CANADIAN COMPETITION RECORD

COMMENT & ANALYSIS

RECENT DEVELOPMENTS IN MERGER REVIEW*

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I. INTRODUCTION

- A number of recent developments illustrate the extent to which the Director and the Bureau have adopted a tougher approach and are increasingly willing to use the formal mechanisms under the *Competition Act* (the "Act") in connection with the review of potentially anti-competitive mergers:
  - to require that information requests be responded to under oath;
  - to examine simultaneously the conduct of merging parties under the criminal law and merger provisions of the Act;
  - to prevent inappropriate information exchanges during pre-merger negotiations;
  - to prevent the completion of a merger or the mingling of assets prior to the completion of the Director's review;
  - to review concurrently transactions being reviewed by other regulatory agencies;
  - to ensure that representations and commitments made during the Director's review remain true and are observed after closing;
  - to share information with other law enforcement agencies; and
  - to ensure that the remedies provided to the Director are fully enforceable.

II. EXCHANGE OF INFORMATION BY PARTIES TO A MERGER

- The Bureau is prepared to use information obtained during the investigation and review of a proposed merger to investigate or prosecute the merging parties for any offences which this information suggests may have been committed under the Act.

- Information provided to the Bureau as a result of the December 1989 acquisition of Davis Wire Industries Ltd. by Tree Island Industries, Limited led to a successful prosecution under the conspiracy provisions of the Act.[1] We are aware of other cases in which information obtained by the Bureau in the course of a merger review has given rise to concerns under the conspiracy or price maintenance provisions of the Act.

- Section 6.6 of the Director's *Merger Enforcement Guidelines*[2] (the "MEGs") notes that information exchanged between the parties during merger negotiations may give rise to issues under conspiracy provisions of the Act. To reduce such risks, the MEGs suggest that:

  - the information exchanged be limited to that reasonably necessary to make a decision about the proposed merger;

  - in the absence of legitimate reasons to the contrary, the information flow only one way; and

  - access to the information be restricted to the persons involved in negotiating the transaction.

- In the United States, antitrust authorities have noted that section 1 of the *Sherman Act* applies to parties negotiating a proposed merger right up to the time the deal is consummated and have suggested, in addition to the safeguards set forth in the MEGs, that counsel consider preparing a written plan respecting access to competitively sensitive information in order to reduce the likelihood that merger discussions will give rise to an investigation or prosecution for a violation of the *Sherman Act*.[3]

- The January 16, 1995 prohibition order[4] issued on consent with respect to negotiations of a proposed merger of certain Quebec concrete companies, demonstrates that the Bureau may seek a prohibition order under section 34 of the Act in cases where, as indicated in the agreed statement of facts filed in that case, it has reason to suspect that merger negotiations are being used to facilitate the violation of the conspiracy or price maintenance provisions of the Act.

- We recommend that the following steps be taken to address proactively any concerns that the Bureau might otherwise have regarding the exchange of information in connection with a proposed merger:

  - consider whether the conduct of any of the merging parties could give rise to concerns under the provisions of the Act and, if any such conduct is identified, take appropriate steps, such as the

performance of a competition law audit, the implementation of a compliance program or such other steps as may be required to address effectively the associated concerns, prior to announcing the merger. If serious competition law problems (e.g. price fixing in a concentrated industry) have been identified, the parties may wish to reconsider the merger insofar as the Director would be likely to challenge the merger regardless of other factors;

- ensure that the parties enter into appropriate confidentiality agreements satisfying the criteria identified in section 6.6 of the MEGs, making it clear that the information will not be used for any operational purpose and, if the transaction may affect commerce in the United States, ensuring compliance with the precautions recommended by U.S. antitrust authorities;

- in cases involving significant market power, the parties to a proposed merger should consider taking steps to ensure that competitively sensitive information: (i) is communicated only to the extent and to the persons necessary to complete the merger, (ii) in the case of extremely sensitive information, is communicated only to the other party's counsel and experts and not to its operational personnel, (iii) is copied only to the extent required and all copies are either destroyed or returned to their source in the event that merger negotiations break down, and (iv) that the parties' professional advisors have executed appropriate confidentiality undertakings; and

- where applicable, ensure that the parties' have waived the provisions of applicable law society rules[5] requiring that counsel disclose all relevant information to their clients.

III. HOLD-SEPARATE INTERIM ORDERS

- In the past, hold-separate arrangements imposed in connection with the Director's review of certain acquisitions, including the acquisition by Southam Inc. of publishing operations in the British Columbia lower mainland region,[6] the acquisition by Hillsdown Holdings plc of shares of Canada Packers Inc.,[7] the sale of Texaco Canada's Atlantic assets to Ultramar Canada Inc. and Island Petroleum Company Inc.,[8] and Schneider S.A.'s acquisition of Federal Pioneer Limited,[9] took the form of undertakings from the merging parties in favour of the Director. However, questions with respect to the enforceability of such undertakings and in particular, the issues raised in the recent litigation respecting the shutdown of the Nova Scotia refinery purchased by Ultramar in 1990, have led the Director to indicate that he intends to make greater use of consent orders.[10]

- The "hold-separate" interim consent order issued in respect of the acquisition by Quebecor Printing Inc. ("Quebecor") of Maclean Hunter Printing Limited and certain other printing companies (collectively, "MHPL") on January 16, 1995[11] provides further evidence of the Bureau's desire to ensure that merging parties are bound in an enforceable manner to act in accordance with the terms of their agreements

with the Director. The *Quebecor* interim order is the first issued by the Competition Tribunal under section 100 of the Act.

- The section 100 order in the *Quebecor* case provided the Director an additional 21 days during which to complete his examination and assessment of Quebecor's acquisition of MHPL. The restrictions imposed on Quebecor by the consent order include the following, that:
  - Quebecor not divest its interests in MHPL;
  - Quebecor cause MHPL to carry on its businesses in the ordinary course in accordance with generally prevailing industry standards;
  - Quebecor use its best efforts to maintain the MHPL businesses and to preserve and enhance their goodwill;
  - Quebecor maintain each of the MHPL businesses as a separate and independent business;
  - Quebecor refrain generally from obtaining or using confidential information respecting MHPL;
  - Quebecor and MHPL refrain, subject to the exceptions set out in the order, from altering the boards of directors, officers and managers of the MHPL businesses; and
  - a monitor be appointed and made responsible for monitoring compliance with the interim order.
- After the Director had completed his assessment, he decided, as discussed in more detail below, that he would not challenge Quebecor's acquisition of MHPL.

IV. INDEPENDENT CONCURRENT REGULATORY REVIEWS OF MERGER TRANSACTIONS

- The Bureau's intention of staying "at the forefront in promoting competition in regulated industries"[12] is reflected in its independent review of mergers which are subject to regulatory approval or review by other federal regulatory bodies rather than deferring to the assessment carried out by these other bodies and perhaps intervening in their hearings.

- The acquisition of the Maclean Hunter companies by Rogers Communications Inc., significant aspects of which were subject to prior approval by the CRTC, is one notable example of the exercise by the Director of concurrent jurisdiction over a major merger, other recent examples include:

- the acquisition of Purolator Courier Inc. by Canada Post Corporation, this transaction was reviewed by the Bureau and also under the *National Transportation Act* (the "NTA") by the National Transportation Agency; and

- the acquisition by Upper Lakes Shipping Ltd. and Algoma Central Corporation of certain gearless bulker carrier ships from the limited partners of the Great Lakes Bulk Carriers limited partnership, which was also reviewed under the NTA.

V. INCREASED FORMALITY IN THE INVESTIGATIVE PROCESS

- The Bureau is increasing the formality of the collection of information for merger review purposes and is increasingly adopting a policy of requiring that parties respond to information requests under oath.[13] The Director has also stated that he is prepared to obtain section 11 orders in appropriate merger inquiries. These policies have been reflected in information requests that are akin to section 11 orders and are supported by the threat of a section 11 order in the event of non-compliance and in the use of section 11 orders to obtain information concerning a merger in at least one recent case.

- Recent decisions in *Samson* v. *Canada*[14] and *TNT Canada Inc.* v. *Director of Investigation and Research*[15] have resulted in the quashing of section 11 orders in certain circumstances in criminal cases. The recent Supreme Court of Canada decisions in *R.* v. *S (R.J.)*[16] and *British Columbia (Securities Commission)* v. *Branch*[17] have raised further doubt with respect to the validity of section 11 orders in circumstances where the predominant purpose of the compelled testimony appears to relate to the prosecution of the witness. However, it is not clear whether, or to what extent, these recent developments will affect the ability of the Bureau to use section 11 orders in the context of a merger review.

- The use of more formal information gathering mechanisms, combined with the Bureau's increased focus on computer files can be expected to give rise to substantial logistical problems, for example, when a company is asked to certify under oath that it has fully and accurately complied with an information request which includes a requirement for the production of machine readable records. A comprehensive review of a business' machine readable records may require that many thousands of computer files, created using a variety of different software packages, be assembled from sources as diverse as computer hard disks, network servers, backup tapes, diskettes and other machine readable media. The logistical difficulties associated with the assembly and review of such materials may result in the expenditure of substantial resources in the preparation of a complete response to a single information request.

VI. LIMITATIONS ON THE CONFIDENTIALITY OF INFORMATION PROVIDED TO THE BUREAU

- On July 22, 1994 the Director released a draft information bulletin respecting confidentiality of information under the Act (the "Draft Information Bulletin")[18] which set out the Director's interpretation of the

confidentiality provisions of the Act. The Draft Information Bulletin suggests that the Director may exercise significantly greater discretion in the release of information provided to the Bureau in confidence than was commonly believed to be the case, more specifically the Draft Information Bulletin states that:

- in the past, information sharing between the Director and Canadian law enforcement agencies has been infrequent but notes that the Director believes there is potential for more extensive interagency coordination and cooperation. The Director considers that he can provide information to Revenue Canada and other government agencies where necessary for the purposes of carrying out their respective law enforcement mandates;

- information required to be kept confidential pursuant to section 29 of the Act may be disclosed to customers, suppliers, competitors and experts for a variety of purposes relating to the advancement of a specific investigation under the Act including for the purpose of eliciting additional information, obtaining an opinion or analysis by an industry, economic or other expert or obtaining enforcement assistance from other law enforcement agencies or co-ordinating enforcement activities with other agencies enforcing similar legislation, including foreign agencies; and

- information provided to the Director that is not subject to section 29 of the Act may be disclosed to foreign agencies to assist them to identify or prosecute anti-competitive conduct affecting another country even though there does not appear to be a competitive impact in Canada.

- The Canadian Bar Association Competition Law Section's commentary on the Draft Information Bulletin[19] takes issue with the Director's views on a number of points including with respect to the disclosure of confidential information, protected under section 29 of the Act, to foreign agencies. On this point the Competition Law Section states that "the Director is not legally entitled to share information with foreign agencies" and suggests that the Act would first have to be amended to permit such disclosure. The Competition Law Section's commentary has also raised significant concerns about the policy and legal implications of permitting the disclosure of information which has been provided voluntarily to the Bureau.

- The Federal Court of Appeal decision in *The D & B Companies of Canada Ltd.* v. *Director of Investigation and Research*[20] confirmed that the Director is not required to provide the same level of disclosure with respect to matters brought before the Competition Tribunal as the Supreme Court, in *R.* v. *Stinchcombe*,[21] has mandated for criminal prosecutions. In its decision, the Federal Court of Appeal upheld the Director's ability to assert public interest privilege with respect to interview notes and the submissions of complainants provided that such materials were provided to the Bureau in confidence. However, it should be noted that this form of privilege may be asserted only by the Director and applies only to submissions prepared for the Director by third parties, and not to other materials provided to the Director in support of or in connection with such submissions.

- In view of the position taken in the Draft Information Bulletin and the decision of the Federal Court of Appeal in *The D & B Companies of Canada Ltd.* v. *Director of Investigation and Research*, parties providing either section 29 or non-section 29 information to the Bureau may wish to take the following steps, in advance, to safeguard the confidentiality of information provided to the Director:

  - confirm that the communications or information will be provided to the Director on the understanding that it will be retained in confidence and will not be disclosed to any other person, including any foreign antitrust authority;

  - advise the Director that, in the absence of the confirmation, the information will not be provided to the Director and describe the harm that would result were the information to be disclosed; and

  - seek assurances from the Director that public interest privilege will be sought by the Director for all confidential communications, both written and oral, provided by the party.

VII. SUBSTANTIVE DEVELOPMENTS IN MERGER REVIEW

- The strategic nature of some recent mergers has resulted in the creation of merged entities with market shares exceeding the thresholds identified in the MEGs[22] and has resulted in the examination of these transactions under evaluative criteria set out in the Act (and elaborated upon in the MEGs). However, parties have in a number of cases been able to establish that the relevant market is characterized by relatively low barriers to entry, rapid technological change or other relevant factors in persuading the Director that the vast majority of these transactions should be permitted to go forward. Some of the more significant merger transactions of the past year and some of the issues examined in connection with each are as follows:

  - The proposed acquisition by Rogers Communications Inc. of Maclean Hunter Ltd. (the "RCI Takeover") was found to be unobjectionable due to the licensing of cable service by the CRTC, the rapidly changing regulatory and technological environment and the potential emergence of competing alternatives such as direct-to-home broadcast satellites and multi-point distribution systems.[23] However, the Director indicated that he intends to monitor the markets which might be affected by the consolidation in the cable television industry which resulted from the RCI Takeover.

  - The Bureau's substantive review of Quebecor's proposed acquisition of MHPL was completed within the 21 day period provided in the above-described interim consent order. In the result, despite the high shares of the market for heat set webb offset printing services held by the merged entity and its principal competitor, the Director determined that Quebecor would not be able to exercise market power in this market as a result of its acquisition of MHPL due to the existence of vigorous and effective competition in all product market segments. In *Quebecor*, the Director found that the

geographic market was effectively limited to Canada insofar as the low value of the Canadian dollar apparently precluded effective competition from U.S. suppliers.[24]

- The acquisition of Purolator Courier Inc. by Canada Post Corporation combined competitors representing approximately 40% of the Canadian market for small express package delivery in Canada and required that the Director evaluate the proposed acquisition in terms of the strength of the remaining competitors and the nature and extent of barriers to entry and expansion. In that case, the Director considered the possible cross-subsidization of Purolator with revenues from Canada Post's exclusive monopoly with respect to letter mail but found there was not, in the Director's view, a sufficient basis to justify bringing a challenge under the merger provisions of the Act.[25]

- The Director's review of the acquisition of Edmonton telephone service provider, Edmonton Telephone Corporation, by Telus Corporation focused on the possibility that this transaction might have the effect of "preventing" competition. Telus Corporation provides telecommunications services throughout Alberta, except for local service in Edmonton. However, after an extensive examination of this transaction the Director determined that he did not have grounds to bring a challenge under the merger provisions of the Act. He mentioned that the potential emergence of greater competition in the telecommunications market, both from cable television companies and from wireless technologies, and the availability of open access to hydro and telephone cable support structures were important factors in his assessment of the longer term effects of the proposed merger of these adjacent telephone services providers.[26]

- The Director also reviewed the acquisition by Upper Lakes Shipping Ltd. and Algoma Central Corporation of a fleet of gearless bulker carrier ships. Notwithstanding that the post-acquisition market share of the merged entities would exceed the 35% threshold set out in the MEGs, the Director decided not to challenge this transaction after being informed by customers that the acquisition would not result in a significant price increase due to remaining alternative suppliers and substitute transportation sources.[27]

- After an extensive examination of the proposed merger of SmithBooks and Coles Book Stores Limited, the two largest book retailing chains in Canada, the Director determined that he did not have grounds to make an application to the Competition Tribunal principally because of low barriers to entry. However, the Director is monitoring the merger and requiring that quarterly reports detailing the trade terms obtained from publishers be provided for the next three years to permit him to assess the impact of that merger.[28]

- The appeals by Southam Inc. and the Director of certain aspects of the Competition Tribunal's decision in the B.C. Lower Mainland publishing case[29] are currently before the Federal Court of Appeal. This case represents the first appeal of a merger decision on its merits, as opposed to jurisdictional or procedural issues, and is expected to provide insights into the standard of review

that the Federal Court of Appeal will employ with respect to Competition Tribunal decisions in merger cases.[30]

- A number of trends are apparent in recent merger resolutions and the comments of the Director and the Senior Deputy Director of the Mergers Branch. The Director has indicated that he intends to address divestiture resolutions in an amendment to the MEGs in the near future and that he favours the use of consent orders and "fix-it-first" divestitures over other types of resolutions. Although undertakings are no longer viewed with favour, the Director has, in a number of recent mergers, relied upon commitments made by the merging parties in conjunction with formal or informal monitoring. The principal distinction between commitments and undertakings relates to the fact that the commitments, if true, would negative the existence of a substantial lessening of competition whereas undertakings are intended to remedy a substantial lessening of competition, once one has been found to have occurred.

- The Federal Court of Appeal decision in *Director of Investigation and Research* v. *Air Canada*[31] in conjunction with the effective use made of the consent order process in the *AGT Directory Limited* and *Quebecor* cases suggest that there may shortly be an increase in the use of consent orders in the resolution of difficult merger cases.

VIII. OTHER RECENT DEVELOPMENTS

- The resource constraints faced by the Bureau (and other federal government agencies) and the trend toward user fees and cost recovery may be expected to have some implications for merger enforcement. The Director has indicated that he intends to implement a cost recovery system and has stated that it will likely involve more Bureau products and services and higher fees than those initially proposed in 1993.[32] The Bureau has also indicated that it intends to use a more selective enforcement strategy, focusing on cases with the greatest economic impact.[33] Other changes which may result from these constraints include increased reliance upon the assistance of private parties, especially in connection with the prosecution of non-merger reviewable practices before the Competition Tribunal and, in the future, the possibility of private actions under the reviewable practices provisions, other than the merger provisions.

- The Director has recently indicated that he may shortly propose amendments to certain areas of the Act.[34] These changes may include:

  - amendments of the merger pre-notification requirements to better meet the assessment needs of the Bureau while reducing the paper burden on business;

  - amendments to better facilitate co-operation among investigative agencies while addressing the confidentiality concerns of business; and

- amendments to reform the adjudication of cases under the misleading advertising and deceptive marketing practices provisions of the Act.

- The Canadian Bar Association National Competition Law Section is also currently considering a number of amendments which it may ask the Government to consider.

- The Director and the Senior Deputy Director of the Mergers Branch have indicated that the MEGs may shortly be amended to deal with certain process issues arising during merger review and, specifically, to set out guidelines for effective divestiture resolutions.[35]

- On February 27, 1995 the Director issued a revised draft of his Information Bulletin respecting strategic alliances under the Act[36] for comment by certain organizations and individuals. The Director and Senior Deputy Director have indicated that they are proceeding to finalize this bulletin.[37] This bulletin raises a number of issues pertaining to joint ventures and mergers and, in particular, the overlap between the merger and conspiracy provisions of the Act and when the Director may elect to proceed under one section or the other when both might potentially apply.

Notes

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1 See D. Hogben, "Wire Makers Bound to Pay $1.6 Million" *Vancouver Sun* (6 November 1992) D2.

2 Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, March 1991) at 59.

3 K.J. Arquit, Director of Bureau of Competition, Federal Trade Commission, (Remarks to the Cleveland Chapter of the Federal Bar Association, 14 December 1989).

4 *R.* v. *Bèton Règional Inc.* (16 January, 1995), Ottawa No. T-58-95.

5 For example, in Ontario see Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 5, Commentary 3.

6 Consumer and Corporate Affairs Canada, Release NR-10320\90-28, "Undertakings Given In Southam Acquisition" (8 June 1990).

7 Consumer and Corporate Affairs Canada, Release NR-10322\90-31, "Undertakings Given In Canada Packers Acquisition" (6 July 1990).

8 Consumer and Corporate Affairs Canada, Release NR-10342\90-42, "Director Will Not Oppose Sale of Texaco Canada's Atlantic Assets" (5 October 1990).

9 Consumer and Corporate Affairs Canada, Release NR-10412\91-27, "Undertakings Given In Acquisition of Square D" (29 May 1991).

10 G.N. Addy, Luncheon Address (Canadian Bar Association Competition Law Section 2nd Annual Competition Law Conference, Montreal, Quebec, 30 September 1994) (the "CBA Speech") [unpublished] at 9. The *Quebecor* consent order and that issued November 18, 1994 in *Director of Investigation and Research* v. *AGT Directory Limited*, [1994] C.C.T.D. No. 24 (Comp. Trib.) suggest that the Director has been moving toward revitalizing the consent order as a significant enforcement mechanism. The problems associated with the use, in the 1980's, of consent orders under the Act and the solutions proposed for same are discussed in C.S. Goldman, "The Merger Resolution Process Under the

Competition Act: A Critical Time In Its Development" (1990) 22 Ottawa L. Rev. 1.

[11] *Director of Investigation and Research* v. *Quebecor Printing Inc.* (16 January 1995), No. CT-95\01 (Comp. Trib.).

[12] F. Matte, Senior Deputy Director of Investigation and Research, Mergers Branch, "Priorities for Bureau of Competition Policy in 1995" ("1995 Priorities Speech"), excerpt from speech given January 25, 1995, reproduced in (1994-1995) 15:4 Can. Comp. Rec. 1 at 5.

[13] See CBA Speech, *supra*, note 10 at 10 and 1995 Priorities Speech, *ibid.*, at 3.

[14] (1994), 55 C.P.R. (3d) 19 (F.C.T.D.).

[15] (16 March 1995), Ottawa T-2531-94 (F.C.T.D.).

[16] [1995] S.C.J. No. 10 (2 February 1995).

[17] [1995] S.C.J. No. 32 (13 April 1995).

[18] Director of Investigation and Research, Draft Information Bulletin - *Confidentiality of Information Under the Competition Act* (Ottawa: Industry Canada, July 22, 1994).

[19] National Competition Law Section of the Canadian Bar Association, "Commentary on the Draft Information Bulletin of the Director of Investigation and Research Respecting Confidentiality of Information Under the *Competition Act*" (December 1994) [unpublished].

[20] (7 November 1994), Ottawa A-505-94 (leave to appeal to the Supreme Court of Canada denied).

[21] [1994] 2 S.C.R. 577.

[22] In section 4.2.1, the MEGs state that the Director generally will not challenge a merger (i) where the post-merger market share of the merged entity would be less than 35% and (ii) where the post-merger market share of the four largest firms would be less than 65% or the post-merger market share of the merged entity would be less than 10%. However, these thresholds do not constitute a safe harbour, the Director retains the discretion to challenge a merger resulting in market shares below these values.

[23] Bureau of Competition Policy, News Release, "Director Will Not Challenge Rogers Communications Inc. Proposed Transaction" (14 December 1994). See (1994-1995) 15:4 Can. Comp. Rec. 17 and 18.

[24] Bureau of Competition Policy, News Release, "Director of Investigation and Research Will Not Challenge Maclean Hunter Printing Limited Acquisition (7 February 1995). See (1994-1995) 15:4 Can. Comp. Rec. 23.

[25] Bureau of Competition Policy, News Release, "DIR Will Not Oppose Canada Post Acquisition of Purolator" (26 November 1993). For commentary, see (1993) 14:3 Can. Comp. Rec. 4 and (1993) 14:4 Can. Comp. Rec. 11.

[26] Bureau of Competition Policy, News Release, "Director of Investigation and Research Will Not Challenge Telus Corporation's Acquisition of Edmonton Telephone Corporation" (28 February 1995), *supra*, this issue of the *Record* at 23.

[27] Bureau of Competition Policy, News Release, NR-11202\94-08 "Director Does Not Challenge Acquisition of Bulk Carrier Ships" (22 April 1994).

[28] Bureau of Competition Policy, News Release, "Director of Investigation and Research Will Not Challenge SmithBooks' Acquisition of Coles Book Stores Limited" (21 March 1995), *supra*, this issue of the *Record* at 24.

[29] *Director of Investigation and Research* v. *Southam Inc.* (2 June 1992), Ottawa CT - 90/1 (Comp. Trib.).

[30] However, the recent decision of the Supreme Court of Canada in *Superintendent of Brokers v. Pezim*, [1994] 2 S.C.R. 577, referred to by the Federal Court of Appeal in *The D & B Companies of Canada Ltd.* v. *Director of Investigation and Research*, *supra* at 4, suggests that the Federal Court of Appeal may be reluctant to overcome the curial deference which the Supreme Court has indicated is to be accorded decisions falling within the particular expertise of expert tribunals.

[31] (30 July 1993), Ottawa A-302-93 (F.C.A.).

[32] CBA Speech, *supra*, note 10 at 12.

[33] 1995 Priorities Speech, *supra*, note 12 at 3-4.

[34] G.N. Addy, Luncheon Address (Canadian Manufacturers Association, Ottawa, Ontario, March 7, 1995) (the "CMA Speech") [unpublished] at 10-13.

[35] CBA Speech, *supra*, note 10 at 9 and 1995 Priorities Speech, *supra*, note 12 at 2-3.

[36] The Director of Investigation and Research, Draft Information Bulletin - *Strategic Alliances under the Competition Act* (Ottawa: Industry Canada, February 27, 1995).

[37] CMA Speech, *supra*, note 34 at 3 and 1995 Priorities Speech, *supra*, note 12 at 5.

CANADIAN COMPETITION RECORD

INTRODUCTION FOR INTERNATIONAL CORPORATE LAW REVIEW, ANNUAL SURVEY ON ANTITRUST*

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I. THE COMPETITION LAW BOOM

The last decade of the 20th Century is producing a boom in the "competition law" market; new statutes are being passed, new agencies are being created, old agencies are receiving enhanced budget resources, and new substantive areas (especially merger review) are being made part of the competition law review process in many jurisdictions. This boom is driven by the rising confidence that competitive markets provide better incentives for efficiency, better service to customers, and more rapid responses to technological change. The drive to privatize often-stodgy state monopolies has created competition law issues — both at the time of the initial privatization and in terms of how privatized former monopolies and their competitors operate. (Nobody really wants to replace stodgy and inefficient state monopolies with greedy, private ones.) Also, competition law has become an important factor in market integration, especially in Europe where it is seen as a device by which public institutions create a level playing field, and prevent private parties from re-establishing by contract or conspiracy the geographic barriers that the Member States have torn down. Finally, in some jurisdictions the antitrust authorities have become responsible for dealing with the pervasive problem of "state aids" — government subsidies to national champions and other favoured enterprises. This is a political hornets-nest.

Somewhat ironically, the competition law boom is apparently being driven by the tendency toward global trade in goods, services, and intellectual property. As trade barriers fall, and as states become more dependent on foreign suppliers for their markets and foreign outlets for their output, government politicians tend to seek enhanced tools for controlling these sources of competition and perhaps, domestic disruption. The irony, of course, is that as markets become more global (or at least cross-border), outsiders become a bigger threat to domestic producer and labour cartels, and the need for competition law may be less than it was before.

A necessary corollary of the internationalization of both markets and antitrust enforcement is that ever more enterprises have to be concerned about the competition laws and the enforcement processes in a growing number of important states. Perhaps the most dramatic example of this is when two companies proposing a merger find themselves having to file premerger notifications — but on very different forms and time schedules — with the competition law authorities in, say, five or even ten countries. Further proof of this proposition is seen when the U.S. Justice Department and the E.U. antitrust authorities announce on the same day that they have jointly negotiated and entered into essentially the same settlement with

Microsoft, the new giant of the post-IBM computing world. We see more evidence when U.S. and Canadian authorities run closely-coordinated investigations — including a joint raid on the defendant, a Japanese company in Canada — and both bring criminal cases at almost the same time.

II. SUBSTANCE, PROCESS AND COOPERATION

In looking at this emerging antitrust world, enterprises and their counsel have to consider at least three major areas: first, the substantive legal rules and how they converge or vary among leading states; second, the processes by which competition law is enforced in various states (processes that often have much more diversity than the substantive rules do); and third, the growing web of cooperation arrangements among different national antitrust enforcers — arrangements that also vary significantly in their detail and scope.

Because markets are inter-related, an enterprise may be disadvantaged seriously on a global basis by being subjected to some particular competition law rule or enforcement order in some far away jurisdiction. For this reason, competition law risks are — or should be — seen as an important part of the portfolio of responsibilities borne by the senior managers of a multi-national enterprise.

III. SUBSTANTIVE RULES

The broad sweep of competition law falls into four general categories: cartel rules, market dominance rules, vertical distribution and licensing rules, and merger control rules. Not every competition law regime has all of these, but virtually all have at least the first three.

Diversity in substantive rules, and how they are enforced, flows from a diversity of goals. To start with there is a tension (long evident in the United States) between protecting any group of firms (e.g., small or local firms) from "unfair competition" and simply focusing purely on competition, regardless of the identity of the winners and losers in the competitive process in a particular market. Some competition law rules reflect a concern about unequal bargaining power or about the ability of one party to impose contractual terms that are seen as being "unfair" or "exorbitant". In some jurisdictions, political pressure can even turn "antitrust enforcement" into "price regulation", especially where a highly visible monopoly or a narrow oligopoly is available as a target. This is perhaps related to the broader tension between competitive markets, where customers pick the winners, and "industrial policy", where governments seek to pick the winners, or at least to tip the balance in favour of its chosen instruments and beneficiaries.
In this respect, competition policy is closely related to trade policy — but each often seeks different results. Trade negotiators generally seek to protect their home markets from unreasonable disruption by foreign competitors while seeking more open access for domestic producers in foreign markets. Thus, for example, in an EU-U.S. trade negotiation, the EU Commissioner for External Economic Relations can be seen pressing for more competition in markets in which the U.S. Department of Justice would like to see more competition, while the U.S. Special Trade Representative seeks to help the EU Commissioner for Competition break down barriers and open up internal markets.

Anti-Cartel Rules

There is the broadest consensus on anti-cartel rules. Most leading countries prohibit agreements among competitors to raise prices or allocate customers and territories, or to boycot new forms of competition. They also generally punish bid-rigging agreements in which competitors seek to fix the outcome of a governmental procurement or other bid situations. Despite substantial commonality on this front, countries differ significantly in the vigour with which they enforce these rules and the severity with which they treat those caught in their breach. The U.S., Canada and the EU stand at the top of the vigour and severity range, with "dawn raids" in the EU and Canada and Star Chamber-type grand jury proceedings in the U.S. Each can levy very large fines — running to 10% of turnover in the EU and not far behind in the U.S.. The U.S. and Canada then throw in jail sentences for individual culprits for good measure.

Abuse of Dominance

Abuse of market dominance is also a fairly standard violation, although articulated in different ways in different countries. In general, an enterprise may only be punished if it is shown to have a dominant position in some relevant market and then to have engaged in conduct that was deemed by the antitrust enforcers and tribunals to be "unfair" or "exclusionary" or "abusive". In this context, different jurisdictions define relevant markets differently — which is important because of how market definition affects market shares. Different jurisdictions also disagree on what levels of market share are necessary to establish dominance. This means a leading worldwide firm has to be concerned with quite different standards and concepts in different jurisdictions.

Vertical Distribution and Licensing

The rules on vertical distribution and licensing agreements also vary considerably. In Canada and the United States, the enforcers and courts-tribunals have increasingly (but not invariably) tended to emphasize consumer welfare — almost to the exclusion of any other values. In the European Union, the authorities and courts have emphasized market integration and thus sought to strike down agreements preserving entry barriers. Other jurisdictions have sought to prevent exploitation, especially of a local distributor or licensee, by a distant and powerful enterprise. This latter approach arises more from a concern about oppression and "free riding" than one sees in the U.S. scheme.

Merger Control

Merger control has undoubtedly been the most dynamic area of competition law growth. Countries that have long had cartel and market dominance rules (e.g., Canada and the EU) have only comparatively recently enacted effective and comprehensive — but often diverse — merger control schemes. Merger transactions tend to be highly visible and can generate much press and political interest. This is also the

point at which concerns for "industrial policy" or "national self-sufficiency" most often clash with pure market concepts based on competition law. Thus, many schemes for merger control are based on "abuse of market dominance" ideas and do not reach a transaction until a dominant position has been created or is threatened. But there is a growing trend to pick up merger waves earlier by using the "substantial lessening of competition" type idea first developed in the United States and now used in places such as Australia and Canada. Some countries (most notably the UK and France) make the whole merger process much more openly political — with the authorities being asked to decide whether a transaction will be in the "public interest", with competition as simply one public interest factor to be considered.

IV. ENFORCEMENT INSTITUTIONS

Individual competition agencies vary enormously in their size, style, enforcement techniques, procedures, and importance within their own governments. A few are straight prosecutors who bring criminal cases in court; others are administrators who investigate and approve (or disapprove) transactions, levy penalties, and frequently are subject to review by some specialized tribunal (such as the Court of First Instance in Europe).

Facts are critical to making antitrust decisions. The competition enforcement agencies vary substantially in the techniques they use to gather facts and in their willingness to bully the affected party. At one extreme, prosecutors use "dawn raids" and seek unannounced interviews, while at the other, agencies depend on voluntary production by affected parties. This diversity is also apparent in merger transactions: thus, for example, the United States requires a limited initial filing — which may be followed by an absolutely massive "second request" — while the EU requires a fairly substantial initial filing (for large transactions) regardless of whether or not a transaction has competitive implications.

Dealing with variations in enforcement premises, prejudices, and tacit policies is one of the most difficult things for a multi-national enterprise operating in many jurisdictions, and there is simply no good substitute for local counsel well-versed in the actual day-to-day workings of the local agency.

V. COOPERATION AMONG ENFORCEMENT AGENCIES

If increased and intensifying cooperation among enforcement agencies has been the hallmark of the early 1990s this should only be seen as a harbinger for the future. In the good old days, bi-lateral agreements provided more or less that one country would inform the other when it was undertaking an investigation or bringing a case that would affect the national interest or a national enterprise of the other country. This has meant that most cooperation between the leading agencies (EU, U.S., Germany, and Canada) has largely been done on an informal basis, even if there was some memorandum of understanding in the background. But the agencies have been chomping at the bit for more. This has made activists out of the different national enforcement agencies, which have increasingly seen themselves as engaged in the common

mission of promoting enhanced competition, both at home and globally. Hence, they have become natural political bedfellows.

Major barriers to cooperation have been national laws designed to protect business secrecy and to maintain the confidentiality of documents turned over to competition agencies in the courses of their investigation. And by protecting businesses from disclosure of their documents to journalists and competitors, national parliaments have also prevented their disclosure to other competition enforcers.

Against this background the 1990s have seen several important developments, perhaps the foremost of which was the first EC-U.S. Memorandum of Understanding which allowed the agency of one party to enlist the agency of the other in enforcing its laws. This agreement was ultimately declared by the European Court of Justice to exceed the authority of the EC Commission (being instead the responsibility of Council of Ministers); but the ideas in it reverberated around the antitrust world. At the same time, the U.S.-Canada Mutual Legal Assistance Treaty ("MLAT") was being extended to cover antitrust offenses. It has now been used by the Canadian and U.S. authorities to engage in joint raids, thereby making possible the type of coordinated prosecutions already discussed. Finally, in 1994, the U.S. Congress passed the "Antitrust Enforcement Assistance Act of 1994" which authorizes the U.S. agencies to enter into MLAT-type arrangements with other countries and to exchange information (other than information in merger cases) subject to various safeguards of confidentiality.

The net result of all this activity is that it now ill-becomes counsel to seek to tell a different story in Ottawa than they tell in Washington, Brussels or Berlin. This will make it even more important that all ramifications of a particular transaction or investigation be considered early and carefully so that different lawyers in different national capitals who represent the same party do not become cross-wired.

VI. PRIVATE REMEDIES

The U.S. has long had a visible and controversial provision in its *Clayton Act* that allows an injured private party to seek to recover treble damages and litigation costs for violations of U.S. law. Given such a bounty and the favourable U.S. jurisprudence on jurisdiction, a variety of international disputes have gravitated to the U.S. courts. In the 1970s, the uranium litigation was directed at alleged foreign agreements made with governmental encouragement in response to a U.S. embargo of foreign uranium. In the 1980s, the British air carrier Laker Airways brought claims against the other trans-Atlantic carriers in the District Court in Washington — much to the annoyance of the British Government — and a great deal of jurisdictional arguing ensued. In the late 1980s, the British company Goldfields plc blocked its attempted takeover by South African interests through an antitrust action in New York, even though the transaction had been approved by the UK Monopolies and Mergers Commission and had passed muster before the U.S. antitrust enforcement agencies.

Meanwhile in Europe, EC and German competition laws allowed parties to walk away from contracts that had any provisions in them that violated competition law. Thus, EC competition law became a regular feature of private litigation in national courts over performance of contracts.

Gradually the process has gone further. The movement is afoot in Europe, and perhaps elsewhere, to give victims of competition law violations direct rights of action for those wrongs — a trend that reflects both the growing importance of competition law and the budgetary squeezes on most governments. It seems likely that by the end of the century, private antitrust litigation will be an ever more important part of the global scene. Whether this spread of what some might regard as "the American disease" is a good or bad thing for various national economies, is an open question. But one consequence is not open to doubt, it will mean more work for competition lawyers and litigators.

VII. CONCLUSION

The most important practical question likely to be faced by the competition law community in the next five years will concern efforts to simplify the whole process for enterprises that face antitrust issues and reviews in a variety of different countries. With the risk of foreign involvement in almost every major investment, this is likely to become an ever more important issue.

At the same time, national politics make it unlikely there will be any sort of serious harmonization of substantive law even on a regional, let alone a global, basis in the near future. The EU has taken this process a long way, but only as part of a fairly tight economically integrated market, and with a strong political commitment to the effort. In North America and probably in Asia, antitrust is likely to play a lesser role in the overall development of regional free trading areas.

If serious substantive convergence is unlikely, what may be possible is the development of common procedures for some types of regulation. For example a convergence of processes — or at least timetables and information requests — for the review of merger facts by a number of jurisdictions may well be achievable. Obviously it would be a great step forward if the parties to a multi-jurisdictional merger could file a single form on a single timetable with the various affected agencies, even if the agencies were left with the ability to make supplementary requests themselves. Moreover, there seems little reason why the agencies could not agree to go a little further and to coordinate their requests for additional information — thus putting the merging parties in the position of knowing that each reviewing agency knows what the others are asking for on such subjects as relevant product market.

Indeed, it might also be possible to begin to think of (dare we say develop) a specialized multi-jurisdictional tribunal to handle both government and private cases affecting enterprises who are governed by signatory parties. For example, assume that the three NAFTA countries agreed to set up a competition tribunal and that the competition agency from any one NAFTA country could seek to have a case transferred from the

relevant national court or agency process to the international tribunal on the ground that it affected questions in what was substantially a NAFTA market. This would have the potential to reduce both party costs and extra-territorial jurisdiction disputes. No small gain for all concerned.

In 1895, only Canada and the United States had competition laws — quite new ones — but these were not particularly important or actively enforced. The twentieth century has seen enormous change, both in laws and government commitment to enforcement, thus putting competition law questions squarely on the current agenda of almost any international enterprise. This trend seems likely to continue for the last five years of the century and we anticipate continued activity — some of it quite unpredictable — on the competition law process front through the turn of the next.

Notes

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