



Pre-Merger Notification Interpretation Guideline Number 9

Shareholder Agreements

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Enforcement guidelines

June 20, 2011

Notice

This publication replaces the following Competition Bureau publication:

Enforcement Guidelines — Notifiable Transactions under Part IX of the *Competition Act* — Interpretation Guidelines, April 25, 2000

This Interpretation Guideline is issued by the Commissioner of Competition ("Commissioner"), who is responsible for the administration and enforcement of the [Competition Act](#) ("Act"). The purpose of this Guideline is to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions. This Guideline sets out the general approach taken by the Competition Bureau ("Bureau") and supersedes all previous statements made by the Commissioner or other Bureau officials. This Guideline is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such, nor is it intended to substitute for the advice of legal counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Merger Notification Unit [Footnote 1](#).

Background

Paragraph 2(4)(a) of the Act provides that a corporation is controlled by a person if that person holds more than 50 percent of the votes that may be cast to elect directors of the corporation. Shareholders of a corporation may enter into agreements, among themselves or with other parties, whereby voting interests may be acquired, transferred or suspended, either on a temporary or permanent basis. These voting interests found in shareholder agreements may include rights to elect directors. The question of the potential impact of shareholder agreements may arise in the context of threshold calculations for purposes of section 109 or subsection 110(3) of the Act.

Policy

Arrangements between parties to a shareholder agreement regarding the number of votes to be cast for the election of directors will not alter the basis for determining whether a person controls a corporation for purposes of paragraph 2(4)(a) of the Act and, hence, whether two corporations are affiliated under subsection 2(2) of the Act. Accordingly, when interpreting "control" in paragraph 2(4)(a) in the context of a shareholder agreement, it is the number of voting shares owned by each shareholder which is relevant, not the number of votes for the election of directors which each shareholder will exercise pursuant to the shareholder agreement.

Example 1 — Affiliation determination

A corporation (Acorp) is owned by two corporate shareholders. Forty percent of the voting shares are owned by corporate shareholder B (Bcorp) and 60 percent by corporate shareholder C (Ccorp). Bcorp and Ccorp enter into a shareholder agreement whereby Bcorp and Ccorp agree to share on a 50/50 basis the votes for electing

corporate directors. For purposes of paragraph 2(4)(a) of the Act, Ccorp controls Acorp. Accordingly, under subsection 2(3) and paragraph 2(2)(a) of the Act, Acorp is a subsidiary of, and is therefore affiliated with, Ccorp. Although Ccorp has entered into a shareholder agreement which grants another shareholder the right to cast additional votes for the election of directors, Ccorp owns more than 50 percent of the voting shares. If Ccorp sells to another corporation (Dcorp) its 60 percent holding in Acorp, and if Dcorp replaces Ccorp in the shareholder agreement between Bcorp and Ccorp, Dcorp will be considered as acquiring 60 percent of the voting shares of Acorp for purposes of subsection 110(3) of the Act. In this case, for purposes of calculating party-size thresholds in section 109 of the Act, Acorp will be considered an affiliate of Ccorp.

Example 2 — Voting trusts

Occasionally, shareholders of a corporation (Acorp) may create a voting trust whereby some or all the shareholders collectively confer their voting rights to a voting trustee. In some circumstances, the voting trustee may have the right to exercise voting rights that, in aggregate, constitute more than 50 percent of the outstanding voting rights attached to the shares of the corporation. Further, the voting trust agreement may require that the shares subject to the agreement be registered in the name of the voting trustee. However, corporate control and, as a consequence, corporate affiliation are primarily dependent on the beneficial ownership of voting shares, not their registered ownership. Accordingly, where a shareholder who is the beneficial owner of shares with more than 50 percent of the outstanding voting rights enters into a voting trust agreement that grants a voting trustee the right to exercise such voting rights, the shareholder still controls the corporation. If the shareholder is a corporation, it is affiliated with Acorp for purposes of subsection 2(2) of the Act. The voting trust could not be affiliated with Acorp in any event because the affiliation provisions in subsection 2(2) do not extend to trusts.

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Footnote

Footnote 1

For further information, please refer to the [*Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*](#) at p.14.