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ACC Association of Corporate Counsel

Key Competition/Antitrust Issues in Canada - U.S. Cross-Border Merger Notification and Review

Toronto, Ontario

February 28, 2006

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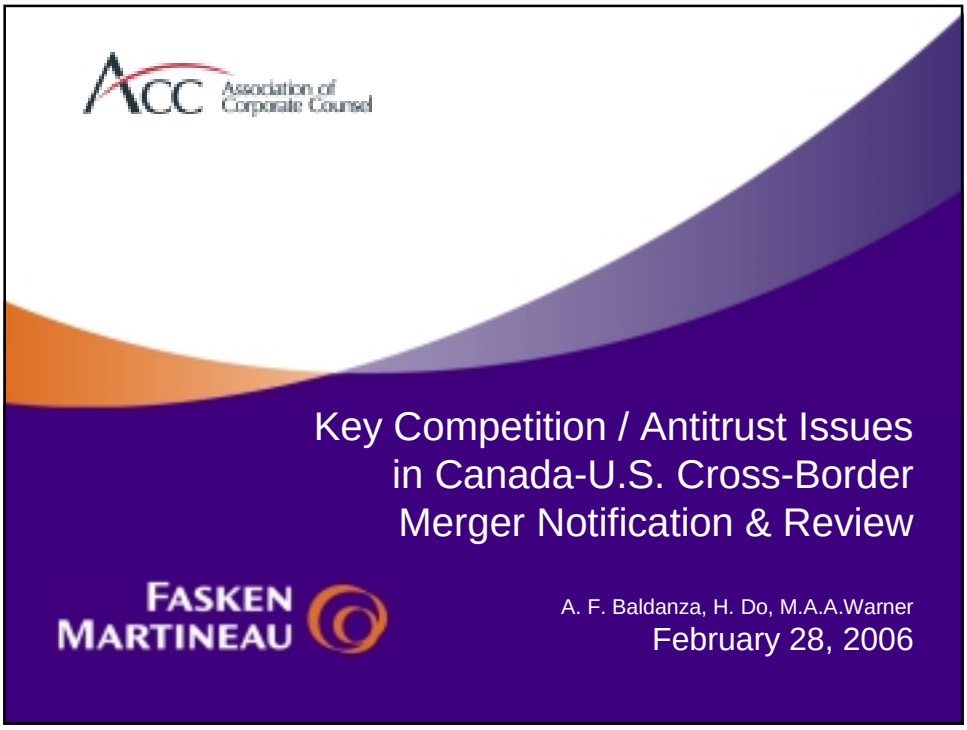
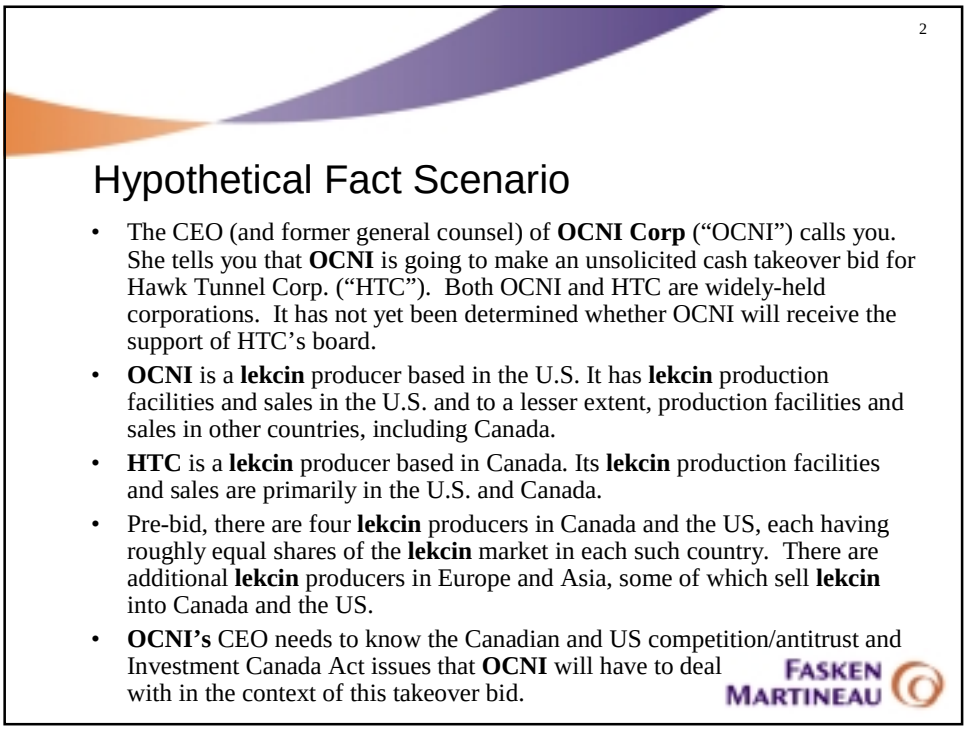
Agenda

12:00 noon	Registration
12:20 p.m.	Introduction and Opening Remarks
12:30 p.m.	Luncheon Program

A discussion of a hypothetical Canada-U.S. cross-border merger involving the CEO of OCNI Corp. ("OCNI"), a non-Canadian company and the Canadian and U.S. Outside Counsel to OCNI, concerning the possible acquisition of Hawk Tunnel Corp. ("HTC"), a company with production facilities and sales primarily in the U.S. and Canada

1:30 p.m.	Question and Answer Session


ACC Association of Corporate Counsel
Key Competition / Antitrust Issues in Canada-U.S. Cross-Border Merger Notification & Review
FASKEN MARTINEAU
A. F. Baldanza, H. Do, M.A.A.Warner
February 28, 2006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Hypothetical Fact Scenario
• The CEO (and former general counsel) of **OCNI Corp** ("OCNI") calls you. She tells you that **OCNI** is going to make an unsolicited cash takeover bid for Hawk Tunnel Corp. ("HTC"). Both OCNI and HTC are widely-held corporations. It has not yet been determined whether OCNI will receive the support of HTC's board.
• **OCNI** is a **lekcin** producer based in the U.S. It has **lekcin** production facilities and sales in the U.S. and to a lesser extent, production facilities and sales in other countries, including Canada.
• **HTC** is a **lekcin** producer based in Canada. Its **lekcin** production facilities and sales are primarily in the U.S. and Canada.
• Pre-bid, there are four **lekcin** producers in Canada and the US, each having roughly equal shares of the **lekcin** market in each such country. There are additional **lekcin** producers in Europe and Asia, some of which sell **lekcin** into Canada and the US.
• **OCNI's** CEO needs to know the Canadian and US competition/antitrust and Investment Canada Act issues that **OCNI** will have to deal with in the context of this takeover bid.
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1. Pre-Merger Notification: Canada

- Notification Thresholds
  - Following types of transactions may be subject to notification:
    - Acquisitions of shares
    - Acquisitions of assets
    - Amalgamations
    - Combinations
    - Acquisitions of interests in combinations
  - Only notifiable if transaction involves an "operating business" and both Party Size and Transaction Size thresholds are exceeded

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1. Pre-Merger Notification: Canada

- Notification Thresholds (cont'd)
  - Party Size Threshold
    - "Parties to the transaction", together with their respective affiliates, have, in the aggregate, Canadian assets or revenues >C$400 million
    - "Parties to the transaction"
      - Share acquisition – acquiror and target corporation
      - Asset acquisition – acquiror and vendor
      - Amalgamation – amalgamating corporations
      - Combination – combining entities
      - Acquisition of interest in combination – likely acquiror and vendor

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1. Pre-Merger Notification: Canada

- Notification Thresholds (cont'd)
  - Transaction Size Threshold
    - Share Acquisition
      - Acquiring > 20% (public corp.) or > 35% (private corp.), or > 50% where 20% and 35% threshold already exceeded, of voting shares of a corporation; and
      - Target corp. has book value of assets in Canada or gross revenues from sales in or from Canada > C$50 million
    - Asset Acquisition
      - Book value of assets in Canada being acquired >C$50 million or generates gross revenues from sales in or from Canada > C$50 million

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1. Pre-Merger Notification: Canada

- Notification Thresholds (cont'd)
  - Transaction Size Threshold (cont'd)
    - There are also transaction size thresholds for amalgamations, combinations and acquisitions of interests in combinations
- Exemptions
  - e.g., affiliate transactions, underwritings, certain securitization transactions, transactions where an Advance Ruling Certificate ("ARC") has been issued

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1. Pre-Merger Notification: Canada

- Short Form vs. Long Form
  - Obligation to file is on all parties to the transaction
  - Long form significantly more onerous
  - Special rule requiring filing by target corp. in unsolicited bid context

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1. Pre-Merger Notification: Canada

- Competitive Impact Submission (CIS)
  - Practice and expectation is to submit CIS to guide the analysis of the Competition Bureau ("Bureau")
- ARC
  - Parties will also often request an ARC as an alternative to or in addition to filing a notification
- Statutory Waiting Periods
  - 14 calendar days – short form
  - 42 calendar days – long form
  - start when all parties have filed complete notifications, except for unsolicited bids where waiting periods start with complete filing by the acquiror

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1. Pre-Merger Notification: Canada

- Service Standards
  - Separate and apart from the legislated waiting periods, the Bureau has service standards for how long it will take to review a transaction:
    - Non-Complex – up to 14 days
    - Complex – up to 10 weeks
    - Very Complex – up to 5 months
- Filing Fee
  - C$50,000 (plus GST if also requesting an ARC)
- Decision whether to file a short or long form rests with the parties (or acquiror in unsolicited bid), but risk of conversion to long form if elect short form – consider:
    - Complexity of substantive issues
    - Timing constraints

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1. Pre-Merger Notification: US

- HSR Thresholds
  - Size of Transaction
    - Value of Voting Securities or assets acquired
      - > US $ 226.8 million Automatically notifiable
      - ≤ US $ 56.7 million Exempt

    In between, notification depends on:
  - Size of Person
    - "Ultimate Parent Entity"
    - "Acquired Person" / "Acquiring person"
    - Total assets or net sales (Everywhere)
      - >US $ 11.3 million / > US $113.4 million "rules"

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1. Pre-Merger Notification: US (cont'd)

- HSR Threshold Exemptions
  - Foreign Asset Acquisitions or
  - Acquisitions of Voting Securities of Foreign Issuer
    - Assets located in the U.S. or net sales in or into the U.S. ≤ US $56.7 million or where:
      - the acquired and acquiring persons are both "foreign";
      - aggregate net sales or total assets of both persons in the U.S. is < US $113.4 million; and
      - size of transaction ≤ US $ 226.8 million

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1. Pre-Merger Notification: US (cont'd)

Notification Thresholds	**Filing Fee**
Assets and Voting Securities:	
US $56.7 million to $113.4 million	US $45,000
US $113.4 million to less than US $567 million	US $125,000
US $567 million or more	US $280,000
Additional Thresholds for Voting Securities:	
≥ 25% of issuer valued at more than US $1.134 billion	
≥ 50% of issuer valued at more than US $56.7 million	

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1. Pre-Merger Notification: US (cont'd)

- HSR Form (Selected Elements)
  - Possibility to Request Early Termination
  - Filings required by Acquired and Acquiring Persons
  - Documents to be Included (Item 4(c))
    - "all studies, surveys, analyses and reports which were prepared by or for any officers or directors…for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate…the date of preparation, and the name and title of each individual who prepared each document."
  - NAICS data (Item 5) – at the 6 digit industry code, 7 digit product class and 10 digit product code levels

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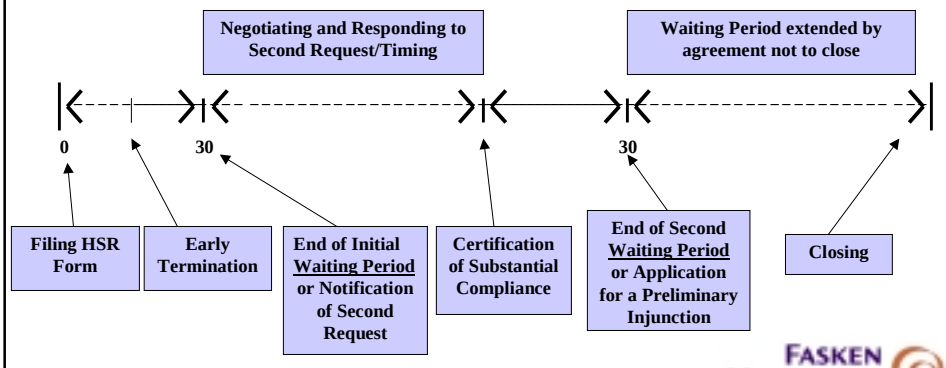
1. Pre-Merger Notification: US (cont'd)

HSR Waiting Periods Timeline (General Rule)



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1. Pre-Merger Notification: US (cont'd)

- HSR Waiting Periods (cont'd)
  - Acquired Person may voluntarily withdraw notification for 48 hours and start a new 30 day waiting period without paying an additional fee, but only once.
- Cash Tender Offers
  - 15 days (Initial Review)
  - 10 days (Second Request)
    - Failure of the target in a tender offer to "substantially comply" does not stop the clock on Second Requests

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1. Pre-Merger Notification: US (cont'd)

- HSR Waiting Periods (cont'd)

(Average Number of Months for Merger Review With Second Requests)

Agency	2000	2005
FTC	11.4	7.8
DOJ	5.4	5.7

- No investigation opened in 82% of reported transactions (02-04)
- 2/3 of transactions processed in fewer than 30 days (02-04)
- 76% of early requests granted, 60% cleared in the first 10 days (04)
- 15% of investigated transactions receive Second Request (04)
- 97.5% of reported transactions do not go to Second Request (04)

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1. Pre-Merger Notification: Other Jurisdictions

- To the extent that any of the parties to a transaction has assets in or sales in, from or into other jurisdictions, should consider whether notifications are required in other jurisdictions
- There are many jurisdictions that now have pre-merger notification regimes, some with very low thresholds
- Where appropriate, try to develop "non-filing" positions

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2. Review of Non-Notifiable Transactions: Canada

- Unless an ARC has been issued, non-notifiable transactions may also be subject of review and challenge by the Commissioner for 3 years from closing
- Not common in Canada
- Ordinarily parties to such transactions will typically not consult the Bureau, except *perhaps* where (I) there are significant issues that will come to Bureau's attention in any event, (II) there are s.45 (conspiracy) concerns, or (III) one or more of the parties requires the certainty that Bureau consultation may offer

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2. Review of Non-Notifiable Transactions: U.S.

- 25% of FTC's merger enforcement actions involved non-reportable transactions in 2003
- Including where post-consummation "unscrambling of the eggs" is involved
  - *Dairy Farmers of America / Southern Belle Dairy*
  - *Aspen Technology / Hyprotech*
  - *Evanston Northwestern Healthcare Corp.*

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2. Failure to File: Canada / U.S.

- U.S.
  - Prosecution of Failures to File
    - *Manulife Financial / John Hancock* – US $1 million fine 2004
    - *Bill Gates/ Republic Services Inc.* – US $ 800,000 fine in 2004
- Canada
  - Injunction by Tribunal (s.100(1)(b))
  - Criminal prosecution (s.65(2))
    - "without good and sufficient cause"
    - offence – fine up to C$50,000
    - no prosecution to date

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2. Information Exchanges and Gun Jumping

- Information Exchanges before Closing should be limited
  - Guidelines should be prepared for employees
- No pre-closing consummation or integration
- Canada – s.45 *Competition Act*
- U.S. – s.1 *Sherman Act* and s.7A(a) of the *HSR Act*
  - *Gemstar-TV Guide International Inc.* – US $ 5.67 million civil fine and injunction (2003)
  - 6 enforcement actions in the last 10 years
  - FTC General Counsel Speech in November 2005 – recognizes potential "chilling effects"

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3. Merger Review: Canada

- Substantive Test: Substantial Lessening or Prevention of Competition
- Review Process:
  - Conducted by Mergers Branch of Bureau
    - Comprised of Merger Notification Unit and 3 Divisions
    - Market research and contacting customers, suppliers, industry associations, regulators, and other stakeholders and interested parties
    - Voluntary requests for info, s.11 orders and/or search warrants
  - Extensive interaction with Bureau (and possibly Department of Justice) through the process

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3. Merger Review in the U.S.: Initial Period

- Substantive Test: Whether the effect "may be substantially to lessen competition, or tend to create a monopoly"
- DOJ or FTC
  - "Clearance" Process
  - Pre-filing Communications / Meetings with Agencies
    - Initiated by Parties
    - Initiated by Agencies
    - Who should attend?
  - Voluntary Submissions / "White Papers"
    - Confidentiality / Privilege Issues
- The States
  - 1987 NAAG Voluntary Pre-Merger Disclosure Compact
  - 1998 Protocol for Joint Federal State Merger Investigations

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3. Merger Review in the U.S.: Initial Waiting Period

- Additional requests to the Parties
- Interviews with Customers, Competitors and Complainants
- Possible contacts with
  - suppliers, former employees or trade associations
  - State and Foreign Antitrust Agencies
  - other Regulatory Agencies

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3. Merger Review in the U.S.: Second Request

- Negotiating Scope and Timing
  - Routinely granted limitations
  - Limitations traded for concessions
- "Quick Look" Procedure
- Phased Production
- "Substantial Compliance"
  - Appeals Process
- CIDs and Subpoenas for Documents
- Meetings with staff
- Staff Recommendations
- "Higher-Level Review"
- Litigation

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3. Merger Review in the U.S.: FTC Second Request Process Reforms (February 2006)

- Custodian Presumption
  - 35 employees
  - Access to the Parties' Employees
  - 30 day advance production or rolling production period
  - Non-application to central files
  - 60 day pre-trial discovery period
- Two-year Relevant Time Period

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4. Confidentiality

- Confidentiality is the norm (subject to exceptions)
  - Canada – s.29 of *Competition Act*
  - U.S. – s.7A(h) of the *HSR Act* and ss. 6(f) and 21 of the *FTC Act*
    - *FOIA* Concerns
    - Other third-parties may attempt discovery directly from the parties involved

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5. Inter-Agreement Enforcement Co-operation and Coordination

- 1995 "Co-operation" Agreement
  - Negative comity
  - Notification
  - Co-operation and co-ordination not mandatory
  - Confidentiality of Information
- 2004 "Positive Comity"Agreement
  - Excludes *HSR Act* pre-merger notification investigations
  - Excludes substantive merger provisions and notifiable transactions provisions of the *Competition Act*

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5. Inter-Agreement Enforcement Co-operation and Coordination: Confidentiality / Waivers

- Increasing coordination among various competition/ antitrust authorities
- Waivers of Confidentiality
  - Competition/antitrust authorities will often ask for waivers to allow the sharing of information to analyze cross-border mergers
  - (See www.internationalcompetitionnetwork.org/NPWaiversFinal/pdf)
- Limited recognition of legal privilege for In-House Counsel and "Foreign" Lawyers in the EU

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6. Role of Private Parties: Canada

- Compel Inquiry by Bureau (s.10(i)(a))
- Input Into Bureau's Analysis
  - Voluntary Submissions
  - S.11 Orders
- Directly Challenging Transaction
  - In practice, unavailable in Canada, although interested private parties may seek intervenor status before the Competition Tribunal if matter proceeds to litigation
  - In theory, could claim damages under ss.36 (based on s.45 contravention) - does not happen in practice
  - S.106 variation orders

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6. Role of Private Parties: U.S.

- Informal Contacts and Requests for Information
- Civil Investigative Demand ("CID")
  - Negotiate scope and timing
  - DOJ - used for production of documents, oral testimony or answers to interrogatories
  - FTC - used for interrogatory requests
- Objecting to a Merger (to the Agencies)
  - *Oracle / People Soft* (2004)
  - *FTC v. Arch Coal* (2004)
  - "antitrust injury"
  - Confidentiality / Privilege

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6. Role of Private Parties: U.S. (cont'd)

- Objections to a Merger (to the Courts)
  - High "Standing" Threshold for damages and injunctions
  - Possible standing for "potential injury from predatory conduct" that may injure consumers
  - Same standard generally applies to "targets"

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7. Disposition and Remedies: Canada

- Vast majority of mergers are reviewed and resolved by the Bureau without resorting to litigation before the Competition Tribunal
- Where you end up depends on whether
  - The merger will give rise to a substantial lessening or prevention of competition
  - Availability of the efficiencies defense
  - The parties are able to negotiate a remedy

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7. Disposition and Remedies: Canada (cont'd)

- Possible Outcomes
  - Formal Clearance
    - ARC
    - No-Action Letter
  - Closing based on expiry of waiting period
    - Interim injunction risk
    - S.92 order risk
  - Consent Agreements/Orders
    - Hold separates
    - Remedies
  - Litigation before Competition Tribunal
    - appeals to the Federal Court of Appeal

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7. Disposition and Remedies: Canada (cont'd)

- Remedies
  - Bureau's Draft Remedies Bulletin (www.competitionbureau.gc.ca / PDFs / info_bulletin_mergerremedies_051017_e.pdf)
  - Structural Remedies (preferred by Bureau)
  - Quasi-structural Remedies
  - Behavioural Remedies
  - Combination Remedies
  - Be prepared to suggest remedies where there are significant competition concerns

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7. Dispositions and Remedies: U.S.

- "Fix it First" Remedies
  - Before Second Request, no consent decree required
  - DOJ is more favorable to this than is the FTC
- "Buyer up Front"
  - Consent decree required
  - FTC requires this, but DOJ has not embraced this
- "Crown Jewel" Provisions
  - DOJ is opposed to them, but the FTC support their use
- "Trustees"
  - Both DOJ/FTC support this

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7. Dispositions and Remedies: U.S. (cont'd)

- Divestitures Timing
  - DOJ - 60-90 days to find candidate, and 30 days to review it
  - FTC – 3-6 months to complete the divestiture
- Consent Orders and *Tunney Act*
  - Public comment
  - Full or limited third-party participation
- Litigation
  - Preliminary Injunction
  - Declaratory Judgment

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8. Selected Additional Considerations

- Where no substantive issues:
  - focus is on timing
  - process is straightforward
  - biggest risk is missing notification obligation
- Where substantive issues exist:
  - Develop a theory of the case and test it against any existing documentation and other facts
  - address completion risk
    - Is it acceptable?
    - How can it be reduced/managed/shared?
    - What is the effect on timing?
    - How does it compare to that of any competing bidders?

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8. Selected Additional Considerations (cont'd)

- When to File Notification?
  - Generally, the sooner the better to get the waiting periods started
- Anticipate Complaints
  - Complaints by customers and suppliers generally carry most weight with agencies
  - Have a communication plan in place to communicate positive message to customers/suppliers and other stakeholders
  - Prepare responses addressing likely competition complaints

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8. Selected Additional Considerations (cont'd)

- Documentation
  - Negotiate appropriate representations, covenants and conditions, in:
    - Purchase Agreement (private deals)
    - Support Agreement and Take-over bid circular (public take-over bid))
    - Arrangement Agreement and Management Proxy Circular (public plan of arrangement)
- Joint Defence Agreement
  - Allows for sharing of sensitive info and cooperation among parties while preserving privilege
- Hostile bidder at informational disadvantage

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9. Investment Canada Act interaction with Competition Act

- Timing Considerations
  - Issue exists where transaction is reviewable under the Investment Canada Act (other than in the case of indirect transactions)
  - 45 day review period - can be extended by Minister of Industry by another 30 days - further extensions with consent of parties.
  - As matter of practice, Minister of Industry will withhold approval until Competition Act clearance has been obtained where the transaction is notifiable under the Competition Act

2005 CBA ANNUAL COMPETITION LAW CONFERENCE
FUNDAMENTALS PANEL ON MERGER NOTIFICATION AND REVIEW

SUBSTANTIVE MERGER REVIEW UNDER THE *COMPETITION ACT*

By: Huy Do[1]

1. General

Pursuant to section 92 of the *Competition Act*[2] (the "**Act**"), the Commissioner of Competition (the "**Commissioner**"), who is the head of the Competition Bureau (the "**Bureau**"), may apply to the Competition Tribunal (the "**Tribunal**") for a remedial order in respect of a merger or proposed merger that substantially prevents or lessens, or is likely to substantially prevent or lessen competition (a "**SPLC**").[3] It is significant to note that only the Commissioner can make an application to the Tribunal under section 92 of the Act. Private parties cannot bring such applications, although they can petition the Commissioner to commence an inquiry, which *may* ultimately lead to an application by the Commissioner to the Tribunal.[4]

This paper sets out the framework for assessing whether or not a "merger" would, or is likely to, result in a SPLC. In addition, this paper outlines the Bureau's review process and discusses issues relating to possible challenges by the Commissioner and pre-merger consummation/integration.

2. Is Your Transaction a 'Merger'

Section 91 of the Act defines a "merger" to mean:

> the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

Essentially, "control" is defined in the Act to mean *de jure* control. Specifically, subsection 2(4) of the Act provides that:

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[1] A partner with Fasken Martineau DuMoulin LLP. The author gratefully acknowledges the significant contributions of Anthony F. Baldanza (partner and Chair of the Antitrust/Competition & Marketing Law Group) and Aaron Stefan (an associate) with the same law firm.

[2] R.S.C. 1985, c. C-34, as amended.

[3] Note that the Commissioner's ability to challenge mergers or proposed mergers pursuant to section 92 of the Act is irrespective of whether or not a merger is subject to the pre-notification provisions under Part IX of the Act.

[4] Pursuant to section 9 of the Act, six persons resident in Canada who are not less than 18 years of age and who are of the opinion that grounds exist for the making of an order under Part VIII (which includes section 92) may apply to the Commissioner for an inquiry into the matter. Upon receipt of an application under section 9 of the Act, the Commissioner is required to "cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts. Note that section 10 of the Act does not explicitly require the Commissioner to make an application under s.92 and, as such, the discretion to bring a section 92 application to the Tribunal rests with the Commissioner.

(a) A corporation is controlled by a person other than Her Majesty[5] if such person holds directly or indirectly more than 50% of the voting securities of the corporation which may be cast to elect directors of the corporation and such voting securities, if exercised, are sufficient to elect a majority of the directors of the corporation; and

(b) A partnership is controlled by a person if the person holds an interest in the partnership that entitles such person to receive more than 50% of the profits of the partnership or more than 50% of the assets on dissolution.[6]

The Act does not provide for a "control" test for entities other than corporations and partnerships. However, in its *Merger Enforcement Guidelines, September 2004*[7] (the "**MEGs**"), the Bureau indicates that it applies a similar analysis (i.e., *de jure* control analysis) in assessing whether or not a transaction results in the establishment or acquisition of control over an unincorporated business.[8]

Unlike the concept of "control", the concept of "a significant interest in the whole or in part of a business" is not defined in the Act. Section 1.5 of the MEGs asserts that since the Act is concerned with the competitive behaviour of firms, a "significant interest in the whole or a part of a business" is held, from a qualitative point of view, when the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour (e.g. decisions relating to pricing, purchasing, distribution, marketing, investment, financing or the licensing of intellectual property rights) of that business or part of a business.

Having regard to the definition of "control" under the Act and Part 1 of the MEGs, the following are guidelines as to transactions that may be captured by the merger provisions of the Act:

(i) in the absence of contrary evidence, all transactions caught by the pre-merger notification provisions of the Act, which includes many of the transactions described below;

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[5] In addition to the *de jure* threshold for control set out in (a) above, a corporation without share capital is considered to be controlled by Her Majesty in right of Canada or a province if a majority of its directors are appointed by: (i) the Governor in Council or the Lieutenant Governor in Council or (ii) a Minister of the Government of Canada or the province.

[6] Note that the disjunctive test for control of partnerships (i.e., holding interests entitling a person to more than 50% of the profits *or* assets upon dissolution) may give rise to a partnership being controlled by two different persons. One person may have an interest in a partnership entitling him/her to more than 50% of the profits, while another person would have an interest in the same partnership entitling him/her to more than 50% of the assets upon dissolution.

[7] The MEGs articulate the enforcement policy of the Commissioner with respect to the substantive merger provisions of the Act. They are available at: http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02934e.html. The MEGs are not law and are not binding on the Commissioner, but are issued to provide general guidance. The final interpretation of the Act rests with the Tribunal and the Courts.

[8] MEGs, at 1.3.

(ii) acquisitions of voting shares of incorporated entities resulting in *de jure* (i.e. more than 50% of the votes that may be cast to elect directors and which are sufficient to elect a majority of directors) or *de facto* control;[9]

(iii) acquisitions of interests in unincorporated entities resulting in *de jure* or *de facto* control;[10]

(iv) amalgamation transactions;

(v) transactions where enough voting shares are acquired to obtain sufficient board seats to materially influence the board or to block special or ordinary resolutions of the corporation;

(vi) a wide range of asset purchase transactions, including the purchase or lease of an unincorporated division, a plant, distribution facilities, a retail outlet, and in certain instances the acquisition of a brand name or intellectual property rights;

(vii) transactions where a party which already holds a significant interest in the whole or a part of a business acquires or establishes a materially greater ability to influence the economic behaviour of the business;

(viii) certain shareholder agreements, management contracts and other contractual arrangements, and loan, supply and distribution arrangements that are not ordinary course transactions and that confer the ability to influence management decisions of another business.[11]

3. Does Your Merger Result in or Is It Likely to Result in a SPLC?

(a) *The Anticompetitive Threshold*

The jurisprudence and the MEGs confirm that the assessment of a SPLC revolves around the concept of market power. As noted in the MEGs, a SPLC "results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power." "Market power" was interpreted by

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[9] Acquisitions of between 10% and 50% of the voting shares may constitute a merger, although a greater interest is generally required to materially influence a private company as compared to a public company. In the absence of other relationships, acquisitions of less than 10% of the voting shares is usually not a merger.

[10] The Commissioner and her staff, the Bureau, consider the nature of the legal and beneficial ownership of unincorporated businesses, voting rights, and rights and obligations with respect to the division of profits and expenses in assessing whether a transaction results in control of an unincorporated business.

[11] Among other things, the Bureau will examine the parties' relationship prior and subsequent to the transaction, the access the acquiror would have to the target's confidential business information, and any evidence of intentions to affect the behaviour of the target or the acquiror. For example, a strategic alliance transaction, which may include a minority equity interest, representation on the board, supply and/or financing arrangements, access to confidential information and/or other features that collectively lead to the conclusion the arrangement changes the economic behaviour of the parties in respect of each other, may constitute a merger.

the Supreme Court of Canada[12], in the context of the conspiracy provision, to mean the ability of the parties to behave relatively independently of the market. As this concept is quite difficult to apply, the Bureau has in the MEGs employed a more practical economics-based definition. It has defined market power as the ability to raise or maintain prices above the competitive level, or the ability to profitably influence other dimensions of competition (such as quality, variety, service, innovation or advertising), for a sustained period of time[13]. According to the MEGs, a SPLC is generally considered "substantial" if prices[14] would be materially greater in a substantial part of the market as a result of the merger and such price increase is not likely to be eliminated by existing or new competitors within two years.[15]

(i) Theories of Competitive Harm: Unilateral and Coordinated Exercises of Market Power

As noted in the MEGs, market power can be exercised *unilaterally* or through *co-ordination* with other competitors[16]. A unilateral exercise of market power arises when a merger enables the merged entity to profitably raise price or profitably influence other dimensions of competition on its own without relying on any accommodating response from its competitors.

Conversely, a co-ordinated exercise of market power arises where a merger reduces competitive vigour in a market due to accommodating responses from other competitors. The MEGs recognize that coordinated behaviour can involve tacit[17] or express understandings on price, service, customers, territories or other dimension of competition.[18] In this regard, the Commissioner would assess whether the merger makes coordinated behaviour among competing firms more likely or effective.

Coordinated exercises of market power tend to be more sustainable where firms are able to achieve co-ordination, monitor compliance, and respond to any deviations from terms of co-ordination, and where coordination will not be threatened by external factors (e.g., reactions of existing or potential competitors not part of the coordinating group or reactions of customers). In assessing the coordinated effects of a proposed merger, the Commissioner will examine factors, such as:

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[12] In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

[13] Sections 2.2 - 2.4 of the MEGs.

[14] Note that the term "price" as used in the MEGs refers to all aspects of a firm's actions that affect the interest of buyers and that references to an increase in price in the MEGs include an increase in the nominal price and a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value. (Section 2.2 of the MEGs.)

[15] Section 2.13 of the MEGs.

[16] Sections 2.5 - 2.7 of the MEGs.

[17] Tacit understands arise from independent but mutual recognition by competitors that under certain conditions they can benefit from competing less aggressively with each other.

[18] Section 5.18 of the MEGs.

- **Market Concentration and Barriers to Entry** - High market concentration[19] and barriers to entry[20] are two necessary (but not sufficient) conditions for a SPLC based on coordinated effects.[21]

- **Homogeneity of Products and Cost Symmetry** - Recognition of the terms of coordination is easier when products are homogeneous and when there are cost symmetries among competing firms. Note that markets characterized by rapid and frequent product innovation are less conducive to coordinated behaviour.[22]

- **Incentives to Deviate from Coordination** - Coordination is less likely when expected profits from deviation from coordination are greater than expected profits from coordination.[23]

- **Market Transparency** - Coordination is easier where there is market transparency with respect to prices, costs, service levels, innovation initiatives, product quality, product choice, etc.[24]

- **Credible Punishment Mechanisms -** The Commissioner would examine the ability of firms to impose credible punishment against other firms who deviate from the terms of coordination (e.g., multi-market exposure among coordinating firms and available excess capacity in the hands of coordinating firms).[25]

- **History of Collusion or Coordination** - A history of collusion or coordination may indicate that firms have successfully overcome the hurdles to effective coordination.[26]

- **Impact of Merger on Maverick**[27] - Mergers that remove a maverick, inhibit a maverick's expansion or entry, or marginalize its competitive significance may increase the likelihood of coordination.

(ii) Lessening or Prevention of Competition

A merger can *lessen* competition from the pre-merger level when the merged entity alone or together with other firms, is able to maintain higher prices (or reduced levels of service, quality,

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[19] See section 3(c) below for a discussion of market share and market concentration, as well as safe-harbour thresholds.

[20] See section 3(d) below for a discussion of barriers to entry.

[21] Section 5.27 of the MEGs.

[22] Section 5.22 of the MEGs.

[23] Section 5.23 of the MEGs.

[24] Section 5.24 of the MEGs.

[25] Section 5.25 of the MEGs. While excess capacity can be used to punish deviating firms, it can also create an incentive to deviate from coordination. As such, it is important to determine who holds the excess capacity and identify their economic incentives.

[26] Section 5.26 of the MEGs.

[27] Sections 5.31 and 5.32 of the MEGS. The MEGs (in footnote 75) define a "maverick" to mean "a firm that has a disproportionate incentive to deviate from coordinated behaviour."

etc.) than would exist in the absence of the merger. Usually, if this occurs, the merger is one that involves direct or existing overlap between the operations of significant competitors. However, a lessening of competition may also occur with vertical mergers that increase barriers to entry or facilitate coordinated behaviour.[28]

Similarly, a *prevention* of competition may occur when a merger enables the merged entity, alone or in concert with other firms, to maintain higher prices (or lower levels of service, quality, etc.) than would exist in the absence of the merger. According to the MEGs, a "prevent" case will typically arise where:

- there is little or no direct overlap between the merging parties' existing businesses and direct competition between the merging parties or parts of their businesses is expected to increase; and
- potential entry or increased competition would have occurred had it not been for the merger.

The MEGs list examples of mergers that may prevent competition[29]:

- the acquisition of an increasingly vigorous competitor or a potential entrant;
- an acquisition, by the market leader, pre-empting the acquisition by another competitor;
- the acquisition of an existing business by a firm that would likely have entered the market in the absence of the merger;
- an acquisition that prevents expansion into new geographic markets;
- an acquisition that prevents pro-competitive effects of new capacity; and
- an acquisition that prevents or limits the introduction of new products.

(b) *Market Definition*

Generally, the SPLC analysis begins with defining the relevant market(s). A relevant product market consists of a given product of the merged entity and close substitutes for it. A relevant geographic market consists of all areas that are regarded as close substitutes by buyers. Hence, market definition is based on substitutability and focuses on demand responses to changes in relative prices. The analysis focuses on what would happen if a "hypothetical monopolist" of a product or in a geographic area, as applicable, were to impose a 5% price increase. If the price increase causes switching to other products or areas (and is thereby made unprofitable) those products or areas are added to the candidate market. This process continues until the hypothetical monopolist can profitably impose and maintain (for a period of one year) the price

[28] Section 2.9 of the MEGs.

[29] Section 2.12 of the MEGs.

increase in the candidate product or geographic market, at which point the market has been defined.[30]

When detailed data on prices and quantities of the relevant products and their close substitutes are available, statistical measures (own-price elasticity, cross-price elasticity, diversion ratios, etc.) are used to define the relevant product markets. Where such data are not available, or to supplement or test such data, indirect evidence of substitutability is employed, including views of buyers and other participants in the market, price relationships, end use, physical and technical characteristics, and a host of other factors.

Similarly, in defining the relevant geographic market(s), reference will be made to data that evidences buyers' willingness to switch their purchases in sufficient quantity from one location to another in response to changes in relative prices. Where such data are not available, or to supplement or test such data, indirect evidence of substitutability is employed, including views of buyers and other participants in the market, price relationships, characteristics of the product, transportation costs, shipment patterns, and other factors.[31]

Market definition is an exceptionally important part of substantive competition analysis and is often determinative of the outcome of such analysis.

(c) *Market Shares and Concentration*

Having defined the relevant market, the market shares of the merging parties and other competitors are examined. Market shares of the merging entities are calculated, typically based on revenues, although volume or units of production, or in some instances, reserves or other indicators of size, may be equally or even more relevant. While market share is an important indicator of market power, market share information in and of itself cannot be determinative as to the likelihood of a SPLC.[32]

In the MEGs, the Commissioner has identified market share thresholds that are unlikely to result in a SPLC. These thresholds are often referred to as "safe harbours". Generally, the Commissioner will not challenge a merger:

- on the basis of a concern related to a unilateral exercise of market power where the market share of the merged entity will be less than 35%; and

- on the basis of a concern related to a coordinated exercise of market power where the market share of the four largest firms (the CR4) post-merger does not reach 65% or the merged entity has less than a 10% market share.[33]

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[30] The discussion in this paper focuses on competitive effects in relation to the merged entity as a seller of products. A similar analysis must be performed in relation to the merged entity as a purchaser of products.

[31] See Part 3 of the MEGs.

[32] Subsection 92(2) provides that "the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share".

[33] Section 4.12 of the MEGs.

Exceeding either or both of the foregoing safe harbours does not, in and of itself, mean that the Bureau will challenge the merger; instead, it indicates that additional analysis (having regard to the evaluative criteria discussed below) will be required by the Commissioner to determine *whether* an SPLC necessitating enforcement action is likely to arise from the merger. Mergers among competitors often involve market shares and concentration outside the safe harbours, and hence, necessitate further analysis on the part of the Bureau.

In the United States and certain other jurisdictions, the Herfindahl Hirschman Index[34] ("**HHI**") is widely employed to assess co-ordinated effects or interdependence concerns. The HHI increases as the number of firms in the market decreases and as the disparity in size between those firms increases. The recent update of the MEGs has acknowledged the usefulness of the HHI, however little guidance has been given on HHI values significant enough to raise concerns in Canada.

(d) *Evaluative Criteria*

The Act expressly states that an SPLC cannot be found to exist merely based upon evidence of concentration or market share. In this regard, section 93 of the Act identifies a non-exhaustive list of factors that the Tribunal (and hence the Bureau) may consider in evaluating whether a merger gives rise to an SPLC. The factors include:

- **the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the merging parties**: The presence and viability of foreign competition to counter the increased market power of the merged entity is examined having regard to factors such as the existence of tariffs, regulations and other impediments for foreign businesses in Canada;

- **whether one of the merging firms can be characterized as a "failing firm"**: Consideration is also given to whether one of the merging entities would fail if the merger were not to occur. A firm's likely failure will influence the determination of whether an SPLC will arise because the loss of the acquired firm as a competitor cannot necessarily be attributed to the merger;

- **the extent to which acceptable substitutes for products supplied by the parties to the merger are or are likely to be available**: The availability of products that are in the same product and geographic market as the products of those supplied by the merging parties will be considered in determining whether consumers have other means of supply;

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[34] The HHI is calculated by squaring the market share of each firm in the relevant market, and then summing the resulting numbers. The HHI can range from a minimum of close to 0 to a maximum of 10,000. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 (900 + 900 + 400 + 400 = 2600). The U.S. Department of Justice considers a result of less than 1,000 to be competitive, a result of 1,000 - 1,800 to be moderately concentrated, and a result of 1,800 or greater to be highly concentrated. Generally, transactions that increase the HHI by more than 100 points in concentrated markets raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. It is likely that considerably higher numbers apply in Canada's smaller, more concentrated economy.

- **the existence of barriers to entry and the effect of the transaction on such barriers**: The Bureau will assess the likelihood of entry in the relevant market within two years on a sufficient scale in response to a material price increase or other change in the relevant market as a result of the merger. Entry can come from a variety of sources, including expansion by firms already in the market, entry by firms on the fringe of the market that have machinery that can be readily converted into producing the relevant products, and firms selling the relevant products in adjacent geographic markets. Other relevant factors include the need to incur sunk costs and regulatory requirements or controls;

- **whether there will be effective competition remaining after the merger**: The collective influence of all sources of competition in the market is assessed to determine whether they will be able to act as a constraining factor against the exercise of market power by the merged entity acting unilaterally or in coordination with other participants in the market;

- **whether the merger or proposed merger will eliminate a vigorous and effective competitor**: Among other things, the acquired firm will be analyzed for any uniquely competitive attributes such as whether it is innovative in some way, is known for aggressive pricing strategies, has a history of not following price leadership, is a disruptive force in an otherwise interdependent environment, offers unique service or warranty benefits or appears to have made impressive gains in market share. Acquisition of a "maverick" by a leading competitor will, all other things being equal, be regarded as more problematic than an acquisition of a less vigorous and effective competitor;[35]

- **the nature and extent of change and innovation in a relevant market**: While change and innovation are considered in relation to other evaluative criteria, a separate analysis is also undertaken with respect to the general impact that change (e.g. technological change) and innovation may have on competition;

- **countervailing market power of buyers**: This factor is not specifically identified in section 93 of the Act, but is frequently considered in merger analysis and now appears in the MEGs. Buyers may constrain the merged entity's market power if, among other things, they can immediately switch to other suppliers, can vertically integrate their operation into the upstream market, and/or if there are potential suppliers not already in the market who may be enticed into entry by orders from buyers switching from the merged entity.

Competitors contemplating a merger should carefully explore the evaluative criteria noted above, and perhaps other factors, to develop facts and arguments as to why an SPLC will not result from the proposed merger.

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[35] Note that, even if the target firm does not meet the criteria of a "failing firm", its financial health and ability to compete going forward, is relevant in assessing whether or not the proposed merger would remove a vigorous and effective competitor.

(e) *Efficiencies*

Even where it is determined that a merger will, or is likely to, result in a SPLC, such merger may nevertheless be allowed to be consumated if it can satisfy the criteria of the efficiencies defence found in section 96 of the Act, which provides:

> (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.
>
> (2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in
>
> (a) a significant increase in the real value of exports; or
>
> (b) a significant substitution of domestic products for imported products.
>
> (3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Section 96 was heavily litigated in the *Superior Propane*[36] case. Both the law and the related enforcement policy in respect of the efficiencies defence are complex, a detailed discussion of which is outside the scope of this paper. Generally speaking, however, application of the efficiencies defence involves the following analysis: (a) identification of the applicable efficiencies; (b) identification of the anti-competitive effects of the merger; and (c) assessment of the trade-off between the efficiencies and anticompetitive effects.

(i) Applicable Efficiencies

The Commissioner will only take into account merger-specific efficiency gains (i.e., efficiency gains that flow from the merger). Generally, merger-specific efficiency gains that are considered by the Commissioner include:

- **Gains in productive efficiency**: Productive efficiencies include product, plant level and multi-plant level cost savings (e.g., cost savings resulting from economies of scale; economies of scope economies of density and reduction of duplicate employees and overhead); savings associated with integrating new activities within the merged

[36] See *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, 2000 Comp. Trib. 16 (original decision); [2001] 3 F.C.A. 185 (first FCA decision); [2002] C.C.T.D. No. 10 (redetermination); 2003 F.C.A. 53 (second FCA decision). The Commissioner chose not to appeal the second FCA decision. While outside the scope of this paper, it should be noted that following *Superior Propane*, various proposals have been put forward to amend s.96. Most recently, the Commissioner has: (a) initiated the public consultations on the topic of efficiencies under Canadian competition law and (b) appointed a panel of experts to prepare a report in respect of same. The expert panel's report is expected imminently.

entity; and savings arising from the transfer of superior production techniques and know-how from one of the merging entities to the other;[37] and

- **Gains in dynamic efficiency**: Dynamic efficiencies include efficiencies attained through the optimal introduction of new products, the development of more efficient production processes and the improvement of product quality or service.[38]

On the other hand, according to the MEGs, certain efficiency gains are not taken into account by the Commissioner in the efficiencies analysis under section 96 of the Act, including:[39]

- **Non-merger-specific efficiency gains** - efficiencies that would likely be attained in any event, absent the merger (e.g., internal growth, merging with a third party, a joint-venture, specialization agreement, or other contractual arrangements);

- **Efficiency gains not affected by order sought** - generally, efficiency gains that would not be affected by the order sought by the Commissioner from the Tribunal (e.g., where the Commissioner seeks from the Tribunal an order requiring a limited divestiture of assets as opposed to an outright prohibition or dissolution of the merger, the Bureau will generally not take into account efficiency gains that are not affected by the divestiture order sought);

- **Redistributive gains** - generally, savings that merely result in the redistribution of wealth (e.g., tax-related saving); and

- **Certain reduction savings** - savings resulting from a reduction of output, service, quality or product choice.

Once applicable efficiency savings have been determined, the integration costs required to achieve such savings (e.g., re-tooling costs, severance costs for redundant employees) must be deducted.[40]

(ii) Anti-competitive Effects of Merger

Contrasted against the efficiency gains, the Commissioner will also assess the anti-competitive effects (both price and non-price effects) of a merger. In terms of price effects of a merger, the MEGs provide that the Bureau will examine both the deadweight loss,[41] as well as any resulting

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[37] Section 8.13 of the MEGs.

[38] Section 8.15 of the MEGs.

[39] Section 8.17 of the MEGs.

[40] Section 8.16 of the MEGs.

[41] Deadweight loss refers to a negative resource allocation effect, which is a reduction in total consumer and producer surplus. Deadweight loss usually includes: (a) losses to consumer surplus resulting from reduction in output due to the merger; (b) losses in producer surplus that arise when market power is being exercised in a relevant market prior to the merger; and (c) losses to consumer and producer surplus anticipated to result in inter-related markets.

redistributive effects (i.e., the wealth transfer from buyers to sellers).[42] With respect to non-price effects, the Bureau will examine the: (a) reduction in service, quality choice; (b) loss of productive efficiency; and (c) loss of dynamic efficiency.[43]

(iii) Trade-Off

The efficiencies defence under section 96 of the Act requires that efficiency gains must "be greater than and offset" the relevant anticompetitive effects of a merger or proposed merger. The MEGs provide that the efficiency gains and anti-competitive effects can have both quantitative and qualitative aspects. The MEGs further provide that there is "currently no statutory basis for assuming any fixed set of weighting between redistributive effects, deadweight losses and efficiency gains"[44] (e.g., whether consumer losses should be attributed more weight than producer losses). Rather, the MEGs indicate that "[s]uch weighting depends on the facts of a particular case."[45]

4. Bureau Review Process

(a) *Classification and Timing*

In addition to the formal waiting periods under the pre-merger notification provisions of the Act, there exist "service standard" periods established by the Bureau in its *Fee and Service Standards Handbook.*[46] The period of time required for the Bureau to review a merger transaction depends upon the classification of the merger as "non-complex", "complex" or "very complex". This classification usually takes place within a few days following the Bureau's receipt of a notification in respect of a proposed merger, although classification can at times take longer.

"Non-complex" mergers are those that are characterized by the absence of substantive competition issues (e.g. where the merging parties are not actual or potential competitors, or where their combined post-merger market share is very low, the market is not concentrated and entry into the relevant market(s) is easy). Such mergers may require up to 14 days of review by the Bureau following its receipt of all required information, including a competitive impact submission.

"Complex" and "very complex" mergers are those that typically involve competitors merging and thus include increasing levels of competitive overlap. Such mergers generally require up to 10 weeks and 5 months, respectively, for review following the Bureau's receipt of all the information it requires to complete its assessment, including a competitive impact submission. Note that the service standard periods are only guidelines and shorter or longer periods may in fact be required.

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[42] Sections 8.22 to 8.24 of the MEGs.

[43] Sections 8.28 to 8.30 of the MEGs.

[44] Section 8.34 of the MEGs.

[45] *Ibid.*

[46] Accessed at: http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02529e.html.

Mergers between significant competitors are likely to be classified as "complex" or "very complex".

(b) *Information Requests*

It is common for the Bureau to request information in addition to that required by pre-merger notification provisions of the Act. These requests are most frequently made in the context of "complex" and "very complex" mergers, and may be submitted orally or in writing and may require sworn responses. In addition, or in the alternative, the Bureau may seek information by way of an order under section 11 of the Act requiring the merging parties to produce records or provide written returns under oath or to attend and be examined under oath by the Commissioner or her representative. Compliance with Bureau information requests and section 11 orders can be extremely burdensome.[47]

5. Challenge by the Commissioner

In cases where a proposed merger raises or may raise substantive concerns, the merging parties are often able to reach a settlement with the Commissioner that will permit the merger to proceed, while addressing the Commissioner's concerns with respect to a SPLC. Such settlements may involve a hold-separate arrangement (discussed below in section 5(c)), the divestiture of assets or the imposition of behaviourial constraints on the merging parties. With the modification of the registered consent agreement provision of the Act (s.105) in 2002,[48] the terms of such settlements are almost always registered as a consent agreement with the Tribunal.

(a) *Section 100 Interim Injunctions*

In the event that parties to a merger propose to complete and implement the merger where the Commissioner determines that she needs more time to analyze the competitive impact of such transaction, the Commissioner may seek the agreement of the parties to delay the closing of the transaction. Alternatively, she may seek an interim injunction from the Tribunal under s.100 of the Act.

The test for a s.100 injunction is:

(b) s.10(1)(b) inquiry is underway and the Bureau needs more time to complete the inquiry; and

(c) absent the injunction, the parties to the transaction are likely to take an action that would substantially impair the Tribunal's ability to remedy the effect of the transaction on competition because such action would be difficult to reverse.

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[47] In theory, the Bureau may also seek to obtain a search warrant pursuant to s.15 of the Act to obtain additional information. However, the author is not aware of any situation where the Bureau sought to obtain information by way of a search warrant for a merger review.

[48] Previously, consent agreements between the Commissioner and merging parties required the approval of the Tribunal. There were instances in which the Tribunal refused to approve the terms of a consent agreement between the Commissioner and the merging parties. However, as a result of the 2002 amendment to the Act, such consent agreements no longer require the approval of the Tribunal. They only need to be registered with the Tribunal to have the effect of a Tribunal order.

Section 100 interim injunctions can be obtained for a period of 30 days, although such period can be extended for an additional 30 days.

(b) *Section 92 Application and Section 104 Injunction*

Where the Commissioner and the merging parties cannot reach a settlement and the Commissioner decides to challenge a proposed transaction under s.92, she may make an application to the Tribunal under section 92 of the Act challenging such transaction. In such circumstances, the Commissioner will also invariably bring an application for an injunction under s.104 of the Act, which may proceed on a contested or consent basis.

Unlike the section 100 injunction, the s.104 injunction is only available where the Commissioner has made an application to the Tribunal under s.92 of the Act challenging a transaction on the basis that it would result, or is likely to result, in a SPLC. Moreover, the test for the injunction under s.104 is more stringent than the test under s.100. Under s.104, the Tribunal may "issue such interim order as it considers appropriate, having regard to the principle ordinarily considered by superior courts when granting interlocutory or injunctive relief." The principles ordinarily considered by superior courts when granting interlocutory or injunctive relief are:

- there is a serious issue to be tried;
- the applicant (i.e., the Commissioner) would suffer irreparable harm in the absence of the injunction (i.e., harm that cannot be adequately compensated for with damages); and
- the balance of convenience favours the granting of such an injunction (i.e., more harm to the petitioning party if the Tribunal does not act than to the responding party if the Tribunal does act).

(c) *Hold Separate Arrangements*

There are two types of interim hold-separate arrangements that are commonly used by the Commissioner and merging parties to allow mergers to proceed while addressing competitive concerns that the Commissioner may have. The first type of interim hold separate arrangement requires that the merging parties hold the assets/businesses being acquired separate from the acquiring party's own assets/businesses pending the Bureau's review and assessment of the proposed merger or pending litigation of the Commissioner's s.92 application before the Tribunal.[49] The second type of interim hold separate arrangement is used where the Commissioner and the merging parties have already agreed to certain divestitures and the hold-separate arrangement is necessary to keep the assets/businesses to be divested separate pending divestiture.[50]

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[49] This type of interim arrangement can be formalized as a consent order by the Tribunal under s.100 or s.104 of the Act. Alternatively, it can be embodied in an agreement between the Bureau and the applicable parties and registered with the Tribunal.

[50] This type of interim arrangement can be formalized as a consent order by the Tribunal under s.104 of the Act or, alternatively, it can be embodied in an agreement between the Bureau and the applicable parties and registered with the Tribunal.

Regardless of the type of hold-separate arrangement employed, the following are features traditionally found in such an arrangement.

- **Scope of Hold Separate Arrangement** - Among other things, the hold separate arrangement will spell out in detail the parties who are subject to the arrangement (usually, the purchaser, the Commissioner and independent management); the assets/businesses to be held separate and the duration of the arrangement.

- **Independent Management** - The hold separate arrangement will contain provisions for the appointment of independent management, which will be responsible for the operation of the assets/businesses being held separate.

- **Separation and Independent Operation** - There will be provisions requiring that the relevant assets/businesses be held separate and apart from those of the purchaser during the term of the arrangement. In addition, independent management is required to operate such assets/businesses independently of the purchaser. Additional obligations are usually imposed on the purchasers in order to ensure the independence of the Hold Separate Businesses.

- **Monitoring** - The hold separate arrangement will also include provisions for monitoring of its implementation. Typically, the arrangement will provide for access by the Bureau/Commissioner to records and employees of the assets/businesses for purposes of ensuring compliance with the hold separate arrangement. In addition, there may be an obligation on the part of independent management to provide a written report to the Commissioner, either periodically or upon her request.

- **Divestiture Mechanism** - To the extent that divestitures are required under the hold separate arrangement,[51] the mechanism by which such divestitures are to take place will be included in the arrangement. Typically, the arrangement will permit the purchaser to use commercially reasonable efforts to dispose of the Hold Separate Businesses to an independent third party within a specified period of time,[52] failing which the Commissioner would appoint a trustee to oversee the sale of the Hold Separate Business. In either case, approval of the Commissioner would be required.

(d) *Remedies*

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[51] Note, however, that not all interim hold-separate arrangements require divestiture. For instance, divestitures may not be necessary if the interim hold-separate arrangement is only to provide the Bureau with additional time to conduct its review. Even in such situations, however, the Commissioner may require that the purchaser agree to some form of divestiture in the future as determined appropriate by the Commissioner.

[52] In most instances, the time frame in which parties have to divest pursuant to a hold separate arrangement is treated as confidential, with such information being redacted in any public document relating to such arrangement. However, in our experience, the Bureau/Commissioner have agreed in the context of a hold separate arrangement to permit the parties to divest within six months (and in the rare instance one year) from the closing of a proposed transaction.

Where a merger or proposed merger is found by the Tribunal to result in a SPLC and where the efficiencies defence cannot be successfully invoked, the Tribunal may issue the following types of remedial orders:

- **Where a merger has been completed:**
  (a) dissolution of the merger in whole or in part;
  (b) divestiture of assets or shares; and/or
  (c) any other remedy with the consent of the party or parties subject to the Tribunal order (e.g., behavioural remedies).

- **In the case of a proposed merger:**
  (a) prohibition against completion of the proposed merger in whole or in part; and/or
  (b) any other remedy with the consent of the party or parties subject to the Tribunal order.

6. Pre-Merger Consummation Issues

It is essential that issues respecting information exchanges between the parties and other pre-closing behaviour be addressed. This is especially important where the parties are competitors of one another.

(a) *Exchanges of Information*

The negotiation and implementation of a merger transaction typically involve substantial flows of information from one merging party to the other.

The exchange of sensitive commercial information may, in some circumstances, lead to an inference of an agreement or arrangement to unduly prevent or lessen competition contrary to section 45 of the Act, thereby exposing those involved to criminal liability. For example, an exchange of information respecting planned prices of the target in the course of buyer due diligence, followed by compatible pricing by buyer and target prior to completion of the merger or after merger negotiations have terminated, may lead to an inference of collusion.

Also, paragraph 61(1)(a) of the Act, the price maintenance provision, prohibits a person from attempting to influence upward, or discourage the reduction of, the price at which another person supplies a product or service by means of an agreement, threat, promise or other like means.[53] Once again, the exchange of commercial information among competitors may lead to an inference of an agreement, threat, promise or other like means to maintain prices.

A further consideration is the inference that may be drawn under the "bid-rigging" provisions of section 47 of the Act. Parties must ensure that they continue to compete for new business during the pre-merger period. Avoidance of exchanges of information that could reasonably be used by the other party to determine: (i) not to submit to tenders for new business for which the other party is tendering, and/or (ii) to engage in any formulation of a tender after reference to non-

[53] While paragraph 61(1)(a) is most often invoked in respect of vertical price maintenance, there are several cases applying this paragraph to conduct on a horizontal level (i.e., among competitors).

public information regarding the other party's tender. If a party calling for tenders is made aware of an agreement between parties respecting the preparation of their bids or that one party will not submit a bid there will not be an offence under section 47. Caution must be exercised however, that such an arrangement may not be permitted under section 45.

In addition to criminal sanctions, persons who violate sections 45, 47 or 61(1)(a) are exposed to civil claims for damages. Section 36 of the Act permits persons who have suffered loss or damage as a result of breaches of Part VI of the Act (i.e., criminal provisions, such as sections 45, 47 and 61), to sue to recover such loss or damage. Hence, it is crucial that the parties manage the exchange of information so as to minimize the degree of risk that may be involved.

The following are suggested guidelines:

- **Enter a Confidentiality Agreement:** The parties ought to enter into a confidentiality agreement which, among other things, stipulates that access to competitively sensitive information will be limited to senior executives involved either in negotiating or approving the transaction; that recipients of competitively sensitive information will not use information for any purpose other than evaluation and implementation of the transaction; and that documents will be returned or destroyed if the transaction is not completed.

- **Limit the information to be exchanged:** Ordinarily, information that is not competitively sensitive, that is, information that would not influence the receiving party's conduct in the marketplace should the transaction not proceed, may be exchanged. Conversely, the sharing of competitively sensitive information such as prices, quantity, quality or cost of production, markets or customers, and business plans or strategy must be limited. The information exchanged should be limited to that which is reasonably necessary to make a decision to proceed with the proposed transaction. For example, only information related to the assets or businesses that are the subject of the transaction should be exchanged.

- **Keep the information as aggregated as possible**: Information that does not disclose specific prices, costs, customers or markets has reduced competitive value and therefore its exchange involves less risk.

- **Historical information is less problematic**: The older the information, the less likely its disclosure will reduce competition. Hence, it is better to disclose historical information rather than prospective information such as strategic plans, marketing plans, product development plans, forecasts, or pricing initiatives. However, even one-year-old data may allow the current position to be ascertained. Hence, this guideline must be applied on a case-by-case basis having regard to the nature of information under consideration and the industry concerned.

- **Restrict who gets access to the information:** Access to competitively sensitive information should be restricted to persons who require the information to negotiate and implement the transaction and who cannot or (at a minimum) are unlikely to be able to make improper use of the information. For example, pricing information should not be

accessible by sales or marketing personnel who can make improper use of the information.

- **Stage the exchange of information:** The closer the parties are to completing the merger transaction, the lower the risk will be that the Bureau will take issue with exchanges of competitively sensitive information. For example, the execution of a definitive purchase agreement may serve as evidence that the parties are focused on completing a transaction rather than colluding.

- **Where practical, information should flow in only one direction:** Where the purchase price is being paid in cash, the information flow should be almost entirely in one direction and should be directed to verifying the value of the target business, verifying liabilities and assets, assessing factors that may be pre-conditions to the viability of the transaction, etc. Where the consideration involves an interest in the acquiror, or the merger is more in the nature of a strategic alliance, some information will likely have to flow in both directions.

- **Special care should be taken when information is provided orally:** Special care should be taken to ensure that conversations do not stray to sensitive or prohibited subjects.

- **Keep a record:** Keep a record of each communication and the information provided and received, and review such record regularly to ensure that only appropriate information has been provided.

- **Independent assessment:** In certain instances (such as that noted above) it may be prudent for the parties to use independent accountants, consultants or lawyers to evaluate competitively sensitive information and make appropriate recommendations provided that the underlying confidential information is kept confidential. This will particularly be the case where the parties are significant competitors of one another and there remains a risk that the transaction will not proceed.

- **Market power heightens concerns:** The greater the market power the parties have, the greater the concern.

(b) *Document Creation*

Intra-company documents relating to a merger transaction may refer to the subject of competition. Such documents, paper or electronic, can easily be misunderstood and therefore may impede the clearance process or even result in criminal charges being brought. Accordingly, merging parties should operate on the assumption that every document created relating to the transaction will end up in the hands of the Bureau. Therefore, great care should be taken to avoid any inference that either party has any intent to prevent or lessen competition (e.g., avoid colourful anti-competitive language such as “eliminate competition” and “dominate”. It is preferable to focus on its positive aspects, e.g. to exit an unprofitable line of business; to achieve economies of scale; etc.

(c) *Pre-merger Co-ordination/Integration*

Merging parties must resist the considerable temptation to get on with integration and begin acting as one entity once an agreement has been signed, but prior to closing. Such "gun jumping" can impede the merger clearance process and potentially give rise to charges under conspiracy, the bid rigging or price maintenance provisions of the Act.

Among other things, the parties must not agree to customer pricing, jointly negotiate purchases, coordinate bids etc., except to the extent such activities were lawfully pursued prior to the merger discussions or are specifically reviewed for legal compliance. Nor may the acquiring party dictate the target's conduct in the marketplace. The parties must continue to compete as they have in the past and behave as though independent, which of course they are. They ought not allow their negotiations to influence their competitive behaviour in the marketplace.

In general, the parties may engage in legitimate activities directed at completing the transaction. For example, the parties may consider integration opportunities for non competitively-sensitive matters such as the integration of computer systems, personnel and facilities. However, each initiative should be reviewed by experienced legal counsel as the analysis is very fact-specific.

Pending completion of the merger transaction, each party should strive to be as competitive as possible, particularly with respect to the business to be acquired and particularly during the period of discussions or negotiations.

FASKEN MARTINEAU

Filing Documents and Sample Forms

Canada - "Short Form" Prescribed in s.123(1)(a) of the Competition Act
http://strategis.ic.gc.ca/pics/ct/s16e.pdf

Canada - "Long Form" Prescribed in s.123(1)(b) of the Competition Act
http://strategis.ic.gc.ca/pics/ct/s17e.pdf

Hart-Scott-Rodino ("HSR") Pre-Merger Notification and Report Form
http://www.ftc.gov/bc/hsr/Stale-Filings-Form%20.pdf

ICN Model Waiver Form (re Confidentiality in Merger Investigations)
http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf

Speaker Biographies

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Anthony F. Baldanza

Tony Baldanza is a partner in the Toronto office of Fasken Martineau. The focus of Tony's legal practice is on assisting his clients in achieving their business objectives by providing timely and knowledgeable advice and representation. He carries on a general business law practice, with particular emphasis on competition law and foreign investment law, and is chair of the firm's national Antitrust/Competition & Marketing Law Group.

In his competition law and foreign investment practice he has handled merger transactions in a wide range of industries, including aggregates, automobile manufacturing, auto parts, beverage alcohol, broadcasting, cement, consumer products, dairy products, financial services, food processing, health care, internet services, logistics, mining, packaging materials, pharmaceuticals, precious metals, railway, retailing, shipping, software, steel, and telecommunications. He regularly assists clients in clearing such transactions through the Canadian Competition Bureau, the Investment Review Division of Industry Canada and, along with counsel in other jurisdictions, the competition law/antitrust authorities of other jurisdictions.

Tony regularly advises companies on how to structure distribution and licensing arrangements to avoid competition law problems, and counsels companies and professional and trade associations on the scope of permissible activities.

Tony also assists clients on corporate/commercial matters, including acquisitions, dispositions and reorganizations, joint venture and partnership arrangements, distribution agreements, supply agreements, etc.

Tony has been recognized by, among others, Chambers, Euromoney, Practical Law Company, Global Counsel Competition Law Handbook and Law & Business Research as one of Canada's leading competition law lawyers.

Areas of Practice

Corporate / Commercial

Antitrust/Competition & Marketing

Foreign Investment

Education

LL.B., 1978
Osgoode Hall Law School of York University

B.A.
University of Toronto

Called to the Bar

Ontario, 1980

Publications and Speaking Engagements

Tony has written and spoken on foreign investment and competition law matters and in relation to mergers and acquisitions in various forums. The following is a selection of his published work and speaking engagements:

Anthony F. Baldanza

- Speaker, "Pricing and Distribution - Comparisons and Contrasts", at the seminar "Key Differences Between U.S. and Canadian Antitrust/Competition Laws", jointly presented by the Association of Corporate Counsel and Fasken Martineau DuMoulin LLP (October 2005)
- Panellist, "Practical Strategies for Establishing an Effective Competition Law Compliance Program", Canadian Institute (2005)
- Chair and panellist, "Revised Canadian Merger Enforcement Guidelines", ABA Brown Bag Presentation (2005)
- Co-chair, Essentials of Competition Law Seminar, Ontario Bar Association (2005)
- Panellist, Mergers, Joint Ventures and Strategic Alliances Panel, Essentials of Canadian Competition Law Seminar, Ontario Bar Association (2005)
- Panel Chair, "The New (and Improved?) MEGs", Annual Conference on Competition Law, CBA National Competition Law Section (2004)
- Co-Author, "The Revised Merger Enforcement Guidelines - What's New in the New MEGs", Annual Conference on Competition Law, CBA National Competition Law Section (2004)
- Panel Chair, "Competition Law Implications of Dealing with Competitors", Canadian Corporate Counsel Association National Spring Conference (2004)
- Author, "Dealings Between Competitors: Mergers", Canadian Corporate Counsel Association National Spring Conference (2004)
- Co-Author, "More Changes to Canada's Competition Act in the Offing?", *Global Competition Review* (2003)
- Panel Chair, "Fundamentals of Mergers, Antitrust Economics and Civil Reviewable Matters", *Annual Conference on Competition Law, CBA National Competition Law Section* (2003)
- Chair, *2002 CBA Annual Fall Conference on Competition Law*
- Co-Author, "Efficiencies and Anti-Competitive Effects: Superior to Date", a paper presented at the *Annual Conference on Competition Law, CBA National Competition Law Section* (2001)
- Co-Author, "Regulated Conduct Doctrine in Canada", *State Action Practice Manual*, Section of Antitrust Law, American Bar Association (2000)
- Co-Author, "In Canada, Efficiencies May Save Anti-Competitive Mergers", *Metropolitan Corporate Counsel* (2000)
- Author, "Efficiencies May Save Anti-Competitive Mergers in the Financial Services Sector", *National Banking Law Review* (2000)
- Panel Chair, "Interdependence Effects in Merger Analysis: Theory, Practice and Policy", *Annual Conference on Competition Law, CBA National Competition Law Section* (2000)
- Subject of Interview, "Canadian Competition Bureau's Draft Abuse of Dominance Guidelines", *LawMoney.com* (2000)
- Subject of Interview, "Developments in Relation to Microsoft", *Report on Business TV* (2000)
- Co-Author, "Recent Developments in Canadian Competition Law", *Canadian Business Law Journal* Vol. 32, No. 2 (1999)

Anthony F. Baldanza

- Speaker, "Amendments to the Merger Provisions of the Competition Act", *Annual Meeting of the National Competition Law Section, Canadian Bar Association* (1999)
- Speaker, "Competition Compliance Programs", *Municipal Electric Association* seminar (1999)
- Speaker, "The Use of Product Groupings in Evaluating Canadian Bank Mergers", *Annual Meeting of the National Competition Law Section, Canadian Bar Association* (1998)
- While Vice-Chair of the Mergers Committee of the National Competition Law Section, Canadian Bar Association (1997-99), he co-authored submissions in relation to the recent amendments to the *Competition Act* (Bill C-20 and its predecessors), and the Notifiable Transactions Regulations.
- Co-Author, "Competition Law", Chapter 20, *Doing Business in Canada* (Matthew Bender) (ongoing)
- Numerous Contributions, *Mergers & Acquisitions in Canada*
- Numerous Contributions, *CCH Commercial Times*
- Contributor, Mergers & Acquisitions Committee Newsletter, ABA Section of Antitrust Law (ongoing)

Professional Activities

- Private Sector Advisor to Commissioner of Competition in respect of the Notification and Procedures Subgroup, International Competition Network (2003-present)
- Contributor, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on Merger Enforcement Guidelines (Draft for Consultation March 2004) of the Competition Bureau of Canada (2004)
- Chair, Organizing Committee, 2002 CBA Annual Conference on Competition Law
- Chair, Mergers Committee of the National Competition Law Section, Canadian Bar Association (1999-2001)
- Member, American Bar Association - Business Law and Antitrust Sections
- Member, International Bar Association - Business Law Section, Committees G (Business Organizations) and C (Antitrust and Trade Law)
- Member, Canadian Council for International Business - Competition Law and Policy Committee and International Competition Law and Policy Task Force
- Member, Task Force on Joint Ventures, Negotiated Acquisitions Committee of Section of Business Law, American Bar Association (1999-2000)
- Instructor, Negotiations Workshop, Bar Admission Course, Law Society of Upper Canada (1992-93)
- Instructor, Business Law, Bar Admission Course, Law Society of Upper Canada (1988-90)

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Huy Do

Huy practices business law, with a focus on competition and international trade law. Huy received his LL.B from Osgoode Hall Law School in 1995 and his LL.M in International Business Law from the London School of Economics in 1996. He returned to clerk for The Honourable Mr. Justice F. Gibson of the Federal Court of Canada in 1996-1997 and was called to the bar in 1998. Prior to joining Fasken Martineau, Huy practised competition and international trade law with a major Canadian law firm and was seconded to the Criminal Matters Branch of the Competition Bureau in 2002.

In the competition law area, Huy has extensive experience dealing with the merger notification and review processes, as well as the civil and criminal provisions of the *Competition Act*. Huy has provided competition law advice in respect of numerous mergers, reviewable practices and criminal matters under the *Competition Act*. Huy also contributed in the preparation of a report to the Commissioner of Competition on amending the conspiracy section (s.45) of the *Competition Act*. In addition, during his time at the Competition Bureau, Huy was involved in the investigations and prosecutions of hard-core cartels and other anti-competitive conduct under the criminal provisions of the Competition Act.

Huy also has significant experience in the area of international trade law having worked on the Russian and Vietnamese accessions into the World Trade Organization, as well as matters involving Canadian domestic trade remedies.

Huy joined Fasken in 2003 and became a partner in 2005.

Areas of Practice

Antitrust/Competition & Marketing

International Trade

Asia Pacific

Education

LL.B., 1995
Osgoode Hall Law School of York University

LL.M. (International Business Law), 1996
London School of Economics and Political Science

Called to the Bar

Ontario, 1998

Professional Activities

- Member of the Law Society of Upper Canada
- Member of the Canadian Bar Association
- Member of CBA Competition Law Section
- Member of CBA Annual Competition Law Conference Organizing Committee (2002 and 2004)
- Member of CBA Competition Law Sections Criminal Matters Committee

Huy Do

Publications

- Author, "Substantive Merger Review under the Competition Act", 2005 CBA Annual Competition Law Conference, November 3-4, 2005
- Co-Author, "More Changes to Canada's Competition Act in the Offing?", *Global Competition Review* (forthcoming)
- Co-Author, "Canadian Competition Law and Policy Developments - Regulated conduct defence post-Garland v. Consumers' Gas Co.", Canadian Competition Record, Fall 2004
- Member of Editorial Board, *Merger Notification and Clearance in Canada*, CCH
- Contributed to "A Report on Canada's Conspiracy Law: 1889-2001 and Beyond", by Al Gourley, August 2001

Speaking Engagements

- Panellist, "Substantive Merger Review under the Competition Act", 2005 CBA Annual Competition Law Conference, Fundamentals Panel on Merger Notification and Review, November 3-4, 2005

Judith E. McKay

Judith McKay is Chief Administrative Officer and General Counsel, E.I. du Pont Canada Company. Judith has responsibility for the leadership and direction of DuPont Canada's Government Affairs, Sales to Government, Public Affairs, Legal, Intellectual Property, Corporate Operations, Facilities, Services & Real Estate and Corporate Governance. She also acts as Chief Legal Officer for DuPont Liquid Packaging Systems.

Judith represented DuPont Canada in connection with the sale by EI du Pont de Nemours and Co. of its INVISTA fibres unit to subsidiaries of Koch Industries, Inc. for a purchase price of US$4.2 billion in 2204.

Judith was recently selected a winner of a 2005 Canada's Most Powerful Women: Top 100 Award in the Professionals category.

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Mark A. A. Warner

Mark Warner is Counsel in the firm's Antitrust/Competition & Marketing and Biotech and Pharma Practice Groups. Mark is based in Toronto, with an adjunct office in London, England. He is a recognized and experienced international competition and trade law expert, author and frequent guest speaker at bar, business, government and academic conferences around the world.

Mark has specialized in competition and trade matters in international law firms in Washington, D.C., New York, Brussels and Toronto for clients including foreign and domestic firms. Mark's experience includes advising on merger notification and review, cartel investigations, distribution agreements and compliance programs for firms in the pharmaceutical, petro-chemicals and transportation sectors. From 1996 to 2000, Mark was a legal counsel in the OECD advising Members and emerging market Non-Members on competition law and trade issues for WTO negotiations.

Mark has also advised governments in Africa, Asia, South America, Eastern and Central Europe and Central Asia on designing and implementing competition and trade laws for CIDA, COMESA, ECLAC, the EU PHARE program, UNCTAD, USAID, the World Bank and the WTO. He was also a WIPO arbitrator for ICANN domain name disputes, and served as Rapporteur of the Hague Conference on Private International Law Commission on Jurisdiction for Torts in Electronic Commerce. Mark has also taught competition and trade law courses at: the University of Leiden (Netherlands), the World Trade Institute (Switzerland), the International Institute for Management in Tele-communications (Switzerland), the University of Western Cape (South Africa), and the International Law Institute (Uganda).

Mark is co-author of the leading Canadian trade law treatise with a former Canadian Minister of Foreign Affairs. He has also published several chapters in books, and his publications include articles on competition, trade and investment law and policy in: Antitrust, World Competition, International Trade Law and Regulation, the American Journal of International Law, Law & Policy in International Business, the Vanderbilt Journal of Transnational Law, the

Areas of Practice

Antitrust/Competition & Marketing

Biotech and Pharma

Education

LL.M., International and Comparative Law, 1993
Georgetown University Law Center

LL.B., 1991
Osgoode Hall Law School of York University

M.A., Economics, 1988
University of Toronto

B.A., Joint Honours in Economics and Politics, 1986
McGill University

Called to the Bar

New York, 1995

Ontario, 1993

Mark A. A. Warner

Northwestern Journal of International Law & Business, the Brooklyn Journal of International Law, the Canadian Business Law Journal and in The Legal Times.

Professional Activities

- Co-author of the Canadian Competition Law and Intellectual Property chapter of the Global Competition Review 2006 Antitrust Review of the Americas
- Invited to testify at the International Competition Policy Advisory Committee to the U.S. Department of Justice (DOJ) (1999), and the Federal Trade Commission (FTC) Workshop on Emerging Issues for Competition Policy in the World of E-Commerce (2001)
- Co-Chair, ICC Competition Commission Working Party on E-Commerce and Competition Policy (2001)
- Member of the Business and Industry Advisory Committee to the OECD (BIAC) and the IBA Antitrust and Trade Law Committee, ICC Competition Commission
- Former Chair of the Section Working Groups on: the E.C. Merger Regulation (1996); Policy on Vertical Restraints (1997); Amendments to the Canadian Competition Act (1995) and Canadian Information on Strategic Alliances (1994)
- Member of the Section's Task Forces on Antitrust in the Global Economy (1997-1999) and on the North American Free Trade Agreement (1993-1995)
- Former Chair of the American Bar Association Section of Antitrust Law's International Antitrust Committee (1997-1999)

Languages

- English
- French

An Overview of Fasken Martineau

A Full Service National and International Firm

Fasken Martineau is one of Canada's leading national business law and litigation firms. Internationally, its London and New York locations make it one of very few Canadian firms with an established presence in the two major financial centres of the world. Our Johannesburg office makes Fasken Martineau the only Canadian law firm with an office on the African continent.

Many of the firm's lawyers are acknowledged leaders in their fields of expertise. Seventy-two of our lawyers are recognized in the Canadian Legal LEXPERT Directory. Nineteen are ranked among the 500 leading lawyers in Canada. And thirteen of the firm's partners are cited in the prestigious Chamber's Global "The World's Leading Lawyers" Directory.

Fasken Martineau is acknowledged for its particular experience in cross-border M&A and securities work, banking and financial services, outsourcing, insolvency and restructuring, tax, litigation, labour, estates and trusts, and arbitrations, as well as in computer and information technology law and intellectual property. With more than 580 lawyers, the firm provides services in virtually all areas of the law to clients located within Canada and internationally, and in almost all industry sectors. Fasken Martineau also has expertise in both of Canada's legal systems, common law and civil law, in both English and French.

The firm's clients include both public and private companies, individuals, government agencies and professional regulatory bodies. Fasken Martineau acts for Canadian and foreign-owned chartered banks, Canadian insurance companies, other financial services providers, major industrial and processing firms, Canadian and foreign-owned investment dealers and underwriting firms, mutual fund groups, natural resource companies, radio, television and cable broadcasting companies, telecommunications companies, high technology companies and accounting and receivership firms. The firm also acts for a number of non-profit and charitable organizations such as hospitals, art galleries, churches, libraries and colleges.

Fasken Martineau has long-standing relationships with clients such as Air Canada, Allied Domecq, AT&T, BMO Nesbitt Burns, Canada Post Corporation, CP Rail, DaimlerChrysler Canada, De Beers, DuPont, ING Canada, O&Y Properties Corporation, PricewaterhouseCoopers, RBC Capital Markets, Rogers Wireless Communications, Scotia Capital, TD Bank Financial Group, The Bank of Nova Scotia, and The National Bank of Canada, among other household names.

Fasken Martineau's business law practice provides an extensive array of services to clients and is committed to providing them with the best results in a creative, customized and cost-effective way. Our lawyers have the experience and expertise necessary to address the most challenging issues facing a major organization operating in today's competitive global market. We have acted

on large, complex and innovative transactions for both domestic and international clients across a broad spectrum of industry sectors.

Our litigators appear regularly before all levels of federal and provincial courts, as well as various administrative tribunals in Canada. We provide our clients with nationally recognized litigation, arbitration and alternative dispute resolution skills, and we work as a team with our clients to achieve optimal results. We make extensive use of state-of-the-art litigation support and case management technology to deliver services to our clients as quickly and as cost-efficiently as possible. We have frequently acted for both Canadian and U.S. clients in a wide variety of cross-border legal matters, and we are often retained by U.S. attorneys to act for their clients when they become involved in Canadian litigation.

The London office, which was established in 1987, provides strategic legal advice on a wide range of Canadian business initiatives to UK, continental European, African and other clients. The office also assists North American and other clients of the Firm with business and legal challenges in the UK, often working closely with local professional advisors. The London office's areas of expertise include advising on public .and private mergers and acquisitions, private equity transactions, privatizations, corporate finance transactions, debt project and structured financings, financial services, infrastructure/public private partnerships, international joint ventures and projects, and establishing businesses in Canada.

Our New York office advises on business law matters having a cross-border component. The range of expertise in the New York office includes mergers & acquisitions, corporate finance, capital markets, banking, anti-trust, international joint ventures and Canadian regulatory matters. In addition to regularly providing a broad range of business law advice, representative briefs include cross-border equity/debt offerings, and acquisitions and divestitures of Canadian businesses.

The Johannesburg office of Fasken Martineau provides legal advice to North American and European companies looking to invest in the African continent as well as South African companies looking for foreign debt and equity finance, cross-border and cross-continent mergers and acquisitions, privatizations, public-private partnerships, restructuring and trade. Many of the Johannesburg office engagements are resource or energy-related matters.

Fasken Martineau Offices

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Calgary:	3400 First Canadian Centre 350-7th Avenue SW Calgary, Alberta, Canada T2P 3N9 Tel: 403 261 5350 Fax: 403 261 5351
Toronto:	Toronto Dominion Bank Tower, P.O. Box 20, Suite 4200 Toronto-Dominion Centre, Toronto, Ontario, Canada M5K 1N6 Tel: 416 366 8381 Fax: 416 364 7813 Toll-Free Number (Ontario, Québec and New York): 1 800 268 8424
Montréal:	Stock Exchange Tower, P.O. Box 242, Suite 3400 800 Place-Victoria, Montréal, Québec, Canada H4Z 1E9 Tel: 514 397 7400 Fax: 514 397 7600 Toll-Free Number (Ontario, Québec and New York): 1 800 361 6266
Québec City:	140, Grande Allée Est, Suite 800 Québec, Québec, Canada G1R 5M8 Tel: 418 640 2000 Fax: 418 647 2455 Toll-Free Number (Ontario, Québec and New York): 1 800 463 2827
New York:	767 Third Avenue, 29th Floor New York, NY, USA 10017 Tel: 212 935 3203 Fax: 212 935 4822
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Antitrust/Competition & Marketing Law Group

Our Lawyers

The core membership of our Antitrust/Competition & Marketing Law Group consists of 14 lawyers in the Toronto office, three in the Vancouver office and three in the Montreal office. Group lawyers include both lawyers with a business law background, and litigation lawyers who represent our clients in proceedings before the courts and the Competition Tribunal.

Experience and Expertise

We have extensive experience and expertise in all areas of competition law, including mergers, criminal matters, reviewable practice and reviewable conduct matters, pricing and distribution issues, marketing and advertising matters, and competition law litigation. We provide advice, assistance and representation to clients in designing, negotiating and implementing transactions, commercial relationships, advertising and marketing programmes and competition law compliance programmes, and in responding to actions and initiatives of third parties whose interests may be adverse to those of our clients. We have considerable experience in advising clients that participate in concentrated industries, where there are often significant competition law issues. We also have substantial experience in representing clients in connection with criminal investigations under the Competition Act, including 'dawn raids' and information demands made by the Canadian Commissioner of Competition under Section 11 of the Competition Act ("Section 11 Orders").

We understand the economic principles underlying competition policies and the application of competition rules. Our lawyers have, in many cases, both an economic and legal background. Furthermore, some of our lawyers have worked on the staff of, or as counsel to, the Canadian Competition Bureau, the Canadian Competition Tribunal and international organisations dealing with competition matters such as the OECD.

The following is a summary of the principal categories of competition law services that the firm provides:

i. Mergers

In this area, we provide advice and representation to clients in relation to a wide range of merger transactions, including take-over bids, negotiated acquisitions and combinations, joint ventures and strategic alliances. We regularly assist clients wanting to advance a merger, and those seeking to oppose a merger, and those (such as arbitrageurs and hedge funds) who seek advice as to the prospects of a proposed merger being successfully completed.

We work with clients at all stages of a merger transaction to:

- determine the impact of the Competition Act and, where applicable, other relevant regulatory legislation including the Investment Canada Act and industry-specific legislation (such as the Bank Act, the Insurance Companies Act and the Telecommunications Act) upon the transaction;

- structure the transaction so as to maximize the prospects of receiving competition law clearance while achieving the client's business objectives;

- develop a strategy and a timetable within which to deal with all competition law issues in the most effective, efficient and expeditious manner possible;

- prepare advance ruling certificate and advisory opinion requests and pre-merger notifications under the Competition Act;

- prepare competitive impact submissions, where appropriate with the assistance of economists;

- respond to information requests from the Competition Bureau;

- represent the client in meetings with the Competition Bureau to address areas of concern;

- where necessary, negotiate and settle hold-separate arrangements and Competition Tribunal consent orders and consent agreements to allow a transaction to proceed;

- where applicable, with the assistance of counsel in other relevant jurisdictions, identify potential antitrust/competition filing requirements in those other jurisdictions and coordinate same;

- where applicable, represent the client before the Competition Tribunal and the courts in respect of the merger.

We have an excellent working relationship the Competition Bureau's Mergers Branch as a result of our frequent involvement in merger transactions and our leadership roles in the Competition Law Section of the Canadian Bar Association.

ii. Criminal Matters / Cartels

Our practice in this area includes advising clients how to avoid contravening the criminal provisions of the Competition Act, including the pricing and conspiracy provisions noted above, and defending against and responding to allegations, investigations or charges under the Competition Act. We have substantial experience in representing clients in criminal investigations under the Competition Act (including in respect of dawn raids and Section 11 Orders), defending clients against criminal charges under the Competition Act, and providing advice and representation in respect of private civil actions brought in relation to conduct alleged to be contrary to the criminal provisions of the Act.

iii. Pricing and Distribution Issues, Abuse of Dominance

Certain agreements, distribution contracts, supply contracts and various pricing practices may be the subject of criminal prosecution and/or private civil court action or be reviewed by the Canadian Competition Tribunal under the civil reviewable practices provisions of the Competition Act. The criminal provisions of the Act include those governing conspiracies, price maintenance, price discrimination, disproportionate promotional allowances, predatory pricing, geographic price discrimination, and those relating to agreements between federal financial institutions. Reviewable practices generally involve abuse of dominance and non-price vertical restraints of trade, including exclusive dealing arrangements, territorial restraints or market restrictions, tying arrangements, and the refusal to supply a customer. We have extensive experience in advising clients respecting pricing and distribution issues, and do so routinely for a large number of clients in a wide range of industries.

iv. Competition Litigation

Fasken Martineau's Litigation Group has a pre-eminent practice in complex, multi-jurisdictional litigation. We are frequently retained as lead counsel in the defence of a multitude of claims commenced throughout North America.

Fasken Martineau's Antitrust/Competition & Marketing Law Group has extensive litigation experience, regularly providing advice and representation to clients in a broad range of competition proceedings. We regularly defend against, and in some instances pursue, civil actions based on conduct alleged to be contrary to the criminal provisions of the Competition Act. We have also acted as counsel for the Commissioner of Competition in challenging merger transactions and in claims alleging abuse of dominance and exclusive dealing.

Fasken Martineau has consistently been ranked by Lexpert as one of the two or three leading class action firms in Canada. We have particular expertise in defending against class actions based on alleged violations of the Competition Act. The types of competition class action that we have handled include claims based on conspiracy, price-fixing, misrepresentation and price discrimination.

We are experienced in:

- providing advice and assistance in responding quickly and decisively to Section 11 Orders;
- implementing the appropriate procedures for collecting, organizing and storing large volumes of evidence;
- using our experience and know-how to conduct settlement negotiations to achieve practical and timely business solutions;
- aggressively defending claims brought against our clients and protecting our clients' interests at hearings if warranted; and

- devising effective litigation strategies to ensure a successful result in the most expeditious, cost-effective and least disruptive manner.

v. International

Fasken Martineau lawyers are regularly involved in cross-border mergers often requiring multi-jurisdictional notifications and reviews. Similarly, with respect to cartel investigations, Fasken Martineau lawyers are also frequently involved in cases requiring international coordination of defense strategies arising from multi-jurisdictional governmental investigations and class actions.

Given the increasing prominence given to international cartels and multi-jurisdictional enforcement cooperation, Fasken Martineau has strengthened its capacity to meet this new challenge with the recent addition of Mark Warner. The firm's commitment to be at the forefront of the international competition law practice is reflected in Mark's experience in the OECD advising Members and emerging market Non-Members on trade and competition law issues for WTO negotiations and on international aspects of merger review, cartel enforcement and distribution issues. In particular, Mark was involved in the OECD's pivotal work on international enforcement cooperation. He has also advised governments in South America, Asia and Africa on designing and implementing competition laws.

Fasken Martineau is a leader in legislative and case-law developments in the international competition law arena. Our lawyers regularly submit comments on the legislative proposals tabled by competition authorities, participate in International competition forums (ICC Competition Commission, Business and Industry Advisory Committee to the OECD (BIAC), IBA, ABA, etc.), deliver presentations at conferences and publish articles in this field.

vi. Marketing and Advertising

In addition to representing clients before the courts and Advertising Standards Canada, we regularly provide advice with respect to specific marketing and advertising programmes before they are undertaken in order to reduce the risk of criminal prosecution or challenge by regulatory agencies or clients' competitors. We provide general marketing and advertising law advice to clients in various industries, including advice in relation to print and other forms of advertising, packaging and labelling, telemarketing, promotional contests and other forms of promotions.

vii. Competition Law Compliance Programmes; Assisting Trade Associations

Many violations of Canada's competition laws do not arise due to a willful disregard of the law, but rather due to the complex nature of Canada's competition laws and the fact that they are frequently not well understood by businesses. We have extensive experience in assisting clients with the design and implementation of programmes to ensure compliance with Canada's competition laws. Such programmes are tailored to meet the specific needs of each client and may include, among other things, a competition and marketing law seminar programme, a compliance policy and manual, a periodic bulletin and, in some instances, compliance audits. Our role in the design and implementation of a compliance programme can range from that of

complete responsibility to 'back-office' support of in-house counsel in their delivery of the programme.

In addition to helping businesses avoid conflicts with the competition laws, the existence of a compliance programme can influence the Competition Bureau in its deliberation of alternative case resolutions and immunity and sentencing recommendations. Also, by conveying an understanding of the laws, we are able to assist clients in pursuing profitable activities that they might otherwise have thought to be illegal, thereby assisting clients in competing to the fullest extent permitted by law.

We also assist trade associations in developing codes of conduct and in conducting their operations so as to achieve their legitimate objectives without offending Canada's competition laws.

Our Clients

The Group has experience and expertise in a wide range of industries (including various regulated industries) – for example, advertising, agriculture, airlines, airports, automobile manufacturing, auto parts, beverage alcohol, broadcasting, building automation and safety, building construction, cement, chemicals, computers and technology, consumer products, electricity, financial services, food and beverage processing, health care, internet services, logistics, manufacturing, mining, natural resources, packaging materials, pharmaceuticals, precious metals, professional services, railway, real estate, retailing, retail and wholesale distribution, shipping, software, steel, telecommunications and trucking, among others.

Our clients include some of Canada's largest domestic and international corporations, domestic and foreign governments and governmental agencies, professional and trade associations, advertising agencies, not-for-profit corporations, individuals and other law firms.

Our Client Service Approach

Our overriding goal is to help the client achieve its objectives in a timely, efficient and cost-effective way. We employ a team approach to client service, to ensure ready availability of informed and knowledgeable counsel, and to ensure that lawyers with the appropriate level of experience provide the requested advice.

Fees

We normally charge fees for services based on the standard hourly rate of the lawyer/paralegal involved. Hourly rates vary, depending on the level of experience of the lawyer/paralegal involved and are competitive with those charged by other major law firms. Staffing of a file will be based on the general principle that, subject to client preferences, the best-qualified lawyer charging the lowest hourly rate will be assigned to work on any matter. Paralegals assigned to any file will be supervised by an appropriate level lawyer.

While lawyers' hourly rates are the standard approach to billing, we would be pleased to discuss and implement alternative billing arrangements, including, for example, arrangements involving a "blended rate" approach, value based billing or flat fees.

Our flexible and innovative approach to providing legal services is reflected in part by our partnering arrangements with various clients. For example, a few years ago we were selected as a DuPont Primary Law Firm and we are now leaders within the DuPont Law Firm Network. This arrangement has led to a high level of service and cost savings to DuPont and networking benefits and increased workflow to Fasken Martineau and the other members of the network. We also have a highly successful partnering relationship with Canadian Pacific Railway.