THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 19, 2007

Raynald Chartrand
Registrar
and
Lucia Shatat
A/Senior Legal Advisor
Competition Tribunal
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Mr. Chartrand and Ms. Shatat:

RE: Competition Tribunal Rules
Canada Gazette Part I — May 26, 2007

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section), to comment on the proposed changes to the Competition Tribunal Rules pre-published in Canada Gazette Part I on May 26, 2007.

Madeleine Renaud and I were pleased to represent the CBA Section as active participants in the development of the proposed rules. The comments in the present letter represent broader input from our members. The CBA Section sees the new package as a significant improvement. We are particularly pleased that the proposed rules provide for a relevance standard in disclosing documents and restore a party's right to examinations for discovery in Tribunal proceedings. This will improve the effectiveness and fairness of Tribunal hearings.

The CBA Section has detailed comments and recommendations on several of the proposed rules.

Rules 12(2) and 15(2): Under rule 12(2) the Tribunal may allow facsimile filing depending on the circumstances, instead of mandatory filing by electronic transmission. Rule 15(2) prohibits facsimile transmission of certain documents. The CBA Section suggests that "subject to Rule 12(2)" be added at the beginning of Rule 15(2), to preserve the Tribunal's discretion to permit facsimile filing.

Rule 17: Rule 17 provides that documents filed by facsimile after 17:00 are deemed to be filed on the next day. This rule should apply as well to any type of service, whether by facsimile or electronic transmission, so parties cannot claim that a document served late at night was served on that day.

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Rule 20: Rule 20(1) provides that a statement made under oath or a solemn affirmation filed electronically requires a secure electronic signature. However, no definition of "secure electronic signature" is provided in the rules. Another issue is that affiants swearing affidavits in smaller communities before local counsel are less likely to have the software or knowledge to produce a secure electronic signature. The CBA Section suggests that Rule 20(1) be amended as follows:

> (1) A statement made under oath or a solemn affirmation filed electronically requires a secure electronic signature *or such other signature as may be permitted by the [Registrar][Tribunal]*.

Rule 34: Rule 34(2) provides for directions with respect to "practice and procedure" before the Tribunal, but rule 34(1) refers to questions as to the "practice or procedure". Rule 34(2) should be revised to refer to "practice or procedure", consistent with rule 34(1).

Rules 46 and 47: Rule 47 gives interveners the right to obtain documents after they have been granted leave to intervene. Rule 47(d) provides that interveners may obtain documents subject to any relevant confidentiality order. However, if the intervention occurs after a confidentiality order has been made, it is unlikely the order would provide for an intervener's access to confidential documents. This could cause serious issues, particularly where the intervener is a competitor of the respondent to an application brought by the Commissioner. In this case, the respondent may request much stricter obligations with respect to confidentiality than are imposed on the Commissioner. Moreover, it is possible that the issues on which the intervener wants to intervene will not require it to have access to confidential documents filed with the Tribunal. The CBA Section suggests that a third paragraph be added to rule 46, providing that when the Tribunal grants leave to intervene, it shall make whatever order is necessary with respect to the intervener's access to documents, and shall seek submissions from the parties on this issue if necessary.

In addition, the proposed rules have no provision regarding the timing of service of lists of documents, witness statements and expert reports for interveners given leave to file evidence. The CBA Section suggests that a fourth paragraph be added to rule 46(4) providing that, to the extent interveners are given leave to serve and file fact or expert evidence, the Tribunal will set the dates by which witness statements, lists of documents and expert reports must be served and filed.

Rule 56: Rule 56 enables parties to request admissions pertaining to the truth of a fact or the authenticity of the document. The CBA Section supports these provisions, but we believe a time limit must be placed on the ability to serve a request to admit so this step does not interfere with the orderly progress of the hearing. Because the *Federal Courts Rules* provide 20 days to respond, parties should be required to serve any requests for admissions at least 30 days prior to the start of a hearing.

Rule 60: Rule 60 provides for the exchange of affidavits of documents. Rule 61 provides for motions with respect to contested privilege claims. However, the proposed rules have no provision allowing a party to move before the Tribunal for a further and better affidavit of documents. The CBA Section suggests that a rule be added as follows:

> Upon the motion of a party who has been served with an Affidavit of Documents, and the Affidavit of Documents is inaccurate or deficient in any manner whatsoever, the Tribunal may order a party to produce a further and better Affidavit of Documents or make any other order that is appropriate under the circumstances.

Rule 62: Rule 62 applies the implied undertaking at common law to documents and information obtained on discovery in Tribunal proceedings. The CBA Section supports the addition of this rule and the confirmation that the implied undertaking applies. However, the common law with respect to the implied undertaking is not entirely settled and is not necessarily consistent across Canadian legal jurisdictions. The CBA Section believes that the implied undertaking should be explicitly codified in the rules. We suggest that Rule 30.1.01(3) to (8) of the *Ontario Rules of Civil Procedure,* as appropriately modified, be adopted in the proposed rules instead of the current wording of Rule 62. A copy of the Ontario rule is attached. The CBA Section proposes that one exception to the implied undertaking in Tribunal hearings should be the ability to use material from an original proceeding in any proceeding to vary or rescind a previous order pursuant to sections 106 and 74.13 of the *Competition Act.*

Rules 68-69: Rules 68 and 69 set the timing for the delivery of witness statements and the list of documents to be relied on at the hearing. The CBA Section believes that Rule 68 does not provide the respondent with sufficient time to respond. The applicant should serve its list of documents and witness statements at least 60 days prior to the hearing in order to give the responding parties sufficient time to respond.

Rule 71(2): This rule provides that a document need not be disclosed in the affidavit of documents if it is to be used solely as a foundation for, or as part of a question in, cross-examination or re-examination. This could potentially lead to abuses, as a party may strategically elect not to disclose documents in its affidavit of documents with the intention of reserving them for possible use in cross-examination or re-examination. The proposed rule is inconsistent with the notion of full and fair disclosure, which the move to the relevance standard is designed to facilitate. The CBA Section suggests that the rule be revised to provide that a party may rely on any document for any purpose that has not been previously disclosed only with leave of the Tribunal. In practice, leave should only be granted to use such documents in extraordinary cases, for example where they relate to facts or arguments not raised in the party's materials. This is consistent with Rule 30.08 of the Ontario rules. We are not aware of any rationale to depart from the normal and fair procedure that non-disclosed documents should only be used with leave.

Rule 74(1): This rule permits fact witnesses to give evidence-in-chief only by way of their witness statement. Although this may be an effective way to present fact witnesses in some hearings, the CBA Section believes that there will be some situations where *viva voce* evidence should be permitted. The proposed rule may prevent parties from presenting their best case and result in evidence being crafted by counsel. The CBA Section recommends that rule 74 be modified to include wording similar to rule 79, which allows an expert witness to be examined-in-chief for the purpose of summarizing or highlighting the evidence contained in the expert's report. Similarly, a party or intervener should have the right to examine a fact witness for the purpose of summarizing or highlighting the evidence contained in the witness statement.

Rule 77: As with the rules relating to service of the applicant's list of documents and witness statements, this proposed rule does not give the responding parties sufficient time to respond to the applicant's expert report. The applicant's economic theory, quantitative analysis and industry-specific expert evidence is not normally fully disclosed to the respondent until the expert report has been served. The respondent should have more time to respond to expert reports that raise issues that may not have yet been considered. Again, the CBA Section recommends that the applicant serve expert reports at least 60 days prior to the hearing.

Rule 80: Rule 80 provides for the appointment of Tribunal experts. As a general matter, the CBA Section questions why this provision is necessary. The Tribunal's lay members are economic and business experts. They are supposed to bring the expertise that the Tribunal needs to decide the matters before it. We do not understand the rationale for allowing the Tribunal, already comprising two expert members, to appoint further experts.

If this rule is retained, the CBA Section recommends it be used sparingly and modified. The parties to the application should not have to pay for an expert appointed by the Tribunal, and rule 80(9) should be amended accordingly. Rule 80 should also provide that the Tribunal can only appoint an expert with expertise outside that of the lay members. Finally, there is an important concern with respect to the timing of Tribunal appointed experts. If the Tribunal is to appoint experts, notice should be given to the parties prior to the hearing. The proposed rules provide that Tribunal members will have access to the parties' and interveners' evidence prior to the hearing. Therefore, the Tribunal should be in a position prior to the hearing to determine whether it needs to appoint a separate expert. The rule should not be used to appoint experts mid-proceeding, potentially resulting in delay and other problems.

Rules 83-87 and 89-90: These rules provide for service of materials relating to motions generally and motions for summary disposition. The proposed rules do not adequately specify dates by which motion material is to be served in advance of hearing the motion. This may cause confusion, lead to materials being filed just before the hearing, and result in motions for adjournments. The CBA Section recommends that the rules be amended so that, where motions are to be determined by a hearing, dates will be set by agreement or a case conference for the service of motion materials and factums.

Rule 106: Rule 106 sets out the content and form of consent agreements to be filed with the Tribunal. We believe the Rules should be amended to require an affidavit or statement to be jointly filed with the consent agreement, explaining why the terms of the consent agreement are necessary and appropriate to remedy the competitive concerns. Currently, no information is required with respect to why the consent agreement is necessary or why its terms are satisfactory to remedy the competition concerns. The absence of this information makes it difficult for the Tribunal to assess whether any changes are required or desirable in the event of an application for variation of the order at some point in the future.

Rule 109: This rule sets the timing for responding material in references sought by the Commissioner. A reference record must be served by any responding party within seven days of being served. The CBA Section believes that this may give rise to unfairness. The Commissioner will have had considerable time in which to prepare the reference. As the reply record may contain affidavits and a factum, responding parties should be given more time to prepare responding materials. The CBA Section suggests that respondents file responding records within 30 days of being served by the Commissioner.

Rules 114-127: These rules govern private access applications. The CBA Section has concerns that affidavits filed by applicants are not subject to cross-examination, particularly given that pursuant to rule 119(3) a respondent can file responding affidavit evidence only with leave of the Tribunal. The CBA Section suggests that a respondent have a right to cross-examine on affidavit evidence served on applications for leave, and that the respondent be able to file responding evidence with leave of the Tribunal.

Confidential Information: Given that Rule 10 provides that documents are presumptively to be served by electronic transmission, the CBA Section has concerns about the proper destruction of confidential documents, both pre-hearing (in the case of errors in transmission) and post-hearing (in the case of deletion when the hearing is concluded). It is rare that confidentiality orders from the Tribunal deal with the proper destruction of confidential documents by parties at the end of proceedings. We suggest that the Tribunal release a practice direction on confidentiality orders that deals with this issue, among other things.

We trust that these comments prove useful in finalizing the draft rules. We would be pleased to discuss our suggestions at greater length, if you have any questions.

Yours very truly,

(Original signed by Tamra Thomson for James Musgrove)

James Musgrove
Chair, National Competition Law Section

ANNEX 1 — ONTARIO RULES OF CIVIL PROCEDURE, RULE 30.1 DEEMED UNDERTAKING

Application
30.1.01
(1) This Rule applies to,
  (a) evidence obtained under,
    (i) Rule 30 (documentary discovery),
    (ii) Rule 31 (examination for discovery),
    (iii) Rule 32 (inspection of property),
    (iv) Rule 33 (medical examination),
    (v) Rule 35 (examination for discovery by written questions); and
  (b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1). O. Reg. 61/96, s. 2.

Deemed Undertaking
(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2.

Exceptions
(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents. O. Reg. 61/96, s. 2.

(5) Subrule (3) does not prohibit the use, for any purpose, of,
  (a) evidence that is filed with the court;
  (b) evidence that is given or referred to during a hearing;
  (c) information obtained from evidence referred to in clause (a) or (b). O. Reg. 61/96, s. 2.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding. O. Reg. 61/96, s. 2.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action). O. Reg. 61/96, s. 2.

Order that Undertaking does not Apply
(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just. O. Reg. 61/96, s. 2; O. Reg. 263/03, s. 3.