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Procedural Fairness in Canadian Merger Review

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**Procedural Fairness in Canadian Merger
Review**

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Overview

- **Canada is an established competition/antitrust jurisdiction, with modern legislation in place for almost 25 years.**
- **Currently, Canada's merger review process and practice is substantially consistent with IGO recommended norms, including:**
 - *ICN Recommended Practices for Merger Notification Procedures (2003)*
 - *OECD Council Recommendation on Merger Review (2005)*

Overview

- **Did not happen overnight: Canada's progress in enhancing procedural fairness in merger reviews has been incremental and largely driven by senior leadership at the Competition Bureau, as well as legislative change.**
- **Conclusion of this presentation:**
 - Even in "mature" jurisdictions, procedural fairness and transparency objectives are works in progress
 - Changes in the law can act as a catalyst
 - Commitment at highest levels of leadership essential for advancing these goals

3

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Merger Review in Canada

- **Competition Act, R.S.C. 1985, c. C-34 (as amended) (the "Act") contains merger provisions.**
- **Commissioner of Competition responsible for administration of the Act, assisted by the Competition Bureau.**
- **Commissioner may make application to the Competition Tribunal for a remedy with respect to mergers which result, or are likely to result, in a substantial lessening or prevention of competition.**
- **Right to appeal from Tribunal on questions of law or mixed law and fact; with leave on questions of fact.**

4

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Merger Review in Canada

- Act contains a merger notification regime in Part IX, including requirement to file a notification in advance of closing and observance of a statutory waiting period.

5

Three Important Features relating to Procedural Fairness

- **First**, the Act gives the Commissioner/Bureau significant discretion over many aspects of the merger review process, e.g:
 - Whether or not an inquiry will be discontinued
 - Issuance of subpoenas/document requests
- **Second**, the Act also contains a strong guarantee of confidentiality binding the Commissioner/Bureau. Save limited exceptions, no communication of information of:
 - Identity of parties, information obtained from them in course of a notification filing or other voluntarily provided information

6

Three Important Features relating to Procedural Fairness

- **Third, Canada has historically adopted a consensual approach to merger reviews:**
 - Litigated merger cases extremely rare; since 1986, less than 10 cases litigated on the merits before Tribunal.
 - In 2008, for example:
 - 337 mergers investigated
 - 270 did not raise issues (no remedy/no significant comment)
 - Of the 66 that were identified as raising issues (complex/very complex), 64 closed without remedy
 - Of the remaining 4, consent agreements filed on 2; 1 did not proceed; 1 saw acceptance of foreign remedy.

7

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Implications

- **The result is that the Commissioner/Bureau are the primary actors in Canadian competition policy, including merger reviews. Limited judicial authority.**
- **Though aspects of procedural fairness are governed by administrative law and other principles, many of the important decisions in a merger review context are made by the Commissioner/Bureau subject to confidentiality.**
- **Procedural fairness/transparency therefore an important goal and challenge in Canada.**
- **There has been a steady evolution in our approach to procedural fairness/transparency since 1986, largely driven by the mandates of individual Commissioners.**

8

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Examples

- In the first few years post 1986, apart from substantive *Merger Enforcement Guidelines*, limited formal guidance on merger review process apart from agency statements and Annual Reports. However, began to change in the mid 1990s.
- **Commissioner von Finckenstein (1997-2003):**
 - *Conformity Continuum Information Bulletin* (2000) formally setting out enforcement philosophy and confirming commitment to transparency and confidentiality
 - *Merger Review Benchmarking Report* (2001)
 - *Fees and Service Standards Handbook* (2003) - fee schedule and non-binding service standards/timing for substantive review
 - Controversy about Bureau's approach to efficiencies as reflected in *Merger Enforcement Guidelines* vs. position in litigation (Superior Propane)

9

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Examples

- **Commissioner Scott (2004-2009)**
 - Introduction of *Technical Backgrounders* program in 2005 (19 issued to date)
 - Revision of *Merger Enforcement Guidelines* (2004)
 - Continued issuance of new guidelines and bulletins, including *Information Bulletin on Merger Remedies in Canada* (2006)
- **Commissioner Aitken (2009-present)**
 - Faced with significant amendments to merger review process in early 2009, including harmonization with US HSR process
 - Response was significant consultation about proposed enforcement guidelines on new process
 - New *Merger Review Process Guidelines* a highpoint in collaboration with stakeholders

10

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Merger Review Process Guidelines as Example

■ *Merger Review Process Guidelines (2009)*

- Outline Bureau's approach to new two stage merger review process
- Early dialogue and cooperation between Bureau and parties
- Internal mechanism for merging parties to challenge Bureau decisions
- Commitment to communicate preliminary views on potential substantive issues as early as possible
- Guidance on issuance of information requests and internal appeal process with respect to scope of request and completeness of response

11

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Observations

- **Canadian approach to procedural fairness in merger review has evolved over time from limited transparency to more open substantive/procedural transparency**
 - **Methods:**
 - Reliance on increased issuance of enforcement guidelines, given limited judicial guidance
 - Timely revision of existing guidance
 - Commissioner commitment to transparency
- **Amendments provided impetus to increase transparency (see *Merger Review Process Guidelines*)**

12

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Conclusion

- **Three observations:**
 - Even in “mature” jurisdictions, procedural fairness and transparency objectives are works in progress
 - Changes in the law can act as a catalyst
 - Commitment at highest levels of leadership essential for advancing these goals
- **Detailed speaking notes (including citations) available on request: sbhattach@heenan.ca**

13

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