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SENT BY EMAIL AND COURIER

Mr. Robert Lancop
Assistant Deputy Commissioner
Mergers Branch
Competition Bureau
Place du Portage 1
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Mr. Lancop:

Comments on the Draft Information Bulletin on Merger Remedies in Canada

Introduction

These comments are being submitted on behalf of Osler, Hoskin & Harcourt LLP. We welcome the opportunity to respond to the request for comments on the draft Information Bulletin on *Merger Remedies in Canada* (the "Draft Bulletin"), and we greatly appreciate having been provided with additional time to do so.

We applaud the Competition Bureau (the "Bureau") for taking the initiative to increase the transparency and predictability of its administration and enforcement of Part VIII of the *Competition Act* (the "Act") by issuing an information bulletin describing the general principles that typically will be followed by the Bureau when formulating remedies to prevent any substantial prevention or lessening of competition that the Commissioner of Competition (the "Commissioner") believes is likely to result from a merger, or has resulted from a completed merger.

For the most part, the matters addressed in the Draft Bulletin are the ones that are of greatest importance to our clients, and many of the principles that are set forth therein are reasonable and accurately reflect the jurisprudence, where the Competition Tribunal (the "Tribunal") or the courts have addressed the issue in question.

For example, we welcome the explicit recognition of the general principle that the objective of a remedy designed to address a substantial lessening of competition "is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" (paragraph 2). However, we submit that adopting, as a proxy for this principle, the language "restoring or preserving competition" may

undermine the clarity of the general principle, by leaving the impression that remedies must restore competition to the pre-merger level, or preserve competition at such level. Particularly given that this has been an issue in the past, we recommend that references to restoring or preserving competition be avoided in the final bulletin (the "Final Bulletin").

We also welcome the recognition that "combination remedies" and behavioural remedies can be effective in ensuring that competition is not prevented or lessened substantially. However, we submit that the test set forth in paragraph 47 for behavioural remedies is too strict and is likely to result in sub-optimal remedies, from the perspective of consumers and society as a whole, in certain types of situations. For example, as reflected in the U.S. experience, behavioural remedies may be more efficient than, and in any event preferable to, structural remedies in the area of vertical mergers.[1] Our experience has shown the same to be true in relation to partially regulated industries.[2] To provide more flexibility for merging parties to propose, and for Bureau staff to consider, an appropriate range of potential remedies in any given situation, we submit that (i) the Bureau should reconsider the requirement that there be "no viable structural remedy" before a behavioural remedy will be accepted; and (ii) vertical mergers, horizontal mergers giving rise to vertical concerns[3] and partially regulated industries should be recognized as exceptions to the principle that "stand alone behavioural remedies are rarely accepted by the Bureau" (paragraph 46).

We further suggest that the Final Bulletin should explicitly recognize the important principle that where two or more remedies likely would be effective in ensuring that competition is not substantially prevented or lessened, the remedy that will be selected is the one which has the least adverse impact on (i) the efficiencies likely to be generated by the proposed transaction, and (ii) the interests of the merging parties.

We applaud the Bureau for addressing merging parties' concerns regarding confidentiality by including a section in the Draft Bulletin on confidential schedules. As recognized in the Draft Bulletin, a delicate balance must be struck between transparency

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1 See the cases discussed in Howard Morse, "Vertical Mergers: Recent Learning", 53 *The Business Lawyer* 1217 (1998) available at http://www.drinkerbiddle.com/Publications/List.aspx?MainAuthors=73686448-ed06-42c0-ad7e-71de3f8985ad

2 Consider, for example, the remedy accepted by the Bureau in connection with the *CN/BC Rail* transaction (available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=256&lg=e).

3 Consider, for example, the remedies accepted in connection with the *Coles/SmithBooks* transaction, which are described in the Annual Report of the Director of Investigation and Research for the year ended March 31, 1995, at 26-27 (removal of restrictive covenants); and the *Molson/Carling* transaction, which are described in the Annual Report of the Director of Investigation and Research for the year ended March 31, 1990, at 14-15 (access to Molson's distribution system in Quebec).

and placing divesting parties on a level playing field with potential purchasers. Bureau staff in the past have been appropriately sensitive to the problems associated with disclosing to potential purchasers of assets to be divested certain information in a consent agreement or undertakings, such as information relating to (i) the period within which assets must be divested by the merged entity or the divestiture trustee; (ii) the content of any "crown jewel" provisions; and even (iii) the fact that crown jewel provisions exist. Particularly where there is likely to be a very limited number of potential purchasers, even disclosure of the fact that crown jewel provisions exist can substantially reduce the prospects for the merging parties to reach an acceptable agreement (or indeed any agreement at all) for the sale of the initial business or assets to be divested. This is because the very limited number of potential purchasers will likely have a very good idea as to the nature of the "crown jewel" assets, and in any event will likely recognize that it may be in every potential purchaser's interest to have an opportunity to purchase the "crown jewel" assets, as opposed to the initial package of assets.

As the Bureau is aware, crown jewel provisions have long been the subject of debate in the U.S., where they are used by the Federal Trade Commission and "strongly disfavored" by the Antitrust Division of the Department of Justice.[4] In determining the appropriate policy to adopt in Canada with respect to crown jewel provisions, and indeed with respect to remedies in general, we submit that the Commissioner have due regard to the important interplay between (i) crown jewel provisions; (ii) a "no minimum price" policy; (iii) the duration of the initial and trustee divestiture periods; (iv) any pressures that may be imposed on the merging parties by the Bureau and/or the dynamics of the marketplace to negotiate a "fix-it-first" remedy; and (v) the number of potential purchasers that realistically are likely to exist in a given case. The latter consideration is particularly important in Canada, where there often are fewer potential financial and strategic purchasers than in the U.S. This can be attributable to one or more of a variety of factors, including: foreign ownership restrictions, the fact that the Bureau may only approve a very small number of potential purchasers (as was the case in a recent matter), and the fact that our markets are "thinner" and potential foreign purchasers are unfamiliar with the Canadian business or regulatory environment and therefore are sometimes hesitant to enter Canada.

Given that the number of potential purchasers that may exist and the leverage that they may have to "game" the process (in order to negotiate an unfairly low price or other extremely favourable terms) will differ from case to case, we submit that the Bureau ought to adopt a more flexible policy which allows for greater trade-offs to be made between the five above-mentioned considerations. For example, in cases where there is a small number of potential purchasers, greater flexibility would be appropriate with

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4 See U.S. Department of Justice, Antitrust Division, *Policy Guide to Merger Remedies* (October 2004), at 37.

respect to one or more of the four other considerations. In other cases, shorter divestiture periods may sufficiently reduce the perceived risk that the merged entity will be unable to sell the initial package of assets to be divested, to preclude the need for crown jewel provisions.

In any event, we encourage the Bureau to reconsider the position that, in general, "[t]he vendor will have a 3-6 month period to divest the asset package," although "[t]he Bureau may grant a short extension of this period in exceptional circumstances or where the vendor has signed a binding letter of intent with a prospective buyer and closing of the divestiture transaction is clearly imminent" (paragraph 31). This represents an important departure from the Bureau's past practice. Given the acknowledgement later in the Draft Bulletin (paragraph 69) that, in the Bureau's experience, "merged entities generally comply with the terms of negotiated settlements (or divestiture orders in contested cases)", we question the basis for the proposed 3-6 months rule. As Bureau staff are well aware, there have been very good reasons why divestitures in the past have taken longer than 3-6 months. To the extent that these reasons have been recognized and accepted by Bureau staff, it is difficult to understand why the Bureau now proposes to adopt a more strict and arbitrary approach, particularly given the fact that the pool of potential purchasers often is very limited in Canada.

We commend the Bureau for addressing the issue of international coordination and cooperation in Part VII of the Draft Bulletin. It is very important to our clients that the Bureau coordinate with foreign competition agencies "when a worldwide or multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar or related to those that are likely to result in other jurisdictions". We particularly welcome the statement that the Bureau "may determine that action beyond what will be taken by foreign jurisdictions is not required" (paragraph 75). We encourage the Final Bulletin to state the general principle, recognized by the Commissioner in June of last year, that when a multi-jurisdictional merger has "a significantly greater nexus with [another] jurisdiction and our concerns will be dealt with" abroad, the Bureau will act with "moderation and constraint".[5] In this regard, it would be helpful to go further and state as a general principle that, as in other cases in the past, the Bureau will likely "await the outcome of the case"[6] in the foreign jurisdiction(s) with which the transaction has a greater nexus before determining what, if any, additional remedy may be necessary to address any competition concerns that may have been identified in Canada.

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[5] Sheridan Scott, "C is for Competition: How we get things done in a globalized business world", remarks to the Insight conference, Montreal, June 17, 2005 (available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1867&lg=e).

[6] *Ibid.*

While the Draft Bulletin addresses most of the general topics that are of interest to our clients in the area of merger remedies, we strongly encourage the Bureau to address the remedies of dissolution (paragraph 92(1)(e)(i)) and temporary injunctions (s. 100). Although these remedies are very rarely invoked, they often are the subject of significant discussion and concern in the merger planning process and beyond. For vendors, the risk that a transaction may be dissolved many months or even years after a transaction has been completed can be an extremely important factor in deciding whether to pursue a sale to a particular purchaser, even when such risk is small. To the extent that it is difficult to imagine why the Commissioner might want to preserve her ability to seek dissolution in the vast majority of cases, a bulletin on merger remedies is the appropriate place to clarify once and for all that this remedy will only be preserved[7] where there is a real and substantial risk that other remedies will not be effective, and dissolution will be sought only where other effective remedies do not, or no longer, exist.

As to preliminary injunctions, there continues to be significant uncertainty regarding when the Commissioner might seek an order under s. 100 of the Act. To the extent that it is reasonable to expect that an order would not be sought in "bricks and mortar" and other situations in which there is no risk of the proverbial "scrambling of the eggs", we submit that this ought to be made clear in the Final Bulletin. In the interest of transparency and predictability, we encourage the Bureau to share with the public its interpretation of the meaning of the words "take an action that would substantially impair the ability of the tribunal to remedy the effect of the proposed merger on competition ... because that action would be difficult to reverse", which appear in paragraph 100(1)(a).

Finally, to the extent that the Bureau's forthcoming study of past merger cases may well yield important insights that have relevance for aspects of the Bureau's policy regarding remedies, we suggest that consideration be given to postponing the Final Bulletin until that study has been completed and the Bureau has had time to assess its findings and implications.

The more specific comments provided below follow the relevant headings in the Draft Bulletin.

1. Preface

We suggest that the Bureau clarify in the Preface to the Final Bulletin that the document sets forth the general approach taken to remedies and is not a binding statement of the position that the Bureau will take in a particular situation. In this regard, we commend the

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[7] In a number of cases in the past, the Bureau has sought to preserve all of the potential remedies available to the Commissioner, where a merger has been permitted to close prior to a divestiture or other remedy being effected.

language in the Forward to the *Merger Enforcement Guidelines*, which states that the "specific facts of a case, as well as the nature of the information and data available, will determine how the Bureau" proceeds in a particular matter.

2. Full versus Partial Divestitures

Paragraph 13 of the Draft Bulletin states that "in certain circumstances it may be necessary to include assets outside the relevant market" in a divestiture package. It is suggested that this could occur "when economies of scale or scope are important or when the assets related to the relevant market do not comprise a stand-alone business". We encourage the Bureau to provide greater guidance in the Final Bulletin regarding this important matter, as business persons require greater certainty and predictability with respect to the circumstances in which they may be required to expand a potential divestiture package beyond assets that are used to supply the relevant market in which a likely substantial prevention or lessening of competition has been or may be found to exist.

3. Hold-Separate Arrangements

We encourage the Bureau to revisit and elaborate upon its position with respect to the circumstances in which hold-separate provisions will be required to be included in a remedial package. Paragraph 20 of the Draft Bulletin begins by stating that the Bureau "may require that hold-separate provisions apply to assets or businesses beyond those that are to be divested pursuant to a consent agreement". However, it then states that it is only in "limited cases", such as those involving the divestiture of a stand-alone business, that the Bureau will confine the hold-separate arrangement to "the portions of the merger that are likely to result in anti-competitive effects". We suggest that the principle be phrased in more positive terms, such as: "The Bureau typically will limit hold-separate provisions to the portions of the merger that are likely to result in anti-competitive effects". The Final Bulletin should then identify the exceptions to this general rule and explain in greater detail the principal parameters of hold-separate arrangements that the Bureau likely will seek to have addressed in a remedial package.

We also encourage the Bureau to revisit its position regarding when alternatives to hold-separate provisions may be accepted. The Draft Bulletin suggests that such alternatives will only be permitted "in very limited circumstances", and that one of the requirements will be that "the assets/businesses to be divested cannot operate on a stand-alone basis but are discretely identifiable such that it would not be difficult to 'unscramble the eggs'" (paragraph 21). Based on our experience, this is a more strict position than what has been reflected in the Bureau's historical practice. Once again, we encourage the Bureau to retain greater flexibility on this issue in the Final Bulletin. We submit that there should not be a strict requirement that a hold-separate arrangement be put in place, so long as

there is de minimus risk that (i) competitively sensitive information could be disclosed; or (ii) the value or competitiveness of the business could be diminished.

4. Fix-it-First Remedies

The Draft Bulletin states that the Bureau "strongly prefers fix-it-first solutions" (paragraph 26). This is understandable. However, to the extent that the tenor of the discussion in paragraphs 25-27 leaves the impression that fix-it-first remedies are anything but exceptional, it is somewhat misleading. We suggest that this section be recast in the Final Bulletin to reflect a recognition that fix-it-first remedies often are not possible or practical.

Paragraph 27 also suggests that the Bureau likely will require a consent agreement to be registered when a divestiture will occur post-closing. Given the nature of the issues that have been raised by a recent challenge to a consent agreement,[8] merging parties are likely going to have a very strong aversion to having a negotiated settlement embodied in a consent agreement, as opposed to a package of undertakings. We submit that at a minimum, the nature of these concerns, and their implications for the willingness of merging parties to reach a negotiated settlement with the Bureau, are such that the Bureau should seriously consider maintaining its past practice of requiring, as part of a package of negotiated undertakings, and in lieu of an "up front" consent agreement, an agreement to put a remedial package before the Tribunal on consent should certain events not occur within a specified timeframe or in accordance with other particular terms.

This raises the related issue of when consent agreements ordinarily should be registered. The Draft Bulletin is silent on this. In the past, there have been situations in which the Bureau has expressed a preference for registering a consent agreement upon the conclusion of its review of a merger, notwithstanding that this may occur a significant amount of time in advance of when the merger is scheduled to close. We encourage the Bureau to maintain the flexibility to defer the point in time at which a consent agreement must be registered, to accommodate potential concerns that may arise where challenges to the consent agreement, particularly by competitors who may have an interest in "gaming" the process, are reasonably foreseeable.

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[8] *Burns Lake Native Development Corporation et al v. Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd..*

5. *Implementing Remedies*

The Bulletin states, at paragraph 50, that the Bureau "will normally require the appointment of an independent third party to monitor compliance with [a] consent agreement" in order to "ensure that the vendor uses its best efforts to fulfill its obligations under the consent agreement." In the past, monitors typically have only been required in connection with hold-separate arrangements. We understand that the U.S. Federal Trade Commission only requires a monitor in relatively narrow circumstances, namely, where "the Commission's order imposes obligations requiring a continuing relationship between the parties and the buyer."[9] We submit that the policy rationale for this approach is sound and ought to be reflected in a more flexible approach in the Final Bulletin.

6. *Trustee Provisions*

Paragraph 59 states: "During the trustee period, the trustee will have the exclusive power and authority to complete the divestiture. The trustee will sell the assets on terms and conditions that are favorable to the vendor at no minimum price." It is unclear what is intended by "on terms and conditions that are favorable to the vendor at no minimum price." We encourage the Bureau to clarify in the Final Bulletin that the divestiture trustee will be obliged to use its best efforts to obtain the most economically advantageous terms for the parties, including price, for the divested business.

We also encourage the Bureau to provide additional detail in the Final Bulletin regarding trustee provisions, specifically in relation to the appointment process and functioning of the trustee.

The Bulletin also ought to address what will occur if the trustee is not able to sell the assets to be divested before the expiry of the trustee divestiture period.

7. *Confidential Schedules*

In addition to the comments on confidentiality that are set forth in the Introduction above, we are concerned with the position taken in paragraph 65 of the Draft Bulletin, which states: "Once the trustee period begins, most terms will be made public, including the time period in which the sale must occur, all crown jewel provisions and the fact that the asset package must be sold at no minimum price."

We submit that it is wholly inappropriate to require "most terms" of the divestiture agreement to be made public once the trustee period begins. Providing potential acquirers with information related to the terms and conditions on which a sale must

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9 *Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*, at 6 (available online at http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm).

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occur, as well as the existence of, and details relating to, crown jewel provisions gives rise to the same types of concerns discussed in the Introduction above regarding potential purchasers' ability to leverage the process to their advantage. Accordingly, we recommend that the Final Bulletin provide more flexibility and recognize that certain provisions in a consent agreement may remain confidential until the divestiture sale is completed.

We also recommend that the Final Bulletin build greater confidentiality protections into its treatment of (i) prospective buyers who sign confidentiality agreements; and (ii) market testing of proposed remedies.

The Draft Bulletin also states that a "template consent agreement" will be included in the Final Bulletin. This template apparently will reflect the "standard guiding principles" to be applied by the Bureau in dealing with merger remedies. To the extent that the template will simply reflect standard guiding principles, as opposed to detailed provisions that will be insisted upon in each case, we believe that the template would make a helpful contribution to promoting greater transparency and predictability. However, if it is contemplated that the template would go beyond articulating standard guiding principles, we would have substantial reservations, because cases tend to be very fact specific and frequently warrant provisions that are tailored to reflect the particular circumstances in question. In short, the Final Bulletin should reflect sufficient flexibility to deal with such circumstances, particularly given the delicate interplay between the various factors described in the Introduction above. Given the importance of the template, we submit that it would be appropriate for the Bureau to provide an opportunity for the public to input into its content, as the European Commission did with respect to its *Best Practices Guidelines for Divestiture Commitments*.

Conclusion

We appreciate the opportunity to submit these comments and hope that they are helpful to the Bureau in preparing the Final Bulletin.

Yours very truly,

Paul Crampton
PC: