Competition & antitrust law

Competition law in Canada is set out in a single federal statute, the Competition Act. Related regulations, guidelines, interpretation bulletins and case law all provide guidance on how the Competition Act is administered and enforced. The Act is primarily administered and enforced by the Competition Bureau (the Bureau) and the Public Prosecutions Service of Canada. Certain provisions of the Competition Act also allow private parties to initiate enforcement proceedings.

The purpose of the Act is to maintain and encourage competition in Canada, and it addresses three categories of conduct: mergers, criminal matters and reviewable practices.¹

1. Mergers
2. Criminal matters
3. Reviewable practices

1. Mergers

The Competition Act defines a merger as the acquisition or establishment - whether by purchase or lease of shares or assets, or by amalgamation, combination or otherwise - of control over or a significant interest in all or part of a business.

the Bureau has adopted an expansive interpretation of this definition. It has indicated that
it will generally not consider the acquisition of less than 10 per cent of the voting shares of a corporation to be a merger. It may consider the acquisition of between 10 and 50 per cent to be a merger, depending on whether the facts suggest that the purchaser will acquire the ability to materially influence the economic behaviour of the target. The Bureau has also taken the position that contractual arrangements, such as shareholders’ agreements or management agreements, can also be considered mergers, provided they confer control over all or part of a business.

Unless the Bureau issues an advance ruling certificate (discussed later in this section), it has the right to challenge any merger prior to its completion and for one year following its completion. This right applies to all mergers, including those that do not exceed the mandatory pre-notification thresholds (also discussed later in this section). As a result, although this is uncommon, the Bureau has challenged some mergers that did not exceed the pre-notification thresholds.

a. Notifiable mergers

Mergers that exceed certain thresholds must be pre-notified to the Bureau and may not be completed until either (i) the statutory waiting period has expired and the Bureau has not obtained an order prohibiting closing, or (ii) the Bureau has completed its review and rendered a disposition that permits closing.

b. Thresholds

Notification is required if both of the following thresholds are exceeded:

- Party size: The parties, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada (exports and imports) that exceed $400 million.
- Acquired business size: The aggregate value of the assets in Canada to be acquired, or the annual gross revenues from sales in or from Canada generated by such assets, exceeds $96 million.²

Additional thresholds apply to proposed acquisitions of equity securities or equity interests, specifically:

- The proposed acquisition of voting shares of a publicly traded corporation will not be notifiable unless, following completion of the transaction, the purchaser owns more than
20 per cent of the voting shares (or more than 50 per cent if, prior to the transaction, the purchaser already owned more than 20 per cent).

- The proposed acquisition of voting shares of a private corporation will not be notifiable unless, following completion of the transaction, the purchaser owns more than 35 per cent of the voting shares (or more than 50 per cent if, prior to the transaction, the purchaser already owned more than 35 per cent).

The financial threshold analysis is based on the most recently available audited financial statements - provided that they are sufficiently recent. If audited financial statements are outdated, do not exist or do not contain sufficiently granular information, the analysis will be based on unaudited financial statements and internal books and records. The threshold analysis must be updated to reflect material developments - such as acquisitions, divestitures or write-downs - that occur subsequent to the currency date of the financial statements on which the initial analysis was based.

If a proposed transaction exceeds the applicable thresholds:

- Notification is required even if the transaction obviously raises no substantive competition law concerns.
- Failure to comply with the notification provisions can result in a substantial administrative monetary penalty and/or criminal conviction.

c. Notification procedure

Notification can be effected in two ways: (i) the filing of a prescribed notification form by each of the parties, and/or (ii) requesting an advance ruling certificate. It is not uncommon to submit both types of notification.

i. Prescribed notification form

The prescribed notification form requires information about the business of the parties and their affiliates, including a narrative description of the business and its operations, financial statements, and customer and supplier lists. Strategic documents relating to the transaction - including business and marketing plans, board papers, and competition analysis - must also be submitted. This should be kept in mind when such documents are being prepared.

The submission of complete prescribed forms, as determined by the Bureau, triggers a statutory 30-day waiting period. During this time, the parties may not complete the transaction unless the Bureau completes its review and renders a
disposition that permits the parties to close.

During the initial 30-day period, the Bureau has the right to issue a supplementary information request (SIR). SIRs are generally reserved for transactions that appear to raise significant competition law concerns, and are relatively rare.

SIRs require the production of substantial additional information, and it is not uncommon for it to take several months for the parties to complete their responses. The issuance of a SIR has the effect of extending the waiting period until 30 days after compliance with the SIR, as determined by the Bureau.

**ii. Advance ruling certificate**

Another way of effecting notification is to request an advance ruling certificate (ARC). An ARC request is a letter - typically submitted by the purchaser's counsel - that describes the parties, the transaction and the relevant industry, and explains why the transaction should not be of concern to the Bureau. An ARC is the best possible outcome for the parties - especially for the purchaser - as it insulates the transaction from subsequent challenge, provided the transaction is completed within one year of issuance of the ARC. Accordingly, the Bureau typically only issues ARCs in respect of transactions that do not raise material substantive concerns.

In situations where the information provided in an ARC request is sufficient for the Bureau to complete its review, but the Bureau is neither comfortable enough to issue an ARC nor concerned enough to challenge the transaction, the Bureau will typically issue a no action letter (NAL) and waive the parties' obligation to submit prescribed forms.

Essentially, a NAL advises the parties that while the Bureau has no current plans to challenge the transaction, it reserves the right to do so within one year of closing. As a practical matter, parties can take a high degree of comfort from a NAL as the Bureau does not have a history of challenging transactions after issuing a NAL.

An ARC request does not trigger a statutory waiting period. However, the Bureau has issued guidelines indicating that it will endeavor to complete its review of transactions that it considers to be "non-complex" within 14 days of receiving a complete ARC request, and within 45 days of receiving a complete ARC request for transactions that it considers to be "complex."

Non-complex transactions are readily identifiable by the clear absence of competition
issues, and include transactions where there is no or minimal competitive overlap between the parties. Complex transactions involve the merger of competitors or the merger of customers and suppliers where there are indications that the transaction may, or is likely to, create, maintain or enhance market power. The vast majority of transactions are classified as non-complex, with the Bureau completing its review within 14 days following classification.

From the parties' perspective, and particularly the purchaser's, closing after an affirmative clearance from the Bureau in the form of an ARC or a NAL is generally preferable to closing solely on the basis of the passive expiration of the statutory waiting period. Nevertheless, parties have the right to close on the basis of a passive expiration of the statutory waiting period without having received confirmation as to what the Bureau may do.

d. Filing fee

The filing fee is $73,584. This applies regardless of whether notification is effected by way of prescribed forms, ARC request or both. The issue of which party pays the filing fee is a matter of business negotiation between the parties and should be addressed in the transaction's purchase agreement. Common arrangements include the purchaser paying 100 per cent of the filing fee or the parties agreeing to each pay half.

e. Test

The test that the Bureau applies in determining whether to challenge a proposed transaction is whether the transaction would prevent or lessen - or be likely to prevent or lessen - competition substantially. This test, as judicially defined, seeks to determine whether the transaction would give the merged firm the ability to profitably raise prices in the post-merger competitive environment or would create, maintain or enhance the merged entity's ability to exercise market power.

f. Possible outcomes

The possible outcomes of a merger review can generally be summarized as follows:

- the Bureau renders a disposition that permits the parties to close according to their desired schedule without any changes to the transaction. This occurs in the vast majority of cases.
• the Bureau takes longer than the parties would desire to complete its review. Closing is
delayed but ultimately not challenged, and proceeds without any substantive change to
the transaction. While not uncommon, this is certainly not typical.
• the Bureau agrees not to challenge the transaction on the basis of concessions made
by the parties, such as the divestiture of certain assets. In the relatively rare situations
where the proposed merger raises significant competitive concerns, this is a common
outcome.
• the Bureau challenges the transaction before the Competition Tribunal (the Tribunal), a
specialized quasi-judicial tribunal, by seeking an order to prohibit its completion. If the
transaction is already complete, the Bureau seeks an order requiring that the
transaction be undone or requiring the purchaser to sell part or all of the acquired
business to a third party. This is extremely uncommon.

2. Criminal matters

As a result of significant amendments to the Competition Act that took effect in March
2009 and March 2010, several criminal offences were repealed and/or converted into
reviewable practices. As a result, the Competition Act has effectively been left with only
two criminal-offence provisions: conspiracy and bid-rigging. Both offences are per se
illegal, meaning that the effect of the conduct on competition is irrelevant. The standard of
proof is beyond a reasonable doubt.

The penalties for violating these provisions are severe. Conviction may result in a
combination of a substantial fine for the corporation and culpable individuals, prison time
for culpable individuals, class action proceedings, civil damages awards and reputational
damage. The trend in Canada appears to be toward more frequent prosecution, higher
fines and more jail sentences.

An investigation or allegation that does not ultimately result in conviction can still be, and
usually is, costly, disruptive and damaging to reputations. Accordingly, it is generally
prudent to avoid conduct that could give rise to even the appearance of a violation of the
Competition Act’s criminal provisions.

a. Conspiracy

It is unlawful for competitors to agree to:
- Fix, maintain, increase or control prices (including discounts, rebates, allowances, concessions or other advantages)
- Allocate sales, territories, customers or markets
- Fix or control the production or supply of a product

A "competitor" is broadly defined to include any person who it is reasonable to believe would be likely to compete with respect to a product. The definition includes existing competitors as well as potential competitors.

The alleged agreement does not need to be written (and often is not) and can be proved solely on the basis of circumstantial evidence. There must be proof of an agreement in order for there to be a conviction.

The Competition Act sets out an ancillary restraint defence and a regulated conduct defence. The ancillary restraint defence applies where the challenged agreement is ancillary to - and necessary to give effect to - a broader agreement that is not itself unlawful. An example of this would be a temporary non-compete covenant in an asset purchase agreement, pursuant to which the seller agrees not to compete with the buyer with respect to the purchased business. The regulated conduct defence applies where conduct that would otherwise violate the Competition Act is authorized and specifically required by other legislation. An example of this would be a provincial agricultural marketing-board legislation that requires producers to limit quantities and sell at specific prices.

The penalty for conspiracy is imprisonment for up to 14 years and/or a fine of up to $25 million.

**b. Bid-rigging**

Bid-rigging occurs when:

- Two or more persons agree that one or more of them will not submit a bid/tender, or will submit and then withdraw a bid/tender in response to a request for bids/tenders; or
- Bids/tenders are submitted that are arrived at by agreement between two or more bidders

Unless the agreement is made known to the persons who requested the bids before the bids are submitted. The penalty for bid-rigging is imprisonment for up to 14 years and/or a fine at the discretion of the court.
c. Immunity

The Bureau has established an immunity program under which the first conspirator to report a conspiracy may receive immunity from criminal prosecution - but not civil damages arising out of private causes of action - if that conspirator, among other things, did not coerce others into participating in the conspiracy and co-operates in the prosecution of other conspirators. Subsequent immunity applicants may receive some form of leniency in the form of reduced fines but will not qualify for full immunity.

d. Private actions

The Competition Act provides private parties with a right to sue to recover actual damages suffered as a result of a violation of the Act's criminal provisions. In theory, private parties have the right to initiate proceedings to prove both the violation of a criminal provision and their damages. As a practical matter, private parties tend to rely on convictions or guilty pleas that result from government - i.e., Public Prosecutions Service of Canada - enforcement to prove the violation, and their actions are limited to proving their damages. Private claims typically take the form of class actions.

3. Reviewable practices

The Competition Act's reviewable-practices provisions address conduct that is presumptively lawful. Such conduct can only be prohibited if the Tribunal finds that, depending on the reviewable practice in question, the conduct substantially prevents or lessens competition or has an adverse effect on competition. The standard of proof is a balance of probabilities.

For all but one of the reviewable practices, the only remedy available is a prohibition order. The underlying theory is that parties should not be punished for engaging in conduct that is presumptively lawful. Abuse of dominance is the exception, which can result in a divestiture order and potentially significant administrative monetary penalties.

The Bureau may initiate proceedings before the Tribunal with respect to all of the reviewable practices. Private parties have the right to initiate proceedings before the Tribunal for certain reviewable practices - but they must first obtain leave of the Tribunal.

a. Competitor agreements
This provision applies to all agreements between competitors, other than those specifically covered by the criminal conspiracy provision previously discussed. Examples of such agreements include joint ventures and strategic alliances. While these agreements often promote competition and enhance efficiency, they can be anti-competitive in some circumstances.

If, upon application by the Bureau, the Tribunal finds that a proposed or existing agreement between competitors has, or is likely to have, the effect of preventing or lessening competition substantially, the Tribunal may order that the agreement be terminated or amended.

The Tribunal may not make an order against an agreement that is likely to result in efficiency gains that will be greater than (and will offset) the effects of any prevention or lessening of competition. This is provided that the gains in efficiency would not likely be attained if an order were made.

b. Abuse of dominance

At the outset, it is worth noting that dominance alone is not problematic under the Competition Act; it is the abuse of dominance that the Competition Act seeks to address. In order for the Bureau to succeed in an abuse of dominance case, it must convince the Tribunal that:

i. One or more businesses have market power in one or more relevant markets in Canada or a part of Canada

Market power is the ability to profitably charge prices above competitive levels for a sustained period of time. A finding of market power generally requires the combination of a high market share and barriers to entry - e.g., high sunk costs or regulatory restrictions. There have only been seven fully litigated cases pursued under the abuse of dominance provision since it was added to the Competition Act in 1986, and all of them involved parties with market shares above 80 per cent. In addition, the Bureau has issued technical backrounders or position statements in relation to a number of abuse of dominance inquiries that it discontinued.

ii. The dominant business or businesses have engaged, or are engaging, in a practice of anti-competitive acts

To be considered anti-competitive, the intended purpose and effect of the acts must be exclusionary, disciplinary or predatory. In most cases, the anti-competitive act will
also have to be directed at a competitor. In limited circumstances, a party that does not itself compete in a market may be found to have engaged in anti-competitive acts against competitors in the market. Examples of potentially anti-competitive acts include: entering into a long-term exclusivity arrangement with a supplier for the purpose of rendering that supplier unavailable to a competitor, or offering below-cost pricing to a critical customer of a competitor.

iii. The anti-competitive acts are having, or will likely have, the effect of preventing or lessening competition substantially

A finding of a substantial prevention or lessening of competition is based on a "but for" test - i.e., whether prices in the applicable market would be lower "but for" the conduct in question.

If the Tribunal finds abuse of dominance, it may order the transgressing business or businesses to cease the acts in question and/or take certain actions - such as the divestiture of assets or shares - that the Tribunal considers necessary to overcome the effects of the anti-competitive practice.

The Tribunal may also impose an administrative monetary penalty of up to $10 million for an initial transgression, and up to $15 million for each subsequent transgression.

c. Price maintenance

Price maintenance occurs when a supplier - by agreement, threat or promise - influences upward or discourages the reduction of the price at which a seller sells, offers to sell or advertises a product within Canada. Price maintenance also occurs when a supplier refuses to supply a product to, or otherwise discriminates against, a seller because of the low pricing policy of that seller.

If a supplier suggests a minimum resale price to a reseller, that suggestion constitutes price maintenance unless the supplier also makes it clear that the reseller is under no obligation to follow the suggestion, and that it will in no way suffer in its business relationship with the supplier if it fails to follow the suggestion.

If the Tribunal finds that price maintenance has had, or is likely to have, an adverse effect on competition in a market, the Tribunal may order the supplier to cease engaging in the challenged conduct and/or accept the seller as a customer on usual trade terms. The Bureau or an affected seller - with leave of the Tribunal - may seek such an order.
Prior to March 12, 2009, price maintenance was a per se criminal offence. In the more than nine years since its conversion to a civil reviewable practice, numerous suppliers have engaged in various forms of price maintenance - yet only one case has ever been considered by the Tribunal, and that case was not a typical price maintenance case. It involved the various fees Visa and MasterCard impose on merchants who accept their cards, rather than a situation where a supplier influences upward or discourages the reduction of the price at which a reseller sells or advertises the supplier's product.

d. Refusal to deal

If a supplier refuses to supply a would-be customer, the Tribunal may order them to supply the would-be customer on usual trade terms if it finds that:

i. The would-be customer is substantially affected in his or her business, or is precluded from carrying on business due to an inability to obtain adequate supplies on usual trade terms.

ii. The reason that the customer or potential customer is unable to obtain adequate supplies is because of insufficient competition among suppliers.

iii. The customer or potential customer is willing and able to meet the usual trade terms of the supplier or suppliers of the relevant product.

iv. The relevant product is in ample supply.

v. The refusal to deal is having or is likely to have an adverse effect on competition in a market.

The Bureau or a would-be customer - with leave of the Tribunal - may seek such an order from the Tribunal.

e. Tied selling

Tied selling is a form of refusal to deal in which a supplier agrees to supply a customer with a product only on the condition that the customer:

i. Acquire a second product from the supplier

ii. Refrain from using or distributing, in conjunction with the supplier's product, another product that is not manufactured or designated by the supplier

Tied selling also includes inducing a customer to agree to these conditions by offering to supply them with a product on more favourable terms. The Tribunal may find a major
supplier is engaged in tied selling, or that it is widespread in a market, if it is likely to:

i. Impede entry or expansion of a firm
ii. Impede introduction of a product or expansion of sales
iii. Have any other exclusionary effect with the result that competition is, or is likely to be, lessened substantially

If this is the case, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.

the Bureau or an affected customer - with leave of the Tribunal - may initiate proceedings before the Tribunal.

f. Exclusive dealing

Exclusive dealing occurs when a supplier, as a condition of supply, requires a customer to deal only or primarily in products supplied or designated by the supplier, or refrain from dealing in a specified product except as supplied by the supplier. Exclusive dealing includes inducing a customer to agree to these conditions by offering to supply the customer on more favourable terms. The required proof and remedial action are the same as described under tied selling. As with tied selling, the Bureau or an affected customer - with leave of the Tribunal - may initiate proceedings before the Tribunal.

There have only been a few cases involving exclusive dealing and tied selling since these provisions were added to the Competition Act in 1976. What little case law exists suggests that in order for the Bureau or an affected private party to have a viable case, the alleged tied selling and/or exclusive dealing must make it nearly impossible for a competing supplier to enter or exist in a market.

g. Vertical market restriction

Vertical market restriction occurs when a supplier, as a condition of supply, requires a customer to supply a product only in a defined market, or exacts a penalty from the customer if the product is supplied outside a defined market.

If the Tribunal finds that this practice is engaged in by a major supplier or is widespread in a market, and is likely to substantially lessen competition, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.
the Bureau or an affected customer - with leave of the Tribunal - may initiate proceedings before the Tribunal.

There have been no cases involving the direct application of the vertical market restriction provision since it was added to the Competition Act in 1976.

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1 The Competition Act also contains civil and criminal provisions relating to advertising and marketing matters. For more information, see the chapter on advertising and marketing.
2 The figure of $96 million applies in 2019. It is adjusted annually based on the change in Canada's GDP.
3 The price-discrimination, predatory-pricing and promotional-allowances provisions were repealed. The applicable conduct can still be challenged under the more general reviewable-practice provision relating to abuse of dominance. The price-discrimination provision was converted into a reviewable practice. The Competition Act also contains criminal provisions that address false and misleading advertising, which are discussed in the chapter on advertising and marketing.

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