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He Knows When You've Been Naughty: Canada's Competition Commissioner Delivers Lumps of Coal to Merging Parties

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Recent Developments in Canadian Merger Review: Sad Holiday Tidings for Merging Parties

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In his own version of the pre-holiday rush, the Canadian Commissioner of Competition challenged one merger transaction just before the Christmas holidays and entered into a consent agreement to preserve assets pending his review of another.

The Commissioner's latest actions reflect and reinforce the Commissioner's stated willingness to seek and obtain interim and final relief in respect of conduct he considers likely to prevent or lessen competition substantially.

We discuss these developments and their implications in more detail below.

I. Commissioner Challenges Grain Elevator Acquisition for Alleged Monopsony Effects

On December 19, 2019, the Commissioner filed an application with the Competition Tribunal challenging the acquisition by Parrish & Heimbecker, Limited (P&H) of a primary grain elevator in Virden, Manitoba (Virden Elevator) from Louis Dreyfus Company Canada ULC (Louis Dreyfus).

The Commissioner's application alleges that, prior to the acquisition, the Virden Elevator was the closest and most effective competitor to P&H's existing grain elevator located along the same stretch of the TransCanada Highway in Moosomin, Saskatchewan (Moosomin Elevator), and that competition from remaining grain elevators is not likely to be a significant constraint on P&H due to their relatively distant or inaccessible locations. According to the Commissioner, P&H's acquisition of the Virden Elevator would give P&H the ability and incentive to increase the price of grain handling services for wheat and canola, resulting in lower prices paid by P&H to area farmers for the purchase of these products. The Commissioner also alleges that high barriers to entry into the grain handling business – including the high capital costs of constructing a grain elevator and the difficulty of finding a suitable site for an

elevator with adequate rail and road access – mean that P&H's ability to exercise market power is unlikely to be constrained by the entry or expansion of competitors.

The Commissioner seeks an order from the Tribunal requiring P&H to divest itself of either the Virden Elevator or Moosomin Elevator and such other assets as may be required for an effective remedy. The Commissioner also seeks an order prohibiting P&H from acquiring any other primary grain elevator in the relevant area for a period of five or ten years (the application refers to both timeframes) without first providing at least 30 days' advance notice to the Commissioner if such acquisition is not otherwise subject to pre-merger notification under the Competition Act.

II. Déja Vu: Commissioner Reaches Consent Agreement to Preserve Assets Pending Completion of Merger Review

In a separate development, the Commissioner reached an interim consent agreement with American Iron & Metal Company Inc. (AIM) requiring AIM to preserve certain assets while the Competition Bureau continues its investigation into whether AIM's acquisition of Total Metal Recovery (TMR) Inc. is likely to prevent or lessen competition substantially. According to the interim consent agreement, dated December 17, 2019, AIM has represented that TMR is in significant financial difficulty and its acquisition by AIM cannot be delayed.

The interim consent agreement contemplates that AIM will proceed to acquire TMR but must preserve certain assets of TMR, including large shredders and other scrap metal processing facilities located adjacent to facilities owned by AIM in Laval, Québec, for a period of 60 days following the acquisition. Preserving the assets of TMR is directed to enabling the Commissioner to seek a viable remedy from the Competition Tribunal (i.e., divestiture of assets as a going concern) if he ultimately decides to challenge the transaction on the basis of competition concerns.

Interestingly, the Commissioner and AIM reached a similar interim consent agreement in very similar circumstances in 2008. In that case, AIM also proposed to acquire another scrap metal company (SNF Inc.) and similarly represented to the Commissioner that the transaction could not be delayed because SNF was in serious financial difficulty. The parties entered into an interim consent agreement requiring AIM to preserve and hold separate certain of SNF's assets for a period of 60 days after closing of the acquisition. That consent agreement eventually expired, and no further action was taken by the Commissioner to challenge the transaction.

III. Implications

1. The Commissioner is able to move quickly to seek relief.

P&H's acquisition of the Virden Elevator was part of a larger transaction with Louis Dreyfus, announced in September 2019, to acquire 10 of the latter's grain elevators and associated assets in Western Canada. The Commissioner's application notes that P&H and Louis Dreyfus closed the transaction two days after expiry of the statutory waiting period and after providing information in response to a supplementary information request issued by the Bureau. The approach of proceeding to closing, presumably in the face of concerns raised by the Bureau, may have placed some

timing pressure on the Bureau to prepare its case for a challenge. However, the Commissioner's application to challenge P&H's grain elevator acquisition only nine days after closing suggests that the Bureau is equipped to move quickly to bring a challenge.

2. The grain elevator challenge is a reminder to consider a proposed merger's impact on parties' existing strategic plans.

The Commissioner also alleged in his application that, prior to the acquisition, P&H had been planning to expand rail car capacity at its Moosomin Elevator. He alleged that this would have increased capacity and the level of competition with the Virden Elevator in the relevant market, but that such plans would be scrapped as a result of the transaction thereby preventing these benefits from materializing.

The Commissioner's emphasis on this point is a good reminder that credible evidence of the parties' intentions in the absence of a merger is relevant to determining the level of competition that would likely exist "but for" the transaction and ultimately the likely net impact of the merger on competition, particularly in terms of preventing competition that might otherwise occur.

3. The Commissioner remains focused on interim relief.

The interim consent agreement reached with AIM is consistent with the Commissioner's recent pledges to seek interim measures in support of actual or potential enforcement action. Another recent example was the agreement reached with Thoma Bravo last summer requiring it to hold separate certain business assets that could be the subject of a remedy sought by the Commissioner in its challenge to Thoma Bravo's completed acquisition of Aucerna.

It is notable that the Commissioner did not seek interim relief as part of his challenge to P&H's grain elevator acquisition, which may have reflected a lower level of concern on the part of the Commissioner about the adverse competitive effects of "scrambling" essential assets or the potential for essential assets to exit the market.

4. The Commissioner may be willing to allow some urgent mergers to close prior to completion of review.

The interim consent agreement with AIM may also signal a degree of flexibility on the Commissioner's part to allow transactions (at least non-notifiable transactions) to proceed in appropriate circumstances, including for reasons of financial distress, subject to appropriate safeguards to preserve the Commissioner's ability to seek viable remedies if necessary.

Notably, while the interim consent agreement requires AIM to maintain TMR and its subsidiaries as separate entities, it does not require AIM to erect confidentiality firewalls in respect of the assets to be preserved, which may not have been viewed as necessary given the nature of the businesses and assets at issue. The Commissioner's prior experience with AIM in very similar circumstances may have contributed to his willingness to agree to similar terms in this instance.

In the grain elevator challenge, the Commissioner also did not move to prevent completion of P&H's acquisition of the Virden Elevator. The basis for that approach is less clear on the face of the Commissioner's application but, as noted above, may have been related to the specific (e.g., immovable) nature of the relevant assets which may have lessened concerns about preserving an effective remedy pending a Tribunal decision on the merits.

5. Interim relief may feature more often in future merger reviews.

The jurisdictional basis of the interim consent agreement in the AIM case is the ability of the Commissioner, under section 100 of the Competition Act, to obtain an interim order from the Tribunal when he can demonstrate that he needs more time to complete his review of a merger and a party to the merger is likely to take steps that would substantially impair the Tribunal's ability to issue an effective remedy if the merger is ultimately challenged.

Orders under section 100 of the Act have been rare, and the section had fallen into disuse following legislative amendments in 2009 that provided the Commissioner with the ability to seek supplementary information from merging parties, thereby suspending closing of a notifiable transaction for a significant period of time (in a process akin to a second request under the U.S. Hart-Scott-Rodino Act).

However, the case for interim relief under section 100 (in particular the Commissioner's need for more time to conduct a review) may be stronger when the transaction in question is not otherwise subject to notification and the accompanying statutory suspensory obligations. In this regard, the Commissioner has clearly signaled his intention to be vigilant in respect of smaller non-notifiable mergers, particularly in the digital economy (see our recent bulletin for additional details), and he may be more willing to seek section 100 orders in this context in future, whether on a contested basis or with the consent of the parties.

6. Enforcement vigilance in all sectors continues despite digital economy focus.

Both of these cases also highlight that, despite the sustained rhetorical emphasis by the Bureau and sister agencies around the world on competition enforcement in the digital sector, mergers and other business conduct in more traditional parts of the economy will continue to face scrutiny by the Commissioner, especially if the Bureau is already familiar with those industries (as is the case with both grain handling and scrap metal).

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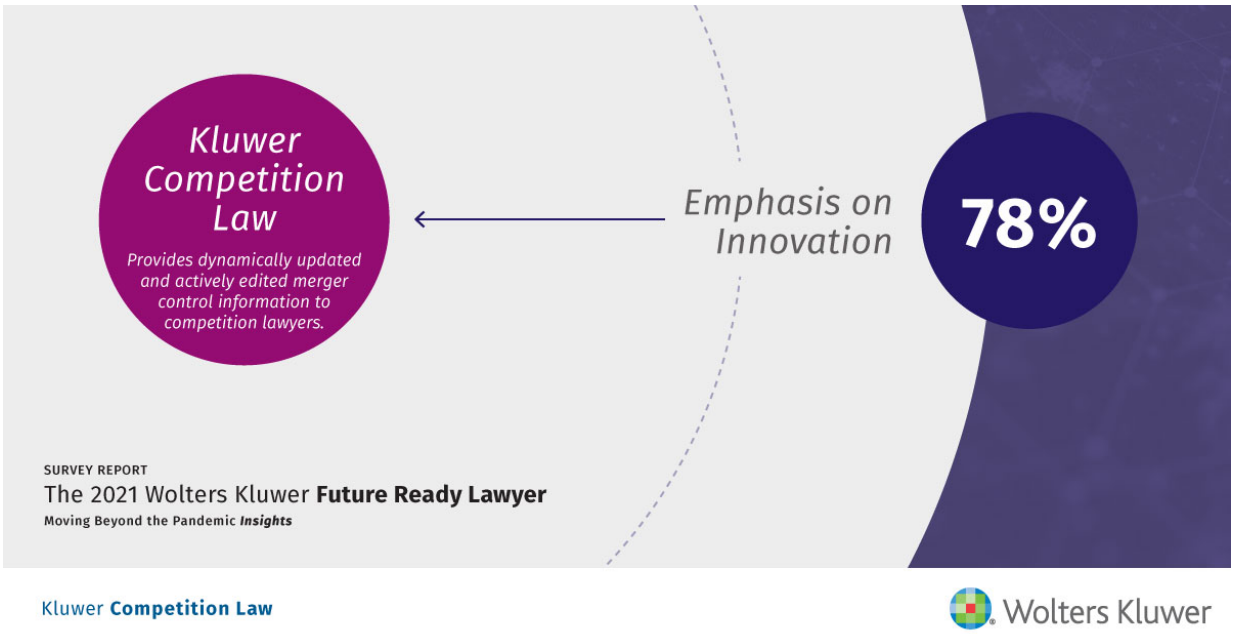

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