

# Agricultural Industry

Competition Law in Canada



*Blakes*

# Canadian firms participate in all aspects of the agricultural industry,

including as input and service suppliers, primary agricultural producers, and distributors. These firms are vital to the continued success of Canada's agriculture.

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The Canadian agricultural sector is an important part of the country's economy, with farm market receipts reaching a record high in recent years and Canada ranking as one of the world's leading exporters of agricultural products. More broadly, the Canadian agriculture and agri-food sector accounts for approximately seven per cent of Canadian GDP and employs more than two-million people. Furthermore, the current COVID-19 pandemic has highlighted the need for a healthy agricultural sector, reinforced its crucial role for Canadians and ensured that agriculture will remain a key focus of government authorities.

The Canadian Competition Bureau, which has recognized the agricultural sector as a "critical part" of the Canadian economy, has made the industry a significant focus of its enforcement activities. This publication provides important information regarding the implications of Canada's competition laws for businesses in the agricultural sector.

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## Things You Need to Know About the Agricultural Industry and Competition Law in Canada

- 1** The Competition Bureau has been **carefully scrutinizing mergers** in recent years, including retail transactions and, more recently, a challenge to the acquisition of a grain-elevator business in Western Canada.
- 2** The Competition Bureau has **coordinated heavily with foreign antitrust agencies** in its review of mergers between multinational firms in the agricultural industry.
- 3** The Competition Bureau has **recognized the importance of innovation** in the agricultural industry and has taken enforcement action to protect it.
- 4** The Competition Bureau can act **against a wide variety of competitive behaviours** by firms in the agricultural industry, including anti-competitive cartels or other competitor collaborations, abuse of dominant position and anti-competitive pricing practices.
- 5** The Competition Bureau is **currently investigating allegations of anti-competitive supply restrictions to a retailer** from certain manufacturers and wholesalers of seeds and crop protection products



# Competition Law Enforcement Framework

Like many developed economies, Canada has a competition law of general application called the *Competition Act* (Act). The purpose of the Act is, among other things, to “maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy ... and in order to provide consumers with competitive prices and product choices.”

Many provisions of the Act are potentially relevant to participants in Canada’s agricultural industry, including criminal prohibitions against certain types of agreements among competitors, as well as civil provisions relating to mergers or business practices that are likely to prevent or lessen competition substantially.

The Act also includes important provisions that allow for agreements that have pro-competitive objectives, even where those agreements have an element that otherwise may contravene the Act, and that recognize efficiency-enhancing behaviour.

The Commissioner of Competition, an official who heads Canada’s Competition Bureau, administers and enforces the Act. The Act requires that mergers that exceed certain thresholds be reported to the Bureau for review. Non-notifiable mergers can be (and are) reviewed by the Bureau post facto, as can all other business conduct.

The Bureau’s investigation and enforcement tools are broad and include court orders to produce data and documents, interview company executives and inspect property. However, the Bureau is not permitted to take action in respect of any business conduct unilaterally. Instead, its concerns must be presented to the Competition Tribunal or to a criminal court (as the case may be) that will ultimately decide the issue. Alternatively, the Bureau or Crown prosecutors may enter into settlements with private parties to resolve the Bureau’s concerns.



# Merger Review

Canada's framework for merger review has similarities to other jurisdictions and includes the following important elements:

## Notification

The Act establishes various thresholds that, if exceeded, require the merging parties to notify the Bureau of their transaction. The financial thresholds test the book value of the merging parties' assets and revenues in Canada. Typically, large agricultural industry mergers (e.g., between crop input manufacturers) exceed these thresholds. However, the Bureau retains jurisdiction to review all mergers, including those that do not exceed the notification thresholds, and has taken recent steps to enhance its intelligence gathering on non-notifiable transactions.

## Waiting Periods

Prior to closing, the Bureau must be notified of mergers that exceed these financial thresholds. Closing is prohibited until 30 calendar days after the notification. In addition, the Bureau can extend this waiting period by issuing a "supplementary information request" (SIR), which is similar to a second request under the United States *Hart-Scott-Rodino Act*. The issuance of an SIR extends the waiting period until 30 calendar days after the merging parties have submitted information responsive to the requests in the SIR. Reviews of mergers where SIRs are issued often take between four to six months, or longer if remedies are required.

## Substantive Review

Regardless of whether the transaction meets the notification thresholds, the Bureau will assess whether a merger is likely to prevent or lessen competition substantially. This occurs only where a merger is likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power. Market power is the ability to act independently of the market in determining price, quality or other dimensions of competition.

In determining whether the merged entity will have market power, the Bureau will consider the parties' combined market shares, the degree of market concentration, barriers to entry/expansion (including the dynamics of innovation and research and development in the particular industry), demand-side considerations (including buyer power) and regulatory oversight, among other factors.



## Efficiencies

The Act includes an express “efficiencies defence” that enables even mergers that are likely to prevent or lessen competition substantially to proceed so long as the efficiency gains from the mergers offset the anticipated anti-competitive effects. While this defence does not cover all synergies, it does take into account fixed-cost savings and variable cost savings, as well as dynamic efficiencies such as the optimal introduction of new products, the development of more efficient productive processes and the improvement of product quality and service. A similar defence is not available in other major jurisdictions.

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## Resolution

Following its substantive review, the Bureau may issue a letter confirming it will take “no action” in respect of a merger (which gives the parties substantive comfort). Alternatively, if the Bureau is concerned the merger is likely to prevent or lessen competition substantially, the Bureau may seek to negotiate changes to the merger (such as a divestiture or behavioural commitment) to address those concerns or apply to the Competition Tribunal for an order prohibiting all or part of the merger, among other things. For mergers in the agricultural sector, such changes have included the divestment of retail locations, product lines or other assets to third-party purchasers.

There are also numerous interim steps available to the Bureau, such as permitting merging parties to close transactions but mandating the businesses about which the Bureau has concerns be placed in a “hold separate” arrangement pending a resolution via settlement or a litigated process.



## Recent Trends in Merger Review

Mergers in the agricultural sector have been an area of active enforcement for the Bureau, including mergers of all sizes and all levels of the supply chain. The Bureau recently initiated a merger challenge against the acquisition of a grain elevator business and is expected to continue to apply close scrutiny to future mergers in the agricultural sector.

Recent trends in merger reviews in the agricultural sector in Canada include the following:

### Product Market Definition

In every instance, the Competition Bureau is focused on identifying the set of products that are substitutes from a demand perspective and applying the “hypothetical monopolist” test.

Examples of product-market analyses conducted by the Competition Bureau in investigating agricultural-sector mergers include:

- Observing that federal regulations, along with certain characteristics of pesticides (e.g., efficacy, timing of application, spectrum of coverage, support offered by manufacturer, resistance considerations, brand and loyalty programs, and price) can determine substitutability between pesticides
- Considering product markets much narrower than all fertilizers, including by dividing fertilizers by nutrient and state (liquid or dry), for mergers involving the combination of fertilizer manufacturers
- Defining product markets very narrowly, such as by analyzing competition for the supply of certain forms of nitrogen fertilizer, in the case of crop input retailers

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### Geographic Market Definition

The Bureau’s approach for defining geographic markets in the agricultural industry depends on the particular market segment in which the merging parties compete. For mergers involving crop input retailers, the Competition Bureau has performed its geographic market analysis on a local basis. For mergers between crop input manufacturers, the geographic market has generally been much broader — for example, the Competition Bureau has stated that the market for pesticides is likely national and that the market for certain fertilizers is likely North America-wide.

## Coordinating Processes

Agricultural-industry mergers that involve global-scale companies — typically those involved in the manufacture of crop inputs — are often subject to notification in Canada. These notifiable mergers are typically also subject to review in other jurisdictions, including the U.S. and the European Union. In such cases, the Bureau will coordinate with competition law agencies in these other jurisdictions and will often request that waivers be provided to those agencies to permit the exchange of the merging-parties' confidential information (the Bureau takes the position that it does not require a waiver under Canadian law). In addition, the Bureau, together with U.S. antitrust agencies, has issued guidance outlining best practices on cooperation in cross-border merger investigations that calls for, among other things, coordination on timing and outcome of cross-border mergers reviewed by these agencies.

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## Quantification

The Bureau often uses quantitative analyses to determine whether a transaction will result in competitive harm. In reviewing a large merger of two canola seed suppliers, the Bureau relied heavily on advanced analytical techniques, including merger simulation models, to measure the competitive effects of the transaction and design an appropriate remedy. The Bureau's economic model incorporated key market details, including quality differences among canola varieties and canola herbicides, complementarity between canola seeds and canola herbicides, potential entry by generic herbicide manufacturers, and other factors. In a recent merger involving the consolidation of two retail crop-input businesses, the Competition Bureau conducted pricing pressure and merger simulation analyses in order to quantify the likely harms to growers.



# Non-Merger Business Practices

The Act contains numerous provisions regarding non-merger business practices that are potentially relevant to agricultural industry participants.

These include the following:

## **Criminal Offences for Price-Fixing and Bid-Rigging**

It is a criminal offence to enter into an agreement with a competitor or potential competitor to fix or control price or output (including capacity); allocate sales, markets or customers; or submit a bid (or refrain from submitting a bid) in response to a call for tender that was arrived at through an agreement with another person. These offences are punishable by significant fines and, for individuals, jail terms. The Bureau has issued guidance explaining that it reserves use of the criminal offences for “naked restraints,” such as restrictions on competition not implemented in furtherance of a legitimate collaboration or joint venture. Private parties can also sue for violations of the criminal prohibitions for damages and restitution. These suits can be brought as class actions. Recent cases in Canada have significantly lowered the bar to class certification.

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## **Civil Prohibitions on Abuse of Dominance**

Business practices that constitute an abuse of dominance can be prohibited by the Competition Tribunal and may be subject to an administrative monetary penalty. A business practice may constitute an abuse of dominance where it is engaged in by a firm with market power, the purpose of the practice is anti-competitive (i.e., there is no objective business justification for the practice) and the practice prevents or lessens competition substantially. Private parties cannot sue for damages for business practices that are alleged to be an abuse of dominance under the Act.

In the agricultural sector, the abuse of dominance provisions may apply where a crop input retailer engages in predatory pricing by setting the price of a fertilizer below cost to eliminate, discipline or deter entry or expansion of a competitor, in the expectation that the retailer will be able to recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct. Other examples could include margin squeezing of a downstream competitor by a vertically integrated supplier of crop inputs and dominant manufacturers of crop inputs requiring their customers to enter into exclusive dealing relationships. The Competition Bureau is currently investigating whether manufacturers and wholesalers of seeds and crop-protection products have anti-competitively refused to supply or restricted supply to a retailer of agricultural inputs.

## Civil Prohibition on Illegal Agreements

Agreements among competitors or potential competitors that prevent or lessen competition substantially can be prohibited by the Competition Tribunal. No other sanction (such as a fine) is available for such agreements. The Bureau has issued guidance explaining that it will use this provision to investigate agreements that do not rise to the level of criminal “naked constraints” but which, nevertheless, have an anti-competitive effect. Any agreement that results in efficiencies that outweigh and offset the anti-competitive effects cannot be prohibited, and private parties cannot sue for damages under the Act in respect of agreements that are not criminal in nature.

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## Distribution Matters

Competition issues may arise where agricultural suppliers wish to control the conditions under which distributors/retailers acquire or resell their products, including the prices at which products are resold (tied selling, exclusivity provisions and resale price maintenance). The Act contains various provisions that permit the prohibition of different business practices relating to the distribution of products where those practices have anti-competitive effects. Private parties can seek the same orders with leave of the Competition Tribunal. However, there are no sanctions (such as a fine) for these practices, and private parties cannot sue for damages under the Act.

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## Misleading Claims

The Act contains misleading advertising and deceptive marketing practice restrictions. In particular, the Act prohibits making a representation to the public that is false or misleading in a material respect where the representation is made to promote a product or business interest. Administrative monetary penalties may be imposed on parties that engage in this conduct. If the false or misleading representation is made knowingly or recklessly, then it may contravene the criminal provisions of the Act, and criminal sanctions and private actions for damages may result.





## Recent Trends in Enforcement

Until recently, business practices in the agricultural industry have not generally been an area of significant attention for the Bureau.

While the “regulated conduct defence” has historically protected the ability of agricultural marketing boards to engage in behaviour that might otherwise be contrary to the criminal provisions of the Act, the Competition Bureau may seek at any time to use its powers against other industry participants to preserve the benefits of competition and innovation that come from Canada’s agriculture.

Recent trends in enforcement that may affect the agricultural industry in Canada include the following:

### Immunity and Leniency

The Competition Bureau recently released its updated Immunity and Leniency Program, which outlines the processes by which participants in criminal cartels can seek protection from all or a portion of the penalties applicable for such behaviour under the Act. The updated Program represents a more comprehensive set of rules, hoping to improve the previous programs that have served as an important source of leads for the criminal enforcement activities of the Bureau. Companies in the agricultural sector should consider applying for protection if such companies are involved in criminal cartel conduct.

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### Corporate Compliance

The Competition Bureau has in recent years put significant emphasis on the importance of compliance programs in ensuring that companies do not contravene the Act. Indeed, the updated Immunity and Leniency Program provides that the existence of a compliance program for a cartel participant may result in the Competition Bureau recommending up to a 20 per cent reduction of any applicable fine. Firms in the agricultural industry that do not have compliance programs should develop and implement them on an urgent basis in order to prevent cartel behaviour, catch existing cartel behaviour and best benefit from the Bureau’s Immunity and Leniency Program.

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### Foreign Competitor Collaborations

Recent case law has held that the Competition Bureau may take enforcement action against any business conduct, including competitor collaborations, that has the effect of harming competition in Canada even where the collaboration was formed outside Canada. Competitors in the Canadian agricultural industry should be aware that such collaborations are not protected from enforcement by virtue of their origin in another country.

# Conclusion

Participants in the Canadian agricultural sector face myriad commercial legal and regulatory challenges on a regular basis.

Part of this environment is Canada's *Competition Act*, a law of general application whose operation should be considered whenever strategic decisions are made, whether with respect to unilateral business conduct or mergers or other collaborations.

Careful planning and management can help minimize the burden associated with compliance with Canada's *Competition Act* and help participants in the Canadian agricultural industry succeed.



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