THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Model Mergers Timing Agreement

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 Competition Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the Competition Law Section.

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I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft Model Mergers Timing Agreement (Draft Timing Agreement) for merger reviews where merging parties raise efficiencies claims. We commend the Bureau's continuing efforts to engage with stakeholders through meaningful consultations.

II. GENERAL COMMENTS

A. Rationale for Draft Timing Agreement

The CBA Section appreciates that timing agreements may be required in certain cases and, if executed properly, can be mutually beneficial. However, it is not clear what problem the Bureau is seeking to address with the Draft Timing Agreement (which is limited to proposed transactions where the merging parties intend to make efficiencies claims), particularly given that most mergers are pro-competitive and efficiencies cases are relatively rare.

We see no obvious need for a model timing agreement that would automatically apply to all merger reviews where merging parties raise efficiencies claims. It would be helpful if the Bureau gave background or identified specific concerns it is trying to address, beyond the general concerns described in the News Release.[1]

B. Overly Broad Application

The Bureau's proposed *blanket* approach of requiring a timing agreement in all cases that involve efficiencies claims is overly broad and unnecessary. Depending on the context, a timing agreement may be neither appropriate nor necessary. The need for a timing agreement should be determined on a case-by-case basis.

Nothing in the *Competition Act*, regulations, case law (e.g., *Tervita*) or Bureau guidelines suggests that a model timing agreement focused on efficiencies determination in the proposed manner (which imposes an onerous burden on merging parties and extends the statutory review period

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1 The Bureau's News Release states, "the purpose of the timing agreement is to ensure that the Bureau has the time and information it requires to properly assess the parties' claimed efficiencies".

to 110 days after Supplemental Information Request (SIR) compliance), is necessary or desirable for effective merger enforcement. In our view, it would be inappropriate to effectively repeal the efficiencies defence by imposing this heavy burden on the merging parties. Any potential narrowing of the defence should be left to the legislative policy initiative function of Innovation Science and Economic Development.

It is also unclear if the Commissioner of Competition, a position established by statute, has authority to enter into timing agreements.

C. Lengthy Timeframes

Pro-competitive mergers should not be unduly delayed, and reviews of complex matters should be expedited, not lengthened.

While the intent of the Draft Timing Agreement is to "establish a schedule for the expeditious resolution" of proposed transactions",[2] it will likely increase the length of the Bureau's review (at least in certain cases). The Draft Timing Agreement contemplates a linear review, where the Bureau assesses and reaches a conclusion on the competitive impact of the proposed transaction before considering the merging parties' efficiencies claims. The Draft Timing Agreement contemplates that submissions on the efficiencies that would be lost if a remedial order were made will now be provided within 30 to 40 days after full compliance with Supplementary Information Requests (SIRs).[3]

This contrasts with the position in the Bureau's draft *Practical Guide to Efficiencies Analysis in Merger Reviews* (Draft Efficiencies Guide), which encourages merging parties to give their initial efficiencies submissions and available supporting information at an early stage, to "allow the Bureau sufficient opportunity to analyze potential effects and efficiencies concurrently".[4]

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2 Draft Timing Agreement at Recital D.

3 As discussed in more detail in the submission, this effectively delays the evaluation of possible efficiency claims - something that the Bureau is legislatively required to do.

4 Draft Efficiencies Guide at Section 1.2, available online. The section also states:

> … providing the Bureau with sufficiently detailed information regarding efficiency claims at an early stage of the process will facilitate the preparation of focused information requests and/or the targeted use of other information gathering mechanisms. The Bureau does not view the merging parties raising efficiency claims as a concession that anti-competitive effects are likely to result from the merger, **and will continue its analysis of the likelihood of anti-competitive effects**. [emphasis added]

The proposed linear approach will unnecessarily delay the merger review process, particularly given the lengthy timelines in the Draft Timing Agreement. This delay is expressly recognized in the Draft Efficiencies Guide:

> In other instances, merging parties have waited for a definitive conclusion as to whether or not the merger is likely to result in an SPLC before providing detailed information about efficiencies. *This approach typically lengthens the Bureau's review process since the assessment of efficiencies claims is iterative, and the provision of a submission is only the first step in this assessment*. While merging parties might seek to hold back a submission until the Bureau has made determinations regarding the scope of the potential remedy or narrowed the scope of a merger that is under review, *this will come at the cost of time that could have otherwise been spent engaging on the efficiencies claims*.[5] [emphasis added]

Consistent with the approach in the Draft Efficiencies Guide, the Bureau's efficiencies assessment should be conducted in parallel with its competitive effects assessment. The Bureau receives significant funding from merger filing fees to enable a parallel review of competitive effects and efficiencies claims. The Bureau used the increased burden of assessing efficiencies claims post-Tervita to justify the recent increases in merger filing fees. In addition, a parallel review would be more conducive to a constructive dialogue on efficiencies claims.

Finally, the lengthy timeframes in the Draft Timing Agreement (which extend to a maximum of 110 days after full compliance with SIRs) do not encourage constructive dialogue and cooperation. The timeframes may have the opposite result, as merging parties may choose to close their transactions immediately following expiry of the second 30-day statutory waiting period in order to begin realizing efficiencies as soon as possible instead of agreeing to the Draft Timing Agreement. Merging parties are also more likely to pursue expedited hearings before the Competition Tribunal (as consent from the Bureau is not required) and mediation, where appropriate.

D. Cost of Delay to Merging Parties

Delays waste public and private resources and significantly increase costs for the merging parties, including loss of customers and talent during the extended review due to uncertainty.[6] The Bureau has committed to conducting reviews as expeditiously as possible, knowing their importance to a well-functioning economy. For example, the *Merger Review Process Guidelines*

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5 *Id*.

6 See, for example, Robert Ekelund Jr. and Mark Thornton, The Cost of Merger Delay in Restructuring Industries (23 June 1999), available online, where the authors calculated that merger delays cost society over $12 billion in 1996.

state, "[i]n discharging its merger review obligations under the Act, the Bureau's priority is to identify in a timely manner those proposed mergers that pose a potential threat to competitive markets in Canada, and to allow the balance to proceed as expeditiously as possible".[7] The Bureau also realizes that it spends enormous resources reviewing complex mergers. With limited resources, spending unnecessary additional time reviewing efficiency-enhancing mergers is counter-productive.

The timeframes in the Draft Timing Agreement will likely increase the length of the Bureau's review (at least in certain cases), unnecessarily increasing costs to merging parties and postponing the realization of pro-competitive efficiencies. To minimize delays arising from the Draft Timing Agreement, the Bureau should examine all timeframes and shorten them where possible.

E. Oral Examinations

Oral examinations under oath are rarely used in Canada and should not be included in the Draft Timing Agreement. The requirement for examinations under oath does not consider the wide range of other tools (both statutory and customary) available to the Bureau, such as voluntary information requests, in-person meetings with merging parties (not under oath) and market contacts. In many cases, these methods will be more practical, appropriate and just as effective to vet the merging parties' efficiencies claims. In addition, efficiencies claims are typically developed by accountants and economists and it would be more appropriate for the Bureau to collaboratively discuss the claims with the professionals who prepared the submissions.

The default should not be to resort to oral examinations under oath in all cases (which are akin to orders under paragraph 11(1)(a) of the Act), particularly given that the merging parties would have already responded to SIRs. The *Merger Review Process Guidelines* state:

> Where parties to a notifiable transaction certify complete responses to their respective SIRs, and the Commissioner does not challenge the completeness of the responses, the Bureau anticipates that use of orders pursuant to section 11 of the Act to obtain additional information from merging parties in a consensual transaction will be rare.[8]

Where compliance by the merging parties with the Bureau's voluntary and SIR process is slow and incomplete, examinations under oath may be the appropriate tool, but they should not be

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7 *Merger Review Process Guidelines* at Section 1, available online.

8 *Id*. at Footnote 14.

used automatically once an efficiency claim is made. We recommend a case-by-case approach for formal oral examinations during merger review.

F. Incorrect Interpretation of Section 96

It appears that the Draft Timing Agreement, associated timeframes and shift to a linear review are premised on an interpretation that section 96 of the Act involves a market-by-market trade-off analysis. However, this market-by-market approach is inconsistent with the statutory language and governing jurisprudence. For example, the Tribunal has indicated that "[t]here is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area".[9]

The CBA Section encourages the Bureau to reconsider both its approach to the section 96 trade-off analysis and whether the Draft Timing Agreement (in its current form or otherwise) is required given existing jurisprudence and the fact that efficiencies cases are relatively rare.

G. Timing of Efficiencies Claims

It is clear from the Draft Timing Agreement that merging parties will be required to decide if they will advance an efficiencies defence *before* they hear from the Bureau on whether the proposed transaction is likely to result in a substantial prevention or lessening of competition (SLPC). In the absence of the merging parties advising the Bureau that they intend to raise the efficiencies defence and entering into a timing agreement that the Bureau deems acceptable, it appears that the Commissioner will not even *entertain* the efficiencies claims.

Notwithstanding the timing benefits of simultaneous review discussed above, merging parties often do not want to decide if they will advance an efficiencies defence until after the Bureau has given its views on SLPC. What approach will the Bureau apply in these circumstances? Will it require merging parties that are "on the fence" on a possible efficiencies defence to advise the Bureau that they might raise the defence and subject them to the Draft Timing Agreement - including the onerous obligations and much longer review period that it contains? We believe this is not a fair or desirable outcome.

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9 *Canada (Commissioner of Competition) v. Superior Propane Inc.,* 2002 Comp. Trib. 16 at paragraph 140.

III. SPECIFIC COMMENTS AND PROPOSED CHANGES

A. One Size Fits All Approach Not Appropriate

The *one size fits all* approach and rigid timeframes will not be appropriate for all transactions. Instead, the Draft Timing Agreement should include a range for each timeframe. For example, rather than referring to "30 days", section 3 of the Draft Timing Agreement could state "Merging Parties shall fully respond to the data specifications of the Supplemental Information Requests … as soon as possible, and in any event no later than [5-30 days – number of days to be negotiated on a case-by-case basis, but must be within this range] before full compliance with the SIR". Ranges give merging parties an opportunity to negotiate appropriate timeframes with the Bureau on a case-by-case basis.

B. Balanced Agreement

The benefits flowing from the Draft Timing Agreement are tilted in the Bureau's favour, which may remove any incentive for merging parties to voluntarily agree to it. To address this concern, the Draft Timing Agreement should include the steps the Bureau will take to quickly narrow the issues through a revised transparency process, including the issuance of status and preliminary assessment reports to the merging parties at early stages of the review. For example, when a SIR is issued, the merging parties should be presented with a preliminary statement of the Bureau's theory of why the transaction may result in an SPLC and why a SIR has been issued. In this regard, the *Merger Review Process Guidelines* state:

> The Bureau is committed to working with merging parties to narrow issues and/or the requirements for records, including data, wherever reasonably possible, while first and foremost ensuring that the Bureau accesses the information it requires to properly review a proposed transaction.[10]

C. Tightening Up Timeframes

Sections 4, 5, 6, 8 and 9 of the Draft Timing Agreement state that certain events will or must occur "no later than" a specified number of days after another event. To help shorten the lengthy timeframes, these sections should be revised to read "as soon as possible, and in any event no later than", as in section 3 of the Draft Timing Agreement.

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10 *Merger Review Process Guidelines* at Section 1.

D. Oral Examinations

Section 8 of the Draft Timing Agreement should be removed. As noted above, oral examinations under oath will not be necessary in all cases, especially when other methods are just as effective for vetting the merging parties' efficiencies claims. In addition, an oral examination imposes a tremendous burden on company representatives, who would need to be prepared to discuss a wide range of issues, including both efficiencies and product market definition.[11]

If the requirement for oral examinations under oath remains, the Draft Timing Agreement should indicate that the Bureau will, no less than five business days in advance of any examinations, give copies of all documents it will put before the individual being examined to the relevant merging party. In addition, the merging parties should have the opportunity to attend one another's examinations and be entitled to the transcripts (on an external counsel only basis or otherwise). To the extent that the merging parties are making efficiencies claims, it will be important that both sides know what is said to the Bureau during the examinations.

The Bureau should accommodate, at least to some degree, the commercial realities of mergers, including that parties have entered into commercial agreements obliging them to cooperate and coordinate on obtaining regulatory approvals (with provision for outside counsel only access to competitively sensitive information).

If examinations under oath occur, the Bureau should describe (in the Draft Timing Agreement or elsewhere) how this evidence can be used if there is ultimately a hearing before the Tribunal.

E. No Derogation of Rights

The Draft Timing Agreement should clarify that the requirement to enter into a timing agreement does not derogate from the substantive or procedural rights available at law to either the merging parties or the Commissioner, whether under the Act or otherwise.

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11 Section 8 of the Draft Timing Agreement states that the company representative will be "examined under oath on any matter relevant to the claimed efficiencies". Given the Bureau's view that section 96 of the Act involves a market-by-market trade-off analysis, it seems likely that this examination would extend to issues relating to the scope of the relevant market.

F. Other Comments on Specific Sections

Recital B

This recital states, among other things, that "[t]he Commissioner is of the view that the Proposed Transaction may result in a substantial [prevention and/or lessening] of competition in [describe relevant markets]". The Draft Timing Agreement (in this recital or elsewhere) should also indicate that the merging parties do not agree with the Commissioner's view.

Recital C

This recital should be revised to refer to applications under sections 92, 100 and 104 of the Act, and not be limited to applications under sections 92 and 104.

Section 1

This section states "the Commissioner and […] Bureau shall have no further obligations under this agreement" after the merging parties have given notice of intent to close the proposed transaction. This should be revised to note that the merging parties have no further obligation under the timing agreement, other than waiting the agreed to number of days to close the proposed transaction.

Section 2

As with Recital C, this section should be revised to refer to applications under sections 92, 100 and 104 of the Act, and not be limited to applications under sections 92 and 104.

Section 3

To the extent that data specifications are broad and cover many topics, some of which will be more important than others, it would be less burdensome to the merging parties and likely more efficient for the Bureau to adopt an approach of priority and non-priority data specifications and establish separate timing to submit each category.

Section 4

This section applies only to requests made to modify a SIR within seven days of SIR issuance and gives the Bureau 30 days to provide an update on the status of its review, including responding to any requests received from the merging parties. First, it is not clear why this section is limited to requests made with seven days of SIR issuance. It often takes merging parties more than seven days to determine whether they can respond to a SIR specification. Second, while negotiating modifications can take time, prompt responses from the Bureau

better enable the merging parties to collect, process, review and produce documents and data more efficiently and timely. We recommend that section 4 be split into two paragraphs, so (a) an update on the status of the review is given no longer than 30 days after SIR issuance; and (b) a response to a request to modify the scope of a SIR is given by the Bureau no later than three days after the request.

Sections 5 and 6

These sections do not specify what happens if parties do not give data at least 30 days before complying with the SIR. This could be fixed by stating "on or before the later of 45 days after receipt of the data and 15 days after substantial compliance with the SIR" (in the case of section 5) and "[o]n or before the later of 30 days after full SIR compliance or 60 days after receipt of the data described in paragraph 3, Management and the case team will be available to meet…." (in the case of section 6). That said, it is unclear why section 5 includes the proviso that the merging parties have not fully complied with the SIR as the Bureau's update on its quantitative assessment should not depend on the certification date, particularly since the merging parties would have already fully responded to the data specifications in the SIR.

Section 6

Given the "order specific" approach to efficiencies favoured by the Bureau, the Bureau should be required to disclose (to the extent possible and on a without prejudice basis) its preliminary thinking on remedies as part of this update. Absent this information, the parties will not be fully informed on how to analyze efficiencies.

Section 7

It is not clear why merging parties should be required to give their submission on efficiencies within 10 days of learning, perhaps for the first time, the Bureau's proposed remedies, or if it is even be feasible in many cases. Merging parties always have an incentive to act as quickly as possible – they may well respond within 10 days but should not be alleged to have "breached" their agreement with the Bureau if they are unable to do so. Lengthening the time for merging parties to give their submission on efficiencies would help prevent arguments.

IV. QUESTIONS RAISED BY THE DRAFT TIMING AGREEMENT

The Draft Timing Agreement raises several questions for the Bureau, including:

- In the absence of the parties entering into a timing agreement that the Bureau deems acceptable, will the Commissioner exercise discretion to consider the

efficiencies defence as part of the merger review process or will it be left to the Tribunal to consider whether the efficiencies defence is satisfied (which would seem to encourage increased use of litigation to resolve merger concerns)?

- Are timing agreements enforceable and what is the remedy if the Draft Timing Agreement is breached by either the Bureau or the merging parties (who just want to get deals done quickly)? For example, what would happen if the Bureau or the merger parties cannot meet a timeframe in the Draft Timing Agreement?[12]
- Will the Bureau commit to timing for any oral examinations, such as completing its examinations within two business days?

V. CONCLUSION

The CBA Section appreciates the opportunity to comment on the Draft Timing Agreement. We would be pleased to discuss our comments in more detail.

12 One possible option is to include a provision similar to the FTC Model Timing Agreement: "Except as specifically provided herein, the failure of a Party to comply with any deadline in this Agreement shall cause any subsequent deadlines specified herein to be extended, day-for-day, for each calendar day the deadline is not met."