SSNIPets

BI ANNUAL MERGERS COMMITTEE NEWSLETTER

CBA NATIONAL COMPETITION LAW SECTION

Winter 2018 edition

From the Editor's Desk:

There's no better way to kick the winter blahs than to warm up to a fresh issue of SSNIPets! A big thank you to all of our contributors, and a reminder to our readers that we are always keen to receive articles for potential publication in SSNIPets. Please feel free to contact me or any of the Mergers Committee Executive with ideas and submissions. Happy reading!

Charles Tingley, Chair, Mergers Committee

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Airline Joint Ventures: Bill C-49 is on the Runway… but is it Ready for Take-Off?

By Jaime Auron & Ashley Taborda

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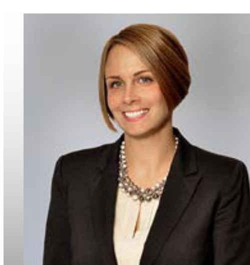
Bill C-49, the *Transportation Modernization Act*, was introduced in May 2017, progressed through the House of Commons, and has now been referred to the Standing Senate Committee on Transport and Communications. Bill C-49 is part of a broader set of legislative measures designed to support the implementation of Transportation 2030, the current federal government's strategic plan for the future of Canadian transportation.

If passed as proposed, Bill C-49 will impact air transportation in several significant ways, most notably by: (i) enhancing air passenger rights; (ii) relaxing foreign ownership limits from 25% to 49%; and (iii) establishing a "streamlined and predictable" process for the authorization of airline joint ventures.

Bill C-49's airline joint venture provisions, which are the focus of this article, create an antitrust immunity regime. Joint ventures approved under this regime will be permitted to operate even where such operations would otherwise violate Canadian competition law, on the basis that these competition concerns are outweighed by broader public interest considerations.



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As currently drafted, the proposed regime may be of limited consequence, as pre-existing transactions/joint ventures and proposed transactions/joint ventures that are subject to mandatory notification under s. 114(1) of the *Competition Act* (the "**Act**") are excluded from Bill C-49's scope (i.e., are not reviewable under this regime). Nevertheless, these provisions represent a significant departure from current practice and are therefore worthy of further examination.

A. The Establishment of an Antitrust Immunity Regime

Despite the novelty of Bill C-49, the concept of antitrust immunity in the airline industry is nothing new; various jurisdictions have adopted antitrust immunity regimes, including the United States ("**U.S.**"), the European Union, Japan, Singapore, and Korea. In Canada, despite not having a formal antitrust immunity regime, the Minister of Transportation (the "**Minister**") has granted ad hoc immunity on at least one occasion. In 1999, the Minister exercised his powers under s. 47 of the *Canada Transportation Act* ("**CTA**") to temporarily suspend application of the Act in relation to the Air Canada/Canadian Airlines merger. This precluded the Competition Bureau (the "**Bureau**") from reviewing the transaction, notwithstanding that it was a merger to monopoly.

Antitrust immunity for airlines exists because the regulatory review of airline joint ventures invariably involves a trade-off: regulators either strictly uphold competition laws (in which case many airline joint ventures would likely be prohibited); or regulators sacrifice some degree of competition to allow the overall public benefits of a transaction or arrangement to be realized. In the U.S., these broader public benefits typically include expanded networks, enhanced timetables, lower pricing due to the elimination of double marginalization, efficiencies, and improved consumer benefits, such as through combined frequent flyer programs. Antitrust immunity also functions as a foreign policy tool, serving as a *quid pro quo* for liberal open skies agreements.[1]

The competition—public benefits trade-off exists primarily because the airline industry is of significant importance to a national economy, such that well-designed airline networks are critical public goods. Accordingly, over 70% of the world's top fifty airlines by brand value have become members in one of three major airline alliances: Star Alliance, Oneworld, and Skyteam. These alliances were born of necessity, with an objective of creating a seamless global network and combatting razor thin profit margins, all in a commercial environment where cross-border consolidation is impeded by significant regulatory hurdles. Indeed, despite the international nature of their operations, airlines are almost always subject to restrictive foreign ownership provisions, which limit their opportunities to create efficiencies and access foreign capital.[2]

On the other hand, the airline industry is argued to exhibit certain characteristics that may raise potential competition concerns. For example, the hub-and-spoke model, a model employed by most major airlines, may confer market power upon airlines using it, particularly in relation to non-stop routes to and from their hubs. New entrants typically

1 Open skies agreements are negotiated between states and typically lift most, but not all, air traffic restrictions.

2 According to the airline "nationality rule," both substantial ownership and effective control (usually interpreted to mean majority control) must typically be vested in nationals of an airline's state of registration. The foreign ownership restrictions imposed by this rule are enforced by a "double-bolted locking mechanism," as the restrictions feature in both internal laws *and* as a provision in even the most liberal air services agreements (the primarily bilateral agreements between states that regulate the provision of air traffic rights). See generally Brian F Havel & Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (New York: Cambridge University Press, 2014).

experience difficulties in eroding this market power, unless their services are sufficiently differentiated or they have substantially lower operating costs. A further competitively ambiguous feature of the airline industry is the potential for price transparency to facilitate co-operation, as airline fares are posted on computer reservation systems, allowing airlines to communicate prices and price intentions with relative ease. A final potentially anti-competitive feature is that of multi-market contact, which may facilitate collusion.[3]

In Canada, the Bureau has brought applications against airlines under the Act's abuse of dominance provisions, merger provisions, and competitor collaboration provisions, in addition to investigating and assisting in the prosecution of criminal price-fixing conspiracies.[4]

B. The Mechanics of Bill C-49

Defining Scope

Importantly, Bill C-49 does not displace the current merger review regime applicable to transportation undertakings, which is governed jointly by the Act and ss. 53.1-53.3 of the CTA.

Rather, Bill C-49 establishes a voluntary Ministerial Review process applicable only to joint ventures between airlines that fall within its scope.

As currently drafted, s. 53.71 of Bill C-49 permits any person proposing to enter into an "agreement or arrangement" to voluntarily notify the Minister of that agreement or arrangement (and send a copy of such notice to the Commissioner of Competition (the "**Commissioner**"). For the purposes of s. 53.7, "agreement or arrangement" is defined as:

> an agreement or arrangement other than a transaction referred to in subsection 53.1(1), involving two or more transportation undertakings providing air services, to, from or within Canada, to coordinate on any aspect of the operation or marketing of such services, including prices, routes, schedules, capacity or ancillary services and to share costs or revenues or other resources or benefits.

Proposed vs. Existing Arrangements

As indicated above, this process notably applies only to *proposed* agreements or arrangements and not to pre-existing ones. This significantly limits the scope of the regime and, according to the recent submission of the Competition Law Section of the Canadian Bar Association on the merits of Bill C-49, "is a significant omission that should be rectified." The Competition Law Section recommends that s. 53.71(1) be extended to "every person who has entered or proposes to enter into an arrangement."

Proposed Coordination Associated with Mergers and Acquisitions

In addition, the authorization process is not available for transactions that are subject to review under s. 53.1(1) of the CTA (i.e., transportation undertaking mergers that are subject to mandatory pre-merger notification under Part IX of the Act). The Competition Law Section's position on the appropriateness of this exclusion depends on how "arrangement" in s. 53.71(1) of Bill C-49 is interpreted. In the context of a merger transaction, an "arrangement… to coordinate on any aspect of the operation or marketing…" may be interpreted as referring either to a merger agreement by itself (*i.e.*, the implicit coordination that comes from ceasing to be independent economic actors) or only to the

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[3] See "Airline Alliances and Mergers" (2000) 2:2 OECD Journal of Competition Law & Policy 127 at 130-135.

[4] Competition Bureau, "Competition Bureau Submission to the OECD: Competition Committee Roundtable on Airline Competition" (16 June 2014) at para. 1.3, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03746.html>.

explicit coordination provisions that may be found in a merger agreement.

If "arrangement" is interpreted in its broadest sense to encompass the merger by itself (i.e., without explicit coordination provisions), the Competition Law Section expressed appreciation as to why transactions subject to mandatory CTA pre-merger review might not qualify for the immunity process proposed in Bill C-49. On this interpretation, the Competition Law Section supports making the voluntary immunity process available to non-notifiable merger transactions involving two airlines, even where coordination is not explicitly stated, as both the Minister and Bureau would have the opportunity to consider whether the transaction raises any competition or public interest concerns.

On the other hand, if "arrangement" is interpreted more narrowly, as applying only to explicit coordination provisions of a merger agreement, the Competition Law Section supports the availability of the voluntary review process to cover the coordination provisions associated with any airline merger transaction, whether or not such a transaction is also notifiable and subject to review by the Minister and Governor in Council under s. 53.1(1) of the CTA. This is because there would be no "principled reason" for why transactions subject to mandatory CTA pre-merger review could not also qualify for immunity from certain aspects of the Act under the voluntary airline arrangement review provisions.

Scope of Immunity

Bill C-49's proposed amendments to the Act provide that Ministerial approval following a two-stage review (described below) would exempt agreements or arrangements from the application of various sections of the Act, including ss. 45 (conspiracies, agreements or arrangements between competitors), 47 (bid-rigging), 90.1 (agreements or arrangements that prevent or lessen competition substantially), and 91 (mergers). According to the Competition Law Section, it is unclear why the contemplated protections do not extend to other civil reviewable practices provisions, such as ss. 76 (price maintenance) and 79 (abuse of dominance).

The Proposed Authorization Procedure

The proposed procedure has two stages, both of which are set out in s. 53.7. The first involves a preliminary review to determine whether an arrangement raises public interest considerations; the second involves a more in-depth review, which requires input from both the Minister and the Commissioner.

When parties to an airline joint venture elect to undergo voluntary ministerial review pursuant to Bill C-49, notice must be given to both the Minister and the Commissioner and must conform to prescribed guidelines (which are yet to be drafted). For the first stage of review, the Minister has 45 days to inform the parties of his or her opinion as to whether the proposed arrangement raises "significant considerations with respect to the public interest."

If public interest considerations do not arise, then ss. 53.72 to 53.79 do not apply. For these arrangements, although there is no further review under the CTA, the exemptions from the Act that accompany a final authorization decision under s. 53.78(8) are unavailable. The Competition Law Section asserts that this should be changed; that arrangements receiving positive determinations at the end of the first stage of review should be afforded the same protections as a final determination, vis-à-vis the Act.

If public interest considerations are engaged, the arrangement proceeds to a second stage of review under s. 53.73 and is prohibited from being implemented without the Minister's authorization. For these arrangements, parties may have to wait up to 285 days for a final decision (or longer, if the Minister unilaterally extends the timelines under s. 53.71(1)).The second stage begins with 150 days for preliminary review, during which the Minister must communicate any concerns to the parties. Concurrent with that period, the Commissioner has 120 days to deliver a report to the Minister. Once communicated, the parties have 30 days to address these concerns in writing before the Minister reaches a preliminary decision. Within 45 days of receiving the parties' response, and after consulting with the Commissioner, the Minister must provide his or her preliminary decision.

Following the preliminary decision, the parties are given 30 days to address remaining concerns, after which the Minister has 30 days to render a final decision. If satisfied that the proposed arrangement is in the public interest, the Minister may authorize it and may specify any appropriate terms or conditions in relation to the public interest or competition that the Minister considers appropriate. The Minister's final report is not required to be published.

During Committee meetings, the decision-making role given to the Minister under Bill C-49 has been a notable point of contention. For example, in its September 14, 2017 submissions, Air Transat argued that the Minister's role politicizes the process and allows the Minister to make a decision without meaningful or transparent input from the Commissioner (despite the Commissioner's reporting function under the Bill).

Air Transat also expressed concerns about the "ubiquitous public interest standard," which it argued was "insufficient to justify the pre-empting of critical competition law oversight to potentially anti-competitive agreements between competitors."

The Risks of Using the Proposed Regime

There are noteworthy risks involved for participants entering the proposed review process regardless of whether the transaction is denied or approved. If denied (unless appropriately withdrawn prior to a final determination), despite being a voluntary process, the parties are prohibited from implementing the agreement or arrangement without Ministerial approval. Contravention of this section may result in a prison term of five years and a fine of up to $10 million, or both. The Competition Law Section has argued that this prohibition and its associated penalties are unreasonable given the voluntary nature of the process, particularly as the Act remains an effective enforcement mechanism. Instead, the Competition Law Section argues that parties should simply not be eligible for the exemption.

There also remains some ongoing risk for approved arrangements which, after only two years, are subject to discretionary re-evaluation by the Minister, initiated by a notification of concerns to the parties. According to the Competition Law Section, which sensibly recommends increasing this period to no less than five years, this two-year period "significantly reduce[s] the utility of seeking and obtaining such authorization."

C. Final Thoughts

As the Competition Law Section notes, Bill C-49's airline joint venture provisions represent an "opportunity to align Canadian competition and transportation policy with the U.S." and would enhance flexibility for airline industry participants who wish to collaborate. However, it is unclear whether Bill C-49 will bring about the public interest benefits anticipated by the legislature.

Indeed, even in the U.S., an arguably more competitive airline environment than Canada's, data collected by the U.S. Department of Justice between 2005-2010 suggest that airline alliances do not necessarily result in the promised consumer benefits and efficiencies.

The competition—public benefits trade-off discussed above is in part created by the airline industry's regulatory hurdles precluding consolidation. To compete in such an environment, airlines have been forced to join alliances and form joint ventures, as cross-border mergers are in many cases simply out of reach. For airlines to effectively compete, either these barriers to merging must be removed, or airlines must participate in alliances and/or joint ventures.

Although Bill C-49 seeks to facilitate the latter, it is unclear whether it is the best approach. Interestingly, in the Competition Bureau's 2015 submission to the CTA, the Bureau did not recommend establishing an antitrust immunity regime. Rather, the Bureau recommended reducing, or even eliminating, foreign ownership restrictions, even beyond the 49% limit proposed by Bill C-49. The Bureau further argued that Canada should allow wholly foreign-owned carriers to operate domestically (as is done in Australia) and expressed its support for cabotage,[5] a practice allowed by only a handful of countries around the globe.

Since airline joint ventures are plagued by anti-competitive concerns, eliminating or reducing the need for airline joint ventures, such as by adopting the Bureau's recommended measures, may be the better approach. Nevertheless, it is Bill C-49 that has been tabled, such that we are left with facilitation of collaboration rather than elimination of barriers. It remains to be seen whether the proposed approach, as may be amended following public consultation, is the path to unlocking significant public benefits, the "long-term threat to healthy competition" that Air Transat fears, or neither if the regime goes unused.

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5 Cabotage refers to an airline’s right to operate domestic flights within another country’s borders, allowing international flights, for example, to continue onwards to a second domestic destination.

A Lawyer – friendly Screening Trick for Mergers

By Brandon Schaufele

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Upward pricing pressure (UPP) has become a core component of merger analysis. UPP is a screening tool, or diagnostic test, on prospective anti-competitive effects arising from the merger of firms selling differentiated products. UPP is a mode1 that summarizes the idea that combining firms creates opportunity costs for those companies. These opportunity costs increase the pressure on the combined firm to unilaterally raise prices, potentially leading to anti-competitive effects. [1] UPP has become so central to merger analysis that it is formally incorporated into the US's Horizontal Merger Guidelines. The Canadian Competition Bureau (the Bureau), while not being explicit, adopted a version of the UPP diagnostic test its 2011 Merger Enforcement Guidelines (MEGs).[2]

UPP is a wonderful concept, especially as a screen. Screens act as a "first-look" analysis of prospective mergers. In fact, one way to think about UPP is as a resource allocation tool for the Bureau: it is a simple test that separates deals into those requiring additional scrutiny – mergers for which there are anti-competitive concerns – from low-risk mergers. What's more, UPP is useful for lawyers, precisely because it is applied by the Bureau and, therefore, offers insight into Bureau decision-making.

The Bureau doesn't use UPP in every case, but its advantages are obvious. First, it is simple. And given relevant parameters, it is fast to calculate. Simplicity and speed lend themselves to elegance and practicality. More importantly, UPP presents a key advantage over many alternative merger evaluation methods: UPP strikes at the fundamental tension in the economics of mergers, and does so in a way that previous methods, such as calculating market shares or concentration statistics, overlook. Understanding this economic tension is important to understanding UPP.

Mergers involve opposing forces. First, they may be anti-competitive. Merging firms, especially parties selling differentiated products, may obtain sufficient market power to *unilaterally* increase prices. As separate firms, increasing prices leads to lost sales. Some of these sales flow to rivals. As a combined firm however, a portion of these lost sales are recaptured, hence firms have this unilateral incentive to increase prices. In fact, it is profitable for the post-merger firm to charge higher prices irrespective of actions taken by its remaining rivals. Higher prices harm competition and consumers. This is the essence of section 92 of the *Act*. The Commissioner should challenge mergers if a "merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially."

But there is recompense for these anti-competitive effects. Combining two firms can facilitate economies of scale or scope and reduce costs of production. Lower production costs yield increased profits and may even lead to lower prices. Section 96 of the *Act* recognizes this, acknowledging that mergers may bring efficiencies that "are greater than and offset" the anti-competitive effects.

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1 Miller, N.H, M. Remer, C. Ryan and G. Sheu, 2017. "Upward pricing pressure as a predictor of merger price effects." International Journal of Industrial Organization, 52: 216-247.

2 Unlike in the US, the MEGs do not specifically refer to UPP; they do, however, allude to concepts that correspond to the same underlying idea. Moreover, subsequent statements from the Bureau explicitly invoke UPP.

UPP balances these economic forces by comparing anti-competitive pressures to merger-specific efficiencies in a straightforward test. Most competition lawyers appreciate the tension in sections 92 and 96, but I doubt many want to devote time to building a large merger simulation model, to calculate the relative magnitudes of anti-competitive pricing effects versus efficiencies. This is why simple rules-of-thumb such as UPP exist. UPP ballparks the potential scope of a section 96 defense.

Unfortunately, something is often sacrificed when complex concepts are reduced to simple tests. When it comes to UPP, there are two relevant questions. First, is UPP accurate or is too much lost when mergers are reduced to a one-line calculation? This is a first-order question. Screens that are wrong more frequently than they are right inflict more harm than good. Second and perhaps a more important question from a competition lawyer's perspective is: how easy is UPP to calculate? Can lawyers do it or are economists required for even the baseline calculations? A rule-of-thumb that is not lawyer-friendly quickly loses much of its usefulness.

The answer to the first question is: UPP is not perfect, but it appears to work quite well. For example, a recent study examined the merits of UPP vis-à-vis a full-blown merger simulation model.[3] Focusing on US airline routes, the study found that UPP predicted price effects that were within 10% of the true price effect in 75% of scenarios. Moreover, UPP got the direction of price change correct in more than 90% of the cases. As a first-look diagnostic, this is a solid record. Not perfect. But respectable, especially for a resource allocation tool.[4]

The second question is more challenging. Much is made of the ease with which UPP can be calculated and applied. Unfortunately, at least from a lawyer's perspective, particularly one who seeks to provide timely advice to their client, the user-friendliness of UPP appears overstated. Let me explain.

Mathematically, UPP is:

$$UPP_1 = M_2 D_{21} - e_1$$

This formula requires three numbers. First, there is e1, the purported efficiencies from the merger. Following the Tervita decision, the importance of efficiencies and section 96 have only increased. Tervita placed efficiency analysis squarely in the centre of Canadian merger analysis and there are few signs that this trend will change.

Initial estimates of efficiencies are usually provided by the parties – or, more accurately, by their bankers. Granted these early estimates may not be merger-specific and likely need refinement before complying with jurisprudence. Yet, as a first-look screen, these values work. Ideally, efficiencies represent variable or marginal cost efficiencies at the product level, but Ralph Winter's article in the *Canadian Competition Law Review* uses another proxy.[5] He uses efficiencies as a percentage of revenue, a value that should be readily available.

3 Cheung, Lydia, 2016. "An Empirical Comparison between the Upward Pricing Pressure Test and Merger Simulation in Differentiated Product Markets." *Journal of Competition Law and Economics*, 1-34.

4 The previously mentioned Miller et al. (2017) article is another paper looking at the accuracy of UPP. It finds that, under reasonably general conditions, UPP is accurate at predicting price effects, equivalent to a mis-specified merger simulation.

5 Winter, Ralph A., 2015. "Tervita and the Efficiency Defence in Canadian Merger Law." Canadian Competition Law Review, 28(2): 133-159.

The next input into UPP is the gross margin of the merging (new) product. This is represented by M_2. To a reasonable approximation, gross margins can be gleaned from accounting statements. These accounting margins aren't precise, but remember the purpose of screening tests. They guide Bureau decision-making and signal whether additional resources are needed to investigate the proposed merger. Approximations are okay. Even the most economically-adverse lawyers should be comfortable with the efficiencies and gross margin components of the UPP test.

The final value in the UPP formula is the diversion ratio, D_{21}. The diversion ratio is the quantity-weighted ratio of the cross-price elasticity of demand to the own-price elasticity of demand. …

Huh? Slow down. It is at this point that UPP goes from an intuitive lawyer-friendly test to one where specialized knowledge is needed. Efficiencies and gross margins are easy to understand and obtain. Price elasticities less so.

Diversion ratios require two price elasticities of demand, parameters that must be econometrically estimated. UPP was supposed to be easy. Last I checked, most Canadian law schools avoided allocating time to econometric methods. Given the diversion ratio is needed to calculate UPP, how then are lawyers expected to apply this test in a straightforward and timely manner?

Price elasticities of demand are not what many would consider lawyer-friendly, especially if the objective of the screening test is to impart a rough idea of whether a specific merger will invite Bureau scrutiny.

This begs the question. If the UPP is not lawyer-friendly, does some alternative back-of-the-envelope rule-of-thumb exist? Well, it turns out there is a lawyer-friendly screening "trick" for merger analysis. I'll refer to this trick as the P-max rule.[6]

The P-max rule strips UPP to its essentials. It ignores gross margins and price elasticities and concentrates on a more intuitive parameter: the increase in the *maximum price* that a merged firm can charge for its product or service. A maximum price is the price at which the firm's demand would be so small that it would exit the market. The P-max rule ignores the price that the combined firm would actually charge; instead, it asks: by merging, how much could the post-merger firm increase its maximum price before being forced out of the market? Switching from the actual price effects to maximum prices necessitates a few slights-of-hand. But these slights-of-hand have an advantage. Maximum prices are easy to think about. For me at least, it is more natural to speculate about potential increases in maximum prices than it is to think through firms' interdependent profit-maximizing first-order conditions.

The P-max rule compares the change in a firm's maximum price to the efficiencies per unit sold. Mathematically, the P-max rule looks like this:

$$\Delta P_{max} - e_1 \geq 0.$$

6 The P-max rule is derived from another rule-of-thumb on optimal price setting under demand uncertainty. Simply, the optimal price setting rule states that if a firm has limited information on its demand, it should assume a linear function and optimize accordingly. Those interested in learning more can consult: Shy, Oz, 2008. How to Price: A Guide to Pricing Techniques and Yield Management, Cambridge University Press, or Cohen, Maxime C., Georgia Perakis and Robert S. Pindyk, October 2015. "Pricing with Limited Knowledge of Demand." NBER Working Paper No. 21679. For Canadian merger policy, this particular P-max rule directly riffs off of Winter's test in his CCLR article by incorporating a minimal form of firm optimization with marginal cost efficiencies.

There are only two parts to the P-max rule. First, as with UPP, there are the merger-specific efficiencies, e_1. There's nothing new here. Second, there is the ΔP_{max} term. This is the increase in the maximum price that a firm could set as a result of the merger. If this formula, the P-max rule, is greater than zero, the change in maximum price is greater than the merger-specific efficiencies and the deal may attract Bureau attention due to its anti-competitive effects. Alternatively, if efficiencies are greater than the prospective increase in maximum prices, it is likely that efficiencies offset the anti-competitive effects.

Consider a silly example of a small town with only two entertainment options: a movie theatre and a bowling alley. As independent businesses, say, the bowling alley can charge a maximum price of $20 per evening before losing too many customers. That is, at $21, everyone either goes to the movies or stays home and the bowling alley makes no sales. Remember $20 is not the bowling alley's profit maximizing price. It is merely the price where there are too few sales to continue operating. Now assume the bowling alley merges with the movie theatre and that there are merger-specific efficiencies of $3 per sale. The merger is likely to increase the maximum price that the bowling alley is able to charge, partially because it will recapture some foregone profit via the movie theatre. Assume that now it is possible to set a maximum price of $25 per evening of bowling and spread its fixed costs over a larger base. Even after the merger however, any price above $25 and the bowling alley shuts down. ΔP_{max} in this case equals $5. More importantly, the merger-specific efficiencies are less than $5, so, according to the P-max rule, this deal warrants further study on grounds that it may be anti-competitive.

The beauty of the P-max rule is that it is lawyer-friendly. Even the most economically disinclined can ballpark maximum prices.[7] Given its sheer simplicity, one would assume a substantial loss in accuracy compared with the UPP test. In fact, this is not the case. The P-max rule is remarkably successful at predicting firm's optimal pricing decisions. Recently, three MIT economists published a paper applying a variant of the P-max rule to 100,000 simulated demand scenarios.[8] They found that this simple rule-of-thumb was within 13% of a firm's optimal price four times out of five. Essentially, P-max is only slightly less accurate than the UPP. That's pretty good, particularly for back-of-the-envelope screening trick that allows lawyers to avoid being forced to talk to economists.

7 A good tactic for appraising maximum prices is to consider the prices of comparable products with similar characteristics. A slightly less robust alternative is to think about the percent increase in market size for a particular product. This percent increase in market size can then be substituted in for ΔP_{max} and compared with Winter's proxy for efficiencies (i.e., synergies as a percent of revenues).

8 See Cohen et al. (2015).

Competition Bureau Summary of CBA Mergers Roundtable 2017

Manager's Report

Jeanne Pratt, Ann Wallwork and Matthew Boswell opened the roundtable with some advice for counsel on merger files.

- Certain competition submissions – made both in writing and in meetings – do not appear to be informed by the evidence the Bureau receives from counsel. This can slow down the review, since the team then needs to take additional steps to verify the veracity of the submissions. Reviews can be faster and more efficient if submissions are better aligned with the evidence the Bureau receives, both from the parties and third parties.

- The Bureau is continuing to issue information notices on certain mergers, inviting market participants to communicate their views to the Bureau. This practice is most common with mergers involving consumer goods, and can be useful where there are multiple local markets. The Bureau wants to ensure that we are hearing from a wide range of customers, including those who will be most significantly impacted.

- There have been several files over the past few years where the merging parties have proposed a remedy and/or buyer at a very early stage in the review. There have also been files where the fix-it-first proposal involved a proposed subsequent divestiture to another potential buyer, theoretically to resolve an as yet unidentified SLC. A proposed fix-it-first buyer can be of assistance once the market has been defined and the Bureau understands the nature of the SLC – but that is obviously later in the review. In cases where a subsequent divestiture to a third player is proposed at an early stage, our experience is that this does not save time or streamline the review – it can be quite the opposite. We would not recommend to the Commissioner that he enter a Consent Agreement involving a potentially anti-competitive remedy where assets are sold to a third player without both transactions being reviewed separately to determine where the problematic areas lie. In addition, the Commissioner must determine the SLC before entering a Consent Agreement. Therefore, we would recommend that the initial key focus be on the substantive aspects of the case, and that meaningful remedy discussions be held once the Bureau concludes on SLC.

- With respect to the negotiating of Consent Agreements, counsel should assume that the Bureau will use the Consent Agreement template language unless parties can demonstrate a very good reason for a deviation.

- Parties negotiating Consent Agreements frequently wish to include some form of back office support for a period of time. While recognising that acquirors of divested assets may find some short-term assistance helpful, the Bureau must also consider whether this will impact the longer term effectiveness of the remedy due to issues arising from ongoing relationships and access to confidential information. The Bureau will assess questions such as whether such support is necessary in order to keep the assets viable pending divestiture, the roles of the clean team post-divestiture, and the length of time that the support will be in place. Particular attention will be given to the roles of employees recommended by the parties for the clean team and, for example, the degree to which they are decision makers as opposed to providing support services. We would be interested in hearing about the experiences of acquirors of divested assets.

Mergers Notification Unit Update
(Mark Magro, Daniela Ivascanu)

A Year in Filings – Update from the MNU

Every year, the MNU compiles statistics on mergers filings. Below are highlights of some statistics presented at the Annual Mergers Roundtable held on May 26, 2017.

Figure I: Total Annual Notification & ARC Request Filings

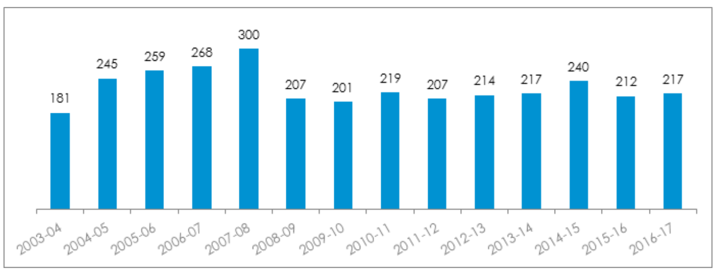


Figure I identifies the total number of filings (i.e. notifications and requests for an advance ruling certificate) for each completed fiscal year (April 1 to March 31) since 2003-04. Over the past five fiscal years, the annual number of filings has been relatively stable, with the exception of 2014-15, which had 240 filings. The total number of filings in 2016-17 represented a 2.4% increase over 2015-16.

Figure II: Average Monthly Notification & ARC Request Filings

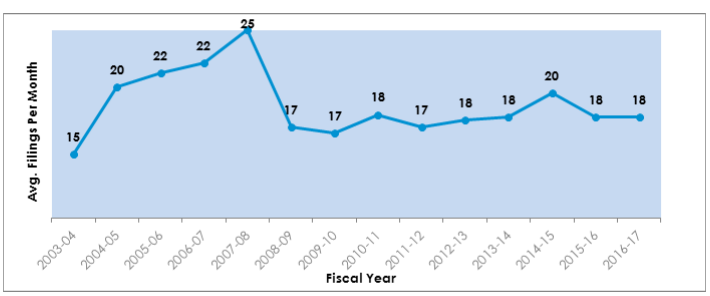


Figure II sets out the monthly average number of merger filings for each completed fiscal year since 2003-04. Over the past nine fiscal years, the annual number of filings has been relatively stable, with 2014-15 having the highest monthly average of 20 filings per month. The monthly average for 2016-17 was the same as the average for 2015-16.

Figure III: Filings Per Month (2016/17 vs. 2012-16 AVG)

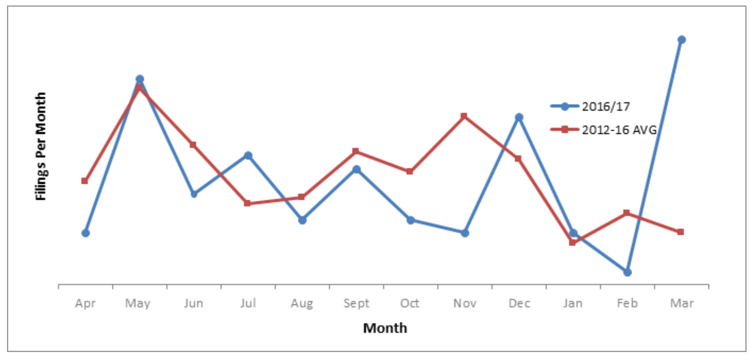
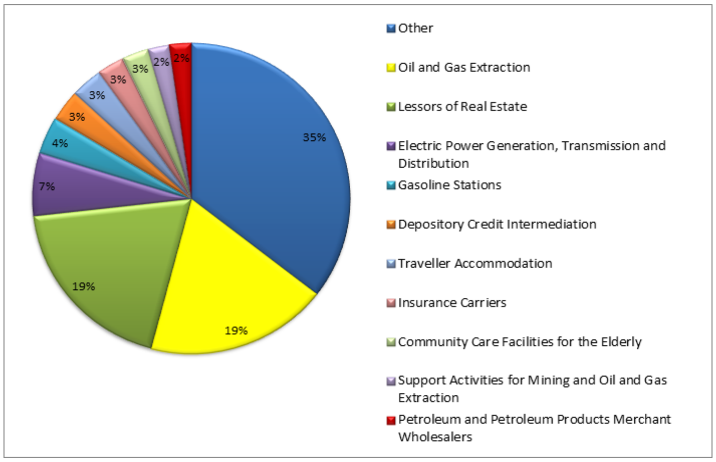


Figure III compares the average number of filings for each month during the fiscal years 2012-16 with the average monthly number of filings for 2016-17. Compared to the monthly average for 2012-16, November and February 2016-17 each saw a material decrease in the number of filings (i.e. five or more). The number of filings in March 2016-17 was the highest since 2012-13.

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 illustrates the sectors most commonly reviewed by the Bureau in 2016-17. During this period, ten sectors had more than four merger reviews. Upstream Oil & Gas and Real Estate were the sectors with the highest number of filings, representing approximately 38% of completed merger reviews. Compared to 2015-16, the number of filings in the "Other" category decreased significantly from 51% to 35% in 2016-17.

Update on Pre-Merger Notification Interpretation Guidelines

On October 27, 2017, the Competition Bureau published a revised Pre-Merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (Subsection 108(1) and Paragraph 111(d) of the Act). This guideline, along with other Pre-Merger Notification Interpretation Guidelines previously published by the Bureau, assists parties and their counsel in interpreting and applying the provisions of the Competition Act relating to notifiable transactions.

The revisions to Interpretation Guideline No. 7 are intended to clarify that the exemption from notification provided by paragraph 111(d) of the Competition Act may, in certain circumstances, extend to acquisitions following the transfer of a creditor's interest (e.g. on secondary markets), provided the acquisition is pursuant to a credit transaction entered into in good faith in the ordinary course of business. The guideline was also updated to provide greater clarity regarding the need to consider whether a business acquired further to an insolvency proceeding may be an "operating business" under subsection 108(1) of the Competition Act and, as a result, may be subject to notification requirements under Part IX of the Competition Act.

SIRs: Process and Practice Eight Years On
(Melissa Fisher)

Supplementary Information Requests – Stats and Trends as of May 6, 2017

Since the introduction of the two-stage merger review process in 2009, the Commissioner has issued Supplementary Information Requests (SIRs) in respect of 89 proposed mergers. As summarized in Table I below, the number and proportion of SIRs issued increased gradually until the past two fiscal years, where there has been a more significant increase. That trend does not seem to be continuing in the current fiscal year (FY2017/18) where only seven SIRs had been issued as of the end of third quarter. The average time to comply with a SIR and the average time for the Bureau to resolve a SIR matter have remained relatively consistent throughout.

The Bureau regularly monitors factors that may contribute to the variance in the number and proportion of SIRs issued from year-to-year and is of the view that the case mix in a given fiscal year is the most significant factor affecting annual variance.[1] For instance, FY2015/16 and FY2016/17 showed an increasing proportion of complex reviews and a greater number of those were very complex matters requiring extensive information gathering and in-depth analysis.

Table I – Proportion of SIRs issued annually between FY 2010/11 and 2016/2017

Fiscal Year	SIRS Issued	Full Compliance Received	Total Matters (%)	Complex Matters (%)	Avg. Time to Comply with SIR (Days)	Avg. Time to Resolve (Days)
2016/17	21	16*	9.5	39.6	64	137**
2015/16	18	14	8.9	27.7	52	104
2014/15	12	11	5.3	21.8	48	147**
2013/14	10	9	4.4	20.8	54	113
2012/13	10	10	4.7	21.7	50	95
2011/12	8	8	3.5	16.0	44	92
2010/11	5	4	2.1	14.7	57	185

- *3 SIRs are still outstanding
- ** Skewed by few long reviews

Tips for Complex Matters

1. Engage early with the review team to understand the team`s approach to the initial thirty day waiting period and provide relevant information.
2. Engage in meaningful pre and post-issuance dialogue, including inviting business people with relevant information to attend calls.
3. When seeking to limit the number of custodians required to respond to a SIR (i.e. Senior Officer definition), provide detailed organizational charts and explanations as to why these custodians may not have relevant information prior to making those requests.
4. To avoid or decrease technical issues relating to SIR productions, engage in technical calls and ensure that productions are provided in accordance with the SIR instructions.
5. Provide all metadata, including custodian, as this will assist with the Bureau team's review time.
6. If using technology assisted review, engage the Bureau team early.
7. Keep review team up to date on the timing of document production such that internal Bureau resources can be ready to receive and process the production.
8. Provide responses to SIR data specifications as soon as possible. Do not wait until you are producing responses to the document specifications.
9. Provide reasonable advocacy and support your submissions with evidence.

Efficiencies: Recent Developments and Future Prospects
(Matthew Chiasson and John MacGregor)

Competition Bureau officers John MacGregor and Matt Chiasson participated in a moderated discussion with David Rosner (Goodmans) on the topic of efficiencies claims in merger reviews. The Bureau representatives pointed to announcements made in Superior/Canexus and Chemtrade/Canexus as examples of cases where the Bureau has taken efficiencies claims into account in deciding not to challenge a proposed merger.

Matt and John also provided some practical tips for parties wishing to make an efficiencies submission,

[1] Factors that the Bureau has examined include the percentage of matters designated as "complex" (and of those, the number that would be considered "very complex"), the number of matters requiring multijurisdictional reviews, and the number of matters involving a "pull-and-refile".

based on their own experience evaluating claims. Those tips included:

- Providing efficiencies submissions early in the process, if possible;
- Including an explanation for how the claimed efficiencies pass the cognizability "screens" set out in the case law and MEGs;
- Including all supporting documentation, calculations and assumptions;
- Making experts and/or business people available for follow-up discussions with the Bureau case team and its experts.

The Bureau representatives stressed that, much like other aspects of the merger analysis, evaluation of efficiencies claims is a fact-specific exercise, and often involves back-and-forth discussion between the Bureau and parties.

International Collaboration: The Competition Bureau and Global Merger Enforcement
(Bradley Callaghan, Lourdes DaCosta)

International Collaboration in the Bureau's Mergers Directorate

As part of the 2017 CBA Merger Roundtable, the Bureau highlighted its international collaboration efforts in merger review in two respects: its file-specific collaboration in the Bureau's merger reviews and its leadership role as co-chair of the International Competition Network's Merger Working Group. Efforts on both fronts seek to strengthen the Bureau's reviews of mergers with an international component and to bring benefits to the Bureau's work in an increasingly global economy.

International Cooperation

The Bureau continues to collaborate with its enforcement partners in merger reviews involving an international dimension. An internal survey of the Bureau's international cooperation suggests that cooperation occurs in a small number of the Bureau's total merger reviews, but a significant – and growing – number of its complex reviews. This can include cases with filings in jurisdictions of the Bureau's partners, cases where geographic markets cross international borders, and even domestic cases where the Bureau stands to learn from a foreign agency due to its prior experience assessing a particular industry or competition issue.

International cooperation helps the Bureau's review but is also in the interest of the merging parties. It brings efficiency to the review and helps avoid inconsistent outcomes, both in terms of the analysis of competitive effects and in the remedies being considered to address potential harm. The Bureau encourages interested readers to consult the International Competition Network's Practical Guide to International Enforcement Cooperation in Mergers for a helpful discussion of how cooperation can benefit both agencies and merging parties.

Degrees of cooperation

The Bureau's growing number of formal cooperation instruments highlights the importance of engagement with its international enforcement partners. The degree of cooperation with other agencies varies, based on the nature of the particular merger review and the relationship that the Bureau has with the other agency, but generally centers on (1) timing, (2) analysis and evidence, and (3) remedies.

The Bureau's deepest cooperation has tended to be with the United States agencies (U.S. Federal Trade Commission and Department of Justice) and the European Commission's Directorate General for Competition. Among many other factors, the key points of the Bureau's engagements with partners include the alignment of review timing across jurisdictions, the evaluation of proposed remedy packages, the assessment of common purchasers in divestures, the selection of common monitors and hold separate managers, and the coordination of monitoring obligations following a remedy.

Sharing of confidential information

The Bureau also discussed at the 2017 Mergers Roundtable the sharing of confidential information with foreign partners and the use of waivers.

In short, the Bureau's position is that it does not require waivers to share confidential information with foreign agencies. The Bureau acknowledges that the sharing of confidential info with foreign agencies is not a matter taken lightly. Where it will advance a specific investigation, the Bureau will share the information as consistent with the provisions in s. 29. Communication by the Bureau of confidential information will typically take place where there is a bilateral or multilateral cooperation instrument in force and will be subject to specific confidentiality safeguards contained in that instrument, as well as those in the Competition Act and in other domestic legislation. Generally, where there is no bilateral or multilateral cooperation instrument in force, the Bureau does not communicate information protected by section 29 unless it is fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. Further information on the Bureau's position regarding the sharing of confidential information with international partners can be found in the Bureau's Confidentiality Bulletin.

The ICN Merger Working Group

The Bureau concluded its three-year role as co-chair of the ICN Merger Working Group (MWG) in 2017. The MWG promotes the adoption of best practices in the design and operation of merger review regimes in order to enhance the effectiveness of merger review mechanisms, facilitate procedural and substantive convergence, and reduce the time and cost of multijurisdictional merger reviews. The Bureau's work with the MWG dates back to the inception of the ICN in 2001, and continues through the Bureau's role as ICN Secretariat and as liaison between the ICN and the OECD. As co-chairs, the Bureau benefitted significantly in shaping the agenda of the MWG, as well as in building critical person-to-person relationships with other agencies, and learning from the experiences of enforcement partners and non-governmental advisors (NGAs).

Recent work and discussions

The Bureau's participation in the MWG's 2017 work was multi-faceted, with significant contributions to guidance documents. The MWG implemented key guidance on merger remedies (see for example the 2016 Merger Remedies Guide) and made subsequent related revisions to the Recommended Practices (RPs) on Notification and Review Procedures regarding remedies. The MWG also revised its central recommended practices on merger notification thresholds and the merger's connection to the reviewing jurisdiction (see RPs on Notification and Review Procedures), and rolled out new guidance on substantive merger reviews regarding efficiency considerations (see RPs on Merger Analysis). Beyond this core work on guidance documents, the MWG also explored topics at ICN events that ranged from non-price effects in merger review to the role of public interest considerations in merger review.

The MWG's work continues with a new project stream focusing on vertical mergers, a teleseminar series on innovation in merger reviews, and an update to the MWG's investigative techniques handbook for a more modern merger review context. In addition, the MWG's core work of updating and drafting recommended practices will continue.

Call for NGA interest

The strength of the ICN's products benefit greatly from the participation of NGAs, which include private legal, economic and academic practitioners in the field of competition law. Because of their separate role from ICN member enforcement agencies, NGAs are often best placed to identify areas of divergence between jurisdictions, and can provide helpful analysis on the practical business realities of the ICN's work.

The Bureau would be very encouraged to hear from Canadian practitioners that are interested in getting involved as an NGA to the MWG. Participation can include anything from providing comments by email to draft MWG documents, to taking a lead role in drafting and coordinating comments on new recommended practices. NGAs can also express interest in attending the MWG's major events such as workshops and seminars, as well as the ICN's Annual Conference. The choice of the Bureau's NGAs for on-site events is largely determined by participation in the MWG's recent work.

If you would like to contribute to the MWG as an NGA, please contact Nigel Caesar to express your interest and describe how you would plan to contribute. Further information on the Bureau's process is available via the Bureau's international portal. An NGA Toolkit providing guidance to prospective NGAs is also available on the ICN's website.

Conclusion

The Bureau's relationships with other enforcement agencies ensure that it can work effectively with partners when the need arises. Its cooperation also benefits businesses involved in the merger review process, leading to investigative efficiencies, better coordination of timing, and coherent outcomes.

The Bureau's participation in the ICN – including its recent leadership role as co-chair of the ICN MWG – further fosters cooperation among competition authorities, while promoting competition law and developing best practices in policy and enforcement. The Bureau continues to see these activities as critical to its work.

Vertical Mergers: Recent Developments
(Andrew Kelly)

Vertical mergers are examined through two lenses: foreclosure and coordinated effects. At the roundtable, the Bureau discussed the theories of harm and subsequent remedies in the reviews of two vertical mergers: Bell and Rogers' acquisition of GLENTEL, and McKesson Corporation's acquisition of Katz Group. Both mergers required behavioural remedies to address coordination concerns arising from the merger, and the McKesson acquisition required, in addition, a structural remedy to resolve concerns of foreclosure.

When examining foreclosure effects arising from a merger, the Bureau recognizes that there can be both pro-competitive and anti-competitive incentives arising from the merger. To use input foreclosure as an example, the Bureau notes three forces – the first two anti-competitive, the third potentially pro-competitive:

- Vertical Incentives: Upward pressure on the upstream firm`s prices to its customers from internalizing the downstream customers` lost sales to be recaptured by the downstream firm;
- Horizontal Incentives: Upward pressure on the downstream firm`s prices from internalizing the diverted sales to its competitors (which are customers of the upstream firm);
- Removal of Double Marginalization: Downward pressure on prices from combining the merged firms` margins on the supply chain.

When evaluating potential harm from the merger, the Bureau assesses these positive and negative forces as well as the constraints on the merged firm post-transaction. In order to arrive at an SLPC conclusion, the team must have reason to believe that these effects will have a material competitive impact. To resolve these types of concerns, the

Bureau will typically seek a structural remedy in markets where anti-competitive forces are greater than the pro-competitive effects. The Bureau used this type of analysis for the McKesson transaction to determine effects in local markets for retail pharmacies. Ultimately, McKesson divested retail pharmacies in 26 local markets.

When assessing coordinated effects, the Bureau examines whether the transaction could make it easier for a coordinated strategy to be implemented. For example, a vertical merger could facilitate coordinated behaviour by an upstream firm in downstream markets. An upstream firm may have more transparency into activity in downstream markets as a result of the merger, and may have a means to 'punish' those who deviate from a coordinated strategy. In both the Bell and McKesson transactions, the Bureau found that the merged firms had substantial influence in their respective upstream markets that could lead to anti-competitive effects in downstream markets. Both firms were required to implement information firewalls between their upstream and downstream businesses to resolve these coordination concerns from the merger.

How Non-Notifiable does not mean "Not Interested": A Brief Survey of Recent Competition Bureau Actions on "Small" Mergers

By Kayla Albin

Kayla Albin
McCarthy Tétrault
(Toronto)

Back seven years ago, in January of 2011, a small $6 million acquisition set the wheels in motion for some hefty debate and very important developments in Canadian competition law. Although the revenues and the assets of the target, Complete Environmental Inc. ("**Complete**"), fell well below the notification thresholds under the *Competition Act* (the "**Act**"), the Commissioner applied to the Competition Tribunal (the "**Tribunal**") for an order to either dissolve the transaction in its entirety or for the acquirer to divest itself of Complete or of Complete's wholly-owned subsidiary, Babkirk Land Services Inc. ("**Babkirk**"). Of course, the acquirer in what would become a landmark case was Tervita Corporation ("**Tervita**"); over the next four years, the Tervita case would make its way all the way up to the Supreme Court of Canada (the "**SCC**").

A. Reminder that Small can be Significant

Despite Tervita's hazardous waste landfill transaction being small enough to avoid mandatory pre-merger notification under the Act, the company proactively and voluntarily notified the Bureau of its merger with Complete. Due to a special landfill development permit held by Babkirk and the particular geography of the deal in northeastern British Columbia, amongst other reasons, the Tribunal found that Tervita's acquisition would "substantially prevent" competition; Tervita was ordered to divest itself of Babkirk. Tervita appealed and, on February 25, 2013, the Federal Court of Appeal upheld the Tribunal's order. Tervita then appealed to the SCC, which released its decision on the case nearly two years later. The case marked the first time a merger was challenged by the Commissioner solely on the basis of a "prevention" of competition, as opposed to a merger's ability to also "lessen" competition. The decision also affirmed the availability of the section 96 efficiencies defense as reason for a prospective merger to proceed, providing guidance on how to properly weigh efficiencies against the harms caused by anti-competitive effects.

The SCC's decision had far-reaching implications for the analytical framework by which mergers are reviewed. However, Tervita has already been talked about in the mergers community for many years at this point. As such, here, Tervita as a whole is not being revisited, other than to highlight that this case, spanning years of litigation, stemmed from the Commissioner challenging a small, already closed, non-notifiable transaction. Was this some sort of outlier?

B. The Notifiable/Non-Notifiable Distinction

For a proposed merger to be notifiable, there are two financial thresholds that must be met. Where the combined book value of the Canadian assets or gross annual sales revenues in, from or into Canada of the parties to the transaction and their respective affiliates exceeds $400 million, the "size of parties threshold" is met. Where the target's assets in Canada or gross revenues from sales in or from Canada generated by those assets exceeds $92 million (in 2018), the "size of transaction threshold" is achieved.[1]

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[1] Part IX of the Act, "Notifiable Transactions", details the specific ownership thresholds that also apply. For instance, in a share acquisition, Section 110(3)

These sorts of thresholds are necessary in order to provide companies, the Bureau and market participants with some objective standard by which pre-merger Bureau involvement can be flagged. Notifiable transactions are therefore automatically subject to a pre-closing waiting period and Bureau review because they are of a size and nexus to Canada that are "too big to be ignored".

However, even if these thresholds are not exceeded, it is recognized that certain types of transactions could still create competition issues. While the thresholds draw a workable line for notification purposes, they will not always be an accurate screen for substantive competitive effects.[2] This is why, according to section 97 of the Act, the Commissioner has the authority to challenge all transactions, even non-notifiable ones, within one year of their closing. In order to adhere to its mandate to "maintain and encourage competition in Canada", the Bureau has the power to investigate any potential instance where competition in a defined market could be lessened or prevented substantially – no matter how seemingly small the market in which such effects are felt or the increment in concentration arising from a merger.

C. Was *Tervita* an Outlier? The Past and the Present Say No

The competition community saw the Bureau use its powers to challenge a non-notifiable transaction in *Tervita* – and was reminded of just how substantively significant such a transaction can be. So, turning back to the original question, was *Tervita* an outlier? *Tervita* certainly garnered a great deal of attention because of its journey to the SCC and, in fact, was the first merger jurisprudence to emerge from the SCC in 17 years. However, interestingly and perhaps surprisingly, the SCC merger case preceding *Tervita* back in 1997 *also* had to do with a challenge to a small, already closed, non-notifiable transaction (or, indeed, multiple transactions).

Canada (Director of Investigation and Research) v. Southam Inc. [3] occurred when Southam Inc. ("**Southam**"), the owner of Vancouver's two daily newspapers, began acquiring small community and specialized newspapers in the area. Within the span of one year, Southam had obtained a controlling interest in 13 community newspapers, as well as several other small, independent publications. Fearing a lessening of competition, the Commissioner applied for an order requiring Southam to divest itself of three of these community newspapers. Upon examination, the Tribunal did, in fact, find a substantial lessening of competition - in real estate print advertising in the North Shore area - and ordered Southam to divest itself of either of two small, community newspapers which focused on real estate. The case ended up making its way to the SCC, which determined that the Tribunal's merits decision was reasonable. While each individual transaction may have been insubstantial enough to fly under the radar for notification, it was the

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provides ownership thresholds that trigger mandatory notification of the transaction. If a proposed acquisition of voting shares would lead to the acquirer owning 20% of a publicly-traded corporation, 35% of a privately-held corporation, or 50% of the vote, if the acquirer already owns more than the preceding percentages, then the acquisition is notifiable to the Bureau. Similarly, in the event of an acquisition of an interest in a combination (e.g., a partnership), Section 110(6) states that if the acquirer would subsequently hold an aggregate interest that entitles him or her to more than 35% of the combination's profits or assets upon dissolution, the transaction is notifiable. If the acquirer was already entitled to that amount prior to the transaction, then the acquisition must result in him or her receiving more than 50% of the profits or assets in order to be notifiable.

2 This is of course true in both directions, i.e., many very large transactions that easily exceed the notification thresholds in the Act raise no competition issues whatsoever.

3 [1997] 1 SCR 748.

combination of transactions that attracted the Bureau's attention and ultimately enforcement action leading to remedies.

More recent deals, while not reaching the SCC, have still proven over and over that *Tervita* was not an outlier by any means, and that the Bureau will still take interest in non-notifiable transactions. While *Tervita* was a case of voluntary notification, the Bureau has indicated that it detects non-notifiable transactions mainly through complaints by market stakeholders (e.g., customers, competitors and suppliers) about anti-competitive effects or by monitoring the market itself. In August of 2014, for example, Eastlink's non-notifiable proposed acquisition of Bruce Telecom was brought to the Bureau's attention via consumer complaints (although the deal was never completed).[4] In October of 2014, Bell Aliant's non-notifiable acquisition of Ontera was identified via stakeholder complaint and resolved with a "fix-it-first" remedy.[5] Also, in December 2014, TELUS Health agreed to address Bureau concerns by amending certain contract provisions in its proposed acquisition of XD^3 Solutions, which also was non-notifiable but was brought to the Bureau's attention by stakeholder complaints.[6] The notification thresholds, again, can be seen to provide guidelines for potentially impactful transactions based on value or ownership – but it is the anti-competitive effect of a deal that matters to the Bureau.

D. The Bureau's Analysis of a Recent Non-Notifiable Transaction

More recently, the Bureau's attention was drawn to Iron Mountain Incorporated's ("**Iron Mountain**") acquisition of Recall Holdings Limited ("**Recall**"). Iron Mountain and Recall were both suppliers of records management services in Canada and worldwide, also offering data management and paper shredding services. On June 8, 2015, Iron Mountain announced an agreement to acquire Recall for US$2.6 billion. The size of the parties' Canadian operations meant that the transaction was non-notifiable; yet, the proposed transaction came to the Bureau's attention (the obligation to seek antitrust clearance in other jurisdictions might have been a factor). The Bureau found that the transaction would result in a substantial lessening or prevention of competition and ultimately insisted on a remedy.

The Bureau issued a position statement outlining its analysis of the Iron Mountain/Recall transaction.[7] Despite not having exceeded the notification thresholds, the Bureau determined that Iron Mountain and Recall "overlapped in the supply of records management services in six Canadian cities: Toronto, Montreal, Ottawa, Calgary, Edmonton and Vancouver" and that the two companies were the largest suppliers of records management services in Canada. Further, according to the Bureau, Iron Mountain and Recall competed not just in the abovementioned local markets, but also in "multi-city markets", due to the distinct characteristics of the records management industry. For instance, large corporate and government organizations with "multi-city" reaches would have high volumes of documents and data for storage across many locations. Using a single supplier for all of their storage needs would not only simplify the administration of the volume of data as a whole, but would also reduce costs through volume discounts

4 Bureau Position Statement: "Competition Bureau statement regarding the proposed acquisition of Bruce Telecom by Eastlink" (August 19, 2014).

5 Bureau Position Statement: "Competition Bureau statement regarding the proposed acquisition of Ontera by Bell Aliant" (October 1, 2014).

6 Bureau Position Statement: "Competition Bureau protects Quebec pharmacists buying pharmacy management solutions" (December 12, 2014).

7 Bureau Position Statement: "Competition Bureau statement regarding Iron Mountain's acquisition of Recall" (March 31, 2016).

and the centralization of management. The Bureau identified such lower storage prices for consumers as one of the positive market benefits of the competition between Iron Mountain and Recall, who would often bid against one another to manage certain potential clients' documents.

The Bureau concluded that possible alternatives, such as in-house document storage or the digitization of documents, were not sufficiently substitutable with Iron Mountain and Recall's records management services. The Bureau also found that entry into the records management market by any new firms would be quite difficult. In order to effectively compete in the "multi-city market" for "multi-city customers", a records management firm would need to already have scale, both in terms of spread across geographic locations and in terms of the financial resources necessary to deal with high customer switching costs. Additionally, according to the Bureau, security certifications necessary to store confidential information, combined with the importance to customers of suppliers having a long-standing reputation, also indicate that barriers to entry are high. The Bureau concluded that, without Recall around anymore, Iron Mountain would have limited effective remaining competitors to bid for records management work and to keep the cost of records management services low.

With this in mind, the Commissioner entered into a consent agreement with Iron Mountain at the end of March 2016 pursuant to which Iron Mountain agreed to sell its records management assets in all six cities where its operations were found to overlap with those of Recall. On January 11, 2017, the Bureau announced that it had approved Summit Park LLC ("**Summit**") to acquire eight records management facilities from Iron Mountain, spanning the six identified Canadian cities, pursuant to the consent agreement.[8] With the acquisition, Summit would "sponsor a new entrant in the records management industry to be named Arkive".

The Bureau was satisfied that Iron Mountain's sale of certain assets to Arkive would preserve competition for records management services in both local and multi-city records management markets in Canada – regardless of the size of those markets and the value of the stakes at play.

E. Need for Continued Vigilance in Non-Notifiable Transactions Going Forward

In the end, now seven years on from the start of *Tervita*, we see that the Bureau continues to monitor mergers that do not exceed the notification thresholds. Indeed, just this past November, a Bureau spokesperson was reported as saying that the Bureau would review a deal between Torstar Corp. and Postmedia Network Inc. to exchange a total of 41 newspapers with plans to cease publication of the majority of them. While the transaction was not subject to notification under the Act, many stakeholders expressed potential concern about the competitive effects of shuttering so many newspapers, particularly with respect to news coverage in the communities those newspapers served. The parties' separately expressed intentions to shut down various newspapers also raise the issue as to whether or not a viable remedy would be available, should the Bureau ever choose to seek one. In such circumstances, the Bureau does have the ability to seek an interim order from the Tribunal "forbidding parties from implementing or completing a proposed merger where a formal application by the Commissioner… is yet to be made." Such an order would prevent the parties from taking any action that could impair the Tribunal's ability to remedy the anti-competitive effects, if any, discovered later on. A preservation

8 Bureau Position Statement: "Competition Bureau statement regarding Summit Park's acquisition of Iron Mountain assets" (January 11, 2017).

agreement between the Bureau and a party to a transaction could also be used to protect certain assets post-closing, such that they can be divested or otherwise become the subject of a remedy if necessary.[9]

In sum, regardless of the size of the transaction or the size of the parties, a merger transaction can still create competition concerns. As such, the Bureau has the power to review any merger and seek interim and final relief from the Tribunal prior to or even well after closing. Companies should conduct substantive competition analyses, regardless of party and transaction size, in the "early days" when any merger is proposed. In this way, competition issues can be fleshed out and weighed at an early stage to assess, manage and apportion the risk of credible enforcement agency concerns being raised.

The mindset of being proactive and assessing how competition law will apply to transactions, whether notifiable or not, is already the norm in countries like the United Kingdom, where there is no legal requirement to pre-notify a proposed transaction to the competition authority. Companies are merely warned that, should their merger be found to be anti-competitive in any way, not having notified voluntarily can "create difficulties" if the "ultimate decision is that the merger should be unwound".[10] It is essentially at the risk of the parties whether to notify or not. Lessons from the United Kingdom can be applied in Canada too – the risk should be weighed and the cost of potential Bureau intervention assessed. While there are numerous factors to consider in any given case, informally notifying the Bureau, even where it is not required, may allow a company to work with the Bureau early on to iron out any issues and otherwise minimize the potentially negative consequences of unexpected Bureau intervention.

On the date of the SCC's decision in *Tervita*, the Commissioner issued a statement that he was "pleased that the Court upheld the conclusions of the Competition Tribunal and the Federal Court of Appeal that competition would be substantially prevented as a result of the merger." According to the Commissioner, the Bureau is "committed to principled enforcement and will continue to promote competition in the marketplace to the benefit of Canadian consumers" – whether the Bureau is notified of transactions or not.

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9 Competition Bureau. *Competition Bureau submission to the OECD Competition Committee roundtable on Investigation of Consummated and Non-Notifiable Mergers*, section 3.2.

10 *International Comparative Legal Guides*. "United Kingdom: Merger Control 2018", at section 3. The guide also provides expected timelines and format for voluntary notification, as well as details on the merger review process in the United Kingdom.

In this recurring segment we get to know two of our Competition Bureau colleagues a little better.

HILARY FURNESS

Competition Law Officer

What is your educational and professional background and for how long have you worked at the Bureau?

In 2015 I completed a dual Masters in Economics and Juris Doctorate Law program at Queen's University. I became a member of Law Society of Upper Canada in the summer of 2016, and joined the Bureau later that fall. I have been working here for just over one year.

What are the most important industries to watch for merger activity?

I don't have a specific industry in mind but rather a type of transaction. As companies operating in traditional marketplaces continue to adapt to an increasingly digital world, we may see an increasing number of transactions between firms with complementary capabilities. An example is the evolving relationship between brick and mortar retail outlets and online purchasing.

Why should young lawyers and economists think about working at the Bureau?

My co-workers are fantastic. They are intelligent, dedicated and eager to learn, and they are innovative, welcoming and are always willing to assist. We work hard to meet tight deadlines and, in doing so, we always work as a team. Moreover, the work is never mundane – officers learn about various industries, some of which they may have never heard of, and the day-to-day tasks change constantly.

If I wasn't at the Bureau, I'd be…

An entrepreneur! I absolutely love to cook, and I have always wanted to own my own restaurant and bar. From Pho to dumplings and from cassoulet to BBQ, creating tasty dishes and hosting friends and family is a big passion of mine.

When I'm not at the Bureau, you can find me….

Antiquing. My husband and I love to take day trips to near-by towns and hunt for old household items. Once we found a phonograph from the late 1800s that was in mint condition; it was beautiful.

Favorite vacation since joining the Bureau?

In the Spring of 2017 my husband and I travelled to Vancouver, BC. I grew-up in a small town approximately 25 km south of Vancouver, and a large number of my good friends and family live in the area. In addition to Vancouver, we visited Whistler and many of the smaller islands. As my husband had never been, it was wonderful to guide him around. Next time we fly west our plan is to visit Washington State and do a road-trip to northern California.

LIONEL KINKARTZ

Competition Law Officer

What is your educational and professional background and for how long have you worked at the Bureau?

I joined the Bureau just over four years ago, after completing a Masters in Economics at the University of British Columbia. I received my first exposure to the Bureau's work as a research assistant during my time at UBC, which showed me how interesting the work can be. Prior to that, I had worked for a few years at an institute focussed on education policy research and outreach at the University of Alberta.

What are the most important industries to watch for merger activity?

Innovation is a topic that comes up a lot these days, and in my view for good reason. As the economy continues to rapidly evolve, I think that examining the impacts of mergers on innovation will be crucial. As such, I feel that industries in which innovation plays a central role will be important to watch.

Why should young lawyers and economists think about working at the Bureau?

It's a fast-paced environment that consistently presents new challenges and new learning opportunities. The access to information to learn about industries and businesses in-depth is also fantastic. In short, you'd be very hard-pressed to encounter a boring day here.

If I wasn't at the Bureau, I'd be…

I'd most likely have pursued my PhD in economics and would be working in consulting. I'm also a huge coffee lover and have always been intrigued by the business opportunities in that space, both at wholesale and retail levels.

What is the file that you have found to be the most formative or interesting in your career at the Bureau and why?

The Parkland/Pioneer merger provided me with a wide range of new opportunities. As an officer with an economics background, the world of litigation had previously not been something with which I was familiar. I can't say enough good things about the people that I had the opportunity to work with and the experience that I had.

What's the best vacation you've taken since joining the Bureau?

That's probably a toss-up between a trip to Japan with my Dad and a trip to Italy with my partner. My favourite parts of Japan were Kyoto and Hiroshima – Kyoto for its natural beauty and Hiroshima for the impact of the Peace Memorial Museum. From my trip to Italy, my experience in Rome was the best. It's hard to beat the combination of the history, food, coffee, and overall energy of the city.