Kluwer Competition Law Blog

Q and A on Canadian Merger Control

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General overview of the key merger control regimes in Canada

Competition Act

Canada's Competition Act (the Act) authorises the Commissioner of Competition (the Commissioner) to challenge
merger transactions that are likely to prevent or lessen competition substantially in a relevant market affecting Canada. The
Commissioner heads the Competition Bureau (the Bureau) which is responsible for investigating merger transactions to
determine if they are likely to have the proscribed anti-competitive effect.

The definition of 'merger' for these purposes is quite broad. In addition to acquisitions of control (defined as the acquisition
of a greater than 50% interest in the target entity), a 'merger' includes any transaction by which one party acquires or
establishes a 'significant interest' in the business of another. 'Significant interest' is interpreted as the ability to exercise
'material influence' over the target party's business, which can capture acquisitions of minority interests (even potentially as
low as 10%), as well as contractual arrangements in which there is no transfer of interests at all.

The Act also establishes a pre-merger notification regime for certain types of merger transactions that exceed statutory
thresholds (including transactions involving the acquisition of minority interests). Merger transactions that are subject to
notification cannot be closed until the required materials are filed and the applicable statutory waiting period has expired or
been waived by the Commissioner.

It is important to note that the Commissioner's review of merger transactions is not limited to mergers that are subject
to pre-merger notification. The Commissioner will also review transactions that fall below the pre-merger notification
thresholds. Conversely, transactions may be subject to pre-merger notification (and applicable waiting periods) even if it is

apparent that they do not raise substantive issues.

The Commissioner may challenge merger transactions at any time before closing or within one year following closing.
Merger applications are adjudicated by the Competition Tribunal (the Tribunal), a specialised administrative body consisting
of judges and lay experts. In practice, very few merger transactions are challenged in Canada. To the extent that issues are
identified, they are typically resolved by negotiated settlement between the Commissioner and the parties.

Investment Canada Act

The Investment Canada Act (the ICA) authorises the Canadian government to review certain investments by non-
Canadians in Canadian businesses and, where considered appropriate, to either prohibit these investments from
proceeding or order investments to be unwound or divestitures made.

There are two key aspects to ICA review:
• the 'net benefit' review process, and
• the 'national security' review process.

Pursuant to the 'net benefit' review process, non-Canadians proposing to acquire 'control' of a Canadian business
(including a business in Canada owned by a foreign entity), and whose acquisitions exceed certain thresholds, must
satisfy the government that its investment will be of 'net benefit' to Canada. Although the ICA sets out various factors to
be considered in this regard, the decision is largely discretionary and will depend on the type and quality of commitments
('undertakings') that the non-Canadian investor is prepared to provide the Canadian government with respect to the
conduct of the Canadian business post-investment. Typical undertakings relate to the role of Canadian management;
employment; and investments in Canadian business, such as for capital expenditure and research and development.

In addition to net benefit review, the ICA also authorises the Canadian government to review and prohibit proposed foreign
investments if they are potentially 'injurious' to Canadian national security interests. In this case, there are no monetary
thresholds; no requirements that 'control' be acquired; reviews can take 130 days or more (including post-closing); and
there is no statutory definition for what constitutes 'injurious to national security'. Since the enactment of the national
security review process in 2009, there have been only a small number of transactions that have not proceeded because of
national security issues. In several of these cases, the parties abandoned the proposed transaction

after learning that they
could be subject to review; in at least one case, the Canadian government prohibited the transaction from proceeding. Each
of these transactions involved sensitive industries (such as uranium mining, computer software or telecoms) and investors
from sensitive jurisdictions (such as Iran, China or Russia).

'Net benefit' reviews of acquisitions of 'non-cultural' Canadian businesses are conducted by the Investment Review Division
(the IRD) of the federal Industry ministry; 'net benefit' reviews of acquisitions of 'cultural' Canadian business are conducted
by the Cultural Sector Investment Review Division (CSIRD) of the federal Canadian Heritage ministry. 'National security'
reviews are carried out by the IRD in consultation with the federal ministry of Public Safety and Emergency Preparedness.

1. Have there been any recent developments regarding the Canadian merger control regimes and are any updates/developments expected in the coming year?

Competition Act

The most important recent development to the Act's merger review process occurred in 2009, when the statutory waiting
period for notifiable transactions was changed and a formal 'phase 2' review process was introduced, analogous to the
'Second Request' process in the United States. In general terms, there is now an initial 30-day waiting period for notifiable
transactions which can be extended if the Commissioner determines that a more in-depth review is required and issues
a 'supplementary information request' (SIR). Where a SIR is issued, the statutory waiting period is extended to 30 days
following the submission by the parties of completed responses to the SIR. To date, SIRs have only been issued in a small
minority of transactions in Canada and do not tend to be as onerous (or time consuming) as in the United States.

The other major recent development has been the ongoing litigation regarding the Commissioner's successful challenge to
the proposed acquisition by Tervita (formerly CCS) of the Babkirk landfill site in British Columbia. This case is noteworthy for
several reasons. First, contested merger applications are very rare in Canada. Second, the transaction was well-below the
notification thresholds (the approximate deal size was only CDN$ 6m) but attracted a Bureau review nonetheless. Third,
the Commissioner sought to have the transaction dissolved rather than simply seeking an order to have the purchaser
divest the landfill. Fourth, the Commissioner argued the case on the grounds that the merger 'prevented' competition
by eliminating a potential entrant rather than the more common allegation that the merger would

‘substantially lessen
competition’.

The Commissioner’s application was granted by the Competition Tribunal (which adjudicates merger challenges under the
Act at first instance). However, the Tribunal declined to order dissolution in favour of divestiture. The Tribunal’s decision was
upheld on appeal by the Federal Court of Appeal. The matter is now slated to be decided by the Supreme Court of Canada
during 2014. This will be the first time that the Supreme Court of Canada has considered a merger review case since 1997.

One of the issues raised by the appeal is whether the Tribunal erred in its approach to deciding that Tervita’s acquisition
of the landfill would prevent competition substantially by eliminating a prospective new entrant. The Supreme Court
of Canada’s decision in this regard could have important implications for how far the Competition Tribunal can go in
determining the likely effect of a proposed merger, including the limits, if any, on the Tribunal’s assessment of future market
outcomes. The court will also consider the interpretation of the Act’s efficiency defence, which can permit mergers that
otherwise would prevent or lessen competition substantially. Canada is one of the few jurisdictions to allow for such a
defence, at least in express terms, and so the scope of its application is always of great interest.

Investment Canada Act

The most important recent ICA developments relate to various steps taken by the federal government to deal with
investments in Canada by foreign state-owned enterprises (SOEs). For example, following a number of high profile
investments in Canada by foreign SOEs that were approved in late 2012, the federal government revised its guidelines
regarding the ‘net benefit’ assessment of SOE investments to emphasise the importance it places on SOEs committing
to maintain the corporate transparency and commercial orientation of the Canadian businesses they acquire. Parliament
also passed legislation in 2013 that introduced a broad definition of SOE in the ICA and that provided for a separate, lower
net benefit review threshold that will be applicable to acquisitions of Canadian businesses by SOEs upon passage of
implementing regulations. Where SOE control or influence is involved, the amendments also introduced new deeming
powers for the Minister of Industry that could, with retroactive application, impose net benefit reviews on (i) direct
acquisitions of control of Canadian businesses by entities that would otherwise qualify as ‘Canadian’ under the ICA, and (ii)
direct acquisitions of certain minority interests in Canadian businesses that would not previously

have been subject to net
benefit review under the ICA.

There were also important developments regarding the ICA's national security review process. In October 2013, Industry
Minister James Moore, announced that the Canadian government had relied on national security grounds to reject the
proposed acquisition by Accelero Capital Holdings of Allstream, a provider of telecommunications services to businesses
in Canada. The Minister did not provide any detailed explanation for this decision, which appears to be the first time since
the national security review provisions were added to the ICA in March 2009 that the Canadian government has publicly
announced a prohibition of a proposed investment on national security grounds following a completed review.

The spotlight on the role of foreign investment in Canada is likely to continue in 2014, as the federal government grapples
with the implementation of the new SOE rules and net benefit review thresholds, and further refines its use of the national
security review process. This will take place in the context of continuing debate over whether the government's recent
measures are discouraging foreign investment, particularly in the oil and gas sector.

2. Under Canadian merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

Competition Act

According to the EU Merger Regulation, the European Commission must be notified and approve a transaction when a
party obtains 'control' of another party (assuming the parties meet certain thresholds). The test for determining control
is whether one party has the possibility of exercising 'decisive influence' over the other party. The European Commission
will consider both quantitative shareholdings as well as whether or not the party may have de facto control by achieving a
majority at shareholders' meetings.

The Canadian merger review regime is different in the sense that (a) for the purposes of substantive review, a distinction is
drawn between the concept of formal 'control' and the concept of 'significant interest' (which seems analogous to 'decisive
influence'), and (b) the acquisition of 'control' is not necessarily a threshold triggering event either for substantive review or
for the pre-merger notification obligation.

As noted above in the response to question 1, the Commissioner's substantive merger review

jurisdiction under the Act is
premised on a merger transaction constituting either an acquisition of ‘control’ (defined as the acquisition of a greater than
50% interest in the target), or the acquisition of a ‘significant interest’ in the target, which is interpreted as the acquiror’s
ability to exercise ‘material influence’. As noted further, the ‘significant interest’ threshold is broad enough to capture
acquisitions of interest as low as 10% or even arrangements that do not involve a transfer of interests at all.

In one recent case, the Commissioner challenged an alliance agreement between two airlines (Air Canada and United
Airlines) under the Act’s merger provisions on the basis that the airlines had effectively merged operations even though
neither party had acquired an interest in the other. This matter was eventually settled.

The Bureau also settled another case in which one operator of a retail hardware and building materials franchise network
acquired a minority interest in a second operator of a similar network of franchise stores. The parties agreed to terminate
their franchise agreements in four overlap areas to resolve the Bureau’s concerns about a prospective substantial lessening
of competition.

As for pre-merger notification, there are several instances where the acquisition of an interest below 50% (ie a minority
investment not constituting ‘control’) can trigger the notification obligation (assuming the other relevant thresholds are
exceeded). This is the case, for example, with share acquisitions and the acquisition of an interest in a ‘combination’.
However, these thresholds are based strictly on the size of the interest acquired and do not incorporate a de facto control
element. In other words, if the interest threshold is exceeded, that part of the notification test is met regardless of whether
the acquiror would exercise ‘material influence’ over the target or not. Conversely, if the interest acquired is below the
relevant threshold, there will be no notification requirement regardless of whether ‘material influence’ over the target would
be established (although that would be relevant for potential substantive review). See the response to question 5 for further
discussion.

Investment Canada Act

In contrast to a merger review under the Act, the acquisition of ‘control’ is one of the required triggers for ‘net benefit’ review
under the ICA. The ‘net benefit’ review process only applies to acquisitions of ‘control’ by non-Canadians of Canadian
businesses that exceed the prescribed thresholds. Acquisitions that fall short of ‘control’ are not

subject to review. The
definition of ‘control’ can vary depending upon the type of entity being acquired. For example, while acquisitions of interests
above 50% in any type of entity are considered to be acquisitions of ‘control’, acquisitions of between one-third to 50% of
the shares of a corporation are also presumed to be an acquisition of ‘control’ (capable of being rebutted). This rebuttable
presumption does not apply, however, to non-corporate entities (eg limited partnerships).

Two further points are worth noting:
• first, in certain cases, such as an acquisition by an SOE, the Minister of Industry can deem the acquisition to be one of
‘control’ even if the normal thresholds are not met-the same applies to the acquisition of certain Canadian ‘cultural’
businesses (see the response to question 5 below for the definition of ‘cultural’ business)
• second, in contrast to the ‘net benefit’ review process, the ICA’s national security review process does not hinge on
there being an acquisition of control by a non-Canadian.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Joint ventures or other types of strategic arrangements may be caught by the broad definition of ‘merger’ found in the Act
and thus be subject to the Act’s substantive merger review jurisdiction. As noted above, one of the recent challenges in
Canada (which was eventually settled) involved an airlines alliance. Joint ventures may also trigger the Act’s pre-merger
notification requirements if they exceed the relevant thresholds. That said, the Act also contains exemptions from
notification and/or substantive review for certain types of non-corporate joint ventures; in practice, the application of these
exemptions tends to be limited, particularly the exemption from substantive review.

Joint ventures also may be subject to ICA review provided that the relevant criteria are met and thresholds exceeded.
Importantly, at least for the purposes of the net benefit review process, the non-Canadian investor must be acquiring
‘control’ of the joint venture (or deemed ‘control’ in the case of corporations).

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any ‘effects’ doctrine/policy if relevant)?

Competition Act

The pre-merger notification requirements in Part IX of the Act apply in respect of specific types of transactions that meet
prescribed financial and voting interest thresholds.

The two key types of acquisitions to which the notification requirements apply are: (i) asset

acquisitions and (ii) share
acquisitions.

The two key thresholds are the 'size of transaction' and the 'size of parties' thresholds:
• Size of transaction—the target must be, or control, an 'operating business' in Canada with over CDN $82m in
Canadian assets (book value) or gross revenues generated by these assets from sales 'in or from' Canada (ie
domestic plus export sales).
• Size of parties—all parties and their affiliates (in aggregate) must collectively have over CDN $400m in Canadian
assets or gross revenues generated by sales in, from or into Canada (ie domestic sales, exports and imports).

For these purposes:
• the parties' most recent annual audited financial statements are generally the starting point for calculating the value
of assets and revenues
• 'operating business' means 'a business undertaking in Canada to which employees employed in connection with the
undertaking ordinarily report for work'
• the 'size of transaction' threshold is adjusted annually according to a formula prescribed under the Act. The CDN
$82m threshold referred to above applies to transactions completed in 2014.

Where a share acquisition is involved, the acquiror's voting interest following the transaction also must exceed 20% (public
company) or 35% (private company) or, if that threshold is already exceeded, 50%.

The other types of transactions covered by Part IX are 'amalgamations', the formation of non-corporate 'combinations'
(eg a partnership), and the acquisition of an interest in non-corporate 'combinations'. Variations of the above financial and
voting interest thresholds apply in those cases.

Foreign-to-foreign transactions can be subject to pre-merger notification under the Act, provided that the target carries
on an 'operating business' in Canada (directly or indirectly) and the relevant thresholds are met. Thus, a transaction will not
be subject to notification if the target merely has turnover from sales into Canada but does not have a Canadian 'operating
business' that generates revenue in or from Canada.

Investment Canada Act—'net benefit' review

The current ICA thresholds for 'net benefit' review are based on the value of the assets owned by the Canadian business
and vary depending on the ownership of the investor and vendor, the type of business being acquired, and the structure of

the acquisition.

For example, where either the non-Canadian investor or the target is controlled by a ‘WTO Investor’ and the Canadian
business is not a ‘cultural business’:
• a ‘direct’ acquisition of control will generally be reviewable if the book value of the assets of the Canadian business
being acquired, and of the assets of all other entities in Canada, the control of which is being acquired, exceeds CDN
$354m
• an ‘indirect’ acquisition of control will generally not be subject to review.

Where no ‘WTO Investor’ is involved, or where a WTO Investor transaction involves the acquisition of a ‘cultural business’,
lower thresholds apply, as follows:
• a ‘direct’ acquisition of control will generally be reviewable if the book value of the assets of the Canadian business
being acquired, and of the assets of all other entities in Canada, the control of which is being acquired, exceeds CDN
$5m
• an ‘indirect’ acquisition of control will be reviewable where the book value of the assets of the Canadian business
exceeds CDN $50m and where the assets of the Canadian business represent less than 50% of the total assets
being acquired in the transaction.

For these purposes:
• In general, a corporation or other entity will be a ‘WTO Investor’ if it is ultimately controlled by one or more ‘WTO
Investors’, ie nationals of a country (other than Canada) that is a member of the WTO (World Trade Organisation) or
individuals who have a right of permanent residence in a WTO member country.
• A widely-held public company will generally be a ‘WTO Investor’:
if it can be established that a majority of the voting shares of the public company is owned by WTO, Investors, or
where no person or voting group controls the company, at least two-thirds of the members of the company’s board of
directors are any combination of WTO Investors and Canadians
• A ‘direct’ acquisition of control occurs when the transaction involves the acquisition of control of an entity
incorporated in Canada. An ‘indirect’ acquisition occurs where a foreign investor acquires control of an entity
incorporated outside of Canada that controls, directly or indirectly, an entity in Canada carrying on the Canadian
business.
• The threshold for direct acquisitions by WTO Investors is adjusted annually on the basis of a prescribed formula. The
CDN $354m threshold applies to transactions completed in 2014.
• The value of the Canadian business’s assets are as reflected in its most recent audited financial

statements.
• 'Cultural business' refers to businesses that are involved in any of the following activities: publication, distribution
or sale of books, magazines, periodicals or newspapers; the production, distribution, sale or exhibition of film or
video products; the production, distribution, sale or exhibition of audio or video music recordings; the production,
distribution, or sale of music in print or machine-readable form; radio communications, radio/television
broadcasting, or satellite programming/broadcasting.

Pursuant to amendments to the ICA enacted in 2009 and to come into effect on a date to be determined by the Federal
Cabinet, the review threshold for direct acquisitions by WTO Investors will change such that review will be required if the
'enterprise value' (to be defined by forthcoming regulations) of the assets of the Canadian business is equal to or greater
than CDN $600m in the case of investments made during the first two years after the thresholds come into force. This
threshold will increase further in subsequent years up to CDN $1b. At the time of writing, we have no indication of when the
new 'enterprise value' threshold will come into force. Moreover, pursuant to additional amendments to the ICA enacted in
2013, the new threshold will not apply to investments by foreign SOEs, which will continue to be governed by the lower asset
value-based threshold.

Three additional points to note:
• foreign investments that do not exceed the applicable thresholds (including indirect acquisitions of control by/from
WTO Investors) must still be notified to the Canadian government within 30 days of closing even though not subject
to review. This requires completing and submitting a very basic notice form, which is available on the IRD website.
The current version of the form only requires the submission of very basic information; however, a proposed new
form will incorporate more detail information requirements once adopted
• as noted above, there are no similar thresholds for the ICA's 'national security' review process. In essence, any foreign
investment, regardless of the size of the investment, can theoretically be subject to 'national security' review
• foreign-to-foreign transactions can be caught by the ICA's 'net benefit' review, insofar as they constitute 'indirect'
acquisitions of Canadian businesses. However, they will only be subject to review if neither the acquirer nor the
vendor is a WTO Investor, or if a transaction involving a WTO Investor results in the non-Canadian investor acquiring
a 'cultural' Canadian business, and relevant thresholds are otherwise exceeded. Indirect acquisitions are also

potentially subject to the ICA's 'national security' review process.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

Competition Act

Both the Act's Notifiable Transactions Regulation and the Bureau's Pre-Merger Notification Interpretation Guidelines are of
assistance in interpreting various aspects of the Part IX pre-merger notification requirements. Issues addressed include the
determination of asset/revenue values generally and in specific circumstances where adjustments may be required; the
definition of 'operating business', the exemption for non-corporate 'combinations', the treatment of non-voting shares and
convertible securities and issues relating to amalgamations, creditor acquisitions, shareholder agreements, corporate spinoffs,
and hostile transactions.

The Bureau has also released for comment several additional draft guidelines, including on the issue of calculating the value
of assets in Canada and gross revenues from sales 'in, from or into Canada' for the purposes of the Part IX threshold. These
draft guidelines have yet to be finalised.

One pre-merger notification issue to be aware of is that the definition of 'parties' to a transaction is different for share
acquisitions than other transactions. Specifically, the Act provides that the 'parties' to a proposed acquisition of shares
are 'the person or persons who propose to acquire the shares and the corporation the shares of which are to be acquired'.
In other words, in a situation where Company A is selling the shares of Company B to Company C, the parties to this
transaction for Canadian notification purposes will be Company B and Company C; Company A, ie, the vendor, is not
considered a party. This can have implications when calculating the 'size of the parties' threshold (see the response to
question 5) and in determining whether all of the parties to the transaction are 'affiliates' of each other for the purposes of
fitting under the exemption from notification available for such transactions (ie internal re-organisations).

Another issue that has arisen in recent years is how to treat SOEs for notification purposes. The Competition Bureau has
recently confirmed that, for the purposes of determining whether pre-merger notification thresholds are exceeded, only
entities that are in the same line of direct state ownership as the relevant SOE need to be considered. In other words, the
Canadian assets and revenues of a merging party's sister SOEs need not be taken into account so

long as these SOEs are in
a separate line of direct state ownership from the relevant SOE.

Investment Canada Act

Regulations under the ICA provide additional explanation for the calculation of asset value for 'net benefit' review threshold
purposes. One key issue to note is that the threshold is calculated based on the value of the Canadian business's total
assets, not just assets located in Canada. This can lead to situations where a transaction is subject to ICA review even where
there the Canadian business being acquired has no operating assets in Canada at all.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Competition Act

Subject to limited exceptions, if a transaction exceeds the thresholds set out above, a pre-notification filing must
be submitted to the Bureau and the transaction cannot close until the statutory waiting period has expired or been
terminated/waived. See the response to question 8 for a more detailed discussion of timing.

One important exemption from notification is when all of the parties to the transaction are affiliates of each other. The most
commonly applied exemption from the notification requirement, however, involves the purchaser applying for and receiving
either:
• an 'advance ruling certificate' (ARC) pursuant to section 102 of the Act, or
• a 'no action letter' with a waiver from the filing obligation.

The effect of receiving either of these two types of clearance letters is to eliminate the need to file a formal notification.
Most transactions in Canada are dealt with in this manner, with the practice being to submit, in lieu of a formal notification, a
written brief applying for an ARC or, in the alternative, a 'no action letter' and waiver. The written brief will set out the reasons
why the parties believe that their proposed transaction does not raise substantive competition issues and thus why the
Commissioner should issue either an ARC or 'no action letter'/waiver.

One potential drawback of this approach is that the statutory waiting period is not triggered until a formal notification is
made. Thus, in circumstances where certainty of process and timing is required, or if issues are anticipates, parties will
typically opt to file a formal notification in order to begin the waiting period. Even in those circumstances, however, the
standard practice in Canada is to submit a written request for an ARC/'no action letter' stating the parties' positive case for

clearance of the transaction.

Investment Canada Act

When a direct investment by a non-Canadian exceeds the ICA's 'net benefit' review thresholds, an application for review
must be submitted prior to closing, and the transaction cannot be completed until either:
• a notice of approval is received from the Canadian government, or
• the relevant waiting period has expired without the Canadian government objecting to the transaction or extending
the review period (either unilaterally or by consent).

In practice, the latter form of 'deemed approval' never occurs and notice of approval (or rejection) is always received from
the government.

Indirect investments that are subject to 'net benefit' review are treated differently, in that investors may choose to submit
their application for review following closing of the transaction. The obvious theoretical downside risk of a post-closing
review is that, if the government decides that the transaction is not of 'net benefit' to Canada, the non-Canadian investor
may be required to divest all or part of the acquired business. This has not been a material risk in practice, however, given
the infrequency of rejections under the ICA.

As for the 'national security' review process, if, prior to implementing a transaction, a non-Canadian investor receives notice
that a 'national security review may be, or has been, initiated under the ICA, the investor is prohibited from closing the
transaction until either receiving notice that the review will not be conducted or that the review has been completed.

7. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Bureau (and/or relevant government ministry where the ICA is concerned)?

Competition Act

(A) Statutory waiting period

The filing of a pre-merger notification under the Act triggers a statutory waiting period which operates as follows:
• there is an initial waiting period of 30 days following the pre-merger notification filing
• the parties may close their transaction upon the expiry of the initial 30-day waiting period unless, prior to the end
of that period, the Commissioner issues a 'supplementary information request' (SIR) to the merging parties for
production of documents and/or responses to questions
• if an SIR is issued, the waiting period is suspended until the parties comply, at which point the waiting period begins to

run again and expires after 30 days following compliance with the SIR.

The Commissioner may terminate or waive the waiting period (including the initial waiting period) at any time by issuing an
ARC or 'no-action' letter indicating that the Commissioner does not intend to challenge the transaction. Conversely, the
Commissioner may apply for an injunction to prevent closing for up to an additional 60 days following the expiry of the
waiting period to allow additional time for review. Parties may also pull and re-file a notification in order to avoid the issuance
of a SIR (at least at first instance) and provide the Bureau with more time for its review.

There is no prescribed deadline within which a filing must be made for a notifiable transaction, the only consideration being
that sufficient time be allowed for the requisite waiting period to expire before closing. In addition, while it is not necessary
to wait for a signed agreement to be in place before the notification is made, the Bureau urges parties to be 'reasonably
certain of their intentions' before they file. First, if the parties do not ultimately sign an agreement, the filing fee will not be
refunded. Second, and even more importantly, the Bureau will not consider the notification to be complete if the parties
request that it does not make market contacts (eg call top customers and suppliers, which must be listed in the notification)
until a deal is signed and the transaction made public. As such, the statutory waiting period will not be considered to have
commenced even though the notification has been submitted. (The same applies to the Bureau's service standard period
for substantive review, discussed below.)

As well, unlike in some other jurisdictions, expiration of the statutory waiting period in Canada does not, by itself, constitute
substantive clearance of a proposed merger. For that reason, as set out under question 9 below, it is possible for parties to
be in a legal position to close, because the statutory waiting period has expired, but not in a practical position close, because
they have not yet received substantive comfort from the Bureau (which is not a statutory requirement).

(B) Service Standard Time Periods

The Bureau also has adopted the following 'service standards' within which the substantive review of notified mergers is to
be completed:
• a maximum of 14 days for 'non-complex' mergers (ie mergers that clearly raise no substantive competition issues)
• a maximum of 45 days for 'complex' mergers (ie mergers where there is an indication that the transaction may
create substantive competition issues), unless an SIR is issued, in which case the review period will

coincide with the
statutory waiting period, namely 30 days following receipt by the Bureau of the completed SIR responses.

Service standard time periods typically begin once the Bureau has received the information it needs to conduct its analysis.
The Bureau's 'service standard' periods are non-statutory and thus non-binding. In practice, the Bureau has a good track
record of meeting its targets. Thus, in its most recent fiscal year, the Bureau succeeded in clearing approximately 95% of
'non-complex' mergers within the 14 day 'service standard' period and approximately 80% of 'complex' mergers within the
45-day 'service standard' period.

In worst case scenarios, Bureau merger reviews may take several months to complete, depending on whether an SIR
is issued, the length of time needed to comply with the SIR, and if remedies need to be negotiated. Of course, litigated
proceedings can take a year or more to complete (not counting appeals).

An unusual feature of the Act's merger review system is that it is possible for the statutory waiting period to expire without
the Bureau having completed its substantive review and provided a response to the parties. In those circumstances, parties
have the choice of closing at their own risk (the Bureau has one year to challenge a transaction that has been completed)
or waiting further until they receive substantive clearance (which is often a condition of closing). Typically, merging parties
faced with this issue wait to obtain substantive clearance before closing the transaction (sometimes subject to a formal
'timing agreement' with the Bureau), although legally there is no impediment to proceeding unless the Bureau proactively
seeks and obtains an injunction. In a recent case, however, the parties decided to close their transaction following
approximately eight months of Bureau review without response. The Bureau eventually cleared the transaction but took
almost six months after the transaction closed to do so.

Investment Canada Act

The time frames for review differ as between 'net benefit' and 'national security' reviews.
• 'net benefit' review— there is an initial 45-day review period following submission of the application for review, which
the Canadian government may extend unilaterally by an additional 30 days. Any further extension can only be made
with the consent of the investor, which is typically provided. Most 'net benefit' reviews are now concluded within 75-
105 days of the filing of the application for review. Reviews of more complicated transactions will go beyond that

• 'national security' review—unlike the 'net benefit' review process, there is no procedure whereby investors can
apply for clearance on the basis that their transactions are not injurious to Canadian 'national security'. Rather,
the government will determine, based on its own assessment, whether to initiate a 'national security' review. The
government must make this determination within 45 days of becoming aware of the transaction (typically, through
the filing of an application for review or a post-closing notification. If a review is initiated, the process can take up to
130 days to complete, subject to extension

8. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

Competition Act

The obligation to file a pre-merger notification applies to both parties. It is thus typical for each party to file its own premerger
notification form, although there is no prohibition against one party filing a completed form on behalf of the other.
The content of the pre-merger notification is prescribed by regulation. Key items to be provided include a list of the top 20
customers and top 20 suppliers of the parties' relevant businesses and documents prepared for the purpose of evaluating
or analysing the proposed transaction from a competition perspective (analogous to the item 4(c) requirement on the US
HSR form). The Bureau has published a standard form of pre-merger notification incorporating these requirements which
is available on its website. The pre-merger notification also has to be certified as being correct and complete in all material
respects and any relevant omissions must be identified and explained.

There is a CDN $50,000 filing fee for pre-merger notifications. This fee is typically paid by the purchaser although that is a
matter to be negotiated between the parties. Payment of the fee is not a requirement for filing the pre-merger notification;
however, if not paid at the time of filing, the fee should be paid within a few days thereafter.

Written applications for ARCs and 'no action letters' are typically prepared and filed by the purchaser, with the participation
of the vendor/target. When filed in lieu of a pre-merger notification, a fee of CDN $50,000 must be paid; if filed together
with a pre-merger notification, only a single fee of CDN $50,000 must be paid to cover both the written submission and the
notification.

Investment Canada Act

Applications for review are prepared and filed by the purchaser. There is no filing fee. The content of the application form is
set by regulation and a form is available on the Industry Canada/Heritage Canada websites. The key item to be provided is
the investor's business plan for the Canadian business, setting out its intentions for achieving a 'net benefit for Canada'.
Similarly, the post-closing notification form is also available on the Industry Canada/Heritage Canada website. There is no
filing fee for submitting this form either.

As noted above, there is no initial filing involved in the case of a 'national security' review under the ICA, which review is
initiated at the Canadian government's discretion. Once a 'national security' review is initiated, however, the investor and the
Canadian business must provide any information that the government requests as being necessary to conduct its review.

9. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the record/stance in terms of pursuing parties for failing to notify relevant transactions

Competition Act

Any person who, without good and sufficient cause (the proof of which lies on that person), fails to notify the Commissioner
of a notifiable transaction is guilty of a criminal offence and is liable to a fine not exceeding CDN $50,000.

In addition, any person who, without good and sufficient cause (the proof of which lies on that person), completes a
transaction prior to the expiry of the relevant waiting period is potentially subject to a variety of court-ordered civil remedies,
including an order to dissolve the merger, dispose of assets, and/or pay an 'administrative monetary penalty' not exceeding
CDN $10,000 for each day that the person is in non-compliance.

There is no statute of limitations in relation to breaches of the Competition Act.

There have not been any prosecutions to date for failure to file a pre-merger notification, nor any civil proceedings for
contraventions of the waiting period.

Investment Canada Act

Non-Canadian investors that fail to comply with the ICA's requirements, or post-closing undertakings provided to the
Canadian government in respect of their investments, can be subject to a variety of court-ordered remedies if they do not
otherwise cure their default upon demand by the Canadian government. Depending upon the circumstances, these courtordered

remedies can include an obligation to divest an acquired business or to pay an ‘administrative monetary penalty’ of
CDN $10,000 for each day of the breach.

There has been only one formal enforcement proceeding commenced under the ICA. That case involved an alleged breach
of undertakings by a non-Canadian investor. The matter was eventually settled with the non-Canadian investor agreeing to
provide revised undertakings to address the alleged breach.

10. Are there any other ‘stakeholders’ that are relevant (for example, any ‘sector regulators’ who might have concurrent powers)?

Apart from merger review under the Act, and foreign investment review under the ICA, merger transactions may be subject
to review by other regulatory authorities with responsibility for specific industry sectors. This includes, for example, merger
transactions in the transportation, financial services, telecommunications and broadcasting sectors.

In some cases, the reviews may be concurrent, although focussing on different issues (at least in theory). For example, in
certain circumstances, mergers involving ‘transportation undertakings’ can be subject to review by both the Commissioner
and the Canada Transportation Agency, with the former examining whether the transaction is likely to prevent or
lessen competition substantially and the latter considering the transaction from the perspective of Canada’s national
transportation policy.

In other cases, the review may be exclusive to one authority over another. For example, the ICA does not apply to certain foreign
investments in the financial services sector that are subject to review by the relevant regulatory authorities in that sector.

Two additional points should be noted:
• in terms of a merger review under the Act, the Bureau will consult with market participants as part of its assessment
of the likely impact of the transaction. The Bureau will typically be most interested in the views of customers and/or
suppliers. That said, in the Tervita case referred to above, it appears that the Bureau was influenced by complaints
from a competitor in the waste storage industry; indeed, it appears that there were no customer complaints about
the transaction at all
• as for ICA review, the IRD will consult with provincial governments (in addition to relevant federal government
departments) as part of its ‘net benefit’ analysis. In one recent transaction, provincial opposition to a proposed
foreign investment proved to be a very important factor in persuading the Canadian government to

deny approval.
As a result, foreign investors are cautioned to take into account any likely reaction at the provincial level (and even
by affected municipal governments) when considering how best to present their 'net benefit' case to the Canadian
government.

11. What (if any) are the other 'hot' merger control issues in Canada?

There has been a spate of retail mergers in Canada in the past year involving grocery products, pharmacies, sporting goods,
and building products, amongst others. Several of these transactions were only cleared on the basis of agreed-upon
divestitures. In addition to examining typical sources of information—such as the parties' internal documents and interviews
with industry participants—the Bureau also engaged in various econometric analyses and merger simulations to assess the
likely impact on competition. The Bureau is likely to continue to make greater use of these tools in the future.
Another recent development has seen the Bureau renew its use of compulsory production orders to gather information for
merger reviews. This has included orders to require individuals to testify under oath, which has not been typical of Bureau
merger reviews in the past.

Finally, the Bureau is also making a greater effort to publish 'position statements' setting out its reasons and analysis
for mergers that it decides not to challenge or where it has entered into consent agreements to settle a matter short of
litigation. This is a very welcome development. Given that so few transactions are challenged in Canada, there is a need
for administrative transparency to ensure that merging parties understand how the Bureau conducts its analyses and the
factors it considers to be determinative, whether for good or bad.

Originally Published by LexisNexis as:"Canada merger control:
A conversation with Mark Katz, partner, at Canadian law firm Davies
Ward Phillips & Vineberg LLP, on key issues on merger control in Canada".

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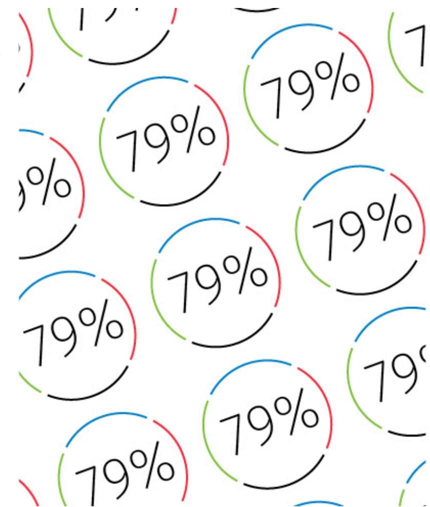

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This entry was posted on Wednesday, November 26th, 2014 at 5:21 pm and is filed under Canada, Source: OECD

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