



Competition Bureau
Canada

Bureau de la concurrence
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Meet the Competition Bureau Workshop



Mergers 101 in Canada

Presented at the Mergers & Acquisitions Workshop

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Outline

Part 1: Legal and Economic Framework

Part 2: Case Studies

Part 3: Hypothetical Merger Scenario





Mandate

- **Scope:** All mergers in Canada subject to *review* by the Commissioner of Competition. Those that exceed monetary thresholds subject to obligatory notification requirements and corresponding waiting periods.
 - Consequences for failure to notify
- **Analytical Approach:** Outlined in the Merger Enforcement Guidelines (“MEGs”)
- **Objective:** To determine whether a merger or proposed merger is likely to result in a substantial lessening or prevention of competition.





Legislative Framework

Legal Test is set out in Section 92

- “Where on application by the Commissioner the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially...”
- **MEGs 2.1:**
“...likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power”





Legislative framework

List of Factors considered are set out in Section 93

- Availability of substitutes
 - Barriers to entry and expansion
 - Effective remaining competition
 - Existence of foreign competition
 - Removal of vigorous and effective competitor
 - Nature and extent of innovation
 - Failing business
 - Any other relevant factor
- **Market share or concentration is clearly an important indicator, but not determinative**
 - **Efficiencies defence may apply (s.96)**





Interface with Other Government Agencies

- While an independent law enforcement agency, the Bureau works along side other parts of government and foreign counterparts who may also be reviewing a merger
- Government bodies with jurisdiction to review mergers include:
 - **Investment Review Division (“IRD”)**, Industry Canada
 - “net benefit” test for takeovers of Canadian companies by foreigners
 - **Federal or provincial regulators**, such as:
 - Minister of Finance, Transport (“public interest” test), CRTC
 - Ministry of Forests, Market Surveillance Administrator
 - **Foreign antitrust authorities**
 - International cooperation with US Federal Trade Commission, US Department of Justice, European Commission, and others, including competition authorities in Mexico (COFECE), India (CCI)
 - “Best Practices on Cooperation in Merger Investigations” with US





Potential Outcomes of Merger Reviews

- **Most transactions do not raise serious competition issues**
 - Advanced Ruling Certificate or No-Action Letter
 - Negotiated consent agreement registered with Competition Tribunal when remedial action is necessary
 - Sometimes, merger is abandoned when a challenge is likely
- **Litigation**
 - Commissioner may bring an application to Competition Tribunal to prevent, dissolve or alter a merger (section 92)
 - Commissioner or Parties may bring an application in the event of changed circumstances
 - Commissioner may seek an injunction to prevent closing or to hold assets separate





Recent Examples of Various Outcomes

- **Registered Consent Agreement, setting out required structural divestitures and/or behavioural remedies**
 - Holcim/Lafarge (structural remedy; international cooperation)
 - Sobeys/Safeway (structural remedy)
 - Glentel (behavioural remedy)
- **Merger abandoned due to competition issues**
 - Louisiana-Pacific/Ainsworth (international co-operation with US FTC)
- **No Action Letter; merger also reviewed by IRD**
 - Burger King/Tim Hortons (IRD Undertakings)
- **Litigation**
 - Parkland/Pioneer (Injunction under s. 104; Challenge under s.92)
 - Tervita: Supreme Court decision (March 2015) reversed earlier rulings and allowed anti-competitive merger to proceed due to efficiencies





Case Studies

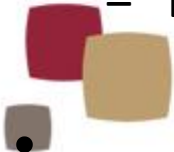
- Agrium/Viterra
- Tervita
- Holcim/Lafarge
 - Overview of Competition Analysis, Conclusions and Outcome
 - Why the case is important





Agrium/Viterra

- **Transaction:** Agrium Inc. proposed to acquire the majority of Viterra Inc.'s retail agri-products business from Glencore International plc
- **Relevant Markets of concern:**
 - Product: retail supply of (i) urea and (ii) anhydrous ammonia
 - Geographic: local – various locations in Alberta and Saskatchewan
- **Bureau conclusion:** merger would likely result in a substantial lessening of competition (“SLC”)
- **Outcome:** negotiated settlement registered with Tribunal
 - Parties agreed to divest seven retail stores as well as nine anhydrous ammonia businesses, and to supply anhydrous ammonia to any purchaser of the divested assets
 - Remedy formalized in a registered consent agreement
 - Bureau approved an acceptable buyer





Why is this case important?

- The negotiated resolution of competition issues in this case is a good example of shared compliance.
- Remedies that preserve competition at the retail level provide opportunities for small and medium-sized businesses, including farmers, to benefit from competitive prices.





Tervita

- **Transaction:** Non-notifiable transaction where CCS Corporation (“Tervita”) acquired Complete Environmental which included, *inter alia*, the Babkirk site and Landfill permit
- **Relevant Markets of concern:**
 - Product: Disposal of hazardous waste at secure landfills
 - Geographic: local – northeastern BC
- **Bureau conclusion:** merger would likely result in a substantial prevention of competition (“SPC”)
- **Outcome:** litigated proceedings
 - Tribunal found and courts agreed that SPC would likely result from merger
 - However, Supreme Court allowed the merger because it determined that gains in efficiencies were greater than and offset the anti-competitive effects





Why is this case important?

- First fully litigated merger in Canada since 2005
 - Two appeals (Federal Court of Appeal and Supreme Court of Canada)
- Theory of harm was exclusively based on a “prevention” of competition rather than a “lessening” of competition – involved the removal of a future entrant
- First non-notifiable transaction challenged by the Commissioner
- Merger was completed before the hearing, with preservation agreement
- Impact of the Supreme Court decision on our work





Holcim/Lafarge

- **Transaction:** As part of a global transaction, Holcim Ltd. proposed to acquire Lafarge S.A in Canada
- **Relevant Markets of concern:**
 - Product: cement and related products
 - Geographic: several regional markets across Canada, including in Alberta
- **Bureau conclusion:** merger would likely result in a substantial lessening of competition (“SLC”); cement plant located outside of Canada was a necessary part of the business in Alberta
- **Outcome:** negotiated settlement registered with Tribunal
 - Holcim agreed to divest all of its assets and businesses in Canada, together with a cement plant located in Montana
 - Remedy formalized in a registered consent agreement – includes provisions for hold separate manager and monitor
 - Proposed global buyer was an acceptable purchaser for the Bureau





Why is this case important?

- Even when early resolution is proposed by merging parties, Bureau will need to determine whether all assets are included in divestiture package in order to ensure an effective remedy.
- International cooperation during the substantive merger review and throughout remedy discussions is important, especially when cross-border issues exist.





Hypothetical Merger Scenario – For discussion purposes only

Environmental Services and Technology (“ENTECH”) is a US company headquartered in Denver with offices in Edmonton and Calgary. It supplies a range of environmental services and technologies to the oil and gas industry and to the mining industry. Its sales in Canada are significant with clients primarily in Alberta.

ENTECH is planning to bid for all of the shares of TOXFREE, a Canadian company headquartered in Edmonton, that has recently begun offering certain environmental services which it provides in competition with ENTECH. While it has a limited market presence currently, its business plan is to price aggressively to grow quickly. One limitation is that a tight labour market locally has meant that it is harder to hire environmental professionals as readily as TOXFREE would like.

In addition to those services, TOXFREE also produces a chemical product (“Neutralizer”) which is used to neutralize certain toxins produced in mining and oil sands production. Neutralizer is selling well both in Canada and the US. TOXFREE has a patent on technology related to the production of Neutralizer and competitors of TOXFREE have found it difficult to replicate the functionality of Neutralizer. ENTECH purchases a significant proportion of TOXFREE’s Neutralizer which it then supplies as part of its suite of environmental service offerings. TOXFREE also supplies ENTECH’s principal competitor in Canada, CLEANTEK.

Timing: ENTECH would like to purchase TOXFREE on an accelerated timeline – within the next 30 days.





Hypothetical Merger Scenario

Discussion Points:

- What advice does Counsel provide to clients who are contemplating a merger?
- What happens once a submission and filing are made to the Bureau?
- What happens if more information is required by the Bureau?
- What happens when the Bureau identifies competition issues?
- How do Parties respond to the Bureau's conclusions?
- If a remedy is proposed, how does the Bureau evaluate the proposed remedy?





Questions?



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