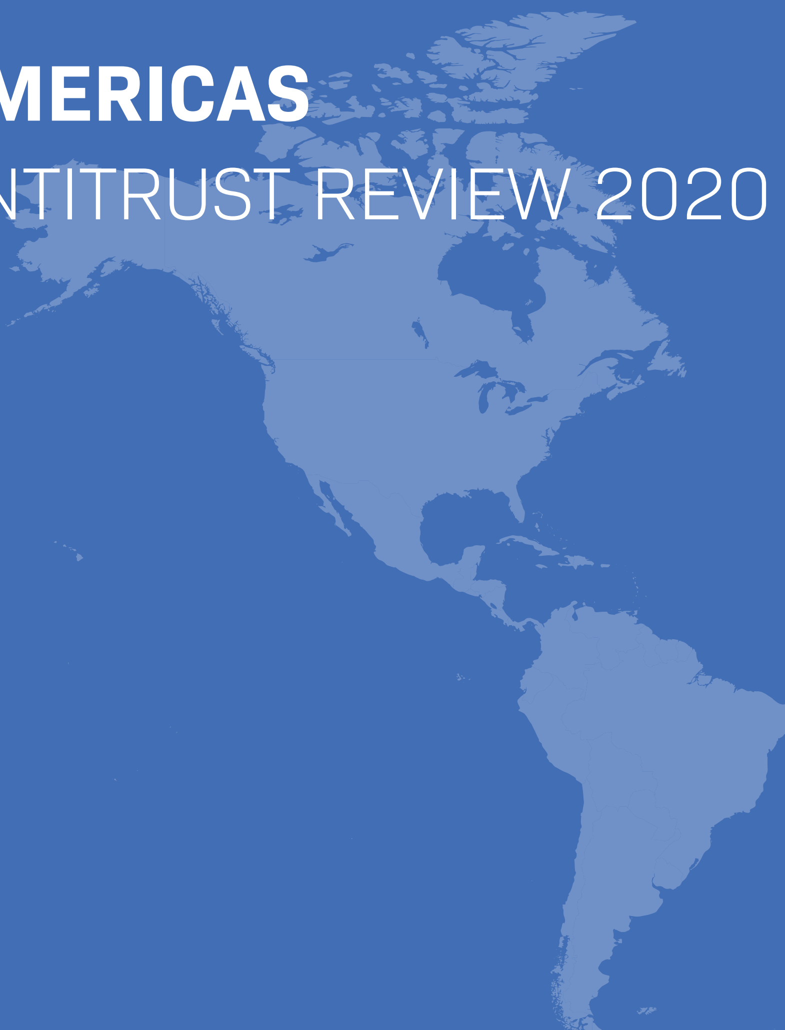
GCR INSIGHT

AMERICAS
ANTITRUST REVIEW 2020



AMERICAS
ANTITRUST REVIEW 2020

Reproduced with permission from Law Business Research Ltd

This article was first published in September 2019

For further information please contact Natalie.Clarke@lbresearch.com

LAW BUSINESS RESEARCH

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-217-6

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Contents

United States

Panama

Peru

Preface

Global Competition Review's *Americas Antitrust Review 2020* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – in-house counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Changes from the previous edition include adding a chapter on US class action defence, focusing on the perspective of plaintiffs. Along with the new topics, contributors' roles highlight trends in competition law. For example, the Federal Trade Commission chapter was penned by Daniel Francis, associate director for digital markets – an area of particular interest globally.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

Global Competition Review
London
August 2019

Canada: Merger Review

Adam Kalbfleisch and Kyle Donnelly
Bennett Jones LLP

This chapter sets out the structure and practice for assessing merger review under the Canadian Competition Act. As with other competition regimes, the fundamental framework of analysis centres on whether a merger will, or is likely to, result in a substantial prevention or lessening of competition (SPLC). We also discuss the enforcement approach taken to merger review by the Competition Bureau (the Bureau). Finally, we examine issues related to challenges by the commissioner of competition (the commissioner) and potential remedies when issues arise.

Under the Competition Act,[1] the Bureau has jurisdiction to review a broad variety of transactions and commercial arrangements as 'mergers'. Specifically, section 91 of the Competition Act defines a merger as:

> *the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or part of a business of a competitor, supplier, customer or other person.*

If it is found that a merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Competition Tribunal (the Tribunal) may, on application by the commissioner, issue an order dissolving or blocking the merger, or ordering the divestiture or rescission of all or part of the acquired business.

In the course of its review to determine whether a transaction is likely to result in an SPLC, the Bureau obtains its analytical information from several sources. It will receive information when the merging parties file notification forms[2] and advance ruling certificate (ARC) requests.

1 Competition Act, RSC, c C-34, as amended (the Competition Act).

2 The Notifiable Transactions Regulations were amended in February 2010 to reflect the recent amendments to the Competition Act. Significant changes include the introduction of a single notification form and the closer alignment of the form's wording with item 4(c) of the United States Notification and Report Form.

In a small number of cases, the Bureau also seeks further information through a 'supplementary information request' (SIR), which is a US-style second request process.[3] The Bureau may also seek a court order pursuant to section 11 of the Competition Act to compel a party to provide documents and information.[4]

In reviewing all the information that it has collected from the parties, its own records, competitors, market sources, experts and other third parties, the Bureau must determine whether a proposed merger will result in an SPLC. As noted in the Bureau's Merger Enforcement Guidelines (MEGs),[5] which provide merging parties with general guidance on the Bureau's analytical approach to merger review, 'an SPLC results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.' In the *Superior Propane* case, the Tribunal noted that 'what is necessary is evidence that a merger will create or enhance market power which . . . is the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition'.[6] The factors considered by the Bureau in determining the existence of an SPLC are discussed below.

The anticompetitive threshold

While market power can generally be assessed from the perspective of either the seller or buyer, the Bureau's MEGs focus on the seller's market power, defined as the ability of a single firm or group of firms to profitably maintain prices above the competitive level for a significant period; however, its analytical framework applies equally to purchasers.[7]

In considering whether the merged entity will have an ability to influence price materially, the Bureau will look at the likely magnitude, scope and duration of any anticipated price increase that may result from the merger. The SPLC will occur when the merged entity, unilaterally or in coordination with other firms, is able to sustain higher prices than would exist in the absence of the merger by diminishing existing competition or by hindering the development of future competition.

3 SIRs are issued quite infrequently; however, the number of SIRs issued by the Bureau on a yearly basis has increased in recent years. This may be attributable to the case mix (ie, there may have been a greater proportion of very complex reviews in recent years), rather than evidence of a pattern. The Bureau may also rely on voluntary information requests and enter into timing agreements with parties in some instances, rather than employing the more formal SIR process.

4 The Bureau has indicated that it may rely on section 11 in certain circumstances; for example, where a transaction is not notifiable or in the case of hostile transactions. See Merger Review Process Guidelines, Competition Bureau, January 2012, footnote 14.

5 Merger Enforcement Guidelines, Competition Bureau, October 2011.

6 *Canada (Commissioner of Competition) v Superior Propane Inc* [2000] CCTD No. 15 at 258.

7 MEGs, above note 5 at 2.3.

In the latter scenario, the Bureau will typically examine the type, scope and timing of the potential entry or expansion by either one of the merging parties. To this end, when reviewing a merger, the Bureau may treat the transaction as a 'prevent' case when the acquirer, the target or a potential competitor has entry or expansion plans that are shelved due to the merger.[8] Examples of mergers that may result in the prevention of competition include the following:

- an acquisition that otherwise prevents planned unilateral expansion by a merging party into new geographic markets;
- the introduction of new products; or
- the acquisition of an increasingly vigorous competitor or potential entrant.

Market definition

Typically, the first step in the Bureau's review of a merger is to define the relevant product and geographic markets in which the merging parties operate.[9] The underlying rationale is to identify a group of buyers that may face increased market power as a result of the proposed merger. In doing so, the Bureau is essentially trying to define the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a hypothetical monopolist[10] can impose and maintain a 5 per cent price increase for a period generally longer than one year.

The definition of the product market revolves around the characteristics of the products and buyers' ability or willingness to switch from one product to another in significant quantities in response to relative price changes.[11] In determining which products, if any, are close substitutes, the Bureau may rely on statistical measures where detailed price and quantity data are available. The Bureau may also look at indirect evidence of substitutability, including evidence from market participants and functional indicators such as end use, physical and technical characteristics, price relationships and relative price levels, as well as potential switching costs incurred by buyers.[12] It is possible that products that are functional substitutes entail high switching costs and in practical terms are not substitutes for buyers. For example, if the cost of switching to a close functional substitute is higher than the hypothetical monopolist's 5 per cent price increase, the switching cost alone may be the determining factor in discouraging a buyer from substituting that new product.

Geographic market definition focuses on the buyers' ability or willingness to switch their purchases from one geographic location to another, in response to changes in relative prices. As with the product market definition, the Bureau will rely on functional indicators in determining

8 ibid at 2.11. See also *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras. 85–104, and *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 67–77.

9 ibid at 4.4 and 4.5.

10 The hypothetical monopolist approach seeks to identify relevant markets by asking, with regard to each product of the merging firms, whether a profit-maximising hypothetical monopolist of that product would be able to profitably impose a small but significant non-transitory price increase.

11 *Canada (Commissioner of Competition) v Superior Propane Inc* [2000] CCTD No. 15 at 49.

12 MEGs, above note 5 at 4.14.

whether geographic areas are considered to be close substitutes. The MEGs provide examples of such indicators, including specific characteristics of the product, transportation costs, price relationships and relative price levels, shipment patterns and conditions regarding foreign competition. Several price and non-price factors can affect a buyer's ability or willingness to consider distant options.[13] For example, non-price factors may include fragility or perishability of the relevant product, convenience, frequency of delivery, and the reliability of service or delivery. Again, as in the case of product market definition, high switching costs incurred by buyers may also discourage substitution between geographic areas.

Market definition is not necessarily a required step in the Bureau's assessment of a merger, and this has been emphasised in recent revisions to the MEGs as well as in a 2012 decision of the Tribunal.[14]

Market shares and concentration

The next step of the analysis involves the identification of participants in the relevant markets to determine whether significant vigorous competitors will remain in the market post-merger. The first step in the SPLC analysis involves determining the participants' and remaining competitors' market shares and concentration levels to initially establish the potential significance of the impact of the merger on the market. Generally, participants include competitors that are current sellers of the relevant products, but can also include potential competitors that could readily and profitably sell into the relevant markets without significant sunk cost investments and could effectively enter within one year. This response is often referred to as a 'supply response'. Typically, the Bureau will examine factors such as switching costs, a seller's ability to reposition its products or extend its product line, its excess capacity and applicable intellectual property rights. In the case of foreign sellers, the Bureau will also look at such matters as the existence of tariffs, fluctuation rates, import quotas or export constraints, domestic ownership restrictions and whether the industry is susceptible to supply interruptions from abroad.

Having identified participants in the relevant market, the Bureau will then calculate their respective market shares, relying on metrics that can consist of dollar sales, unit sales, capacity or, in certain natural resource industries, reserves. In selecting the appropriate market share metric, the Bureau will attempt to identify the sellers' future competitive significance.

Determining market share or concentration only provides part of the larger picture. Indeed, section 92 of the Competition Act stipulates that a merger cannot be found to substantially prevent or lessen competition solely on the basis of market shares. Nevertheless, high market shares may serve as a warning sign and lead to a more in-depth analysis of the merger by Bureau officials.

To avoid needlessly delaying mergers by conducting an in-depth investigation of every single transaction, the Bureau has outlined certain thresholds to identify mergers that are unlikely to have anticompetitive consequences. Typically, the commissioner will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger

13 ibid at 4.21.

14 See MEGs, above note 5 at 3.1 and *The Commissioner of Competition v CCS Corporation et al* (29 May 2012), CT-201-002 (Competition Tribunal) at paras. 360–364.

share of the merged entity is less than 35 per cent. Similarly, in the case of a concern related to a coordinated exercise of market power by the remaining competitors, if the post-merger share accounted for by the four largest firms in the market would be less than 65 per cent, or if the post-merger market share of the merged entity itself would be less than 10 per cent, the commissioner will typically not challenge the proposed merger.

These thresholds are not absolute benchmarks and should be considered with some caution. Conversely, mergers that exceed these thresholds are not automatically viewed as anticompetitive. In these cases, the Bureau will simply expand its analysis and examine other factors to determine whether the merger in question will result in an SPLC. In practice, many mergers with a post-merger share exceeding 35 per cent are not ultimately challenged by the commissioner.

In addition to determining market share and concentration, the Bureau will examine their distribution across competitors and the extent to which market shares have varied over a significant period. Finally, the Bureau will also take into consideration the nature of the market and the impact of forthcoming change and innovation on the stability of existing market shares.

Anticompetitive effects

If the market share and concentration thresholds are exceeded or if the Bureau has information suggesting that there may be an SPLC as a result of the merger, it will conduct a competitive effects analysis, based on factors listed in section 93 of the Competition Act. This analysis typically focuses on unilateral and coordinated effects.

In a market with many sellers offering comparable products, a firm may be limited in its ability to profitably raise prices as buyers may be tempted to switch to substitute products. However, there may be situations where a firm will be able to exercise unilateral market power irrespective of how its competitors respond. In markets with differentiated products, a post-merger price increase may be profitable because a price increase by one of the merging parties will divert demand toward the other merging party. In markets where firms are distinguished based on capacity, a price increase is likely to be profitable if the seller offering close substitutes has insufficient capacity to absorb the demand that would normally be diverted from the merged entity.

A merger may result in coordinated effects when a group of firms can profitably coordinate their behaviour. This usually occurs when individual firms can adjust their conduct in response to one another. Such behaviour can involve tacit or express understandings on price, service levels, allocation of customers or territories, or any other aspect of competition.[15] Typically, the Bureau will examine whether market conditions will more effectively facilitate coordinated behaviour post-merger by assessing, for example, whether firms will be better able to detect and monitor deviations from coordinated efforts and how the merger changes the competitive dynamic in the market.

15 MEGs, above note 5 at 6.25.

SPLC factors

The specific factors that the Bureau looks at pursuant to section 93 are briefly summarised below.

Foreign competition

The Bureau will examine the presence and viability of foreign competition to determine whether they are likely to counter increased market power of the merged entity.

Failing firm

The Bureau will consider whether one of the merging entities would fail if the merger were not to occur. A firm is considered to be failing if it is or is likely to become insolvent, to initiate voluntary bankruptcy proceedings or to be petitioned into bankruptcy or receivership.[16] Before concluding that a merger involving a failing firm is not likely to result in an SPLC, the Bureau will look at other alternatives, including acquisition by a competitively preferable purchaser, retrenchment or restructuring, and liquidation.[17]

Substitutes

Consideration will be given to the availability of acceptable substitutes for the merging parties' products that are in the same geographic market as the merging parties and whether consumers have other means of supply.

Barriers to entry

In assessing whether entry by a potential competitor is effective, the Bureau will take a closer look at whether entry is likely, timely and sufficient in scale and scope. Its analysis will also take into consideration existing entry barriers that may affect the likelihood, timeliness and sufficiency of entry.[18] These barriers may include regulatory impediments, significant sunk costs and other entry-deterring factors.

Remaining competitors

The Bureau will attempt to determine whether the collective influence of all sources of competition in the market will be able to constrain the exercise of market power by the merged entity acting unilaterally or in coordination with other market participants.

16 Similar to other agencies around the world, the Bureau did not make any substantive change to its interpretation of this factor during the most recent economic crisis.

17 *Canada (Director of Investigation and Research) v Air Canada* [1989], 27 CPR (3d) 476 (Competition Tribunal); *Canada (Director of Investigation and Research) v Air Canada* [1993), 49 CPR (3d) 7 (Competition Tribunal).

18 *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* [1992], 40 CPR (3d) 289 (Competition Tribunal) at 331.

Elimination of a vigorous competitor

A firm that is a vigorous and effective competitor often plays an important role in pressuring other firms to compete harder. The competitive attributes and history of the target firm are assessed to determine whether the merger is likely to result in the removal of a vigorous and effective competitor.

Innovation

The Bureau examines change and innovation in relation to:
- distribution;
- service;
- sales;
- marketing;
- packaging;
- buyer tastes;
- purchase patterns;
- firm structure;
- the regulatory environment; and
- the economy as a whole.

Where there is a great deal of change and innovation, it is less likely that any firm will be able to exercise market power for sustained periods.

Countervailing buying power

Where credible options are available to buyers, buyer concentration can prevent a price increase and make it difficult for sellers to exercise market power. Typically, a buyer will have this ability if, for example, it can switch to other sellers in a reasonable amount of time, or the promise of substantial orders can induce the expansion of an existing seller or sponsor entry by a potential seller. In this scenario, the Bureau will assess whether one or more buyers have such a countervailing power to constrain the exercise of market power.

Efficiencies exception

Unlike the integrated analysis conducted in the United States and by the European Commission, the Bureau considers efficiencies separately, following its evaluation of whether a merger will result in an SPLC. This reflects the fact that the Canadian legislative framework contains an explicit efficiencies exception. Specifically, subsection 96(1) of the Competition Act allows for the clearance of an anticompetitive merger, where the efficiency gains brought about by the merger are greater than and offset the anticompetitive effects. The onus is on the parties to establish the gains in efficiency, whereas the commissioner bears the burden of establishing the anticompetitive effects of the merger. The Bureau recently issued (in draft for public consultation) a practical guide to efficiencies in merger reviews, which is intended to inform businesses and their advisers of the Bureau's most recent experience conducting the trade-off analysis in accordance with section 96 and in what circumstances the commissioner may exercise discretion to not challenge an otherwise anticompetitive merger due to efficiency gains.[19]

The first step in the trade-off analysis consists of an assessment of all efficiency claims, including their nature, magnitude and likely realisation. The Bureau will pay close attention to gains in productive efficiency, such as savings associated with integrating new activities within the firm or product, plant-level and multi-plant-level savings in variable and fixed costs, as well as gains in dynamic efficiency, such as the optimal introduction of new products or the improvement of product quality and service.

The second step in the trade-off analysis is to balance the efficiency gains against 'the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger'.[20] This entails the Bureau looking at all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiencies, negative or socially adverse redistributive effects, and effects on service, quality and product choice. Further, the Bureau may also consider price and non-price effects in interrelated markets.

In weighing the efficiency gains against the anticompetitive effects, the Bureau normally applies the balancing weights standard, where the increase in surplus from the efficiency gains is balanced against the deadweight loss resulting from the anticompetitive effects to which may be added some portion of the wealth transfer from consumers to producers that is considered socially adverse.[21] The Supreme Court of Canada recently ruled that the balancing test may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger should be compared against the quantitative anticompetitive effects. Second, the qualitative efficiencies should be balanced against the qualitative anticompetitive effects and a final determination must be made as to whether the total efficiencies offset the total anticompetitive effects of the merger at issue. The Supreme Court held that marginal efficiency gains should not be required for the defence to apply, as the language of section 96 of the Act does not provide a basis for requiring this kind of threshold.[22]

As mentioned above, the Bureau published guidance on its approach to efficiencies in merger reviews in draft in March 2018 and subsequently announced that it intends to rethink its procedural approach to merger reviews where parties invoke the efficiencies defence. The commissioner recently announced that he is 'highly unlikely'[23] to exercise his enforcement discretion and not challenge a potentially anticompetitive merger without reliable, credible and probative evidence that supports and validates the efficiencies defence advanced by the parties. The Bureau

19 See Competition Bureau, 'A practical guide to efficiencies in merger review', 20 March 2018.

20 MEGs, above note 5 at 12.21.

21 See *Canada (Commissioner of Competition) v Superior Propane Inc* (30 August 2000), CT-1998/002 (Competition Tribunal).

22 *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 147–155.

23 Remarks by Commissioner of Competition Matthew Boswell at the Canadian Bar Association Competition Law Spring Conference 2019 (May 7, 2019), Toronto, Ontario (available at: www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html).

has announced that its refined procedural approach will require the provision of detailed evidence supporting the efficiencies claimed; the ability to test the evidence underlying those claims; and adequate time, set out in a timing agreement, to conduct a meaningful assessment of the efficiencies claimed.

The commissioner also announced that the Bureau intends to provide guidance on the general categories of evidence and information that parties will need to produce to the Bureau to advance and support their claims regarding efficiencies. In addition, the Bureau intends to release a model form of timing agreement for consultation that will include timed stages for production of information and evidence and engagement with the Bureau during a review that involves efficiencies claims.

Challenging a merger

If the Bureau finds that the merger or proposed merger is likely to result in an SPLC and that there is no robust evidence of the efficiencies exception, the commissioner may apply to the Tribunal to challenge the merger or, alternatively, negotiate remedies consensually with the merging parties to resolve its competition concerns. If the commissioner is of the view that more time is needed to adequately analyse the competitive impact of a proposed merger, he or she may seek the agreement of the merging parties to delay the closing of the transaction. Otherwise, the commissioner may seek an interim injunction from the Tribunal pursuant to section 100 of the Competition Act, although this power has been used very rarely as the Tribunal must be satisfied that, in absence of an interim order, an action is likely to be taken that would substantially impair its ability to impose a remedy because that action would be difficult to reverse.

The Canadian merger review regime establishes an initial waiting period of 30 days, after which the parties can close their transaction provided the Bureau has not exercised its discretion to extend the waiting period by issuing an SIR.[24] With the Bureau now having the power to stop the clock, it is likely that section 100 orders will become even less relevant as a tool to provide the Bureau with additional time to review a merger.

If, following its review, the Bureau is of the view that the transaction would lead to an SPLC, and the commissioner and merging parties are unable to reach a settlement, it is open to the commissioner to challenge the proposed transaction pursuant to section 92 of the Competition Act. This is invariably followed by the commissioner bringing an application for an injunction under section 104, which may proceed on a contested or consensual basis. Unlike a section 100 injunction, a section 104 injunction is only available where the commissioner has made an application to the Tribunal pursuant to section 92 alleging that the proposed merger would result in

24 Upon the issuance of an SIR, the waiting period is suspended until a complete response has been submitted by the merging parties. Once the response to the SIR is submitted, a new 30-day period begins to run and the parties may close their transaction following its expiry.

an SPLC. To obtain this order from the Tribunal, the commissioner must establish that there is a serious issue to be tried, that irreparable harm would be caused if injunctive relief is not granted and that the balance of convenience favours granting the injunction.[25]

Remedies

Where the Bureau is concerned a merger or proposed merger is likely to result in an SPLC, it will attempt, where possible, to negotiate a remedy with the parties concerned. This remedy must restore competition to the point where it is no longer substantially less than it was pre-merger.[26] Although the Bureau has a wide range of structural and behavioural remedies at its disposal, it generally favours the former because, on balance, it believes they are more effective.[27] These preferences are outlined in the 'Information Bulletin on Merger Remedies in Canada', which provides the Bureau's current policy on merger remedies, general guidance on the objectives for remedial actions as well as general principles it applies when it seeks, designs and implements remedies.[28]

Typically, the Bureau is willing to consider three types of remedies. Structural remedies involve the divestiture of assets, which must be viable and sufficient to eliminate an SPLC. The divestiture must occur in a timely manner, generally within three to six months,[29] and the buyer must be independent and have both the ability and intention to be an effective competitor in the relevant market. Prior to the completion of the divestiture, the Bureau normally requires that the merging parties hold these assets separate, although in some instances it is willing to simply require that the competitive viability of the assets be maintained.[30]

Second, the Bureau may also seek quasi-structural remedies. In this case, the merged entity is allowed to retain ownership of the assets acquired in the merger, but must take certain actions that have structural implications for the marketplace, such as the removal of anticompetitive contract terms, the granting of non-discriminatory access rights to networks or the licensing of intellectual property.

Finally, the Bureau may seek behavioural remedies, although until recently, it has rarely done so on a stand-alone basis. Rather, it may seek combination remedies where a structural divestiture is combined with behavioural remedies.

Common examples include the following:

- short-term supply arrangements for the buyer of the assets to be divested, at a price defined to approximate direct costs;

25 On 29 May 2015, the Tribunal granted the commissioner's application for an interim injunction, only in part, requiring Parkland to 'hold separate' Pioneer's retail gas assets in six communities for the duration of the commissioner's challenge; the commissioner was seeking such an order in 14 communities. See *The Commissioner of Competition v Parkland Industries Ltd*, 2015 (Competition Tribunal) 4 (29 May 2015), CT-2015-003.

26 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at para. 85.

27 *Canada (Commissioner of Competition) v Canadian Waste Services Holding Inc* [2001] CCTD No. 32, 15 CPR (4th) 5 (Competition Tribunal) at para. 110.

28 Information Bulletin on Merger Remedies in Canada, Competition Bureau, 22 September 2006.

29 ibid at para. 33.

30 ibid at para. 24.

- the provision of technical assistance to help a buyer or licensee train employees in complex technologies, especially for those technologies related to intellectual property; and
- codes of conduct, which can be readily monitored and expeditiously enforced by a third party, such as through binding arbitration procedures.

That said, the commissioner has recently stated that the Bureau may require behavioural remedies to resolve concerns with a merger when structural remedies are either unavailable or insufficient.[31] The Bureau issued a template for merger consent agreements in September 2016, which is designed to provide better insight into the Bureau's expectations when negotiating measures to address competitive issues likely to arise from a proposed merger.[32]

On 29 March 2016, the Bureau reached its first ever mediated resolution of a merger challenge when it entered into a consent agreement with Parkland Fuel Corporation in connection with its acquisition of Pioneer Energy. The consent agreement was the first to have been reached through a mediation process in a Tribunal proceeding. The mediator was a judicial member of the Tribunal.[33]

Recent developments

Matthew Boswell had the 'interim' label removed in March 2019 when the government of Canada announced his appointment as commissioner of competition. In his first public remarks as commissioner, he stated that 'active enforcement will be an area of primary focus. . . . [W]e will use all of the tools at our disposal to address what we believe to be problematic conduct. This will include increased consideration of the use of tools such as injunction applications.' The commissioner noted that the Bureau will use such tools more frequently to interrupt or halt anti-competitive conduct pending a full hearing.

The Bureau has made the digital economy an area of focus and hired a chief digital enforcement officer to support all aspects of its enforcement work in the digital economy.

The Bureau recently expanded the role of the Merger Intelligence and Notification Unit to focus more on intelligence gathering, including in connection with non-notifiable transactions. Finally, the filing fee for merger reviews increased from C$72,000 to C$73,584, as of 1 April 2019, as it is now subject to an annual consumer price index adjustment.

31 The Bureau recently obtained behavioural remedies in respect of the *Telus/Public Mobile* and *Garda/G4S* transactions. See Competition Bureau, Announcement, 'Competition Bureau Issues a "No Action Letter" to TELUS' (29 November 2013); Competition Bureau, Position Statement, 'Competition Bureau Statement Regarding The Proposed Acquisition by TELUS of Public Mobile' (29 November 2013); Competition Bureau, Announcement, 'GardaWorld provides Competition Bureau with commitment in Quebec' (13 March 2014); and Competition Bureau, Position Statement, 'Competition Bureau Statement Regarding the Acquisition by GardaWorld of G4S Canada' (13 March 2014).

32 See Competition Bureau, 'Competition Bureau Mergers Consent Agreement Template' (29 September 2016).

33 See Competition Bureau, News Release, 'Competition Bureau and Parkland reach mediated resolution that will see gas stations and assets sold in Ontario and Manitoba' (29 March 2016).

Adam Kalbfleisch
Bennett Jones LLP

Adam Kalbfleisch's practice encompasses a wide range of competition and foreign investment review matters. Adam, who is recognised by clients in *Chambers Global* as a 'patient, detailed and responsive' lawyer, regularly advises both domestic and foreign clients engaged in mergers, joint ventures and other forms of strategic alliances in connection with the notification and clearance provisions of the Competition Act and the Investment Canada Act.

Adam advises clients in connection with conspiracy and other criminal provisions of the Competition Act, as well as on potentially anticompetitive business practices, including abuse of dominance, exclusive dealing and refusal to deal matters. He also provides advice concerning corporate competition law compliance programmes, product regulation, and marketing and advertising law matters.

Adam is an active member of the Canadian Bar Association and the American Bar Association, and was the chair of the Canadian Bar Association's 2014 Annual Competition Law Fall Conference. He is also a member of the Canadian Chamber of Commerce competition law and policy task force, and chair of the Icelandic Canadian Chamber of Commerce.

Kyle Donnelly
Bennett Jones LLP

Kyle Donnelly's practice encompasses a wide range of competition and foreign investment review matters (including national security reviews). Kyle regularly advises both domestic and foreign clients engaged in mergers, joint ventures and other forms of strategic alliances in connection with the notification and clearance provisions of the Competition Act and the Investment Canada Act. Kyle advises clients in connection with potentially anticompetitive business practices, including abuse of dominance, exclusive dealing and refusal to deal matters. He also provides advice concerning corporate competition law compliance programmes, product regulation, and marketing and advertising law matters. Kyle is an active member of the Canadian Bar Association and the American Bar Association.

Bennett Jones LLP is an internationally recognised Canadian law firm founded and focused on principles of professional excellence, integrity, respect and independent thought. Our firm's leadership position is reflected in the law we practise, the groundbreaking work we do, the client relationships we have and the quality of our people.

From offices in Calgary, Toronto, Edmonton, Ottawa, Vancouver, New York and Beijing, Bennett Jones' professional practice encompasses virtually every sector of business, industry and government. Operating as an integrated unit across our geographic locations, our business practice is to assign lawyers to work on client files who have the skills and experience to best meet our clients' needs.

Our antitrust and competition group is committed to providing every client with best-in-class competition advice and representation. Our group includes internationally recognised practitioners such as a recent former commissioner of competition and several former Competition Bureau and Department of Justice officials. We bring to bear depth and experience developed while advising clients on the most complex domestic and international competition matters. We anticipate and respond to our clients' needs in all aspects of antitrust and competition law. This includes the ability to steer clients through complex merger and foreign investment review processes, and extends to all aspects of antitrust enforcement and litigation.

3400 One First Canadian Place
PO Box 130
Toronto, Ontario M5X 1A4
Canada
Tel: +1 416 863 1200
Fax: +1 416 863 1716

www.bennettjones.com

Adam Kalbfleisch
kalbfleischa@bennettjones.com

Kyle Donnelly
donnellyk@bennettjones.com

The *Americas Antitrust Review 2020* edition of Global Competition Review Insight is one of a series of books that also covers the Asia-Pacific, Europe, the Middle East and Africa. Each book delivers specialist intelligence and research designed to help readers – in-house counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes.

Global Competition Review has worked exclusively with the region's leading competition practitioners, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also put it into context – that makes the report particularly valuable to anyone doing business in the Americas today.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-217-6