THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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ELEVENTH EDITION

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny

by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019

Chapter 5

CANADA

Michael Koch, David Rosner and Justine Johnston[1]

I OVERVIEW

Competition and antitrust matters continue to attract significant attention in Canada. Following the retirement of Commissioner of Competition John Pecman in May 2018, Matthew Boswell, Senior Deputy Commissioner of Competition, has been appointed Commissioner of Competition. Commissioner Boswell has continued to highlight the importance of an innovation-friendly approach to regulation.

The Competition Bureau (Bureau) continues to encourage compliance with competition laws, modernise its policies (including its intellectual property enforcement guidelines and its cartel immunity and leniency policy), and establish and improve working relationships with law enforcement in other legal areas and other jurisdictions.

II CARTELS

Cartel and bid-rigging enforcement continue to be top enforcement priorities of the Bureau. The cartel (Section 45) and bid-rigging (Section 47) provisions of the Competition Act (Act) are indictable offences with serious monetary and jail penalties for convicted offenders. There is no limitation period for these offences.

The Bureau identified the remedying of cartels and bid-rigging, as well as working with public procurement authorities to detect and prevent cartels and bid-rigging in public contracts, as among its most important commitments in its most recent three-year plan.[2]

i Significant cases

In October 2017, the Bureau conducted dawn raids at the offices of seven bread wholesalers and grocery retailers in a criminal investigation tied to 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 before meeting with grocery retailers and getting the retailers to accept the fixed prices. The retailers that were subject to the dawn raids 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.

1 Michael Koch and David Rosner are partners and Justine Johnston is an associate at Goodmans LLP.

2 'Competition Bureau, 2015–2018 Strategic Vision', 2 June 2015. This document is available on the Competition Bureau's website at www.competitionbureau.gc.ca.

In December, 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 time period, in a pattern known as the 7/10 convention – seven cents more at wholesale and 10 cents more for consumers in stores.

Of the remaining companies implicated in the alleged price-fixing, Walmart has declined to comment, while the others have denied contravening any provisions of the Competition Act. With much of the documentary evidence in public court findings redacted, Sobeys and Metro have filed applications to make all the documents public. Sobeys has also threatened legal actions against Loblaw for implicating Sobeys in the scheme. The Bureau has not offered a timeline for when charges may be laid, and in early 2018, publicly clarified that there was no conclusion of wrongdoing at that time. At the time of writing, a class action lawsuit against the implicated companies is in the process of being certified; the statement of claim alleges that the implicated companies overcharged consumers by C$5 billion.

In 2017, the Bureau completed an investigation into a number of auto part suppliers with sales into Canada, as part of which Mitsubishi Electric Corporation, a Japanese manufacturer and supplier of auto parts, pleaded guilty and paid a C$13.4 million fine. Mitsubishi Electric Corporation is reported to have been party to an illegal agreement with a competing Japanese supplier of alternators and ignition coils sold to Honda, Ford and General Motors. The Bureau first learned of this cartel activity through its immunity programme. While Mitsubishi Electric Corporation was not the immunity applicant, it did participate in the Bureau's leniency programme, and implemented a compliance programme to prevent future contravention of Canadian law. To date, public proceedings related to cartels in the auto parts industry have resulted in 13 guilty pleas and fines totalling over C$86 million.

The Bureau has continued to investigate a gasoline price-fixing conspiracy (most recently, Irving Oil Limited pleaded guilty and was fined C$287,583) and, in 2018, charged four individuals in connection with conspiring to rig bids for certain infrastructure contracts in Quebec.

ii Trends, developments and strategies

In September 2018, the Bureau published the final version of its revised immunity and leniency programmes, pursuant to which a party that reveals the existence of criminal conduct and cooperates may be granted immunity from prosecution. Under the revised programmes, immunity is withheld until such time as the applicant's cooperation and assistance is no longer required. In practice, this would result in applicants only benefiting from a provisional grant of immunity (as contrasted with a final grant of immunity) for the long periods of time typically associated with cartel investigations, and potentially up until the applicant has testified at the trial of alleged co-conspirators. This change is intended to address the risk that, following the initial application, the applicant may reduce or cease the extent of its cooperation, and is intended to address a challenge that prosecutors faced in a recent bid-rigging trial where a cooperating witness that benefited from the Bureau's cooperation programmes provided testimony that was different from what the Bureau expected.

In addition, the programmes no longer automatically protect directors, officers and employees of the immunity or leniency applicant. Instead, to benefit from the programmes, such individuals would need to demonstrate their personal knowledge of the alleged

wrongdoing and their willingness to cooperate with the Bureau's investigation. As well, wider protections are afforded to current directors, officers and employees of immunity applicants, as compared to leniency applicants. Another significant change reserves for the Bureau the right to require that witness interviews be conducted under oath, and to video or audio-record those interviews (as well as corporate proffers). Finally, all applicants are now required to provide confidentiality waivers allowing the Bureau to communicate with agencies in other jurisdictions where the applicant is applying for immunity or leniency.

The immunity and leniency programmes provide valuable incentives for parties to unlawful conduct to self-report. However, the changes may render the Bureau's premier cartel detection tool less attractive, particularly for potential applicants that are attempting to balance varying cooperation requirements of agencies operating across different jurisdictions.

iii Outlook

Given the Bureau's continued 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 treating all possible violations very seriously.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. It also should be noted that Canada has a mutual legal assistance treaty with the United States, as well as an extradition treaty with the United States, which can be used in relation to cross-border criminal investigations.

Above all else, it is critical for companies considering possible international conduct to understand the operation of the Bureau's immunity and leniency programmes, and what the operation of these programmes might entail for the companies' interests under the programmes of non-Canadian agencies and in respect of possible civil suits. In addition, companies must understand well how sales across borders are accounted for, which reduces the risk that companies could face fines for the same sales in multiple jurisdictions.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Act contains non-criminal provisions relating to abuse of dominance (Section 79), restrictive agreements among competitors (Section 90.1) and various distribution practices (Sections 75–77). These provisions, which are collectively known as 'reviewable practices', permit the Commissioner to seek an order from a specialised court, the Competition Tribunal (Tribunal), where the Commissioner can show that the reviewable practice is, or is likely to have, a negative effect on competition.

The Bureau has made enforcing the reviewable practices provisions a significant priority, and has brought a number of notable cases and obtained a number of consent agreements.

i Significant cases

The Commissioner of Competition v. The Toronto Real Estate Board

In 2018, the Toronto Real Estate Board (TREB) applied for, but was denied, leave to appeal to the Supreme Court of Canada from a decision of the Federal Court of Appeal, upholding the decision of the Tribunal below. This brought to a conclusion a case first brought by the Commissioner in 2011.

TREB's application to the Supreme Court followed its unsuccessful appeal to the Federal Court of Appeal from the Tribunal's 2016 decision finding that TREB had abused

its dominant position pursuant to Section 79 of the Act. Specifically, the Tribunal found that TREB, through its operation of the multiple-listing service and its membership rules, controlled the market for residential real estate brokerage services in the Greater Toronto Area (GTA). The Tribunal also found that TREB has a 'plausible competitive interest in adversely impacting competition' in the market for residential real estate brokerage services in the GTA because it wished to shield its traditional members from new and innovative competitors (and to exclude these new competitors). The Tribunal concluded that TREB's rules with respect to the use of the multiple-listing service were intended to insulate traditional members from innovative new competition, and had the effect of substantially preventing non-price competition.

TREB's principal argument before the Federal Court of Appeal was that the Tribunal erred by concluding that competition had been lessened substantially without requiring the Commissioner to quantify the alleged anticompetitive effects. The Federal Court of Appeal issued its decision in December 2017, upholding the Tribunal's decision. The Court held that the requirement imposed by the Supreme Court of Canada in *Tervita* – that the Commissioner quantify any quantifiable alleged anticompetitive effects in order to rely on them – did not apply in the abuse of dominance context. The Court held that no such obligation existed because that statutory scheme is different from that relating to mergers, where an efficiencies defence is available. However, the Court expressed sympathy for TREB's arguments, explaining that 'as a matter of logic' the Supreme Court's rationale for requiring that quantifiable effects be quantified 'could equally be applied to determinations made under both' the abuse of dominance and merger provision.

The Commissioner of Competition v. HarperCollins

Tribunal proceedings involving the e-books industry also finally concluded in 2018, with the entry by HarperCollins and the Commissioner into a consent agreement. The result of that agreement, together with Kobo's defeat in certain collateral proceedings is that, four years after originally entering into consent agreements to address alleged anticompetitive conduct in the e-books industry and almost six years after the United States Department of Justice publicly announced its case, the Commissioner finally obtained his desired remedy in the case.

In 2014, the Commissioner announced the entering into of consent agreements with four trade book publishers in relation to an alleged agreement among competitors with respect to the sale of eBooks in Canada. Those consent agreements, if implemented, would have prohibited the publishers from utilising certain commercial terms (such as most-favoured-nation clauses) in distribution agreements with online retailers, among other things. The consent agreements were broadly similar to consent decrees entered into by those same publishers in the United States with the United States Department of Justice concerning the sale of eBooks following the launch of the iPad by Apple in 2010.

Following a challenge to these consent agreements brought by a third-party online retailer, Kobo, the agreements were rescinded on technical grounds in 2016. The Commissioner then entered into new consent agreements, addressing these technical defects. However, HarperCollins, which had originally agreed to a consent agreement in 2014, did not agree to enter into a new consent agreement in 2016. As a result, the Commissioner brought an application, alleging that HarperCollins had entered into an agreement with competitors that lessened competition substantially. In its defence, HarperCollins brought a motion for summary judgment, arguing that the Commissioner's allegations concerned an agreement

in the United States, and that the Tribunal did not have jurisdiction over such a foreign agreement. In July 2017, the Tribunal issued a decision rejecting HarperCollins' motion for summary judgment. The Tribunal held that the alleged conduct had a real and substantial connection to Canada, even though it occurred outside of Canada. Given the existence of such a real and substantial connection, it was within the jurisdiction of the Tribunal to make an order in respect of it. HarperCollins did not appeal the Tribunal's decision.

The Commissioner of Competition v. Softvoyage

In January 2018, the Commissioner announced that he had entered into a consent agreement with Softvoyage Inc, a developer of travel-related software, also under the provision of the Act prohibiting the abuse of a dominant position.

Softvoyage produces software that is used by tour operators. In particular, tour operators use two types of Softvoyage software. The first type permits tour operators to manage the content of their vacation packages – that is, to assemble the various components (flights, hotel offers, etc.) into tour packages that are offered to consumers. The second type permits tour operators to provide access (i.e., to distribute) to travel agents, websites and other retailers of the tour operator's inventory of holiday packages.

The Commissioner's investigation concluded that Softvoyage is the dominant supplier for both types of software in Canada, with a share of sales of more than 90 per cent in each market. The Commissioner's investigation also concluded that Softvoyage had engaged in a series of practices that had the effect of raising barriers to entry for rival suppliers. These practices included Softvoyage's use of its control of the market for distribution software to 'facilitate' its control over the market for content management software through technical barriers that negatively impacted the ability of tour operators to use rivals' content management software. Softvoyage is alleged to have then used restrictive contractual provisions in its agreements with tour operators that made entry by rivals even more difficult. These provisions included exclusivity clauses that prevented tour operators from using other distribution software, or from extracting data from Softvoyage's content management software for use with other distribution software.

The consent agreement requires, among other things, that Softvoyage refrain from enforcing such contractual terms for a period of seven years, and to facilitate connectivity between Softvoyage's content management software and third-party software through good faith and non-discriminatory collaboration.

The Bureau's press release announcing the consent agreement refers to Softvoyage's software as 'essential', but does not explain its conception of the concept of 'essential facilities', or whether this is a cognisable theory of harm under Canadian law. Softvoyage did not admit the truth of the allegations.

The Commissioner of Competition v. Vancouver Airport Authority

In October and November 2018, the application brought by the Commissioner against Vancouver Airport Authority (VAA) was heard on its merits before the Tribunal. At the time of writing, the Competition Tribunal had not released its decision.

In September 2016, the Commissioner brought an application against (VAA). VAA is a non-profit organisation that is charged with carrying out a statutory mandate to manage Vancouver International Airport in the public interest. Its board members are nominated by various levels of government and professional organisations. The application alleged that VAA controls the market for access to the airside (roughly the area within the Airport's security

perimeter and outside the terminal), and that VAA is exercising that control in a way that substantially lessens or prevents competition in the market for the supply of galley handling services – the loading of in-flight meals onto aircraft at the airport. VAA filed a full response to the Commissioner's application, denying the Commissioner's allegations under all heads of the abuse of dominance provision.

In preparing for the hearing of this matter, the Commissioner produced a large volume of documents, but asserted 'public interest privilege' over a subset and refused to produce them to VAA. A series of decisions by the Competition Tribunal had established that the Commissioner was entitled to withhold from production in Tribunal (non-criminal) proceedings any document or information he had gathered from third parties in the course of his investigation by relying upon a blanket 'public interest privilege'. VAA challenged the assertion of public interest privilege as a class privilege, arguing among other things that the operation of the privilege resulted in a serious imbalance in the procedural rights of the parties. The Tribunal, which considered VAA's challenge at first instance, rejected VAA's arguments, finding among other things that the Commissioner's 'public interest privilege' had long been recognised by Canadian courts.

VAA appealed the Tribunal's decision to the Federal Court of Appeal. In a decision issued in January 2018, the Federal Court of Appeal upheld VAA's challenge and abolished class-based public interest privilege. The decision rested on two pillars. First, the Court concluded that the privilege was not necessary, since there was no evidence to support the Commissioner's argument that abolition of the privilege would result in third-party sources being less inclined to provide information to the Commissioner owing to fear of reprisals. The Court noted that similar 'candour' arguments had been viewed sceptically by the Supreme Court of Canada, and that such scepticism was warranted given that competition law authorities in other jurisdictions carry out their investigative mandates without such a class privilege to rely upon. Second, the Court was concerned about the serious unfairness that can result from such a one-sided privilege. The effect of the decision – which will apply in all contested proceedings before the Tribunal into the future – leaves the Commissioner able to assert public interest privilege on a document-by-document basis. Such assertions of privilege, which will be fact-specific, are more likely to result in a fair process before the Tribunal.

ii Trends, developments and strategies

The Bureau has continued its practice of seeking production and other orders under Section 11 to investigate reviewable practices. For example, in 2018, the Commissioner sought and obtained orders to obtain detailed financial and pricing records and interview a high-level executive in connection with an investigation into predatory pricing by WestJet Airlines Ltd's low-cost carrier, Scoop. Similar orders were obtained in 2016 against airlines such as First Air and Canadian North.

Responding to Section 11 orders can be an invasive and time-consuming process that requires the target company and others involved in an inquiry to make extensive documentary production. The use of this investigative tool clearly raises the costs for businesses of responding to Bureau inquiries. It also increases the likelihood of greater public attention and interest to the Bureau's inquiry, given the public filings in the Court's record.

iii Outlook

The Bureau can be expected to continue investigating and bringing enforcement actions in areas of the economy that it considers can benefit from innovation. The *TREB*, *E-books* and *Softvoyage* cases are just three examples of situations where the Bureau believed that it was appropriate to bring litigation to address business practices that it viewed as erecting barriers to entry or otherwise restricting innovation. In recent years, the Bureau has also conducted investigations of other companies, including Google, whose products and services are innovative. Given the Bureau's continuing interest in promoting the conditions it believes are necessary for innovation, future investigations in these types of industries are likely.

IV MARKET STUDIES

Since his appointment, Commissioner Boswell has highlighted the importance of ensuring that the spark of innovation is not dampened by dated views on regulation.[3] Under his leadership, the Bureau continues to focus on innovation industries.

i Fintech

On 26 September 2018, the Bureau released a progress report following the implementation of its market study into technology-led innovation in the Canadian financial services (fintech) sector. As expected, the Bureau adopted an advocacy approach and organised a number of outreach events. In the nine months since the publication of the study, the Bureau made formal submissions to advise Canadian decision-makers on issues such as the modernisation of payment systems, anti-money laundering and counter-terrorist activity financing regimes, and updating securities law frameworks so that they apply to virtual currencies.

The market study was finalised by the Bureau in December 2017, and focused on three broad areas: payments and payment systems; different forms of lending, including crowdfunding; and advice in respect of investing. The report gives an overview of the regulatory and competitive landscape of these areas, and makes a handful of broad recommendations for policymakers and regulators, industry participants and customers (including consumers). These recommendations are intended to assist with the modernisation of the financial services regulation system in Canada and foster innovation through technology-neutral, principles-based regulation. The bulk of the Bureau's recommendations would need to be implemented by other regulators (e.g., securities regulators), which suggests that the Bureau's efforts in the fintech sector will be through advocacy. To this end, the Bureau committed to carrying out 10 fintech-related advocacy interventions in its 2018–2019 Annual Plan.

ii Big data

In September 2017, the Bureau published for public comment a white paper concerning 'big data'. The paper represents an attempt to define what is meant by big data, offer views about how different provisions of the Competition Act might potentially apply to cases involving big data and summarise the Bureau's experience to date with cases that involved different types of data.

3 'Advancing Competition in a Changing Marketplace', Remarks by Matthew Boswell, Interim Commissioner of Competition, 10 October 2018 at Global Series 2018. This is available on the Competition Bureau's website at www.competitionbureau.ca.

The Bureau's white paper emphasises at the outset the need to 'strike a balance' in enforcement to ensure that innovation is not stifled by the collection and use of data, and that the Bureau considers the existing legislative framework largely effective for meeting novel cases that may arise in industries that feature big data. Importantly, unlike competition law agencies in other jurisdictions (e.g., France and Germany), the Bureau does not advocate changes to existing competition laws or novel application of existing laws in industries that feature big data. Among other things, the paper does not advocate for changes to merger notification rules to require notification of foreign companies that have minor revenues but large 'market' shares in Canada, or suggest that algorithms that monitor the pricing of rivals might be cartels absent some other illegal agreement among conspirators.

V MERGER REVIEW

Merger enforcement is one of the main tasks of the Bureau and has been a major source of competition enforcement cases.

The Bureau's Mergers and Monopolistic Practices Branch reviews a wide range of mergers across all markets in or in relation to Canada to determine whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. The Commissioner has up to one year after a merger is substantially completed to challenge such mergers by filing an application with the Competition Tribunal for remedial relief, such as dissolution of the merger or divestiture of assets or shares or, with the consent of the merging parties, any other action.

The merger provisions of the Act apply to the acquisition of control over, or significant interest in, the whole or part of a business. Significant interest means the ability to materially influence the economic behaviour of the target company. The definition of 'merger' is broadly based to include the acquisition of shares or assets, amalgamations or combinations.

With limited exceptions, parties to a proposed merger of a certain size (summarised below) are required to file with the Commissioner certain information required by the Act, and wait a certain period of time before being in a legal position to close their proposed merger. It should be noted, however, that even in cases involving mergers below the statutory thresholds (summarised below) there is still jurisdiction under the Act for such smaller mergers to be subject to review under the merger provisions, whether or not those mergers were the subject of voluntary notification to the Bureau.

The merger notification provisions of the Competition Act contain a size of parties threshold and a size of transaction threshold, both of which must be met before advance notification of a proposed merger is required. For the size of parties threshold, the parties to the proposed merger, together with their respective affiliates, must either have assets in Canada that exceed C$400 million in aggregate value, or have had gross revenues from sales in the previous year in, from or into Canada that exceed C$400 million in aggregate value.

In 2019, the size of transaction threshold with respect to the acquisition of assets in Canada of an operating business is that either the aggregate value of the assets in Canada being acquired exceeds C$96 million in aggregate value, or the gross revenues from sales in or from Canada generated from the assets in Canada exceeds C$96 million. The dollar threshold of C$96 million is adjusted annually to account for inflation.

With respect to the acquisition of shares, the financial thresholds discussed above apply, and in addition a shareholding threshold must be crossed. The shareholding threshold is that as a result of such proposed acquisition the buyer together with its affiliates would hold more

than 20 per cent of the voting shares of a company whose shares are publicly traded, or more than 35 per cent of the voting shares of a company whose shares are not publicly traded. If the buyer already holds more than 20 or 35 per cent of the voting shares as applicable, but as a result of the proposed transaction would acquire more than 50 per cent of the voting shares of the target company, that proposed transaction would also be subject to merger notification if the financial thresholds above are met and the exemptions to merger notification do not apply.

The initial waiting period for a proposed merger subject to merger notification is 30 days after the required information is submitted to the Commissioner. This initial waiting period can be extended if the Commissioner issues a supplementary information request (SIR) to the parties to the merger before the expiry of the initial waiting period. If an SIR is issued, the new waiting period becomes 30 days after full compliance with the SIR by both parties. An SIR will likely be issued in cases requiring a very detailed examination to determine if significant competition issues arise from the proposed merger. Such requests can be extensive in nature.

i Significant cases

The Bureau continues to maintain a busy docket of merger reviews, including in respect of transactions among Canadian companies and of non-Canadian companies with significant assets or sales in Canada. Many of these reviews resulted in consent agreements requiring the sale of assets or behavioural commitments. Recent notable cases include the following:

In May 2018, the Commissioner entered into a consent agreement with Metro Inc in respect of its proposed acquisition of the Jean Coutu Group. As these companies offer pharmacy distribution and franchise services, the Commissioner was concerned that, following the implementation of the transaction, Metro would have an incentive to materially increase upstream prices charged to pharmacists, decrease the quality of banner services provided to pharmacists, or impact retail prices at pharmacies. To remedy the Commissioner's concern that the transaction was likely to substantially lessen competition in eight markets in Quebec, Metro agreed to sell a number of its properties or leases to an alternate supplier of distribution and banner services and terminate its pharmacy-related franchise and distribution agreements in the contested markets.

In May 2018, the Commissioner entered into a consent agreement with Bayer AG in connection with its proposed acquisition of Monsanto Company. The Commissioner alleged that the loss of competition between Bayer and Monsanto would impact prices and innovation in the canola seeds industry, and that the merged entity would have an incentive to increase royalty rates to competing seed companies. In particular, the Bureau was concerned that the transaction was likely to substantially lessen and prevent competition for the supply of canola seeds and traits, soybean seeds and traits, seed treatments that protect crops against nematodes, and carrot seeds. Pursuant to the consent agreement, Bayer agreed to sell the affected businesses, and proposed BASF SE as the purchaser. The Bureau subsequently reviewed the BASF SE acquisition. Prior to granting competition clearance, the Commissioner entered into a consent agreement with BASF SE, whereby BASF SE was required to divest a herbicide trait systems.

In November 2017, although it was not notifiable, the Commissioner began investigating a transaction between Torstar Corporation and Postmedia Network to exchange 41 community newspapers' properties and commuter daily newspapers. On the date of

closing, Postmedia Network and Torstar Corporation subsidiary Metroland Media Group Ltd. announced that 36 of the 41 newspapers would be closed following the deal. Ultimately, the Commissioner decided not to challenge the transaction before the Competition Tribunal.[4]

ii Trends, developments and strategies

The Bureau's acceptance of efficiency claims in an increasing number of merger reviews demonstrates the power of this defence under Canadian law, and the importance of the efficiencies defence as a tool for companies seeking to engage in important strategic transactions. Obtaining the benefit of the efficiencies defence, however, requires careful and early planning, as well as the assistance of experts able to organise and marshal the evidence necessary to support such efficiencies claims.

In addition, the Bureau's continued close cooperation with agencies in other jurisdictions – particularly the United States Federal Trade Commission and the Antitrust Division of the Department of Justice – highlights the importance of ensuring close collaboration between counsel in different jurisdictions charged with obtaining clearance for the same merger.

iii Outlook

The Bureau can be expected to continue treating the review of mergers as one of its most important priorities, particularly as the number of strategic mergers in the economy remains high. Unfortunately, it remains the case that the Bureau's efforts are conducted amid a relative dearth of jurisprudence from the Tribunal on the subject of mergers. This is driven by various factors, including the fact that parties involved in mergers are typically under significant time pressure to close their transactions, and the process before the Tribunal does not at present accommodate the expedited consideration of mergers challenged by the Commissioner. This places a premium on 'getting the deal done', which can sometimes be at the expense of a detailed competition analysis. The Bench and Bar Committee of the Canadian Bar Association's Competition Law Section has set up a Merger Process Fast Track Working Group to look into, and make recommendations for, how the review of challenged mergers can be expedited, to allow for the Competition Tribunal's consideration of challenged mergers on a timeline more commensurate with the commercial realities of mergers. In January 2019, the Competition Tribunal released a Practice Direction on an expedited proceeding process that will improve the efficiency and effectiveness of Tribunal proceedings for appropriate matters.

VI CONCLUSIONS

The Bureau's enforcement actions have been directed at furthering competition in a broad variety of Canadian industries, ranging from automotive parts, manufacturing, media, retail, e-commerce, fintech and air transportation. The Bureau has continued to advocate for Canadian consumers by promoting the benefits of increased competition in regulated sectors of the economy. In the future, the Bureau can be expected to focus its efforts on the consumer impacts of the digital economy, including technologies such as pricing algorithms and blockchain that may impede competition or innovation. The Bureau will also continue to collaborate with domestic regulators and policymakers, as well as its international counterparts on merger reviews and criminal and civil investigations.

4 As at the time of writing, the Bureau continues to investigate the transaction under Section 45 of the Act.

Recent developments are likely to reverberate for some time in Canadian competition law. Cartel investigations and prosecutions will remain a priority and continue, although the effect of the new immunity and leniency programmes on such investigations and prosecutions remains to be determined. Bureau enforcement activity will be affected by the developing Tribunal jurisprudence regarding the abuse of dominant position provision. The Federal Court of Appeal's decision regarding public interest privilege will affect how future litigation is conducted before the Tribunal for years to come. The Bureau's increasing recognition of the value of efficiencies underlines the importance of this defence as a tool in the arsenal of companies seeking clearance for their strategic mergers from the Bureau.

Appendix 1

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