Stikeman Elliott

# Competition Global Guide: Canada Q&A

By Michael Kilby, David Feldman and Laura Rowe

## Merger notification flowchart - Canada

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# Competition Law in Canada: Overview

**by Michael Kilby, David Feldman and Laura Rowe, *Stikeman Elliott LLP***

Country Q&A | Law stated as at 01-Sep-2023 | Canada

A Q&A guide to competition law in Canada.

The Q&A provides a high-level overview of the antitrust and competition law rules for restraints of trade and dominance, merger control and the legal approach to joint ventures.

The section on restraints of trade and dominance covers the regulatory framework applicable to horizontal and vertical restraints, monopolistic behaviour and abuses of dominance; the regulatory authorities; exemptions and exclusions; penalties; third-party claims; and appeals.

The section on merger control covers the relevant rules for acquisitions; notification requirements; the timelines and rules regarding publicity and confidentiality; the substantive test; remedies, penalties; third-party claims; and appeals.

## Regulatory Framework

1. What is the competition law framework?

In Canada, the federal Competition Act (R.S.C., 1985, c. C-34) regulates competition law matters, including mergers, restraints of trade or competition and abuse of dominance. Canada's provinces do not have competition laws, though they have legislative powers in certain related areas, such as consumer protection.

Restraints of trade or competition are regulated under both the criminal and reviewable practice provisions of the *Competition Act*. Criminal prosecution is typically reserved for the most serious offences ("naked restraints" or cartels), while the reviewable practice regime is more flexible and is intended to catch a broader spectrum of agreements, arrangements and other conduct (for example, vertical restraints and certain types of competitor collaborations) that can prevent or lessen competition substantially in certain circumstances.

Abuses of market power are regulated under the reviewable practices provisions of the *Competition Act,* in particular the abuse of dominance provisions.

Merger control in Canada is governed by Part IX (notification provisions) and Part VIII (substantive merger review provisions) of the *Competition Act*. While only mergers that surpass certain thresholds are subject to notification under Part IX, any merger can be challenged by the Commissioner of Competition pursuant to the substantive review provisions in Part VIII. In addition,

the Canadian government has enacted the Notifiable Transactions Regulations (SOR/87-348), which provide further details on the requirements for merger notifications.

The Canadian competition regulator, the Competition Bureau (see *Question 2*) has issued enforcement guidelines. These do not have the force of law, but are intended to assist in the interpretation of the *Competition Act*. They include the:

- *Pre-Merger Notification Interpretation Guidelines*.
- *Merger Enforcement Guidelines*.
- *Merger Review Process Guidelines*.
- *Hostile Transactions Interpretation Guidelines*.

The *Competition Act* does not contain any sector-specific rules and applies generally across all industries. However, mergers in certain sectors are subject to concurrent review processes under other federal statutes, including in the following industries:

- Transport (Canada Transportation Act (S.C. 1996, c. 10)).
- Finance (Bank Act (S.C. 1991, c. 46)).
- Telecommunications (Telecommunications Act (S.C. 1993, c. 38)).
- Broadcasting (Broadcasting Act (S.C. 1991, c. 11)).

Foreign direct investment is separately regulated under the Investment Canada Act (R.S.C., 1985, c. 28 (1st Supp.)), which is beyond the scope of this Q&A.

## Regulatory Authority

2. Which authority or authorities regulate competition?

The *Canadian Competition Bureau*, an independent law enforcement agency which sits within the federal department Innovation, Science and Economic Development Canada, is responsible for the administration and enforcement of the *Competition Act*. The Competition Bureau is headed by the Commissioner of Competition (the Commissioner).

The Competition Bureau is responsible for conducting merger reviews and investigating potential violations of the Competition Act. The Commissioner may bring applications under the civil provisions of the *Competition Act,* including the merger control, abuse of dominance and reviewable matters provisions, to the Competition Tribunal.

The Competition Tribunal is an administrative tribunal that operates independently of the Competition Bureau and has all such powers, rights and privileges as are vested in a superior court of record. The Competition Tribunal may issue a range of formal remedial orders, including administrative monetary penalties for violations of the abuse of dominance provisions and divestiture

orders for merger cases. The Competition Bureau itself may issue no final orders or penalties, but rather must apply to the Competition Tribunal (or the courts if the matter is criminal in nature).

If the Commissioner determines that a breach of the criminal provisions of the Competition Act has occurred, it will, following an investigation by the Competition Bureau, refer the case to the Director of Public Prosecutions (DPP) with a recommendation that criminal charges be brought. The DPP then decides whether a prosecution is in the public interest.

With respect to mergers in the sectors referred to in *Question 1*, there is concurrent jurisdiction:

- Transport Canada reviews transportation-related mergers.
- the Department of Finance reviews finance-related mergers.
- the Canadian Radio-television and Telecommunications Commission reviews telecommunications and broadcasting related mergers.

## Restrictive Agreements and Practices

3. What is the basic legal framework governing restrictive agreements and practices?

### Regulatory Framework

Restrictive agreements and practices are regulated under both the criminal and reviewable practice provisions of the federal *Competition Act*. Criminal prosecution is typically reserved for the most serious offences ("naked restraints" or cartels), while the reviewable practice regime is more flexible and is intended to catch a broader spectrum of agreements, arrangements and other conduct (for example, vertical restraints or certain types of competitor collaborations) that can prevent or lessen competition substantially in certain circumstances.

While Canada's provinces do not have competition laws, they have legislative powers in certain related areas, such as consumer protection.

### Criminal Provisions

The criminal conspiracy provisions under the *Competition Act* (section 45 (1)) establish an indictable offence for conspiring, agreeing or arranging with a competitor to fix prices, allocate sales, territories, customers or markets, or to control supply of a product. Any such unlawful agreement or arrangement with a competitor is prohibited irrespective of whether it results in any competitive harm, subject to the defences and exceptions described below.

As of 23 June 2023, agreements between employers to fix wages or other employment terms and agreements between employers to not poach each other's employees are subject to the criminal provisions of the *Competition Act* (section 45 (1.1)).

The conspiracy provisions carry heavy penalties, including unlimited potential fines, class action liability and imprisonment.

### Reviewable Practice Provisions

Restraints of trade can be reviewed under the reviewable practice provisions of the *Competition Act*, which are subject to the civil standard of proof (balance of probabilities) and a full rule of reason approach.

The *Competition Act* authorises the Competition Tribunal to make an order to prohibit or otherwise remedy an agreement or arrangement between competitors that substantially prevents or lessens competition in a market, or is likely to do so (the civil agreement provisions; section 90.1). The *Competition Act* provides a number of non-exhaustive factors that the Tribunal can consider in determining whether an agreement or arrangement substantially prevents or lessens competition, such as:

- The degree of existing foreign competition.
- The availability of substitutes.
- Barriers to entry.
- Whether the agreement or arrangement would create any efficiencies.

Agreements in restraint of trade can also be civilly reviewed under the more specific refusal to deal (section 75), price maintenance (section 76) and exclusive dealing, tied selling and market restrictions (section 77) provisions of the *Competition Act*.

### Industry-specific Regimes

The *Competition Act,* together with guidelines published by the Competition Bureau, provides a specific framework for considering anti-competitive conduct related to intellectual property rights. The *Competition Act* provides a special remedy in relation to the exercise of patents, trade marks and other intellectual property found to cause certain anti-competitive effects. Remedies related to anti-competitive intellectual property practices can also be obtained through the ordinary criminal and civil agreement provisions of the *Competition Act*.

## Monopolies and Abuses of Dominance

4. Are there specific rules that apply to monopolistic or dominant companies?

Abuses of market power are regulated under the reviewable practices provisions of the *Competition Act,* in particular the abuse of dominance provisions (section 78).

## 5. How is dominance/monopoly power determined?

Abuse of dominance is established where the following elements are established and a defence does not otherwise exist:

- A person (or persons) substantially controls a class of business (this is essentially a market power test).
- The person is engaging in anti-competitive acts (such as those described in *Question 6*).
- The practice results in a substantial prevention or lessening of competition in a market.

The Competition Bureau has published detailed enforcement guidelines setting out its analytical approach to abuses of dominance.

## 6. Are there any recognised categories of behavior that may constitute abusive conduct?

The *Competition Act* provides a non-exhaustive list of anti-competitive acts that can constitute abusive conduct (section 78(1)), including:

- Squeezing of a downstream competitor.
- Pre-emption of scarce facilities or resources.
- Acquisition of a customer or supplier that would otherwise be a competitor.
- Selective or temporary use of fighting brands.
- Buying up products to prevent price erosion.
- Exclusivity arrangements.
- Below-cost pricing.

As a practical matter, most abuse of dominance cases in Canada have involved firms with large market shares allegedly engaging in exclusive or restrictive contractual practices that have the effect of impeding firms from expanding or entering the market, to the detriment of consumers.

## Exemptions and Exclusions

7. Are there any exemptions from the competition laws? If so, what are the criteria for individual exemption or block exemptions?

The criminal and reviewable practices provisions of the *Competition Act* generally exempt agreements or arrangements between affiliates.

The criminal conspiracy provisions of the *Competition Act* provide several defences, including where the:

- Conspiracy, agreement or arrangement is ancillary, reasonably necessary for giving effect to, and directly related to a separate agreement or broader agreement that, considered alone, does not violate the criminal conspiracy provisions ("ancillary restraints" defence).
- Conspiracy, agreement or arrangement is related only to the export of products from Canada.

Conduct is required or authorised by federal or provincial law, in certain circumstances ("regulated conduct" defence).

The civil agreement provisions provide an efficiencies defence for arrangements and agreements that would otherwise be found anti-competitive. The Competition Tribunal cannot make an order where:

- The agreement or arrangement has brought, or is likely to bring about, efficiency gains that more than offset the prevention or lessening of competition resulting from the agreement or arrangement.
- The gains in efficiency would not have been attained if the order by the tribunal (for example, enjoining the agreement) were made.

8. Is it possible to obtain guidance from the authority as to whether an agreement or practice is likely to restrict competition?

The *Competition Act* provides a mechanism by which any person can apply to the Commissioner, with supporting information, for a binding opinion on the applicability of any provision of the *Competition Act* or for conduct or a practice in which the applicant proposes to engage. This opinion remains binding on the Commissioner for as long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed. The Commissioner can decide not to provide an opinion. This mechanism is very rarely relied upon in practice.

9. Is any conduct excluded from the scope of the competition laws?

## Exclusions

Certain efficiency-enhancing specialisation agreements between parties can be excluded from the criminal conspiracy and civil agreement provisions of the *Competition Act*. In addition, many of the civilly reviewable practices such as price maintenance, exclusive dealing, tied selling and market restriction, could also be said to contain "exclusions" in the sense that they are only subject to an order from the Competition Tribunal if several conditions are met, including that the conduct in question results or is likely to result in a substantial prevention or lessening of competition (see *Question 3*).

An act that is merely the exercise of intellectual property rights pursuant to federal legislation will generally be excepted from the *Competition Act*.

## Statutes of Limitation

There is no limitation period in respect of the criminal conspiracy provision of the *Competition Act*. However, no private action can be brought against a person related to a proceeding under the criminal provisions of the *Competition Act* after the later of two years from the day on which the conduct was engaged in, or the day on which any criminal proceedings relating to the conduct were finally disposed of, subject to a discoverability principle.

There are generally no limitation periods in respect of the civil agreement provisions, nor do limitation periods apply to the refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction provisions. In relation to mergers (discussed below), the Commissioner may challenge a transaction at any time before or up to one year after closing.

## Penalties

10. What penalties or sanctions are available for breaching the competition laws?

## Orders

The reviewable practices provisions authorise the tribunal to make the following orders, which depend on the anti-competitive practice:

- **Civil agreement provisions.** The Tribunal can prohibit any person, whether or not a party to the agreement or arrangement, from doing anything under the agreement or arrangement and/or can require a person to take any other action with the consent of that person.
- **Refusal to deal.** The Tribunal can order a supplier to accept a person as a customer.
- **Price maintenance.** The Tribunal can make an order prohibiting the person from engaging in such conduct or requiring them to accept the harmed person as a customer on usual trade terms.

- **Exclusive dealing, tied selling and market restriction.** The Tribunal can make an order prohibiting a person from engaging in such conduct and containing any other requirement that it considers necessary to restore or stimulate competition in the market.
- **Abuse of dominance.** The Tribunal can make an order prohibiting a person from engaging in the anti-competitive practice and/or directing such persons to take actions that are reasonably necessary to restore competition in the market, including by ordering divestitures.

## Fines and Monetary Remedies

Under the criminal conspiracy provisions of the *Competition Act,* a person convicted of an offence can be fined any amount in the discretion of the court (previously, fines were capped at CAD25 million).

Under the abuse of dominance provisions of the Competition Act, the Competition Tribunal may make an order against a person who violates the provision ordering them to pay an administrative monetary penalty not exceeding the greater of CAD10 million (for initial violations) or CAD15 million (for subsequent violations) and three times the value of the benefit gained from the anti-competitive practice (or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross turnover).

No fines can be levied against persons under the civil agreement provisions, or the refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction provisions of the *Competition Act*.

## Personal Liability

Individual directors or managers convicted under the criminal conspiracy provisions of the *Competition Act* are liable to imprisonment or fines.

A person convicted for an indictable offence under these provisions can be imprisoned for up to 14 years.

Individuals can be subject to an order by the Tribunal under the reviewable practices provisions.

## Immunity/Leniency

The Competition Bureau operates an immunity programme, in which the first party to disclose an offence not otherwise detected, or to provide evidence leading to criminal charges, can receive immunity from prosecution. The Bureau also operates a leniency programme in which persons not eligible for immunity can be considered for lenient treatment in sentencing. These programmes are complex and specific legal advice should be sought in relation to any individual case.

## Impact on Agreements

The Tribunal, upon application by the Competition Bureau, can order a person to stop doing anything under an anti-competitive agreement or arrangement, provided the relevant legal tests are met (which always require anti-competitive effect).

## Third Party Damages Claims

11.Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or abuse of dominance? Are collective/class actions possible?

## Follow-on/Standalone Actions

Any person who has suffered loss or damage as a result of conduct that is contrary to the criminal provisions of the *Competition Act* can bring an action to recover those losses, together with any additional amount that the court can allow, not exceeding the full cost to him or her of any investigation.

Third parties cannot claim damages for losses suffered as a result of anti-competitive conduct under the reviewable matters provisions of the *Competition Act*.

## Procedures or Rules

Third parties can bring an action for losses or damage suffered as a result of conduct that is contrary to the criminal provisions of the *Competition Act* to the Federal Court or a provincial superior court. Typically, private parties rely on convictions or guilty pleas secured by the Public Prosecutions Service of Canada to prove the violation. Actions are usually limited to proving damages and typically take the form of class actions.

The limitation period for such actions is the later of two years from a day on which the conduct was engaged in or the day on which any criminal proceedings relating thereto were finally disposed of.

## Class/Collective Actions

A class action can be brought to recover damages associated with conduct that is contrary to the criminal provisions of the *Competition Act*. Under Canadian law, an action must first be certified by a court to proceed as a class action. Class actions, including the certification step, often take many years to resolve.

Class actions are not permitted in respect of the reviewable matters provisions of the *Competition Act*.

## Appeals

12. Is there a right of appeal against any decision of the authority? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

### Rights of Appeal and Procedure

Decisions of courts in respect of the criminal provisions of the *Competition Act,* and decisions by the Tribunal in respect of the reviewable matters provisions of the *Competition Act,* can be appealed to a court of appeal. Depending on the circumstances, leave to appeal can be required.

### Third Party Rights of Appeal

Generally, no rights of appeal are available to true third parties, except in situations where the third party is itself the primary private litigant in respect of abuse of dominance, refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction conduct. Third parties can in some circumstances seek intervenor status.

## Merger Control

13. What merger control rules apply to mergers and acquisitions in your jurisdiction?

Merger control is governed by the federal *Competition Act,* which includes both notification provisions (Part IX) and substantive merger review provisions (Part VIII). While only mergers that surpass certain thresholds are subject to notification under Part IX, any merger can be challenged by the Commissioner of Competition pursuant to the substantive review provisions in Part VIII.

14. What are the relevant jurisdictional triggering events?

All mergers are subject to potential investigation by the Commissioner and possible referral to the Competition Tribunal before, or within one year of, their substantial completion. A merger is broadly defined under the *Competition Act* to mean the acquisition, in any manner, of control over, or of a significant interest in, the whole or a part of the business of another person.

Five types of transactions are subject to mandatory pre-merger notification, provided the applicable financial thresholds are surpassed:

- Asset acquisitions.
- Share acquisitions.
- Amalgamations.
- The formation of unincorporated combinations to carry on business.

- Acquisitions of an interest in unincorporated business combinations.

The *Competition Act* also contains an anti-avoidance clause that stipulates that any transactions structured to avoid the application of the Act will be subject to the pre-merger notification requirements.

For details of the latest jurisdictional thresholds see, *Merger Control Quick Compare Chart: Canada*.

To compare jurisdictions, see the *Merger Control Quick Compare Chart*.

For details of the latest thresholds from the Canadian competition authority, see *https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/procedures-guide-notifiable-transactions-and-advance-ruling-certificates-under-competition-act#s2_2*

## Notification

15. What are the notification requirements for mergers? Are they mandatory or voluntary?

Each party to a transaction must file a complete notification for the statutory waiting period to begin. The parties to most types of acquisition are the purchaser and the target company.

Notifications must be filed with the Commissioner through the Competition Bureau.

The *Notifiable Transactions Regulations* set out the prescribed information that must be included in a pre-merger notification.

While it is not required under the *Competition Act*, the parties to a merger will in practice almost invariably also submit a joint substantive submission requesting an advance ruling certificate (ARC) or a "no action" letter in respect of the transaction (often referred to as an "ARC request letter"), which can be filed in advance of, or at the same time as, the parties' notifications. The issuance of an ARC automatically exempts parties to a transaction from the obligation to file a notification, while a waiver of the notification obligation will generally be requested and issued along with a "no action" letter.

The substantive submission takes the form of a letter and generally includes:

- A description of the parties and their Canadian activities.
- A discussion of the relevant product and geographic markets.
- An analysis of the competitive effects of the transaction in Canada (including a reference to the remaining competition, countervailing buyer power, barriers to entry, and so on).

Notification is mandatory for all transactions that exceed the relevant thresholds, subject to a few narrow exceptions (for example, transactions involving affiliated entities).

## Procedure and Timetable

16. What are the procedures and timetable?

The receipt of completed notifications from both parties to a transaction commences an initial 30-day waiting period. Filing an ARC request alone will not initiate the waiting period but will trigger the Competition Bureau's non-binding service standard, which is 14 days for non-complex transactions and 45 days for complex transactions.

Within the initial 30 days, the Competition Bureau can issue a Supplementary Information Request (SIR) if it decides that further information is required to complete its review. The information requested by the Competition Bureau under a SIR can be quite broad and can include any additional information that is relevant to the Competition Bureau's review of the transaction.

The issuance of an SIR triggers a second 30-day waiting period, which will begin only once both parties complete their respective SIR responses. A proposed transaction cannot close until the expiry of this second waiting period, unless terminated early by the Commissioner (via the issuance of either an ARC or "no action" letter).

For complex transactions, the review can extend beyond the second waiting period. In such cases, the Competition Bureau can request, and the parties can agree, to extend the waiting period through a timing agreement. Alternatively, the Competition Bureau can seek an order from the Competition Tribunal to delay closing.

For an overview of the notification process, see *Canada Merger Notifications Flowchart*.

## Publicity and Confidentiality

17. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

## Publicity

The Competition Bureau generally does not publicise the fact that a notification has been made and does not usually comment on transactions under review. For certain high-profile mergers the Competition Bureau generally acknowledges that it will review the merger and may issue public requests for information. Once the Competition Bureau has completed its review and reached a decision, it provides very limited information to the public by posting information to an online merger registry and, less frequently, by publishing a position statement.

All transactions in which the parties have requested an ARC or no action letter and/or filed notifications will be published on the online merger registry. The registry includes only the:

- Parties to the transaction.
- Relevant industry.
- Result of the review (that is, whether the review resulted in an ARC, no action letter, consent agreement, or a judicial decision).

The Competition Bureau is reportedly studying the possibility of expanding the level of disclosure provided as part of the merger registry and changing the update frequency from monthly to weekly. However, to date, no formal steps have been taken in this regard and there remain questions as to whether greater disclosure would be permissible under the Competition Act (see below, *Automatic Confidentiality*).

Position statements, which summarise the Competition Bureau's review and main findings, are typically issued only for a few transactions annually that are high profile, involve complex or important issues or are resolved through the use of novel analytical tools or procedures.

## Automatic Confidentiality

The Competition Bureau is generally required to treat all information it receives in the context of a transaction as confidential (section 29, Competition Act). Exceptions to this mandatory confidentiality exist where the:

- Information has otherwise been made public.
- Person providing the information has consented to its disclosure.
- Information is communicated by the Commissioner or Competition Bureau staff to another Canadian law enforcement agency.
- Information is communicated for the purposes of the administration and enforcement of the *Competition Act*.

## Confidentiality on Request

See above, *Automatic Confidentiality*.

## Substantive Test

18. What is the substantive test?

The substantive test for challenging a merger, to be applied by the Competition Bureau, and which must be satisfied for the Competition Tribunal to issue a remedial order, is whether the transaction is likely to substantially prevent or lessen competition in a relevant market. The Competition Bureau's Merger Enforcement Guidelines set out in detail the analytical framework it uses to make this assessment. See also *Question 1*.

## Merger Remedies

19. What are the types of remedies that can be required as conditions of merger clearance?

A remedy can be offered and accepted at any stage of the merger review process. Where the Competition Bureau believes that a proposed merger will, or is likely to, prevent or lessen competition substantially, it will generally initially seek to reach a negotiated remedy agreement with the parties, which will then be registered with the Competition Tribunal in the form of a consent agreement, upon which it takes the effect of a court order. However, if a resolution cannot be reached, the Competition Bureau can apply (either before or up to one year following the completion of a merger) to the Tribunal seeking a remedial order.

Remedies can be behavioural and/or structural. While the Competition Bureau has an established preference for structural remedies, such as divestitures, it has, over the years, shown some willingness to accept mixed structural and behavioural remedies in some cases. All consent agreements are publicly available.

In some cross-border transactions, where a remedy has been agreed to in another jurisdiction (typically the US or EU), the Competition Bureau has insisted on a "mirror image" remedy in Canada. However, in certain other instances, where no Canadian assets and no unique Canadian issues are involved, the Competition Bureau has not required any remedy in Canada and has instead relied on remedies imposed in other jurisdictions.

## Penalties

20. What are the penalties for failing to comply with the merger control rules?

## Failure to Notify Correctly

Failure to file a notification "without good and sufficient cause" is a criminal offence, punishable by a fine of up to CAD50,000.

Where the party that fails to notify the transaction is a corporation, its officers, directors or agents can also be criminally liable, in certain circumstances. Individuals are liable to the same punishment as the corporation whether or not the corporation has been prosecuted or convicted.

### Implementation Before Approval or After Prohibition (Gun-Jumping)

Implementation of a notifiable transaction before expiry of the applicable waiting period is a civil offence punishable by a variety of remedial orders, including dissolution of the completed merger, divestiture of assets and/or administrative monetary penalties of up to CAD10,000 for each day by which the waiting period was breached.

### Failure to Observe

Breach of a Competition Tribunal order or of a registered consent agreement is a criminal offence subject to either:

- On summary conviction, a fine of up to CAD25,000 and/or imprisonment for up to one year.
- On conviction on indictment, a fine at the court's discretion and/or imprisonment for up to five years.

## Appeals

21. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

### Rights of Appeal

An order issued by the Competition Tribunal can be appealed as of right to the Federal Court of Appeal on questions of law and of mixed fact and law, and by leave of the court on questions of fact alone. An appeal from a decision of the Federal Court of Appeal lies, with leave, to the Supreme Court of Canada.

### Procedure

An interlocutory ruling of the Competition Tribunal can be challenged within ten calendar days unless this period is extended by a judge of the Federal Court of Appeal.

Any other decision of the tribunal must be challenged within 30 calendar days (not including days in July and August) of judgment, unless this period is extended by a judge of the Federal Court of Appeal.

An appeal from a decision of the tribunal is likely to be a relatively long process. It may take several months, or a year or more, from the date of an initial tribunal judgment before a Federal Court of Appeal judgment is issued. A subsequent appeal to the Supreme Court of Canada would be expected to take a similar length of time, if not longer.

### Third Party Rights of Appeal

Third parties can seek to have the tribunal vary or rescind a registered consent agreement by which they are "directly affected". In practice, this rarely occurs as the test to be met by third parties is difficult to meet. Third parties can also seek leave to intervene in tribunal and court proceedings.

22. Has the regulatory authority issued guidelines or policy on its approach in analysing mergers in a specific industry?

The Competition Bureau has not issued any formal guidelines or policies on its approach to analysing mergers in a specific industry. The Bureau occasionally issues position statements on concluded merger reviews, which may shed light on its analytical approach for future transactions. However, these position statements are not binding.

## Joint Ventures

23. How are joint ventures analysed under competition law?

Certain unincorporated JVs (defined as "combinations" under the *Competition Act*) are exempt from notification. The exemption applies where:

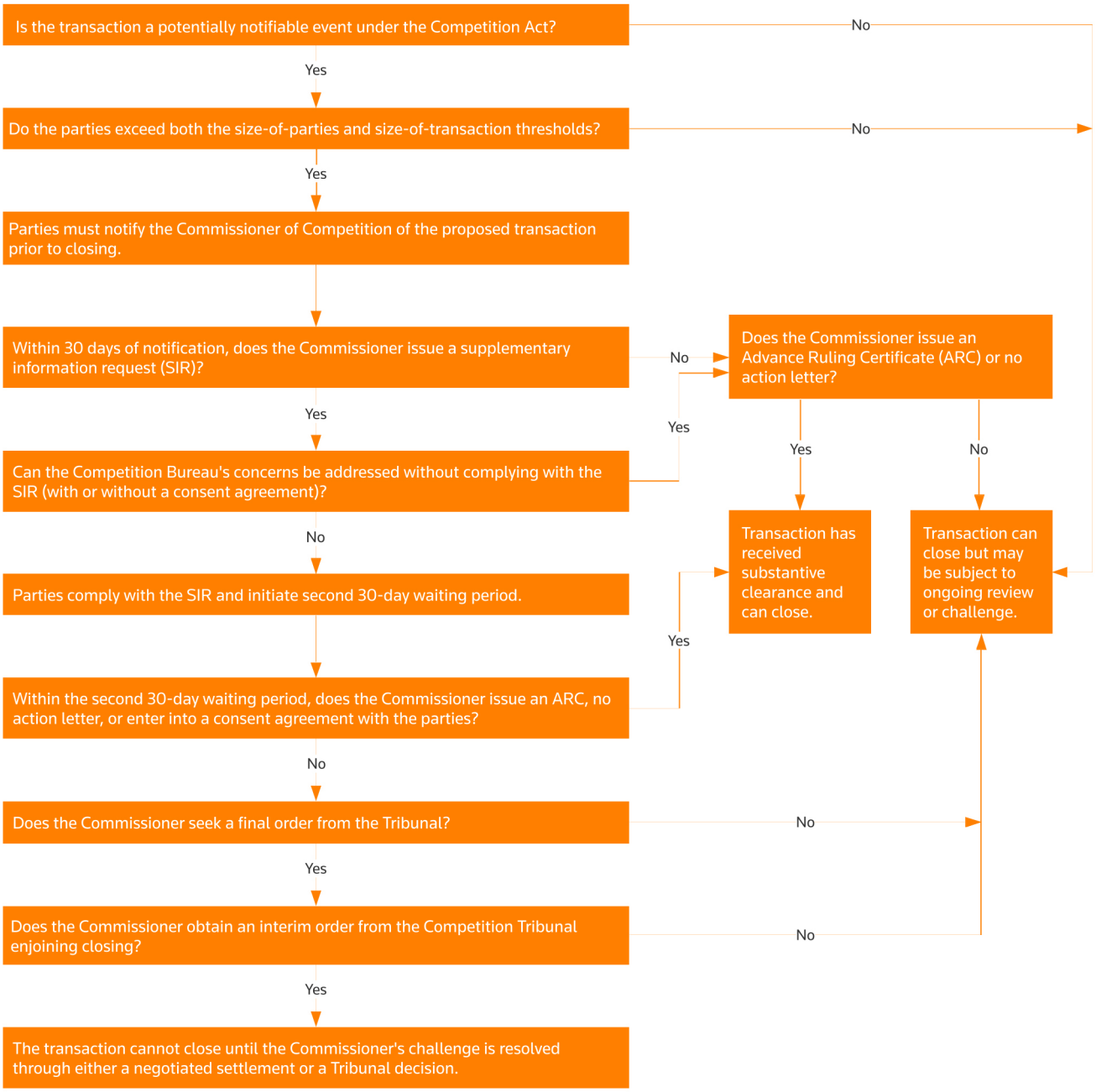
- There is a written JV agreement that will govern a continuing relationship between the JV partners.
- There is an obligation on one or more of the JV partners to contribute assets to the JV.
- The transaction does not involve a change of control over either of the JV partners.
- The JV's range of activities is restricted.
- Provision has been made for the orderly termination of the JV.

These conditions are sometimes satisfied where unincorporated JVs are involved.

Although JVs meeting the above criteria are exempt from notification, they can still be subject to substantive review. A very narrow exemption from substantive review exists only in respect of JVs that have been established to undertake a specific programme of research and development.

# Practical Law
## Merger notification flowchart: Canada



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**Professional and academic qualifications.** Bar admission: Ontario, Canada, 2006; JD, University of Toronto; MA (Economics), University of Toronto; B.Arts.Sc., McMaster University

**Areas of practice.** Competition; foreign investment.

**Recent transactions**

- Lowe's Companies in its CAD3.2 billion friendly acquisition of Rona Inc by way of a plan of arrangement under the Business Corporations Act (Québec).
- Manitoba Telecom Services Inc. in the acquisition of all its outstanding shares by BCE Inc by way of a plan of arrangement for approximately CAD3.9 billion.

**Professional associations/memberships.** Law Society of Ontario; Canadian Bar Association; American Bar Association.


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**Areas of practice.** Competition; foreign investment.

**Recent transactions**

- United Technologies, in its all-stock merger of equals of its aerospace business with Raytheon Company.
- Pembina Pipeline Corporation, in its CAD4.35 billion acquisition of Kinder Morgan Canada Limited and the U.S. portion of the Cochin Pipeline system.
- Air Canada in its proposed acquisition of Air Transat AT Inc.

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# About Stikeman Elliott

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