne, to move forward with a smart regulation strategy.

“... to accelerate reforms in key areas to promote health and sustainability, to contribute to innovation and economic growth, and to reduce the administrative burden on business.”³ (emphasis added)

“To ensure that the regulatory system continues to provide Canada with a strategic competitive advantage, there is a need to rethink conventional assumptions. Regulations need to be looked at from the perspective of the contribution they can make to spur innovation for the social and economic interests of Canadians.”⁴ (emphasis added)

The wisdom of Section 96(1) should certainly be kept. We therefore recommend that Bill C-249 not be adopted, and certainly not until a full study on this issue is conducted.

³ Speech From The Throne, September 2002

⁴ Background Information on the External Advisory Committee on Smart Regulation
<http://www.smartregulation.gc.ca/en/04/pr-02.asp>