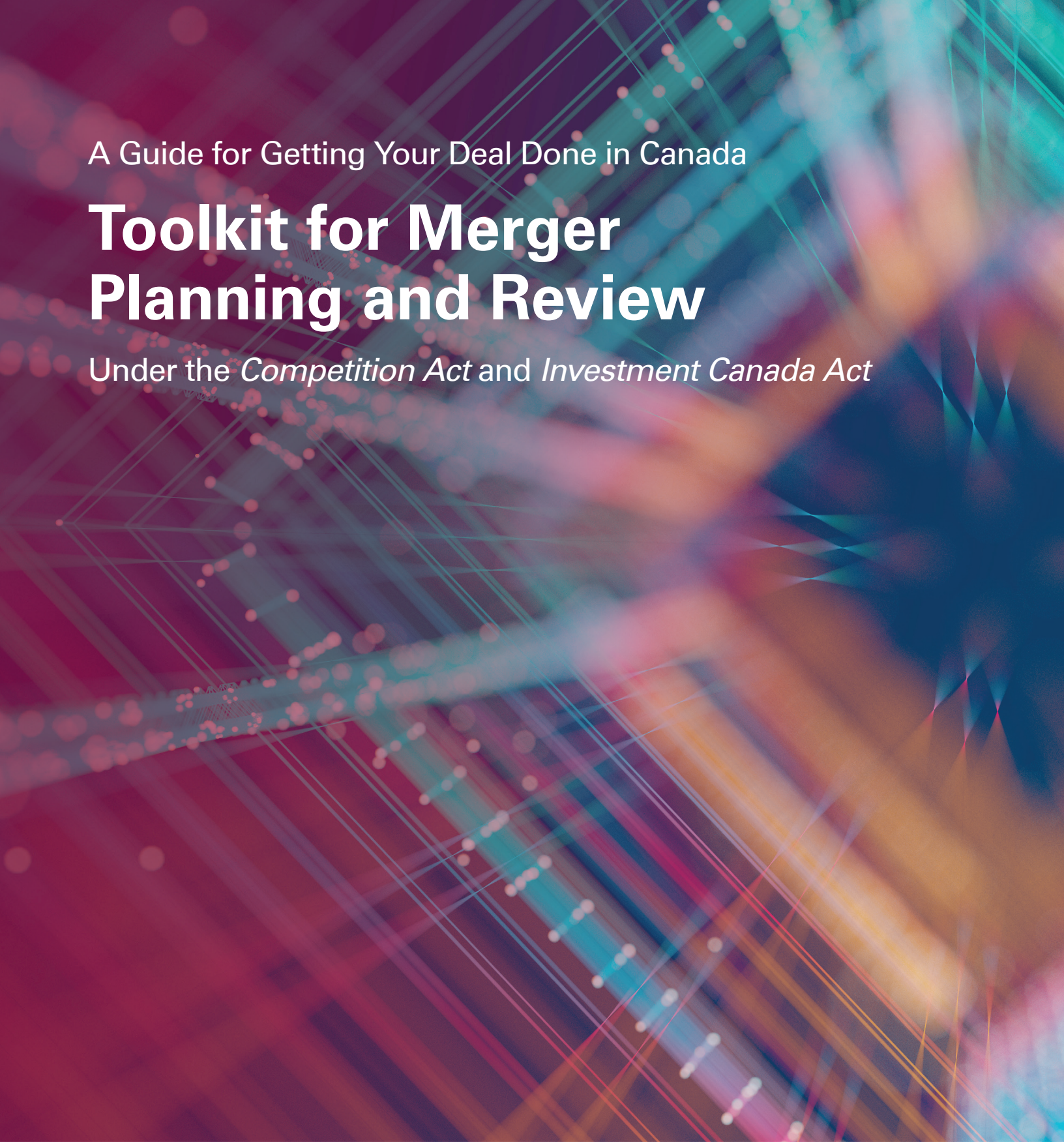

A Guide for Getting Your Deal Done in Canada

Toolkit for Merger Planning and Review

Under the *Competition Act* and *Investment Canada Act*

Blakes

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Helping You Navigate the Complexities of Merger Review

Introduction

We have prepared this Toolkit for Merger Planning and Review ("Toolkit") to help guide you through the merger review process in Canada. Many government agencies, including the Canadian Competition Bureau and Investment Canada, have the authority to review, challenge or block a merger. Effective navigation of the Canadian merger review process is essential to getting your deal done, and Blakes can help you along the way.

Keep this Toolkit handy as it will guide you through the process from start to finish. We begin by answering some of the most common questions about merger review, including whether a transaction must be reported to the Competition Bureau or Investment Canada before closing. We then offer guidance on internal preparations your company should undertake, specifically looking at what to do before the deal is announced in due diligence, in deal negotiations and in allocating risk through transaction structuring. The Toolkit then takes you through the formal filing process. Finally, the Toolkit provides guidance on responding to information requests from the government and effective use of technology that can assist you in responding to such requests. We also present an overview of the efficiencies defence and failing firm arguments, which may assist in getting your deal through, if certain criteria are met.

Blakes prides itself on delivering creative strategies that provide optimal solutions to meet our clients' business needs, and we do so on your timeline.

Brian A. Facey
Chair, Competition, Antitrust & Foreign Investment Group

Merger Review: Commonly Asked Questions

Who reviews mergers in Canada?

The Commissioner of Competition, ("Commissioner"), and staff at the Competition Bureau ("Bureau"), can review all mergers in Canada, regardless of whether the merger is notifiable. Certain mergers involving foreign investors are also subject to review by the federal Minister of Innovation, Science and Economic Development Canada or the Minister of Canadian Heritage. Mergers involving transportation businesses may also be reviewable by the federal Minister of Transport. There may also be federal or provincial industry-specific regulators that could review mergers in specific industries, such as banking, telecommunications, broadcasting, defence and energy. This Toolkit is focused on the most common merger review process in Canada, being reviews by the Bureau and under Canada's foreign investment regime, such that reviews undertaken by the Minister of Transport or other industry-specific regulators are outside the scope of this document.

When does a merger have to be notified to the Competition Bureau?

Parties to mergers that exceed certain control and monetary thresholds cannot complete their transaction until they notify the Bureau and receive clearance either through an advance ruling certificate ("ARC") or expiry or waiver of the waiting period. These thresholds are:

- The parties to the transaction, which can include the vendor, together with their affiliates, must have assets in Canada, or gross revenues from sales in, from or into Canada, in excess of C$400-million; AND
- The target business, together with its affiliates, must have assets in Canada, or gross revenues from sales in or from Canada generated from Canadian assets, in excess of C$96-million (adjusted annually).

Are there any exemptions?

The notification rules can be technical and there are exemptions. It is important to consult counsel to assess notification requirements, particularly in connection with joint ventures or acquisitions of real property.

What timelines are associated with merger reviews under the *Competition Act*?

There is a 30-day waiting period, starting from the time the merging parties file notification forms with the Bureau, during which the transaction cannot close. If the Commissioner issues a Supplementary Information Request ("SIR"), the waiting period is extended until 30 days after the merging parties have complied with the SIR. Once the applicable waiting period has expired, the parties may close the transaction unless an injunction is in place or there are other contractual conditions to be satisfied.

What is the typical time needed to complete a merger review under the *Competition Act*?

This will depend on the complexity of the issues raised by the merger. For example, during the Bureau's 2018-2019 fiscal year, the Bureau completed 209 merger reviews:

- 142 "non-complex" reviews were completed in an average of 10 calendar days.
- 67 "complex" reviews were completed in an average of 42 calendar days.

If a merger is reviewed and SIRs are issued, the typical time until closing is approximately four to six months.

What is the likelihood of the Competition Bureau undertaking an in-depth review?

This depends on the competition concerns raised by the proposed transaction, which increase significantly in circumstances where the merging parties would have a combined market share of more than 35% in any relevant market after completion of the proposed transaction. In its 2018-2019 fiscal year, the Bureau issued SIRs in approximately 6% of the mergers it reviewed.

What comfort can I receive that my merger will not be challenged by the Competition Bureau?

If a transaction is notified to the Competition Bureau, definitive clearance can be provided in one of two ways:

- An Advance Ruling Certificate ("ARC") precludes the Commissioner from making an application to the Competition Tribunal relating to the proposed transaction if closing occurs within a year of receipt. In practice, only the least complex cases receive an ARC.
- A No-Action Letter ("NAL") indicates that the Commissioner does not, at that time, intend to make an application to the Competition Tribunal relating to the proposed transaction but could do so up to one year post-closing. In practice, post-closing challenge of a merger receiving a NAL is rare.

Can the merger be blocked or restructured?

Yes. Under the *Competition Act*, the Competition Tribunal, which is a specialized competition law court, can block or restructure a transaction on a temporary basis pending a trial or on a permanent basis after a full trial. To issue a permanent remedy, the Tribunal has to find that the merger would or would be likely to "prevent or lessen competition substantially" in one or more relevant markets and that the efficiencies from the merger did not exceed the anti-competitive or negative effects.

What are the filing fees?

The filing fee is currently C$75,055.68 (indexed annually).

What is the role of in-house counsel during the merger review process?

In-house counsel play a critical role during the merger review process in developing the legal strategy for getting a merger cleared, coordinating with the business teams to gather evidence relevant to a review, participating in meetings and calls with government agencies, and commenting on submissions and other advocacy documents.

Will my company's customers or suppliers be contacted?

Yes, notification filings to the Bureau require merging parties to provide names and contact information for their 20 most important customers and suppliers for each principal category of products. The Bureau will typically contact these customers and suppliers to determine whether they have any concerns about the proposed merger. Merging parties will often give their customers and suppliers a notice of likely calls from the Bureau.

Will my company's documents get subpoenaed?

Possibly. The Competition Bureau can request voluntary productions, issue an SIR or seek a court order (a "Section 11 Order") requesting extensive volumes of documents, data and other information where it believes it necessary to determine whether a merger would, or would be likely to, prevent or lessen competition substantially and to validate efficiencies claims. Blakes can assist parties in complying with these requests.

Will I need to make commitments as part of getting the deal done?

If, in the course of reviewing a merger, the Commissioner identifies competition concerns, the Commissioner may request that the merging parties divest assets or enter into contractual commitments as a condition of granting clearance.

How can Blakes help?

We can assist you in all phases of merger review before all relevant government agencies. In the planning stages, we can evaluate the risk of a protracted review and potential requirements for divestitures or other remedies. Pre-signing, we can negotiate provisions in the transaction agreement allocating the regulatory risk between merging parties. We can prepare the required filings and draft submissions and advocate for the proposed transaction with the Bureau and any other relevant regulator. We can assist with remedy negotiations if required or litigate at the Tribunal if the Bureau decides to oppose a transaction.

PART 1

Internal Preparations

Planning Ahead: Why Internal Preparation Matters

Preparation is a critical step to minimize the length and scope of a merger review. This process should begin before approaching the other party and well before signing a transaction agreement.

With preparation, parties can ensure that the best legal strategy is deployed from the beginning and that all actions are consistent with this strategy. This includes circulating critical guidance to everyone involved in the proposed transaction, including:

- **A Document Management Strategy** to ensure that employees or management do not create any documents that could be produced to government agencies which might contain inaccurate or misleading information about the nature of competition in the industry.
- **A Due Diligence Protocol** to manage the flow of information between merging parties so that only reasonably necessary information is exchanged, minimizing the risk of the parties coordinating, or being seen to coordinate, their conduct and to protect the company's business secrets.
- **Gun Jumping Guidelines** to manage the risk that the parties might exchange competitively sensitive information inappropriately or otherwise move to implement the merger prematurely, exposing themselves to enforcement action by the Bureau.
- **Integration Planning Guidelines** to ensure that the parties are ready on Day 1 after closing to complete their merger and achieve the efficiencies contemplated from the transaction all in compliance with competition laws.

PART 2

Due Diligence and Deal Negotiation

Regulatory Due Diligence is an important Step in the Deal Process – Common Mechanisms for Allocating Regulatory Risk

In addition to the due diligence undertaken to assess and allocate risks relating to the transaction (competition law or otherwise), the buyer should also conduct an assessment of the target's past compliance with the *Competition Act*. This may include interviews of the target company's executives as well as an assessment of the target company's documents and data, and any competition law compliance programs the target company has in place. This process is important to ensure that the buyer is not assuming future enforcement risk or class-action exposure under the *Competition Act* for past conduct. This process will also inform the negotiation of representations and warranties as well as covenants relating to competition law issues.

Due to the possibility that a transaction may be blocked or restructured, parties will frequently allocate this risk in their transaction agreements. Regulatory risk includes the possibility that the Bureau or another relevant agency may challenge a transaction or require remedies, such as divestitures, in order to allow the transaction to proceed.

The most common ways to allocate regulatory risk between parties include:

- **Covenants.** What each party is required to do to secure clearance, e.g., submitting required filings within a certain timeframe, responding quickly to requests for information from agencies, offering to sell certain assets and/or businesses, and/or cooperating with each other.
- **Termination fees.** Impose a financial penalty, typically on the purchaser, for not obtaining certain regulatory clearances by a certain date.
- **Closing conditions.** Whether the purchaser must close when the waiting period expires or can wait until the relevant agency or agencies complete their review.
- **Other.** In addition to the above, other structuring options may be available to allocate regulatory risk, depending on the circumstances and the parties' risk appetite.

Common Mechanisms for Allocating Regulatory Risk

Mechanism	Maximum Risk (for Purchaser)	Moderate Risk (for Purchaser)	Minimal Risk (for Purchaser)
Covenant	"Hell or high water" ("HOHW") clause: purchaser will do all things necessary to secure clearance including divesting assets and litigating if necessary	Qualified HOHW: remedy capped at X assets or X% of EBITDA If further divestitures required, purchaser not obligated to close / adjustment of purchase price	No obligation to divest any assets, hold separate, or litigate Alternatively, purchaser required to divest nonmaterial assets if required to secure approval
Reverse Break Fees	Large reverse break fee payable if deal does not close because of regulatory objections	Low reverse break fee	No reverse break fee
Conditions	Expiry of applicable waiting periods No injunction in place preventing closing	Expiry of applicable waiting periods No injunction in place preventing closing No regulatory agency investigation/litigation	Expiry of waiting periods Affirmative clearance (ARC or NAL in Canada)

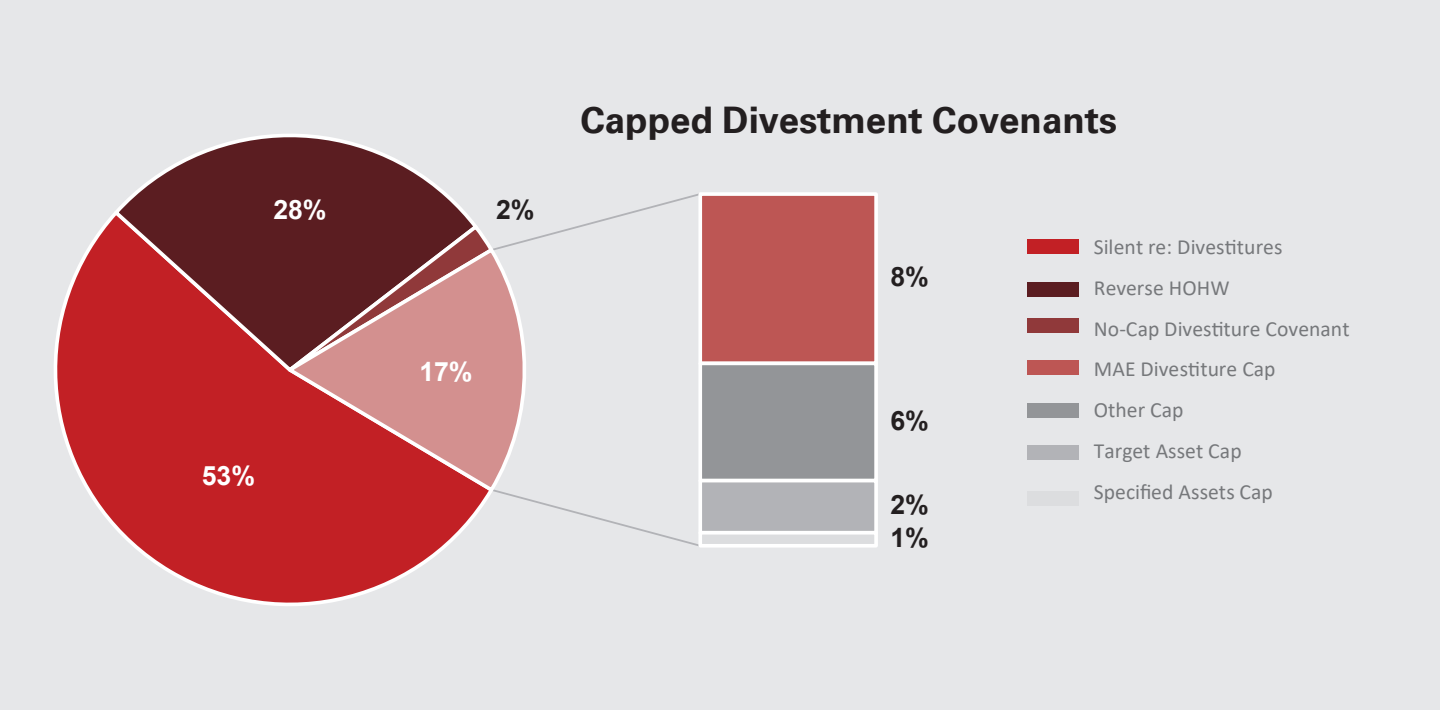
Key Takeaways from Blakes Deal Study

Deals in Canada are typically not abandoned over disagreement on the allocation of regulatory risk. Parties showing confidence and reasonable flexibility on regulatory issues tend to advance negotiations as it is seen as a sign of serious intent to get the deal done.

Below are some key insights on recent trends related to the use of common mechanisms for allocating antitrust risk in past public M&A agreements.

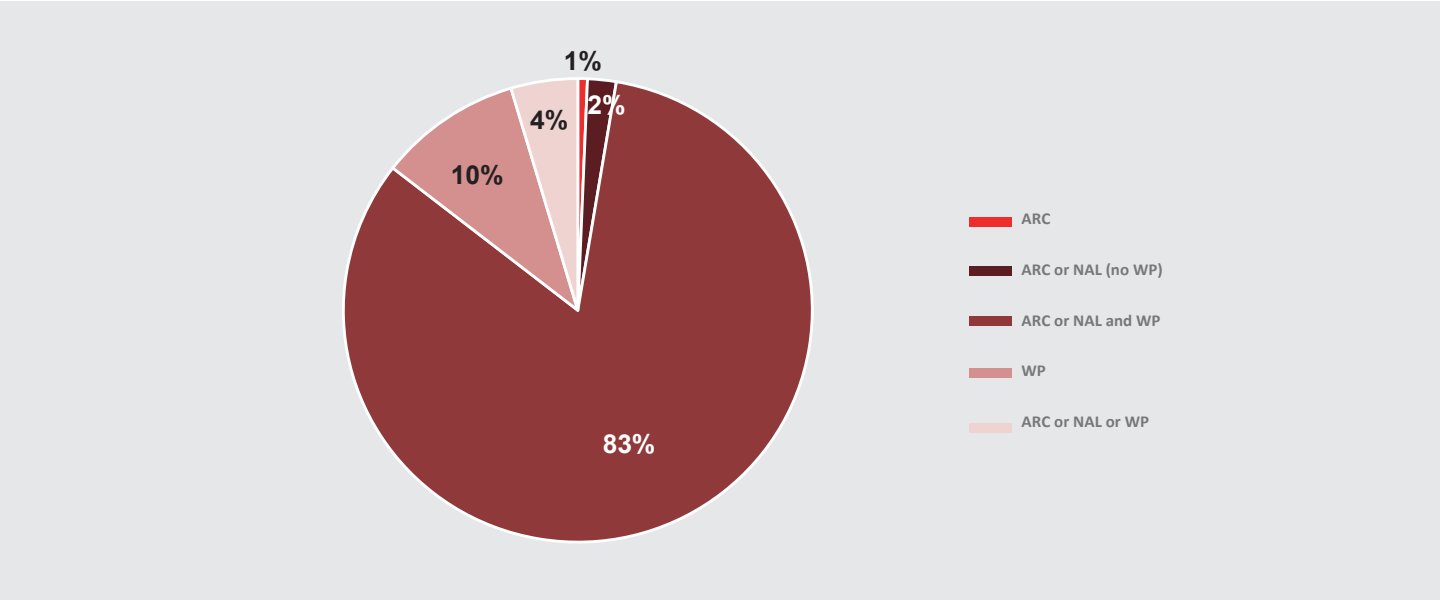
Covenants

Covenants relating to either the need to offer divestiture remedies to secure approval for a deal or the explicit requirement to not offer divestitures (i.e., a reverse HOHW) are found in about half of transaction agreements. Those that do include a divestiture covenant almost always involve a cap, which limits the divestiture obligation based on a defined "material adverse effect" (or MAE), the target's asset value, or some other metric decided between the parties.



Conditions

An overwhelming majority of regulatory closing conditions require receipt of affirmative clearance from the Bureau, either through receipt of an ARC or NAL, in addition to expiration or early termination of the waiting period (WP) or waiver of the obligation to submit a notification.



PART 3

Filing Process

Review Process and Waiting Periods

Overview of Review Process and Waiting Periods

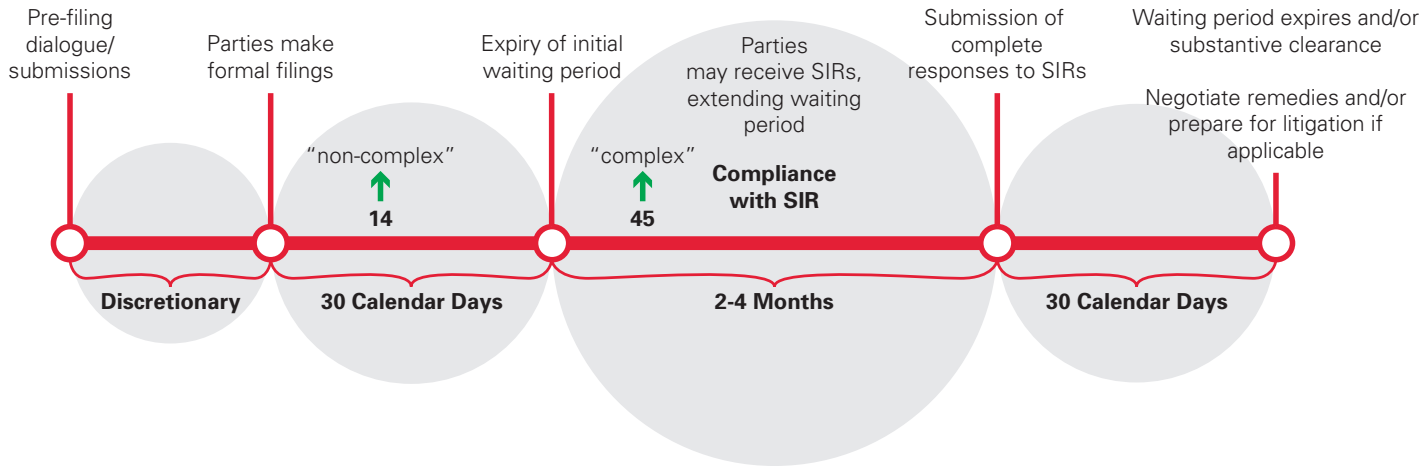
Under the *Competition Act*, mergers which exceed the statutory notification thresholds are subject to a 30-day statutory waiting period during which the merger cannot close. The waiting period begins when both parties have submitted complete notifications.

The Bureau has an internal service standard within which it seeks to advise merging parties of its position regarding the merger. The service standard depends on the complexity of the issues raised by the proposed merger, with mergers involving minimal overlaps likely to be regarded as "non-complex." For "non-complex" mergers, the Bureau's service standard is 14 days, and for "complex" mergers, the service standard is 45 days or, where an SIR is issued, 30 days after the parties have complied with the SIRs.

The Bureau's service standard is not a statutory timeline and the parties may close the transaction after the 30-day statutory period has expired or if the Commissioner waives the waiting period – unless the Commissioner issues SIRs to the parties. The scope of additional information required to respond to an SIR is potentially quite broad as it includes any information the Commissioner may deem relevant to the assessment of the transaction.

Where SIRs have been issued, subject to the Commissioner seeking an injunction, the merging parties may complete their merger 30 days after both parties have complied with the SIRs. In many cases, however, the parties will choose to wait until the Commissioner has completed the substantive assessment of the transaction.

Illustrative Merger Review Timeline



Filing Strategy

There are two aspects of merger filings in Canada: a notification and a letter submission (often referred to as an "ARC request letter"). A notification begins the 30-day statutory waiting period after which the merger may close, while the letter submission, which does not start the waiting period, presents the Commissioner with reasons why the Commissioner should clear the merger, or at least take no action in respect of it. Clearance in the form of an ARC includes a waiver of the statutory waiting period and a guarantee (if all material facts were disclosed) that the Commissioner will not challenge the merger provided that it is substantially completed within one year of the ARC being issued (and practical comfort if the merger is substantially completed more than one year after the ARC is issued). Clearance in the form of a NAL includes a waiver of the statutory waiting period (if the NAL is issued before the statutory waiting period has expired) and practical comfort that the Commissioner will not challenge the merger absent exceptional circumstances.

The filing fee, regardless of which filings are submitted, is currently C$75,055.68.

How the Filing Process Works

Notifications

The notification requires the parties to set out detailed information on their business and the proposed transaction. Each party to a merger is responsible for submitting its own notification, and external counsel should manage the notification process to minimize the effort required on the part of each party, ensure consistency, and manage any strategic issues that arise from how the response is provided, for example as regards the description of the transaction, principal category or categories of products, etc.

In the notification, each party to a merger must provide:

- General information regarding the party
- A description of the merger
- The foreign antitrust authorities that have been notified of the merger
- Affiliates of the party with significant Canadian assets or significant gross revenues from sales in, from, or into Canada
- Information regarding the offices, businesses, and principal category of products for each such affiliate
- An organizational chart
- Financial statements
- Contact and sales information for primary customers and suppliers by principal category of products
- Total sales to all customers by principal category of products
- Total purchases from all suppliers by principal category of products
- Geographic regions of sales by principal businesses
- Copies of all transaction planning documents prepared by or for a director or officer that consider, among other things, the implication of the transaction on competition (similar to the so-called "4c" documents provided in the U.S.).

Parties may choose a different filing strategy depending on the complexity of the merger. For transactions that do not raise material competition issues because of minimal overlap between the parties or significant remaining competition, parties typically request clearance solely by way of an ARC request letter, which does not start the statutory waiting period.

For transactions that raise more issues or where the parties want timing certainty, parties typically submit both an ARC request letter and formal notifications. Sometimes, the parties will withhold the certificate of completeness to delay the start of the waiting period in order to provide the Bureau with more time upfront and potentially negate the need to issue an SIR.

How the Filing Process Works

ARC Request Letters

ARC request letters both request a waiver of the statutory waiting period and present the Commissioner with reasons why the merger will not negatively impact competition in Canada. Such reasons may include arguments that the parties:

- Do not compete or are not close competitors
- Have low combined market shares
- Face many vigorous and effective competitors
- Compete in an industry with low barriers to entry and expansion
- Sell to customers with the power to resist price increases
- Will achieve significant efficiencies that will offset any hypothetical anticompetitive effects

As described more fully in Part 5, below, a merger which raises competitive concerns may nevertheless receive clearance where the merger is likely to bring about gains in efficiency.

Transaction Planning Documents

Merger notifications are legally required to include transaction planning documents prepared or received by an officer or director that touch on competition issues (i.e., market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions).

Gathering the required documents can be initiated via an email to officers and directors of the notifying party who may have such documents in their possession.

If a merger requires notification in both Canada and the U.S., Canadian counsel can work with U.S. counsel in order to eliminate duplication of effort in collecting the required documents.

PART 4

Thinking Ahead

Role for the Company During the Merger Review Process

The merger review process requires a significant amount of time and effort from the management and other employees of the merging parties. This section provides an overview of the steps in a merger review process and the associated input required.

The merging parties must be particularly engaged during the process of responding to an SIR. Blakes can lessen the burden on the merging parties, including through the use of e-discovery tools (described more fully in Part 7, below).

Customer and Supplier Outreach

The level of scrutiny applied by the Bureau to a merger review is influenced to a large degree by complaints from the parties' customers and suppliers. Proactively reaching out to customers and suppliers can mitigate any concerns they may have and lessen the risk of competition enforcement action.

Below is a sample customer and supplier outreach work plan.

Sample Customer and Supplier Outreach Work Plan

Pre-Merger Announcement

- ☐ Identify key customers / suppliers to be contacted
- ☐ Prepare scripts and key messages for calls to customers / suppliers
- ☐ Assign contact responsibility to business people
- ☐ Preparation call with management and outreach employees pre-announcement

Post-Merger Announcement

- ☐ Identify key customers / suppliers to be contacted
- ☐ Contact key customers / suppliers in order of priority immediately upon announcement
- ☐ Proactively address customer concerns appropriately (e.g. contract extensions, pricing concessions, etc.) and prioritize
- ☐ Report results to legal counsel

Employee Communications: How To Do It and When

Until a merger has closed, the merging parties are required under competition law to continue to operate as independent competitors on a "business as usual" basis. Coordination (or even the appearance thereof), prior to the completion of a merger, can give rise to serious criminal and civil penalties under Canada's competition laws.

Neither party should attempt to materially influence any of the other party's ordinary course business decisions or pre-closing operations until the merger is complete. There must be no coordination (and no conduct that suggests coordination) between the companies prior to closing.

Employees should be informed of the above principles as soon as they become aware of the proposed merger using the Guidelines discussed in Part 1.

Integration planning for the post-merger conduct of the merged business is permissible, subject to the appropriate protocols, however, no plans can be implemented prior to the completion of the merger.

Shareholder Communications: Press Releases

The Bureau regularly monitors press releases. For that reason, merging parties should avoid press releases with content which would attract unnecessary attention from the Bureau.

Press releases should highlight, if applicable, the complementary aspects of the parties' businesses and/or that the proposed merger will result in significant efficiencies.

External counsel should review all press releases prior to circulation in order to ensure that all messaging is factual and consistent with the broader strategy.

Working with Experts

External experts – including economists, efficiencies experts, industry experts, and government relations (GR) and public relations (PR) advisors – can play a critical role in helping parties navigate through a merger review.

Advice from experts can assist merging parties in evaluating regulatory risk and determining the best strategy to get a transaction approved. As a result, it is often critical to get experts involved early, before a transaction is signed and announced.

Expert	Purpose and Role
Economists	• Many key competition issues are economic in nature • Empirical economic analyses can be critical evidence for, among other things, determining market definition and potential price effects
Efficiencies Experts	• The Canadian *Competition Act* includes an express efficiencies defence in section 96 • Efficiencies experts will work with merging parties to quantify the efficiencies likely to accrue to the Canadian economy from a merger
GR and PR Advisors	• GR and PR advisors help parties understand and navigate the current political environment (particularly important for potential reviews under the *Investment Canada Act*) or by other sectoral regulators • Can contact or arrange meetings with key decision makers in government • Able to advise on media relations and customer outreach strategy
Industry Experts	• Industry experts can provide an impartial perspective to help regulatory agencies understand the dynamics of complex industries

Preparing for a Challenge: Remedies and Lawsuits

If, in the course of reviewing a proposed merger, the Commissioner identifies areas in which he or she believes the transaction will prevent or lessen competition substantially, the Commissioner will normally try to negotiate alterations to the transaction which address such concerns. These negotiations can be protracted.

Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order prohibiting the parties from completing the transaction for a temporary period.

The Bureau may permit the parties to hold the target business separate until the Tribunal process has run its course. Following its review, the Tribunal can either allow the merger to proceed or, in the case of a completed merger, order a purchaser to dispose of all or some assets or shares or take such other action as is acceptable to the merging parties and to the Commissioner.

In practice, there have been very few contested proceedings. In most cases where the Commissioner has expressed merger review concerns, the parties have been able to agree upon a set of commitments that are mutually satisfactory to the merging parties and to the Commissioner, which commitments are formalized in a binding Consent Agreement registered with the Tribunal.

PART 5

Efficiencies

The *Competition Act* includes an express efficiencies defence in section 96 of the *Competition Act* that enables mergers that would or would be likely to prevent or lessen competition substantially to proceed so long as the efficiency gains to the Canadian economy are greater than and offset the anticipated anticompetitive effects.

When quantifying efficiencies, Canadian merger review takes into account fixed-cost savings and dynamic efficiencies, not just variable cost savings. As a result, the efficiencies defence may result in mergers being cleared in Canada with no remedies, or only limited remedies, as compared to other jurisdictions where no similar defence exists.

To rely on the efficiencies defence, merging parties typically retain efficiencies experts to prepare an expert report for the Bureau setting out the quantifiable efficiencies likely to accrue to the Canadian economy from the merger. Efficiencies experts will work with merging parties to determine which synergies estimates constitute quantifiable efficiencies that are legally recognized under the *Competition Act*.

Blakes' lawyers have worked on many of the leading efficiencies cases in Canada, including the Superior Propane series of cases before the Tribunal and Federal Court of Appeal and the Superior / Canexus and Superior / Canwest transactions, which were cleared by the Bureau on efficiencies grounds.

Types of Information Needed to Prepare Efficiencies Reports:

Pre-existing Information

- ☐ Synergies estimates and the integration plan for the proposed transaction, including all supporting background models, calculations, and data
- ☐ Timing to achieve synergies
- ☐ Integration expenses and other implementation costs required to achieve the projected synergies
- ☐ Likely plans in the absence of the proposed transaction
- ☐ Information on synergies achieved in previous transactions

Supporting Information

- ☐ Geographic breakdown of efficiencies savings
- ☐ Details on assets, locations, capacity utilization, capacity constraints, product mix, and input sources
- ☐ Detailed cost information by facility
- ☐ Detailed headcount information
- ☐ Forward-looking information on costs, production, and capital expenditures

Order-Specific Efficiencies (later in review process)

- ☐ Calculations of efficiencies likely to be lost under any hypothetical remedies order
- ☐ Costs likely to be incurred by a hypothetical divestiture (remedy) buyer

Treatises by members of Blakes Competition & Antitrust group have been cited by the Supreme Court of Canada on the application of the efficiencies defence (Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations and Competition and Antitrust Law: Canada and the United States).

Blakes' lawyers have also authored many of the leading articles on efficiencies in Canada, including Mind the Gap: Merger Efficiencies in the United States and Canada; Promoting Innovation and Efficiency by Streamlining Competition Reviews; Marshalling the Efficiencies Defence; and Merger Efficiencies in the United States and Canada: An Overview with Key Takeaways for Cross-Border Mergers.

PART 6

Failing Firms

Both the *Competition Act* and the *Investment Canada Act* allow for clearances of transactions more expeditiously or with fewer obstacles when a party is experiencing financial difficulty.

Competition Act

While the *Competition Act* still applies when a firm is failing, financial distress may ease merger clearance by the Bureau. The Bureau will consider two key questions:

1. Is the firm being acquired actually failing? The Bureau considers a firm to be "failing" if it is or is likely to become insolvent, initiate voluntary bankruptcy or be petitioned into bankruptcy.
2. Are there any competitively preferable alternatives to the proposed merger? For the Bureau, this could include the acquisition by another purchaser that does not raise competition law concerns, restructuring that enables the failing firm to survive as a meaningful competitor or a liquidation process that creates increased competition (e.g., by facilitating entry or expansion).

Even if a firm is not "failing," financial challenges may diminish its competitiveness going forward. Accordingly, its acquisition may not result in the substantial lessening of competition that would otherwise have occurred if the firm was financially sound as required by the *Competition Act*.

Investment Canada Act

Investment Canada Act review (discussed further in Part 8 below) of acquisitions of Canadian businesses by non-Canadian investors may be streamlined when the Canadian business being acquired is facing significant financial difficulty. While transactions exceeding certain thresholds typically require a pre-closing review and ministerial approval, a transaction can close absent such a review where the Minister is satisfied that a delay would jeopardize the Canadian business, evaluated in light of its financial condition. In addition, foreign investors are typically required to submit binding undertakings to the Minister to demonstrate that the investment will be of "net benefit" to Canada in connection with an *Investment Canada Act* review, but more limited undertakings may be acceptable when the target firm is in financial difficulty.

PART 7

Information Requests and E-Discovery

How the Bureau Can Formally Obtain Information

The Competition Bureau can issue an SIR and/or seek a Section 11 Order (a court order) requesting extensive volumes of documents, data and other information where it needs further information to determine whether a merger would, or would be likely to, prevent or lessen competition substantially and to validate efficiencies claims. Indeed, the Bureau may also seek a Section 11 Order requiring that a representative of one or more of the merging parties attend at an oral examination conducted under oath.

	Supplementary Information Request (SIR)	Section 11 Order
Overview	The Commissioner may issue an SIR at any time during the initial 30-day waiting period for a notifiable transaction	The Commissioner may apply for court orders for documents, data, statements and witness interviews
Affected Parties	Parties to the proposed transaction	Anyone with a presence in Canada
Authority	The issuance of an SIR is subject to the Commissioner's sole discretion	Court order
Timing Implications	Parties are precluded from closing their proposed transaction until 30 days after the date on which they comply with the Commissioner's SIR	No impact on timing unless an injunction is obtained
Privilege Issues	There are no privilege logs in the SIR process, so there is no need for the parties to provide the Bureau with a record of the documents that have been withheld or redacted for privilege; however, it is good practice to code/identify why a privilege claim has been made in the review tool	Requirement to provide a privilege log which identifies the documents over which a privilege claim is made and the basis for the privilege claim

Types of Documents Typically Submitted in Response to an SIR or a Section 11 Order

The following are examples of the kinds of documents and records which are most typically requested as part of an SIR or section 11 order:

- ☐ Corporate organization chart
- ☐ Emails and documents prepared or received for the purpose analyzing the proposed transaction with respect to its impact on competition
- ☐ Documents discussing competitors, market shares, customers and the competitive dynamics in the marketplace
- ☐ Customer negotiation strategy documents and agreements
- ☐ Reports, studies and business plans related to dimensions of competition such as price, service, capacity
- ☐ Contracts with key customers or suppliers
- ☐ Financial business data, including loss or income statements
- ☐ Transaction level sales and purchase or cost related data
- ☐ Information on physical asset and facility locations and characteristics
- ☐ Third-party data related to the specific issues the Bureau is considering, including industry reports
- ☐ Any pre-existing assessments of projected synergies or efficiencies

Responding to an SIR or a Section 11 Order

Responding to an SIR or a Section 11 order can result in the submission of tens of thousands of records (including emails, presentations, word documents, and hand written notes) to the Bureau, which in turn may require the collection and review of hundreds of thousands of records or more. This often requires the implementation of a sophisticated procedure, including the collection, processing, coding, reviewing and production of a potentially enormous number of records.

As businesses are increasingly conducting their operations electronically, companies are relying on technology to help facilitate the collection and review of records located on their IT systems. New and innovative technologies will help speed up the collection of potentially relevant records and may reduce the volume of records that need to be reviewed. Technology-assisted review (TAR), including the use of search terms and/or predictive coding, can save clients both time and money in the process of responding to an SIR or a section 11 order.

Occasionally, companies will encounter documents relating to other antitrust issues during e-discovery. In such circumstances, it is important that the company investigate the issue and, if required, develop a strategy to address it. Some key steps for a business to take include:

- ☐ Review the document and determine the seriousness of the issue and the implications
- ☐ Perform a targeted review to identify any additional documents related to the issue
- ☐ Interview relevant personnel to get to the bottom of the issue
- ☐ Develop a strategy to remedy the issue and proactively address it with the Bureau, if necessary
- ☐ Implement, if relevant, a compliance program to prevent similar issues from arising

What is Blakes inSource?

inSource

Blakes inSource is a response to clients who are asking how we can best help them meet their legal needs in new and innovative ways. Over the past several years, we have grown our team of staff lawyers and project managers to conduct document review work for litigation and competition files, assist with due diligence and perform commercial work for clients.

Why is Blakes doing this?

Our goal is to provide a flexible range of options to our clients in appropriate circumstances. In cases where legal process outsourcers must be engaged, Blakes inSource provides a cost-effective, flexible and superior model to provide those services to clients. This model also provides a level of scalability, so that we can very quickly provide appropriate resources on short notice for significant projects.

Why is this unique?

Our inSource team is located within Blakes offices, and the staff lawyers are part of the broader team on a matter, providing seamless, high-quality service with direct supervision by partners and associates working on the same matter. In addition, our model ensures consistency which is not always available through third-party providers – the same lawyers will work on your matters each time, which provides valuable learning and efficiency. We have access to a highly qualified talent pool, and support training and learning for our staff lawyers to ensure we provide a much higher quality of service than a typical legal process outsourcer ("LPO").

Can clients send work directly to inSource?

The services provided by inSource are primarily made available to select Blakes clients as part of a broader mandate or portfolio of work. In limited circumstances, inSource may be able to take on a discrete project if it makes sense for both the client and inSource to do so.

What kind of work will inSource be doing?

Blakes inSource is a division of Blakes that uses an alternative service delivery model to provide certain services more efficiently and cost-effectively. The group is staffed with skilled lawyers who use leading legal technology and specialize in document review, due diligence, cyber breach responses, commercial contract drafting, legislative updates, and more.

Who are the lawyers working for inSource and how do you recruit them?

There is a large talent pool of available lawyers who are interested in non-traditional, non-partnership track legal work. Blakes inSource provides interesting, engaging legal work, and the opportunity to work side by side with Blakes lawyers and staff. We provide access to our professional development programs and other training and learning opportunities, and a pleasant, collegial work environment with a respect for diversity. As a result, it has been easy for us to continue to hire very talented and capable lawyers able to work on complex projects and deliver to the Blakes standard.

PART 8

Investment Canada Act

Commonly Asked Questions

What is it?

The *Investment Canada Act* ("ICA") regulates the establishment and acquisition of Canadian businesses by non-Canadian investors. It is crucial that foreign investment counsel consider the application of the ICA to a merger – mergers which fall under the scope of the ICA may be subject to government review and approval on the basis of whether the transaction is likely to be of "net benefit" to Canada or whether the transaction will be injurious to Canada's national security.

When is a review required?

If an acquisition of control falls below the applicable financial threshold or the investor is establishing a new Canadian business, the investment will simply be "notifiable", which can be done post-closing most circumstances.

If an acquisition of control exceeds the applicable financial threshold, it will be reviewable and cannot be completed until the review is complete.

The applicable financial thresholds depend on the nature of the investor, the nature of the transaction and the nature of the Canadian business being acquired.

Is there a national security dimension?

Yes. Special review requirements and timing considerations apply to transactions, whether already implemented or proposed, which potentially raise national security considerations. The national security provisions can apply to any investment by a non-Canadian, whether or not control has been acquired.

The term "national security" is not defined under the ICA. Where the Minister has reasonable grounds to believe that an investment by a non-Canadian to acquire all or part of an entity (or to establish an entity) carrying on business in Canada could be injurious to national security, the Minister may notify the non-Canadian that the investment may be reviewed for potential national security concerns, in which case the investor may not complete its investment until it receives the required notice or approval.

The Minister is barred from providing such notice 45 days after having received an application or notification, or, where the transaction is not subject to a requirement to file a notification or application, more than 45 days after the transaction has been implemented.

Control and Financial Thresholds

Investor	Acquired Entity	Operates a Canadian Cultural Business	Financial Threshold
Investor is based in a WTO country	Foreign Corporation	No	n/a Investment not Reviewable*
Investor is based in the US, EC, Mexico or other country with a free-trade agreement with Canada	Canadian company or assets of Canadian business	No	$1.613 billion in enterprise value (indexed annually)*
Investor is based in a WTO country	Canadian company or assets of Canadian business	No	$1.075 billion in enterprise value (indexed annually)*
State-owned Enterprise	Canadian company or assets of Canadian business	No	$428 million in book value (indexed annually)
All Investors	Any	Yes	$5 million or $50 million in asset value depending on proportion of Canadian assets
All Investors	Any	n/a	None for national security

* Threshold also applies where the vendor is based in the WTO or a free-trade agreement country, as applicable.

What are the filing fees?

None.

When does Investment Canada need to be notified?

If an investment is not reviewable, it can be notified before closing or within 30 days after closing. Investors may elect to notify pre-closing if they are concerned about a national security review and want to work through any issues before closing.

Are there any exemptions?

Yes. Investments where ultimate control over the Canadian business does not change, as well as acquisitions of government-owned businesses. There are other, less commonly used exemptions as well.

What factors does the government consider in assessing whether a transaction is of "net benefit"?

When assessing "net benefit to Canada", the Minister will consider several factors including: the effect of the investment on employment, exports, Canadian participation in the business, industrial efficiency, technological development, product innovation or product variety in Canada, competition in the Canadian marketplace, as well as the compatibility of the investment with national industrial, economic and cultural policies, and the contribution of the investment to Canada's ability to compete in world markets.

Will I need to make commitments to obtain approval?

Investors must offer a suitable set of undertakings in connection with the approval of the investment. These undertakings typically run for three to five years though they can be longer, particularly in the case of an acquisition of a cultural business or investments by state-owned enterprises. These commitments may, among other things, obligate the investor to keep the head office of the Canadian business in Canada, ensure that a majority of senior management of the Canadian business is comprised of Canadians, maintain certain employment levels, make specified capital expenditures and conduct research and development activities based on specified budgets, and make a certain level of charitable contributions.

Can a merger be blocked under the ICA?

Yes. Reviewable investments can be blocked if they are not of net benefit to Canada. Any other investments can be blocked if they are injurious to national security.

What is the timeline for a foreign investment review?

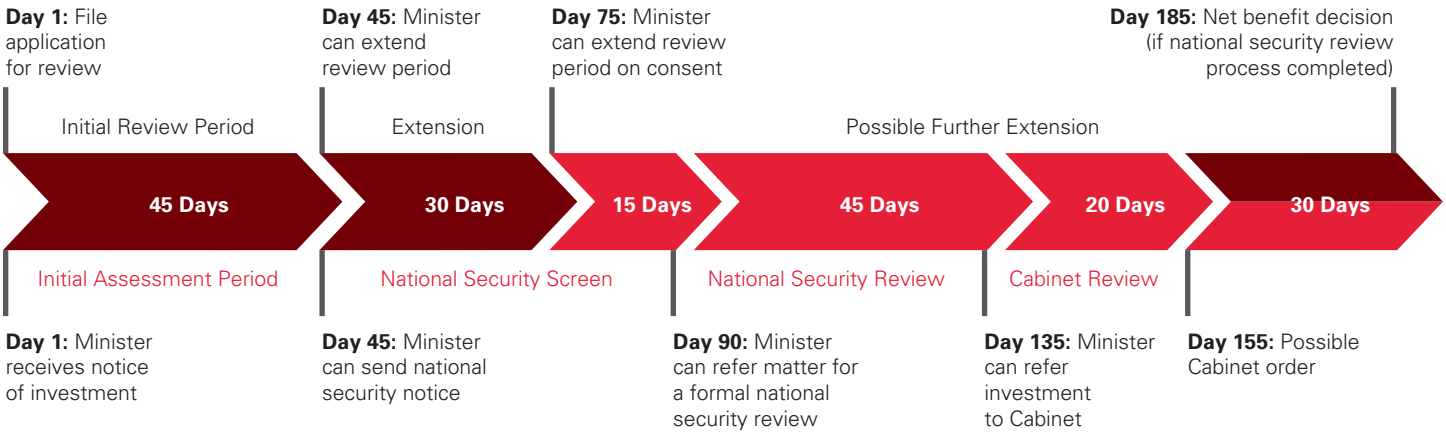
Timelines

Most net benefit reviews are completed in the 75-day statutory period.

In the case of a national security review, the time period to complete the process can take up to 155 days or longer if the investor consents to extensions.

A combined net benefit and national security review could take upwards of 230 days to complete.

Net Benefit Review



National Security Review

Conclusion

Successfully completing a transaction in Canada frequently requires a sophisticated understanding of the Canadian merger review process and the careful execution of an effective strategy. Negotiating a transaction agreement requires an awareness of the potential regulatory risks and an understanding of the most useful contractual mechanisms for allocating that risk. Using effective advocacy that addresses the key issues when preparing submissions and meeting with government agencies is critical to ultimately getting the merger cleared, as is readiness for the possibility of litigation. Blakes competition law experts have extensive experience with the merger review processes in Canada and are well-positioned to assist with all aspects of a merger review in Canada.

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