THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Fifteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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Aidan Synnott

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PREFACE

As detailed in the chapters that follow, competition enforcement remained quite active in many jurisdictions during the past year. Authorities around the globe devoted significant attention to merger control and to conduct matters – including abuse of dominance and cartel activity.

Enforcers in several countries and at the European Commission investigated and took action with respect to numerous transactions, and several deals saw concurrent investigations and other proceedings. In this regard, the discussions in the European Union and United States chapters detailing the actions against the Illumina–Grail transaction are particularly notable. An administrative law judge at the US Federal Trade Commission (FTC) determined that FTC complaint counsel failed to prove its prima facie case in challenging this deal. However, the European Commission prohibited the deal after it asserted jurisdiction pursuant to a referral from a Member State. There are other examples of divergent outcomes in the chapters that follow, including the differing treatment of the proposed Cargotec–Konecranes transaction by the European Commission (which approved the deal) and the US Department of Justice and UK Competition and Markets Authority (which effectively blocked it).

More generally, merger control activity in many jurisdictions remained robust. For example, as reported in the Brazil chapter, enforcers there reviewed a record number of mergers. Elsewhere, an amended competition law in Finland changed the merger notification thresholds there. There were also changes in the Turkish merger control regime, including a new provision broadening notification requirements for transactions regarding the acquisition of technology undertakings. In Italy, a new law expanded the powers of the competition authority and changed the test applicable in merger control investigations. There were other notable legislative developments, and the discussion of the passage of the Digital Markets Act and the Digital Services Act in the European Union chapter will be of particular interest.

Several jurisdictions saw notable cartel enforcement activity, with Brazilian, European Commission, Japanese and Portuguese authorities undertaking dawn raids. These actions targeted companies in online food delivery, water infrastructure, automotive, advertising and fashion industries, among others. Cartel activity related to the provision of goods or services to public entities received attention from several authorities, including the Canadian Competition Bureau and the US Department of Justice. Finnish, French and Swedish authorities also took several actions against cartels in the past year. Meanwhile, the General Court in the European Union dealt with several appeals from Commission decisions regarding alleged cartel conduct. Several enforcers, including the US Department of Justice and the European Commission, updated policies and guidance related to their leniency programmes.

Conduct-related enforcement actions against technology companies also featured prominently. Canada, the European Commission, France, Turkey and United States all moved forward with investigations and proceedings in this area. The Swedish competition

authority published a report regarding conduct in digital platform markets, concluding that 'competition law may lack sufficient flexibility with regard to new types of markets'. The Turkish competition authority also issued a report on e-marketplace platforms, and the Taiwan Fair Trade Commission released a white paper on the digital economy.

Several authorities also brought abuse of dominance (or monopolisation) cases against companies outside the tech space – including against pharmaceutical firms. The French competition authority issued several fines for abuse of dominance, including against companies supplying electricity and gas. Conversely, the Italian Council of State annulled a fine that the competition authority had levied on energy companies there. In addition, several authorities, including those in Portugal, Turkey and the United States, continued to pursue labour-related enforcement activity.

We will continue to watch with interest to see how competition regulation and enforcement evolves around the globe in the coming year.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2023

Chapter 2

CANADA

Michael Koch, David Rosner, Devin Persaud, Josh Zelikovitz and Jon Wall[1]

I OVERVIEW

2022 saw the most significant reform of Canadian competition laws in over a decade, with a promise of much more to come. Commissioner Matthew Boswell (the Commissioner), who leads Canada's Competition Bureau (the Bureau), received additional funding in 2021 and 2022 to enforce compliance with the Competition Act (the Act), as a means to protect Canadians from anticompetitive conduct. The Bureau continues to focus on advancing its efforts to detect anticompetitive conduct early through intelligence gathering and continues to modernise its policies, promote competitive outcomes in regulated industries and collaborate with authorities in other legal areas and jurisdictions.

In 2022, a comprehensive review of the Act was launched by the Minister of Innovation, Science and Industry (the Minister). A series of targeted amendments announced in the 2022 federal budget were largely technical in nature but provided an indication of a movement towards modernisation of Canada's entire competition regime. Certain of these amendments came into effect in 2022, with additional changes set to come into force in 2023. In November 2022, the Minister announced that a review and public consultations of the Act would begin a comprehensive amendment process. With this announcement, the Minister released a consultation paper that discussed ideas for significant amendments to the Act that, if passed, would touch on almost every aspect of Canadian competition law (the ISED Discussion Paper).

II CARTELS

The Bureau consistently identifies the detection and remedying of conspiracies, cartels and bid rigging, especially for infrastructure contracts, as among its most important priorities. Section 45 and Section 47 of the Act, respectively, make conspiracies (cartels) and bid rigging criminal offences carrying significant monetary and jail penalties. There is no limitation period for these offences.

i Significant cases

A summary of recent notable cases where the Bureau has taken enforcement action in respect of cartels and bid rigging is set out below.

1 Michael Koch and David Rosner are partners and Devin Persaud, Josh Zelikovitz and Jon Wall are associates at Goodmans LLP.

Bid rigging for provincial contracts in Manitoba

In late 2022, the Bureau laid criminal charges against five individuals who allegedly manipulated the process for awarding 89 contracts by the Manitoba Housing and Renewal Corporation with a value of approximately C$4.5 million. These individuals allegedly agreed to allocate the contracts among themselves between 2011 to 2016. The Bureau collaborated with the public agency whose bids were allegedly rigged and the local police force in its investigation. Trials relating to these charges have not yet begun.

Bid rigging for municipal contracts in Quebec

In 2021, the Bureau laid a further set of criminal charges in connection with a conspiracy to rig bids for infrastructure contracts in the City of Gatineau (Québec). In 2020, the Bureau concluded investigations of Roche Ltée, Groupe-conseil (now Norda Stelo Inc), SNC-Lavalin, Génius Conseil Inc and CIMA+ in respect of their roles in bid-rigging schemes targeting municipal contracts. To date, there have been seven settlements related to the Bureau's ongoing investigation and, collectively, the implicated companies have been ordered to pay more than C$12 million in fines. In 2018, four senior officials with CIMA+, Genivar and Dessau were charged and, in 2019, all four pleaded guilty. Cumulatively, they received conditional sentences totalling five years and 11 months. In June 2021, the Bureau also laid criminal charges against a fifth person, a regional director at Genivar. This individual pleaded guilty and was sentenced to pay a C$25,000 fine (in addition to a 15 per cent surcharge on that amount) on 14 October 2022.

Bid rigging for condominium refurbishment in the Greater Toronto Area

In March 2021, the Bureau announced that it had laid multiple criminal charges against four companies and three individuals in connection with an alleged conspiracy to commit fraud and rig bids for condominium refurbishment services in the Greater Toronto Area. The Bureau alleged that the parties were part of a conspiracy that ran from 2009 to 2014, defrauding multiple condominium corporations that put out tenders for refurbishment contracts. Tri-Can Contract Incorporated, JCO & Associates, LAR Condominium Refurbishment Specialists and CPL Interiors Ltd were all charged under the conspiracy provisions of the Act. CPL Interiors Ltd was fined C$761,967 after pleading guilty to these charges in January 2022.

Packaged bread price-fixing agreement

In 2021, the Bureau stated that its investigation into the conspiracy surrounding packaged bread was still very much active. In 2017, the Bureau conducted dawn raids at the offices of seven bread wholesalers and grocery retailers amid a criminal investigation into the alleged price-fixing of packaged bread products. In court filings, the Bureau alleged that bread wholesalers Canada Bread and Weston Bakeries communicated with one another to set bread prices that retailers then agreed to pass through to consumers. These retailers were Loblaw Companies Ltd (whose parent company, George Weston Ltd, owns Weston Bakeries), Walmart Canada Corp, Sobeys Inc, Metro Inc and Giant Tiger Stores Ltd.

In December 2017, George Weston and Loblaw publicly admitted to their participation in what the companies say has been an industry-wide arrangement over the past 14 years to coordinate and fix the price of bread, and identified themselves collectively as the immunity applicant in this case. According to documents released by the Ontario Superior Court of

Justice, the investigation alleged that prices were increased at least 15 times over this period, in a pattern known as the '7/10 convention' – seven cents more at wholesale and 10 cents more for consumers in stores.

The Bureau has yet to lay any charges in this case and has publicly stated that in complex cases like these time is required to gather and review all necessary evidence.

The related class action lawsuit – the largest of its kind in Canada – launched against the implicated companies (seeking more than C$1 billion in damages) was certified in part at the end of 2021. An Ontario court certified the proposed class action in *David v. Loblaws* against the largest Canadian producers and retailers of packaged bread (but only on behalf of certain proposed classes of purchasers). The case was dismissed against the parent companies of certain of the defendants.

Mohr v. National Hockey League, 2021 FC 488 (affirmed by the Federal Court of Appeal, 2021 FCA 179)

This Federal Court decision provided important guidance on the application of Sections 45 and 48 of the Act. In September 2020, former junior hockey player Kobe Mohr sought to certify a claim, seeking damages of approximately C$825 million, on behalf of all major junior hockey players who signed a standard player agreement. Mohr alleged Hockey Canada and major North American hockey leagues conspired to limit players' opportunities to negotiate and play with teams in other leagues. Mohr also alleged the defendants conspired to impose unreasonable terms and conditions on the proposed class members, including the imposition of 'nominal wages' and the loss of rights for proposed class members to market their image and participate in sponsorship and endorsement opportunities. The defendants brought a motion to strike the claim stating that they were not 'competitors' for the product or service at issue and, in any event, Section 45 does not apply to agreements among buyers for the purchase of a product or service. In granting the defendants' motion to strike the claim in its entirety, the Court agreed that agreements in relation to the purchase of a service ('buy-side agreements') were not within the scope of Section 45 (as discussed in section II.ii). The Court also struck the Section 48 claim on the basis that the Section does not apply to a conspiracy between different leagues (only agreements between intra-league teams).

ii Trends, developments and strategies

The Bureau continues to monitor economic growth and development as the covid-19 pandemic recedes. It has publicly stated that it will remain vigilant against potentially harmful anticompetitive conduct by those who may seek to take advantage of consumers and businesses. Despite this statement, there were fewer prosecutions for collusive conduct in 2022 than in 2021.

Two amendments to the Act introduced in 2022 are related to cartels. The first removes the C$25 million limit on fines for criminal agreements between competitors to fix prices, restrict supply or allocate markets. The second makes it an offence for employers to agree to fix, maintain, decrease or control wages or other terms of employment (wage-fixing agreements) and to refrain from hiring or trying to hire one another's employees (no-poach agreements). The penalty for violating this provision includes imprisonment for up to 14 years or a fine to be set at the discretion of the court, or both. Both amendments come into effect on 23 June 2023.

In addition to the criminal conspiracy provisions, an existing, parallel, civil provision of the Act, Section 90.1, provides for potential civil recourse against wage-fixing or no-poach

agreements by permitting the Commissioner to apply to the Competition Tribunal (the Tribunal) to seek an order against anticompetitive agreements where these meet the threshold for anticompetitive effects. Past Bureau policy documents have noted that the Bureau may consider certain wage-fixing or no-poach agreements under this provision, though it has never applied to the Tribunal for an order against any such agreements.

In early 2023, the Bureau released draft guidance on how it intends to enforce the new Section 45(1.1) (Draft Employer Guidelines).[2] The Draft Employer Guidelines are intended to supplement the 2021 Competitor Collaboration Guidelines (CCGs). Among other things, the Draft Employer Guidelines clarify that in order for an offence to be made out under Section 45(1.1):

a in contrast to the current offence of conspiracy, the employers do not need to be competitors;

b there must be an employer-employee relationship as defined by the relevant laws and circumstances (i.e., unlikely to apply to gig workers); and

c while conscious parallelism is not a violation, conscious parallelism paired with facilitation (e.g. monitoring each other's employment practices) could be a violation.

The Bureau also provided agreement-specific guidance. Importantly, the Bureau clarified that no-poach agreements must be reciprocal (i.e., an agreement to not poach each other's employees, not a one-sided no-poach agreement) to be considered contrary to the Act. With respect to prohibited wage-fixing agreements, the Bureau clarified its interpretation of this prohibition's reference to 'other terms of employment' as including any terms 'that could affect a person's decision to enter into or remain in an employment contract'.

As with other offences under Section 45 of the Act, the 'ancillary restraints defence' applies to Section 45(1.1). This defence allows certain business transactions to include restraints on competition such as no-poach or non-solicit clauses where these restraints are directly related and reasonably necessary to the transaction. For example, the Bureau confirmed in the Draft Employer Guidelines that it will generally not assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal track.

Further underscoring its focus on cartels and conspiracy, the Bureau released a 'Collusion Risk Assessment Tool' to help Canadian procurement agents protect their processes from bid rigging. This tool is an online survey that provides a 'collusion risk score' and suggests best practices to mitigate those risks. The Bureau also joined an international working group with competition authorities from Australia, New Zealand, the United Kingdom and the United States to identify attempts by businesses to use supply chain disruptions as a cover for price-fixing or other collusive activities that involve competitors cooperating instead of competing with each other.

Finally, the Bureau continues to encourage those who believe they are involved in an illegal agreement with their competitors to seek immunity or leniency in return for cooperation under the Bureau's Immunity and Leniency Programs.

2 Competition Bureau, Enforcement guidance on wage-fixing and no poaching agreements, 18 January 2023: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements.

iii Outlook

Given the Bureau's focus on the detection, investigation, prosecution and punishment of cartels and bid-rigging matters, companies should continue to give significant attention to ensuring compliance with applicable laws and to treat all potential violations seriously. This is particularly important in matters where the procurer is a government entity. Businesses should note that the Bureau considers having a corporate compliance programme, which conforms to its *Corporate Compliance Programs* Bulletin, to be a mitigating factor in sentencing and will recommend a reduced sentence for businesses with such a programme.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. This is particularly relevant for cross-border conduct; Canada has a mutual legal assistance treaty and extradition treaty with the United States that can be used in cross-border criminal investigations. Above all else, it is critical for companies, especially those considering international conduct, to understand how the Bureau's Immunity and Leniency Programs operate, and how the conduct may affect the companies' interests under the programmes of non-Canadian competition authorities and potential civil suits.

In February 2022, the Bureau called for the cartel provisions of Act to be amended in order to: (1) criminally prohibit buy-side conspiracies; (2) expand the scope of conduct that may be considered criminal bid rigging; and (3) increase the maximum fines for criminal conduct. Item (1) was partially addressed by wage-fixing and no-poaching prohibitions added to the Act. Item (3) was fully addressed by amendments to the Act in 2022 (the 2022 Amendments). As the 2022 Amendments are considered by the Canadian Government 'a "down payment" prior to embarking on broader reforms'[3] it is expected that criminal prohibition of buy-side conspiracies is on the horizon as it was again mentioned in the ISED Discussion Paper.

The ISED Discussion Paper highlighted 'algorithmic collusion' (i.e., the idea that automation could make it easier for firms to arrive at or sustain collusive outcomes with no or minimal human interaction) as an area of specific importance for future amendment.

The ISED Discussion Paper also raises the possibility of expanding the scope of civil enforcement against agreements that prevent or lessen competition substantially to permit action in respect of prior anticompetitive collaboration, not only ongoing and future conduct – as it currently allows. As any amendment is unlikely to apply retroactively, firms should remain vigilant in assessing the legality of ongoing and future collaboration with competitors until any relevant amendments are enacted.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Act contains civil (i.e., non-criminal) provisions relating to abuse of dominance,[4] restrictive agreements among competitors[5] and various distribution practices, including refusal to deal, price maintenance, exclusive dealing, tied selling and market restrictions.[6] These provisions, which are collectively known as 'reviewable practices', only permit the Tribunal from making an order where the Commissioner or a private applicant can demonstrate that the reviewable practice is or is likely to have an anticompetitive effect. The Tribunal has the power to make

3 ISED, *The Future of Competition Policy in Canada*, (Ottawa: 2022): https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

4 Sections 78–79.

5 Section 90.1.

6 Sections 75–77.

remedial orders in respect of each provision and may impose an administrative monetary penalty (of up to C$10 million for a first order and C$15 million for subsequent orders) in respect of abuse of dominance.

i Significant cases

Enforcement action in respect of the reviewable practices provisions of the Act continues to be a priority for the Bureau. A summary of recent matters is set out below.

Bureau investigations into drug patent settlement agreements

In May 2022, the Bureau announced that it had closed two previously undisclosed investigations into what it described as potentially anticompetitive patent litigation settlement agreements relating to discontinued legal proceedings relating to two pharmaceutical drugs. Bureau policy states that drug patent settlement agreements will not be investigated under the civil provisions of the Act if: (1) they provide for generic entry prior to patent expiry; and (2) they do not include any payment or other compensation from the brand to the generic. If a payment does occur, the Bureau has said that it will look at the context of the payment to determine whether the payment likely had the effect of delaying entry of the generic drug into the market. Notably, the Bureau suggested for the first time that a 'reasonable payment', such as a reasonable estimate of the brand manufacturer's expected remaining legal costs and other costs, would not pose an issue under the Act. In respect of these investigations, the Bureau provided no specific reason why the investigations were closed, other than stating that evidence suggested that the agreements did not contravene the Act.

Canada does not at present have a regime for mandatory notification of drug patent settlement agreements (i.e., it has no equivalent of the US Hatch-Waxman notification regime), though the Bureau has in the past called for such a regime The ISED Discussion Paper seeks public comment about whether such a regime should be established in Canada.

Bureau investigation into Turo

In May 2022, the Bureau announced the conclusion of an investigation into Turo, a peer-to-peer car-sharing platform for the booking of vehicles. Turo imposed upon its host users an exclusivity clause that restricted hosts from listing vehicles on other car-sharing platforms at the same time that the vehicles were also listed on Turo's platform. The Bureau closed its investigation after Turo announced that it would cease enforcing its exclusivity, and thereafter drop the clause from use in Canada. The lack of any consent agreement being registered with the Tribunal was somewhat unusual in this case.

Bureau investigation into Google

In October 2021, the Bureau obtained a court order to advance a civil investigation into conduct by Google related to its online advertising business. The Bureau publicly announced that it was investigating whether Google had engaged in certain practices that harm competition in the online display advertising industry in Canada. With a focus on the abuse of dominance provisions, the Bureau stated it will seek to ascertain whether Google's practices resulted in higher prices and reduced choices for consumers, and whether they decreased innovation within the industry.

The Bureau often works closely on technology sector investigations with the US Department of Justice (DOJ), which, together with several state Attorneys General, commenced litigation against Google in January 2023 alleging monopolisation of several digital advertising technology products, and seeks structural relief.

Bureau investigation into Amazon

The Bureau is continuing its investigation of Amazon under the restrictive agreements and abuse of dominance provisions of the Act, with a focus on the latter.[7] In August 2020, the Bureau publicly announced its investigation and sought feedback from market participants about Amazon's policies that affect third-party sellers' willingness to sell their products at a lower price on other retail channels (e.g., their own websites or other online platforms); whether third-party sellers can succeed on Amazon's marketplace without using the 'fulfilment by Amazon' service or advertising on Amazon.ca; and Amazon's efforts or strategies to influence consumers to buy Amazon's products over those offered by competing sellers.

While the Bureau has not provided an update on this matter since 2020, we understand that the investigation remains ongoing.

ii Trends, developments and strategies

The Bureau, and potentially now private parties, continue to monitor for abusive conduct by dominant parties. The 2022 Amendments newly allow a private party to apply directly to the Tribunal for remedies if the private party has been directly and substantially affected by another's abuse of dominance. This private access has not yet been tested.

The Bureau released a revised information bulletin on transparency (*Transparency Bulletin*) describing how it plans to communicate with stakeholders such as parties under investigation, complainants, industry participants and the general public. The most important change brought about by the revised *Transparency Bulletin* is the Bureau's statement that it no longer considers itself prohibited from publicly disclosing details regarding its active investigations. It also describes the increasingly common approach of requiring lawyers of the parties under investigation to communicate exclusively with the Bureau's lawyers once retained, not the Bureau itself.

The Bureau continues to seek document and data production, witness examinations and other orders under Section 11 of the Act to investigate reviewable practices. Responding to Section 11 orders can be an expensive and time-consuming process that requires the target company and others involved in an inquiry to make extensive documentary and data production. The use of this investigative tool increases the likelihood of greater public attention and interest in the Bureau's inquiry, given the public filings in the court's record. The prominence of this tool will likely expand given the 2022 Amendments to the Act now explicitly require a person to provide information under a court order obtained by the Bureau if they carry on business in, or sell into, Canada, even if the person is located outside Canada. Further, the 2022 Amendments also add a new power to compel written information from both foreign and domestic affiliates of a corporation and lowered the threshold for courts to issue such orders.

The 2022 Amendments increased the value of the administrative monetary penalty that can be imposed by the Tribunal for an abuse of dominance. The previous maximum was

7 Section 79.

a penalty of up to C$10 million (and up to C$15 million for a recidivist). The maximum penalty is now the greater of those amounts or three times the value of the benefit derived from the abusive conduct. If the latter amount cannot be reasonably determined, it is capped at 3 per cent of the dominant company's annual worldwide gross revenues.

iii Outlook

The Bureau remains committed to investigating and bringing enforcement actions for reviewable matters in all sectors of the economy, with a particular focus on digital, pharmaceutical and other consumer facing sectors. As the Bureau remains focused on carefully selecting matters for investigation (and potential enforcement action), companies should ensure their business practices are compliant with all applicable laws. In particular, companies operating in and adjacent to the digital economy should be cognisant of the Bureau's ongoing efforts as their investigations and potential enforcement actions are likely to involve or implicate the digital economy.

Under the 2022 Amendments, private parties are anticipated to begin applying to the Tribunal for leave to seek remedies for abusive conduct by competitors, suppliers and buyers. In light of the high bar for obtaining leave, however, it remains to be seen whether the private right of action becomes a more effective tool for enforcement. At the same time, the Bureau advocates new tools to address anticompetitive agreements in the technology space and has asked for a regime of mandatory notification of pharmaceutical patent litigation settlement agreements (similar to the filing requirements in other jurisdictions, such as under the US Hatch-Waxman Act).

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Bureau conducts market studies to examine an industry or business sector from a competition perspective to identify relevant laws, policies, regulations or other factors that may impede competition. In contrast to antitrust enforcers in other jurisdictions, the Bureau has limited powers in respect of market studies. Notably, the Bureau cannot compel the production of documents or testimony, nor does it have rule-making authority to implement its recommendation. The Bureau conducts its market studies by gathering voluntary information and making non-binding policy proposals.

i Significant cases

Canada's grocery sector

The Bureau is conducting a market study in the grocery sector, aimed at examining how governments across Canada can promote greater competition in retail grocery. The Bureau is studying factors that may have contributed to a change in the sector's dynamics, including supply chain disruptions and the pandemic. It is studying the outcomes of other countries' studies (e.g., Australia, New Zealand, the United Kingdom and the United States) and plans to make recommendations on how governments can lower barriers to entry and stimulate competition. The Bureau is expected to complete its study in 2023.

Canada's digital healthcare sector

In 2022, the Bureau published a three-part market study examining the support available to the digital healthcare sector in Canada. Part I examined competition in electronic medical records, observing how disparate provincial privacy and data rules and a lack of interoperability standards are impeding competition in the sector. Part II studied health care procurement, and made technical recommendations relating to RFP processes. Part III examined barriers to healthcare providers offering digital healthcare services to patients, and recommended expanding payment methods for healthcare providers offering digital services, and recommended changes to licensing regimes to allow flexibility across provincial and territorial borders within Canada.

Canada's pharmaceutical sector

The Bureau has placed a renewed focus on the pharmaceutical sector. The Bureau has publicly called for the implementation of mandatory notification of patent settlement litigation (i.e., a regime similar to the notification process in the US pursuant to the Hatch-Waxman Act). The Bureau also entered into a new collaboration with Health Canada's Health Products and Food Branch with the aim of improving Canadians' access to safe, effective and affordable medicines. The collaboration calls for increased information and expertise sharing between the Bureau and Health Canada; for the Bureau to provide competition input into Health Canada policy; and for Health Canada to make referrals to the Bureau when it encounters behaviour that may conflict with the Competition Act.

ii Trends, developments and strategies

The Bureau remains focused on understanding and promoting competition in industries that matter the most to Canadians. Since the Bureau has no ability to compel third parties to provide information for a market study, the Bureau relies on publicly available information, information already in its possession and information provided by stakeholders on a voluntary basis. Where appropriate, companies can consider participating in market studies so that the Bureau understands an industry from the 'business' perspective. Any information voluntarily provided to the Bureau is protected by the confidentiality provisions in Section 29 of the Act (which protects information from disclosure except under certain limited circumstances) and is subject to the Bureau's Communication of Confidential Information under the Competition Act Bulletin.

iii Outlook

The Bureau will continue to use market studies as a tool to understand how competition can be increased in a given industry or sector. The Bureau can be expected to focus market studies on those markets that may be affected by a perceived lack of competition, including digital, telecommunications, wireless and health sectors, as well as those that directly affect Canadian consumers.

V MERGER REVIEW

The Bureau reviews a wide range of mergers, including acquisitions of assets or shares, amalgamations and other combinations to determine whether a merger is or is likely to substantially lessen or prevent competition in Canada (SLPC). Subject to certain exceptions,

parties to a proposed merger that exceeds certain financial thresholds are required to file pre-merger notifications with the Commissioner. The Commissioner retains jurisdiction to substantively review all mergers in Canada, even those that fall below the pre-merger notification financial thresholds. The Commissioner may challenge a merger for up to one year after closing by filing an application with the Tribunal requesting an order to dissolve the merger or divest assets or shares or, with the consent of the merging parties, any other action.

A pre-merger notification filing is required where both of two financial thresholds, colloquially referred to as the 'size of target' and 'size of parties' thresholds, are exceeded (unless certain exemptions apply).[8] For 2023, the size of target threshold is C$93 million. The size of target threshold is exceeded where the aggregate value of the assets in Canada to be acquired or the gross revenues from sales in or from Canada generated from those assets exceed the threshold. The size of parties threshold is exceeded where the parties to the proposed merger, together with their respective affiliates, either have assets in Canada or had gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value. The size of parties threshold takes into account the vendor's assets and revenues that are not included in the transaction, if the vendor owns more than 50 per cent of the target.

If a proposed merger is notifiable, it may not be completed until the parties file complete notifications and the 30-day statutory waiting period has expired, been terminated early or the Commissioner has waived the obligation to submit a notification. However, the Commissioner may issue a supplementary information request (SIR) to the parties. The substance and process of an SIR is substantially similar to that of a DOJ or FTC 'second request'. If an SIR is issued, then the merger cannot be completed until 30 days after the parties comply with the SIR, and provided that the Tribunal has not issued an order prohibiting the parties from completing the transaction. SIRs are issued in complex matters where the Bureau must conduct an in-depth analysis of whether the proposed merger will substantially lessen or prevent competition. As a result, the Commissioner's substantive assessment of a proposed merger may extend beyond the statutory waiting period and the parties may choose not to complete the transaction until after the Commissioner's review is complete.

A significant trend in 2022 was the increasing willingness of merging parties in complex and contested transaction to close 'at risk', after the completion of statutory waiting periods but before receiving affirmative clearance from the Commissioner. This, together with the Bureau's enforcement priorities, has led to a marked increase of high-profile merger challenges initiated by the Commissioner.

i Significant cases

Recent notable cases are summarised below.

8 If the proposed merger is by way of an acquisition of shares, the shareholder threshold must also be exceeded. To exceed this threshold, the buyer, together with its affiliates, must hold (1) more than 20 per cent of the voting shares of a publicly traded company or (2) more than 35 per cent of the voting shares of a company that is not publicly traded. The threshold is also exceeded if the buyer, together with its affiliates, already holds more than 20 or 35 per cent of the voting shares (as applicable), and would hold more than 50 per cent of the voting shares of the target company as a result of the proposed merger.

The Commissioner of Competition v. Rogers Communications Inc and Shaw Communications Inc

In March 2021, Rogers Communications Inc (Rogers) and Shaw Communications Inc (Shaw) announced an agreement for Rogers to acquire all outstanding shares of Shaw. Rogers and Shaw each provide wireless services in Alberta, British Columbia and Ontario. In May 2022, the Commissioner applied to the Tribunal to block the proposed transaction. To address the Bureau's concerns, Rogers and Shaw proposed to divest most of Shaw's wireless subsidiary, Freedom Mobile Inc, to Videotron Ltd (Videotron), a wireless services provider almost exclusively operating outside of Shaw's wireless footprint. After two rounds of unsuccessful mediation,[9] the matter proceeded on an expedited basis with a decision delivered on 1 January 2023.

As this was the first Canadian instance of 'litigating the fix', the Tribunal had to address novel issues. First, the Commissioner alleged, and the Tribunal disagreed, that only the merger between Rogers and Shaw could be considered by the Tribunal as the Commissioner only brought an application against that merger. Instead, the entire transaction, including the divestiture, was considered because the merger of Rogers and Shaw could no longer occur without the divestiture to Videotron due to the agreements between the parties, among other reasons. Second, given the Tribunal's finding that the divestiture was a key element of the proposed transaction, the burden of proving the proposed transaction would significantly lessen or prevent competition fell to the Commissioner. Third, the Tribunal found that when evaluating the competitive effects of a merger, the counterfactual begins on the date the agreement is signed but may take into account some events that occur after the merger agreement is signed but before the hearing. Whether an interstitial event may be considered in the counterfactual appears to depend on whether it is a self-inflicted wound by the merging parties.

The Tribunal found the Commissioner did not meet its burden of proving the proposed merger was likely to cause an SLPC. As a result, it did not consider the significant evidence presented on efficiencies. The Commissioner unsuccessfully appealed the Tribunal's decision to the Federal Court of Appeal, which noted 'this was far from a close case'.[10]

During its investigation of this matter, the Bureau issued a public request for information where it described the theories of harm it was considering and solicited public feedback on each.[11] This was the first such request of its kind and may be expected in future complex merger reviews.

Commissioner of Competition v. Parrish & Heimbecker, Limited

In 2019, Parrish & Heimbeck (P&H) acquired 10 primary grain elevators from Louis Dreyfus Company in western Canada, including in Virden, Manitoba. The Bureau alleged that the acquisition was likely to result in farmers paying higher prices for grain-handling services in one local market, where P&H would control the only two primary grain elevators, which were formerly close competitors.

9 Pursuant to the Tribunal's January 2019 Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal (January 2019).

10 *Canada (Commissioner of Competition) v Rogers Communications Inc. et al.*, 2023 FCA 16 at para 10.

11 Competition Bureau, Request for Information: Rogers Communications Inc./Shaw Communications Inc., 28 September 2021: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/news-releases/request-information-rogers-communications-inc-shaw-communications-inc.

Despite the Bureau's concerns, P&H closed the acquisition at risk. The Commissioner then filed an application with the Tribunal seeking a divestiture order for one of the two primary grain elevators in the local area near Virden, Manitoba. Significantly, the Commissioner challenged only the acquisition of the primary grain elevator in the local area and not the full transaction. The matter was heard before the Tribunal between November 2020 and February 2021.

On 31 October 2022, the Tribunal issued its decision dismissing the Commissioner's challenge of the merger. The Tribunal found that the Commissioner failed to prove his claims of anticompetitive effects and determined that the Commissioner's positions with respect to defining the relevant product and geographic markets as 'not grounded in commercial reality and in the evidence'. In particular, the Tribunal held that the price effects of merger were immaterial and that there would be enough effective remaining competition.

The Commissioner of Competition v. Secure Energy Services Inc and Tervita Corporation

In March 2021, Secure Energy Services Inc (Secure) announced an agreement to acquire Tervita Corporation (Tervita). Secure provides and Tervita provided waste services in Western Canada, including speciality waste services to the oil and gas industry. The Bureau alleged that the parties were vigorous competitors of each other and that the merger would result in a 'merger-to-monopoly' for speciality waste services in many local markets.

The Bureau has a long-standing interest in the waste sector, including unsuccessfully challenging the merger that created Tervita at the Supreme Court of Canada in 2015 (*Tervita 2015*). *Tervita 2015* is significant for clarifying the 'efficiencies defence', a unique feature of Canadian competition law allowing parties to an otherwise anticompetitive merger to complete their transaction if they can demonstrate that the efficiencies of the transaction outweigh its anticompetitive effects. *Tervita 2015* establishes that, to block or unwind a transaction, the Commissioner must quantify all quantifiable anticompetitive effects of the transaction. In the six years since the *Tervita 2015* decision, the Bureau has voiced significant opposition to this decision and the efficiencies defence more broadly, and the case at hand is, in many respects, an extension of the earlier jurisprudence about the evidence required to be presented by the Commissioner to overcome the operation of the efficiencies defence.

The procedural history of this matter is also worth noting. The Bureau entered into a timing agreement with Secure and Tervita whereby the merging parties committed to giving the Bureau 72 hours' notice before closing. In June 2021, the Bureau received such notice. Having not filed for an order to block the transaction, or for an interim injunction to prevent the parties from moving towards closing, the Bureau scrambled to attempt to prevent the merger from closing. Believing it lacked sufficient time to obtain an interim order, the Bureau requested in effect an 'interim interim' injunction for the Tribunal to block the transaction for several days to allow time for an application for an interim order to be heard. The Tribunal did not grant this novel injunction, on the grounds that it did not believe it had the power to grant such an order. The Bureau then sought, and lost, an emergency appeal to the Federal Court of Appeal (at midnight, on a statutory holiday). While the Federal Court of Appeal affirmed that it has the power to issue such interim interim injunctions on an emergency basis, the court declined to do so in the circumstances of the case.[12] Minutes after the release

12 *Commissioner of Competition v. Secure Energy Services Inc and Tervita Corporation*, FCA Docket A-185-21, 2 July 2021.

of that decision, Secure and Tervita closed their transaction. However, on subsequent appeal months later, the Federal Court of Appeal ruled that the Tribunal in fact has the power to grant interim interim injunctions as a matter of law.[13]

After its initial failure to obtain an injunction, the Bureau sought a separate interim order against Secure, seeking an order for Secure to halt business integration by holding separate the facilities formerly owned by Tervita and ensuring that they are operated independently. One of the elements that the Bureau was required to demonstrate to the Tribunal was that the 'balance of convenience' favoured the granting of an interim injunction. Secure put forward evidence from experts that an interim order would prevent it from realising upon efficiencies and that as a result it would suffer loss. The Bureau made no effort to measure or quantify its view of the efficiencies, arguing that it was impractical for it to do so in the short amount of time since the issuance of its SIR. The Tribunal held that, as in *Tervita 2015*, the Commissioner had failed to meet his burden to quantify efficiencies and that, in the case of an interim order, the Commissioner should put forward a 'ballpark estimate' of dead-weight loss, a range of likely price effects, a range of 'plausible' elasticities, and 'basic sense' of non-price effects (e.g., losses to quality, choice, innovation, etc.).

The Commissioner continues to seek an order to restore competition, such as by dissolving the transaction or ordering a divestiture of certain assets. The hearing before the Tribunal took place in May and June 2022 and a decision is still pending.

WestJet and Sunwing

On 2 March 2022, WestJet Airlines Ltd (WestJet) and Sunwing Vacations and Sunwing Airlines (Sunwing) announced that they had entered into an arrangement agreement whereby WestJet would acquire Sunwing. As the proposed merger involved two Canadian airlines, it was subject to pre-merger notification under the Act as well as a public interest review under the Canada Transportation Act.

The Minister of Transport initiated a Phase II public interest review for the proposed transaction (only the third Phase II review ever conducted). Such a review limits the Tribunal's jurisdiction to prohibit the proposed transaction, but incorporates a requirement for the Minister of Transport to seek competition advice in the form of a public report from the Commissioner.

In his report dated 25 October 2022, the Commissioner raised competition concerns about the transaction, on certain sun destination routes to the Caribbean. The Minister of Transport has a broader mandate to consider the transaction in light of Canada's national transport policy interest, of which competition is only one component. The Minister of Transport is currently still conducting his review.

Commissioner of Competition v. GFL Environmental Inc

In December 2021, the Commissioner brought an application to the Tribunal to partly unwind the acquisition of Terrapure Environmental Inc by GFL Environmental Inc (GFL). The Competition Bureau had concerns about the transaction pertaining to the parties' rivalry for the provision of industrial waste services and oil recycling services at certain locations in western Canada.

13 *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25.

As in the cases of both Secure and P&H, discussed above, GFL opted strategically to close at risk prior to receiving affirmative approval from the Bureau. Following mediation, GFL and the Bureau settled their dispute by reaching a consent agreement whereby GFL agreed to sell seven of its industrial waste and oil recycling services facilities in British Columbia, Alberta and Saskatchewan. The Bureau later approved the sale of these facilities to Environmental 360 Solutions Ltd.

Consent agreements to resolve concerns in local markets

In several transactions over 2021 and 2022, the Bureau entered into consent agreements with merging parties to resolve concerns over an SLPC in several local markets.

In November 2021, the Bureau entered into a consent agreement for the approval of the acquisition of Domtar Corp (Domtar) by Karta Halten BV (Paper Excellence). Paper Excellence and Domtar are two of the largest pulp and paper manufacturers in Canada, and therefore two of the largest purchasers of wood fibre. In a position statement, the Bureau explained that pulp and paper plants have high barriers to entry. Further, the Bureau explained that transport costs preclude sellers of wood pulp in some interior regions from selling to anyone other than nearby mills. Therefore, the Bureau concluded that the transaction would give the parties the incentive and ability to exercise monopsony power over sellers of wood pulp, thereby lessening competition. The consent agreement required Paper Excellence to divest its Kamloops Mill to an independent purchaser approved by the Bureau. An affiliate of Kruger Inc was approved as purchaser of the Kamloops Mill by the Bureau. The Domtar transaction is particularly notable because of the rarity of the Bureau seeking a remedy to resolve concerns pertaining to a monopsony (rather than monopoly) theory of harm.

ii Trends, developments and strategies

In 2022, the Bureau continued its trend of taking a more aggressive posture on merger reviews, including with respect to committing litigation resources and conducting active intelligence gathering on non-notifiable mergers that may raise competition concerns. However, the Bureau has faced significant challenges in litigation before the Tribunal.

The 2022 Amendments clarified several tests related to anticompetitive conduct. The amendments codified existing general principles of merger law, including a change to Section 93 of the Act that instructs the Tribunal, when evaluating a merger, to consider: network effects, whether a merger would entrench market position of leading incumbents, and effects on price or non-price competition including quality, choice or privacy. This change appears designed to give the Tribunal broader discretion to make findings of anticompetitive effects in matters involving large digital technology companies, where traditional price effects may not be obvious. The amendments also implemented, for the first time, an anti-avoidance provision in the Act's notification rules.

The ISED Discussion Paper also proposes a number of changes to the Canadian merger review framework. It requests feedback on several discussion topics relating to: the revision of pre-merger notification rules to better capture mergers of interest, an extension of the limitation period for non-notifiable consummated mergers to be challenged (up to a period of three years post-closing), easing of the conditions for an injunction or interim relief when a merger is challenged, whether labour issues should have a more central role in merger analysis, and changes to/abolition or reform of the statutory efficiencies defence.

In Canada, the efficiencies defence continues to be a powerful tool for firms seeking to engage in strategic transactions that may have anticompetitive effects. The Bureau has

advocated for the abolition of this defence for a number of years and proposes that the approach to efficiencies be consistent with the approach under US law, where efficiencies are a factor to be considered in the assessment of competitive effects but that will not generally be dispositive unless the efficiencies reverse the harm to consumers. Merging parties seeking to obtain the benefit of the efficiencies defence should engage in careful and early planning and seek the assistance of experts able to organise and marshal the evidence necessary to support efficiencies claims.

iii Outlook

The Bureau treats merger reviews as one of its top priorities, particularly as the number of strategic transactions remains high. Companies should continue to expect that the Bureau will thoroughly review and investigate all mergers, including non-notifiable mergers of which it becomes aware, that have or are likely to have significant competitive effects, and to take aggressive enforcement action where it has concerns. The Bureau can be expected to continue to tailor remedies to the anticompetitive portions of a merger. Parties to mergers that have substantive overlaps, but do not exceed the pre-merger notification thresholds, should be cognisant of the expanded role of intelligence gathering and carefully consider whether their proposed mergers should be voluntarily notified to the Commissioner.

While the Bureau does not have a policy function within the government, the Bureau is increasingly more vocal on the need for reform, referring to Canada's merger control rules as being inadequate, and calling for legislative change. Many of the issues raised in the ISED Discussion Paper reflect the Bureau's February 2022 submission that called for: abolition of the efficiencies defence; more flexibility to bring cases against mergers in the technology sector that may prevent future competition; an increase in the Bureau's time limit to challenge a transaction from one year to three years; a broader approach to remedies, giving the Tribunal the power to fully restore competition in remedies rather than directing it towards the 'least intrusive' remedy; a more regulator-friendly regime to allow injunctions to pause transactions under review; and the closing of loopholes in the Act's pre-merger notification requirements. There is no doubt that change will be coming in the near future to the Act, as the sweeping and comprehensive potential reforms raised by the ISED Discussion Paper will be evaluated by the government after the public consultation has closed on 31 March 2023.

VI CONCLUSIONS

With the Commissioner focused on protecting Canadians from anticompetitive conduct, the Bureau continues to investigate, review and take enforcement action in respect of all types of anticompetitive conduct. In future, companies should expect that the Commissioner and Bureau will maintain existing priorities, while looking for opportunities to further competition and foster innovation across all sectors of the Canadian economy, including through its increasingly aggressive posture towards enforcement and litigation.

As discussed above, the Bureau and the ISED Discussion Paper have initiated discussion on sweeping changes to the Act, while the Minister has already made a number of more technical amendments to make enforcement and oversight easier. We anticipate that the process of consultation and review will continue through 2023 and that a revamped Act will be put before Parliament later this year.

Appendix 1

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