June 2003

"Play it again, Konrad" Revisited

In its May, 2003 edition, Global Competition Review presented an effective article on Canadian bank mergers both past and, perhaps, future.

The focus on the window of opportunity for bank mergers that may present itself in 2004 was enjoyable speculation

On one historical observation, however, there are perspectives which would differ from those presented in the article.

Since January, 1999, two points have frequently been made by counsel to the unsuccessful merger proponents and those positions were unfortunately presented in the article. The first is that the Competition Bureau was "more intractable than usual and not at all its usual cooperative self".

Cooperation, of course, is what counsel receive from agencies when the representations of those counsel are successful; the lack thereof is found when they are not. But from the Bureau's perspective, cooperation also remained a somewhat elusive objective. The Bureau experienced some frustration in receiving materials from the merger proponents, and consequently felt it necessary to expedite the production of documents through the use of section 11 of the Competition Act, which provides for the compulsory production of documents.

But it is the suggestion by merger proponents that the Bureau refused to entertain talk of remedies that strikes a particularly discordant note.

As the article itself states, this was a large and unprecedented merger review. The legal reality, that the Minister of Finance held the ultimate authority to approve the mergers, embodied both in the Bank Act and the Competition Act required that a means of communication between the Bureau and the Minister had to be developed and communicated clearly to the merger applicants.

The Bureau was concerned that the merger applicants might not understand the process. Consequently, in the Merger Enforcement Guidelines as Applied to a Bank Merger (BMEGs) http://strategis.ic.gc.ca/SSG/ct02484e.html published in July 1998, the issue was squarely addressed.

Paragraph 15 of the BMEGs states:

"15. While the authority of both the Director and the Minister of Finance are spelled out in the Competition Act and the Bank Act, both acts are silent on how the Director and the Minister should interact and how this process should unfold. To ensure that the merging parties are informed of both the competition and other public interest concerns in an efficient, predictable and transparent manner, Annex I, attached hereto, sets out the banking merger review process to be employed by the Competition Bureau."

Annex I explicitly states that:

"After having completed its analysis of the merger as proposed, the Director will provide to the parties and to the Minister of Finance, a letter setting out the Director's views on the competitive aspects of the proposed merger."

The parties, and their counsel, were also advised, and knew, that the Bureau could have no effect upon the determinations made by the Minister of Finance, once the Director's letter was in his hands. Consequently, the merger proponents and their counsel were invited to take cognisance of the issues which the Bureau raised during the course of the many protracted discussions which were held and to suggest possible resolutions so as to address remedies as an integral part of their presentation. The merger proponents and their counsel chose however not to amend their proposals as initially submitted. They took the position that there were no elements in their proposed transactions which required modification. It was on this basis that the letters of December 11 to the Minister of Finance were prepared by the Bureau. It was the Minister who then took the decision to disallow the mergers.

It remains unfortunate that the merger proponents continue to articulate concerns that the merger process, as implemented, did not follow the conventional pattern. These were not conventional merger applications. The mergers themselves were unusual, the legal context was unique, and the Bureau did what it could to provide the merger applicants the opportunity to suggest their own "remedies".

Yours faithfully, William Rosenfeld, QC, Goodmans, Toronto.