Canadian Competition and Foreign Investment Outlook 2018

Stikeman Elliott LLP

Stikeman Elliott

Introduction

This *Canadian Competition and Foreign Investment Outlook 2018*, developed by Stikeman Elliott's Competition & Foreign Investment Group, is a "cheat sheet" for clients and legal counsel to quickly check whether a transaction is likely to trigger merger filings in Canada. In addition, we include a few insights on relevant merger control developments in Canada, both from a *Competition Act* and an *Investment Canada Act* perspective.

As one of the most active transactional law firms in Canada, with a pre-eminent Competition & Foreign Investment Group, we play a leading role in securing regulatory approvals in respect of many of Canada's most substantively complex mergers, year in and year out. We pride ourselves in providing clients with efficient and pragmatic advice and sophisticated advocacy on major national and international transactions, as well as day-to-day compliance matters across all industries. We have also acted on the most noteworthy foreign investment transactions in recent years, representing both Canadian targets and foreign purchasers.

Our group has some of the best minds in the industry, which is why we have been recognized as a Band 1 Competition/Antitrust Group in *Chambers Canada* and *Chambers Global* as well as an Elite law firm in the *Global Competition Review's GCR 100* consistently, year after year.

We hope you find this publication useful. If and when you determine that filings might be required in Canada, we hope that you make Stikeman Elliott your first call.

© Stikeman Elliott LLP

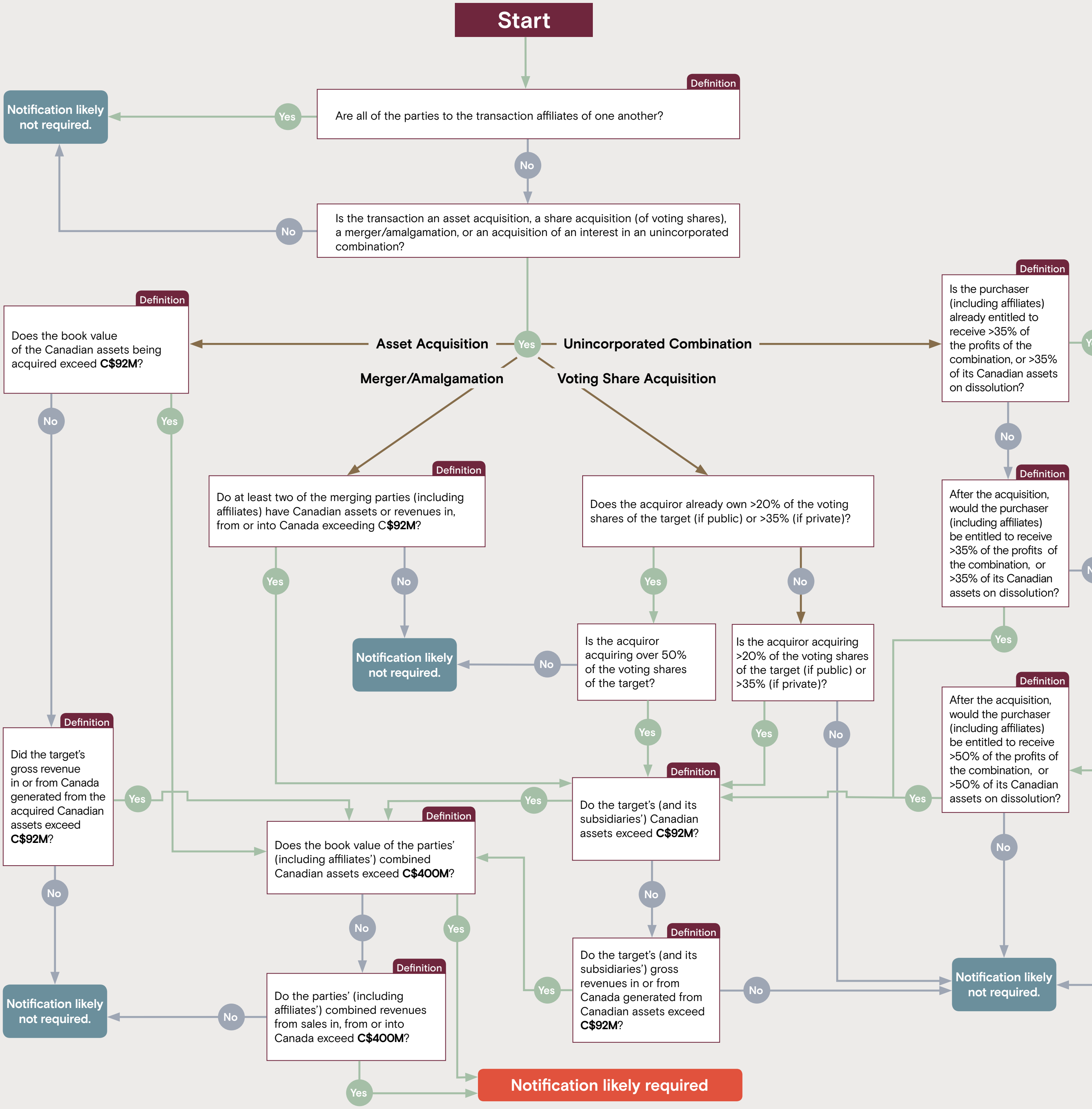
Canadian Competition and Foreign Investment Outlook 2018

Merger Notification Assessment Tool

Michael Laskey

Transactions exceeding certain thresholds require mandatory pre-merger notification to the Canadian Competition Bureau. This flowchart will help assess whether a merger is subject to mandatory pre-merger notification under the *Competition Act*. Please note that this flowchart does not constitute legal advice and, in particular, that other exemptions from the notification requirements may apply. Monetary thresholds referred to in this chart are current as of February 2018, with the relevant figures being calculated as of the end of the most recently completed financial year.

* Hover mouse over Definition tab to show details.



Stikeman Elliott

Merger Control Update

Michael Kilby

Merger review under the *Competition Act* continues to be an area of intense activity for the Competition Bureau. In its last fiscal year, the Bureau completed 222 merger reviews, of which 21 involved Supplementary Information Requests (SIRs), with eight reviews ultimately resulting in a remedy. The SIR count, at approximately 10% of merger reviews, represents the highest number since the SIR process was introduced in 2009. The Bureau has attributed the steadily increasing number of SIRs in recent years to a wave of substantively complex mergers, rather than any changed standard for issuing SIRs. Our own view is that this higher level of SIRs may be the "new normal" and we will be watching closely for any variations in 2018 and beyond.

With respect to remedies, we have observed several recent trends relating to cross-border remedies and also to "fix it first" remedies proactively proposed by merging parties. This Outlook provides a few of our insights regarding these remedy trends in Canada, together with an update on the uniquely Canadian efficiencies defense.

Merger Remedies

Global Mergers

There continues to be significant, but not complete, convergence between Canadian remedies and U.S./EU remedies on high-profile, cross-border transactions. The most notable 2017 examples include the *Dow/DuPont* and *Sherwin-Williams/Valspar* transactions, in which the Bureau obtained remedies via formal consent agreements registered at the Competition Tribunal, with the Canadian remedies being extremely similar, if not identical, to the U.S. remedies. We believe this reflects ever-increasing coordination and cooperation between the Bureau and international antitrust agencies. We expect this trend to continue.

At the same time, however, there are clearly instances where Canadian remedies will differ from U.S./EU remedies (e.g., in pharmaceutical transactions where market structures for particular products can vary significantly between countries) or where there is no Canadian remedy at all because the Competition Bureau is satisfied that the foreign remedies will fully resolve any Canadian anti-competitive effects (e.g., *Anheuser-Busch InBev/SABMiller*) or the Bureau appears to have reached a fundamentally different substantive conclusion from its international counterparts, (e.g., *GE/Electrolux* – blocked in the U.S., cleared in Canada). It is therefore the case that while there continues to be broad convergence in merger remedies on cross-border transactions involving Canada, such convergence is far from absolute and the different approaches available to the Bureau may allow for made-in-Canada solutions on the right set of facts, although it must be said that discerning those particular facts is not easily done.

Proactive Remedies

The Bureau has been confronted recently with several scenarios in which parties have proposed specific remedies — the sale of assets to pre-identified third-party buyers — concurrent with the announcement of their main transaction. The parties have positioned these on-sale transactions as remedies which the Bureau should take into account when carrying out its review of the main transactions, and as effectively presenting a "fix it first" remedy solution. The most notable 2017 examples include transactions in the retail gas industry and the mobile wireless industry. More specifically, Alimentation Couche-Tard concurrently announced both the acquisition of CST Brands and the subsequent sale of the majority of CST's Canadian retail gas stations to Parkland Industries, and BCE concurrently announced both the acquisition of MTS (a mobile wireless provider in the province of Manitoba) and the subsequent sale of mobile wireless assets (most notably, subscribers) to Telus, another competitor with smaller market share in Manitoba.

The Bureau's clear position in relation to these sorts of proposals has been to analyze first the main transaction without regard to the proposed remedy, reach conclusions as to the anti-competitive effects arising from the main transaction, and to only then consider whether the proposed remedy addresses those effects. The Bureau's position appears to be grounded in the principle, which has support in Canadian case law, that it can only seek a remedy where it has concluded that a substantial lessening of competition will result and that it cannot simply accept a remedy out of the gate before it has carried out the substantive work necessary to support the conclusion. In addition, the Bureau has shown deep skepticism that the remedies proactively proposed by the parties out of the gate are in fact true antitrust remedies, as opposed to commercial transactions with remedial features. Indeed, in both of the cases cited above, the Bureau ultimately required additional remedies beyond those proposed by the parties, which were considered to be insufficient. Moreover, the duration of the Bureau's review was not materially shortened by the proactively proposed remedies and, if anything, was arguably made more complicated.

The practical effect of the Bureau's approach to this issue will likely be that merging parties may be even more reluctant to proactively propose remedies, given that, in addition to those remedies being expanded or supplemented during the course of the Bureau's review, they are unlikely to result in a materially shorter review. This will likely be counterintuitive to businesspeople who would otherwise assume that there must be both a substantive and timing benefit to making early remedy proposals in Canada.

Efficiencies Defence

As many readers will know, the Canadian *Competition Act* includes a fully integrated efficiencies defence, pursuant to which efficiency gains generated by a proposed merger may be used to offset any anticompetitive effects, provided, generally, that the former are shown to be greater than the latter, and regardless of whether any benefits associated with the efficiencies will be passed on to customers.

The appropriate relative balancing, if any, between consumer surplus and producer surplus has long been a source of controversy in Canadian merger law. The most current Tribunal case law on the matter sets out that: (i) the "total surplus standard" — a completely neutral, non-weighted approach, with no different value being applied to consumer surplus versus producer surplus — should be the starting point; (ii) the likelihood of any "socially adverse" effects associated with the merger advanced by the Bureau will then be considered together with an assessment of how to treat the wealth transfer that will be associated with any adverse price effects (historically, this has been referred to in Canada as the "balancing weights" approach); and (iii) the Tribunal expects that the wealth transfer will be treated as neutral in most cases (i.e., the total surplus standard would prevail).

In light of the above, efficiency arguments have long been an important feature of merging parties' submissions to the Bureau. However, and while it is clear that the Bureau has for many years given due consideration to these arguments, the Bureau has only recently begun to publicly acknowledge its reliance on efficiencies in merger review. In the 2015 *Postmedia/Sun Media* transaction, although the Bureau issued a clearance on the traditional basis that no substantial lessening of competition would arise from the transaction, it also found — and stated publicly — that the effects of any lessening or prevention of competition would have been offset by meaningful cognizable efficiencies. The Bureau's public position statements issued following its even more recent reviews of the proposed *Superior Plus/Canexus* merger (2016), the *Superior Plus/Gibson Energy* merger (2017) and the *Calm Air/First Air* cooperation arrangements (2017) go a significant step further; we believe that they represent the first three instances in which the Bureau has explicitly acknowledged a decision to take no action, or more limited action, against *otherwise anticompetitive mergers* on the basis of efficiency gains.

Superior Plus/Canexus, in particular, provided a particularly vivid illustration of the significance of the efficiencies defence in Canadian competition law. While the Bureau concluded that "the anti-competitive effects of the merger would be clearly outweighed by the efficiency gains from the transaction," the transaction was ultimately scuttled by anti-trust authorities in the U.S., where no efficiencies defence is available. The Bureau's newly demonstrated public transparency with respect to efficiencies will likely cause parties to place even more emphasis on this potentially powerful defence in the course of future reviews.

The Stikeman Elliott Competition & Foreign Investment Group continues to be extremely active in 2018. In relation to significant merger matters, we have acted on many of the most contentious transactions, measured on the basis of any metric. We have represented the buyer or target/vendor in approximately:

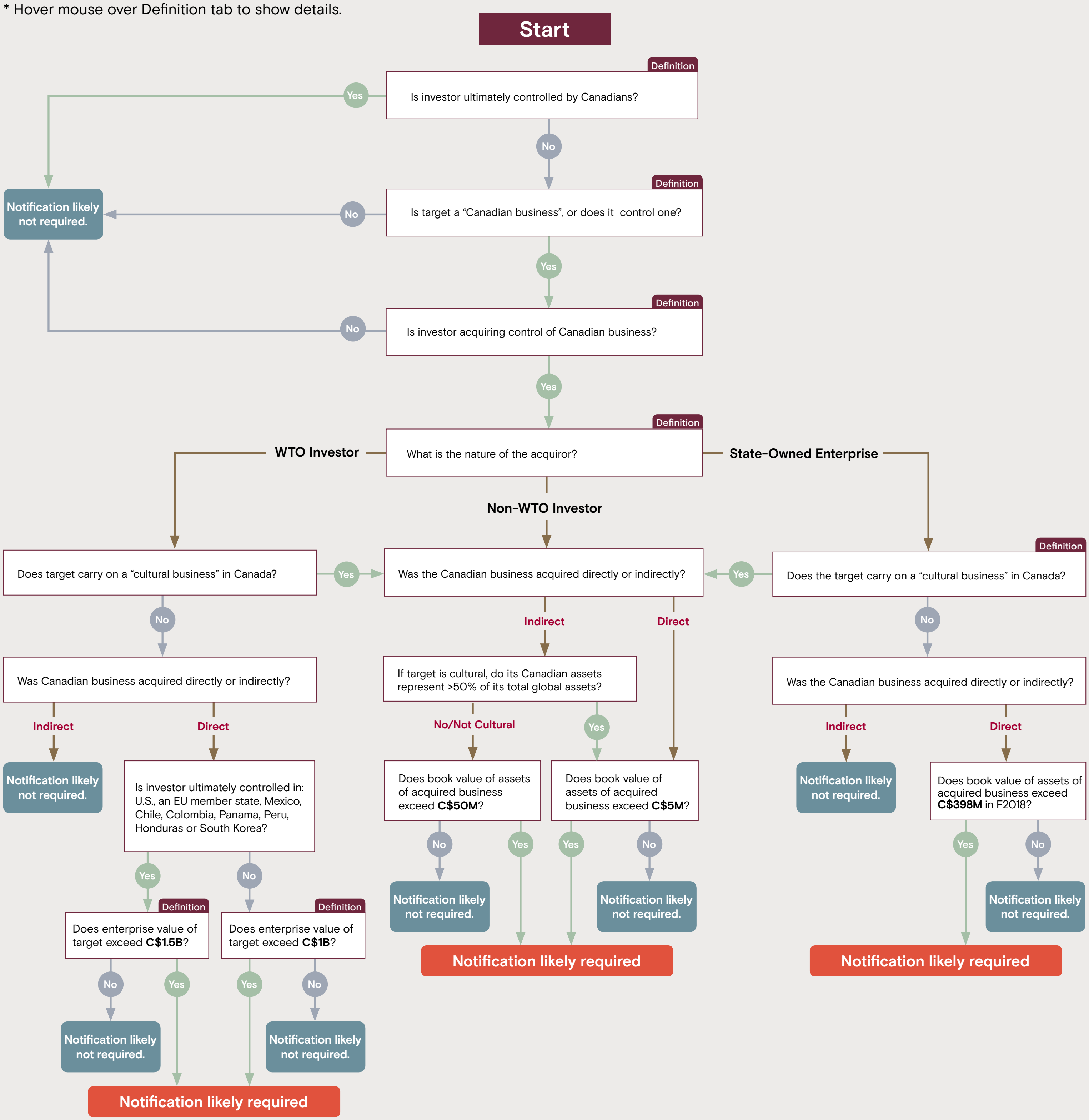
- 40% of transactions for which a Canadian second request was issued by the Bureau in its most recent fiscal year (four out of ten);
- 55% of merger transactions in 2017/2018 (through the time of writing) for which the Bureau issued a "position statement" setting out its substantive analysis (six out of eleven); and
- In relation to foreign investment review, we have acted for the buyer or target/vendor in respect of six out of only approximately 11 major transactions subject to an economic review requirement as of December 2017.
- Key recent mandates: Bayer/Monsanto; Airbus/Bombardier; Potash/Agrium; United Technologies/Rockwell Collins; Colas Canada/Miller McAsphalt Group; DH Corp/Vista; CST Brands /Alimentation Couche-Tard and ABB/GE; Dominion Diamond/Washington Companies; Fidelity National Financial/Stewart Information Services Corp.

Foreign Investment Notification Assessment Tool

Michael Laskey

Please note that this flowchart does not constitute legal advice and, in particular, that other exemptions from the notification requirements may apply.

* Hover mouse over Definition tab to show details.



Stikeman Elliott

Recent Trends in Foreign Investment Review

The *Investment Canada Act* (ICA) is Canada's foreign investment review legislation, providing for notification and review of certain investments by non-Canadians in Canada. Since 2009, it has also served as the mechanism for national security reviews by foreign investors in Canada. Heading into 2018, this note provides an update on relevant developments related to economic and national security reviews in Canada[1]

Economic Reviews

Jeffrey Brown

The ICA has long been criticized as impeding inbound investment to Canada by imposing costs on foreign investors not borne by Canadian investors. Such costs arise for investments that trigger a (usually pre-closing) review, which virtually always results in the negotiation of undertakings by the investor to secure a "net benefit to Canada" approval from one or both of the Minister of Innovation, Science and Economic Development (formerly the Minister of Industry) or the Minister of Canadian Heritage. As a result of expanded exemptions and increases in review thresholds, however, the vast majority of investments now trigger only a notification requirement, which can be filed post-closing and is in most cases an administrative formality. Reviews are now effectively limited to direct acquisitions of large Canadian companies or of Canadian businesses with activities designated as "cultural" under the ICA.

Recent Trends

In the mid-2000s, Canada experienced a period of somewhat heighted scrutiny of foreign investment under the ICA. Such scrutiny was prompted largely by concerns of a "hollowing out" of corporate Canada in the wake of a number of high profile transactions, and even saw the rejection of two investments.

2017 saw the continuation of what may be an emerging "lighter touch" to ICA foreign investment review, as evidenced by:

- a higher "enterprise value" threshold of C$1 billion for non-cultural reviews by "WTO investors" following implementation of a previously announced acceleration of the timetable for increasing this threshold from C$600 million to C$1 billion (two years earlier than previously planned);
- a new "enterprise value" threshold of C$1.5 billion for non-cultural reviews by "trade agreement investors", defined as investors controlled by nationals of certain countries that have trade agreements with Canada (i.e., the European Union, NAFTA, Chile, Peru, Colombia, Panama, Honduras and Korea);
- more focused undertakings for net benefit to Canada approvals;
- more flexible application of government policies relating to investments respecting certain cultural sector;
- fewer "discretionary reviews" ordered following notification of cultural sector investments; and
- expedited reviews for investments involving *de minimis* or ancillary cultural activities.

When Does the ICA Apply?

Subject to certain exemptions, every acquisition of control by a non-Canadian of a Canadian business, even where such business is already controlled by a non-Canadian, requires the filing of either a notification or an application for review. Notifications can be filed at any time up to 30 days after implementation of an investment, whereas applications for review usually trigger a pre-closing approval requirement.

Whether a transaction is subject to notification or review depends on whether certain asset thresholds are satisfied, which thresholds depend on several factors, including transaction structure (i.e., whether the Canadian business is acquired directly, or indirectly through a foreign corporate parent), nationality of the investor and/or vendor, whether the investor is owned or influenced by a foreigner (making it a "state-owned enterprise", or "SOE") and whether the Canadian business is a "cultural business" (i.e., it publishes, sells, distributes or exhibits such products as books, magazines, music, film or video , even to a *de minimis* degree).

The ICA's application in any given case can be highly technical and complex. Refer to the chart on the previous page for an overview.

[1] The Investment Canada Act Annual Report 2016-2017 is available at https://www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/2016-17AnnualReport.pdf/$file/2016-17AnnualReport.pdf.

Filing and Timing

Notifications can be filed at any time up to 30 days after implementation of the investment. Notifications are an administrative formality in the vast majority of cases, however:

- "discretionary reviews" can be ordered within 21 days of filing of notifications involving a cultural business (although such reviews are relatively uncommon); and
- notifications commence a 45-day period during which a national security review can be triggered (with the result that it is becoming more common for investors to file notifications prior to closing, i.e. to obtain comfort they will not face a post-closing national security review – see "National Security Reviews").

Reviewable transactions must be approved as being of "net benefit to Canada" by the Minister of Innovation, Science and Economic Development (for non-cultural investments) and/or the Minister of Canadian Heritage (for cultural investments), which approval is based on prescribed factors set out in the ICA and in view of any legally binding undertakings the purchaser is willing to make. For direct acquisitions, such approval is required prior to closing. Reviewable indirect acquisitions may occur post-closing, with the application for review required to be filed by the investor within 30 days after closing.

Once filed, the applicable Minister(s) has 45 days within which to make a "net benefit" determination, although the Minister may (and often does) extend this period for an additional 30 days, with further extensions available with the consent of the investor. While review times will vary, reviews of 60-75 days are not unusual.

National Security Reviews

Michael Kilby

National security reviews under the *Investment Canada Act* have become considerably more frequent in recent years, culminating in a number of blocked transactions and/or divestiture orders. This has resulted in more careful, upfront assessments of national security risk and also in the evolution of certain strategies to manage this risk.

At the same time, we note that there have recently been several high-profile transactions in Canada which were not made subject to a formal national security review, even though they would have certainly gone through a fulsome CFIUS review had they been U.S.-focused transactions and may even have been blocked outright. These developments have created a degree of differentiation between the assessment of national security risk as between Canada and the U.S.

This note is intended to provide a short, simple summary of key considerations and observations regarding the Canadian national security review process, based on our extensive experience in advising on such matters.

Filing decision

As a notification may be filed before closing or after closing, a buyer must make an important decision as to when to file its notification.

	Pros	Cons
File at least 45 days before closing	Certainty at closing, or else no payment of purchase price No risk of post-closing remedies	Transaction delayed for at least 45 days Possible disadvantage to bid in auction scenario
File after closing	No delay No negotiation with seller over covenant or timing	Risk of post-closing review and possibly remedies In worst case, divestiture

Timing

National security reviews in Canada can be commenced at any time up until 45 days after a notification is filed under the *Investment Canada Act*. A notification under the *Investment Canada Act* may be filed before closing or up to 30 days after closing of a transaction. A notification is required in respect of any direct or indirect acquisition of control of a Canadian business by a buyer that is ultimately controlled by non-Canadians, regardless of the size of the transaction.[2]

Risk Factors

The Government of Canada has released a non-exhaustive list of criteria that it uses when assessing national security risk.[3] As a practical matter, however, our experience has been that the following factors can increase the likelihood of a Canadian national security review.

- Buy-side
  - Russian ownership
  - Chinese ownership
  - Middle East ownership
  - State-Owned Enterprises
  - "Five Eyes" tend to result in lower risk (Canada, plus U.S., U.K., Australia and New Zealand)
- Target-side
  - Telecom (carriers and also equipment)
  - High-End Technology
  - Software/Encryption/Data Storage
  - Government Contracts/Government Access
  - Goods with a potential or dual military use
  - Goods or services subject to export or import controls
  - Proximity to sensitive sites

[2] For the purposes of this summary, we ignore the rare situation of a transaction that is already subject to a pre-closing application for economic review under the Investment Canada Act also being made subject to national security review.

[3] Available at https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html

Other Observations

The Government of Canada has adopted a somewhat more transparent approach in its reporting on the prevalence of national security reviews. Most interestingly, what has become abundantly clear in recent years is that the reviewing agencies attempt to make full use of the initial 45 day screening period (before which any decisions regarding a more formal review process are made) and that this will sometimes mean that a transaction may be scrutinized very closely outside of any formal review process, thereby making a formal review process unnecessary. The corollary to this, however, has been that once a transaction is in fact within the formal national security review process, it is quite likely that very significant concerns exist. Indeed, based on the most recent available data, it would appear that well over a majority of transactions that proceed to a formal review are ultimately blocked or result in divestiture orders.

When it chooses to initiate the national security review process, the government almost never notifies the parties until the final day of the screening period (i.e., the 45th day after the notification was filed). Parties sometimes receive vague questions about national security considerations during the 45-day screening period, but the receipt (or non-receipt) of such questions is generally not a good indication of whether or not a review will be initiated. As such, investors should allow the full 45-day screening period to lapse before taking comfort, and should not expect an early indication.

Politics

In the early years of the Canadian national security review process (noting that the process was only created in 2009), it appeared to us that there was a relatively minimal role for political considerations in relation to national security reviews and that decisions were largely driven by technical assessment at the bureaucratic level. As a result of two significant developments in 2017, however, the political role in national security assessments has become more evident. More particularly, the current government reversed the decision of the prior government that had ordered a Chinese owner to divest a Canadian business that manufactured sensitive photonics technology with potential military applications. In addition, a Chinese acquirer of a Canadian satellite company was allowed to proceed without any remedies or conditions being imposed. It is difficult to reconcile these decisions with prior decisions made under the previous government, suggesting that different political perspectives have in fact been brought to bear in the government's decision-making processes.

For further information, please contact:

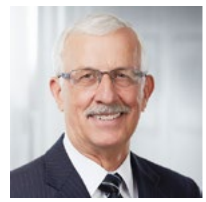
Paul Collins
Head, Competition and
Foreign Investment Group
416 869 5577
pcollins@stikeman.com

Katherine L. Kay
416 869 5507
kkay@stikeman.com

Michael Kilby
416 869 5282
mkilby@stikeman.com

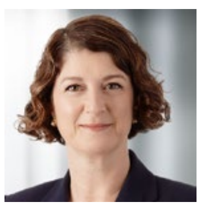
Jeffrey Brown
613 564 3472
jbrown@stikeman.com

Michael Laskey
416 869 5541
mlaskey@stikeman.com



Lawson A.W. Hunter, QC
613 566 0527
lhunter@stikeman.com

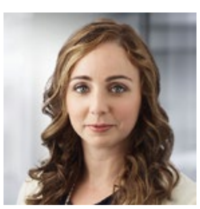
Shawn C. D. Neylan
416 869 5545
sneylan@stikeman.com



Susan M. Hutton
613 566 0530
shutton@stikeman.com

Eliot Kolers
416 869 5637
ekolers@stikeman.com

Danielle Royal
416 869 5254
droyal@stikeman.com



Ashley Piotrowski
416 869 5648
apiotrowski@stikeman.com

Megan MacDonald
613 566 0544
mmacdonald@stikeman.com

Our Competition & Foreign Investment Group provides sophisticated, pragmatic advice on major national and international transactions, as well as day-to-day compliance across all industries. On the litigation side, the team handles high stakes exposures in the criminal, regulatory and class action spheres, using dynamic and highly effective courtroom advocacy and a razor-sharp strategic approach.

We are one of the most active transactional law firms in Canada, with a deep understanding of the competitive dynamics of Canada's major industrial and commercial sectors. As such, we can effectively evaluate and structure transactions to manage the risk of regulatory intervention by the Commissioner of Competition and other governmental agencies. We have also acted on the most noteworthy foreign investment transactions in recent years, representing both Canadian targets and foreign purchasers. Clients also rely on our unique ability to coordinate the increasingly important public relations and government relations aspects of competition and foreign investment review.

Our competition litigation practice is a recognized market leader, with top ranked counsel handling the full spectrum of client issues, from cartel investigations, prosecutions and resolutions, to immunity and leniency applications, to contested mergers and other civilly reviewable matters before the Competition Tribunal, to defence of class actions and other lawsuits alleging competition law violations and economic torts. The team's reputation for vigorous advocacy and strategic focus on our clients' interests, in the courtroom and at the negotiating table, serves our clients exceedingly well as they face the Competition Bureau, Public Prosecution Service of Canada, and class action plaintiffs.

To sign up to receive updates from The Competitor, Stikeman Elliott's blog on competition and foreign investment topics, please visit www.thecompetitor.ca.

Band 1 law firm in *Chambers Canada 2018* for Competition/Antitrust

Band 1 law firm in *Chambers Global 2017* for Competition/Antitrust - Canada

Elite law firm in Global Competition Review's *GCR 100 2017*

Top-tier law firm in *The Legal 500 Canada 2017* for Competition & Antitrust

"Most Frequently Recommended" for Competition Law in *The Canadian Legal Lexpert Directory 2017* for Competition Law

Top-Listed Metro Award for Competition/Antitrust Law: Ottawa - *The Best Lawyers in Canada 2016*

Competition Law Firm of the Year - Chambers Canada Awards 2015

Follow us

Stikeman Elliott

Subscribe to updates on a variety of valuable legal topics from Stikeman Elliott's Knowledge Hub.

This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice.
© Stikeman Elliott LLP 2017-12-01