

# Canada

Neil Campbell, James Musgrove, Mark Opashinov and Joshua Chad

McMillan LLP

## Legislation and jurisdiction

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

In Canada, all mergers are governed by the federal Competition Act (the Act), which establishes jurisdiction for the review of mergers affecting the Canadian market. The Act is enforced by the Commissioner of Competition (the Commissioner), who is appointed by the Federal Cabinet for a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Innovation, Science and Economic Development. The Commissioner and, by extension, the Bureau has broad powers to investigate and evaluate a merger. Should the parties to a merger not be prepared to cure competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal generally has the powers of a regular court and is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings ‘as informally and expeditiously as the circumstances and considerations of fairness permit’, the Tribunal operates with many of the procedural trappings of an ordinary court and, consequently, hearings routinely take many months to complete.

For mergers subject to foreign investment or other specific regulatory approvals, see question 8.

### 2 What kinds of mergers are caught?

All mergers (and the term is defined very broadly) that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. However, the Act’s pre-merger notification regime is of more limited scope. Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds (discussed in question 5). These are: asset acquisitions; share acquisitions; acquisitions of an interest in an unincorporated combination; amalgamations; and the formation of unincorporated combinations.

### 3 What types of joint ventures are caught?

Generally, joint ventures with a sufficient Canadian nexus are caught by the Act’s broad definition of ‘merger’ and are subject to the Act’s substantive jurisdiction. Depending on how it is structured, a joint venture could be caught under the mandatory pre-merger notification regime as an unincorporated combination (usually a partnership), a share or asset acquisition, or a corporate amalgamation. However, there are exemptions for joint ventures that meet certain conditions. (There are also similar provisions in the Act dealing with competitor agreements that may apply to joint ventures – see question 20.)

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

The Act contains a bright-line definition of ‘control’: the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, the holding or acquisition of an interest in the partnership entitling the holder or acquirer to more than 50 per cent of the profits of the partnership or of its assets on dissolution. However, the Act’s pre-merger notification regime does not require that control be acquired to trigger a filing obligation. The acquisition of ‘any of the assets in Canada of an operating business’ (other than in the ordinary course) or of shares yielding cumulative ownership of more than 20 per cent of the shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will be sufficient to trigger a notification obligation (provided that other financial criteria discussed in question 5 are met). There are similar types of thresholds respecting acquisitions of interests in combinations.

Additionally, minority interests less than outright control may be caught by the substantive provisions of the Act, because it defines a merger to include any transaction by which a party acquires a ‘significant interest’ in the business of another person. What constitutes a ‘significant interest’ is not defined by the Act. However, the Commissioner’s Merger Enforcement Guidelines (MEGs) contemplate that the acquisition of a ‘significant interest’ could occur at as low as a 10 per cent ownership interest – or in some cases without an equity interest if contractual or other circumstances allow material influence to be exercised over the business of another person.

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

The Act’s substantive jurisdiction extends to all mergers that have a real and substantial Canadian nexus regardless of size. However, the Act’s pre-merger notification requirements are triggered by bright-line thresholds designed to give certainty to merging parties regarding filing obligations. The transaction must involve an ‘operating business’ in Canada (in the sense that employees regularly report for work within Canada as opposed to merely a passive investment – but, in the Commissioner’s view, such employees may be those of an agent or contractor). The obligation to notify is contingent upon satisfaction of both a party-size threshold and a transaction-size threshold.

#### Party-size threshold

The parties to the transaction, together with their worldwide ‘affiliates’ (defined generally as those entities in a relationship of control to one another or under common control), collectively have assets (book value) in Canada or gross revenues from sales in, from or into Canada (that is, domestic sales plus exports and imports) in excess of C\$400 million in the most recently completed fiscal year. For share acquisitions, the acquired corporation (rather than the vendors of the

shares) is deemed to be the party to the transaction. A vendor that owns more than 50 per cent of the shares would then be included in the party-size threshold calculation as an affiliate of the target.

### Transaction-size threshold

The transaction size threshold is based on the book value of assets in Canada that are held by the entity which is the subject of the transaction or which are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2017 the general threshold (for assets or revenues) is C\$88 million. (Note: the threshold is subject to an annual inflation adjustment by regulation, which is typically announced in January of the year. Consequently, the threshold is likely to be higher than C\$88 million in 2018.)

As noted in question 4, if the underlying party-size and transaction-size thresholds are met, the acquisition of more than 20 per cent of the shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will trigger a notification obligation. Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business other than through a corporation (eg, a partnership) is also notifiable if the party-size and transaction-size thresholds are met and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits of the combination or of its assets on dissolution. Similar, but more complex, thresholds apply to amalgamations.

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

Notification is mandatory for transactions that exceed the thresholds set out in question 5. A narrow exemption exists for asset securitisations meeting certain criteria. There are also other exceptions of very limited scope (eg, transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by applying for an advance ruling certificate), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner that he or she will not challenge the merger. However, the significant filing fees required on notification (see question 10) make such voluntary filings relatively rare.

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

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

Canada asserts an 'effects' test for jurisdiction. Thus, foreign-to-foreign mergers may be subject to substantive review under the Competition Act even though they occur outside Canada, if competitive effects from the transaction would occur within Canada. The competitive effects of primary interest are the impact on customers located in Canada.

Foreign-to-foreign transactions are subject to pre-merger notification if the financial thresholds set out in question 5 are exceeded. The asset value branches of the thresholds focus only on assets in Canada. However, the revenue branches of the thresholds include exports in addition to domestic sales, and in the case of the party-size threshold imports as well. For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the financial thresholds are met (see question 5).

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

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, acquires control of a Canadian business regardless of whether it was owned by Canadians or other non-Canadians. A non-Canadian acquirer must either file an application for review or

a post-closing notification of the investment unless a specific exemption applies.

To determine whether an investment is reviewable under the Investment Canada Act it is necessary to consider whether the investor (or the vendor) is a 'WTO investor' (ie, controlled by citizens of member states of the World Trade Organization); the value of the assets of the Canadian business being acquired; and whether the Canadian business being acquired engages in cultural activities (such as those involving books, magazines, film, television, audio or video recordings, or radio or television broadcasting).

The threshold test changed for non-state-owned enterprise (SOE) WTO investors from an asset value test to an enterprise value test on 24 April 2015. As of June 22, 2017, if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has an enterprise value of C\$1 billion (representing a C\$400 million increase from 2016). Beginning January 2019 the threshold will undergo an annual inflation adjustment. There are also higher proposed thresholds under both the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) and under the proposed Trans-Pacific Partnership (TPP). Where the investment involves the acquisition of publicly traded shares, enterprise value is calculated as the sum of the market capitalisation of the target and its liabilities minus its cash and cash equivalents. Where the investment involves the acquisition of privately held shares, enterprise value is calculated as the sum of the acquisition value and the target's liabilities (based on its most recent quarterly financial statements) minus its cash and cash equivalents (based on its most recent quarterly financial statements). Where the investment involves the acquisition of assets, enterprise value is calculated as the sum of the acquisition value and assumed liabilities minus cash and cash equivalents.

Where an SOE WTO investor is involved, and if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has assets with a book value in excess of C\$379 million. That threshold is expected to rise by an inflation-adjusted amount in early 2018.

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

Where the Canadian business engages in any of the activities of a cultural business, or if neither the investor nor the vendor are WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value of C\$5 million or C\$50 million, respectively.

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

On an application for review, the substantive test applied is whether the proposed transaction is likely to be of net benefit to Canada. Any economic impact on Canada may be considered, including employment, investment, productivity, R&D, exports, Canadian management participation in the business and other factors. If the acquirer is an SOE, the review will also examine whether it is likely to operate the acquired Canadian business in an ordinary commercial manner. The Investment Canada Act approval is parallel to but separate from Competition Act reviews, and the Bureau provides input into this process with respect to a transaction's effects on competition in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act, but it is common for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review. However, even where the transaction falls below the thresholds, it must still be notified by way of a filing form to the Investment Review Division of the Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage for cultural cases). Notification may be submitted by the acquirer any time before or up to 30 days after

consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the asset value) by the Federal Cabinet within 21 days after receipt of the notification.

The Investment Canada Act also establishes a national security review regime. Where the Minister of Innovation, Science and Economic Development in consultation with the Minister of Public Safety and Emergency Preparedness determines that a transaction may be injurious to national security, the Federal Cabinet may initiate a review of the transaction regardless of the size of the business or transaction, the nationality of the acquirer, whether the transaction involves an acquisition of control or of a minority interest and whether or not the transaction has closed. To date, minimal guidance has been provided as to the types of transactions that may be injurious to national security. A number of transactions have apparently been rejected or have been abandoned based on concerns about the investor in question acquiring telecommunications assets that were regarded as critical infrastructure. There has also been a 'proximity' case in which the establishment of a new Canadian business was required to find a new location that was not nearby a facility of the Canadian Space Agency. One transaction has been blocked on the apparent basis that the geomapping assets in issue were sensitive on national security bases. In addition, a Chinese firm was ordered to divest a recently acquired interest in a Canadian fibre components and modules company, but this decision was challenged and on a re-review the government cleared the transaction.

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

#### **Notification and clearance timetable**

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

The Act does not set out deadlines for filing. When to submit a notification is a decision of the parties. However, a transaction that is notifiable may not be consummated until the applicable statutory waiting period has expired (see question 11).

Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence with possible fines of up to C\$50,000 as well as the possibility of civil penalties of up to C\$10,000 per day. Parties with a notification obligation that fail to file do so at their peril as the Bureau monitors financial press accounts of transactions and is also made aware of transactions through competitor, customer or supplier complaints. While to date there have been no convictions or penalties imposed for failure to notify, parties should expect this provision of the Act to be enforced vigorously unless the failure to notify was inadvertent, in which case a decision not to prosecute or other resolution might be negotiable with the Commissioner and the Director of Public Prosecutions.

##### **10 Who is responsible for filing and are filing fees required?**

Generally, both parties to the transaction have the obligation to file. In the case of a share acquisition, the Act deems the target entity, not the vendor, to be a party to the transaction.

In hostile or unsolicited takeover bids, the bidder makes an initial filing (which commences the waiting period) and the Commissioner then requisitions the counterpart filing from the target (which must be filed within 10 days).

The filing fee for a notification is C\$50,000. The same filing fee applies to a voluntary notification and an application for an advance ruling certificate. The filing fee is often paid by the acquirer, but this is a matter of negotiation between the parties.

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

There is a 30-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs).

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (similar to a US 'second request') requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close

waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by the parties. While the issuance of a SIR is a formal process established by the Act, requests by the Commissioner during the initial waiting period for the voluntary disclosure of additional information are common and do not affect the statutory waiting period.

The Act provides for early termination of the waiting periods by the Commissioner. This can be expected to occur if the review has been completed but is unlikely when the review is ongoing.

Consummation of the transaction is not permitted during the waiting periods. If the parties proceed by way of an application for an advance ruling certificate, the no-close period runs until the Commissioner has either issued a certificate or closed the file and provided a waiver of the filing requirements.

In complex cases, reviews may extend beyond the waiting periods. However, in such cases, the Commissioner often simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but merging parties often do so. The Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review. Formal timing agreements between the parties and the Bureau are another possible option by which parties may agree not to close the transaction for a period of time after the expiry of the statutory waiting period and to respond voluntarily to information requests in an effort to avoid a SIR (see question 15 in respect of the SIR process) or an application for an injunction.

If the Commissioner decides to challenge a transaction, another provision of the Act allows the Commissioner to seek an interlocutory injunction to prevent the transaction from closing in whole or in part, pending the resolution of the Commissioner's challenge on the merits. To succeed in obtaining an interlocutory injunction, the Commissioner must prove that there will be 'irreparable harm' if the injunction is refused. The recent Parkland case clarified that 'irreparable harm' includes harm to consumers and harm to the broader economy resulting from the transaction, as this harm cannot be undone by any order of the Tribunal under the merger provisions of the Act. In order to prove harm within a market, the Commissioner must provide 'sufficiently clear and non-speculative' evidence of market definition and concentration.

##### **12 What are the possible sanctions involved in closing before clearance and are they applied in practice?**

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

Regardless of whether the waiting period has expired, closing before clearance carries the risk that the Commissioner will challenge the merger after completion of the review if he or she concludes that it is likely to lessen or prevent competition substantially. He or she may seek a divestiture or dissolution order up to one year after the date of closing.

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

Subject to crafting a local hold-separate resolution as noted in the answer to question 14, if the transaction is notifiable in Canada, the penalties for early closing discussed in questions 9 and 12 would apply to foreign-to-foreign transactions.

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

As noted in the response to question 11, the parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing and the Commissioner has not obtained an injunction.

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

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

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

As noted in question 10, rules exist to ensure that targets of hostile or unsolicited takeover bids supply their initial notification in a timely manner. In such a case, the waiting periods are commenced upon the submission of the acquirer's filing.

#### **16 What is the level of detail required in the preparation of a filing?**

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

- an overview of the transaction structure;
- an executed or draft copy of the legal documents to be used to implement the proposed transaction;
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified of the proposed transaction;
- a summary description of the principal businesses carried on by each party and of the principal categories of products within such businesses, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information for each party;
- business, product, customer, supplier, financial and geographic scope of sales information of each of the party's principal businesses;
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales; and
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction that contain market-related or competition-related information (similar to the '4(c)' documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act)).

If the Bureau concludes during the initial 30-day review period that more detailed review is warranted, it may issue a SIR requiring the production of whatever additional documents and data are considered relevant to the review. The Bureau's (non-binding) guidelines on the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals. The guidelines also state that the default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant time period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years. Finally, the Bureau has suggested that, where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau will work with the parties to try to limit the list of custodians to any list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

#### **17 What is the statutory timetable for clearance? Can it be speeded up?**

As discussed in question 11, there is a 30-day no-close statutory waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs).

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

In most straightforward cases the Commissioner's review is typically concluded within two to four weeks. However, in more complex cases the Bureau's review process may be substantially longer.

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

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

The Bureau commences its service standards when it receives sufficient information to assign a complexity rating, as outlined in its Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters. However, they are intended to be maximums and the Bureau often completes cases in less than the full service-standard period.

It is possible to speed up the timetable for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the 'service-standard' periods (or both) expire. The Commissioner can terminate the waiting periods early – within the initial 30-day period or within the no-close period following the issuance of a SIR – if he or she is satisfied that there is not a competitive concern. Parties and their counsel will usually provide additional information as requested by the Bureau on a voluntary basis and often submit detailed 'competitive impact' analyses to the Bureau to expedite completion of the review process.

As discussed in question 11, if the parties proceed by way of an application for an advance ruling certificate, the no-close period runs until the Commissioner has either issued a certificate or closed the file and provided a waiver of the filing requirements.

In the relatively few cases in which a formal filing has been made, the 30-day period has expired and no SIR has been issued, but the Commissioner needs more time for his or her review, the Commissioner may request that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but merging parties often do so. Alternatively, the Commissioner can seek a temporary interim order to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

To avoid the issuance of such an interim order or to avoid the issuance of a SIR (see question 15 in respect of the SIR process), formal timing agreements between the parties and the Bureau are sometimes used. In these agreements, the parties agree not to close the transaction for a period of time after the expiry of the statutory waiting period and to respond voluntarily to information requests from the Bureau.

#### **18 What are the typical steps and different phases of the investigation?**

After notifications have been filed, the Bureau will typically have follow-up questions as it conducts its investigation. Bureau staff will usually contact some or all of the customers set out in the parties' filings to solicit information from them regarding the proposed transaction. Suppliers and competitors may also be contacted. In addition, the Bureau may request that the parties to the merger provide additional information, documents or data such as estimates of market shares.

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

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

## Substantive assessment

### 19 What is the substantive test for clearance?

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

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

The Act also requires that the Tribunal not make a determination on the basis of market shares or concentration ratios alone.

Uniquely among mature competition regimes, the Act provides a statutory efficiency defence that allows an otherwise anticompetitive merger to be 'saved' if there are offsetting efficiencies (see question 23 with respect to economic efficiencies). A recent decision of the Supreme Court of Canada has indicated that measurable, quantitative efficiencies and quantitative anticompetitive effects will typically be balanced against one another after which non-quantitative evidence will also be balanced, and that the question will typically be whether there is a total surplus to the economy that results from the proposed transaction.

The MEGs elaborate on the Bureau's views of each of the evaluative factors set out in the Act. They also establish 'safe harbours' within which the Commissioner generally will not challenge a merger with respect to 'unilateral effects' and 'coordinated effects' theories of competitive harm (see further discussion in the response to question 21). In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent. Transactions which involve higher market shares or industry concentration are not automatically challenged, but will generally receive careful scrutiny.

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

Joint ventures often fall within the definition of mergers (see question 3) and are thus subject to the same substantive test (see question 19). However, the Act specifically exempts from merger review certain unincorporated 'combinations' in connection with one-off projects or programmes, provided a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities, and the extent of the adverse effect of the joint venture on competition. Part IX of the Act contains an imperfectly analogous notification exemption for 'combinations' that meet specified criteria.

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

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

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

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current competitors) is likely to lead to a substantial prevention or lessening of competition on either a unilateral effects basis or a coordinated effects basis. Under the first theory of harm, the Bureau will consider whether the merged entity will likely be able to raise prices profitably (or lessen competition in other, non-price dimensions) as a result of the merger without relying on an accommodating response from its competitors (see question 19). Under the second theory of harm, the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor, or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses. Vertical mergers may raise concerns when they increase barriers to entry, raise rivals' costs or facilitate coordinated behaviour. Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market *de novo* and eroded the existing market power of the other party.

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

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

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed by the Act's purpose clause, including its concern with ensuring that 'small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'. However, as a practical matter, non-competition issues such as industrial policy considerations are generally not relevant to the Commissioner's review.

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

Acquisitions of Canadian companies by foreign acquirors may also be subject to broader review under Canada's foreign investment review legislation – see question 8.

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

As noted in the response to question 19, the Act provides an efficiency defence that allows an otherwise anticompetitive merger to be 'saved' by efficiencies that will be greater than and offset any prevention or lessening of competition. The scope of the efficiencies defence was examined in the *Superior Propane* case, and more recently in the *CCS/Tervita* case. *Superior Propane* was the first decision in which a party succeeded in having an otherwise anticompetitive merger saved by efficiencies. The main issue in that case was whether a 'total surplus' or a 'consumer welfare' standard should be used to evaluate the trade-off between efficiencies and anticompetitive effects. The Tribunal adopted the 'total surplus' standard, but the Federal Court of Appeal rejected this approach and remanded the case back to the Tribunal for reconsideration of the proper standard to apply. At the rehearing, the Tribunal again rejected the consumer welfare standard but adopted a 'balancing weights' approach, which gives some consideration to the redistributive effects of a merger (eg, negative impacts on low-income consumers) in addition to the overall magnitude of efficiency gains. This decision was upheld by the Federal Court of Appeal.

In the more recent *CCS/Tervita* case, the Supreme Court of Canada overturned decisions of the Tribunal and Federal Court of Appeal and accepted the parties' efficiency defence. While the majority decision of the Supreme Court recognised that the transaction's cognisable efficiencies were minimal, the Commissioner had not met the required burden to quantify the quantifiable anticompetitive effects of the merger. As a result, the transaction's minimal efficiencies were sufficient to outweigh the improperly calculated anticompetitive effects, which were given a weight of zero. As a result, the Bureau will want to know whether the parties plan to raise an efficiencies defence early in the process. If there is the potential for an efficiencies claim, the Bureau will likely require production of considerable data through the SIR process so that it can properly quantify the transaction's anticompetitive effects and efficiencies.

### Remedies and ancillary restraints

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

The Tribunal, on application by the Commissioner, may order the parties to a proposed merger to refrain from implementing their merger or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially. If a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares. In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken to remedy the anticompetitive effects of a proposed or completed merger.

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

Divestitures are the primary remedy used in merger cases. In the *CCS/Tervita* case, the Bureau sought dissolution as the preferred remedy but the Tribunal concluded that a divestiture order would be appropriate. While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

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

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

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

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

As noted in question 7, foreign-to-foreign mergers with competitive effects within Canada are subject to the Act, including its remedial provisions. Consequently, remedies up to and including divestitures of Canadian assets have been required in foreign-to-foreign mergers. However, in some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anticompetitive

concerns in Canada. Examples include *BASF/Ciba*, *Dow/Rohm & Haas*, *GE/Instrumentarium*, *Procter & Gamble/Gillette*, *UTC/Goodrich*, *Thomson/Reuters* and *Novartis/GSK* where the remedies required by the US or European authorities were seen as sufficient to address Canadian concerns. See question 34 for additional discussion of cases in which remedies have been required for foreign-to-foreign mergers in Canada.

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

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

### Involvement of other parties or authorities

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

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

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

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

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

All documents (including pre-merger notifications) and information provided to the Bureau are treated confidentially. However, the Act does permit the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases). In addition, the Commissioner may disclose information for the purposes of the administration or enforcement of the Act. This may occur in the Bureau's 'field contacts' with customers, suppliers and competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information.

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

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

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

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

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust

cooperation agreements exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United States, the European Union and the United Kingdom, as well as between Canada and each of Australia, Brazil, Chile, India, Japan, South Korea, Mexico, Taiwan and New Zealand. In addition, the Bureau signed memoranda of understanding with China's State Administration for Industry and Commerce and the Ministry of Commerce of the People's Republic of China in March 2015 and with China's National Development and Reform Commission in February 2016. Unlike many of its sister agencies, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, as long as such sharing of information is likely to result in assistance to the Bureau in its review of a transaction (see the response to question 30).

### Judicial review

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

The Tribunal Act provides for an appeal from the Tribunal on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal lies, with leave, to the Supreme Court of Canada. In its recent decision in *CCS/Tervita*, the Supreme Court of Canada found that Tribunal decisions are to be reviewed on a less than deferential standard, with questions of law to be reviewed for correctness and questions of fact and mixed law and fact to be reviewed for reasonableness.

Although it is theoretically possible to obtain judicial review of the Commissioner's decisions or actions as well, in practice he or she is accorded a very high amount of deference because he or she is responsible for investigative rather than adjudicative functions.

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

An appeal from a decision of the Tribunal can be a relatively long process. For example, in the *Superior Propane* case, the Federal Court of Appeal took eight months to render its decision on the Commissioner's initial appeal of the Tribunal's decision from the date of the Tribunal's judgment. Similarly, in the more recent appeal of the Tribunal's order in the *CCS/Tervita* case, the Federal Court of Appeal released its decision nine months from the date of the Tribunal order.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada would be expected to take a few months before leave is granted, and, if granted, many more months before a hearing is held and the court renders its decision. In the *CCS/Tervita* case, almost two years elapsed from the date of the Federal Court of Appeal decision until the Supreme Court of Canada released its decision (five months for leave to be granted, eight months for the case to be heard, and 10 months under reserve).

### Enforcement practice and future developments

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

Because the Commissioner effectively acts as the Tribunal's gatekeeper in the merger context, merging parties (both domestic and foreign) will typically work with the Commissioner to address any concerns he or she might have with their transaction, rather than face a lengthy and uncertain process of defending their merger through litigation before the Tribunal. The Commissioner has litigated very few contested proceedings to a conclusion before the Tribunal. The Commissioner obtained mixed results in the Southam newspaper case. However, the Commissioner failed to obtain a remedy in the *CCS/Tervita*, *Hillsdown* and *Superior Propane* cases and the Commissioner was also unsuccessful in attempting to obtain a temporary injunction against the Labatt/Lakeport merger. More recently, the Commissioner did obtain a partial injunction, and ultimately a consent resolution, in the *Parkland* case. In the majority of cases in which the Commissioner has had concerns, however, the Bureau has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers including, most recently, *Teva/Allergan*, *Iron Mountain/Recall*, *Medtronic/Covidien*, *Novartis/Alcon*, *The Coca-Cola Company/Coca-Cola Enterprises*, *Teva/Ratiopharm* and *Live Nation/Ticketmaster*. Transactions also occasionally have been abandoned in the face of opposition by the Commissioner (eg, the *Bragg/Kincardine* merger in 2014).

The current merger review process was adopted in March 2009. From March 2009 to March 2017, SIRs were issued in connection with 88 transactions. In the Bureau's most recent fiscal year, SIRs were issued in just under 10 per cent of all transactions, which is a material increase from last year and a considerable increase from prior years. Responding to these requests has required a significantly greater investment of time and resources than preparing the former 'long-form' notification or responding to a voluntary information request under the prior regime. The Bureau has not received additional resources to support the enforcement of the new regime. The time frame for the completion of the Bureau's review of a transaction subject to a SIR has ranged from three months to seven-and-a-half months. Evidence for this increase can be seen in the average review time that the Bureau takes to review complex mergers (40 per cent of which resulted in a SIR in the Bureau's most recent fiscal year). Year over year, the average time to review a complex merger rose by approximately 45 per cent (36 days to 52 days).

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

#### 35 Are there current proposals to change the legislation?

There are proposed technical changes to expand the definitions related to affiliated entities that are currently being considered by Parliament.

# mcmillan

Neil Campbell  
James Musgrove  
Mark Opashinov  
Joshua Chad

neil.campbell@mcmillan.ca  
james.musgrove@mcmillan.ca  
mark.opashinov@mcmillan.ca  
joshua.chad@mcmillan.ca

Brookfield Place, 181 Bay Street, Suite 4400  
Toronto  
Ontario M5J 2T3  
Canada

Tel: +1 416 865 7000  
Fax: +1 416 865 7048  
www.mcmillan.ca

Canada					
Voluntary or mandatory system	Notification trigger/filing deadline	Clearance deadlines (Stage 1/Stage 2)	Substantive test for clearance	Penalties	Remarks
Notification is mandatory for transactions that exceed certain thresholds. However, the Competition Act's substantive jurisdiction extends to mergers of any size that have an effect on the Canadian marketplace, whether involving domestic parties or purely foreign-to-foreign mergers.	No filing deadline. Where advance notification is required, parties may file at any time after reaching an agreement or letter of intent. However, transactions may not close during mandatory waiting periods.	A mandatory 30-day no-close period is triggered by submission of a notification. If the Commissioner issues a supplementary information request, submission of the required responses will trigger a further no-close period that expires 30 days after both parties have responded.	Whether the merger is likely to prevent or lessen competition substantially in a relevant market.	The criminal penalty for not filing a mandatory notification is a fine of up to C\$50,000, as well as the possibility of an additional penalty of up to C\$10,000 per day for closing a transaction prior to the expiry of a waiting period.  Sanctions for a completed anticompetitive merger include dissolution or divestiture.	The acquisition of control of a Canadian entity by a non-Canadian will also require notification and possibly review and approval under the Investment Canada Act.