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# Canada's Common Sense Approach to International Mergers [\[top\]](#)

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## Introduction

Canada's Competition Bureau ("CCB") has recently formalized the approach it will take to remedies in international mergers. In its Information Bulletin on Merger Remedies in Canada<sup>1</sup> the Bureau affirmed its desire to explore coordinated solutions with agencies in other jurisdictions. More notably, it also affirmed its willingness—in appropriate cases—to accept remedies agreed to elsewhere as sufficient to resolve potential antitrust concerns in Canada. This evolution in the Bureau's thinking represents both a sound policy approach and effective use of scarce resources.

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<sup>1</sup> See CCB, Information Bulletin on Merger Remedies in Canada (September 22, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2170&lg=e>. See also Melanie Aitken, Acting Deputy Commissioner of Competition, Advanced Mergers and Acquisitions, presented at the Insight Conference on Advanced Mergers and Acquisitions (December 4, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2276&lg=e>.

The subject was also discussed as part of the ABA Brown Bag program "Canada's New Merger Remedies Bulletin: What International Lawyers Need to Know" (November 15, 2006), co-sponsored by the M&A Committee, the International Committee and the Canadian Bar Association's National Competition Law Section Mergers Committee (Presented by Melanie Aitken, Assistant Deputy Commissioner, Competition Bureau; Marimichael Skubel, Kirkland & Ellis; Gavin Robert, Linklaters; and moderated by Neil Campbell and Omar Wakil, McMillan Binch Mendelsohn LLP).

The Bureau has a longstanding policy of working closely with foreign agencies in merger investigations, particularly the Federal Trade Commission, Department of Justice and European Commission. Wherever possible the Bureau will coordinate with foreign competition authorities on remedies when a multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar, or related to, those that are likely to result in other jurisdictions.

According to the Bulletin,

"The greater the extent to which competition issues identified in Canada are similar to those in other jurisdictions, the greater the likelihood that coordinated remedies will be effective. [...] Consistent and coordinated remedies help avoid potential frictions stemming from situations whereby a remedy in one jurisdiction may not be acceptable in another. Consistent and coordinated remedies can also lead to a more effective resolution than would be attained through independent enforcement action."

Coordinated cross-border remedies may mean the coordinated approval of a divestiture package as well as the approval of a particular buyer or monitor trustee for a North American or worldwide divestiture.

A notable case in which enforcers in Canada and elsewhere worked hand-in-glove to craft workable worldwide solutions occurred in connection with the acquisition by Bayer AG

of the global crop protection business of Aventis SA. The multi-jurisdictional review of the transaction resulted in the harmonization of remedies in Canada, the United States, Europe and elsewhere. The agreed-upon remedies included cross-border divestitures and IP licenses, a six-month divestiture term and crown jewel provisions.<sup>2</sup>

What is particularly remarkable about the Bulletin is that it also acknowledges that the Bureau will sometimes not take separate action to formalize negotiated remedies in Canada, even when a merger is expected to result in a substantial lessening or prevention of competition. According to the Bulletin, the Bureau may rely on foreign remedies when the locus of the remedy is outside of Canada. There is an important qualifier: the Bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada.

## Competition Bureau Investigations

The policy approach articulated in the Bulletin does not mean that the Bureau will defer its investigation to a foreign authority. Indeed, the time pressure of a merger transaction requires the Bureau to at least keep pace with the timing of the international review. Substantive antitrust issues may not become clear until the Bureau has conducted a full investigation. Moreover, it may only be at the late stage of identifying effective remedies that the Bureau is able to determine that an international solution could satisfy a Canadian concern.

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<sup>2</sup> See CCB, Competition Tribunal Orders Canadian Divestitures in Bayer's Acquisition of Aventis Crop-Science (July 19, 2002), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=407&lg=e>.

That said, the Bureau can and does size-up mergers early on in the review process. A typical review begins with an evaluation of the filings and competitive impact submissions from the merger parties and a marketplace inquiry that usually focuses on the parties' customers but can include competitors and suppliers. It can quickly become evident that the locus of a transaction is off shore, that substantive antitrust issues do not differ from those in the United States, Europe or elsewhere and, importantly, that a remedy would likely take place outside Canada. This may happen, for example, where the merger parties have sales offices in Canada but where all production occurs offshore. In such cases, the Bureau may not pursue an investigative approach that would require the parties to supply Canadian versions of submissions made elsewhere or embark on costly document productions unlikely to produce evidence that differs from that supplied elsewhere. Instead, it may actively monitor foreign regulatory developments by requesting status updates and waivers to exchange information with foreign counterparts.

Such an approach is not adopted in all international cases. Significant productive assets may be located in Canada or the Bureau may identify Canada-specific issues that warrant an investigation just as detailed as those occurring elsewhere. When Diageo plc purchased part of the Seagram Spirits and Wine Business from Vivendi Universal SA, the Bureau quickly zeroed-in on a Canada-only overlap in a narrow Canadian whisky market. After an in-depth investigation, it required the divestiture of the overlap brand. Interestingly, the Bureau also scrutinized rum markets in the same transaction but ultimately took no action, possibly because it knew the FTC would likely require

a world-wide divestiture in that market, which it did some months later.<sup>3</sup>

## Acceptance of International Remedies

Just as it will not truly defer to the investigation of another authority, the Bureau has made it clear that it would never defer to another jurisdiction when it comes to fashioning remedies. Rather, it is open to accepting remedies in foreign jurisdictions as adequate solutions for anticipated anti-competitive impacts in Canada. The distinction may be a fine one but the point is that the Bureau will not uncritically accept a foreign remedy. Just as it will carry out its own independent investigation, it will carry on its own assessment of what it believes is necessary to resolve an anti-competitive merger.

This practical, low(er) cost approach appears to have worked well in several cases.

- Dow / Union Carbide:<sup>4</sup> In an early (pre-Bulletin) example of the Bureau's acceptance of an international remedy, the Bureau determined that separate Canadian remedial action was not required in light of the remedies being ordered by other enforcement authorities. The Bureau had identified significant competition issues in a number of product markets, as did the FTC and European Commission. To satisfy concerns in the United States and Europe,

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<sup>3</sup> See Federal Trade Comm'n, With Conditions, FTC Approves Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. (Dec. 19, 2001), available at <http://www.ftc.gov/opa/2001/12/diageo.htm>.

<sup>4</sup> See CCB, Annual Report of the Commissioner of Competition for the Year Ended March 31, 2001, at 21, available at <http://strategis.ic.gc.ca/pics/ct/ar0001.pdf>.

the parties agreed to divest certain technology assets, intellectual property rights and businesses. According to a recent statement by the Commissioner, the remedy for the substantive issues identified by the Bureau "consisted primarily of worldwide intellectual property rights that were covered by the U.S. Consent Decree."<sup>5</sup> Given that the IP was covered by the U.S. decree, the Bureau concluded that it did not need to take additional action. There is not enough information on the public record to know exactly what IP was covered by the U.S. decree, but information disclosed by the FTC suggests that it might have required the licensing of Canadian IP.<sup>6</sup> The case is interesting in highlighting the Bureau's (probable) approach to an offshore remedy where the only Canadian component is the licensing of Canadian IP.<sup>7</sup> Where the IP is simply the Canadian counterpart to IP issued elsewhere and is only needed to sell a product into Canada, the Bureau will likely not require a separate and formal Canadian remedial approach.

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<sup>5</sup> See Sheridan Scott, Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World: To Defer or Not To Defer? Is that the question?, presented at the American Bar Association's Section of Antitrust Law 2006 Spring Meeting Washington, DC (Mar. 29, 2006) at 16, available at [http://www.competitionbureau.gc.ca/PDFs/canadianperspective-e\\_e.pdf](http://www.competitionbureau.gc.ca/PDFs/canadianperspective-e_e.pdf).

<sup>6</sup> See FTC, FTC Clears Dow/Union Carbide Merger With Conditions (Feb. 5, 2001), available at <http://www.ftc.gov/opa/2001/02/dowunion.htm>.

<sup>7</sup> But like other older cases Dow ought to be treated somewhat cautiously as a precedent as the Bureau evolves and refines its approach to remedies in international mergers.

- GE / Instrumentarium:<sup>8</sup> The Bureau concluded that the merger would likely result in significant competition concerns in the supply of patient monitors in hospitals and healthcare facilities. To resolve concerns in Europe and the United States, the General Electric Company agreed to divest the worldwide Spacelabs business of Instrumentarium Oyj. GE also provided a formal commitment to the European Commission that it would maintain interfaces on patient monitors and other devices to ensure that third party suppliers could interconnect with their equipment. At the request of the Bureau, GE confirmed that the European interface commitment would apply on a global basis. Accepting the worldwide divestiture commitment at face value and armed with the side-letter assurance that Canada would be covered by the interface commitment, the Bureau issued a no action letter and closed its file. The Bureau did not require any further action or more formal recording of the remedy. Notably, it emphasized that if the Spacelabs business was not divested or the interface commitment was breached, the Bureau had the right under the Competition Act to make an application to the Competition Tribunal within three years after the transaction had closed.
- Alcan / Pechiney:<sup>9</sup> The Bureau concluded that the Alcan Inc acquisition of Pechiney SA would likely not result in a substantial

lessening or prevention of competition when assessed in light of the remedial commitments made by Alcan in the United States and Europe. The geographic markets examined by the Bureau were primarily North American or global, and Pechiney did not control any physical assets in Canada that overlapped with those of Alcan. Alcan had agreed to divestitures of facilities in the United States and the EU and made commitments to the EU regarding certain technologies and designs. The Bureau determined that these measures preserved competitive options for Canadian customers as well, and did not take any further action. The case highlights the Bureau's fundamental approach: essentially it is conditionally closing its file on the basis that there will be no substantial lessening of competition in Canada if the foreign remedy is implemented.

- Procter & Gamble / Gillette:<sup>10</sup> The Bureau determined that divestitures required by US and European competition agencies adequately resolved concerns in Canada. The Procter & Gamble Company had agreed with the FTC and European Commission that it would divest products in oral care markets in the United States, Europe and Canada. (In fact, the Bureau's press release states that the parties agreed to the divestitures in the United States and Europe partially in response to concerns expressed by the Bureau.) Interestingly, the Bureau's assessment does not appear to have been identical to that of the FTC. The Bureau "identified some concern in the oral care markets for battery powered

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<sup>8</sup> See CCB, Bureau Resolves Competition Concerns With Medical Equipment Merger (Sept. 16, 2003), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=379&lg=e>.

<sup>9</sup> See CCB, Alcan's Offer for Pechiney Cleared by the Competition Bureau (Oct. 14, 2003), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=383&lg=e>.

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<sup>10</sup> See CCB, Competition Bureau's Concerns Resolved in Procter & Gamble's Acquisition of Gillette (Sept. 30, 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1953&lg=e>.

toothbrushes and teeth whitening products.” The FTC identified additional problematic overlaps and also required remedies in connection with rechargeable toothbrushes and antiperspirant/deodorant products.<sup>11</sup> There is no indication that the agencies adopted differing analytical approaches and the divergence may have been due to different product line-ups or the presence of additional competitors in Canada.

- Boston Scientific / Guidant.<sup>12</sup> The Bureau decided to not challenge the acquisition of Guidant Corporation by Boston Scientific Corporation after concluding that the consent order Boston Scientific signed with the FTC and the commitments made to the European Commission adequately resolved competition concerns in Canada. Reminiscent of its narrow approach in Procter & Gamble / Gillette, the Bureau’s public statements suggest that it was concerned with a sub-set of issues being dealt with in the United States.<sup>13</sup> The Bureau flagged two aspects of the US consent order as particularly important to it. The first was the up-front divestiture of Guidant’s vascular intervention and endovascular businesses, including intellectual property, to Abbott Laboratories. The second was the agreement that Abbott would relinquish the

small equity position it acquired in Boston Scientific as part of the transaction financing arrangements.

Notably, in all of these cases the Bureau emphasized that its conclusions were reached after “extensive” or “thorough” reviews.<sup>14</sup> In Alcan, Boston Scientific and Procter & Gamble it added that it had consulted with customers and competitors as well as with the FTC and the European Commission.<sup>15</sup> These cases

<sup>11</sup> See FTC, FTC Consent Order Remedies Likely Anticompetitive Effects of Procter & Gamble’s Acquisition of Gillette (Sept. 30, 2005), available at <http://www.ftc.gov/opa/2005/09/pggillette.htm>.

<sup>12</sup> See CCB, International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger (May 11, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2090&lg=e>.

<sup>13</sup> See the FTC materials, FTC, In the Matter of Boston Scientific Corporation and Guidant Corporation, available at <http://www.ftc.gov/os/caselist/0610046/0610046.htm>.

<sup>14</sup> Speaking about these cases generally, the Commissioner of Competition has said that the “Bureau has declined to seek our own remedies because, after a thorough, independent and cooperative review, we concluded that Canadian interests were adequately addressed by another jurisdiction’s actions” (emphasis added). See Sheridan Scott, Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World: To Defer or Not To Defer? Is that the question?, presented at the American Bar Association’s Section of Antitrust Law 2006 Spring Meeting Washington, DC (Mar. 29, 2006) at 14, available at [http://www.competitionbureau.gc.ca/PDFs/canadianperspective-e\\_e.pdf](http://www.competitionbureau.gc.ca/PDFs/canadianperspective-e_e.pdf). In this speech, the Commissioner cites several other merger cases in which the Bureau accepted international remedies (see 16ff) as well as the agency’s similar approach in other areas. See also Sheridan Scott, C Is For Competition: How we get things done in a globalized business world, Remarks at Insight Conference (June 17, 2005), available at [http://www.competitionbureau.gc.ca/PDFs/insight\\_speech\\_eng.pdf](http://www.competitionbureau.gc.ca/PDFs/insight_speech_eng.pdf).

<sup>15</sup> Similar remarks are usually made by the FTC and European Commission in these cross-border cases. For instance, in Procter & Gamble the press release of the FTC also emphasized international cooperation: “Throughout the course of their respective investigations, the FTC and the staff of the EC Competition Directorate, the Canadian Competition Bureau, and the Mexican Federal Competition Commission consulted and cooperated with each other under the terms of the respective cooperation agreements with each jurisdiction.” A similar remark was made by the US agency in Boston Scientific: “The European Commission’s Competition Directorate (EC), Canada’s Competition Bureau, and Japan’s Fair Trade Commission also are reviewing or have already reviewed this proposed merger. Throughout the course of their respective investigations, FTC staff and their counterparts in those authorities

serve to emphasize that an in-depth review ought to be anticipated in Canada, even when the outcome is the acceptance of an international remedy.

In all of these cases the Bureau is effectively relying on the willingness of other enforcers to adopt an extraterritorial approach to merger remedies, such as a worldwide divestiture, to resolve a competition concern. Clearly a workable remedy will not always have to be global in scope.<sup>16</sup> GE / Instrumentarium is a case in point: it was presumably the unclear geographical extent of the interoperability remedy that required the Bureau to seek a separate reassurance from the merger parties that it would in fact apply to Canada.<sup>17</sup> GE / Instrumentarium probably also provides a good example of the furthest the Bureau will

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communicated and cooperated with each other under the terms of their respective bilateral cooperation agreements.”

<sup>16</sup> This is acknowledged in a footnote in the Bulletin: “In one case, the foreign jurisdiction may conclude that because of costs or the size of markets, it should order the sale of a business, including intellectual property rights, on a worldwide basis. In a different case, the foreign authority might conclude that because of costs or scale of business, it would be sufficient to simply order the sale of the business, including the intellectual property rights, within its own jurisdiction. In the latter case, Canada would need its own Canada-specific remedy.”

<sup>17</sup> Although pragmatic, the advisability of seeking such assurance in the form of an informal commitment from merger parties may also raise questions about enforceability. The Competition Act provides that settlements can be formalized into a Consent Agreement. When the Consent Agreement provisions were introduced to the Act, the Bureau indicated that its previous policy of negotiating solutions through the use of undertakings with merger parties would be rarely used. The Bulletin does not discuss the use of undertakings and it is not clear that the letter GE wrote to the Commissioner was meant to be one. Nevertheless, the approach of GE / Instrumentarium may not reflect current Bureau policy in terms of acceptance of undertakings generally.

go in accepting an international remedy without requiring a formal Consent Agreement in Canada.

According to the Bulletin, when deciding when to accept an international remedy the main question is whether the remedy involves conduct or assets that are “primarily” outside Canada.<sup>18</sup> Where there is a significant Canadian component, or action that has to be taken in Canada, a separate and formal Canadian remedy ought to be expected. Although the “primarily” test is clearly somewhat subjective, it seems to be a reasonable way of articulating when the Bureau will exercise enforcement discretion in cross-border cases. In GE / Instrumentarium, it was clear that conduct in Canada was required to resolve a Canadian concern; moreover, it was unclear whether the foreign remedy was meant to cover Canada. Should a similar fact situation arise today, a formal Canadian resolution should likely be expected. The Bureau’s acceptance of foreign remedies that are global, or that at least cover Canada, will therefore clearly have limits.

## Enforcement

The Bureau’s policy approach to international remedies relies partially on its jurisdiction to challenge a merger up to three years after

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<sup>18</sup> According to the Bulletin, “the Bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the assets that are subject to divestiture, and / or conduct that must be carried out as part of a behavioral remedy, are primarily located outside of Canada.” Conversely, “the Bureau is more likely to formalize negotiated remedies within Canada when the matter raises Canada-specific issues, when the Canadian impact is particularly significant, when the asset to be divested reside in Canada, or when it is critical to the enforcement of the terms of the settlement.” It is also therefore relevant to consider these factors in assessing the likelihood that the Bureau would accept a particular remedy.

completion. This allows the agency to re-open its investigation and bring an application before the Competition Tribunal for a remedial order in the event that a foreign remedy is not fully carried out. As suggested in the GE and Alcan case summaries referred to above, the Bureau would not challenge the breach of the foreign remedial commitment but rather the merger itself on the basis that the circumstances under which the agency closed its file had changed. (Indeed, the Bureau could probably take the same approach if it had initially “cleared” the merger on the basis of an “Advance Ruling Certificate” as well as a no action letter.<sup>19</sup> The former formally binds the Commissioner and prevents her from challenging a merger. However, it only restricts her from bringing an application on the basis of “information that is the same or substantially the same as the information on the basis of which the certificate was issued.” If the certificate were issued on the basis that a foreign remedy would be carried out, and that remedy is not carried out, the issuance of the certificate would likely not bar a challenge.) As a practical matter, of course, it is unlikely that the Bureau would ever have to take enforcement action. The foreign authority that required the remedy will presumably have a stronger interest in policing its implementation.

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<sup>19</sup> The standard Bureau resolution of a merger investigation is a “no action letter” that advises the merger parties that the Bureau has concluded that it does not presently have sufficient grounds to bring an application to challenge the merger. The Commissioner also uses the communication to remind merger parties of the three-year limitation period, and therefore may re-open its investigation. The Bureau would likely have issued no action letters in all of the cases in which it accepted international remedies, unless the merger was not subject to a mandatory pre-merger notification obligation. (In which case the Bureau would not ordinarily have provided the merger parties with a written reaction to its investigation.)

## Conclusions

To resolve competition concerns within Canada, the Bureau may either take specific action or it may determine that action beyond what will be taken in foreign jurisdictions is not required. While enforcement decisions are made on a case-by-case basis, the Bureau is likely to be sympathetic to the acceptance of an international remedy where the assets or conduct in question are primarily outside Canada, where there are no uniquely Canadian substantive issues and where separate Canadian enforcement action is not necessary to the successful implementation of the remedy. For merger parties in these sorts of cases, an early cooperative approach with the Bureau is advisable. It can increase the likelihood that the Bureau will accept an international remedy and potentially lead to lower investigation and remedial costs. In practical terms it will be important to explain the proposed transaction and its nexus to Canada up-front. This should be supplemented with offers of co-operation in the form of waivers to allow the Bureau to confirm with foreign agencies what it is being told by the parties. Co-ordination on remedies will be difficult or impossible if the Bureau is constrained in the scope of the information it can secure from the agency planning to require the remedy. Clearly only a sub-set of cross-border cases will qualify for this sort of enforcement approach. Nevertheless, the Bureau’s innovative and open-minded policy in these cases ought to be welcomed by international businesses and their advisors.