Canada: Competition Law Overview

Stikeman Elliott LLP

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Background

Competition law is governed by the federal *Competition Act* which, when it was enacted in 1986, transferred most elements of the regulation of mergers and monopolies to a civil law regime from a cumbersome and ineffective criminal law framework. The history of the *Competition Act* since its adoption shows an increasing sensitivity on the part of the Canadian government to the anti-competitive effects of mergers and other business practices.

The *Competition Act* contains civil and criminal provisions, as well as provisions governing pre-merger notification. The civil provisions are subject to review by the Competition Bureau headed by the Commissioner of Competition (who oversees the administration of the *Competition Act* including the investigation of mergers and anti-competitive business practices), but may only be sanctioned by the Competition Tribunal, a quasi-judicial body. Matters such as merger review, anti-competitive behaviour by "dominant" firms, price maintenance, refusals to deal, exclusive dealing, tied selling and market restriction are investigated by the Bureau and may be challenged before the Tribunal on the application of the Commissioner, or private parties in certain circumstances.[1] The pre-notification regime requires notification to the Commissioner of transactions that exceed specified monetary and, where applicable, shareholding thresholds. The criminal provisions of the *Competition Act* address bid-rigging and cartels, certain forms of misleading advertising, deceptive telemarketing and pyramid schemes, among others.

Enforcement Procedures

In Canada, there are four primary enforcement authorities: the Commissioner of Competition (the Commissioner), the Director of Public Prosecutions (DPP) (formerly, the Attorney General), the Competition Tribunal and the courts. The Minister of Industry, whose department is responsible for the *Competition Act*, has only a marginal role in the process. The criminal and civilly reviewable parts of the *Competition Act* each have their own enforcement structure, although there is substantial overlap between the two in terms of enforcement authorities.

The primary enforcement authority is the Commissioner, who is authorized to investigate both criminal and civilly reviewable matters under the *Competition Act*. Typically, the investigative process begins with a preliminary examination of potentially unlawful conduct that has come to the Commissioner's attention. If, after

[1] Private parties are permitted to apply directly to the Competition Tribunal to address matters regarding refusal to deal, price maintenance, tied selling, exclusive dealing and market restrictions (Sections 75, 76 and 77 of the *Competition Act*). Private parties must, however, seek leave from the Competition Tribunal to make such applications. Conspiracy, bid-rigging and certain other offences continue to be dealt with as criminal matters. Private parties may sue in court for damages suffered as a result of alleged criminal violations of the *Competition Act*, but not behaviour falling under the civil provisions. The Competition Tribunal can issue civil monetary penalties (fines) in certain cases, but cannot award damages to private parties.

due inquiry, the Commissioner concludes that there are sufficient grounds to believe that a criminal offence has been committed, the Commissioner may recommend to the DPP that charges be laid. Responsibility for the prosecution of criminal offences lies solely with the DPP.

Unlike for criminal matters, the Commissioner is authorized to prosecute civilly reviewable matters before the Competition Tribunal. The Competition Tribunal is an adjudicative body comprised of no more than six judicial members who are appointed from among the judges of the Federal Court of Canada, and no more than eight lay members. In general, each panel of the Competition Tribunal consists of three to five members of which at least one is a judicial member. Only judicial members may determine questions of law, and issues before the Competition Tribunal are determined according to the civil standard of proof (balance of probabilities).

Mergers

Definition

The *Competition Act* defines a “merger” broadly, as the direct or indirect acquisition by one or more persons of control over or a significant interest in all or part of the business of a competitor, supplier, customer or other person. It makes no difference whether this happens by purchase or lease of shares or assets, by amalgamation or combination, or otherwise (e.g., by licence or contract). The Commissioner is entitled to bring an application challenging a merger before the Competition Tribunal at any time within one year of the completion of the merger. Where the Competition Tribunal determines that competition in a market will be prevented or lessened substantially as the result of a merger or proposed merger, it may exercise its broad discretionary authority to make a remedial order. Such an order can consist of the outright prohibition of a proposed merger or part of the proposed merger or, in the case of a completed merger, dissolution of the merger or partial or complete divestiture or, with the consent of the parties, other measures designed to alleviate the anti-competitive effect. Behavioural constraints are also sometimes imposed.

The Principal Substantive Test

For mergers, the principal substantive test under the *Competition Act* is whether an actual or proposed transaction “would or would be likely to prevent or lessen competition substantially” in a relevant market. This is the test that the Commissioner uses when deciding whether to initiate an application before the Competition Tribunal and it is also the test used by the Competition Tribunal in its adjudication of the application. In applying the test, the Commissioner and the Competition Tribunal will consider the extent and effectiveness of foreign competition, whether the business of a party to the merger has failed or is likely to fail, the extent and availability of acceptable substitutes for products supplied by the parties, current barriers to entry into the market, whether the transaction would result in the removal of a vigorous and effective competitor, the extent to which effective competition would remain following the transaction, the nature and extent of change and innovation in the relevant market, and any other relevant factor. An otherwise anti-competitive merger may be defended on the basis of efficiencies if such cost savings outweigh and offset any anticipated anti-competitive harm and if the savings will not likely be achieved if the remedy sought by the Commissioner is ordered.

Merger Enforcement Guidelines

The analytical framework that has been adopted employs legal and economic criteria similar to those found in American antitrust jurisprudence. The Commissioner has released Merger Enforcement Guidelines, modeled on similar guidelines adopted by the United States Department of Justice, setting out in general terms how the merger review provisions of the *Competition Act* are to be administered.

Advance Notification of Large Transactions

General

Certain large transactions involving Canadian businesses trigger advance notice requirements under the *Competition Act*. Such transactions cannot then be completed until the end of the review period discussed below. Pre-merger notification filings are required in connection with a proposed acquisition of assets or shares or an amalgamation, the formation of a non-corporate business combination or the acquisition of an interest in such a combination where thresholds relating to the "size of the transaction," the "size of the parties" and the "percent of equity" are exceeded.

What Counts as a "Large Transaction"?

If, and only if, the parties to a transaction, together with their respective affiliates, exceed $400 million in total assets in Canada *or* in total gross annual revenues from sales in, from or into Canada (the "size of the parties" threshold), the Commissioner must be notified of transactions that exceed the following "size of target" threshold (which may be indexed annually to GDP – the stated "size of target" threshold is applicable for 2013):

- an acquisition of assets in Canada with a book value in excess of $80 million or that generate gross revenues from sales in or from Canada of more than $80 million;

- an acquisition of voting shares of a corporation which, together with all other corporations controlled by it, has assets in Canada, or annual gross revenues from sales in or from Canada from those assets, in excess of $80 million;
- a proposed corporate amalgamation where at least two of the amalgamating corporations (including their respective affiliates) have assets in Canada with a value exceeding $80 million or have gross annual revenues from sales in, from or into Canada in excess of $80 million and the value of the assets in Canada of the continuing corporation or the gross revenues from sales in or from Canada generated from those assets exceeds $80 million; 2
- the formation of an unincorporated business combination (such as a partnership or trust) where the value of the assets in Canada contributed, or the gross revenue from sales in or from Canada from those assets, exceeds $80 million (please note: a potential "joint venture" exemption may apply); or
- an acquisition of an interest in an unincorporated business combination (such as a partnership or trust) that carries on an operating business with assets in Canada, or gross revenues from sales in or from Canada generated from those assets, in excess of $80 million.

Notification of an acquisition of an interest in a combination or of voting shares of a corporation will be required only if, consequent to such an acquisition, certain "percent of equity" thresholds would be exceeded. These thresholds differ depending on whether the transaction is a combination or share acquisition. In the case of an interest in a combination, the thresholds are:

- where as a result of the transaction, the person will have a right to receive more than 35% of the profits or more than 35% of the assets on dissolution; or
- where this threshold has already been exceeded, the right to receive more than 50% of the profits or assets.

In the case of the acquisition of the voting shares of a corporation, the thresholds are:

- 20%, in the case of an acquisition of a company's voting shares any of which are publicly traded;
- 35%, in the case of an acquisition of voting shares of a private company; or
- 50%, in the case of a subsequent acquisition of voting shares of either kind of company by a person that has previously surpassed the thresholds set out above with respect to that company.

It is possible for the target entity to exceed both the size of the parties and the size of target thresholds on its own.

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[2] While the *Competition Act* does not provide a definition of amalgamation, the Competition Bureau has stated that the union of two or more corporations, whereby they become one corporation, pursuant to valid legislation is considered an amalgamation for purposes of the *Competition Act*, whether the amalgamation occurs under federal or provincial legislation or under the laws of a foreign jurisdiction. A so-called "Delaware merger", for example, is treated as an amalgamation.

Filing Obligations and Waiting Periods

Where a transaction is notifiable, the parties must file a pre-merger notification pursuant to the *Competition Act* and the *Notifiable Transactions Regulations* (unless such a requirement has been waived by the Bureau or the transaction exempted by the issuance of an advance ruling certificate (ARC – see below). Generally, a notification would require: (i) information such as a description of the proposed transaction and business objectives intended to be achieved by it; (ii) a list of foreign authorities that have been notified of the proposed transaction and the dates on which they were notified; and (iii) information in respect of each party and its affiliates, including a description of its principal business and principal categories of products, and detailed customer and supplier information.

Pre-merger notification filings are subject to a filing fee of C$50,000.

An initial 30-day waiting period will apply following the submission of a pre-merger notification filing, during which time the proposed transaction cannot be completed (unless earlier termination has been granted by issuance of an ARC or a "no-action" letter – see below). If, during this 30-day period, the Commissioner issues a formal request for additional information (referred to as a "supplementary information request" or "SIR"), it will effectively reset the clock and a new 30-day waiting period will commence following compliance with the request (which can take several weeks or months).

Where a party has completed a proposed transaction before expiry of the waiting period, either a court or the Competition Tribunal, on application by the Commissioner, may impose a fine of up to $10,000 per day of non-compliance with the waiting period, among other things. Failure "without good and sufficient cause" to notify prior to closing is a criminal offence punishable by a fine up to a maximum of C$50,000.

Advance Ruling Certificates (ARC) and "No-Action" Letters

The *Competition Act* establishes an advance ruling process through which parties to a proposed merger transaction may seek an ARC from the Commissioner confirming that, on the basis of a review of the facts they have presented in their application, the Commissioner will not challenge the proposed merger. An ARC has two advantages. First, it exempts the parties from the statutory requirement to notify the transaction or, if notification materials have been filed, it terminates the statutory waiting period. Second, an ARC prevents the Commissioner from challenging the proposed transaction following its completion, unless material new information comes to light.

All requests for an ARC are subject to a filing fee of $50,000. When both a pre-merger notification and an ARC request are filed for the same transaction, only one fee is payable.

An ARC will be issued only in the clearest of circumstances where the Commissioner is of the view that a transaction will not or will not be likely to substantially lessen or prevent competition in any relevant market. However, if the request for an ARC is denied, the Commissioner may still issue a letter stating that he has no current intention to challenge the transaction (a so-called "no-action" letter). Parties will regularly close their transactions on the basis of a "no-action" letter. The principal distinction between the issuance of an ARC and a "no-action" letter is that in the case of a "no-action" letter, the Competition Bureau retains its right to challenge the transaction within one year of closing. Having said that, we are not aware of any instance where a post-closing merger challenge occurred following the issuance by the Competition Bureau of an unqualified "no-action" letter. The other notable distinction between an ARC and a "no-action" letter from a procedural perspective is that the issuance of a "no-action" letter does not automatically exempt parties from the pre-merger notification obligation. However, the Commissioner may (and routinely will) waive the obligation to notify a transaction pursuant to s. 113(c) of the *Competition Act* on the basis that substantially similar information as that required in a notification filing was provided in the ARC request.

Dual Filing for Transportation Undertakings

Under the *Canada Transportation Act*, when a pre-merger notification is required to be filed under the *Competition Act*, parties to a proposed merger transaction involving a federal "transportation undertaking" must also give notice to the Minister of Transport, Infrastructure and Communities and, in the case of air transportation undertakings, to the Canadian Transportation Agency.[3] There is no filing fee in respect of a *Canada Transportation Act* notification. Failure to notify the Minister when required is a criminal offence punishable by fine up to a maximum of $50,000.

Where required, notice to the Minister is to contain the same information as that provided to the Commissioner under the *Competition Act* (*i.e.*, the information prescribed under the *Notifiable Transactions Regulations*), as well as information on the public interest as it relates to national transportation, as required by non-statutory guidelines to be issued by the Minister.[4] Once a filing has been made to the Minister, the Minister has 42 days to decide whether the proposed merger raises any public interest issues. If the Minister is of the opinion that public interest issues are raised, the parties will not be permitted to close the transaction without the approval of the Governor in Council (*i.e.,* the federal Cabinet). The final decision will ultimately depend on the Minister's recommendation and undertakings agreed to by the parties. If the parties implement a transaction without such approval, the Minister may apply to a superior court to make any appropriate remedial order,

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[3] Prior to amendments made in 2007, notice was limited to transactions involving air transportation undertakings. Foreign ownership restrictions applicable to the air transportation sector continue to apply, but they have not been extended to non-air transportation undertakings.

[4] On July 28, 2008, Transport Canada released draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings. As of June 2013, final guidelines had yet to be published.

including a divestiture of assets. Note that the Minister of Transport Canada and the Canadian Transportation Agency are of the view that the issuance of an advance ruling certificate or s. 113(c) waiver (either of which exempts parties from the *Competition Act* notification obligation, as discussed above) does not exempt parties from the *Canada Transportation Act* notification obligation (this view has not been tested in court).

Other Powers of the Commissioner

In addition to the administration of the merger review process under the *Competition Act*, the Commissioner has the power to:

- inquire into reviewable trade practices including refusal to deal, price maintenance, some forms of misleading advertising, exclusive dealing, tied selling, market restrictions and delivered pricing and initiate civil proceedings before the Competition Tribunal in relation thereto; and
- investigate and then recommend that the DPP prosecute certain criminal offences including bid-rigging, conspiracy in restraint of trade (cartels), some forms of misleading advertising and telemarketing, pyramid schemes and some multi-level marketing plans.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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