

## A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World<sup>#</sup>

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*Much progress has been made over the last ten years in finding ways to reduce the possibility of inconsistent outcomes in the application of competition laws around the world. However, some risk of conflicting remedies still remains, given differences amongst jurisdictions in their national experiences, their legal institutions, the scope of their domestic legislation and even the availability of resources. This article examines some of the ways in which the Canadian authorities have sought to avoid inconsistent outcomes in cross-border mergers, relying on general comity principles and on the '3 Cs' of effective international antitrust enforcement: communication, coordination and cooperation.*

### Introduction

This year marks the 10<sup>th</sup> anniversary of the creation of the International Competition Network (ICN), a remarkably successful and productive organisation that was launched in response to growing concerns — in both business and government — that economic globalisation was dramatically increasing the potential for the inconsistent application of competition laws around the world. Not only were more and more transactions and

activities taking place on a multinational basis but a steadily increasing number of jurisdictions were enacting new competition laws, a reflection of the growing number of market-based economies. The goal of the ICN was to promote greater substantive and procedural convergence among antitrust authorities, with the hope that this would reduce the likelihood of inconsistent outcomes where different jurisdiction reached different conclusions about the same activity. However, while the work

<sup>#</sup> This article was first published in *Competition Law International*, Vol 7 No 1, April 2011, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association

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of the ICN has certainly contributed significantly to the development of global benchmarks for competition law enforcement, the potential for inconsistent outcomes remains very much a continuing risk for business and governments alike. In the end, the final determination of any matter is up to separate agencies administering domestic legislation, with their own national experiences and the unique aspects of their individual economies, legal institutions and even availability of resources, both financial and human. Even with strong international benchmarks for effective enforcement, these differences can result in remedies that vary from jurisdiction to jurisdiction or in similar remedies with inconsistent procedures for implementation. Such inconsistent outcomes are inevitably accompanied by greater costs and frustration for all stakeholders, and it is therefore important to maintain a focus on finding ways to reduce of the risk of such outcomes.

*Comity also has a strong foundation in Canadian jurisprudence*

This article discusses some of the ways in which this issue has been approached in Canada, with respect to merger activities. For some time now, the Canadian Competition Bureau (the Bureau) has sought ways to deal effectively with cross-border mergers, given the North American scope of many of the relevant markets, by developing a pragmatic approach that

balances its domestic enforcement responsibilities with global economic realities. Since Canada's approach has been characterised as one based on comity principles, this will be the starting point for the discussion.<sup>1</sup>

### Comity principles

One of the first challenges in describing comity principles is agreeing on its meaning.

The WTO defines comity as a term in international law signifying a reciprocal courtesy or mutual respect, which one member of the family of nations owes others in considering the effect of its official acts.<sup>2</sup> Comity also has a strong foundation in Canadian jurisprudence; Canada's highest Court defined it in *Morguard Investments Ltd. v. DeSavoye*<sup>3</sup>:

Comity in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws<sup>4</sup>...

The Supreme Court went on to say that "the content of comity must be adjusted in light of a changing world order",<sup>5</sup> and referred to globalisation of commerce, when it stated:

...the business community operates in a world economy and we correctly speak of a world community even in

1 Robert Pitofsky's comments at the ABA Section of Antitrust Spring Meeting in 2006, *Enhanced Comity*, online at: [www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/06/011.pdf](http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/06/011.pdf).

2 World Trade Organization, *World Trade Report 2004: Exploring the Linkages Between the Domestic Policy Environment and International Trade*.

3 *Morguard Investments Ltd. v. DeSavoye*, (1990) 3 SCR 1077.

4 *Ibid*, at 1096.

5 *Ibid*, at 1097.

the face of decentralised political and legal power.<sup>6</sup>

In *Connaught Laboratories Ltd. v. Medeva Pharma Ltd.*<sup>7</sup> the Federal Court of Canada adopted, and built upon, the Supreme Court's reasoning in *Morguard*. The Judge writing the opinion for the Court held that:

Comity is the name given to the general principle that encourages the recognition in one country of the judicial acts of another. Its basis is not simply respect for other nations, but convenience and necessity, recognising the need to facilitate inter-jurisdictional transactions.

...The Supreme Court of Canada has said, in the context of a case involving the recognition in one province of Canada of a decision of the Courts of another province, that the context of comity must be adjusted in light of a changing world order. I see no reason why that principle should not apply on an international scale.<sup>8</sup>

Comity consists of two distinct aspects: "negative" and "positive" comity. The Organisation for Economic Co-operation and Development (OECD) describes negative comity as the principle that a country should notify other countries when its enforcement proceedings may affect their important interests, and give full and sympathetic consideration to

ways of fulfilling its enforcement needs without harming those interests.<sup>9</sup> The OECD describes positive comity as a principle of voluntary co-operation in competition law enforcement involving a request from one country that another country initiate or expand enforcement activities in order to remedy anti-competitive conduct going on in its territory that substantially and adversely affects the first country's interests.<sup>10</sup>

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The OECD's recommendation on merger review recognises the principle of negative comity when it calls upon member countries to seek to resolve domestic competition concerns while avoiding inconsistencies with remedies sought in other jurisdictions.<sup>11</sup> Finally, some commentators take the view that negative comity principles could lead to an agreement where one jurisdiction would presumptively defer to another jurisdiction's remedy where the deferring party's interest is slight relative to that of the other party.<sup>12</sup>

In terms of the Canadian approach, the Bureau does not engage in "presumptive deference" if that means deciding to

6 *Ibid*, at 1098.

7 *Connaught Laboratories Ltd. v. Medeva Pharma Ltd.* (2000) 4 CPR (4th) 508.

8 *Ibid*, at 518.

9 Organisation for Economic Co-operation and Development, Working Party No 3 on International Cooperation, *CLP Report on Positive Comity: Note by the Secretariat* (14<sup>th</sup> June, 1999) at 18.

10 *Ibid*, at 6 and 17.

11 Organisation for Economic Co-operation and Development, *Recommendation of the Council on Merger Review 2005*, see section I B 1; see also the International Competition Network's *Recommended Practices for Merger Notification Procedures*, Recommended Practice XE, online at: [www.internationalcompetitionnetwork.org/library.aspx?page=8](http://www.internationalcompetitionnetwork.org/library.aspx?page=8).

12 See for example the testimony of James R Atwood, Partner, Covington & Burling, before the Antitrust Modernization Commission, Hearing on International Antitrust Issues, Washington, DC, 15<sup>th</sup> February, 2006, online: [www.amc.gov/commission\\_hearings/pdf/Statement\\_Atwood.pdf](http://www.amc.gov/commission_hearings/pdf/Statement_Atwood.pdf), at page 15.

abide by the enforcement decision of another jurisdiction at the outset of a merger review, regardless of outcome and without having conducted its own fact-finding and competition analysis to determine whether competition concerns exist in Canada and how they should be efficiency and appropriately addressed.<sup>13</sup> In Canada, the legal framework would make such a “blanket” presumptive deferral extremely unlikely.

First, the Commissioner has a statutory duty to administer and enforce the law and could not agree in advance to presumptively defer or abide by the decision of another jurisdiction reviewing a merger, without assessing whether the transaction could harm competition in Canada and whether a Canada-only remedy might be necessary.

Secondly, there will also be multi-jurisdictional cases where consistent competition analysis among agencies may produce different results because of different facts in the various reviewing jurisdictions. In the merger context, this can occur where the same merger is being reviewed by several jurisdictions, but the facts in Canada differ from those in other jurisdictions, thereby leading to different results. An illustration would be where post-merger concentration levels in Canada are higher than in the US, as competitors in the US have decided not to establish themselves in Canada, in light of the fact that the Canadian market for the particular product is small and there are relatively high entry costs in relation to the potential size of the market. The prospects of new entry might also be different for the same reason.

Also, presumptive deferral might not be justified, for example when a transaction involves market players essential to a nation’s economy, society or machinery of government. Whether there is mutual confidence between jurisdictions regarding legal analysis, resources and independence also factors into the consideration of any proposal of presumptive deferral.

The inability to defer presumptively a matter, however, does not preclude the Bureau from deciding that it need not occupy “the driver’s seat” in determining what specific remedies are required to address competition concerns. As illustrated in the examples discussed below, this type of “pragmatic” deference can help to reduce inconsistencies in both remedies and procedures and comports fully with Canadian legal frameworks. Indeed, to paraphrase the Federal Court of Appeal’s description of comity, Canada has several tools it can use to facilitate its ability to rely on “judicial acts of another nation” (for example in the form of negotiated consent decrees) for reasons of “convenience and necessity” thereby facilitating “inter-jurisdictional transactions”.

### **The Canadian tools of trade**

Like most other developed jurisdictions, Canada has formal co-operation instruments with foreign partners around the world that are essential to effective enforcement of its laws in a global economy. While there is “no one size fits all” approach for these instruments, generally they are state-to-

13 *Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World*: Speaking notes for Sheridan Scott, Commissioner of Competition, ABA Spring Meeting, 29<sup>th</sup> March, 2006 online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02049.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02049.html); see also Remarks by Melanie Aitken, Commissioner of Competition, United States Council for International Business (USCIB)/International Chamber of Commerce (ICC), Key note address, 22<sup>nd</sup> September, 2010, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03315.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03315.html).

state, or agency-to-agency accords. State-to-state agreements typically are comprehensive and provide a regime for notification, enforcement co-operation, co-ordination with regard to related matters, positive comity and avoidance of conflicts, consultations, periodic meetings and confidentiality. Canada has state-to-state co-operation agreements with the United States, the European Union (EU), Mexico, and most recently Japan.<sup>14</sup>

Agency-to-agency co-operation arrangements are similar to state-to-state agreements but are limited to competition law enforcement interests rather than broader national interests. The Competition Bureau has inter-agency arrangements with competition authorities in Australia, New Zealand, Chile, and the United Kingdom.

Both types of co-operation instruments include comity principles. For example, the 1995 Canada-US co-operation agreement provides that, within the framework of each jurisdiction's own laws, the parties must consider carefully the other jurisdiction's interests in all phases of enforcement activities. These interests include notice of any developments of significance to those interests, when to open an investigation, the scope of the investigation and the remedies and penalties that are sought. It outlines that the parties aim to minimise adverse effects of enforcement activities on each other's important interests and articulates a

non-exhaustive list of comity factors that drive these decisions.<sup>15</sup>

*Co-ordination of agency action, particularly in the context of mergers, can result in more efficient reviews of transactions*

This type of formalised co-operation is one of the "three Cs" of international antitrust enforcement effectiveness: communication, co-ordination and co-operation.<sup>16</sup> While formal mechanisms of co-operation are no doubt useful, they are likely to have less practical importance than the other two elements, namely communication and co-ordination.

As Commissioner of the US Federal Trade Commission (FTC) William J Kovacic has pointed out on multiple occasions, the presence of close communications at several key levels—head of agencies, staff working levels, non-governmental actors—can pay enormous dividends in terms of consistency of approach and implementation of international best practices.<sup>17</sup>

Communication is also a key input for co-ordination. Co-ordination of agency action, particularly in the context of mergers, can result in more efficient reviews of transactions and can help minimise procedural borders in

14 Copies of each of these instruments can be found on the Bureau's website at: [www.competitionbureau.gc.ca/internet/index.cfm?itemID=115&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=115&lg=e).

15 The agreement is available on the Bureau's website at: [www.competitionbureau.gc.ca/internet/index.dfm?itemID=1592&lg=e](http://www.competitionbureau.gc.ca/internet/index.dfm?itemID=1592&lg=e).

16 *Cartels: Beyond our borders*, Speaking notes for Sheridan Scott, Commissioner of Competition, Wellington, New Zealand, 1<sup>st</sup> August, 2007, online: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02445.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02445.html).

17 See, for example, *The Federal Trade Commission at 100: Into our 2nd Century –The Continuing Pursuit of Better Practices*, January 2009, at p68, online: [www.ftc.gov/os/2009/01/ftc100rpt.pdf](http://www.ftc.gov/os/2009/01/ftc100rpt.pdf).

businesses. Indeed, agencies now routinely request waivers in the context of cross-border mergers and parties, equally routinely, provide them in order to facilitate co-ordination of reviews.

Fortunately, more and more agencies around the world are increasing their use of the three “C”s—in part due to the success of international fora for discussion such as the ICN—and are recognising how critical the basic notions of comity are in the global marketplace. For example, US Department of Justice (DoJ) Assistant Attorney General Christine Varney has noted that the presence of a global economy can complicate the remedial process, both with regard to merger and conduct matters, and has articulated several principles to strike the proper balance between recognising domestic law enforcement obligations and facilitating the conduct of global commerce. In particular, she called upon all agencies to be mindful of extraterritorial effects, to be attentive to what other agencies have done and to be sensitive to changes other agencies may be considering.<sup>18</sup>

### Using the three “Cs”

In the merger context, co-operation efforts with other jurisdictions, mainly the US and the EU, commence with hearing about a transaction in the media or upon receiving a notification fling from merging parties, or a complaint. In multi-jurisdictional mergers, the Bureau’s co-operation agreements require that, at a particular point in time, it formally notify its foreign counterparts and they must notify the Bureau of transactions affecting important interests. This ensures that the lines of communication and consultation are open.

The Bureau will generally co-ordinate with other competition authorities when a worldwide or multi-jurisdictional merger may have anti-competitive effects in Canada that are similar to the likely effects in other jurisdictions. Co-ordination can involve communicating as developments occur within jurisdictions, participating in joint discussions with the merging parties, and fashioning remedies in Canada that are parallel to those of other jurisdictions. The Bureau typically co-ordinates the timing of the review process and shares views and information about transactions with its counterparts within the bounds of confidentiality constraints, views on the ambit of information requests and the appropriateness of potential remedies. It also discusses such matters as market definition, entry conditions and case theories, with a view to achieving a consistent analysis.<sup>19</sup>

Such an integrative and co-operative approach can have several advantages. Sharing perspectives, investigative techniques and enforcement approaches creates a wider and more diverse pool of information to draw on, increases the likelihood that analysis will be consistently applied across jurisdictions, streamlines the review and remedy process, reduces somewhat duplicative workloads, and reduces uncertainty for businesses.

This is very important for the many global mergers that affect Canadian markets. The extent of the “Canadian element” is always an important consideration, and while the Bureau can take independent action, it may be that no action beyond what is taken by foreign jurisdictions is needed.

18 *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, Assistant Attorney General Christine Varney’s Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference, 15<sup>th</sup> February, 2010, Paris, France, online at: [www.justice.gov/atr/public/speeches/255189.htm](http://www.justice.gov/atr/public/speeches/255189.htm).

19 Aitken, see note 13 above.

While each case turns on its own facts, which are carefully weighed and analysed, the Bureau is more likely to formalise negotiated remedies within Canada when a matter raises Canada-specific issues, when the Canadian impact is significant, when the assets to be divested reside in Canada or when it is critical to the enforcement of the terms of the settlement.<sup>20</sup> On the other hand, the Bureau may rely on remedies in formal proceedings of foreign jurisdictions when assets subject to divestiture, or conduct that must be carried out as part of a behavioural remedy, are primarily located outside of Canada. When there are competition issues in Canada and the Bureau relies on foreign remedies, the actions taken by foreign authorities must, however, resolve the Bureau's concerns.<sup>21</sup>

When the Bureau is co-ordinating cross-border remedies, one of its primary objectives is to prevent conflicts that may arise when remedies are intended to address competition concerns in different jurisdictions. Generally speaking, the Bureau will listen to the views of foreign agencies regarding particular remedies and, provided that the competition concerns in Canada are adequately addressed, will make efforts to align itself.<sup>22</sup> In this way the Bureau recognises relief in other jurisdictions as contextual background and strives to avoid unnecessary burdens on business. Many recent multi-jurisdictional merger cases demonstrate this. There have been

a number of mergers where the Bureau has declined to seek its own remedies because, after a thorough, independent and co-operative review, it concluded

*Canadian interests were adequately addressed by another jurisdiction's actions*

that Canadian interests were adequately addressed by another jurisdiction's actions.

For example, in the 2003 worldwide merger between GE and Instrumentarium, the remedies required by the US agency and the European Commission (EC) adequately resolved concerns in Canada. To resolve competition concerns in the US and Europe, GE agreed to divest Instrumentarium's Spacelabs business, and GE provided a formal commitment to the EC that it would maintain existing and future interfaces on patient monitors, therapy devices and clinical information systems to ensure that equipment from third party suppliers could effectively connect with GE equipment. When GE confirmed to the Bureau in writing that the European interface agreement applied globally and was available to third party suppliers in Canada and elsewhere, the Bureau was able to clear the transaction without the need for an independent remedy.

20 This could arise in circumstances where issues with a multi-jurisdictional merger are the same in Canada as a foreign jurisdiction. In one case, the foreign jurisdiction may conclude that because of costs or the size of the markets, it should order the sale of a business, including intellectual property rights, on a worldwide basis. In a different case, the foreign authority might conclude that because of costs or scale of business, it would be sufficient to simply order the sale of the business, including the intellectual property rights, within its own jurisdiction. In the latter case, Canada would need its own Canada-specific remedy.

21 See note 13 above.

22 Speaking Notes for Melanie Aitken, Interim Commissioner of Competition, to the Northwind Professional Institute 2009 Competition Law and Policy Forum, Cambridge, Ontario, 12 February 2009, online: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02994.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02994.html).

The Bureau also co-operated with the US DoJ and the EC on Alcan's acquisition of Pechiney, but decided there would be no substantial lessening or prevention of competition (SLPC) in Canada because of commitments made by Alcan to the DoJ and the EC.<sup>23</sup> In this case, the geographic markets were mostly North American; however, the aluminum production technology was global. While Alcan had extensive assets in Canada, Pechiney did not control any physical assets in Canada that overlapped. In order to resolve concerns raised by the DoJ and the EC, Alcan agreed to divestitures of facilities in the DoJ and the EC<sup>24</sup> and made commitments to the EC regarding certain technologies and designs.<sup>25</sup> The Bureau determined that these measures preserved competitive options for Canadian customers as well, and did not take any further action.<sup>26</sup>

In the 2004 acquisition of Aventis by Sanofi-Sythelabo, worldwide divestitures accepted by the EC also dealt with the Bureau's concerns. Similarly, the following year, after a thorough review of the *Procter & Gamble/Gillette* merger, the Bureau found that the divestitures required by the US and European competition agencies adequately resolved concerns in Canada in the oral care markets for battery powered toothbrushes and teeth whitening products.<sup>27</sup>

The Bureau also decided that it would not challenge the acquisition of the Guidant Corporation (Guidant) by Boston Scientific Corporation (Boston Scientific). Boston Scientific had agreed to divest Guidant's vascular intervention and endovascular business to Abbott Laboratories (Abbott) and this was reflected in a consent agreement that the parties had signed with the FTC. The FTC order also included Abbott's agreement to relinquish voting rights to the equity it acquired in Boston Scientific. The commitment in this consent order and those made to the EC were sufficient to resolve competition concerns in Canada.<sup>28</sup>

Similarly, the Bureau relied on formal commitments made to the US DoJ and the EC when Thomson Corporation acquired Reuters PLC. The Bureau was concerned about the lack of competition in the market for detailed financial data on companies and financial transactions. However, the Bureau decided not to challenge the transaction due to the fact that the parties agreed to divest copies of databases in three categories to address US and European concerns and a fourth category to meet EC concerns alone. It is interesting to note, at the same time, that Thomson made additional commitments to the Bureau regarding the manner in which the divestitures would be implemented

23 Government of Canada, Alcan's Offer for Pechiney Cleared by the Competition Bureau, (14<sup>th</sup> October, 2003), available online at: [www.competitionbureau.gc.ca/internet/index.cfm?itemID=383&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=383&lg=e).

24 *Ibid.* Alcan agreed to divest Pechiney's aluminum rolling facility in Ravenswood, West Virginia, and other rolling mills in Europe

25 *Ibid.* Alcan also made commitments to the EC related to alumina refining technology, aluminum smelter cell technology and anode baking furnace designs.

26 *Ibid.*

27 Government of Canada, *Competition Bureau's Concerns Resolved in Procter and Gamble's Acquisition of Gillette* (30<sup>th</sup> September, 2005), online at: [www.competitionbureau.gc.ca/internet/index.cfm?itemID=1953&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1953&lg=e).

28 International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger, 11<sup>th</sup> May, 2006, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02090.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02090.html).



in Canadian markets, though not in the form of a registered consent agreement.

The Bureau likewise chose not to challenge Schering-Plough Corporation's acquisition of Organon BioSciences NV from Akzo Nobel NV on the grounds that the FTC had ordered the divestiture of several vaccines, one of which remedied Canadian concerns.<sup>29</sup> The FTC's consent order was also the starting point for the Canadian remedy in Dow Chemical Company's acquisition of Rohm and Haas Company. The Bureau had determined that the merger would likely result in a SLPC in Canada for the supply of acrylic acid products, acrylic latex polymer products and hollow sphere particle products. Dow agreed to divest certain assets, including certain Canadian intangible assets as part of its commitments. As was the case in the Thomson/Reuters transaction, the Bureau relied on the US consent order, supplemented with separate commitments to the Bureau that were not translated into a formal consent agreement.

The most recent examples of reliance on FTC consent orders to remedy Canadian concerns took place last year. First, the Bureau had competition concerns with respect to Danaher Corporation's acquisition of MDS Inc.'s Analytical Technologies business, specifically regarding laser micro-dissection (LMD) instruments used by researchers to visualise and extract specific cells from microscopic regions of tissue for use in specialised testing such as DNA or RNA analysis. Danaher had agreed to divest MDS's Arcturus brand of LMD instruments, reagents and consumables to Life Technologies Corporation and included in the divestiture the transfer of all relevant Canadian intellectual property rights for the supply of the Arcturus LMD instruments in Canada.

Finally, the Bureau relied on the FTC's consent order to address its competition

concerns regarding Nufarm Limited's acquisition of AH Marks Holding Limited. Following its examination, the Bureau concluded that the acquisition would likely result in a SLPC in the supply of an active ingredient used for herbicides, referred to as MCPA. Under the FTC decree, Nufarm agreed to sell rights and assets associated with two herbicides to competitors and to modify agreements with two other companies to allow them to fully compete in the market. In addition, Nufarm agreed to divest its MCPA Task Force seat, as well as Canadian MCPA Technical Registration and Canadian Formulated Product Registration.

In none of these cases did the Competition Bureau insist that the parties' commitments take the form of a separate consent agreement, to be registered with the Competition Tribunal. This flexibility alone can represent considerable savings of time and resources for both the agency staff and the merging parties. However, some of these cases also provide an illustration of situations where the Bureau was willing to take a "back seat" in the negotiation of remedies as well, particularly where the Canadian aspects of the transaction were dwarfed by those in another jurisdiction. For example, in some cases, the Bureau simply indicated that it would not take action since the problem had been remedied by the legal actions of other jurisdictions with a significantly closer nexus. Furthermore, in other cases, where it seems that the Bureau wanted at least to "ride shotgun" in the discussion of remedies, it is clear that the remedies agreed to in the other jurisdictions were the starting point for the Bureau: while the Bureau sought additional written commitments, these were required to confirm the application of the remedy to address Canadian concerns not to create conflicting obligations.

*The idea of advanced comity was developed in a submission to the Antitrust Modernisation Commission*

The Bureau's approach in these cases lines up with what many would characterise as comity principles and, where there was a desire for more active involvement, might also be seen as reflecting principles of "advanced comity". The idea of advanced comity was developed in a submission to the Antitrust Modernisation Commission, where the following seven steps were proposed as mechanisms for further pursuit of comity principles:

- revise existing co-operation agreements to recognise explicitly the importance of facilitating global trade, investment and consumer welfare;
- draw upon the application of comity in other regulating and transnational settings;
- agree to a presumptive deferral of a remedy where the deferring party's interest is slight relative to that of the other party;
- agree to seek to avoid inconsistent remedies;
- agree to fashion remedies on a joint basis;

- consultation at request of affected entities; and
- benchmarking reviews in instances where both jurisdictions impose remedies.<sup>30</sup>

In the cases where the Bureau was more actively involved in designing the remedies, either with or without insisting upon the negotiation of a formal consent agreement, there has clearly been a willingness to adhere to a number of these proposals, such as adopting the explicit practice of agreeing to avoid inconsistent remedies, or at least agreeing not to impose divergent remedies without prior consultation with the other agency. In addition, where a separate agreement has been negotiated, the Bureau has drafted its decree with a view to not creating inconsistent obligations, for example, "by using common definitions, drafting complementary common trustee provisions, and consulting during the divestiture process".<sup>31</sup> Amongst the more recent examples of highly similar consent decrees are the remedies negotiated in the Schering-Plough/Merck,<sup>32</sup> and Ticketmaster/Live Nation<sup>33</sup> transactions.

Finally, the Bureau is also undertaking initiatives that could help advance the proposal that agencies conduct benchmarking reviews in situations where jurisdictions impose divergent remedies. The purpose of such reviews would be to assess the impact of diverging views, with the goal of ensuring that in the future cross-border

29 Acquisition of Organon BioSciences NV by Schering-Plough Corporation, 30<sup>th</sup> May, 2008, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02682.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02682.html).

30 See note 12 above.

31 *Ibid*, at 7.

32 Competition Bureau Resolves Issues in Merger of Merck and Schering-Plough, 29<sup>th</sup> October, 2009, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03146.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03146.html); FTC Orders Restores Competition Lost Through Schering-Pough's Acquisition of Merck, 29<sup>th</sup> October, 2009, online at: [www.ftc.gov/opa/2009/10/merck.shtm](http://www.ftc.gov/opa/2009/10/merck.shtm).

33 Competition Bureau Requires Divestitures by Ticketmaster-Live Nation To Promote Competition, 25<sup>th</sup> January, 2010, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html); see also, Justice Department Requires Ticketmaster Entertainment Inc to Make Significant Changes to its Merger with Live Nation Inc, 25<sup>th</sup> January, 2010, online at: [www.justice.gov/atr/public/press\\_releases/2010/254540.htm](http://www.justice.gov/atr/public/press_releases/2010/254540.htm).

remedies would be consistent.<sup>34</sup> In the Bureau's case, one of the projects it has underway is aimed at determining the effectiveness of merger remedies imposed between 1986 and 2005, with a view to refining its practice and to comparing its remedy design to that of other jurisdictions.<sup>35</sup> The conduct of such studies can make a useful contribution to discussions around the fashioning of appropriate and effective remedies in a global context, one of the challenges underlined in the remarks of Assistant Attorney General Varney referred to earlier. Such studies, supplemented with a practice of making public the basis for agency conclusions on specific merger remedies, can often help to shed light on where real differences of opinion lie and whether these can be resolved in the future. They can also foster what Commissioner Kovacic has described as "critical self-assessment"<sup>36</sup> without which change is unlikely to take place.

### Conclusion

There is little doubt that all stakeholders can benefit from these attempts at

implementing comity practices. Competition agencies are constantly seeking ways to focus their attention where anti-competitive effects on their domestic economy are most likely and to make most effective use of their limited resources. Businesses are seeking to comply with legal requirements in a multiplicity of jurisdictions in the most cost efficient manner. With this in mind, Canada has adopted a pragmatic approach that recognises the usefulness of relying on other jurisdictions legal actions to remedy Canadian competition issues, where for example, the impact of the transaction in Canada is not significant, or the assets to be divested reside outside of Canada and there are no issues specific to Canada that require separate treatment.

Given the growth of global commerce and the increasing number of jurisdictions enacting competition laws, we should all continue to be preoccupied with pursuing these and other ways to bring about more effective global antitrust enforcement.

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34 See note 12 above at 7.

35 Remarks by Sheridan Scott, Commissioner of Competition, CBA Annual Fall Conference on Competition Law, 28<sup>th</sup> September, 2006, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02201.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02201.html); Remarks by Melanie Aitken, Commissioner of Competition, CBA Fall Conference, 30<sup>th</sup> September, 2010, online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html).

36 W E Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, Remarks before the Seoul Competition Forum, Seoul, Republic of Korea, 20<sup>th</sup> April, 2004, online at: [www.ftc.gov/speeches/kovacic.shtm](http://www.ftc.gov/speeches/kovacic.shtm).