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CBA NATIONAL COMPETITION LAW SECTION

Winter 2015 Edition

From the Editor's Desk:

Happy New Year! Too rusty to get straight back to work? Cue the Mergers Committee to come to the rescue! We hope you enjoy this edition and find it of use to your practice. As always, we welcome your contributions and feedback, whether to me or the co-chairs Adam Goodman, Richard Annan or Ann Wallwork. Happy reading!

– Nikiforos Iatrou, Chair, Mergers

Changes to Pre-Merger Notification Analysis under the Act and ICA

By Kyle Donnelly

Kyle Donnelly
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Regulatory lawyers are frequently asked to advise with respect to notification obligations in connection with mergers and acquisitions. Recent amendments to the *Investment Canada Act* ("**ICA**") and proposed amendments to the *Competition Act* have had a significant impact on regulatory lawyers' analysis of pre-merger notification in Canada. This piece will discuss some of the issues associated with these recent/proposed legislative changes.

I. The ICA and the New "Enterprise Value" Calculation

As the reader knows, an investment governed by the ICA will either be reviewable or merely notifiable. One of the first steps for regulatory lawyers when approached by a client or corporate counsel about a new transaction is to assess whether the transaction is reviewable or notifiable. Subject to the discussion below about national security issues, if regulatory counsel is able to conclude that a proposed transaction is merely notifiable, it eliminates a significant unknown with respect to timing for closing.

The new Investment Canada Act Regulations ("**ICA Regulations**"), which came into force this year increased the reviewability threshold for "net benefit" reviews to $600 million (for 2015), increasing to $1 billion in 2019. However, the new ICA Regulations also introduced a new methodology for determining the value of a Canadian business. The new "enterprise value" calculation departs from the previous "book value" calculation. The previous "book value" methodology was convenient for competition lawyers since, under the *Competition Act*, the asset and revenue thresholds for mandatory pre-merger notification filings are generally calculated using gross book values based on the most recent audited financial statements for the relevant entity.

The switch to "enterprise value" was brought about by a 2007 panel, the Competition Policy Review Panel (the "Panel"), which was tasked with reviewing Canada's competition and foreign investment laws with a view to boosting Canada's competitiveness. The Panel, in its final report titled "Compete to Win", recommended that Canada retain an investment review process, but that it should be one of "exceptional application". It was thought that a higher review threshold would be consistent with narrowing the scope for ICA intervention, and therefore subjecting fewer transactions to "net benefit" reviews.[1]

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[1] In addition, a higher threshold would be aligned with the Panel's view that Canada benefits from openness to the world and that attracting greater foreign investment is beneficial and in Canada's economic interest.

The concept of enterprise value, as the Panel states, "better reflects the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized on a balance sheet by current accounting methods."[2]

Under the amended ICA Regulations, the enterprise value of the Canadian business is equal to the market capitalization or acquisition value of the entity, plus its liabilities, minus its cash and cash equivalents. Without going into too much detail, each of these concepts is treated slightly differently depending on the type of transaction (i.e., shares v. assets), and the nature of the Canadian business (i.e., public v. private).

The new enterprise value methodology was expected to result in fewer reviews and therefore more flexibility for foreign investors.[3] However, the amendments have introduced a number of unwelcome complexities to the notifiability analysis.

A. Operating Liabilities

For share acquisitions, the term "liabilities" is defined to mean an entity's "total liabilities, other than operating liabilities, that are listed in its most recent quarterly financial statements...". The definition is similar for asset acquisitions: "total liabilities, other than operating liabilities, that are assumed by the non-Canadian, as determined in accordance with the transaction documents that are used to implement the investment.

The *Regulatory Impact Analysis Statement* ("Impact Statement") that accompanied the new ICA Regulations states that the definition of "liabilities" could have overstated enterprise value "since it would include ordinary course debt (such as accounts payable)." To address this concern, the ICA Regulations omit "operating liabilities" from the enterprise value calculation.

But what is an operating liability? The term is not defined in the new ICA Regulations, and apart from the "ordinary course debt" comment in the Government's Impact Statement, it is not entirely clear what it is meant to encompass.

Take the below hypothetical financial statements by way of example. Financial statements tend to distinguish between current liabilities (all debts and other liabilities that are payable within one year)[4] and non-current liabilities (generally, a debt that will not come due within the next year).[5]

Liabilities	**Q2**
Current	*(in thousands)*
Accounts payable and accrued liabilities	1,800,000
Deferred revenue	200,000
Income tax payable	60,000
Risk management liability	35,000
Current portion of long-term debt	-
Current portion of obligations under finance lease	10,000
	2,105,000
Non-Current	
Long-term debt	5,000,000
Obligations under finance lease	20,000
Deferred tax liability	420,000
Asset retirement obligation	230,000
	5,670,000
Total Liabilities	**7,775,000**

It is fairly clear that "accounts payable" and "income tax payable", are caught by the term "operating liabilities", it is less clear for other items such as "risk management liability", "deferred tax liability" and "current portion of long-term debt".

It is not clear whether the term "operating liabilities" under the new ICA Regulations is meant to be

[2] At page 31, the final report is available here: https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf

[3] See the Regulatory Impact Analysis Statement that accompanied the new Regulations (available at: http://www.gazette.gc.ca/rp-pr/p2/2015/2015-03-25/html/sor-dors64-eng.php).

[4] *Black's Law Dictionary*, 10th ed, sub verbo "current liabilities".

[5] *Black's Law Dictionary*, 10th ed, sub verbo "non-current liabilities".

synonymous with "current liabilities". However, such an interpretation would not be consistent with definitions of "operating liabilities" that are floating around online.

For example, Investopedia defines it as "obligations created in the course of ordinary business operations, but they are not created by the company raising cash from investors. Financing liabilities are debt instruments that are the result of the company raising cash."

Similarly, Business Dictionary.com defines it as "Short-term liabilities resulting from the primary business operations of a firm. They are non-interest bearing, and comprise of accounts payable, accrued expenses, and income tax payable."

According to these definitions, one could determine whether a liability is "operating" by asking: how did the liability get on the balance sheet? If the liability is owed to a creditor that loaned the money for the purpose of earning a return on investment, then the liability would be a financing liability. If, however, the liability got on the balance sheet in the course of doing business, then it is operating. So, using the above statement, the following items earn interest and would be financing liabilities (counted for purposes of calculating enterprise value): Current portion of long-term debt, Current portion of obligations under finance lease, Long-term debt and Obligations under finance lease. The following items do not earn interest and would be excluded: Accounts payable and accrued liabilities, Deferred revenue, Income tax payable, Risk management liability, Deferred tax liability and Asset retirement obligation.

"An interpretation note on this subject would be helpful."

In any event, an interpretation note on this subject would be a helpful supplement to the new ICA Regulations.

B. Double-counting

Another problem raised by the new ICA Regulations is the treatment of cash free and/or debt free transactions. For share acquisitions, if the transaction contemplates a price per share that explicitly excludes debt and/or cash from the purchase price, must the liabilities/cash, as shown on the quarterly financial statements be included in the calculation of enterprise value?

The answer, on a strict reading of the ICA Regulations, would appear to be yes, even though this would result in increasing the enterprise value of the Canadian business. Not only would this lead to more "net benefit" reviews under the ICA (contrary to the Panel's objective), there is a strong common sense argument against counting liabilities that are not being assumed.

A related problem arises in connection with asset acquisitions. The new ICA Regulations state that the total acquisition value "is the total amount of consideration payable for the acquisition of the Canadian business, as determined in accordance with the transaction documents that are used to implement the investment." The liabilities are equal to "total liabilities, other than operating liabilities, that are assumed by the non-Canadian, as determined in accordance with the transaction documents; and cash and cash equivalents are equal to "the total cash and cash equivalents that are transferred to the non-Canadian, as determined in accordance with the transaction documents."

The ICA Regulations do not provide any guidance on how to attribute acquisition value, liabilities, and/or cash where the transaction documents do not set out what part of the purchase price, assumed liabilities, or transferred cash, are related to the assets of the Canadian business. This is relevant for companies with assets outside of Canada. For example, a non-Canadian purchaser enters into an agreement with a U.S. corporation to acquire all of its assets, which includes certain assets in Canada. The purchase price does not differentiate between those assets located in Canada and those located in the U.S. and abroad. Would the total purchase price then have to be used as the "acquisition value" for the enterprise value calculation? This would also seem to increase the scope of the ICA, which not only would undermine the Panel's recommendation, but would lead to bizarre results in situations where only a small amount of overall assets are located in Canada.

C. National Security Review Provisions

While not a direct result of the amendments to the new ICA Regulations, the notifiability analysis is increasingly being complicated by the national security review provisions. It seems that in the past year or so, the Government has started to apply the national security review provisions much more frequently.

Handicapping whether a particular deal might raise national security issues and become subject to a national security review is not always straightforward, particularly since the Government is reluctant to provide any details regarding the national security issues that they have identified.

As such, even if a transaction is merely notifiable, the purchaser and its counsel must consider the risk of triggering a national security review and decide whether it is in the best interests of the client to make the notification filing pre-closing, with a view to allowing the 45-day period during which the Government can initiate a national security review to expire prior to closing.

The identity of the purchaser and the jurisdiction of ultimate control is a key factor in the risk assessment. It appears that investors with ties to certain countries (e.g., Russia, China, Iran) are more likely to trigger a national security review. The CSIS Public Report 2013/2014 (the "CSIS Report") confirms as much.[6]

The nature of the Canadian business is another key factor in the risk assessment. The CSIS Report lists certain "key sectors" of the Canadian economy that have been of particular interest to foreign agencies, including but not limited to aerospace, biotechnology, communications, information technology, nuclear energy, oil and gas, as well as the environment.[7] Furthermore, investments in Canadian businesses that participate in the following sectors that are identified in Public Safety Canada's *2014-2017 Action Plan for Critical Infrastructure* may also increase the risk of getting bumped into a national security review:[8]

Sector	Sector-specific federal department/agency
Energy and utilities	Natural Resources Canada
Information and communication technology	Industry Canada
Finance	Finance Canada
Health	Public Health Agency of Canada
Food	Agriculture and Agri-Food Canada
Water	Environment Canada
Transportation	Transport Canada
Safety	Public Safety Canada
Government	Public Safety Canada
Manufacturing	Industry Canada Department of National Defence

[6] Canadian Security Intelligence Service, *Public Report 2013/2014*, (2014) at page 25. The report notes that a number of foreign states, "with Russia and China often cited in the press as examples, continue to gather political, economic, and military information in Canada through clandestine means."
[7] CSIS Report, at page 25.
[8] Public Safety Canada, *2014-2017 Action Plan for Critical Infrastructure*, (2014) at page 10.

II. Notifiability Analysis under the *Competition Act*

There are also changes on the horizon with respect to the *Competition Act* that would affect the notifiability analysis. The highly anticipated "price-gap" legislation was introduced in Parliament on December 9, 2014. While *Bill C-49 – An Act to Amend the Competition Act*[9] is better known for its introduction of the controversial price discrimination provisions, it also contains changes to the affiliation rules that would simplify the notifiability analysis in some cases.

The affiliation rules (sections 2-4), as they stand today, can lead to unusual results and affect the mandatory notifiability of a proposed transaction. These unusual results are described in greater detail in Omar Wakil's *2015 Annotated Competition Act*.[10] In sum, the current affiliation rules apply more narrowly to non-corporate entities than they do to corporations. This is relevant to the notifiability of a transaction because the "size of parties" threshold requires that the parties to the transaction, *together with their affiliates*, must have either assets in Canada or gross revenues from sales in, from or into Canada that exceed $400 million.

The amendments are meant to expand the concept of affiliation to a broader range of business organizations and would simplify the exercise of identifying affiliates for purposes of the notifiability analysis. This clarification of the affiliation rules is a welcomed development; however, it may not come to pass. Bill C-49 was tabled approximately nine months ago; to date, it has only received a First Reading. With the House of Commons adjourned until September 21st, and the upcoming election scheduled for October 19th, it appears as though this bill is unlikely to proceed before the end of the current legislative session. As such, it is unclear when the amendments to the affiliation rules will be adopted, if at all. ■

[9] Available here: http://www.parl.gc.ca/legisinfo/BillDetails.aspx?Language=E&Mode=1&billId=6822185&View=6
[10] Omar Wakil, *The 2015 Annotated Competition Act*, (Toronto: Carswell, 2014) at pages 5-6.

Parkland: Forging a Roadmap for Interim Relief in Contested Mergers

By Jonathan Bitran

Last spring, the Competition Bureau ("**Bureau**") filed an application challenging the proposed acquisition by Parkland Fuel Corporation ("**Parkland**") of substantially all of the assets of Pioneer Energy ("**Pioneer**") under section 92 of the *Competition Act* ("**Act**"), alleging that the acquisition would likely result in a substantial lessening of competition for the retail sale of gasoline in 14 local markets. The section 92 application will not be decided until at least 2016, unless the parties can negotiate a resolution before then.

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McCarthy Tetrault

Pending final determination of the section 92 application, the Bureau sought an injunction under section 104 of the Act ordering Parkland to hold separate, and preserve, the assets located in the 14 local markets after closing. Unprecedented in the merger context, Parkland and Pioneer challenged the Bureau's injunction application. On May 29, 2015, the Competition Tribunal ("**Tribunal**"), chaired by Justice Denis Gascon, a recently appointed former competition lawyer, released its decision, agreeing in part with the Bureau and in part with Parkland and Pioneer, by granting a hold separate order for six of the 14 markets.[1] As such, on June 25, 2015, Parkland closed the transaction, holding separate and preserving the assets in the six markets.[2]

This case raises the following interesting points, which are discussed further below. They indicate that there are opportunities for merging parties to effectively contest interim relief sought by the Bureau. For example:

- Parkland may have succeeded in its challenge of the Bureau's application for section 104 interim relief if its commitments had been more detailed, so as to allow the Tribunal to conclude that the competition concerns were addressed.

- The Tribunal confirmed that to make out irreparable harm, a required element for the granting of an injunction, the high standard of "clear and non-speculative evidence" must be met.

- Section 104 interim injunctions may become more common than section 100 interim injunctions (available when the Bureau has not had enough time to prepare a section 92 challenge), the test for the former being more onerous than for the latter, because the 2009 amendments to the Act significantly extended the time available for the Bureau to complete merger reviews.

I. Background

In a transaction that met the threshold for notification under the Act, Parkland proposed to buy 181 gas stations and 212 gasoline supply agreements in Ontario and Manitoba from Pioneer. The Bureau conducted an extensive review that lasted almost seven months, and which included the issuance of a Supplementary Information Request ("**SIR**") that focused on 21 overlapping geographic areas. Parkland and Pioneer provided the Bureau with approximately 70,000 documents in response to the SIR. After advising the Bureau of its intention to close the transaction (the parties had agreed to give the Bureau at least 15 days' notice), Parkland stated that it would divest gas stations and supply agreements in 10 local areas to address the Bureau's concerns, despite its belief that the transaction was not likely to substantially lessen competition. Nonetheless, the Bureau proceeded to file a section 92 application with respect to 14 local markets, which include the 10 areas for which Parkland had indicated it would provide remedies. In addition, the Bureau filed a section 104 application seeking an order forcing Parkland to hold separate the Pioneer assets and preserve its own assets in the 14 local markets upon closing of the transaction until the final determination of the section 92 application.

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[1] See *The Commissioner of Competition v. Parkland Industries Ltd*, 2015 Comp. Trib. 4: 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

[2] See Parkland's June 25, 2015 press release: http://www.parkland.ca/investors/news/news_post?source=http://parkland.mwnewsroom.com/press-releases/parkland-fuel-corporation-announces-the-closing-of-tsx-pki--11g045860-001&type=1

In a section 92 application, the Tribunal can make a remedial order where it determines that a merger is or is likely to substantially prevent or lessen competition. However, it can take several months to conclude proceedings, during which the alleged anticompetitive effects may manifest themselves. As such, the section 104 interim injunction is available if the typical court-mandated requirements for injunctive relief are met.

In its response to the Bureau's section 104 application, Parkland made the following commitments:

- It would complete the divestitures in the 10 local areas that it had previously advised the Bureau about, as soon as possible after closing.

- It would divest or terminate a gasoline supply agreement in a further local area.

- In all 14 local areas, pending divestiture or resolution of the section 92 challenge, as applicable, it would not increase its margin for gasoline supply and would maintain its existing pricing strategy for its gas stations.

II. The Decision

Section 104 of the Act states that an order can be issued at the Tribunal's discretion "having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." Accordingly, the Tribunal cited a three pronged test propounded by the Supreme Court.[3] All three prongs must be satisfied in order to grant an interim injunction. The steps are:

1. Is there a serious issue to be tried?

2. Will irreparable harm occur if the interim injunction is not granted?

3. Is the balance of convenience in favour of granting the interim injunction?

Serious Issue for Trial

The Tribunal explained that there is a low threshold to meet this element of the test. If it can be determined "that the underlying section 92 application is neither vexatious nor frivolous," then this element is met. Nonetheless, the Tribunal acknowledged that a cursory assessment of the merits of the case is required.

The Bureau argued that Parkland, via unilateral or coordinated conduct, would be able to exercise market power in the 14 local markets upon closing of the transaction. Parkland argued that, in light of its commitments, there was no serious issue to be tried in the underlying section 92 application for 11 of the local areas. However, the Tribunal noted that Parkland's argument implicitly acknowledged that, but for the proposed remedies, there was a serious issue in all local areas. Furthermore, the Tribunal did not find Parkland's commitments to be specific enough to be considered an appropriate remedy. The Tribunal noted that Parkland's commitments did not provide particulars that would usually be found in merger consent agreements, such as how and when the divestitures would take place, how the assets would be preserved until divestiture, what the profile of a suitable buyer would be, and whether the Bureau could approve the buyer. Had Parkland incorporated the foregoing elements into its commitments, it stands to reason that the Tribunal may have come to a different conclusion on this point. If a commitment to carry out an "effective and enforceable" remedy is made, arguably there is no serious issue for trial. On the other hand, if a remedy commitment must include many of the obligations that a typical consent agreement contains in order to be accepted as viable by the Tribunal, it may defeat the purpose of contesting an injunction.

> ***"The Tribunal did not find Parkland's commitments to be specific enough."***

Irreparable Harm

As a preliminary matter, it was uncontested that, should harm occur if an injunction were not granted, it would be irreparable by definition. Since the Tribunal cannot award damages in merger cases, any losses borne by consumers would be permanent. As such, the only focus under this prong of the test was whether any harm would result if an interim injunction was not granted.

The Tribunal considered two standards of evidence when determining whether prospective harm would occur: "high degree of probability" and "clear and non-

[3] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1111/index.do

speculative". Citing Federal Court[4] and Tribunal[5] precedent, the Tribunal found that the latter, stricter standard was appropriate.[6] However, Tribunal noted that the Bureau is assisted in meeting this evidentiary burden by the presumption it is acting in the public interest.

The Bureau's contention that harm would result from increased prices to consumers for gasoline was premised on high market shares and increased concentration in 14 markets which are "local in nature." However, Parkland submitted that underlying the Bureau's theory of harm is an assumption about geographic markets (that they are local), which the Bureau did not justify. The Tribunal was of the view that, since harmful market power is dependent on increased market shares and concentration that is, in turn, dependent on the geographic market definition, a review of the Bureau's definitions was necessary.

After reviewing the reports and testimony of the experts on both sides, the Tribunal concluded that the Bureau had proposed geographic market definitions that were not independently verified by its expert. Further, it found that Parkland's expert demonstrated that the Bureau's local markets may be too narrow. For example, the commuting and gas purchasing patterns of some residents in certain areas suggested that more distant gas stations were competitive constraints. However, Parkland's expert conceded "legitimate competition concerns" in four markets and "high concentration" levels in two other markets. Accordingly, the Tribunal found that there was "clear and non-speculative" evidence of increased market share and concentration in those six markets, which are precursors to anticompetitive irreparable harm. Since Parkland's expert presented analysis as evidence that such increases would not occur in the eight remaining markets, while the Bureau did not provide rigorous evidence, the Tribunal concluded that the evidentiary burden was not met for those local areas.

"Bureau had proposed geographic market definitions that were not independently verified."

Interestingly, in the Tribunal's view, the Bureau should have gone to greater lengths to flesh out the geographic market definition even though it did not have to be proven until the section 92 application, because it is so fundamental to making an inference of anticompetitive effects. Contrasting with section 100 applications (where the Bureau asks for more time to review), the Tribunal pointed out that, in advance of this section 104 application, the Bureau had reviewed the transaction for several months, received documents in response to a SIR and received Parkland's expert report. It had ample opportunity to prepare. Further, the Tribunal noted the 2009 amendments to the Act, which significantly increased the Bureau's time for review. This may be a hint that, given the additional time the Bureau now has to review mergers, it may be more difficult for the Bureau to succeed on section 100 applications, despite the Tribunal's expectation of significant preparation for section 104 applications.

The Tribunal found fault with Parkland's commitments at this prong of the test as well, finding its commitment to not increase margins pending a final resolution lacking. The fact that Parkland's commitments merely created a margin ceiling would not prevent harm if there would have otherwise been a price decrease.

Balance of Convenience

This is the third and final prong of the test, all of which must be satisfied in order to grant an interim injunction. Given that irreparable harm was proven in only six of the 14 local areas, the possibility of an injunction remained only for those six markets. Strongly in favour of the Bureau is the presumption that it acts in the public interest. On the other hand, the Tribunal found that the only credible harm to Parkland would be the cost of hiring hold separate managers to manage the assets in the six markets that would be subject to an order (plus a minor loss in efficiencies). The Tribunal was silent on the cost of a monitor to oversee Parkland and the hold separate managers, although monitors are commonly utilized at the discretion of the Bureau in such situations. Finally, the Tribunal noted that section 92 applications are dealt with quickly. Unsurprisingly, it concluded that

[4] See *Amnesty International Canada v. Canadian Forces*, 2008 FC 162: http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/54887/index.do and *Bayer HealthCare AG and Bayer Inc. v. Sandoz Canada Inc.*, 2007 FC 352: http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/53818/index.do

[5] See *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al*, 2008 Comp. Trib. 16: http://www.ct-tc.gc.ca/CMFiles/CT-2008-004_0070_61PVD-852008-7744.pdf

[6] Somewhat confusingly, the burden of proof always remains the balance of probabilities for civil cases, so the question is whether the evidence, based on the evidentiary standard, meets the burden of proof (i.e., is it more likely than not that the evidence of prospective harm is clear and non-speculative?).

the inconvenience to Parkland was not outweighed by the public interest.

The Order

Having found that all three prongs of the test for interim relief (serious issue for trial, irreparable harm and balance of convenience) were met for six markets, it was open to the Tribunal to issue an injunction. The Tribunal exercised its discretion to order Parkland to hold separate the Pioneer assets and preserve its own assets in those six markets, citing the need for an adequate, yet not overly intrusive or restrictive, interim order. The hold separate order essentially mimicked the terms and conditions the Bureau had sought in its application, which are commonplace in merger consent agreements.

III. Conclusion

This case is very interesting in that it contains many illuminating nuances that could be useful to merging parties in contested cases. In its section 104 application, the Bureau did not object to the closing of the transaction, but rather sought a hold separate agreement for the 14 areas where it had concerns. Parkland made commitments to address what it perceived to be the Bureau's competition concerns. The Tribunal conducted a serious evaluation of those commitments, and if they had contained more of the safeguards found in merger consent agreements, perhaps they could have been utilized to avoid an injunction. Furthermore, the Tribunal, in affirming the "clear and non-speculative" standard of evidence for irreparable harm (one of the prerequisites to granting an injunction), expected the Bureau to convincingly define the geographic markets, which are a crucial underpinning to the theory of harm. The Tribunal's expectations were bolstered by the Bureau's long review period, more common since extensions were added to the Act as part of the 2009 amendments, which allowed it to make a fulsome section 92 application. As a result, the Tribunal only provided interim relief for six of the 14 markets in question. This case signals that with thoughtful and appropriate efforts, in the right situation, merging parties may be able to limit or neutralize section 104 applications. ■

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MARK YOUR CALENDARS!

January 15, 2016 – Economics of Efficiencies "Fundamentals" Session

Economics & Law Committee brown bag

January 27, 2016 – Merger Due Diligence and Cross-Border Compliance

Mergers Committee, International Committee and ABA Ethics & Compliance Group brown bag

January 29, 2016 – Notifications 101, Part II

Young Lawyers Committee and Merger Committee brown bag

March 2, 2016 – Vertical Mergers and Monopsony

Mergers Committee brown bag

March 16, 2016 – Merger Remedies Around the World

Mergers Committee brown bag

April 5-8, 2016 – ABA Section of Antitrust Law

64th ABA Section of Antitrust Law Spring Meeting, Washington, D.C.

April 12-16, 2016 – ABA Section of International Law

ABA Section of International Law 2016 Spring Meeting, New York, N.Y.

May 5, 2016 – Mergers Roundtable and Fee Forum

Mergers Roundtable and Fee Forum, WeirFoulds LLP, Toronto

May 19, 2016 – CBA Competition Law Section

CBA 2016 Competition Law Spring Forum, Toronto

CBA Merger Roundtable

By Alexa Gendron-O'Donnell

Introductory Remarks

On May 29, 2015, the Mergers Directorate of the Competition Bureau held its annual roundtable with members of the Canadian Bar Association. In her introductory remarks, Jeanne Pratt, Senior Deputy Commissioner of the Mergers and Monopolistic Practices Branch, highlighted some of the major enforcement activities that had occurred since she had taken up her post roughly four months before. She pointed to a number of active investigations in the Monopolistic Practices Directorate into industries such as groceries, e-books, and smart phones, and noted the recent consent agreements the Mergers Directorate had entered into including in respect of the Holcim/Lafarge, BCE/Rogers/Glentel, and Kingspan/Vicwest matters. She also noted recent court decisions including the guidance provided by the Supreme Court of Canada in Tervita, the Competition Tribunal's ruling in CREA regarding the interpretation of its consent agreement, and the anticipated decision from the Tribunal regarding the contested injunction in the Parkland/Pioneer matter.

Alexa Gendron-O'Donnel
Competition Bureau

Below is a summary of some of the Bureau's remarks from that day.

Monitors and Trustees

The Bureau consistently seeks monitors in cases where there is a remedy. When this remedy involves a sale of assets, a divestiture trustee who will be responsible for effecting the sale should it extend past the initial sale period is also commonly required. It has been the Bureau's experience that one of the biggest factors in mitigating costs for the parties arising from the appointment of a monitor and/or trustee is the parties' cooperation level with these persons. Greater levels of cooperation, including timely responses to questions and information requests, can streamline the monitoring or divestiture process by allowing the monitor or trustee to focus on their primary task.

The Review of Transactions involving Failing Firm Analyses

The Competition Act explicitly recognizes the importance of failing firm considerations by listing it as a factor to which the Tribunal may have regard in determining whether or not a merger is likely to substantially prevent or lessen competition. The Bureau's Merger Enforcement Guidelines (MEGs) set out the Bureau's basic approach to failing firm analysis by delineating criteria to be assessed in reaching a conclusion as to whether a firm would be considered to be failing, including whether: (i) it is insolvent or is likely to become insolvent; (ii) it has initiated or is likely to initiate voluntary bankruptcy proceedings; or (iii) it has been, or is likely to be, petitioned into bankruptcy or receivership. The MEGs also note that the Bureau will assess alternatives to a potentially anti-competitive proposed merger including acquisition by a competitively preferable purchaser, retrenchment or restructuring, and liquidation.

Given the number of mergers the Bureau has recently reviewed in which it assessed businesses that were in financial difficulty, Ariane Jaros-Denis, a Senior Competition Law Officer, and Ryan Leenhouts, a Competition Law Officer in the Mergers Directorate, provided additional information regarding the Bureau's approach to failing firm analyses.

Specifically, the Bureau recognizes that mergers involving financially distressed businesses may well be subject to significant timing pressures and that the businesses in question may be sustaining losses and seeking to use the proposed transaction to restore their viability.

However, given that the counterfactual scenario is particularly difficult to determine, as pre-merger conditions are not necessarily a good proxy for the situation that would prevail but for the merger, the Bureau must make complex inferences and projections. The Bureau requires strong evidence from the parties and cannot rely on mere assertions that a business is failing.

The Bureau encourages parties to make their failing firm claims early and work with the review team to identify and provide additional information required to test these claims. While the Bureau's specific information requirements will vary on a case-by-case basis, parties are encouraged to provide the following types of information as quickly as possible:

- Complete financial statements for the relevant businesses;

- For the most recent fiscal years, and at the most frequent available interval, with a strong preference for objectively verified statements;

- Documents relating to the availability of credit facilities and other sources of financing, such as those showing that loans will be imminently called or that further credit is unobtainable;
- Financial analysis of the closure of the relevant businesses;
  - In a failing division case, it is particularly important to show the incremental cost savings associated with various closure scenarios;
- Detailed cost allocation methodologies;
  - Where indirect costs are allocated to the relevant business, provide the rationale for such allocations, and an indication of whether these allocations reflect incremental cost savings;
- Documents detailing transfer pricing;
  - Include evidence or submissions on how the company's internal transfer pricing compares to pricing for similar products or services in the market;
- Cash-flow forecasts and other relevant projections of key cost or revenue drivers;
- Documents detailing recent restructuring efforts;
- Evidence regarding expected proceeds from liquidation;
- Evidence that alternative purchasers were sought;
  - Include internal documents describing the process for seeking alternative purchasers, NDAs with potential purchasers, or other evidence; and
- Evidence relating to synergies expected to be achieved through the transaction.

The Bureau may also seek to determine whether any alternative purchaser of the assets could be expected to achieve sufficient synergies to return the business to financial viability.

Electronic Production

Melissa Fisher, an Associate Deputy Commissioner in the Mergers Directorate, and Steve Sansom of Competition Bureau Legal Services provided updates and additional information about electronic production. They were joined by Don Houston, a partner at McCarthy Tetrault, and Andrea Taylor from Deloitte for the panel discussion.

On April 28, 2015, the Bureau published its electronic production guidelines for use in all cases where it is receiving electronically stored information (ESI), including supplementary information requests (SIRs), section 11 orders, immunity and leniency programs, and voluntary productions. These guidelines were developed further to a joint Bar and Bureau working group on e-production and provide a standardized set of instructions to make it easier for parties to produce information and to better enable the Bureau to use the tools it has to review what was received. These guidelines are intended to be an evergreen document that will be updated as technology evolves.

The guidelines indicate how to provide ESI in one of two formats:

- Where no litigation application software is being used – the Bureau prefers this be primarily used for very small productions and/or by individuals or small firms; and
- Where litigation software is used – consistent with what the Bureau sees now, it prefers most parties to use a litigation application export; the guidelines provide detailed instructions on how the Bureau prefers that information and its relevant metadata to be produced.

The electronic production guidelines also provide instructions on how to redact privileged documents and detail how the Bureau prefers paper records to be converted to ESI, including the provision of certain bibliographic information consistent with what is required by most provincial and federal courts. Paper records are rarely produced to the Bureau.

The technical instructions in SIRs and section 11 orders have been updated to align with the guidelines.

The Bureau also continues to evaluate and adapt to technological changes related to electronic production, including the increased use of predictive coding in

Canada. The Bureau recognizes that predictive coding can be useful for large production reviews and encourages parties who wish to use it to discuss it with the Bureau and seek feedback, thereby allowing the review team to be comfortable with the effectiveness of the predictive coding methodology used in a particular case. This could include a discussion of qualitative controls, such as confidence levels, overturn rates, and random samplings of documents.

The Bureau has seen increased production volumes in response to recently issued SIRs and a decrease in the average amount of time it takes parties to comply. We continue to invest significant resources in improving the efficiency of the document review process and to consider ways to work with the parties to reduce the cost of complying with SIRs. For example:

"Bureau recognizes that predictive coding can be useful."

- The Bureau has been testing alternative indexing methods, including having the parties provide a list of search terms used to identify potentially responsive documents and those used to eliminate non-responsive ones.
- The Bureau believes pre and post-issuance dialogue continues to have significant value. Counsel and clients can identify categories of information responsive to the SIR that may not be relevant to the dispositive issues of the investigations, allowing production of these documents to potentially be deferred or foregone and reducing the overall size of the production. Technical calls and sample productions of actual documents (not dummy documents) continue to be very valuable in reducing technical issues.

Market Contacts

Lourdes DaCosta, a Senior Competition Law Officer in the Mergers Directorate, discussed the Bureau's approach to market contacts during merger reviews. She was joined by Omar Wakil, a partner at Torys, and Damien Liddle, Senior Corporate Counsel for Indigo, for the panel discussion.

Market contacts are an essential part of the Bureau's investigative process, even when parties claim there is little or no overlap. The Bureau considers it to be one of the quickest and most efficient ways to learn about the competitive dynamics in an industry, verify information provided by the merging parties such as the nature and extent of any overlap, and ultimately determine whether there are competition issues that warrant a more detailed examination. Although there are certain circumstances in which the Bureau determines that market contacts are not required, these are the exception.

As such, it is important to be able to access reliable market contact information quickly in order to expedite the review. Market contact information provided by the merging parties regarding their customers and suppliers is a helpful starting point, especially when such information is specific to product and/or geographic areas and business people are identified as the contact. Depending on the case at hand, the top twenty customers and suppliers in a principle business may provide the review team with the information it needs. However, if the review team determines the businesses or markets of interest may be more narrowly defined than a principle business, it may send out an RFI for market contact information within that principle business or market.

The Bureau recognizes the value of confidential information throughout the merger review process. Prior to speaking with market contacts and/or receiving additional information, Bureau officers will describe the protections afforded by section 29 of the Competition Act, including the limited circumstances where confidential information may be disclosed. The ability to rely on this provision of the Act has been vital to obtaining information from market contacts and must be balanced against the Bureau's desire to be transparent with merging parties when communicating the nature of any competition issue that needs to be addressed. Given the ultimate importance of obtaining information in the first place, the Bureau will err on the side of less disclosure to keep the information confidential, while relaying competition concerns to the merging parties at a more aggregated level.

Tervita

The Supreme Court of Canada (SCC)'s recent decision in the Tervita matter has generated much discussion in the antitrust world. Trevor MacKay, an Acting Assistant Deputy Commissioner in the Mergers Directorate, and Jonathan Hood of Competition Bureau Legal Services discussed the ways in which the Bureau has been considering the implications of this outcome for its merger review process. They were joined by Chris Hersh, a partner at Cassels Brock, for the panel discussion.

The SCC in Tervita confirmed that it is appropriate to assess a substantial prevention of competition by using a method of analyzing what the market would look like 'but for' the merger. With regard to the efficiencies defence set out in section 96 of the Competition Act, the SCC held that the Commissioner must quantify anti-competitive effects where possible and that section 96 includes both a quantitative and qualitative component. In particular, the words "greater than" in section 96 requires a numerical or quantitative comparison, while "offset" calls for a counterbalancing of any qualitative aspects.

The need to quantify anti-competitive effects where possible may have implications for the Bureau's information gathering process. However, it is important to note that the process of quantification is not a new priority coming out of the decision; rather, the Bureau has been focused for some time now on enhancing their ability to complete advanced economic modelling given that it is where antitrust has been trending. The Bureau's goal is to use sophisticated estimation techniques in order to yield reliable results, though it still relies on other evidence of anti-competitive effects. The Bureau recognizes that, to complete quantification, more data may be required from both merging parties and, at times, third parties; however, it will look to limit the required information where possible and appropriate.

With respect to information on efficiencies, Tervita highlights that the Bureau can be well into litigation with little to no information about the efficiencies that the respondent intends to claim. While questions on efficiencies have been a standard part of the Bureau's SIRs, parties may choose to not provide responses, leaving an information gap. While the Bureau welcomes the Bar's views on this matter, in some cases it is now seeking additional information through SIRs or section 11 orders to enable it to estimate efficiencies. In certain cases, the Bureau receives submissions about relevant efficiencies and it encourages parties to provide those submissions early enough in the review to allow it to assess them and incorporate the information into their analysis and potential enforcement decisions.

ICN Merger Working Group

Alexa Gendron-O'Donnell, the Special Advisor to the Senior Deputy Commissioner, described the Bureau's recent and upcoming work as co-chairs of the International Competition Network (ICN)'s Merger Working Group (MWG).

The Bureau has completed the first year of its three-year term as co-chair of the ICN's MWG, an informal venue for competition authorities to maintain contact and promote dialogue regarding competition issues and policies. During our term as co-chair, the Bureau has identified as its main project a renewal and update of the 2005 Merger Remedies Review Project document. As such, during the past "ICN year", the Bureau launched a series of teleseminars to allow antitrust jurisdictions from around the world to share their recent experiences and lessons learned. This year the Bureau will use this information to enter into the drafting and editing phase of the new remedies document which the Bureau hopes to share at the upcoming ICN Annual Conference in Singapore. Over the course of the year, the Bureau will also work with our MWG co-chairs from the European Commission (EC) and the French Authorité to organize the Merger Workshop hosted by the EC in Brussels in September and support the dissemination and implementation of the recently published Guide to International Enforcement Cooperation in Mergers. Throughout all MWG projects, we continue to benefit from active and engaged Canadian non-governmental agencies (NGAs), including members from the Canadian Bar, who can participate on calls or teleseminars, as part of drafting groups, or as panelists during annual conferences or workshops.

"The Bureau has completed the first year of its three-year term as co-chair of the ICN's MWG"

International Cooperation on Merger Reviews

Alexa also elaborated on the Merger Directorate's recent cooperation with certain antitrust agencies on merger reviews. The Mergers Directorate is putting the Bureau's recently published Best Practices on Cooperation in Cross-Border Merger Investigations with the U.S. Department of Justice and Federal Trade Commission into regular practice, as illustrated by the Bureau's close cooperation on recent files like LP/Ainsworth, Medtronic/Covidien, Continental/Veyance, GSK/Novartis, and Holcim/Lafarge. The depth of cooperation on a particular file is often dictated by the facts and timing of the case and the extent to which we are examining similar issues. However, cases like LP/Ainsworth and Holcim/Lafarge are important examples of significant levels of cooperation.

These cases included cooperation strategies such as regular contact between the case teams, joint market contact calls, a coordinated approach to data and econometric analysis, and close cooperation on remedy design and implementation.

The Bureau also continues to collaborate with other antitrust agencies including the European Commission on cases like GSK/Novartis and Holcim/Lafarge as well as the Mexican Federal Competition Commission on Continental/Veyance.

During global mergers with reviews by multiple antitrust agencies, it is common for the Bureau's merger review team to be contacted by or reach out to international agencies to discuss timelines, industry knowledge, or basic theories of harm. The Bureau engages in a spectrum of cooperation ranging from basic calls on timing to the level of coordination on cases like LP/Ainsworth and Holcim/Lafarge. The Bureau continues to use cooperation efforts as a way to streamline merger reviews and increase efficiency.

Bureau Officers' Trip to the Competition Commission of India

Shortly after the Bureau signed its memorandum of understanding with the Competition Commission of India (CCI) in late 2014, Brad Russell and Ian Cass, both Senior Competition Law Officers in the Mergers Directorate, met with representatives of the CCI in March for a three-day workshop at the CCI's offices in New Delhi. Brad provided an overview of the meeting and discussions.

The Bureau and CCI teams engaged in productive and interactive dialogue on their respective merger enforcement practices and challenges. The Bureau team presented on a number of topics, including: case processing and resource allocation; procedures for reviewing non-complex and complex cases; theoretical approaches to merger review; the use of experts; merger reviews in bidding markets; document review strategies; and non-notifiable reviews. Two case studies were also presented.

In particular, CCI representatives were interested in Canada's experiences and practices with respect to the streamlining of non-complex cases to allocate additional resources to complex matter and obtaining information and cooperation from third parties. Brad and Ian elaborated on the Bureau's strategies and practices for allocating resources, engaging with parties and the Competition Bar, and providing public guidelines outlining the Bureau's merger review practices and procedures.

The Bureau looks forward to continued engagement with the CCI in the context of the MOU as well as case-by-case cooperation as it arises.

A Year in Filings – Update from the MNU

Every year, the Merger Notification Unit (MNU) compiles statistics on mergers filings. Below are highlights of some statistics presented at the Annual Mergers Roundtable held on May 29, 2015 by Daniel Campagna, Chief of the MNU, and Aaron Bown, a Competition Law Officer within that group.

Figure I: Total Annual Notification & ARC Request Filings

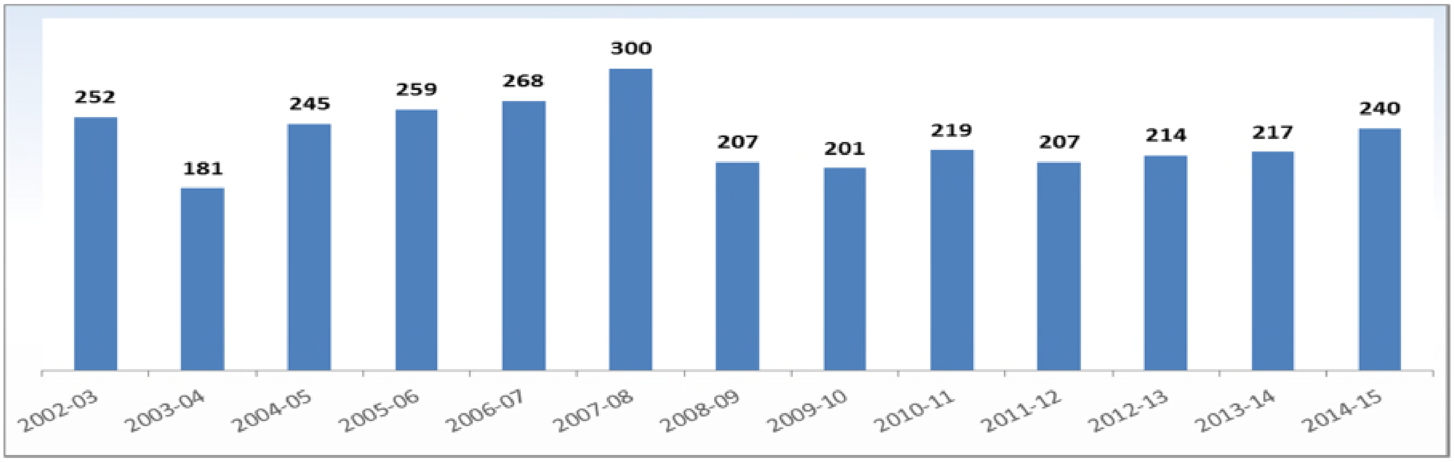


Figure I identifies the total number of filings (i.e. notifications and requests for an advance ruling certificate) for each completed fiscal year (April 1 to March 31) since 2002-03. Over the past seven fiscal years, the annual number of filings has been relatively stable.

Figure II: Average Monthly Notification & ARC Request Filings

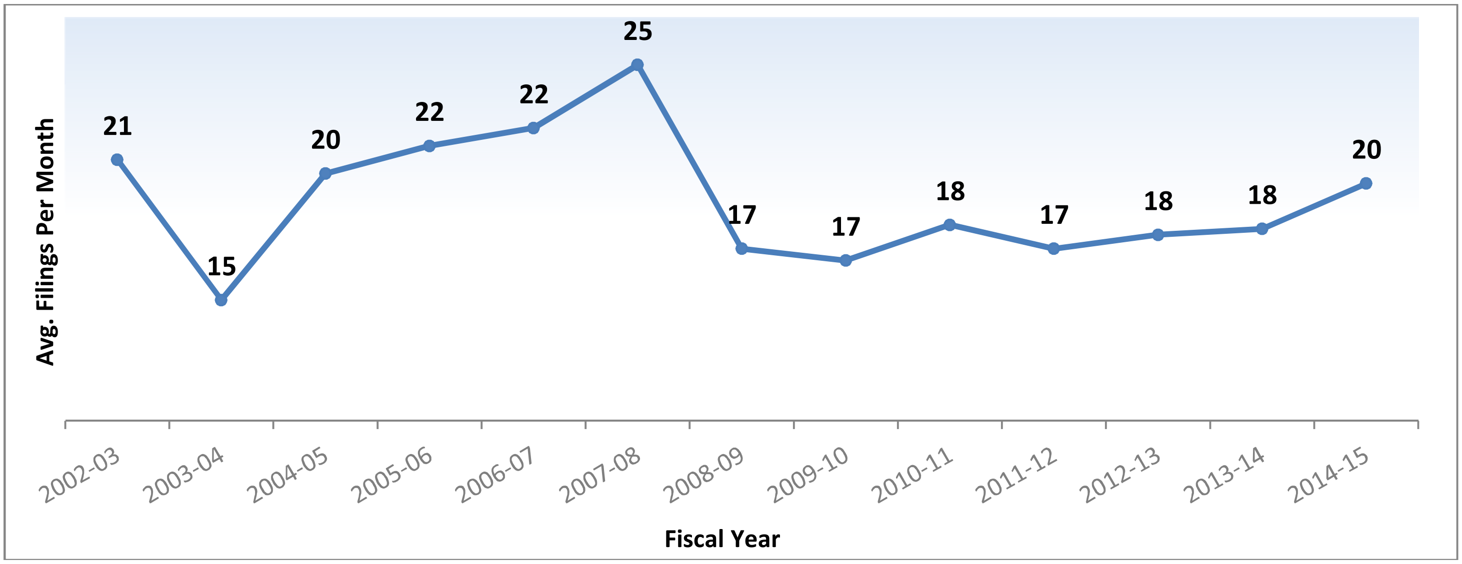


Figure II sets out the monthly average number of merger filings for each completed fiscal year since 2002-03. Over the past seven fiscal years, the annual number of filings has been relatively stable, with the 2014-15 having the highest monthly average of 20 filings per month. The monthly average for 2014-15 represented an 11.1% increase over 2013-14.

Figure III: Filings per Month (2014/15 vs. 2011-14 AVG)

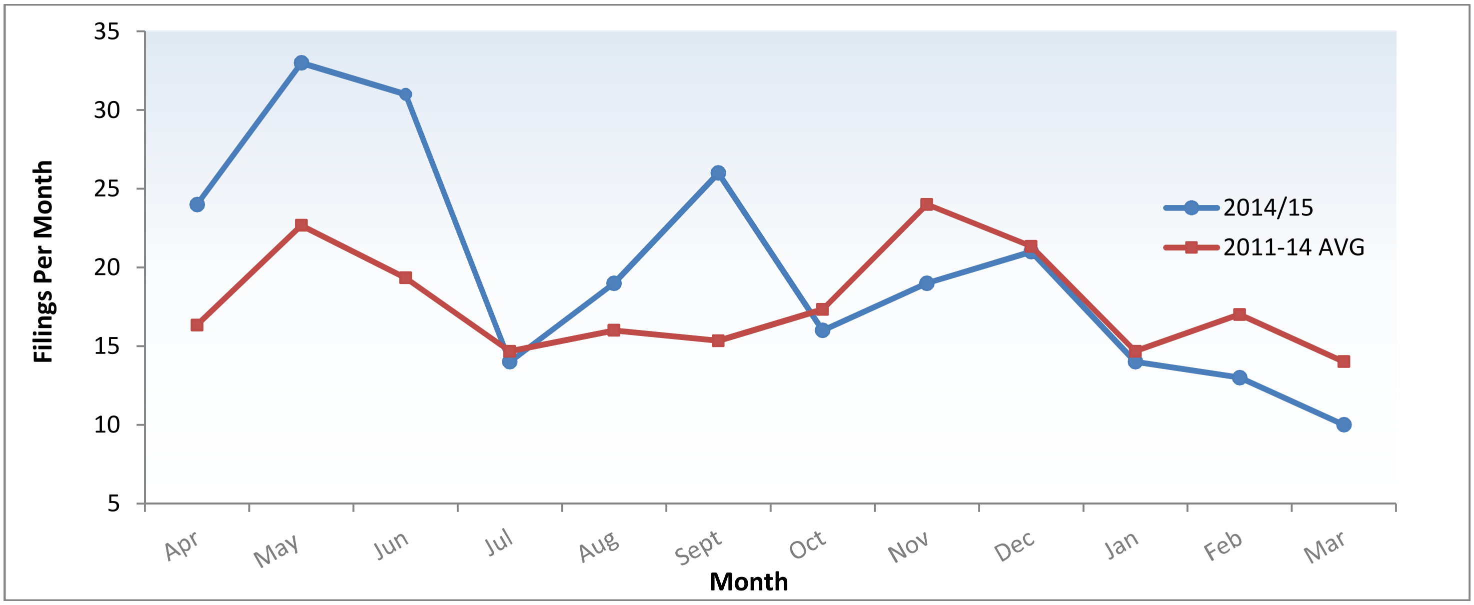
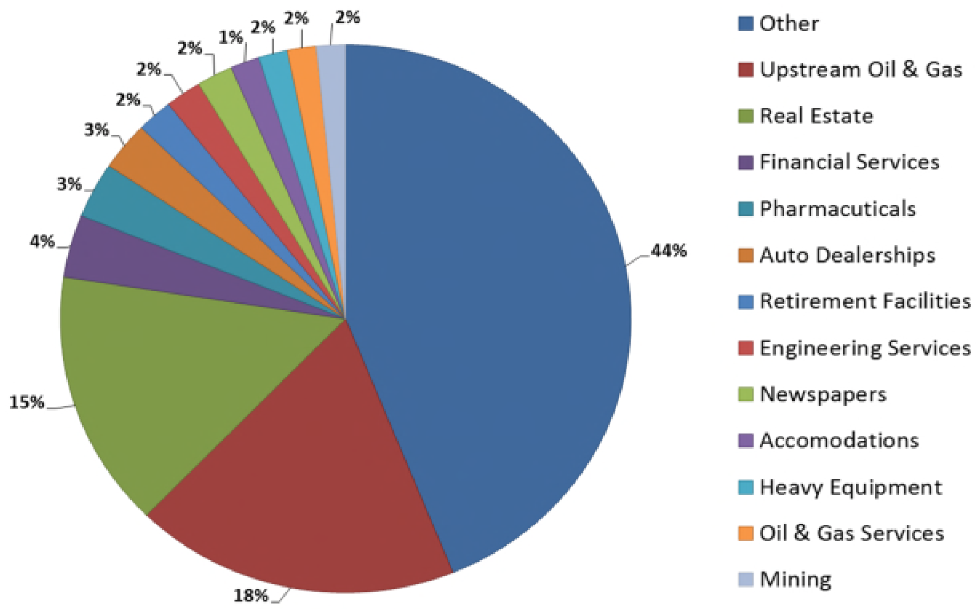


Figure III compares the average number of filings for each month during the fiscal years 2011-14 with average monthly number of filings for the fiscal year 2014-15. With the exception of September, the fluctuation in the number of filings per month during the fiscal year 2015-14 generally followed monthly fluctuations during the fiscal years 2011-14. Relative to the average number of filings during the fiscal years 2011-14, fiscal year 2014-15 saw historical trends significantly exceeded from April to June, and in September.

Figure IV: Case Load – Sector Breakdown (Completed Reviews)



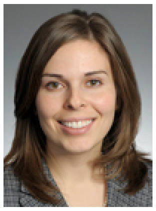
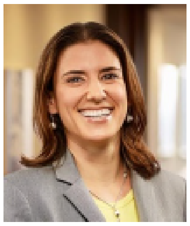
The Bureau assigns a four-digit NAICS code (North American Industry Classification System) to each merger it reviews according to the sector involved. These codes are published along with the outcome of each completed merger review in the Bureau's Monthly Report of Concluded Merger Reviews. Figure IV presents the sectors that were most commonly reviewed by the Bureau in fiscal year 2014-15. During this period, twelve sectors had more than three merger reviews - an increase from seven sectors in the previous fiscal year. Similar to fiscal year 2013-14, approximately one-third of all merger reviews were in the real estate and upstream oil & gas sectors. About 44% of the Bureau's reviews during the 2014-15 fiscal year were in sectors that had less than three filings (represented by the "Other" category in Figure IV).

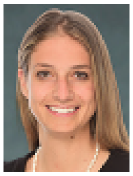
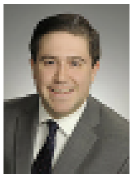
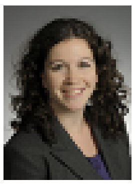
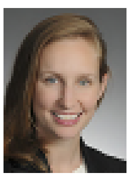
Update on Pre-Merger Notification Interpretation Guidelines

Following a request for public comment, on September 15, 2015, the Bureau published the final Pre Merger Notification Interpretation Guideline No. 16: Definition of "Goods" (Paragraph 111(a) of the Act). Comments received from the public were considered when finalizing the guideline. Guideline No. 16 is intended to clarify the interpretation of the word "goods" as used in paragraph 111(a) of the Competition Act and it may assist businesses in determining whether a proposed acquisition of loans, mortgages or receivables must be notified to the Bureau. The guideline can be accessed on the Bureau's website at the following webpage: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03985.html.

MATCH THE LAWYER

So you think you're well connected in the competition world? Sure, we all know the hotshots who are Lexpert ranked every year, but can you identify the newbies who do the actual work late at night? Let's see if you can match up the names, faces and firms below, all relatively new calls who are busy measuring the size of your office for when they end up leading your competition groups in a few years. We got you started with one newbie – see if you can do the rest.

	Leah Noble	Davies
	Rebecca Moskowitz	Bennett Jones
	David Dueck	Blakes
	Jaime Auron	Competition Bureau
	Badar Yasin	Tory LLP
	Kristen Holman	Osler
	John Pecman	Blakes

	Gina Demczuk	Blakes
	William Wu	Stikeman Elliott
	Kayla Theeuwen	Torys LLP
	Peter Flynn	Blakes
	Katrina Zoricic	WeirFoulds LLP
	Joshua Chad	Stikeman Elliott
	Julia Potter	Blakes
	Marina Chernenko	Stikeman Elliott
	Kate McNeece	McMillan