THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-49, *Transportation Modernization Act*

CANADIAN BAR ASSOCIATION
COMPETITION LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 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 CBA Competition Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Committee and approved as a public statement of the CBA Competition Law Section.

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I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to provide comments on Bill C-49.[1] Our comments focus on the proposed additions to the *Canada Transportation Act* and the *Competition Act* to provide for the review and approval of airline joint venture arrangements by the Minister of Transport. If adopted, these arrangements would be exempt from several *Competition Act* provisions of general application.

This voluntary review and approval process will align Canada's approach to airline joint ventures and arrangements to be substantially similar with that of the United States. In the U.S., the Secretary of Transportation has jurisdiction to exempt airlines from the application of federal antitrust laws.[2]

As discussed below, the airline arrangement review and approval process proposed by Bill C-49 is similar, although not identical, to the *Canada Transportation Act* Ministerial mandatory review process for mergers and acquisitions above certain financial thresholds and involving a "transportation undertaking" adopted in 2007 (referred to as the CTA Merger Review Process).

The CBA Section welcomes the proposed amendments as an opportunity to align Canadian competition and transportation policy with the U.S., our largest trading partner and the leading destination for Canadian air travellers. This process will give greater flexibility for participants in the airline industry to collaborate, with the expectation that efficiencies and greater service offerings to Canadian travellers will be achieved. Moreover, the process specifically accounts for potential harm to competition.

As a high-level observation, the CBA Section believes that it is important that the airline arrangements review regime appropriately balances the benefits available through the process with the risks, costs and inconvenience associated with the process. Our comments are

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1 Bill C-49, *Transportation Modernization Act*, 1st Sess., 42nd Parl., 2017.

2 49 U.S.C. § 41308-41309.

intended to help improve that balance, rendering it more likely that the regime will be used by interested parties in appropriate circumstances.

II. COMMENTS

A. Guidelines

> *[from C-49, s. 14: proposed s. 53.71 of the Canada Transportation Act:]*
> *Information*
> *(2) A notice given under subsection (1) shall contain any information that is required under the guidelines that are issued and published by the Minister, including information that relates to considerations respecting competition.*
>
> *Guidelines*
> *(3) The guidelines referred to in subsection (2) shall be developed in consultation with the Competition Bureau and shall include factors that may be considered by the Minister to determine whether a proposed arrangement raises significant considerations with respect to the public interest under subsection (6) and, if applicable, to render a final decision regarding the arrangement under subsection 53.73(8).*
> *Not statutory instruments*
> *(4) The guidelines referred to in subsection (2) are not statutory instruments within the meaning of the Statutory Instruments Act.*

The proposed airline arrangement approval provisions come a decade after the introduction of the CTA Merger Review Process.[3]

In June 2008, Transport Canada released its *Draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings*.[4] The CBA Section commented on those draft guidelines. The most significant concern was that the guidelines lacked a definition for "transportation undertaking," leading to uncertainty over the types of transactions subject to mandatory review and approval.[5] Notwithstanding, the concept of "transportation undertaking" remains undefined in the statute, regulations or guidelines. Furthermore, the guidelines were never finalized and remain in draft in the same form as they were released in June 2008.

The passage of Bill C-49 and the preparation of new guidelines for the airline arrangement review process give the Minister an excellent opportunity to finalize the 2008 guidelines in

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3 *Canada Transportation Act*, S.C. 1996, c. C-10, ss. 53.1-53.6.

4 Transport Canada, *Draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings* (June 2008), online (http://ow.ly/1sfr30fbat7).

5 Canadian Bar Association, National Competition Law Section, Submissions: Draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings (September 2008), online (http://ow.ly/Ulkl30fbayu).

light of the CBA Section comments at the time. This includes providing greater clarity on the scope of transactions subject to review under the CTA Merger Review Process.

B. The review process should be extended to proposed and existing arrangements

> *Notice*
> *53.71 (1) Every person who proposes to enter into an arrangement may notify the Minister of that arrangement. If the person so notifies the Minister, they shall at the same time provide a copy of the notice to the Commissioner of Competition.*

Paragraph 53.71(1) would open the airline arrangement review and approval process to parties to proposed arrangements (i.e., arrangements that have not yet been implemented). However, there is currently no provision for the review and approval of existing arrangements. In the view of the CBA Section, this is a significant omission that should be rectified.

Given that a number of airline alliances are already in place and, in some cases, decades-old, it should follow that existing alliances and arrangements should qualify for review under the process.

The Commissioner of Competition's recent challenge under sections 90.1 (agreements between competitors) and 92 (mergers) to proposed coordination between United and Air Canada on certain trans-border routes concerned agreements that dated back to 1995 and 1996.[6] Without commenting on the merits of that case, the CBA Section is of the view that it would be beneficial to permit the Minister to assess historical agreements on a "public interest" basis under the new procedure (taking into account, as would be required, any substantive competition issues).

RECOMMENDATION

1. **The CBA Section recommends that existing arrangements be added to paragraph 53.71(1) as follows: "Every person who has entered or proposes to enter into an arrangement may notify the Minister of that arrangement. If the person so notifies the Minister, they shall at the same time provide a copy of the notice to the Commissioner of Competition."**

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6 *Commissioner of Competition v. Air Canada*, Comp. Trib. CT-2011-004 (Notice of Application at para. 21), online (http://ow.ly/Yj0i30fbaDj).

C. Application to non-notifiable transactions

The review provisions apply to a proposed "arrangement" defined as follows:

> *[Bill C-49, s. 14, proposed s. 53.7 of the Canada Transportation Act]*
> ***arrangement*** *means an agreement or arrangement, other than a transaction referred to in subsection 53.1(1), involving two or more transportation undertakings providing air services, as defined in subsection 55(1), to, from or within Canada, to coordinate on any aspect of the operation or marketing of such services, including prices, routes, schedules, capacity or ancillary services and to share costs or revenues or other resources or benefits. (entente)*

It is clear from this definition that the airline arrangement review provisions do not apply to transactions that are subject to mandatory review by the Minister and the Governor in Council under the CTA Merger Review Process ("a transaction referred to in subsection 53.1(1)"). To be subject to the CTA Merger Review Process, the transaction must be of a specific type (e.g. acquisition of shares) and exceed the relevant thresholds for pre-merger notification under Part IX of the *Competition Act*.

It is not clear, however, whether the airline arrangement review provisions would apply to a non-notifiable transaction, such as a transaction that falls below the relevant thresholds (for example, an acquisition by one airline of 5% of the shares of another airline), but does not explicitly account for coordination "on any aspect of the operation or marketing of… services, including prices, routes, schedules, capacity or ancillary services and to share costs or revenues or other resources or benefits."

If the term "arrangement" is applied broadly to encompass not only the explicit coordination provisions in a merger agreement (i.e., "on any aspect of the operation or marketing…"), but the merger itself, we appreciate why transactions subject to the mandatory CTA Merger Review Process might not qualify for voluntary review under the airline arrangement review process. In those circumstances, however, the CBA Section supports the inclusion of non-notifiable transactions involving two airlines where coordination may not be explicitly stated. Indeed, given that such a transaction would not be subject to pre-merger review by the Competition Bureau or the Minister under the mandatory CTA Merger Review Process (in both cases because it falls under the thresholds or is otherwise not caught), this would give both the Minister and the Bureau the opportunity to consider whether the transaction raises any competition or public interest issues.

On the other hand, if "arrangement" is applied narrowly to the coordinated operation or marketing of services aspects of a larger merger transaction between airlines, the CBA Section supports the availability of the voluntary review process to both non-notifiable and notifiable transactions. In those circumstances, where "arrangement" encompasses merely a portion of the wider transaction, there would be no principled reason why transactions that are being reviewed by the Minister to determine if they are permitted to proceed (under the CTA Merger Review Process) cannot also qualify for immunity from certain aspects of the *Competition Act* under the voluntary airline arrangement review provisions.

D. Prohibition of arrangements that are not approved

At the end of the airline arrangement review process, the Minister is to render a final decision under subsection 53.73(8) regarding the relevant arrangement. If the Minister's final decision is that the arrangement is in the public interest, the Minister may authorize the arrangement and specify any terms and conditions to address competition and public interest concerns. If the final decision is negative, however, section 53.72 provides that the arrangement is prohibited from being implemented, although there are opportunities for the parties to withdraw their application prior to a final determination, avoiding the prohibition.

It is unclear why failure to obtain a Ministerial approval should result in a prohibition of the arrangement. The process itself is voluntary and the benefit it offers parties is an exemption from the operation of certain provisions of the *Competition Act*. If the parties are willing to proceed with the arrangement without that exemption, the CBA Section sees no principled reason why they should not be entitled to do so, particularly given that, absent a positive decision from the Minister, the *Competition Act* would remain capable of enforcement by way of legal proceedings initiated by the Commissioner or the Crown before the Competition Tribunal or the courts.

E. Scope of protection

If the parties to an airline arrangement obtain a Ministerial final decision under subsection 53.73(8), Bill C-49 provides that they are entitled to exemption from the operation of four provisions of the *Competition Act* (two criminal offences and two civil provisions):

- Section 45 – cartel conspiracy;
- Section 47 – bid rigging;
- Section 90.1 – agreements and joint ventures between competitors; and

- Section 92 – mergers.[7]

It is unclear why the contemplated protection does not extend to the application of other provisions of the *Competition Act*, including sections 76 (price maintenance) and 79 (abuse of dominance). The CBA Section suggests that the application of these civil reviewable practices provisions be contemplated for exemption as well.

It should also be explicitly stated in an amended section 36 of the *Competition Act* that airline arrangements that have been the subject of subsection 53.78(8) are incapable of forming the basis of a damages claim for a breach of sections 45 or 47 under that section, which provides a cause of action for damages suffered as a result of a breach of the criminal provisions.

Furthermore, the exemption from sections 45, 47, 90.1 and 92 of the *Competition Act* is only extended if the Minister renders a final decision under subsection 53.73(8) of the *Canada Transportation Act* following the secondary review process (in which the Bureau participates). However, the review process is a two stage process, which can be terminated at the first stage if the Minister determines that the arrangement "does not raise significant considerations with respect to the public interest." In the CBA Section's view, this conclusion at the end of the first stage of the review process should be treated as equivalent to a final determination from the Minister and afforded the same exemptions. If input from the Competition Bureau is required for comfort then it should be contemplated as part of the first stage process.

RECOMMENDATION

2. The CBA Section recommends adding first stage approval to the exemptions in paragraphs 45(6)(c), 47(3)(b), 90.1(9)(d) and 94(d) of the *Competition Act,* for example:

[from proposed s. 45(6) of the Competition Act]
(c) *is an arrangement, as defined in section 53.7 of the Canada Transportation Act, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act <u>or regarding which the Minister of Transport has opined does not raise significant considerations with respect to the public interest under subsection 53.71(7)</u> and for which the authorization <u>or opinion</u> has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.*

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7 Canada Transportation Act, S.C. 1996, c. C-10, s. 53.1(7); Bill C-49, Transportation Modernization Act, 1st Sess., 42nd Parl., 2017, cl. 85-88 (amending the Competition Act, ss. 45, 47, 90.1 and 94).

Without extending a similar exemption to arrangements that are determined not to raise significant public interest concerns, it is unlikely that the voluntary review process will be viewed as affording sufficient benefit to parties.

F. Timing issues

From the initial application by the parties under subsection 53.71(1) to a final determination under subsection 53.73(8), the airline arrangement review process can take up to 285 days. This is different from and potentially longer than the timelines in the CTA Merger Review Process (although in that process, not every step is subject to a specified timeline). Section 53.81 gives the Minister the unilateral ability to extend those timelines. Given how long the process can take without extensions, the CBA Section recommends circumscribing extensions from the applicable time periods only where the parties consent.

Another timing issue is the length of time the Minister has to reach an initial opinion on public interest issues, terminating the first stage of the process. Subsection 53.71(6) gives 45 days to issue that opinion, which varies from the 42 days for the initial stage of the CTA Merger Review Process. That timeline remains aligned with the historical 42-day waiting period for pre-merger notifications under the *Competition Act*, which was changed to 30 days (capable of extension with a supplementary information request) in 2009. While it is not necessary that the initial periods under the CTA Merger Review Process and the airline arrangement review process be harmonized, Bill C-49 does provide an opportunity to align the initial stage timeline in the CTA Merger Review Process with the current 30-day period under the *Competition Act*, given that these two processes are applied to the same transactions simultaneously.

G. Making a summary of the Commissioner's report public

[from the proposed s. 53.73 of the Canada Transportation Act]
Review process
53.73 (1) *The Minister, or a person designated by the Minister, shall examine the proposed arrangement, if it is subject to the review process.*
Commissioner's report
(2) *The Commissioner of Competition shall, within 120 days after the day on which he or she receives a copy of the notice under subsection 53.71(1) with the information referred to in subsection 53.71(2), report to the Minister and the parties on any concerns regarding potential prevention or lessening of competition that may occur as a result of the proposed arrangement.*
Summary
(3) *The Commissioner may make public a summary of the conclusions of the report.*

The CBA Section appreciates the flexibility currently contemplated for the Commissioner on whether to release any information at all, when that information is released, and specifying that the Commissioner would release a summary of conclusions rather than the entire report. The CBA Section recommends a further safeguard, however, to protect the confidentiality of the parties in the event of a failure to obtain Ministerial approval.

RECOMMENDATION

3. **The CBA Section recommends amending these provisions to specify that the Commissioner's report can be made public only after the Minister's final decision under subsection 53.73(8) and only if the Minister's final decision authorizes the arrangement.**

H. Minister's ability to re-open an authorized arrangement after two years

[from proposed ss. 53.77 of the Canada Transportation Act]
Concerns regarding authorized arrangement
53.77 (1) *The Minister may, at any time after the second anniversary of the day on which an arrangement is authorized, notify the parties of any concerns raised by the arrangement with respect to the public interest and competition.*
Measures to address concerns
(2) *The parties shall, within 45 days after the day on which they receive the notice under subsection (1), provide a response in writing to the Minister, specifying, among other things, any measures they are prepared to undertake to address those concerns. The parties may propose amendments to the arrangement.*
Continuing the authorization
(3) *If, after consulting with the Commissioner, the Minister determines that the arrangement is still in the public interest, the authorization is continued subject to any new or amended terms and conditions specified by the Minister to address the concerns referred to in subsection (1).*

Proposed section 53.77 gives the Minister largely unfettered discretion to reconsider the protection provided to an airline arrangement following the second anniversary of the initial authorization. Following an interim period in which the Minister notifies the parties and the parties have an opportunity to address any concerns about competition or the public interest, the Minister may revoke the authorization under paragraph 53.78(2)(b) or subject the authorization to new terms and conditions under subsection 53.77(3).

The CBA Section considers the ability of the Minister to revisit authorization after two years to significantly reduce the utility of seeking and obtaining such authorization. This is especially so

since the first authorization process can take up to 285 days or longer, at the discretion of the Minister. Authorization should not be a moving target.

RECOMMENDATION

4. **The CBA Section recommends that the Minister's ability to reconsider the protection afforded should be exercisable only if the circumstances that led to granting the authorization by the Minister have changed, such that the original authorization would not have been granted or, alternatively, no earlier than five years following authorization.**

I. Sanctions for implementing an unapproved arrangement or failure to comply with Ministerial terms and conditions

[from proposed ss. 53.82-52.83 of the Canada Transportation Act]
Order
53.82 *If a person contravenes sections 53.72 or 53.78, a superior court may, on application by the Minister, order the person to cease the contravention or do anything that is required to be done, and may make any other order that it considers appropriate, including an order requiring the divestiture of assets. The Minister shall notify the Commissioner of Competition before making an application.*
Offence — section 53.72 or 53.78
53.83 (1) *Every person who contravenes section 53.72 or 53.78 is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years or to a fine of not more than $10,000,000, or to both.*

The proposed addition of sections 53.82 and 53.83 would render it a criminal offence for parties to implement arrangements subject to a secondary review that have not received final Ministerial approval and for parties to breach any terms and conditions associated with Ministerial approval. The Minister could apply to a superior court for an order requiring the parties to cease any contravention or "do anything that is required to be done" and for any other order the court considers appropriate, including asset divestitures.

With the proposed review and approval process completely voluntary, it is unclear why parties should be subject to any sanction for failure to observe the provisions. In the CBA Section's view, the sanctions proposed in sections 53.82 and 53.83 are significantly out of proportion to the conduct the sections intend to dissuade, and are likely to have the effect of discouraging parties from making an application under the process. Instead, if arrangements are implemented without Ministerial approval or if the terms and conditions attached to an authorization are not adhered to, the parties should not be entitled to the exemption associated

with the process, not the forfeiture of their assets, prison or liability for multi-million dollar fines. Indeed, revocation of the authorization in these and other circumstances is already explicitly provided for in section 53.79 of the *Canada Transportation Act*.

III. CONCLUSION

The CBA Section appreciates the opportunity to provide its views on Bill C-49 and trusts they are of assistance going forward. We would be pleased to discuss our comments further.