THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

Submission to the Competition Bureau

Re: Information Bulletin on Merger Remedies in Canada

January 2006

The Voice of Canadian Business ™
Le porte-parole des entreprises canadiennes MD

SUBMISSION CONCERNING THE INFORMATION BULLETIN ON MERGER REMEDIES IN CANADA

On behalf of the Canadian Chamber of Commerce, we are pleased to provide comments on the Competition Bureau's draft Information Bulletin on Merger Remedies in Canada. The Canadian Chamber of Commerce is Canada's largest and most representative business association. It speaks for 170,000 members in over 350 local chambers of commerce. Our mission is to foster a strong, competitive, and profitable economic environment that benefits business and all Canadians. In that context, we offer the comments below.

Before discussing our specific comments, we note with appreciation the Bureau's efforts at increasing transparency in merger review, not only with respect to this Draft Bulletin but also through the issuance of information notices and backgrounders explaining decisions in particular cases. It is critical to their planning that businesses understand the legal landscape to the greatest extent possible, particularly in areas such as mergers. We support the efficient and timely review of mergers and a non-adversarial approach to resolving concerns. In this regard, we were pleased to note that the presumptive remedy in a section 104 injunction hearing is a hold separate, pending the outcome of litigation and that the Bureau prefers to negotiate, rather than litigate (Para. 4) resolutions to issues arising in merger cases.

The Chamber appreciates the Bureau's efforts to provide guidance on the objective of remedial action and the general principles applied by the Bureau when it seeks remedies. However, the Bulletin's preface advises that "While a remedy must be tailored to the specific facts and circumstances of a case, such principles are essential elements that will be taken into account in all cases where remedial action is required." It is essential that these principles not overstate the law, for instance by casting Bureau enforcement preferences as merger law requirements.

We are also very pleased to see the extensive discussion on the framework that will be employed in multi-jurisdictional mergers, which we hope will reduce the cost and other burdens imposed by multiple reviews as well as the potential for divergent remedies in a particular case. We urge the Commissioner to continue to take a strong public position on the benefits of international cooperation and the application of comity principles in merger reviews.

1. No Discussion of Efficiencies Defence

The Chamber has actively endorsed initiatives to increase productivity and generate cost savings for Canadian businesses through greater efficiencies. In our submission to the Public Policy Forum Regarding Proposals To Amend The *Competition Act*, the Chamber noted that the exploitation of efficiencies is a significant motivation for entering into mergers and strategic alliances. The Canadian Chamber has also stated previously that efficiency enhancement as defined in the *Superior Propane* decision should be a

complete defense to any merger. We were surprised to see that the Draft Bulletin gives no consideration at all to the implications of the statutory efficiencies defence set out in section 96 of the *Competition Act*.

The Bulletin should reflect that: (i) as a matter of law, no remedy is to be imposed where the efficiencies from the merger are greater than and offset its anticompetitive effects [1]; and (ii) the efficiencies defence has to be properly taken into account in fashioning merger remedies, consistent with ¶ 8.6 of the Bureau's *Merger Enforcement Guidelines*, in which the Bureau acknowledges that it will assess efficiencies as part of its merger review process and the law emanating from the Federal Court of Appeal's decision in *Superior Propane.*

2. Legal Test

There are a few examples in the draft Remedies Bulletin where the Bureau seems to advocate for a legal test that goes beyond merely requiring that the "substantiality" aspect of an anti-competitive merger be eliminated. Restoring competition to the pre-merger state or preserving competition are not the goals of merger remedies as a matter law in Canada.

3. No Minimum Price Proposal

The Draft Bulletin provides that the remedy package is to be offered at no minimum price during the divestment trustee period. We have concerns that the existence of a no minimum price policy encourages potential purchasers to withhold offers in an attempt to potentially secure an unwarranted price reduction (or crown jewel) to a remedy package, and thus could unfairly tip the balance against the merging party. More broadly, we are concerned that this could place a damper on merger activity by generating too much uncertainty for the acquiror. In any event, the determination of whether a minimum price is required should be made on a case-by-case basis, with a presumption against a no-minimum price term.

4. Insufficient Recognition of Role of Behavioural Remedies in Canada

In a small market economy such as Canada, where higher concentration is unavoidable and efficiencies desirable, a divestiture remedy may not be the appropriate means of addressing potential market power issues arising from a proposed merger. A more effective tool may be a behavioural remedy that permits the realisation of the projected efficiencies but constrains the future exercise of market power.

The Competition Bureau has accepted behavioural remedies to resolve competition concerns in numerous cases, either through undertakings or consent orders. Behavioural remedies (e.g. supply commitments[2]) provide considerably more flexibility and in many

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[1] See *Commissioner of Competition v. Superior Propane (*Fed. C.A.) [2003] F.C.J. No. 151, (Tribunal finding that efficiencies from anticompetitive merger were greater than its anticompetitive effects and allowing the merger to proceed without any remedies upheld by Federal Court of Appeal).

[2] For example, the Director permitted the merger of Molson Companies Ltd. and Elders IXL Ltd. (the parent of Carling Breweries), for a number of reasons including the substantial efficiency gains expected. To address competition concerns in the Quebec market where Molson would have a

cases they preserve efficiency benefits, where structural remedies (e.g. divestitures) will not do so. If behavioural remedies are not acceptable options to address potential competition concerns with a merger, one is left with one of two extremes: (i) allow a potentially anti-competitive merger to proceed; or (ii) prohibit a merger and require divestiture. Divestitures are less than an ideal remedy in a number of cases, such as:

a. Where there is no competitively preferable interested purchaser and the vendor is not interested in continuing the business it has contracted to sell;
b. The transaction has closed and the purchaser has "scrambled the eggs";
c. The anti-competitive effects of the merger barely outweigh the efficiency gains; and
d. In rapidly changing markets.

The Draft Bulletin suggests that the Bureau evaluate the viability of divested assets and the vigour of competitors. These matters must be looked at in context. For example, the divested assets need not be viable in and of themselves; however, they must be viable when held by the competitor to whom they are to be divested.

The Canadian Bureau has used behavioural remedies with success in a number of merger cases, and should be open to the full range of remedies in any particular case. The Draft Bulletin understates the role such remedies have played and can play in a country like Canada, which due to its size may have fewer potential buyers and foreign ownership restrictions in some sectors.

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particularly strong position, Molson was required to guarantee access to its distribution system for local and potential foreign competitors (excluding Labatt's) on a non-profit, fee-for-service basis.