

Canada

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LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

Mergers are governed by the federal Competition Act (the Act), a statute of general application throughout Canada. The statute is interpreted in decisions of the Competition Tribunal and, on appeal, the courts. There are very few contested merger cases in Canada, however, and the principal source of guidance to both the procedural and substantive aspects of merger control in Canada is in the form of publications issued by the Competition Bureau. The most recent version of the Merger Enforcement Guidelines was released by the Bureau in 2004, and is scheduled to be updated in the fall of 2011. The MEGs provide guidance as to the economic standards that will be applied to analysing the competitive impact of mergers and how they will be assessed. The *Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (the Handbook), and the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act* (the Procedures Guide) provide useful procedural information. See www.competition.gc.ca.

The Investment Canada Act (ICA) allows for Canadian government review of acquisitions of control of Canadian businesses by a foreign-controlled entity, if the business exceeds certain prescribed thresholds. Review is generally to ensure that such acquisitions of control are of 'net benefit to Canada', although the ICA also enables the federal Cabinet to review a broad range of foreign investments in Canada (including potentially those that do not meet the thresholds for 'net benefit' review) if they may be injurious to Canada's national security. All non-reviewable foreign acquisitions of control of a Canadian business and the establishment of any new Canadian business by non-Canadians are subject to notification under the ICA. The ICA is augmented by regulations and by guidance published by the Investment Review Division (IRD) of Industry Canada. See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home for more information.

2. What are the relevant enforcement authorities, and what are their contact details?

The Commissioner of Competition (the Commissioner), a federal cabinet appointee, is charged with the administration and enforcement of the

Competition Act. She heads the Competition Bureau, a law enforcement agency that operates independently within the Department of Industry Canada, and supports the Commissioner.

The contact details for the Commissioner and the Bureau are as follows:
Competition Bureau - Merger Notification Unit
50 Victoria Street
Gatineau, Quebec K1A 0C9

Phone: 819-997-4282

Fax: 819-997-0324

Website: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home

Correspondence regarding the Investment Canada Act can be addressed to:
Director of Investments
Investment Review Division
Industry Canada
235 Queen St, Room 400B, East Tower
Ottawa, Ontario K1A 0H5

Phone: 613-954-1887

Fax: 613-954-3003

e-mail: investcan@ic.gc.ca

3. What types of transaction are potentially caught by the relevant legislation?

The acquisition by one party of a 'significant interest' in the business of another, whether by acquisition of assets or shares or by any other means, is a 'merger' under the Competition Act. However, what constitutes a 'significant interest' is not defined. The Merger Enforcement Guidelines suggest that a 'significant interest' could occur at as low as 10 per cent ownership or even without equity interest if contractual or other circumstances allow material influence to be exercised over another's business. That said, the Competition Act enables the Competition Tribunal to investigate and to prohibit agreements between competitors (or potential competitors) that substantially lessen or prevent competition, such that the merger control provisions of the Competition Act typically are applied to business combinations.

Pre-merger notification is required for certain types of transaction, if the relevant financial thresholds are met. These include asset acquisitions, share acquisitions, amalgamations, the formation of unincorporated combinations to carry on business, and the acquisitions of interests in such unincorporated combinations. The Commissioner may challenge any 'merger' she thinks will be anti-competitive, even if it is not subject to notification.

Under the ICA, mergers are only subject to 'net benefit' review if they meet the test for the acquisition of control (generally, the acquisition of more than a 50 per cent voting interest) by a non-Canadian entity (ie, an

entity or voting group that is ultimately controlled by individuals who are not Canadians) of a Canadian business (a business carried on in Canada with a place of business in Canada, assets in Canada and individuals who are employed or self-employed in connection with the business). The ICA specifies that only the acquisition of shares or other voting interests, or the acquisition of all or substantially all of the assets of a business can result in the 'acquisition of control' for purposes of that statute.

4. Are joint ventures caught, and if so, in what circumstances?

Joint ventures with a sufficient Canadian nexus are caught under section 110 of the Act. The joint venture will be captured based on the aggregate value of the assets in Canada and the gross revenues from sales in or from Canada. However, there are exemptions for joint ventures that meet certain criteria (see section 112 of the Competition Act).

If the formation of a joint venture gives rise to the acquisition of control of a Canadian business by a non-Canadian investor, the ICA will similarly apply.

5. What are the jurisdictional thresholds?

Determination of whether a transaction exceeds the thresholds for merger notification under the Competition Act depends on the specific structure of a given transaction. Generally, a proposed transaction is notifiable if it exceeds:

- (a) a 'size of parties' threshold (book value of assets in Canada or revenues in, from or into Canada, of the parties and all of their respective affiliates, must exceed Cdn\$400-million), and
- (b) a 'size of target' threshold (generally, Cdn\$73-million, based on the book value of the assets or entity in question, or gross revenues from sales in or from Canada generated therefrom – this threshold may be indexed annually – notice is generally provided in January of each year.)

In the case of share acquisitions, an additional 'shareholding threshold' must be met (ie, the acquirer must own, as a result of the transaction, more than 20 per cent of the voting shares of a public corporation or more than 35 per cent of the voting shares of a private corporation, or, if these shareholding levels are already exceeded, more than a 50 per cent shareholding in either a public or private corporation).

Special rules exist for determining asset and revenue values. Also, special rules exist for formation of business combinations otherwise than through a corporation, or the acquisition of interests in such a combination.

For ICA 'net benefit' review, the threshold depends on whether the acquisition of control is directly involving the Canadian business (ie, the acquisition of assets of the Canadian business or of the shares or voting interests of the entity that conducts the Canadian business), or only indirectly results in a change in control of the Canadian business by virtue of the acquisition of control of an offshore parent. The threshold also depends on whether the investor or the seller is, prior to the transaction, controlled by individuals who are from a WTO-member country (other than Canada). Generally speaking, the direct acquisition of control of a Canadian

business is subject to advance review and Ministerial approval if the book value of assets of the Canadian business (including all worldwide subsidiaries who report to Canada) exceeds Cdn\$312 million (indexed annually for inflation), for WTO-investors, and \$5 million if neither the buyer nor the seller is from a WTO-member country. Indirect acquisitions of control are subject to review (which may be post-closing) only if neither the seller nor the investor is from a WTO-member state (other than Canada), and if the book value of the assets exceeds Cdn\$50 million. The lower thresholds (Cdn\$5 million for direct and Cdn\$50 million for indirect) also apply to all acquisitions of control of a Canadian business engaged in (to however small a degree) a 'cultural' business (ie, distribution, publication or sale of books, magazines, periodicals, newspapers, musical scores; music, video or audio recordings; radio or television broadcasting). Almost all direct foreign investment in Canada can be subject to national security review (whether or not it is subject to 'net benefit review'), although only on the recommendation of the Minister of Industry after consultation with the Minister of Emergency Preparedness, and only by the federal Cabinet.

6. Are these thresholds subject to regular adjustment?

Under the Competition Act, only the 'size of target' threshold is subject to regular adjustment. Amendments are published in late January in the Canada Gazette, to account for inflation in the previous calendar year.

The WTO-investor threshold for review of a direct acquisition of control of a Canadian business (Cdn\$312 million for 2011) is indexed, and adjusted annually, in January, each year.

7. Are there any sector-specific thresholds?

The Competition Act covers all mergers (see question 3) and requires mandatory notification for those that exceed the thresholds set out in question 5. However, there are additional regulatory frameworks that are sector specific, which contain merger control provisions. For example, the ICA sets lower thresholds for the acquisition by foreign investors of a Canadian business that is a 'cultural business'. A 'cultural business' will include any entity that publishes, distributes or sells books, magazines, periodicals, newspapers, music, audio, film, video or music-video recordings. Further, specific review regimes are in place pursuant to sector-specific legislation for the broadcasting and telecommunications sector, airlines, financial institutions and cultural industries, among others.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

All mergers, as defined in the Competition Act, are potentially subject to review, regardless of whether they meet the thresholds for notification. As such, even if a merger is not notifiable under the Competition Act, it is important to consider whether it may raise any issues under the Competition Act's substantive merger provisions.

Pre-merger notification is mandatory for all of the described transactions

that exceed the jurisdictional thresholds (see question 5). Failure to notify without ‘good and sufficient cause’ constitutes a criminal offence that is subject to a fine of up to Cdn\$50,000.

In addition to a formal notification or (more often) instead of a formal notification, the parties to a transaction may request clearance of a transaction by the Commissioner, in the form of either an ‘advance ruling certificate’ (ARC) or a ‘no-action’ letter). An ARC or no-action letter can also be requested even for non-notifiable transactions.

Filing either a notification or an application for review (depending on whether the thresholds are met) under the ICA is mandatory, where the investor is non-Canadian and relevant thresholds are met. There is no mandatory filing associated with a potential national security review – rather, once such a review is ordered, the transaction may not close until it has received Cabinet approval.

9. Can a notification be avoided even where the thresholds are met, based on a ‘lack of effects’ argument?

No. All mergers that exceed the notification thresholds are notifiable under the Competition Act. Similarly, if the ICA review thresholds are met, a filing is required.

10. Are there special rules by which a notification of a ‘foreign-to-foreign’ transaction can be avoided even where the thresholds are met?

No. However, the target business must be, or control, an ‘operating business’ in Canada in order to come within the notification provisions of the Competition Act. An operating business is defined as ‘a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work’. Note that in order for the notification provisions of the Competition Act to apply there has to be an acquisition of an actual business – sales into Canada alone will not suffice.

A ‘foreign-to-foreign’ acquisition of control of a non-cultural Canadian business by (or from) a non-Canadian WTO investor is exempt from ‘net benefit’ review under the ICA.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

Yes. The Commissioner of Competition can initiate an inquiry into and ultimately challenge a merger under the Competition Act, whether or not it is notifiable, if it substantially lessens or prevents competition in Canada.

With the exception of cultural businesses or on national security grounds, the Minister responsible for the ICA cannot interfere with a transaction on the basis of the ICA unless it meets the threshold for review.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

There is no specific deadline by which a notification must be made under

the Competition Act. Despite this, considering that in the absence of early termination (see below), filing starts the clock on a statutory 30-day waiting period during which the transaction may not be ‘substantially completed’ (section 123), and this waiting period can be extended if the Commissioner requests additional information (see question 16), parties are advised to submit their notifications well in advance of the anticipated closing date for the transaction. To assist predictability, the Bureau classifies files upon intake according to the anticipated degree of complexity of its assessment of the likely competitive effects. Such an assessment is done only if the parties provide the Bureau with sufficient information upon which to base its assessment (ie, a competitive impact brief). Once such information is provided (and follow-up questions answered, if any), the Bureau will classify the transaction as either ‘non-complex’ or ‘complex’. According to the non-binding ‘service standards’ to which the Bureau is held accountable when its performance is assessed internally, it commits to processing non-complex transactions within 14 days of receipt of sufficient information. Complex transactions will be cleared (or a preliminary conclusion will be communicated, if a remedy is required), within 45 days or, where a supplementary information request or SIR is issued (ie, if the transaction was notified and raises serious issues), within 30 days following compliance with the SIR (ie, the same as the statutory waiting period). The length of time that should be allowed for Bureau review of a transaction varies, accordingly, from a bare minimum of two weeks prior to closing (preferably, even for non-complex transactions, 30 days, in case there are questions) to several months, depending on the complexity of the competitive analysis and the likelihood of remedies being requested by the Bureau.

Notifications under the ICA must be made within 30 days after closing. Applications for review of direct acquisitions of control must be filed in sufficient time to enable the Minister to give his decision and will not be able to close until Ministerial approval is obtained. The initial waiting period of 45 days is often (usually) extended by the Minister for an additional period of 30 days (and can be extended further with the agreement of the investor), such that investors are advised to file their applications for review a minimum of 75 days prior to the anticipated closing date and preferably earlier (allowing at least 100 days is recommended if the investor is a state-owned enterprise, if the Canadian business carries on cultural activities, or if the transaction will have a high public profile in Canada). Applications for review of indirect acquisitions of control can be filed up to 30 days after closing (and can also be filed prior to closing). A notice to the investor of an actual or potential national security review must be issued within 45 days following receipt by the Minister of a notification or an application for review under the ICA or, if neither is filed, then within 45 days of the transaction coming to his or her attention (additional time is permitted to transmit that notice to the investor). Where national security could be an issue, early filing of a notification or application for review or otherwise putting the Minister on notice about the transaction well in advance of closing should be considered.

13. Can a notification be made prior to signing a definitive agreement?

Yes. The parties to the transaction may request that the Bureau commence a confidential review process by providing it with details of the transaction in the absence of an executed agreement. However, in order to officially start the waiting period (or, if only an ARC or no-action letter has been requested and no notification has been filed, such that a waiting period will not start, in order to complete its review) the Bureau will require the consent of the parties for Bureau officials to undertake 'market contacts' ie speak to customers and competitors to ascertain the impact of the transaction on competition.

Similarly, no definitive agreement is required to be signed in order for an investor to file either a notification or an application for review under the ICA.

14. Who is responsible for notifying?

All parties to the proposed merger have the obligation to file pre-merger notification materials under the Competition Act. For share acquisitions, the Act deems only the acquirer of shares and the company whose shares are being acquired to be 'parties' to the transaction.

Under the ICA, only the investor is responsible for filing, whether an application for review or a notification.

15. What are the filing fees, if any?

Merger notifications under the Competition Act are subject to a Cdn\$50,000 filing fee, which is due at the time of filing. All 'parties to the transaction' carry the responsibility of paying the fees equally. Where both a formal notification and a request for an advance ruling certificate or no-action letter are filed in respect of the same transaction, only a single filing fee is required.

There are no filing fees under the foreign investment review or national security provisions of the ICA.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?

Yes. Section 123(1) imposes a 30-day statutory waiting period on all notified mergers. This waiting period is extended if the Commissioner requests, within the first 30 days, additional documents or information. If an SIR is issued, the waiting period is extended to 30 days following compliance with the SIR. The waiting period commences from the day the materials are received by the Bureau. Parties may take steps short of 'substantial completion' during this time period, but the transaction may not close until the waiting period is expired. That said, the Commissioner retains the right pursuant to the Competition Act to challenge any merger, even one that has been notified, for up to one year after closing, unless she has issued an advance ruling certificate in respect thereof.

Notification under the ICA does not carry with it a waiting period, and indeed can be filed up to 30 days after closing. Direct acquisitions of control

that are subject to ‘net benefit’ review under the ICA, however, may not be closed without prior Ministerial approval.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

On a case-by-case basis, the Bureau may allow a proposed merger to proceed while requiring the parties to hold all assets separate until all competition issues are resolved (ie a ‘hold separate’ agreement), and (typically) to divest whatever the Bureau requires it to after closing without requiring the filing of a contested case before the Competition Tribunal. Without such an agreement, closing of a notifiable transaction under the Competition Act is contingent upon either the expiry or waiver of the waiting period (if notification materials are filed) or the issuance of an ARC (which exempts the parties from the requirement to notify) or a no-action letter (which terminates the waiting period early). The use of a hold-separate agreement to enable the parties to close a transaction prior to Bureau sign-off is rare.

Ministerial approval of a reviewable transaction under the ‘net benefit’ provisions of the ICA is typically contingent upon the investor entering into binding undertakings with the Minister concerning its future conduct of the Canadian business. In the case of a direct acquisition of control of a Canadian business, closing is not permitted unless and until Ministerial approval has been obtained. Indirect acquisitions of control may close without such approval (indeed, the application for review can be filed up to 30 days post-closing).

18. Are any other exceptions (carve-outs, etc) available to allow parties to close/implement prior to approval?

No.

19. What are the possible sanctions for failing to notify a transaction?

It is a criminal offence under section 65(2) of the Competition Act to fail to notify a notifiable transaction. See also the answer to question 27 (filing false information).

Section 39 of the ICA enables the Minister responsible to request a foreign investor to ‘show cause’ as to why they are not in breach of the Act. Failure to comply with such a request can result in the application by the Minister to a court for a remedial order pursuant to section 40 of the ICA. Sanctions for failure to file an application for review could range from, among other things, a court order requiring divestiture and/or a fine of up to Cdn\$10,000 per day for each day of non-compliance.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called ‘gun-jumping’)?

Section 123 sets out the penalties that may be imposed for breach of the waiting period. These include: ordering that the parties dissolve the merger and imposing an administrative monetary penalty (‘AMP’, ie, a civil fine) of

up to Cdn\$10,000 for each day the breach is outstanding.

For penalties for closing before Ministerial approval is received under the ICA, see the response to question 19.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

Breach of an order of the Competition Tribunal prohibiting a merger is a criminal offence, punishable on indictment to a fine at the discretion of the court or to imprisonment for a term not exceeding five years (or both), and on summary conviction to a fine not exceeding Cdn\$25,000 or to imprisonment for a term not exceeding one year (or both) (Competition Act, section 66). Most merger cases in Canada where remedies are involved, however, are not contested before the Competition Tribunal, but are the subject of a negotiated settlement with the Commissioner. Such negotiated settlements are contained in a consent agreement which, upon registration with the Competition Tribunal, has the force of a Tribunal order. Sanctions for breach of a registered Consent Agreement are the same as for breach of any other Competition Tribunal order under the provisions in question, as noted herein.

For penalties for breach of the ICA, see the response to question 19.

22. What are the different phases of a review? Is there any way to speed up the review process?

For notifiable transactions, the receipt of a complete notification by the Bureau triggers a statutory 30-day period during which the merger cannot close (subject to an extension where an SIR is served – see question 16 above). The merger will be reviewed during the waiting period, although there is no guarantee that a decision will be delivered on or before the expiry of the 30 days. For greater predictability, the Commissioner has instituted a non-binding ‘service standard’ that represents the maximum departmental processing time: 14-days for ‘non-complex’ matters, 45-days for ‘complex’ matters or, where an SIR has been issued, 30 days following compliance with the SIR (ie, where an SIR is issued, the statutory waiting period). All filings are assessed once sufficient information is provided (it is customary in Canada for parties to file a competitive impact brief along with or instead of a formal notification), upon which to form an opinion as to its likely complexity from the point of view of analysing its likely competitive impact in Canada. Filing a fulsome competitive impact brief along with, in cases involving more than minimal competitive overlap, contact details for Canadian customers, is the best way to ensure a speedy review in Canada (see the *Procedures Guide* and the *Handbook* referred to in the response to question 1 for further detail).

As noted, the 30-day waiting period may be extended if the Commissioner requires additional information thorough the issuance of an SIR. In practice, parties will usually continue discussions with the Bureau staff while complying with an SIR, such that full compliance with an SIR may not be

necessary. Where the Commissioner finds that it obtained all the necessary information from the parties, but requires additional time to come to a conclusion, section 100 may be invoked to obtain an injunction preventing the merger from closing following the expiry of the waiting period. At any point, the waiting period may be terminated early through the issuance of a 'no-action' letter or an ARC by the Commissioner.

There are no distinct phases involved in a 'net benefit' review under the ICA. Once the application for review is filed, IRD staff will distribute a summary to the provinces where employees are located, will gather comments from those provinces, from interested federal government departments and (possibly) from other stakeholders and will commence discussions with the foreign investor regarding appropriate undertakings (if any). Once discussions with IRD staff are complete, the Minister will review the file and his or her decision will be communicated to the investor. See the response to question 12 for typical timeframes for review. National security reviews under the ICA follow a different (longer) process for which counsel should be consulted.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

The distinction between a 'short-form' and a 'long-form' notification form was eliminated from the Competition Act in Canada in the 2009 amendments. There is now only one notification form, and a uniform initial waiting period of 30 days, extendable if the Commissioner issues an SIR (see the response to question 12 for complete details).

That said, parties to a proposed merger may apply to the Commissioner for an advance ruling certificate (ARC) or a no-action letter as an alternative to formal notification. An ARC can be issued, at the discretion of the Commissioner or its delegate, in cases where it is satisfied that there will be no grounds upon which to challenge the merger before the Competition Tribunal. Issuance of an ARC exempts the transaction from the requirement to file formal notification materials (hence, is often filed in place of such notification materials, for non-complex cases) and, unless material new information coming to light, bars the Commissioner from challenging the transaction provided it closes within one year of issuance of the ARC (transactions which were the subject of an ARC and close more than one year later are still exempt from notification but do not benefit from the bar against being challenged).

Where the Commissioner has no significant concerns about a transaction, but is not willing to issue an ARC, then a 'no action letter' will be issued, which again states that the Commissioner is satisfied she does not have grounds at that time to challenge the transaction. Although a no-action letter will not serve to exempt the transaction from notification (as would an ARC), section 113(c) of the Act enables the Commissioner to waive the requirement to notify if equivalent information was provided in an application for an ARC. As a matter of practice, therefore, parties to non-complex transactions will often provide a competitive impact brief in the form of a request for an ARC or a no-action letter and request that, if a no-

action letter is provided, it be accompanied with a waiver of the requirement to notify. Such waivers are, in non-complex cases, routinely granted.

As noted above in the response to question 12, the vast majority of notifiable transactions are 'non-complex' (ie, have little if any overlap and/or small market shares in markets with low barriers to entry) and are typically processed by the Bureau within 14 days of receipt of a request for an ARC or no-action letter.

24. What types of data and what level of detail is required for a notification?

See question 26.

25. In which language(s) may notifications be submitted?

Notifications under the Competition Act may be filed in either of Canada's official languages: English and French.

While pre-existing documents in languages other than English or French are not required to be translated for the purpose of a notification under the Competition Act, information that is required to respond to an SIR pursuant to subsection 114(2) of the Act must be translated into either English or French. The foreign language document will need to be submitted together with the translation.

Notifications or applications for review under the ICA may be filed in either English or French.

26. Which documents must be submitted along with a notification?

A complete notification under the Competition Act will require, from each party:

- specified corporate information about the parties;
- an overview of the proposed transaction, including business objectives of the parties;
- a list of the other competition or antitrust authorities that have been notified of the proposed transaction (outside Canada) and the dates on which such notification took place;
- for each party, a list of its affiliates with significant assets in Canada or significant gross revenues from sales, in, from or into Canada and a chart describing their relationship to the party;
- for the party and each of its significant affiliates (as determined above), a summary description of each of its principal businesses, including annual reports or financial statements, a summary description of its principal categories of product within each business (as defined by the party or affiliate in its day-to-day operations), and lists of names and full contact details for each of the top 20 customers and suppliers for each such principal category of product, as well as the total sales or purchases for that category of product and the geographic scope of such sales or purchases;
- all 'reports, studies, surveys or analyses' prepared by or for an officer or director of the party and its affiliates or the purpose of evaluating or analysing the proposed transaction with respect to market shares,

competition, competitors, markets, potential for sales growth or expansion (the so-called '4(c)' documents for United States merger notification purposes); and

- an affidavit sworn by a senior officer of the notifying party, in appropriate form.

Copies of the notification form are available on the Bureau's website: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01705.html.

The Bureau may, within the 30-day initial waiting period, request that additional information be provided by way of an SIR. If an SIR is issued within this timeframe, the waiting period is extended until 30 days after compliance with the SIR. Any information not voluntarily provided may also be obtained by way of an ex parte application to the court (ie, an order issued under section 11 of the Act).

Information that should be contained in a request for an ARC or no-action letter generally comprises that required to explain the likely competitive impact: a description of the transaction and each of the parties, their businesses and any areas of overlap, and within each area of overlap, remaining competitors, market shares, barriers to entry, countervailing buyer power and any other factors relevant to a competitive assessment. If overlapping market shares are more than minimal (eg, 10 per cent), customer contact lists should also be provided (see the *Handbook* referred to in the response to question 1 for more detailed guidance).

The information required in a notification under the ICA is generally confined to boilerplate information about the investor, the ultimate controlling entity, the country of control, the number of employees and the book value of assets of the Canadian business. An application for review under the ICA is more onerous and includes not only more fulsome descriptions of the parties, and three years of financial statements for each, but a detailed narrative describing the 'plans' of the investor for the Canadian business according to the detailed list of factors that the Minister must consider, as specified in section 20 of the ICA (employment, capital expenditure, participation by Canadians in management and the board, resource processing in Canada, the use of Canadian suppliers, the impact on competition, compatibility with provincial or federal economic or cultural policies, etc).

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

According to section 65(2), any person who intentionally conceals information during the notification process, without a valid excuse, may be liable of an offence and liable to a fine of up to Cdn\$50,000.

For sanctions under the ICA, see the response to question 19.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

The Bureau encourages consultations in advance of submitting a merger

notification if significant issues will be raised. The goal of early consultations is to provide appropriate context and basic information to the Bureau officers involved in the review of the proposed transaction and to assist in identifying issues that may require further examination early on. The Bureau encourages pre-notification consultations as these may reduce the scope of or necessity for an SIR. However, whether this opportunity is taken advantage of is wholly reliant on the parties' willingness to engage in advance discussions with the Bureau. As such, while not uncommon, they are far from customary. That said, where timing is likely to be an issue, parties may choose to file a request for an ARC or no-action letter (ie, the competitive impact brief) prior to filing a formal notification (ie, prior to commencing the waiting period), in order to give the Bureau more time with the transaction and thereby to maximise the chance that an SIR will not be issued.

Pre-filing discussions with IRD officials in respect of a 'net benefit' review under the ICA are also possible, but would not be customary.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

All information filed with the Commissioner and the Competition Bureau is subject to strict confidentiality provisions under the Competition Act and is exempt from disclosure under the federal Access to Information Act. The only exceptions from the prohibition against disclosure pertain to: (i) information that is already public; (ii) disclosure to another Canadian law enforcement agency; and (iii) when disclosure is necessary for the administration or enforcement of the Act. Please note that the Commissioner takes the view that this latter exception permits the Bureau to share information with antitrust enforcement authorities in other jurisdictions if required in order to advance the Bureau's review of the same transaction (ie, a waiver is not required in order for the Bureau to share information with other antitrust agencies with which it may wish to coordinate its review, even though those same agencies may require waivers from the parties in order to reciprocate). The Bureau's track record with respect to the treatment of confidential information is excellent and since the Bureau issues no public decisions or case summaries (other than the occasional press release and backgrounder with summary information), very few facts are known about the vast majority of merger reviews in Canada, other than those for which Consent Agreements are filed with the Competition Tribunal or the (very rare) contested proceeding.

Information provided to the IRD under the ICA is both confidential and privileged, and officials cannot be forced to divulge the information, even in the context of a court proceeding (other than for the enforcement of the ICA). It is also exempt from disclosure under the federal Access to Information Act. There are certain exceptions, however, including posting of the fact of a notification or review on the Industry Canada website, disclosure to provincial or federal officials for the purpose of

the administration or enforcement of the ICA, publication of accepted undertakings given in order to obtain approval under the ICA, and reasons given by the Minister for rejection of an investment (see section 35 of the ICA).

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

The fact of notification under the Competition Act is typically not made public. Section 29 of the Competition Act prohibits the Commissioner and Bureau employees from disclosing any information filed by the parties, and the manner in which it was received, unless the information otherwise becomes publically available subject to some exceptions – see question 29 for details. If the Bureau wishes to disclose any private information in its possession to the public, then it will be required to obtain the consent of the parties before publishing any press release. Such consent is often requested, and granted, in approved cases where there were significant issues to consider, and is usually a condition of a Consent Agreement. As noted in the response to question 29, however, Bureau officials are permitted to disclose information provided to it by the filing parties to the extent that this is required for the purposes of the ‘administration or enforcement’ of the Act. As such, the Commissioner reserves the right to make ‘market contacts’ (ie, calls to customers, suppliers and competitors) for any transaction that is notified, or is the subject of a request for an ARC or no-action letter. Such calls are conducted in a manner which minimises disclosure of information provided by the parties (the calls are designed to elicit information, not to provide it) but inevitably the fact of the proposed transaction, for example, must be revealed.

As noted in the response to question 29, ICA notifications and applications for review are noted on the Industry Canada website, in very summary detail.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

Decisions of the Competition Bureau are not routinely published, nor even listed publicly. Press releases are issued for significant or interesting transactions, and Consent Agreements that are registered with the Competition Tribunal are, generally speaking, public documents (although confidential appendices are sometimes used, for example, for certain details of required divestitures if disclosure would harm the divestiture process). Press releases and ‘backgrounders’ are commonly released in connection with the registration of a Consent Agreement.

Other than the fact of a notification or application for review, details are not routinely published for transactions subject to the ICA. As noted above, undertakings provided in order to obtain Ministerial approval of a reviewable transaction can be published, as can reasons for a negative decision (if made final – very rare).

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The substantive test for the Commissioner to challenge a merger before the Competition Tribunal under section 92 of the Competition Act is whether the merger results, or is likely to result, in a substantial prevention or lessening of competition. This has been interpreted by the Tribunal and the courts to mean the creation, preservation or reinforcement of market power (ie, the ability to increase price or otherwise to behave relatively independently of competitive forces). An ‘efficiencies defence’ is available under section 96 of the Act, which prohibits the Tribunal from making an order in respect of an otherwise anti-competitive merger if the likely efficiencies outweigh and offset the anti-competitive effects, and if the efficiencies will not likely be achieved if the order is issued.

Foreign acquisitions of control of a Canadian business which satisfies certain thresholds must satisfy the relevant Minister under the ICA that the transaction is likely to be of ‘net benefit’ to Canada, according to a list or prescribed criteria contained in section 20 of the ICA (employment, capital expenditure, participation by Canadians in management and the board, resource processing in Canada, the use of Canadian suppliers, the impact on competition, compatibility with provincial or federal economic or cultural policies, etc.)

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

All potential theories of competitive harm are analysed by the Competition Bureau when assessing the likelihood that it will substantially lessen or prevent competition. Horizontal effects are the primary focus, but market foreclosure will be carefully considered where vertical issues arise, and the possibility for increased coordination will be considered in appropriate cases. Section 96 of the Competition Act provides that an otherwise anti-competitive merger cannot be the subject of a remedy if the merger will give rise to efficiencies that will not be achieved if the remedy is required, and the efficiencies are greater than and offset the anti-competitive effects of the merger. The Merger Enforcement Guidelines contain considerable detail about the types of analysis and the evidence used to assess both anti-competitive effects and efficiencies.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

As a general rule, ‘non-competition’ issues, such as industrial policy or labour policy issues are not considered by the Competition Bureau in its

analysis, unless such policies form a barrier to entry. It is very 'apolitical'. However, the Bureau is obliged by case law to consider all of the purposes of the Act when considering the extent of likely anti-competitive effects and whether they might be offset and outweighed by merger-related efficiencies (a possible defence to an otherwise anti-competitive merger); that is, 'to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy' and to 'ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'.

Although the likely competitive impact is one factor which the Minister must consider when assessing whether a reviewable transaction is likely to be of 'net benefit' to Canada under section 20 of the ICA, as a matter of practice, the Minister is unlikely to approve a reviewable transaction unless the Competition Bureau has been notified and has issued an ARC or a no-action letter or otherwise approved the transaction. The other factors the Minister is required to consider arguably are all non-competition in nature.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

A defence is available to parties under section 96 to argue economic benefits as 'gains in efficiency' in favour of the merger (see the response to question 43).

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

By virtue of the operation of the various international treaties, the Competition Bureau is able to cooperate with other jurisdictions (most commonly the United States and the European Commission) when dealing with large scale mergers that may impact multiple countries including Canada. No waiver is required for the Bureau to share information with other authorities if to do so will enable it to advance its own inquiry; however, other jurisdictions such as the United States and the European Community commonly require such a waiver in order to reciprocate.

The 2002 amendments to the Act incorporated a framework that allows Canada to assist signatory countries to the Mutual Legal Assistance Treaty (MLAT) in the enforcement efforts of their competition regimes and for signatory countries to do the same for Canada.

37. To what extent are third parties involved in the review process?

Although the Act only authorises the Commissioner of Competition to challenge mergers, third parties take a substantial indirect role in the pre-merger review process. For instance, the Bureau may be persuaded by complaints it receives from the public to review a particular transaction. Further, the Commissioner may, and usually does, solicit opinions and evidence from customers, suppliers and competitors in order to help form its own decisions and to present before the Competition Tribunal, if necessary. If not provided voluntarily, information can also be obtained from third

parties pursuant to a court order for documents, information or testimony, under section 11 of the Act.

Third parties are not typically involved in the ICA review process, other than other federal departments or provincial governments. That said, the Minister can obtain information from any third party, if desired and relevant.

38. Is it possible for the parties to propose remedies for potential competition issues?

Either the parties or the Commissioner can propose remedies under the Competition Act, whereas only the Tribunal may impose them. Remedies may be offered at any stage of the process.

In most cases, remedies are agreed upon through negotiations between the parties and the Commissioner and suggestions from the parties on the appropriate remedies are very much encouraged. The remedies agreed upon will then be entered into a Consent Agreement that is signed by the parties and the Commissioner and filed with the Tribunal. Once filed, an agreement has the same force and effect as a decision of the Tribunal. As such, no remedies may be listed in a Consent Agreement that are not within the jurisdiction of the Tribunal to award. Third parties play no role in this process, but can apply to vary or rescind a Consent Agreement only on the grounds that the remedy could not have been issued by the Tribunal.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies, etc)?

If the Commissioner is satisfied that a merger prevents or lessens competition substantially, or is likely to do so, he/she may make an application to the Competition Tribunal for remedial relief.

The Commissioner may apply to the Competition Tribunal for a remedial order in respect of a merger any time within one year after the substantial completion of the merger, unless the Commissioner has issued an ARC in respect of the merger pursuant to section 102 of the Competition Act.

As set out in section 92(1)(e) and 92(1)(f), the Act is specific about the remedies the Tribunal can impose in contested cases. Such remedies include, in the case of completed mergers, the dissolution of the merger, disposition of assets or shares, or (with the consent of the parties) the taking of any other action. When dealing with a proposed merger the Tribunal may issue an order prohibiting the parties from proceeding with the transaction; or ordering the parties to refrain from completing the merger until the Tribunal is satisfied that the transaction does not prevent or lessen competition.

As described in the *Information Bulletin on Merger Remedies in Canada* (posted on the Bureau website), the Bureau generally speaking has a strong preference for structural remedies. Behaviour remedies have been approved in appropriate cases, however, particularly where vertical issues were involved.

40. What power does the relevant authority have to enforce a prohibition decision?

The Commissioner has no authority to compel or enforce remedies upon parties. Although sanctions may later be imposed on parties who, nonetheless, finalise a transaction that was prohibited, the Bureau does not have any way to prevent them from doing so without going to the Tribunal or a court to enforce a Tribunal order. If no consensual remedy can be agreed upon, and the parties wish to proceed, the Commissioner is obliged to challenge the transaction at the Competition Tribunal.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

The Commissioner of Competition can challenge a merger under the Competition Act whether or not it is notifiable (by way of application to the Competition Tribunal).

When a merger is likely to prevent or lessen competition substantially, the Bureau generally attempts to reach an agreement with the parties without resorting to litigation. However, in the event that an agreement cannot be reached, the Commissioner can apply to the Competition Tribunal to challenge the merger under section 92 of the Competition Act.

Final decisions made by the Tribunal may be appealed as to questions of law (and with leave as to questions of fact) to the Federal Court of Appeal. Decisions of the Federal Court of Appeal may themselves be appealed, with leave, to the Supreme Court of Canada.

42. What is the typical duration of a review on appeal?

The typical duration of an appeal of a Competition Tribunal decision is between six and 12 months.

43. Have there been any successful appeals?

The Superior Propane decision (*Commissioner of Competition v. Superior Propane Inc.* (30 August 2000), CT 1998 002/192, Reasons and Order (Comp. Trib.)) marked the first and only time where the Tribunal allowed a merger to proceed based on the 'efficiency defence'. In deciding this, the Tribunal found that a merger to monopoly was allowable, where it met the 'total surplus standard'; that is, where the anti-competitive impact was outweighed and offset by the efficiencies that would be derived as a result of the merger. The Commissioner of Competition successfully appealed the Tribunal's decision. The Court of Appeal held that the Competition Tribunal had erred in law by limiting the effects to be considered to resource-allocation effects and by failing to ensure that all of the objectives of the Act, and the particular circumstances of each merger, were considered in the balancing exercise mandated by section 96 of the Act. Although the Commissioner won the appeal, the Competition Tribunal in its Redetermination Decision (2002 Comp Trib 16) re-affirmed its decision to permit the merger on the basis of the efficiencies defence.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

In 2010, the Competition Bureau reviewed a total of 216 mergers, which includes both notifiable and non-notifiable transactions. Of the 216 merger cases reviewed, only 10 were the subject of formal notification filings (the vast majority are the subject of requests for ARCs or no-action letters, while a few were not subject to notification).

While there was a significant increase in the number of mergers reviewed by the Bureau from 2003–2004 through 2007–2008, the impact of the 2008–2009 recession resulted in a decline in the number of filings reviewed during that year and in 2009–2010.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

In Canada, the authority (the Bureau) does not have the authority to prohibit a transaction. If the Commissioner concludes that a transaction is likely to result in a substantial lessening and/or prevention of competition (and no Consent Agreement is reached), it may bring an application before the Competition Tribunal to challenge the merger under section 92 of the Act. Undoubtedly, transactions are abandoned in the face of Bureau opposition but this fact would not necessarily be publicly known.

Contested merger cases are, however, comparatively rare in Canada. Most cases where the Commissioner requires a remedy result in registered Consent Agreements. Since the 1998 case in Superior Propane, discussed above, the Commissioner sought an interim injunction to delay the acquisition by Labatt Brewing Company Limited of Lakeport Brewing Income Fund while she completed her review. The first ever request for an injunction under section 100 of the Act was denied by the Competition Tribunal (2007 Comp. Trib. 9) and the transaction proceeded, with the Commissioner eventually deciding not to challenge the transaction. An interim injunction was again requested in *Commissioner of Competition v. American Iron & Metal Co. Inc.* (CT-2008-001), but the parties quickly reached a settlement and registered a Consent Agreement to end that case. Finally, the Commissioner filed an application to challenge the acquisition by CCS Corporation of Complete Environmental Inc. and its wholly-owned subsidiary, Babkirk Land Services Inc. in January, 2011. The respondents have filed their reply, indicating they intend to contest the Bureau's position. A scheduling order was issued on 2 May 2011, with a hearing of the matter scheduled to commence on 16 November 2011 and to last approximately one month (2011 Comp. Trib. 4)

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

According to the Bureau's Merger Review Performance Reports, in fiscal 2009-2010, 2.7 per cent of the total number of merger cases reviewed by the Bureau resulted in Consent Agreements being registered with the

Tribunal. In the 2007-2008 fiscal year, only 0.6 per cent of the total number of transactions received by the Bureau resulted in a registered Consent Agreement.

47. How frequently has the authority imposed fines in the past five years?

There is no authority to issue fines in Canada in respect of mergers, other than for failure to notify or failure to respect the waiting period, and no such fines have been issued, to date.

