Divestiture Relief in Merger Cases: An Assessment of the Canadian Experience

Margaret Sanderson* and Ann Wallwork**

Divestiture is the most common form of relief used by antitrust authorities to address anti-competitive mergers. In this article, the authors discuss whether competition authorities, in using this tool, have achieved effective relief to anti-competitive mergers. Effective relief is defined to be the prevention of anti-competitive effects.

Three criteria are identified as being essential to ensuring effective relief. First, the assets chosen for divestiture must comprise a viable entity. Second, the independence and competitive significance of the purchaser must be assured. Third, the time taken to complete the divestiture should not be prolonged. These criteria are used to assess Canadian and American antitrust authorities' experience with divestitures.

It is the authors' opinion that, not unlike the American experience, the initial use of divestitures as a remedy to anti-competitive mergers in Canada was characterized by a number of problems which resulted in early relief likely being less effective in certain cases. Efforts to improve the effectiveness of the process were undertaken as experience with the process was gained. Nonetheless, the authors recommend that Canadian authorities further formalize their procedures in respect of divestiture relief, on the premise that increased standardization of the process will ensure that viable asset packages are sold to competitive entities in a timely fashion.

Lors d'un fusionnement jugé anti-concurrentiel, la sanction la plus courante consiste à demander à la partie principale de se départir d'une partie de l'entreprise nouvellement formée. Dans cet article, les auteures examinent l'efficacité de cette approche en se demandant si elle réussit à prévenir les effets anti-concurrentiels.

Les auteures présentent trois critères d'efficacité. D'abord, les actifs choisis doivent constituer une entité viable. Deuxièmement, l'indépendance et la situation concurrentielle de l'acheteur doivent entrer en ligne de compte. Enfin, la vente doit se faire dans un délai raisonnable. À la lumière de ces critères, les auteures portent un jugement sur l'expérience canadienne et américaine en la matière.

Les auteures sont d'avis qu'au Canada comme aux États-Unis, l'approche sous étude s'est d'abord butée à certaines difficultés qui ont nui à son efficacité. Avec le temps, l'expérience a permis des améliorations utiles. Néanmoins, les auteures suggèrent que les autorités canadiennes adoptent des procédures plus uniformes pour que dans tous les cas on parvienne à vendre des actifs viables à un concurrent dans les plus brefs délais.

* Bureau of Competition Policy.

** Bureau of Competition Policy.

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Synopsis

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Introduction

Since the enactment of Canada's *Competition Act*[1] in 1986, the Bureau of Competition Policy has examined hundreds of mergers. To date, thirty-three transactions have been found by the Director of Investigation and Research to be likely to substantially lessen or prevent competition. Of these, thirteen were abandoned by the parties in light of the Director's concerns. Of the twenty mergers which proceeded, seventeen were subject to certain modifications, generally involving divestiture.

Divestiture is the most common form of relief sought by antitrust authorities in anti-competitive merger cases. As a remedy, divestiture has at least three theoretical advantages. It is flexible, relatively easy to enforce, and generally effective in redressing the market structure which gave rise to the competitive concern. Whether enforcement agencies utilize this form of relief in an appropriate manner is another matter.

[1]*Competition Act*, R.S.C. 1985, c. C-34, as am. by R.S.C. 1985 (1st Supp.), c. 27, ss. 187, 189, R.S.C. 1985 (2d Supp.), c. 19, Part II, R.S.C. 1985 (3d Supp.), c. 34, s. 8, R.S.C. 1985 (4th Supp.), c. 1, s. 11, R.S.C. 1985 (4th Supp.), c. 10, s. 18, S.C. 1990, c. 37, ss. 29-32, S.C. 1991, c. 45, ss. 547-550, S.C. 1991, c. 46, ss. 590-594, S.C. 1991, c. 47, ss. 714-717, S.C. 1992, c. 1, ss. 44-46, 145, S.C. 1992, c. 14, s. 1, S.C. 1993, c. 34, ss. 50-51 [hereinafter the *Act*].

This paper will address this latter issue in the context of the Bureau of Competition Policy's experience with divestitures in merger cases. The paper begins by briefly reviewing the goals of merger relief (part I), following which there is a brief summary of the academic literature on the subject of divestitures (part II). Part III discusses the Canadian merger cases which required some form of divestiture and part IV reviews the present practices of American federal antitrust authorities. We close with our conclusions.

I. The Goals of Merger Relief

Remedies for anti-competitive conduct have not been subject to a great deal of debate in Canada. This may stem from the difficulties in defining the goal of antitrust relief in general. Is deterrence, restitution or penalty the aim of the remedies? Will this vary with the offence? While recognizing the intellectual debate surrounding these questions, we believe that the appropriate goal for merger relief is the prevention of anti-competitive effects. Pursuit of this goal by enforcement agencies will also serve to deter *anti-competitive* mergers. This line of reasoning is also taken by Kenneth Elzinga:

> an effective antimerger statute requires effective relief ... [I]f mergers which violate the standards of the law are not subjected to meaningful relief, two results will follow: first, competition will not be restored in those markets where antimerger cases have been brought and, second, the law will not be a bar to those potential mergers which might have a deleterious effect on competition.[2]

Mergers in Canada are subject to administrative law standards, and as such, are not within the framework which traditionally exacts punishment for criminal infractions. Restitution is also inappropriate in light of the prospective nature of merger review — assuming the transaction has not been consummated (or has been so only recently), then no market power has been exercised (or only minimally so), and consequently "victims" have little claim to damages. Prevention is then the logical aim of relief for anti-competitive mergers. Inherent in these standards is the restoration of competition in the affected markets.

There are numerous means of preventing anti-competitive mergers. From an economic standpoint, behaviour is altered when the respective costs and benefits of alternative courses of action are changed. To deter a particular activity one must make the expected costs of that activity greater than the expected benefits. The net gain from an anti-competitive merger is equal to the expected value of the additional profits accruing to the merged entity from the exercise of its market power, in the event that the merger is not successfully challenged, less the costs imposed on the merging parties by the enforcement authorities, in the event that the merger is successfully challenged. The enforcement authorities can reduce the net gain from anti-competitive mergers by increasing either, or both, the probability of successful challenge and the costs imposed in the event of successful challenge.

The probability of successful challenge is a function of enforcement effort. A larger financial and human resource budget for antitrust authorities would,

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[2] K. Elzinga, "The Antimerger Law: Pyrrhic Victories?" (1969) 12 J. L. & Econ. 43 at 44.

ceteris paribus, increase the probability that anti-competitive mergers would be challenged successfully. Efficient resource allocation requires that, at the margin, the enforcement costs of challenging anti-competitive mergers just equal the costs to society of allowing such transactions.

The costs imposed by enforcement officials upon the firm for an anti-competitive merger may take a variety of forms. For example, fines equal to the additional profits realized by the merged entity from exercising market power could, under some circumstances, deter anti-competitive mergers. The required conditions include the following: First, enforcement officials will successfully challenge all anti-competitive mergers (*i.e.* the probability that an anti-competitive merger is successfully challenged is equal to one). Second, no socially benign merger will be challenged (*i.e.* this probability is equal to zero). Third, the merger will not generate any synergies or cost savings. Not only would such cost savings ehange a firm's incentives to engage in anti-competitive mergers, but these cost savings may be of sufficient magnitude to offset the anti-competitive effects. Where any of these conditions do not hold, the calculation of a fine which will effectively deter anti-competitive (*i.e.* welfare-reducing) mergers will be considerably more complex.[3] A simpler alternative that has traditionally been adopted by antitrust authorities has been the elimination of the merged entity's sources of market power through total or partial divestiture.

The Competition Tribunal has recently dealt with this issue in its decision on remedies in *Canada (Director of Investigation and Research)* v. *Southam Inc.*[4] In this case, the Tribunal was presented with two possible goals for divestiture. The Director argued that the remedy must restore, to the extent possible, the level of competition which existed prior to the anti-competitive merger.[5] The respondents argued that the remedy must resolve the likely substantial lessening of competition identified and, furthermore, that the remedy should be restricted from going beyond what is necessary or practicable to deal with that likely substantial lessening of competition.[6] The Tribunal's decision states that "[i]n contested proceedings, the appropriate test is whether the proposed remedy will restore the pre-merger competitive situation in the market in question."[7] To accomplish this, the Tribunal has available to it the remedies of dissolution, total divestiture of assets or shares, or partial divestiture of assets or shares.[8]

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[3]See G.S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 J. Pol. Econ. 169, for an economic discussion of the issue of optimal fines in criminal cases.

[4](10 December 1992), CT-90/1 (Comp. Trib.) [hereinafter *Southam Remedy*]. Note that this decision is under appeal by Southam.

[5]*Ibid.* at 8.

[6]*Ibid.* at 9.

[7]*Ibid.* at 10.

[8]S. 92(1)(*e*) of the *Competition Act* states:

> (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially ... the Tribunal may, subject to sections 94 to 96,
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> (*e*) in the case of a completed merger, order any party to the merger or any other person
>
> (i) to dissolve the merger in such manner as the Tribunal directs,

The Tribunal has confirmed the view that orders in merger matters should be designed solely as remedies and not as punishment.[9] However, if a remedy, to be effective, goes beyond the market where the substantial lessening of competition occurs, this does not imply that it is necessarily punitive.[10] The Tribunal goes further to pronounce that considerations of harm or inconvenience to the respondents or third parties are not relevant to assessing the effectiveness of the proposed remedy.[11] This approach is fully consistent with that taken in the United States. For example, in the *duPont-GM* remedy case, the U.S. Supreme Court stated that: "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, *whatever the adverse effect of such a decree on private interests.*" [emphasis added][12]

In keeping with this view, the Antitrust Division of the U.S. Department of Justice articulates the goal of merger relief as the restoration or maintenance, within a reasonable time period, of the competition that existed prior to the merger.[13] Similarly, officials at the Federal Trade Commission state the purpose of divestiture as ensuring the continuation of the assets or the business as ongoing, viable businesses engaged in the market, and remedying any lessening of competition resulting from the acquisition.[14]

To be an effective remedy, the divestiture must be to a viable, competitive entity, and must be completed in a timely fashion. In light of this standard we ask: How effective has divestiture relief been in Canadian merger cases? And by extension, what changes would we recommend when dealing with future cases requiring divestiture?

II. Academic Literature

The effectiveness of divestiture relief in merger cases has been detailed in three academic studies undertaken by Elzinga,[15] Pfunder, Plaine and Whittemore,[16] and Rogowsky.[17] All three studies are highly critical of the divestiture

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action ...

[9] *Supra* note 4 at 11.

[10] *Ibid.* at 13.

[11] *Ibid.*

[12] *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316 at 326 (1961).

[13] C.K. Robinson, "Merger Remedies: Policies and Procedures at the Department of Justice" in *The Antitrust Division and the Federal Trade Commission Speak on Current Developments in Federal Antitrust Enforcement* (New York: Practicing Law Institute, 12-13 November 1992) 331.

[14] D.P. Ducore, "Antitrust Compliance Issues at the FTC: Selected Topics" in *The Antitrust Division and the Federal Trade Commission Speak on Current Developments in Federal Antitrust Enforcement and Consumer Protection* (New York: Practicing Law Institute, 14-15 November 1991) 193 [hereinafter *Antitrust Division and FTC Speak*].

[15] *Supra* note 2.

[16] M.R. Pfunder, D.J. Plaine & A.G. Whittemore, "Compliance with Divestiture Orders under Section 7 of the Clayton Act: An Analysis of the Relief Obtained" (1972) 17 Antitrust Bull. 19.

[17] R.A. Rogowsky, "The Economic Effectiveness of Section 7 Relief" (1986) 31 Antitrust Bull. 187.

relief obtained by both the U.S. Department of Justice and the Federal Trade Commission during the periods examined. Each study is discussed in more detail below.

Elzinga covers the merger cases filed by the U.S. government after 1960 which had been settled either by consent order or decided for the government by the end of the calendar year 1969 (thirty-nine cases).[18] Effective relief occurs, in Elzinga's opinion, when the acquired firm is re-established as an independent, viable firm within the market in a timely fashion.[19] Cases are divided into the four categories of successful, sufficient, deficient or unsuccessful based upon the three conditions of independence, viability and time taken.[20]

Using these criteria Elzinga finds that only four of the thirty-nine cases studied resulted in either successful or sufficient relief.[21] The total time taken from acquisition to divestiture averaged sixty-six months, with the average time from acquisition to the complaint taking fifteen months. Consequently, some fifty-one months, or four and one-quarter years, were required to complete the divestiture relief sought by enforcement officials.[22]

Rogowsky extends Elzinga's analysis by including both a larger sample of cases (104 cases covering the period 1968-1980), and by examining whether or not competitive injury requiring divestiture existed.[23] The welfare effect of

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[18]*Supra* note 2 at 46.

[19]*Ibid.* at 47.

[20]*Ibid.* at 46. Elzinga is strict in his disposition of cases. The U.S. emphasis on collusive exercises of market power, as opposed to a unilateral exercise by a dominant firm, results in a preference for purchasers who are both new to the industry and "not large conglomerates" (*ibid.* at 47-48). To qualify as a successful divestiture in Elzinga's terms, a "viable center of initiative" must be re-established with no loss of competition, actual or potential, in the process (*ibid.* at 47). A case drops from successful to sufficient when the independence criterion is compromised due to either a sale to a small borizontal competitor, a sale to a vertical competitor with no foreclosure problems, a sale representing a market or product extension with no obvious loss in potential competition, or a sale to a "very large" conglomerate competitor (*ibid.* at 49). The deficient category includes sales which were either incomplete or where the assets fell into less-than-desirable hands, but where the assets represent a viable entity (*ibid.* at 50). Unsuccessful relief includes cases where no structural relief was obtained, where divestiture was insignificant or was made to a significant horizontal competitor or a vertical competitor with foreclosure problems, or where the divested assets were found to be non-viable (*ibid.*). Cases are dropped one ranking (*e.g.* from "successful" to "sufficient") where structural relief took place at least three years after the date of acquisition, and are dropped two rankings (*e.g.* from "successful" to "deficient") when structural relief occurred five or more years after the date of acquisition (*ibid.* at 51-52).

[21]*Ibid.* at 52.

[22]*Ibid.*

[23]*Supra* note 17. Rogowsky essentially maintains Elzinga's four categories, but with a separation between orders and compliance (*ibid.* at 192). He is somewhat less strict than Elzinga when examining partial divestitures, recognizing that "on efficiency grounds partial relief may be considered successful if tbe benefits of early relief outweigh the costs of prolonged litigation" (*ibid.* at 191). Like Elzinga, Rogowsky also factors in the time taken to complete the divestiture, dropping an order one ranking (*e.g.* from "successful" to "sufficient") where divestiture takes place more than two years following the acquisition and two rankings (*e.g.* from "successful" to "deficient") where divestiture does not occur until after four years. Compliance falls one ranking if a divestiture agreement is reached after one year of the order being made, and two rankings if it requires more than two years (*ibid.* at 193-94).

divestiture is analysed for those cases which Rogowsky finds offered successful or sufficient relief.[24] Like Elzinga, Rogowsky concludes that U.S. divestiture relief was not a success prior to 1980. He finds that two-thirds of the divestitures undertaken provided either deficient or unsuccessful relief. Furthermore, of the one-third of the cases providing successful or sufficient relief, more than seventy per cent of these cases were found to have presented no likelihood of a substantial lessening of competition.[25]

The Pfunder, Plaine and Whittemore study,[26] while also attempting to measure the effectiveness of the divestiture relief in U.S. merger cases, adopts a slightly different approach from that of Elzinga and Rogowsky. The Pfunder *et al.* study focuses on isolating elements of the divestiture process which, if present, may render the remedy less effective. These include the following: identity of the purchaser; viability of the assets chosen for divestiture; price at which the assets are divested; time taken to complete the divestiture; which party is responsible for compliance; and whether the matter is litigated or settled by consent.[27] The sample includes all cases initiated after the 1950 Celler-Kafauver amendments to section 7 of the *Clayton Act*,[28] up to January 1, 1970 (114 cases). The results of the Pfunder *et al.* study are fully consistent with those of Elzinga and Rogowsky, namely, that the

> [g]overnment has directed the bulk of its resources toward the challenge and litigation stages of enforcement, but has lost the benefit of those efforts through orders that are unworkable or unresponsive to the illegality charged, through inadequate supervision of compliance, and through subsequent modifications which nullify the effective remedial elements of the original order.[29]

The reasons for this failure are examined by all three studies, although the study by Pfunder *et al.* is the most comprehensive in its narration and recommendations. Ineffective relief results from three broad problems: (1) failure to designate a viable asset package for divestiture; (2) failure to divest to a competitive entity; and (3) failure to complete the divestiture in a timely fashion. The three categories are by no means distinct, with each having an influence upon the others.

A careful economic analysis must be undertaken of any assets to be divested. The package should be viable, and hence capable of being profitably

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[24]*Ibid.* at 216.

[25]*Ibid.* at 228. Competitive injury resulting from each case where either successful or sufficient divestiture is found to occur is examined by Rogowsky using two general methods (*ibid.* at 220-28). First, where sufficient time has elapsed, Rogowsky investigates whether the post-acquisition firm's market share erodes, industry concentration decreases, or significant entry occurs *before* the divestiture is completed. In such circumstances, he infers that the effects of the merger on competition, and hence the government remedy, were not substantial. Second, when unable to observe the post-acquisition market over an acceptable period of time, Rogowsky examines the likelihood that the structure and performance of the industry support the theory of the case. Owing to differences across cases, he focuses on entry barriers, biasing the analysis in the government's favour.

[26]*Supra* note 16.

[27]*Ibid.* at 43-45.

[28]15 U.S.C. §18 (1988).

[29]*Supra* note 16 at 40.

operated as a going concern. Where only a single asset, such as a brand-name, is to be divested, the purchasing firm must necessarily bring greater resources (*i.e.* financial, managerial, production facilities, sales organization etc.) with it, if it hopes to successfully utilize the asset. This will limit the group of potential buyers available, affecting both the likelihood that the assets are ultimately viable and the competitive influence of the purchaser. Pfunder *et al.* advocate supplementing asset packages where necessary in order to make them attractive to pro-competitive purchasers.[30]

The value of any particular asset package depends upon the discounted future stream of profits the purchaser expects to receive from its operation. This is necessarily higher for anti-competitive purchasers. When evaluating potential purchasers, Pfunder *et al.* criticize the government for too often being concerned with whether the purchaser is less anti-competitive than the defendant.[31] Termination of ownership rather than the restoration of a viable competitive market structure becomes the principal focus.

Any fear that a prospective purchaser will liquidate the package is unfounded if a proper selection of the assets has taken place. The assets should be chosen with a view to having a greater value as an operating concern than in liquidation and hence rational purchasers will not liquidate. Therefore, there is no need for "fair price" provisions within divestiture orders. Too often parties' claims of being unable to locate a purchaser were found to be synonymous with an inability to find a purchaser *at the desired price*. Searches for higher bids will also lengthen the time taken to complete the divestiture.

Time limits were characterized as arbitrarily chosen and laxly enforced. Any lengthening of the time taken to complete a divestiture will increase the gain to the defendant when the merger has not been enjoined. Atrophy of the asset package soon results. As time progresses, any chosen divestiture package will become less viable. Pfunder *et al.* also find that the longer the period taken to finalize the divestiture, the more likely it is that the government will not oppose a purchaser it finds anti-competitive.[32] This further compromises the limited standards applied to relief and may ultimately end with no sale being made.

Fundamental to correcting any of the above, Pfunder *et al.* identify the need for a change in the underlying perception of the government players involved in the divestiture process.[33] They conclude that too often officials defined the notion of "penalty" broadly and so refrained from imposition of an order which looked to them like a penalty, but which in reality was only effective relief. Any reluctance to acknowledge that divestitures are "forced sales" gives defendants an inordinate amount of power in negotiating the terms by which divestitures will take place. In such circumstances it is not surprising that the government's interests are subsumed by those of the defendant.

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[30] *Ibid.* at 62-63.
[31] *Ibid.* at 53-54.
[32] *Ibid.* at 50.
[33] *Ibid*, at 40-41.

III. Cauadian Divestiture Experience

As outlined in the Pfunder, Plaine and Whittemore study, it is difficult to assess whether, in the case of individual divestitures, the relief obtained was truly responsive to the underlying illegality of the original merger. "An order which is superficially responsive to the underlying illegality may be rendered ineffective by changes in the acquired entity, in the market, in the industry, and in the economy."[34] In light of this, the divestiture cases which have been handled by the Bureau of Competition Policy were assessed by reference to the three criteria identified above as essential to ensuring effective relief; namely, the viability of the assets chosen for divestiture, the independence and competitive significance of the purchaser, and the period of time taken to complete the divestiture. We also look at efforts by the Bureau to ensure the parties' compliance with the divestiture process.

Thirteen divestiture cases were examined in the course of this analysis. In chronological order, by date of the Bureau's first awareness of the proposed acquisition, these cases are: Cineplex Odeon Corporation/Compagnie France Film (certain assets); Canada Safeway Limited/Woodward Stores Limited (certain assets); Trailmobile Group of Companies Ltd./Fruehauf Canada Inc.; CBR Cement Canada Limited/Revelstoke Concrete Investment Inc.; Provigo Distribution Inc./Steinberg Inc. (certain assets); Hostess Food Products Limited/Frito-Lay Division of Pepsi-Cola Canada Ltd.; Maclean Hunter Limited/Selkirk Communications Limited; Imperial Oil Limited/Texaco Canada Inc.;[35] Laidlaw Inc./Tricil Limited; Tree Island Industries, Limited/Davis Wire Industries Ltd.; Great Atlantic & Pacific Company of Canada, Limited (A&P)/Steinberg, Inc. (certain assets); Maple Leaf Mills Limited/Ogilvie Mills Ltd.; and, Southam/Lower Mainland Publishing Limited (LMPL).[36] Of the above cases, only the Imperial Oil divestiture was in the form of a consent order, and the Southam divestiture followed contested proceedings which are under appeal. Undertakings, agreed upon by the parties and the Bureau, were used in all the remaining cases, although never implemented in Maple Leaf Mills as the parties chose to abandon the proposed transaction.

A. *Viability of Assets*

Any forced divestiture of assets will be effective only where the package to be divested forms a viable business.

> Effective structural relief is a function of, first, formulation of an order which imposes upon defendant the obligation to divest a strong, viable competitor, and second, supervision of compliance to guarantee accomplishment of its terms and its spirit. An entity ordered divested must be a complete economic package, to attract a wide range of potential purchasers, rather than a more limited group seeking an anticompetitive advantage.[37]

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[34] *Ibid.* at 35-36.

[35] *Canada (Director of Investigation and Research)* v. *Imperial Oil Ltd.* (26 January 1990), CT-89/3 (Comp. Trib.).

[36] *Canada (Director of Investigation and Research)* v. *Southam Inc.* (2 June 1992), CT-90/1 (Comp. Trib.).

[37] *Supra* note 16 at 130-31.

Rational behaviour dictates that, given the opportunity, firms will choose to divest a less than complete package of assets. It would seem self-evident, then, that the Bureau must carefully scrutinize the proposed divestiture package, testing its viability by reference to existing industry practice when anything less than a fully operational unit is to be sold.

Full divestiture of the entire acquired firm has only been required in the case of Davis Wire.[38] All other divestitures have been sales of a portion of the assets originally acquired, although these partial divestitures have frequently been stand-alone operating entities.[39] The effectiveness of divestiture in a couple of the early cases, where single or selected assets were sold which did not comprise an independent, fully profitable component of the existing firm, is questionable. In later cases, when the ramifications of all viable solutions were considered early in the review process, the asset package ultimately chosen for divestiture was considerably strengthened.

An absence of market interest in the assets to be divested has often been because the package lacked viability. Limited interest was expressed in assets where, for example, supply contracts left the purchaser unable to have a competitive impact. In the recent *Southam Remedy* case, the Tribunal echoes the concern that "a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect."[40] In such circumstances, "the small accommodations and goodwill that are required to make a long-run supply relationship work would not create the kind of climate that is desirable and necessary to restore the competitive situation disrupted by the merger."[41]

To assure itself that assets to be divested remain viable, the Bureau has made use of hold separate undertakings when firms close the original transaction prior to completing the divestiture. Note, however, that it is the Bureau's practice to only require the alleged anti-competitive portion of the transaction to be held separate and apart by the acquiror, in contrast to the American practice.[42]

In the application for a consent interim order in *Southam*, the Director argued that the public interest could be injured if divestiture of an acquired business were ordered, but, in the interim, the viability of the relevant assets was allowed to decline, causing harm to both independent units and competition. As stated, this damage arises from the fact that "the more integrated and coordinated

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[38]Tree Island and its American parent, Georgetown Industries, Inc., agreed to sell all Davis Wire shares to a person who would carry on its business as an independent manufacturer.

[39]Cineplex Odeon/Compagnie France Films, Safeway/Woodward, CBR/Revelstoke, Maclean Hunter/Selkirk, Provigo/Steinberg, Laidlaw/Tricil, A&P/Miracle Mart, Imperial Oil/Texaco Canada, and Southam/LMPL.

[40]*Supra* note 4 at 24. The Tribunal was responding to the respondents' proposed remedy whereby a limited number of the originally acquired assets would be divested by the parties, with contractual arrangements entered into by the proposed purchaser and the respondents for distribution, composition and printing services.

[41]*Ibid.* at 25.

[42]See Part IV.A, below, for a description of U.S. hold separate orders.

are the operations [of the defendants] ... the less they are actively competing in their markets."[43] The Tribunal stated that "[p]rotecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to 'unscramble the eggs' upon a later finding that the merger will indeed likely lessen competition substantially is apparent."[44] The Tribunal's decision in *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.* confirms its reluctance to impose a remedy when the merging parties have significantly combined operations prior to the interim order being granted.[45] This decision appears to be a signal that the Director should seek interim orders earlier in the litigation process.

The importance of an effective hold separate agreement is accepted both within the Bureau and the Tribunal. Hold separates were put into effect in six of the Bureau's divestiture cases. However, the success of the hold separate clauses varies, and is closely linked, with the period of time during which the divestiture took place. Clearly, it is difficult to fully ensure that personnel and customers do not move to the acquiror, and that there is no flow of information, and any such concerns will be exacerbated with the passage of time.

In attempting to address these concerns, the Bureau has realized varying degrees of success. While some hold separates, such as that undertaken by Trailmobile, were quite specific and complete, others have been less successful, dogged by Bureau concerns over the possibility that flows of information and customers were, in fact, taking place between the parties, or that, despite the hold separate, the viability of the assets to be divested was being permitted to decline.

The strongest language used in a hold separate to date is that found in the *Southam Consent Interim Order* case.[46] Among other things, the parties are limited in their ability to issue additional equity securities, amend articles or by-laws, terminate lines of credit or financial guarantees, curtail marketing, engage in sales of promotional activities, and terminate or alter current employment, salary or benefit agreements for key personnel. In addition, the parties cannot enter into or withdraw from contracts, or change their operations in any way that would materially inhibit or delay the divestiture or reduce the value of the business. Southam is not to be involved, in any way, with decisions involving the assets to be divested, with reference to a range of specified areas such as advertising rates. A monitor has been appointed who is required to act independently of Southam or any member of the Southam group. The Director has the right to request written reports from the monitor to determine whether compliance with the hold separate order is being met.

Notwithstanding the well-crafted nature of the order in this case, it must be recognized that a hold separate is effective only as a short-term measure. Its

[43]*Canada (Director of Investigation and Research)* v. *Southam Inc.* (1991), 36 C.P.R. (3d) 22 at 26 (Comp. Trib.) [hereinafter *Southam Consent Interim Order*]. This order was subsequently updated on March 8, 1993: *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1993), 48 C.P.R. (3d) 224 (Comp. Trib.) [hereinafter *Southam Divestiture*].

[44]*Southam Consent Interim Order, ibid.*

[45](1992), 41 C.P.R. (3d) 289 (Comp. Trib.).

[46]*Supra* note 43.

value, and the viability of the firms involved, declines as the permitted time period increases. Thus, the length of time involved in some divestiture cases meant the hold separates became decreasingly useful. While the gains made through the *Southam* order are important, in future proceedings the Bureau must continue to work to also convince the Tribunal of the need for an expeditious divestiture in addition to an effective hold separate order.

B. Prospective Purchasers

Of primary importance to the outcome of any divestiture is the identity of the purchaser. As noted earlier, the potential value of the assets to a pro-competitive purchaser will be lower than to an anti-competitive purchaser who anticipates realizing monopoly profits. In addition, it is in the divesting party's interest to sell to a less than vigorous competitor, thereby reducing any potential threat in terms of future prices and market shares. Thus, while it is rational behaviour on the part of the firm to seek a purchaser with the incentive to pay a higher price and provide less competition, it is the responsibility of the enforcement agency to counter these threats to competition.[47]

The Bureau has always insisted on approving the final purchaser. However, in some early cases, the divesting parties so controlled the process by which information about the divestiture was disseminated that they ultimately limited the number of prospective purchasers. Where parties control the means by which purchasers are made aware of the availability of assets, they also control the choice of purchasers. Likewise, when the parties are permitted to choose, and sometimes manipulate, the information which is provided to purchasers, they have the ability to filter more or less information as will best suit their purpose. Consequently, situations have developed where potentially pro-competitive purchasers were either refused information or provided with only sketchy details of the sale. In contrast, the most open process is one of public bidding, as occurred in the Imperial Oil divestiture. A number of other divestitures have also included clauses within the undertakings which provided for the sales procedure to be accomplished by tender, bidding or other similar procedure to allow fair opportunity to all prospective purchasers. The Bureau's insistence on wide-scale advertising in cases such as A&P and Imperial Oil has been an important development in alleviating these concerns.

The Director's most recent request for a more transparent process was recently supported by the Tribunal in the Southam/LMPL divestiture order. The order provides that "[t]he divestiture shall be carried out in a manner that provides a fair opportunity to potential purchasers to obtain notice of the sale ..."[48] Subject to the execution of a customary confidentiality agreement, *bona fide*

[47]In keeping with this, the Southam/LMPL divestiture order stipulates that the notice of proposed sale from the trustee or respondents must include the agreement of the proposed purchaser that it will respond within seven days to a request by the Director for additional information regarding the proposed divestiture or Trustee Sale (*Southam Divestiture*, *supra* note 43). This provides the Director with increased access to vital information regarding the ability of the proposed purchaser to reintroduce competition in the market.

[48]*Ibid.* at 226.

purchasers are to be provided with all information required to assess the financial viability and prospects of the business, with copies of the information provided also sent to the Director. In the case of Imperial Oil, all interested parties were also provided with identical information packages, with copies of all correspondence provided to the Bureau.

The price at which the assets are divested has also been, in some cases, a stumbling block to successful completion of the process. At times the parties have insisted that they should not be forced to sell the assets at an "unfair" price. There are a variety of incentives which encourage a firm to market assets at a price which is ultimately unrealistic for a forced sale, beyond the obvious incentive of realizing a high return on their purchase. For instance, delay of a divestiture, as a result of an unreasonably high asking price, may permit the parties to eventually claim changed market conditions in an effort to avoid divestiture entirely.

C. Period of Time Taken to Complete Divestiture

In those circumstances where the process becomes mired for lack of a purchaser, enforcement officials tend to accept compromises, especially in terms of timing. Paul Crampton states that "delay is the enemy of divestiture,"[49] and quotes the Director as considering timely divestitures to be necessary "because commercial, labour and market conditions can often change rapidly. Moreover, the economic or competitive viability of a product line or a company can be quickly dissipated without active or secure management."[50] Clearly, enforcement officials are aware of the importance of controlling the time period during which the merger must be completed. This has been reflected in the designated deadlines for completing divestiture sales, as set out in the undertakings, which have ranged from two to twenty-four months.

Where timing has been of particular concern is with regard to deadline extensions. Requests for extensions have coloured the Bureau's experience with divestitures ever since its first merger case. In more than half of the divestiture cases, extensions have been requested and, in most cases, granted. The result has been that, excluding the few remaining unsold assets in the A&P and Imperial Oil cases, the average time taken to complete divestitures in Canada is sixteen months from the point where the undertakings are signed, ranging from a low of two months to a high of thirty-four months.[51]

The reasons behind requests for extensions have varied. They have included claims by parties that they could not divest due to their inability to find an interested purchaser; the claim that the divesting firm was involved in ongoing negotiations with potential purchasers; claims of changed market conditions arising from factors such as the Canada-U.S. Free Trade Agreement or the

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[49]*Mergers and the Competition Act* (Toronto: Carswell, 1990) at 608, quoting C.F. Rule, Assistant Attorney General, U.S. Department of Justice.

[50]*Ibid.*

[51]Of the 9 relevant cases, 2 were completed in less than 3 months, 4 took between 11 and 18 months, and the remaining 3 cases took over 22 months.

recession, and a resulting need for adjustment in the package of assets for which divestiture was required; dissatisfaction at the price which prospective purchasers were prepared to offer; and environmental liability problems. In some cases, as the time period involved in the divestiture lengthened, there appeared to be some validity to the parties' claims and some justification for the Bureau to yield. However, the occasional validity of parties' claims must be weighed against the costs of allowing the divestiture process to be slowed or altered and the resultant cost to the economy of postponing an effective remedy.

In an effort to alter firms' incentives to complete a timely divestiture sale, the Bureau has increasingly included a trustee clause in the undertakings. Parties are provided with an opportunity to sell the asset package on terms and to a purchaser approved by the Director within a set time frame, following which the package will be transferred to a trustee for sale to the highest bidder. Trustee clauses have been written into the six most recent undertakings entered into by the Bureau, as well as two earlier cases. Only once, in the case of A&P, have assets been placed in the hands of a trustee as a result of undertakings between the Bureau and parties. The periods of time permitted for completion of the trustee sale, as stated in the undertakings, have ranged from sixty days to eighteen months.

The Bureau first introduced the trustee requirement in replacement undertakings in one of the early mergers, adding a clause stating that, should the trustee fail to complete the sale within the designated time period, a consent order attached to the undertakings would enable the Tribunal to order the sale of the relevant assets within an additional three months. There was also reference to a trustee sale in another early case, although there was no clarification regarding the consequences should the trustee fail to complete the divestiture. The trustee clause was not acted upon in this case, so the potential outcome of this structural weakness was not addressed at the time.

The trustee clause written into another case in this time period proved to be a bone of contention in the case of a failure to divest. In this case, the Director wanted to be able to take such action as he would deem appropriate, including extending the term of the Trustee's appointment. However, the Bureau subsequently agreed to release the parties from these obligations regarding appointment of a trustee, having received a commitment from the divesting party that the relevant assets would be divested within six months or the undertakings would be made part of a consent order.

The trustee requirements have been strengthened somewhat in the recent *Southam Divestiture* case.[52] Application for the appointment of a trustee is to be made to the Tribunal seven days before expiry of the 180-day period allowed for Southam to complete the sale on its own. The trustee then has sixty days to complete the divestiture on the most favourable price, terms and conditions available. Separate records documenting the trustee's efforts are to be maintained with reports delivered to the Director and respondents every thirty days. Should the trustee fail to sell the business, a report is to be filed with the Tri-

[52] *Supra* note 48.

bunal, Director and parties, explaining why the trustee has failed to complete the sale, and giving recommendations as to future action. The respondents can object to the trustee sale only on the grounds of malfeasance, gross misconduct or contravention of the order by the trustee.

Six divestiture cases have included clauses which would enable the Director to include the terms of the undertakings in a consent order, where, in the Director's opinion, the parties fail to abide by the terms of the undertakings. In the event that the undertakings do not result in a successful divestiture, there is a logical progression from undertakings to the Tribunal hearing, with a commitment from the parties as to their obligations. However, the clause is effective only in the context of undertakings which have been correctly structured and enforced.[53] Use of the clause has yet to be tested.

D. *Monitoring of Undertakings*

In order to ensure that the divestiture process moves quickly, and that all Bureau requirements are respected, monitoring clauses have been written into many of the undertakings. These clauses were included in eight of the thirteen relevant divestitures. With the exception of Safeway/Woodward, all of the cases where monitoring was required have been recent ones. Monitoring has taken several forms, including reports upon request, quarterly reports, and monthly reports.

The type and detail of information required in the monitoring reports has varied according to the nature of the individual divestiture. As a result of earlier experiences, one recent case was particularly effective in addressing the question of monitoring. In addition to the requisite information detailing the divestiture process (*e.g.* access to bids, etc.), the Director could request an audit of the operating condition of the assets at the parties' expense. The Director could also have access, upon thirty days' notice, to all documents and personnel. In addition, an independent auditor could be required.

In the *Southam Divestiture* order, monitoring reports are to be provided to the Director in three instances: first, upon the Director's request, by the monitor, appointed under the hold separate interim order, detailing the firms' compliance with the terms of the order; second, by the respondents, within three days of a request by the Director, giving a full description of all substantive contracts, negotiations and offers in respect of their attempt to divest the assets; and, third, by the trustee, every thirty days, detailing the same information as required of the respondents in documenting the trustee's efforts to sell the business. While these compliance efforts are all case-specific requirements, they demonstrate a determination to ensure that the parties adhere to the divestiture process set out by the Bureau or the Tribunal.

A formalized monitoring requirement should focus parties on completing the divestiture, and also serves to forewarn the Bureau of any difficulties or

[53]For example, if the Bureau has permitted the marketing of assets which lack viability, the Tribunal may be less than enthusiastic about endorsing the undertakings in the form of a consent order.

weaknesses with the process. The specificity of the requirements may continue to be determined by the nature of the divestiture and the industry, but the trend within the Bureau has been toward a more formalized monitoring clause, including, wherever necessary, data provided by external experts, at the parties' expense. Monitoring of the parties' progress serves to increase the probability of effective completion of the divestiture and, where the parties appear not to be respecting their undertakings, allows the Bureau to respond quickly to these concerns.

IV. American Divestitnre Procedures

A number of changes have been made to the divestiture procedures invoked by U.S. enforcement officials to address the earlier concerns raised in the academic studies summarized above. The process is now considerably less *ad hoc* and more formalized than that which existed in the 1960s and 1970s.

Of notable importance is the passing of the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976,[54] requiring parties to prenotify the U.S. antitrust agencies of particular transactions prior to their consummation. Through this process, the antitrust authorities are provided with a means of effectively enjoining entire transactions pending resolution of their competition concerns. By making use of this ability, in conjunction with more standardized divestiture procedures which alter the parties' incentives to complete the sale, divestitures have become self-realizing. This is reflected in a greatly improved timeliness of the settlement process.

Both the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") and the Federal Trade Commission ("FTC") prefer a "fix-it-first" remedy to anti-competitive mergers, thereby eliminating any need to proceed with court action. Post-acquisition divestitures will be agreed to when the defendant can satisfy the Antitrust Division or the FTC that the assets to be divested can be sold and operated by the purchaser as a viable, long-run competitive entity. All U.S. divestiture settlements are accomplished by consent decree in the case of the Antitrust Division, and by consent order before the Commission of the FTC, an important difference from the Canadian practice of undertakings.

Consent orders issued by the Commission, and clearly consent decrees from the district courts, are enforceable through the courts with heavy fines (up to $10,000 (US) per day for continuing violations) for failure to comply with the terms of a particular order or decree. The FTC has sued for such fines in a number of cases. In a recent case, the Court of Appeals for the Ninth Circuit upheld an earlier district court decision requiring Louisiana-Pacific Corp. to pay $4 million in fines for failure to comply with an FTC divestiture order.[55]

For cases before the Antitrust Division, the actual terms of the decree are usually negotiated by the defendants' counsel and the Antitrust Division staff

[54] 15 U.S.C. §§1311-1314 (1988).

[55] *United States* v. *Louisiana-Pacific Corp.*, 2 Trade Cas. ¶69,166 (D. Or. 1990).

involved in the original investigation into the defendants' activities. Likewise, the FTC staff involved in the original investigation will negotiate the terms of the order with the defendants' counsel. The Office of Operations within the Antitrust Division then drafts the decree. In FTC cases, the Office of Compliance handles all subsequent compliance matters following the consent order's enactment. For both agencies, the terms of orders and decrees are highly standardized. Neither agency will deviate lightly from boilerplate provisions because they ensure consistency and fairness in negotiating and entering consent proceedings.[56]

A. *Viability of Assets*

To ensure asset viability, U.S. enforcement officials insist upon the divestiture of an acquired, ongoing concern. Typically this means all the overlapping assets acquired *plus* any additional assets required to make those assets an ongoing concern. The language used, requiring the possible divestiture of additional businesses or the effectuation of additional requirements to ensure viability, is typically open-ended, and while this may be of concern to businesspeople, it is believed to be insurance that the enforcement agency gets what it is ultimately seeking — a viable set of assets — given that it has less information about the business than those with whom it is negotiating.[57]

Generally, hold separate orders are used to assure authorities that asset viability is maintained. There is no automatic preference for preliminary injunctions where there are good signs of settlement. Note, however, that the hold separate arrangements affect a broader range of assets than that designated for divestiture, including the identified "crown jewels" of the merger transaction. This has been found to greatly improve the defendants' incentives to quickly complete any required divestiture.[58]

Explicit language is incorporated into hold separate orders to ensure that the defendants maintain the marketability of assets by preserving the physical condition of assets and by continuing to provide sufficient working capital for their operation. Defendants are also prevented from terminating or altering any

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[56]For examples of Antitrust Division and FTC divestiture and hold separate orders, see *United States* v. *Baker Hughes Inc.*, 2 Trade Cas. ¶69,149 (D.D.C. 1990); *United States* v. *Archer-Daniels-Midland Co.*, 5 Trade Reg. Rep. ¶22,781 (1990).

[57]Note that despite this broad definition, these provisions have not yet been used. The threat of their invocation is credible enough to persuade the parties to quickly complete the required divestiture. On a more specific level, the FTC order in *United States* v. *Atlantic Richfield Company*, 5 Trade Reg. Rep. ¶22,878 (1990) [hereinafter *Arco Chemicals*] defined viability to mean "the property is capable of operating independently at the same output as currently (at competitive prices) and is capable of functioning independently and competitively in the same business as the assets are currently employed." See M.G. Schildkraut, "FTC Consent Orders in Merger Matters" in *Antitrust Division and FTC Speak, supra* note 14, 85 at 91.

[58]M.B. Coate, A.N. Kleit and R. Bustamante find that where the competitive concern is only in respect of a small portion of the overall transaction, but the entire transaction is being enjoined pending resolution of the FTC concerns, this is the primary determinant of the parties' willingness to settle with the FTC rather than litigate or abandon the transaction (Federal Trade Commission Bureau of Economics, *Fight, Fold or Settle?: Modeling the Reaction to FTC Merger Challenges* (Working Paper No. 200) (Washington, D.C.: Federal Trade Commission, February 1993)).

current employment, salary or benefit agreements. In general, defendants do not manage the held separate assets in any fashion. Furthermore, the held separate assets retain all earnings and profits from their operation as opposed to the defendants. Signed affidavits of senior officials attesting to fulfillment of all these conditions are required at the time the divestiture is completed.

B. Prospective Purchasers

The onus is on the defendant to prove the pro-competitive impact and viability of the prospective purchaser to the enforcement agency for its approval. While the process by which the defendant chooses to sell the asset package is not dictated by either the Antitrust Division or the FTC, both agencies require extensive reporting of efforts undertaken. Affidavits and full documentation of all of the defendant's activities to effect the divestiture must be filed with the respective agency on a monthly basis. These efforts are routinely cross-checked by compliance officials. Typically, Antitrust Division consent decrees also state access requirements for information on the sale, and the time in which the defendant must comply with all requests for information made by *bona fide* prospective purchasers.

Prior to recommending approval of the final purchaser, an extensive examination of the competitive impact of the transaction is undertaken. The purchaser must be fully independent, notionally and financially, from the defendant. Full documentation of the purchaser's business plans, and financial and accounting information is required. Interviews are held with officials of banks and other lenders, customers, and officials of the purchaser who will be responsible for running the divested assets, to assist enforcement officials in judging the purchaser's viability. In cases where a purchaser is filed with the Federal Trade Commission for approval, there is also a thirty-day public comment period prior to final approval.

C. Period of Time Taken to Complete Divestiture

Extensions to the time periods which follow are very rarely granted by either the FTC or the Antitrust Division. In cases before the FTC, divestiture must be complete within twelve months of the order. This means final Commission approval of a signed-off deal, including the thirty-day public comment period. In Antitrust Division cases, the defendant is usually given up to twelve months to have a binding offer by an approved purchaser, although there have increasingly been cases where firms are given only a six-month time frame. Recent divestiture settlements by the Antitrust Division have been under the twelve-month time frame. For merger cases settled between 1981 and 1992, the average time taken to complete the required divestiture, from the point of filing the consent decree with the court, was eight months, ranging from a low of under one month to a high of nineteen months.[59] While the numbers are not

[59]In total, the Antitrust Division sought challenges or divestitures in 68 merger cases between 1981 and 1992. Of this total, 49 cases were settled by consent decree, of which 39 cases required divestiture. Of the 39 cases requiring divestiture, divestiture had occurred in 31 cases by the end of 1992.

available for the FTC, conversations with officials within that agency indicate that the average time taken is similar.

Failure to complete the divestiture within this time frame will result in the appointment of a trustee to effect the sale and/or the seeking of civil penalties or other court relief for breach of an order. The FTC has been more aggressive in seeking civil penalties than the Antitrust Division. Neither agency finds that trustee sales are required very frequently, as the parties generally complete the sale on their own.

The conditions surrounding trustee appointment, contract, and sale are laid out in considerable detail in the order or decree. Where the government and defendant cannot agree on the trustee to be appointed, each party nominates two candidates to the court or Commission which appoints a final trustee. The Commission or court approves the trustee contract, which must contain financial incentives to quickly complete a sale. Trustees are authorized to complete the divestiture at such price and on such terms as are then obtainable upon a reasonable effort on their part, and do so at the defendant's expense. Frequently, the trustee is authorized to supplement the existing asset package with specified "crown jewels" in order to ensure completion of the sale. This, in combination with the obvious loss of control over the sale, acts as a powerful incentive for the defendant to complete the divestiture within the originally specified time period.

Conclusions

Earlier in this article we noted that the effectiveness of anti-competitive merger relief should be measured in relation to its denial of market power. More specifically, divestitures must be viable, competitive, and timely. Our review of the Canadian experience illustrates that, not unlike the American experience, the Bureau of Competition Policy's initial use of divestitures as a remedy to anti-competitive mergers was characterized by a number of problems which resulted in early relief likely being less effective in certain cases. However, changes have been made in an effort to improve the effectiveness of the process. It is our opinion that it is now time for the Bureau to further standardize its procedures in respect of divestiture relief, thereby ensuring that viable asset packages are sold to competitive entities in a timely fashion.

The Bureau should be sceptical of any divestiture package which does not represent a profitable, stand-alone, operating entity with recognizable market share, customers and managerial expertise. As in the United States, the burden should clearly be upon the parties to demonstrate that the assets to be divested comprise a viable ongoing concern. The definition of viable assets used in the *Arco Chemicals* order of the FTC[60] is a good example, which the Bureau may wish to consider adopting.

To ensure viability, we believe the Director should argue that the businesses to be divested be defined to include "any additional assets or businesses

[60]*Supra* note 58.

which may be necessary to ensure their viability and competitiveness." In the recent Southam/LMPL case, the Tribunal did not incorporate this type of phrase within the final divestiture order, but instead chose not to limit the divestiture to the listed assets, allowing for the inclusion of assets used in or necessary to the business that a purchaser wishes to acquire. Notwithstanding use of this definition, it is our belief that the Director should promote inclusion of the "viability and competitiveness" phrase in all future orders in light of the Tribunal's strongly stated intention to ensure that the divested assets form a viable, competitive business.

In order to ensure that the assets are maintained in the interim, the Bureau should consider making greater use of interim injunctions. Where the parties have closed the transaction, hold separate interim orders should be used as a matter of course. More thought might be given to standardizing the language used in these orders in a manner which will ensure their effectiveness. Hold separates should generally be expansive rather than restrictive, as this will improve the parties' incentives to quickly complete any required divestiture. The profits and earnings of the held separate assets should remain with the assets themselves, rather than accrue to the parties. Affidavits attesting to the state of the assets immediately prior to completion of the divestiture would give the Bureau greater confidence that the parties have not neglected their obligations in any way.

Monitoring of the parties' efforts to effect the sale should continue. The Bureau may wish to direct the process to a greater extent by developing a generic profile, early in the divestiture process, of the type of purchaser who would restore the pre-merger competitive structure of the market. This profile would aid in later decisions concerning not only which potential purchasers are directly approached, but also the kinds of publications in which advertisements are placed and the geographic range within which potential purchasers are likely to be located, as well as enabling the Bureau to make clear to the divestor early in the process the kinds of purchasers who are likely to be acceptable and unacceptable to the Director.

Parties involved in negotiating divestiture undertakings with the Bureau must realize that divestitures are forced sales. They are the "cost" imposed upon the firm for an anti-competitive merger or portion thereof. There should continue to be no minimum price at which divestiture will take place. Whereas the parties are initially free to set their own price, they must bear the risk of asking too high a price, that risk being the inevitable transfer of responsibility for the sale to a trustee. The trustee must divest the assets for whatever price they will bring. If the insistence on unrealistically high prices for divested assets is to be discouraged, the parties must be convinced that deadlines will be enforced.

Trustee clauses should remain a fixture of all undertakings. Their effectiveness has been improving and efforts to standardize the language used, in particular to ensure that the trustee is financially rewarded in a manner that encourages timely completion of the divestiture, shonld continue. It is clear that, when used effectively, this clause can provide incentives to both the parties and to the trustee to complete the sale quickly.

In the past, time deadlines have not always been met, and this may have created a sense that the Bureau lacks resolve in this matter. A standarized structure which permits extensions only under *extreme* circumstances will alter the parties' incentives, in that failure to complete their obligations within the designated time period will impose increasingly high costs on the parties, as responsibility for the sale goes to a trustee. It is our view that twelve months is more than sufficient time to complete the vast majority of divestitures. The average time taken to complete divestitures in recent merger cases involving the Antitrust Division confirms the feasibility of this time frame. A limited time period (for example, up to a maximum of six months) beyond this should be granted to the trustee where parties have failed to complete the sale.

Enforceability of divestitures may be called into question if the Bureau continues to use undertakings rather than consent orders. In light of this, the Bureau should revisit businesses' willingness to proceed to the Tribunal by way of consent, given the Tribunal's decision with respect to intervenors in *Canada (Director of Investigation and Research)* v. *Air Canada*.[61] The business and legal communities have, in the past, expressed concern over the length of time involved in consent orders. However, in this recent decision, the Tribunal recognized the need to restrict intervenors' participation to limited issues which would clearly not be addressed by either the Director or respondents in order to expedite the process. If this view reflects the Tribunal's general willingness to expedite proceedings, it should encourage greater use of consent orders. In addition, consent orders provide the opportunity to enforce breaches of undertakings by seeking fines or other penalties under the criminal penalty provisions of the *Competition Act* or through contempt proceedings.

By introducing a more structured approach to divestiture, the Bureau will alter the incentives of those merging parties who choose to enter an agreement where a substantial lessening or prevention of competition is likely to occur. There has been an element of trial and error in the approach taken by antitrust authorities as they move along the learning curve. In the case of Canada, this may have left the impression that there is a low probability of firms being held to all terms within undertakings, most notably timing. With the introduction of a standardized process, from which deviation will be infrequent, parties who choose to continue with an anti-competitive merger must be prepared to accept the higher risk of facing significant costs. This is the direction in which the U.S. enforcement agencies have moved in order to address those inefficiencies which had hindered their early divestiture efforts. It is also a direction which the Tribunal, as stated in the recent *Southam Remedy* case,[62] appears prepared to support. Divestiture relief will then be assured of achieving the desired goal of preventing anti-competitive mergers, and in so doing, will restore competitive markets.

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[61](23 December 1992), CT-88/1 (Comp. Trib.).
[62]*Supra* note 4.