GOODMANS

250 YONGE STREET
SUITE 2400
TORONTO, ONTARIO
CANADA M5B 2M6
TEL: 416.979.2211
FAX: 416.979.1234
www.goodmans.ca

wrosenfeld@goodmans.ca

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Delivered

Mr. Terence Corcoran
Editor-in-Chief
National Post
300 - 1450 Don Mills Road
Toronto, Ontario
M3B 3R5

Dear Terence:

In his article of June 18, "Leave Mergers Alone" Mr. Jay Holsten hoped that the amendments to the Competition Act embodied Bill C-249 would die on the order paper and thus be rendered ineffective.

Mr. Holsten may well have this as a personal view, but it is not universally shared.

Two elements are essential if competition policy is to be effective. The first is that it must correspond to Canada's economic needs. The second is that it be clear so that those who contemplate mergers and those who advise them can have clarity in the law when analysing specific merger plans. These objectives will be strongly enhanced with the passage of Bill C-249.

It is surprising that Mr. Holsten would state that Canada's economy has not much changed following the enactment of the Competition Act in 1986. It has: we have entered first into the FTA and then into NAFTA. More profound changes have not occurred since confederation. The law must adapt.

The Superior Propane case floundered its way through the Competition Tribunal to the Federal Court of Appeal, then back to the Competition Tribunal then yet again back to the Federal Court of Appeal. While many lawyers have spent considerable time and effort in attempting to crystallize the implications of the decisions rendered in that case, it has not been possible to use it as a guide in advising clients. The significant legal principle which appears to emerge from that case is that, in Canada, an anticompetitive merger, even a merger to monopoly, could be saved by consequent efficiencies of which shareholders were the principal beneficiaries. But when, and how a merger could be structured to achieve that result remains quite unclear and, as Mr. Holsten points out, the case may well have been decided on insufficient evidence.

Bill C-249 seeks to provide the necessary guidance. There is no impact on Canada's foreign trade here. The local monopolies in remote communities rescued by the efficiency defence in Superior Propane had nothing to do with foreign trade.

In 1997, well after Canada's 1986 Competition Act, the U.S. Department of Justice and Federal Trade Commission dealt clearly and succinctly with the issue of efficiencies. Those authorities published Merger Enforcement Guidelines which present the then current view on efficiencies. Recognising the growing emphasis on efficiencies, they started that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near monopoly."

Bill C-249 by focusing on efficiencies that will bring benefits to consumers thus attempts to have Canadian competition law correspond with that of its major trading partner and also with the law of the European Community. Since many mergers now involve Canada and its trading partners, that correspondence is highly desirable. And if there is a change in Canadian merger law here, it is not to deny the role of efficiencies, but simply to place those efficiencies in a context where the interests of consumers cannot be ignored – hardly an earth shattering concept in competition law.

Beyond that, it is of course desirable that statutory amendment be preceded by policy debate. That is what we had always believed the parliamentary process to involve. Particularly in the case of Bill C-249 is this the case. It was a private members bill, and consequently no party discipline would be invoked either at the committee stage or upon final passage. It is therefore difficult to understand Mr. Holsten's concern that Bill C-249 has not received appropriate debate.

Efficiencies will not be found in the legal swamps of Superior Propane; they will be found in clarity and the ability to "do deals" in a timely and effective manner, which Bill C-249 facilitate.

Yours very truly,

Bill Rosenfeld

WPR/lc

Cc: Mr. Jay Holsten