LEXPERT

APRIL 2006

Reprinted with Permission from the April 2006 issue of
Lexpert® Magazine. © Thomson Carswell

THE BUSINESS MAGA[...]AWYERS

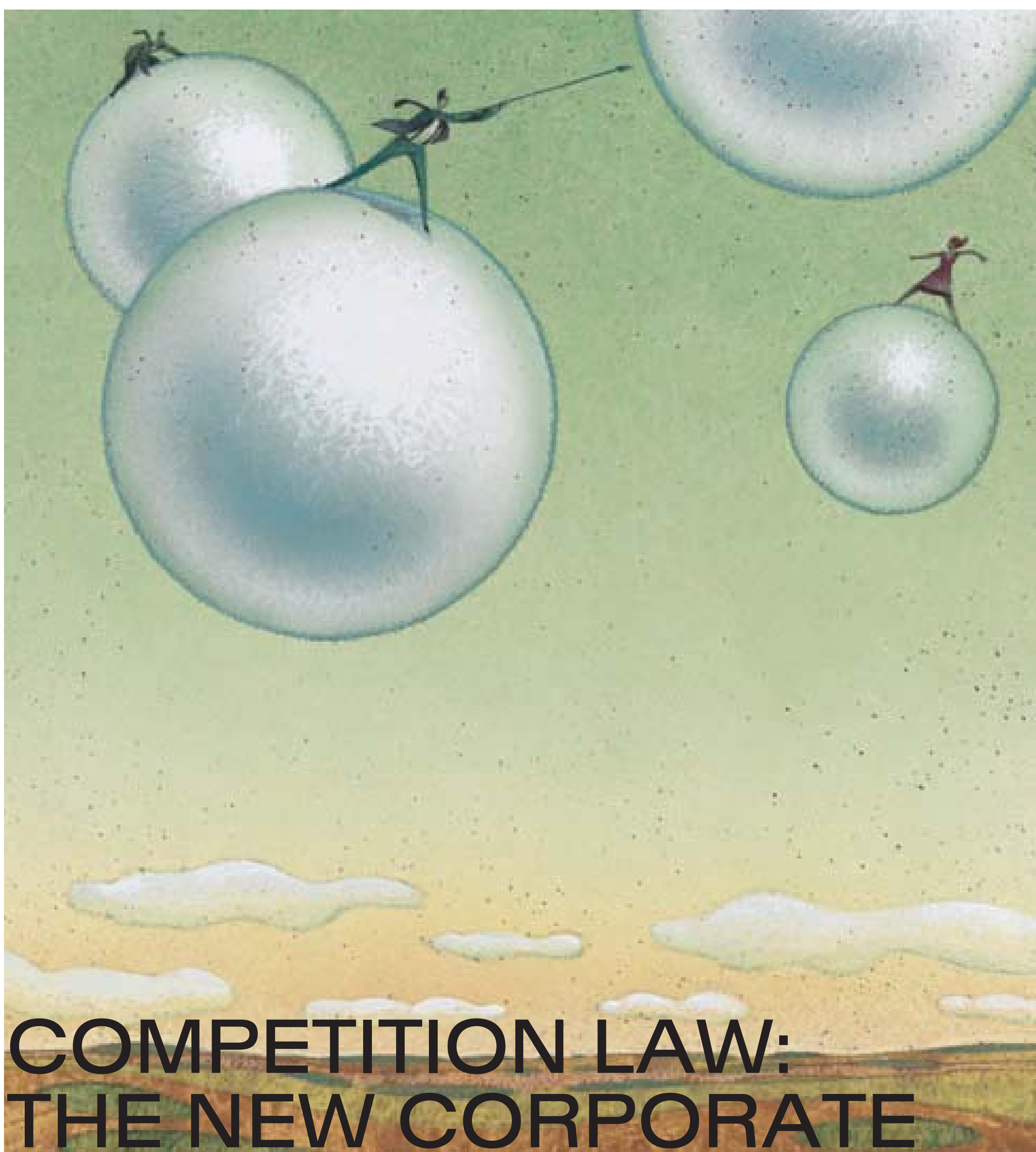
Competition Law The New Corporate Weapon

The Oil Patch
10 New Rules

Public-Private Partnerships
Tipping Point or Slippery Slope?

A. Neil Campbell and J. William Rowley, Q.C.,
of McMillan Binch Mendelsohn LLP

©Corbis



COMPETITION LAW: THE NEW CORPORATE WEAPON

BY JULIUS MELNITZER

Most Hamiltonians are resigned to the sulfurous stench that hangs over their otherwise comfortable, steel-making town, just west of Toronto. 'It's the smell of money,' they like to say, with a certain satisfaction. And as long as steel prices remain stable and labour issues are under control, they might think it's reasonable to assume that their lives will continue on, uninterrupted by the implications of quiet furnaces and fresh air.

But they would be wrong. Hamilton-based steel maker Dofasco Inc. may have only a bit part in the world steel market, but it was recently drawn into the vortex of a historic power play between two of the world's biggest steel companies, both headquartered in Europe. Last November, Luxembourg-based Arcelor SA, the world's second-largest steel maker, announced a hostile bid for Dofasco. Germany's ThyssenKrupp, one of Europe's largest industrial conglomerates, rode to the rescue, becoming Dofasco's white knight. A

 REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

bidding war ensued, and Arcelor triumphed with a $5.6 billion offer.

But Arcelor then faced competitive distractions on another front. In early January, just a few days after Arcelor and Dofasco sealed their merger, Mittal Steel Co., the world's No. 1 steel maker, stomped onto the scene with its very big boots. A Rotterdam-based company with vast resources, it made a US$22.5 billion hostile takeover bid for Arcelor. This coincided with Mittal's February purchase of three of the subsidiaries of the *other* big Hamilton steelmaker, Stelco Inc., which is currently near the end of a protracted, court-supervised restructuring.

Like a growing number of other global conglomerates though, Mittal knew that even its apparently bottomless pockets would not necessarily get it past the intertwined, multi-jurisdictional maze of competition regimes in Canada, the United States and the European Union. Anticipating the problems, Mittal officials checked in with competition lawyers around the world, including Paul Collins, head of the competition/antitrust group at Stikeman Elliott LLP. Mittal subsequently announced that if its bid for Arcelor was successful, it would dump Dofasco by flipping it back to ThyssenKrupp for the German company's final offer of $68 a share, millions less than the $71 that Arcelor paid.

While that may have quieted things down in Canada—at least until the Competition Bureau considers an investigation should the Mittal-Arcelor deal actually go through—world events continued to buffet the transaction. Most obviously, it became mired in caustic political rhetoric in Europe, where Arcelor employs more than 80,000 people. Politicians and union leaders in France, Belgium, Luxembourg and Spain vehemently opposed the takeover, engineered by super-rich, Indian-born steel tycoon Lakshmi Mittal; just to give an idea of his power, *Forbes* magazine this year ranked Mittal as the fifth richest person in the world. In an effort to quiet social concerns, Mittal himself travelled to European capitals to meet with national leaders.

But with the biggest headlines focusing on the politics, it was telling that Mittal also showed up in Brussels for a visit with Neelie Kroes, the EU's Competition Commissioner. Clearly, Mittal's consultations with competition lawyers had made him realize where his company's bread was buttered. "Competition considerations can be deal breakers and that's where competition lawyers come in," says Bill Rowley, Q.C., of McMillan Binch Mendelsohn LLP. "They're the ones who can put the grease to the wheel or a sharp sword to the knot."

Indeed, Canadian competition law has left its uninspired past behind and is moving into the limelight. Since the federal government enacted a modern competition law in 1986, frequent amendments have consistently toughened up the rules and the enforcement powers of the Competition Commissioner. The new strictures have also awakened competitors and suppliers to the potential for kneecapping tactics: complaining to the Bureau and calling a 'competition foul,' either in the context of a merger review or by alleging abuse of dominance, exclusive dealing, tied selling, market restriction or misleading advertising have become useful strategic weapons. Companies not alert to these developments could find themselves at a significant disadvantage.

"Competition concerns are capable of shifting the leverage between buyers and bidders, so if you're for sale, you need to assess the competition risk," Rowley says. "In particular, you need to consider concessions the regulators may force you to make and how much those concessions will affect value."

All this has greatly increased the significance and complexity of Canadian competition law in a relatively short period of time; that means that Canada's major law firms must have experience and depth in their competition law departments. While all of them have credible competition law capability, there is surprising consensus about the five that are the market leaders: Blake, Cassels & Graydon LLP, Davies Ward Phillips & Vineberg LLP, McMillan Binch Mendelsohn, Osler, Hoskin & Harcourt LLP and Stikeman Elliott. Even so, indications are that there is no shortage of work for anyone, particularly in merger review (see sidebar). Notes Rowley, "The world has adopted competition law the way the chicken is adopting bird flu. The growth is virulent."

The ongoing Inco-Falconbridge saga illustrates the many-headed Hydra that competition law is fast morphing into. In October 2005, Inco Limited announced a friendly $12.5 billion bid for Falconbridge Limited. The companies are headquartered in Sudbury, Ontario, but they have far flung international operations. The merger created the world's biggest nickel company, a behemoth that could compete with the likes of international players BHP, Anglo American and Rio Tinto.

When Inco announced its bid, it was clear that competition considerations were thoroughly canvassed beforehand. The company's offer included a promise to divest its Nikkelverk refinery in Kristiansand, Norway, to secure antitrust approval. On this basis, Canada's Competition Bureau approved the deal, but not until January, forcing Inco to extend its offer twice, the second time to January 27.

None of that was enough—these days, it takes more than the approval of a single competition regulator to pave the

way for a deal. As it turned out, the merged company would have a greater than 90 per cent market share in the high quality nickel used to produce super alloys, metals used by aerospace and defence companies to make the spinning parts in jet engines.

This raised the hackles of General Electric (GE), one of three leading global manufacturers of airplane engines, a major user of this kind of nickel, and a company with no shortage of friends in Washington. At press time, GE was lobbying the US Department of Defence to oppose the merger. ThyssenKrupp, the German conglomerate, and Eramet, the French nickel producer, also opposed the deal.

"The competition stakes in a deal went way up, because now there was risk that some two-bit jurisdiction might start eating into the economics of the transaction and maybe even thwart it altogether."

By the end of February, the US Department of Justice and the European Union had been investigating the transaction for four months. The initial investigation by EU regulators raised concerns that the transaction "would eliminate the main alternative supplier on [the nickel and cobalt] markets" and "would risk significantly reducing consumer choice and likely lead to price increases." The EU launched a full-fledged probe in which the regulatory outcomes became so uncertain that Inco once again extended its deadline, this time to June 28. And the company said it was prepared to extend the bid further—to August 2006—if there was more delay in obtaining regulatory clearance.

Given the range and complexity of the competition considerations in the Inco deal, imagine what competition complications could do to a hostile takeover, where time is even more of the essence and the arbitrageurs ever anxious about the cost of money over time. Canadian companies and their lawyers can no longer confine themselves to domestic competition considerations, even when Canadian companies are merging with each other.

Competition regulators may be flexing big muscles these days, but it wasn't always so. Indeed, during the incipient days of the globalization rush, an international competition regulation infrastructure was lacking. In 1990, there were less than 10 competition regimes in the world, and only four of them—those in the United States, the European Union, Canada and Australia—had a meaningful history. Today, over 100 countries have competition laws, thanks in large measure to the World Bank, which has helped countries establish market economies that include antitrust regimes. "Not all these regimes are effective," Rowley observes. "Many of them are brand new and just learning, but that doesn't change the fact that the world has adopted a competition culture driven by the realization that competition law and consumer welfare are intertwined."

Regulators concerned about preserving jobs and keeping consumer prices competitive, however, may not have fully anticipated the fallout for affected companies, especially those with international interests. But as the number of competition regimes grew internationally, they began to present completion risks to multinational mergers. "The competition stakes in a deal went way up, because now there was risk that some two-bit jurisdiction might start eating into the economics of the transaction and maybe even thwart it altogether," Rowley says.

To deal with this problem, US Attorney General Janet Reno and Assistant Attorney General for Antitrust Joe Klein created the International Competition Policy Advisory Committee (ICPAC) in 1997. Its goal was to think about international competition in the context of economic globalization. The group focused on multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies.

ICPAC's final report, issued in February 2000, recommended that the United States explore the creation of a "global competition initiative" where governments, business and non-governmental organizations could consult on antitrust matters. ICPAC recommended that the initiative focus on a "greater convergence of competition law and analysis, common understanding, and common culture."

Less than two years later, top antitrust officials from 14 jurisdictions—Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States and Zambia—launched the International Competition Network (ICN). "The formation of the ICN meant that agencies around the world began collaborating to share information," says McMillan Binch's Neil Campbell, a partner in the firm's competition & international trade group. "Best practices, standardization and the promotion merger review regimes followed."

 REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

According to Stikeman Elliott's Kim Alexander-Cook, ICN's merger group is the "most active" part of the organization. In fact, competition issues relating to mergers have become so important that a number of blue chip companies, including GE, British Telecom, Rio Tinto, Alcan and Goldman Sachs have formed a group dedicated to "streamlining transnational mergers." In this regard, the fact that Peter Sutherland, the chair of Goldman Sachs International, is a former EU Competition Commissioner, deserves more than passing notice. Lisa Rabbe, the firm's executive director of government affairs, spends a great deal of her time evaluating the effect of competition law on Goldman's deals.

Competition considerations, then, equal risk when it comes to doing deals. In fact, the risks have become so significant that some sellers have taken to accepting lower bids with fewer competition problems. This can give financial buyers, such as private equity firms, a leg up on strategic buyers even though the latter can pay higher prices because of anticipated cost savings from combined operations. "From a competition viewpoint, private equity buyers present less completion risk, and they play this up to overcome higher bids," says Neil Campbell.

One of the most stunning examples is the Yellow Pages series of transactions that culminated in Bain Capital LLC doubling its equity investment in only five months. The story kicked off in 2004 with the auction run by Verizon Communications Inc. to dispose of its Western Canada phone book division, Advertising Directory Solutions (ADS). The favourite as the successful bidder was Yellow Pages Group (YPG), which sought ADS as a critical growth vehicle that would allow the company to expand a directory business then confined to Ontario and Quebec.

YPG offered $2.3 billion. The problem, however, was that acceptance of YPG's offer would create a 93 per cent market share for the merged entity. Fearing that a YPG deal would not get approval from the Competition Bureau by the transaction's closing deadline only three months off, Verizon—anxious to satisfy credit rating agencies with the cash from the sale—accepted a $1.9 billion offer from Bain Capital.

But YPG didn't quit. When Bain shut down most of the directories that competed with YPG in the east, the competition risk diminished. In May 2005, eight days after it received clearance from the Competition Bureau, YPG bought ADS from Bain for $2.55 billion, a price it could afford because profits at ADS had risen.

Bain made yet another successful flip, YPG got its growth vehicle, and the Competition Bureau had done its job. It bears notice that Verizon, YPG and Bain each had one of Canada's top competition lawyers on their deal teams. George Addy, a partner at Davies, represented Bain; Neil Campbell of McMillan Binch represented Verizon; and Cal Goldman, Q.C., chair of the competition group at Blakes, acted for YPG. Competition law as a strategic weapon had finally arrived in Canada big time. But it had taken awhile.

Ironically, Canada's first competition laws, enacted in 1889, predate the US *Sherman Act*, passed the following year. Since then, the role of Canada's antitrust law in its economy and its jurisprudence has been far less significant than that of US antitrust laws, which quickly became an integral part of American commerce. The first, albeit unsuccessful, US prosecution came in 1895 against the sugar combine E.C. Knight Co., which controlled 98 per cent of US refining capacity. President Theodore Roosevelt subsequently used the *Sherman Act* to mount an antitrust campaign that divided the Northern Securities Company, a railway holding company that monopolized railway traffic between Chicago and the northwest. President Taft followed by splitting up the American Tobacco Company and the Standard Oil Trust.

Over the years, Congress has passed many statutes to fortify antitrust legislation. These include the *Clayton Antitrust Act* in 1914, the *Robinson-Patman Act* of 1936 and the *Hart-Scott-Rodine Antitrust Improvements Act* of 1976. Most recently, President Bush in June 2004 signed into law the *Criminal Antitrust Penalty Enhancement and Reform Act*, increasing the penalties for antitrust violations to ten years' imprisonment and a $1 million fine for individuals. The maximum fine for companies rose to $100 million.

Clearly, the antitrust arsenal has long been a strategic weapon in the US. Merger opponents, whether competitors, suppliers or customers, have been quick to use the legislation to instigate criminal and civil complaints with the Antitrust Division of the DOJ and the Federal Trade Commission. And, because US law allows for treble damages in antitrust suits, the courts have been a particularly effective forum.

In Canada, it wasn't until 1986 that modern antitrust legislation was introduced in the form of the *Competition Act*. The *Act*, which has been amended many times since, contained the country's first merger clearance regime.

Much of the current regulatory activity can be traced to the complex interplay between the twin trends of deregulation and trade liberalization that have swept the globe in the last two decades. The effects were first seen in national markets, as the focus on mergers and acquisitions shifted from building conglomerates to growing strategically–a policy

REPRINTED WITH PERMISSION FROM THE APRIL 2006 LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

POINT OF ENTRY

BY MARZENA CZARNECKA

A list of Canada's top competition law firms today bears an uncanny similarity to Canada's top transactional law firms. Some exceptions apply of course, but competition law is clearly one of the three critical points of entry to top-tier M&A work. (The other two are top-ranked M&A practitioners and a first-rate corporate tax practice.)

As a result of the field's rapidly increasing importance, competition for the top competition lawyers in Canada is as fierce as competition for the M&A work itself. There's been brisk trade in competition lawyers since 2001, most of it among top transactional firms, as well as firms with such aspirations. There is a particularly high demand for competition lawyers with staff experience at the Competition Bureau. In May 2002, Canada's three kings of competition were three former directors of investigation and research (the Commissioner of Competition's former title): Stikeman Elliott's Lawson Hunter, Blake, Cassels & Graydon's Cal Goldman and Osler, Hoskin & Harcourt's George Addy.

At that time, the war for talent was already in full swing. Davies Ward Phillips & Vineberg was reeling from the departure of Goldman, as well as top-notch competition litigator Neil Finkelstein. Around the same time, Osler lost competition litigator extraordinaire John Rook, Q.C., to the Toronto office of Bennett Jones.

Fast-forward three years. Davies has replaced Goldman and co. with, among others, Addy from Osler. Stikeman Elliott lost Hunter to industry, and is still reeling from the shock (with Hunter, it was undoubtedly one of the top two competition practices in the city. Without Hunter, it's slipped a notch). Osler, on the other hand, has weathered the departures of Addy and Rook extremely well: minus an inside bureau man, it nonetheless has one of the top three competition law practices in the city. The other two, we think, are at Blakes and Davies. They are followed by Bill Rowley-led McMillan Binch Mendelsohn, the Hunter-free Stikeman Elliott, and in the third bracket, running hard, are Rook-enhanced Bennett Jones, McCarthy Tétrault and Fraser Milner Casgrain. And the competition for competition talent continues: expect Stikeman Elliott to do whatever it takes to regain ground. Quite simply, a top transactional firm must have a top competition practice.

swing fraught with competition law consequences. "Markets became more concentrated," says Dany Assaf, co-chair of Ogilvy Renault LLP's competition/antitrust practice. "That's the structural fact behind the growth of competition law."

Deregulation in other sectors also meant a decreased role in merger review for tribunals like the Canadian Transportation Agency, the Canadian Radio-Television and Telecommunications Commission, and the National Energy Board. "That left the Competition Bureau front and centre," says Cal Goldman, head of the Competition Bureau from 1986 to 1989 and now at Blakes in Toronto.

A key ingredient of Canada's 1986 *Competition Act* was the inclusion of pre-merger notification provisions. As in the United States, size-of-person and size-of-transaction tests determine pre-merger notification obligations in Canada. Parties, who together with their affiliates have Canadian assets or sales of less than $400 million, are exempt—unless the value of the assets in the transaction or gross annual sales exceeds $50 million, or $70 million in the case of corporate amalgamations. Pre-merger notification means that parties must give advance notice of the transaction to the Bureau and may not close until the mandatory waiting period of 14 or 42 days, depending on the type of filing, has passed. The process became ever more onerous as legislative amendments gave the Bureau more teeth to dig into transactions. But it took the implosion of a few highly-publicized megadeals to put competition lawyers near the forefront of the deal table.

Much of the current regulatory activity can be traced to the complex interplay between the twin trends of deregulation and trade liberalization that have swept the globe in the last two decades.

One of the best-known is the ill-fated GE-Honeywell bid. When General Electric Co. entered into an acquisition agreement with Honeywell International in October 2000, Jack Welch, then CEO of GE, saw the deal as his triumphant swan song. With Welch's retirement date fast approaching, the US$42 billion transaction was to cement GE's position as a dominant force in the aerospace industry. GE was already one of three leading global manufacturers of airplane engines and a power in aerospace

 REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

financing, while Honeywell was a leading manufacturer of advanced cockpit control electronics.

Welch believed that the combination of Honeywell's technology with GE's engines and financing capabilities made for a perfect fit. Yet these were the very synergies that lead the EU's Competition Commissioner, Mario Monti, to kill the deal, and in so doing, launch a new era of competition law as a corporate strategic weapon.

It was to become the first time that foreign regulators had blocked a US Department of Justice (DOJ) approved merger between large American companies. And the protagonists behind the refusal were the two other major players in the jet engine world, United Technologies and Rolls-Royce, as well as 15 international airlines. Collectively, they convinced Monti to conduct a full-blown investigation of the transaction.

GE appealed Monti's decision to the European Court of Justice. But it was December 2005 before the Court upheld Monti—long after the merger had become moot. However, the lessons learned were not moot. The scuttled transaction demonstrated that companies operating in a global market are subject to competition regulation wherever they do business. "GE-Honeywell was a wake up call in the sense of what happened to them could happen to anybody," Paul Collins recalls.

With the death of the GE-Honeywell merger, transnational mergers with competition overtones became uncertain prospects, subject to local rules and varying regulatory practices. In no way were the uncertainties more evident than in the reaction of GE's competitors, the apparent winners in the piece. *Time* magazine reported that they had wanted the deal weakened, not killed, so that they could buy the Honeywell assets that the Commission required GE to divest.

"Monti and his counterparts around the world aren't taking on these cases because they want to stick it to the ugly Americans," *Time* concluded. "They are doing so because in a globalized world, the country where a company has headquarters matters much less than where it does business."

Even Welch accepted this reality. *Time* asked him whether a European should be able to shape a merger between two American companies. "That's the law," he responded. "That really is just the way the world works."

By now, it's become clear that the strategic thinking needed to negotiate the competition law regulatory minefield can't occur midway through a deal and certainly not as an afterthought. To begin with, boards of directors are under increasing scrutiny to do all their deal related homework in advance. "Ten years ago, boards made merger decisions before calling in the competition lawyers," says

But it wasn't always this way. Competition practices at the major firms first developed as providers of value-added services to existing clients, an afterthought if you will. This had the somewhat ironic result that top transactional firms such as Torys did not market their competition capabilities externally. Osler and Stikeman Elliott, strong transactional firms as well, followed the same model initially. But they started pursuing stand-alone competition work in the early 1990s, aggressively positioning themselves as the "go to" firms for complex competition issues. McMillan Binch did the same, perhaps even more aggressively. Explains Rowley, "Our homegrown M&A deal flow is not as great as Osler, Stikeman's or Blakes. And so we have to be more noticeable internationally if we are to get the kind of 'better than our size' work that allows us to perform at the top of the antitrust game in Canada, the United States and the rest of the world."

Goldman followed a similar model when building up the competition practice at Davies between 1995 and 2001. "We grew that practice by making it known to counsel in the US, and partly in Canada" that the firm was "happy" to do just the Canadian competition aspects of deals, he explains. This strategy allowed Goldman to create one of the highest profile competition practices in the country. "The competition bar in the US referred the competition aspects of large and mid-sized merger to our practice…without forwarding the work to their usual Canadian corporate counsel."

The development of "go to" competition practices led to many domestic and international clients splitting off the competition aspects of corporate transactions to perceived leaders in the field, much to the chagrin of the law firms doing the balance of the transactions. "This sort of thing worries firms," says one competition lawyer. "They see it as a chink in their armour." And they recognize that losing the competition work may be just the beginning, particularly if they lose it to a firm with strong corporate capabilities. It is thus no surprise that

REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

there is room in the mix for Donald Affleck, Q.C., a competition litigator with Toronto litigation boutique Affleck Greene Orr.

If you're doing a deal of any significance, in Canada, North America or the world, you're going to have competition/antitrust issues. And if you don't have the competition capabilities, you stand to lose not just that chunk of the work, but the entire deal. Sophisticated clients know that to play in the big corporate leagues, they need competition lawyers who go beyond competence. And that means the pressure is on, even for the stars. "If you don't deliver the goods the first time, you will never see that work again," says Goldman. "There will not be a second chance."

Competition Law League Table

Toronto

Advisory - Most frequently recommended

Goldman, Calvin S., Q.C., Blake, Cassels & Graydon LLP

Advisory - Consistently recommended

Addy, George N., Davies Ward Phillips & Vineberg LLP
Bodrug, John D., Davies Ward Phillips & Vineberg LLP
Campbell, A. Neil, McMillan Binch Mendelsohn LLP
Collins, Paul, Stikeman Elliott LLP
Crampton, Paul S., Osler, Hoskin & Harcourt LLP
Franklyn, Peter H.G., Osler, Hoskin & Harcourt LLP
Kennish, J. Timothy, Osler, Hoskin & Harcourt LLP
Rowley, J. William, Q.C., McMillan Binch Mendelsohn LLP

Advisory - Repeatedly recommended

Affleck, Donald S., Q.C., Affleck Greene Orr LLP
Assaf, Dany H., Ogilvy Renault LLP
Borgers, Oliver J., McCarthy Tétrault LLP
Facey, Brian A., Blake, Cassels & Graydon LLP
Glossop, Peter L., Osler, Hoskin & Harcourt LLP
Graham, Bruce M., Gowling Lafleur Henderson LLP
Holsten, R. Jay, Torys LLP
Hughes, Randal T., Fraser Milner Casgrain LLP
Lally, A. Michelle, Osler, Hoskin & Harcourt LLP
Musgrove, James B., Lang Michener LLP
Quinn, John J. (Jack), Blake, Cassels & Graydon LLP

Litigation - Most frequently recommended

Finkelstein, Neil, Blake, Cassels & Graydon LLP
Rook, John F., Q.C., Bennett Jones LLP
Thomson, Kent E., Davies Ward Phillips & Vineberg LLP

Crystal Witterick of Blakes. "That doesn't happen anymore."

Recently, Guidant Corporation, an Indianapolis-based world leader in the development of cardiovascular medical technology, highlighted the importance of considering competition risks from a governance perspective. It made a public statement of the antitrust risks involved in rejecting long time suitor Johnson & Johnson in favour of a US$27 billion offer from Boston Scientific. For its part, Boston Scientific had also done its competition thinking in advance, paving the way for regulatory approval by pre-arranging a deal with Abbott to buy certain assets from the merged company. "A fix-it-first approach is a signal to the markets that a bidder won't let antitrust matters hang up the deal," says James Musgrove, chair of the competition and marketing law group at Lang Michener LLP.

Anthony Baldanza, chair of the antitrust competition group at Fasken Martineau DuMoulin LLP, is of a similar mind. "A 'fix–it-first approach,' particularly one that includes a divestiture partner, is a very powerful weapon in securing merger clearance, because it can take the wind out of the Bureau's sails and avoids a prolonged inquiry," he says.

But a 'fix-it-first approach' also requires a 'see competition counsel first' strategy. "Competition counsel are one of the first outside counsel contacted in any strategic merger," Collins says. "In-house counsel engage them very early, even at the drawing board stage. And the questions asked are threshold queries around such fundamental issues as whether the deal is doable, what it would take to do it, and how long it would take to do." George Addy, who leads Davies Ward's competition practice and was head of the Competition Bureau from 1993 to 1996, agrees: "Clients have us there from the get-go," he says. "They want advice about significant matters like the valuation of a deal, the execution risk, and what the final asset package will look like once the regulators complete their review."

Competition lawyers can also help parties avoid the mistake of creating documents that could give the impression they believed the deal was anti-competitive. "You've got to warn clients about throwaway remarks in an e-mail or documents about things like 'getting rid of a competitor,' because that e-mail might be compellable," says Kevin Wright, a partner in the competition law group at Davis & Company LLP. "Also, by having a lawyer around early, the client can create privilege for sensitive documents." Similarly, parties exchanging information must be careful that their communications don't support an inference of an agreement to lessen competition, because that

 REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

could lead the Bureau to invoke the criminal conspiracy provisions of the *Competition Act*.

But even getting in early, from a client's perspective, might not be early enough from the lawyer's side of the table. "Clients may not be willing or able to wait for an exhaustive economic analysis," says Subrata Bhattacharjee, who heads up Heenan Blaikie LLP's competition practice. "The need to come up with a quick but accurate analysis of the competitive effects of a deal without having that information puts a lot of pressure on competition lawyers and a great premium on experience—especially experience in the particular industry."

Competition counsel's analysis is also critical from a negotiation dynamic because vendors who foresee competition problems will try to get purchasers to take the competition risks with "hell or high water" clauses or reverse breakup fees. When Whirlpool recently triumphed over two other suitors with its US$1.79 billion bid for Maytag, for example, the proposed deal created a market giant that produced half of the dishwashers and 70 per cent of the clothes washers and dryers manufactured in the United States. The competition risks for the deal, which at press time was still under review by the DOJ, were considerable, influencing Maytag to extract a $120 million reverse breakup fee from Whirlpool.

"There's a very clear trend to vendors conducting sales in a way that relieves them of competition risk to the greatest extent possible," says Campbell. "Because these risks invoke complex and costly impacts, the vendor and all the bidders will bring in competition counsel to negotiate."

When the bid is hostile, things can get even more complicated, especially in the public markets, with their securities regulatory overlay. "The competition process can take considerably longer than the 35-day securities waiting period that exists in Ontario," says Peter Franklyn, chair of Osler's competition and antitrust group. While extensions are common in the securities arena, it's the rare bidder that wants its offer out there for too long. "Delays raise the prospect of competing bidders, give targets time to find white knights, and aren't good for share prices because they make the arbitrageurs nervous," notes Jay Holsten, chair of Torys LLP's antitrust & competition practice.

In addition, the possibility of delay increases with the number of jurisdictions in which a transaction must pass muster. "It's critical that parties avoid getting jammed up with the various filings, and the only way to do that is to file early and keep everything tightly coordinated," says Randy Hughes, head of the national competition law

Litigation - Consistently recommended

Affleck, Donald S., Q.C., Affleck Greene Orr LLP
Houston, Donald B., Fraser Milner Casgrain LLP
Hughes, Randal T., Fraser Milner Casgrain LLP
Kay, Katherine L., Stikeman Elliott LLP
Rowley, J. William, Q.C., McMillan Binch Mendelsohn LLP

Litigation - Repeatedly recommended

Hainey, Glenn A., Gowling Lafleur Henderson LLP
Kent, David W., McMillan Binch Mendelsohn LLP
Laskin, John B., Torys LLP
Leslie, Glenn F., Blake, Cassels & Graydon LLP
Low, D. Martin, Q.C., McMillan Binch Mendelsohn LLP
Russell, Robert S., Borden Ladner Gervais LLP

Ottawa

Advisory - Repeatedly recommended

Hutton, Susan M., Stikeman Elliott LLP

Montreal

Most frequently recommended

Bériault, Yves, McCarthy Tétrault LLP

Consistently recommended

Renaud, Madeleine, McCarthy Tétrault LLP

Repeatedly recommended

Comtois, Yves, McCarthy Tétrault LLP
Gascon, Denis, Ogilvy Renault LLP
Potter, Simon V., McCarthy Tétrault LLP

Vancouver

Consistently recommended

Lusk, Russell W., Q.C., Borden Ladner Gervais LLP

Calgary

Consistently recommended

Strekaf, Jo'Anne, Bennett Jones LLP

Edmonton

Consistently recommended

Zalmanowitz, Barry, Q.C., Fraser Milner Casgrain LLP

REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

group at Fraser Milner Casgrain LLP.

For their part, targets must make a core decision whether to invoke competition law with the intention of buying time to obtain competing bids that are higher or have less regulatory risk. "But it may also eliminate or reduce the value of a bid that provides the highest value to shareholders," Campbell observes. "So directors have to exercise their fiduciary duties carefully when contemplating such a strategy."

There's another danger: "If the target says to competition authorities, 'Don't let the hostile party buy us because they'll monopolize the industry,' what happens if a strategic white knight who also raises competition issues comes into the picture?" asks Hughes. "It's important to think three or four steps ahead when you're giving competition advice to clients."

The greatest threat to the completion of a deal, however, may come from marketplace complaints that don't originate with the parties. "Competition agencies have made it clear they're open to submission from any interested parties," says Paul Crampton, a competition partner at Osler, who wrote the Bureau's 1991 Merger Guidelines during a four-year tenure there.

In other words, customers, competitors, suppliers, trade unions or other market participants are all free to complain to the Bureau. "And they're doing so with a rising level of sophistication," Crampton says. "The old rule of thumb that a merger is good if a competitor complains but bad if a customer complains no longer applies."

To make matters even more uncertain, a "directly affected" party can challenge a consent order after the fact. Recently, Burns Lake Native Development Corporation claimed an interest in some of the assets affected by the divestiture provision in a consent agreement related to the merger of West Fraser Timber and Weldwood of Canada. "Cases like *Burns Lake* underscore the importance of considering complaint risks," Campbell says. "The Bureau will attach considerable significance to such complaints in its initial investigation review process." Bell Canada, for example, took advantage of the complaints process when it announced its opposition to Manitoba Telecom Service Inc.'s bid for Allstream Inc.

Because of the importance of complaints of this type, competition counsel more often than not have drafted and strategized the complaints. "We're doing an ever greater number of cases where complainants retain us to deal with a merger that affects them," Campbell notes. "Their goal is to make proactive submissions that marshal the competition concerns which they believe the Bureau should address."

Indeed, a wide range of stakeholders are seeking the advice of competition counsel. "We've been getting calls from investors, debtholders, funds and financial services companies asking how mergers in a particular industry might affect them," says Michael Osborne of Affleck Greene Orr LLP.

In other words, competition law can be a strategic weapon even where there's no deal in the offing. An "interested party" can complain to the Bureau about a competitor's anti-competitive conduct at any time. Complainants can allege abuse of dominance, exclusive dealing, tied selling, market restriction or misleading advertising.

"Even if the case does not come to the Competition Tribunal for a hearing, the subject of the complaint may be put under a microscope, may choose to voluntarily agree to restrictions on its conduct, or may expend a great deal of

 REPRINTED WITH PERMISSION FROM THE APRIL 2006 ISSUE OF LEXPERT(R) MAGAZINE. © THOMSON-CARSWELL.

money defending itself against the reputational harm that can come from a complaint," notes Witterick.

Perhaps the most celebrated target of competition complaints is Microsoft. The company is embroiled in a standoff with the European Commission over compliance with a March 2004 antitrust decision against it. The ruling fined Microsoft $588 million for abuse of its market position, ordered the company to unbundle its Windows operating system from its Media Player software, and forced it to divulge information that allowed rivals to integrate their products with Windows. Microsoft has appealed to the European Court of First Instance; a hearing is scheduled for April.

The software giant's competitors kept the pressure on by filing a new complaint in February. A group that includes IBM, Nokia, Oracle and Sun Microsystems is targeting what it calls "Microsoft's existing monopolies" as well as plans to "extend its market dominance into a range of existing and pre-announced future product areas." The group claims that complaining to the European Commission is the only way to make Microsoft correct its "anti-competitive behaviour."

Comparable strategies are proliferating in Canada. In the last two decades, the Canadian competition environment has undergone a steady harmonization with the American system. So much so that the "Report of the Advisory Panel on Efficiencies," released by Competition Commissioner Sheridan Scott in October 2005, recommended convergence with the United States on the treatment of the thorny question of efficiencies in merger review "unless there is an objective reason for maintaining a distinct Canadian approach." So Scott appeared to be waiting for further progress by the US Antitrust Modernization Commission, which in November 2005 held public hearings on the role of efficiencies in mergers and is scheduled to report on its findings in 2007.

Similarly, following the lead of President Bush, all indications are that the federal government will be increasing penalties significantly in its latest round of amendments to the *Competition Act*. And in yet another indication of convergence, the Bureau's newest merger review guidelines mimic those of the European Union.

Just wait until Canada's Tory government reopens the issue of chartered bank mergers. "International banks like HSBC will be there to make sure they get a chance to get some real cream out of any divestitures demanded by the Competition Bureau," Rowley says. That should arouse some interest in other jurisdictions—and keep all the competition lawyers busy for quite a while.

Julius Melnitzer is a freelance legal affairs writer.

Who do you know in Canada?

For CANADIAN antitrust, there's no competition

McMillan Binch Mendelsohn

Toronto Montréal

A. Neil Campbell
416.865.7025
neil.campbell@mcmbm.com

John F. Clifford
416.865.7134
john.clifford@mcmbm.com

D. Martin Low QC
416.865.7100
martin.low@mcmbm.com

Mark Opashinov
416.865.7873
mark.opashinov@mcmbm.com

J. William Rowley QC
416.865.7008
wrowley@mcmbm.com

Omar Wakil
416.865.7087
omar.wakil@mcmbm.com

David W. Kent
416.865.7143
david.kent@mcmbm.com

www.mcmbm.com