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I. INTRODUCTION

In March 2009, the Canadian *Competition Act's* merger review process was amended to align it more closely with U.S. merger review under the *Hart-Scott-Rodino Antitrust Improvements Act* ("HSR ACT"). The key change involved the adoption of an initial 30-day review period, which could be extended with the issuance by the Competition Bureau (the "Bureau") of a "Supplementary Information Request" ("SIR"). As a result of these changes, the Canadian merger review process is now more directly and closely analogous to the merger review process in the United States.

Convergence in the merger review processes between different competition agencies can generally be helpful for merging parties, reducing the complexity and cost of compliance while speeding up the timeline for competition approval. In the specific case of information gathering, convergence may enable parties to save time and money in collecting, reviewing, organizing, and producing the requested information and records.

There has now been sufficient experience with Canada's new SIR process to offer a few conclusions about the efficacy of its operation, and particularly whether it has helped to make it easier for merging parties to deal with information requests when issued by agencies in both Canada and the United States. As discussed in more detail in this article, the SIR process has functioned quite well in practice, although there still remain areas of divergence that can make the merger review process in Canada more difficult for parties and counsel involved in cross-border Canada/U.S. mergers.

II. OVERVIEW OF THE CANADIAN MERGER REVIEW PROCESS

With the 2009 amendments, the *Competition Act* now imposes a thirty-day initial waiting period from the filing of a merger notification during which the proposed transaction may not be closed. Before the 30-day waiting period expires, the Bureau may issue a SIR, in which case the proposed transaction cannot be completed until 30 days after the Bureau receives the completed information requested in the SIR. Thus, the overall structure of the Canadian merger review process is the same as that in the United States, where there is also an initial 30-day review period that can be extended by a "second request."

In addition to the statutory waiting periods, however, the Bureau also operates pursuant to non-statutory, non-binding "service standard periods." These "service standard" periods designate the time within which the Bureau will attempt (but is not obliged) to complete its

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substantive review of the proposed transaction. The duration of the "service standard" will depend on how the Bureau classifies the proposed transaction based on the level of competition issues it raises. Thus, the Bureau will endeavor to complete its review of "non-complex" transactions within 14 days of having received a complete filing (taking into account any time needed to supplement the filing with additional information requested by the Bureau), and endeavor to complete its review of "complex" transactions within 45 days of filing (unless an SIR has been issued, in which case the "service standard" period will also terminate 30 days after complete responses have been submitted).

Over 80 percent of notifiable mergers are categorized as "non-complex" and cleared by the Bureau within 14 days of notification. "Complex" mergers typically take between 45 day to 5 months to resolve, although this will vary depending on whether a SIR is issued and remedies need to be negotiated.

In the rare case that the Bureau decides to challenge a merger, it must bring an application to the Competition Tribunal (the "Tribunal"). Contested applications can take more than a year to conclude. In limited cases, the Bureau may agree to a "hold separate" arrangement in respect of assets or businesses that raise competition concerns to permit closing pending completion of the Bureau's review or a challenge before the Tribunal.

III. THE SIR PROCESS

A. Frequency of Issuance

When the *Competition Act* was amended in 2009, there was concern that the Bureau would be overly eager to exploit its new investigative tool, and would resort to SIRs as an automatic default in any merger that raised issues, no matter how minor or limited. The Bureau tried to allay these concerns by indicating in speeches and guidelines at the time that it would be judicious in its use of SIRs. For example, a Bureau representative testified before a committee of Canada's Parliament that the Bureau was likely to issue SIRs in only "four to six" mergers per year. The Bureau's *Merger Review Process Guidelines* issued in 2009 stated that "very few mergers" raise serious issues and that it "is unlikely that the SIR mechanism will be employed by the Bureau on a frequent basis."

As it turned out, the Bureau issued five SIRs within the first six months of the enactment of the new merger review process in 2009. However, the pace of that initial surge did not continue. In its 2010-2011 fiscal year (based on a March 31 year end), the Bureau issued SIRs in five transactions (approximately 2 percent of all filed mergers); in its 2011-2012 fiscal year, the Bureau issued eight SIRs (approximately 3 percent of all filed mergers). In other words, the feared avalanche of SIRs has not materialized, and they seem to be utilized only in what can be considered to be, at least on their face, the hardest cases.

Interestingly, in its revised *Merger Review Process Guidelines* issued in January 2012, the Bureau no longer says that it will only employ SIRs in a "very few" cases. This change in language raised eyebrows among competition law practitioners in Canada at the time, but it has yet to be followed by any significant uptick in the Bureau's use of SIRs.

It is also worth noting that, despite what is often a North American market, the U.S. and Canadian authorities may still diverge in whether to issue a SIR/second request in any given case.

Consider, for example, the recent acquisition of RSC Holdings, Inc. by United Rentals, Inc., where both companies were involved in equipment rentals in the United States and Canada. The U.S. DOJ chose not to issue a second request whereas the Bureau issued a SIR. In the end, though, the Bureau reached the same conclusion as its U.S. counterpart and cleared the transaction less than one month after the SIR was issued.

B. Pre-Issuance Discussions

Where the Bureau concludes that a SIR is necessary, it will try to provide a draft to the parties two business days prior to issuance (although there is no obligation to do so). The intention is to allow the parties to provide input on the scope and nature of the information required and to identify any technological barriers to production.

In practice, given what may only be a two day window, there is often only limited time available pre-issuance to deal with all of the issues that the draft SIR may raise. Accordingly, it is not uncommon for discussions to continue even after the SIR has been issued.

That said, one should not be misled into believing that these consultations will always result in changes to the SIR. On the whole, while the Bureau is always willing to entertain suggestions for improvement, it is generally reluctant to revise its SIRs to any substantial degree. Moreover, while parties are able, in theory, to contest the scope of the SIR through an internal Bureau "appeal" process, we are not aware of anyone ever having actually utilized this process—for obvious reasons.

C. Scope of Information Required

As with U.S. second requests, SIRs will require the production of various types of documents, data, and narrative responses to questions. Unlike in the United States, however, the Bureau does not typically conduct interviews and take depositions as part of this process.

Although the Bureau has included a sample SIR in its revised *Merger Review Process Guideline,* there is no "standard form" of SIR and there are no limits on the scope of information that could be required apart from "relevance" to the Bureau's investigation.

The lack of any prescribed limitations on scope generated concerns at the time the SIR process was adopted that the Bureau would exploit this opportunity to go on proverbial "fishing expeditions" and thus burden merging parties with broad, unwieldy, and unfocused information requests. Horror stories emanating from south of the border about the scope of U.S. second requests only served to stoke these concerns.

Our experience, however, is that the Bureau has been admirably disciplined in defining the scope of its SIRs. The Bureau typically seeks to avoid "data dumps" and tries to limit the extent of information it requires to be produced.

One way in which the Bureau has accomplished this objective is by limiting the types of records it is seeking. The term "record" is defined very broadly in the *Competition Act* to include any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof. In other words, the definition covers pretty much anything one could think of,

and, most significantly from a volume perspective, extends to include e-mails. Often, however, the Bureau will limit the number of items for which it requires parties to produce all of their relevant "records." Instead, to its credit, the Bureau typically limits most of its information requests to relevant "reports, studies, evaluations, and strategic marketing and business plans" and other high level documents of that nature. Obviously, the narrower the types of records required, the less onerous compliance with the SIR will be.

The Bureau also typically limits the time frame for the information it is seeking. Generally speaking, the "default" period for hard copy and electronic records is the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years, while the default period for data is the previous three full calendar years. This is the same general time frame used in the United States.

Finally, the number of custodians whose files will have to be searched will have a significant impact on the scope of the SIR and the cost of compliance. The Bureau will generally agree to limit the number of responsive custodians to 30 individuals, although it does not consider itself bound to do so in any given case. Interestingly, however, the Bureau will not always insist on the parties clearing custodians with them in advance. We have been involved in situations where the identity of the custodians has been part of pre- (and post-) issuance discussions and where the Bureau has even agreed to "sign off" on the appropriateness of the individuals identified as custodians. In other cases, however, there has been no discussion of custodians, with the Bureau simply taking the position that the parties must satisfy themselves that they have searched the appropriate individuals, bound as they are to certify that their responses to the SIR are "correct and complete in all material respects" (see below).

D. Refresh Obligations

As in the United States, the Bureau requires production to be "refreshed" where a certain period of time (typically 90 days) has lapsed since the issuance of the SIR. This can mean conducting a second sweep, after all initial searches are done, to make sure more recent documents are caught and produced. This refresh obligation places a premium on responding to the SIR as soon as possible. In our experience, many parties are able to respond to SIRs in as short a time as four weeks. However, this will obviously depend on the scope of the information requested.

E. Certification

Information submitted in response to a SIR must be accompanied by a sworn affidavit (certificate) from an officer or other authorized representative of the responding party, certifying that the responses are "correct and complete in all material respects" and that the documents produced are "certified true copies of the original records."

The Bureau's template certificate also requires the affiant to state that s/he has "reviewed the information" being provided in response to the SIR. This is obviously an impossible statement to make and one wonders why the Bureau includes it in the certificate template. In our experience, however, the Bureau has in practice been satisfied with certificates stating that the affiant has informed himself/herself of the process used to comply with the SIR and had some form of supervisory role over this process (however broad). This consideration should be taken into account from the outset in deciding who the affiant should be.

Parties are entitled to exclude certain categories of information from the SIR, such as where the information:

- is not known or reasonably obtainable;
- could not, on any reasonable basis, be considered to be relevant to an assessment by the Bureau as to whether the proposed transaction would or would be likely to prevent or lessen competition substantially;
- has been previously supplied to the Bureau (e.g., as part of initial filings or subsequent voluntary information requests);
- cannot be supplied because of a confidentiality requirement established by law (Bureau Guidelines indicate that this is considered to exclude contractual confidentiality obligations); or
- is subject to a valid claim of privilege.

Where a party seeks to rely on one or more of these exclusions, the basis for doing so must be set out in the SIR certificate.

A major category of documents withheld from SIR responses is those subject to privilege. This would cover, for example, confidential communications between the parties and their lawyers for the purpose of seeking or receiving legal advice (solicitor-client privilege) as well as communications made in anticipation of potential litigation relating to the transaction (litigation privilege). For corporate clients, solicitor-client privilege in Canada extends to communications with in-house counsel in respect of legal advice (as opposed to business advice). Unlike in the United States, the Bureau does not require a "privilege log" summarizing the documents over which privilege has been claimed. This saves time and trouble in responding to SIRs.

Some industries/jurisdictions may be subject to specific limitations that will have to be taken into account when compiling responses to the SIR. For example, the U.S. International Traffic in Arms Regulations prevent the export from the United States of certain documents generated by companies in defense-related industries. It is important for parties and their counsel to identify any such restrictions early on in the SIR process so that they can be dealt with expeditiously and do not delay completion of the response.

Unlike with respect to notification materials filed to initiate the review process, the bureau does not issue any documentation confirming that the SIR responses are complete. Generally speaking, therefore, parties assume that their responses are complete as of the date of submission, unless informed otherwise by the Bureau. In theory this could lead to disputes about the commencement/termination dates of the final 30-day waiting period. In practice, we have yet to see this occur.

F. Alternatives to the SIR

Instead of issuing a SIR, the Bureau may, in limited circumstances, enter into a timing agreement with the parties that sets out the timeframe for completion of the merger review. Under such agreements, the statutory waiting period is allowed to expire but the Bureau and the merging parties agree to delay closing until the Bureau has completed its review pursuant to an agreed-upon timetable. A similar process is available in the United States.

The most recent guidance from the Bureau on this topic lists factors that the Bureau may consider in determining whether a timing agreement is appropriate including, among other things, the type of transaction (timing agreements may be more likely in hostile transactions); whether a statutory waiting period is running; the information required by the Bureau to conduct its review; and the extent to which information has already been received. The timing agreement will involve (i) a detailed description of the information to be provided by the parties, and (ii) a timetable for submitting responses. The transaction cannot be completed until the timing agreement commitments made by the parties have been satisfied.

As in the United States, the Canadian process also contemplates that parties may "pull and re-file" their notifications to provide the Bureau with an additional statutory 30-day period in which to continue its review. The hope is that this expedient will give the Bureau sufficient time to complete its analysis without having to resort to a SIR. One caution is that the re-filing must be made within five business days or else a new filing fee will be payable.

Finally, it is possible that the Bureau may allow the statutory waiting period to expire without having issued a SIR or completed its substantive review. In those circumstances, the parties may close at their own risk, in which case the Bureau has one year to challenge a transaction that has been completed. The typical approach, however, is for parties to wait until they receive substantive clearance from the Bureau.

G. Cross-border Considerations

The Bureau generally tries to be sensitive to the parties' justifiable desire to avoid unnecessary duplication of effort where both the Bureau intends to issue a SIR and the U.S. agency has issued a second request.

In extreme cases, the Bureau may even be willing to forego issuing a SIR entirely where the parties commit to providing the Bureau with full access to the second request responses. According to its Merger Review Process Guidelines, the Bureau may agree to such an arrangement provided that (i) the parties have provided appropriate confidentiality waivers to the U.S. agency to permit sharing of information with the Bureau, and (ii) the data and records received in this manner will be treated for all purposes "as if" provided directly to the Bureau.

More typically, however, rather than foregoing the issuance of a SIR in its entirety, the Bureau will issue a limited SIR that addresses issues particular to Canada or requests the same type of information requested in the United States but that is specific to Canada, e.g., strategic plans that were/are to be implemented in Canada. This is intended to limit the extra searching that may be required for Canadian purposes. Indeed, given the breadth of the typical U.S. second request, it is often possible to extract most, if not all, responsive documents to the SIR from the U.S. database.

Discrepancies in time frames, however, can sometimes complicate this process. For example, it is not unusual in cross-border transactions for parties to commence the U.S. merger review process before initiating review in Canada. In those circumstances, the Bureau may not issue its SIR for several months after the second request has been issued by the U.S. agency. This can lead to situations where the Bureau is asking for documents that go beyond the time frame searched for U.S. purposes, thus necessitating a separate search to pull and review documents from this "tail end" period (when viewed from the U.S. perspective). A legitimate question is

whether these extra searches serve any purpose other than allowing the Bureau to establish that it operates its own separate and independent merger review process.

Another issue that often arises is over indexing. The Bureau will require that an index be provided indicating the SIR question (specification) to which each document is responsive. U.S. agencies do not impose a similar requirement for second requests. Accordingly, where it is anticipated that there will be both a second request and a SIR, it is advisable to have some sort of categorization protocol in place for the second request that can then be used for the purposes of the SIR.

IV. CONCLUSION

Despite initial concerns, Canada's SIR process has not proved to be overly cumbersome or unwieldy, although it undeniably remains a costly proposition for clients. To date, the Bureau has been fairly reasonable in its approach to SIRs, which is not something we would say about the Bureau in all cases. It is to be hoped that this approach will continue, particularly with respect to cross-border mergers where parties are facing both a second request and a SIR. Reducing complexity in compliance is of obvious benefit to merging parties, but also enables the Bureau to carry out its functions in an efficient fashion. In the end, that is the basis upon which the Bureau's performance as a competition enforcement agency will be judged.