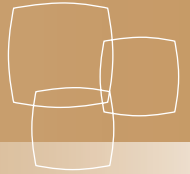




Competition Bureau  
Canada

Bureau de la concurrence  
Canada

Report



# Merger Review Performance Report

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May 2010





This publication is not a legal document. It contains general information and is provided for convenience and guidance related to the Competition Bureau's *Fee and Service Standards Handbook and Policy*.

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# I. INTRODUCTION

The Competition Bureau (the “Bureau”) is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition (the “Commissioner”), the Bureau is responsible for the administration and enforcement of the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. The basic operating assumption of the Bureau is that competition is good for both businesses and consumers.

Generally, mergers of all sizes in all sectors of the economy are subject to review by the Commissioner to determine whether they are likely to result in a substantial lessening or prevention of competition.

In general, mergers are viewed positively as a means of increasing competitiveness and providing Canadians with the benefit of lower prices, product choice, innovation and quality service; however, the Bureau pays close attention to the small number of mergers that could substantially prevent or lessen competition, thereby harming Canadians.

## Amendments to the Act and Updates to Service Standards

On March 12, 2009, Bill C-10, the *Budget Implementation Act, 2009*, came into effect. The bill introduced important amendments to the Act, including a new two-stage merger review process.

Very shortly following the amendments, the Bureau issued draft *Merger Review Process Guidelines* (“Guidelines”), describing the Bureau’s proposed approach to implementing the new merger review process. During consultations on the *draft Guidelines* (finalized on September 18, 2009), stakeholders raised a number of issues regarding the interface of the new regime and the *Fee and Service Standards Policy* (“Policy”), and requested a revision of the Policy in order to be more consistent with the revised statutory regime.

In addition, in the course of previous consultations by the Mergers Branch, the Bureau had been asked to clarify certain aspects of the *Fee and Service Standards Handbook* (“Handbook”), including complexity designations. In light of the significant changes made to the merger review process as a result of the amendments, and in response to stakeholder feedback in recent years, the Bureau is proposing to implement new service standards. They are described in detail in the draft *Fee and Service Standards Handbook For Merger-Related Matters* (2010).

## Stakeholder Consultations

When the Bureau introduced the Policy in 1997, it committed to holding ongoing consultations to collect stakeholder feedback. The Bureau last revised its Policy and its Handbook in 2003. Proposed changes to the Handbook and the Policy will be discussed at a Merger Fee Forum

and Stakeholder Consultation on May 31, 2010 in Toronto. After the Forum, the Bureau will post the proposed changes to the Handbook on its website for a period of 60 days for further comment.

### **Performance Report**

The *Merger Review Performance Report* provides an update on the performance of the Bureau's Mergers Branch since the last report published in June 2007. This report will also be discussed during the Merger Fee Forum and Stakeholder Consultation.





## 2. WORKLOAD AND RESOURCES

**TABLE I**  
**Caseload<sup>1</sup>**

		Merger Notification Filings*	Advance Ruling Certificate Requests**	Other Examinations	Total
2009-2010	#	10	190	16	216
	%	5%	88%	7%	100%
2008-2009	#	12	195	32	239
	%	5%	82%	13%	100%
2007-2008	#	15	294	28	337
	%	5%	87%	8%	100%
2006-2007	#	18	250	32	300
	%	6%	83%	11%	100%
2005-2006	#	17	242	26	285
	%	6%	85%	9%	100%
2004-2005	#	31	214	24	269
	%	11%	80%	9%	100%
2003-2004	#	22	159	21	202
	%	11%	79%	10%	100%

\* Excludes merger notification filings for which Advance Ruling Certificates were also requested.

\*\* Includes cases where a notification filing was made in conjunction with an ARC request.

As Table I indicates, there was a significant increase in the number of mergers reviewed by the Bureau from 2003-2004 to 2007-2008. The impact of the 2008-2009 recession is reflected in the decline in the number of transactions reviewed during that year and early in 2009-2010.

While there has been a decrease in the number of mergers reviewed over the last two fiscal years, the number of transactions raising serious competition concerns has increased, in particular, during 2009-2010, as evidenced by the six consent agreements registered with the Competition Tribunal (the “Tribunal”). In July 2009, the Bureau reached a consent agreement with Suncor Energy Inc. and Petro-Canada, addressing the Bureau’s conclusions that, absent a remedy, the merger would substantially lessen competition. The review was one of the

<sup>1</sup> The totals include the number of notifications, ARC requests and examinations commenced for other reasons (Investment Canada Notices, Heritage Canada Notices, complaints, or otherwise) during the April 1<sup>st</sup> to March 31<sup>st</sup> period of each year.

most complex undertaken by the Bureau, and was completed in fewer than four months. The Bureau entered into an additional five consent agreements with merging parties, resolving competition concerns raised by proposed merger transactions in the pharmaceutical products, fertilizer products, ticketing services, and solid hazardous waste disposal services industries. Several of these transactions required close cooperation with counterpart agencies in other jurisdictions. Communication and coordination with these agencies promoted efficient and effective reviews and resolutions.

Since the last report, in addition to its enforcement work, the Mergers Branch has been involved in a number of other activities, including the issuance of the Guidelines and the proposed changes to the Handbook and the Policy, mentioned above. The *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act* has also been revised and will be published shortly.

The *Notifiable Transactions Regulations* have been amended to reflect legislative changes to the Act introduced in the *Budget Implementation Act, 2009* in March 2009; namely, replacing the "short form" and "long form" notification information requirements with a single notification form. Paragraph 16(1)(d) of the Regulations (the request for studies, surveys, analyses and reports) was redrafted to better align the wording with item 4(c) of the United States Notification and Report Form. The new Regulations came into force on February 2, 2010.

### **Merger Remedies Study**

In the most recent Performance Report (2007), the Bureau indicated that it had initiated a study of the effectiveness of past merger remedies. The Bureau is currently finalizing its study, which involved a review of 50 cases between 1986 and 2005 where at least part of the remedy was implemented. The Bureau held approximately 135 interviews with various market participants, including merged entities, purchasers of divested assets, customers, competitors, and other relevant parties. The Bureau aims to complete the study this year, and intends to publish its findings and recommendations shortly thereafter.

### **Efficiencies in Merger Review**

In the 2007 Performance Report, the Bureau also undertook to conduct further policy work on efficiencies and planned to clarify its enforcement approach in the area of efficiencies in merger review. The Bureau has published a *Bulletin on Efficiencies in Merger Review*<sup>2</sup>, as a supplement to the *Merger Enforcement Guidelines*<sup>3</sup>. This bulletin is designed to provide practical guidance to assist merging parties in understanding the Bureau's approach.

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2 To access this bulletin, please consult [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

3 To access these guidelines, please consult [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

## Technical Backgrounders

In April 2005, the Bureau published a *Policy Statement for the Publication of Technical Backgrounders*<sup>4</sup>, which describes the use of technical backgrounders as a means to increase transparency. A technical backgrounder describes the Bureau's analysis in a particular investigation and the reasons underlying its final conclusions. These backgrounders are not intended to set precedents, nor will they be prepared with respect to any case that proceeds to the Tribunal.

In determining whether there is value in publishing a technical backgrounder in a particular matter, the Bureau will be guided by section 29 and subsection 10(3) of the Act, and will consider, as applicable in the circumstances, the following criteria:

- Whether the release of more comprehensive information will provide useful insight or education to the public and business community, thereby encouraging greater compliance with the law;
- Whether the issues are sufficiently important or complex;
- Whether there is a need to clarify a point of law or policy (for example, where the Bureau has taken a new approach);
- Whether the matter in question has received substantial publicity in the press; and
- Whether the practice in question has a significant impact on consumers.

Since the last Performance Report was published, the Bureau has issued five merger-related technical backgrounders:

- Superior Plus/Irving Oil and Irving Oil Marketing (2009)
- TSX Group Inc./Bourse de Montréal Inc. (2009)
- Organon BioSciences N.V./Schering-Plough Corporation (2008)
- BGM/CHUM (2007)
- Abitibi-Consolidated Inc./Bowater Incorporated (2007)

The Bureau is committed to publishing technical backgrounders, where appropriate and in accordance with the above-noted criteria, to ensure transparency.

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4 To access this policy, please consult [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).



### 3. MAJOR MERGER REVIEW EXPENDITURES

**TABLE 2**  
**Cost of Merger Review<sup>5</sup>**

	Full-time Staff*	Direct Costs (millions)	Indirect Bureau Costs (millions)	Total Bureau Cost	Major Expenditures
<b>2009-2010</b>	54	\$14.4	\$0.2	\$14.6	Suncor/Petro-Canada; Ticketmaster/Live Nation; Agrium/CF Industries Holdings Inc.
<b>2008-2009</b>	52	\$12.6	\$0.6	\$13.2	Labatt/Lakeport; Google Inc./Yahoo Inc.; XL Foods Inc./Tyson Foods Inc.
<b>2007-2008</b>	44	\$13.6	\$0.7	\$14.3	Labatt/Lakeport; Abitibi-Consolidated Inc./Bowater Inc.
<b>2006-2007</b>	47	\$11.6	\$0.7	\$12.3	Labatt/Lakeport; Saskatchewan Wheat Pool/Agricore United; Bell Globemedia/Chum; UGG/Agricore; Saskatchewan Wheat Pool/James Richardson International; and James Richardson International/Agricore
<b>2005-2006</b>	47	\$10.5	\$0.6	\$11.1	Saskatchewan Wheat Pool/James Richardson International; Cargill/Better Beef; Tolko/Riverside; and UGG/Agricore
<b>2004-2005</b>	41	\$9.4	\$0.5	\$9.9	West Fraser/Weldwood; Telus/Microcell/Rogers; CN/BC Rail; and Waste Management of Canada/Browning-Ferris Industries Ltd.
<b>2003-2004</b>	41	\$6.5	\$0.3	\$6.8	Waste Management of Canada/Browning-Ferris Industries Ltd.; CN/BC Rail; and CN/Ontario Northern Railway

\* This includes the total number of staff working within the Mergers Branch, and does not include staff working in the Bureau to support Mergers Branch functions.

5 Table 2 includes costs to the Bureau. They do not include the full costs to the Government of Canada related to merger review. These costs would include, for example, a portion of other government department services (such as the Department of Public Works and Government), and a portion of human resource and financial services provided by Industry Canada.

Over the past year, the Mergers Branch has faced the challenge of implementing the immediate changes brought forth by the new amendments to the Act. There have been an unusually high number of very complex, strategic mergers since the amendments came into effect. Each of these transactions had its own unique challenges. The Branch registered six consent agreements with the Tribunal in under seven months. The Bureau's thorough, detailed, and expedient reviews received positive feedback from parties and their counsel, as well as stakeholders.

The direct costs of merger review include the salaries for staff in the Bureau whose work relates to merger review. The major non-salary direct costs include expenditures associated with hiring economic and industry experts, and external legal support and lawyers assigned to merger review at the Department of Justice (DOJ). The indirect costs associated with merger review include Bureau overhead expenditures, such as informatics and administration.

Since 2007-2008, revenues collected by the Mergers Branch have fallen short of the costs expended by, on average, \$2.1M per year. In the summer of 2007, the Bureau committed to reviewing its resource expenditures over the five-year period since fees had been increased in 2003. The Bureau continues to examine its resource expenditures, and considers the current fee structure to be appropriate. The Bureau's Policy is consistent with the Government's overall objective of fairness, which seeks to ensure that those who benefit most from a service should pay for it, rather than forcing all Canadians to pay through general taxation.

Very complex cases with time constraints have required the Mergers Branch to hire numerous industry and economic experts to provide thorough analyses to assist the Branch in meeting timing exigencies. Outside counsel are also often hired to supplement the legal support provided by the Department of Justice on very complex matters. The Bureau has also hired a number of top-tier graduates, enabling it to provide high-quality merger reviews.

**TABLE 3**  
**Revenue Generated through Merger Notification and ARC requests**

	Revenue generated through Merger Notification and ARC requests (millions)
2009-2010	\$10.1
2008-2009	\$10.2
2007-2008	\$15.3
2006-2007	\$13.2
2005-2006	\$12.9
2004-2005	\$12.4
2003-2004	\$8.8



## 4. FILING COMPLEXITY AND SERVICE STANDARDS

**TABLE 4**  
**Volume of Cases by Level of Complexity<sup>6</sup>**

		Non-Complex	Complex	Very Complex	Total
2009-2010	#	173	27	6	<b>206</b>
	%	84%	13%	3%	100%
2008-2009	#	180	23	5	<b>208</b>
	%	87%	11%	2%	100%
2007-2008	#	279	23	4	<b>306</b>
	%	91%	8%	1%	100%
2006-2007	#	238	22	3	<b>263</b>
	%	91%	8%	1%	100%
2005-2006	#	216	36	7	<b>259</b>
	%	83%	14%	3%	100%
2004-2005	#	213	19	8	<b>240</b>
	%	89%	8%	3%	100%
2003-2004	#	165	18	2	<b>185</b>
	%	89%	10%	1%	100%

Between 2003 and 2010, on average, approximately 88% of proposed transactions subject to service standards were classified as non-complex, 10% as complex, and 2% as very complex. That breakdown remained relatively constant throughout the time period set out in Table 4.

<sup>6</sup> The totals include the number of notifications and ARC requests completed between April 1 and March 31 of each year.

**TABLE 5**  
**Percentage of Filings where the Service Standard was met**

	#	Non-Complex	Complex	Very Complex	Total
<b>Service Standard</b>	<b>%</b>	2 weeks	10 weeks	5 months	
<b>2009-2010</b>	<b>#</b>	162	24	5	<b>191</b>
	<b>%</b>	93.64%	88.88%	83.33%	92.72%
<b>2008-2009</b>	<b>#</b>	174	20	3	<b>197</b>
	<b>%</b>	96.67%	86.96%	60%	94.71%
<b>2007-2008</b>	<b>#</b>	267	21	4	<b>292</b>
	<b>%</b>	95.7%	91.30%	100%	95.42%
<b>2006-2007</b>	<b>#</b>	225	20	2	<b>247</b>
	<b>%</b>	94.5%	90.9%	66.67%	93.9%
<b>2005-2006</b>	<b>#</b>	205	34	6	<b>245</b>
	<b>%</b>	94.9%	94.4%	85.7%	94.6%
<b>2004-2005</b>	<b>#</b>	208	17	7	<b>232</b>
	<b>%</b>	97.7%	89.5%	100%	96.6%
<b>2003-2004</b>	<b>#</b>	164	17	2	<b>183</b>
	<b>%</b>	99.4%	94.4%	100%	98.9%

As Table 5 indicates, the Mergers Branch has consistently met service standards in the majority of cases. The Bureau has taken measures to ensure service standards are realistic and that necessary resources are available to ensure an effective and efficient merger review. To be clear, meeting service standards is premised on cooperation from the parties.



## 5. FEEDBACK LEAFLETS

### Background

Feedback leaflets were developed to allow stakeholders to provide written feedback on specific Bureau services. The questions asked address whether a respondent was served in the language of their choice, and the courtesy, helpfulness, and knowledge of staff members. There is also space for the respondent to include brief comments. The responses in these leaflets help the Bureau to ensure that those who sought services, or were bound by regulatory processes to which a fee applied, had timely and systematic opportunities to provide ongoing input about service levels and quality of service.

Beginning in 2004, a specific Merger Review feedback leaflet was developed, and accompanies every response to a merger notification and/or ARC request. The Compliance and Operations Branch of the Bureau is tasked with receiving the completed feedback leaflets and compiling the data, to ensure anonymity of those respondents who opted not to sign their leaflets. Photocopies of signed leaflets accompany a bi-annual report that is produced for the Mergers Branch. The report includes data from both the signed and anonymous leaflets. Comments and feedback are taken into consideration when updating or developing new guidelines, policies or other tools used by enforcement officers and the public.

In 2009-2010, the Bureau received fourteen completed feedback leaflets on Merger Review. Responses were largely positive. In recent years, some comments have been directed toward perceived delays and a few others were critical of the experience level of primary staff contacts; however, the most common feedback was related to difficulties with the Bureau's Web site. Specific issues raised by respondents include:

- The Consumer and Business portals hindered easy searches;
- Information related to a particular subject was scattered throughout the site; and
- The site had outdated content.

In response to these concerns, the Bureau's Public Affairs Branch was tasked with updating the website – a process that was completed in December 2008. The goal of this transformation process was to improve the ability to search the site's content and to increase user satisfaction among key audiences, including the legal community, economists, media, consumer groups, academics, other governments and consumers. Key changes to the site included:

- Improving search engine results by having only one main search option and providing users with a choice to sort results by relevance or date;
- Re-organizing the information architecture, removing the two main portals and presenting information by type of work; and
- Implementing publishing guidelines for all communication products.



Since these changes have been implemented, feedback related to difficulties with the site has decreased substantially. In particular, there have been few complaints about the web site (one out of eight responses). The same is true with respect to other dissatisfactions, such as experience/knowledge of staff (one poor rating out of eleven responses). The Bureau is disappointed by the overall low rate of response to the Feedback leaflets and will be consulting stakeholders on how feedback might be captured more effectively.



## 6. CONCLUSION

The Mergers Branch continues to prioritize efficient and quality service. Service standards provide one measure to respond to stakeholders' requirements for predictability, and represent one measure of timeliness, albeit dependent to a considerable extent upon cooperation from the parties. The Bureau continues to meet its service standards in well over ninety percent of cases. This percentage has continued to increase and, as described earlier, positive feedback from stakeholders is also on the rise.

Stakeholders are invited to provide comments during the Merger Fee Forum and Stakeholder Consultation on May 31, 2010 in Toronto. At the Forum, the Mergers Branch will present material and seek feedback on the updated Handbook and Policy and address any questions related to the recent amendments to the Act. Comments or suggestions are also welcome by phone or e-mail to:

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## 7. HOW TO CONTACT THE COMPETITION BUREAU

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