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Getting the Deal Through

MERGER CONTROL 2023

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Jurisdictions

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Canada, the federal Competition Act (the Act) establishes jurisdiction for the review of mergers affecting markets in Canada. The Act is enforced by the Commissioner of Competition (the Commissioner), who is appointed by the Federal Cabinet, typically for a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Innovation, Science and Economic Development.

The Commissioner and, by extension, the Bureau have broad powers to investigate, evaluate and, where appropriate, challenge mergers. Should the parties to a merger not be prepared to cure competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings 'as informally and expeditiously as the circumstances and considerations of fairness permit', the Tribunal operates with many of the procedures of an ordinary court. Proceedings take a number of months – often up to a year or even more – to complete.

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, establishes or acquires control of a Canadian business, regardless of whether it was previously owned by Canadians or other non-Canadians. A non-Canadian acquirer must either file an application for review or a post-closing notification of the investment (depending on the size of transaction) unless a specific exemption applies. The Investment Canada Act also has national security provisions, which can apply to acquisitions of less than full control of firms.

Scope of legislation

2 | What kinds of mergers are caught?

All mergers that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. The definition of 'merger' is broad and includes the acquisition of control or a significant interest in the business of another person; however, the Act's pre-merger notification regime is of more limited scope.

Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds.

These are: asset acquisitions; share acquisitions; acquisitions of an interest in an unincorporated combination; amalgamations; and the formation of unincorporated combinations.

There is also a proposal before Parliament, which at the time of writing is expected to be enacted by the time of publication, to include an anti-avoidance provision that will capture and include the requirement to notify transactions that are 'designed to avoid' the notification provisions.

3 What types of joint ventures are caught?

Generally, joint ventures with a sufficient Canadian nexus are caught by the Act's broad definition of 'merger' and are subject to the Act's substantive jurisdiction. Depending on how it is structured, a joint venture could be caught under the mandatory pre-merger notification regime as an unincorporated combination (usually a partnership), a share or asset acquisition, or a corporate amalgamation.

There are exemptions for joint ventures that meet certain conditions. There are also provisions in the Act addressing competitor agreements, even if they do not constitute mergers, which may apply to joint ventures.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Act contains a bright-line definition of 'control': the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, sole proprietorship, trust or other unincorporated entity, the holding or acquisition of an interest in the non-incorporated entity that entitles the holder or acquirer to more than 50 per cent of the profits of the entity or of its assets on dissolution; however, the Act's pre-merger notification regime does not require that control be acquired to trigger a filing obligation.

The acquisition of 'any of the assets in Canada of an operating business' (other than in the ordinary course) or of shares yielding cumulative ownership of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) is sufficient to trigger a notification obligation (provided that the other criteria are met). There are similar thresholds for acquisitions of interests in combinations.

Additionally, minority interests less than outright control may be caught by the substantive (as opposed to notification) provisions of the Act because the Act defines a merger to include any transaction by which a party acquires a significant interest in the business of another person. A 'significant interest' is not defined by the Act; however, the Commissioner's Merger Enforcement Guidelines (MEGs) contemplate that the acquisition of a significant interest could occur at as low as a 10 per cent ownership interest – or in some cases without an equity interest if contractual or other circumstances allow material influence to be exercised over the economic behaviour of another person (including decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights).

The MEGs note that, among other factors, board composition, voting and veto rights, the terms of any shareholder or voting agreements and put, call or other liquidity rights are relevant to determining if there has been or will be an acquisition of a significant interest.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act's substantive jurisdiction extends to all mergers that have a real and substantial Canadian nexus, regardless of size; however, the Act's pre-merger notification requirements are triggered by bright-line thresholds designed to give certainty to merging parties regarding filing obligations.

The transaction must involve an 'operating business' in Canada (there are employees that regularly report for work within Canada in relation to the business) as opposed to merely a passive investment; however, in the Commissioner's view, the employees may be those of an agent or contractor.

The obligation to notify is also contingent on satisfaction of both a party-size threshold and a transaction or acquiree-size threshold.

Party-size threshold

The parties to the transaction, together with their worldwide 'affiliates' (defined generally as those entities in a relationship of control to one another or under common control), collectively have assets (book value) in Canada or gross revenues from sales in, from or into Canada (ie, domestic sales plus exports and imports) in excess of C$400 million in the most recently completed fiscal year.

For share acquisitions, the acquiring corporation and the acquired corporation (rather than the vendors of the shares) are deemed to be the parties to the transaction.

In the case of the acquisition of an interest in a combination, the parties are the person or persons who propose to acquire the interest and the combination whose interest is to be acquired. A vendor that owns more than 50 per cent of the shares in a corporation, or the interests in a combination, to be acquired would be included in the party-size threshold calculation as an affiliate of the entity being acquired.

Transaction-size threshold

The transaction-size threshold (sometimes referred to as the acquiree-size threshold) is based on the book value of assets in Canada of the entity that is the subject (target) of the transaction or that are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2022, the threshold (for assets or revenues) remained at C$93 million – the same level as the prior year – as a result of the ministerial decision not to follow the established policy of adjusting in line with changes to the GDP. The threshold is subject to an annual adjustment based on changes in the GDP, which is typically announced and goes into effect in late January or early February of each year.

If the underlying party-size and transaction-size thresholds are met, the acquisition of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will trigger a notification obligation.

Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business other than through a corporation (eg, a partnership) is also notifiable if the party-size and acquiree-size thresholds are met and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits of the combination or of its assets on dissolution.

Similar, but more complex, thresholds apply to amalgamations.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification is mandatory for transactions that exceed the party-size and transaction-size thresholds. A narrow exemption exists for asset securitisations meeting certain criteria. There are also other exceptions of limited scope (such as transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by applying for an advance ruling certificate), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner as to whether he or she will challenge the merger.

If a non-notifiable merger comes to the Bureau's attention from other sources (eg, marketplace complaints or market surveillance by the Bureau's Merger Intelligence and Notification Unit), a notification is not required, but the Bureau may request or compel the production of relevant information to carry out an assessment under the substantive merger provisions of the Act.

The Bureau has recently increased its focus on gathering intelligence to identify and review below-threshold, potentially anticompetitive transactions, with at least four below-threshold transactions reviewed in depth since June 2019, including one that resulted in a divestiture. Transactions may be challenged by the Bureau for up to one year after closing.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Canada asserts an effects test for jurisdiction over mergers; thus, mergers may be subject to substantive review under the Act even though they occur outside Canada, if competitive effects from the transaction will be experienced within Canada, although the ability to obtain relief may depend on the parties' other connections to the jurisdiction. The competitive effects of primary interest are the impacts on customers located in Canada. Such effects could arise in relation to current or future sales into Canada when one or both merging parties are located outside Canada.

Foreign-to-foreign transactions are subject to pre-merger notification if the financial thresholds for notification are exceeded and the target has an operating business in Canada. (The asset value branches of the thresholds focus only on assets in Canada; however, the revenue branches of the thresholds include exports in addition to domestic sales, and in the case of the party-size threshold, imports as well.)

For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the subsidiary's assets or revenues exceed the acquiree-size threshold, and the parties and their affiliates collectively have assets or revenues exceeding the party-size test.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Investment Canada Act applies whenever a non-Canadian directly or indirectly acquires control of a Canadian business, regardless of whether it was owned before the acquisition by Canadians or by non-Canadians. If the transaction exceeds certain size threshold, it will require advance approval; if it is below that threshold the purchaser must file a notification of the investment, unless in either case a specific exemption applies.

The Investment Canada Act's provisions with respect to national security also apply to transactions both above and below the thresholds, and they apply to acquisitions of interests less than controlling interests as well.

There are a number of financial thresholds that determine whether a transaction is subject to review and approval, or merely requires notification (notification can be given either before or after closing) under the Investment Canada Act. The applicable financial threshold turns on, among other things, whether the acquirer is a state-owned enterprise (SOE), or whether the target is currently owned or to be acquired by an investor from a World Trade Organization (WTO) country, or a country with which Canada has entered into a trade agreement (Trade Agreement Investor).

A Trade Agreement Investor is:

- an entity controlled by citizens of states that are party to the Comprehensive Economic and Trade Agreement between Canada and the European Union;
- an entity controlled by citizens of states that are party to (and have ratified) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership; or
- an entity controlled by citizens of states that are party to the Agreement between the United States of America, the United Mexican States and Canada, as well as citizens of Chile, Colombia, Honduras, Panama, Peru, South Korea and the United Kingdom.

There is a separate (lower) threshold applicable to firms controlled by WTO investors. WTO investors are entities controlled by citizens of member states of the World Trade Organization. There are also alternate thresholds that apply if the investor is an SOE. There are also separate and very low thresholds that apply where the Canadian business being acquired engages in cultural activities (eg, those involving books, magazines, film, television, audio or video recordings, or radio or television broadcasting).

The threshold test changed, for non-SOE WTO investors, from an asset value test to an enterprise value test in 2015. As of 2022, if the Canadian business is being acquired directly by or from a WTO investor and is not engaged in cultural activities, an investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C$1.141 billion.

Further, as of 2022, if the Canadian business is being acquired directly by or from a Trade Agreement Investor and is not engaged in cultural activities, the investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C$1.711 billion. Both the WTO investors threshold and the Trade Agreement Investors threshold typically undergo annual adjustments each January or February, based on changes to the GDP.

Where the investment involves the acquisition of publicly traded shares, the enterprise value is calculated as the sum of the market capitalisation of the target and its liabilities, minus its cash and cash equivalents. Where the investment involves the acquisition of privately held shares, the enterprise value is calculated as the sum of the acquisition value and the target's liabilities (based on its most recent quarterly financial statements), minus its cash and cash equivalents (based on its most recent quarterly financial statements). Where the investment involves the acquisition of assets, the enterprise value is calculated as the sum of the acquisition value and assumed liabilities, minus cash and cash equivalents.

Where an SOE WTO investor is involved, and if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has assets with a book value in excess of C$454 million. This threshold also typically undergoes an annual adjustment each January or February.

If the acquisition by or from a WTO investor is indirect (ie, the acquisition of shares of a foreign corporation that controls a Canadian business) and does not involve a cultural business, the transaction is not reviewable, regardless of size.

Where the Canadian business engages in any of the activities of a cultural business, or if both the investor and the vendor are not WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value in Canada of C$5 million or C$50 million, respectively.

If the transaction is subject to review, an application for review is made to the Investment Review Division of the federal Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage, where the merger involves cultural businesses). There is an initial review period of 45 calendar days, which may be extended by 30 calendar days at the discretion of the agency, and further upon consent of the investor.

On an application for review, the substantive test applied is whether the proposed transaction is likely to be of net benefit to Canada. Any economic impact on Canada may be considered, including employment, investment, productivity, research and development, exports, Canadian management participation in the business and other factors. If the acquirer is an SOE, the review will also examine whether it is likely to operate the acquired Canadian business in an ordinary commercial manner.

The Investment Canada Act approval is parallel to but separate from Competition Act reviews (in cases subject to a Competition Act review). In addition, the Bureau provides input into the Investment Canada Act review process with respect to a transaction's effects on competition, in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act net benefit to Canada test, but it is typical for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review; however, even where the transaction falls below the thresholds, it must still be notified by way of a filing with the Investment Review Division of the Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage for cultural cases).

Notifications may be submitted by the acquirer any time before or up to 30 days after consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the asset value) by the Federal Cabinet within 21 days of receipt of the notification.

The Investment Canada Act also establishes a national security review regime, under which transactions can be reviewed regardless of the size of the business or transaction, the nationality of the acquirer (except Canadians), whether the transaction involves an acquisition of control or of a minority interest, or whether the transaction has closed.

In December 2016, the Canadian Government published its Guidelines on the National Security Review of Investments (the National Security Guidelines), which were subsequently revised in March 2021. They set out the types of investments that may trigger national security reviews. Factors that the government considers in determining whether to review an investment for national security reasons include:

- the potential for injury to Canada's defence capabilities;
- the potential for transfer of sensitive technology or know-how outside Canada – sensitive technologies can include (but are not necessarily limited to):
    - advanced materials and manufacturing;
    - advanced ocean technologies;
    - advanced sensing and surveillance;
    - advanced weapons;
    - aerospace;
    - artificial intelligence;
    - biotechnology;
    - energy generation, storage and transmission;
    - medical technology;
    - neurotechnology and human-machine integration;
    - next-generation computing and digital infrastructure;
    - positioning, navigation and timing technologies;
    - quantum science;
    - robotics and autonomous systems; and
    - space technology;
- the Canadian business's involvement in research respecting, manufacturing or selling goods or technology that may be needed for Canada's national defence;
- the potential impact of the investment on the supply of critical goods and services to Canadians;
- the potential impact of the investment on critical minerals and critical supply chains (comprising minerals that are essential for renewable energy and clean technology applications, including batteries, permanent magnets, solar panels and wind turbines, and minerals used for advanced manufacturing supply chains, including defence and security technologies, consumer electronics, agriculture, medical applications and critical infrastructure);
- the potential impact of the investment on Canada's critical infrastructure, which includes energy and utilities, finance, food, transportation, government, information and communication technology, health, water, safety and manufacturing;
- the potential to enable foreign surveillance or espionage;
- the potential for the investment to hinder current or future intelligence or law enforcement operations;
- the potential for injury to Canada's international interests;
- the potential of the investment to involve or facilitate organised crime; and

- the potential for the investment to enable access to sensitive personal data that could be leveraged to harm Canada's national security through its exploitation – sensitive personal data includes:
  - personally identifiable health or genetic data;
  - biometric data;
  - financial data;
  - communications data;
  - geolocation data; or
  - personal data concerning government officials, including members of the military or intelligence community.

The National Security Guidelines emphasise that all investments by SOEs and by investors subject to the influence of SOEs will be subject to enhanced scrutiny related to potential national security concerns.

In addition to issuing the revised National Security Guidelines, in April 2020, the government provided a covid-19 policy statement noting that the Investment Canada Act's national security provisions will be used to carefully review any foreign direct investments in Canadian businesses related to public health and involved in the supply of critical goods or services to Canadians or to the government. Further, the policy statement highlighted that 'sudden declines in valuations [of Canadian businesses] could lead to opportunistic investment behaviour' and that until the economy recovers from the covid-19 pandemic, the government would engage in enhanced scrutiny of foreign investments in Canadian businesses 'to protect national security and to ensure the integrity of all investments into Canada'.

Based on those statements, it appeared possible that the government might use the Investment Canada Act's national security provisions to take action against certain types of investments by non-Canadians in respect of Canadian businesses that are at depressed valuations owing to the economic impact of the covid-19 pandemic; however, it appears that no national security reviews were initiated to address this type of concern, and in most – if not all – industries, market value rebounded quickly from immediate post-covid-19 pandemic declaration lows.

There have been a few recent cases involving national security reviews under the Investment Canada Act that have become public. A number of transactions have been rejected or have been abandoned based on concerns about the investor in question acquiring telecommunications assets that were regarded as critical infrastructure. There has also been a 'proximity' case in which the establishment of a new Canadian business was required to find a new location that was not near a facility of the Canadian Space Agency. One transaction has been blocked because the geo-mapping assets in issue were sensitive on a national security basis.

In addition, a Chinese firm was ordered to divest a recently acquired interest in a Canadian fibre components and modules company, but this decision was challenged and on re-review, the government cleared the transaction.

In early 2018, the proposed takeover of a Canadian construction services firm by a Chinese state-owned enterprise was blocked. While the precise reasons for this decision were not made public, the Canadian firm's work with nuclear power facilities, telecommunications infrastructure, and military housing and training facilities may have raised concerns related to critical infrastructure.

In late 2020 a Chinese acquisition of a Canadian mining company with a mine site on the North-West Passage was prohibited.

In addition to the general reviews under the Competition Act and, if applicable, the Investment Canada Act, there are sector-specific ownership limits and review regimes in areas such as financial services, transportation, broadcasting and telecommunications.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition Act (the Act) does not set out deadlines for filing. The timing for submission of a notification is a decision of the parties; however, a transaction that is notifiable may not be consummated until the applicable statutory waiting period has expired.

Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence, with possible fines of up to C$50,000 as well as the possibility of civil penalties of up to C$10,000 per day. The Competition Bureau (the Bureau) monitors financial press accounts of transactions and may also be made aware of transactions through competitor, customer or supplier complaints.

Although, to date, there have been no convictions or penalties imposed for failure to notify (other than agreements to implement compliance programmes), this provision of the Act may be enforced vigorously unless the failure to notify was inadvertent, in which case a decision not to prosecute or other resolution might be negotiable with the Commissioner of Competition (the Commissioner) and the Director of Public Prosecutions.

10 Which parties are responsible for filing and are filing fees required?

Generally, both parties to the transaction have the obligation to file. For share acquisitions and acquisitions of an interest in a combination, the Act deems the target entity, not the vendor, to be a party to the transactions. In hostile or unsolicited takeover bids, the bidder makes an initial filing (which commences the waiting period), and the Commissioner then requisitions the counterpart filing from the target (which must be filed within 10 days).

The filing fee for a notification is currently C$77,452.36. This fee will likely be in effect until 2023, when it once again will be subject to an adjustment for inflation. The same filing fee applies to a voluntary notification by way of an application for an advance ruling certificate. There is also ongoing consideration of structuring filing fees based on transaction size, but that amendment has not yet been introduced.

The filing fee is often paid by the acquirer, but this is a matter of negotiation between the parties. Where filings have been submitted by both parties, the Bureau considers both notifying parties to be jointly and severally liable for the filing fee. If only a request for an advance ruling certificate is submitted for a proposed transaction, the requesting party is solely responsible for the fee.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is a 30-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs). In hostile or unsolicited takeover bids, the 30-day no-close waiting period begins on the date that bidder's filing is certified as complete.

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (similar to a US 'second request'), requiring the parties to submit additional information that the Commissioner believes to be relevant to his or her assessment of the proposed transaction.

If the Commissioner issues a SIR, a second no-close waiting period is established, which expires 30 days after the day that the required information has been received by the Commissioner and certified complete by the parties (except in the context of hostile or unsolicited takeover bids, where the second no-close waiting period commences once the Commissioner receives the certified complete SIR response from the bidder).

While the issuance of a SIR is a formal process established by the Act, requests by the Commissioner during the initial waiting period for the voluntary disclosure of additional information are common and do not affect the statutory waiting period.

Consummation of the transaction is not permitted during the waiting periods. The Act provides for early termination of either waiting period by the Commissioner. This can be expected to occur if the review has been completed but not when the review is ongoing.

If the parties proceed by way of an application for an advance ruling certificate instead of filings, there is not a fixed timeline. The no-close period effectively runs until the Commissioner has either issued such a certificate or provided a 'no action' letter confirming the Commissioner's lack of intention, at that time, to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

In complex cases, reviews may extend beyond the statutory waiting periods. In those cases, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete, or seeks undertakings from the parties that they will not close the transaction without providing the Commissioner with an agreed amount of advance notice. There is no obligation to accommodate such a request, but merging parties often do so, typically in an effort to ensure that the Commissioner remains focused on assessing the evidence related to the transaction, rather than preparing for litigation or seeking an injunction.

Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period after the expiry of the statutory waiting period. In particular, if the parties plan to raise an efficiencies defence, the Commissioner has provided guidance indicating an expectation that the parties and the Bureau will enter into a model timing agreement to allow the Bureau sufficient time to evaluate the parties' claimed efficiencies.

The Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

If the Commissioner decides to challenge a transaction, another provision of the Act allows the Commissioner to seek an interlocutory injunction to prevent the transaction from closing in whole or in part, pending the resolution of the Commissioner's challenge on the merits. To obtain an interlocutory injunction, the Commissioner must prove that there will be 'irreparable harm' if the injunction is refused and that the 'balance of convenience' favours delaying the closing of the transaction.

The 2016 *Parkland* case clarified that irreparable harm includes harm to consumers and harm to the broader economy resulting from the transaction, where the harm cannot be undone by an order of the Competition Tribunal (the Tribunal) under the merger provisions of the Act. The Commissioner must provide 'sufficiently clear and non-speculative' evidence of market definition and concentration and likely harm to competition to meet this test.

The recent *SECURE/Tervita* case has also established that the Competition Tribunal may grant an interim injunction to allow time for the filing of an interlocutory injunction, in appropriate circumstances.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing prior to expiry of the applicable waiting period is a criminal offence that can be subject to a fine of C$50,000 and also a civil penalty of up to C$10,000 for each day of non-compliance. While there have been no reported cases of prosecutions, and while some leniency has been shown in cases of inadvertence, the Commissioner is likely to enforce this provision vigorously if it appears that the non-compliance was intentional.

There is also the possibility that coordination undertaken prior to closing that amounts to gun jumping could be subject to a prosecution for conspiracy or bid rigging (given that the parties would not (yet) benefit from the affiliates exception from these criminal offences).

Even if the waiting period has expired, closing before the Commissioner has completed reviewing the matter carries the risk of the Commissioner challenging the merger post-closing, if he or she concludes that the merger is likely to lessen or prevent competition substantially. He or she may seek a divestiture or dissolution order up to one year after the date of closing.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

To be subject to the Canadian notification provisions, and therefore subject to a no-close period in Canada, there must be a local nexus, including an 'operating business' in Canada. While foreign-to-foreign transactions with no on-the-ground Canadian nexus may be subject to substantive review if there are expected to be substantive effects in Canada, likely by way of diminished import competition to Canada, if there is no operating business in Canada, the transaction is not subject to notification and consequently not subject to a suspension period.

Subject to crafting a local hold-separate resolution (which is extremely rare), if the transaction is notifiable in Canada, the penalties for early closing outlined above would apply to foreign-to-foreign transactions.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing, and the Commissioner has not obtained an injunction or entered into a timing agreement with the parties.

The Commissioner will focus primarily on Canadian issues in all cases. In a foreign-to-foreign merger, the Bureau (and the Tribunal) will typically be receptive to local divestiture or possibly behavioural remedies as long as they are sufficient to address the domestic anticompetitive effects.

Local hold-separate arrangements pending resolution of a Bureau review or Tribunal proceeding have occasionally been employed in the past; however, the Bureau's Remedies Bulletin indicates that the circumstances in which the Bureau will consider agreeing to the use of such hold-separate agreements are narrow.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Rules exist to ensure that targets of hostile or unsolicited takeover bids supply their initial notification in a timely manner. In such a case, the 30-day no-close waiting period commences upon the submission of the acquirer's filing, even if the target has not yet submitted its information.

The Act provides for mechanisms to require the target of an unsolicited transaction to file information within 10 days.

For hostile or unsolicited takeover bids that result in SIRs being issued by the Commissioner, the second 30-day no-close waiting period commences upon the Commissioner's receipt of a certified response to the SIR from the acquirer.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information required for a pre-merger notification filing is set out in the Act and in regulations promulgated pursuant to the Act. The main requirements of the pre-merger notification filing are:

- an overview of the transaction structure;
- an executed copy of the legal documents to be used to implement the proposed transaction (or the latest draft thereof, if not yet finalised);
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified of the proposed transaction;
- a summary description of the principal businesses carried on by each party (on an affiliate-by-affiliate basis) and of the principal categories of products (or services) supplied by such businesses in their various markets, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information for each party;
- business, product, customer, supplier, financial and geographic scope of sales information of each of the party's principal businesses;
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction that contain market-related or competition-related information (similar to the '4(c)' documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act)); and
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales.

If the Bureau concludes during the initial 30-day review period that a more detailed review is warranted, it may issue a SIR requiring the production of additional documents and data. The Bureau's (non-binding) guidelines related to the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals.

The default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years.

Where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau may, in appropriate cases, work with the parties to try to limit the list of custodians (to the extent possible) to a list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

An officer or other person who has been duly authorised by the board of directors of the notifying party is required to certify on oath or solemn affirmation that, to the best of that person's knowledge and belief, all information provided in the pre-merger notification filing and in a response to a SIR (if applicable) is correct and complete in all material respects. Knowingly providing incorrect information could result in criminal prosecution for perjury in connection with swearing a false certificate.

The Act also contains an obstruction offence that applies where any person impedes or prevents or attempts to impede or prevent any inquiry or examination under the Act. Knowingly withholding or providing misleading information could be seen as impeding or attempting to impede an examination by the Commissioner.

There has also been one reported case where the Bureau advised merging parties (identities not disclosed) that it would rescind the previously issued clearance because the information received in connection with the merger notification was materially misleading.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

After notifications have been filed, the Bureau will typically have follow-up questions as it conducts its investigation. In transactions that give rise to a prima facie overlap or where it is not clear to the Bureau whether there is overlap based on information provided by the merging parties, Bureau staff will usually contact customers set out in the parties' filings (as well as other market participants) to solicit information from them regarding the proposed transaction. In addition, the Bureau may request that the parties to the merger provide additional information, documents or data, such as estimates of market shares.

If the Commissioner plans to issue a SIR, the scope of this request will be discussed with the merging parties very shortly before the expiry of the initial 30-day waiting period and these discussions may continue after the request is issued. The SIR will typically involve compulsory production of large volumes of documents and data. Subpoenas may also be issued to third parties to produce relevant documents or data. The provision of compulsory testimony through depositions before a hearing officer is possible but rarely used in practice.

Most complex mergers will involve face-to-face or videoconference meetings with Bureau staff and federal Department of Justice lawyers. Regardless of complexity, regular communication between the Bureau staff and the parties' counsel is the norm.

18 What is the statutory timetable for clearance? Can it be speeded up?

There is a 30-day no-close statutory waiting period from the day the filing is certified complete.

The Commissioner may, within the initial 30-day waiting period, issue a SIR requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close statutory waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by each of the parties.

In most straightforward cases, the Commissioner's review is concluded in less than two weeks; however, in more complex cases, the Bureau's review process may be substantially longer.

Although it is non-binding, the Bureau's Fee and Service Standards Handbook sets out the following 'service-standard' periods to which the Bureau will attempt to adhere in its review process:

- 14 days for non-complex mergers;
- 45 days for complex mergers, except where a SIR is issued; and
- 30 days after compliance with a SIR, for complex mergers where a SIR is issued (this last service-standard period is coextensive with the statutory no-close waiting period following compliance with a SIR).

The Bureau informs notifying parties of the commencement of its service standards within five business days of receiving sufficient information to assign a complexity rating, as outlined in its Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters; however, service standards are intended to be maximums, and the Bureau may (and often does, in non-complex cases) complete cases in less than the full service-standard period.

It is possible to speed up the timetable for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the service-standard periods (or both) expire. The Commissioner can terminate the waiting periods early – within the initial 30-day period or within the no-close period following the issuance of a SIR – if he or she is satisfied that there is not a competitive concern.

Parties and their counsel will usually provide additional information as requested by the Bureau on a voluntary basis and often submit detailed 'competitive impact' analyses to the Bureau to expedite completion of the review process.

If the parties proceed by way of an application for an advance ruling certificate, the no-close period effectively runs until the Commissioner has either issued such a certificate or provided a 'no action' letter confirming the Commissioner's lack of intention, at that time, to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

In cases in which a formal filing has been made and the 30-day period has expired but the Commissioner needs more time for his or her review, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate that request, but merging parties often do so; however, there have been a number of recent cases where merging parties have chosen to close their transactions once the waiting periods have expired but prior to the Bureau finishing its review. This includes:

- the *Parrish & Heimbecker/Louis Dreyfus* grain elevator sale that closed in December 2019 and that the Commissioner has challenged before the Competition Tribunal (case under reserve by the Competition Tribunal at the time of this writing);
- the *Thoma Bravo/Aucerna* deal that closed in May 2019 and that the Commissioner subsequently challenged, ultimately resulting in a divestiture pursuant to a consent agreement;
- the *Tervita/Newalta* deal that closed in July 2018, with the Commissioner opting to let the one-year deadline to challenge the transaction expire; and
- the *Pembina/Veresen* deal that closed in October 2017, with the Commissioner's decision not to challenge the transaction not being made until September 2018.

Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period after the expiry of the statutory waiting period, or for a period after the parties give the Commissioner notice of their intention to close. In particular, if the parties plan to raise an efficiencies defence, the Commissioner has provided recent guidance indicating an expectation that the parties and the Bureau will enter into a model timing agreement to allow the Bureau sufficient time to evaluate the parties' claimed efficiencies.

Alternatively, the Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

Given the foregoing, for simple transactions, the review period is typically about two weeks; however, for the most complex transactions, the review period can extend to 150 days, or even longer.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for the Commissioner of Competition (the Commissioner) to challenge and the Competition Tribunal (the Tribunal) to issue a remedial order is whether the merger or proposed merger is 'likely to prevent or lessen competition substantially' in any relevant market. The Competition Act (the Act) sets out a number of evaluative factors that the Tribunal (and, by implication, the Commissioner during his or her investigation) is to consider in applying this substantive test:

- the availability of acceptable substitute products;
- the effectiveness of remaining competition;
- foreign competition;
- whether the merger will remove a vigorous competitor from the market;
- whether the target entity has failed or is about to fail;
- barriers to entry;
- the nature and extent of change and innovation in the market; and
- any other relevant factors (which will often include the possible existence of countervailing buyer power).

At the time of writing, a bill is before Parliament (which is expected to be enacted by the time of publication) that will add an additional three factors:

- network effects within the market;
- whether the merger will contribute to the entrenchment of leading market participants; and
- effects on price or non-price competition, including quality, choice or consumer privacy.

The Act also requires that the Tribunal not make a determination on the basis of market shares or concentration ratios alone. While that provision is not yet subject to legislative change, the Commissioner has signalled that he would like a statutory amendment to permit the use of market share presumptions.

The Act provides an explicit statutory efficiencies defence that allows an otherwise anticompetitive merger to be 'saved' if there are offsetting efficiencies. A 2015 decision of the Supreme Court of Canada indicated that quantitative efficiencies and quantitative anticompetitive effects will typically be balanced against one another, after which non-quantitative evidence will also be considered.

The Commissioner has for some time expressed concern about the efficiencies defence, and recently made a submission, in response to a call for proposals from Senator Howard Wetston, that efficiencies generated by a transaction become a factor in determining whether a transaction is likely to lead to a substantial lessening or prevention of competition, rather than a defence. No statutory amendments with respect to the efficiencies defence have been introduced into Parliament at the time of writing.

The Commissioner's Merger Enforcement Guidelines (MEGs) elaborate on the views of the Competition Bureau (the Bureau) respecting each of the evaluative factors set out in the Act. They also establish safe harbours within which the Commissioner generally will not challenge a merger with regard to 'unilateral effects' and 'coordinated effects' theories of competitive harm.

In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent. Transactions that involve higher market shares or industry concentration are not automatically challenged but will generally receive careful scrutiny.

The fact of a 'failing firm' technically is not a defence to merger challenge; rather, whether the business, or part of the business, of a party to the merger or proposed merger has failed or is likely to fail is a factor to be considered by the Tribunal in determining whether a merger is likely to give rise to a substantial prevention or lessening of competition. The MEGs elaborate that if 'imminent failure' of a firm is probable and that, in the absence of the merger, the assets of the failing firm would be likely to exit the relevant market, then the loss of the actual or future competitive influence of the failing firm will not be attributed to the merger in the Bureau's review.

In addition, the Bureau will want to be satisfied that there are no competitively preferable alternatives to the proposed transaction, such as a competitively preferable purchaser, retrenchment by or even liquidation of the failing firm.

In April 2020, the Bureau released a position statement describing its approach to failing firm arguments after its review and decision not to challenge the *American Iron & Metal Company/Total Metal Recovery* transaction. It confirmed and elaborated on the approach in the MEGs that financial documents and related information will be examined in detail to determine whether the firm is failing and that no competitively preferable alternatives exist. The position statement also detailed the types of information that the Bureau typically gathers from customers, competitors and other interested parties to perform this analysis.

20 | Is there a special substantive test for joint ventures?

Joint ventures often fall within the definition of mergers and, in such situations, are subject to the same substantive test; however, the Act specifically exempts from merger review certain unincorporated 'combinations' in connection with one-off projects or programmes, including research and development projects, provided a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities and the extent of the adverse effect of the joint venture on competition.

Part IX of the Act contains an imperfectly analogous notification exemption for combinations if they are formed with a restricted range of activities, there is an agreement in writing or intended to be put in writing imposing an obligation to contribute assets to the combination and governing a continuing relationship between the parties, there is no change in control of a party, and there are provisions for orderly termination of the combination.

In March 2010, two new provisions of the Act came into force dealing with agreements between competitors. Such agreements may be subject either to criminal prosecution under the conspiracy offence or to challenge as a reviewable practice by way of an application to the Tribunal for a prohibition order. The substantive framework for the competitor agreements reviewable practice is almost identical to the merger provisions. Once the Bureau has decided which track to pursue (merger, civil agreement among competitors or criminal conspiracy), there are double jeopardy protections that preclude it from using the other tracks.

The Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be restricted to 'naked restraints' (cartel-like conduct) and that bona fide joint ventures that do not constitute mergers will normally be reviewed under the competitor agreements' reviewable practice provision.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current or potential competitors) is likely to lead to a substantial lessening or prevention of competition on either a unilateral effects basis or a coordinated effects basis. Under the unilateral theory of harm, the Bureau will consider whether the merged entity will likely be able to raise prices profitably (or lessen competition in other, non-price dimensions) as a result of the merger without relying on an accommodating response from its competitors.

Under the coordinated theory of harm, the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor, or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses.

Vertical mergers may raise concerns when they increase barriers to entry, raise rivals' costs or facilitate coordinated behaviour.

Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market de novo and eroded the existing market power of the other party.

In addition to price, the Bureau may also assess the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising or privacy, among other attributes.

Non-competition issues

22| To what extent are non-competition issues relevant in the review process?

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed by the Act's purpose clause, including its concern with ensuring that 'small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'. Broader issues, such as employment, head office functions, national champion concerns or other industrial policy considerations have not historically been relevant to the Commissioner's review. These factors can be relevant to an assessment under the Investment Canada Act.

Bureau reviews of proposed mergers in the federal financial services and transportation sectors on competition grounds may operate in parallel with ministerial approval processes that are based on broader public interest considerations. In both systems, the Commissioner's views on the competitive ramifications of proposed mergers inform but would not bind the relevant minister in making a decision on public interest grounds; thus, the Act specifically provides that the Tribunal shall not make an order in respect of a merger involving financial institutions or transportation undertakings in respect of which the Federal Minister of Finance or Minister of Transport, as the case may be, has certified to the Commissioner that the merger would be in the public interest.

In February 2019, the Commissioner provided a report to the Minister of Transport regarding a proposed merger of the two main airlines operating in northern Canada, Canadian North and First Air. The Bureau's report concluded that the proposed merger would give rise to significant competition concerns; however, in June 2019, the government approved this merger following a public interest assessment led by the Minister of Transport, notwithstanding the Commissioner's competition concerns.

Similarly, in March 2020, the Commissioner provided a report to the Minister of Transport regarding the proposed acquisition by Air Canada of Transat AT, concluding that this proposed acquisition would likely result in a substantial lessening or prevention of competition in the sale of air travel or vacation packages to Canadians. Specifically, the Commissioner indicated that the merger would substantially lessen competition on 83 routes originating in Canada with destinations in Europe, Mexico, Central America, the Caribbean, Florida and South America.

However, in February 2021, the government of Canada approved this merger subject to a number of terms and conditions. Notwithstanding the receipt of approval in Canada, Air Canada ultimately decided to abandon the deal in April 2021 in response to the European Commission signalling to the parties that it would not approve the transaction.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Act provides an efficiencies defence that allows an otherwise anticompetitive merger to be 'saved' by efficiencies that are likely to be greater than and offset any prevention or lessening of competition. The scope of the efficiencies defence was examined in the *Superior Propane* and the *CCS/Tervita* cases.

Superior Propane was the first litigated case in which a party succeeded in having an otherwise anticompetitive merger saved by efficiencies. A key issue in that case was whether a 'total surplus' or a 'consumer welfare' standard should be used to evaluate the trade-off between efficiencies and anticompetitive effects. The Tribunal adopted the total surplus standard, but the Federal Court of Appeal rejected this approach and remanded the case back to the Tribunal for reconsideration of the proper standard to apply. At the rehearing, the Tribunal again rejected the consumer welfare standard but adopted a 'balancing weights' approach, which gives some consideration to the redistributive effects of a merger (eg, negative impacts on low-income consumers) in addition to the overall magnitude of efficiency gains. This decision was upheld by the Federal Court of Appeal.

In *CCS/Tervita*, the Supreme Court of Canada overturned decisions of the Tribunal and Federal Court of Appeal and accepted the parties' efficiencies defence. While the majority decision of the Supreme Court recognised that the transaction's cognisable efficiencies were minimal, the Commissioner had not met the required burden to quantify the quantifiable anticompetitive effects of the merger. As a result, the transaction's minimal efficiencies were sufficient to outweigh the uncalculated anticompetitive effects, which were given a weight of zero.

In the same decision, the Court noted that there were economic arguments in favour of the total surplus approach to the efficiencies defence, but specified that the Tribunal has the flexibility to make the ultimate choice of methodology. Qualitative anticompetitive effects and qualitative efficiencies generated by a merger will only be considered and weighed against each other in the analysis in respect of effects and efficiencies that cannot be quantified. As a result, the Bureau now seeks to determine whether the parties plan to raise an efficiencies defence early in the review process.

Supplementary information requests typically have efficiency-related questions that parties must address if they intend to make an efficiency claim. The Bureau may require the production of considerable data so that it can properly quantify the transaction's anticompetitive effects and efficiencies.

In May 2020, the Bureau published a model timing agreement for merger reviews involving efficiencies claims. The timing agreement establishes stages, including when certain data and information are to be supplied to the Bureau, and how and when the Bureau will respond to the efficiencies arguments raised by the merging parties. The first transaction to use the (then draft) model timing agreement was the *Canadian National Railway Company (CN)/H&R Transport Limited* transaction in 2019.

In *CN/H&R*, the Bureau concluded that the acquisition by CN of H&R would likely result in a substantial lessening of competition in eight local markets, but the Bureau determined that the efficiency gains would be greater than the likely anticompetitive effects and therefore did not challenge the transaction. This is the latest in a series of cases where efficiency claims have 'saved' an otherwise anticompetitive transaction, not through litigation but during the Bureau's review.

In the 2017 *Superior Plus/Canwest Propane* transaction, the Bureau concluded that while the merger would give rise to a substantial lessening of competition in 10 local markets, it would not seek to require divestitures in those markets because the efficiency gains resulting from the transaction were likely to outweigh the anticompetitive effects in those local markets significantly. Divestitures were required in 12 other local markets where efficiency gains were not seen to outweigh the anticompetitive effects.

The Bureau also concluded that the efficiencies defence was applicable in its 2016 review of Superior Plus's proposed acquisition of Canexus, although this deal was abandoned because of a challenge by the Federal Trade Commission in the United States.

In addition, in the 2017 *First Air/Calm Air* merger, the Bureau noted that its financial expert found that the merger's efficiencies gains were likely to outweigh its anticompetitive effects significantly, leading to the Bureau's conclusion that it did not have a sufficient basis to challenge the merger. The Bureau's review of *Chemtrade/Canexus* in 2017 was also approved on the basis that the efficiencies that would likely be lost from blocking the merger or imposing remedies would significantly outweigh the likely anticompetitive effects of the merger.

In March 2018, the Bureau published for public comment a draft of a new guide for assessing efficiencies in merger reviews. The final version of the guide had not been published at the time of writing, and the draft guide has been removed from the Bureau's website; however, in May 2019, the then recently appointed Commissioner gave a speech in which he noted that he is highly unlikely to exercise his enforcement discretion to decline to challenge a potentially anticompetitive merger without 'reliable, credible and probative evidence that supports and validates the efficiencies defence being advanced'.

The Commissioner indicated that the Bureau would expect to receive detailed evidence supporting the efficiencies claimed, to have the opportunity to test the evidence underlying the efficiency claims and to be provided with adequate time, pursuant to timing agreements, to meaningfully assess the efficiencies. The model timing agreement provides detail on the type of information that the Bureau expects to receive from merging parties to substantiate efficiency claims.

In early 2021, the Standing Committee on Industry, Science and Technology studied Canada's competitiveness, which included considering possible amendments to the Competition Act. One possible amendment that was discussed and debated was the possible elimination of the efficiencies defence. The Commissioner, in a submission to a consultation on Competition Act amendments led by Senator Howard Wetston, has proposed that the efficiencies defence be removed from the Act.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Tribunal (the Tribunal) on application by the Commissioner of Competition (the Commissioner) may order the parties to a proposed merger to refrain from implementing their merger or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially. If a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares.

In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken to remedy the anticompetitive effects of a proposed or completed merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example, by giving divestment undertakings or behavioural remedies?

Divestitures are the primary remedy used in merger cases. In the *CCS/Tervita* case, the Competition Bureau (the Bureau) sought dissolution as the preferred remedy, but the Tribunal concluded that a divestiture order would be appropriate.

While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture and are more often seen in vertical rather than horizontal cases. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Any divestiture or other remedy ordered by the Tribunal must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. The Tribunal has broad jurisdiction to attach detailed terms and conditions to divestiture orders, including deadlines for completion and provisions appointing and empowering trustees to effect divestitures if the merging parties fail to do so in a timely manner. The Bureau also has broad discretion to negotiate the terms of divestiture or dissolution orders or behavioural remedies to be embodied in a consent agreement.

The Bureau's 2006 Remedies Bulletin indicates that it prefers 'fix-it-first' remedies whereby an approved upfront buyer is identified and, ideally, consummates its acquisition of the stand-alone business to be divested at the same time as the merger parties consummate their own transaction. When it is not possible to fix it first – which, in practice, is frequently – the Bureau will normally require that divestures be effected by the merging parties within three to six months. If they fail to do so, a trustee will be appointed to complete the sale in a similar time frame without any guaranteed minimum price to the seller.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign mergers with competitive effects within Canada are subject to the federal Competition Act, including its remedial provisions. Consequently, divestitures of Canadian assets have been required in many foreign-to-foreign mergers. In many of those cases, there were remedies in foreign jurisdictions as well.

In some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anticompetitive concerns in Canada. Examples include *United Technologies/Raytheon, Harris Corporation/L3 Technologies*, *United Technologies/Rockwell Collins*, *BASF/Ciba*, *Dow/Rohm & Haas*, *GE/Instrumentarium*, *Procter & Gamble/Gillette*, *UTC/Goodrich*, *Thomson/Reuters* and *Novartis/GSK*. In those cases, the remedies required by the US or European authorities were seen as sufficient to address Canadian concerns.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Bureau will consider ancillary restrictions as part of its consideration of the transaction as a whole; thus, its clearance of a transaction will normally also cover any ancillary restrictions that are known at the time of the review.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Bureau (the Bureau) routinely contacts customers, and often also suppliers and competitors, for factual information and their views about a merger; however, the Competition Act (the Act) authorises the Commissioner of Competition (the Commissioner) alone to bring an application to the Competition Tribunal (the Tribunal). Consequently, a complainant has no direct ability to challenge a merger.

The Bureau is attentive to complaints from all types of private parties. The Act also provides that any six residents of Canada can compel the Commissioner to conduct an inquiry into a merger or other matters under the Act, but the Commissioner remains the sole 'gatekeeper' who can commence a merger challenge before the Tribunal.

The Competition Tribunal Rules provide that if the Commissioner brings an application to the Tribunal, any party affected by the merger may seek leave to intervene; thus, complainants may obtain a formal voice in the proceedings at that stage.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All documents (including pre-merger notifications) and information provided to the Bureau are to be treated confidentially; however, the Act permits the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases).

In addition, the Commissioner may disclose information for the purposes of the administration or enforcement of the Act. This may occur in the Bureau's contacts with customers, suppliers and competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information to the extent possible.

The Commissioner's interpretation of the confidentiality safeguards in the Act is articulated in the Bureau's 2013 Information Bulletin on the Communication of Confidential Information Under the Competition Act. The Bureau takes the position that it has the power to share confidential information with foreign antitrust agencies without receiving a waiver from the parties providing the information, pursuant to the 'administration and enforcement' exemption. This interpretation is perceived by some as controversial and has not been tested before the courts.

The Bureau does not publicly announce the receipt of filings or commencement of investigations in the merger context. Once a merger review has been completed, the Bureau publishes the names of the merger parties, the industry in which they operate and the outcome of the Bureau's review in a monthly online registry. The Bureau also publishes press releases or position statements regarding decisions in high-profile cases.

If the merger proceeds to a hearing before the Tribunal, it may be necessary, for the purposes of administration and enforcement of the Act, for otherwise confidential information to be disclosed. While the Bureau's position that it had a 'public interest privilege' over all documents collected from third parties as a class as part of a Bureau investigation or inquiry was rejected by the Federal Court of Appeal in the *Vancouver Airport Authority* case, such a privilege may still be claimed for certain materials on a document-by-document basis. Competitively sensitive information of third parties can be protected in Tribunal proceedings through the use of confidentiality orders.

Where a challenge occurs or a remedy is embodied in a consent agreement, most of the relevant materials will be filed on the public record at the Tribunal; however, commercial or competitively sensitive material may be filed on a confidential basis if a protective order is obtained.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust cooperation instruments (cooperation agreements or memoranda of understanding) exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United States, the European Union and the United Kingdom, as well as between Canada and each of Australia, Brazil, Chile, China, Colombia, Hong Kong, India, Japan, Mexico, New Zealand, Peru, Singapore, South Korea and Taiwan.

In addition, in September 2020, the Bureau announced that it had signed a new multilateral competition enforcement framework with Australia, New Zealand, the United Kingdom and the United States.

In March 2021, the Bureau announced that it has joined its counterparts in the United States, the United Kingdom and the European Union to launch an international working group to develop an updated approach to analyse the effects of pharmaceutical mergers. This working group was initiated by the US Federal Trade Commission.

Unlike many of its sister agencies, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, as long as such sharing of information is likely to result in assistance to the Bureau in its review of a transaction; however, it frequently requests that merging parties grant confidentiality waivers to foreign agencies to enable them to engage in two-way communications with Bureau staff.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Although the Competition Bureau or the Commissioner investigates and determines whether to challenge a merger, the challenge is heard, and the decision is made by, the independent Competition Tribunal.

The Competition Tribunal Act provides for an appeal from a decision of the Competition Tribunal (the Tribunal) on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal is only available if leave is obtained from the Supreme Court of Canada.

In its decision in *CCS/Tervita*, the Supreme Court of Canada held that Tribunal decisions on questions of law are to be reviewed on a standard of correctness, and questions of fact and mixed law and fact are to be reviewed on the basis of reasonableness.

Although it is theoretically possible to obtain judicial review of the decisions or actions of the Commissioner of Competition (the Commissioner), in practice, he or she is accorded a very high amount of deference because the Commissioner's activities are investigative rather than adjudicative.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A decision of the Tribunal is appealable to the Federal Court of Appeal, but factual findings may only be appealed with leave of the court. The typical period for such an appeal is six to 12 months.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada is only available with leave from the Supreme Court, which is granted only infrequently. In the *CCS/Tervita* case, which is the most recent merger case reviewed by the Supreme Court, almost two years elapsed from the date of the Federal Court of Appeal decision until the Supreme Court of Canada released its decision (five months for leave to be granted, eight months for the case to be heard, and 10 months under reserve).

Enforcement decisions by the Commissioner (eg, a decision not to challenge a merger) are theoretically subject to judicial review by the Federal Court; however, such decisions are granted very substantial deference, so it is rare for complainants or other parties to bring an application for judicial review of such a decision. The time frame for such proceedings would likely be similar to appeals of Tribunal decisions.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Merging parties (both domestic and foreign) will typically work with the Commissioner of Competition (the Commissioner) to address any concerns he or she might have with their transaction, rather than face a lengthy and uncertain process of defending their merger through litigation before the Competition Tribunal (the Tribunal). As a result, the Commissioner has litigated very few contested proceedings before the Tribunal.

Among those cases litigated, the Commissioner obtained mixed results in the *Southam* newspaper case. The Commissioner failed to obtain a remedy in the *CCS/Tervita*, *Hillsdown* and *Superior Propane* cases. The Commissioner was also unsuccessful in attempting to obtain a temporary injunction against the *Labatt/Lakeport* merger and subsequently decided not to challenge the merger. More recently, the Commissioner obtained a partial injunction, and ultimately a consent resolution, in the *Parkland* case.

In some cases, the Commissioner has obtained remedies in merger cases on consent following the start of litigation. For example, in August 2019, the Commissioner succeeded in obtaining a divestiture on consent in *Thoma Bravo/Aucerna* following the Commissioner filing an application to the Tribunal challenging the transaction. The Commissioner's December 2019 challenge to the *Parrish & Heimbecker/Louis Dreyfus* grain elevator transaction, as well as its 2021 challenge to the *SECURE/Tervita* merger in the industrial waste sector, and its 2022 challenge to Rogers' acquisition of Shaw in the telecommunications sector remain ongoing as of the time of writing.

In the vast majority of cases in which the Commissioner has had concerns, the Competition Bureau (the Bureau) has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers, including *WESCO/Anixter*, *Elanco/Bayer Animal Health*, *Evonik/PeroxyChem*, *Linde/Praxair*, *BASF/Bayer*, *Bayer/Monsanto*, *Abbott/St Jude*, *Abbott/Alere*, *DuPont/Dow*, *Valspar/Sherwin-Williams*, *Teva/Allergan*, *Iron Mountain/Recall*, *Medtronic/Covidien*, *Novartis/Alcon*, *The Coca-Cola Company/Coca-Cola Enterprises*, *Teva/Ratiopharm* and *Live Nation/Ticketmaster*.

Transactions have also occasionally been abandoned in the face of opposition by the Commissioner (eg, Bell's proposed reacquisition of 50 per cent interests in two television channels from Corus in 2018, and the *LP/Ainsworth* and *Bragg/Kincardine* mergers in 2014).

The current merger review process was adopted in March 2009. From March 2009 to March 2022, supplementary information requests (SIRs) were issued in connection with approximately 150 transactions. In recent years, SIRs have been issued in approximately 5 to 6 per cent of transactions (5.1 per cent in the 2021/2022 fiscal year). Responding to those requests requires a significant investment of time and resources (similar to, although usually not as extensive as, the US 'second request' process). The time frame for the completion of the Bureau's review of a transaction subject to a SIR, after the parties provide the required information, has ranged from less than three months to seven-and-a-half months. For the 2021/2022 fiscal year the average time decreased to 86 days.

The substantive merger enforcement framework is set out in the 2011 Merger Enforcement Guidelines. The Bureau remains focused primarily on horizontal cases that could substantially lessen or prevent competition through unilateral or coordinated effects.

Reform proposals

35| Are there current proposals to change the legislation?

On 1 May 2018, technical changes were implemented to the provisions of the Competition Act (the Act) to expand the definitions related to affiliated entities. The earlier version of the Act did not fully capture affiliates held through trusts and partnerships.

In February 2021, Canada's House of Commons Standing Committee on Industry, Science and Technology passed a resolution that called for the Committee to conduct a study on 'competitiveness in Canada', which would include considering potential reforms to the Act.

In autumn 2021, Senator Howard Wetston called for submissions in respect of possible amendments to the Act. He received numerous submissions, including a proposal for some 35 amendments from the Commissioner, many related to mergers.

In its 2021 Budget, the government very significantly expanded the Bureau's budget, and in its 2022 Budget implementation bill it introduced a number of amendments to the merger provisions, including adding additional factors related to the assessment of mergers, clarification of rules surrounding unsolicited bids, and addition of an anti-avoidance provision to the merger notification rules. The amendments are before Parliament at the time of writing and are expected to become law by the time of publication.

In addition, a wider consultation on amendments to the Act, including changes to the efficiencies defence, is being launched and is expected to proceed in late 2022 into 2023.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The key developments in the past year include:

- confirmation, in the *SECURE/Tervita* case, that the Tribunal has the power to grant interim injunctions to temporarily prevent merger closings in urgent cases;
- the amendments to the merger provisions, which are before Parliament at the time of writing; and
- the consultation on more extensive amendments, including those that may repeal the efficiencies defence and that may allow the Commissioner of Competition (the Commissioner) to rely on rebuttable presumptions based on market share information, expected shortly.

At the time of writing, the Commissioner has three merger challenges (*Parrish & Heimbecker/Louis Dreyfus*; *SECURE/Tervita* and *Rogers/Shaw*) at one stage or another before the Competition Tribunal. This is a historic record for concurrent merger challenges and may signal a more aggressive stance by the Commissioner in the future.

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