Kluwer Competition Law Blog

Pre-merger Notification in Canada: An Overview

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This Note provides an overview of the notification requirements that apply to certain mergers, acquisitions and other business combinations under Part IX of the Competition Act. It first considers the type of transactions that require notification and the thresholds that apply. It then summarizes the procedural processes connected with filing a pre-merger notification with the Commissioner of Competition and the Competition Bureau.

INTRODUCTION

The Competition Act, R.S.C. 1985, c. C-34 (Act) requires that mergers, acquisitions and other business combinations that meet certain prescribed thresholds be notified to the Commissioner of Competition (Commissioner), the head of the federal Competition Bureau (Bureau), before they can be completed. A notification must be filed by each party to a notifiable transaction and requires the parties to provide basic information and documents regarding the parties, their customers and suppliers, and the transaction. A $50,000 filing fee is also payable.

The Commissioner reviews notifiable transactions to determine if they are likely to prevent or lessen competition substantially. The Commissioner may seek to challenge a transaction that is likely to have these anticompetitive effects. Alternatively, if the Commissioner concludes that anticompetitive effects are unlikely, he may issue a form of clearance letter indicating that he does not intend to challenge the proposed transaction. For this purpose, it is usual practice for merging parties to prepare and file a substantive brief in addition to (or as an alternative to) a notification, outlining why the proposed transaction is unlikely to give rise to anticompetitive effects and thus should not be challenged by the Commissioner.

The notification obligations under the Act are distinct from the substantive merger review provisions. As a result, even if a proposed transaction is not subject to a pre-merger notification requirement, it may still be reviewed under the substantive merger provisions of the Act. This practice note does not address the substantive merger provisions of the Act, which are described in the Bureau's Merger Enforcement Guidelines, issued in October 2011.

Parties are prohibited from closing a notifiable transaction until a statutory waiting period that is triggered by notification has expired or, alternatively, has been terminated or waived by the issuance of a clearance letter by the Commissioner. Penalties for closing before expiry, termination or waiver of the waiting period may include significant fines and potential unwinding of the

transaction.

SCOPE AND THRESHOLDS

The notification obligations under the Act apply to the following types of transactions:

• Acquisitions of assets.

• Acquisitions of shares.

• Amalgamations of corporations.

• Formations of combinations to carry on business otherwise than through a corporation (for example, partnerships, income trusts and unincorporated joint ventures).

• Acquisitions of interests in combinations.

As a general rule, these types of transactions are subject to notification where: (a) an operating business is a subject of the transaction; (b) a size of parties threshold is exceeded; (c) a size of transaction threshold is exceeded; and (d), in certain circumstances, a minimum ownership threshold is exceeded. Where applicable, each of these requirements must be met for the transaction to be subject to notification.

Operating Business

Notification will only be required where the subject matter of the transaction is or controls an operating business in Canada. An operating business is defined in the Act to mean "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work". Accordingly, for example, a transaction will not be notifiable where the target only has sales into Canada from offshore, but otherwise has no business undertaking in the country.

Size of Parties Threshold

A notification is not required for any type of transaction unless the parties to the transaction, together with their affiliates, have either:
• Assets in Canada that exceed $400 million in aggregate value.
• Annual gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value.

Size of Transaction Threshold

Similarly, notification of a transaction is only required where a size of transaction threshold is exceeded. The value of the threshold is adjusted annually based on a statutorily prescribed formula (the 2015 value is $86 million). The specific application of the threshold varies by type of transaction. Notification is required for:

• Asset acquisition. The acquisition of assets in Canada where the aggregate value of those assets, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$86 million.

• Share acquisition. The acquisition of voting shares of a corporation where the aggregate value of the assets in Canada directly or indirectly controlled by the corporation, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds $86 million.

• Amalgamation. An amalgamation of two or more corporations if:
• the aggregate value of the assets in Canada that would be directly or indirectly owned by the continuing corporation, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds $86 million; and
• the aggregate value of the assets in Canada, or the annual gross revenues from sales in, from or into Canada of each of at least two of the amalgamating corporations, together with its affiliates, exceeds $86 million.
Note that, pursuant to guidelines issued by the Bureau, triangular (Delaware) mergers and reverse triangular (reverse Delaware) mergers are considered amalgamations for the purposes of the merger notification provisions of the Act.

• Formation of a combination. The combination of two or more persons to carry on business otherwise than through a corporation if:
• one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business; and
• the aggregate value of those assets in Canada, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds $86 million.

• Acquisition of an interest in a combination. An acquisition of an interest in a combination (other than a corporation) where the aggregate value of the assets in Canada that are the subject-matter of the combination, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds $86 million.

Ownership Thresholds

In certain cases, the notification provisions require that a minimum ownership threshold also be exceeded.

In the case of share acquisitions, for example, the purchaser’s voting interest in the vendor following the transaction (including interests owned by the purchaser’s affiliates) must exceed:

• 20% (where the vendor’s shares are publicly traded).

• 35% (where the vendor has no publicly traded shares).

• If the relevant threshold is already exceeded prior to the transaction, 50%.

Similarly, where the transaction involves the acquisition of an interest in a non-corporate combination, the purchaser, together with its affiliates, must hold an aggregate interest in the combination that entitles the person to receive more than:

• 35% of the profits of the combination or 35% of its assets on dissolution.

• If the purchaser is already so entitled, 50% of such profits or assets.

Calculation of Assets and Gross Revenues

Generally speaking, the relevant asset and gross revenue figures used in the threshold calculations are to be obtained from the most recent audited financial statements of the relevant party, provided that the last day covered by those financial statements is not more than 15 months prior to: (a) the date on which a notification is submitted; or (b) if the transaction is not notifiable, the 30th day prior to implementation of the transaction (Reference Date). Where audited financial statements are not available, the relevant asset and gross revenue figures are those stated in the books of the relevant party, and determined as of the most recent date or for the most recent annual period for which the amount can reasonably be determined (provided that such date or the end of such annual period is within three months of the Reference Date).

When calculating asset value, any amounts for depreciation or diminution of value should be deducted, but no amount should be deducted for liabilities or encumbrances. Similarly, when calculating gross revenues, no amounts should be deducted for expenses. In the case of both asset value and gross revenues, amounts representing duplication arising from transactions between affiliates should be deducted.

EXEMPTIONS

Transactions that otherwise satisfy the above thresholds may not be subject to notification if they fall within certain statutory exemptions.
Most notably, transactions in respect of which the Commissioner issues: (a) an advance ruling certificate (ARC); or (b) a no-action letter and waiver of the requirement to submit a notification, are exempt from notification. (Substantive filings made to request ARCs or no-action letters and waivers are discussed below.)

The formation of a non-corporate combination (such as an unincorporated joint venture or partnership) is exempt from notification if:

• All the persons who propose to form the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties.

• No change in control over any party to the combination would result from the combination.

• That the agreement restricts the range of activities that may be carried on under the combination and contains provisions that would allow for its orderly termination.

There are also exemptions for:

• Transactions between affiliates.

• Transactions subject to approval under certain legislation relating to financial and insurance companies deemed by the Minister of Finance to be in the public interest.

• Certain acquisitions of real property or goods in the ordinary course of business.

FILING REQUIREMENTS

When a transaction is subject to notification under the Act, each party to the transaction must separately submit a notification to the Commissioner.

Note that, in the case of a share acquisition, the Act deems that the parties to the transaction are the purchaser(s) of the shares and the corporation whose shares are to be acquired (but not the vendor of the shares). In all other cases, the parties to the transaction are generally considered to be the parties to the transaction agreement.

Regulations to the Act set out the information required to be submitted as part of a notification. This information includes:

• A description of the transaction and the business objectives to be achieved as a result of it.

• A copy of each legal document to be used to implement the transaction.

• A list of foreign antitrust authorities that have been notified of the transaction.

• The name and address of the party and the name and address of each affiliate of the party with significant assets in Canada or revenues from sales in from or into Canada (called a material affiliate), and a chart describing the relationship between the party and each material affiliate.

• Annual reports or audited financial statements of the party and each material affiliate.

• A description of the principal businesses and the principal categories of products produced, supplied or distributed by the party and its material affiliates. (Note that it is common practice to limit this information to areas of competitive overlap or vertical relationship between the parties and exclude information concerning other principal businesses and principal categories of products on the basis that such information cannot be considered relevant to the Commissioner's assessment of the transaction).

• Names, contact information and annual sales to each of the top 20 customers of the party and each material affiliate for each principal category of product listed.

• Names, contact information and annual purchases from each of the top 20 suppliers of the party and each material affiliate for each principal category of product listed.

• Total annual sales to all customers and total annual purchases from all suppliers of the party and each material affiliate for each principal category of product listed.

• The geographic regions of sales for each of the principal businesses and the principal categories of products listed by the party and each material affiliate.

• All studies, surveys, analyses and reports that were prepared or received by an officer or director of the party or its material affiliates for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions. (This requirement is analogous to the requirement in item 4(c) of the U.S. HSR notification form. Note, however, that there is no requirement under the Act analogous to the requirement in item 4(d) of the U.S. HSR notification form.)

ADVANCE RULING CERTIFICATES AND NO ACTION LETTERS

In addition to, or sometimes in lieu of, the notification filing, parties will typically submit a confidential written brief:

• Explaining why the transaction will not prevent or lessen competition substantially (the statutory test).
• Seeking confirmation that the Commissioner does not intend to challenge the transaction.

This confirmation is typically provided either in the form of an ARC or a no-action letter.

The Commissioner may issue an ARC where it is clear that a proposed transaction is unlikely to give rise to any substantial lessening or prevention of competition in Canada. If obtained, an ARC prevents the Commissioner from challenging the transaction on the basis of the same or substantially the same information, provided that the transaction is substantially completed within one year of receipt of the ARC. The issuance of an ARC also provides an exemption from the Act's notification requirements (including operation of the statutory waiting periods).

If an ARC is not obtained, the Commissioner may issue a no-action letter indicating that he has decided not to challenge the transaction at that time but reserving the right to do so within one year following closing (the statutory limit in this regard). In addition, a no-action letter typically contains a waiver that exempts the parties from the Act's notification requirements (including operation of the statutory waiting periods). As a practical matter, a no action letter is regarded as an effective form of clearance on which parties can rely to close their transactions.

WAITING PERIOD

Parties to a notifiable transaction are precluded from completing the transaction until the expiry of a statutory waiting period, as follows:

• There is an initial waiting period of 30 days following submission of the notification by each party.

• 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 parties for production of documentsor responses to questions.

• If an SIR is issued, a new waiting period is triggered and expires 30 days following compliance with the SIR by both parties.
As noted under Advance Ruling Certificates and No-Action Letters, 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 and waiver 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 to allow the Bureau additional time to conduct its review beyond formal expiry of the statutory waiting period.

UNSOLICITED BIDS

Where transaction is a share acquisition, the statutory waiting period is determined without reference to the day on which a notification or a complete response to an SIR is received from the corporation whose shares are to be acquired. Thus, the initial 30-day waiting period begins when the Commissioner has received a complete notification from the bidder and the second 30-day waiting period begins when the Commissioner has received a complete response to an SIR from

the bidder. Accordingly, in the context of an unsolicited (hostile) transaction, a target is not able to affect the commencement of the relevant waiting periods.

In addition, where the purchaser files a notification before the corporation whose shares are to be acquired, the Commissioner is required to immediately notify the target company that a notification has been received and the target company is required to file a notification within 10 days of being notified.

FILING FEES

There is a fee of $50,000 for filing a notification or applying for an ARC or no-action letter. The fee is typically paid by the purchaser, but this is a matter for negotiation and agreement by the parties.

SERVICE STANDARD TIME PERIODS

The Bureau has adopted the following non-binding service standards within which the Bureau endeavours to complete its substantive review of a merger:

• A maximum of 14 days for non-complex mergers (that is, mergers that clearly raise no substantive competition issues).

• A maximum of 45 days for complex mergers (that is mergers where there is an indication that the transaction may create substantive competition issues). However, if an SIR is issued, the review period will coincide with the statutory waiting period (namely 30 days following receipt by the Bureau of the completed SIR responses).

The actual time required for the Bureau to complete its review may be shorter or longer than the service standard periods described above. In certain complex and contentious cases, Bureau review can take months to complete.

Service standard time periods typically begin once the Bureau has received sufficient information it needs to conduct its analysis. That may require responding to initial questions from the Bureau provided to the parties following the filing of their notifications or a request for an ARC or no-action letter. This information may include:

• Submissions regarding relevant product and geographic market definitions, identification of all competitive overlaps.

• A list of the parties' competitors.

• Sales data and independent market share data in respect of each competitive overlap.

• Marketing, business and strategic plans.

• Customer and supplier lists, including contact information.

Once a complexity designation has been assigned, the Bureau will typically have further follow up requests for information for the parties (and, potentially, third parties), and the parties will often make further substantive submissions to the Bureau. But these subsequent communications may not be as detailed (or even necessary) in the case of non-complex mergers.

According to statistics released by the Bureau, approximately 75 percent of the merger transactions it reviewed in its 2014 fiscal year were categorized as “non-complex” and approximately 25 percent were categorized as “complex”. The average review time for “non-complex” transactions was approximately 11 days, while the average review time for “complex” transactions was approximately 33 days.

It is possible for the statutory waiting period to have expired without the Commissioner having issued an SIR or completed its substantive review. In those circumstances, parties have the choice of closing at their own risk (the Commissioner has one year to challenge a transaction that has been completed) or waiting further until they receive substantive clearance in the form of an ARC or no-action letter and waiver (which is often a condition of closing). Typically, parties in these circumstances wait to obtain substantive clearance before closing (sometimes pursuant to a negotiated timing agreement (see Timing Agreement), but legally there is no impediment to closing (unless the Commissioner proactively seeks and obtains an injunction).

THE SIR PROCESS

Where the Bureau concludes that an SIR is necessary, it will try to provide a draft SIR to the parties one or two business days prior to the expiry of the initial 30-day waiting period. This is to give the parties some opportunity to provide input on the scope and nature of the information required, identify any technological barriers to production and identify the custodians from whom records must be produced. Discussions regarding the scope of the SIR can also take place following formal issuance.

The Bureau will generally agree to limit the number of responsive custodians to 30 individuals, although it does not consider itself bound to do so in any given case. The Bureau also will generally agree to limit requests to the year-to-date period immediately preceding the date of the issuance of the SIR plus:
• Two calendar years prior for document requests.
• Three calendar years prior for data requests.

Based on experience to date, it seems that parties have generally been able to respond to SIRs within approximately one to three months of receipt. However, the duration of the SIR process will obviously vary from transaction to transaction, depending upon the scope of the data and information requested and the time the parties take to respond.

Given that compliance with an SIR can be time consuming and costly, parties to a transaction may wish to explore other options that provide the Bureau with more than the initial 30-day waiting period in which to conduct its review. Parties will want to consider these options if they believe that allowing such additional time will permit the Bureau to complete its review of the transaction and not resort to issuing an SIR.

Delay Notification Certification

The initial 30-day waiting period only commences upon the receipt by the Bureau of a completed notification certified under oath. Therefore, parties will often submit a substantive brief requesting an ARC or no-action letter either alone or together with an uncertified (but otherwise complete) notification to allow the Bureau to commence its review. After allowing a period of time to elapse (often two weeks), the parties may then submit a completed and certified notification that will initiate the 30-day waiting period.

Pull and Re-file

Parties who have filed complete notifications and commenced the initial waiting period may elect to voluntarily withdraw their notifications and re-file them in order to provide the Bureau with additional time to complete its review. The new 30-day waiting period will commence upon the re-submission of the notification.

While parties are free to pull and re-file their notifications more than once, parties are only permitted to pull and re-file once without having to pay an additional filing fee, provided that the notifications are re-submitted within five business days after they were withdrawn.
it is our experience that, in pull and re-file cases, the Bureau will refuse to commit not to issue a SIR once the new 30-day waiting period has expired. Parties must take this into consideration when weighing the pros and cons of pursuing the pull and re-file option.

Timing Agreements

In limited circumstances, the Bureau may agree to dispense with the issuance of an SIR and instead enter into a timing agreement with the parties. The factors that the Bureau may consider in determining whether a timing agreement is appropriate include:

• The type of transaction (hostile or friendly).

• Whether the statutory waiting period is running.

• The information required by the Bureau to conduct its review and the extent to which information has already been received.

The timing agreement will involve (a) a detailed description of the information to be provided by the parties; and (b) a timetable for submitting responses. The transaction cannot be completed until the timing agreement commitments made by the parties have been satisfied.

NON-COMPLIANCE WITH NOTIFICATION REQUIREMENTS

The Act prohibits parties from completing a notifiable transaction until the applicable waiting period has expired or been terminated or waived. Failure to file a notification without good and sufficient cause is a criminal offense punishable by a fine of up to $50,000. This penalty may be imposed on the party that failed to submit a notification and its officers, directors and agents (whether or not the party itself is charged or convicted). Additionally, where a party fails to file a notification, the Competition Tribunal may issue an interim order prohibiting the parties from completing the transaction.

If a transaction is completed or likely to be completed before the expiry of the applicable waiting period (without good and sufficient cause), a court may:

• Order a party to submit information in response to an SIR.

• Issue an interim order prohibiting the completion of the transaction.

• Order the dissolution of a completed transaction or the divestiture of assets or shares.

• In the case of a completed transaction, order a party to pay an administrative monetary penalty of

up to $10,000 per day for each day the party was in violation of the waiting period.

• Grant any other relief considered appropriate.

In May 2015 the Bureau announced that Parrish and Heimbecker (P&H), a privately-held Canadian corporation, had agreed to adopt a compliance program designed to ensure compliance with the Act's pre-merger notification provisions. According to the Bureau announcement, P&H had failed to notify the Bureau of two proposed acquisitions. Of note, among the compliance measures to which P&H agreed is the requirement to seek a legal opinion on whether pre-merger notification is required for all proposed transactions exceeding $5 million in value.

ALLOCATION OF SUBSTANTIVE CLOSING RISK

Where a transaction is subject to notification under the Act, the parties will commonly incorporate clauses in the purchase agreement to deal with the Bureau's review process. For example, there will usually be a provision requiring the parties to use their commercially reasonable (or best) efforts to file their notifications or a request for an ARC or no-action letter in an expeditious fashion following execution of the agreement. Sometimes a specific deadline is established. It is also customary to include a provision obliging the parties to cooperate with each other in obtaining clearance from the Commissioner.

Purchase agreements will also typically include Act-related closing conditions.

The most common form of closing condition will confirm that the transaction cannot be consummated unless an ARC or no-action letter and waiver of the waiting period has been received. In certain cases, the terms of the transaction will be such that the purchaser is willing to bear a greater share of the risk that the Commissioner may object to the transaction. In those circumstances, the competition closing condition is often limited to the expiry of the applicable waiting period without any requirement that the Commissioner has provided the purchaser with positive clearance in the form of an ARC or no-action letter.

Vendors will also sometimes insist on, and purchasers will agree to, provisions setting out the specific steps that the purchaser must take to obtain approval, including the divestiture of assets and other remedies. Given the obvious sensitivities involved, parties will sometimes use a side-letter to deal with this type of commitment rather than include it in the purchase agreement itself.

Other conditions that may be incorporated in the agreement include:

• A deadline within which competition approval must be obtained, after which either or both parties may terminate the deal.

• A "break" fee that the purchaser must pay to the vendor if the transaction cannot proceed for competition reasons.

• In the case of a transaction involving multi-jurisdictional approvals, a list of the jurisdictions apart from Canada where approval is a condition of closing.

PROCEEDINGS AND REMEDIES

Applications to challenge merger transactions are brought by the Commissioner to the Competition

Tribunal. There is no private right of action for mergers in Canada.

Remedies that the Commissioner may seek include injunctions to prevent or delay closing, and post-closing divestitures or dissolution. Contested applications can take more than a year to conclude. In limited cases, the Commissioner may agree to a hold separate arrangement in respect of assets or businesses that raise competition concerns to permit closing pending completion of the Bureau's review or a challenge before the Tribunal.

Where the Commissioner expresses substantive concerns with a transaction, the purchaser and the Commissioner may also agree to remedies to allay the Commissioner's concerns and avoid a challenge to the transaction. Such a resolution typically takes the form of a consent agreement, which is registered with the Competition Tribunal.

Consent agreements are effective once filed and there is no public consultation period or period during which the Competition Tribunal may consider the agreement before approving it. The Commissioner typically requires that divestitures form part of the remedies package and the consent agreement will set out the process for such divestitures to be effectuated. Although the Commissioner welcomes the prospect of fix-it-first remedies in this regard, the more common scenario involves an agreement to divest post-closing.

GUIDELINES

The Bureau has published several guidelines that discuss the Act's pre-merger notification process in more detail. Most notably, these include the:

• Pre-Merger Notification Interpretation Guidelines.

• Procedures Guide for Notifiable Transactions.

• Advance Ruling Certificates Under the Competition Act.

These and other relevant documents are available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00132.html#tab4.

MERGER REVIEW UNDER OTHER LEGISLATION

In addition to the notification requirements of the Act, notification and approval requirements under other legislation may apply to certain mergers in Canada.

Notably, under the Investment Canada Act, an acquisition by a non-Canadian of control of a Canadian business that satisfies certain thresholds may be reviewable to determine if it is:
• Of net benefit to Canada.
• Injurious to Canadian national security.

Acquisitions by a non-Canadian of control of a Canadian business that do not satisfy the relevant thresholds may nevertheless be subject to post-closing notification.

Additionally, public interest merger reviews may be required under certain sector-specific legislation, including the:

• Bank Act.

• Cooperative Credit Associations Act.

• Insurance Companies Act.

• Trust and Loan Companies Act.

• Canada Transportation Act.

• International Bridges and Tunnels Act.

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“>Mergers

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