THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Version provisoire du *Guide sur la tarification et les normes de service relatives aux fusions*

SECTION NATIONALE DU DROIT DE LA CONCURRENCE
ASSOCIATION DU BARREAU CANADIEN

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AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe plus de 38 000 juristes, dont des avocats, des notaires, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section nationale du droit de la concurrence de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et approuvé à titre de déclaration publique de la Section nationale du droit de la concurrence de l'Association du Barreau canadien.

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I. INTRODUCTION

La Section nationale du droit de la concurrence de l'Association du Barreau canadien (la Section de l'ABC) est heureuse d'avoir l'occasion de commenter la version provisoire du *Guide sur la tarification et les normes de service relatives aux fusions* (le Guide provisoire) que le Bureau de la concurrence a diffusé à des fins de consultation au mois de mai 2010. La Section de l'ABC appuie les efforts soutenus du Bureau en vue d'exposer clairement ses politiques de mise en application par le biais de la publication de lignes directrices, de bulletins d'information, de discours, de communiqués de presse et d'autres outils d'interprétation.

II. RÉSUMÉ

La Section de l'ABC a formulé de nombreux commentaires et observations principaux relatifs au Guide provisoire :

- **Il faut adopter une approche plus efficace quant aux modifications de base apportées à la Loi.** Les modifications apportées aux dispositions relatives à l'examen des fusions de la *Loi sur la concurrence* (la Loi) en 2009 étaient censées avoir un plus grand impact sur le processus d'examen des fusions que ce qui est décrit dans le Guide provisoire. Une refonte globale de la procédure de triage et d'examen des fusions est requise au lieu d'une simple mise à jour des normes et politiques adoptées sous le régime de l'ancienne Loi. La Section de l'ABC réaffirme la position qu'elle a énoncée à cet égard dans son mémoire de juin 2009 sur le Projet de lignes directrices pour l'application du processus révisé d'examen des fusions.[1]

- **Les échéanciers doivent concorder avec le nouveau processus prévu par la Loi.** Le Guide provisoire impose des échéanciers analogues relatifs aux processus d'examen des fusions qui ne concordent pas nécessairement avec les modifications récentes apportées à la Loi.

- **Certaines exigences en matière de renseignements ne semblent ni nécessaires, ni claires, mais plutôt accablantes**. Bon nombre des exigences quant aux renseignements

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[1] Consultez le mémoire sur le site Web: http://www.cba.org/ABC/Memoires/2009fr/09_35.aspx.

qu'il faut fournir ne nous paraissent pas claires, superflues et inutilement accablantes (p. ex., les renseignements exigés dans le cadre de transactions non complexes).

- **Le Guide provisoire augmente le degré de complexité et d'incertitude du processus d'examen des fusions.** Il résulte du chevauchement du Guide provisoire et de la Loi modifiée une mosaïque complexe d'échéanciers et d'exigences en matière de renseignements, découlant soit de la loi, soit d'autres sources sans fondement juridique. En conséquence, il existe une incertitude croissante dans le milieu des affaires concernant les transactions en matière de fusions, ce qui est contraire à l'intention du Parlement derrière les modifications apportées à la Loi. La Section de l'ABC est d'avis que le Guide provisoire devrait fournir, entre autres, des précisions sur les interactions pratiques entre les cas complexes et les accords sur les délais, d'une part, et entre les cas très complexes et les demandes de renseignements supplémentaires (DRS), d'autre part. Les accords sur les délais et les DRS ont tous les deux un effet sur la durée de l'examen entrepris par le Bureau, limitant ainsi l'effet bénéfique de la transparence, l'un des objectifs visés par les normes de service.

- **Le regroupement de certains bulletins, lignes directrices et politiques.** Quant à la forme, il serait utile, soit de regrouper les politiques, les guides et les bulletins du Bureau qui traitent de fusions, des processus d'examen des fusions, ainsi que de la tarification et des normes de service, soit d'inclure des renvois.

- **Autres commentaires.** La Section de l'ABC a plusieurs autres préoccupations importantes sur lesquelles elle donne des précisions ci-dessous. Celles-ci portent, notamment, sur les autorisations données aux organismes de la concurrence étrangers, sur l'utilisation faite des accords sur les délais, sur le prélèvement de la TVH pour ce qui est des avis consultatifs, sur la politique de remboursement et sur la nature restrictive de la procédure lorsqu'un dossier est retiré et soumis de nouveau.

III. COMPATIBILITY WITH THE STATUTORY MERGER REGIME

A. Fundamental Legislative Change Requires a Streamlined Approach

Both the Merger Review Performance Report, June 2010 (MRPR) and the Draft Handbook acknowledge that, in light of the "significant changes" to the merger review process in the amendments, "updates are necessary" to existing service standards and complexity designations.

The CBA Section is of the view that the amendments were intended to have a far more significant impact on the merger review process than indicated in the Draft Handbook. A fundamental overhaul of the merger triage and review process is required, rather than simply updating or supplementing existing standards.

Federal government policy provides that those who pay fees for government services are entitled to fundamental information on the services provided and any associated service standards. Treasury Board of Canada's Policy on Service Standards for External Fees states, "service standards represent the government's commitment to those who use its services, in a framework of transparency and accountability. This is particularly true when users are charged a fee." The Policy requires the Bureau to adopt service standards that are "measurable; and relevant at the level of the paying stakeholder" for matters for which a fee is paid (including notifiable transactions under Part IX of the Act).

In this regard, the CBA Section reiterates the arguments in the June 2009 submission and its view that the Bureau should adapt its internal service standards (timelines) for merger review with the new statutory waiting periods, as these were deliberately designed by Parliament to reflect actual review timeframes. To do otherwise would be inconsistent with the government's commitment to provide transparency and accountability to Canadian businesses and would undermine the Treasury Board Policy as it applies to merger review under the Act.

The Draft Handbook reduces the service standard periods for complex and very complex mergers and the CBA Section views this as a step in the right direction. However, we do not believe this is a sufficient step. The Section would be pleased to dialogue with the Bureau on how the service standards could be brought more into line with the statutory waiting periods, recognizing that the distinctively Canadian practice of requesting no-action letters has continued despite the new regime.

B. Timelines Should Be Consistent with New Statutory Process

The Draft Handbook imposes a parallel merger review timing process which does not necessarily accord with the recent amendments. Overlaying the Draft Handbook on top of the amended Act results in a complex mosaic of timing and information requirements – some established by law (for example, the 30 day waiting period after an SIR) and others with no legal foundation (for example, the 14 day, 60 day, or 120 day thresholds, with corresponding start and stop dates based on additional time periods within which parties are required to respond to voluntary information requests) – which increases uncertainty for the business community in merger review. This is contrary to the intention of Parliament.

For example, the statutory amendments contemplate completion of merger reviews in the vast majority of cases within 30 days, without reference to any of the 14 day, 60 day, or 120 day thresholds set out in the Draft Handbook. This approach undermines Parliament's objective in adopting a two-stage merger review process with specific timeframes applicable to each stage.[2] Absent a timing agreement, parties are permitted to close a transaction following expiry of the first 30 day period where a SIR has not been issued, notwithstanding that the Bureau's review is ongoing. However, parties choosing to do so face significant uncertainty as long as the Bureau continues to take the position that it may challenge notifiable transactions where a SIR was not issued, upon completion of its review. Expiry of the initial 30 day review period has little practical meaning for parties if they take on a material risk if they do close.

Having said that, we agree that the Bureau should continue to strive to complete most merger reviews within 14 days, and that clearing transactions in less than the 30 day waiting period contemplated by the Act is consistent with the Act and Parliament's intent.

If the timelines in the current Draft Handbook are retained, it should be made clear that the service standard period for very complex mergers expires on the first to occur of the expiry of the Part IX waiting period and the service standard otherwise set out in the Draft Handbook.

IV. SPECIFIC COMMENTS ON THE DRAFT HANDBOOK

A. Determining the Complexity Classification

The CBA Section offers the following observations on the specific criteria outlined in the Draft Handbook for identifying when a proposed transaction is likely to be classified as non-complex, complex or very-complex:

- While distinguishing between proposed transactions based on the anticipated degree of horizontal overlap is useful, further consideration should be given to the appropriateness of establishing thresholds for vertical aspects of a transaction. While vertical issues may be a factor to be considered under section 92 of the Act, as discussed in the Merger Enforcement Guidelines (MEGs), in practice there are very few circumstances where a merger would be likely to give rise to vertical competition law

[2] The proposition that changes to the time for merger reviews enacted by Parliament need to be reflected in Bureau policy is supported by the case law dealing with this issue under the Act. See Canada (*Commissioner of Competition*) v. Labatt Brewing Co. Ltd. et al., 2007 Comp. Trib. 9, aff'd 2008 FCA 22 at paras. 27-28 (referring to the legislative history of changes in the merger waiting period from 21 to 42 days, and noting these changes "create a heightened expectation that 42 days should be sufficient to complete a merger review)."

concerns. That said, if the Bureau intends to retain a threshold in section 3.2.2, the CBA Section submits that a 10% threshold is too low to reasonably give rise to any degree of vertical competition concerns.

- It appears that the lists of "mitigating factors" and "complicating factors" in sections 3.2.2 and 3.2.3, respectively, are directed at the same issue: the circumstances in which a proposed transaction could be classified as complex rather than non-complex notwithstanding the parties having a combined share in any relevant market of less than 35%. The CBA Section believes it would be more effective to combine the discussion in these two sections into a single list of distinguishing factors. In addition:
    - In combining the lists, it would be preferable to retain the reference to "credible complaints" in section 3.2.3 and make this in reference to the competitive implications of the merger, rather than the much lower threshold set out in section 3.2.2 that "market participants have expressed no competition concerns".
    - Given that both lists include a criterion regarding the number of remaining competitors in the relevant market, the Draft Handbook suggests that potential competition law concerns are more likely to arise where there is an increased likelihood of coordinated behaviour in the relevant market. Consideration might, therefore, be given to referencing this directly.
- In the discussion of the distinction between complex and very complex transactions in section 3.2.4, the list of factors that may result in a very complex classification mirrors significantly the list for distinguishing between non-complex and complex transactions in section 3.2.3, with the distinction that the combined share of the parties in the relevant market would be greater than 35%. Given the significant difference in the time periods for review of complex and very complex transactions, additional guidance would be useful on when the Bureau will classify a transaction as complex as opposed to very complex where the combined market share exceeds 35%. For example:
    - Is a transaction likely to be classified as very complex rather than complex where it involves "leading" participants in the relevant industry (as stated in the current Handbook) rather than just "participants"?
    - Is the Bureau making a deliberate distinction for purposes of complex/very complex classification between barriers to entry and "high" barriers to entry and if so, how can this be determined?
    - What is a "complex theory of competitive harm"? Is there an element of "uniqueness" to it, along the lines referred to in the current Handbook?
    - Has the Bureau deliberately omitted the statement in the current Handbook that a very complex transaction is one where "Tribunal proceedings are a strong possibility"?
    - How will the Bureau treat transactions where there is a need to discuss a remedy? Will there be a presumption that these transactions will be classified as very complex?
- The Draft Handbook identifies a failing firm analysis as one of the complicating factors when considering very complex mergers. In the CBA Section's experience, a successful failing firm submission can at times be completed outside the formal review process on an expedited basis. This early consideration and determination of a failing firm submission may truncate the competitive effects analysis. In addition, in some failing firm contexts, the entity proposed to be acquired may be at risk of failure before the expiry of the service standard periods otherwise contemplated by the Draft Handbook.

- Consideration should be given to including a *de minimis* share increase (for example, less than 5%) as a mitigating factor likely to affect the complexity classification. In our experience, this is a highly relevant consideration in assessing whether any lessening of competition is likely to be *substantial*.
- The current Handbook includes very useful examples of the types of transactions that could be classified as non-complex, complex and very complex. The non-complex examples are particularly useful, as non-complex transactions comprise the overwhelming majority of notifiable transactions. The Draft Handbook does not include examples. Consideration should be given to retaining these examples and expanding them. (For example, most transactions involving real estate and private equity firms do not raise competition law issues and are properly classified as non-complex. In addition, transactions which are essentially internal corporate reorganizations but which do not technically meet the requirements of an exempt affiliate transaction under section 113(a) are properly classified as non-complex).

B. Certain Information Requirements Seem Unnecessarily Burdensome and Unclear

With respect to the information required for initial merger reviews, the amendments (to the Act and the regulations) are precise as to the information to be provided to the Bureau to allow a merger review to be completed in the first 30 days. The Draft Handbook significantly expands the information requirements for purposes of commencing a service standard period. For example, Parliament repealed the requirement under the regulations to submit marketing plans and strategic plans with an initial filing (which starts the statutory waiting period), yet on page 14 the Draft Handbook requires precisely this to commence the service standard period. Considering the burden on merging parties in providing information over and above the statutory requirement, the Bureau's rationale for requesting additional information should be clear and appropriate. This is particularly true where additional information requirements are imposed uniformly in order to trigger review timeframes, rather than requested on a case by case basis where circumstances require.

A number of the concepts and information requirements in the Draft Handbook seem unnecessary or unclear (for example, the concept of a "vertical overlap" is unclear and an articulation of a market share threshold in upstream or downstream markets seems largely irrelevant), and unduly burdensome (such as the information requirements associated with transactions classified as non-complex or the requirement to provide marketing plans in all complex mergers).

Among other things, the CBA Section believes that the requirements in sections 3.3.2 and 3.3.3 require more information than has usually been provided in non-complex ARC applications.

There is also considerable overlap between sections 3.3.2 (non-complex with no or minimal overlap) and 3.3.3 (non-complex with moderate overlap). Although customer information is not required in the section 3.3.2 information requirements, the Draft Handbook states that marketplace inquiries may be necessary in these cases. There would be almost complete overlap if the Handbook required customer information for the 3.3.2. non-complex mergers. Indeed, the Draft Handbook comes close to effectively recommending that pre-merger notification filings (and more) be submitted in all cases because even the information requirements for non-complex cases are similar to merger filing information requirements. The CBA Section believes that many non-complex mergers are dealt with by way of ARC applications which do not generally contain all of the information required by the Draft Handbook. The CBA Section believes that the information requirements for such transactions ought to be limited to item (d) and marketplace inquires should not be necessary in such cases.

C. Interlocking Directorships and Minority Interests

The CBA Section has concerns about the Draft Handbook's emphasis on interlocking directorships and minority interests. Unlike the United States, Canada does not have an equivalent to section 8 of the *Clayton Act*, suggesting that Parliament has not sought to place emphasis on addressing such issues through the competition laws. Moreover, as a much smaller country, interlocking directorships are far more common in Canada.

If this discussion is retained, the requirements in the Draft Handbook are burdensome and would, in our view, benefit from greater detail and explanation to clarify the scope of the required information. The requirement under 3.3.2(e) to disclose "whether any relevant interlocking directorships exist" requires more discussion to assist in limiting the scope of the required information. The Bureau could provide greater clarity by referring to the MEGs, which indicate that the Bureau examines the competitive effects of a merger resulting from the existence of "interlocking directorships between and among the merging parties or their affiliates and their competitors, customers and suppliers". The CBA Section also questions the need to provide information on interlocking directorships for transactions with minimal overlap and recommends that this information be required only in connection with more complex mergers. In addition, there is some ambiguity as to whether the requirement under 3.3.3(b) to disclose "whether interlocking directorships exists" is broader than the requirement under 3.3.2 to disclose "whether any relevant interlocking directorships exist".

The CBA Section believes that more detail should be provided to clarify the scope of information required with respect to non-complex mergers with moderate overlap. Section 3.3.2(e) with respect to non-complex mergers with no or minimal overlap refers to the identification of competitive overlaps and, *inter alia*, the identification of "businesses in which the party owns any interest". Similarly, section 3.3.3(b) with respect to non-complex mergers with moderate overlap refers to the identification of "any instances in which the party owns any minority interest". It is ambiguous whether the intent is to require a comprehensive list of all minority interests owned by the parties, or whether competitive overlaps should be identified by taking minority interests into consideration. Assuming the intent is to ask parties to consider minority interests to identify overlaps, it would be helpful to provide further guidance in this respect and use consistent language at 3.3.2 and 3.3.3.

It is unclear whether the information sought is limited to voting shares in corporations, or also applies to interests in non-corporate entities. In addition, in our view a relevance threshold should be added to limit the burden to parties. The Instructions for Item 6(c) of the U.S. HSR Form limit the required information on minority interests to holdings of voting securities of five percent or more, and to holdings in corporate entities with total assets of US$10 million or more. In our view, the requirement to disclose minority interests should be limited to voting interests in competitors of 10% or more. This threshold would be consistent with the MEGs, which indicate at paragraph 1.8 that "(i)n the absence of other relationships, a direct or indirect ownership of less than 10% of the voting interests in a business does not generally constitute ownership of a 'significant interest'". In addition, a 10% threshold would align with public disclosure requirements under applicable Canadian securities regimes.[3]

D. Consolidation of Various Guidelines, Bulletins and Policies

It would be helpful to consolidate or cross reference the Bureau documents dealing with mergers, merger review processes, and fees and service standards. This is the first Fee and Services document issued by the Bureau which solely addresses "merger-related matters". [4] The Bureau has two other documents relating to fees and services standards, both dealing with

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[3] For example, in accordance with National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, upon acquiring or obtaining control or direction over ten per cent or more of the voting securities of a Canadian public issuer, the acquirer becomes an "insider" of that issuer and must disclose any trading in securities of that issuer while above the ten per cent threshold.

[4] Technically it should address "Mergers and Merger Related Matters".

mergers and other topics: "Competition Bureau Fee and Service Standards Policy" (March 2003) and "Competition Bureau Fee and Service Standards Handbook" (December 2003). The Bureau also issued the Merger Review Process Guidelines (September 2009), as well as a Procedures Guide, (May 2000). In addition, the website refers to the 1997 Fee and Service Standards Handbook which is to be replaced by the Draft Handbook.

The Bureau's June 2010 MRPR states that a number of concerns have been raised by stakeholders, which the Bureau is working to address. These include "information related to a particular subject was scattered throughout the [web]site" and the "site had outdated content". It would be helpful to have one guideline addressing fees and service standards, rather than a series of documents, or at least an explanation of how each document relates to the others.

E. Other Comments and Observations

- The Bureau increasingly requests that parties enter into timing agreements in mergers which appear to the Bureau to be "complex", yet in which the Bureau does not necessarily wish to issue an SIR. In footnote 13, the Draft Handbook states that it does not apply where a timing agreement has been reached. Assuming this reference includes timing agreements in "complex" transactions where a SIR was not issued, it appears that the Handbook actually applies primarily to non-complex transactions for which there is little need for such guidance.
- The CBA Section believes the Handbook should state its market place contact policy in mergers involving no or very small incremental market share increases, and that the 5% threshold should be increased. In our experience, market contacts where post-merger shares are greater than 5% but still relatively low are not inevitably undertaken by the Bureau and the Handbook should reflect this.
- The CBA Section believes that the Bureau should provide a clearer statement regarding its willingness to delay making market contacts. The Draft Handbook refers to the Bureau "exercising its discretion" to do so. In the experience of many CBA Section members, the Bureau routinely accepts requests to delay making market contacts. However, the *quid pro quo* is that the service standard or waiting period (in the case of a notification) will not commence until the Bureau can commence its market contacts. A clear statement to this effect would provide greater guidance to merging parties.
- The requirement to provide e-mail addresses should be removed for all complexity levels, as this information is not included in s. 16 of the Notifiable Transactions Regulations. The regulations were recently amended and e-mail addresses were not added as part of the prescribed customer information. The Draft Handbook should not require that parties provide customer information beyond the scope of the Regulations, as this is often burdensome to obtain.
- Authority to impose fees is rooted in the *Department of Industry Act*. However, that statute appears to be silent on the nature of the liability for payment. Section 6.1 of the Draft Handbook states that the party requesting an ARC is responsible for the payment of the filing fee, and "all notifying parties" will be considered to be jointly and severally liable for the fee associated with a pre-merger notification. Even though these

elements remain unchanged from the current Handbook, the CBA Section believes it would be beneficial for the Handbook to explain the statutory basis for joint and several liability, and whether the Bureau believes that the target company in an unsolicited transaction subject to section 114(3) of the Act would be treated as a "notifying party" for purposes of collecting an outstanding payment. In our view, there is no basis for asserting such liability on the target of an unsolicited bid that is not a party to an offer to its shareholders.

- The CBA Section does not believe the Draft Handbook should "strongly encourage" merging parties to provide waivers to foreign competition agencies. While parties often do so and waivers may result in a more expeditious review, the CBA Section is of the view that the Bureau's policy should not be to encourage something beyond its statutory mandate. Moreover, issuance of a waiver has nothing to do with the complexity of a transaction. The Bureau should consider revising the discussion to indicate that in certain circumstances waivers may result in a more expeditious review.
- The Bureau's classification process should state that it is broadly guided by sections 92, 93 and 96 of the Act, rather than solely "numerous factors", such as those on page 9 of the Draft Handbook.
- Footnote 9 on page 12 is circular, defining a *significant* affiliate as an affiliate with *significant* sales or *significant* assets, without a reference to possible competitive significance, or some sense of relativity (for example, a company with less than $5 million in revenues, in a multimillion dollar transaction, etc.)
- The reference to written opinions on page 14 of the Draft Handbook should indicate that written opinions provided under section 124.1 are "binding on the Commissioner" and not simply on the Bureau.
- It is not clear why HST is payable for a written opinion, but not for an ARC. It would be helpful to provide an explanation of the difference.
- The refund policy is currently restricted to two business days unrelated to the services provided. For example, where a transaction is abandoned three days after payment, but before the Bureau has conducted any significant work, it seems unfair to have a policy of refusing a refund in these circumstances. The Bureau could consider extending the two business days to five.
- The pull and refile process seems unduly restrictive as to when a further filing fee must be paid. Presumably, the same services are provided regardless of whether a filing is made and pulled one or more times. The CBA Section believes that as a practical matter, a period longer than five business days should be allowed for refiling and suggests the period be 20 days.

V. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.