Canada's Updated Merger Control Laws—How the Changes Impact Strategies for Practitioners and Merging Companies

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In 2024, Canada's merger control laws were amended in significant ways. These once-in-a-generation changes include changes to the merger notification laws, the introduction of a presumption of illegality for mergers that exceed market share and other thresholds, the deletion of Canada's distinctive "efficiencies defense", and an increase to the standard for acceptable remedies.

The amendments were formulated and adopted by Canada's Parliament with little debate, leaving significant uncertainty as to how they are to be implemented. To fill this vacuum, the Canadian Competition Bureau ("Competition Bureau") has begun to consult upon and publish non-binding guidelines, describing how it intends to enforce the changes in the law; those guidelines have yet to be interpreted by Canadian courts. As a result, competition law practitioners and merging companies face a new merger enforcement landscape that presents significant uncertainty.

This article describes key aspects of the amendments to Canadian merger control laws and the uncertainties they create, and discusses how common strategies that are used by practitioners when seeking the Competition Bureau's approval of (or litigating over) mergers may be impacted.

Canada's Updated Merger Notification Laws

Canada's merger notification laws[1] had not been meaningfully updated since the time of their creation in 1986. Due to their age, among other reasons, the merger notification laws were weak at requiring notification to the Competition Bureau of the subset of M&A deals most likely to harm competition. For example, the laws failed to require the notification of acquisitions of large non-Canadian companies that had significant sales to Canadian customers (e.g., in the technology industry)—and thus, the laws were in this way under-broad. At the same time, the laws required the notification of large numbers of Canadian deals that were unlikely to harm competition (e.g., deals in the Canadian natural resources sectors, where companies compete in global markets)—and thus, the laws were in this way over-broad.

The amendments go some distance to addressing the under-broad nature of the notification laws, and in particular requiring the notification of deals for the acquisition of non-Canadian targets that make significant sales to Canadian customers. Previously, those deals often were not notifiable because Canadian merger notification thresholds only applied to the target's sales "in or from" Canada—that is, sales by a Canadian-established entity to customers in Canada (domestic sales) or to customers outside of Canada (export sales), but not to sales by a non-Canadian entity

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[1] *See* Competition Act, R.S.C. 1985, c. C-34, §§ 108—124 (Can.).

to customers in Canada (import sales).[2] The amended law now requires that the merger notification thresholds be applied to the target's domestic sales, export sales, *and* import sales.[3]

As a result, acquisitions of companies that make significant sales to Canadian customers will be subject to merger notification, whether or not the target is established in, or has subsidiaries in, Canada. Practitioners looking to apply the Canadian merger notification thresholds should ask their clients for each type of revenue before conducting an assessment. Practically, this often means seeking data about all sales by a company's Canadian subsidiaries (to capture domestic and export sales), as well as data about sales to Canadian customers by non-Canadian subsidiaries (import sales), and then aggregating those figures.

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By counting domestic, export, and import sales, Canada's merger notification thresholds are different from similar thresholds in both the U.S. and E.U., where export sales are not usually relevant to the analysis. In the U.S, the merger notification thresholds generally focus on the value of the securities acquired (or the assets acquired).[4] For the acquisition of non-U.S. companies, exemptions exist if sales in (domestic) or into (import) the U.S. are less than a threshold, but sales from (export) the U.S. are not relevant to the assessment.[5] In the E.U., merger notification thresholds generally focus on "turnover"—that is, sales made to customers in the E.U. wherever they originate, but sales from (export) the E.U. to other jurisdictions are not subject to the thresholds.[6] It almost goes without saying, but sales from (export) a jurisdiction are far less likely to be relevant to competition within that jurisdiction. As a result, Canada's merger notification laws continue to be over-broad in ways that do not reflect sound competition law policy.

In addition, practitioners should be aware that significant other technical problems remain embedded within Canada's merger notification laws. For example, the laws are not "transaction structure neutral," and as a result fail to require the notification of many large deals based entirely upon their particular structure. Consider, for example, a transaction in the retail industry, in which the target's business is conducted through ten Canadian subsidiaries (and the shares of each of those subsidiaries will be directly acquired by a buyer); unlike rules in the U.S. or E.U., where the sales of each subsidiary would be aggregated for the purposes of applying merger notification thresholds, Canadian law does not require (or even permit) such aggregation. Thus, the acquisition of businesses in parallel—whether at the same time under a single transaction agreement or close in time—will not be notifiable unless at least one of the acquired businesses surpasses the thresholds by itself. Practitioners should therefore pay close attention to the structure of proposed deals, as the application of the merger notification laws continues to depend on the deal structure.[7]

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2 The merger notification thresholds are also applied to the value of the merging parties' assets in Canada; *see* Competition Act, §§ 109 and 110.

3 *See*, changes to Competition Act, § 110 and in particular the addition of the words "sales . . . into Canada."

4 The U.S. Hart-Scott-Rodino Act sets out notification thresholds based on the "size-of-transaction," and "size-of-parties." 15 U.S.C. §18a(a)(2).

5 *See*, *e.g.*, 16 C.F.R. §§ 802.50 - 802.51.

6 See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Article 5(1) (defining "turnover" as being comprised only of "products sold and services provided to undertakings or consumers, in the Community or in that Member State…" (emphasis added)).

7 The amendments introduce an anti-avoidance provision (see Competition Act, § 113.1). The provision provides only that a transaction "designed to avoid the application of" the notification rules is subject to notification. There is no anti-avoidance or "aggregation" rule for transactions that were designed for other reasons (e.g., because of tax reasons, or because the desired structure is the most efficient way to acquire the target business). There has been no enforcement under § 113.1 to date.

New Presumptions of Illegality, New Rules for Temporary Injunctions, and the Impact on Strategies of Practitioners and the CCB

Prior to the changes, one well-known strategy for practitioners with a contentious merger under review by the Competition Bureau was to "hurry up and close"—that is, comply with the requirements of the Bureau's Supplementary Information Request ("SIR")[8] as quickly as possible, wait for the expiry of the further 30-day waiting period, and then close. This strategy would force the Bureau to seek a temporary injunction from the Competition Tribunal, where the Bureau's record of litigating such matters is strewn with defeats.[9] In part due to the complexity and risk of obtaining a temporary injunction, in practice the Bureau rarely sought temporary injunctions, more frequently agreeing that merging parties may "hold separate" the parts of the merger about which the Bureau had the most concern,[10] or entering into consent agreements for minor divestitures that left the Bureau unsatisfied with the ultimate result.[11] Timing agreements—which permitted the Bureau additional time to review a merger prior to deciding whether to clear or oppose—between merging parties and the Bureau were extremely rare, as additional time for the Bureau was in conflict with the "hurry up and close" strategy and failed to place pressure on the Bureau to attempt to obtain a temporary injunction.

The amendments contain two important elements, which are likely to alter practitioners' strategic calculus (and the Competition Bureau's calculus) significantly.

- First, the amendments have introduced a rebuttable presumption that mergers will be presumptively illegal—that is, they will presumptively prevent or lessen competition substantially, contrary to section 92 of the Competition Act (which permits the prohibition of a merger)—if certain thresholds are exceeded. Specifically, a merger will be presumptively illegal if: (i) the merger will or is likely to increase the Herfindahl–Hirschman index ("HHI") in a market by more than 100 and (ii) the post-merger HHI in a market will or is likely to exceed 1,800, or the merging parties' market share is or is likely to exceed thirty percent. This change codifies into

8 A SIR is Canada's functional equivalent to a U.S. "Second Request," i.e., a follow-up request issued by the Competition Bureau to the merging parties after merger notification filings have been received, demanding further information related to the merger. Like a U.S. Second Request, the issuance of a SIR extends the waiting period under which parties may not consummate their transaction until at least 30 days after the parties have complied with the SIR.

9 *See*, *e.g.,* Commissioner of Competition v. Labatt Brewing Co. Ltd., 2007 CACT 9 (Can.), (dismissing application for 30-day temporary injunction against closing under § 100 because the Commissioner failed to bring evidence that the closing would "substantially" impair the ability to remedy harm to competition); Commissioner of Competition v. Parkland Indus. Ltd., 2015 CACT 4 (Can.), (partly rejecting application for hold separate order under § 104 pending hearing of the § 92 application due to the absence of "specific or detailed" evidence regarding market definition in every single local market where competition was allegedly lessened). *See also* Commissioner of Competition v. Secure Energy Services Inc., 2021 Comp Trib 4 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/499680/index.do (denial of application for interim order pending the hearing of the section 104 application); Commissioner of Competition v. Secure Energy Services Inc., 2021 Comp Trib 7 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/511952/index.do (denial of application for section 104 interim injunction pending hearing of the section 92 application).

10 For an illustrative example, *see* Commissioner of Competition v. GFL Environmental Inc., CT-2021-006 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/516977/index.do.

11 For an illustrative example, *see* Commissioner of Competition v. BCE Inc., CT-2017-007 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462485/index.do (consent agreement); Competition Bureau, Position Statement, *Acquisition of MTS by Bell*, (Feb. 15, 2017), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/acquisition-mts-bell.

Canadian law the same numeric standards set forth in the U.S. Department of Justice and Federal Trade Commission's 2023 Merger Guidelines.[12]

- Second, the amendments provide that where the Competition Bureau has applied to the Competition Tribunal for a temporary injunction, closing of the merger is automatically prohibited until the Bureau's application is decided upon by the Tribunal.

The first amendment impacts future temporary injunction litigation in at least two important ways. First, it makes market definition an important focus of litigation. Compared to the level of proof required to obtain a temporary injunction prior to the amendments, it may be comparatively easy (and require little evidence) for the Competition Bureau to prove the existence of a narrow market in which shares exceed the threshold (and thus to gain the presumption of illegality and win important aspects of the test for a temporary injunction). Second, it is unclear what level of evidence will be required to rebut the presumption of illegality, especially in the context of a temporary injunction. Until a body of law is developed, merging parties that are concerned about the consequences of an early-stage loss in litigation may be reluctant to accept the risk arising from the hearing of a temporary injunction application.

The amendments create many additional questions about how the Competition Bureau is likely to approach its new substantive and procedural advantages, the answers to which will influence practitioners' strategies.

The second amendment, by automatically extending the prohibition against closing until an application for a temporary injunction is resolved, makes it far harder for merging parties to rush the Competition Bureau. That is, the Bureau will no longer feel extreme pressure to secure an early hearing date in advance of the planned closing date, but will be able to litigate at a more moderate pace. The Bureau will be able to credibly warn merging parties after compliance with a SIR that, if the parties do not agree to a timing agreement, the Bureau will shift the focus of its efforts to preparing for litigation (the mere filing of which extends the waiting period).

In sum, the amendments mean that it is easier for the Competition Bureau to demonstrate that a merger is illegal (including at the stage of a temporary injunction application), and the Bureau has new procedural advantages to prevent mergers from closing during the pendency of litigation. All of this means that practitioners' "hurry up and close" strategy is far less likely to yield successful results for clients compared to prior years. Instead, merging parties have new and stronger incentives to spend time with the Bureau during its merger review, in an attempt to convince the Bureau that the proposed merger is unlikely to prevent or lessen competition substantially. In many cases, the Bureau may decline to engage substantively with merging parties without the protections of a timing agreement—that is, an agreement that the merging parties will not close without giving adequate advance notice to the Bureau. These changes bring the strategies of Canadian practitioners much closer to the strategies of U.S. practitioners, where timing agreements have been a common feature of merger review for many decades.

The amendments create many additional questions about how the Competition Bureau is likely to approach its new substantive and procedural advantages, the answers to which will influence practitioners' strategies. For example:

- ***More SIRs?*** Because many mergers will exceed the new concentration thresholds and be deemed presumptively illegal, will the Competition Bureau issue SIRs in each case where the concentration thresholds are neared or exceeded? Historically, the Bureau issues

[12] U.S. Dep't of Just. and Fed. Trade Comm'n, *Merger Guidelines* 2.1 (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [hereinafter "***U.S. Merger Guidelines***"]; *see also* FTC v. Tapestry, Inc., No. 1:24-cv-03109 (JLR), 2024 U.S. Dist. LEXIS 194671, at *137-38 (S.D.N.Y. Nov. 1, 2024) (applying the concentration level presumptions set out in the *U.S. Merger Guidelines*).

approximately ten SIRs per year,[13] but experienced practitioners know that many more cases present shares and HHI levels that near or exceed the levels necessary to engage the presumption of illegality, especially where narrow markets can be postulated. An increased number of SIRs would test the Bureau's resources and capacity.

- ***More Burdensome SIRs?*** Will the Competition Bureau demand more information in its SIRs? In practice, the Bureau has tended to issue SIRs that are far narrower (and easy to comply with) compared to U.S. Second Requests. With the amendments, the Bureau may seek more extensive evidence that is relevant to market definition, as well as evidence that is relevant for the temporary injunction applications it must credibly threaten in order to win timing agreements. For these reasons, SIRs may become more burdensome to comply with.
- ***Negotiation Over Compliance with SIRs?*** If there are more and more burdensome SIRs, and the Competition Bureau's resources and capacity are tested, will the Bureau engage more substantively with merging parties about their compliance with SIRs? In the U.S., for example, the agencies routinely agree to a set of custodians whose documents will be collected and reviewed as part of a Second Request response, as well as to specific elements of the review process. The Bureau has generally been unwilling to engage in such negotiations, asserting that it is up to the merging parties to satisfy themselves about the steps taken to comply with the requirements of a SIR. However, with broader SIRs and the prospect of timing agreements, the incentives of the Bureau and merging parties may be aligned early in a review process to negotiate aspects of how the merging parties will comply with a SIR. In other words, to reduce the burden on both the merging parties and the Bureau, there may be new incentives to negotiate aspects of compliance with SIRs.
- ***More Informal Engagement from the Competition Bureau?*** Will the Competition Bureau increase its substantive engagement with merging parties during its reviews? At present, the Bureau's general practice is to only provide limited engagement with merging parties; for example, the Bureau's case teams are generally not willing to discuss theories of harm or other elements of a case during the pendency of a review, and at the end of a review, case teams will only read a pre-approved script about the Bureau's concerns about a merger (while answering few questions). Informal engagement with merging parties, or candor about areas where evidence for substantive concerns is weak or thin, is unusual. If timing agreements give the Bureau a degree of comfort that a deal will not close quickly, and the periods of "peace" under a timing agreement are indeed used to address substantive areas, then the Bureau may have greater incentives to engage substantively with merging parties during merger reviews (including more informally than in the past).

Developments with regard to all of the following questions will influence practitioners and their strategies, including the timing for compliance with SIRs and how and when evidence is presented to case teams.

The Deletion of the Efficiencies Defense, and the Prospects of Utilizing Efficiencies in Future Merger Reviews

Arguably Canadian merger control law's most distinctive feature was the "efficiencies defense"—that is, the provision that prevented the Competition Tribunal from prohibiting a merger if a merger's

[13] *See* Competition Bureau, *Competition Bureau performance measurement & statistics report 2023-2024* Table 3.3.3 (Mar. 28, 2024), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-bureau-performance-measurement-statistics-report-2023-2024.

efficiencies were "greater than and offset" its anti-competitive effects. According to the Supreme Court of Canada, the efficiencies defense gave "primacy to economic efficiency" in Canadian merger review, which arose from Parliament's "recognition that, in some cases, consolidation is more beneficial than competition."[14] The efficiencies defense gave rise to complex and arcane arguments (and court decisions) about the evidence necessary to prove the value of efficiencies,[15] and imposed significant challenges for the Competition Bureau to attempt to quantify the value of harm to competition (against which the efficiencies would be weighed).[16]

The amendments simply delete the efficiencies defense altogether.

The amendments simply delete the efficiencies defense altogether. As a result, evidence related to efficiencies is no longer an overtly relevant consideration under Canadian merger control laws. Parliament's approach to changing the law—a simple deletion—was somewhat surprising. For example, while the Competition Bureau campaigned for the efficiencies defense to be deleted, it also argued for efficiencies to be expressly listed as a consideration that the Tribunal could take into account when assessing whether a merger was likely to prevent or lessen competition substantially.[17] Parliament ignored all such middle ground approaches.

What, then, is the legal role for evidence of efficiencies in Canadian merger review? And what efforts should practitioners make to substantiate and present efficiencies arising from their client's mergers?

On the one hand, the law provides that in assessing whether or not a merger is likely to prevent or lessen competition, "the Tribunal may have regard" to a number of factors, including "any other factor that is relevant to competition in a market that is or would be affected by the merger."[18] For its part, the Tribunal has previously held that certain types of efficiencies are relevant to an understanding of a merger's effect on competition—that is, when the efficiencies from "a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more rivals . . ."[19] In addition, prior to the amendments the Competition Bureau acknowledged that efficiencies can be relevant to an assessment of competition (and can be treated as a "factor"),[20] and has appeared willing to assess the effect of efficiencies that increased rivalry on competition in specific situations where

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[14] *See* Tervita Corp v. Canada (Commissioner of Competition), 2015 S.C.C. 3, ¶¶ 87, 111 (Can.).

[15] *See*, *e.g.*, Commissioner of Competition v. Secure Energy Services Inc., 2023 Comp Trib 2, ¶¶ 95-146 (Can.).

[16] *See* Tervita Corp v. Canada (Commissioner of Competition), 2015 S.C.C. 3, ¶¶ 127-28 (Can.); Commissioner of Competition v. Secure Energy Services Inc., 2021 Comp Trib 7 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/511952/index.do (denial of application for section 104 injunction).

[17] *See* Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* 2.1 (Feb. 8, 2022), https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec02_1. ("Rather than treating efficiencies as an exception that allows harmful mergers, Canada should move in line with international best practice, and instead incorporate efficiencies as a factor that may be considered in assessing a merger.") [Hereinafter "*Competition Bureau Wetston Submission*"].

[18] Competition Act, § 93.

[19] *See* Commissioner of Competition v. CCS Corporation, 2012 Comp Trib 14, ¶ 388 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463327/index.do#_Toc23856032.

[20] *See Competition Bureau Wetston Submission*, *supra* n.17, at n. 39.

the efficiencies defense was not legally available to the merging parties.[21] Moreover, standard economic models (including models that the Tribunal has relied upon in resolution of litigation) recognize that lower marginal costs that arise from a merger are relevant to assessing the competitive effects of a merger. All of this suggests that some efficiencies—in particular, those that are relevant to competition—are likely to be relevant to an assessment of whether a merger is likely to prevent or lessen competition substantially in future litigation.

On the other hand, the Canadian legal test for whether a merger is likely to prevent or lessen competition substantially is simply whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger.[22] This test focuses on the ability of the merged firm to exercise greater power, but does not inquire about any of the incentives of the merged firm (e.g., whether it will pass through the savings from lower costs to consumers, in order to capture greater market share and thereby intensify competition). Thus, it is not at all clear as a matter of law that efficiencies—including marginal cost savings that standard economic models recognize as important to assessing the effects of a merger—are legally cognizable under Canadian law. This raises an important question whether Canadian courts will revisit the legal test for when a merger will be illegal, especially since the test was developed in litigation where efficiencies were considered at a larger stage of the analysis. Furthermore, in informal (and non-binding) discussions Competition Bureau senior staff have expressed a view that efficiencies are not relevant to the application of Canadian merger control laws,[23] and the Bureau recently issued a consultation document expressing the view that "efficiencies will not usually affect the analysis of whether a merger will lessen or prevent competition substantially."[24]

Given this legal and policy uncertainty, what seems likely is that practitioners defending mergers that are likely to generate significant efficiencies will continue to present evidence of those efficiencies to the Competition Bureau (and the Competition Tribunal in litigation). In addition, the Bureau will be forced to take some account of, and respond to, those claims—as failing to do so creates risk that the Bureau might lose another piece of litigation because of its failure to engage with evidence of efficiencies.[25] To do so, the Bureau will likely need to adopt a framework for evaluating efficiency claims. (In parallel, the Bureau may also develop a legal argument to disregard efficiencies).

One framework the Competition Bureau is likely to consider is the one set out in the *U.S. Merger Guidelines*, which requires that efficiency claims be merger-specific, verifiable, prevent the risk

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[21] *See* Competition Bureau, *Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act*, § 5 (Oct. 25, 2022), https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/reports-and-studies/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act (despite the legal unavailability of the efficiencies defense in that particular merger, "[t]he Bureau considered these submissions and supporting analyses" related to "fuel and other non-labour cost savings…").

[22] *See* Tervita Corp v. Canada (Commissioner of Competition), 2015 S.C.C. 3, ¶¶ 54-55 (Can.).

[23] *See* Canadian Bar Association discussion panel, *Merger Review and Litigation After Section 96* (Mar. 4, 2024), https://www.cbapd.org/details_en.aspx?id=na_na24com02a.

[24] *See* Competition Bureau, *Reviewing the merger enforcement guidelines* sec 2.10 (Nov. 7, 2024), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/reviewing-merger-enforcement-guidelines.

[25] Another possibility is that the Competition Bureau seeks guidance from the Competition Tribunal about the admissibility of evidence of efficiencies prior to trial, by bringing a motion to strike the merging parties' pleadings related to efficiencies. Unlike U.S. merger litigation, Canadian merger litigation has not featured extensive motion practice.

of a reduction in competition, and not arise from the anticompetitive worsening of terms for the merged firm's trading partners.[26]

Another potential framework is the "five screens" test, which the Competition Tribunal adopted for administering the now deleted efficiencies defense.[27] However, there are reasons to doubt that this framework remains appropriate or that it will be adopted by the Competition Bureau. For example, under the first screen, all claims of productive efficiency (i.e., enabling the production of a given level of output with fewer resources) were legally cognizable, which permitted parties to claim the value of fixed cost savings (e.g., savings from the elimination of redundant real estate or headcount) as an efficiency. Under the same screen, efficiencies that arise in a market other than the market in which the Bureau has expressed competition concerns were cognizable. The Bureau is unlikely to agree that such fixed cost savings or out-of-market cost savings are "relevant to competition in a market" about which it has concerns, because neither of those efficiencies impact the incentive of the merged firm when it competes for the sale of a marginal unit of output in the market at issue. By further example, under the fourth screen, claims of efficiencies that are achieved outside of Canada and would not benefit Canadian shareholders were excluded. But efficiencies outside Canada can be very "relevant to competition in a market" in Canada, and the policy for continuing to exclude such claims is far weaker. The Tribunal's "five screens" test therefore seems inapposite for an inquiry into the subset of efficiencies that are relevant to competition in a market.

Going forward, practitioners should be attuned to the legal and persuasive relevance of efficiencies that their clients' mergers may create, so long as those efficiencies are arguably relevant to competition.

Going forward, practitioners should be attuned to the legal and persuasive relevance of efficiencies that their clients' mergers may create, so long as those efficiencies are arguably relevant to competition. In all likelihood, the Competition Bureau will remain skeptical of efficiency claims. But if those efficiency claims (i) are relevant to competition in the markets about which the Bureau has concerns (that is, the efficiencies are "in market" and, for example, they lower the merged firm's marginal cost of production in that market compared to the status quo), (ii) clearly arise as a result of the merger and are not otherwise obtainable, (iii) can be independently verified and quantified, and (iv) do not arise merely as a result of a transfer of wealth from the merged entity's trading partners (e.g., lower prices from a supplier due to increased bargaining power), then the Bureau would be foolish to ignore those claims.

New Standards for Merger Remedies, and the Impact on Negotiating Remedies and Litigating the Fix

Previously, Canadian merger control laws provided little statutory guidance about remedies. However, in an early case, the Supreme Court of Canada ruled that because mergers could only be prohibited if they prevented or lessened competition substantially, merger remedies that restored competition but that still prevented or lessened competition to a degree that was not substantial would be accepted.[28] This differed from the standard for merger remedies in the United States, where merger remedies must preserve competition and maintain or restore the pre-merger level of competitive intensity.[29] Recently, district courts in the US have engaged in the same reasoning as the Supreme Court of Canada—that is, speculating that because only mergers that lessen competition substantially can be prohibited, merger remedies should be accepted if they only lessen

[26] *See U.S. Merger Guidelines*, *supra* n. 12, at § 3.3.

[27] *See* Commissioner of Competition v. Secure Energy Services Inc., 2023 Comp Trib 2, ¶ 492 (Can.).

[28] Director of Investigation and Research v. Southam, [1997] 1 SCR 748, ¶ 85 (Can.).

[29] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

competition to a degree that is not substantial.[30] Despite this budding convergence among courts on both sides of the border, Parliament's amendments overturn the Supreme Court of Canada's early decision and provide that to be acceptable a remedy must "preserve" or "restore" competition to the level "that would have prevailed but for the merger."

In many cases, there may not be a meaningful difference between a remedy that preserves or restores competition to the level that would have prevailed but for the merger (the new standard), and a remedy that would restore competition to the level that it can no longer be said to have been lessened substantially (the old standard). However, there is a subset of cases where the revisions are likely to require the divestiture of different or additional assets. And there is a further subset of cases where the ancillary aspects of a remedy (e.g., certain provisions concerning the implementation) are likely to be more burdensome as a result of the amendments.

For example, in the past practitioners have often proposed the sale of the merging parties' less desirable assets as a remedy to the Competition Bureau's concerns about competition in a market. The amendments may give the Bureau greater bargaining power to demand that the merging parties' more desirable assets be divested instead, because a new entrant purchaser is more likely to be an effective competitor if it can utilize the more desirable set of assets. By further example, in the past the Bureau commonly accepted post-closing divestiture processes. In some cases, this resulted in a failed remedy process, or long delays in the entry of new competitors.[31] The amendments may give the Bureau greater bargaining power to demand "fix-it-first remedies," requiring that remedies be completed prior to the closing of the merging parties' deal.

Given the Competition Bureau's increased bargaining power in remedy negotiations, practitioners should invest more effort in support of their advocacy for the sufficiency of a remedy. Among other things, practitioners should give consideration to giving the Bureau more extensive information about operational aspects of the assets to be divested, including detailed information about the divested asset's suppliers. In addition, practitioners should give consideration to how prospective purchasers of divested assets will be presented, including ensuring that prospective purchasers have sophisticated business plans that can be promptly provided to the Bureau. All of this may have the effect of extending the time required for the Bureau's review, and may result in the Bureau seeking a new or extended timing agreement to evaluate a remedy proposal.

Another implication of the new remedy standard is that standalone behavioral remedies are likely to become even more infrequent. The Competition Bureau's long-standing policy has been that "structural remedies are typically more effective than behavioral remedies," and that as a result the Bureau "prefer[s] structural remedies over behavioral remedies."[32] There may be few mergers where competition is capable of being permanently preserved or restored through a standalone behavioral remedy. Many standalone behavioral remedies are intended to facilitate entry of a new competitor (e.g., by offering to supply a key input); such remedies necessarily acknowledge that competition has been changed as a result of a merger, and would be easily

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[30] United States v. UnitedHealth Group. Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022) ("By requiring that UHG prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7.").

[31] *See* Commissioner of Competition v. BCE Inc., CT-2017-007 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462485/index.do (including the extended timescale necessary for the new entrant to establish its business, and its subsequent exit from the market).

[32] *See* Competition Bureau, *Information Bulletin on Merger Remedies in Canada* ¶ 10 (Sept. 22, 2006), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/information-bulletin-merger-remedies-canada.

rejected by the Bureau.[33] Other examples of standalone behavioral remedies involve firewalls; the need for such firewalls implicitly acknowledges that competitively sensitive information will not be segregated post-merger in the way that it was pre-merger.[34] Practitioners contemplating offering a standalone behavioral remedy should expect even more substantial skepticism from the Bureau, and as a result extensive evidence about the legal and competitive adequacy of the proposal will be required of practitioners.

Even greater legal uncertainty exists for cases where merging parties attempt to "litigate the fix"—that is, satisfy the Competition Tribunal that a remedy they have proposed is sufficient, and the deal should not be enjoined.

First, there is an ongoing legal debate whether a proposed divestiture in litigation constitutes a "remedy" (in the sense that it is presented in answer to the Competition Bureau's concerns about competition), or is instead part of the change to market structure contemplated by the proposed deal.[35] To the extent the Competition Tribunal accepts that a proposed divestiture is part and parcel of the originally proposed merger (and the divestiture will be implemented without the order of the Tribunal), there is a good argument that a proposed divestiture need not preserve or restore competition to the level that would prevail but for the proposed deal. By contrast, if the proposed divestiture is not part and parcel of the originally proposed deal, merging parties may find themselves having to satisfy a higher legal standard in order to successfully "litigate the fix."

Second, since the amendments establish a rebuttable presumption of illegality, merging parties whose proposed divestiture is treated as a "remedy" face the risk of having to prove as a matter of law that the remedy restores the level of competition that would prevail but for the merger. By contrast, if the proposed divestiture is treated as part of the originally proposed deal and the effect of the remedy ensures the merging parties market share and HHI levels are below the thresholds for presumed illegality, the Competition Bureau's burden of proof will be substantially harder to discharge.

Practitioners planning to "litigate the fix" should therefore take significant care to put themselves on the advantageous side of these legal questions.

Practitioners planning to "litigate the fix" should therefore take significant care to put themselves on the advantageous side of these legal questions. Among other things, a remedy should be proposed as early as possible prior to the commencement of litigation, with as much detail settled with a prospective purchaser (e.g., transaction and transitional services agreements). One way practitioners may be able to accomplish this objective is to take advantage of timing agreements. By giving the Competition Bureau additional time to conduct its review (and delaying the Bureau's decision to commence litigation), practitioners may be able to accomplish their objective of refining the details of a proposed remedy. Thus, the strategic implications of timing agreements can cut in multiple ways, depending on the circumstances of an individual case. Another way practitioners may be able to accomplish this objective is by contractually linking an original deal and a divestiture—for example, making them cross-conditional in certain ways, so that there is a legal obligation to implement the divestiture without the need for an order of the Tribunal.

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[33] *See*, *e.g.*, Commissioner of Competition v. Trilogy Retail Enterprises, 2001 Comp Trib 21 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464595/index.do.

[34] *See*, *e.g.*, Commissioner of Competition v. The Coca-Cola Company, 2010 Comp Trib 9 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463530/index.do.

[35] *See* Commissioner v. Rogers Communications Inc., 2023 Comp Trib 1, ¶¶ 107-124 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521175/index.do.

The Competition Bureau is applying an increasing degree of scrutiny to proposed mergers, and the amendments assist the Bureau's efforts by: requiring the notification of more mergers; making the substance and process of litigation easier for the Bureau; potentially eliminating (or otherwise significantly narrowing) the relevance of efficiencies evidence; and raising remedy standards. Despite these once-in-a-generation changes to Canada's merger control laws, opportunities continue to exist for practitioners to provide valuable assistance to merging companies. The utilization of strategies described in this article—as well as strategies that emerge in cases to be litigated—may create new possibilities to help merging companies successfully navigate the challenges of merger review in Canada. ●