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Canada merger control

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Originally published by LexisNexis (part of RELX (UK) Limited)
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Produced in partnership with Davies Ward Phillips & Vineberg LLP

A conversation with Mark Katz, partner at Canadian law firm Davies Ward Phillips & Vineberg LLP, on key merger control issues in Canada under the Competition Act (the Act).

NOTE–to see whether notification thresholds in Canada and throughout the world are met, see Where to Notify.

General overview of the Competition Act merger control regime

The Act authorises the Commissioner of Competition (the Commissioner) to challenge merger transactions that are likely to prevent or lessen competition substantially in a relevant market affecting Canada. The Commissioner heads the Competition Bureau (the Bureau) which is responsible for investigating merger transactions to determine if they are likely to have the proscribed anti-competitive effect.

The definition of merger for these purposes is quite broad. In addition to acquisitions of control (defined as the acquisition of a greater than 50% interest in the target entity), a merger includes any transaction by which one party acquires or establishes a significant interest in the business of another. Significant interest is interpreted as the ability to exercise material influence over the target party's business, which can capture acquisitions of minority interests (even potentially as low as 10%), as well as contractual arrangements in which there is no transfer of interests at all.

The Act also establishes a pre-merger notification regime for certain types of merger transactions that exceed statutory thresholds (including transactions involving the acquisition of minority interests). Merger transactions that are subject to notification cannot be closed until the required materials are filed and the applicable statutory waiting period has expired or been waived by the Commissioner.

It is important to note that the Commissioner's review of merger transactions is not limited to mergers that are subject to pre-merger notification. The Commissioner will also review transactions that fall below the pre-merger notification thresholds. Conversely, transactions may be subject to pre-merger notification (and ap-plicable waiting periods) even if it is apparent that they do not raise substantive issues.

The Commissioner may challenge merger transactions at any time before closing or within one year following closing. Merger applications are adjudicated by the Competition Tribunal, a specialised administrative body consisting of judges and lay experts. In practice, very few merger transactions are challenged in Canada. To the extent that issues are identified, they are typically resolved by negotiated settlement between the Commissioner and the parties.

Interface between Competition Act and Investment Canada Act reviews

The Investment Canada Act (the ICA) is the other major Canadian statute of general application that con-tains a merger review process. The ICA authorises the Canadian government to review certain investments by non-Canadians in Canadian businesses and, where considered appropriate, to either prohibit these in-vestments from proceeding, order investments to be unwound or divestitures made, or condition approval on undertakings and commitments by the investor.

There are two aspects to ICA review: 'net benefit' review and national security review. Net benefit reviews of acquisitions of non-cultural Canadian businesses are conducted by the Investment Review Division (IRD) of the federal Ministry of Innovation, Science and Economic Development; Net benefit reviews of acquisitions of cultural Canadian business are conducted by the Cultural Sector Investment Review division (CSIRD) of the federal Canadian Heritage ministry. National security reviews are carried out by the IRD in consultation with the federal ministry of Public Safety and Emergency Preparedness and Canada's national security agencies.

One of the net benefit criteria that IRD or CSIRD will consider in assessing a transaction is the impact on competition. In carrying out this part of the analysis, IRD/CSIRD will, as a matter of course, seek the Bureau's views on potential competition issues arising from the transaction. This is done by providing written notice to the Bureau that a foreign investment proposal is under review, and by providing basic information about the transaction and the parties involved, as well as any plans submitted by the investor. In some cases, the Bureau will have already commenced, or completed, a review of the transaction under the Competition Act prior to receiving this written notice. In other cases, such a review is initiated following receipt of the written notice. In all cases, the Bureau conducts its own independent review of the transaction, and shares its conclusions with IRD/CSIRD regarding the effects of the transaction on competition. The Bureau's analysis and ultimate conclusions are considered in the context of the broader assessment of net benefit.

Because the Bureau's input is considered as part of the net benefit analysis, the Bureau also shares timing and other procedural information relating to its review, as necessary. Generally speaking, the net benefit review will not be finalised until after the Bureau's analysis is complete.

The Bureau and IRD/CSIRD will not exchange information if doing so would contravene any relevant legislation, international instruments, policies or guidance documents. Moreover, neither organisation will disclose any privileged or confidential information obtained from the other organisation to any third party without the written consent of the other organisation, except as required by law.

For more information on the ICA review process, see Canada FDI control

1. Have there been any recent developments regarding the Competition Act merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Canada?

The past year in Canada saw the Commissioner (Matthew Boswell) launch a concerted campaign to reform Canadian competition law and policy. The Commissioner's view is that competition law should play a central role in facilitating the recovery of the Canadian economy following the COVID-19 pandemic, but that the current version of the Act is ill-equipped to achieve this goal. As we move into 2022, the Commissioner's advocacy effort for reform is gaining traction, having secured some measure of support from the Liberal government. Where this will ultimately lead still remains to be seen. For the moment, however, there is a good chance that Canadian competition law will be more restrictive by the end of 2022 than it was at the beginning.

(i) The Commissioner's Call for Reform

In an October 2021 address to Canada's competition bar, the Commissioner offered a vigorous defence of competition law enforcement as a key driver of Canada's post-pandemic economic recovery. He then argued that statutory reforms are required to enable the Bureau to enforce Canadian competition law effectively, especially in response to the evolution in Canada and elsewhere to new digital and technology-based economies.

The Commissioner did not go into great detail about his ideas for proposed amendments, but he did offer a sampling of the changes that he would like to see made to the Act, including repeal or reform of the 'efficiencies defence' available to merging parties under Canadian law. This defence allows parties to argue that their mergers ought not be prohibited on the basis that the 'efficiencies' generated outweigh any anti competitive effects.

In a subsequent paper issued in February 2022, the Bureau set out a detailed wish list containing numerous and substantial recommendations for amending the Act (some of which the Commissioner had also mentioned in his October 2021 speech), including significant changes to the current merger review regime, such as:

- shifting the burden of proof to merging parties to prove that a 'concentrative merger' would not substantially lessen or prevent competition;

- requiring that merger remedies restore competition to pre-merger levels and not just eliminate any ‘substantial’ lessening or prevention of competition;
- easing the legal standards applicable to injunctive relief before the Competition Tribunal;
- expanding the scope of mergers that must be notified to the Bureau pre-closing;
- extending the limitation period for challenging a merger post-closing to three years from one year; and
- elimination of the ‘efficiencies defence’.

This is an aggressive agenda that leaves much to argue with. But the Commissioner obviously sees the time as being ripe to make some significant changes to his enforcement mandate.

(ii) Federal Government Announces Competition Law and Policy Review

The Commissioner’s reform campaign received an important – and official - vote of confidence on February 7, 2022, when the federal Minister of Innovation, Science and Industry announced that the federal government intends to ‘carefully evaluate potential ways to improve [the] operation,’ of Canadian competition law. Although the Minister’s official announcement did not expressly mention merger-related issues, he later suggested in a newspaper interview that changes to the efficiencies defense would indeed be considered.

The Minister’s announcement did not provide details about the proposed framework for reviewing the Act, nor did he set any timeline. In his newspaper comments, though, the Minister said that reforms could occur in multiple stages, with some initial changes ‘in the coming months’ that would have ‘an immediate and tangible impact for consumers and businesses in Canada,’ with a ‘more comprehensive modernization’ of the Act to follow. The Minister also stressed that competition law reform is ‘certainly top of mind’, because it supports the Canadian government’s agenda of addressing ‘the rising cost of living, corporate concentration and a fair chance at participating in the economy’.

The Minister’s announcement gives Canadian government imprimatur to the Commissioner’s reform efforts. It also aligns Canada with other jurisdictions, including the United States, the United Kingdom, and Australia, that are also looking to amend their competition laws in order to enhance enforcement. Based on the Minister’s comments, we would expect to see some limited amendments to the Act being proposed in the near future, with more ‘big picture’ items dealt with in a longer-term consultation process.

One possible change to look out for is an increase in the filing fee for merger notifications under the Act. This fee is adjusted on an annual basis and currently stands at $74,905.57. However, the Commissioner has commented that a change in approach is needed to ‘properly fund [merger] operations in line with current realities and demands’. This is likely setting the stage for a change to the merger fee formula and an increase over current levels.

2. Under Canadian merger control law, is the control test the same as the EU concept of ‘decisive influence’? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

According to the EU Merger Regulation, the European Commission must be notified of and approve a transaction when a party obtains control of another party (assuming the parties meet certain thresholds). The test for determining control is whether one party has the possibility of exercising ‘decisive influence’ over the other party. The European Commission will consider both quantitative shareholdings as well as whether the party may have de facto control by achieving a majority at shareholders' meetings.

The Canadian merger review regime is different in that the acquisition of control (formal or de facto) is not a threshold triggering event for the pre-merger notification obligation.

There are several instances where the acquisition of an interest below 50% (ie a minority investment not constituting control) can trigger the notification obligation (assuming the other relevant thresholds are exceeded). This is the case, for example, with share acquisitions and the acquisition of an interest in a non-corporate ‘combination’, e.g., a partnership. In the case of share acquisitions, a transaction may be notifiable where the acquiror's voting interest following the transaction exceeds 20% (in the case of a public company) or 35% (in the case of private company). Similarly, the acquisition of an interest in a combination may be notifiable so long as the interest acquired exceeds 35%. These thresholds are based strictly on the size of the interest acquired and do not incorporate a de facto control element. In other words, if the interest threshold is exceeded, that part of the notification test is met regardless of whether the acquiror would exercise material influence over the target or not. Conversely, if the interest acquired is below the relevant threshold, there will be no notification requirement regardless of whether material influence over the target would be established (although that would be relevant for potential substantive review). See the response to question 4 for further discussion.

3. Are joint ventures caught by the Competition Act merger control provisions (in-cluding non-structural, cooperative joint ventures)?

Joint ventures or other types of strategic arrangements may be caught by the broad definition of merger found in the Act and thus be subject to the Act's substantive merger review jurisdiction. Joint ventures may also trigger the Act's pre-merger notification requirements if they exceed the relevant thresholds. That said, the Act also contains exemptions from notification and/or substantive review for certain types of non-corporate joint ventures; in practice, the application of these exemptions tends to be limited, particularly the exemption from substantive review.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any ‘effects’ doctrine/policy if relevant)?

The pre-merger notification requirements in Part IX of the Act apply in respect of specific types of transactions that meet prescribed financial and voting interest thresholds.

The two key types of acquisitions to which the notification requirements apply are: (i) asset acquisitions and (ii) share acquisitions.

The two key thresholds are the ‘size of transaction’ and the ‘size of parties’ thresholds:

- **Size of transaction**—the target must be, or control, an operating business in Canada with over CDN $93m in Canadian assets (book value) or gross revenues generated by these assets from sales in or from Canada (ie domestic plus export sales).
- **Size of parties**—all parties and their affiliates (both corporate and non-corporate entities) (in aggregate) must collectively have over CDN $400m in Canadian assets or gross revenues generated by sales in, from or into Canada (ie domestic sales, exports and imports).

For these purposes:

- the parties' most recent annual audited financial statements are generally the starting point for calculating the value of assets and revenues
- ‘operating business’ means ‘a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work’
- the ‘size of transaction’ threshold is adjusted annually according to a formula prescribed under the Act—the CDN $93m threshold referred to above came into force in February 2022 and applies to transactions completed in 2022; the same threshold applied to transactions completed in 2021.

Where a share acquisition is involved, the acquiror's voting interest following the transaction also must exceed 20% (in the case of a public company) or 35% in the case of a (private company) or, if that threshold is already exceeded, 50%.

The other types of transactions covered by Part IX are amalgamations, the formation of non-corporate combinations (eg a partnership), and the acquisition of an interest in non-corporate ‘combinations’. Variations of the above financial and voting interest thresholds apply in those cases.

Foreign-to-foreign transactions can be subject to pre-merger notification under the Act, provided that the target carries on an operating business in Canada (directly or indirectly) and the relevant thresholds are met. Thus, a transaction will not be subject to notification if the target merely has turnover from sales into Canada but does not have a Canadian operating business that generates revenue in or from Canada.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

Both the Act's *Notifiable Transactions Regulation* and the Bureau's *Pre-Merger Notification Interpretation Guidelines* are of assistance in interpreting various aspects of the Part IX pre-merger notification requirements. Issues addressed include the determination of asset/revenue values generally and in specific circumstances where adjustments may be required; the definition of operating business; the exemption for non-corporate combinations; the treatment of non-voting shares and convertible securities; and issues relating to amalgamations, creditor acquisitions, shareholder agreements, corporate spin-offs, and hostile transactions.

One pre-merger notification issue to be aware of is that the definition of 'parties' to a transaction is not the same for all types of transactions. This can be important when calculating the relevant assets and revenues for the 'size of parties' threshold (see question 4) as it determines which parties are relevant for that purpose. For example, the Act provides that the parties to a proposed acquisition of shares are 'the person or persons who propose to acquire the shares and the corporation the shares of which are to be acquired'. In other words, in a situation where Company A is selling the shares of Company B to Company C, the parties to this transaction for Canadian notification purposes will be Company B and Company C; Company A, ie the vendor, is not considered a party. The same applies to transactions involving the acquisition of an interest in a non-corporate combination (e.g., a partnership). In that case as well, the Act provides that the parties to a proposed acquisition of an interest in a combination are 'the person or persons' who propose to acquire the interest and the combination whose interest is to be acquired'. These rules do not apply in the case of asset acquisitions, amalgamations or the formation of non-corporate combinations.

Another issue to be aware of is the Act's definition of 'affiliates', which comes into play in the 'size of parties' threshold as the Canadian assets and revenues of the parties' affiliates must be included as well. There is also an exemption from notification for transactions where all of the parties are affiliates of each other.

Pursuant to the Act, one entity will be affiliated with another if (a) one such entity controls the other (ie owns more than 50% of its interests) or (b) both entities are controlled by the same third entity. Thus, for example, entities in which a party owns only a minority interest will not be considered its affiliates and will not be relevant for the purposes of determining the 'size of parties' threshold. The same also applies to any entities where a party may be a joint partner and own a 50% interest; because the party's interest does not exceed 50%, these entities are not regarded as its affiliates under the Act.

Another issue that has arisen in recent years is how to treat SOEs for notification purposes. The Competition Bureau has recently confirmed that, for the purposes of determining whether pre-merger notification thresholds are exceeded, only entities that are in the same line of direct state ownership as the relevant SOE need to be considered. In other words, the Canadian assets and revenues of a merging party's sister SOEs need not be taken into account so long as these SOEs are in a separate line of direct state ownership from the relevant SOE.

Finally, one other point to note is in relation to appropriate exchange rates to use for currency conversions–the Bank of Canada's official rate at 12pm on the final day of a company's business year should be used for conversions to Canadian Dollars (not the average for the business year).

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Subject to limited exceptions, if a transaction exceeds the thresholds set out above, a pre-notification filing must be submitted to the Bureau and the transaction cannot close until the statutory waiting period has expired or been terminated/waived. See the response to question 8 for a more detailed discussion of the timeline for reviews.

One important exemption from notification is when all of the parties to the transaction are affiliates of each other. The most commonly applied exemption from the notification requirement, however, involves the purchaser applying for and receiving either:

- an ‘advance ruling certificate’ (ARC) pursuant to section 102 of the Act, or
- a ‘no action letter’ (NAL) with a waiver from the filing obligation.

The effect of receiving either of these two types of clearance letters is to eliminate the need to file a formal notification. Most transactions in Canada are dealt with in this manner, with the practice being to submit, in lieu of a formal notification, a written brief applying for an ARC or, in the alternative, a NAL and waiver. The written brief will set out the reasons why the parties believe that their proposed transaction does not raise substantive competition issues and thus why the Commissioner should issue either an ARC or NAL or waiver.

One potential drawback of this approach is that the statutory waiting period is not triggered until a formal notification is made. Thus, in circumstances where certainty of process and timing is required, or if issues are anticipated, parties will typically opt to file a formal notification in order to begin the waiting period. Even in those circumstances, however, the standard practice in Canada is to submit a written request for an ARC/NAL stating the parties' positive case for clearance of the transaction.

7. Is there any discretion to review transactions that fall below the notification thresholds?

The Bureau’s authority to review transactions operates independently form the Act’s pre-merger notification regime. Accordingly, the Bureau may – and will – investigate transactions that fall below the relevant notification thresholds if it has reason to believe that they may result in a substantial prevention or lessening of competition. Indeed, at least two of the merger cases considered by the Supreme Court of Canada have involved transactions that were not subject to pre-merger notification.

The Bureau may learn about non-notifiable transactions in a variety of ways: complaints from market participants; requests from the IRD for input into its net benefit analysis under the ICA; contacts from other jurisdictions that are reviewing the transaction; or from the Bureau’s own review of the business press.

8. Is it possible to close the deal globally prior to local clearance?

It is important to stipulate that, under the Act, ‘clearance’ of a merger transaction is not a pre-condition to the right and ability to close that transaction. The only requirement is that the statutory waiting period have expired. Once the waiting period has expired, parties are entitled to close their transactions even if the Bureau has not completed its review. Indeed, this is not an uncommon occurrence. As a practical matter, however, the Bureau does not favour parties closing before its review is completed. As such, it will generally ask for a ‘timing agreement’ whereby the parties commit not to close for an agreed-upon period of time to permit the Bureau to complete its review. The Bureau has warned that if parties will not commit to extend the time for review, the Bureau will switch to litigation mode and will no longer be as transparent in discussions regarding issues and potential remedies. Ultimately, if it decided to take enforcement action, the Bureau could seek an order extending the time for its review (by up to 60 days) or challenge the transaction and seek an order enjoining closing of the transaction (in whole or in part) pending determination of its challenge. Another option for the Bureau, however, is to acquiesce to the transaction closing and continue with its investigation. In the latter regard, the Bureau has up to one year following closing to challenge a transaction.

Over the past several years, there have been several instances of parties ‘closing over the Bureau’, i.e., not waiting for the Bureau to complete its review, including at least one case involving a global transaction. Global transactions raise difficult issues for the Bureau because, although the matter has never been tested, it is highly doubtful that the Competition Tribunal has the jurisdiction to grant an order enjoining a global. transaction from closing. At most, therefore, the Bureau may seek to ‘hold separate’ the two businesses in Canada to ensure that its ability to seek a potential divestiture is not compromised (there could be additional complications if potential divestiture assets are located outside of Canada, eg if the relevant market is North American or global). Based on recent experience, it seems that the Bureau will be reluctant to enter into such an agreement informally and will insist on a formal order from the Tribunal. This may be a disincentive to a negotiated resolution since proceeding in that way would also involve a formal challenge to the transaction. In those circumstances, the purchaser may decide not to cooperate and contest any proceeding for an interim hold separate order, obliging the Bureau to make its case before the Competition Tribunal. Given the Bureau's poor litigation track record in obtaining interim merger relief, this is a legitimate option for the purchaser to consider.

9. Is there a deadline for filing a notifiable transaction and what is the timetable there-after for review by the Bureau?

(A) Statutory waiting period

The filing of a pre-merger notification under the Act triggers a statutory waiting period which operates as follows:

- there is an initial waiting period of 30 calendar days following the pre-merger notification filing (the 30–day count starts from the day after the filing is certified as complete (which is typically the same date as the filing was made unless there were serious deficiencies)
- the parties may close their transaction upon the expiry of the initial 30-day waiting period unless, prior to the end of that period, the Commissioner issues a 'supplementary information request' (SIR) to the merging parties for production of documents and/or responses to questions
- if a SIR is issued, the waiting period is suspended until the parties comply, at which point the waiting period begins to run again and expires 30 calendar days following compliance with the SIR.

The Commissioner may terminate or waive the waiting period (including the initial waiting period) at any time by issuing an ARC or NAL indicating that the Commissioner does not intend to challenge the transaction. Conversely, the Commissioner may apply for an injunction to prevent closing for up to an additional 60 calendar days following the expiry of the waiting period to allow additional time for review. Parties may also pull and re-file a notification in order to avoid the issuance of a SIR (at least at first instance) and provide the Bureau with more time for its review.

There is no prescribed deadline within which a filing must be made for a notifiable transaction, the only consideration being that sufficient time be allowed for the requisite waiting period to expire before closing. In addition, while it is not necessary to wait for a signed agreement to be in place before the notification is made, the Bureau urges parties to be 'reasonably certain of their intentions' before they file. First, if the parties do not ultimately sign an agreement, the filing fee will not be refunded. Second, and even more importantly, the Bureau will not consider the notification to be complete if the parties request that it not make market contacts (eg call top customers and suppliers, which must be listed in the notification) until a deal is signed and the transaction made public. As such, the statutory waiting period will not be considered to have commenced even though the notification has been submitted. (The same applies to the Bureau's service standard period for substantive review, discussed below.)

As well, unlike in some other jurisdictions, expiration of the statutory waiting period in Canada does not, by itself, constitute substantive clearance of a proposed merger. For that reason, as set out under question 8 above, it is possible for parties to be in a legal position to close, because the statutory waiting period has expired, but not in a practical position close, because they have not yet received substantive comfort from the Bureau (which is not a statutory requirement).

(B) Service Standard Time Periods

The Bureau also has adopted the following 'service standards' within which the substantive review of notified mergers is to be completed:

- a maximum of 14 calendar days for 'non-complex' mergers (ie mergers that clearly raise no substantive competition issues)
- a maximum of 45 calendar days for 'complex' mergers (ie mergers where there is an indication that the transaction may create substantive competition issues), unless an SIR is issued, in which case the review period will coincide with the statutory waiting period, namely 30 calendar days following receipt by the Bureau of the completed SIR responses.

Service standard time periods typically begin once the Bureau has received the information it needs to conduct its analysis.

The Bureau's service standard periods are non-statutory and thus non-binding. In practice, the Bureau has a good track record of meeting its targets in close to 97% of cases. However, in the roughly 3% of cases that require in-depth reviews and (potentially) remedies, Bureau merger reviews can stretch on for many months. Indeed, it is not uncommon for certain merger reviews to reach and go beyond their one year anniversaries without resolution. To be fair, where multi-jurisdictional transactions are involved, this is sometimes due to delays in other jurisdictions. However, there are certainly 'Canada-only' cases in which the merger review process has seemed interminable.

As can be seen, the Bureau's service standard periods do not line up with the statutory waiting period (unless a SIR is issued, in which case the service standard period is simply subsumed within the statutory period). As discussed above, this can lead to situations where the statutory waiting period has expired but the Bureau's service standard period has not (e.g., in the case of a 'complex' transaction, if the Bureau has not competed its review within the statutory waiting period but declines to issue a SIR to extend the statutory waiting period further). This can be a source of unnecessary confusion for merging parties although the practical implications are limited.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

The obligation to file a pre-merger notification applies to both parties. It is thus typical for each party to file its own pre-merger notification form, although there is no prohibition against one party filing a completed form on behalf of the other.

The content of the pre-merger notification is prescribed by regulation. Key items to be provided include a list of the top 20 customers and top 20 suppliers of the parties' relevant businesses and documents prepared for the purpose of evaluating or analysing the proposed transaction from a competition perspective (analogous to the item 4(c) requirement on the US HSR form). The Bureau has published a standard form of pre-merger notification incorporating these requirements which is available on its website. The pre-merger notification also has to be certified as being correct and complete in all material respects and any relevant omissions must be identified and explained.

Written applications for ARCs and NALs are typically prepared and filed by the purchaser, with the participation of the vendor/target. There is no prescribed format, but these requests typically include descriptions of the parties, the proposed transaction and the relevant industry, and an analysis of why the proposed transaction is not anticompetitive, with reference to factors such as post-merger market shares, effective remaining competition, barriers to entry and countervailing power of customers.

There is a CDN $75,055.68 fee for pre-merger filings (this fee is adjusted annually, with the next expected adjustment in April 2022). This fee is typically paid by the purchaser, although that is a matter to be negotiated between the parties. Payment of the fee is not a requirement for filing the pre-merger notification; however, if not paid at the time of filing, the fee should be paid within a few days thereafter.

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the record/stance in terms of pursuing parties for failing to notify relevant transactions

Any person who, without good and sufficient cause (the proof of which lies on that person), fails to notify the Commissioner of a notifiable transaction is guilty of a criminal offence and is liable to a fine not exceeding CDN $50,000.

In addition, any person who, without good and sufficient cause (the proof of which lies on that person), completes a transaction prior to the expiry of the relevant waiting period is potentially subject to a variety of court-ordered civil remedies, including an order to dissolve the merger, dispose of assets, and/or pay an 'administrative monetary penalty' (AMP) not exceeding CDN $10,000 for each day that the person is in non-compliance.

There is no statute of limitations in relation to breaches of the Act.

There have not been any prosecutions to date for failure to file a pre-merger notification, nor any civil proceedings for contraventions of the waiting period.

12. Are there any other 'stakeholders' that are relevant (for example, any ‘sector regulators’ who might have concurrent powers)?

Apart from merger review under the Act, and foreign investment review under the ICA, merger transactions may be subject to review by other regulatory authorities with responsibility for specific industry sectors. This includes, for example, merger transactions in the transportation, financial services, telecommunications and broadcasting sectors.

In some cases, the reviews may be concurrent, although focusing on different issues (at least in theory). For example, in certain circumstances, mergers involving 'transportation undertakings' can be subject to review by both the Commissioner and the Canada Transportation Agency, with the former examining whether the transaction is likely to prevent or lessen competition substantially and the latter considering the transaction from the perspective of Canada's national transportation policy.

In other cases, the review may be exclusive to one authority over another. For example, the ICA does not apply to certain foreign investments in the financial services sector that are subject to review by the relevant regulatory authorities in that sector.

In terms of a merger review under the Act, the Bureau will consult with market participants as part of its assessment of the likely impact of the transaction. The Bureau will typically be most interested in the views of customers and/or suppliers but there have also been cases where competitors have been an important factor in driving the Bureau’s decision to challenge a transaction