MERGER REMEDIES IN CANADA

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Merger Remedies in Canada

Introduction

The merger provisions have been in place in Canada for twenty years. Over that period, the Competition Bureau ("Bureau") has pursued consensual remedial relief in some form in fifty four cases. The majority of cases went according to plan, in the sense that was sought was obtained. A number of cases had significant problems in the remedy phase and in a handful of cases what was sought to be divested was not divested and was returned to the merging parties[1]. Lessons have been drawn from this body of experience as the Bureau over time has become progressively more conservative in seeking terms and conditions for remedial relief. This progression is further evidenced by the draft Information Bulletin on Merger Remedies ("Remedies Bulletin") released by the Bureau on October 19, 2005 and which should be published in final form in the fall of 2006.

The first part of this paper will provide an outline of the institutional framework for merger review in Canada. The second part will discuss the key features of the merger remedies process as it has evolved in the practice of the Bureau since 1986. The third part of this paper will discuss how the Remedies Bulletin compares with the norms established in the cases resolved by consent to date.

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[1] In the Air Canada/Canadian Airlines case, the regional airline of Canadian was shopped but did not sell. In the Chapters/Indigo case, the book stores to be divested did not sell during either the initial sale period or during the trustee sale. In Abitibi/Donahue, the newsprint mill to be divested did not sell. Abitibi eventually closed this newsprint mill.   For more detail, see "Competition Bureau Announces It Will Not Oppose Acquisition of Canadian Airlines" (December 21, 1999) and accompanying Backgrounder and Undertakings, available online at www.competitionbureau.gc.ca; Canada (Commissioner of Competition) v. Trilogy Retail Enterprises LP. /Chapters CT2001-003 (Competition Tribunal); and Commissioner of Competition v. Abitibi-Consolidated Inc. CT 2001-009. All of the Competition Tribunal cases cited in this paper are available online from the Tribunal's website: www.ct-tc.gc.ca.

Part I

The Institutional Context

Before considering the details of the remedy process, it is useful to consider the institutional context of merger review. Of the more than 4,800 mergers reviewed since 1986, when the merger provisions became operative, only nine cases have been brought to the Competition Tribunal on a contested basis. Where competition problems have been identified, a consensual solution has been worked out in 87% of the cases. As the Federal Court Appeal noted, the remedies available in a contested case are only divestiture and dissolution, and are “rather blunt instruments”[2].

As a practical matter, the process of merger remedies in Canada is essentially a regulatory function since very few merger proponents will be willing to accept the risks, delays and costs of litigation to preserve their transaction. Since in most cases there will be no oversight or review of either the Bureau’s investigation or its proposed settlements, the Bureau must be careful in the exercise of its large discretion.

The Forum for Remedies

When the merger provisions were created, a formal consent order process utilizing the Competition Tribunal was incorporated into the Act. On consent, the Tribunal has the jurisdiction to order any action that would eliminate the alleged substantial lessening or prevention of competition. Unfortunately, the consent order process got off to a very rocky start when the Tribunal rejected the first consent order application of the Director and the parties in the Palm Dairies[3] case. Almost immediately the Bureau started to use post-closing undertakings or pre-closing restructuring as the preferred means to resolve

[2] Canada (Director of Investigation and Research). v. Air Canada (1993), 49 C.P.R. (3d) 417 (F.C.A.)
[3] Canada (Director of Investigation and Research) v. Palm Dairies Ltd. (1986) 12 C.P.R. (3d) 540 (Comp. Trib.)

competition issues. After the Imperial Oil[4] case, which required an extensive hearing and several attempts to get a draft order that the Tribunal found acceptable, the Bureau did not seek a consent order for another six years.[5]

The advantage of undertakings is that they can be quickly negotiated. However, they have two significant disadvantages. First, since they are not recognized in the statute, their enforceability is questionable[6]. Second, the Bureau's practice has been to rarely release the undertakings or describe their provisions in detail. Unlike the consent order process, there is no statement of grounds and material facts or consent order impact statement. These documents clearly set out the basis for the assertion by the Commissioner that the merger is anti-competitive and explain in detail how the proposed settlement will fix the problem. The non-disclosure of the terms of the undertakings and the thinking behind them creates a serious lack of transparency to the merger review process and does nothing to enhance predictability that would be informed by greater transparency.

In 1997, with a renewed commitment to transparency[7], the Bureau began again to use the consent order process. In contrast to the 1991 to 1996 period when there were no consent orders, in the 1997 to 2002 period, there were 12 consent orders. At the same time, post-closing undertakings were not abandoned, and in fact were used 15 times in this period. While the consent order process worked very well in this period, critics still maintained the process was too uncertain because of the possibility that interveners and other factors would extend the time involved in the consent order process. The Tribunal approved all

[4] Canada (Director of Investigation and Research) v. Imperial Oil Ltd. (1990) 31 C.P.R. (3d) 277 (Comp. Trib.)

[5] The Bureau publicly reported five cases it resolved by undertakings during the 1990 to 1996 period: Tree Island Industries, Limited (Georgetown Industries Inc.)/Davis Wire Industries Ltd., Laidlaw Inc./Tricil Limited, Maple Leaf Mills/Oligve Mills Ltd., Shell Canada Products Ltd./Pay Less Gas Co. (1972) Ltd. and Kimberley-Clark Corporation/Scott Paper Company.

[6] See, for example, the discussion in A. Neil Campbell, "Merger Law and Practice: The Regulation of Mergers under the Competition Act" (Carswell) 1997 (hereinafter "Campbell") at pp.279-280.

[7] In his first year as Director of Investigation and Research (then re-titled Commissioner of Competition), Mr. von Finckenstein outlined five operating principles of the Bureau: fairness, transparency, timeliness, predictability and confidentiality.

of the consent orders during the 1997 to 2002 period except one, the Ultramar/Coastal[8] case. Following this case, a proposal quickly appeared by the Bureau to change the consent order process to one of a consent agreement registration. This change became law on June 4, 2002.

The consent registration process is essentially an enforceable undertaking. The parties and the Commissioner, once they have come to an agreement, merely file it with the Registrar of the Competition Tribunal. It is not reviewed by a member of the Tribunal before registration. Once registered, it has the same force and effect as a Tribunal order. As a result of this change, the Bureau is unlikely to use undertakings very often in the future.[9]

The consent agreement process has the same timeliness as undertakings and has the advantage of clear enforceability. There is a limited right of intervention[10] if the person is directly affected and can establish that terms could not be the subject of an order of the Tribunal. Transparency is improved compared to the Bureau's historical practice of non-public undertakings since a public version of the consent agreement becomes available for review.

However, the consent agreement process, compared to the consent order process, suffers from a number of drawbacks.

First, there is no judicial oversight that the agreement reached between the Commissioner and the merging parties meets minimum standards of effectiveness and enforceability. The consent order process required the Commissioner to explain to an independent body

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[8] Canada (Commissioner of Competition) v. Ultramar Ltd., Reasons and Order dated April 26, 2000, Competition Tribunal CT 2000-001

[9] Remarks of Gaston Jorré, Remedies in Competition Law Panel, 2002 Annual Fall Conference on Competition Law, Canadian Bar Association. See also the Submission of Canada to OECD Merger Remedy Roundtable DAF/COMP(2004)21 at p.126. Curiously, however, the first merger case settled after the consent agreement process, Cendent/Budget, was by undertaking.

[10] The Competition Tribunal in a recent decision has taken a narrow interpretation of "directly affected" such that the right of intervention is quite limited. See Burns Lake Native Development et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. Competition Tribunal CT 2004-013

why he believed a proposed merger was anti-competitive and how a proposed remedy would remove the substantial lessening or prevention of competition. In addition, the Commissioner had to demonstrate that the terms of the order were sufficiently clear that they could be enforced. The consent order hearing allowed representations by interveners on both effectiveness and enforceability. This process provided a valuable discipline to the entire remedy negotiation. The terms of proposed consent orders were modified in response to concerns raised by the Tribunal and strengthened as a result, albeit at a cost in terms of speed and certainty.[11]

The developing record of results in consent agreements will provide evidence of whether the added rigour of the consent order process is desirable. If the record after 2002 demonstrates that there is a higher rate of less effective remedies or that when agreements are reviewed for possible variation or rescission under section 106[12], they are frequently found to contain terms that are unenforceable, the consent agreement process should be reconsidered. Conversely, if the record does not show these trends, it would be evidence that the added rigour of the consent order process was not required to produce acceptable and potentially more certain and timely results.

A second problem with the consent agreement process is a reduced level of transparency. The practice has been to register only a public version of the consent agreement. There are no supporting documents filed or made public. A one page press release will usually be made by the Bureau announcing the consent agreement, but it will provide virtually no

[11] Critics of the consent order process did not like the fact that the terms of consent orders could become more onerous in order to address the concerns raised by the Tribunal. They preferred to negotiate only once with the Bureau, and not have to revisit the deal reached with the Bureau. The way the process worked was that the Tribunal would assume that a substantial lessening or prevention of competition existed and then asked the question as to whether the proposed consent order as drafted would remedy the competition problem identified. Private parties could not expect that the Tribunal would require the proposed order to become less onerous than agreed to. The Tribunal could comment that a particular remedy or measure appeared unnecessary, but it would not object to issue an order for this reason. In the Imperial Oil case, for example, the Tribunal granted a consent order that included the divestiture of retail gasoline stations, although it found "considerable reason to doubt whether much of it was necessary at all." Imperial Oil, footnote 4, at paragraph 68.

[12] Under section 106, the Tribunal may vary or rescind a consent agreement or order if it finds that the circumstances that led to the making of the consent agreement or order have changed such that the consent agreement or order would no longer be effective in achieving its intended purpose or would have not been made.

detail on the reasons why the remedy was required or why the remedy agreed to will fix the alleged problems identified.

In contrast, in the consent order process, the Commissioner would file a lengthy and detailed statement of grounds and material facts that would explain the analysis and reasoning that led to allegation of a substantial lessening or prevention of competition. She would also file a consent order impact statement that explained in detail why the proposed remedy would be effective and enforceable.

This level of transparency improves both accountability and predictability of the Commissioner's actions in merger review. In addition, it would be of assistance in matters where variations of the agreement are sought under section 106. Under paragraph (a) of that section, the Tribunal will need to have evidence of the circumstances that led to the making of an agreement. In the consent order process, there was at least the statement of grounds and material facts that set out the circumstances from the Commissioner's viewpoint. In the current process, there is nothing in the Tribunal's record that can be relied on.

This transparency issue can be easily remedied. There is nothing that prevents the Commissioner from preparing a statement of grounds and material facts and a consent order impact statement and posting it on the Bureau's website. While it is not a legal requirement for section 105, it would improve the level of transparency and provide evidence of the circumstances that led to the making of the agreement in cases where variation is sought. Merging parties, of course, want to resist as much as possible putting anything on the public record that casts their proposed merger in a negative light. Consistent with past practice, however, it can be made clear that these documents reflect only the Commissioner's views, that the parties do not agree with the facts alleged or with the conclusion that the merger is anti-competitive, and are agreeing with the proposed remedy only in order to receive regulatory approval in a timely fashion.

The Bureau has recently adopted the practice of issuing technical backgrounders for major cases, which presumably will include all cases where a consent agreement was required. The technical backgrounders do provide greater detail than the standard press release. While this is a welcome initiative and does improve the level of transparency, it does not provide the same level of detail and analysis that is contained in the statement of grounds and material facts and the consent order impact statement and is not a good substitute for these documents.

Part II

Key Features of the Remedies Process

Types of Remedies

The types of remedies that the Bureau has used to remedy competition problems in proposed mergers have been structural, behavioural or a combination of the two.

The Bureau has consistently indicated that structural remedies will be strongly preferred to behavioural remedies since they usually require limited or no future monitoring or enforcement action. Since the proposed merger creates a permanent structural change to the market, it is felt that a structural remedy is the most appropriate remedy in most merger cases.

Structural remedies are most commonly thought of as divestitures of an ongoing business or parts of a business that in combination with the assets of a purchaser, can provide effective competition in the relevant markets of concern. Divestitures have been the dominant method utilized by the Bureau to remedy merger problems[13]. In contested cases, dissolution[14] or prohibition has also been sought.

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[13] Submission of Canada to OECD Merger Remedy Roundtable DAF/COMP(2004)21 at p.128 "Between 1995 and 2002, over 90% of case resolutions of the Competition Bureau contained a structural remedy."

[14] In Canada (Director of Investigation and Research) v. Air Canada, Reasons and Order dated November 22, 2003 (hereinafter referred to as "Gemini II") the completed merger was dissolved. In Canada

The Bureau has also employed behavioural remedies designed to reduce barriers to entry to the markets of concern, thus changing the structural conditions in the market[15]. In Gemini I[16], the parties were required to set up a direct access link between the databases of Air Canada and Canadian Airlines and other computer reservation systems so that these firms could have the same access to this necessary airline information as the Gemini system. In Air Canada/Canadian Airlines[17], a number of undertakings were designed to reduce entry barriers, such as surrender of landing slots at peak hours at Pearson International Airport, divestiture of ticket counters, bridges and loading bridges at certain airports, assignment of lease rights to open up access to Hamilton airport and permitting smaller carriers the right to participate into Air Canada's frequent flyer program.

The Bureau has employed remedies where structural divestiture was contingent on certain events happening that would facilitate or involve new entry. For example, in ABB/Westinghouse[18] the parties were asked to seek accelerated tariff remission. If the parties were unsuccessful in obtaining the remission, a divestiture was required. In Astral/Telemedia, the Bureau was concerned about French-language radio advertising. It

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(Commissioner of Competition) v. Superior Propane Inc. CT-1998-002 (Competition Tribunal) and in Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Limited CT-1991-001 (Competition Tribunal), the Bureau sought to dissolve the mergers. In the proposed acquisition of Ultramar Diamond Shamrock by Petro-Canada, the parties abandoned the transaction after being informed that the Bureau believed it would substantially lessen competition and that there was no way to restructure the deal to remove those concerns. (Reported in the Annual Report of the Commissioner of Competition for the fiscal year ended March 31, 1999).

[15] The dividing line between what is structural and what is behavioural can be unclear. In the U.S. D.O.J. Antitrust Division Policy Guide to Merger Remedies, structural remedies mean remedies that change the structure of the market and can include the sale or licensing non-physical assets such as intellectual property rights. A similar definition has been adopted by the Bureau in the Remedies Bulletin, but the Bureau goes even further to include changes to contract terms as "quasi-structural". Shortening contract terms or removing non-competition clauses or exclusive dealing provisions have traditionally been considered behavioural remedies though they may reduce barriers to entry and are the type of remedies sought under the abuse of dominance provision.

[16] Canada (Director of Investigation and Research) v. Air Canada, Reasons and Order dated July 7, 1989 Competition Tribunal CT 1988-001 (hereinafter referred to as "Gemini I")

[17] "Competition Bureau Announces It Will Not Oppose Acquisition of Canadian Airlines" (December 21, 1999) and accompanying Backgrounder and Undertakings, available online at www.competitionbureau.gc.ca.

[18] Canada (Director of Investigation and Research v. Asea Brown Boveri Inc.) CT 1989-001 (Competition Tribunal)

anticipated that the CRTC would issue new FM licenses in three markets of concern. In addition to AM radio station divestitures, it required a backstop FM radio station divestiture solution that would terminate on the earlier of six months after the opening of new FM radio station in the market or forty-two months from closing of the transaction.

In cases where the Bureau has required divestiture, it is not uncommon for the Bureau to require some supporting behavioural provisions that will facilitate the competitive effectiveness of the divested assets. For example, it may be the case that the purchaser will require technical assistance during some transition period in order to operate the newly acquired assets efficiently. There may be a "ramp-up" period in production where access to inventory is required. Access to certain inputs, such access to a nearby landfill for waste disposal[19] or access to aggregates for a ready mix operation[20], are examples of the types of behavioural elements that have been used by the Bureau in the past to support a primarily structural solution.

In a few cases, the Bureau has employed a "pure" behavioural remedy as solution to a merger-related competition problem.

In Gemini I, the case concerned the merger of the computer reservation systems ("CRS") of the two major airlines in Canada, which together accounted for over 90% of the domestic airline revenues at the time. The Bureau was concerned that competition in the CRS market could be substantially lessened because these airlines would not have the incentive to give competing CRS vendors access to their airline information on the same basis as they would give it to Gemini, making it very difficult for them to compete. The Bureau was also concerned that competition in airline markets could be substantially affected because Gemini was the dominant CRS system at the time used by travel agents and could bias the information to favour its airline owners to the detriment of airline competitors, as well as be used as a vehicle for collusion.

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[19] Canada (Director of Investigation and Research v. Canadian Waste Services Inc., Consent Order dated April 16, 1997, Schedule A, CT1997-001 (Competition Tribunal)

[20] Canada (Commissioner of Competition v. Lafarge S.A.) Consent Order dated August 1, 2001, at para.42 CT2001-005 (Competition Tribunal)

The remedial options in this case were dissolution of the merger, divestiture, or the imposition of a highly behavioural solution, which included access to "essential facilities" type provisions as well as a detailed set of rules designed to reduce entry barriers and limit the potential of exclusionary practices resulting from the vertical integration of Air Canada and Canadian Airlines with Gemini. The case began as a contested case seeking structural relief but was settled on consent before the hearing started. The CRS rules that were adopted were modeled on the CRS rules in the United States that were enforced by the U.S. Department of Transportation. The Tribunal took comfort from the fact that the rules were seen as an interim measure until a similar set of rules could be put into regulation by Transport Canada.[21]

In the 2004 acquisition of BC Rail Ltd. ("BC Rail") by the Canadian National Railway ("CN"), the Bureau again adopted a purely behavioural approach to resolve what it saw as significant competition concerns in markets for interline transportation of commodities, such as lumber, between points in B.C. served by BC Rail and to other points in North America. In the pre-merger environment, shippers could use BC Rail, connect to CN at Prince George or use BC Rail to connect at Vancouver to Canadian Pacific Rail Company, Burlington Northern and Santa Fe Railway Company or Union Pacific Corporation. Post-merger, the Bureau's concern was that CN would have the incentive and ability to make connecting to other carriers at Vancouver uneconomic and thereby significantly reduce shipper's options. It was also concerned about competition for the movement of grain from the Peace River region of Alberta.

The CN/BC Rail consent agreement sets up a complex regulatory solution. CN is committed to publishing "open gateway" tariffs that will allow connecting rail carriers at Vancouver to quote through rates to shippers with full knowledge of the rate they will pay for the intra-B.C. portion carried by CN in the post-merger environment. The rates are adjusted for inflation less productivity improvements. Transit times to Vancouver are benchmarked against existing service levels with penalties for non-performance.

[21] D.I.R. v. Air Canada, Reasons for the Consent Order dated July 7, 1989 (CT1988-001) at p.18

Safeguards have been added to assure adequate rail car supply. This remedy is similar to the type of remedy used by railway industry regulators in the United States.

In its one page press release and three page backgrounder, the Bureau does not indicate why it chose to adopt such a complex behavioural remedy as opposed to a more straightforward structural remedy. The press materials for CN indicate single rail carrier service will provide significant efficiencies benefits and service improvements for shippers.[22] It may be the case that there was no structural solution available in this case that would preserve substantial efficiency benefits and also solve the alleged competition problem. This will be an interesting test of the utility of a purely behavioural order with its detailed regulatory aspects that require monitoring by the Bureau. The use of arbitration provisions that may be used by connecting carriers could relieve some of the enforcement burden of the Bureau.

Both the Gemini I and CN/BC Rail cases were similar in that the competition problems related to vertical issues. In the case of Gemini, it was the vertical integration of the airlines and the CRS, and in the case of CN/BC Rail, it was an "end to end" merger that created potential problems for interconnecting traffic at Vancouver. In both cases, the problems lay in access to an "essential facility", in the case of Gemini it was the airline information of Air Canada and Canadian Airlines, and in the case of CN/BC Rail, access to the intra-BC rail network on economic terms. The terms of access to essential inputs were mandated to allow competition in final output markets. This is different than the simple regulation of the pricing of the merging parties to their end customers.
In two cases, Chapters/Indigo ("Chapters")[23]and Astral/ Télémedia ("Astral")[24], structural remedies were the principal solution sought, but each contained as well a "code of conduct" that had provisions that did govern pricing and other terms of sale to end

[22] See CN-BC Rail Partnership Fact Sheet, available at www.cn.ca
[23] Canada (Commissioner of Competition) v. Trilogy Retail Enterprises LP. /Chapters CT2001-003 (Competition Tribunal).
[24] Canada (Commissioner of Competition) v. Astral Media Inc., Télémedia Radio Inc., Radiomédia Inc., CT2001-010 (Competition Tribunal)

customers for a limited period of time[25]. In both cases the primary mechanism for enforcement was through arbitration by either book publishers in the case of Chapters and advertisers in the case of Astral. I do not think that these cases stand for the proposition that short term commitments to limit price increases will be sufficient to remedy concerns about the exercise of market power. The basic problem with such suggestions is that after the commitment is over, the market power that the merger creates can be exercised and if this occurs after the three-year limitation period for challenging mergers, there is nothing the Bureau can do to stop it.[26] It is not an adequate response to mergers that create or enhance market power.

Remedial Standard

The goal of a merger remedy in Canada is not to restore the level of competition to its pre-merger state, but to reduce any lessening or prevention of competition to the point at which it is no longer substantial.[27] According to Justice Iacobucci, "some lessening of competition following a merger is tolerated, because the Act proscribes only a substantial lessening of competition.[28] This less onerous standard provides more flexibility than a requirement to return competition to its pre-merger state. It also means that the Bureau cannot seek remedies that will make a market more competitive than existed prior to the merger, but simply address the competition problem caused by the merger itself.

[25] In Chapters, the code of conduct was in place for five years from the issuance of the order. In Astral, it was in place in a problem market until the earlier of the completion of divestiture in that market, the operation of a new French language FM station for 24 months in that market or 42 months from the closing of the transaction. The linkage in Astral to certain structural events could be characterized as a "bridging mechanism" to control market power until the structural component is realized.

[26] Under the abuse of dominance provisions in Canada, unlike Europe, raising price is not an anti-competitive act. See the Competition Bureau's "Enforcement Guidelines on the Abuse of Dominance Provisions, dated July 2001 at p.6 available at www.competitionbureau.gc.ca.

[27] Canada (Director of Investigation and Research) vs. Southam Inc.(1997) 71 C.P.R. (3d) 417 at p. 445 (S.C.C.)

[28] Ibid., at p.444

Implementation of Remedies

Divestitures

The Bureau has indicated that for divestiture to provide effective relief to an anti-competitive merger, three criteria must be met[29]:

- the viability of the assets chosen for divestiture
- the independence and competitiveness of the purchaser; and
- the timeliness of divestiture

(i) Viability of assets

One way to assure the viability of assets is to require the divestiture of an ongoing, autonomous business that has proven to be a competitive force in the marketplace. This avoids some of the start-up problems that can be encountered when less than a full business is divested.

The Bureau has sometimes required the divestiture of an entire business. For example, in Lafarge/Blue Circle[30], Lafarge divested the Canadian operations of Blue Circle. Similarly, in British American Tobacco/Rothman International[31], the acquirer divested its interest in Rothmans in Canada.

More commonly, the Bureau has required the divestiture of something less than an autonomous business, such as a manufacturing facility, retail store, operating division or intellectual property rights to certain product lines. In these cases, the effectiveness will depend on the ability of the purchaser to integrate the assets into its existing business or supply the missing components to make it a viable business in the marketplace.

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[29] Submission of Canada to the OECD Merger Remedy Roundtable, DAF/COMP(2004)21 at p.132. (hereinafter "Canada OECD Submission")
[30] Commissioner of Competition v. Lafarge S.A. CT 20001-004 (Competition Tribunal)
[31] Commissioner of Competition v. British American Tobacco p.l.c. CT 1999-001 (Competition Tribunal)

The viability of assets can be difficult to determine. Clearly the merging parties have the incentive to minimize the costs to them of any divestiture by trying to limit both the scale of divestitures and the quality of assets to be divested. They would much rather see high cost, uncompetitive facilities or declining brands in the hands of competitors than low cost, state of the art facilities or high growth leading brands or products.

For its part, the Bureau will often engage an industry consultant to help it determine the viability of the assets under consideration. While competitors or customers can make their views known at any point in the merger examination process, it is not common for the Bureau to pro-actively seek their input on the viability of particular assets that are being considered for divestiture. In many cases the Bureau has agreed to an asset package without this input. Market testing occurs when the divestiture assets are put up for sale by the parties and, if necessary, by the trustee.

In most cases, the Bureau has allowed a "mix and match" approach to asset selection in that assets can be chosen from either of the existing assets of the merging parties. While this approach allows considerable flexibility in asset selection, it does carry some additional risk in that it combines assets that have never worked together. For example, two plants may take some time to coordinate production due to differences in production or information technology, quality control standards and other differences in operations. As a result, the European Commission is more cautious with respect to using this mix and match approach.[32]

The Bureau has rarely been clear on what criteria it uses in any particular case to decide what is required in terms of the scale of divestiture to meet the remedial standard of eliminating the substantial lessening or prevention of competition. For example, assume Firm A with 35% of some relevant market proposes to purchase Firm B with 30% of the same relevant market. Also assume that the merger involves many other markets that are

[32] Commission Notice on remedies acceptable under Council Regulation No. 4064/89 and under Commission Regulation (EC) No. 447/98, Official Journal of the European Communities, 2.3.2001, para.18

not of concern. Would the Bureau require the parties to divest all of the operations of either Firm A or B with respect this relevant market?[33] In the alternative, would it require the parties to divest sufficient assets (plants, brands, etc.) such that the combined market share would be reduced to a particular target market share level, such as 50%?[34] And if it has chosen a particular target level, why was this level chosen as opposed to some other level and what precedent value would this hold for future cases? If other criteria were used to decide the level of divestiture, what were they? This is an area that would benefit by greater transparency from the Bureau.

The case law is clear that if remedy needs to go beyond the problematic markets in order to be effective, it will not be defective as a result. Assume for example that a plant produces products in both problematic markets and non-problematic markets. If the product lines are not severable, and no other suitable facility can substitute, it may be the case that the entire plant will be required for divestiture. In Southam, the Supreme Court stated:

> "…If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective."[35]

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[33] In the Technical Backgrounder describing its decision in the acquisition of Famous Players by Cineplex Galaxy, the Bureau indicates that its objective in divestiture in this case was to reduce the merged entity's market share to the approximate pre-merger market share of the larger of either Cineplex or Famous Players' market share in each city.

[34] In the large bank merger reviews in 1998 and in the merger review of Toronto-Dominion Bank's acquisition of Canada Trust, the Bureau found that post-merger market shares of 45% or greater in certain key products (where the net increase as result of the merger was more than 5%), combined with other supporting factors, such as high barriers to entry, would substantially lessen competition. See, for example, the Bureau's letter to parties in the Toronto-Dominion Bank/Canada Trust case on the Bureau website, www.competitionbureau.gc.ca. According to Joe Sims and Michael McFalls, the Federal Trade Commission and US DOJ are increasing unwilling to permit divestitures to incumbents, sometime referred to as "zero-delta" policy such that the divestiture will not increase concentration at all in the markets of concern. "Negotiated Merger Remedies: How Well Do They Solve Competition Problems?", 69 Geo. Wash. L. Rev. 932 The Bureau has not adopted such a stringent policy.

[35] Canada (Director of Investigation and Research) v. Southam Inc. [1997]1 S.C.R. 748 at p.791 (S.C.C.)

The viability of assets may depend on factors other than the inherent characteristics of the assets themselves. In the Abitibi/Donahue case[36], the sale of the Port Alfred newsprint mill, whether in the hands of the parties or in the hands of the trustee, was unsuccessful. At least part of the problem with this divestiture failure appeared to relate to deteriorating market conditions where the price of newsprint reached cyclical lows during the sale period.

Another problem may arise when insufficient scale is being offered. In the Chapters/Indigo case, the merger involved the two largest book retailers in Canada. In its Statement of Grounds and Material Facts, the Bureau stated that:

> A bookstore chain can achieve economies of scale from a strong multi-store regional presence. To support the corporate overhead associated with in national chain, it is understood to be necessary to have a critical mass of stores. Indigo estimated that 24 superstores were necessary as a minimum critical mass for its particular multi-regional presence."[37]

The consent order, however, required the divestiture of 13 superstores and 10 mall stores. Interveners argued that the critical mass of superstores was insufficient and well below the 24 stores cited above. The Tribunal rejected these submissions because it did not have evidence to support the submission. It was also reluctant to intervene when prior to the merger, Indigo operated 15 superstores, while the divestiture required the sale of 13 superstores plus mall stores. In the eyes of the Tribunal, to require more superstores would likely restore competition beyond a point that existed before the merger.[38] The result of the case was that no purchasers could be found for the divestiture package and the stores were returned to the merging parties.

The case raises an interesting problem. If a critical mass of 24 superstores was required for efficient scale, the divestiture package was flawed. However, the purchaser itself, a relatively new entrant and in an expansion phase, was then operating at sub-optimal

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[36] Commissioner of Competition v. Abitibi-Consolidated Inc. CT 2001-009

[37] Commissioner of Competition v. Trilogy Retail Enterprises L.P./Chapters, CT-2001-003, Statement of Grounds and Material Facts, para.60 (hereinafter "Chapters")

[38] Chapters, Reasons for Consent Order, para. 32.

scale. Could the Tribunal require more than the complete divestiture of the business of either of the parties that existed at the time of the merger? Perhaps such an action could be justified if there was convincing evidence that, but for the merger, the purchaser would have continued to grow to a minimum viable scale.

In the Rona/Réno-Dépôt merger ("Rona"), the Bureau examined the competitive effects in retail markets for home improvement products. Rona operated 31 big box stores in Quebec and Ontario, while Réno-Dépôt operated 20 big box stores in these provinces. The Bureau concluded that the merger would substantially lessen competition in only one market and required divestiture of one big box store. The consent agreement was registered on September 4, 2003 but a purchase agreement was not signed until November 24, 2004.[39] One reason for the lengthy sale period may have been the lack of scale associated with one big box retail location. Unless a purchaser already had a chain of box stores in reasonable proximity, it may not have sufficient scale to support one large format store location.

In testing the viability of assets, the Bureau usually takes comfort from the fact that a buyer has decided to purchase the assets and assumes that the purchaser has an economic interest to effectively operate the assets in the relevant market. As the Federal Trade Commission ("FTC") Divestiture study[40] indicated, however, buyers do not always have the same interests as the competition law agencies and may be content to harvest brands or compete in other markets with assets that have been cheaply acquired in a compelled divestiture process. In addition, merging parties have an incentive to seek out the weakest buyers that they think can be accepted by the competition agencies, although this incentive can be counterbalanced if stronger buyers are willing to pay a higher price for the assets. In most cases market forces can and should be relied on, but it does require some vigilance on the part of the Bureau to ensure the sale process is properly conducted

[39] Rona Inc. v. Commissioner of Competition CT 2003-007 (Competition Tribunal), Reasons and Order for s.106 Application, dated May 30, 2005 at paragraph 61 (hereinafter "Rona"). Rona successful argued in its s.106 application that due to the imminent arrival of Home Depot in this market, it should not be required to divest. The Tribunal agreed and the sale process was terminated.

[40] "A Study of the Commission's Divestiture Process" Federal Trade Commission 1999, available at www.ftc.gov ("FTC Divestiture Study").

and the Bureau is satisfied with the competitiveness of both the asset package and the purchaser.

One measure that the Bureau can use to ensure the viability of the asset package is to require that additional or alternative assets be subject to divestiture if the purchaser is unable to sell the original package of assets in the timelines agreed to in the consent agreement. The additional assets may be useful where the purchaser cannot locate suitable buyers that have complimentary assets to the original divestiture package that in combination would make it an effective competitor. Furthermore, requiring additional assets to be divested increases the incentive of the purchaser to find a buyer for the original and less valuable package of assets during the initial sale period. This "crown jewel" or "backstop divestiture" provision has been infrequently been used by the Bureau in the past, but is appearing more often in settlements reached in recent years.[41]

According to the Antitrust Division of the U.S. Department of Justice ("U.S. DOJ"), such provisions are strongly "disfavoured because generally they represent acceptance of either less than effective relief at the outset or more than is necessary to remedy the competition problem."[42] In other words, the U.S. DOJ prefers to bear the risk of getting it right with the original package of assets negotiated to solve the alleged competition problem. The FTC however, utilizes the crown jewel provision more frequently. [43]

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[41] It is difficult to determine if any of the many undertakings used by the Bureau contained such provisions as the terms of the undertakings were never made public, but is the author's experience that such provisions were used infrequently. Since 1997, however, five consent orders have contained public backstop divestiture provisions (D.I.R. v. Dennis Washington et. al. CT 96/1 (hereinafter "Seaspan"), D.I.R. v. ADM Agri-Industries Ltd. CT 1997-002, (hereinafter "ADM"), D.I.R. v. Canadian Waste Services Inc. CT 1998-001 (hereinafter "CWS"), Commissioner of Competition v. Bayer AG and Aventis Crop Science Holdings S.A. CT2002-003 (hereinafter "Bayer-Aventis") and Commissioner of Competition v. Astral Media Inc., Télémedia Radio Inc., Radiomédia CT2001-010) (hereinafter "Astral"). Other consent orders or consent agreements may contain such provisions in confidential schedules that have never been publicly released.

[42] Antitrust Division Policy Guide to Merger Remedies, U.S. D.O.J., October 2004, p. 37.

[43] See Submission of the United States to OECD Merger Remedies Roundtable, DAF/COMP (2004)21 footnote 11 at p.245

(ii) Independence and Competitiveness of the Purchaser

The Bureau has always required its approval of any purchaser to the divested assets. This veto gives it the ability to satisfy itself that the purchaser will likely be an effective competitor in the relevant markets of concern and will use the assets to be divested to compete in those markets. It will not however, direct a sale to a purchaser it thinks will be the most competitive but will allow the seller to choose any purchaser that will be independent and sufficiently competitive to remedy the substantial lessening or prevention of competition.

Independence should be axiomatic. This has rarely been an issue. More subtle problems, however, can arise where transitional measures, such as supply contracts or technical support are required. As the FTC Study noted, long term reliance on the merging parties for supply of essential inputs or technical assistance can be a source of potential trouble in the future.[44] On the other hand, it is becoming commonplace in the economy for firms to rely on other firms through outsourcing, contract manufacturing, licensing, raw material supply agreements, site service agreements, joint ventures, shared infrastructure or back office systems.

Determining competitiveness, however, can be more difficult. The Bureau generally assumes that if a purchaser is willing to invest its money, has been identified in a legitimate sales process and is willing to compete in the relevant markets of concern, that will provide comfort as to its competitiveness. As the U.S. DOJ Remedy Guide notes:

> "If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple."[45]

[44] Ibid., p.18
[45] Antitrust Division Policy Guide to Merger Remedies, October 2004 ("U.S. DOJ Remedies Guide"), p.33

The FTC divestiture study, however, details a number of examples where the buyer did not succeed in becoming an effective competitor[46]. A firm with a track record in the relevant markets or at least similar markets would give additional comfort. While desirable from the viewpoint of market experience, there may nevertheless be cases where a proposed divestiture to an existing market participant will be unacceptable if that divestiture would itself be competitively problematic under a theory of either unilateral or coordinated effects. In the case of coordinated effects, for example, an out-of-market firm may be required in order to resolve the competitive concerns.

(iii) Timeliness of Divestiture

Timeliness can be key to achieving a successful divestiture. The longer a divestiture takes, the higher the risk that assets will deteriorate, key personnel will obtain alternative employment or market conditions will change. This period of uncertainty is in addition to the uncertainty that may have been caused by an extensive examination and negotiation process that stretched over many months.

While the importance of timeliness was well understood from the beginning of merger enforcement in Canada in 1986, the early record was disappointing. Sanderson and Wallwork, in examining the Bureau's record from 1986 to 1993, note:

> "Requests for extensions have coloured the Bureau's experience with divestitures ever since its first merger case. In more than half of the divestiture cases, extensions have been requested and, in most cases, granted. The result has been that, excluding the few remaining unsold assets in the A&P and Imperial Oil cases, the average time taken to complete divestitures in Canada is sixteen months from the point the undertakings are signed, ranging from a low of two months to a high of thirty-four months."[47]

This study noted that three cases took over 22 months to complete the divestitures.

[46] FTC Divestiture Study, pp.16-28.

[47] Margaret Sanderson and Ann Wallwork, "Divestiture Relief in Merger Cases: An Assessment of the Canadian Experience" (1993) 38 McGill L.J. 757 at p.769.

Since 1993, there has been no systematic study of merger remedies by the Bureau, at least none that has been made public. Moreover, the time for the initial sale period by the parties or the time for the sale by the trustee, has usually been kept confidential in undertakings, consent orders or consent agreements since 2001. Nevertheless, it is the author's experience that improvements have been made in the time taken to divest since 1993. Initial sale periods are often between 6 to 12 months and multiple extensions are more difficult to get than in the past. It is often the case that if the parties are close to finalizing a sale negotiation near the end of the initial sale period, they will be given 30 to 60 additional days to complete the transaction before the trustee provisions take effect.

A similar transition to shorter divestiture periods has occurred in the United States. The FTC Study noted that its earlier orders often gave respondents 12 to 15 months to divest. In more recent FTC orders, the working rule is that divestiture must be accomplished within six months after the consent agreement is signed. [48] The U.S. DOJ Remedies Guide indicates that the divesting firm will normally be given 2 to 3 months to locate a purchaser on its own.[49]

The argument against disclosing the time periods for sale in the initial consent agreement is that it would give buyers greater leverage in negotiations. However, time periods are routinely disclosed in the United States. The Bureau's own practice has been very inconsistent. For a four year period between 1997 and 2001, a number of consent orders[50] did disclose the time period for initial sale and for the trustee sale. Following that period, all consent orders and consent agreements have kept this information confidential, with the exception of two cases[51] were the Bureau filed parallel orders with the FTC where the periods were disclosed in the U.S. orders in any event.

[48] FTC Study, p.39.
[49] DOJ Remedies Guide, p. 30.
[50] The Seaspan, ADM, CWS, British American Tobacco and Quebecor cases all disclosed the initial sale period (ranging from 6 months to 15 months) and the trustee sale period (3 to 6 months). Canada (Commissioner of Competition) v. British America Tobacco p.l.c. (CT1999-01), Canada (Commissioner of Competition) v. Quebecor Inc./Videotron (CT-2000-005).
[51] In Lafarge-Blue Circle and Bayer-Aventis, the initial sale period was 6 months.

The FTC has also required with frequent regularity that merging parties find an acceptable buyer for the package of assets they propose to divest and execute an acceptable agreement with the buyer before the Commission accepts the proposed consent order for public comment (often referred to as the "upfront buyer" provision).[52] For its part, the U.S. DOJ often relies on "fix-it-first" remedies where the merging parties sell off overlapping businesses before closing, but unlike the FTC, do not require a consent decree. Clearly this measure is "ideal" from the standpoint of timeliness in that the remedy occurs before the main transaction closes.

In Canada, pre-closing restructuring has sometimes been done to resolve competition concerns. Campbell discusses the five cases between 1986 and 1995 that were subject to pre-closing restructuring.[53]A handful of pre-closing restructuring cases have occurred since 1995[54], but it is certainly the exception, not the rule in Canada. In one case, Pfizer/Pharmacia, where the Bureau conducted parallel examination and negotiations with the Federal Trade Commission, the Bureau adopted the FTC order, including the upfront buyer provisions.

Terms of Consent Agreements

Since the Bureau rarely requires a fix-it-first solution, it is usual for the parties to be allowed a period of time after closing to sell the selected assets and if unsuccessful, to empower a trustee to sell the assets. During the sales process the parties will be obligated to report to the Commissioner on the status of the sales efforts on a regular, usually monthly, basis.

It is often the case that the Bureau will require a monitor to be appointed at the parties expense. The function of a monitor is to ensure that the parties are using their best efforts

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[52] By 1999, the FTC was requiring an up-front buyer in about sixty percent of its divestitures. Robert Pitofsky, "The Nature and Limits of Restructuring in Merger Review", Cutting Edge Antitrust Conference (Feb. 17, 2000), http://www.ftc.gov/speeches/pitofsky/restruct.htm.
[53] Campbell, footnote 5, at pp.310-314.
[54] Examples include the Canada Bread/Multi-Marques and Sysco/Serca Foodservice cases, discussed in the Canada OECD Submission, fn. 27, at p. 132-133.

to fulfill their obligations under the consent agreement. The monitor will have access to any associated facility or records in order to carry out his mandate. The monitor will have reporting obligations to the Commissioner. The monitor will often be an outside accounting firm that will use the experience gained during this period to also act as the divestiture trustee.

In order to preserve the integrity and competitiveness of the divestiture package, the Bureau will usually require that the divestiture assets be held separate and operated by an independent manager pending final divestiture. An independent manager will be responsible for the daily management, for making pricing decisions, and for maintaining the customer base and competitiveness of the business.[55] He will have reporting obligations to the monitor and the Commissioner. The parties will pay all reasonable fees and expenses incurred by the independent manager. The independent manager may be someone who has connections to the parties if that person is otherwise qualified and is subject to appropriate confidentiality measures. The consent agreement will spell out in some detail the obligations of the parties to maintain the viability, competitiveness and independence of the assets to be divested.

Multi-Jurisdictional Remedies

The increasing number of large multi-jurisdictional mergers has resulted in more parallel examinations and, for those mergers creating competition problems, a greater need for coordination of merger remedies.

One obvious situation that calls for remedy coordination occurs when the merger is having anti-competitive effects in multiple countries, but the “fix”, a divesture of a production facility, is located in one country only.

[55] Submission of Canada to OECD Roundtable on Merger Remedies, DAF/COMP(2004)21 at p.134.

In the acquisition of Scott Paper by Kimberly-Clark[56] for example, the U.S. DOJ and the Bureau both identified a competition concern in baby wipes. However, there was only one Scott plant producing baby wipes for North America. Consequently, it was important that the purchaser of the plant would be an effective competitor in both the United States and Canada. Essentially the opposite circumstance occurred in the Lafarge/Blue Circle merger[57]. In this case, the cement production facilities were located in the Province of Ontario, but a significant percentage of the production was exported to the U.S. states bordering the Great Lakes. As a result, the Bureau and FTC cooperated closely on a divestiture package that would remedy the competition problems on both sides of the border.

While principles of comity and practicality make coordinated remedies attractive, it is of course not possible in all cases. The nature and degree of competitive problems can differ, requiring different remedial actions.

Part III

Remedies Bulletin

On October 19, 2005, the Bureau released for public comment its draft Information Bulletin on Merger Remedies in Canada ("Remedies Bulletin"). The Remedies Bulletin was subject to an extensive consultation exercise that included a period for written comments and roundtable discussions in the first half of 2006. It is expected to be released in its final form in the fall of 2006.

The Remedies Bulletin in many respects reflects the current practice of the Bureau as discussed in Part II. The emphasis remains on structural remedies or a combination of structural remedies and behavioural remedies that play a supporting role or reduce entry

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[56] Kimberly-Clark Corporation/Scott Paper Company merger was described in the Annual Report of the Competition Bureau for fiscal 1996-1997, available at www.competitionbureau.gc.ca

[57] Commissioner of Competition v. Lafarge S.A. CT 2001-004, Consent Order. See also "FTC Clears Merger of Lafarge S.A. and Blue Circle Industries" Press release dated June 18, 2001, available at www.ftc.gov.

barriers. In a number of areas, however, the Remedies Bulletin continues the progression to a more conservative approach to the remedies process. Appendix One summarizes the important differences and similarities from current practice. These issues are discussed below.

Timing

The Remedies Bulletin shortens the initial sale period in which the vendor must divest from the current practice of 6 to 12 months to a period of 3 to 6 months.[58] The period for the trustee sale period suggested by the Remedies Bulletin is the same as the current practice of 3 to 6 months.

The shorter initial sales period is a significant change from current practice. It would bring the Bureau closer to the practice in the United States. It would reduce the risk of remedy problems or failures due to factors such as changing market circumstances, the departure of key employees or the loss of major customers.

However, these benefits will come at additional cost to the merging parties. Canadian markets are typically much thinner in terms of the number of strategic buyers than U.S. markets. This makes it more difficult to find acceptable buyers in a short time frame. Firms in the same industry that are not currently participants in the Canadian market may take some additional time to evaluate the opportunity and make the strategic decision to enter. Sellers in industries subject to foreign investment limits may find it difficult to locate domestic buyers in such a short time frame. Sellers who prefer to set up an auction process may find it difficult to arrange in a three month time frame. In general, the shorter time frame will impose additional costs on merging parties to expedite the search process and likely result in some greater value destruction than would otherwise be the case with a longer sale period.

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[58] Remedies Bulletin, para.31

The Remedies Bulletin also arguably restricts the Bureau's current practice of allowing an additional 1 or 2 month period to complete a divestiture where the parties are close to concluding a purchase and sale agreement during the initial sale period. The Bulletin indicates that the Bureau may grant a "short extension" in "exceptional circumstances or where the vendor has signed a binding letter of intent with a prospective buyer and the closing of the divestiture is clearly imminent."[59]

Crown Jewels

As discussed in Part II, the Bureau has occasionally insisted on a crown jewel provision, particularly in recent years. The Remedies Bulletin places greater emphasis on the use of crown jewel provisions[60]. It implies that where there is some uncertainty as to whether the remedy will be viable, crown jewel provisions will be required. The circumstances where viability may be somewhat uncertain, such as in cases of partial divestitures or where assets may deteriorate quickly, are frequently encountered.

In its roundtable discussions on the Remedies Bulletin, Bureau officials indicated that that crown jewels would be more routinely sought and would not rule out its application even in cases where a standalone business was being proposed for divestiture. A driving motivation is to provide the parties with a powerful incentive to sell the original divestiture during the initial sales period. Although the Remedies Bulletin indicates that the crown jewel provision is not intended to be punitive, it is not difficult to see how on the line between incentive and punishment could be crossed very easily. Helpfully, Bureau officials have acknowledged that the crown jewel assets should be in the problem market(s) and not in markets where no competition concerns have been identified. While adding additional assets to make the original package more saleable is a legitimate objective, it must be exercised cautiously in order to avoid becoming punitive and more than is required to achieve an effective remedy.

[59] Remedies Bulletin, par.31
[60] Remedies Bulletin, para.33

If as seems to be the case the Bureau is intending to make the use of crown jewel provisions a standard feature of the merger remedy process, it will impose a significant additional burden on merging parties. Crown jewel provisions impose additional costs on the parties by creating uncertainty about whether the alternative assets will stay with the current owner or be divested. This puts on hold any integration plans the parties may have, potentially delaying any efficiency gains that would flow from integration. It also puts in limbo the status of employees connected to those businesses or assets for an extended period of time, creating its own costs due to lost productivity and increased anxiety among employees about their future.

The use of crown jewel provision may also impair the success of the original sale period if purchasers delay their interest in the hopes of picking up the "crown jewels" at fire sale prices. This risk is mitigated by the policy in the Remedies Bulletin of keeping secret during the initial sale period the list of specific assets that would form the crown jewel package. However, the Remedies Bulletin indicates that the fact that a crown jewel provision exists may not be kept confidential. With this knowledge, prospective purchasers may still delay their interest in the hopes of picking up a more attractive package of assets at very attractive prices from a trustee sale. Strategic buyers who are very familiar with the assets of their competitors may be able to figure out with some precision the additional assets that would likely be available in a crown jewel provision. Moreover, it is unnecessary to publicly disclose the existence of the crown jewel provision during the initial sale period as the increased incentive it creates for vendors to sell quickly is undiminished by non-disclosure.

Due to the costs imposed on the parties to a merger, crown jewel provisions should continue to be used infrequently and limited to cases where there is significant doubt as to the viability of the asset package and such uncertainty could be addressed by adding additional assets for the trustee to sell. The parties' incentive to move the sale process along will be increased by the change to a shorter initial sale process and does not require additional incentives.

Upfront Buyers and Fix-it-First

According to the Remedies Bulletin, the Bureau "strongly prefers fix-it-first solutions". This represents no change in policy as the Bureau as always preferred fix-it-first solutions. As discussed in Part II, however, fix it first solutions are infrequently offered by the merging parties in Canada or required by the Bureau.

The Remedies Bulletin indicates that a buyer may need to identified before the Bureau will agree to a remedy package where the assets to be divested must be combined with the complementary assets of a buyer to produce a successful remedy. The Remedies Bulletin indicates "upfront buyer" provisions may be required, but does not suggest that it would be frequently required. If that is the correct interpretation of the Remedies Bulletin, then it reflects the current practice of the Bureau.

Requiring upfront buyers or fix-it-first solutions can impose substantial costs on the merging parties. The need to find and receive approval for a buyer will usually delay closing the merger. This may delay the realization of merger efficiencies and increase transaction costs. The additional delay creates greater risk that movements in the market may make share-for-share deals unattractive or financing more expensive to obtain. Forcing the merging parties to sell assets before closing can give potential buyers tremendous leverage where the sale of the divested assets are holding up a much larger deal and can destroy the value of the divested assets for the parties.

Given these costs imposed on the parties, the Bureau should not require fix-it first or upfront buyer measures unless there is significant risk that a post-closing sale process will not succeed. For example, risks of post-closing failure may be higher where there are few acceptable purchasers or there is substantial doubt about the viability of the assets as a remedy without finding a purchaser with complimentary assets.

Full versus Partial Divestitures

The Remedies Bulletin indicates that partial divestitures that provide the necessary components for a purchaser to provide effective competition sufficient to eliminate the substantial lessening or prevention of competition arising from a merger will be acceptable. Such components could include, for example, certain manufacturing facilities, retail locations, individual products or product lines and related intellectual property, such as patents and brand names. Understandably, the Remedies Bulletin indicates such partial divestitures will be subject to more careful scrutiny to ensure their effectiveness than the full divestiture of a standalone business that has a proven track record in the marketplace. This is consistent with past practice.

The Remedies Bulletin also notes that in some cases it may be necessary to include assets outside the relevant market where, for example, economies of scale and scope are important. As noted in the discussion of the Chapters and Rona cases cited earlier, this can be a difficult issue to resolve.

Mix and Match of Assets

As discussed in Part II, the Bureau has frequently allowed parties to mix assets from both buyer and target to form the package of assets for divestiture. The Remedies Bulletin indicates that the Bureau now generally prefers assets from one merging party, normally the target being acquired in the merger in order to reduce asset integration issues.[61] This change brings the Bureau closer in line with the practice in Europe and the United States, but retains some flexibility where circumstances warrant.

Market Testing of the Asset Package

The Remedies Bulletin indicates that prior to agreeing to an asset package, the Bureau may seek information from market participants, including competitors and customers, to

[61] Remedies Bulletin, para.16

test whether the package would be saleable, viable and sufficient to resolve the competition concerns. Clearly this will be a delicate exercise in order to protect confidentiality and to filter the self-interest of the parties giving the information. It will prolong the remedy process.

However, it should give the Bureau useful information in order to satisfy itself that the remedy package will be sufficient to resolve the concerns. It should therefore reduce the level of uncertainty that might otherwise require crown jewel or upfront buyer provisions.

No Minimum Price

The Remedies Bulletin indicates that in order to increase the likelihood that the divestiture will occur, the Bureau will require that during the trustee sale period, the remedy package will be divested at no minimum price.

This policy is in response to two cases, Air Canada/Canadian Airlines and Abitibi/Donahue, where the consent settlements contained provisions relating to minimum or floor prices below which the trustee could not sell. In both cases, the floor price provisions became the subject of dispute proceedings, either by arbitration or before the Competition Tribunal.

The no minimum price concept was well established in Bureau practice prior to these cases. After these cases, the Bureau made it clear that it would not entertain floor price provisions in future consent agreements.[62] The Remedies Bulletin is not a departure from previous norms in this respect. It is consistent with U.S. practice where successful divestiture will not be concerned with the price paid for divestiture assets, unless it raises concerns about the viability of the purchaser.[63]

[62] See for example, Canada OECD submission, fn. 27, at p.135
[63] DOJ Remedies Guide, p.33

Stand-Alone Behavioural Remedies

As discussed in Part II, the Bureau has rarely adopted a stand-alone behavioral remedy. The Remedies Bulletin makes it clear that the Bureau is very unlikely to entertain a pure behavioural remedy, and if anything has described a set of criteria that is even more restrictive than previous experience would suggest. It indicates that a behavioural remedy may be acceptable if it eliminates the substantial lessening or prevention of competition, if there is no viable structural remedy *and* it will require minimal or no ongoing monitoring and enforcement by the Bureau. This third condition is going to be difficult to achieve as almost any behavioural order is going to require some oversight, unless the Bureau is prepared to rely solely on third party arbitration.

Curiously, the Bulletin makes no mention of efficiencies in this consideration for using a behavioural remedy. For example, in a case where there is no structural remedy option available, but compelling efficiencies, one might want to consider a behavioural solution to preserve the efficiencies while at the same time moderating the anti-competitive effects. In a case where there are no compelling efficiencies, one could rightly question the efficacy of a pure behavioural remedy, in which case blocking the merger may be the preferred solution.

Undertakings

As discussed in Part II, when the consent order process was changed to a consent agreement registration process, the Bureau indicated that undertakings would be rarely used. However, the Remedies Bulletin does not discuss in what circumstances undertakings could still be used. It does not discuss undertakings at all. In the roundtable consultation on the Remedies Bulletin, the Bureau indicated that it would not use undertakings in the future.

Hold-Separate Provisions

As is the current practice, the Remedies Bulletin indicates that hold-separate provisions would normally be required to preserve the competitiveness of the divestiture package and avoid the problem of "unscrambling the eggs" if the parties were allowed to combine the assets to divested with their other operations.

However, the Bureau goes on to note that hold-separate provisions will apply only after completion of the merger, not normally during the period where the merger investigation is ongoing. In other words, the Bureau will normally use section 100 to prevent closing where it needs more time to complete its investigation as opposed to letting the parties close subject to a hold separate undertaking as sometimes has occurred in the past.

Confidential Schedules

The Remedies Bulletin indicates that the Bureau will continue to agree to confidential schedules during the initial sale period to prevent buyers from knowing the duration of the sale before a trustee will be appointed and that the trustee sale may include a crown jewel provision or a no minimum price provision.[64]

The Bureau, however, will disclose most terms of the confidential schedules once the trustee period begins, including the time period for the trustee sale, any crown jewel provisions and the fact that the package must be sold at no minimum price.[65]

This policy helps to protect private interests in achieving value for the assets in the initial sale period while ensuring the efficient functioning of the trustee sale process.

[64] Given the fact the Remedies Bulletin makes it clear that the Bureau will require during the trustee period that the remedy package will be divested at no minimum price in every case, it seems of little value to keep it confidential in any particular case.
[65] Remedies Bulletin, par.65

In addition, the Remedies Bulletin indicates that there will be full disclosure of the terms of the consent agreement when the divestitures are complete or if the remedies are made public in other jurisdictions. This welcome change from recent Bureau practice will provide greater transparency. It should also be applied retroactively so that the confidential terms of previous consent agreements or consent orders should be made public, as should the terms of all previous undertakings. This would provide a more detailed record that exists today of the remedial actions in past cases. This is important not only for future guidance but also for accountability of the Bureau in the discharge of its public responsibilities.

International Cooperation and Coordination

The Remedies Bulletin provides some additional clarity on when in a multi-jurisdictional merger it will rely on the remedy actions taken by foreign agencies to resolve potential competition issues in Canada. The Bureau may rely on remedies initiated by foreign jurisdictions when assets that are subject to divestiture and/or conduct that must be carried out as part of a behavioural remedy are primarily located outside of Canada[66]. The Bureau further asserts it will only do so if it is satisfied that such action will resolve competition issues in Canada. This assertion appears to leave open the possible extra-territorial application of Canadian competition law to require the divestiture of assets located outside of Canada.

Conclusion

While the Bureau's experience in resolving competition concerns through consensual remedies in merger cases has, in the majority of cases, been a positive one, there have been some notable exceptions. As a result, the Bureau has become progressively more conservative in the terms and conditions it will seek in remedies discussions. The draft

[66] Remedies Bulletin, para. 75. A recent example of this policy occurred in the merger review of the acquisition of Guidant Corporation by Boston Scientific Corporation where the Bureau determined that the FTC Consent order and the commitments made to the European Commission were sufficient to resolve the competition concerns in Canada. See "International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger", Competition Bureau Information Notice dated May 11, 2006.

Remedies Bulletin continues that evolution by departing from the current practice in a number of important respects, including significantly shorter timer frames for the initial sale period and the more frequent use of crown jewel provisions.

Crown jewel and upfront buyer provisions can impose substantial costs on merging parties. By significantly shortening the initial sale period, the Bureau has provided ample incentive for merging parties to move the sale process along without the additional incentive of crown jewel provisions. In addition, by more thorough market testing of the asset package before agreeing to the divestiture package, as suggested by the Remedies Bulletin, the Bureau should feel less need to have a backstop divestiture because of the risk it may have misjudged the viability of the original divesture package. For these reasons, crown jewel or upfront buyer provisions should be infrequently required and reserved for those cases where there remains significant doubt about the viability of the asset package or the existence of credible buyers to resolve the competition concerns.

The Bureau's merger remedies process would be improved by increasing transparency. The Remedies Bulletin does improve transparency by indicating that upon completion of the initial sale period most terms in confidential schedules will be made public and that upon completion of the divestitures, there will be full disclosure of the terms of the consent agreement. This policy should be retroactively applied to all previous consent agreements, consent orders and undertakings. In addition, where a consent agreement is reached, the Bureau should prepare and publicly release a statement of grounds and materials facts and a consent agreement impact statement in order to explain why it thinks a proposed transaction raises competition concerns and how the proposed remedy would resolve the concerns. Increased transparency would improve public accountability, predictability and confidence in a merger control system that is essentially regulatory in nature.

Appendix One

Comparison of the Remedies Bulletin to Current Practice

Policy	Current Practice	Remedies Guideline
Initial Sale Period	6-12 months	3-6 months
Trustee Sale Period	3-6 months	3-6 months
Structural Remedies	Strong preference	Strong preference
Behavioural Remedies	Supporting Role; Standalone rare	Supporting Role; Standalone rare to non-existent
Crown Jewel Provision	Occasionally	More frequently used-- where uncertainty over asset viability/effectiveness
Upfront Buyer Provision	Occasionally	Occasionally
Fix-it-First	Strongly preferred but infrequently required	Strongly preferred but infrequently required
Mix and Match of Assets	Frequently Allowed	General preference to have assets from target only
Market testing of asset package before consent agreed to	Not usually done	Bureau will seek to do this more often
No minimum price provision	Standard practice	Standard practice
Confidential Schedules	Existence of crown jewel provision, time period for initial sale kept confidential	Assets subject to crown jewel and initial time period confidential, but not existence of crown jewel provision These terms disclosed during trustee sale and all schedules become public after divestiture completed