

Canada's Competition Act: An overview of antitrust and unfair competition regulatory measures

September 02, 2025

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Canadian law relating to antitrust and unfair competition is found primarily in the federal *Competition Act*. With only a few exceptions, the *Competition Act* applies to all industries and all levels of trade across Canada. The *Competition Act* contains both criminal and non-criminal provisions. Criminal offences include bid-rigging, conspiracy, wage-fixing and no-poach agreements, deceptive telemarketing, misleading advertising and deceptive marketing practices. Non-criminal, or “reviewable”, matters include mergers, abuse of dominant position and anticompetitive civil agreements.

The Commissioner of Competition (“Commissioner”), who heads the Competition Bureau (“Bureau”) is responsible for investigating alleged competition offences, although private parties can also take action under a number of civil provisions of the *Competition Act*.

The *Competition Act* has undergone significant amendments in recent years, signalling a fundamental reorientation of Canada’s regulatory approach. Mergers and businesses now face heightened scrutiny, stricter compliance requirements, and increased risks of enforcement, whether by the Bureau or through private litigation.

Merger Notification

The *Competition Act* defines a merger in broad terms to include the direct or indirect acquisition or establishment of control over, or significant interest in, the business of another person.

Mergers that exceed certain thresholds are required to be notified to the Competition Bureau in a prescribed form before closing. A filing fee (C\$88,690.45 as of April 1, 2025)

and a waiting period also apply. For most transactions, the primary applicable thresholds are:

- the parties to the transaction, together with their respective affiliates, have assets in Canada or gross revenues from sales in, from or into Canada in excess of C\$400 million; and
- the gross value of the assets in Canada being purchased, or of the assets in Canada on the books of the entity being purchased, or the gross revenues from sales in or from Canada derived from those assets or on the books of the entity being purchased exceed C\$93 million.¹

In the case of acquisitions of voting shares in an entity, a share-holding threshold also applies. This threshold is exceeded where as a result of the transaction, the purchaser, together with its affiliates, would own more than 20 per cent of the voting shares of a public company or more than 35 per cent of the voting shares of a private company. If the purchaser and its affiliates already collectively surpass either the 20 per cent or 35 per cent thresholds, as applicable, this threshold is exceeded by any subsequent share purchase that results in the bidder and its affiliates owning more than 50 per cent of the target's voting shares.

Where a merger exceeds the applicable thresholds and is therefore notifiable, the parties must each file prescribed documentation to the Bureau, including

- Completed pre-merger notification forms, which include information on corporate structures, customers, suppliers and regions of sales.
- Copies of the transaction agreements.
- All studies, surveys, analyses and reports that were prepared or received by a senior officer or director of the corporation for the purpose of evaluating or analyzing the proposed transaction.

The initial waiting period is 30 days after the last of the party's prescribed documentation is filed, subject to early termination by the Commissioner. The parties also generally jointly prepare and submit a request for an advance ruling certificate ("ARC") from the Commissioner. ARC requests are typically narrative submissions outlining why the parties do not believe that a proposed transaction raises substantive concerns. If granted, an ARC exempts the parties from the need to file the prescribed documentation (if it has not already been filed).

The Bureau has implemented internal service standards (which are different from the statutory waiting periods). These establish soft deadlines for completion of the Bureau's review of a notified transaction, which the Bureau can normally be expected to meet. The service standard applicable to any particular transaction, and the time expected to complete a review of the transaction, depends on whether the Bureau classifies the transaction as noncomplex or complex, which is based on the review team's assessment of the chances of competitive harm resulting from the transaction. The target maximum turnaround times for the reviews are:

- For a noncomplex transaction: 14 days.
- For a complex transaction: 45 days.

Where the Bureau fails to complete its assessment of a proposed transaction by the end of the waiting period, the Bureau has a number of options available if there are material concerns about the potential anti-competitive impact of a proposed transaction. For example, the Bureau can request:

- additional information from the parties, in which case, closing would be barred until 30 days after compliance with the information request.
- that the parties not proceed with the transaction pending the completion of its review.
- that the parties only close the transaction subject to certain conditions (such as a “hold separate” agreement).

The Commissioner can also bring an *ex parte* application before the Competition Tribunal (“Tribunal”), a specialized independent administrative tribunal overseen by judges of the Federal Court of Canada, for an interim order to prevent the completion or implementation of the proposed transaction. Where the Commissioner applies for an interim order to enjoin closing, the parties are prohibited from closing the merger until the injunction application has been heard and disposed of by the Tribunal.

On completing its review if it does not have concerns, the Bureau typically issues an ARC, or a no-action letter stating that based on its review to date, that the proposed transaction is not likely to substantially lessen competition in Canada.

Where a notifiable transaction under the Competition Act involves a transportation undertaking, the parties must also file a notification with the Minister of Transport pursuant to subsection 53.1 of the Canada Transportation Act. The information provided in this notification will be substantially similar to that filed with the Bureau but also needs to include information concerning the public interest as it relates to national transportation.

Merger Review

The Bureau or Commissioner does not have the power to block, dissolve or impose conditions on mergers. Rather, they can launch an application to the Tribunal seeking an order blocking, dissolving or imposing conditions on a merger. Only if the Tribunal finds that a merger is likely to substantially prevent or lessen competition in a market can it issue a remedial order. Subject to certain exceptions, the Commissioner has the power to challenge any merger, including those below the thresholds for notification set out above. Mergers that are not notified to the Bureau can be challenged for up to three years after closing, while mergers that are notified can be challenged for up to one year after closing.

The Bureau’s substantive review of a proposed merger is determine whether to challenge it on the basis that it is likely to result in a substantial lessening or prevention of competition in Canada in relevant product and geographic markets. The *Competition Act* includes a provision that provides that where the Commissioner challenges a merger, it is presumed to result in a substantial lessening or prevention of competition if it results in a combined market share exceeding 30 per cent or if the post-merger concentration index (i.e., the Herfindahl-Hirschman Index) rises by more than 100 points and exceeds 1,800. If the Commissioner challenges a merger, this shifts the burden to merging parties to rebut the presumption that the merger will harm competition.

In determining whether a merger will substantially prevent or lessen competition, the Competition Tribunal will consider a variety of factors, including:

- Market shares and concentration;
- The extent and effectiveness of remaining post-merger competition;
- Barriers to entry into the market
- The likelihood of the business of one of the parties to the merger failing in the absence of the merger;
- Network effects within a market; and
- The effect of the merger on price or non-price competition, including quality, choice or consumer privacy.

If the Commissioner challenges a merger and the Tribunal determines that it is likely to substantially lessen competition, the Tribunal may prohibit or dissolve the merger, in whole or in part, or may allow it to proceed under imposed conditions. Parties to a merger and the Commissioner may also enter into consent agreements whereby the parties agree to remedial measures as a condition of the Commissioner not challenging or discontinuing a challenge of a merger.

Criminal Offences

The Attorney General of Canada has exclusive jurisdiction over all criminal prosecutions under the *Competition Act*. Those suspected of engaging in criminal offences are referred by the Commissioner to the Attorney General for Canada for prosecution in court. Both companies and individuals can be charged with criminal offences, including conspiracy and bid-rigging, as well as certain misleading advertising and deceptive marketing practices including drip pricing. Sanctions for such offences include fines and/or prison sentences.

The key criminal offence under the *Competition Act* is conspiracy, which involves any agreement or arrangement (formal or informal) between competitors or potential competitors:

- to fix, maintain, increase or control prices;
- to allocate sales, territories, customers or markets; or
- to fix, maintain, control, prevent, lessen or eliminate production or supply of a product.

Such agreements are per se illegal and parties to those agreements are subject to significant fines and/or prison sentences, regardless of any actual anti-competitive effect.

Amendments that came into force in June 2022 also criminalized wage-fixing and no-poach agreements **between employers**, and such agreements are now subject to the same sanctions as criminal conspiracies. These agreements need not be between competitors, just two or more employers.

These amendments also removed the maximum fine under the conspiracy provisions.

In addition to criminal sanctions, private parties can launch follow on class actions in civil courts to recover the amounts equal to the loss suffered by the class.

Misleading Advertising and Deceptive Marketing Practices

The *Competition Act* also contains provisions aimed at curtailing misleading advertising and deceptive marketing practices. These provisions generally prohibit representations to the public that are false or materially misleading, that are not based on adequate and proper tests, or that contain false testimonials or misstatements as to price. Where such representations are made deliberately or recklessly, those making the representations can be pursued criminally and criminal sanctions can be sought and imposed, and private parties can also launch class actions. If the disputed representations are not made deliberately or recklessly, the *Competition Act* provides for civil sanctions, including orders prohibiting a continuation of the anti-competitive practice, imposing significant administrative monetary penalties (up to \$10M for a first offence and \$15 for subsequent offences), and providing for the possibility of monetary recovery for the persons affected by the conduct, the latter which is limited to the amount of the benefit derived.

Criminal deceptive marketing practices include drip pricing, double ticketing of prices, pyramid selling, bait-and-switch selling, deceptive prize notices. The *Competition Act* prohibits promotional contests, where there is a representation made suggesting that the recipient has won, or will win, a prize or benefit, and that seeks payment from, or requires the recipient to incur, any cost, unless the recipient actually wins the contest and prescribed disclosure requirements are met. Criminal responsibility for deceptive marketing practices can also be imposed on the directors and officers of the corporation who were in a position to control or influence the behaviour of those acting on behalf of the corporation.

Reviewable, non-criminal deceptive marketing practices include misleading or false representations to the public that fall short of the criminal standard, greenwashing claims, drip pricing, performance claims based on inadequate testing, and bait-and-switch advertising.

The Attorney General of Canada has exclusive jurisdiction over all criminal prosecutions under the *Competition Act*. Both companies and individuals can be charged with criminal offences, including conspiracy and bid-rigging, as well as some misleading advertising and deceptive marketing practices. Those found to have committed such offences are sanctioned by fines and/or prison sentences.

Abuse of Dominance

Abuse of dominance can arise when a business with market power engages in (i) a practice of anti-competitive acts; or (ii) conduct that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and the effect is not a result of superior competitive performance.

While there is no precise definition in the Competition Act of what conduct constitutes an “abuse of dominance”, such conduct refers generally to practices aimed at a competitor that, objectively viewed, are predatory, exclusionary or disciplinary. The Competition Act provides a number of examples of conduct that constitute an abuse of dominance including: (i) buying up products to prevent erosion of prices from existing levels; (ii) the use of certain exclusive dealing arrangements to foreclose competition; and (iii) the adoption of practice or product standards that are designed to prevent entry or diminish or limit competition.

Either the Commissioner or private parties with leave of the Tribunal can commence applications before the Tribunal seeking an order in respect of alleged abuse of dominance. The Tribunal can order a party found to have abused dominance to alter conduct or, it can impose civil administrative monetary penalties up to the greater of: (i) \$25,000,000 for the first order and \$35,000,000 for each subsequent order; and (ii) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3 per cent of the person’s annual worldwide gross revenues.

Civil Anticompetitive Agreements

The Civil Anticompetition agreements provision of the Competition Act (s.90.1) allows the Tribunal to issue a remedial order on application by the Commissioner or a private party with leave with respect to agreements that are found to harm competition. The provision - which originally was limited to agreements between competitors, has been expanded significantly to include a wider variety of potentially anti-competitive agreements including vertical agreements between suppliers and customers where a “significant purpose” is to lessen competition. This shift was partly spurred by concerns over real estate deals, like exclusivity clauses between landlords and anchor tenants that lock out rival stores. For example, a supplier barring a retailer from stocking competitors’ goods could now face a Tribunal challenge, even if the parties aren’t direct rivals.

The Tribunal can order behavioural and monetary penalties for violations of this provision.

Footnote

¹ This is the threshold value for 2025. This value can be adjusted annually based on changes in gross domestic product.

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