FULFILLING THE PROMISE: PROPOSALS FOR A MORE EFFICIENT MERGER REVIEW PROCESS IN CANADA

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September 2017

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Competition Bureau resources are being wasted on the analysis of non-problematic mergers and the review of more complex transactions is taking too long. Both developments suggest that legislative amendments are required to better focus the expenditure of public resources and avoid discouraging investments and growth.

Substantial amendments to the Canadian Competition Act in 2009 included an overhaul of the merger review process. The amendments significantly lengthened the potential waiting periods during which parties cannot close a proposed transaction and expanded the scope of information that the Bureau can compel from merging parties without seeking a court order. In this and other respects, discretionary decisions of the Bureau can impose significant costs and delays on Canadian businesses.

At the time of the 2009 amendments, senior Bureau representatives assured Parliament that the new process would be efficient and predictable for businesses and that the Bureau would make a decision whether to challenge a merger by the end of the waiting period. The Bureau also promised to be more cooperative, saying that it would be prepared to "sit down with the parties" to understand the issues and take issues off the table.[1] In our experience, however, the merger review regime in Canada has, in certain important respects, become less efficient and predictable, and prone to systemic delays beyond the decision timeframes contemplated by the 2009 amendments:

(a) ***Resources Continue to be Misallocated to Low-risk Transactions:*** The large majority of mergers continue to be cleared by the Bureau within a few weeks. Indeed, about 30 – 40% of the notifications have consistently related to the upstream oil and gas and real estate sectors, which have not raised significant issues – and remain unlikely to do so. As noted below, a significant amount of Bureau and private sector resources is being spent on investigative time, filing fees and advisors for matters that raise no competition issues, which suggests that the filing thresholds and exemptions need to be adjusted to minimize over-reach and better focus the Bureau's work.

(b) ***Delay is Becoming Entrenched for Complex Transactions***: Where the Bureau has significant potential concerns about a merger, the review can be very lengthy and extend well past the waiting period. The Bureau's merger performance statistics suggest a sharp increase over the last three years in the time required to complete reviews of more complicated transactions, and a corresponding significant decline in the fulfilment of the Bureau's service standards for advising parties of decisions in such cases.[2] In two recent cases, for example, clearance

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[1] See Appendix "A" to this paper for a sample of statements to Parliament by Bureau representatives.

[2] See Competition Bureau Quarterly Statistics Report for the period ending March 31, 2017, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04129.html#tbl_3_4. These statistics show an approximately 50% increase over the last three fiscal years in the average number of days required to complete reviews of notifiable transactions that the Bureau designates to be "complex". The Bureau's

was obtained only after review periods of approximately 10 months.[3] Further, if the parties disagree with the Commissioner's findings at the end of this long timeline and wish to contest them before the Competition Tribunal, they face a further delay, well in excess of one year, before the Tribunal will rule on the merits of the Commissioner's concerns, and the Tribunal has to date adopted a relatively low threshold for granting injunctions prohibiting implementation of a transaction pending the Tribunal's decision on the merits.

(c) ***Bureau's Reluctance to Disclose its Concerns Contributes to Inefficiency***: In our experience, the Bureau often declines to explain concerns or potential concerns to parties in sufficient detail and in a sufficiently timely manner for the parties to understand and meaningfully respond to issues. While the Bureau typically cites confidentiality concerns to justify limited disclosure, if the Commissioner were to file a contested application, the Bureau would have to disclose much more information to the parties. It's become clear that the Bureau doesn't have the appropriate incentives to reach a decision and meaningfully communicate with the parties in a timely manner during the merger review process.

(d) ***Pro-competitive Mergers are Hindered***: As review periods lengthen and the Commissioner continues to require remedies to address theories of anti-competitive harm that the parties do not have a meaningful opportunity to understand or challenge, the merger review process increasingly discourages pro-competitive mergers from proceeding. Many businesses cannot tolerate such a lengthy period of regulatory uncertainty, with the risk of losing key employees, customers and other business opportunities while the regulatory review drags on. Abandonment of a pro-competitive merger may have adverse consequences for the competitiveness and growth of not only the Canadian businesses involved, but also their customers and suppliers. An overly burdensome, protracted and unaccountable merger review process can also contribute to a business climate that discourages investment.

The current implementation of the Canadian merger review process is not meeting its stated goal of aligning its timelines with the U.S. process, nor is it delivering on the assurances provided to Parliament. In our view, certain aspects of the Canadian merger review process should be revised to establish appropriate checks and balances and incentives for the Bureau to fulfill the

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success rate in meeting its non-binding service standards for completing such reviews has also declined from 91% to 74%. It is also notable that, while the Bureau's service standards correspond with the end of the waiting period in cases where the Bureau issues a SIR, they actually extend 15 days beyond the initial 30-day waiting period where no SIR is issued. To this extent, the Bureau's service standards (which themselves are non-binding) specifically contemplate delays beyond the statutory period.

[3] For example, Alimentation Couche-Tard Inc. announced an acquisition of CST Brands, Inc. on August 22, 2016. The Bureau had concerns about the merger's impact on certain local retail gas markets. Clearance was not obtained until the parties entered into a consent agreement with the Commissioner on June 27, 2017, over 10 months later. On December 13, 2016, the Commissioner announced that he had reached a consent agreement allowing wholesaler McKesson Canada Corporation to acquire the Rexall pharmacy chain, more than nine months after the transaction was announced on March 2, 2016.

original promise of the 2009 amendments. In this paper, we summarize the existing merger review process in Canada, identify aspects of the process that lead to excessive delay, and set out proposals for amendments.

1. The Canadian Merger Review Process

Transactions that exceed certain financial thresholds must be notified to the Commissioner prior to closing.[4] The Bureau reviews such transactions to determine whether they are likely to prevent or lessen competition substantially. The Commissioner may challenge any merger (whether notified or not) that is likely to have such anticompetitive effects by seeking an injunction, divestiture, or certain other types of remedial orders from the Competition Tribunal, which is a quasi-judicial body comprised of Federal Court judges and lay members.

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.

(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.

(i) Size of Parties Threshold

A notification is not required for any type of transaction unless the parties, together with all their affiliates, have either: (1) assets in Canada that exceed $400 million in aggregate value, or (2) annual gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value.[5]

(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: (1) assets in Canada with an aggregate value that

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4 For a more detailed discussion of the merger review thresholds, see John Bodrug and Adam Fanaki, International Merger Enforcement – A Canadian Context, June 1-2, 2017, ABA Antitrust in the Americas Conference, available at: https://www.dwpv.com/en/Insights/Publications/2017/International-Merger-Enforcement-A-Canadian-Context.

5 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.

exceeds $88 million; or (2) annual gross revenues from sales in or from Canada exceeding $88 million.

(iii) Ownership Threshold

In certain contexts, 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 must exceed 20% (where the target's shares are publicly traded) or 35% (where the target has no publicly traded shares), or, if one of those thresholds 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; and (ii) all studies, surveys, analyses and reports prepared or received by an officer or director analyzing the competitive implications of the proposed transaction. In addition to the cost to the parties of retaining external advisors, assessing the application of the notification provisions and preparing a notification or application for a waiver, each notification must be accompanied by a $50,000 filing fee, even where the transaction clearly raises no substantive competition issues.

(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 U.S. merger review process:

- an initial waiting period expires 30 days following submission of the notification by each party;
- 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, data and/or written responses to questions;[7] and

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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.

7 In practice, these initial statutory timeframes have been "managed" through various strategies adopted by merging parties, often in consultation with the Bureau. For example, other than in straightforward cases, merging parties often provide the Bureau with information relevant to a competition analysis of their transaction but without immediately certifying their notifications, in order to avoid pressuring the Bureau during the initial 30-day waiting period and to decrease the risk that an SIR is issued. In more exceptional cases, parties have also considered a "pull and re-file" strategy according to which notification filings are formally withdrawn and re-filed in order to start a fresh 30-day clock in the hope that the Bureau will

- if an SIR is issued, a new waiting period is triggered and expires 30 days following compliance with the SIR by both parties.[8]

The Commissioner may terminate or waive the waiting period at any time by issuing a clearance in the form of either an advance ruling certificate or a no action letter.

In cases involving relatively greater complexity, however, the Commissioner often does not reach a decision by the end of the waiting period, or at least does not communicate his views to the parties. In this case, the parties are left in a position where they can close but remain at risk of a challenge by the Commissioner within one year of closing.[9] By contrast, in the U.S., if the antitrust agencies do not issue a "second request" (the equivalent of a SIR) by the end of the initial waiting period it is understood that the authorities do not intend to challenge the proposed transaction.[10]

As a practical matter, the Bureau's investigation is typically based on market contacts, including 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 may provide the parties with some limited feedback on its issues and conclusions during the merger review process, but the level of detail is mixed in significant part because the Bureau doesn't want to be "tied down" to a position.[11] Accordingly, the Act does not currently compel or incent transparency by the Bureau at this stage. The Bureau's preferred approach is to negotiate concessions from the merging parties without committing itself to a case theory or sharing the underlying factual evidence in support the need for remedies. Where the Bureau has significant concerns about a merger, until and unless the Commissioner files a notice of application with the Tribunal challenging all or part of the transaction, the parties often do not have a clear view of the Commissioner's concerns or theory of harm.

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complete its assessment of the transaction and provide clearance within the new initial waiting period (and without issuing an SIR).

[8] The Commissioner may apply for a temporary injunction under section 100 of the Act 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. To obtain such an injunction, the Commissioner must demonstrate to the Tribunal that (1) more time is required to complete the Commissioner's investigation and, (2) in the absence of the 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.

[9] In practice, merging parties have sometimes entered into "timing agreements" with the Commissioner (often at the strong urging of the Commissioner) according to which they undertake not to close their transactions before a certain date or without a certain minimum period of notice, in order to give the Commissioner more time to complete his review in the hopes of obtaining clearance and avoiding litigation.

[10] Although the U.S. antitrust agencies are able to challenge transactions after the waiting period expires, based on the long history of these authorities not subsequently challenging notified mergers in respect of which the waiting period has been allowed to expire without a challenge, merging parties routinely close transactions on the basis of the expiry of the waiting period without an equivalent positive assurance such as an advance ruling certificate or no action letter.

[11] While the Bureau has legitimate concerns about protecting the identity of complainants and the confidential information of third parties, these should not preclude more fulsome explanations about its issues, analyses and conclusions with respect to a proposed merger.

The effect of this lack of communication is that the parties are kept in the dark and have to make remedy proposals "blind" to what the Bureau's analysis is showing. The Bureau's leverage in these circumstances is compounded by the lack of procedural means for the parties to compel disclosure of the Bureau's case during the review.

2. Substantive Challenges

Where the Commissioner concludes that a merger is likely to prevent or lessen competition substantially, the purchaser and the Commissioner often agree to remedies to address the Commissioner's concerns and avoid a contested challenge. Such resolutions typically take the form of a consent agreement registered with the Tribunal and have often involved divestitures of specified assets.

If no resolution is agreed upon, the Commissioner may apply to the Tribunal for an order under section 92 of the Act challenging the transaction. To obtain an order under section 92, the Commissioner must demonstrate to the Tribunal that the merger is likely to prevent or lessen competition substantially. The Commissioner may seek orders to prohibit closing, make divestitures, or (post-closing) dissolve the transaction. In some cases, an interim "hold separate" arrangement may be imposed on consent of the Commissioner or by order of the Tribunal to preserve certain assets and businesses and maintain competition, but still permit closing of the transaction, pending completion of the Bureau's review or final disposition of a challenge before the Tribunal.

(a) Interim Orders

Where the Commissioner has challenged the transaction under section 92, he may also seek an interim order under section 104 of the Act preventing closing of the transaction pending the Tribunal's ruling on the merits. 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 such an order, the Tribunal will consider (1) whether there is a serious issue to be tried in the main action, (2) whether the applicant would suffer irreparable harm if the requested order were refused, and (3) which of the parties would suffer greater harm from the granting or refusal of the requested order pending a decision on the merits.[12]

The *Parkland* case[13] involved the first contested hearing under section 104 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 those 14 markets pending the outcome of the Commissioner's challenge and imposing a hold separate arrangement

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[12] 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.

[13] *Commissioner of Competition* v. *Parkland Industries Ltd*, 2015 Comp. Trib. 4 [*Parkland*].

on assets in those 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.

The Tribunal held that the first requirement for a section 104 order (i.e., a "serious issue to be tried") 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.

The Tribunal's decision in *Parkland* focused on the second factor, whether the Commissioner had demonstrated, on a balance of probabilities, that irreparable harm would ensue if the interim relief sought were not granted. In this regard, 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.[14] However, the Tribunal added that it would not "delve too deeply into the merits of the case at the interim injunction stage". It requires only "minimal" evidence to support reasonable or logical inferences of the alleged harm.[15]

With respect to the third factor (sometimes referred to as the "balance of convenience"), the Tribunal presumed that actions taken by the Commissioner pursuant to the Act are in the public interest. The Tribunal gave significant and determinative weight to this public interest role, without attempting to quantify the harm to competition that would likely occur if no hold separate order were in place pending trial.

It remains to be seen whether and how certain aspects of the approach in *Parkland* may evolve in the context of subsequent Tribunal proceedings. It is open to question whether the Tribunal has been too deferential to the Commissioner and not sufficiently rigorous in its consideration of the burden to be met for injunctive relief. Matters to be resolved include (1) the relative weight to be given to the Commissioner's public interest function where the parties can establish significant harm that is likely to result from the requested interim order (e.g., a failed transaction, losses in efficiency and loss to public shareholders), and (2) the degree to which the Tribunal may be willing to assess the anti-competitive effects asserted by the Commissioner, particularly since superior courts in Canada tend to impose a heavier onus on the party seeking extraordinary relief such as an interim injunction.[16] When proceedings such as these are undertaken by the Commissioner, typically after months of reviewing a transaction, it seems unbalanced and contrary to the scheme of the Act that the Commissioner should face such a minimal burden

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14 *Parkland* at para. 93.

15 *Parkland* at paras. 50 and 74. 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.

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

when seeking to enjoin a transaction. As the *Parkland* case demonstrates, the Tribunal has so far held the Commissioner to a much lower standard than would apply before the superior courts.

In addition, while the Commissioner does have an evidentiary threshold to meet under a section 104 application, as applied in the *Parkland* case, that threshold is much lower than the preliminary injunction ("PI") standard to which the U.S. antitrust agencies are held. In the proposed Staples/Office Depot merger, for example, the court described the standard for a PI under section 13(b) of the U.S. *Federal Trade Commission Act* as requiring the government to show: (1) a likelihood of success on the merits, and (2) that the equities tip in favour of injunctive relief.[17] Even a quick reading of recent decisions 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 recent years.[18] Similarly, the granting of a PI typically results in the merging parties abandoning the transaction.[19]

(b) Timelines to a Decision on the Merits

Merging parties can obtain a decision on the merits much faster in the U.S. than in Canada. The contrasting timelines can be illustrated by comparing the *Parkland* case to the approximately contemporaneous FTC challenge to the Steris/Synergy Health merger. The FTC had concerns that this 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 U.S. federal court (denying the motion for a PI) was issued on September 25, 2015, following a three day hearing.[20] 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.[21]

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[17] 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). Similarly, the manual of the Antitrust Division of the U.S. Department of Justice ("DOJ") indicates that the U.S. 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. See the Antitrust Division Manual of the U.S. DOJ at page IV-14 (https://www.justice.gov/atr/file/761146/download).

[18] 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 and 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.

[19] See ABA Section of Antitrust Law, Antitrust Law Developments (8th ed. 2017) at 422-423. For example, in the recent Staples/Office Depot and Sysco/US Foods cases, the merging parties did not proceed with the then proposed transactions following the issuance of a PI.

[20] See Federal Trade Commission v. Steris Corporation, Case No. 1:15CV1080 (U.S. District Court, North Eastern District of Ohio, Eastern Division).

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

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. After a one day hearing on the interim order, the Tribunal issued a scheduling order for a hearing on the merits to take place from May 30, 2016 to June 21, 2016 (15 days of hearings), more than a year after the challenge was filed. 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 well over a year following the filing of the notice of application if contested litigation had run its course.[22]

The Staples/Office Depot merger 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 after the FTC filed its 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 on the merits was scheduled to take place over six weeks, from February 6 to March 23, 2017, also well over one year after filing of the Commissioner's 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 of an agency challenge, but the hearing itself is likely to take significantly longer than a PI hearing in the U.S.[23]

In the U.S., DOJ applications for PIs are dealt with by state courts and proceed quickly. In Canada, the Tribunal was created as a specialized court in order to have an expert and focused institution to deal with competition matters expeditiously. Experience suggests that this goal has not been accomplished.

3. <u>Intersection with Investment Canada Act Review</u>

The Investment Canada Act (the "ICA") is Canada's principal foreign investment review legislation. 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[24] cannot be completed until the Minister of Innovation, Science and Economic Development, and/or the Ministry of Canadian Heritage (the "Minister") is satisfied that the transaction is likely to be of "net benefit to Canada". While the focus of the Minister's net benefit assessment is normally on factors such as the impact of the acquisition on employment in Canada, Canadian participation in

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22 Shortly before the scheduled hearing on the merits, and following mediation by a judicial member of the Tribunal, on March 29, 2016 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. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04049.html.

23 Appendix "B" to this paper sets out the key dates of the merger proceedings discussed in this section.

24 Currently the ICA net benefit review threshold is C$1 or C$1.5 billion in 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.

the management of the business, and plans for capital expenditures and research and development in Canada, the ICA also directs the Minister to consider the impact of the transaction on competition.

In practice, the Minister has looked to the Commissioner to provide advice on the proposed transaction's impact on competition and has withheld net benefit approval until the Commissioner has advised the Minister of his final views on the competitive effects in Canada. To date, Ministers have not been prepared to give such net benefit approval until parties have completely resolved competition issues with the Commissioner. This position effectively gives the Commissioner the power to unilaterally enjoin a transaction that also requires ICA approval until the parties address competition issues to the satisfaction of the Commissioner, without the need for the Commissioner to obtain an injunction from the Tribunal, or to meet any of the standards set out in the Competition Act for issuing interim injunctions.

4. Proposed Amendments

In order to re-align the incentives and the structure of the merger review process with the original intention of the 2009 legislation, we propose the following amendments to the Canadian merger review process.

(a) Deemed Approval if the Commissioner Does Not Provide a Decision at the End of the Waiting Period

To ensure that the Commissioner actually does provide the parties with his views within the time intended by the 2009 legislation, the Act should be amended to provide a deemed approval at the end of the waiting period[25] if the Commissioner does not, at or before that time, either (1) provide the parties with a no action letter or advance ruling certificate, (2) file a notice of application with the Tribunal challenging the transaction, or (3) obtain the parties' consent to extending the time in which the Bureau may make a decision with respect to the actions described in (1) or (2) above. A useful precedent for this concept already exists in the ICA where the Minister is deemed to approve the transaction if he or she does not provide the parties with his or her view on net benefit prior to the end of the statutory review period. That time period can be extended by consent of the parties, but the parties can require the Minister to comply with the statutory timeframe if they so choose.[26]

(b) Clarify the Standard for the Tribunal to Issue Interim Injunctions

In our view, after months of review and receipt of extensive SIR and other information produced to the Bureau, if the Commissioner wishes to challenge a merger, he should, at the end of the waiting period (subject to a possible extension of up to 60 days under section 100), be required to demonstrate a likely substantial prevention or lessening of competition to a higher standard than the Tribunal adopted in *Parkland*. Indeed, under the U.S. system upon which the current

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25 Or, if applicable, the end of a temporary injunction issued under s. 100. See note 9 above.

26 Consistent with this recommendation, the Bureau's non-binding service standards for completing reviews of "complex" notifiable transactions should be fully aligned with the statutory waiting periods (*i.e.*, 30 days absent the issuance of an SIR, as opposed to the current 45 days in cases where no SIR is issued).

Canadian process was said to be based, the U.S. antitrust authorities are required, within an expedited timeframe, to demonstrate a likelihood of success on the merits.

The Tribunal should also be directed to quantify the likely harm if an interim order requested by the Commissioner were not made, rather than necessarily giving decisive weight to the Commissioner's general public interest role. In any event, even without legislative amendment, it would remain open to the Tribunal to give greater weight in future cases to more specific harm that is demonstrated to be likely to result from the issuance of an order. For example, if the Commissioner seeks to block an entire transaction, the parties may be able to demonstrate significant and quantifiable "inconvenience" for the merging parties (and their shareholders) if the Tribunal were to issue the requested injunction and a more limited order would be sufficient.

(c) Require the Commissioner to Meet the Timeframe Contemplated by the Investment Canada Act

The Commissioner should be required to provide his views on the proposed transaction's impact on competition within the timeframe in which the Minister is required to make a net benefit decision under the ICA.[27] In effect, the Commissioner can currently hold up the entire process by withholding his views and leaving the Minister in a state of uncertainty with regard to one of the elements specifically identified in the ICA to be assessed under a net benefit review. Even if the Commissioner raises some concerns or potential concerns, the Minister could then take them into account and weigh the impact on competition against other factors in the net benefit analysis. In some cases, the Minister may conclude that the transaction is likely to be of net benefit to Canada notwithstanding concerns or potential concerns raised by the Commissioner. For example, the Commissioner may be raising concerns with regard to only a relatively small market or markets. The Minister could also conclude that, since the Commissioner is fully engaged in the matter, the Commissioner can address his concerns using the Competition Act process, including by seeking injunctions from the Tribunal where appropriate. Accordingly, any legitimate concern about competitive impact would be addressed in due course by the Commissioner under the Competition Act and that ICA approval could be provided to the investor without further delay. Such an approach would be consistent with the specific timeline within which the Commissioner has to provide his views on a merger that is subject to a public interest review under the Canada Transportation Act.[28]

(d) Expanded Scope for Reference Applications to the Tribunal

Currently, section 124.2 of the Competition Act enables the Commissioner to apply to the Tribunal at any time for a determination of a question of law, jurisdiction, practice or procedure. A person subject to inquiry (which includes parties to a merger that is being challenged by the Commissioner) may seek such a determination (as well as a determination on a question of

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27 The Commissioner's views need not be limited to a formal decision such as the issuance of an advance ruling certificate or no-action letter, or the commencement of litigation. For example, if the ICA timelines are complete before the expiration of the waiting period under the Competition Act, the Commissioner could simply convey his views as at that time.

28 See section 53.2 of the Canada Transportation Act requiring the Commissioner to report on any competition concerns about a transaction within 150 days, or such longer period as the Minister may allow.

mixed law and fact) only with the consent of the Commissioner. In order to allow merging parties to test key points on which they believe that the Commissioner is being unreasonable or uncommunicative, they ought to be entitled to refer a question (including a question of mixed fact and law) to the Tribunal for determination without agreement of the Commissioner.

Such reference decisions could resolve or focus issues in a manner that enables the balance of the Bureau's review to proceed more efficiently. The Tribunal could address any misuse of such a reference if a party were to seek to use this procedure excessively or inappropriately.

While, to date, SIRs issued by the Bureau have tended to be less onerous than the equivalent "second requests" issued by U.S. antitrust authorities, the addition of a power for the Tribunal to review SIRs and pare back unduly onerous requirements that have tenuous relevance would also add an appropriate discipline on an otherwise unfettered power to impose extremely burdensome production requirements on merging parties.[29] Since parties who have received an SIR cannot complete the proposed transaction until they comply with the SIR, or the Commissioner waives the waiting period, the addition of such a review power would not prejudice the Bureau's review.

(e) Adjust Notification Thresholds and Exemptions

The very high percentage of merger reviews concluded without issues (about 97% of the Bureau's merger reviews since 2009) is indicative of a significant unnecessary cost imposed on businesses (not limited to the $50,000 filing fee) and taxpayers. The Commissioner also cites resource constraints as a major challenge. Clearly, the statistics demonstrate that significant Bureau resources are currently allocated to matters that raise no concerns under the Act. Both of these issues suggest that something needs to be done about the notification thresholds and the scope of exemptions from mandatory notification. First, consideration should be given to increasing the notification thresholds. At the very least, the $400 million size of parties threshold should be annually indexed to inflation in the same way as annual revisions to the size of transaction threshold. (The $400 million threshold has not changed since it was introduced in 1987.) Second, exemptions for non-problematic mergers such as real estate and upstream oil and gas transactions would immediately reduce the number of notifications substantially, allowing the Bureau to focus more efficiently on other matters that are more likely to raise substantive concerns.[30] Given the Bureau's authority to challenge any transaction for up to one year after it has closed, even in an exceedingly rare case where a substantive concern might arise in these sectors, the fact that such transactions relate principally to hard assets that cannot be "scrambled" means that the Bureau would likely still have a remedy even if the transaction is not notifiable and the parties close before the Bureau has completed a review.

[29] Similarly, applications for court orders requiring production of information or documents under section 11 of the Act should be made with notice to respondents (i.e., the persons required to provide the information and documents) to enable them to present any concerns to the court before such an order is issued. The Commissioner should have to show the need for an ex parte application, rather than the current process under which all applications for such orders are to be made ex parte.

[30] New exemptions would not require legislative amendment but can be prescribed by regulation, as was done previously in respect of the exemption relating to certain types of asset acquisitions undertaken to give effect to asset securitization transactions.

5. Conclusion

The uncertainty and likely chilling of investment arising from the current merger review regime increases costs for all transactions, delays economic market benefits and leaves parties to mergers that do raise issues without a realistic means to compel analytical efficiency and enforcement transparency and accountability by the Commissioner and the Bureau.

It has now been almost 10 years since the last legislative amendments to the Competition Act and over 30 years since the merger review regime was first introduced. That history and recent experience suggest that it is clearly time for a closer look at the Canadian merger review framework and institutions as well as related elements of the Competition Act to restore balance and improve the effectiveness of the law while ensuring transparency and accountability of the enforcement regime.

APPENDIX "A"

Competition Bureau Statements to Parliament in 2009 Relating to Bill C-10 (Adopting the Current Merger Review Process)

Collette Downie, Director General, Marketplace Framework Policy Branch, Industry Canada

- "The Competition Policy Review Panel recommended, and the government adopted, changes to the Competition Act to ensure that Canada's merger review process allows the Competition Bureau to get the information it requires from the merging parties to properly assess the effects of a merger and make the right decision to challenge or clear the merger in a timely manner.

  It also recommended, and this was emphasized by the panel, that companies need as much certainty as possible about the process and the timelines of their transactions. It is in this way that Canada maintains its reputation as a good place to invest. Under the old provisions, parties could close a proposed merger after 42 days, even if they had not given the Competition Bureau the information it needed to determine if the merger harmed the economy. Moreover, the bureau had to resort to court orders to compel the information from uncooperative parties, a process that was rigid and did not leave the Competition Bureau with sufficient time to responsibly review complex mergers in a timely and informed manner. Under the new system, merging companies are told within 30 days whether their proposed transaction raises serious concerns. The vast majority of all transactions should be cleared within that initial 30-day period, and often in significantly less time. For the small number of potentially harmful mergers – about four to six per year – companies will be told what supplementary information is required from them in order to complete a more in-depth analysis. Once that supplementary information is provided, the Bureau will have 30 days to make a decision about whether to challenge the merger.

  …

  With respect to mergers, the idea was to align the two processes, so the new merger review process is very similar, at least in structure, to the U.S. process, with similar timelines. If you have cross-border transactions, businesses will hopefully receive similar types of information requests at similar times, and the two competition agencies will be required to proceed relatively in parallel." (emphasis added) (May 13, 2009 – testimony before Senate Committee on Banking, Trade and Commerce)

- Senator Callbeck: "The fact is that this second-stage process could be more burdensome, time consuming and costly."

  Collette Downie: "I would say that is not the case. The provision has been designed to reduce the current burden on businesses that have to respond to subpoenas because of the rigidity of that process and because of the way that the time periods work ...The [Bill C-10] amendments take away the ability of parties to [run the clock] … [the Bureau] will now have the time and incentive to sit down with the parties … to take issues off the table and to understand exactly what information is required and what information exists … Currently,

that cannot happen with any great flexibility under the existing system." (March 11, 2009 – testimony before Senate Committee on National Finance)

Adam Fanaki, Acting Senior Deputy Commissioner of Competition, Competition Bureau – Mergers Branch, Industry Canada

- "If I may add, we are focusing on one aspect of the merger review process that would apply in those relatively rare cases where substantive competition concerns arise. The proposed process will be a more flexible and more cooperative because we will be taking it out of the litigation world of applying for court orders to secure information and bringing it into a more cooperative process world. In addition to that change to the process, Bill C-10 would reduce the number of mergers required to be notified to the Competition Bureau by raising the thresholds that trigger the notification obligation; would reduce from three years to one year the time period within which the Bureau may challenge a merger following closing; and enshrine in law that [the Bureau] must decide and notify parties within 30 days of the receipt of the relevant information, whether a merger will be challenged." (emphasis added) (March 11, 2009, testimony before Senate Committee on National Finance)

Other Statements Regarding the 2009 Amendments

Melanie Aitken, Commissioner of Competition, Competition Bureau

- "With the 2009 amendments to the merger review process, Parliament refreshingly dispensed with this ill-conceived notion of a 'balance', in favour of unambiguously putting the public interest first, but importantly, with certain checks on the investigative body (e.g., parties can close their proposed mergers 30 days after compliance with a Supplementary Information Request). In my view, the reworked investigative model, aligning the incentives of merging parties with those of the Bureau in conducting sufficiently thorough merger reviews, puts the emphasis in the right place. There is now a meaningful ability for the Bureau to access relevant information in a timely way, while there are, at the same time, disciplines in the scheme to ensure the Bureau is strongly motivated to conduct its review expeditiously, keenly aware of the importance to its credibility of minimizing the burden on those implicated in its work."[31] (emphasis added)

Competition Policy Review Panel, Compete to Win, Final Report – June 2008

- "Given the identification of these issues and the importance of our merger review process being better harmonized with that of the US, the Panel is of the view that it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the US. This change would separate merger cases into two categories: those cases that are concluded (and effectively cleared) within 30 days of the initial filing, and "second stage" cases that raise complex competition issues. So-called

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31 Melanie Aitken, "The 2009 Amendments to the Competition Act: Reflecting on their Implementation and Enforcement, and Looking Toward the Future", *Canadian Competition Law Review*, 2012 Vol. 25 Number 2, 653 at 663 ("Reflections on the 2009 Amendments"). Ms. Aitken was the Commissioner at the time the 2009 amendments were considered and passed.

"second stage" cases would be subjected to an additional review period that would terminate 30 days following full compliance with a "second request" for information."[32] (emphasis added)

[32] At p. 56. See https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/...to.../Compete_to_Win.pdf. The Competition Policy Review Panel's report and recommendations have been described by former Commissioner Aitken as the "immediate source" of the 2009 amendments (see "Reflections on the 2009 Amendments", note 29 above at 660), and were referred to in testimony before Parliament in connection with them, including by the Director General, Marketplace Framework Policy Branch at Industry Canada which housed the Competition Bureau at the relevant time.

APPENDIX B

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 on Merits	Closing	Time to Decision on Merits
Steris/Synergy (FTC)	May 29, 2015	August 17-19, 2015	September 24, 2015	n/a	November 2, 2015	4 months after Complaint filed
Parkland (Canada)	April 30, 2015	May 7, 2015	May 29, 2015	Consent agreement settled matter, but hearing was scheduled for May 30 – June 21, 2016	June 25, 2015	Tribunal hearing was scheduled to begin 13 months after Commissioner's notice of application
Staples/Office Depot (U.S.)	December 7, 2015	March 21 – April 5, 2016	May 10, 2016	n/a	n/a	5 months after Complaint filed
Staples/Office Depot (Canada)	December 7, 2015	n/a	n/a	Transaction abandoned as a result of U.S. decision, but hearing was scheduled for Feb. 6-March 23, 2017	n/a	Tribunal hearing was scheduled to begin approximately 14 months after Commissioner's notice of application

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