



Competition Law

Doing Business In Canada

In Canada, the federal *Competition Act* (the “CA”) governs all aspects of competition law. Companies doing business in Canada should be aware that the CA:

- ◆ Provides comprehensive rules regarding substantive and procedural requirements applicable to mergers;
- ◆ Establishes criminal offences, the breach of which may lead to significant fines for companies and fines and/or imprisonment for individuals involved;
- ◆ Allows individuals to launch civil damages suits for breaches of the statute’s criminal provisions;
- ◆ Contains rules for reviewable practices that may be prohibited if such practices substantially prevent or lessen, or have an “adverse effect” on competition in a market in Canada; and
- ◆ Contains both criminal and non-criminal provisions relating to advertising, promotional activities, as well as various types of marketing structures.

Merger Notification and Review

Even if a transaction raises no substantive competition issues under the merger review provisions, absent an exemption (see “**Notification Procedure and Substantive Review**” below), parties to a merger that meets the notification thresholds must nevertheless comply with the filing and waiting period requirements of the pre-merger notification regime. Conversely, a merger that does not meet the notification thresholds may still be subject to review by the Commissioner of Competition (the “**Commissioner**”) and an order of the Competition Tribunal (the “**Tribunal**”) if it raises a substantive issue under the merger review provisions of the CA.

What is a “Merger”?

A “merger” is defined in the CA as any form of direct or indirect acquisition or establishment of “control over or significant interest in” all or part of a business.

When is a Merger Notifiable?

Parties must notify the Commissioner of a proposed merger if the transaction meets both of the following financial thresholds, each of which is indexed annually:

Size of Transaction Threshold

For an acquisition of assets of an operating business, where:

- ◆ The aggregate value of the Canadian assets being acquired exceeds \$88 million; or
- ◆ The gross annual revenue from sales in or from Canada generated by these assets exceeds \$88 million.

For an acquisition of shares, where:

- ◆ The aggregate value of the Canadian assets owned by the corporation whose shares are being acquired (or a corporation controlled by that corporation) exceeds \$88 million; or
- ◆ The gross annual revenue from sales in or from Canada of the corporation whose shares are being acquired (or a corporation controlled by that corporation) exceeds \$88 million.

Size of Parties Threshold

For transactions involving either assets or shares, the parties to the transaction (and their affiliates) must have:

- ◆ Combined assets in Canada exceeding \$400 million; or

- ◆ Combined gross annual revenues from sales in, from (export) or into (import) Canada exceeding \$400 million.

Additional Threshold for Share Acquisitions

Even if both the “size of transaction” and “size of parties” thresholds are met, an acquisition of shares is notifiable only when a purchaser:

- ◆ Acquires 20% or more of the voting shares of a *public* company (or 50% or more, if it already owns 20% of shares); or
- ◆ 35% or more of the voting shares of a *private* company (or 50% or more, if it already owns 35% of shares).

Notification Procedure and Substantive Review

Parties must provide the Commissioner prescribed information about their business and that of their affiliates, principal suppliers and customers. Once the filings are certified complete, a mandatory 30-day waiting period thereafter can be extended by up to several months if the Commissioner requests additional, relevant information (a Supplementary Information Request or “SIR”).

This transaction cannot be closed until 30 days after compliance with the SIR, unless the Commissioner issues an Advanced Ruling Certificate (“ARC”) (see “**What Are Advance Ruling Certificates and No-Action Letters?**” below) or waives the waiting period.

If the Commissioner’s review is not complete after the expiry of the applicable waiting period, the parties often agree not to close until the investigation is complete. The Competition Bureau (the “**Bureau**”) strives to complete its review of a proposed non-complex transaction (no competitive overlap or very low post-transaction market shares) within 14 days and a complex transaction (some, or significant competitive overlap) within 45 days (except where a SIR is issued).

What Are Advance Ruling Certificates and No-Action Letters?

The Commissioner may still challenge a transaction within one year after it has closed unless he has issued

an ARC. Where clearly satisfied that the merger raises no substantial issues, the Commissioner will issue an ARC. An ARC exempts the transaction from the notification provisions and bars the Commissioner from applying to the Tribunal under the merger review provisions — unless there is a material change in circumstances — provided the transaction is substantially completed within one year after the ARC is issued. More typically, the Commissioner will issue a no-action letter (“**NAL**”), confirming that the transaction raises no substantive issues. The NAL preserves the Commissioner’s right to challenge the transaction for one year from the date of closing.

What Are the Filing Fees?

The mandatory filing fee for all pre-merger notifications or requests for ARCs or NALs — regardless of the size or complexity of the transaction — is \$50,000. Usually, either the purchaser pays the fee or the parties split it evenly. Where parties provide both a premerger notification filing and a request for an ARC or NAL, there is only one \$50,000 fee.

When is a Merger Subject to Substantive Review?

Regardless of size, a merger can be subject to substantive review if it is likely to give rise to a substantial prevention or lessening of competition in a relevant market in Canada. Before challenging a transaction, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for an (extendable) period of up to 30 days to complete his or her inquiry. The Commissioner may also apply for an interim order when challenging a proposed transaction.

What Are Possible Merger Remedies?

The Tribunal may: (i) issue a remedial order (typically requiring the sale of specified assets) where it finds, on a balance of probabilities, that a (proposed or actual) merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market; (ii) order the parties not to proceed with a proposed merger; or (iii) order the dissolution of a completed merger or the divestiture of specific assets or shares.



Criminal Offences

The CA establishes several criminal offences that are investigated at the discretion of the Bureau and may then be prosecuted by the Attorney General for Canada. These offences can also serve as the basis for civil suits for damages, which are generally brought by way of class actions.

Conspiracy

- ◆ *Per se* offence punishable by imprisonment for up to 14 years and/or a fine of up to \$25 million;
- ◆ Legitimate competitor agreements are subject to civil review (see “**Reviewable Trade Practices**” below).

Bid-rigging

- ◆ *Per se* offence punishable by imprisonment for up to 14 years and/or substantial fines.

Misleading Advertising

- ◆ Criminal offence (reserved for fraud or deliberate breaches of the CA) punishable by imprisonment for up to 14 years and discretionary fines;
- ◆ Civil offence subject to administrative monetary penalties of up to \$10 million per count for the first offence by a corporation and up to \$750,000 per count for the first offence by an individual, among other remedies.

Reviewable Trade Practices

The Tribunal may prohibit certain legal trade practices where, on a balance of probabilities, they are found to substantially lessen (or, in the case of price maintenance, have an adverse effect on) competition in a market in Canada. The Tribunal may issue a remedial prohibition order as well as levy Administrative Monetary Penalties (“**AMPs**”) under the abuse of dominance provisions (see “**Abuse of Dominant Position**” below).

Abuse of Dominant Position

- ◆ May be subject to an order requiring the modification or termination of the conduct at issue, as well as

administrative monetary penalties of up to \$10 million for the first offence and a maximum of \$15 million for subsequent offences.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

- ◆ May be subject to an order from the Tribunal requiring the agreement/arrangement to be terminated or modified.

Price Maintenance

- ◆ May be subject to an order requiring the modification or termination of the conduct at issue.

Refusal to Deal

- ◆ May be subject to an order by the Tribunal requiring the supplier to supply the product(s) at issue.

Exclusive Dealing and Tied Selling

- ◆ May be subject to proceedings brought in conjunction with abuse of dominant position proceedings.

Market Restriction

- ◆ May be subject to a prohibition (or other) order by the Tribunal to restore or stimulate competition.

Civil Actions

Individuals who have suffered damages as a result of either an alleged violation of the criminal provisions in the CA or a breach of a Tribunal's order may bring civil suits — generally brought by way of a class action — to recover actual damages suffered, plus costs (US-style treble damage awards are not possible).



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