THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Fourteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. In the past year, we have also seen the emergence of cooperative policy efforts among several enforcement authorities. Two areas in particular – digital markets and pharmaceutical markets – have been the focus of cross-border initiatives. The G7 – Canada, France, Germany, Italy, Japan, the United Kingdom and the United States – along with Australia, India, South Africa, South Korea and the European Commission participated in a Digital Competition Enforcers Summit, which was hosted by the UK Competition and Markets Authority (CMA) in November 2021. Earlier in the year, the United States Federal Trade Commission, certain state attorneys general, the European Commission, the Canadian Competition Bureau and the CMA established a multilateral pharmaceutical working group.

In many jurisdictions, merger review and enforcement activity remain robust. Indeed, the United States agencies are dealing with an exceptionally high number of merger filings, reflecting a marked increase in deal activity. Meanwhile, in France, the Competition Authority (FCA) also saw a significant increase in merger activity and blocked a merger in the pipeline industry. According to our authors, this is only the second time the FCA has blocked a merger. Merger reviews were also up in Brazil. At the same time, however, the report from the United Kingdom notes that expectations for an increase in merger review activity at the CMA have so far not been realised and 'there is no evidence, as yet, of the expected Brexit boom in notifications'. In Japan, the Fair Trade Commission (JFTC) 'maintained a steady level' of merger enforcement activity.

The policing of cartels continues to be a focus of several competition agencies around the globe. Many jurisdictions with active anti-cartel enforcement programmes have seen the return of dawn raids, which had been largely suspended in several countries after the onset of the covid-19 pandemic. For example, dawn raids in Japan targeted the utilities sector, which, as we read in that country's submission, appears to be an area of focus for the JFTC. In Portugal, 2021 was 'record year for dawn raids', according to our authors. Authorities there targeted the financial, energy, healthcare and information services sectors. The Swedish Competition Authority conducted a dawn raid related to alleged price-fixing for covid-19 PCR tests. Our authors from Greece note that in the second half of 2021, authorities there conducted dawn raids on companies in 'an impressive range of markets'.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. In the United Kingdom, the CMA is establishing a Digital Markets Unit and has proposed legislation aimed at digital companies with 'strategic market status'. Similarly, the European Commission has proposed a Digital Markets Act to regulate that sector in the European Union; and competition authorities of Member States have been involved in the negotiation

of that legislation. Numerous legislative proposals introduced in the United States are aimed at digital platforms, and the agencies here are continuing with litigation against several platform companies. Numerous other jurisdictions are engaged in legislative and enforcement activity in this area, including Japan, where the Digital Platform Transaction Transparency Act recently came into force. Companies operating in digital markets were also the subjects of enforcement activity in several other jurisdictions, including Argentina, Canada, France and Turkey. In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe, including in the United Kingdom, the United States and Japan.

A number of agencies have continued to bring actions against resale price maintenance (RPM). Indeed, as we read in the chapter from the United Kingdom, it is clear that RPM (particularly as it relates to online pricing restrictions) remains a top priority for the CMA. Indeed, following several fines imposed in 2020, the CMA issued a statement of objections to a lighting company. Swedish authorities also fined a lighting supplier. Elsewhere, French authorities fined eyewear manufacturers and companies involved in video surveillance, and Turkish authorities levied fines on fuel distributors. It is also notable that enforcement activity in labour markets appears to be increasing in several jurisdictions, including in the United States. The Turkish Competition Board and the Portuguese Competition Authority are also examining labour market issues.

In the coming year, we will watch with interest to see how competition regulation and enforcement continues to evolve around the globe.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2022

Chapter 3

CANADA

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

I OVERVIEW

Commissioner Matthew Boswell (the Commissioner), who leads Canada's Competition Bureau (the Bureau), continues to encourage compliance with the Competition Act (the Act), prioritising competition law enforcement as a means to protect Canadians from anticompetitive conduct. Despite the uncertainties created by the covid-19 pandemic, the Bureau, bolstered by additional funding in 2021, 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.

Moving into 2022, the Bureau has called for efforts to review and revamp existing competition laws to keep pace with what it characterises as a 'dramatic international shift towards more aggressive enforcement of competition laws'. In February 2022, the Bureau published sweeping proposals to amend many areas of the Act,[2] including with respect to restrictive agreements, abuse of dominance and cartels. The Bureau does not have responsibility for setting Canada's competition policy and its proposals were released ostensibly in response to an already completed review of the Act that had been conducted by an independent Canadian senator. Simultaneously, the Minister of Innovation, Science and Industry (the Minister), announced his intention to conduct his own review of the Act. The Minister's reviews appears to be of a much more confined scope than the proposals indicated in the Bureau's submission, suggesting that more limited technical amendments and modernisations of the Act may be forthcoming; however, any changes to the legislation must go through the normal parliamentary process subject to the applicable timelines.

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 commitments. Section 45 and Section 47 of the Act make provision for conspiracy and

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

2 See 'Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau', 8 February 2022, for the Honourable Howard Wetston (2021), 'Consultation Invitation – Examining the Canadian Competition Act in the Digital Era'.

bid rigging respectively as criminal offences with serious monetary and jail penalties for convicted offenders. 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 are set out below.

Bid rigging for municipal contracts in Quebec

In 2021, the Bureau continued to lay criminal charges in connection with a conspiracy to rig bids for infrastructure contracts in the City of Gatineau (Quebec). 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 six 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.

Bid rigging for condominium refurbishment in the Greater Toronto Area

In March of 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.

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 launched against the implicated companies (seeking more than C$1 billion in damages) was certified at the end of 2021.

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

This Federal Court case provided important guidance on the application of Sections 45 and 48 of the Act.[3] 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[4]). The Court also struck the Section 48 claim because the Section does not apply to a conspiracy between different leagues (only agreements between intra-league teams).

Latifi v. the TDL Group Corp, 2021 BCSC 2183

In November 2021, the Supreme Court of British Columbia dismissed this proposed class action claim that the plaintiff brought based on Section 36 of the Act, alleging a violation of the criminal conspiracy provisions of the Act. The TDL Group Corp is the owner of the Tim Hortons brand and franchisor of Tim Hortons restaurants in Canada. The claim alleged that TDL's franchise agreement requiring franchisees not to poach employees from other Tim Horton's locations illegally supressed employees' wages. The claim was dismissed because, among other reasons, the Court concluded that wage-fixing (another buy-side agreement) did not fall within the ambit of Section 45.

3 Subsection 45(1) of the Act provides that everyone who, with a competitor of that person with respect to a product, conspires, agrees to conspire, agrees or arranges to fix, maintain, increase or control the price for the supply of the product; allocate sales, territories, customers or markets for the production or supply of the product; or fix, maintain, control, prevent, lessen or eliminate the production or supply of the product commits an offence. Subsection 48(1) of the Act states that every one who conspires with another person to limit unreasonably the opportunities of another person to participate as a player or competitor in professional sport or to impose unreasonable terms and conditions on player or competitor participants in professional sport; or to limit unreasonably the opportunity for another person to negotiate with and play for the team of choice is guilty of an indictable offence.

4 The Court in obiter did not exclude the possibility that Section 45 could apply to a supplier boycott or other hardcore cartel agreement among competitors in a downstream market to restrict output.

Jensen v. Samsung Electronics, 2021 FC 1185

Also in November 2021, the Federal Court of Canada denied a motion for certification against defendants alleged to have conspired in the production, sale and output of dynamic random access memory chips. The plaintiffs contended that the alleged conspiracy disclosed a cause of action under Section 36 for breaches of Sections 45 and 46 of the Act. In dismissing the motion for certification, the Court determined that the plaintiffs did not provide a minimum evidentiary basis for an alleged conspiracy, and equated the claim to a fishing expedition. The Court also made note that where there are no guilty pleas or convictions, nor an investigation by the Bureau (or any foreign antitrust authority), the plaintiffs will face an uphill battle to adequately support allegations of a conspiracy.

ii Trends, developments and strategies

The Bureau continues to monitor economic growth and development during the covid-19 pandemic. 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 during these extraordinary times. In 2020, the Bureau published covid-19-related guidance in respect of competitor collaborations, which is discussed in Section III.ii.

The effects of the Bureau's 2020 statement on application of the Act to no-poaching, wage-fixing and other buy-side agreements have now played out in multiple courtrooms. While the Bureau recognised that certain buy-side agreements are anticompetitive and have no pro-competitive consequences, it confirmed that the Section 45 conspiracy provision does not apply to buy-side agreements because the 2009 amendments removed the word 'purchase' from the provision, which limited its scope to supply-side agreements. Instead, the Bureau clarified that it would assess buy-side agreements under the provision of the Act regarding civil restrictive agreements among competitors.[5]

The Bureau affirmed this in its May 2021 revised Competitor Collaboration Guidelines (CCGs). This is the first major update of the CCGs since 2009. The new CCGs also clarify the type of evidence the Bureau will consider when deciding whether suppliers of differentiated products are competitors or potential competitors. Such evidence may include a review of business and strategic plans prepared in the course of business and marketing, and communications with potential customers. Additionally, the CCGs state that the Bureau will look closely at 'sham' agreements between competitors that are structured to avoid Section 45. This change may result in increased scrutiny of certain arrangements such as non-compete agreements entered into in connection with a merger. Finally, the new CCGs state that artificial intelligence and common pricing algorithms have the potential to be viewed as price-fixing agreements under the Act (provided there is evidence of an actual or tacit agreement or understanding to fix or control prices). To date, the Bureau has not publicly announced any investigations involving an algorithmic theory of price-fixing.

The Bureau underlined in 2021 that 'cracking down on cartels would continue to be a top priority'. 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. The jurisprudence in 2021 also showed a willingness of the courts to strike or reject certain class-action claims stemming from conspiracy allegations with little or no evidentiary basis. In what was

5 Section 90.1.

previously regarded as a jurisdiction with a very low bar to class action certification, recent cases have shown that courts are willing to demand more of plaintiffs, rather than rely on bald statements of collusion (especially when these claims rely on conscious parallelism and a unilateral signalling of price increases, with no evidentiary support).

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. Companies 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 companies 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 programmes 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. Simultaneously, the Minister announced an intention to review the Act with respect to wage-fixing agreements (which may be considered a subset of buy-side conspiracies) and to modernise the penalty regime.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Act contains civil (i.e., non-criminal) provisions relating to abuse of dominance,[6] restrictive agreements among competitors[7] and various distribution practices, including refusal to deal, price maintenance, exclusive dealing, tied selling and market restrictions.[8] These provisions, which are collectively known as 'reviewable practices', permit the Commissioner to seek an order from the Competition Tribunal (the Tribunal), where the Commissioner must demonstrate that the reviewable practice is or is likely to have an anticompetitive effect. The Tribunal has the power to make remedial orders in respect of each provision but may only 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.

6 Sections 78–79.

7 Section 90.1.

8 Sections 75–77.

i Significant cases

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

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. This industry employs various technology products to display advertisements to users when they visit websites or use apps. With a focus on the abuse of dominance provisions, the Bureau 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.

Like other competition authorities such as the European Commission, Germany's Bundeskartellamt and the US Federal Trade Commission (FTC), the Bureau is increasingly focusing on the conduct of 'big tech' and competition in online marketplaces or platforms.

Bureau investigation into Amazon

The Bureau is continuing its investigation of Amazon under the restrictive agreements and dominance provisions of the Act, with a focus on abuse of dominance.[9] The Bureau is examining whether Amazon engaged in conduct on Amazon.ca that has had a negative impact on competition for Canadian consumers and companies that do business in Canada. In August 2020, the Bureau publicly announced its investigation and sought feedback from market participants about Amazon's policies that impact 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.

The Commissioner of Competition v. Vancouver Airport Authority

In 2019, the Tribunal dismissed the Commissioner's application against Vancouver Airport Authority (VAA) under the abuse of dominance provision of the Act. In 2016, the Commissioner brought an application against VAA before the Tribunal alleging that VAA engaged in anticompetitive conduct because it decided not to grant a licence to a firm that wished to begin supplying in-flight catering to airlines at the Vancouver airport (YVR). VAA explained that it had no anticompetitive purpose – it decided not to permit additional in-flight caterers at YVR to maintain healthy competition between the two full-service caterers already operating at the airport.

In advance of the hearing, VAA challenged the Commissioner's reliance on blanket 'public interest privilege' to shield certain documents and information from disclosure. Ultimately, the Federal Court of Appeal abolished the Commissioner's class-based public interest privilege. This ruling has strained the Bureau's ability to shield certain classes of documents from disclosure, across an array of non-criminal matters.

9 Section 79.

In 2019, the Tribunal determined that the Commissioner could not meet two of the three prongs of the abuse of dominance test, namely it found that VAA had not engaged in a practice of anticompetitive acts and that the Commissioner did not prove that VAA's conduct resulted in any substantial lessening of competition (in terms of both price and quality) The application was dismissed.

The decision advanced two notable areas of case law. First, the Tribunal set a low bar for the degree of 'plausible competitive interest' in a given market that a firm must have as a prerequisite to a finding of abuse of dominance. Second, the decision was the first time that the Tribunal considered and opined on the regulated conduct defence. While the regulated conduct defence has been used in criminal matters under the Act, the Tribunal determined that the defence could not be extended to the abuse of dominance provision of the Act because the provision does not contain the type of 'leeway' language that courts in other circumstances have identified when deciding that federal law should not operate to impugn conduct authorised by provincial or other federal law.

ii Trends, developments and strategies

In response to the covid-19 pandemic, the Bureau published a statement on competitor collaborations, which recognised that the pandemic may create a need for rapid business collaborations of limited duration and scope to ensure the supply of products and services that are critical to Canadians. The Bureau indicated that if there is a 'clear imperative' for companies to collaborate in the short-term to respond to the crisis, and collaborations do not go further than what is needed and are undertaken and executed in good faith, then the Bureau would 'generally refrain from exercising scrutiny'. The Bureau emphasised that it has zero tolerance for any attempts to abuse the flexibility or guidance offered in responding to the covid-19 pandemic as 'cover for unnecessary conduct' that would contravene the Act. To date, the Bureau has not issued any public guidance on specific cases and has confirmed at industry events that no businesses had yet sought guidance from the Bureau on competitor collaborations under its statement.

The Bureau published revised CCGs in 2021, reflecting its experience with competitor collaboration reviews and relevant judicial decisions. The revised CCGs have more detail about the types of the evidence the Bureau will consider when assessing whether companies are competitors, and clarify the circumstances where the Bureau will investigate agreements between competitors under the cartel provisions of the Act.

The Bureau wishes to foster a culture of competition in the digital economy. In August 2020, the Bureau released a toolkit designed to help policymakers assess the competitive impact of policies and tailor policies to benefit competition, including in the digital sector. The Bureau hosted a Digital Enforcement Summit with Canadian and international participants, who shared enforcement best practice. In November 2021, the Bureau joined its G7 counterparts for a Competition Enforcers Summit to discuss collaboration in areas of interest such as app stores and mobile ecosystems, cloud computing and algorithms. The Bureau also announced that it is to launch a new digital enforcement and intelligence branch, which it intends to use as a centre for expertise on digital businesses and to provide intelligence expertise.

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.

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.

In February 2022, the Bureau's submission called for the agreements and abuse provisions of the Act to be amended. The submission advocated an expansion of the meaning of 'abuse of dominance', including special rules for anticompetitive conduct aimed at emerging competitors in the digital economy. 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). The Bureau has also called for higher penalties for abusive conduct and competitive agreements, and for the establishment of a right of private action (which, unlike in the United State and Europe, is generally only available in Canada in respect of criminal conspiracies). Simultaneously, the Minister also announced his intention to review the Act, aiming to 'increase access to justice', which may imply creating new rights of private action, and modernising the penalty regime.

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.

i Significant cases

Canada's digital healthcare sector

The Bureau is conducting a market study examining the support available to digital healthcare across Canada through pro-competitive policies. The covid-19 pandemic has demonstrated the important role that digital solutions play in meeting Canadians' healthcare needs. The Bureau states that it aims to promote the adoption of policies that achieve legitimate policy goals without inadvertently limiting the entry, expansion or consumer adoption of new products and services. The Bureau invited Canadians to comment on the digital healthcare sector to learn more about Canadians' experiences accessing and using digital healthcare service to understand the factors that may be impeding access to digital healthcare or limiting innovation and choice in Canada's healthcare sector, and identify possible opportunities for change. At the time of the writing, the Bureau has not released its final report.

Canada's pharmaceutical sector

The Bureau has placed a renewed focus on the pharmaceutical sector. The Bureau joined together with counterparts in the United States, United Kingdom and European Union to form a working group to analyse the effects of mergers in the pharmaceutical sector, and has solicited feedback from stakeholders and members of the public. 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 should consider participating in market studies so that the Bureau understands an industry from the 'business' perspective. Any voluntary information 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 held back by a perceived lack of competition, including digital, telecommunications, wireless and health sectors, as well as those that directly impact 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. 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).[10] For 2022, 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 counts the vendor's assets and revenues even if these are not included in the transaction.

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. The merger may be completed upon the expiry of the first waiting period unless the Commissioner issues a supplementary information request (SIR) to the parties. The substance and process of an SIR is substantially similar to that of a US Department of Justice (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 2021 has been 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.

i Significant cases

The Bureau reviews all types of transactions, including domestic and multinational transactions, where there are significant assets or sales in Canada. Recent notable cases are summarised below.

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

In March 2021, Secure Energy Services Inc (Secure) and Tervita Corporation (Tervita) announced that they had entered into an arrangement agreement whereby Secure would acquire all the issued and outstanding shares of Tervita. Secure provides and Tervita provided waste services in Western Canada, including speciality waste services to the oil and gas industry. The Bureau alleges that the parties were vigorous competitors of each other and that the merger has resulted in a 'merger-to-monopoly' for speciality waste services in many local markets.

10 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 Competition 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 whereby parties to an otherwise anticompetitive merger may complete their transaction if the efficiencies of the transaction outweigh its anticompetitive effects. *Tervita 2015* establishes that, to block or unwind a transaction, the Commissioner of Competition must quantify all quantifiable anticompetitive effects of the transaction. In the six years since the *Tervita 2015* decision, the Competition 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 dispute the efficiencies defence.

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 instead requested a novel '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 circumstance of the case.[11] Minutes later, Secure and Tervita closed the 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 but did not opine on whether it would have been appropriate to do so in this matter.[12]

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 conveniences' favoured the granting of an interim injunction. Secure put forward significant evidence from experts that an interim order would cause it to suffer from the loss of efficiencies. 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. The matter has not yet gone to a hearing.

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

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

Air Canada and Transat AT Inc

In June 2019, Air Canada and Transat AT Inc (Transat) announced that they entered into an arrangement agreement whereby Air Canada would acquire all the issued and outstanding shares of Transat. As the proposed merger involved two Canadian airlines, it was subject to pre-merger notification under the Act and 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 second Phase II review ever conducted), which limits the Commissioner's jurisdiction to take enforcement action in respect of the proposed transaction.

As part of the Phase II review, the Minister of Transport was required to seek competition advice in the form of a public report from the Commissioner. The Commissioner raised serious competition concerns about the transaction, most significantly pertaining to the loss of rivalry in flights from Canada to Europe, where the parties accounted for approximately 60 per cent of non-stop capacity. However, the Minister of Transport has a broader mandate to consider the transaction in light of Canada's national transportation policy interest, of which competition is only one component. The Minister of Transport approved the transaction conditionally upon Air Canada making binding commitments to maintain levels of employment, add new destinations and, most notably, surrender certain capacity-constrained slots between Canadian and European cities if so requested by another Canadian carrier. The Minister of Transport noted in his approval that the Competition Bureau did not believe Air Canada's commitments were sufficient to alleviate its competition concerns. The Minister approved the transaction anyway.

Ultimately, the transaction did not proceed. In addition to Canadian regulatory approval, the transaction was subject to competition review by the European Commission. In April 2021, the parties abandoned the transaction when it became clear that their proposed remedies would not overcome the continuing competition concerns of the European Commission.

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 determined that the acquisition is 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.

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. 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. As at January 2022, the Tribunal has not yet released a decision.

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 in Western Canada.

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 Competition Bureau. At the time of writing, a hearing at the Tribunal has not yet been held. GFL has stated publicly that it intends to work cooperatively with the Competition Bureau to resolve the matter.

Consent agreements to resolve concerns in local markets

In three transactions in 2021, the Bureau entered into consent agreements with merging parties to resolve concerns over a single local market in the context of a much larger transaction.

In July 2021, the Bureau entered into a consent agreement for the approval of a proposed joint venture between Federated Co-operatives Limited (FCL) and Blair's Family of Companies (Blair's). FCL and Blair's each operates agriculture retail locations in Western Canada. The consent agreement provided for the divestiture of a single retail site to alleviate the Bureau's concerns in one local market in south-eastern Saskatchewan.

In October 2021, the Bureau entered into a consent agreement for the approval of the acquisition by MacEwan Petroleum Inc (MacEwan) of Grant Castle Corp's 51 convenience stores and 22 gas stations. The consent agreement provided for MacEwan to divest one gas station and one convenience store in Kemptville, Ontario (population 3,900). The agreement requires that these two assets be sold to a single purchaser.

More substantially, 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 argued that pulp and paper plants have high barriers to entry. Further, the Bureau argued that transportation 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 incentives and abilities to exercise monopsony power over sellers of wood pulp, thereby lessening competition. The consent agreement requires Paper Excellence to divest its Kamloops Mill to an independent purchaser approved 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. The Bureau has limited tools available to address buy-side competition issues. In contrast with the US DOJ (which recently sued to block the proposed acquisition of Simon & Schuster by Penguin Random House on the basis that the merger would allegedly create monopsony power that would harm authors who command bidding wars for their manuscripts), the operation of Canada's efficiencies defence may effectively preclude the Bureau from bringing a monopsony case on any basis other than detriment to consumer welfare. Like the Bureau's inability to bring buy-side criminal cartel charges (as discussed in Section II.i), this limitation may be preventing the Bureau from joining its international peers in a trend towards more worker-protection focused competition enforcement.

ii Trends, developments and strategies

In 2021, the Bureau made good on the promise of Commissioner Matthew Boswell to take a more aggressive posture on merger reviews, including with respect to litigation capacity and active intelligence gathering on non-notifiable mergers that may raise competition concerns. However, the Bureau has faced significant challenges in litigation before the Tribunal.

In Canada, the efficiency defence continues to be a powerful tool for firms seeking to engage in strategic transactions that may have competitive effects. Given the detailed and

resource-intensive analysis required to review efficiencies claims, the Bureau expects merging parties to enter into a timing agreement so that the Bureau may consider efficiencies claims, and it recently released a model timing agreement for merger reviews involving claimed efficiencies. Some merging parties believe it is not tactically advantageous for firms to do so. 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.

Merging parties should be cognisant of the shifting landscape with respect to parties closing at risk, prior to obtaining affirmative approval from the Competition Bureau. Further, in light of the events of 2021 and particularly the Bureau's failure to obtain an interim order against Secure and Tervita, the Bureau is likely to be more aggressive in seeking interim injunctions against merging parties.

In 2021, the Bureau continued to work closely with competition authorities in other jurisdictions, including the US FTC and DOJ, the European Commission and the UK Competition and Markets Authority. In December 2021, the Bureau entered into a 'piggyback' consent agreement in respect of S&P Global's proposed merger with IHS Markit Ltd, obtaining commitments for divestitures identical to those given in the United States and Europe. Similarly, the Competition Bureau was working towards a consent agreement with Aon and Willis Towers Watson when their proposed merger was abandoned in the course of their litigation with the US DOJ.

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 that have or are likely to have significant competitive effects, including taking appropriate enforcement action. 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, Commissioner Matthew Boswell is increasingly expressing the view that Canada's merger control rules are inadequate, and calling for legislative change. The Bureau's February 2022 submission called for sweeping changes to merger reviews, including the abolition of the efficiencies defence; instead, the Bureau proposes that the approach to efficiencies be consistent with the approach under US law, wherein 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. To date, efficiencies defences have relied to a significant extent on fixed cost savings, which as a matter of economics are not directly relevant to harm to consumers; the Bureau's advocacy for a US standard for efficiencies would, implicitly, remove the right of parties to rely on savings in fixed costs as an efficiency and limit cognisable efficiencies exclusively to variable cost savings. The Bureau also called for: 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. Simultaneously, the Minister announced his intention to evaluate the closing of loopholes in the Act.

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. Going forward, 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 has called for sweeping changes to the Act, while the Minister has proposed to review some limited and mostly technical aspects of the Act. We anticipate that a process of consultation and review will continue through 2022 and beyond, although what legislative changes might actually occur is not yet in focus.

Appendix 1

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Michael Koch is a partner in the competition, antitrust and foreign investment group whose practice focuses on regulation and public law litigation, including communications, competition, foreign investment and copyright law. He has been involved in major competition and foreign investment matters, and earlier played a role in each major CRTC proceeding to establish the competitive framework for the Canadian telecommunications industry since serving as counsel to the CRTC in 1994. He is a frequent lecturer on competition law, and has been recognised by numerous publications, including *Chambers Global*, *Lexpert*, *Who's Who Legal* and *Euromoney*. He was called to the Ontario Bar in 1988.

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