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COMPETITION LAW

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PRACTICE AREA DEFINITION

The practice of competition law in Canada falls into two broad but distinct categories: solicitor (advisory) work (which includes merger analysis); and litigation.

Solicitor (Advisory) Work: Providing advice on competition law issues is an increasingly important part of advising business clients. Competition lawyers are called upon to advise clients on the competition law implications of a variety of business activities. By identifying and helping clients to address these issues, competition lawyers assist clients in managing and minimizing competition law risk. Competition lawyers provide advice with respect to corporate and commercial matters and day-to-day business practices. They are also advocates for clients in discussions with Competition Bureau officials. Principal areas of advice and representation include: mergers and acquisitions; strategic alliances and joint ventures; marketing and distribution activities; relations with customers, competitors and suppliers; and, increasingly, the interface between competition law and intellectual property law.

Competition Litigation: Competition litigation in Canada has traditionally involved representing clients before the courts on criminal matters and before the Competition Tribunal on civil proceedings initiated by the Commissioner of Competition. While there was limited private competition litigation in Canada in the years immediately following the enactment of the *Competition Act* in 1986, this type of proceeding has become more common with the advent of competition law class actions. Recent amendments permitting limited private access to the Competition Tribunal, and proposals to expand private access, are likely to lead to further private competition litigation in Canada.

RECENT DEVELOPMENTS OF IMPORTANCE

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Merger activity in Canada hit a record high in the second quarter of 2007, with announced transactions valued at over \$200 billion.¹ While many mergers are not reportable to the Canadian Competition Bureau, transactions that exceed the *Competition Act*'s pre-merger notification thresholds are reportable and are reviewed by the Commissioner of Competition to determine whether they are likely to substantially prevent or lessen competition.²

According to published statistics, over 90 per cent of reportable mergers do not give rise to significant substantive issues and are classified by the Competition Bureau as *non-complex*.³ In most cases, the Bureau's review of these transactions is completed within two weeks.

In 2006, the Bureau classified 22 mergers as *complex*. These are transactions between direct or *potential* competitors or between customers and suppliers in which there are indications of the potential to create or enhance market power, as described in the enforcement policies set out in the Bureau's *Merger Enforcement Guidelines* (MEGs).⁴ Complex mergers typically involve a review period of between two and three months.

Only three transactions were classified by the Competition Bureau as *very complex* in 2006. This describes a category of merger transaction typically characterized early in the Bureau's review as *likely* to create or enhance market power. Generally, the mergers that fall within this category are those between the leading participants in concentrated industries, where it is reasonable to conclude that the market share and concentration thresholds set out in the MEGs will be exceeded, and where high barriers to entry are evident.⁵ These transactions often also give rise to well-substantiated complaints from market participants. The Bureau's service standard for the review of very complex mergers is five months, although the actual review of some very complex transactions has taken considerably longer.

While it is certainly the case that not all transactions that give rise to significant merger issues can be described as "mega-mergers," it is also the case that not all mega-mergers give rise to significant merger issues. For example, many private equity transactions, such as the proposed acquisition of BCE by a group led by Ontario Teachers' Pension Plan, do not raise significant – if any – *Competition Act* issues since they typically do not involve competitive overlaps between the acquirer and target.

Where significant antitrust issues do arise, it has become increasingly important to approach and to manage these issues strategically. In this article, we discuss some of the considerations that have come into play in a number of recent Canadian mega-mergers and the manner in which the parties attempted to manage these issues to their strategic advantage.

BUYER BEWARE

Merger transactions give rise to strategic considerations for both buyers and sellers. When a company puts itself (or is put) into play, it will often level the playing field for all potential purchasers by transferring the risk of merger completion to the successful purchaser.⁶ "Hell or high water" clauses in purchase agreements effectively transfer this risk, often limiting the time for the regulatory review to the statutorily mandated waiting period and requiring the purchaser thereafter to agree to any remedial action that the competition authorities may require.

For private equity purchasers, these clauses are typically of little concern. For strategic buyers – that is, companies that operate in the same markets as the target – however, they can be more problematic. To make an informed decision regarding the

magnitude of the risk being assumed, a strategic buyer will need well-considered advice from its competition law counsel. This will also be the case for the target, which will look to its competition counsel for an accurate assessment of the merger issues that a transaction with a particular purchaser will give rise to, including their impact on deal timing and risks to ultimate completion.

Where assessments by counsel differ – for example, where the purchaser’s counsel is more “optimistic” than the seller’s counsel regarding likely antitrust outcomes – further ways are available for a seller to transfer the merger-completion risk to the purchaser. Recently, so-called reverse break fees have been required by sellers in a number of transactions involving strategic purchasers.⁷ Reverse break fees are designed, among other things, to compensate the seller/target for the merger-completion risk it may agree to assume in a transaction with an uncertain merger review outcome.

THEY'RE GIVING ME A COMPLEX

Although there are relatively few complex, and even fewer very complex, mergers in Canada in any given year, they are significant transactions when they do arise and they bring the strategic management of competition law risk clearly into focus. Saskatchewan Wheat Pool’s 2007 acquisition of Agricore United provides a useful illustration.⁸

On November 7, 2006, SWP announced an unsolicited offer for Agricore. Valued at \$1.2 billion, this Canadian mega-merger involved the number 1 and number 2 grain handling companies in western Canada. In light of the size and market positions of the parties and the number of markets that would be affected by the merger, it was likely that the transaction would be classified by the Competition Bureau as very complex, with a review period of five months. However, given that the transaction began as a public take-over bid, and that under applicable securities law, SWP’s bid would only need to be outstanding for 35 days, two issues presented themselves, both related to the timing of the transaction.

The first issue was how to deal with the reaction in the capital markets to a merger review period of 150 days (or more) and the associated delay in completing the transaction, which, in turn, gave rise to capital market risk. The second issue was that the prospect of a lengthy regulatory review increased the risk to SWP that a competing purchaser (whose transaction might give rise to fewer competition law issues) would come along. In these circumstances, addressing the competition law aspects of the transaction in a manner that would expedite the regulatory review timeline became critical.⁹

A complicating factor was the Competition Bureau’s previous experience with the grain handling industry. In 2001, the Bureau reviewed the merger that resulted in the formation of Agricore, and the Bureau’s conclusions regarding issues relevant to an assessment of a merger involving competing grain handling companies – such as the relevant product and geographic markets – were a matter of public record.¹⁰ The Bureau had also required the merger parties in that case to divest certain assets, which strongly suggested that divestitures would be required in any further merger involving Agricore and one of its competitors.¹¹ The only real question was the likely magnitude of the required sales.

SWP’s strategy in these circumstances was, first, to treat the Competition Bureau’s experience (and prior conclusions regarding a merger) in the grain handling industry as an opportunity to expedite the review process. With this aim, SWP carried out a

detailed front-end competition analysis of its proposed merger on a basis that was consistent with and reflected the Bureau’s conclusions in 2001. This allowed SWP to “handicap” the likely outcome of the Bureau’s review and the Bureau’s likely remedial requirements, in each case before announcing the transaction.

Second, and most important from a timing perspective, was for SWP to initiate an early approach to the Competition Bureau and to pursue its initial discussions with the Bureau on a basis that acknowledged the Bureau’s experience in the industry, the factual conclusions the Bureau had reached and the remedies it had required in 2001, and the fact that some divestitures clearly would be required by the Bureau in this case. This, in turn, enabled SWP to engage the Bureau in the remedies portion of its analysis at a much earlier date than might otherwise have been the case.

Expediting the merger review process in the case of a hostile take-over bid is particularly important because the target invariably will use competition law issues in strategic, defensive terms. Indeed, an important theme in Agricore’s public rejection of SWP’s initial offer was that, in the normal course, the Competition Bureau’s review of an SWP-Agricore merger would be expected to take several months, and that the outcome of the Bureau’s review (and likelihood of a positive outcome) was extremely uncertain. SWP’s ability to expedite the review process, and to negotiate, settle and announce a consent agreement with the Bureau in late March 2007 – almost two months earlier than expected – represented a clear shift of deal momentum in SWP’s favour.

WHY CAN'T WE BE FRIENDS?

Although raising competition issues can be an effective defence strategy for a target in a hostile bid situation, it is a double-edged sword.

For many years, hostile take-over bids in Canada were few and far between. Although they have become more common recently, it is also true that rarely do they remain hostile throughout the piece. Where there is a limited choice of strategic alternatives available to the board of directors of a public company target, and the principal purpose of defending a hostile bid is really to maximize shareholder value, the difference between a hostile bid and a friendly merger is often less than a dollar per share.

Given this reality, a target that adopts a “scorched earth policy” – which essentially involves providing competition authorities with information and making regulatory submissions that will support a negative review outcome, including the possibility of challenging the merger in its entirety – may find that it has created an insurmountable barrier to merger completion, on friendly terms or otherwise.

BE CAREFUL WHAT YOU WISH FOR

For many years in the United States, and more recently in Canada, third parties such as competitors, suppliers and customers of merging parties have taken an active role in attempting to influence the outcome of merger reviews. The involvement of these parties in the merger review process also raises strategic issues.

It is sometimes said that complaints by competitors of the parties to a merger is a sure sign that the transaction is pro-competitive. Whether or not this view affects the weight that competition authorities attach to competitor complaints in merger reviews, there is no doubt that in Canada, competition authorities take customer complaints very seriously. For example, during its review of the 2006 acquisition of CHUM by CTVglobemedia,¹² the Competition Bureau was faced with numerous complaints from the parties’ advertising customers, some of which reflected a

view of the market that was quite different from the view advanced by the parties in their regulatory submissions. The Bureau was required to expend significant time and effort in running the underlying facts to ground and resolving the differences between what it was hearing from the parties, on the one hand, and from customers, on the other hand.

What the third-party complainants may not have recognized at the time they made their views known to the Competition Bureau was that, to get to the bottom of the facts, the Bureau would need to rely on its powers under Section 11 of the *Competition Act* and apply for court orders requiring the parties to the transaction and the third-party complainants to provide factual and documentary information to back up their respective claims.¹³

In this case, the Competition Bureau applied for and obtained more than 30 Section 11 orders, which required the respondents to provide within a relatively short time a significant volume of documents and other information. Although the Section 11 process in this case added to the complexity and length of the Bureau's review, and placed the Bureau under significant time pressure to meet its service standard for the transaction, it also imposed a significant burden on the section 11 recipients, most of whom were not parties to the transaction.

Where a merger is likely to raise significant competition law issues and the transaction is time-sensitive, it is crucial for the merging parties to attempt to manage the likely customer (and other third-party) reaction to the transaction in a manner that will limit opposition; if, in addition, there is a strong likelihood that competition authorities will resort to their formal powers, the merging parties should encourage the authorities to make an early approach to the market. Third parties, on the other hand, need to consider whether the magnitude of their concerns regarding the likely impact of a proposed merger justifies the time and expense they may need to devote to attempting to provide factual support for these concerns.

FINAL THOUGHTS

Merger activity in Canada and elsewhere over the past 20 years has resulted in significant consolidation in many industries. This, in turn, has heightened the regulatory issues that merging parties face when their transactions are reviewed by competition law authorities.

Parties to complex and very complex mergers need to adopt a strategic approach to these issues, which can affect not only risk allocation but also deal timing and, in some cases, ultimate transaction success. ■

1. The most recent period for which statistics were available as of the date of writing. Laura Bobak, "Canadian M&A activity hits record high," *Toronto Star*, August 29, 2007.
2. The Competition Bureau has the power under the *Competition Act* (R.S.C. 1985, c. C-34, as amended) to review all mergers, whether or not they are notifiable.
3. Competition Bureau, *Merger Review Performance Report*, 2007.
4. Competition Bureau, *Fee and Service Standards Handbook*, December 2003.
5. *Ibid.*
6. Namely, the risk that the regulator will challenge (i.e., attempt to block) the transaction, either with or without remedies.
7. An example was the acquisition of Maytag by Whirlpool, which involved a \$120 million reverse break fee.
8. Torys LLP was counsel to Saskatchewan Wheat Pool (SWP) on this transaction. SWP has since been renamed Viterra Inc.
9. An alternative approach, which was taken by Labatt in respect of its 2007 acquisition of Lakeport, was to require the Competition Bureau to complete its review within the 42-day statutory waiting period mandated by Part IX of the *Competition Act* and, in effect, to require the Bureau to seek injunctive relief should it determine at that time that, absent remedial action, the merger should not be allowed to proceed. While this approach may be possible in the context of a friendly merger, it is not a practical alternative for a hostile transaction.

10. These conclusions were set out in a consent agreement entered into between the Commissioner of Competition and Agricore.
11. The Bureau's conclusions in that earlier review decreased the likelihood that SWP could be successful in convincing the Bureau that a merger with Agricore should not give rise to any remedial requirements.
12. Torys LLP was lead counsel to CTVglobemedia on the CHUM acquisition.
13. The Competition Bureau is increasingly relying on its so-called formal powers (which can be distinguished from reliance on voluntary information produced by the merging parties and other third parties) to compel the production of information in complex and very complex merger review. by the merging parties and other third parties) to compel the production of information in complex and very complex merger review.