THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Merger Consent Agreement Outline

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

March 2008

500-865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

TABLE OF CONTENTS

Merger Consent Agreement Outline

PREFACE i

I. INTRODUCTION 1

II. OBJECTIVE OF A CONSENT AGREEMENT 2

III. NEED FOR FLEXIBILITY AND RECOGNITION OF CONTEXT 3

A. Preamble 3
B. Time Periods 4
C. Appointments by The Commissioner 5
D. Monitor 6
E. Divestiture Procedure 7
F. Purchaser 9
G. Divestiture Trustee Sale 9
H. Confidentiality Agreements 11
I. Extension of Sale Period 12
J. Challenge by the Acquiring Company 12
K. Confidential Provisions 12
L. General Provisions 13

PREFACE

The Canadian Bar Association is a national association representing 37,000 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 National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Merger Consent Agreement Outline

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on the Consent Agreement Outline published by the Competition Bureau on May 1, 2007 to complement the *Information Bulletin on Merger Remedies in Canada*, released on September 22, 2006.

The stated objective of the Outline is to provide guidance to businesses and legal counsel on the objectives and specific wording sought by the Bureau when it designs and implements consent agreements to resolve competition concerns arising from proposed mergers.

The Bureau notes in its May 1, 2007 news release that the Outline is meant to be a generic model from which the Bureau will prepare future consent agreements with merging parties. The Bureau stated that it will serve as only a starting point as the terms and conditions of each agreement will be tailored to the specific facts and circumstances of each merger. However, the intent is that it should provide directions to parties on negotiating consent agreements with the Bureau.

The Bureau also indicated that the Outline will be a living document and that the Bureau will introduce changes to it as its policy and practice continue to develop in this area.

The CBA Section supports the efforts of the Commissioner of Competition and the Bureau to publish guidance on the application of the *Competition Act*. The Bureau's practice of issuing information bulletins and interpretation guidelines increases the transparency and predictability of the interpretation, administration and enforcement of the Act, and the Outline serves this purpose.

Given the role and importance of consent agreements to resolve issues in mergers raising competition concerns, the CBA Section welcomes the initiative to provide guidance regarding the Commissioner's point of departure when negotiating consent agreements.

However, unlike its consultation with respect to the Information Bulletin, the Bureau did not provide stakeholders with an opportunity to provide comments on the Outline before publication. The CBA Section respectfully submits that the Outline is a significant document which warrants reconsideration in a number of respects.

II. OBJECTIVE OF A CONSENT AGREEMENT

The Outline does not have the force of law, and the accompanying news release creates the expectation that the Commissioner will negotiate each consent agreement with an acquiring company in the context of a particular merger. Unfortunately, although it is described as a starting point for remedy negotiations, the Outline in some important respects includes terms and provisions that seem to reflect the most extreme or onerous terms that might be required from a party to the merger (for convenience of reference, the "acquiring company"). In our view, the Outline would be more helpful as a starting point for negotiations if it included more balanced provisions that were less burdensome on the acquiring party, without undermining the effectiveness of the remedy.

Consistent with the Supreme Court of Canada decision in the *Southam* merger case[1], the objective should be a consent agreement with the least intrusive of the possible effective remedies to restore competition to the point at which it is not substantially less than it was before the merger. Particularly in the absence of any oversight by the Competition Tribunal before consent agreements are registered and have the same effect as orders of the Tribunal, the Bureau should keep this objective in mind and not simply exercise bargaining strength to extract the most onerous provisions that can be obtained from a particular acquiring party in the context of a particular transaction.

---

[1] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748

Our comments highlight the terms and provisions of the Outline which, in our view, appear to be unnecessarily intrusive or burdensome in that they would, in most cases, go beyond what is required to achieve an effective remedy.

III. NEED FOR FLEXIBILITY AND RECOGNITION OF CONTEXT

The CBA Section recognizes the positive contribution to certainty and predictability that results from greater consistency in the Bureau's approach to consent orders. However, an important balance must be struck between greater certainty and predictability and dealing with the particular facts of a specific merger in a fair and appropriate fashion. The CBA Section is concerned that, in its attempt to achieve the former objective, the Bureau may have unnecessarily restricted its ability to achieve the latter goal.

There are many reasons why it may be in the interests of a merging party in a particular case to agree to language in a consent agreement that would be punitive in other contexts. For example, in a contested takeover bid, the party triggering the process may wish to preserve an important timing advantage, even at a significant cost. Similarly, with the benefit of additional time prior to announcement of its bid, a hostile bidder may have lined up a buyer for assets to be divested and therefore regard onerous divestiture commitments as having little practical import. Counsel to the acquiring party in a multi-jurisdictional merger may be under significant pressure to reach a settlement in Canada, so that Canada does not become an "outlier", relative to other jurisdictions, in terms of the time at which settlement discussions are completed. It is unreasonable for the Bureau to use language negotiated in these and other situations as the new "benchmarks" that everyone else is asked to accept.

The following are our specific comments on particular sections of the Outline.

A. Preamble

(a) The preamble of the Outline lacks a "whereas" clause to the effect that "**with the execution of this Agreement, the Commissioner will not oppose the transaction**, in whole or in part, pursuant to sections 92, 100 or 104 of the Act". In the context of a particular transaction, this may be an important statement in a consent agreement for an

acquiring company. It would confirm that the agreement brings some finality to the Bureau's review of the proposed transaction and all issues that might have been raised with respect to the transaction are finally settled and agreed to by the parties, subject only to the agreement itself and to the *Competition Act* provisions allowing variation or rescission of the order. For example, this statement may be important for an acquiring company to demonstrate to its bankers that conditions to closing have been satisfied.

(b) There is no clause in the preamble to the effect that **the acquiring company does not admit to the substantial prevention or lessening of competition alleged by the Commissioner**. It may be implicit from the Commissioner's perspective, but merging parties who agree to a consent agreement traditionally want it in the agreement. More significantly, in our experience, the merging parties typically disagree with the Bureau's view and do not in fact concede that the merger is likely to result in a substantial prevention or lessening of competition, at least not in the terms alleged by the Commissioner. In most cases, this statement would be an accurate representation of the facts.

(c) The last recital contemplates the **"immediate" registration of the consent agreement with the Tribunal**. In a number of situations, the "immediate" registration of the executed agreement will not be appropriate. For example, in an auction or contested sale process, it would not typically be appropriate to file the consent agreement until the outcome of the auction or other sale process has been completed, i.e., by the determination of the winning bidder. Before such time, any announcement of the remedies to which one of the rival bidders may have agreed for its own strategic purposes may have the unintended effect of benefiting other bidders and perhaps even complicating the delicate state of the first-mentioned bidder's negotiations with unions, local communities and other stakeholders.

B. Time Periods

In the CBA Section's view, the Commissioner should not require that the Initial Sale Period and Trustee Sale Period be made public in consent agreements prior to the expiry of these periods. Particularly given that the Bureau has significantly reduced the duration of these periods, relative to past practice, it would put divesting parties in a very weak and unfair

negotiating position if potential purchasers were aware of the specific time within which a divestiture agreement had to be reached during either of these periods. The CBA Section submits that there is no need to place divesting parties in this position, particularly given the strong public policy interest in encouraging settlements (such as consent agreements) that avoid potentially costly court proceedings.

C. Appointments by the Commissioner

(a) The Outline provides that the **Commissioner, rather than the acquiring company, is responsible for appointing** the Hold Separate Manager, the Hold Separate Monitor, the Divestiture Monitor and the Divestiture Trustee. The Outline states that the Commissioner has sole authority to appoint these persons, without any participation or consultation of the acquiring company. In the equivalent process in other jurisdictions (such as the European Commission), the acquiring company appoints the Hold Separate Manager, the Hold Separate Monitor and the Divestiture Trustee, subject to the final approval of the agency.

In our view, it is reasonable and fair to permit the acquiring company to have at least some participation or consultation in the appointment of the Hold Separate Manager, Hold Separate Monitor, Divestiture Monitor and Divestiture Trustee. The acquiring company is often better placed than the Commissioner to recommend appropriate persons to fulfill the positions. Industry participants, such as the parties to the transaction, may have helpful information about potential monitors and trustees with experience in the industry, or which candidates may have conflicts of interest. Indeed, the Outline provides that the appointment of a substitute to the Hold Separate Monitor or Divestiture Monitor is "subject to the consent of the acquiring company, which consent shall not be unreasonably withheld." We see no reason why " an appointment by the Commissioner subject to the consent of the acquiring company, which consent shall not be unreasonably withheld" should not be contemplated for the initial appointments to these positions, perhaps with some time limit to ensure that the appointment process is completed within a reasonable time.

Consultation with the acquiring company is particularly appropriate in a context where, even though the Commissioner has the last word on the appointments, the acquiring company

remains responsible for remunerating the Hold Separate Manager, Hold Separate Monitor Divestiture Monitor and Divestiture Trustee, including expenses (such as where the manager, monitor or trustee hires experts, consultants or employees to assist).

(b) On the issue of **costs and expenses to be paid by the acquiring company**, some disparities in the Outline must be addressed in a particular case:

- For the Hold Separate Manager, the acquiring company shall be responsible for "all expenses" related to the function as well as "all costs" associated with the employment of any persons by the Hold Separate Manager that are "reasonably necessary to fulfill its obligations";
- For the Hold Separate Monitor and the Divestiture Monitor, the acquiring company shall be responsible for "the cost and expense" of employing consultants, counsel, etc. "as reasonably necessary" in the Monitor's opinion;
- For the Divestiture Trustee, the acquiring company shall be responsible "for all reasonable fees and expenses properly charged or incurred by the Divestiture Trustee" (including expenses for such consultants and counsel as considered necessary by the Divestiture Trustee to carry out its obligations).

These provisions should be harmonized to use a common standard that is clearly limited to "reasonable" costs and expenses and requires that the persons employed by the appointees are limited to consultants and counsel "reasonably necessary" to allow the Hold Separate Manager, Hold Separate Monitor, Divestiture Monitor and Divestiture Trustee to carry out their respective obligations.

D. Monitor

The Outline states that neither the acquiring company nor the Hold Separate Manager may attempt to influence, direct or control the Monitor. While they should not attempt to direct or control the Monitor, it is not clear why they should be prohibited from attempting to influence the Monitor. Presumably, the Monitor will be in regular discussions with them about what they have done to comply with the consent agreement and they ought to be able

to attempt to influence the Monitor's view of whether they have complied. We suggest that the words "attempt to influence" be dropped from this prohibition.

E. Divestiture Procedure

(a) The section of the Outline dealing with the Divestiture Procedure is general and does not **distinguish between the procedure during the Initial Sale Period and the subsequent procedure during the Trustee Sale Period**. All provisions of the Outline regarding the Divestiture Procedure are deemed to apply to both the Initial Sale Period where the acquiring company conducts the sale process and the Trustee Sale Period where the divestiture is to be done by the Trustee. This may not be appropriate in a particular case.

(b) The Outline includes a number of provisions designed to facilitate a sale, such as requiring the acquiring company to give or make available to a purchaser of the divested business customary representations and warranties, technical assistance, employees, protection of pension benefits, etc.

While general requirements regarding the divestiture process itself or the qualifications to be met by a purchaser could apply to and be justified in the Initial Sale Period, there is **no reason to impose the strict conditions detailed in the Outline to a divestiture by an acquiring company in the Initial Sale Period**. (See our comments below on such provisions in the context of the Divestiture Trustee Sale.)

In the Initial Sale Period, the intent is to give the acquiring company an opportunity to arrive at a consensual sale with a prospective purchaser which is acceptable to the Commissioner. The conditions for the sale (including the price and all other terms and conditions) should therefore be left for the parties to negotiate. The *in terrorum* effect of the Trustee Divestiture provisions in the consent agreement will be more than sufficient to give the acquiring company incentive to make its best efforts to reach a divestiture agreement during the Initial Sale Period, for the price and on the terms and conditions most favorable and reasonably acceptable to the acquiring company (and the Commissioner), in the circumstances.

There is therefore no reason to impose additional conditions on the acquiring company. It seems to us that, in most cases, the only areas where the Commissioner may reasonably have some interest to protect during the Initial Sale Period are with the purchaser itself (to ensure that it is a viable and effective competitor), and the divestiture process (to ensure that a complete disposition of the divested assets as a going concern is achieved). Other terms and conditions should be left to the parties to negotiate, with the final agreement (as approved by the acquiring company and the purchaser) subject to approval by the Commissioner.

(c) A number of **employee-related provisions** appear to go beyond what could be considered reasonable or necessary for an effective remedy, even in the context of a Divestiture Trustee Sale. For example, forcing the acquiring company to "protect pension benefits for any employee who accepts an offer of employment from the Purchaser", or to "pay a bonus to any employee who accepts an offer of employment from any Purchaser" will likely create serious issues for an acquiring company and seem to go beyond what is required to ensure an effective remedy in most cases.

(d) Similarly, **the requirement that any prospective purchaser be furnished with "all pertinent information"** and "be permitted to make such reasonable inspection of the Assets and of all financial, operational and other non-privileged documents and information which may be relevant to the Divestiture" is unreasonably and unnecessarily broad. Again, the acquiring party will already have enormous incentive to reach an agreement with a potential purchaser during the Initial Sale Period. It should not have to provide the information to all prospective purchasers who may come knocking on its door. Imposing this requirement on may actually interfere with the acquiring company's ability to complete a divestiture to an acceptable purchaser during the Initial Sale Period. Similarly, during the Trustee Sale Period, the Divestiture Trustee should be tasked with determining what information should be provided to *bona fide* prospective purchasers.

(e) The CBA Section submits that **allowing the Commissioner to access, on two days notice,** all records of the acquiring company relating to compliance with the consent

agreement, and to interview employees and officers of the company on matters relating to compliance, is unreasonable. A more reasonable period would be seven days.

F. Purchaser

Under "Divestiture Procedure", the Outline gives the last word on several potentially contentious and important issues to the Commissioner, one of which is the determination of whether a prospective purchaser is an acceptable buyer of the assets to be divested.

The provisions regarding potential purchasers of the divested assets appropriately require that the purchaser "shall effect the purchase with the demonstrated commitment to carrying on the business and competing effectively" and "shall have the managerial, operational and financial capability to compete effectively in the market." This requirement applies to a sale by the acquiring company during the Initial Sale Period as well as to a Divestiture Trustee Sale. It is indeed an important and necessary requirement as it ensures that the purchaser will effectively compete following the divestiture.

However, the Outline states that compliance is subject to consideration and approval of the Commissioner only. In our view, it would be more appropriate that approval of a purchaser be based solely on the criteria outlined in the Agreement (that is, ability and commitment to carry on business and compete effectively). Further, in the event of a disagreement, the acquiring company should be able to apply to the Tribunal for a determination.

G. Divestiture Trustee Sale

A number of provisions relating to the Divestiture Trustee Sale appear to be unreasonably onerous on the acquiring company and unnecessary to achieve an effective remedy.

(a) Requiring the acquiring company to **"provide reasonable and ordinary commercial representations and warranties"** to the purchaser of the business being divested appears to go beyond what is necessary to achieve an effective remedy in the context of a Divestiture Trustee Sale in which the acquiring company cannot have any involvement. It would effectively impose a penalty on the acquiring company of

unknowable magnitude. Further, it is not clear how a trustee would determine "reasonable and ordinary commercial representations and warranties" in the context of a fire sale, which is out of the ordinary course. In our view, a remedy would likely be more certain and effective in a divestiture trustee sale on an "as is/where is" basis, with no representations and warranties. This approach also has the advantage of minimizing ongoing contact and disputes between the acquiring company and the purchaser of the divested assets.

In any normal arm's length transaction, such issues will be the subject of considerable negotiation, yet the Outline contains only a limited mechanism for protection of the rights of the acquiring company. More particularly, in the context of Divestiture Trustee Sale which can be ultimately made at no minimum price, to require that an acquiring company agree to such additional terms and conditions will normally be unreasonable and unnecessary.

The CBA Section submits that due process considerations will generally warrant including a provision in a consent agreement requiring notice to the divesting party of any proposed sale by the Divestiture Trustee, so the divesting party has an opportunity to become satisfied that the Divestiture Trustee has lived up to the obligations under the consent agreement, including the obligation to use commercially reasonable efforts to negotiate the most favorable terms and conditions available at that time. The acquiring company should also have a right to apply to the Tribunal for a determination in the event of a dispute.

(b) Paragraph (h) in the second bullet under VIII. Divestiture Trustee Sale of the Outline states that the **Divestiture Trustee shall sell the relevant assets "at no minimum price"**. In a footnote to an August 2007speech[2], the Commissioner expressed the view that this term could require the acquiring party to pay a purchaser of assets to complete a divestiture:

> Note that the term 'no minimum price' also includes those uncommon situations whereby the vendor will have to compensate (i.e., make payment to) the buyer. For example, in cases where the asset(s) to be divested cannot be separated from

[2] Speaking Notes for Sheridan Scott, Commissioner of Competition, "The Canadian Competition Bureau's Approach to Merger Remedies", Trade Practices Workshop, Law Council of Australia, Business Law Section, Queensland, Australia, August 10-12, 2007, http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02393e.html, note 20.

> certain liabilities, the vendor will have to compensate the buyer for any costs associated with such liabilities. Similarly, in cases where the costs associated with such liabilities are uncertain, the vendor may need to indemnify the buyer.

We have two comments on this note. First, it is not clear that a requirement to sell at "no minimum price" includes an obligation to pay a purchaser to complete a sale or provide an indemnity. Second, given the apparently open-ended liability the Commissioner seeks to impose on an acquiring party, this position seems unnecessarily punitive. As a practical matter, if no acceptable purchaser is willing to pay even $1 for the assets to be divested, there is a more fundamental issue about the viability, or perhaps need for, the divestiture that ought to be addressed by the Tribunal before forcing a completion of a divestiture in such circumstances.

(c) It would be helpful to provide guidance with respect to the "customary terms set by the Commissioner", regarding the **expenses of the Divestiture Trustee for which the acquiring party will be responsible**.

(d) Regarding the provisions for a **potential failure of the Divestiture Trustee Sale**, the CBA Section submits that in most cases it would be punitive and unnecessary to require an acquiring company to agree, in advance, to an order of the Tribunal requiring the sale of unidentified other assets, or the imposition of unidentified other obligations. It is questionable whether such open ended terms could be the subject of a Tribunal order and thus whether they are proper for a consent agreement filed pursuant to section 105 of the *Competition Act*. If the Commissioner has concerns about the package of initial assets to be divested, the appropriate solution is to include crown jewel provisions on additional identified assets that may have to be divested, or specific additional obligations that may be imposed.

H. Confidentiality Agreements

The Outline provides, in several places, that a confidentiality agreement should be executed "in the form stipulated by the Commissioner". This is the case for the Hold Separate Manager, Hold Separate Monitor, Divestiture Monitor, Divestiture Trustee and Purchaser

and, each time, without any consultations with the acquiring company. An acquiring company has a legitimate interest in ensuring that confidentiality agreements adequately protect its confidential, sensitive business information. A more appropriate approach would be for the confidentiality agreements to be subject to consent or approval by the acquiring company, not to be unreasonably withheld, failing which application may be made to the Tribunal for resolution. Alternatively, confidentiality agreements could be negotiated contemporaneously with the consent agreement.

I. Extension of Sale Period

In the past, many consent agreements provided that if, prior to the expiry of the time for the Initial Sale Period or the Trustee Sale Period, the acquiring company received from a prospective purchaser a formal offer or other written indication of intent to purchase the divestiture assets, which the acquiring company or the Divestiture Trustee has accepted, the time for effecting the divestiture would be extended by a period reasonable in the circumstances, within which time the divestiture must be completed. We submit that a similar provision should be included in the Outline.

J. Challenge by the Acquiring Company

The Outline would strictly limit the rights of the acquiring company to challenge the terms and conditions of the Divestiture to allegations of malfeasance, gross negligence or bad faith on the part of the Divestiture Trustee. In our view, this is unreasonable and potentially unnecessarily punitive to the acquiring company. An acquiring company should also have the right to challenge (before the Tribunal) the proposed terms of a sale on the ground that the Trustee failed to abide by the Agreement, which requires it to follow specific procedures and imposes various parameters on its conduct.

K. Confidential Provisions

The Outline states that some provisions of a consent agreement will no longer remain confidential after the Initial Sale Period, and that the absence of minimum price and the length of the initial sale and divestment sale periods will be confidential only until the Divestiture Trustee Sale period. It is not clear why this approach is required to achieve an

effective outcome. At a minimum, the duration of the Divestiture Trustee Sale period should continue to be confidential.

With the issuance of the Information Bulletin, the principle of no minimum price in a Divestiture, the approximate duration of the sale period and the possibility of having a crown jewel provision in a remedy package are elements now known by the business community. There is therefore no reason to make public, prior to the conclusion of the Divestiture, the specific provisions of a consent agreement in those respects. The fact that they are there creates, in and of itself, the incentive for the acquiring company to conclude the Divestiture as quickly as possible. Making them automatically public as soon as the Initial Sale Period is over would likely be unnecessarily prejudicial to an acquiring company.

L. General Provisions

(a) It is not clear that the limited provision in the Outline allowing for applications to the Competition Tribunal regarding "interpretation, application or implementation" of the Agreement would be sufficient to allow the Tribunal to adjudicate such issues on the merits if the acquiring company objected to the Commissioner's decisions. In our view, this should be made clear as it is appropriate for the Tribunal to have this role.

(b) The Outline refers only to amendments to the Agreement pursuant to section 106 of the *Competition Act* based on a mutual agreement. The Outline is silent on other possibilities covered by section 106. In our view, the consent agreement should clearly state that the Tribunal retains jurisdiction for the purpose of any application by the Commissioner or the acquiring company to rescind or vary any provision of the agreement in the event of a change of circumstances or on consent, as contemplated by section 106.

The CBA Section would be pleased to discuss these comments with the Bureau in greater detail.