

## CANADIAN RETAIL MERGERS: GREEN MEANS GO

The Canadian Competition Bureau (the “Bureau”) has investigated several significant retail-sector mergers in the past two years.<sup>2</sup> In most of the cases, the Bureau determined that the merger was likely to result in anti-competitive effects, and disposition of assets was identified as a required remedy (or the merger was abandoned).

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Prior to considering these mergers, the Bureau had little occasion to closely scrutinise retail mergers. There were, certainly, combinations in the retail sector that the Bureau did investigate but few raised serious, national competitive concerns. Rarely was there a need to analyse local trading areas to establish relevant markets or to determine whether the merger would result in any substantial prevention or lessening of competition in these markets.

The issues raised by, and high profile of, recent retail mergers has caused the Bureau to analyse local retail areas and publicly release its analysis and conclusions. The results have been disappointing. The Bureau appears to have adopted, and continued to follow, a rigid, structuralist approach to both definition of markets and, in particular, identification of markets in which anti-competitive effects are likely. In this article we survey the cases and the Bureau’s approach, and discuss how that approach is a sea change from the Bureau’s typical approach to merger analysis in other industry sectors.

### The Analytical Framework for Merger Analysis in Canada

The Commissioner of Competition (the “Commissioner”) is Canada’s chief antitrust regulator. He heads the Bureau and has sole authority under the *Competition Act*<sup>3</sup> (the “Act”) to apply to the Competition Tribunal to challenge a merger that is likely to prevent or lessen competition substantially.

In 1991, the Commissioner (then called the Director of Investigation and Research) issued *Merger Enforcement Guidelines* (“*Guidelines*”) which provide a detailed outline of the Bureau’s approach to analysis and enforcement of the

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<sup>2</sup> Retail mergers that have been subject to Bureau scrutiny in the past two years have occurred in the banking, grocery and department store sectors. They have been either national or regional (i.e., involving outlets in at least two provinces) in scope, and are discussed in depth *infra*.

<sup>3</sup> R.S.C. 1985, c. C-34, as amended.

merger laws.<sup>4</sup> In the *Guidelines*, the Commissioner indicates that a merger will result in a prevention or lessening of competition if the parties to the merger are able to exercise a greater degree of market power (unilaterally or inter-dependently with others) as a result of the merger. The prevention or lessening will be “substantial” if prices are likely to be materially greater (*i.e.*, 5% or more), or service levels reduced, in relevant markets than in the absence of the merger; and where this price differential (or reduction in service levels) would not be eliminated within two years by new or increased competition.

#### *Market Definition*

The first stage in the Bureau’s review of a merger involves identifying the relevant market or markets in which the merger parties operate. Conceptually, a relevant market is defined in terms of the smallest group of products and smallest geographic area in relation to which sellers, if acting as a single firm (a “hypothetical monopolist”) that was the only seller of those products in that area, could profitably impose or sustain a significant and non-transitory price increase above levels that likely would exist in the absence of the merger. In practice, product markets are defined having regard to real world business considerations. The Commissioner gives particular weight to the following factors:

- Views, strategies, behaviour and identity of buyers (often considered the most important sources of information).
- Views, strategies and behaviour of the parties to the merger (pre-merger announcement) and third parties knowledgeable about the industry.
- End use of the products—*e.g.*, the extent to which products are functionally interchangeable is an indicator of whether substitution between them is likely to occur.
- Physical and technical characteristics of the products.

- Switching costs.
- Presence/absence of a correlation in price movements between different products over a significant period of time.
- Assistance of close or other acceptable substitute products.

If the parties to a merger offer a wide range of products, product “clusters” (rather than individual products) could exist as the relevant product market. Cluster markets may be defined where there are costs associated with consumers switching their buying behaviour to locate and purchase a number of products from different locations in response to increases in the prices of the clustered products.<sup>5</sup> Where cluster markets are defined, the analytical focus becomes the group of sellers selling similar clusters of products or services rather than sellers that sell individual products or services.

Typically, geographic markets are defined by reference to the geographic areas in which the parties to the merger sell their relevant products. Evaluative criteria similar to those identified with respect to definition of product markets will inform the definition of relevant geographic markets.

#### *Evaluative Criteria and Market Shares*

Once relevant markets are defined, the Commissioner will assess the likely competitive effects of the merger by reference to so-called evaluative factors, the most relevant of which are set out in section 93 of the Act. These include entry barriers; effective remaining competition; whether a party to the merger is likely to fail; the competitive effectiveness and vigour of the merging parties; and change and innovation.

Market shares and concentration ratios also will be considered, but strict “structural tests” traditionally have been rejected in Canada. Indeed, section 92(2) of the Act specifically states that the Tribunal “shall not find that a merger or proposed merger prevents or

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<sup>4</sup> See Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa: Minister of Supply and Services, 1991).

<sup>5</sup> On cluster markets see William Blumenthal and David A. Cohen, “Channels of Distribution as Merger “Markets”:  
Interpreting Staples and Cardinal,” *Antitrust Rep.*, November 1998, at 2.

lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share”.

In the *Guidelines*, the Commissioner identifies two “safe-harbour” concentration thresholds. The first provides that, absent any concern about co-ordinated behaviour, if the post-merger market share of the merged entity is less than 35%, it is presumed not to be able unilaterally to exercise greater market power. The second safe harbour applies where anti-competitive effects are thought likely because of inter-dependent behaviour. In such circumstances, the *Guidelines* indicate that a merger is not likely to warrant a detailed review where the post-merger market share of the merged entity is less than 10%, or where the post-merger market share of the four largest firms in the market is less than 65%. The *Guidelines* go on to state the obvious; that as market shares increase above the safe-harbour thresholds, “the potential increases for a merger to give rise to concerns”<sup>6</sup>.

## Bureau review of Retail Mergers

In its recent decisions involving retail-sector mergers, the Bureau has shown little tolerance for transactions that result in market shares much higher than the *Guidelines* safe-harbours. This is inconsistent with prior Bureau decisions in other sectors. A study of mergers reviewed by the Bureau in the three years following enactment of the present Act (*i.e.*, 1986-89) found that during that period a transaction was likely to be opposed only if the merging parties had a combined market share of 70% or more.<sup>7</sup> One author has observed that “in practice transactions involving a

post-merger market share in excess of 50% can be expected to receive close scrutiny from Bureau staff [but not necessarily prohibited], and at very high concentration levels (*e.g.* mergers which will create a domestic duopoly or monopoly) there is an implicit presumption of anti-competitiveness unless other factors which preclude an exercise of market power (*e.g.* low entry barriers) can be shown to exist”.<sup>8</sup>

The recent retail-sector decisions also suffer from an apparent lack of detailed analysis of evaluative factors such as ease of entry and remaining competition in each relevant market. This is troubling, having regard for the statutory scheme and the more thorough analysis the Bureau has undertaken of mergers in other sectors.

The Bureau’s recent decisions in retail banking, grocery store and department store mergers are discussed below.

## Bank Mergers

*Royal Bank of Canada / Bank of Montreal* (1998)<sup>9</sup> and *Canadian Imperial Bank of Commerce / Toronto-Dominion Bank* (1998)<sup>10</sup>

The Royal Bank of Canada and the Bank of Montreal notified the Bureau of their intention of merge on January 23, 1998. The proposed merger would have combined the banks ranked first and third in Canada based on the value of Canadian assets.<sup>11</sup> Shortly thereafter, the Canadian Imperial Bank of Commerce (“CIBC”) and Toronto-Dominion (“TD”) banks notified the Bureau of their proposed merger. That proposed merger would have combined the banks ranked second and fifth in Canada based on the

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<sup>6</sup> See *Guidelines* at page 21.

<sup>7</sup> See R. S. Khemani and D. M. Shapiro, “An Empirical Analysis of Canadian Merger Policy” (1993), 41 *Journal of Industrial Economics* 161. The study considered 98 mergers that received a detailed review by the Competition Bureau.

<sup>8</sup> See A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (Toronto: Carswell, 1997) at pages 110-111.

<sup>9</sup> See the letter from the Director of Investigation and Research to the Chairman and Chief Executive Officer of Royal Bank of Canada and the Chairman and Chief Executive Officer of Bank of Montreal, December 11, 1998, available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>10</sup> See the letter from the Director of Investigation and Research to the Chairman and Chief Executive Officer of Canadian Imperial Bank of Commerce and Chairman and the Chief Executive Officer of Toronto-Dominion Bank, December, 1998, available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>11</sup> As of December 31, 1997, Royal Bank and Bank of Montreal held approximately C\$315 billion in assets in Canada.

value of Canadian assets.<sup>12</sup> Ultimately, the mergers were not approved by the Minister of Finance (in large part because of concerns identified by the Commissioner) and were abandoned.<sup>13</sup>

The bank mergers are interesting and important because they were the first contentious, national mergers considered by the Bureau that had a significant retail component. At the retail, branch-banking level, the Bureau defined a variety of personal and business banking products as separate relevant antitrust markets. Only one of the product markets (“business transaction accounts and related markets”) was a cluster market.

The Bureau concluded that relevant geographic markets were local for all products, other than business operating loans between C\$1 million and C\$5 million in respect of which markets were defined as regional (province). Hundreds of local markets were identified. To define urban markets, the Bureau used 112 integrated economic areas defined by Statistics Canada as Census Agglomerations (“CA”) and 25 areas of more than 100,000 people identified by Statistics Canada as a Census Metropolitan Area (“CMA”). CAs and CMAs are urban areas which Statistics Canada has determined have a high degree of social and economic interaction. One important factor used to define CAs and CMAs is commuting data. The commuting thresholds utilised by Statistics Canada to define a CA and CMA are far higher than the commuting thresholds underlying the delineation of similar urban areas in the US and are far higher than the commuting thresholds underlying the delineation of local banking markets

applied by the US Federal Reserve Board and US Department of Justice.

Relevant rural markets were identified as those non-urban areas in which the merging parties had retail branches that were located within 20 kms of each other. To define rural markets, Bureau staff drew circles with a radius of 20 km around all non-urban branches of the merging banks that were located within 20 km of each other. The resulting peanut-shaped area was defined as a relevant rural market.<sup>14</sup>

The approach resulted in the identification of 125 urban markets and 99 rural markets in which Royal Bank’s and Bank of Montreal’s branch operations overlapped. CIBC’s and TD Bank’s branch operations were found to overlap in 179 local markets (111 urban and 68 rural markets).

Once geographic markets were defined, the Bureau estimated combined market share of the merging parties in each market for each relevant product. With this information, the Bureau then developed a grid that identified “problem markets” by colour. Markets in which the combined market share of the parties was less than the 35% safe-harbour described in the *Guidelines* were coloured green because no substantial lessening of competition was thought to result from the merger in those markets. Markets in which the combined share was between 35% and 45% were identified as “orange” markets. Orange meant “caution”, insofar as the transaction might have an anti-competitive effect, but this could not be determined in the absence of consideration of other factors. If the combined share of the banks in any relevant market was 45% or more, the Bureau

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<sup>12</sup> As of December 31, 1997, CIBC and TD held approximately C\$275 billion in assets in Canada.

<sup>13</sup> The Bureau’s assessment of these mergers is discussed fully in J. Clifford and J. Rowley, “Canada Says No to Bank Mega Mergers: The Review Process and the Future,” *Antitrust Rep.*, May 1999 at 11

<sup>14</sup> The markets as ultimately defined in many instances were illogical. For example, in adopting the 20 km mid-point radius approach, it must be assumed the Bureau took 20 km as its best estimate of the extent of the geographic influence of bank branches located in rural areas. Logically, then, branches located within 20 km of each other should be in the same market. However, when the Bureau’s methodology was actually implemented in those parts of the country having high population density and/or an abundance of financial institutions, a series of overlapping circles were constructed. In other areas, the rural circles overlapped the boundaries of the defined urban markets. The resulting pattern was a classic example of a “chain reaction” sometimes seen in geographic market definition exercises where a series of areas which can be quite distant from one another (at the extremes) would properly form part of the same market because they exert price discipline on immediately neighbouring markets. This notwithstanding, the Bureau chose to ignore the overlapping circles and treated each primary circle/urban area as a distinct geographic market. This compares to the U.S. where considerable weight is given to the “chain reaction” transmission of market forces that integrate broad geographic areas, even in the fragmented US banking system.

concluded the transaction would result in a substantial lessening of competition. These were identified as “red” markets.

The stop-light approach to problem identification was overly simplistic. The Bureau’s conclusions about “red” markets were based almost exclusively on market share estimations, and lacked any focused analysis of the competitive dynamics in *each* market in which shares exceeded the *Guidelines* safe-harbour. Prior to the bank mergers, transactions resulting in combined share of more than 45% did not automatically lead to rejection of the merger.

*Toronto Dominion Bank / Canada Trust* (2000)<sup>15</sup>

After the 1998 bank mergers were abandoned, TD and Canada Trust (“CT”) agreed to merge. The transaction, which would combine Canada’s fifth largest bank based on the value of Canadian assets with the largest Canadian trust company, was recently completed following the provision of undertakings to the Commissioner to divest bank branches and a credit card business.<sup>16</sup>

At the retail, branch-banking level, the analytical approach adopted by the Bureau in the TD / CT case was identical to that employed in the Royal Bank / Bank of Montreal and CIBC / TD mergers discussed above. Again, urban markets were defined by reference to Statistics Canada census areas. Rural markets were identified as non-urban areas where either of the merging parties had a retail bank branch located within a 20 km proximity of the other. Once markets were identified in which the TD and CT each had retail operations, market shares were calculated and a “stop light” grid prepared. Again, the Bureau went so far as to state that markets in which the parties

combined shares were under 35% “will not result in a substantial lessening or prevention of competition”; shares in the 35% to 45% range “may result in a substantial lessening or prevention of competition”; and combined shares over 45% “will result in a substantial lessening or prevention of competition.” Divestitures were ordered in each of the markets identified as “red”, *i.e.* markets in which the merging parties had a combined share of 45% or more of a relevant product.

## Grocery Stores

The Bureau’s green / orange / red approach to problem market identification has been replicated in a number of recent grocery store mergers.

*Loblaws / Provigo / Agora Food Merchants* (1999)<sup>17</sup> and *Sobeys / Oshawa* (1999)<sup>18</sup>

In August 1999, the Bureau announced that it would not challenge the proposed acquisitions by grocery giant Loblaws Companies Limited (“Loblaws”) of Provigo Inc. (“Provigo”) and Agora Food Merchants Inc. According to the Bureau, the planned transactions prompted an investigation that included an impact analysis on a regional basis in each market where Loblaws would supply retail stores. Following completion of its investigations, the Bureau registered competition concerns in four markets, and Loblaws agreed to divest.

The Provigo acquisition was completed in December 1998. Although Loblaws divested stores in twenty-four markets in Eastern and Northern Ontario, the Bureau had lingering concerns in markets in Ontario and Quebec. As a result, Loblaws agreed to divest stores in eight additional markets.<sup>19</sup>

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<sup>15</sup> See “Proposed Merger of Toronto-Dominion Bank and Canada Trust”, Information (Competition Bureau) January 31, 2000, “The Competition Bureau and the Proposed Merger of Toronto-Dominion Bank and Canada Trust”, Fact Sheet and the Letter from the Commissioner of Competition to the Chairman and Chief Executive Officer of the Toronto-Dominion Bank and the President and Chief Executive Officer of Canada Trust, January 28, 2000, available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>16</sup> *Ibid.*

<sup>17</sup> See “Divestitures Key To Resolving Competition Concerns In Loblaw Transaction”, Press Release (Competition Bureau), August 12, 1999, available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>18</sup> See “Divestitures Resolve Competition Concerns in Sobeys’ Acquisition of The Oshawa Group”, Press Release (Competition Bureau) December 22, 1999, available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>19</sup> *Supra*, note 17.

On November 2, 1998, Empire Company Limited (“Empire”) and The Oshawa Group Limited (“Oshawa”) announced that Empire, through Sobeys Inc. (“Sobeys”), would acquire Oshawa.<sup>20</sup> The transaction included Oshawa’s retail and wholesale operations across Canada, with the exception of the Maritimes. In addition, Sobeys acquired Oshawa’s food service business, SERCA Foodservice Inc. that also operated across Canada.

The Press Releases and *Backgrounders* issued by the Bureau in connection with 1999 supermarket mergers shed little light on the manner in which the agency defined relevant markets. In the Sobeys case the Bureau stated that “[w]ith regard to food retailing and wholesaling, the Bureau analysed the impact of this transaction on a regional basis as well as for each market where Sobeys will be supplying retail stores.” What, precisely, the Bureau meant by “each market” is difficult to gauge. The Bureau did identify certain “geographic retail markets”, by city or town name, suggesting that urban markets encompassed the entire urban area. The extent or boundaries of these markets are not at all clear and readers are left guessing exactly how the Bureau defined geographic markets. This contrasts to earlier supermarket decisions in which the Bureau used a two mile trading zone to define geographic markets.<sup>21</sup>

More mystifying is the manner in which product markets were defined. The language of earlier supermarket decisions<sup>22</sup> - which identified traditional grocery stores and superstores as the relevant market - is completely absent from the decisions. That said, AC Nielsen data, which the Bureau used to identify industry concentration, divides the “market” amongst the four largest grocery retailers, “other grocery” and “remaining channels.” This reference to “remaining channels” suggests that

the Bureau may have been defining markets more broadly than it has in the past. But again, no explicit statement to this effect was made.

Interestingly, the Bureau appears to have taken a slightly less formalistic approach to the identification of problem markets, but clearly is still highly influenced by the market shares of the parties. Again, the stop-light grid was prepared and divestitures required in “red” markets (being markets in which the parties had a combined share of more than 45%). But some divestitures were also made in “orange” and “green” markets as well and a statement was made that above the 35% “screening threshold”, the Bureau “conducted a detailed analysis [...] including such factors as barriers to entry, removal of a vigorous and effective competitor and effective remaining competition.” That said, none of the materials released by the Bureau about the mergers gives an indication of the exact extent to which the Bureau analyzed the section 93 evaluative factors on a market-by-market basis as contemplated under the *Guidelines*.

## DEPARTMENT STORES

The Bureau’s decisions over the past decade relating to mergers in the department store sector focused more on the definition of product markets than geographic markets or consideration of competitive effects. Indeed, no remedy has been sought in any department store merger considered by the Bureau, and thus no “substantial prevention or lessening of competition” was needed to be justified.

Recent, publicly available information from the Bureau relating to market definitions in mergers between department stores is sparse. The threshold question in such cases is whether a department store market exists at all (and, if so, which retailers ought to be included in the market) or whether the competitive

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<sup>20</sup> See “Sobeys Inc. Acquisition of Certain Assets of The Oshawa Group Limited” Competition Bureau Backgrounder (December 1999), available on the Competition Bureau website, <http://competition.ic.gc.ca/>.

<sup>21</sup> See “The Great Atlantic & Pacific Company of Canada, Limited / Steinberg Inc.”, Competition Bureau Backgrounder (October 1990). See also A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (Toronto: Carswell, 1997) at page 319 and the references cited therein.

<sup>22</sup> In commenting on the A & P / Steinberg transaction, the Commissioner defined the relevant product market in the following manner: “while recognising that non-traditional outlets are becoming an increasing factor in grocery sales, [...] the appropriate product market for purposes of competition assessment should be confined to traditional supermarkets.” See “The Great Atlantic & Pacific Company of Canada, Limited / Steinberg Inc.”, Competition Bureau Backgrounder (October 1990).

strength of department stores ought to be assessed on a department-by-department basis. In other words, is there a department store market or is there a department store type merchandise market? The Bureau's consideration of the merger involving the Hudson's Bay Company ("Bay"), Simpsons Limited and Simpsons-Sears Limited—discussed in the Director's 1979, 1980 and 1981 Annual Reports—suggests that the Bureau may, at that time, have viewed "full-service" department stores as a relevant product market.<sup>23</sup> A review of more recent cases suggests, however, that the Bureau's thinking has evolved and that it now will assess such mergers on a department-by-department basis.

*Zellers / Woodward's* (1993)<sup>24</sup>

Woodward's Limited ("Woodward's") owned retail department stores and was based in Vancouver, British Columbia. The stores operated under various names, including Woodward's, Woodwynn and Abercrombie & Fitch. In December 1992, Woodward's filed for protection from its creditors in the British Columbia Supreme Court. In March 1993, the Bay, through its affiliate Zellers Inc. ("Zellers") signed a letter of intent with Woodward's for the acquisition of the majority of the shares of Woodward's.

In 1993, the Director concluded that the acquisition by the Bay and its subsidiary, Zellers, of Woodward's would not likely result in a substantial lessening of competition. He noted, in particular, that

"analysis of the available information indicated that the combined share of the parties was relatively low. In addition, there was significant remaining competition from other department stores and from speciality retailers in the markets examined".<sup>25</sup>

This short consideration of the relevant market is interesting insofar as (i) it suggests that discounters such as Zellers and Woodward's appear to be considered department stores (*i.e.*, there is no distinction made between the major or traditional department stores and discount retailers) and (ii) the Bureau was willing to consider competition from specialty stores (suggesting that all retailers selling department store-type merchandise were within the relevant market).

*Wal-Mart Stores / Woolworth Canada* (1994)<sup>26</sup>

On January 18, 1994 the Director received an application for an advance ruling certificate under section 102 of the Act in respect of the proposed acquisition by a wholly-owned subsidiary of Wal-Mart Stores, Inc. ("Wal-Mart") of over 100 Woolco department stores across Canada from Woolworth Canada Inc. The Director reviewed the proposed acquisition and concluded

that the proposed acquisition would not increase the already low degree of industry concentration in the sale of department store merchandise in Canada.<sup>27</sup>

<sup>23</sup> *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1979 (Ottawa: Supply and Services Canada, 1980) at pages 21 to 25. But see also *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1980 (Ottawa: Supply and Services Canada, 1981) at page 67 and *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1981 (Ottawa: Supply and Services Canada, 1982) at pages 58 and 59. Following the announcement that Simpsons Limited and Simpsons-Sears Limited were to merge, the Director initiated an inquiry because the merger would bring together firms accounting for more than 60 per cent of the sales of "full service" department stores in Canada. Although the Simpsons / Simpsons-Sears merger was subsequently abandoned, the Director continued to monitor the Bay / Simpsons merger. In his 1981 *Annual Report* the Director reported that he had conducted an investigation of the business practices of the Bay / Simpsons and concluded that "[t]here was no evidence that the Bay/Simpsons shares of "traditional" department store sales had increased significantly since the merger." See *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1981 (Ottawa: Supply and Services Canada, 1982) at 58.

<sup>24</sup> *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1994 (Ottawa: Supply and Services Canada, 1995) at page 17.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Director of Investigation and Research*, Annual Report for the Year Ended March 31, 1994 (Ottawa: Supply and Services Canada, 1995) at page 18.

<sup>27</sup> The Director went on to note: "Moreover, Wal-mart's reputation for competing aggressively on price, service and innovation in technology, distribution and inventory management as well as product development indicated that the proposed transaction would likely increase competition."

The reference to “department store merchandise” again suggests that the Bureau concluded that the relevant product market was retailers selling department store type merchandise (or something roughly equivalent). However, it is worth noting that prior to the Woolco acquisition Wal-Mart did not have any operations in Canada, suggesting that the transaction raised no or minimal competitive concerns regardless of market definition. Consequently, market definition was not a central focus of the Bureau’s review.

*Sears Canada / T. Eaton Co.* (1999)

The Bureau had occasion to consider the competitive effect of yet another merger in the department store sector when in September 1999 Sears Canada Inc. (“Sears”) announced its intention to acquire all of the common shares of T. Eaton Co. Ltd. (“Eaton’s”), 16 Eaton’s stores and the Eaton’s name and brands.<sup>28</sup> Eaton’s was insolvent at the time it was acquired by Sears, and there were no obvious alternative purchases. Accordingly, a failing firm argument likely influenced the Bureau in its approval of the transaction. However, the authors of this paper were informally advised that the product market definition adopted by the Bureau in its review of the transaction was “department store type merchandise”, suggesting that the Bureau has indeed abandoned notions of department stores as relevant markets and that it will consider the impact of such transaction on a merchandise-line by merchandise-line basis.

A number of conclusions may be drawn from the Bureau’s department store decisions. Although the agency appears to have been disposed to a narrowly defined product market of “full service” department stores in the late 1970s / early 1980s, it more recently appears to have recognised that competition amongst department stores and other specialty or discount retailers will discipline each other, suggesting that the relevant market is at least all general merchandisers, if not all retailers selling department-store type merchandise. Given industry changes since the time of the Hudson Bay / Simpsons merger, the Bureau would probably be receptive to a product market defined as “department store type merchandise.” In other words, it appears that the modern approach to market definition in the case of department store mergers is to define as individual markets the cluster of products sold by each department within a department store. Thus department stores would compete against women’s clothing retailers; hardware stores; furniture stores and any other retailers selling products available at department stores.<sup>29</sup>

Although the Bureau has yet to adopt the green / orange / red approach to department store mergers, it may be expected to do so in future cases if current trends continue. As the Bureau appears to be adopting a “department store type merchandise” definition of the relevant market, it could conceivably determine that safe harbour market share thresholds have been exceeded with respect to the sales of a single

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<sup>28</sup> See “Sears Canada closes deal for Eaton’s”, *The Globe and Mail*, 31 December 1999, page B3.

<sup>29</sup> This approach clearly differs from that taken in the leading US case, *Bon-Ton Stores v. May Department Stores Co.* (1994-2 Trade Cas. (CCH) ¶ 70,800 (W.D.N.Y.)). The *Bon-Ton* defendants had argued that a department stores market was under inclusive because it overlooked businesses that competed with department stores such as general merchandise, apparel and furniture stores. Although the *Bon-Ton* court agreed that department stores competed in a vast marketplace that encompassed retailers in general, it applied various criteria in finding qualitative differences which were sufficient to establish “tradition department stores including J.C. Penny’s” as a proper market. The court found that department stores could be distinguished from other retailers based on: physical appearance and layout of the stores; their distinctive customers; the wide range of brand name merchandise (with distinct prices); and service.

Although *Bon-Ton* is instructive insofar as it indicates the criteria that Canadian enforcement officials might consider in defining the relevant market, it seems unlikely that such a market definition would be adopted in Canada. It is worth noting that *Bon-Ton* is also inconsistent with decisions taken in other jurisdictions. The Dutch Competition Authority (or “NMa”), for example, in the Vendex / KBB department-store merger concluded that it was not possible to establish a separate market for department stores. The NMa focused its inquiry on the effect that the proposed merger would have on the markets for baby clothing; women’s underwear; jewellery, watches and clocks; and leather goods. This case is discussed in the 1998 annual report of the NMa, *Jaarverslag 1998*, available online (in Dutch) at: <http://www.nma-org.nl/>. See also *European Counsel Magazine*, June 1999 (Volume IV Number 5) at 76.

department. What an appropriate remedy would be in such a case is unclear. Would enforcement officials require the divestment of an entire retail outlet because the merger parties' combined share of one produce line exceeds *Guidelines* safe harbour thresholds? Although such an outcome could, of course, occur following an in-depth consideration of section 93 factors, the scenario illustrates the inadequacy of market-share driven analysis based primarily on concerns about shares that exceed certain pre-determined thresholds.

### **Conclusions**

The Bureau has shown a willingness to take issue with retail mergers in markets in which concentration levels are found to be unacceptably high without

conducting a serious antitrust analysis of the impact of the proposed transaction in each relevant geographic market (or, if conducting such an analysis, disclosing its approach and conclusions in each market). This approach has not been tested by the Competition Tribunal, presumably because solutions negotiation with the Commissioner are preferred by the merger parties than protected Tribunal litigation. However, in the absence of a challenge and the clarity that could result from a decision of the Tribunal, it should be expected that Bureau staff will continue to apply their stop-light approach to identification of problem markets and the rigid, structural methodologies implied by that approach.