International Merger Enforcement – A Canadian Context

John Bodrug
Adam Fanaki
Partners, Davies Ward Phillips & Vineberg LLP
Toronto, Ontario, Canada

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Most international merger transactions do not raise significant substantive competition issues such that the principal challenges for clearing competition filing and approval requirements are (1) identifying jurisdictions that require filings and (2) submitting required information and obtaining clearances to permit closing to occur on a timely basis. However, further challenges can arise where competition authorities in some jurisdictions raise unanticipated or atypical substantive issues, or the timelines to resolving substantive issues (whether anticipated or not) are long and inconsistent between jurisdictions. To the extent that competition authorities push beyond more typical existing horizontal competitive overlap issues or seek overreaching remedies, differences in the timing to obtain a ruling on a contested basis can make it more challenging to put the authority's theory of anti-competitive harm or its requested remedy to a test before a court or tribunal.

The Canadian merger review experience to date illustrates some of these points, including:

(a) relative to the U.S., a much longer timeline to getting to a decision in a contested proceeding that delves into the merits and effectively determines whether the agency will proceed with a substantive challenge;

(b) scope for alleging a substantial prevention of competition based on findings of the likely future success or failure of parties' business strategies if the merger does not proceed; and

(c) a receptiveness by the competition authority to pursue theories of coordinated effects and economic incentives to engage in foreclosure arising from vertical mergers.

Conversely, the Canadian efficiencies defence, with a potentially broader scope than other jurisdictions, illustrates that clearance of a transaction in one jurisdiction may not predict clearance in other jurisdictions, even in cross-border markets that include those jurisdictions.

This paper begins with an overview of the Canadian merger review process, followed by a comparison of the U.S. and Canadian timelines for contested cases and a discussion of some atypical bases on which the Canadian competition authority has found proposed mergers to be anti-competitive. Finally, the paper discusses the efficiency defence in the merger provisions of the Canadian Competition Act (the "Act").

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1. Merger Review Process

The Act provides for reviews of mergers by the Commissioner of Competition (the "Commissioner") who heads the Competition Bureau (the "Bureau"). Only the Commissioner can challenge mergers under the Act – neither private parties nor provincial governments can challenge mergers on competition grounds in Canada.

As described further below, transactions that exceed certain financial thresholds must be notified to the Commissioner prior to closing. The Bureau reviews such transactions to determine whether they are likely to prevent or lessen competition substantially. The Commissioner may seek to challenge a merger that is likely to have such anticompetitive effects by seeking an injunction, divestiture, or certain other types of remedial orders from the Competition Tribunal (the "Tribunal"), a quasi-judicial body comprised of Federal Court judges and lay members.[1]

The notification obligations under the Act are distinct from the substantive merger review provisions. As a result, even if a proposed merger is not subject to mandatory pre-merger notification, the Commissioner may still review and challenge it under the substantive merger provisions of the Act within one year after the merger is substantially completed.[2]

(a) Notification Thresholds

As a general rule, mergers and acquisitions involving an operating business in Canada are subject to mandatory notification where each of three thresholds are exceeded: (i) a "size of parties" threshold; (ii) a "size of transaction" threshold; and (iii) where applicable, a minimum ownership threshold.

Notification will be required only where the entity or business to be acquired is (or controls) an undertaking in Canada to which employees ordinarily report for work.[3] A transaction will not be notifiable where the business to be acquired has sales into Canada only from offshore, but otherwise has no presence in Canada.

(i) Size of Parties Threshold

A notification is not required for any type of transaction unless the parties, together with all their affiliates, have (1) assets in Canada that exceed C$400

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1 Competition Act, s. 92.
2 Competition Act, s. 97.
3 Competition Act, s. 109.

million in aggregate value, or (2) annual gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value.[4]

(ii) Size of Transaction Threshold

Similarly, notification of a transaction is required only where the "size of transaction" threshold is exceeded. The application of the "size of transaction" threshold varies by type of transaction, but, generally speaking, this threshold will be exceeded for transactions completed in 2017 where the business to be acquired has either: (i) assets in Canada with an aggregate value that exceeds C$88 million, or (ii) annual gross revenues from sales in or from Canada exceeding C$88 million.[5]

(iii) Ownership Threshold

In certain cases, the notification provisions require that a minimum ownership threshold also be exceeded. In the case of share acquisitions, for example, the purchaser's voting interest in the acquired entity following the transaction (including interests owned by the purchaser's affiliates) must exceed 20% (where the acquiree's shares are publicly traded) or 35% (where the acquiree has no publicly traded shares), or, if the relevant threshold is already exceeded prior to the transaction, 50%.[6]

(b) Filing Requirements

When a transaction is subject to mandatory pre-merger notification under the Act, each party to the transaction must separately submit a notification to the Commissioner that includes, among other things: (i) contact information and sales to, or purchases from, top customers and suppliers of the party and its affiliates,

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4 Competition Act, s. 109. Generally speaking, the relevant asset and gross revenue figures used in the threshold calculations are to be obtained based on the most recent audited financial statements of the relevant party, although the Bureau's policy is to count inter-company sales and loans in some circumstances. See Competition Bureau Pre-Merger Notification Interpretation Guideline Number 14: Duplication Arising From Transactions Between Affiliates, April 25, 2014, at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03717.html.

5 Competition Act, s. 110. See also: https://www.canada.ca/en/competition-bureau/news/2017/03/2017_pre-merger_notificationtransaction-sizethreshold.html

6 Similarly, where the transaction involves the acquisition of an interest in a non-corporate combination, the purchaser, together with its affiliates, must as a result of the transaction hold an aggregate interest in the combination that entitles the person to receive more than 35% of the profits of the combination, or more than 35% of its assets on dissolution, or, if the purchaser is already so entitled, to receive more than 50% of such profits or assets.

and (ii) all studies, surveys, analyses and reports prepared or received by an officer or director analyzing the competitive implications of the proposed transaction.[7] (This latter requirement is similar to the requirement in item 4(c) of the U.S. Hart-Scott-Rodino Act ("HSR Act") notification form).

(c) Waiting Periods

Parties to a notifiable transaction are precluded from completing the transaction until the expiry of a statutory waiting period which is modelled on the HSR Act:

- an initial waiting period expires 30 days following submission of the notification by each party;[8]

- the parties may close their transaction upon the expiry of the initial 30 day waiting period unless, prior to the end of that period, the Commissioner issues a supplementary information request ("SIR") to the parties requiring the production of documents and/or written responses to questions; and

- if an SIR is issued, a new waiting period is triggered and expires 30 days following compliance with the SIR by both parties.[9]

The Commissioner may terminate or waive the waiting period at any time by issuing a form of clearance for the transaction discussed below.

In some cases, however, the Commissioner may not reach a decision by the end of the waiting period, leaving the parties in a position to close at their own risk of a challenge by the Commissioner within the one year limitation period.

As a practical matter, the Bureau's investigation is typically based on market contacts, including the customers and suppliers identified by the parties in their notifications, and review of documents and data of the parties and other market participants. The Bureau sometimes receives submissions from third parties and

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7 See Notifiable Transactions Regulations (SOR/87-348) at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-87-348/index.html.

8 In the case of certain unsolicited transactions, only the bidder's notification is required to start the waiting period: Competition Act, s. 121.

9 Separate from the statutory waiting period, the Commissioner has adopted certain non-binding "service standard" periods within which he endeavours to complete the substantive review of a merger. For transactions that the Bureau designates as "non-complex", the service standard period is 14 days. For "complex" mergers, the service standard period is 45 days unless an SIR is issued, in which case the review period will coincide with the statutory waiting period.

occasionally solicits input from the public.[10] The Bureau's economists may also conduct analyses of data obtained in the review.[11] The Bureau generally provides the parties with some feedback on issues and conclusions during the merger review process, but the degree of detail in this feedback varies because of concerns that detailed explanations may identify complainants or their confidential information. Accordingly, where the Bureau has significant concerns about a merger, until and unless the Commissioner files a notice of application, they may not have a definitive or clear view on the Commissioner's concerns or theory of harm.

(d) Temporary Interim Injunctions

The Commissioner may apply for a temporary injunction to prevent closing for up to an additional 60 days beyond expiry of the statutory waiting period to allow the Bureau additional time to complete its review.[12] To obtain such an injunction, the Commissioner must demonstrate to the Tribunal that (i) more time is required to complete the Commissioner's investigation and, (ii) in the absence of the interim order, a person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition because that action would be difficult to reverse.

(e) Advance Ruling Certificates and No-Action Letters

In addition to, or sometimes in lieu of a notification, the purchaser normally will submit to the Bureau a confidential written brief (i) explaining why the proposed transaction is not likely to prevent or lessen competition substantially (the statutory test), and (ii) seeking written confirmation that the Commissioner does not intend to challenge the proposed transaction. Such confirmation by the Commissioner is typically provided in the form of either an advance ruling certificate ("ARC") or a "no-action letter".[13]

The Commissioner may issue an ARC where it is clear that a proposed transaction is unlikely to give rise to a substantial lessening or prevention of competition in

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10 See for example: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04077.html.

11 The Bureau has issued Merger Enforcement Guidelines that provide considerable discussion of the factors that the Bureau considers in its merger analysis: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf. In addition, the Bureau has issued guidelines on the merger review process in Canada: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html.

12 Competition Act, section 100.

13 A fee of C$50,000 is payable for filing a notification or applying for an ARC or no-action letter.

Canada.[14] If obtained, an ARC prevents the Commissioner from challenging the transaction on the basis of the same or substantially the same information on the basis of which the ARC was issued, provided that the transaction is substantially completed within one year of issuance of the ARC.

Alternatively, the Commissioner may issue a no-action letter indicating that he has decided not to challenge the transaction at that time but reserves the right to do so within one year following closing (the statutory limitation period). As a practical matter, a no-action letter is regarded as an effective form of clearance on which parties rely to close their transactions.[15]

2. Substantive Challenge

Where the Commissioner concludes that a merger is likely to prevent or lessen competition substantially, in many cases the purchaser and the Commissioner will agree to remedies to address the Commissioner's concerns and avoid a contested challenge to the transaction before the Tribunal. Such a resolution typically takes the form of a "consent agreement" which is registered with the Tribunal. Consent agreements are effective as soon as they are filed with the Tribunal, without any public consultation period or process for the Tribunal to consider or approve the agreement. However, a third party directly affected by a consent agreement may apply to the Tribunal within 60 days after the agreement is filed. The Tribunal may issue an order to have the terms rescinded or varied in circumstances where the terms of the consent agreement could not be the subject of an order of the Tribunal.[16] Most consent agreements have involved divestitures, and such consent agreements set out the process for the divestitures to be effectuated.

If no resolution is agreed upon, the Commissioner may apply to the Tribunal for relief under section 92 of the Act. To obtain an order under section 92, the Commissioner must demonstrate to the Tribunal on a balance of probabilities that the merger is likely to prevent or lessen competition substantially. Remedies which the Commissioner may seek include injunctions to prevent closing, divestitures, or (post-closing) dissolution. In some cases, the Commissioner may agree to a "hold separate" arrangement to preserve certain assets and businesses to maintain competition, but still permit closing of the transaction pending

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14 Competition Act, section 102.

15 Competition Act, s. 103. The issuance of an ARC also provides an exemption from the Act's notification requirements (including operation of the statutory waiting periods). Where no formal notification has been filed, a no-action letter typically contains a waiver that exempts the parties from the Act's notification requirements (including operation of the statutory waiting period).

16 Competition Act, section 106.

completion of the Bureau's review or final disposition of a challenge before the Tribunal.

(a) Interim Orders

Where the Commissioner has applied to the Tribunal under section 92, he may also seek from the Tribunal an interim order under section 104 of the Act preventing closing of the transaction or an order on such other terms as might be issued by a court.[17] Section 104 empowers the Tribunal to issue any interim order that it considers appropriate having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. In assessing whether to issue an order under section 104, the Tribunal will consider whether (i) there is a serious issue to be tried in the main action, (ii) whether the applicant would suffer irreparable harm if the requested order were refused, and (iii) which of the parties would suffer greater harm from the granting or refusal of the requested order pending a decision on the merits.[18]

The Parkland case[19] involved the first contested hearing under section 104 of the Competition Act in a proceeding initiated by the Commissioner. In April 2015, the Commissioner challenged Parkland's proposed acquisition of Pioneer Energy, alleging that the transaction would likely result in a substantial lessening of competition in the retail supply of gasoline in 14 local markets (representing about 10% of the acquired business). At the same time, the Commissioner applied for an order under section 104 to prevent the merging parties from implementing the transaction in the 14 markets pending the outcome of the Commissioner's challenge and imposing a hold separate arrangement on assets in the 14 markets, but otherwise allowing the acquisition as a whole to proceed with respect to the balance of Pioneer's business. In May 2015, the Tribunal granted an interim order requiring Parkland and Pioneer Energy to preserve and hold separate retail gas stations and related supply arrangements in only six of the 14 markets pending a full hearing on the contested markets.

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17 Competition Act, section 104.

18 This tripartite test for interlocutory or injunctive relief generally (not just for Competition Act cases) was set out by the Supreme Court of Canada in RJR – MacDonald v. Canada (Attorney General), [1994] 1 S.C.R. 311.

19 Commissioner of Competition v. Parkland Industries Ltd, 2015 Comp. Trib. 4 [Parkland], available at: http://www.ct-tc.gc.ca/CMFiles/CT-2015-003_Reasons%20and%20Order%20Granting%20in%20part%20an%20Application%20for%20Interim%20Relief%20Under%20Section%20104%20of%20the%20Competition%20Act_46_38_5-29-2015_4743.pdf.

The Tribunal held that the first requirement for a section 104 order establishes a low threshold and, once it finds that the underlying merger challenge is neither vexatious nor frivolous, the Tribunal should determine that there is a serious issued to be tried and proceed to the second requirement.[20] With respect to the third requirement, the Tribunal stated that the role of the Commissioner as a public authority in protecting the public interest is an important factor in assessing the balance of convenience. The crux of the Tribunal's decision in Parkland turned on whether the Commissioner had demonstrated on a balance of probabilities that irreparable harm would ensue if the interim relief sought were not granted.

To this end, the Tribunal held that the Commissioner is required to provide "clear and non-speculative evidence" allowing the Tribunal to make reasonable and logical inferences on how the alleged irreparable harm would occur before the Tribunal will issue an interim order under section 104. This will involve some evidence of relevant markets and qualitative factors.[21] The Tribunal added that it would not "delve too deeply into the merits of the case at the interim injunction stage", but it requires at least "minimal" evidence to support reasonable or logical inferences of the alleged harm.[22]

The Commissioner submitted that, without a hold separate order during the interim period, Parkland would acquire market power to increase prices through coordination and unilaterally in 14 local markets. The Tribunal issued a hold separate order with respect to only six of the 14 markets because it found that the Commissioner had not presented sufficient evidence to establish the relevant markets or market concentration in the remaining eight areas. In particular, the Tribunal said that "evidence supporting an element as fundamental as the Commissioner's market concentration calculations is a pre-requisite for assessing his allegations of anti-competitive effects and resulting harm to consumers and the general economy in this case".[23]

For the six markets in respect of which the Tribunal imposed a hold separate order, the Tribunal pointed to some evidence before it that Parkland's expert accepted the Bureau's definition of the geographic market and conceded high concentration levels.[24] In these six markets, the Tribunal found evidence of increases in market shares and concentration following the proposed merger from

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20 Parkland at paras. 103-112.
21 Parkland at par. 93.
22 Parkland at paras. 50 and 74.
23 Parkland at paras. 83 and 89.
24 Parkland at paras. 84 and 85.

which it was reasonable to infer, along with other factors, that the anti-competitive effects alleged by the Commissioner would occur.[25] Notably, the Tribunal did not make a ruling on whether a substantial prevention or lessening of competition was likely to occur, which is the test under the substantive merger provisions for a final order.

It remains to be seen whether and how certain aspects of the approach in Parkland may evolve in the particular facts of subsequent Tribunal proceedings, such as (i) the weight to be given to the Commissioner's public interest function in the balancing of harm in granting or not granting the order, and (ii) the degree to which the Tribunal will be willing to assess the anti-competitive effects asserted by the Commissioner in evaluating the likelihood of irreparable harm in the absence of the requested order, particularly since superior courts in Canada tend to impose a heavier onus on the party seeking extraordinary relief such as an interim injunction.[26]

While the Commissioner does have an evidentiary threshold to meet under a section 104 application, for so long as the Tribunal's approach in Parkland stands, it will be much lower than the preliminary injunction ("PI") standard to which the U.S. antitrust agencies are held.[27] In the Staples/Office Depot case, for example, the court described the standard for a PI under section 13(b) of the Federal Trade Commission Act as requiring the government to show: (i) a likelihood of success on the merits, and (ii) that the equities tip in favour of injunctive relief. The manual of the Antitrust Division of the U.S. Department of Justice ("DOJ") indicates that the Federal Rules do not prescribe a standard for granting or denying a PI but a court will consider: (i) the probability of success on the merits, (ii) the possibility of irreparable harm, (iii) how harm and injury may be balanced between the parties, and (iv) the public interest.[28] Even a quick reading of recent court decisions in U.S. proceedings clearly demonstrates that U.S. courts do delve very deeply into the merits of the case and weigh the evidence at the PI stage. As a practical matter, the denial of a PI in cases brought by the DOJ has typically ended the litigation. While FTC policy calls for a case-by-case assessment of whether to continue litigation after a denial of a PI, it has rarely done so and not in

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25 Parkland at par. 86.

26 See, for example, Kanda Tsushin Kogyo Co. Ltd. v. Coveley, [1997] O.J. No. 56 (Div. Ct.) at para. 4.

27 Federal Trade Commission, Commonwealth of Pennsylvania, and the District of Columbia v. Staples, Inc. and Office Depot, Inc., 110 FTC (DDC 2016) at page 14, citing FTC v. Cardinal Health, 12 F Supp (2d) 34 at 44 (DDC 1998) (see https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv2115-455).

28 See the Antitrust Division Manual of the U.S. DOJ at page IV-14 (https://www.justice.gov/atr/file/761146/download).

recent years.[29] Similarly, the granting of a PI typically results in the merging parties abandoning the transaction.[30] For example, in the Staples/Office Depot case, the merging parties did not proceed with the then proposed transaction following the issuance of a PI. Still, the denial of a PI may be appealed, as was the case in the FTC's challenge of the Advocate Health Care/NorthShore University Health System merger in which the FTC obtained a PI following an appeal to the United States Court of Appeals for the Seventh Circuit, which reversed the earlier denial of a PI on the basis of the district court's erroneous approach to market definition.[31]

It may be noted that, even where the parties successfully oppose a section 104 order in Canada, if they proceed to close the transaction before a final determination, they still face a risk of the Tribunal ordering divestitures or an unwinding of the merger if the Commissioner ultimately prevails. For example, in Parkland, after only partial success on the application for a section 104 order, the Commissioner continued his challenge with respect to all 14 markets in which he had sought remedies in his initial notice of application.

(b) Timelines to a Decision on the Merits

The contrast in the Canadian and U.S. timelines to a substantive decision on the merits can be illustrated by comparing the Parkland case to the approximately contemporaneous FTC challenge to the Steris/Synergy Health merger. The FTC challenged Steris' proposed acquisition of Synergy Health because of concerns that the merger would prevent the emergence of new competition in the U.S. from Synergy in relation to certain x-ray sterilization services. The FTC filed its complaint on May 29, 2015 and a decision of the federal court (denying the motion for a PI) was issued on September 25, 2015, following a three day

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29 See FTC statement on pursuing litigation after a denial of a preliminary injunction https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf and FTC decisions not to pursue the Steris/Synergy Health merger after denial of PI: https://www.ftc.gov/system/files/documents/public_statements/847203/151030sterissynergycommstmt.pdf or the Arch Coal/Triton Coal merger after denial of a PI: https://www.ftc.gov/news-events/press-releases/2005/06/ftc-closes-its-investigation-arch-coals-acquisition-triton-coal.

30 See ABA Section of Antitrust Law, Antitrust Law Developments (7th ed. 2012) at 413-416.

31 Federal Trade Commission and States of Illinois v. Advocate Health Care Network, et al., 15 FTC (IL 2016) (see http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D10-31/C:16-2492:J:Hamilton:aut:T:fnOp:N:1854909:S:0).

hearing.[32] Accordingly, the parties had a decision on the merits approximately four months after the complaint was filed and were able to close their transaction shortly after the court denied the requested PI.[33]

The Commissioner's notice of application in Parkland relating to the 14 local retail gas markets challenged by the Commissioner was filed on April 30, 2015 and a notice of an application for an interim order under section 104 was filed on May 7, 2015. After a one day hearing, the Tribunal issued its section 104 order on May 29, 2015, following which it issued a scheduling order for a hearing on the merits on May 30, 2016 to June 21, 2016 (providing for 15 days of hearings). Further, there is no set time for the Tribunal to issue a decision following a hearing and, in some cases, decisions have been released many months after the hearing. Accordingly, the substantive decision on the merits in Parkland would not have been forthcoming for over a year following the filing of the notice of application if contested litigation had run its course. (Before the scheduled hearing on the merits, and following mediation by the Tribunal, Parkland and the Commissioner settled the matter with a consent agreement requiring remedies in eight local markets, including divestitures of some stations that were not subject to the section 104 hold separate order.)[34]

The Staples/Office Depot case provides another illustrative example. On the same day, December 7, 2015, the FTC filed an administrative complaint in the United States and the Commissioner filed a notice of application with the Competition Tribunal. In the U.S., a federal court hearing on a PI was held over two and a half weeks from March 21 to April 5, 2016 and the court released a decision on May 10, 2016, approximately five months from the filing of the complaint. Although a PI was issued and the transaction was blocked as a result of the U.S. proceedings, before the transaction was terminated, a Tribunal hearing was scheduled for six weeks from February 6 to March 23, 2017, over one year after the Commissioner's filing of the notice of application. In Canada, under the current approach in Parkland, not only would it take much longer to get to a decision that delves deeply into the merits, but the hearing itself is likely to be significantly longer than a PI hearing in the U.S.

The prospect of such a lengthy delay to a hearing on the merits will often create significant commercial pressure on parties to negotiate a consent agreement with

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[32] See Federal Trade Commission v. Steris Corporation, Case No. 1:15CV1080 (U.S. District Court, North Eastern District of Ohio, Eastern Division), available at: http://antitrustunpacked.com/siteFiles/BlogPosts/2015_steris_synergy_note_opinion.pdf.

[33] See http://ir.steris.com/phoenix.zhtml?c=68786&p=irol-newsArticle&ID=2105140.

[34] See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04049.html.

the Commissioner to enable closing to occur, whether by a full resolution on the merits or, potentially a hold separate arrangement pending final determination. While the Commissioner agreed to a hold separate arrangement in Parkland, it remains to be seen how the Tribunal will assess whether a hold separate order will be sufficient to address anticipated competitive harm pending a final determination where the Commissioner seeks only a full injunction to the challenged merger proceeding and opposes a hold separate order.

The Tribunal's participation in mediation in contested merger cases may increase the prospect of an early resolution. In the Staples/Office Depot case, the Tribunal had scheduled a mediation for May 30, 2016, approximately five months after the notice of application was filed. However, both parties must consent to the process and a successful outcome depends entirely on the parties agreeing to a mediated resolution.[35]

Attached as Schedule "A" to this paper is a chart with the key dates of the merger proceedings discussed in this section.

3. Investment Canada Act

The Investment Canada Act (the "ICA") is Canada's principal foreign investment review legislation. While most international mergers are not subject to approval requirements under the ICA, a transaction that involves the direct acquisition of control of an entity incorporated in Canada carrying on a Canadian business that exceeds certain financial thresholds[36] cannot be completed until the Minister of Innovation, Science and Economic Development (the "Minister") is satisfied that the transaction is likely to be of "net benefit to Canada". While the focus of the Minister's assessment is normally on factors such as the impact of the acquisition on employment in Canada, Canadian participation in the management of the business, and capital expenditures and research and development in Canada, the ICA also directs the Minister to consider the impact of the transaction on competition. As a practical matter, the Minister has looked to the Commissioner to provide advice on the proposed transaction's impact on competition and has

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[35] See the Tribunal's Practice Direction on Mediation at: http://www.ct-tc.gc.ca/Procedures/PracticeDirection-Mediation-eng.asp

[36] Currently the ICA net benefit review threshold is C$600 million enterprise value for many acquisitions, but lower thresholds apply for other types of acquisitions, including acquisitions by state-owned enterprises or acquisitions of Canadian cultural businesses. For more background on the ICA generally, see Investment Canada Act, Guide for Foreign Investors in Canada, 2016, Davies Ward Phillips & Vineberg LLP, at https://www.dwpv.com/~/media/Files/Guides/EN/Investment-Canada-Act-2016-English.ashx.

withheld ICA approval until the Commissioner has advised the Minister that he is satisfied that the transaction is not likely to have significant anti-competitive effects in Canada. To date, Ministers have not been prepared to give such ICA approval until parties have resolved competition issues with the Commissioner. This position effectively gives the Commissioner the ability to enjoin a transaction requiring ICA approval until the parties can address competition issues to the satisfaction of the Commissioner or negotiate an acceptable consent agreement, without the need for the Commissioner to obtain an injunction from the Tribunal, or to meet the standards set out in the Act for issuing injunctions.

4. Atypical Substantive Concerns

It is apparent from the foregoing timing considerations, that, in an international merger in particular, parties may be under considerable pressure to negotiate resolutions with the Commissioner to meet closing deadlines. The timing disadvantage in Canada can put parties in a relatively weak bargaining position with the Commissioner. While there is always some uncertainty in assessing antitrust risk because of factors such as market definition, that risk can be more challenging to assess where the competition authority may raise issues beyond the usual horizontal competitive overlap context. Below we discuss (1) the Tribunal's approach in one case finding a likely substantial prevention of future competition and (2) an example of the Commissioner's recent findings of likely substantial prevention or lessening of competition in vertical mergers.

(a) Prevention of Anticipated Future Competition

Tervita Corporation, a waste-management services company in Western Canada, owned and operated the only two secure landfills for oil and gas hazardous waste in northeastern British Columbia when it acquired Complete Environmental in January 2011. A subsidiary of Complete Environmental owned property in northeastern B.C. known as the Babkirk site and a permit from the B.C. Ministry of the Environment to operate a secure landfill for oil and gas waste at that site; however, at the time of Tervita's acquisition, Complete Environmental had not begun building a secure landfill at the site.

The Tervita/Complete Environmental transaction fell well below the pre-merger notification thresholds in the Act, but was nevertheless challenged by the Commissioner on the basis that it was likely to result in a substantial prevention of competition in the market for the disposal of hazardous waste produced largely at oil and gas facilities in northeastern B.C. According to the Commissioner, the

transaction prevented the entry of a poised competitor into the relevant market that would have lowered tipping fees for producers of hazardous waste.[37]

Tervita argued that the merger did not prevent competition because, absent the sale to Tervita, the vendors planned to and would have used the Babkirk property for a different service of treating hazardous waste (bioremediation)[38] that would not compete meaningfully with Tervita.[39] Tervita also asserted that the transaction gave rise to efficiencies that it claimed outweighed any anti-competitive effects of the merger and therefore that the Act's efficiencies defence applied.[40]

The Tribunal found a likely substantial prevention of competition in the relevant market. Although agreeing with Tervita that, absent the acquisition by Tervita, the vendors intended to pursue a non-competing bioremediation business such that the acquisition would not remove an existing or poised competitor at the time of the merger, the Tribunal went on to assess the likelihood of success of that bioremediation business. The Tribunal concluded that, absent the merger in 2011, Complete Environmental's bioremediation business would likely have failed and that, by the spring of 2013 at the latest, Complete Environmental would have either commenced operating a landfill in competition with Tervita or sold its business to someone else who would have done so.[41] On appeal, both the Federal Court of Appeal ("FCA") and the Supreme Court of Canada ("SCC") upheld the Tribunal's analysis.[42]

Notably, the SCC held that factual findings about whether a company would have been likely to enter in the absence of the merger must be based on evidence of decisions the company itself would make and not decisions that the Tribunal would make in the company's circumstances.[43] Although the SCC held that the Tribunal does not have a "licence to speculate", the SCC endorsed the Tribunal's assessment that the vendors would likely have failed in the business they had chosen to pursue.[44]

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37 Commissioner of Competition v CCS Corporation et al, 2012 Comp. Trib. 14 at paras 21-22 [CCS].

38 *Ibid* at 23.

39 The landfill permit was required for incidental aspects of the bioremediation business.

40 CCS, *supra* note 35 at 25.

41 *Ibid* at 207.

42 See Tervita Corp. v. Commissioner of Competition, 2013 FCA 28 [Tervita FCA] and [2015] 1 SCR 161 [Tervita SCC].

43 Tervita SCC, *supra* note 40 at 76.

44 *Ibid* at 65, 199.

While merging parties may take some comfort from the SCC's comment that the forward-looking assessment called for in prevention cases must be based on evidence of decisions that the companies themselves would make rather than speculation by the Tribunal, the SCC's endorsement of the Tribunal's relatively far reaching findings about the likely failure of the vendors' planned remediation business and the future operation of a competing landfill after such failure suggests that merging parties should be alert to theories of competitive harm involving scenarios other than those planned or contemplated by the parties themselves at the time of the merger.

(b) Vertical Mergers

While it is most common for mergers to raise "horizontal" issues relating to existing competitive overlaps between the merging parties, antitrust authorities sometimes find "vertical issues" related to customer/supplier relationships between the merging parties. The potential for such vertical issues has been highlighted in merger enforcement guidelines in both Canada[45] and the U.S.[46] for many years.

Vertical issues can also be more difficult to resolve in some circumstances. The Bureau's most recent merger resolution involving vertical issues related to McKesson Corporation's 2016 acquisition of Rexall Pharmacy Group.[47]

The Bureau's statement on the McKesson/Rexall transaction describes McKesson as the largest wholesaler of pharmaceutical products in Canada and Rexall, a customer of McKesson, as being among the largest retailers of pharmaceutical

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45 The Canadian merger guidelines state that vertical mergers tend to have less of an adverse impact on competition than horizontal mergers but still have the potential to eliminate a competitor's access to inputs or markets. In its examination of vertical mergers, the Bureau will consider (i) whether the merged firm has the ability to harm rivals; (ii) whether the merged firm has the incentive to do so; and (iii) whether the merged firm's actions would be sufficient to prevent or lessen competition substantially. See page 36 of the Bureau's Merger Enforcement Guidelines at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

46 Similar to Canada, DOJ guidelines state that vertical mergers are not as harmful to competition as horizontal mergers. The DOJ will undertake a structural analysis if it believes that a vertical merger creates the ability to impede competition. Specifically, the DOJ will consider a set of objective factors (such as market concentration and the merged firm's entry advantages, overall efficiencies, and market share) before determining whether the likelihood and magnitude of the possible harm justifies a challenge to the merger. See page 24 of the U.S. Department of Justice Merger Guidelines (1984) at https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

47 See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04174.html.

products in Canada, with more than 400 pharmacies in Canada.[48] McKesson did not own any retail pharmacies prior to the Rexall transaction but provided some banner or franchise services to independent pharmacists who chose to operate under a McKesson banner. The Bureau determined that, in the absence of a remedy, in 26 local markets McKesson could have substantially prevented or lessened competition because:

(a) McKesson would have an incentive to disadvantage McKesson's retail rivals by supplying them under less favourable terms, conditions or service quality, and

(b) Rexall would have an incentive to compete less aggressively at retail, knowing that lost customers would switch to rival retailers also supplied by McKesson, on which the merged entity would earn a wholesale margin.

The Bureau also found that wholesale and retail competition from third parties was unlikely to effectively constrain McKesson's ability to profitably act on these incentives.

These concerns were addressed by a consent agreement to make divestitures in these 26 local markets. However, the Bureau also found that, even outside these 26 markets, commercially sensitive information obtained by McKesson from its customers (including information on promotions) and Rexall's competitive information could increase transparency and allow:

(a) Rexall to better anticipate and react to promotional activity of its rivals; and

(b) McKesson to co-ordinate and monitor outcomes at the retail level.

To address these coordinated effects concerns, the Commissioner accepted a consent agreement establishing a series of firewalls restricting the transmission of commercially sensitive information between the wholesale and retail businesses, under supervision of a monitor.

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[48] The Bureau described Shoppers Drug Mart ("SDM") as Canada's largest drug retailer in its statement on Loblaw's acquisition of SDM in 2014, pursuant to which Loblaw agreed to make post-merger divestitures in 27 local markets to address horizontal competitive overlap issues. See: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03703.html.

The fact that divestitures resolved the Commissioner's unilateral effects concerns in the 26 local markets implies that these markets would otherwise have exceeded some concentration threshold at the retail and/or wholesale level, but the Commissioner still sought a firewall remedy even for markets below such concentration levels.

Whatever the merits of the McKesson/Rexall case, it illustrates that the Bureau may conduct a complex analysis of post-merger incentives. Within the Bureau's review period, merging parties will not have the degree of access to and opportunity to rebut such an analysis as they would have in a contested Tribunal proceeding on the merits. Given the many variables and different possible approaches to an economic analysis of behavioural incentives, there is wide scope for the Commissioner to reach conclusions that would not be accepted by the Tribunal in a contested hearing. Indeed, it is not uncommon for the Commissioner to alter his position on the economic analysis during the course of a contested merger proceeding on the merits.

5. Efficiency Defence

Where a merger otherwise results in a substantial prevention or lessening of competition, the Act provides that the Tribunal may not make an order if (i) the gains in efficiency resulting from the merger are likely to be greater than, and offset, its anti-competitive effects, and (ii) the gains in efficiency would not likely be attained if the order were made. In the Tervita case, a majority of the SCC reversed the Tribunal and FCA decisions and held that the efficiency defence applied on the evidence available to the Tribunal.

Consistent with prior Tribunal and FCA decisions, the SCC held that (i) several methodologies may be used to determine whether the efficiency gains of a merger are likely to be greater than, and offset, competitive harm, and (ii) the Tribunal has the flexibility to choose the methodology appropriate to the circumstances of each case. For example, the Tribunal may use its discretion to determine in a given case whether gains to shareholders in a transaction are more or less important than losses suffered by consumers. In conducting its assessment, the Tribunal is also to consider all available quantitative and qualitative evidence.

The SCC held that the Commissioner has the burden of establishing the anticompetitive effects of the merger that are to be balanced against proven efficiencies. In keeping with the goal of ensuring as objective an assessment as possible, and out of fairness to the merging parties that must make out the defence (and therefore must know what level of efficiencies are required to outweigh the competitive harm), the SCC held that any quantifiable anti-competitive effects

claimed by the Commissioner must be quantified. While estimates of such effects are acceptable, they must be grounded in evidence that can be challenged and weighed. If such quantifiable effects are not quantified, they cannot be considered qualitatively and will be given no weight. Only anti-competitive effects that cannot be quantified (e.g., reductions in service or quality) can be assessed on a qualitative basis. The SCC noted that, because of the appropriate emphasis on objectivity, qualitative efficiencies and anti-competitive effects will, in most cases, be of lesser importance in the analysis.

In the Tervita case, the Commissioner did not provide the Tribunal with quantitative estimates of the merger's alleged anti-competitive effects. The SCC held that, in the absence of such evidence, the Tribunal and the FCA should not have considered such effects qualitatively or otherwise given them any weight in the balancing exercise. Consequently, the SCC assigned a zero weight to the quantifiable anti-competitive effects of the merger (i.e., no valid qualitative anti-competitive effects were proven), and the merger-specific efficiencies established by the merging parties, though negligible, were nonetheless sufficient to outweigh and offset the absence of any proven anti-competitive effects.

In this regard, the SCC held that proved efficiencies need not cross a significance threshold before they can be weighed in the balance. All that is required for the defence to succeed is that the efficiencies are greater than and outweigh the competitive harm to any extent.

While the SCC acknowledged that it may seem paradoxical to uphold the efficiencies defence in respect of an anti-competitive merger involving marginal efficiencies, particularly where the merger maintains a monopoly position, the SCC found that the statutory scheme allows for this result because of the distinct analyses for dealing with substantial prevention of competition (section 92) and efficiencies (section 96). A quantification of the former is required only under section 96 because of the need to carry out the balancing exercise required by that section. Accordingly, the SCC's decision recognizes the importance of efficiencies in merger review.

In an international merger context, the availability of the Canadian efficiency defence may be a moot point if the transaction is successfully challenged in another major jurisdiction. For example, on June 28, 2016, the Commissioner announced that he had cleared Superior Plus Corporation's proposed acquisition of Canexus Corporation despite his conclusion that the transaction would likely result in a substantial lessening of competition in Canada for the supply of sodium chlorate, a chemical used to produce bleaching agents for the pulp and paper industry, in addition to markets in Canada for the supply of several other chlor-

alkali chemicals produced only by Superior and Canexus. The Commissioner found that customers would face materially higher prices and have limited options, but attributed his decision to the availability of the efficiencies defence under section 96 of the Act in light of analyses provided by the parties, and confirmed by an external expert retained by the Bureau, of freight optimization and anticipated elimination of overhead costs and duplicate corporate services.[49]

However, the day before the Bureau's announcement, the FTC announced that it was challenging the transaction.[50] The FTC, working closely with the Bureau, similarly determined that the Superior/Canexus transaction would significantly reduce competition in the North American market for sodium chlorate. In particular, the FTC concluded that, if the merger were to take place, the combined entity would have more than half of all North American sodium chlorate production capacity and the proposed merger would result in anti-competitive reductions in output and higher prices.[51] The FTC's press release did not comment on efficiencies. Although the U.S. antitrust agencies do take cognizable efficiencies[52] into account as part of their overall assessment of a merger's likely competitive impact, they do not apply an equivalent to the Canadian efficiencies defence. The U.S. antitrust agencies will not simply compare such efficiencies to the anti-competitive effects of the merger, but rather will require extraordinary cognizable efficiencies if the merger presents a substantial adverse effect to the competitive market.[53] The U.S. horizontal merger enforcement guidelines indicate that the agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anti-competitive in any relevant market. In particular, the agencies consider whether

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49 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

50 https://www.ftc.gov/news-events/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies.

51 The FTC Complaint added that the largest two firms would have held more than 80% of the post-merger market, raising concerns about both unilateral and coordinated effects. The FTC calculated the post-merger Herfindahl-Hirschman Index at more than 3,800 (with a merger increment of 1,300), far above the applicable presumptive illegality threshold. The Complaint also alleged that barriers to entry were significant and expansion by rival firms was unlikely because of significant capital costs to create new manufacturing capacity.

52 Efficiencies are not cognizable if they are vague, speculative or otherwise cannot be verified by reasonable means: ABA Section of Antitrust Law, Antitrust Law Developments, (7th ed. 2012) at 367.

53 *Ibid*.

the cognizable efficiencies likely would reverse the merger's potential harm to consumers, e.g., by preventing price increases.[54]

Having concluded its review, the FTC announced that it had filed an administrative challenge and sought a temporary restraining order and PI in federal court, pending the outcome of the administrative proceeding. On June 30, 2016, Superior announced that it had terminated its agreement with Canexus.[55]

However, on March 8, 2017, the Commissioner announced that he would not challenge another proposed acquisition of Canexus because of the efficiency defence in the Act. In this case, the proposed acquirer was Chemtrade Logistics Income Fund, a smaller producer of sodium chlorate, that had launched an unsolicited bid for Canexus. Chemtrade had only one small sodium chlorate plant (Superior has six plants), and Chemtrade did not produce other chlor-alkali chemicals.[56] A Bureau press release on the Chemtrade/Canexus transaction stated that competition in the sodium chlorate market is limited, but the Commissioner again applied the efficiency defence in the Act, determining that the anti-competitive effects would be significantly offset and outweighed by efficiencies, such as transportation costs, that would likely not be attained if the merger were blocked or other remedies were imposed.[57]

The transaction closed on March 10, 2017,[58] the FTC having allowed the statutory waiting period to expire more than four months earlier without seeking any remedies, presumably because it determined that the Chemtrade/Canexus transaction did not give rise to a substantial lessening of competition in the U.S.[59]

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54 See U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010) at https://www.justice.gov/atr/file/810276/download.

55 http://www.theglobeandmail.com/report-on-business/toronto-based-superior-plus-pulls-out-of-canexus-deal-after-us-agency-rejection/article30699167/.

56 The FTC's Complaint in Superior/Canexus described Chemtrade as a "smaller player" with "much less capacity and a limited effect on competition".

57 See: https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html. Chemtrade publicly disputed Canexus' claimed efficiencies, arguing that the fact that most of the output from Chemtrade's single sodium chlorate plant is "captive to a single customer adjacent to the plant … significantly limits any meaningful logistical" efficiencies, presumably including freight synergies. See: http://www.newswire.ca/news-releases/chemtrade-responds-to-canexus-directors-circular-598166911.html.

58 See: http://www.newswire.ca/news-releases/chemtrade-announces-receipt-of-regulatory-approvals-615722793.html and http://www.newswire.ca/news-releases/chemtrade-announces-closing-of-the-canexus-acquisition-615876363.html.

59 The different findings of the Bureau and the FTC on the Chemtrade/Canexus transaction may be partially explained by the fact that the Bureau determined that the relevant market

In light of these factors, the precedential value of the Commissioner's decision not to challenge the Chemtrade/Canexus merger is unclear. Given the indications of Chemtrade's limited presence, this may have been a borderline case for the Commissioner to find a likely substantial prevention or lessening of competition, particularly since information on the public record indicates that merger efficiencies may have been relatively small.[60]

While the Commissioner has in these recent cases been willing to apply the efficiency defence without resort to the Tribunal, the defence involves a detailed factual and economic analysis that can, in particular cases, leave significant scope for disagreement. Once again, the long timeline to a contested hearing delving into the merits can limit the parties' practical ability to have the Tribunal rule on a case where they are unable to convince the Commissioner of the application of the efficiency defence.

In any event, parties wishing to rely on the efficiency defence in the Act should monitor any potential amendments to the Act as the Commissioner has publicly recommended that the efficiency defence be amended or removed from the Act: "…recent developments, like our decision in Superior/Canexus, show that

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in Chemtrade/Canexus was "the market for sodium chlorate in Western Canada", whereas the FTC considered that the relevant geographic market was North America in Superior/Canexus. Because the Bureau's analysis of Chemtrade/Canexus treated Western Canada as a relevant market, the Bureau may have found more significant harm than if the relevant market had been North America as a whole. However, the FTC's Superior/Canexus Complaint described sodium chlorate as a commodity chemical with low freight costs. The Complaint also stated that U.S. customers account for roughly 75% of North American sodium chlorate sales while 70% of North American production capacity is located in Canada.

60 Chemtrade launched an unsolicited bid for Canexus on October 4, 2016. On October 19, the Canexus board rejected the bid as too low, in part because it considered that the Chemtrade bid did not adequately value merger efficiencies. Chemtrade issued a response on October 24 characterizing Canexus's assessment that the merger would result in annual synergies of $20 to $30 million as "unrealistic and misleading". Chemtrade noted that Canexus had already realized general and administrative savings of $15 million in 2015 and 2016, "thereby eliminating a large proportion of the synergies that could have been available to Chemtrade," and rejected Canexus's suggestion that the merger would result in significant procurement or other operational savings due to the lack of overlap between the parties' businesses and the fact that "Canexus's predominant input cost is electrical power, the prices of which are set by provincial jurisdictions for all customers, eliminating any ability for Chemtrade to realize power purchasing synergies should it acquire Canexus." See: http://www.newswire.ca/news-releases/chemtrade-responds-to-canexus-directors-circular-598166911.html.

Canada's approach to efficiencies is increasingly misaligned with other jurisdictions. My view is that this is bad for businesses and bad for consumers."[61]

6. Conclusion

The U.S. PI process demonstrates that courts or tribunals can delve into the merits of merger challenges by antitrust authorities in a manner that leads to a decision that parties and regulators will consider determinative in most cases much faster than the timetable currently contemplated for merger challenges in Canada. Whether through revised approaches by the Commissioner or the Tribunal or by statutory amendment, if necessary, the process in Canada should be significantly revised to either add a more substantive review of the merits at the interim injunction stage (perhaps adopting some aspects of the U.S. PI model) or accelerate a final determination.

Until and unless the Canadian merger review process is revised, merging parties would be well advised to factor into their timing and risk analysis, as well as the allocation of risk in merger agreements, the significant time required to contest a challenge by the Commissioner and the possibility of the Commissioner raising atypical theories of anti-competitive harm that may be challenging to rebut on a timely basis.

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61 See: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04148.html.

SCHEDULE A

Illustrative Timelines for Contested Antitrust Merger Challenges in Canada and the U.S.

Merger	Commencement of Challenge	Hearing of Interim Order	Decision on Interim Order	Full Hearing	Decision After Full Hearing	Closing
Parkland (Canada)	April 30, 2015	May 7, 2015	May 29, 2015	n/a – Consent agreement registered on March 29, 2016 after mediation	Consent agreement settled matter, but full hearing was scheduled for May 30 – June 21, 2016	June 25, 2015
Steris/Synergy (FTC)	May 29, 2015	August 17-19, 2015	September 24, 2015	n/a	n/a	November 2, 2015
Staples/Office Depot (Canada)	December 7, 2015	n/a	n/a	Scheduled Feb. 6 – March 23, 2017	n/a	n/a
Staples/Office Depot (U.S.)	December 7, 2015	March 21 – April 5, 2016	May 10, 2016	n/a	n/a	n/a
Tervita (Canada)	January 1, 2011	n/a	n/a	November 16, 2011	May 29, 2012	Transaction closed before challenge by Commissioner