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# Merger Control in Canada: Overview

By Michael Kilby and David Feldman

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# Merger Control in Canada: Overview

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

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A Q&A guide to merger control in Canada.

This Q&A is part of the global guide to merger control. Areas covered include the regulatory framework, regulatory authorities, relevant triggering events and thresholds. Also covered are notification requirements, procedures and timetables, publicity and confidentiality, third party rights, substantive tests, remedies, penalties, appeals, joint ventures, inter-agency co-operation, powers of intervention and proposals for reform.

## Regulatory Framework

**1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?**

### Regulatory Framework

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 and may be subject to the substantive review provisions in Part VIII.

### Regulatory Authority

The *Competition Act* is administered and enforced by the Commissioner of Competition with the support of the Competition Bureau, an independent law enforcement agency.

While the Commissioner and the Competition Bureau investigate and evaluate mergers, only the Competition Tribunal, a specialised, quasi-judicial body, can issue a formal remedial order with respect to a merger.

## Triggering Events/Thresholds

**2. What are the relevant jurisdictional triggering events/thresholds?**

### Triggering Events

All mergers are subject to potential investigation by the Commissioner of Competition and possible referral to the Competition Tribunal 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 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.

### Thresholds

Transactions that exceed each of the following thresholds generally trigger a pre-merger notification requirement:

- **Size of transaction threshold.** The target business, on a consolidated basis, has either:
  - assets in Canada whose book value exceeds CAD93 million; or
  - annual gross revenues from sales in or from Canada, generated from assets in Canada, that exceed CAD93 million.

  This threshold is generally adjusted annually for inflation.
- **Size of parties threshold.** The purchaser and target, together with their respective upstream and downstream affiliates collectively, have either:
  - assets in Canada whose combined book value exceeds CAD400 million; or
  - combined annual gross revenues from sales in, from or into Canada that exceed CAD400 million.

For an acquisition of shares, along with the above thresholds, the following shareholding threshold must be met:

- For public companies, the purchaser must be acquiring more than 20% of the target's voting shares (or, if the purchaser already owns more than 20%, the purchaser's acquisition must bring the purchaser's total shareholding above 50% of the target's voting shares).
- For all other businesses, the purchaser must be acquiring more than 35% of the voting shares of the target business (or, if the purchaser already owns more than 35%, the purchaser's acquisition must bring the purchaser's total shareholding above 50% of the target's voting shares).

## Notification

**3. What are the notification requirements for mergers?**

### Mandatory or Voluntary

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

### Timing

A notifiable transaction cannot close until the statutory waiting period has expired. While the *Competition Act* does not set a deadline for filing a notification, the statutory waiting period will not commence until a complete filing has been made.

### Pre-notification and Formal/Informal Guidance

Before notification, parties can approach the Competition Bureau to engage in informal discussions and seek initial guidance, either on a names or no-names basis. However, in practice, the Competition Bureau does not provide any substantive guidance until the parties have either submitted a request for an Advance Ruling Certificate (ARC) or filed notifications.

 

## Responsibility for Notification

Each party to a transaction must file a complete notification for the statutory waiting period to begin. The parties to a share acquisition are the purchaser and the corporation whose shares are to be acquired.

## Relevant Authority

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

## Form of Notification

The Notifiable Transactions Regulations (available at *www.laws-lois.justice.gc.ca/eng/regulations/SOR-87-348/index.html*) set out the information that must be included in a pre-merger notification. While no particular form for the notification filing is required, the Competition Bureau has developed a template form (available at *www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01705.html*).

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 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 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).

## Filing Fee

A single filing fee of CAD74,905.57 applies to notification filings and ARC request submissions. The filing fee is adjusted annually for inflation. Responsibility for payment of the filing fee is a matter for negotiation between the parties.

A fee remission policy came into effect on 1 April 2021. Under this policy, a portion of the filing fee may be refundable when the Competition Bureau's review exceeds the applicable non-binding service standard. The terms of the fee remission policy are available at *www.ic.gc.ca/eic/site/icgc.nsf/eng/07681.html#s1*.

## Obligation to Suspend

A notifiable transaction cannot close until one of the following occurs:

- The parties to the transaction have received an ARC.
- The parties' obligation to file notifications has been waived.
- The applicable waiting period (including any extensions) has expired or been terminated.

Other

## Procedure and Timetable

**4. What are the applicable 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 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

**5. 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 does not publicise the fact that a notification has been made and does not usually comment on transactions under review. 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 transactions 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 (*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*.

## Rights of Third Parties

**6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?**

### Document Access

Documents provided to the Competition Bureau are generally subject to statutory confidentiality protections and not available to third parties (*see Question 5*). Third parties, however, can seek a court order to obtain disclosure of Competition Bureau held documents. While the Competition Bureau has traditionally taken the position that all documents it collects in the course of an investigation (including a merger review) are subject to class privilege, the existence of this class privilege was rejected in a recent Federal Court of Appeal decision.

### Be Heard

During its review of a transaction, the Competition Bureau will contact market participants (for example, customers and suppliers of the merging parties, competitors and other stakeholders) to solicit their views on the transaction.

Third parties can also proactively contact the Competition Bureau to provide their views on a transaction. While third parties do not have the right to challenge a proposed merger, complaints may influence the review and result in closer scrutiny by the Competition Bureau.

 

## Substantive Test

### 7. What is the substantive test?

The substantive test for intervention 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.

### 8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

The *Competition Act* contains an explicit efficiencies defence, under which efficiency gains generated by a proposed merger can be used to offset any anti-competitive effects, provided that the former are greater than the latter and regardless of whether any benefits associated with the efficiencies will be passed on to consumers. However, such efficiency gains cannot be used to offset anti-competitive effects unless the Competition Bureau is satisfied that those gains would not be likely if the remedy sought to cure the competition concern were ordered.

### 9. Is it possible for the merging parties to raise a failing/exiting firm defence?

Under the *Competition Act*, one of the factors to be considered in determining whether a merger is likely to result in a substantial prevention or lessening of competition is “whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail”. As such, the loss of the actual or future competitive influence of a failing firm is not factored into the Competition Bureau’s merger analysis if its imminent failure is probable and if, in the absence of a merger, the assets of the firm are likely to exit the relevant market.

The Competition Bureau considers a firm to be failing if it:

- Is insolvent or is likely to become insolvent.
- Has initiated or is likely to initiate voluntary bankruptcy proceedings.
- Has been, or is likely to be, petitioned into bankruptcy or receivership.

The Competition Bureau’s Merger Enforcement Guidelines set out a number of factors to be considered in assessing whether a firm is likely to fail (such as financial statements, projected cash flows, calling of loans, trade credit and so on).

 

## Remedies, Penalties and Appeal

**10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?**

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. 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 behavioural remedies in some cases.

For example, in recent years, the Competition Bureau has entered into a number of consent agreements that utilised a combination of structural and behavioural remedies (for example, these were used in mergers between Harnois/DPT, McKesson/Rexall and Parkland/Pioneer).

Where behavioural remedies are granted, the tribunal order (whether issued on consent or after a contested hearing) will include a reporting obligation requiring regular reports to the Commissioner to ensure compliance.

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.

**11. 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

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.

**12. 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 very difficult to meet. Third parties can also seek leave to intervene in tribunal and court proceedings.

## Automatic Clearance of Restrictive/Ancillary Provisions

**13. If a merger is cleared, are any restrictive or ancillary provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?**

A decision by the Commissioner of Competition not to challenge a merger does not automatically clear restrictive provisions in transaction agreements. Practically speaking, however, this issue rarely arises.

 

## Regulation of Specific Industries

**14. What industries (if any) are specifically regulated?**

Generally, the *Competition Act* applies broadly across all industries with no special rules for specific industries. However, mergers within certain industries are subject to separate concurrent review processes, including transactions in the following sectors:

- Transport (*Canada Transportation Act* review).
- Finance (*Bank Act* review).
- Telecommunications/broadcasting (Canadian Radio-television and Telecommunications Commission review under the *Broadcasting Act* or the *Telecommunications Act*).

**15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?**

The Competition Bureau has not published guidelines on its approach to analysing mergers in specific industries. However, for certain mergers it will publish technical backgrounders or position statements, which discuss the Competition Bureau's analysis with respect to a particular merger.

Additionally, in 2014, the Competition Bureau published a paper entitled "Economic Analysis of Retail Mergers at the Competition Bureau", which discusses its approach to analysing the upstream and downstream parts of retail mergers (available online at *www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03796.html*).

## Powers of Intervention and Foreign Investment Review

**16.What powers does the national government have to intervene in mergers on the grounds of public interest, national security or media plurality?**

Acquisitions of control of Canadian businesses by non-Canadians that exceed certain prescribed financial thresholds are subject to "net benefit" review by the Canadian Government under the *Investment Canada Act* and cannot be implemented before receiving a favourable Ministerial decision that the investment is likely to be of "net benefit" to Canada. Binding commitments related to the future operations of the Canadian business (known as undertakings) are usually required to obtain the approval. Special, lower, financial thresholds apply to foreign investments in specified "cultural" industries (for example, book publishing and production or distribution of film/ video/ audio recordings).

Mergers may also be subject to review under the *Investment Canada Act* if they give rise to Canadian national security interest concerns. The specific test is whether the responsible Minister has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security". No financial threshold applies to a national security review and there is no definition of "national security". The government can deny the investment, ask for undertakings, provide terms or conditions for the investment, or, where the investment has already been made, require divestment. Review can occur before or after closing. Reviews can be initiated up to 45 days after filing of a notification form (*see below*).

 

Mergers within certain industries may also be subject to industry specific public interest reviews, including transactions involving transportation undertakings, financial institutions and telecommunications companies.

**17. Are there any post-closing or foreign investment review filing requirements?**

Acquisitions of control of Canadian businesses by non-Canadians that fall below certain prescribed financial thresholds, and are therefore exempt from pre-closing economic review under the *Investment Canada Act*, are subject to a post-closing notification obligation under the *Investment Canada Act*. The filing, which is made to the Investment Review Division of Innovation, Science and Economic Development Canada, can be made anytime up to 30-days following closing. There is no filing fee associated with the notification filing.

As noted above, the filing of a complete notification form (whether on a pre- or post-closing basis) triggers a 45-day period within which a notice of potential national security review must be issued. For this reason, parties often choose to file the notification at least 45 days before closing where national security issues are considered likely.

## Joint Ventures

**18. 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 often satisfies 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.

## Inter-agency Co-operation

**19. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?**

The Competition Bureau regularly co-operates with regulatory authorities in other jurisdictions (in particular, the US and EU authorities) in relation to merger investigations. The Competition Bureau takes the position that co-operation with

 

other jurisdictions (including sharing information) is undertaken for the purpose of the administration and enforcement of the *Competition Act*. As such, the Competition Bureau does not require a waiver from the parties to exchange information with other regulatory authorities and, in the context of cross-border merger reviews, it is not uncommon for them to do so.

## Recent Mergers, Cases, Trends and Statistics

**20. What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable? Are there any statistics published on annual merger reviews conducted in the jurisdiction?**

During the 12 months ended 31 March 2021, the Competition Bureau completed 193 merger reviews. The Competition Bureau issued an SIR in connection with 11 mergers and obtained a remedy through entering into a Consent Agreement in connection with two mergers.

In May 2020, the Competition Bureau released a model timing agreement for merger reviews where the parties raise efficiencies arguments. The timing agreement contemplates specific timelines both for the merging parties to supply information to the Competition Bureau and for the Competition Bureau to provide the merging parties with feedback.

While parties are under no obligation to enter into a timing agreement and, if entering into a timing agreement, are not required to accept the Competition Bureau's model agreement, parties advancing efficiencies arguments should expect that the Competition Bureau may press for a timing commitment that aligns with its model.

In April 2020, in response to COVID-19, the Canadian Government implemented a policy applying enhanced national security scrutiny to foreign investments in Canadian businesses related to public health or involved in the supply of critical goods and services and to foreign investments involving state-owned enterprises.

In March 2021, a notable transaction between two waste services providers generated rare new jurisprudence when the Competition Bureau attempted to prevent closing on an emergency basis, while its more formal injunction application was pending decision. The Competition Tribunal found that it had no jurisdiction to issue the emergency injunction sought, to which the Federal Court of Appeal agreed. However, the Competition Bureau's substantive challenge continues before the Competition Tribunal and its appeal of the injunction decision remains ongoing. The outcome of these proceedings will help to clarify the circumstances under which the Competition Bureau and the Competition Tribunal can prevent a transaction from closing.

## Additional Information and Proposals for Reform

**21. Are there any proposals for reform concerning merger control?**

Not applicable.

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## Contributor Profiles


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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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**Professional and academic qualifications.** Bar admission: Ontario, Canada, 2016; JD, University of Toronto; BA, McGill University

**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.

**Professional Associations/Memberships.** Law Society of Ontario; Canadian Bar Association; American Bar Association.

# About Stikeman Elliott

Stikeman Elliott is a global leader in Canadian business law and the first call for businesses working in and with Canada. Our offices are located in Montréal, Toronto, Ottawa, Calgary, Vancouver, New York, London and Sydney. We provide clients with the highest quality counsel, strategic advice, and workable solutions. The firm has an exceptional track record in major U.S. and international locations on multijurisdictional matters and ranks as a top firm in our primary practice areas including mergers and acquisitions, securities, business litigation, banking and finance, competition and foreign investment, tax, restructuring, energy, mining, real estate, project development, employment and labour, and pensions.

For more information about Stikeman Elliott, please visit our website at www.stikeman.com.

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