Serving Two Masters

The emerging issue of Interlocking Directorships in Merger Review pursuant to the Competition Act (Canada)

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Introduction

This paper addresses certain aspects of the emerging issue of interlocking directorships in relation to merger review under Canada’s *Competition Act* (the “Act”). Specifically, when does an interlocking directorship that is created or exacerbated by a merger give rise or contribute to circumstances that prevent or lessen, or are likely to prevent or lessen, competition substantially (hereafter referred to as an “SLPC”)? In other words, when should the Commissioner of Competition (the “Commissioner”) contemplate the challenge of a merger or seek appropriate remedies in light of a director serving on two boards?

Summary of Conclusion

It is submitted that an interlocking directorship in and of itself is an insufficient basis upon which to challenge a proposed merger under Canadian antitrust law. Only where a directorship results from a more extensive connection or relationship (typically characterized by an equity interest) that is created or enhanced as a result of a merger should there, in appropriate circumstances, be a basis to be concerned about the possibility of an SLPC.

The Issue

Why are issues raised by interlocking directorships? The principal concern arises from the fact that a director who sits on two boards may be a direct or indirect link between two competitors. While potential conflicts of interest, breach of fiduciary duties, breach of duties of care, and illegal coordination of competitive activities are some of the reasons to avoid interlocks, a graphic expression of the antitrust concern was expressed by Louis Brandeis in the early 1900s as follows:

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition … Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters.

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1. I am grateful to Bram Abramson for his insight and research in connection with this paper.
3. For the purposes of this paper, a “interlocking directorship” includes such circumstances where the same individual sits on the board of directors of two different corporations.
4. “Merger” for the purposes of this paper includes any transaction that falls within the meaning of the term “merger” as defined in section 91 of the Act.
5. An SLPC is the basis upon which the Canadian Competition Tribunal can block or unwind a merger. See section 92 of the Act.
In either event, it tends to inefficiency; for it removes incentive and destroys soundness of judgment.\(^6\)

It was this type of negative endorsement that led to the enactment of laws in the United States that prohibit interlocking directorships in certain circumstances where the same director sits on the board of two competitors.\(^7\)

While it does not require much imagination to appreciate why the circumstances of one person serving as a director of two competing corporations gives rise to the opportunity for and possibility of anti-competitive conduct, the issue that this paper seeks to address is whether an interlock that arises in the context of a merger is likely to prevent or lessen competition substantially. The thesis developed herein is that, absent other factors, an interlocking directorship, in and of itself, cannot be said to give rise to an SPLC. It should not be presumed that a director will act in an anti-competitive manner.

**Plethora of Interlocks**

Given the complexities of potential corporate structures, there are many circumstances in which interlocking directorships can arise. Furthermore, interlocks among officers of corporations may also give rise to concerns. Horizontal interlocks (i.e. involving two competitors) can be distinguished from vertical interlocks (e.g. involving a customer and its supplier). Horizontal interlocks may be direct or indirect. For the purposes of our discussion, we will limit our consideration to horizontal interlocks where the antitrust concern relates to competitors. In our analysis we will distinguish between “simple interlocking directorship”, “representative interlocking directorship”, and “remote interlocking interlocking directorship”, all of which are described in detail below. For the sake of simplicity, we will not deal with situations where the director happens to be one of the merging parties.

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**Simple Interlocking Directorship**

This situation arises where an individual sits on the boards of (but does not hold or represents a concentrated and significant ownership interest in) two independent corporations that do not compete or have a vertical (customer/supplier) relationship and one of the corporations proposes to acquire a competitor of the other corporation.

**Representative Interlocking Directorship**

This situation arises where an entity has an equity/financial interest in a corporation that is coupled with a right to nominate at least one director, and the entity proposes to merge with a competitor of such corporation, and receive a right to nominate the same director to the board of directors of the competitor.
Remote Interlocking Directorship

This situation arises where an entity acquires a corporation where a director of the acquired corporation also sits on the board of an unrelated corporation that is a competitor of a subsidiary of the acquiring corporation.

There are, of course, endless other possible permutations of interlocking directorships, and the foregoing three examples serve merely to highlight three different situations. To contextualize these examples, a pure interlocking directorship arises almost by coincidence; the objective of the merger is not the creation of the interlock. A representative interlocking directorship (by “representative” we are implying that the appointment of the director flows from a concentrated and significant economic interest, such as a shareholder in a control position) arises where the acquiring party has an economic interest in two competitors and consciously appoints the same director. A remote interlocking directorship occurs where the director of one competitor becomes the director of a corporation that is related to (but not the parent or subsidiary of) the other competitor.

The Fundamental Basis of Merger Review: Control and Influence vs. Conduction of Information

The substantive merger provisions of the Act provide that, in order for a transaction to be challenged, it must be a merger. A merger arises when an acquiror acquires: (i) control over a
business, or (ii) a significant interest in a business. This discussion adopts the meaning of “significant interest” as set out in the Merger Enforcement Guidelines (the “MEGs”) of the Competition Bureau (the “Bureau”), namely:

1.4 The Act provides no guidance with respect to the meaning of the words “significant interest”, leaving them to be construed according to the purpose of the Act.

1.5 In determining whether an interest is significant, the Bureau considers both the quantitative nature and qualitative impact of the acquisition or establishment of the interest. Given that the Act is concerned with the competitive market behaviour of firms, qualitatively a “significant interest” in the whole or a part of a business is held when the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour (including decisions relating to pricing, purchasing, distribution, marketing, investment…). [emphasis added]

It is submitted that where an acquiring entity has a pre-existing interest that does not amount to a “significant interest” in a competitor of an acquired corporation, the pre-existing non-significant interest held in such competitor should not be the basis of a challenge of the acquisition. In other words, if Competitor A can acquire a non-significant interest in Competitor B without triggering the merger provisions of Act (because it is not a “merger”), then the corollary should be true that an acquiring party who holds a pre-existing non-significant interest in Competitor B should be allowed to “merge” with Competitor A, even if a merger between Competitor A and B would give rise to an SLPC. The critical distinction rests on holding no more than a non-significant interest.

Is this approach consistent with the MEGs? It is hard to tell. The MEGs don’t appear to provide helpful guidance on how to measure the extent of the market presence of an acquiror, or how the interests they hold could be measured to determine significance or non-significance. For example, when measuring the market share of an acquiror, it is submitted that it is generally accepted that the market share of any affiliates of the acquiror are attributed to the acquiror. Furthermore, it is probably also accepted that the market share of any unaffiliated entity over which the acquiror has de facto control (as opposed to de jure control), should also be attributed to the acquiror. There would likely be a debate as to what, if any, portion of the market share of an entity in which the acquiror has a significant interest, but does not control, should be attributed to the

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8 See section 91 of the Act.
9 September 2004, Competition Bureau, Industry Canada.
10 Ibid. at 1.4, 1.5.
11 Which is why the Act requires extensive information about the affiliates of the acquiror in the notification forms to be submitted in connection with pre-merger notification under Part IX of the Act.
However, it is submitted that where an acquiror has a pre-existing interest in an entity that does not amount to a significant interest (e.g. the acquiror cannot materially influence the economic behaviour of such entity), any overlapping market share of such entity should be ignored for the purposes of a merger review.

However, with respect to entities not subject to the material influence of an acquiror in such circumstances, should there nonetheless be a concern relating to the flow of information between, and coordination of, competitors? Specifically, are there legitimate concerns relating to potential information flow or potential coordination among interlocking directorships? While beyond the scope of this papers, there may also be a concern regarding the economic incentives not to compete due to a passive interest in a competitor.13

**Should A Risk of Information Flow be a Basis to Challenge a Merger?**

It appears that there is a view that the mere risk of information flow between two competitors as a result of a pure interlocking directorship can be a sufficient basis to challenge a merger. The Bureau’s merger guidelines appear to adopt this stance. Paragraph 5.10 of the MEGs states the following:

5.10 The Bureau also examines the competitive effects of a merger resulting from, or enhanced by, the existence of particular relationships such as interlocking directorships between and among the merging parties or their affiliates and their competitors, customers and suppliers. For example, the Bureau may determine that a pre-existing relationship or arrangement between one of the merging parties and a third party raises concerns due to the merger because the third party is a direct competitor to the other merging party.14 Similarly, where directors of one of the merging parties are employees, executives, partners, owners, or members of the board of directors of another firm, or who have other interests in the business, such that confidential business information could be communicated, the Bureau assesses the competitive effects of those relationships. The Bureau is not generally concerned if board

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12 See note 33.
representation in these circumstances occurs solely through “independent” directors where the businesses do not directly compete. [emphasis added]¹⁵

The implication of the Bureau’s enforcement position as expressed in the MEGs is that an interlock alone is sufficient to potentially challenge a transaction. In other words, where “confidential business information could be communicated, the Bureau assesses the competitive effects of those relationships”. While the author is not aware of any circumstances where the Bureau has challenged a transaction on the basis of an interlocking relationship alone, the Bureau has recently issued a technical backgrounder that reflected an approach sensitive to anti-competitive information sharing risks where an interlocking directorship would be created.

On March 6, 2006, the Bureau issued a technical backgrounder that summarized some of the issues raised by the acquisition of Sogides Ltée (“Sogides”) by Quebecor Media Inc. (“QMI”).¹⁶ The following passage from the backgrounder addresses the interlock issue:

However, in the course of reviewing the transaction, the Bureau learned that Sogides’ president, Pierre Lespérance, had an interest in Gestion Renaud-Bray Inc. (Renaud-Bray), which competes with QMI’s Archambault Group Inc. (Archambault) bookstores. QMI and Sogides signed a Consent Agreement with the Competition Bureau to eliminate the possibility of information exchanges between Archambault and Renaud-Bray through Mr. Lespérance. Such an information exchange could be detrimental to publishers and distributors who have supplier relationships with Archambault and Renaud-Bray bookstores. The agreement includes the following requirements:

• the resignation of Mr. Lespérance from Renaud-Bray’s Board of Directors; and
• the appointment of an independent agent to replace Mr. Lespérance on the Renaud-Bray’s Board of Directors. [emphasis added]¹⁷

The Consent Agreement entered into by the parties¹⁸ also reveals that Mr. Lespérance’s holding company (the vendor of Sogides) holds a voting share interest in Renaud-Bray. Thus, the merger created a remote interlocking directorship.

¹⁵ Supra note 9, at 5.10. See also footnote 18 of the Information Bulletin on Merger Remedies in Canada (Competition Bureau, September 22, 2006), which can be found at the Competition Bureau website at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2170&lg=e
¹⁷ Ibid.
Unfortunately, what is not clear from the materials made available in the Sogides case is whether the Bureau’s concern about the “possibility of information exchanges” was inextricably linked to the ownership interest that Mr. Lespérance held in the competing entity, or whether the interlocking directorship alone would have given rise to this result.\textsuperscript{19} It is also not clear whether Mr. Lespérance’s interest in Renaud-Bray was sufficient enough to amount to a “significant interest” or constituted “control”.

**Eliminating the Possibility of Information Exchanges?**

One of the interesting aspects of the Sogides technical backgrounder is the Bureau’s statement that they sought to “eliminate the possibility of information exchanges”.\textsuperscript{20} Assuming that this concern related to a potential flow of competitively sensitive information between two competitors who, combined, would have market power (within the meaning of the MEGs), the question arises whether future merging parties will need to take into account the prospect that the Bureau may want to eliminate even the *possibility* of information exchanges. Is this an appropriate approach in light of the fact there are many likelier avenues for information exchanges than director interlocks? What if directors or officers of competitors belong to the same social club? What if they attend the same trade associations? What if they are related by blood or marriage? The reason these information sharing analogies have been raised is to question how wide the merger review net might be, or should be, cast. By adopting this language, is the Bureau not signalling that all of these types of possible sources of information exchanges will be examined as part of a merger review?

It is respectfully submitted that we would not expect the Canadian competition authorities to inquire into every possibility of information exchange among post-merger competitors. With regards to the Sogides result, it would be somewhat comforting to learn that the reason that the Bureau dismantled the interlock (and neutralized the voting shareholding) was because they concluded that Mr. Lespérance held a significant interest in, if not controlled, Renault Bray.

\textsuperscript{19} See also the Bureau’s press release on April 22, 2002 where Famous Players was required to divest its interest in Galaxy (both film exhibitors) and end its representation on Galaxy’s Board of Directors – a situation where board representation appears to be linked to ownership interest. The press release can be found at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=401&lg=e.

\textsuperscript{20} The Sogides backgrounder does not make it clear that the combination of the two competitors, Renaud-Bray and Archambault, would result in an SLPC. It is assumed for the discussion herein that that was the Bureau’s conclusion. If that would not have been the case, then the implication would be that the risk of information exchanges have superseded the statutory SLPC test as the standard against which a merger is measured.
Directors Least Likely to Reveal Confidential Information

There is no doubt that an interlocking directorship gives rise to the possibility of information exchanges (as do, of course, common club memberships, family, friendships, trade associations, etc.). One would hope, however, that the risk of anti-competitive information exchanges by any person is tempered by Canadian laws against illegal conspiracies. Moreover, what makes an interlocking directorship relatively less vulnerable to these types of exchanges than other connections is the significant body of jurisprudence, legislation, and codes of ethics that would in many, if not most, instances preclude such information exchanges. Without attempting to set out a complete summary of such restrictions, directors’ duties and obligations include, among others:

- a duty to act honestly and in good faith with a view to the best interests of the corporation;
- a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and
- an obligation not to put themselves in a position of conflict with their duty to the corporation.

Interlocking directorships on the board of competitors therefore may give rise to logistical difficulties for the director who would have to juggle potentially conflicting duties of care, loyalty and good faith, and conflicts of interest. But for the reasons articulated above, interlocking directorships are unlikely to promote improper information exchanges or anti-competitive coordination any more than the likelihood that directors would breach other obligations under corporate law. Although statistical information in respect of interlocks is hard to come by, the commercial reality of competitors wanting to guard their competitively sensitive information, combined with challenges faced by all directors who must reconcile conflicting obligations, likely reduces the incidence of such interlocks. However, as one commentator has noted, such “arrangements can make business and economic sense, particularly in industries where experienced and knowledgeable individuals are in short supply.” A more rigorous consideration of the determinants and consequences of interlocking directorships by sociologist Mark Mizruchi suggests

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21 See section 45 of the Act.
that interlocks are not driven by anti-competitive collusive objectives, but may arise for any number of other practical reasons:

This raises the questions of whether interlocks between competitors were motivated by attempts to collude, whether they were effective in facilitating such collusion, or whether they were ultimately irrelevant. …. This finding [that intraindustry interlocks were highest in industries with intermediate levels of concentration] is consistent with the suggestion that, up to a point, concentration facilitates intraindustry ties but that the most highly concentrated industries, because of their small numbers of producers, have little need for interlocking in order to set prices.24

In other words, highly concentrated industries - where price-fixing is likely to be most effective – “have little need for interlocking in order to set prices.” In answer to the question, “how and why do interlocks form?”, Mizruchi identifies a host of explanations other than collusion, including cooption and monitoring, legitimacy, career advancement and social cohesion.25

However, given some of the inherent difficulties in serving “two masters” at the same time, there is an incentive to avoid exposing oneself to circumstances that will inevitably give rise to conflicts of interest.26 As one commentator has observed:

Competing, directly or indirectly, with the company inherently constitutes a conflict of interest. Indeed, it is difficult to think of a clearer paradigm of a director’s conflict of interest than the participation by a director in such activities.27

Therefore, while the “possibility” of information exchanges exist where there is an interlock, it is one of the least worrisome possibilities that exist among the risks of possible information exchanges.28 In fact, it is submitted, that where entities have a devious or unscrupulous intention to exchange confidential competitively sensitive information in order to achieve an anti-competitive

25 Ibid.
28 For an interesting discussion on the likelihood of directors abusing a horizontal interlock, please see Travers, H., “Interlocks in Corporate Management and the Antitrust Laws” *Texas Law Review* (July 1968), volume 46, number 6 at pages 839 to 851.
objective, it seems unlikely that the method of choice would be such an overt and obvious conduit that is subject to other director witnesses and written minutes of the discussions.

Finally, given the remoteness of a director from the day to day affairs of the corporation, one must also question the effectiveness of a director being able to implement anti-competitive actions without the active and conscious involvement of management in such schemes. Furthermore, in terms of being a conduit of information (such as pricing information), it is unlikely that a director of a large corporation received detailed competitively sensitive information at the level required to sustain basic anti-competitive activities.

It is for these reasons that interlocking directorships should not form the foundation of merger concerns, much less the basis upon which to challenge a proposed merger. For these reasons, without limiting the other points raised in this paper, a pure interlocking directorship is the least worrisome scenario.

**Interlocks Rarely Arise in Isolation**

It seems relatively rare that interlocking directorships occur where the director is independent vis-à-vis both corporations. A director is often appointed in connection with an ownership interest or other connection to the corporation. How then does an interlock, coupled with other interests in the corporation, herein called a “representative interlocking directorship”, impact on our analysis? The answer may lie in the fundamental nature of merger review, namely determining whether an SLPC is created as a result of the “merger”. For the purposes of this discussion, we will assume that the only two factors to be considered in respect of a representative interlock are the ownership interest and the potential consequential right to appoint a director.

It is submitted that it should be degree of influence conferred by the ownership interest that gives rise to concerns that there will be an incentive to lessen competition. To take an obvious example, if a merging party controls one competitor and acquires 100% of the only other competitor, a finding of an SLPC would not be surprising. If, however, a merging party has an ownership interest in one competitor that does not confer on the merging party any ability to materially influence the economic behaviour of the competitor (but coupled with a right to appoint a director), and the merging party then acquires the only other competitor, should there be a basis for challenge? Clearly there will be a risk of the possibility of information exchange, but should that be enough?
The Minimum Standard Should be Material Influence

In the course of the review of a merger, it is unrealistic to expect the Commissioner to be able to ferret out all possibilities of information exchanges with competitors. Instead, it is far more predictable, principled and coherent to use the established and understood norm of significant interest as the key indicator that a legitimate risk of information exchange arises. The risk that the representative director of a shareholder that has a significant ownership interest in the corporation will reveal information to the shareholder increases because the shareholder requires such information to exert its influence. Significant interest as a threshold makes sense because if the shareholder does not have the ability to materially influence the corporation, there is a reduced likelihood that competitively sensitive information will be shared. The Bureau’s MEGs provide useful guidance as to some of the criteria and characteristics of significant interest, including the following:

1.12 Depending on the specific terms of the arrangements, significant interest can be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving corporations, partnerships, joint ventures, combinations and other entities. In addition, loan, supply and distribution arrangements that are not ordinary-course transactions and that confer the ability to materially influence management decisions of another business (that is, financing arrangements and terms of default relating to such arrangements; long-term contractual arrangements or pre-existing long-term business relationships and the economic significance of these relationships) may constitute a “merger” within the meaning of section 91.

1.13 In determining whether the acquisition or establishment of a significant interest constitutes a merger, the Bureau examines the relationship between the parties prior to the transaction; the likely relationship between the parties subsequent to the transaction; the access that an acquiring party obtains to confidential business information of the target business; and any evidence of

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29 Which does not, of course, guarantee that a director will breach directors’ duties and conspiracy laws to pass on information.

30 Which is why, theoretically, an acquiring party can acquire a non-significant interest in its rival without triggering the substantive merger provisions of the Act.

31 [MEGs footnote] See D.I.R. v. Dennis Washington et al., (1996) CT-1996/001 (Comp.Trib.), Second Amended Notice of Application, Statement of Grounds and Material Facts, December 17, 1996 (hereinafter “Seaspan”) at 8. The Bureau’s determination that a significant interest was acquired or established was based on several factors including: the indirect acquisition of voting equity interest; the acquisition of equity warrants; board representation; the purchase of senior subordinated debentures; and the terms of a Joint Investment Agreement between Dennis Washington and the largest shareholder of Seaspan.
intentions to affect the behaviour of the target business or to change the behaviour of the acquiring party. [emphasis added]^{32}

As emphasised in this passage from the MEGs, “access to information” forms part of the determination as to whether there is a significant interest. This is perfectly legitimate. Access to confidential (and competitively sensitive) information should be one of the factors in determining interest level— but only one factor. If the only connection were the possibility of access (as in the case of a pure interlocking directorship), there should not, it is submitted, be a sufficient basis to establish a significant interest. All things being equal, in all likelihood it will principally be the proportion of directors on the board that the acquiring party can appoint that will be determinative.

It is only once a significant interest (or control) has been established, based on a number of factors (including those enumerated above), that the Bureau should take the next step of examining if there is an SLPC (although query the extent to which a mere significant interest should be discounted pursuant to such an inquiry as opposed to control^{33}).

**Safe Harbours**

The Commissioner’s duty under the Act, in connection with the review of mergers, is to challenge a merger that the Commissioner and her staff at the Bureau believe gives rise to an SLPC. The Commissioner and the Bureau have also, thankfully, taken on the challenge of communicating many of their enforcement positions and approaches to merger review, thereby achieving greater predictability and transparency.^{34} However, notwithstanding these efforts, there remains some uncertainty in respect of the Commissioner’s approach to the emerging issue of interlocking directorships. Additional guidance that identifies “safe harbours” (i.e. a description of general circumstances that would not give rise to any expected concerns) would be helpful. At the moment,

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^{32} *Supra* note 9, at 1.12, 1.13.

^{33} See Bailey, “Ownership and Control,” *supra* note 13, at page 3, where Ms. Bailey makes the following observation:

“How one thinks about these types of situations can also have implications for how market shares and HHIs are calculated. For example, suppose firm B owns a 10 percent interest in firm J, which has a 20 percent share of the widget market. Suppose firm A, a widget manufacturer that has a 30 percent share of the widget market, announces it will acquire firm B. Depending on the facts regarding governance and control, it can make sense to assign anything between none and all of firm J’s market share to firm B. As a result, depending on how one attributes firm J’s market share to firm B, the post-transaction market share for the combined firm can vary between 30 percent and 50 percent and the change in the HHI can vary between 0 and 1200.”

^{34} As exemplified by the 2004 MEGs, the 2006 Information Bulletin on Merger Remedies in Canada, and the recent collection of technical backgrounders, such as the Sogides backgrounder.
the only apparent safe harbour appears to be expressed in paragraph 5.10 of the MEGs that provides “[t]he Bureau is not generally concerned if board representation in these circumstances occurs solely through “independent” directors where the businesses do not directly compete.” Indeed, even if there were cross-ownership interests, even amounting to control, by virtue of the businesses not competing one would not expect there to be concerns.

Flowing out of the foregoing discussion, it is recommended that the Bureau adopt at least one additional merger review related safe harbour, namely:

The Bureau is not generally concerned if interlocking board representation occurs solely through independent directors, even where the businesses compete.\(^35\)

Furthermore, even where the acquiring party parties has a pre-existing interest in a competitor of the acquired business that does not amount to a significant interest, the Bureau should consider declaring that such a connection is insufficient to challenge a merger. There have been no examples that the author is aware of where a Canadian merger was challenged on that basis. While beyond the focus of this paper, the foregoing discussion suggests that as a rule of thumb pre-existing passive (i.e. non-significant) interests should not raise anti-competitive concerns.\(^36\)

**Distinguishing the Agricore United Remedy**

In connection with the merger of United Grain Growers Limited and Agricore Cooperative Limited (such merged entity hereafter referred to as “Agricore United”), certain remedies were recently accepted, pursuant to a consent order,\(^37\) in response to Agricore United’s 16.67% interest in CanAmera Foods Limited Partnership (“CanAmera”), a Canadian canola seed processor, which gave Agricore United a right to be represented on the board of CanAmera. This ownership interest was originally held by Agricore Cooperative Limited. The consent agreement provided strict confidentiality provisions designed to prevent the sharing of competitive sensitive information with Archer Daniels Midland Company (“ADM”), a 19% shareholder in Agricore United.\(^38\) ADM was

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\(^{35}\) This safe harbour might be refined to exclude situations where the director could actually materially influence the corporation, for example where there are only two directors, where a director has a veto, or otherwise has unusual powers.

\(^{36}\) *Supra*, note 13.

\(^{37}\) *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 11 (File no.:CT2001007), date of order February 19, 2002. See also the related publicly filed documents, including the Statement of Grounds and Material Facts, found at http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=228&CaseID=173#228

\(^{38}\) ADM had a right to increase this holding up to 45%.
originally a shareholder of United Grain Growers Limited. ADM was also a major domestic seed processor and competitor of CanAmera. The consent agreement provided:

[42] Agricore United shall keep all non-public information in its possession regarding CanAmera obtained as a result of Agricore United’s direct or indirect interest in CanAmera confidential and separate from ADM (including the ADM nominees to Agricore United’s Board of Directors).

[43] Agricore United shall not appoint any director, officer or employee of ADM as a nominee to the Board of Directors of CanAmera.

[44] The Agricore United Grain Operations Committee shall exclude canola oil seed processing from the scope of its mandate.

[45] The restrictions set out in paragraphs 42 through 44 of this order shall remain in effect so long as Agricore United is entitled either to elect a representative to the Board of Directors of CanAmera or holds a greater than 10% interest in CanAmera, but in any event, not beyond November 1, 2011. 39

What are the implications of this remedy? Clearly the remedy obtained reflects the Bureau’s concern about the flow of confidential information. However, it is notable that the Bureau did not require a divestiture in this context (neither ADM disposing of its interest in Agricore United, nor Agricore United disposing of its interest in CanAmera). Instead, the Bureau opted for a remedy that, in many ways, was simply a codification of what parties in such a circumstance would arguably do in any event. To the extent that ADM and CanAmera are major competitors in a market, ADM’s nominee would likely have avoided receiving (and certainly transmitting to ADM) competitively sensitive information about CanAmera. Furthermore, the prohibition against Agricore United appointing an ADM person to the board of CanAmera may also have been superfluous. Short of a coincidence, Agricore United would only appoint an ADM person to the board of CanAmera if ADM controlled Agricore United or if ADM and Agricore United had agreed to such a course of action (the first scenario raising legitimate merger issues and the latter raising the spectre of an agreement that is anticompetitive). Therefore, it is submitted, that the remedies relating to CanAmera do not support the conclusion that interlocking directorships are likely to give rise to information exchanges that are anti-competitive. The remedies endorsed by the Tribunal likely only reinforced a course of action that the parties would have followed in any event.

39 Supra, note 37 at para 42 to 45.
Conclusion

As the foregoing hopefully demonstrates, it is important to distinguish between the shareholder and the director in the context of discussing interlocking directorships. Under Canadian merger review law, an interlocking directorship should only be the basis of potential concern if the directorship reflects or is a characteristic of “control over or significant interest in” the corporation held by the shareholder, not the director. If the shareholder has sufficient direct or indirect ownership of two corporations\(^40\) to “materially influence the economic behaviour of the business”\(^41\) of each corporation, a legitimate review of the ensuing interlocking directorship (not to mention other competitive effects) is appropriate. However, if the shareholder or shareholders that appointed the director cannot materially influence the relevant corporation (for example where the director is one of many), an ensuing interlocking directorship should not be an issue that impacts merger review.

While an interlocking directorship might give rise to the possibility of information flowing between the interlocked corporations, the risk of such an exchange is, all things being equal, less problematic than many other potential risks of information passing between the corporations\(^42\). The risk is low because such an exchange (i) may be contrary to the director’s fiduciary and other obligations to the corporation, (ii) would occur in a transparent forum and be recorded, and (iii) might run afoul of Canada’s competitions laws relating to conspiracy. Thus, to the extent that an individual agrees to “serve two masters” by sitting on more than one board of directors, such an interlocking directorate does not, absent a significant degree of interlocking influence on the part of the same shareholder, provide a basis to challenge a merger under Canada’s Competition Act.

\(^{40}\) or there are contractual or other arrangements in place that have the same effect.
\(^{41}\) See para 1.5 of the MEGs.
\(^{42}\) As exemplified by the many ways information is exchanged for the purposes of creating illegal cartels.