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Merger Reviews: Competition Bureau Blocks Information Exchanges

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In our recent merger review experience with the Canadian Competition Bureau, the Bureau has objected to and sought remedies in respect of individuals who serve as directors or officers or hold minority shareholding positions in competing businesses, apparently even without a full market analysis of the likely competitive effects in the market in which the two linked businesses compete.

This developing practice is illustrated by a Consent Agreement between the Commissioner of Competition and Quebecor Media registered with the Competition Tribunal in December 2005. Quebecor acquired Sogides, a publisher of French language trade books in Québec. Among its other businesses, Quebecor also publishes and distributes books in Québec. According to a "technical backgrounder" released by the Bureau in March 2006, the acquisition did not raise any competition issues in the Québec market for the publishing and distribution of French language trade books. However, Pierre Lesperance, the president of Sogides, had an interest (presumably a minority interest) in Renaud-Bray, which operates retail bookstores in Québec in competition with Quebecor's Archambault retail bookstores. The Commissioner may challenge a merger only if it is likely to result in a substantial lessening or prevention of competition in a relevant market. However, the Bureau's backgrounder includes none of the traditional information relating to factors such as market shares and barriers to entry that would normally be relevant to an assessment of whether the Quebecor/Sogides merger could be considered to substantially lessen competition in the retail bookstore market in Québec. The Bureau asserts only that "an information exchange [between Archambault and Renaud-Bray through Mr. Lesperance]

could be detrimental to publishers and distributors who have supplier relationships with Archambault and Renaud-Bray bookstores".

In order to resolve the Bureau's concerns, the parties entered into the Consent Agreement with the Commissioner which requires Mr. Lesperance to resign from the board of Renaud-Bray, provides for the appointment of an independent agent to replace Mr. Lesperance on the Renaud-Bray board, restricts the information the agent can provide to Mr. Lesperance, and permits certain communication with Mr. Lesperance in the event that any pre-emptive rights, rights of first refusal or drag-along rights are triggered under the Renaud-Bray unanimous shareholder agreement. (A number of other provisions of the Consent Agreement are confidential and not on the public record.)

To date, none of the Bureau's concerns about linkages through directors, officers or minority shareholders of competing companies has been proven or tested in any contested proceeding before the Competition Tribunal. Merging firms have preferred to agree to the Bureau's demands for restrictions on information flow or other remedies in such contexts rather than incur the significant time and expense of challenging either the theory that the relationship between the parties is likely to have the effect alleged by the Bureau or, even if it did, that such effect would likely amount to a substantial lessening or prevention of competition in a relevant market.

Until such a challenge does occur, merging parties can expect that (1) Canadian merger review will involve a probing assessment of director, officer and minority shareholder relationships between the merging parties and other firms that compete with them, and (2) where such relationships exist, the Bureau may seek commitments to eliminate the linkages or restrict the exchange of competitively sensitive information between the parties in respect of markets in which they compete, even in the absence of the type of thorough market analysis that the Bureau would normally conduct in respect of areas of direct competition between the merging parties.

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