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Canada's Draft Service Standards for Merger Review: Plus Ça Change, Plus C'est La Même Chose?

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Sandra Walker[1]

I. INTRODUCTION

Canada's merger review process has always suffered from schizophrenia. Unlike in the EU and United States, the timeline for the substantive merger review process has never been aligned with the statutory waiting periods. Absent an injunction, once the statutory waiting periods have expired, the parties are free to close a transaction. However, the expiry of the waiting period has never offered the merging parties any comfort that their proposed transaction would not be challenged under the Competition Act post-closing. The parties could only obtain such comfort by obtaining positive clearance from the Competition Bureau ("Bureau"), either in the form of an advance ruling certificate ("ARC") or a no-action letter advising that it does not have substantive competition concerns and therefore does not intend to challenge the deal. This state of affairs has left merging parties wondering whether to close in Canada when legally entitled to or whether to await the Bureau's positive clearance.

All this was expected to change when Canada's Parliament amended the Competition Act in March 2009 to establish a two-stage merger review. These amendments appeared to align Canada's regime with that of the U.S. Hart-Scott Rodino Act ("HSR Act") process. The new regime came into effect in March 2009, introducing a 30 day initial waiting period with the possibility of a supplementary information request ("SIR") that would trigger a second waiting period expiring 30 days after compliance with the SIR. It was anticipated that this process would streamline the review process and that the expiry of the initial 30 day waiting period for the vast majority of transactions would signal that the Bureau did not intend to challenge the deal except in highly unusual circumstances.

Has the new Canadian merger review regime lived up to its potential? Not in view of the Bureau's draft *Fee and Services Standards Handbook for Merger-Related Matters* ("draft Handbook") which was released for comment in May 2010. As described in detail below, while the draft Handbook reduces the existing substantive merger review periods (a welcome change) and provides additional clarity on how the Bureau categorizes mergers, it continues the misalignment or de-linking of the substantive merger review periods and the statutory waiting periods for the vast majority of mergers —*plus ça change, plus c'est la même chose*. This results in what the Canadian Bar Association has called a "complex mosaic of timing and information requirements…which increases uncertainty for the business community in merger review".[2]

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[2] *See* http://www.cba.org/CBA/submissions/2010eng/10_52.aspx at page 3.

II. THE FORMER STATUTORY REGIME

Prior to the 2009 amendments to the Competition Act, where a pre-merger notification was triggered (for transactions exceeding certain monetary and shareholding thresholds), parties to an asset or share acquisition were not permitted to close until the expiry of a waiting period that depended upon the type of notification filing made.

A 14 day waiting period was triggered by a "short form" filing while a 42 day period applied to a "long form." Parties to most mergers would file a short form. If the transaction raised significant competition concerns, the Bureau could "bump" the filing to a long form during the 14 day period and thereby trigger a 42 day no-close period once the long form had been filed.

Unlike in the U.S. merger process, the expiry of the statutory waiting period triggered thereby did not signify positive Bureau clearance. Rather, it was common for the Bureau to continue the substantive review beyond the waiting periods.

Furthermore, in the first 12 years of the current merger review process, the Bureau did not offer any guidance on how long such a substantive review would take. This changed in 1997 with the introduction of a filing fee of C$50,000 and the requirement under federal government policy that those who pay for government services have the right to information on those services and service standards that are "measurable and relevant at the level of the paying stakeholder." The service standards varied according to the level of competition concerns raised by the transaction, with the Bureau designating transactions as non-complex, complex, and very complex. Associated with each classification was a maximum service standard period—14 days for non-complex, 10 weeks for complex, and 5 months for very complex. These standards were non-binding and were only triggered when the Bureau deemed it had received sufficient information to assess the transaction. The information required for this assessment was set out in the Bureau's *Fee and Service Standards Handbook*.

The waiting period could, and can still, be avoided in the case of transactions involving no or minimal competitive overlap if the Bureau issues an ARC (which exempts the parties from filing a notification form) or a no-action letter with a waiver of the notification requirement. This "positive clearance" may be obtained from the Bureau upon the request of the merging parties, which typically includes a written submission analyzing the competitive impact of the proposed transaction. The only downsides are: a) the risk that neither would be issued and the parties would then be required to file a notification form (which could potentially delay closing) and b) the fact that there is no statutory maximum period within which the Bureau is required to issue an ARC or a no-action letter.

III. THE 2009 AMENDMENTS TO THE COMPETITION ACT

The 2009 amendments to the Competition Act's merger notification process were passed quickly and with little public consultation. While some were critical of the adoption of the U.S.-style merger regime because of the time-consuming and resource-intensive nature of the "second request"-type process and the Bureau's enhanced ability to delay closing through the issuance of a SIR, others saw it as an opportunity to simplify the timelines for merger review and offer merging parties greater predictability.

As noted in the discussion below, the Bureau, while offering incremental enhancements to the current Handbook—such as the reduction of the service standard periods—has not seized the opportunity to overhaul its substantive merger review process to reflect the major restructuring of

the statutory merger scheme in the 2009 amendments. The result is a complex of statutory and service standard review periods that are largely de-linked and therefore serve more to confuse than enlighten. This part summarizes the highlights of the draft Handbook.

The draft Handbook offers guidance respecting three main subjects:

- How the Bureau determines the complexity of a proposed transaction;
- The revised timelines applicable in respect of the Bureau's substantive review (including revised service standard periods); and
- The information required by the Bureau to commence the applicable service standard.

A. Complexity Classification

The draft Handbook retains the Bureau's previous classification system of non-complex, complex, and very complex mergers and sets out the criteria the Bureau will use in categorizing transactions.

- For non-complex transactions, the Bureau distinguishes between mergers resulting in no or minimal competitive overlap between the parties, with minimal overlap being defined as including a combined post-merger market shares of less than 10 percent in any relevant market and shares of less than 10 percent for either party in any relevant upstream or downstream market. The non-complex category also includes transactions where post-merger market share is between 10 and 35 percent where mitigating factors are present such as low barriers to entry, the presence of a large number of effective remaining competitors, and the lack of any market concern about the transaction. Based on the Bureau's past experience, about 88 percent of transactions are classified as non-complex.
- Complex mergers involve transactions between competitors, or between customers and suppliers, where there are indications that the transaction may create, maintain, or enhance market power. Generally the Bureau will focus on transactions where the combined post-merger market share is 35 percent or more but will also include transactions where the combined market share of the parties is less than 35 percent and the shares of either party in any upstream or downstream market are below 35 percent and there are other complicating factors such as barriers to entry, few effective remaining competitors, and credible complaints. Based on the Bureau's past experience, about 10 percent of transactions are classified as complex.
- The Bureau views proposed transactions as very complex if post-merger market shares likely exceed 35 percent and/or the market shares of either party in any upstream or downstream market will likely exceed 35 percent and there are other complicating factors such as a concentrated industry, high barriers to entry, the investigation involves complex theories of anti-competitive harm, or well-substantiated complaints or competitive concerns. The draft Handbook states that very complex cases often involve the issuance of a SIR and the participation of economists and outside experts. Based on the Bureau's past experience, about 2 percent of transactions are classified as very complex.

From a review of the complete list of factors, it is apparent that many of the same factors appear in the different lists. In particular, there is significant overlap in the factors for complex and very complex transactions with little detail on how to differentiate between them. This

deficiency is particularly important given the very substantial difference in service standard periods between the two categories (set out below). There is also no consideration that minimal incremental share gain can be a mitigating factor that can truncate the analysis because any lessening or prevention of competition must be "substantial" in order to be challenged. In addition, it is unclear why vertical market shares are emphasized given that the Bureau's *Merger Enforcement Guidelines* state that in practice there are few circumstances in which vertical competition law concerns are likely to arise.

B. Service Standard Periods

The draft Handbook revises the non-statutory "service standard" periods contained in the current Handbook. Note that these service standards are subject to a number of qualifications. First, they are only triggered when the Bureau receives information it considers sufficient to commence its review (generally that set out in the draft Handbook). Second, the service standard period will not commence until the Bureau is able to make market contacts (except in the case of some non-complex mergers with no or minimal overlap). As a consequence, the service standard could be significantly delayed if a proposed transaction is confidential.

- The maximum time period for the review of "non-complex" merger is to remain the same—at 14 calendar days. This is less than half of the amended initial statutory review period of 30 days.
- "Complex" mergers will be reviewed within 60 calendar days (roughly 8½ weeks) down from the current 10 weeks.
- Review of "very complex" merger is decreased to 120 days from the current 5 months.
- Where a SIR is issued, the service standard is 30 calendar days following the Bureau's receipt of a complete response to the SIR. This brings the statutory waiting period into alignment with the service standard period.

The reductions in review time for complex and very complex mergers are welcome as is the Bureau's position that the service standard in the case of a SIR will be brought into alignment with the statutory waiting period.

However, the draft Handbook's service standard periods are flawed in a couple of respects. First, as noted above, the Competition Act now provides for a 30 day statutory review period for most transactions and for transactions raising serious competition concerns, a review period ending 30 days after compliance with an SIR. The Competition Act does not discuss either 14, 60, or 120 day review periods or the use of timing agreements. In the result, the initial 30 day statutory waiting period is rendered essentially meaningless as the expiry of this period does not offer the merging parties any meaningful comfort[3].

Second, the service standards will not apply where the merging parties enter into formal timing agreements with the Bureau. Such agreements stipulate that the parties cannot close the transaction for an agreed-upon period of time to allow the Bureau to complete its review. As timing agreements are increasingly used in complex transactions where the Bureau does not wish

[3] It should be noted that even in jurisdictions where the statutory and substantive review periods are aligned, there are mechanisms or strategies through which review periods can be extended; an example of this is in the United States where the parties may withdraw a filing and then re-submit it in order to re-commence the initial review period under the HSR Act (a strategy that is also contemplated in the draft Handbook).

to issue a SIR, the inapplicability of the service standard in such situations could well impair the uniform application of the service standards in a significant number of cases.

C. Information Requirements

The information required to trigger commencement of the service standard period is broad and in some instances, unduly onerous. For example, while the 2009 amendments repealed the requirement for marketing and strategic plans, these are required to commence the service standard period for complex and very complex mergers. In addition, the information required to assess a non-complex transaction is much more burdensome for the merging parties than information commonly provided to the Bureau in a request for an ARC (a written submission analyzing the competitive impact of a transaction). For instance, in the case of a non-complex transaction where the market share is less than 35 percent, the draft Handbook lists the information required in a notification filing. In essence, this means that for a non-complex transaction about which the Merger Enforcement Guidelines state that no issue would arise, the parties would need to file a notification, rather than follow the accepted practice (described above) of filing a request for an ARC or no-action letter.

The draft Handbook also requires disclosure of the parties' minority interests without indicating at what level of shareholding an "interest" would be considered relevant. In addition, information on interlocking directorships is also listed as information required to commence the service standards. While important in the United States because of section 8 of the US Clayton Act (which prohibits the holding of directorships in competing corporations above a certain size), this factor is not included in the Competition Act and therefore its inclusion in information required for all mergers without even a relevancy qualification (except in the case of non-complex transactions with little or no competitive overlap) is questionable and potentially burdensome for merging parties.

IV. CONCLUSION

The 2009 amendments to the Competition Act signaled that Canada was re-vamping its merger review processes to offer merging parties increased certainty about the timelines for merger review and greater harmonization with jurisdictions such as the United States. While the Bureau's draft Handbook provides transparency on how the Bureau will analyze a merger, it does not offer the necessary predictability and in fact, preserves the uncertainty of the former statutory regime for the vast majority of merger transactions; apart from instances where a SIR is issued, there continues to be a disconnect between the Bureau's timelines for substantive merger review and the initial 30 day statutory waiting period. It should be acknowledged that this weakness in Canada's merger review process is coupled with a degree of flexibility not found in other jurisdictions—which, in some instances, may work to the benefit of the merging parties (e.g., a timing agreement that avoids the requirement for a SIR). On balance, however, the draft Handbook represents a missed opportunity to move the trade-off between predictability and flexibility towards the former and, indeed, such a shift would have accorded with Parliament's apparent intention when it amended the Competition Act to establish a two-stage merger review regime.