

Goodmans^{LLP} Update

Top Five Recent Developments in Canadian Competition Law

In advance of the 66th Annual ABA Section of Antitrust Law Spring Meeting, we have summarized the top five recent developments in key areas of Canadian competition law:

1. **Competition Bureau.** John Pecman's 5-year term as Commissioner of the Competition Bureau (the "Bureau") ends in June 2018. His term's accomplishments include: (i) conducting a number of investigations and enforcement actions in cases involving innovation competition, (ii) reinvigorating the Bureau's efforts to publish meaningful guidance and policy, and (iii) making significant efforts to promote the institution of compliance programs among Canadian businesses, including creating economic incentives (i.e., potential fine reductions) for such compliance efforts. An Interim Commissioner is expected to be appointed until a permanent replacement for Mr. Pecman is selected.
2. **Merger Enforcement.** Merger enforcement continues to be a mainstay of the Bureau's docket. In the past year, the Bureau obtained remedies that were registered in seven consent agreements, including in respect of three global transactions. The efficiencies defence remains an important tool for merging companies seeking clearance from the Bureau. In Canada, mergers that prevent or lessen competition substantially cannot be prohibited if the gains in efficiency outweigh the competitive effects. The Bureau recently issued a guide to efficiencies claims in mergers, discussed in our April 3, 2018 Update, *Competition Bureau Issues Guidance on Efficiencies Claims in Merger Transactions*.
3. **Abuse of Dominance.** The law on abuse of dominance continues to evolve following the Bureau's success in a case alleging abuse of dominance against the Toronto Real Estate Board (TREB). The case is significant because, among other things, it resulted in a ruling assessing the effect of exclusionary practices on innovation. Most recently, the Federal Court of Appeal upheld the Bureau's victory at first instance; TREB is seeking leave to appeal to the Supreme Court of Canada (SCC). Guided by the decision at first instance, the Bureau issued for public comment detailed guidance about what constitutes an abuse of dominance in Canada. In addition, the Bureau continues to actively litigate a separate abuse of dominance case against Vancouver Airport Authority (which Goodmans represents). The case already resulted in an important ruling in favour of the airport operator, overturning previous precedent and denying the Bureau the ability to assert a blanket (or "class") privilege over materials in its investigatory files, discussed in our February 5, 2018 Update, *Federal Court of Appeal Levels the Playing Field for Respondents Before the Competition Tribunal*. A hearing is expected in this matter in the fall.
4. **Cartels.** The Bureau continues to actively investigate cartels, both domestic and international. The Bureau's domestic investigations frequently involve the use of high profile dawn raids; these raids have been conducted in consumer facing industries, including against an alleged price fixing cartel for bread. Separately, the Bureau issued for public comment revisions to its Immunity and Leniency programs. The revisions proved controversial among members of the bar for a number of reasons, and raised questions about the attractiveness of participation in the programs in Canada (including by foreign companies). For example, the revisions propose (i) permitting recording an immunity / leniency applicant's proffer (which may create discoverable materials); and (ii) delaying final confirmation that an applicant will benefit from immunity / leniency until the applicant's assistance is no longer required (potentially after the trial of other companies that participated in the alleged conduct).

5. **Class Actions.** In 2013, the SCC issued a “trilogy” of decisions that significantly lowered the bar for competition law class action claims in Canada. Among other things, those decisions (i) confirmed the ability of indirect purchasers to sue for damages, and for direct and indirect purchasers to sue as a single “universal” class, and (ii) lowered the bar to obtaining class certification. One impact of this “trilogy” has been to sharpen the focus on other stages of class proceedings and, in particular, on discovery. The Bureau is taking steps to keep up with these developments, publishing guidelines in 2017 explaining its general position to not voluntarily provide information in its files to persons seeking to advance private damages claims (since such disclosure might compromise voluntary disclosure made by companies to the Bureau, including through its Immunity and Leniency programs). To this end, the Bureau will oppose subpoenas from private parties seeking information in its files if, among other things, compliance would adversely impact the Bureau’s ability to administer or enforce Canadian competition law.

For further information on Canadian competition law developments, please contact any member of our Competition, Antitrust and Foreign Investment Group.

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