THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency

this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings

within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose

to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2018

Chapter 12

CANADA

Julie A Soloway, Cassandra Brown and Julia Potter[1]

I INTRODUCTION

Over the course of 2017 and the first half of 2018, the Competition Bureau (the Bureau), led by the Commissioner of Competition (the Commissioner), continued to pursue a rigorous enforcement strategy in all merger reviews: aggressively monitoring the media for information in connection with non-notifiable transactions and issuing a large number of formal and informal information requests during its reviews (including supplementary information requests (SIRs), which are analogous to US second requests). At the same time, while a few major transactions received close scrutiny by the Bureau, ultimately most of these transactions were cleared with no remedies required.

This period also saw amendments to the Competition Act (the Act) that will affect merger reviews going forward. In particular, a revised definition of 'affiliate' in the Act came into effect on 1 May 2018, which removed asymmetries in the affiliation rules as between corporate and non-corporate entities, such that corporate and non-corporate entities are now treated in the same manner. The change to the affiliation rules will impact the determination of: (1) whether a transaction is subject to notification; and (2) the content of pre-merger notification filings.

II YEAR IN REVIEW

The number of merger reviews in Canada increased during the 2017–2018 year, with the average number of filings per month in 2017–2018 (19) being slightly higher than the next highest average (18 in 2008–2009). The Bureau reports having concluded 231 merger reviews during this period, an increase of approximately 4.1 per cent over its reported figures for the previous fiscal year. Of those 231 transactions, 70 were classified as 'complex', and only six transactions resulted in a consent agreement.

Although the Bureau initially anticipated issuing SIRs only in the case of 'those very few mergers that raise significant potential issues',[2] in 2017–2018, 10 SIRs were issued, representing approximately 4.3 per cent of the transactions reviewed. An SIR is not the Bureau's only method for obtaining large volumes of additional data and information in respect of a transaction. On the contrary, it is routine for the Bureau to issue voluntary

1 Julie A Soloway and Cassandra Brown are partners and Julia Potter is an associate in the Competition, Antitrust and Foreign Investment Group at Blake, Cassels & Graydon LLP.

2 Competition Bureau, 'Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition' (12 May 2009); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html.

information requests to the parties where no SIR is forthcoming. The Bureau reports that it continues to clear more than 93 per cent of the transactions it reviews within its target time frame according to the complexity of the review (called a 'service standard') – and notes that it takes an average of 10.62 days to review a non-complex transaction and 53.48 days to review a complex transaction. However, the Bureau's statistics do not account for transactions where the parties and the Commissioner have entered into a timing agreement.

The issuance of an SIR does not signal that the Bureau will require a remedy. On the contrary, the Bureau has issued 10 SIRs over the 2017–2018 period and entered into consent agreements in only six of those cases. One further case was concluded with issues, but no Canadian consent agreement was required.

The Bureau released one new interpretation guideline related to merger review in 2017 that provides guidance on creditor acquisitions where the business being acquired is defunct, temporarily closed, or has suspended operations.[3] The Bureau also continues to issue position statements describing its analysis in complex mergers and key transactions. From 2017 to present, the Bureau has issued 10 position statements.

Major transactions reviewed from 2017 to mid-2018 include the following.

Corus Entertainment Inc/Bell Media Inc

On 17 October 2017, Corus Entertainment (Corus) announced an agreement to sell French language speciality channels Historia and Séries+ to BCE Inc (Bell). On 25 May 2018, the Commissioner informed Bell that the transaction would not be approved. Bell's 50 per cent interests in Historia and Séries+ were originally divested to Corus in January 2014 pursuant to a consent agreement between Bell and the Commissioner. Bell was required to divest these and other assets to address the Commissioner's concerns regarding Bell's acquisition of Astral Media Inc in 2013. The consent agreement further provided that Bell could not reacquire a divested programming service for 10 years without the prior written approval of the Commissioner. The Commissioner took the position that the relevant test to be applied for the proposed transaction was whether the conditions the led to the original consent agreement (for the supply of French language television programming services to programming distributors) had materially changed, rather than whether the new transaction would prevent or lessen competition substantially compared to the prevailing conditions in the marketplace. The Commissioner ultimately found that the conditions the led to the original consent agreement had not materially changed, and did not approve the reacquisition.[4]

Bayer/Monsanto

On 30 May 2018, the Competition Bureau announced that it had reached a consent agreement with Bayer AG (Bayer) in respect of its proposed acquisition of Monsanto Company (Monsanto), announced on 14 September, 2016. Bayer is a global pharmaceutical, consumer health, animal health and crop protection science company and Monsanto is a

3 Competition Bureau, 'Pre-Merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (SubSection 108(1) and Paragraph 111(d) of the Act)' (26 October 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04309.html.

4 Competition Bureau, 'Backgrounder: Commissioner of Competition's Decision Regarding Bell's Proposed Acquisition of Historia and Séries+' (31 May 2018); available online at: https://www.canada.ca/en/competition-bureau/news/2018/05/backgrounder-commissioner-of-competitions-decision-regarding-bells-proposed-acquisition-of-historia-and-series.html.

global provider of agricultural products. The Commissioner was concerned about the proposed acquisition's potential effects on competition and innovation in the agricultural sector. An extensive review by the Bureau found that the acquisition was likely to substantially lessen and prevent competition in Canada with respect to the supply of several seeds, traits and treatments. To address the Commissioner's concerns, the consent agreement requires that Bayer sell its canola seed and traits business, soybean seed and traits business, carrot seed business, nematode seed treatment business, glufosinate-ammonium herbicide business, LibertyLink herbicide tolerance technology, assets related to the Centurion herbicide, and digital farming business in Canada. Given that Bayer and Monsanto's businesses operate in many countries and the global nature of the transaction, the Bureau coordinated its review with other jurisdictions, including the European Commission and the US Department of Justice. The Bureau continues to review the suitability of Bayer's proposed buyer of the assets.[5]

Metro Inc/Jean Coutu

On 23 April 2018, the Commissioner entered into a consent agreement with Metro Inc (Metro) regarding the acquisition of the Jean Coutu Group (PJC) Inc (Jean Coutu). Prior to the agreement, the Bureau extensively reviewed the proposed acquisition, analysing over 150 local markets where both parties provide distribution and franchise services to independent pharmacists. The Bureau focused its analysis on whether the transaction would enable Metro to increase the charge to pharmacists for franchise royalties, wholesale goods prices, distribution fees, and other payments. The Bureau found that post-transaction, Metro would have the incentive to increase prices and decrease the quality of services provided in eight markets located in the Province of Quebec.[6] To address these concerns, Metro agreed to divest all of its rights in 10 pharmacies in the eight problematic markets.[7]

Abbott/Alere

On 1 February 2017, Abbott Laboratories (Abbott), a global health company, announced that it would acquire Alere Inc (Alere), a global medical diagnostics company. The Bureau's review of this transaction focused on the parties' products in point-of-care testing. The Bureau found that Abbott and Alere products were the largest competitors in both bedside blood gas testing and bedside cardiac marker testing. It was also found that the barriers to entry in these markets for new competitors were high. The Bureau's findings were similar with respect to the parties' related offerings for the veterinary market. The Bureau, Abbott and Alere reached a consent agreement requiring the sale of Alere's businesses relating to these products, including

5 Competition Bureau, 'Competition and Innovation Safeguarded in the Canadian Agricultural Sector'(30 May 2018); available online at: https://www.canada.ca/en/competition-bureau/news/2018/05/competition-and-innovation-safeguarded-in-the-canadian-agricultural-sector.html.

6 Competition Bureau, 'Competition Bureau Statement Regarding METRO Inc.'s Acquisition of The Jean Coutu (PJC) Group Inc.' (16 May 2018); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04363.html.

7 Metro, 'Press Releases 2018: METRO Receives Competition Bureau Authorization to Proceed with the Acquisition of the Jean Coutu Group Inc.' (11 May 2018); available online at: https://corpo.metro.ca/en/media/newsroom/2018/METRO-competition-bureau-authorization-acquisition-jean-coutu.html.

Alere's manufacturing facilities for the products and any intellectual property relating to the systems. Rather than relying on remedies from foreign jurisdictions, a specific remedy was ordered in Canada, for reasons including the existence of manufacturing assets in Canada.[8]

Superior Plus LP/Canwest Propane

On 13 February 2017, Superior Plus LP (Superior) announced a proposed acquisition of Canwest Propane (Canwest). At the time of the transaction, Superior was Canada's largest national propane retailer and Canwest operated in the retail bulk propane distribution business in western Canada. The Bureau's review of this transaction involved considering the efficiency exception under Section 96 of the Act. Section 96 prohibits a remedial order where the parties can demonstrate that the likely efficiency gains from the merger would outweigh and offset the merger's likely anticompetitive effects. The Bureau's approach was to analyse the anticompetitive effects of the merger in each of 25 relevant geographic markets for the retail sale of bulk propane. The Bureau found that competition was likely to be substantially lessened in 22 of the markets. The Bureau also analysed the efficiency trade-offs in each local market and concluded that there would be no remedy required in 10 local markets due to the trade-offs. In regards to the remaining 12 markets, the Bureau announced a consent agreement with the parties on 28 September 2017, which required the sale of assets in all 12 regions and the sale of a portion of customer contracts in several regions. Superior also agreed to waive contract terms preventing customers from switching suppliers in several regions.[9]

Agrium/Potash Corporation of Saskatchewan

On 11 September 2017, the Bureau issued a no action letter (NAL), concerning a proposed merger between Agrium Inc (Agrium) and Potash Corporation of Saskatchewan Inc (PCS), indicating that the Commissioner did not intend to make an application under Section 92 of the Act at that time. Agrium and PCS were both global manufacturers and suppliers of fertilizer products. In the course of its merger review, the Bureau investigated multiple products produced and sold by each party including potash fertilizer, dry or liquid phosphate fertilizer and nitric acid. The US Federal Trade Commission also reviewed the transaction and coordinated closely with the Bureau. The Bureau's approach in this review focused on the strength of remaining competitors in each of the fertilizer markets. The Bureau concluded that as a result of effective remaining competition and the entry of a new competitor in potash, the proposed transaction was not likely to lead to a substantial lessening of competition.[10]

Couche-Tard/CST/Parkland

On 27 June 2017, the Bureau announced that it had reached separate consent agreements with Alimentation Couche-Tard Inc (Couche-Tard) and Parkland Industries Ltd (Parkland)

8 Competition Bureau, 'Competition Bureau Statement Regarding the Acquisition by Abbott of Alere' (28 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

9 Competition Bureau, 'Competition Bureau Statement Regarding Superior Plus LP's Proposed Acquisition of Canwest Propane from Gibson Energy ULC' (28 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

10 Competition Bureau, 'Competition Bureau Statement Regarding Proposed Merger between Agrium and Potash Corporation of Saskatchewan' (11 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

regarding Couche-Tard's acquisition of all issued and outstanding shares of CST Brands Inc (CST) and the subsequent sale of the majority of CST's Canadian assets from Couche-Tard to Parkland. CST was involved in retail fuel and related businesses in eastern Canada and parts of the United States. The Bureau focused its review on the market for the retail sale of gasoline, and determined that the relevant geographic markets were local in nature. The Bureau assessed whether the transactions were likely to substantially lessen competition in these local markets through unilateral or coordinated effects, finding that each transaction raised the risk of unilateral price increases and coordination between retail gas stations in a number of local markets. The Bureau's approach resulted in divestitures in several markets despite the fact that the parties' combined post-merger market share did not exceed the 35 per cent unilateral effects threshold set out in the Bureau's 'Merger Enforcement Guidelines'. As the Bureau determined that both transactions would likely result in a substantial lessening of competition in several markets, the consent agreements required Couche-Tard to sell 366 retail gasoline sites and contracts to Parkland, Parkland to sell nine dealer contracts to a third party, and Parkland to divest its own assets in two local markets where the Bureau concluded that Parkland was not a suitable purchaser.[11]

Sherwin-Williams/Valspar

On 20 March 2016, Sherwin-Williams Company (Sherwin Williams) announced a proposed acquisition of Valspar Corporation (Valspar), valued at approximately US$11.3 billion dollars. Sherwin-Williams and Valspar were both global companies that developed, produced, distributed and sold architectural and industrial paint coatings to consumers. The Bureau stated that the parties were close competitors in the supply of industrial wood coatings used by original equipment manufacturers. The Bureau determined that industrial wood coating customers were segmented into those that required customised, small-batch shipments and those that required a long-term supply of large-batch shipments. While the Bureau found that, post-merger, there would be effective remaining competition for customers in Canada sourcing small-batch shipments, the transaction was likely to substantially lessen competition for customers requiring a long-term supply of large-batch shipments. The parties entered into a consent agreement to address the Bureau's concerns, and agreed that Valspar's Canadian and US assets used primarily for the supply of industrial wood coatings in Canada would be sold to Axalta Coating Systems, a new entrant to the market.[12]

Dupont/Dow

On 27 June 2017, the Bureau entered into a consent agreement with E.I. du Pont de Nemours and Company (Dupont) and the Dow Chemical Company (Dow), regarding the proposed merger between the two parties. The Bureau was concerned about this merger due to the potential loss of rivalry in agricultural product markets in western Canada (broadleaf herbicides for cereal crops and pre-seed burn-off additives for cereal crops), and specialised plastics markets in North America (acid copolymers and ionomers). The Bureau

11 Competition Bureau, 'Competition Bureau Statement Regarding Couche-Tard's Acquisition of CST and Divestiture of Certain Assets to Parkland' (6 July 2017); available online at:http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04252.html.

12 Competition Bureau, 'Competition Bureau Statement Regarding the Acquisition of Valspar by Sherwin-Williams' (26 May 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04244.html.

was particularly concerned about the effect on innovation in the agricultural sector. In the course of its review, the Bureau found that this merger concerned two close and principal competitors in various product markets and was likely to result in the loss of innovation rivalry. The Bureau also concluded that these effects would likely result in higher prices for both farmers and packaging firms and reduce the incentive to innovate in respect of product offerings. To address these concerns, the consent agreement required DuPont to divest its global cereal herbicides to FMC Corporation and sell its global acid copolymer and ionomer business to SK Global Chemical Co Ltd.[13] The Bureau concluded that both buyers could compete effectively and support innovation in Canada.[14]

BCE Inc/Manitoba Telecom Services

On 15 February 2017, the Bureau announced that a consent agreement had been reached regarding BCE Inc's (Bell) proposed acquisition of Manitoba Telecom Services (MTS) valued at C$3.9 billion. Bell had also entered into a separate agreement with TELUS Corporation (TELUS) to sell TELUS a number of MTS' post-paid wireless subscribers and assign TELUS one-third of the MTS dealer locations. The Bureau was concerned about the effects of the merger on mobile wireless services in Manitoba, as both Bell and MTS operated in that province. The Bureau's position was that, as a result of coordinated behaviour between Bell, TELUS and Rogers, wireless prices in Canada were higher in regions where there was not a strong regional competitor. As MTS was the incumbent mobile wireless carrier in Manitoba with a strong position in the market, the Bureau found that the proposed transaction would lead to a unilateral exercise of market power and a substantial increase in the price for mobile wireless plans. To address this concern, Bell agreed to complete its agreement with TELUS and to divest assets and provide transitional services to Xplornet, a carrier of rural broadband internet through fixed wireless and satellite networks throughout Canada with plans to enter into the mobile wireless market in Manitoba.[15]

ChemChina/Syngenta

On 14 February 2017, the Bureau issued a NAL indicating that the Commissioner did not intend to make an application under Section 92 of the Act with respect to the proposed acquisition of Syngenta AG (Syngenta) by China National Chemical Corp (ChemChina). ChemChina owns ADAMA Agricultural Solutions (ADAMA), which, like Syngenta, supplied pesticides for crops and turf in Canada. At the time of the proposed acquisition, ADAMA was a recent entrant to the Canadian market, offering off-patent products without operating any research facilities, whereas Syngenta operated a number of research facilities across Canada. Through an investigation of the parties' crop and turf pesticides, the Bureau

13 Competition Bureau, 'Competition Bureau Statement Regarding the Merger between Dow and DuPont' (27 June 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html.

14 Competition Bureau, 'Competition and Innovation are Preserved Following Major Agricultural Merger' (27 June 2017); available online at: https://www.canada.ca/en/competition-bureau/news/2017/06/competition_and_innovationarepreservedfollowingmajoragricultural.html.

15 Competition Bureau, 'Competition Bureau Statement Regarding Bell's acquisition of MTS' (15 February 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html.

found that there was rivalry between Syngenta's branded and ADAMA's generic products, but concluded that the parties' products were not close substitutes and that there would be sufficient remaining competition in the market post-transaction.[16]

III THE MERGER CONTROL REGIME

The Act contains two parts that apply to mergers. Part IX contains the pre-merger notification provisions and Part VIII contains the substantive merger review provisions.

i Pre-merger notification

A transaction that exceeds certain thresholds is subject to pre-merger review and may not be completed until the parties have complied with Part IX of the Act. Under Part IX, the parties must file a pre-merger notification with the Bureau and wait until the applicable waiting period has expired, been waived, or been terminated. Failure to file 'without good and sufficient cause' is a criminal offence, punishable by a maximum fine of C$50,000.[17] Where the parties close prior to the expiry of the waiting period, the Commissioner can apply to the court for a range of remedies, including fines of up to C$10,000 per day for each day that the parties have closed in advance of the expiry of the waiting period.[18]

For a pre-merger notification to be required under the Act, a transaction must exceed certain thresholds. For acquisitions of shares or interests in combinations, the size of transaction threshold will be exceeded if the target (and any entities it controls) has assets in Canada, or revenues in or from Canada generated by assets in Canada, in excess of C$92 million.[19] The size of parties test is met if the parties to the transaction, together with their respective affiliates, have assets in Canada or revenues in, from or into Canada in excess of C$400 million. For share transactions, the notification requirement is triggered by the acquisition of 20 per cent of the voting shares of a public company or 35 per cent of the voting shares of a private company (or, in each case, 50 per cent of the voting shares if the acquirer already owns the percentages stated above).[20]

Certain classes of transactions are exempted from notification, including transactions where all parties are affiliates of each other,[21] an acquisition of real property or goods in the ordinary course of business,[22] acquisitions of share interests in a combination for the sole purpose of underwriting the share or interest,[23] acquisitions of collateral or receivables made

16 Competition Bureau, 'Competition Bureau Statement Regarding the Proposed Acquisition of Syngenta by ChemChina' (14 February 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04197.html.

17 Section 65(2) of the Act.

18 Section 123.1 of the Act.

19 This threshold is subject to adjustment for inflation, and annual adjustments are published in the Canada Gazette. C$92 million is the applicable threshold as of 2018.

20 Section 110(3)(b) of the Act.

21 Section 113(a) of the Act.

22 Section 111(a) of the Act.

23 Section 111(b) of the Act.

by a creditor pursuant to a good faith credit transaction in the ordinary course of business,[24] certain joint ventures,[25] and where the Commissioner has issued an advance ruling certificate (ARC).[26]

The filing of a notification requires information relating to the nature of the parties' businesses and affiliates, principal customers and suppliers of the parties and their affiliates and general financial information. Other than in the case of a hostile bid (where special timing rules apply),[27] each party to the transaction must submit its completed notification form for the waiting period to begin. The information and documentation to be supplied with the form largely mirrors requirements in the United States, namely, all documents evaluating the proposed transaction with respect to competition (known as '4(c)' documents in the United States) as well as the most recent version of any legal documents to be used to implement the proposed transaction.

A transaction that is subject to notification cannot be completed until the expiry of the applicable statutory waiting period. Following the receipt of completed filings by both parties to a transaction, there is a 30-day waiting period. Within that initial 30-day period, the Bureau may issue an SIR if it determines that further information is required to complete its review.[28] This power is discretionary and not subject to oversight by the Competition Tribunal (Tribunal) or courts.

The issuance of an SIR triggers a second 30-day waiting period, which commences when both parties have substantially complied with the SIR. A proposed transaction may not close until the expiry of this second waiting period (subject to certain exceptions).[29]

Upon expiry or waiver of the applicable waiting period, the transaction may be completed, unless the Tribunal has issued an order enjoining the completion of the transaction or the parties have otherwise agreed with the Commissioner to defer closing. The Tribunal will only make an order delaying closing where its ability to remedy the merger would be substantially impaired by closing. The waiting period may be terminated earlier if the Commissioner notifies the parties that he or she does not intend, at that time, to make an application to the Tribunal under the substantive merger provisions (by issuing an NAL), or if the Commissioner issues an ARC. The waiting period may be extended if the Commissioner seeks, and is granted, an order from the Tribunal delaying closing.[30]

The Bureau's non-binding Merger Review Process Guidelines (Process Guidelines) provide guidance on the Bureau's administrative approach to the merger review process. The Bureau aims to obtain the information it requires to complete its assessment as early in the

24 Section 111(d) of the Act.

25 Section 112 of the Act.

26 Section 113(b) of the Act.

27 In hostile transactions, the 30-day waiting period begins to run when the offering party files a notification. A target company must still file a notification within 10 days of receiving notice from the Bureau to do so. In this way, a target cannot extend the timing of the waiting period by holding up its notification.

28 Section 114(2) of the Act.

29 Exceptions include situations where the transaction involves a hostile bid, where the parties receive a waiver that terminates the second statutory waiting period, and where the parties conclude a consent agreement with the Commissioner.

30 Section 100 of the Act. The Tribunal may only grant such an order in the limited circumstances set out in Paragraphs 101(1)(a) and 101(1)(b) of the Act.

process as possible. During the initial 30-day period, the parties to the transaction may wish to engage in consultations with the Commissioner, who may also request that the parties provide further information on a voluntary basis.[31]

Compliance with these requests may reduce the scope of, or potentially even the need for, an SIR. Where parties intend to rely upon exceptions set out in the Act, such as efficiency gains likely to result from the transaction, the Bureau encourages the parties to provide substantiating claims regarding those exceptions as early as possible during the review process. The Bureau may also seek information from third parties by issuing a voluntary information request or by obtaining court orders under Section 11 of the Act directing a third party to provide certain information in connection with the Bureau's review of the transaction.

The Process Guidelines establish standards for the scope of an SIR, including the relevant time frame for which the Bureau will generally request data, the number of custodians in respect of which records may be collected, and the potential for timing agreements, by which the parties and the Bureau may agree upon voluntary extensions to the review period. One aspect of the Bureau's dialogue with the parties prior to issuing a SIR centres on the appropriateness of requests the Bureau intends to make in the SIR. For example, the Bureau may seek feedback to determine whether the parties maintain data in the form in which the Bureau intends to request it and with whom or how such data is held. In addition, the Bureau may seek to identify any confidentiality concerns associated with the provision of such data, and ascertain whether there are any other issues that might impair the ability of the parties to comply with the SIR as a result of ambiguities or inconsistent terminology. Dialogue prior to the issuance of an SIR does not preclude post-issuance dialogue for the purpose of further narrowing issues or scope for production.

The number of custodians for the purposes of collecting records related to the transaction can be an important factor in the overall cost of complying with an SIR, and it is in the parties' interest to attempt to limit the number of custodians as much as possible. The Process Guidelines state that the Bureau will generally cap the number of record custodians to be searched in preparing a response to an SIR at a maximum of 30 individuals.[32] However, this does not preclude the Bureau asking for information contained in central files (such as budgets, contracts and financial reports), in the files of predecessors and assistants of custodians (during the search period identified by the Bureau), and in the files of employees operating at the local level where it has determined that local markets are relevant to the merger review. In some situations, such as where operations are run at the North American level and there are no issues unique to Canada, the Bureau may agree to align custodians with those identified by US authorities for the purposes of a second request under the HSR Act. Generally, the Bureau limits the time period for the collection of records prepared by the party to the two calendar years immediately preceding the issuance of the SIR, and limits data requests to the three calendar years immediately preceding the issuance of the SIR.

The Process Guidelines also purport to establish an internal appeals process to deal with disputes over an SIR. If a party objects to the scope of an SIR and cannot resolve the issue with the relevant assistant deputy commissioner, the party may submit a written notice of appeal. The notice is forwarded to a senior Bureau official outside the mergers branch

31 Competition Bureau, 'Merger Review Process Guidelines' (8 September 2015) at Section 2; available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/merger-review-process-2015-e.pdf/$FILE/merger-review-process-2015-e.pdf.

32 Ibid, at Section 3.4.2.

who, after hearing from the party and relevant assistant deputy commissioner, will either confirm the SIR or modify it. The same process can be used if the party and assistant deputy commissioner disagree over whether there has been compliance with the SIR (and therefore disagree over whether the second waiting period has commenced). If that disagreement persists, the Bureau may apply to a court[33] for a determination on the question of compliance.

The Process Guidelines also emphasise the Bureau's desire to cooperate with its counterpart agencies in other jurisdictions. The Bureau's position is that it may share information with such agencies as required for the enforcement of the Act, and parties should assume that the Bureau will share information with any other jurisdiction where the parties have notified their transaction.

ii Substantive considerations

Regardless of whether a transaction is subject to pre-merger notification, the substantive provisions of the Act apply to all mergers. The substantive test the Bureau applies in reviewing transactions is whether the transaction is likely to prevent or lessen competition substantially in a relevant market. There is an express efficiency defence to anticompetitive mergers, which applies to cases where the efficiencies from the merger are likely to be greater than, and offset any effects of, the prevention or lessening of competition. Mergers may be challenged only by the Commissioner, who can apply to the Tribunal to delay or block closing and to unwind or seek other remedies for completed mergers for up to one year after their completion.

The expiry of the applicable statutory waiting period does not always mean that the Bureau has completed its substantive review of a transaction. It is often the case that the Bureau's review will extend beyond the waiting period in complex cases. However, unless the Commissioner is successful in obtaining an injunction under the Act to prevent the parties from closing, as a legal matter, the parties are free to close after expiry of the waiting period, or any extension thereof.

The Bureau has adopted non-binding service standards to indicate the expected time for the completion of its substantive review of a merger. 'Non-complex' transactions carry a 14-day time frame for review. 'Complex' transactions carry a 45-day time frame for review or, if an SIR is issued, the time frame is extended to 30 days from the date of compliance with the SIR.

IV OTHER STRATEGIC CONSIDERATIONS

On 1 May 2018, legislative amendments to the Act came into effect that broadened the Act's affiliation rules. Previously, the affiliation rules were asymmetrical as between corporate and non-corporate entities, such as partnerships, sole proprietorships and trusts; two corporations could be considered affiliates under the Act, whereas a corporation and a non-corporate entity – or two non-corporate entities – would not be considered affiliates despite a functionally identical relationship. The amendments have eliminated the existing asymmetry by expanding the Act's definition of affiliation to treat corporate and non-corporate entities in the same manner. Affiliation plays an important role in determining: (1) whether a transaction is subject to notification (a pre-merger filing); and (2) the content of pre-merger

33 Sub-Section 123.1(4) of the Act defines 'a court' for this purpose to mean the Tribunal, the Federal Court or the superior court of a province.

notification filings (as customer and supplier information must be included for all relevant affiliates). While the revisions to the affiliation rules will reduce the number of 'technical filings' resulting from internal reorganisations involving partnerships that would now be exempt, these revisions are also likely to result in some transactions that were not notifiable under the previous affiliation rules becoming notifiable in the future.

Effective 31 May 2018, former Assistant Crown Attorney Matthew Boswell was appointed as the new Interim Commissioner of Competition. Mr Boswell joined the Competition Bureau in 2011 and has held the role of Senior Deputy Commissioner since September 2012. Mr Boswell is replacing former Commissioner John Pecman, who retired at the end of May, and will hold the title for up to one year until a permanent Commissioner is appointed.

V OUTLOOK & CONCLUSIONS

The Bureau continues its practice of actively scanning the Canadian marketplace for, and reviewing and challenging, mergers – even where they do not trigger a notification requirement under the Act. This highlights a number of considerations that parties contemplating a transaction should keep in mind, including the following.

a Regardless of whether a merger triggers a pre-merger notification requirement under Part IX of the Act, it may be challenged by the Bureau for up to one year after its completion. As such, substantive due diligence is critical in mergers between competitors and between suppliers and customers, even in circumstances where formal advance notice need not be given to the Bureau.

b Parties to a merger should be aware of the importance of documents in the Bureau's review of mergers, as a review of the parties' internal documents can affect both the length and outcome of the Bureau's assessment of a transaction.

c The Bureau is receptive to receiving the views of market contacts on mergers, whether those parties are customers, suppliers, competitors or others. While the Bureau is sensitive to strategic complaints, it will follow up on complaints and follow the evidence as appropriate in any given case.

The Bureau closely coordinates merger reviews with foreign agencies, particularly with the US Department of Justice and Federal Trade Commission as well as the European Commission. Coordination between the Bureau and foreign agencies generally involves a request that merging parties grant a waiver to foreign agencies reviewing the transaction to allow those agencies to share any information they receive with the Bureau. This facilitates the coordination of the agencies' reviews, including sharing analysis and holding frequent update calls or meetings.[34] The Bureau will take into account remedies imposed in other jurisdictions to the extent that such remedies address competition concerns in Canada; however, the Bureau will continue to require separate or additional remedies in Canada where these are necessary to address Canadian specific concerns.

34 It is the Bureau's view that it does not require a waiver to provide confidential information to foreign agencies if done for the purposes of the administration or enforcement of the Act (Section 29 of the Act).

One word of caution, however: while coordination and cooperation with international agencies is on the rise, and the Bureau generally makes efforts to keep the length of its review in step with foreign agencies, the Commissioner's review can extend beyond the time for obtaining clearance in other jurisdictions, particularly where a merger raises unique substantive issues in Canada.

Appendix 1

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Julie A Soloway is a partner in Blakes' competition, antitrust and foreign investment group. She advises both domestic and foreign clients on all aspects of competition law, with a particular emphasis on multinational mergers and acquisitions. She also provides advice on strategic alliances, unilateral conduct matters, as well as criminal and civil investigations and compliance matters. She has advised many foreign investors, including state-owned investors, on the Investment Canada Act (including the State-Owned Enterprise Guidelines), which regulate the acquisition of foreign control of Canadian businesses. She has secured approvals for foreign investors in many of Canada's key industries, including technology, oil and gas, pharmaceutical, and financial services.

Ms Soloway has worked in a leading capacity on some of Canada's most complex and high-profile transactions, including *Sagard/Fairfax Financial/Sports Group Ltd*, *Thermo Fisher/Patheon*, *Office Depot/Staples*, *HNA/Ingram*, *Koch/Infor*, *CPP/Glencore*, *BCE/Glentel*, *ExxonMobil/Celtic*, *Marubeni/Gavilon*, *Outokumpu Oyj/Inoxum*, and *Intact/AXA*.

She is recognised as a leading competition lawyer in *The Canadian Legal Lexpert Directory* 2018, *Chambers Global: The World's Leading Lawyers for Business* 2018, *Who's Who Legal: Thought Leaders* 2018, *The Legal 500 Canada* 2018, *Euromoney's Guide to the World's Leading Competition & Antitrust Experts* 2018, and *Chambers Canada: Canada's Leading Lawyers for Business* 2018. Ms Soloway has served on the American Bar Association's Section of Antitrust Law (SAL) leadership for over 11 years. She is currently co-chair of SAL's International Committee. She is co-founder of the group Canadian Women in Competition Law and co-author of *Leading the Way: Canadian Women in the Law*. Ms Soloway is on the editorial board of Corporate Lawyer's *Competition Law Quarterly Legal Reviews*. She is published in a wide range of journals and has spoken at legal conferences around the world on competition and foreign investment issues.

Ms Soloway has a strong international background, including a diploma in European competition law from King's College London, a doctorate in international trade law (Toronto) and a degree in international, european and comparative law (Brussels).

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She is the co-author of Canada's leading textbook on merger review, the co-author of an annual Annotated Competition Act, and was an adjunct professor of competition law at Osgoode Hall.

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Ms Brown obtained her joint BCL/LLB from McGill University in 2008 and holds a bachelor of commerce degree in economics and law from the University of Alberta.

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Ms Potter has worked on a number of complex and high-profile transactions, including *Praxair/Linde*, *Zodiac Aerospace/Safran*, *Washington Companies/Dominion Diamond*, *Brand Energy/Safway*, *Syngenta/ChemChina*, *Anheuser-Busch InBev/SABMiller/Molson Coors*, and *Anheuser-Busch InBev/Mark Anthony Group* assets.

Ms Potter first joined Blakes as a summer law student in 2012 and subsequently articled with the firm. In 2014, she was seconded to a multinational package delivery company where she worked on a variety of corporate and commercial matters. Ms Potter obtained her JD from the University of Toronto in 2013 and holds a master of science degree in economics from the London School of Economics and a bachelor of arts degree in economics from McGill University.

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