

# Merger Remedies: A Canadian Perspective on Getting to Deal Completion

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# Outline

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# Introduction

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- Vast majority of cases do not require a remedy
- However, in difficult cases where a remedy may be necessary to avoid litigation (Canadian perspective) or obtain approval (EU perspective), remedy design and strategy is typically critical to timing
- Scope of remedies also can impact on the transaction rationale and ongoing conduct of merged firm:
  - potential loss of merger related efficiencies
  - potential destruction of value of divested business
  - potential delays to integration, particularly where hold separate required
  - potential substantial compliance costs and diversion of internal resources
  - potential behavioural-related obligations that survive closing
- Critical to identify and present remedies that can properly satisfy Commissioner's concerns while having the least potential harm to rationale for the merger
- Remedy discussions can be more complicated in respect of those international mergers where remedy in one jurisdiction does not satisfy the Commissioner's concerns: either because Commissioner has concerns over enforceability or because the facts in Canada differ from those in the jurisdiction where the remedy is being effected

# Pre-Agreement Planning

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- Initial considerations:
  - retain experts (economists, business valuers, accountants, industry experts, etc.)
  - enter into a joint defence agreement
  - consider apportionment of risks
- PSA terms critical
  - covenants:
    - requirement to offer remedies, and if so, any limitations that must be provided (“hell or high water”?)
    - cooperation
    - joint participation in Bureau meetings
    - timeliness of filings and supplementary submissions
  - closing conditions:
    - expiration of waiting period or will the parties close only upon receipt of a no-action letter
  - outside date
- Document creation
- Consider pre-filing discussions with the Bureau

# Merger Control: Timelines

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- Waiting period for notifiable mergers:
  - 30 day initial period, or
  - if Commissioner issues a “Supplemental Information Request” (SIR), 30 days following compliance with the SIR
- Can close upon expiration of waiting period (subject to the terms of any timing agreement)
- Caution: Bureau’s investigation can extend beyond waiting period – indicative review periods:
  - “non-complex”: up to 14 days
  - “complex”: up to 10 weeks
  - “very complex”: up to 5 months
- Commissioner retains right to challenge a merger before the Competition Tribunal at any time before or within 1 year after closing

# Substantive Test

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- All mergers are subject to the substantive merger provisions, regardless of whether notifiable
  - On application by the Competition Bureau to the Competition Tribunal, a remedy may be ordered where a merger would likely prevent or lessen competition substantially in a relevant market
- The Act sets out a non-exhaustive list of factors that the Tribunal may take into account in determining merger applications brought before it:
  - The extent of foreign competition
  - Whether or not a party to the merger has failed or is likely to fail
  - The availability of acceptable substitutes for the products supplied by the merging parties
  - Barriers to entry
  - The extent to which effective competition will remain after the merger
  - Whether the merger would result in the removal of a vigorous and effective competitor
  - The nature and extent of change and innovation in a relevant market
- The Competition Tribunal is expressly precluded from concluding that a merger will substantially lessen competition solely on the basis of likely post-merger market shares
- The Act also includes an express efficiencies defence
  - Competition Tribunal is not permitted to issue an order where the merger is likely to bring about gains in efficiency that will be greater than and offset the effect of any prevention or lessening of competition, where those efficiencies would be lost if the order were made

# Temporary Injunctive Orders

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- Commissioner can apply to the Tribunal for a temporary injunction under s. 100 of the *Competition Act* at any time before closing:
  - 2 possible orders
  - 30 days for each order, max. 60 days
- To obtain a s.100 order, Commissioner must establish:
  - an inquiry has been initiated
  - more time is required to complete the inquiry, and
  - if the interim order is not granted, a person is likely to take an action that would substantially impair the ability of the Tribunal to make an order under s.92 to remedy the effect of the proposed transaction on competition because that action would be difficult to reverse

# Temporary Injunctive Order (cont'd)

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- In *Labatt/Lakeport*, Commissioner unsuccessfully applied for a s. 100 order (upheld on appeal):
  - no automatic right to a temporary delay
  - expectation that statutory waiting period sufficient to complete review, particularly following the adoption of the new US style SIR process in March 2009
  - Bureau cannot block closing, unless remedy impaired (test is not whether the Tribunal can restore competition to pre-merger level)

# Temporary Injunctive Order (cont'd)

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- Important takeaways:
  - mere act of closing does not cause significant impairment
  - can push for closing in Canada once waiting period has expired
- Can provide some leverage for negotiating a hold-separate to permit closing

# Merger Control: Getting to as Speedy a Closing as Possible

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- Bureau typically will discuss remedies only after it has collected all relevant information (SIR) and nearing the conclusion of its assessment:
  - Commissioner can issue SIR without judicial oversight
  - SIR process removes the former leverage parties had to close quickly
- Bureau not likely to forego SIR and allow closing into a hold-separate, even for global transactions where Canadian process could delay worldwide closing:
  - at one time, Bureau was amenable to allow closing into a hold separate whilst its review continued, but this changed when the 2006 Remedies Bulletin was published
- Bureau's leverage substantially weakened once waiting period has expired
- Bureau appears willing to consider a pocket decree and timing agreement to facilitate closing before waiting period has expired, however, open questions:
  - will it be registered with the Tribunal upon signing (in which case, made public)?
  - what period of time will the Bureau require to conclude its investigation?
  - does it represent an unfair “bulls-eye” for third party complainants?

# Negotiating Remedies

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- Bureau has 3 options at the end of its review if it has serious concerns:
  - negotiate a remedy (provided acquiring party is prepared to accept a remedy)
  - litigate before the Competition Tribunal
  - exercise enforcement discretion by not challenging the merger, but notify acquiring party that the Bureau will monitor the market and that it retains the right to challenge the merger at a later date
- Bureau has negotiated remedies in many cases:
  - historically, through a confidential, binding undertaking
  - following amendments to the Competition Act, through registration of a consent agreement before the Competition Tribunal:
    - enforceable as a court order
- Public information on Bureau's approach and precedents include:
  - Remedies Bulletin
  - Consent Agreement Outline
  - Registered consent agreements (available on Tribunal's website)
  - Bureau speeches

# Structure and Nature of Acceptable Remedies

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- Strong preference for:
  - structural remedies
  - quasi-structural remedies
- Bureau's official position is that standalone behavioural remedies will be "seldom accepted", but there are precedents:
  - *Suncor/Petro-Canada* (wholesale obligations)
  - *CN/BC Rail*
  - *Cendant/Budget Rent A Car*
  - *BBM Canada/Nielsen Media Research Limited*
- Other possibilities:
  - fix-it-first solutions
  - up-front buyer
- Bureau may seek notification obligations that apply only in respect of possible future transactions:
  - aware of a transaction where, by written undertaking within a "no-action" letter, Commissioner imposed a 30-day pre-closing notification obligation on the parties in the event that they were to acquire a competitor even if the transaction not subject to Part IX of the *Competition Act*
  - similar obligation imposed on Merck (in *Merck/Schering-Plough*) in respect of the sale of 50% interest in Merck to Sanofi-Aventis

# Structure and Nature of Acceptable Remedies

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- Key requirements for a suitable remedy:
  - assets must be viable and sufficient to eliminate competition concerns
  - divestiture must occur in timely manner
  - buyer must be independent of divesting party and have both ability and intention to be an effective competitor

# Merger Remedies: International Cooperation

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- Remedies Bulletin confirms that Bureau will coordinate closely with foreign authorities on the design of remedies
- In appropriate cases, Bureau may forgo a Canadian specific remedy where a suitable remedy is agreed to with a foreign antitrust authority:
  - *Dow/Rohm and Haas*
  - *BASF/Ciba*
  - *Thomson/Reuters*
  - *Schering-Plough/Organon Business of Akzo Nobel*
  - *Boston Scientific/Guidant*
  - *Alcan/Pechiney II*
  - *Proctor & Gamble/Gillette*
- However, a Canadian specific remedy is likely where:
  - matter raises Canada-specific issues,
  - Canadian impact particularly significant,
  - assets/business to be divested are located in Canada, or
  - concern over enforcement
    - *Akzo Nobel/ICI*

# Consent Agreement Terms

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- Bureau has published a non-binding Consent Agreement Outline
- Key terms may include:
  - initial sale period (3-6 months)
  - divestiture trustee sale period (3-6 months)
  - preservation of divestiture assets
  - appointment of divestiture monitor, divestiture trustee and hold separate manager
  - sale procedure
  - crown jewel
  - no minimum price provision
  - Tribunal's right to make any order if divestiture not successful
  - confidential schedules
- In many, but *not* all, cases Bureau may require a hold separate to effect the remedy

# Recent Consent Agreements

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- Bureau entered into five consent agreements in 2009; some interesting features (heavily fact dependent):
  - No requirement to admit a substantial prevention or lessening of competition
  - Purchaser's right to be involved in selection of divestiture monitor (in one case, but not all cases)
  - In addition to structural remedies, Bureau has accepted both behavioural (e.g. on-going supply) and quasi-structural (e.g. Board composition) commitments
  - In Agrium, Bureau agreed to the divestiture of a partial interest in a facility, and the obligations kick in at only a 15% equity interest

# Recent Consent Agreements (cont'd)

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- Bureau has accepted a preservation and maintenance obligation in lieu of hold separate/preservation requirement
- Three of the consent agreements involved up-front buyers and the agreements provided rules to address the possibility that the up-front buyer did not complete the sale or, in the case of *Merck/Schering-Plough*, was not considered to be an acceptable purchaser
- In an up-front buyer scenario, imposed and ongoing notification and approval obligation on the parties in the event of any future transaction between them in the area that was the subject-matter of the remedy
- Bureau continues to insist upon the right to apply to the Tribunal for wide ranging orders in the event that a divestment is not successful

# Strategic Considerations

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- Hostile bid?
- Unique Canadian issues?
- Coordinating timing of filings with other jurisdictions?
- Who will bear the risk – purchaser or vendor?
- Work with Bureau before filing is made and/or before public announcement?
- How quickly can parties comply with SIR?
- Offer hold separate or pocket decree?