A PATH TO PROPORTIONALITY IN THE SIR PROCESS

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In a merger review, the Commissioner of Competition has the power to issue supplementary information requests ("SIRs") to merging parties, in addition to the standard disclosure required under the Competition Act. *The authors suggest that the principle of proportionality is and should be applicable to the exercise of the Commissioner's SIR power; however, current merger review procedures, including pre- and post-issuance dialogue and the Competition Bureau's internal appeal process, do not provide effective avenues for parties to challenge the scope or proportionality of a SIR. Recent decisions of the Competition Tribunal suggest that the principle of proportionality—well recognized in civil proceedings in Canada—is equally applicable in Tribunal proceedings. If a party were to take the risky course of closing a transaction over the Commissioner's objections after refusing to comply with an overbroad SIR, and in the event of a proceeding brought by the Commissioner, challenge the scope of the SIR before the Tribunal, the Tribunal would likely consider the proportionality of the SIR. The authors conclude that policy and legislative changes—including acknowledgment and implementation by the Bureau of the proportionality principle, and the oversight of SIR appeals by an independent arbiter—are necessary to better ensure proportionality in the SIR process.*

Dans le cadre de l'examen d'une fusion, le Commissaire de la concurrence a le pouvoir discrétionnaire de présenter une demande de renseignements supplémentaires (DRS) auprès des parties à la fusion, en surcroît des renseignements habituellement exigés aux termes de la Loi sur la concurrence. *Les auteures soutiennent que le principe de la proportionnalité serait applicable dans un tel cas et qu'il doit être appliqué dans le cadre de l'exercice de ce pouvoir par le Commissaire. Toutefois, les procédures actuelles d'examen des fusions, dont le dialogue préalable et le dialogue ultérieur à la présentation d'une DRS ainsi que la procédure d'appel interne du Bureau de la concurrence, ne fournissent pas de moyens adéquats pour que les parties puissent contester la portée ou la proportionnalité d'une DRS. Récemment, le Tribunal de la concurrence a rendu des décisions indiquant que le principe de la proportionnalité, principe bien reconnu dans le contexte des poursuites civiles au Canada, est tout aussi applicable aux instances devant le Tribunal. Si une partie devait décider de prendre le risque de conclure une transaction, en dépit des objections du Commissaire, après avoir eu refusé de se conformer à une DRS d'une portée excessive, et que le Commissaire introduisait des procédures durant lesquels cette partie contestait la portée de la DRS devant le Tribunal, ce dernier se pencherait tout probablement sur la proportionnalité de la DRS. Les auteures tirent donc la conclusion que des modifications sur le plan des politiques et de la législation, y compris la reconnaissance et la mise en œuvre du principe de*

proportionnalité par le Bureau ainsi que le contrôle des appels portant sur les DRS par un décideur indépendant, sont nécessaires afin de veiller à ce que le principe de proportionnalité soit respecté dans le processus de DRS.

Canada's *Competition Act* ("Act") requires parties to many mergers to submit prescribed information to the Commissioner of Competition ("Commissioner"), and to satisfy a waiting period before closing. The Commissioner has the power, during that initial waiting period, to request "additional information that is relevant to the Commissioner's assessment"[1] of a proposed merger transaction in the form of a Supplementary Information Request ("SIR"), following the standard disclosure required under the Act.[2] The Commissioner decides whether the additional information sought is relevant to the Commissioner's assessment, and a merging party's only recourse when faced with a SIR it believes to be overly broad is to challenge the SIR through an internal appeal process within the Competition Bureau ("Bureau"). While no two SIRs are identical and the length of time required to comply can vary, two to three months is not uncommon. Meanwhile, however, the transaction cannot be completed until a new waiting period expires—and the new waiting period only starts upon full compliance with the SIR. Clearly, the scope of the SIR—if overbroad—can unnecessarily delay closing of a transaction. In this paper, we identify the shortcomings of this internal review process and suggest that policy and legislative changes are necessary to better ensure proportionality in the SIR process. Though we do not suggest that it is the Commissioner's practice to issue overly broad SIRs,[3] given the inadequate appeal mechanism currently provided, merging parties lack meaningful opportunity to challenge the scope of a SIR.

The principle of proportionality—the principle that a fair and just process must be proportionate to the nature of the dispute and the interests involved—informs the conduct of civil proceedings in Canada, and is a key feature of the discovery process. The principle is codified in civil rules of procedure throughout Canada, and its importance was recently affirmed by the Supreme Court of Canada, which called for a "culture shift" that will require judges "to actively manage the legal process in line with the principle of proportionality."[4] The Court emphasized that a fair and just process must be "accessible—proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure."[5]

Recent decisions of the Competition Tribunal ("Tribunal") regarding the discovery process in a contested hearing suggest an emerging trend whereby the proportionality principle is equally applicable to discovery

in Tribunal proceedings as it is to civil proceedings. It is the authors' view that the principle of proportionality is and should be applicable to the Bureau's merger review process, and, in particular, to the exercise of its SIR power. If, as an alternative to the limited internal review mechanism available to parties to challenge the scope of a SIR, parties challenged the scope of a SIR before the Tribunal, the Tribunal would be likely to consider the proportionality of the SIR to, for example, the interests involved, the volume of commerce affected, and the amount of money at stake in the transaction.

We recommend that the Bureau undertake policy changes to address questions of proportionality proactively and to expressly recognize the principle of proportionality in its merger review process policies. We further recommend legislative change to create an objective and predictable process for reviewing a SIR, similar to the "presiding officer" role that exists for challenges to examinations under section 11 of the Act.[6]

Part I of this article provides an overview of the SIR process and current mechanisms available to merging parties to challenge the scope of a SIR.

Part II reviews recent Tribunal jurisprudence and concludes that the proportionality principle is being applied by the Tribunal. Given the similar goals to be achieved by the discovery process and the SIR process—namely, both processes are designed to uncover evidence to help determine whether a transaction will result in a substantial lessening or prevention of competition—we suggest that strong arguments exist for applying the principle of proportionality to the SIR process as well, and that, given the opportunity, the Tribunal would likely apply the principle when reviewing a challenge to a SIR.

The conclusion proposes that the Bureau should proactively incorporate the principle of proportionality into its SIR process, and, in consultation with the competition bar, develop guidelines for ensuring proportionality in the SIR process. In conjunction with the Bureau's policy changes, legislative changes should be made to improve the appeal process.

PART I: THE SIR POWER

Background

The SIR power was created in 2009 as part of significant changes to Canada's merger review process. These changes created a two-stage review process. First, merging parties must notify the Bureau

of a pending transaction and wait 30 days before closing[7] (unless the waiting period is terminated earlier by issuance of a letter or certificate by the Bureau indicating the Commissioner does not intend to challenge the transaction). Most transactions are cleared in this first stage. Second, in some complex cases, the Bureau may issue a SIR requiring the parties "to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction," triggering a second waiting period during which parties are prohibited from closing the transaction until thirty days after all requested information is received by the Bureau.[8] The Bureau states that it issues SIRs "[w]here a notifiable transaction raises concerns regarding a potential substantial lessening or prevention of competition."[9]

The new process was implemented to give the Bureau more time to review complex mergers, to align Canada's process with the United States' Hart-Scott-Rodino[10] process, and to provide more certainty with respect to review timelines.[11] Melanie Aitken, the Interim Commissioner of Competition at the time the changes were made, explained:

> The old provisions did not provide us with the proper tools or sufficient time to review the very small number of transactions each year that have the potential to significantly harm competition in Canada. We are confident that the new provisions, designed with an emphasis on predictability and aligning incentives, will allow the Bureau to collect information we need to proceed with a responsible review. At the same time, it will give more certainty to business about timing and process and harmonize our process with the U.S., which should help parties navigate the process more efficiently in a global marketplace.[12]

The SIR power enables the Bureau to demand additional documents and data from merging parties. This is a powerful tool for obtaining information from transacting parties, given that closing before all requested information is provided is prohibited.

The SIR power was enacted despite the Commissioner's pre-existing broad power to request information. Under section 11(1) of the Act, the Commissioner has always had the power to make an *ex parte* application to the court or Tribunal for the production of documents or other information from any party under investigation. Concern had been expressed about the misuse of this power before the creation of the SIR process, even though section 11 requests, unlike SIRs, are subject to court supervision. For example, in *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, Mactavish, J. overturned her previous order for the production of information from Labatt Brewing Co. ("Labatt")

because the Commissioner had failed to disclose, among other things, the burden the order would impose on Labatt.[13] Specifically, the Commissioner failed to disclose Labatt's concerns that the information request was too broad, that it demanded irrelevant information, and that compliance would cost Labatt over half a million dollars.[14]

Despite existing concerns of overuse of information demands under section 11 of the Act, Parliament nonetheless expanded the Bureau's information-gathering tools in 2009 with the SIR process. Since the coming into force of the SIR power, the Bureau has issued at least 39 SIR requests.[15] The first SIR was issued on April 29, 2009 to Suncor Energy Inc. and Petro-Canada in connection with the companies' proposed merger.[16] Since then, the number of SIRs per annum has doubled from five in each of the first two years of the program to 10 in each of 2012 and 2013. SIRs as a percentage of total reviews have also doubled, from 2.3% in 2009 to 4.7% in 2012/2013.[17] On average, it takes parties 50 days to respond to SIRs.[18] Although this figure has dropped significantly from 93 days in 2009, it is indicative of the significant burden and delay that are often imposed upon merging parties by such requests, especially since the parties must typically wait at least an additional 30 days to close the transaction after supplying all information requested by the SIR.[19]

Legislative Scheme

Several provisions of the Act govern the SIR process. The SIR power itself is set out in section 114(2), which provides that the Commissioner or a person authorized by the Commissioner may, within 30 days after receiving the prescribed merger notification information in section 114(1), send a notice to the person who supplied the information requiring them to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction.[20]

Though section 114(2) provides the Commissioner with broad powers, under section 116, a SIR recipient can refuse to supply information on the grounds that it is not known or reasonably obtainable, is privileged or confidential, is not relevant, or was already supplied to the Bureau.[21] In the face of such objections, however, the Commissioner still has the power to demand production of the information.[22]

Upon complying with a SIR, parties are required to certify that the information supplied under a SIR is correct and complete "in all material respects."[23] As noted above, parties are prohibited under the Act from closing the transaction until thirty days have passed from the date all requested information is supplied to the Commissioner.[24]

Lastly, under section 123.1, the Commissioner can apply to the Tribunal or a court to sanction a party that closes, or is believed to be likely to close, a transaction before providing the SIR information. Sanctions include orders requiring the party to submit the requested information, orders prohibiting the party from proceeding with closing the transaction, orders requiring the dissolution of the merger, or significant monetary penalties, which can amount to up to $10,000 per day.[25]

Challenging an Overly Broad SIR

As described in further detail below, a SIR recipient has the opportunity to engage in dialogue with the Bureau about the SIR both before and after its issuance. If, after pre- and post-issuance dialogue, a SIR recipient remains dissatisfied with the scope or content of the SIR, the recipient can then contest the SIR using the Bureau's internal review process. If unsuccessful through this process, a SIR recipient could apply to the Federal Court for judicial review of the review decision. However, as described further below, each process has serious shortcomings. A frustrated party unable to challenge the scope of a SIR may choose to close the transaction in the face of an outstanding SIR, await a challenge by the Bureau for non-compliance, and then contest the validity of the SIR before the Tribunal on the grounds of proportionality. This approach would, of course, entail a great deal of risk for merging parties. We therefore suggest that policy and legislative reform are needed to improve the opportunity for appeals in the SIR process.

The Bureau's Pre- and Post-Issuance Dialogue Processes Provide Limited Opportunity to Challenge an Overly Broad SIR

The Bureau will send a draft SIR to the merging parties prior to its issuance, and at the parties' option, engage in dialogue regarding its contents.[26] This process is aimed at ensuring the parties understand what information is being requested, assessing the data storage and record-keeping systems of the SIR recipients, determining whether there is other information that would better assist the Bureau in its analysis, and ascertaining whether there are any reasons that the parties may be unable to provide the requested information.[27] The Bureau states that it will consider comments received from the parties regarding the draft SIR but will ultimately use its own discretion to determine if any changes are required.[28]

SIR recipients are encouraged to engage in further dialogue with the Bureau after the SIR has been issued.[29] This post-issuance dialogue provides an opportunity for the parties to prioritize the information

that has been requested, structure electronic searches of the documents, and determine what information remains outstanding.[30]

Although the pre- and post-issuance dialogue processes provide some opportunity for discussion, they do not provide any meaningful opportunity for SIR recipients to negotiate the scope of the SIR. This is primarily so because that is not the aim of these processes, as discussed above. For example, the Bureau has specifically stated that the pre-issuance dialogue process "is not intended to serve as a forum for debate or negotiation with the Bureau on the merits of the case or the relevance of particular information requests found in the draft SIR."[31] Furthermore, these processes do not provide any opportunity for third-party or objective assessment of the SIR, and any changes to the SIR are subject to the Bureau's discretion. Lastly, the pre-issuance dialogue process typically occurs in a very protracted timeframe before the SIR is issued, leaving limited opportunity for large-scale changes to the content and scope of the draft SIR.[32]

The Bureau's Internal Appeal Process May Suffer From An Apprehension of Potential Bias

The only option set out in the Bureau's Merger Review Process Guidelines for challenging a SIR is the Bureau's internal appeal process.[33] This process is not legislatively mandated, but is a Bureau policy whereby merging parties can challenge the scope of a SIR request or contest determination by the Bureau that the party's response is incomplete. This appeal process is also outlined in the instructions that accompany a SIR.

To appeal the scope of a SIR using the internal process, a party must submit a written notice of appeal to the Senior Deputy Commissioner of the Mergers Branch. This notice will then be forwarded to a Deputy Commissioner from another Bureau branch who will investigate the complaint, request additional information within five business days, give the parties an opportunity to make submissions, and render a decision within seven business days of the additional information being provided.[34] The Deputy Commissioner considering the appeal may decide that the scope of the SIR is appropriate and uphold the SIR, or may modify it. Only after a decision has been made on the appeal regarding the scope of a SIR, or the party's appeal has been withdrawn, may a party assert that it has complied with the SIR.[35]

We are not aware of the appeal process ever having been used to challenge the scope of a SIR. As such, it is unclear how well the process would work and what the probability of success would be. Based on

our discussions within the competition bar, however, we are not aware of it ever having been used.

It is unclear why merging parties have not used the SIR appeal process. It is also possible that the pre- and post-issuance dialogue processes are used in lieu of the appeal process to attempt to narrow the scope of a SIR, despite providing a very limited ability to combat an overly broad SIR, as discussed. It is possible that the Bureau has never issued an egregiously overly broad SIR. They have been recognized as being responsible in this regard.[36] The *Labatt* case shows, however, that there can be disputes in this regard.[37] However, it is in our view just as likely that parties have not used the appeal process due to concerns about its effectiveness or procedural fairness. There may be a potential for a reasonable apprehension of institutional bias[38] in the existing SIR appeal process. The appeal is reviewed by a Deputy Commissioner from another Bureau branch, who is reviewing the decision of a Senior Deputy Commissioner with expertise in merger review. The reviewing Deputy Commissioner reports to the Commissioner, who, notionally, is the issuer of the SIR; the reviewing Deputy Commissioner is therefore considering the appeal with the knowledge that staff from the Commissioner's office, or even the Commissioner him or herself, has already reviewed and authorized the SIR. Additionally, while it remains unclear because the process has never been used (or if it has been used, its use has not been made public), it appears that the Senior Deputy Commissioner of the Mergers Branch chooses which Deputy Commissioner will review the appeal.[39] The perception of the potential for institutionalized bias may discourage use of the internal appeal process.

Judicial Review Would Likely Harm the Timing of the Merger

If a party were unsuccessful in appealing a SIR through the Bureau's internal process, it could, in theory, apply for judicial review of the appeal decision. Doing so would place the dispute before a court, eliminating the procedural fairness concerns discussed above. However, given the time-sensitive nature of most merger transactions, it is likely not feasible for parties to wait for judicial review, which could take up to a year to resolve, to find out if they are permitted to close a transaction. As such, the effectiveness of judicial review in combatting an overly broad SIR is limited.

Further, the internal appeal process is likely to attract a high degree of deference from the reviewing court. It is a well-accepted principle of administrative law that discretionary decisions attract a high level of deference during judicial review.[40] Both the Commissioner's decision to issue a SIR and the reviewing Deputy Commissioner's decision on

appeal are discretionary and, thus, the reviewing court would likely be highly deferential.[41] As such, the prospect of successfully invoking judicial review to overcome an overly broad SIR seems remote.

Closing the Transaction in the Face of an Outstanding SIR is a Potential—Albeit Risky—Option

Without policy and legislative reform to address the shortcomings of the internal appeal process, merging parties might resort to challenging the scope of a SIR by proceeding to close the transaction, and in the event of a challenge brought by the Commissioner, responding by challenging the scope of the SIR before the Tribunal on the basis of either relevance or proportionality. We believe this option, though flawed and risky, would allow a SIR recipient to more effectively contest an overly broad SIR. It also demonstrates the need for policy and legislative reform.

If this option were to be pursued, one would expect the following steps to unfold. First, the SIR recipient would need to follow the internal appeal procedure outlined above. Second, assuming the appeal fails, the recipient would inform the Commissioner, under section 116, that certain information from the SIR will not be provided because it is irrelevant or not reasonably obtainable (in cases where proportionality is at issue). Third, the SIR recipient would certify under section 118 that the SIR is correct and complete in all material respects. Fourth, the parties would proceed with closing the transaction, likely over the Commissioner's objections. The Bureau has previously demonstrated a willingness to challenge consummated transactions in the CCS/Tervita case,[42] and one would expect a similar reaction in these circumstances—if not an application for an injunction to prevent closing. Accordingly, the Commissioner would likely bring an application to the Tribunal for either a determination on the question of compliance with the SIR or a sanction order under section 123.1 for non-compliance with the SIR. This hearing would provide the opportunity for the SIR recipient to contest the SIR on the grounds of proportionality, with the advantage of shifting the burden of proof to the Commissioner to establish non-compliance with the SIR.

As discussed above and in further detail below, the principle of proportionality, which is applied in the civil litigation context, has been recognized and applied by the Tribunal. The emergence and continued development of the principle by the Tribunal suggests that a SIR recipient could successfully challenge an overly broad SIR in a Tribunal hearing on the grounds of its proportionality in comparison to the transaction in issue.

PART II: THE PRINCIPLE OF PROPORTIONALITY

The Principle of Proportionality

Civil procedure in Canadian courts, including the discovery process, is informed by the principle of proportionality, which, broadly speaking, holds that a fair and just process must be proportionate to the nature of the dispute and the interests involved. In other words, the complexity and expense of processes in a civil proceeding should be proportionate to the complexity and value of the matter at issue. The principle has been codified in legislation across Canada, including, for example, in the *Ontario Rules of Civil Procedure*. Rules 1.04(1) and 1.04(1.1) provide:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> 1.04(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[43]

The principle is again codified in the *Ontario Rules of Civil Procedure* in Rule 29.2, which provides for proportionality in discovery. When determining whether a person must answer a question or produce a document, the court is required to consider whether,

> (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
>
> (b) the expense associated with answering the question or producing the document would be unjustified;
>
> (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
>
> (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
>
> (e) the information or the document is readily available to the party requesting it from another source.[44]

While the *Federal Courts Rules* do not contain an explicit proportionality principle, Rule 3 provides, in language similar to Rule 1.04(1) of the *Ontario Rules of Civil Procedure*, that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[45]

The importance of the principle of proportionality has been affirmed by the Supreme Court of Canada ("SCC"), most recently in the context of summary judgment. In *Hryniak v. Mauldin*, the SCC explained,

> ... A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible—proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> ... If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.[46]

After noting that the proportionality principle is reflected in many of the provinces' rules and "can act as a touchstone for access to civil justice,"[47] the SCC noted:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).[48]

The SCC called for a culture shift that "requires judges to actively manage the legal process in line with the principle of proportionality."[49]

The proportionality principle has also been specifically considered and applied in the context of electronic discovery ("e-discovery").[50] The Ontario Superior Court has adopted the eight-factor proportionality test for e-discovery set out by Master Short in *Warman v. National Post Co.*,[51] which takes into account the following factors:

(1) the specificity of the discovery requests;

(2) the likelihood of discovering critical information;

(3) the availability of such information from other sources;

(4) the purposes for which the responding party maintains the requested data;

(5) the relative benefit to the parties of obtaining the information;

(6) the total cost associated with production;

(7) the relative ability of each party to control costs and its incentive to do so; and

(8) the resources available to each party.[52]

The Sedona Canada Principles Addressing Electronic Discovery ("Sedona Principles")[53] also set out principles and commentary respecting proportionality in the e-discovery context. Principle 2 provides:

> In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.[54]

The commentary to Principle 2 explains that "[l]itigants should take a practical and efficient approach to electronic discovery, and should ensure that the burden of discovery remains proportionate to the issues, interests and money at stake."[55]

Principle 5 holds that "[t]he parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden."[56] The Sedona Principles set out the following test for the discovery of electronically stored information: "Will the quantity, uniqueness and/or quality of data from any particular type or source of electronically stored information justify the cost of the acquisition of that data?"[57]

Proportionality at the Competition Tribunal

The *Competition Tribunal Act* provides that all proceedings before the Tribunal shall be dealt with as informally as the circumstances and considerations of fairness permit.[58] That this provision incorporates the proportionality principle was made clear by the Chair of the Tribunal, Rennie, J., in his recent reasons on a motion for further and better affidavits of documents in *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership*.[59]

In an earlier scheduling order in *Reliance*, Rennie, J. reminded counsel that the principle of proportionality informs the relevancy inquiry.[60] In his more recent reasons, Rennie, J. noted that the parties had agreed that the principle of proportionality was applicable to the motion.[61]

Justice Rennie considered several sources for the application of the

principle of proportionality to production at the Tribunal. First, Rule 230 of the *Federal Courts Rules* provides that the Court may relieve a party from production for inspection of any document, having regard to "whether it would be unduly onerous to require the person to produce the document."[62] The Court's determination in this regard must weigh "the probability of its usefulness with the time, trouble, expense and difficulty involved in obtaining it."[63]

Justice Rennie then referred to the sources for the principle of proportionality cited earlier in this article: the SCC's decision in *Hryniak v. Mauldin*;[64] the eight-factor proportionality test for e-discovery adopted by the Ontario Superior Court of Justice;[65] and Principle 2 of the Sedona Principles.[66]

Finally, Rennie, J. cited section 9(2) of the *Competition Tribunal Act*, which, as noted above, provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.[67]

Drawing from these five sources to apply the principle of proportionality, Rennie, J. dismissed Reliance Comfort Limited Partnership's ("Reliance") motion, finding that the production of the relevant documents (sound recordings) by the Commissioner of Competition to Reliance "would involve great difficulty and a very significant expenditure of time and effort to the Commissioner of Competition."[68]

With this decision, it is clear that the principle of proportionality applies to the production of documents in proceedings before the Competition Tribunal in the same manner that it applies in the civil courts. While *Reliance* (2014) was perhaps the Tribunal's most explicit acknowledgment of the application of the principle of proportionality, previous decisions have also considered the principle.

In *Canada (Commissioner of Competition) v. Air Canada*,[69] the Commissioner sought an order compelling Air Canada to answer outstanding undertakings, refusals and questions taken under advisement during examinations for discovery. Air Canada refused to answer two categories of questions—the first, because it argued that answering the questions would impose a massive and disproportionate burden,[70] and the second on the grounds of relevance and proportionality.[71] Without specifically referencing the principle of "proportionality," Rennie, J. engaged in a proportionality analysis. He found that certain questions in the first category needed not be answered because they were overbroad in scope in that they required extensive information, over a 17-year period, for an indeterminate number of routes.[72] However, with regard to a question asking Air Canada to provide "all records

prepared during the Request Period for the purposes of evaluating, analyzing, forecasting or modeling demand for Canada-United States transborder air passenger services," the question did not pose a disproportionate burden given the relevance of the information to the matters at issue.[73] Justice Rennie found that the second category of questions was relevant and proper and would not place undue hardship on Air Canada.

In *Canada (Commissioner of Competition) v. Visa Canada Corp.*,[74] Simpson, J., in her reasons on the Commissioner's motion for the production of unredacted documents, stated that the general rule regarding redaction of productions is that, subject to special circumstances, if a portion of a document is relevant, the document must be disclosed and an unredacted version must be made available for inspection.[75] Justice Simpson noted that "special circumstances" include grounds of proportionality, onerousness, convenience and genuine issues of confidentiality, thus affirming, however summarily, the importance of proportionality in the production process.[76]

In *Canada (Director of Investigation & Research) v. Southam Inc.*,[77] the respondent, Southam Inc. ("Southam"), sought answers to questions the Director refused to answer at discovery. Some of the questions had not been answered because the Director's counsel considered the questions to be unreasonable. In dismissing Southam's motion, the Tribunal inherently relied on a proportionality principle, stating, "In general, individuals when being discovered need not answer questions seeking information which is in the questioner's knowledge or questions that would put a burden on the party being questioned which is out of all proportion to the benefit to be gained from the answer by the examining party."[78]

While only a small number of Tribunal decisions have considered and applied the principle of proportionality, the progression of Tribunal jurisprudence, culminating in *Reliance* (2014), indicates that the principle applies to discovery in proceedings before the Tribunal. In our view, the Tribunal should and likely would apply the principle of proportionality to other competition law procedures, including to the SIR process.

The discovery process in a contested case before the Tribunal and the Commissioner's merger review process both share a common goal: identifying evidence that will help the Commissioner or the Tribunal to determine whether a party's conduct or a proposed transaction is likely to result in a substantial lessening or prevention of competition. Similarly, the merger review process and the process for challenging

a merger before the Tribunal are both aimed at inquiring whether a transaction will result in a substantial lessening of competition. There is no principled basis for restricting the application of the principle of proportionality to the context of discovery of documents in a contested proceeding. This would achieve a strange result whereby the Commissioner would be afforded broader, more intrusive rights at the investigative stage than he or she is afforded when challenging a potentially anticompetitive merger before the Tribunal. The principle of proportionality therefore indicates that merging parties should have an opportunity to challenge the scope of a SIR before the Tribunal on the grounds of relevance and proportionality. It follows, then, that the principle of proportionality should also act as a guiding framework to the Bureau to inform its requests for information in the SIR process.

CONCLUSION: DEVELOPING A MORE PRINCIPLED, PROPORTIONAL, AND TIMELY CHALLENGE PROCESS

Each of the options available to a merging party to challenge the scope of a SIR has shortcomings. The Bureau's internal appeal process may suffer from an appearance of the potential for bias; the process of judicially reviewing the internal appeal decision would be too lengthy; and the "close-and-challenge" approach is highly risky, given the reputational risks to a party that takes an aggressive approach, the potential for administrative monetary penalties of up to $10,000 per day, legal costs of litigation if challenged, and the possibility of having to unwind a completed transaction if the party's SIR challenge is ultimately unsuccessful.

Given the weaknesses of the processes available to parties to a proposed merger, policy and legislative changes are called for to develop a SIR challenge process that is more principled, proportional, and timely. On the Bureau's part, this would require policy action to recognize the principle of proportionality in the SIR process. Legislatively, a more objective process for a party to challenge the scope of a SIR should be developed. One option for legislative change is to consider creating a role for an independent arbiter to oversee the SIR process and determine the propriety of any SIR questions that are challenged by the subject of the SIR. That and other options are worth exploring further.

The Bureau Should Acknowledge the Principle of Proportionality

The Bureau should publicly acknowledge and implement the principle of proportionality in the SIR process. Acknowledging that SIRs must be proportionate will provide helpful guidance to both the Bureau when issuing the SIR and merging parties anticipating a SIR.

Ensuring compliance with the principle of proportionality would also reduce costs and increase efficiency in both the information gathering and information review phases of the merger review process. Lastly, publicly acknowledging that SIRs must be proportional is likely to improve the public's understanding of, and confidence in, the Bureau's process. Formal policy from the Bureau regarding the proportionality of SIR requests could make merging parties more likely to trust that the requested information is necessary for the review, and more open to pursuing dialogue with the Bureau regarding SIR requests that a party considers overly broad in scope.

The Appeal Process Should Be Overhauled

In conjunction with acknowledging the principle of proportionality in the SIR process, a more robust appeal process should be developed, perhaps through amendment to the Act. In the authors' view, an adequate and effective appeal process should provide a forum for contesting SIRs on the grounds of relevance and proportionality, and should be presided over by an independent, third-party adjudicator. The "presiding officer" that may be appointed to oversee oral examinations under s. 11(*a*) of the Act[79] might serve as inspiration: presiding officers under s. 11 are empowered to make orders for the conduct of examinations and to rule on objections to questions.[80] Improving the appeal process would provide a more efficient option for contesting the scope of a SIR than the existing internal appeal process, judicial review, or close-and-challenge approach, and would increase public confidence in the SIR process.

In the authors' view, these changes would eliminate doubt regarding the role of proportionality in the SIR process, providing parties with the assurance that the Bureau is alive to concerns of proportionality, as well as with meaningful opportunity to appeal a SIR that is disproportionate in scope within the context of time-sensitive transactions.

Endnotes

* The authors wish to thank Nikiforos Iatrou and the Canadian Competition Law Review editorial board for their helpful feedback and comments.

[1] *Competition Act*, RSC, 1985 c C-34, s 114(2).

[2] *Ibid*, s 114(1).

[3] Indeed, Paul Collins and Michael Laskey observed in 2012 that, in comparison with the American counterpart to the SIR—the "second request"—the Bureau's SIRs were often more carefully tailored than second requests, and could be answered more quickly: Paul Collins & Michael Laskey, "Striking the Right Balance: 25 Years of Merger Review in Canada" (2012) 25:2 Can Comp L Rev 422-23.

[4] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 31 [*Hryniak*].

[5] *Ibid* at para 28.
[6] *Competition Act, supra* note 1, s 11. The function and powers of a presiding officer are set out in ss 13 and 14 of the Act.
[7] *Ibid*, ss 114(1), 123(1)(*a*).
[8] *Ibid*, ss 114(2), 123(1)(*b*).
[9] Canada, Competition Bureau, "Merger Review Process Guidelines" (Gatineau: Competition Bureau, 2009) at 4, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/merger-review-process-2012-e.pdf/$FILE/merger-review-process-2012-e.pdf> [Merger Review Process Guidelines].
[10] *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 USC § 18a.
[11] Melanie Aitken, (Speaking Notes for speech delivered at the Senate Banking, Trade and Commerce Committee Hearings Regarding *Competition Act* Amendments, 13 May 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03065.html>.
[12] *Ibid*.
[13] *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FC 59, [2008] FCJ No 127 [*Labatt*].
[14] *Ibid* at para 100.
[15] As of June 22, 2014.
[16] Suncor Energy Inc. and Petro-Canada, Joint Information Circular and Proxy Statement at 71 (1 May 2009), online: <http://www.sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001048>.
[17] Canada, Competition Bureau, "SIR Report: Update on Key Statistics & Trends," delivered at the Annual Roundtable Meeting (Toronto: Mergers Branch 10 May 2013) at 2.
[18] *Ibid* at 2.
[19] *Ibid* at 2, 4; *Competition Act, supra* note 1, s 123(1)(*b*). In practice, the Bureau often requests additional time beyond 30 days following compliance with a SIR.
[20] *Ibid*, s 114(2).
[21] *Ibid*, s 116(1), (2), (2.1).
[22] *Ibid*, s 116(3).
[23] *Ibid*, s 118.
[24] *Ibid*, s 123(1)(*b*).
[25] *Ibid*, s 123.1.
[26] Merger Review Process Guidelines, *supra* note 9 at 5-6.
[27] *Ibid* at 5.
[28] *Ibid* at 6.
[29] *Ibid* at 7-8.
[30] *Ibid*.
[31] *Ibid* at 5.
[32] *Ibid* at 5.
[33] *Ibid* at 11-12.
[34] *Ibid* at 11.
[35] *Ibid*.
[36] *Hryniak, supra* note 4.
[37] *Labatt, supra* note 13.
[38] The test for institutional bias was outlined by the Supreme Court of Canada

in *2747-3174 Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 44: "The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically—and having thought the matter through—would have a reasonable apprehension of bias *in a substantial number of cases*."

[39] The selection by the Senior Deputy Commissioner of the Mergers Branch of the reviewer may give rise to a reasonable apprehension of bias for violating the fundamental principle that no one shall be the judge in their own cause (*nemo judex in sua causa debet esse*), since, as noted by the Federal Court of Appeal in *MacBain v Canada (Human Rights Commission)*, [1985] 1 FC 856 at para 125 (FCA), "it cannot be said that there is any meaningful distinction between being your own judge and selecting the judges in your own cause."

[40] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 51-56 [*Baker*]; *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at 165; For the application of the principle to an investigative decision of the Commissioner see: *Cinémas Guzzo Inc c Canada (Procureur général)*, 2005 FC 691.

[41] The SCC in *Baker, supra* note 40, at para 52 defined discretionary decisions as: "decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."

[42] *Commissioner of Competition v CCS Corp*, 2012 Comp Trib 14, aff'd *sub nom Tervita Corp v Canada (Commissioner of Competition)*, 2013 FCA 28, rev'd 2015 SCC 3.

[43] RRO 1990, Reg 194, rr 1.04(1), 1.04(1.1).

[44] *Ibid*, r 29.2.03(1).

[45] *Federal Courts Rules*, SOR/98-106, r 3.

[46] *Hryniak*, *supra* note 4 at paras 28-29.

[47] *Ibid* at para 30.

[48] *Ibid* at para 31.

[49] *Ibid* at para 32.

[50] For an in-depth discussion of e-discovery principles, see Bryan Finlay, Marie-Andrée Vermette & Michael Statham, *Electronic Documents: Records Management, e-Discovery and Trial* (Aurora, ON: Canada Law Book, 2010) (loose-leaf).

[51] 2010 ONSC 3670, 103 OR (3d) 174.

[52] *Ibid* at para 82.

[53] The Sedona Conference Working Group 7, "The Sedona Canada Principles Addressing Electronic Discovery" (January 2008), online: <https://thesedonaconference.org/download-pub/71> [Sedona Principles].

[54] *Ibid*, Principle 2 at 11.

[55] *Ibid*, Principle 2 at 11.

[56] *Ibid*, Principle 5 at 23.

[57] *Ibid*, Principle 5, Comment 5.a at 23.

[58] RSC 1985, c 19 (2nd Supp), s 9(2).

[59] 2014 Comp Trib 9 [*Reliance* (2014)].

[60] 2013 Comp Trib 18, [2013] CCTD No 18 at para 8 [*Reliance* (2013)].

[61] *Reliance* (2014) *supra* note 59 at para 26.

[62] *Federal Courts Rules*, SOR/2008-141, r 60; *Reliance* (2014), *supra* note 59.

[63] *Ibid.*
[64] *Ibid* at para 25; *Hryniak v Mauldin, supra* note 4.
[65] *Reliance* (2014), *supra* note 59 at para 27. See also *Warman v National Post Co, supra* note 51 at para 82.
[66] *Reliance* (2014), *supra* note 59 at para 28; Sedona Principles, *supra* note 53 Principle 2 at 11.
[67] *Reliance* (2014), *supra* note 59 at para 30; *Competition Tribunal Act, supra* note 58, s 9(2).
[68] *Reliance* (2014), *supra* note 59 at para 32.
[69] 2012 Comp Trib 20, [2012] CCTD No 20.
[70] *Ibid* at para 24.
[71] *Ibid* at para 27.
[72] *Ibid* at para 25.
[73] *Ibid* at para 26.
[74] 2011 Comp Trib 19, [2011] CCTD No 19.
[75] *Ibid* at para 11.
[76] *Ibid* at para 22.
[77] (1991) 38 CPR (3d) 68, [1991] CCTD No 16 (Comp Trib).
[78] *Ibid* at para 16.
[79] *Competition Act, supra* note 1, s 11(*a*). Section 13(1) of the Act provides for the appointment of a presiding officer: "Any person may be designated as a presiding officer who is a barrister or advocate of at least ten years standing at the bar of a province or who has been a barrister or advocate at the bar of a province for at least ten years."
[80] *Ibid*, s 14(2).