STRIKING THE RIGHT BALANCE: 25 YEARS OF MERGER REVIEW IN CANADA

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I. Introduction

1986 was a watershed year for Canadian merger policy. Prior to the enactment of the *Competition Act*,[2] mergers in Canada had been subject to strict criminal prohibitions and an amorphous public interest test which, having been designed to address combines and price-fixing, was entirely ill suited for merger review. Notwithstanding the significant opposition of Canadian industry at the time, the Act introduced a more carefully tailored civil review process which has proven far more successful in bringing the requisite clarity and certainty to the enforcement of merger law.

It has long been acknowledged that Canada, with a much smaller economy than that of the United States, cannot premise its merger regime on structural factors alone. On one hand, Canadian markets may require more highly concentrated firms in order to achieve economically efficient levels of scale. On the other hand, the consequences of allowing an inefficient merger to proceed in a small economy like Canada's can be more acute than would be the case in a larger economy like that of the United States.[3] Canadian merger review must be adaptive and finely tuned to the particularities of Canada's economy.

In this sense, a key theme in the development of Canadian merger policy since 1986 has been the balancing of the rights and powers of the public and private sectors. Businesses require a wide discretion to undertake economically efficient mergers and, most of all, certainty as to the standards that will be applied when their mergers are reviewed. At the same time, the public sector needs the tools and time to fully review mergers and to prohibit or curtail mergers which would be harmful and inefficient. At this time, over 25 years after the passage of the Act, it is useful to reflect on some of the important developments in Canadian merger law and their effects on this important balance.

II. The 1986 Act and the Transition from Criminal to Civil Law

Although statutory competition law has existed in Canada since 1889,[4] it was not until Mackenzie King's 1910 *Combines Investigation Act*[5] that the definition of "combine" was broadened to include mergers (and monopolies). Mergers were defined, at that time, to be acquisitions "whereby competition ... is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others."[6] As Dunlop *et al.* noted, this approach attempted to ban mergers with "detrimental characteristics," but left to the courts the task of determining what those detrimental characteristics entailed.[7] The merger laws were also criminal: if a board of investigation determined that a merger was in violation of the *Combines Investigation Act*, the combine was required to cease and desist its unlawful activities within ten days. Failure to do so resulted in a maximum fine of $1,000 per day.[8]

Mergers would remain subject to criminal law until the passage of the Act in 1986. Moreover, in the period from 1910 to 1986, judicial interpretation gave a highly restricted meaning to the nebulous public interest test. For example, in the *BC Sugar* case, a Manitoba court ruled that acquiring a business in order to "extinguish a competitor" was not, in itself, a crime.[9] In the *K.C. Irving* case, the Supreme Court ruled that a firm having a market share of 100% did not, on its own, imply the existence of an unlawful combine.[10] Cases such as these highlight the courts' skepticism toward the use of an imprecise public interest test in the context of a criminal law.

The government, faced with court decisions limiting the reach of the *Combines Investigation Act* and the realization that criminal law was not the appropriate realm for the review of proposed mergers, directed the newly-formed Economic Council of Canada to recommend changes.[11] In 1969, the Council released its 244-page interim report advocating a new, civil approach to merger review.[12] Attempts by the government to implement the changes were subject to vigorous criticism by the business community, which argued that the changes would take decision-making power away from businesses and centralize it "in the hands of a group of technocrats bound only by the vaguest rules."[13] Although the least contentious and most important changes were implemented as the so-called "Stage I Amendments" in November of 1973, the balance of the changes took another decade. The Stage II amendments, including the enactment of the *Competition Act*, introduced for the first time a civil review regime for mergers and a specialized quasi-judicial tribunal to adjudicate merger challenges.

The Act brought sweeping changes to the merger review regime in Canada. It introduced a pre-merger notification regime based largely on the U.S. *Hart-Scott-Rodino Antitrust Improvements Act of 1976*,[14] requiring proactive notification of mergers above certain size thresholds, followed by a waiting period during which the merger could not close. At the time, the relevant waiting periods were either seven or 21 days depending on whether a short-form or long-form notification was filed. The waiting periods were later extended to 14 and 42 days, respectively, as experience with the new regime led to a further fine-tuning of public and private rights and responsibilities.[15] Despite changes to the fees and thresholds associated with notification and the elimination of a distinction between short-form and long-form notifications, this pre-notification mechanism survives today.

The Act also introduced the "reasonably likely to cause a substantial prevention or lessening of competition" ("**SPLC**") test for assessing the impact of mergers. In response to concerns about the imprecision of the old public interest test, the Act sets out an open-ended list of principled and economically-literate factors to be used in assessing the likelihood of a so-called SPLC.[16] These "section 93 factors," which include the extent of foreign competition, the likelihood of failure of a merging party, acceptable substitutes to the merging parties' offerings, barriers to entry, and the nature and extent of change, and innovation in the market, have also remained largely unchanged. In response to concerns about Canada's small economy and the inadequacy of structural tests (as noted above), subsection 92(2) of the Act prevents the Tribunal from prohibiting a merger solely on the basis of evidence of concentration or market share.

Finally, unlike its U.S. counterpart, the Act explicitly recognizes gains in economic efficiency which offset the anticompetitive effects of a merger, and requires the Tribunal to analyze efficiencies separately from anticompetitive effects. This "efficiencies defence," often cited as a demonstration of the Act's economic literacy, has also become an integral part of Canadian merger analysis, despite short-lived attempts to repeal it in the mid-1990s. Recently, however, the Commissioner has suggested that analyzing efficiencies separately from anticompetitive effects may not be the best method to consider their impact.[17] The Bureau's most recent *Merger Enforcement Guidelines* have removed all references to the *Superior Propane* case, wherein the Tribunal adopted a "balancing weights" test for measuring the impact of efficiencies.[18]

In sum, although the Act has been developed and amended since 1986 as interested parties have better understood its implications and fine-tuned the balance of public and private rights, the key principles of Canadian merger review remain largely unchanged. At the same time, however, some of the broad interpretational questions which existed in 1986 (*e.g.*, how to assess market definition in the context of international markets) remain.

III. Contrasting Canadian Merger Review with the U.S. and Europe

The similarities and differences among Canadian, U.S. and E.C. merger review are myriad and will not be exhaustively catalogued here. However, in reviewing the effectiveness of the Act's merger provisions, it is instructive to consider some key digressions from U.S. and E.C. policy, and the way these digressions have affected the balance of public and private rights and powers.

i. U.S. Merger Review

It is no secret that the Canadian merger regime – including the pre-notification regime of 1986 and the two-stage "second request" regime of 2009, which is discussed in greater detail below – is based heavily on its U.S. counterpart. The fact that Canada and the U.S. largely "speak the same language" in their merger review policies is beneficial in that it allows for productive communication and collaboration between the Bureau and the U.S. merger review agencies. The evaluation of mergers is premised on the same broad, economic goals in both jurisdictions, and the substantive review process (*e.g.*, market definition, structural factors, likelihood of anticompetitive effects, likelihood of new entry and expansion, and efficiencies) is often similar.

However, there are key procedural and policy differences between Canadian and U.S. merger review which create a different balance of public and private rights. For example, in the U.S., the "size of parties" and "size of transaction" thresholds are smaller than their Canadian counterparts.[19] Canada's higher thresholds require the Commissioner to be more proactive in monitoring the media to ensure that small, yet potentially problematic transactions are not missed; a concern about such "midnight mergers" was a key consideration in the enactment of the U.S. *HSR Act*.[20] At the same time, the wider net cast by the *HSR Act* makes it a potentially blunter instrument, and it is a fact that a large fraction of notified transactions in the U.S. are not investigated in any depth.

As with the notification regime, the key difference between U.S. "second requests" and the recently-implemented Supplementary Information Request ("**SIR**") procedure in Canada is that the former are often less carefully tailored than the latter. The FTC and the DOJ have historically adopted more of a "kitchen sink" approach to the issuance of second requests, leading to large and costly reviews that often require merging parties to retain third-party document management providers and document reviewers. The significant cost and time associated with second requests has led to attempts at reform (for example, the DOJ and FTC now routinely enter into "Process and Timing Agreements" designed to define and limit the scope of second requests following their issuance). Although the SIR regime has only been in force in Canada for just over three years (with only 19 SIRs issued to date)[21], the Bureau has aimed to draft SIRs which are more surgically targeted than U.S. second requests, and which can therefore be completed relatively quickly and without having to retain third-party service providers. The Bureau also regularly engages in pre-issuance dialogue with merging parties prior to issuing a SIR, while the U.S. agencies do not follow such a practice.

Canada's higher notification thresholds result in a relative advantage for small mergers, which can sometimes occur "under the Bureau's radar" and escape close scrutiny. On the other hand, the Bureau has a practice of giving positive clearance to mergers (in the form of either an Advance Ruling Certificate or, more commonly, a no-action letter), a practice which may be more difficult to maintain if the Bureau was constantly flooded with a deluge of small notifications. The Bureau is also limited in its ability to challenge closed mergers by section 97 of the Act, which sets out a one year limitation period following substantial completion after which a merger cannot be challenged. The U.S., by contrast, has no such limitation period. The Bureau's targeted approach to SIRs has led to a streamlined and efficient merger review process which is typically completed more quickly and less expensively, both for the Bureau and for the merging parties.

ii. European Merger Review

Unlike the E.C., Canada has abandoned the distinction between "short-form" and "long-form" merger notifications. In Canada, all transactions, regardless of their relative complexity, must use the same notification form. However, the Canadian notification form is much less onerous than the full European Form CO. Despite this difference, the overarching structure of the merger review process is similar in both jurisdictions: the issuance of a SIR in Canada for complex transactions can be likened to an Article 6(1)c decision by the Commission that "the concentration raises serious doubts" and the commencement of a Phase II investigation. Unlike a SIR, however, the waiting period in a Phase II investigation commences immediately after the Article 6 decision. (In friendly Canadian mergers, the second statutory waiting period commences only after both parties have certified compliance with their SIRs.)

The main difference between the E.C. and Canadian merger review regimes is that, unlike in the E.C., the Commissioner cannot unilaterally block (in whole or in part) or dissolve a merger. He or she must always file an application before the Competition Tribunal, whose decision can then be appealed to the Federal Court of Appeal and, ultimately, the Supreme Court of Canada. In the E.C., by contrast, the Commission may unilaterally make an article 8(3) or 8(4) order (prohibiting a contemplated merger and dissolving a prematurely-implemented merger, respectively), although it must issue a statement of objections, with the concomitant right for the merging parties to access its file and request a formal oral hearing.[22] The General Court and European Court of Justice will only become involved if an adverse decision is appealed.

As a result of this distinction, Canada and the E.C. effectively have opposite burdens of proof in the event that the relevant antitrust regulator wishes to block (in whole or in part) or dissolve a merger. In Canada, mergers are presumptively allowed, and the Commissioner must convince the Tribunal (and, potentially, the courts) that a merger ought to be blocked (in whole or in part) or dissolved before such a remedy can be realized. In the E.C., an article 8(3) or 8(4) order results in a presumption of "incompatibility with the common market," and the merging parties are required to successfully appeal the order before the European courts before the merger is allowed to proceed. This is a significant philosophical difference on the allocation of rights and powers among the private and public sectors. One explanation for the difference may be that Canadian merger law was arguably implemented to *maintain* a (presumptively) pre-existing competitive market, while the E.C. Treaty seeks to *form* a competitive economic union.

Unlike the situation in Canada, where the Commissioner files his or her case with the Tribunal only when he or she decides to challenge a merger, the European Commission is required to publish reasoned decisions for each merger it reviews. Moreover, third parties, not just the merging parties themselves, may appeal E.C. decisions. These differences affect the time required for the E.C. to review and clear notified mergers, since third parties with various interests may be waiting in the wings to review and challenge the Commission's decision.

IV. Important Cases and Developments since 1986

Although the 1986 Act marked a vast improvement in the clarity and effectiveness of Canada's merger review regime, there have been a number of significant developments (judicial, legislative, and policy) since 1986 that have fine-tuned the balance between public and private sector rights. This section will reflect on only a select few of these developments.

i. Hostile Transactions

As enacted, the Act raised a significant concern for would-be hostile bidders. Although the statutory waiting period would not begin until pre-merger notifications had been received from both the bidder *and* the target, there was no statutory compulsion requiring the target to submit a notification. This statutory gap allowed for the creation of an antitrust "poison pill," whereby the target could refuse to submit a notification and thereby frustrate the bidder's ability to receive necessary antitrust clearance. This uncertainty led to a disequilibrium between hostile and friendly mergers, as the Act effectively imposed itself (albeit unintentionally) on the market for corporate control.

In 1999, the Act was amended to add subsection 114(3), which provides that, upon receiving a pre-merger notification from a hostile bidder, the Bureau must immediately inform the target of the notification (but not its contents), and the target thereafter has ten days to submit a notification. In addition, subsection 123(3) clarifies that, in unsolicited transactions, the statutory waiting period begins when the bidder submits its notification, without reference to the time taken by the target to submit its notification.

Where the Bureau decides to issue a SIR, the same problem applies, as there is no provision requiring the target to comply with its SIR. The Bureau has recently clarified that, to ensure receipt of SIR responses from targets on a timely basis, it will typically issue SIRs in combination with "timing agreements," which are private contracts between the target and the Commissioner pursuant to which the target agrees to a schedule for its SIR response.[23] If the target refuses to agree to a timing agreement, it is virtually certain that the Bureau will seek a court order pursuant to section 11 of the Act. The Bureau has not yet sued a target for failure to comply with a timing agreement, so it is uncertain how it would attempt to quantify the damages resulting from such a delay.

With respect to the disclosure of information to the target, the Act only requires that the target be informed of the fact of the bidder's notification. However, the Bureau has gone beyond this basic requirement and has stated that it typically provides both bidders and targets with information about its complexity designation, the anticipated timing of its review, its preliminary and final views on market definition and relevant section 93 factors, and its preliminary and final views regarding a potential prevention or lessening of competition (collectively described in the Guideline as "Pertinent Information").[24] This welcome policy initiative has effectively narrowed the information asymmetry that typically arises in the context of hostile transactions.

Overall, the amendments to sections 114 and 123 of the Act have balanced the rights of hostile bidders and targets, and have stopped the Act from inadvertently facilitating a "poison pill," which would allow targets in hostile transactions to unilaterally delay competition approval. Future amendments should clarify the obligation of targets to comply with SIRs, while taking into account that a SIR response is typically a significantly more onerous task than a premerger notification.

ii. Post-Closing Challenges

Prior to March 2009, the Commissioner had three years in which to challenge completed mergers, whether or not the merger had been notifiable.[25] In March 2009, this limitation period was reduced to just one year.[26] The reduction of the limitation period marked a significant change in the balance of private and public rights, as the Commissioner must now be much more vigilant for small transactions which do not exceed the pre-merger notification thresholds, and must be prepared to challenge such mergers very expeditiously when he or she has concerns. On the other hand, the reduced limitation period provides additional comfort to merging parties. Because the Bureau most often issues positive clearance in the form of "no-action letters" (as opposed to Advance Ruling Certificates), the reduced limitation period will also provide additional certainty to merging parties in many notifiable transactions, and will give the Bureau a correspondingly shorter time to monitor completed mergers after it issues no-action letters.

The accelerated limitation period is in sharp contrast to the U.S., where there is effectively no limitation period for challenging completed mergers. In the E.C., there is also no limitation period for challenging companies which have failed to comply with conditions or obligations of their merger clearance. However, the situation with respect to non-notifiable mergers is slightly different, as the Commission cannot challenge such mergers directly.[27]

Although the reduction of the limitation period marks a clear re-balancing of private and public powers, it does not mean that merging parties are free to behave anticompetitively after 365 days. The Bureau can always challenge companies under the civilly reviewable practice provisions of the Act, although these provisions would not allow it to "unscramble the eggs" as a successful merger challenge could. Also, it is noteworthy that the newly-enacted civil provision for competitor collaborations (section 90.1 of the Act) does not have a defined limitation period.

The Commissioner has recently indicated that the Bureau will take a more active role in monitoring the media for non-notifiable transactions which may raise competition concerns, and will challenge such transactions where appropriate.[28] A challenge against one such transaction, *Commissioner of Competition v. CCS Corporation et al.*,[29] was launched in 2011 and was recently resolved when the Tribunal ordered the post-closing divestiture of a hazardous waste landfill site.

iii. Consent Orders and Consent Agreements

As commentators have noted in the past, the process of negotiating and agreeing to a merger remedy in Canada is effectively a regulatory function, since very few merging parties are willing to accept the risks, costs and delays of litigating their merger before the Tribunal.[30] To facilitate remedy agreements which were acceptable to all stakeholders, the Act originally contemplated a consent order process, pursuant to which the merging parties and the Director (as the Commissioner was then called) were required to convince the Tribunal that their proposed agreement eliminated the SPLC which would result from the impugned merger. As part of that process, interested (or potentially affected) parties were invited to intervene, and a full hearing before the Tribunal ensued.

The Director's first attempt to use the consent order process was rejected by the Tribunal.[31] A future attempt to use the process required extensive wrangling with the Tribunal and several interveners before a draft consent order was accepted, and the Bureau thereafter abandoned consent orders for six years.[32] For that ensuing period, the Bureau instead preferred post-closing undertakings, which were effectively private contracts between the Commissioner and the merged entity, and which did not require the Tribunal's blessing.

However, because post-closing undertakings did not have the force of a court order, their enforceability was uncertain. In 1995, the Attorney General of Nova Scotia alleged that Ultramar Canada Inc. had breached a post-closing undertaking it had made to the Director and that there was a reasonable apprehension of bias on the part of the Director himself. The AG sought a *mandamus* order requiring the Director to compel Ultramar to act according to Nova Scotia's understanding of the original undertakings.[33] Although the application was dismissed, the case raised serious doubts with the Bureau as to the reliability of the undertaking process, and the Bureau was very skeptical about agreeing to undertakings in the future: from 1986 – 1995, of the 1,535 mergers assessed by the Bureau, the Commissioner accepted undertakings in only 10.[34]

Ultimately, it was proposed that the consent order process be streamlined and changed to a more straightforward "consent agreement" registration process, and this change became law on June 4, 2002.[35] A consent agreement, once registered, has the advantages of post-closing undertakings in that it requires effectively no Tribunal approval and can be drafted and registered relatively quickly. Like a consent order, however, it has the force of a court order and therefore avoids the enforceability concern of undertakings. Subject to the confidential treatment of a very limited scope of information, consent agreements are public and thereby more transparent than undertakings.

The key criticisms of the shift to consent agreements were that the process lacked judicial oversight to ensure that a registered consent agreement was, in fact, enforceable and sufficient to eliminate any SPLC, and that the process lacked transparency because only the ultimate consent agreement was made public (without any supporting documents or statements of grounds and material facts).[36] The drafting of consent agreements was seen by some as a backroom deal, without sufficient consideration for interveners and other parties who may be affected by the agreed-upon remedy. The process by which an effectively private contract became a judicial order was also unclear, which led to initial uncertainty about the enforceability of consent agreements. However, the consent agreement process has now become common and, generally, well accepted.

The shift to a consent agreement regime was a significant step for Canadian merger review; it greatly facilitated private merger remedy agreements between the Commissioner and the merging parties by making such agreements clearly enforceable and easily certified. Also, the recent Bureau initiative toward a greater use of post-closing position statements should go a considerable way toward addressing concerns about transparency, while still allowing the Bureau to respect its confidentiality obligations in section 29 of the Act.

iv. Decided Cases

Merger law in Canada has faced a paucity of adjudicated cases. Since 1986, there have been only six fully contested merger cases that were decided on their merits. This was not unexpected; it was well understood that the Act incentivizes settlement of merger cases and not litigation.[37] This incentive structure was further entrenched when the consent order process was changed to a consent agreement process in 2002. Nonetheless, the downside of having such few decided cases is that there exists little guidance from the Tribunal and the courts as to the meaning of the merger provisions of the Act. The guidance documents issued by the Bureau, although they are not law, take on much more *de facto* significance because they fill in the gaps left by the dearth of judicial interpretation.[38]

One case in particular –*Superior Propane* – highlights several interesting issues which bear on the balance between private and public sector rights. We will not review the judicial history of the *Propane* case in detail, but for the purpose of this chapter, it is sufficient to note that the case turned on the interpretation of now-section 96 of the Act, dealing with efficiencies. The Commissioner's initial approach, consistent with the position set out in the 1991 *Merger Enforcement Guidelines*, was to apply a so-called "total surplus" standard, whereby wealth transfers from consumers to producers were regarded as neutral, and not as anticompetitive effects. Although the Tribunal decision in *Hillsdown*[39] questioned whether such wealth transfers were truly neutral, the then-Director, Howard Weston, confirmed that the Bureau would continue to adhere to a total surplus standard.[40] Later, however, during the *Propane* case, the Commissioner retrenched and began to advocate a different, "balancing weights" approach, which attributed some anticompetitive effect to wealth transfers. In the most recent version of the *Merger Enforcement Guidelines*, references to the *Propane* case – as well as the balancing weights test – have been removed.[41]

Although guidelines and enforcement documents are certainly helpful when litigated mergers are few, there is no substitute for decided cases. Such guidelines have no precedential value and do not even bind the Commissioner. Although litigation is an expensive and often inefficient means of resolving concerns about a given merger, the precedential value of decided cases cannot be understated.

v. Two-Stage Merger Review

Following the decision in the *Labatt/Lakeport* case,[42] the Minister of Industry mandated Brian Gover to investigate the Bureau's use of its investigative powers. In his report, Gover noted that the creation of a legislative power similar to the U.S. second request, which would automatically extend the statutory waiting period, would "be a salutary amendment to the Act."[43] Independently, in June 2008, the Competition Policy Review Panel, which had been mandated to review Canada's competition and foreign investment policies, also recommended that the Commissioner be empowered, in his or her discretion, to initiate a "second stage" review which would entail a "second request" for information.[44]

Following the recommendations in these reports, a two-stage merger review regime came into force in March 2009, pursuant to which the Commissioner may now issue a "supplementary information request" if he or she determines that additional information is required to review a merger. A SIR has the effect of extending the statutory waiting period until 30 days after all parties certify completeness with their SIRs.[45]

The two-stage merger review regime has served to align the rights of parties, who have access to significant information about their businesses and the rationales for and impacts of their proposed merger, and the powers of the Commissioner, who requires access to such information (and sufficient time to review it) in order to discharge her duties. However, businesses have expressed reasonable concerns that the burdens associated with SIR compliance and the extension of the mandatory waiting period may lead to significant cost and delay if the SIR power is used too frequently and if SIRs are not properly tailored and targeted.

The impact of the two-stage merger review process, and challenges going forward, are explored in greater detail in section VI below.

V. Contributions of Competition Bureau Guidelines

As discussed above, there have been very few litigated merger cases since 1986, and even fewer cases which have led to a full decision on their merits by the Tribunal or the courts. Because of this sparsity, much of the guidance regarding the conduct of the merger review process and the substantive assessment of mergers is informed by the Bureau's interpretation and enforcement guidelines. Such guidelines provide an essential window into the Bureau's review methodologies.

The most significant merger guidance document is the *Merger Enforcement Guidelines*. Like the U.S. *Horizontal Merger Guidelines*, the MEGs set out a framework for the analysis of market definition, anticompetitive effects, and efficiencies. The MEGs also address other technical issues such as interlocking directorates. In addition to the MEGs, the Bureau has released 11 Interpretation Guidelines as well as the *Merger Review Process Guidelines*, which provide additional clarity about the Bureau's interpretation of various logistical and administrative parts of the law. Such guidelines further the Bureau's goal of providing guidance and transparency to stakeholders.

Apart from general guidance, the Bureau has also released transaction-specific position statements, as well as merger review performance reports, and has undertaken a merger remedies study. Although these documents are not substitutes for full Tribunal decisions, they provide real-world guidance about the Bureau's operation in specific cases.

A more recent initiative is the Bureau's merger registry,[46] which lists all of the merger reviews concluded each month, for which a pre-merger notification was made. The registry has been the subject of complaints from businesses and members of the Bar on the grounds that it may violate the Act's confidentiality provisions or may chill parties' confidence about the confidentiality of their information when they provide it to the Bureau. Notwithstanding such complaints, the registry is consistent with the Bureau's commitment to be as transparent as possible, within the law, about its operation.

VI. Challenges Looking Forward

The Bureau's approach to merger review since the coming into force of the Act has, for the most part, been reasonable and even-handed, and only in rare occasions has Bureau opposition led to the abandonment of a transaction.[47] Since the coming into force of the 2009 amendments to the Act, 19 SIRs have been issued, 8 consent agreements have been registered and one contested merger is currently in the course of litigation before the Tribunal. The Bureau believes that the two-stage merger review process gives it the powers it needs to continue to properly discharge its mandate and assess transactions, and helps to prevent it from being sidetracked with logistical and process issues.

Since the inception of the SIR process, the Bureau has become much better at targeting its SIRs, such that a number of issued SIRs have been completed within four weeks. This is similar to the length of time taken to comply with voluntary information requests issued prior to the amendments. As the Bureau adjusts to the new regime, it is able to better target SIRs to allow for surgical access to necessary information without unfairly encumbering merging parties with unnecessary expense and delay. This is in contrast to the more cumbersome U.S. regime, where second requests are issued more frequently and are often much less targeted.

The success or failure of the amendments is driven in large part by the interaction between the Bureau and businesses (and their counsel). Because the initial statutory waiting period lasts only 30 days, and because SIRs take time to decide upon internally and draft, the Bureau effectively has approximately 20 – 22 days after a notification is submitted to begin preparing a draft SIR, if one is deemed necessary. A productive relationship with counsel will allow information requests (including SIRs) to be targeted and will therefore reduce the burden associated with the two-stage review regime.

The ultimate result of the 2009 amendments is a greater balance between the rights and powers of the public and private sectors. Moreover, the two-stage process has greater integrity and defensibility in that it promotes a focus on facts and submissions, and an even-handed treatment of all merger reviews. Competition policy is better served as a result.

The Bureau has been very careful in ensuring that all SIRs are justified internally. This internal justification needs to continue and evolve as the Bureau develops a better understanding of the efficacy of different questions and types of information sought and obtained. The Bureau has also taken significant steps to dialogue with parties and their counsel when it intends to issue a SIR. The Bureau should continue this dialogue going forward, to ensure that SIRs continue to be appropriately targeted and responsive to the particularities of each merger review.

Overall, we believe that the 2009 amendments represent a significant step in fine-tuning the balance of public and private rights. While the core tenets of merger review have remained largely consistent since 1986, this fine-tuning must continue going forward to ensure a balanced merger review regime that facilitates efficient mergers while allowing the Bureau to fairly and effectively discharge its mandate.

ENDNOTES

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[2] RSC 1985, c. C-34 as amended (hereinafter, the "Act").
[3] For example, see Lawrence A. Skeoch and Bruce C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Supply and Services Canada, 1976) at 37.
[4] *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, SC 1889, 52 Vic., c. 41, also referred to as the "*Wallace Act*."
[5] SC 1910, c. 9.
[6] Bruce Dunlop *et al.*, *Canadian Competition Policy, a Legal and Economic Analysis* (Toronto: Canada Law Book Inc., 1987) at 190-191.
[7] *Id.*
[8] Michael Trebilcock *et al.*, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) [*Law and Economics*] at 12.
[9] *R. v. British Columbia Sugar Refining Co.* (1960), 129 C.C.C. 7 (Man. Q.B.).
[10] *R. v. K.C. Irving*, [1978] S.C.R. 408.
[11] Law and Economics, *supra*, at 18.
[12] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Information Canada, 1969) at 113.
[13] See Ian D. Clark, "Legislative Reform and the Policy Process: The Case of the *Competition Act*," in R.S. Kemani and W.T. Stanbury eds., *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991) at 229.
[14] Usually cited as 15 U.S.C. § 18a.
[15] *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, S.C. 1999, c. 2, ss. 25 – 35 and paras. 37(z.14)-(z.17), SI/2000-1, Vol. 134, p. 139.
[16] See section 93 of the Act.
[17] Melanie L. Aitken, Commissioner of Competition, Keynote Address, 2012 Competition Law Spring Forum: Best Practices in a Time of Active Enforcement (May 2, 2012). Such a view about the intellectual difficulty in separating efficiencies from anti-competitive effects is not new for the Bureau. In 2001, after the Federal Court of Appeal's initial decision in the *Superior Propane* case, André Downs, then-Deputy Commissioner, argued that "…efficiency and equity concerns cannot be separated if the [merger review] analysis is to be economically meaningful." See André Downs, "Remarks to the Canadian Bar Association's Annual Fall Conference on Competition Law" (September 20, 2001), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01161.html.
[18] See *Merger Enforcement Guidelines* and *Superior Propane*, *infra*.
[19] In Canada, the size of parties and size of transaction thresholds are C$77 million and C$400 million, respectively. In the U.S., the size of parties thresholds are $13.6 million and $136.4 million in either total assets or net annual sales. The size of transaction threshold is $68.2 million. The size of parties test is not applied to transactions involving the acquisition of assets or voting securities valued in excess

of $272.8 million.
[20] For example, see Brian A. Facey, "Canada should learn from U.S. experience before adopting new antitrust laws," in *The Globe & Mail* (April 9, 2009).
[21] Current to July 9, 2012.
[22] See European Commission, *EU Competition Law – Rules Applicable to Merger Control – Situation as at 1 April 2010*, available at: http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf.
[23] Competition Bureau, "Merger Review Process Guidelines" (January 11, 2012) at sections 2.4 and 4.2, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html.
[24] Competition Bureau, "Hostile Transaction Interpretation Guideline Number 1: Bureau Policy on Disclosure of Information" (July 21, 2011), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03142.html.
[25] If an Advance Ruling Certificate is issued in respect of a merger, the Commissioner cannot challenge the merger solely on the basis of information that is the same or substantially the same as the information on the basis of which the Certificate was issued, provided that the merger is substantially completed within one year of the issuance of the Certificate. See section 103 of the Act.
[26] See section 97 of the Act.
[27] For more information, see Alexandros Papanikolaou and Michael Rosenthal, "Merger Efficiencies and Remedies," in Global Competition Review, *The European Antitrust Review 2012*, available at: http://www.globalcompetitionreview.com/reviews/37/sections/130/chapters/1379/merger-efficiencies-remedies/.
[28] For example, see Competition Bureau, "Remarks by Melanie L. Aitken, Commissioner of Competition, Keynote Speech at the Canadian Bar Association 2011 Annual Fall Competition Law Conference" (October 6, 2011), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html.
[29] CT-2011-002.
[30] Richard Annan, "Merger Remedies in Canada," Annual Competition Law Conference (November 4, 2005) [*Merger Remedies*] at 2.
[31] *Director of Investigation and Research v. Palm Dairies Limited*, CT 1986-001 (Comp. Trib.).
[32] *Director of Investigation and Research v. Imperial Oil Limited*, CT-1989-003 (Comp. Trib.).
[33] *Nova Scotia (Attorney General) v. Ultramar Canada Inc.*, [1995] 3 F.C. 713.
[34] Neil Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (Toronto: Carswell, 1997) at 292.
[35] See Merger Remedies, *supra*, at 4.
[36] *Id.* at 5 – 6.
[37] For example, see Lawson A.W. Hunter, "The New Merger Provisions of the *Competition Act* – Certainty or a Random Walk," 8(4) C.C.P.R. 1 at 9.
[38] See *id.*
[39] See *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992) 41 C.P.R. (3d) 289.
[40] Howard Weston, "Developments and Emerging Challenges in Canadian Competition Law," Fordham Corporate Law Institute (October 22, 1992).

[41] See Competition Bureau, *Merger Enforcement Guidelines* (October 2011), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

[42] *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59.

[43] Brian Gover, "Review of s. 11 of the *Competition Act*" (August 12, 2008), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html.

[44] Competition Policy Review Panel, *Compete to Win* (June 2008), available at: http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf.

[45] The situation is slightly different for hostile transactions. See the discussion in subsection *i* of this section IV, *supra*.

[46] See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02435.html.

[47] For example, the Annual Reports of the Commissioner of Competition for the years ending 2005 through 2010 (the most recent year for which a report is available) indicate that, in each year, only one transaction under review by the Bureau was abandoned because of the Bureau's competition concerns. See Competition Bureau, "Archived Annual Reports," available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02858.html. Note, however, that these statistics do not account for transactions which were abandoned prior to the commencement of a Bureau review, for example because of advice from counsel as to likely competition concerns.