

The Honourable Tony Clement, PC, MP
 Minister of Industry
 235 Queen Street
 Ottawa, Ontario
 K1A 0H5

February 27, 2009

Dear Minister Clement:

For over five years, we have been requesting that the Competition Bureau change its policy with respect to merger fees for large commercial real estate transactions. Over this period, we have met numerous times with Industry Canada officials, officials from the Competition Bureau and in 2007 appeared at the Bureau's stakeholder consultations.

Last summer, we wrote regarding our support for two of the recommendations in the "Compete to Win" report. In addition to the recommendations in the report, which we believe favours our position regarding large commercial transactions, we have also recently become aware of a letter from the National Competition Law Section of the Canadian Bar Association that appears to support an exemption for large commercial real estate, an exemption that exists in the US and that we also have been asking for, for five years. An excerpt is included with our submission.

1. Transactional Exemption for Large Commercial Real Estate

Recommendation 15 of the report states:

"The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the Competition Act."

We submit that large commercial real estate transactions should be exempted from the merger notification provisions.

The Current Bureau Policy

Currently, the Bureau applies a fee of \$50,000 to review real estate mergers valued over \$50 million, scheduled to be raised to \$70 million when Bill C-10 comes into force. While we appreciate the recent increase to the merger threshold value, many routine commercial building purchase and sale transactions exceed this threshold, particularly in larger cities. The Bureau's own data indicates that 1/3 of real estate notifications are for single building transactions. Our industry regards this fee as a tax, and an unfair subsidy of Competition Bureau operating budgets and complex transactions.

- Alberta Investment Management
- Allied Irish Banks
- Allied Properties REIT
- Artis REIT
- Aspen Properties Ltd.
- Bentall Capital
- Blackmont Capital Inc.
- BMO Capital Markets Real Estate Group
- Boardwalk REIT
- Brookfield Financial Real Estate Group
- Brookfield Real Estate Opportunity Fund
- Calloway REIT
- Canaccord Adams
- Canderel
- CAP REIT
- CB Richard Ellis Limited
- Charter REIT
- Chartwell Seniors Housing REIT
- CIBC Commercial Mortgages
- CIBC World Markets Inc.
- Colliers International
- CREIT
- Crombie REIT
- Cushman & Wakefield LePage Inc.
- Dundee REIT
- ECL Developments
- Extendicare REIT
- FCB Property Management Services
- Fengate Capital Management
- First Capital Realty Inc.
- First National Financial LP
- FPI Cominar/Cominar REIT
- GE Real Estate
- Grosvenor Canada Limited
- GWL Realty Advisors Inc.
- H & R REIT
- Holloway Lodging REIT
- Homestead Land Holdings Limited
- IG Real Estate Advisors
- ING Real Estate Canada
- InnVest REIT
- InStorage REIT
- Ivanhoe Cambridge
- Killam Properties Inc.
- M3 Capital Partners
- Macquarie Capital Markets Canada
- Manulife Financial
- Melcor Developments
- Menkes Development Ltd.
- MI Developments Inc.
- Montrose Calgary
- Morguard Corporation
- Morguard Investments Limited
- Morguard REIT
- Mortgage Fund Three
- National Bank Financial Inc.
- Northern Property REIT
- Ontario Realty Corporation
- OP Trust
- Oxford Properties Group Inc.
- Platinum Equities Inc.
- Presima
- Primaris Retail REIT
- RBC Capital Markets Real Estate Group
- Redcliff Realty Advisors Inc.
- Retrocom mid-market REIT
- RioCan REIT
- Scotia Capital Inc.
- Scotiabank
- Scott's REIT
- Silverbirch Hotels and Resorts
- Starwood Capital Group
- Sun Life Assurance Company of Canada
- TD Securities Inc.
- The Cadillac Fairview Corporation Ltd.
- The Minto Group
- Timbercreek Asset Management Inc.
- Whiterock REIT

1.1 National Competition Law Section of the Canadian Bar Association (CBA) - Letter of November 30, 2007 to the Competition Bureau

On November 30, 2007 the Competition Law Section of the CBA submitted a letter to the Competition Bureau Mergers Branch regarding the Merger Notification Fee Structure. We have bolded the relevant sections below:

“Exemptions for industries where there are no substantive issues

To the extent that there are concerns about the quantum of fees in the context of industry sectors where there are rarely competition concerns, the CBA Section believes that it would be more appropriate to consider additional exemptions from pre-merger notification rather than wholesale alterations to the filing fee structure for all transactions.

Indeed, further exemptions from pre-merger notification may also be appropriate in circumstances where there is little or no risk that closing would deprive the Tribunal of effective remedies in a post closing challenge. An acquisition of an office building is a good example.

*Several industries or types of transaction fall into one or both of these categories (i.e., low likelihood of substantive issues or concerns that could be remedied post-closing.) **Transactions in the real estate and upstream oil and gas sectors are frequently cited as examples and where broad exemptions from notification exist in the US. The CBA Section therefore suggests that serious consideration be given to adding exemptions from pre-merger notification for additional classes of transaction.** “*

- excerpt from a November 2007 CBA letter to the Competition Bureau
http://www.cba.org/CBA/sections_Comp/Competition/pdf/filing_fee.pdf

As we have repeatedly stated in previous correspondence, there is no data to suggest that competition problems arise from large commercial real property transactions. Real Estate transactions are exempt from merger review in the US under *Hart-Scott-Rodino Act*. In our review of available cases heard before the Competition Tribunal, not a single case can be found involving large real estate purchase and sales. Any competition concerns can surely be addressed after the fact without penalizing routine transactions.

Routine Transactions are Penalized: Currently, the Bureau applies a fee of \$50,000 to review, in advance, real estate mergers valued over \$50 million. Many routine commercial building purchase and sale transactions exceed this threshold, particularly in larger cities.

Current thresholds of \$50 million unfairly penalize routine transactions in large centres in categories such as office, retail and industrial. This is clearly problematic, particularly in larger centres, such as Toronto, Montreal, Calgary and Vancouver where large real estate assets trade with some frequency.

Real Estate Pays a Disproportionate Amount of Fee: Routine commercial real estate transactions account for approximately 15% of Competition Bureau transaction fee revenue and seem to be paying for bank and large corporate merger review.

Lack of Data to Suggest a Competitive Concern: There is still no data to suggest that competition problems arise from large commercial real property transactions. Real Estate is generally highly fragmented, with infinite substitutes and alternatives to any asset class in any market.

One-Third of Real Estate Transactions Reviewed are Single Buildings: Based on the Bureau's own data, approximately 1/3 of all real estate transactions reviewed involved a single building. Our own data suggests this number may still be understated. It is highly unlikely that a transaction involving a single property, not a portfolio, could trigger an anti-competitive concern in an urban area. There are always substitutes and alternatives. This further illustrates why our Members feel that such fees are completely unjustified.

2. Alignment with the United States

Recommendation 14 a) of the "*Compete to Win*" report states that the Minister should introduce amendments to the *Competition Act* that would:

"align the merger notification process under the Competition Act more closely with the merger review process in the United States."

In the United States, real estate transactions are exempt from merger fees. The rationale for these exemptions is that real estate transactions are unlikely to violate competition laws, and any fees would therefore be a burden on the regulatory system and business.

US competition and antitrust law falls under the jurisdiction of the Federal Trade Commission ("FTC") and the Department of Justice. *The Hart-Scott-Rodino Act* ("HSR") is the legislation that regulates mergers and acquisitions. The rules under Section 7 of the HSR Act have been amended to create exemptions to the requirements imposed by the HSR Act. These four new rules clarify the types of transactions that are in the ordinary course of business of the parties to the transaction. The rules are designed to reduce the burden on the business community by eliminating the pre-merger notification requirements to certain transactions that are unlikely to violate antitrust laws.

When the US Federal Trade Commission (FTC) passed the exemptions in 1996, the Director of the FTC Bureau of Competition stated:

"These exemptions will remove an unnecessary burden from business and will allow the FTC and department of justice to better focus scarce resources on transactions that are more likely to cause competitive harm...experience has taught us that certain categories of acquisitions do not raise competitive concerns...adoption of these rules will conserve the resources of the business community, the antitrust agencies and the American taxpayers."

Opposite the U.S., Canada's rules create unnecessary red tape that needlessly raises the cost of doing business in Canada. The equivalent transactions in Canada are not exempt, and must go through the process of pre-merger notification, or an Advanced Ruling Certificate (ARC) application, both of which require the exorbitant filing fee and often high legal fees to prepare and process the application. This is in essence a tax on all midsized and larger commercial real estate transactions.

3. Our Request:

Provide an Outright Exemption for Real Estate Merger Fees and Exempt Real Estate from the Prenotification Requirement

We request an outright exemption for the pre-notification requirement of commercial real estate trades, as is the case in the United States. Competition laws would still apply to real estate: only the pre-notification requirement and fee would be eliminated. Given current economic conditions, it is difficult to justify additional fees on large commercial real estate transactions.

Please do not hesitate to contact us if you have any questions regarding our submission, or if you require any further information.

Regards,

A handwritten signature in black ink, appearing to read 'Michael Brooks', with a long horizontal line extending to the right.

Michael Brooks
Chief Executive Officer

About REALpac

REALpac, the Real Property Association of Canada is Canada's senior national real property association whose mission is to collectively influence public policy, educate government and the public, and ensure stable and beneficial real estate capital and property markets in Canada. Our Members currently own in excess of CDN \$150 Billion in real estate assets located in the major centres across Canada and include real estate investment trusts (REITs), publicly traded and large private companies, banks, brokerages, crown corporations, investment dealers, life companies, and pension funds. Visit REALpac at www.realpac.ca.