Canadian merger control

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Any merger that is likely to affect competition in Canada is potentially subject to the application of Canadian merger control law. The Competition Act (Canada) (the ‘Act’), the source of Canada’s antitrust law, consists of substantive provisions that empower Canada’s commissioner of competition to challenge mergers that are anti-competitive and procedural provisions relating to pre-merger notification. It is important to emphasise that these two sets of provisions are entirely distinct; the fact that a transaction is not pre-notifiable has no bearing on the application of the substantive provisions and vice versa.

This chapter briefly describes the substantive merger provisions of the Act. It then sets out the Canadian pre-merger notification regime that applies to substantial mergers (whether or not any competition concerns arise). The third part of the article discusses the Canadian merger review process and procedure. Finally, we draw the reader’s attention to other merger review statutes that may give rise to additional notification obligations, including the Investment Canada Act.

Substantive merger provisions

A merger is defined by the Act as the acquisition of control over, or of a significant interest in, the whole or part of a business. Under the substantive provisions of the Act, if a merger lessens or prevents, or is likely to lessen or prevent, competition substantially, the Commissioner may make an application to the Competition Tribunal seeking remedies. The Tribunal is empowered to dissolve the merged entity and vice versa.

The principal issue will be whether a merger has or is likely to have a substantive anti-competitive effect in Canada. This usually requires a determination of whether there are overlaps between the parties. If there are, a standard market analysis is carried out to ascertain the market power of the merged entity and the competitive effects of the transaction.

The most important factors in assessing the effects of the merger on competition are the degree of concentration, barriers to entry, and the extent to which effective competition would remain in the market after the merger. The Act also provides that in assessing a merger regard may be had to other factors such as the availability of substitute products, the extent of foreign competition, whether the target is a failing firm and potential efficiency gains. While an in-depth examination of the application of the substantive merger provisions is beyond the scope of this article, the approach to merger analysis in Canada is very similar to other jurisdictions (such as the US) that assess the competitive impact of a merger on the basis of whether it will substantially lessen competition. We would observe, however, that because of the small size of the Canadian domestic market, greater concentration may be acceptable in industries where a relatively higher market share optimises efficiency and international competitiveness.

Applications to challenge mergers may only be brought by the commissioner and may be brought prior to, or within three years after, the substantial completion of the merger.

Pre-merger notification

Irrespective of whether a proposed merger is likely to lessen competition substantially in Canada, the Act requires merging parties to comply with the pre-merger notification requirements of the Act in respect of certain specified substantial transactions before such transactions can be completed. In order for a proposed transaction to be subject to pre-merger notification, the following requirements must cumulatively be satisfied:

- The parties to the transaction must satisfy the ‘size of parties’ threshold
- The proposed transaction must fit into one of five specific categories and exceed the ‘size of transaction’ threshold
- The proposed transaction is not otherwise exempt from pre-merger notification

Size of parties threshold

Pre-merger notification is not required unless the parties to the proposed transaction, together with all of their affiliates, have aggregate assets in Canada or gross annual revenues from sales in, from and into Canada that exceed C$400 million. In the case of a share acquisition, the parties to the proposed transaction are deemed to be the purchaser and the corporation the shares of which are being acquired.

Asset and revenue calculation

In general terms and with certain exceptions, the assets and revenues are to be calculated using book values based on the most recent annual audited financial statements for the relevant entity.

Size and category of transaction

In addition to the size of parties threshold, the proposed transaction must fall within one of five stipulated categories and the value of the transaction must meet the applicable size of transaction threshold. The size of transaction threshold is also based on asset value and annual revenues. The calculation of such asset value and revenues is similar to the determination of the size of parties threshold described in the previous paragraph (ie based on annual financial statements). An important difference is that the size of parties threshold refers to revenues in, from and into Canada, whereas the size of transaction threshold is limited to revenues in and from Canada.

The discussion below identifies the five categories of notifiable transactions and their respective thresholds. If a proposed transac-
Acquisition of assets
Pre-merger notification is required in respect of the acquisition of assets of an operating business in Canada that have an aggregate book value or generate gross annual revenues from sales in and from Canada in excess of C$50 million. For purposes of the Act, an operating business means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.

Acquisition of voting shares
The acquisition of voting shares will be subject to pre-merger notification if (i) a sufficient percentage of such voting shares is acquired, (ii) the acquired corporation or a subsidiary corporation thereof carries on an operating business in Canada, and (iii) the C$50 million size of transaction threshold is met.

A voting share is defined as a share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing. While this definition is somewhat ambiguous and subject to debate in Canada, in most circumstances it is clear whether the acquired shares are voting or not. The typical common share is a voting share.

The percentage threshold of voting shares that must be surpassed in order to trigger pre-merger notification is 20 per cent in the case of a public corporation, 35 per cent in the case of a private corporation, and 50 per cent if the purchaser already holds more than 20 per cent or 35 per cent of the voting shares, as the case may be. The acquisition of voting shares that does not cause the acquirer to surpass an applicable threshold is not notifiable (for example, going from 40 per cent to 50 per cent is not notifiable).

Finally, the aggregate book value of any of the assets in Canada of the acquired corporation and its subsidiary corporations (other than assets that are shares of any of those corporations) or the annual gross revenues from sales in and from Canada generated by such assets must exceed C$50 million.

Amalgamations
Pre-merger notification obligations apply in respect of the amalgamation of two or more corporations where (i) one or more of those corporations carries on an operating business, or controls a corporation that carries on an operating business, and (ii) the aggregate book value of the assets in Canada of the amalgamating corporations and their subsidiary corporations (other than assets that are shares of any of those corporations) or the annual gross revenues from sales in and from Canada generated by such assets exceed C$70 million.

The Canadian competition authorities treat the so-called ‘reverse triangular merger’ in the United States (where a parent company merges a wholly owned subsidiary with a target company resulting in the former shareholders of the target company receiving parent company shares) as an amalgamation for purposes of determining pre-merger notification requirements in Canada.

Combinations
A ‘combination’ is the combination of two or more persons to carry on business otherwise than through a corporation where one (or more) of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by such person or corporations controlled by such person. Partnerships formed in this manner would be considered to be a combination.

Pre-merger notification in respect of the formation of a combination would arise where the aggregate book value of any of the assets in Canada of the combination or the annual gross revenues from sales in and from Canada generated by such assets exceed C$50 million.

Acquisition of an interest in a combination
The acquisition of an interest in a combination that carries on an operating business is subject to pre-merger notification if a sufficient interest is acquired and the size of transaction threshold is met.

In order for the pre-merger notification provisions to apply, the acquirer must, as a result of the proposed acquisition of the interest, acquire an interest that entitles the acquirer to more than 35 per cent of the profits of the combination or more than 35 per cent of its assets on dissolution. If the acquirer is already so entitled, then the threshold is 50 per cent.

The size of transaction threshold is similar to the other categories, in that the notification obligation can only arise if the aggregate book value of any of the assets in Canada of the combination or the annual gross revenues from sales in and from Canada generated by such assets exceed C$50 million.

Exemptions
There are two categories of exemption from the requirement to file a pre-merger notification. The first category consists of obtaining a discretionary exemption from the commissioner of competition. Thus this first category still requires interaction of some kind with the regulatory authorities. The second category exempts the merging parties from providing any notice or requiring any discretionary waivers from the authorities.

Discretionary exemptions
Where the Commissioner is of the view that a proposed transaction does not give rise to any competition concerns, she may issue an advance ruling certificate, often referred to as an ‘ARC’. By issuing an ARC, the Commissioner waives their ability to later challenge the proposed merger under the substantive merger provisions of the Act. ARC requests are usually made in cases where the transaction has no prima facie anti-competitive effect. If an ARC is obtained, pre-merger notification is not required.

Where there has been an application for an ARC, but the commissioner is not prepared to issue an ARC (usually to preserve their ability to challenge the merger in the following three years) and the applicants supplied the Commissioner with information that is substantially similar to what would be contained in a formal notification, the commissioner may waive the obligation to file a formal notification.

Statutory exemptions
There are a number of statutory exemptions to pre-merger notification (although, as noted above, the substantive merger provisions continue to apply to most mergers, even if formal notification requirements do not). The statutory exemptions can be summarised as follows:

- a transaction all the parties to which are affiliates of each other;
- asset securitisations;
- joint ventures governed by a written agreement that (i) imposes on one or more of the parties an obligation to contribute assets, (ii) governs a continuing relationship among the parties, (iii) restricts the range of activities of the joint venture, and (iv) contains provisions that would allow for its orderly termination, provided that there is no change in control over any party to the joint venture that results from the joint venture;
- a transaction exempted by the minister of finance;
- the acquisition of real property or goods in the ordinary course of business if the person who proposes to acquire the assets
would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business;
- acquisition of voting shares for the purpose of underwriting such shares;
- an acquisition that would result from a gift, intestate succession or testamentary disposition;
- certain acquisitions resulting from a foreclosure or default or forming part of a debt work-out made by a creditor in or pursuant to a credit transaction entered into in good faith in the ordinary course of business; or
- the acquisition of a natural resource property by a person who will incur expenses to carry out exploration or development activities with respect to the property.

**Notification procedure and process**

If a proposed transaction is subject to a pre-merger notification requirement, the parties thereto may not close the transaction unless notice thereof has been given to the commissioner of competition and the applicable waiting period has expired or has been waived by the Commissioner.

The parties to a proposed transaction have the choice of filing either a long form or a short form notification. A long form (which requires substantially more information) is only filed in cases which may give rise to competition issues; in most cases the short form is preferred. If the short form is filed, the waiting period is 14 days; if the long form is filed, the waiting period is 42 days. If a short form is filed, the Commissioner may require that the long form be filed, in which case the waiting period becomes 42 days from the date that the long form is filed. Special waiting period rules apply in respect of the acquisition of voting shares through the facilities of a stock exchange in Canada.

Information required by the short form includes a description of the transaction, the identity of the parties and their affiliates, a description of the principal businesses, categories of products, the most important customers and suppliers and the geographic regions of sales. The long form requires considerably more detail, including documents prepared or received by a senior officer for the purpose of evaluating the transaction, the identity of the parties and their affiliates, a description of the principal businesses, categories of products, the most important customers and suppliers and the geographic regions of sales. The long form typically requires substantially more information.)

While it is not necessary to file more information than required by law (ie the form), any notification of a merger that raises issues should be accompanied by a competitive analysis, which includes additional information particularly in relation to market definition, the degree of competitive overlap, market concentration and barriers to entry. Although legally entitled to close after the expiry of the statutory waiting period, because the commissioner can challenge a closed transaction, parties generally do not close until the commissioner has completed her review and cleared the transaction, which may take longer than the statutory waiting period. The Competition Bureau (the agency that assists the commissioner in the enforcement of the Act) will normally advise the parties at the beginning of a review how long it is likely to take. The three service standard time frames utilised by the Bureau are two weeks, 10 weeks and five months, depending on the degree of complexity of the antitrust issues raised. The commissioner signals the completion of her review by the issuance of a no-action letter that indicates that she is of the view that there are no grounds to challenge the transaction.

As the Bureau can review and challenge mergers even if they are not subject to mandatory notification, parties may, in some circumstances, choose to voluntarily seek clearance of a non-notifiable transaction which raises competition issues.

**Application for an advance ruling certificate**

As indicated above, the parties may also apply for an advance ruling certificate (ARC) in respect of the proposed merger. This may be done in conjunction with or in lieu of the filing of the formal notification form. Generally speaking, if parties are confident that an ARC will be issued, a short form is not filed. Where, however, there is a risk that an ARC will not be issued, or if the transaction is subject to time pressures and the parties want the comfort of being able to rely on the expiry of the waiting period, a short form is typically filed.

**Filing fees**

The filing fee in respect of a merger is C$50,000. This filing fee applies irrespective of whether a short or long form is filed and/or an ARC is applied for. Even seeking an ARC or a no-action letter in the case where no pre-merger notification obligation arises is subject to the C$50,000 fee.
Other merger statutes
Although a detailed discussion of other merger statutes tangentially related to the Competition Act is beyond the scope of this article, we would draw the attention of the reader to the following two statutes that might apply to a proposed merger:

Investment Canada Act
If the acquirer is ultimately controlled by a non-Canadian, then the proposed acquisition may require approval from the federal minister designated pursuant to the Investment Canada Act. If the acquisition of control of a Canadian business is subject to review under such statute, the parties must satisfy the minister that the transaction is of net benefit to Canada before the transaction can be implemented. Factors that are relevant in the determination of net benefit include the effect of the proposed transaction on competition, economic activity, Canadian participation, productivity, innovation and the compatibility of the investment with national policies. The initial review period under such statute is 45 days, which can be extended by another 30 days.

Air transportation undertakings
If a proposed transaction is subject to pre-merger notification under the Competition Act and the transaction involves an air transportation undertaking, the merging parties will also have an obligation to file a notification with the minister of transportation and the Canadian Transportation Agency pursuant to the Canada Transportation Act and seek the required approvals thereunder. The Canada Transportation Act provides that no person shall complete such a transaction unless (i) the Canadian Transportation Agency determines that it would result in an air transportation undertaking that is Canadian, and (ii) the transaction is approved by the federal Cabinet based on the recommendation of the minister of transport (who will have received a report from the commissioner of competition). Such an approval will be subject to appropriate terms and conditions, including an indication of which of the terms and conditions address competition and which address national transportation concerns.

Notes
1 Remedies are discussed in greater detail in Canadian Competition Law Remedies chapter, page 85.
2 For the purposes of the Act, one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person. A corporation is a subsidiary of another corporation if it is controlled by that other corporation. If two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other. A partnership or a sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person. Note that a partnership is not necessarily affiliated with the entity that controls it. Also note that the Act has rules that delineate the manner in which control is exercised.