THE EVOLUTION OF CANADA'S PRE-MERGER NOTIFICATION REGIME - 1986-2012

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Introduction

> "[Two] points regarding the proposed advance notice requirements should be noted. First, from looking at a list of the largest companies in Canada, it is clear that the section would apply to a limited number of companies and mergers. Second, the requirement is far less onerous than those imposed in the United States...."[2]

The introduction of a civil merger provision and a pre-merger notification (PMN) regime as part of the 1986 amendments to the Competition Act[3] represented an important step in the evolution of Canadian competition law. Prior to 1986, Canada had a criminal merger provision that was essentially unenforceable, and prior notice of mergers was not required.

The rationale for the new PMN provisions was relatively straightforward: "in the case of large, complex transactions, it is important to have an opportunity to examine the competitive impact before the merger is completed [since] it is often difficult, if not impossible, to obtain effective remedies in those cases where the operations of formerly independent businesses have been combined."[4]

By legislating PMN, Canada followed the lead of the United States, which had enacted a PMN regime in 1976.[5] However, even by the early 1980s, it was clear that the American regime was becoming more cumbersome than U.S. lawmakers had originally envisaged.[6] It was for this reason that the new Canadian regime was specifically designed to be less onerous than its American counterpart. Major differences included higher financial thresholds (triggering the PMN requirement) than in the U.S., a shorter waiting period, and relatively straightforward information production requirements – all designed to reduce the number of notifiable transactions or to ease the compliance burden on businesses involved in transactions to which the PMN requirements would apply.

As then Minister of Consumer and Corporate Affairs Canada, Michel Côté, stated on the introduction of Bill C-91[7] in December 1985:

> "[M]erger prenotification is necessarily an area of some complexity. There exists a choice between simplicity on the one hand and completeness on the other. The proposed provision strikes a balance between these two objectives."[8]

The evolution of Canada's PMN regime reflects an ongoing departure from the intentions of its architects. While certain technical aspects of the regime enacted in 1986 may have required change over the years, the policy objective underlying the regime – namely, balancing effective enforcement with a modest compliance burden on business – remains as fundamentally sound today as it was 25 years ago. In these circumstances, it is time that concrete steps were taken to reduce the over-enforcement that characterizes Canada's PMN regime today.

Background

It took more than fifteen years to achieve the reforms to Canada's competition law embodied in Bill C-91. In 1969, the Economic Council of Canada (ECC) – in a report requested by the federal government – recommended many of the changes ultimately adopted in 1986. While the government introduced legislation in 1971 and 1977 to implement the ECC's recommendations regarding mergers, specialization agreements and abuse of dominant position, the legislation did not pass[9] – a result, in part, of opposition from the business community.[10]

The failure of repeated attempts to amend the Competition Act[11] during the 1970s led to an unprecedented round of government consultations with the business and legal communities, consumer groups, labour, academics, other interested parties and the provinces in the early 1980s. The result of these consultations was a consensus on a workable package of amendments – including a PMN regime – that was broadly acceptable to most constituencies.[12] Tabled in December 1985, Bill C-91 became law in June 1986.

The 1986 Amendments

Unlike the PMN provisions of earlier amendment proposals, which had been criticized for being too complicated or convoluted,[13] Bill C-91 adopted an approach to PMN that was more orderly and systematic.[14] More importantly from the perspective of businesses that would be affected by the PMN and waiting period requirements, the new Canadian regime was designed to be less onerous than its American counterpart.

To achieve this objective, the new Canadian regime differed from the American regime in a number of important respects:

- The party-size and transaction-size (financial) thresholds were significantly higher than the corresponding HSR thresholds, which was intended to reduce the number of notifiable transactions;[15]
- The financial thresholds were not fixed but, rather, could be increased

by regulation[16] – thereby avoiding the need for a statutory amendment to increase the threshold amounts – with a view to reducing the number of notifiable transactions where appropriate having regard to experience gained under the Canadian regime;

- The exemptions from PMN contemplated the creation of further exemptions by regulation, with a view to reducing the number of notifiable transactions where appropriate having regard to experience gained under the Canadian regime;
- The legislation provided for both short- and long-form filings, the former of which would ease the compliance burden on businesses undertaking transactions subject to a PMN requirement that did not raise substantive merger issues;[17]
- The legislation established two, alternative statutory waiting periods – a 7-day waiting period where a short-form filing had been made, and a 21-day waiting period where a long-form filing had been made – each of which was shorter than the 30-day waiting period under the HSR Act; and
- The legislation imposed relatively straightforward information production requirements.

Similarly, the Notifiable Transactions Regulations, which specified the manner in which parties would determine whether the relevant PMN thresholds were exceeded, simplified this determination by focusing on financial information derived primarily from existing financial statements.

ARC Applications

A notable difference between the Canadian regime and its U.S. counterpart was the ability of parties to notifiable transactions to avoid formal PMN by applying for an advance ruling certificate (ARC). While filing an ARC application initiated a Bureau review of a proposed transaction that was essentially the same as the review triggered by a PMN filing, it did not trigger the statutory waiting period, with the result that parties applying for ARCs – unless they concurrently submitted a PMN filing – were in the Bureau's hands on review timing. However, because the form of ARC applications was not prescribed, they tended to focus on the information and analysis most relevant to the Bureau's review, which in turn had the effect of facilitating the review and expediting the review process. ARC applications soon became a convenient, much-used alternative to PMN filings for transactions that did not raise significant merger issues.

Waiting Periods

Despite the relatively short waiting periods introduced in 1986, three factors mitigated the corresponding time pressure on the Bureau's review of notifiable transactions. First, the vast majority of all notifiable transactions did not – and do not today – raise significant merger issues,[18] with the result that Bureau was able to complete its review of most mergers within a matter of days.[19] Second, a significant number of mergers (both then and now) were implemented using corporate structures, such as plans of arrangement, that involved time periods that extended well beyond the 21 day waiting period triggered by a long-form filing. As a result, in practice, the Bureau often had several weeks to undertake and complete a merger review. Finally, given the non-complexity of most mergers, it became common for parties to notifiable transactions to apply for ARCs, rather than to submit PMN filings, which had two results: First, because there was no formal waiting period associated with an ARC application, the Bureau was not held to a review period of fixed duration where these applications were made;[20] second, because parties receiving ARCs[21] got "comfort" from the Bureau regarding its analysis of the merger issues to which the transaction gave rise, it also became common for parties to notifiable transactions to allow the Bureau sufficient time following the completion of the formal waiting period to complete its review and to sign off on the deal.[22]

1986 to 1996

In the decade after 1986, Canada's PMN regime functioned for the most part as its architects had intended. The compliance burden on businesses required to notify the Bureau of proposed merger transactions – particularly the vast majority of notifiable transactions that did not raise significant merger issues – were minimized through the ability to submit either a short-form filing or ARC application, and there were no associated filing fees. At the same time, the Bureau received prior notice of the merger transactions most likely to raise substantive merger issues, in addition to the many other transactions that did not raise significant merger issues, the review of which it completed within weeks, if not days.

While there were no changes to either the financial thresholds that triggered the PMN obligation or to the categories of transactions that were exempt from PMN, it was still early days.

Subsequent Changes

Four important changes to Canada's PMN regime took place after 1996.

(1) Filing Fees and Service Standards

The first changes took place in 1997 with the introduction of a requirement to pay a PMN filing fee of $25,000[23] and a corresponding introduction of "service standards."[24] In addition to noting that charging fees for PMN filings and ARC applications was consistent with the government's Cost Recovery and Charging Policy, the Bureau expressed the view in the press release announcing the changes[25] that "a fees and standards regime will make the Bureau's services more efficient [and filing parties] will benefit from more informative reviews and opinions and, in most instances, quicker turnaround times."

Somewhat surprisingly, the service standards adopted by the Bureau did not correspond with the statutory waiting periods under the Competition Act; rather, the Bureau began categorizing notifiable transactions as either non-complex, complex or very complex, with corresponding review periods of two weeks, ten weeks and five months.[26]

(2) New Information Requirements and Longer Waiting Periods

In 1999, the PMN provisions of the Competition Act were amended to double the length of the statutory waiting periods to 14 and 42 days, to change the basic information required to be provided to the Bureau as part of a PMN filing, and to move the PMN information requirements from the Act to the Regulations. In addition, a new exemption was created (by regulation) for asset securitization transactions.

While the Backgrounder issued by the Bureau in connection with these amendments stated that the changes to the PMN information requirement the would "improve and speed up the merger review process by making sure the Competition Bureau gets key information it needs to assess the effect proposed mergers will have on competition," there was no discussion of the rationale for doubling the length of the statutory waiting periods.

The Backgrounder did note a reduction in the burden on business that would result from the new exemption for asset securitizations, which it stated "typically do not raise competition issues."[27]

(3) Transaction-Size Threshold Increase and Higher Filing Fees

In 2003, the then-$35 million transaction-size threshold was increased (by regulation) to $50 million.[28] In discussing the change, the *Regulatory Impact Analysis Statement* (Statement) that accompanied publication of the regulation noted that the increase would approximately match the increase in the consumer price index since 1987.[29] However, the Statement also noted that:

> "More than 80% of notifiable transactions submitted to the Commissioner do not raise any issues under the Act. The purpose of the amendment is to reduce the number of notifiable transactions which are unlikely to raise competition issues, in order to reduce the compliance burden imposed on business."[30]

On the topic of further reductions in the regulatory burden associated with PMN, the Statement noted the Bureau had received a submission[31] suggesting an increase in the transaction-size threshold to $250 million for the oil and gas industry. However, the Bureau rejected this submission because "it remains the Commissioner's view that industry-specific thresholds would result in a complex framework" and "the Competition Bureau is satisfied that this proposal would be problematic to administer."[32]

Finally, the Statement noted that "another way to reduce the number of notifiable transactions is to create exceptions for other classes of transactions that are not likely to raise any competition issues" but that "[s]o far, the Competition Bureau's analysis has not identified a class of transactions for which exemptions should be created."[33]

(4) HSR Revisited

The final changes, which resulted in the current version of Part IX, were made in 2009 and represented a fundamental overhaul of Canada's PMN regime. Among other things, the 2009 amendments:

- Eliminated the short and long-form filing options, replacing them with a single filing;
- Replaced the short and long-form waiting periods with a single 30-day waiting period; and
- Provided the Commissioner of Competition (Commissioner) with the ability to issue a supplemental information request (SIR),[34] which has the effect of stopping the statutory waiting period until 30 days after the parties to the transaction have complied with the SIR.

While the 2009 amendments also increased the transaction-size threshold to $70 million and provided for annual increases[35] in the threshold amount, these increases were not specifically designed to reduce the regulatory compliance burden associated with PMN but, rather, to ensure that the threshold amount kept up with inflation. Yet again, there were no changes to the party-size threshold, and no further exemptions from PMN were created.

An important driver behind the 2009 amendments appears to have been the recommendations of the Competition Policy Review Panel (Panel) in its

June 2008 final report.[36] Regarding the "approach" of Canada's merger law – on which the Panel had sought comments during its formal consultations – the Panel observed that:

> "using an analytical approach [to merger review]...that is convergent with [Canada's] major trading partners should...reassure international investors that Canadian competition law in respect of mergers are modern and transparent."[37]

However, the Panel also recommended that Canada's merger review process – on which the Panel had not sought comments during the consultation process and on which no public submissions were made[38] – should be "better harmonized" with that of the United States.[39] Eight months later, after no meaningful public discussion of this recommendation, provisions designed to give it effect were included in Bill C-10, the *Budget Implementation Act, 2009.*[40] Five weeks later, on March 12, 2009, Bill C-10 received Royal Assent.

As a result of these changes, 25 years after PMN was first introduced, Canada has a PMN regime that applies to a significant (rather than a limited) number of companies and mergers and has requirements that are no less onerous (rather than far less onerous) than those imposed in the United States.

Comment

An important objective of the PMN provisions of the 1986 Competition Act was to strike a balance between the need for an effective merger review regime and a desire to avoid imposing an unnecessary compliance burden on Canadian business. In attempting to strike this balance, Canadian policy makers rejected the much-criticized U.S. model[41] and opted for a "made-in Canada" solution.

Initially, the Canadian model worked well. But as merger activity in Canada and elsewhere accelerated in the 1990s, as advances in information technology complicated document production and review, and as competition authorities began to engage in more extensive economic analysis that required the production of substantial amounts of electronic data,[42] it became apparent that some changes to the PMN provisions of the Competition Act were required.

Amendments to Part IX over the past 25 years have implemented many of these changes and greatly enhanced the Bureau's power in the merger review process at the expense – quite literally – of Canadian business.[43] What has been absent, however, from the process of "updating" Canada's PMN regime over the years – despite clear acknowledgment that the regime is over-broad – is any meaningful effort to narrow its application – and, thereby, to reduce the PMN compliance burden[44] – as the architects of Part IX, and as Parliament, intended.

This could be achieved in a number of ways, the most obvious of which, in that it is expressly contemplated by the legislation, would be to further increase the PMN thresholds[45] – particularly on a sectoral basis – or to create further exemptions from the obligation to make a PMN filing.[46] Possible candidate exemptions include those for: corporate reorganizations in which *de facto* control is unaffected; transactions involving the acquisition of non-operating assets; transactions in which the acquiror has no presence in Canada; and many transactions in the upstream oil and gas and real-estate sectors.[47] Statements by past Commissioners that industry-specific thresholds would result in a complex framework that would be difficult to administer, or that the Bureau has not identified transactions for which exemptions should be created, are difficult to justify: more troubling is the fact that they ignore the intention of the legislation and its underlying policy objectives.

Any mandatory PMN regime should attempt to limit the over-enforcement to which otherwise "effective" enforcement invariably gives rise. While it may not be the first instinct of regulators to cede acquired jurisdiction, it is time that Canada's Competition Bureau acknowledged the burden on business that PMN compliance imposes and made a *bona fide* effort to reduce (or recommend changes to reduce) the number of clearly unnecessary PMN filings that must be made in Canada today.

ENDNOTES

[1] The author is the Chair of the Competition and Antitrust Group at Torys LLP. Together with colleagues, he was closely involved in the formulation of the Canadian pre-merger notification regime and related policy discussions during the period 1983-87.

[2] *Background Information and Explanatory Notes*, Bill C-29, Consumer and Corporate Affairs, April 1984 at 18.

[3] *Competition Act*, R.S.C., 1985, c. C-34, as amended (Competition Act or Act). The PMN provisions of the Act did not come into force until July 15, 1987, with the coming into force of the Notifiable Transactions Regulations, SOR/ 87-348 (Notifiable Transactions Regulations or Regulations).

[4] *Information Notice*, Consumer and Corporate Affairs Canada, July 1987, at 2.

[5] *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18a, as amended (HSR Act or HSR).

[6] See, for example, the *Eighth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976*, September 19, 1985, which noted a 62% increase in the number of second requests issued over the prior year. "A review of the legislative history of the HSR Act shows that Congress assumed that the burden and cost of responding to a Second Request would be modest, noting that the Agencies should request materials 'already available to the merging parties [and] lengthy delays and extended searches should consequently be rare.' [122 Cong. Rec. 30,876-77 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino)].

However, the actual burden associated with responding to a Second Request far exceeds Congress' original intention." Source: Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada) Draft Enforcement Guidelines on the Revised Merger Review Process, May 2009.

[7] *Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*. First reading, December 17, 1985; proclaimed in force June 19, 1986, other than the PMN provisions, which came into force on July 15, 1987. See note 3 above.

[8] *Competition Law Amendments - A Guide*, Consumer and Corporate Affairs Canada, December 1985, at 19.

[9] While some reforms were enacted in 1975, they dealt with different matters, including the application of the legislation to services, misleading advertising, and a number of civil reviewable matters. Source: Combines Investigation Act Amendments 1984 - Background Information and Explanatory Notes - Consumer and Corporate Affairs Canada - at 32.

[10] Margaret Smith, Parliamentary Research Branch, Law and Government Division, *Mergers and Abuse of Dominant Position: Legal Aspects*, September 10, 1998.

[11] At the time, the *Combines Investigation Act* (Canada).

[12] Statement, December 17, 1985, Michel Côté, Minister of Consumer and Corporate Affairs Canada, on the tabling of Bill C-91.

[13] Consumer and Corporate Affairs Canada, *Competition Law Amendments - A Guide*, December 1985, at 19.

[14] Ibid, at 20.

[15] At the time, the HSR thresholds were $100 million and $10 million, respectively.

[16] This included the possibility of different thresholds for different business sectors.

[17] The "short-form filing" with limited information production requirements could be used for relatively straight-forward transactions that did not raise significant, substantive merger issues, and a "long-form filing" with more detailed information requirements could be used for transactions raising more complex merger issues.

[18] See, for example Competition Bureau, Merger Review Performance Report, June 2001. During the period 1997-2001, more than 80% of the notifiable transactions reviewed by the Bureau were non-complex. See also footnote 33 below.

[19] During the period 1997-2001, the Bureau completed its review of non-complex notifiable transactions in between 10 and 12 days, on average. Source: Competition Bureau, *Merger Review Performance Report*, June 2001.

[20] In 1995, for example, 52% of the mergers reviewed by the Bureau were triggered by the filing of an ARC application. By 2002, ARC applications represented more than 70% of merger-related filings. Source: Competition Bureau, *Merger Review Performance Report*, October 2004.

[21] Or a "no action letter," if an ARC was not issued.

[22] This situation can be contrasted with the outcome of merger reviews in the U.S., which merely result in the expiry of the statutory waiting period (or early termination of the waiting period) in circumstances in which a second request is not issued. Neither the U.S. FTC or Antitrust Division of the U.S. Department of Justice provides notifying parties with "comfort."

[23] This amount was increased to $50,000 in 2003.
[24] The introduction of service standards reflected the requirements of federal government policy that "those who pay for government services are entitled to fundamental information on the services being provided and any associated service standards." See, for example, *Policy on Service Standards for External Fees*, 2004 (Treasury Board).
[25] Competition Bureau, October 20, 1997.
[26] At the time, the statutory waiting periods were 7 and 21 days.
[27] According to the Backgrounder, these transactions accounted for approximately 15% of the total number of transactions examined by the Competition Bureau each year.
[28] As noted in footnote 23 above, the PMN and ARC application filing fees were also increased to $50,000 "to better reflect the cost of merger review."
[29] See Regulatory Impact Statement accompanying SOR/2003-104, March 20, 2004.
[30] Canada Gazette, Part II, Extra Vol. 137, No. 3, March 27, 2003 at 3. Under the heading "Benefits and Cost," the Statement made a number of observations regarding the trade-off between the compliance burden on business and the need for an effective PMN and merger review regime. First, it noted that "…the current transaction-size threshold is overly inclusive as it imposes an…expense and regulatory burden upon merging firms while providing the Commissioner with notice of very few problematic transactions that would not be notified at the proposed $50 million transaction-size threshold." With respect to the $400 million party-size threshold, the Statement noted that the threshold would stay the same given that "this threshold was considered relatively high, both with respect to the size of the Canadian economy and a comparison with its equivalent American threshold. Second, it noted that "[t]he increase to the transaction-size threshold will likely not increase materially the risk that the Commissioner would not be notified of a problematic transaction. During the 2000-2001 fiscal year, it would not appear that any of the notifiable transactions valued between $30 million and $50 million…gave rise to competition concerns…In any event, the Commissioner has the statutory ability to review all mergers affecting Canadian operating businesses." Finally, it noted that "[t]he increase to the transaction-size threshold will alleviate the burden for parties, and business in general, involved in small-scale transactions, and it will reduce by approximately 10% the number of transactions that must be notified. It is estimated that the affected 10% of notifiable transactions represent increased cost to businesses [who] engage in mergers with little likelihood of raising competition concerns."
[31] The Backgrounder noted that the amendments were the "result of formal and informal consultations with stakeholders."
[32] Ibid., footnote 30, at 6.
[33] Ibid., footnote 30, at 3. This statement was surprising given that, in 2002, the Bureau stated in its *Fees and Services Standards Handbook*: "Non-complex transactions are readily identifiable by the absence of competition issues and the minimal amount of work required to complete assessments…Examples of non-complex transactions include many mergers in unconcentrated industries such as upstream oil and gas exploration and extraction, (this would exclude pipelines,

processing/refining and distribution), mining (where the parties are not significant players in Canada), and real estate. Other examples include...changes from de facto to de jure control (i.e. 40% to 55% control), and international mergers where only one of the parties has a significant presence in Canada." Source: Competition Bureau, *Fee and Service Standards Handbook*, (Draft) November 2002. See "Complexity Definitions - Non-Complex Mergers."

[34] Equivalent to a second request under the HSR Act.

[35] To be determined by the Minister of Industry having regard to changes in the average of the Nominal Gross Domestic Products

[36] Government of Canada, Competition Policy Review Panel, *Compete To Win*, Final Report – June 2998. Available at www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

[37] After 1986, this issue did not appear to be in doubt, as reflected in the fact that the Panel did not recommend any substantive changes to Canada's merger law.

[38] In a February 3, 2009 submission to Industry Canada regarding the potential changes to the Canadian merger review process recommended by the Panel, the National Competition Law Section of the Canadian Bar Association noted that "neither the consultation paper released by the Panel in October 2007 nor any of the submissions that were subsequently made to the Panel mentioned the possibility of amending the Act to reflect a U.S.-style 'second request' process. It appears that it was not until the Commissioner submitted a Discussion Paper to the Panel, dated March 31, 2008, that the Commissioner raised any issue with the merger review process and drew attention to certain features of the U.S. and European merger review processes, which she favourably contrasted with the existing statutory waiting periods and compulsory information gathering powers under the Act."

[39] More specifically, the Panel was of the view that "it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the US."

[40] S. C. 2009, c. 2

[41] "Responding to a Second Request typically results in 1) the expenditure of several million dollars for document and data processing and attorneys' and economists' fees, and 2) the production of millions of pages of documents and dozens of gigabytes of electronic data and documents. In fact, a 2003 survey conducted by PricewaterhouseCoopers concluded that the external costs to the merging parties subject to a Second Request in the United States were at least double that of any other jurisdiction. The Second Request process also typically is a very lengthy one; the average length of an HSR investigation can be six months or longer. Some investigations in fact last much longer and continue for one year or more. Extensive investigations not only are costly, but also delay the savings and efficiencies that the parties expect to achieve through their transaction. There is also a risk that lengthy merger reviews can result in the loss of key personnel and/or limit each party's ability to respond to changes in the marketplace." Source: Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada) Draft Enforcement Guidelines on the Revised Merger Review Process, May 2009, at 5.

[42] Ibid., at 5.

[43] Since 1997, parties to non-complex notifiable transactions, many of which raise no merger issues whatsoever, have paid more than $90 million in PMN filing fees.
[44] In recent years, this compliance burden has been exacerbated by the fact that the Bureau has been conducting relatively thorough reviews of even non-complex transactions as to which there is no reasonable likelihood of a challenge, which results in higher legal and other cost for the parties.
[45] This would also be consistent with the *Recommended Practices For Merger Notification Procedures*, issued by the International Competition Network: "In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of agency resources without any corresponding enforcement benefit": Recommendation I.B., Comment 1.
[46] This was also the recommendation of the Panel which stated that "consideration should be given to creating more exemptions from merger notification for classes of merger transactions that do not raise competition concerns. Such changes can be effected relatively expeditiously by prescribing regulations under section 124 of the Competition Act."
[47] Having effectively adopted the U.S. model in 2009, another way to ease the compliance burden would be to adopt the enforcement approach of the U.S. antitrust agencies – namely, to conduct a more cursory review of clearly non-problematic transactions.