

YEAR IN REVIEW 2021: COMPETITION LAW LOOKS FORWARD

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In 2021, Canada's Competition Bureau faced a rapidly changing world. In addition to several challenging mergers, the global COVID-19 pandemic continued, alongside growing concern over the political influence of tech giants, and their relationship to economic inequality. Against a backdrop of broad social change there were increasing calls to modernize Canada's competition policy. The Bureau's enforcement actions were focused on big tech companies, including the launch of an investigation into Google Inc.'s marketing practices, and a review of the proposed acquisition of Canadian telecom company Shaw Communications Inc. by its rival, Rogers Communications Inc. .

En 2021, le Bureau de la concurrence du Canada a dû faire face à un monde en rapide évolution. Outre plusieurs fusions difficiles, la pandémie mondiale de COVID-19 se manifestait toujours, de même que les préoccupations croissantes concernant l'influence politique des géants de la technologie et leur relation avec l'inégalité économique. Dans ce contexte de grands changements sociaux, les appels à la modernisation de la politique de concurrence du Canada se sont multipliés. Les mesures d'application de la loi du Bureau ont été axées sur les grandes entreprises de technologie, notamment le lancement d'une enquête sur les pratiques de marketing de Google Inc. et l'examen du projet d'acquisition de l'entreprise de télécommunications canadienne Shaw Communications Inc. par son rival, Rogers Communications Inc.

Introduction & Highlights

In 2021, Matthew Boswell, the Commissioner of Competition (the "Commissioner"), started the second half of his term at the helm of Canada's Competition Bureau (the "Bureau") with a notably stronger advocacy stance, declaring that Canada needs a comprehensive review of the *Competition Act* (the "Act"). The Bureau dealt with several difficult merger cases with a notable loss in its bid for an interim injunction as it prepared to challenge Secure Energy Services Inc.'s ("Secure") acquisition of Tervita Corporation ("Tervita"), which could indicate a more litigious approach by the Bureau when conducting merger reviews. The Bureau also published updated Competitor Collaboration Guidelines ("CCGs") for the first time since their initial release in 2009, updating its guidance on competitor collaborations, conspiracies and bid-rigging. The Bureau also

commenced a civil abuse of dominance investigation into Google Inc.'s ("Google") conduct in the online display advertising industry.²

Highlights of 2021 included:

- In January, the Bureau advocated in favour of open banking in Canada to bolster competition in Canada's financial services industry.
- In March, the Bureau announced that it would be reviewing the proposed \$26-billion acquisition of Shaw Communications Inc. ("Shaw") by Rogers Communications Inc. ("Rogers"), an acquisition that will also require approval from the Canadian Radio-television and Telecommunications Commission (the "CRTC") and the federal department of Innovation, Science and Economic Development Canada ("ISED").
- In March, the Bureau joined counterparts from the US, UK and EU to form a working group to update and refine the analysis of mergers in the pharmaceutical industry.
- In May, the Bureau published updated CCGs for the first time since the guidelines were issued in 2009.
- In June, the Bureau challenged the proposed merger between oil and gas waste service providers Secure and Tervita under section 92 of the Act. The Commissioner's application for interim relief delaying the closure of the deal was dismissed (the section 92 application will not be decided until 2022).
- In July, the Bureau targeted deceptive marketing practices related to Canada's pandemic relief programs.
- In October, MacEwen Petroleum Inc. ("MacEwen Petroleum") entered into a consent agreement concerning its proposed acquisition of Quickie retail stores, agreeing to sell the Quickie gas station located in Kemptonville, Ontario.
- In October, the Federal Court of Canada issued an order to advance the Bureau's investigation into Google's conduct in the online display advertising industry.
- In October, the Commissioner called for a comprehensive review of Canada's competition laws to address competition challenges.

Mergers

Bureau Challenges Merger of Oil and Gas Waste Service Providers Secure and Tervita

On March 9, 2021, Secure and Tervita announced a transaction to combine their oil and gas midstream infrastructure and environmental solutions business.³ This merger represents the combination of the two largest suppliers of oil and gas waste services in the Western Canadian Sedimentary Basin (“WCSB”), and in some areas, the only two competitors. The Bureau brought a last-minute application before the Competition Tribunal (“Tribunal”) on June 29, 2021—only three days before the transaction was set to close, and one day before the end of the statutory waiting period.⁴

The Commissioner’s application challenging the merger was brought under section 92 of the Act. Simultaneously, the Commissioner brought an application under section 104 of the Act, seeking an interim injunction preventing the merging parties from closing until the section 92 application had been disposed of.⁵ In light of the urgency of the situation, the Commissioner also requested “an emergency case conference [...] where we will seek an interim order preventing the respondents from closing the transaction until the section 104 application is heard.”⁶ With respect to this “interim, interim” relief, the Tribunal held that it lacked the jurisdiction to grant such relief pending the hearing of the section 104 application.⁷

The Commissioner’s application under section 104 was heard on August 8, more than a month after the deal closed. Therein, the Commissioner sought to unwind the transaction, and in the alternative, an order requiring certain identified facilities formerly owned by Tervita to be “held separately and operated independently” from Secure.⁸

On August 16, the Tribunal dismissed the section 104 application, which satisfied the first two elements of the *RJR Macdonald* test for injunctive relief (serious issue to be tried/strong *prima facie* case, irreparable harm), but not the third (balance of convenience).⁹ When applying the “balance of convenience” test, the Tribunal asked, “which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits?” The Tribunal held that Secure had “provided clear and non-speculative evidence regarding the general extent of the harm that it will suffer if the relief requested by the Commissioner is granted.” Further, the Tribunal held that the Commissioner had failed to quantify the harm likely to arise from the transaction.¹⁰

Despite these setbacks, the Commissioner is proceeding with his original section 92 application. In the latest development, the hearing of Secure's November 8 motion to compel production of third-party documents was canceled, as the parties had resolved the issues raised therein.¹¹

Bureau Reviews Proposed Acquisition of Shaw by Rogers

On March 15, 2021, Rogers announced a proposed acquisition of Shaw and the Bureau immediately released a statement that the transaction would be reviewed, according to the Bureau's mandate "to review mergers to determine whether they are likely to result in a substantial lessening or prevention of competition."¹² The Bureau subsequently obtained orders from the Federal Court compelling Bell Canada ("Bell"), Telus Communications Inc., Xplornet Communications Inc. and Vidéotron to produce records and written information related to mobile wireless services.¹³

Initially, the Bureau restricted its analysis of the proposed merger to the mobile wireless services market.¹⁴ However, in a filing made to the CRTC, Bell argued that regulators should take a broader approach, and account for the fact that the merging parties both provide wireline and broadcast television services.¹⁵ Subsequently, the Bureau expanded its analysis to consider several broadcasting issues, including competition for consumer and small business internet services, fibre transport services, downstream competition among broadcast distribution undertakings ("BDUs") and other content viewing platforms, and the provision of relay distribution undertakings, which allow BDUs without a direct wireline or satellite connection to provide certain programming.¹⁶

By its nature, the proposed \$26-billion transaction requires the approval of three regulatory agencies: the Bureau, the CRTC, and, because of the change of ownership of wireless spectrum, ISED.¹⁷ Although Shaw and Rogers both participate in broadcast TV, cable, Internet, and wireless, hearings at the CRTC are limited to assessing the effect of the transaction on broadcast and cable TV.¹⁸ By acquiring Shaw, Rogers stands to acquire "16 television channels across B.C., Alberta, Saskatchewan and Manitoba; all of Shaw's cable, satellite and pay-per-view television services; and a 25 per cent ownership in CPAC, the public affairs channel."¹⁹ Shaw also offers Internet services, and owns Corus Entertainment (a mass media company) and the mobile wireless telephone provider Freedom Mobile—which represents 8% of mobile wireless subscribers in Ontario, Alberta, and British Columbia.

Rogers and Shaw argue that the proposed transaction is necessary for Canadian telecommunications to remain competitive in a broader

international context. They argue that the acquisition will allow Rogers to make the investments required to build a nation-wide 5G network that can place Canada's digital economy on a footing to "move to the next frontier,"²⁰ and that it will likely result in an estimated \$1-billion of annual efficiencies, thus permitting it to pass muster under the Act even if—which has yet to be alleged or proven—it were found likely to substantially lessen or prevent competition.

Bureau Joins Multilateral Pharmaceutical Merger Task Force

In March, the Bureau joined with counterparts from the US, UK and EU to form a working group to develop updated approaches for analyzing the effects of pharmaceutical mergers.²¹ Initiated by the US Federal Trade Commission, the working group includes the European Commission Directorate General for Competition, the UK's Competition and Markets Authority, the US Department of Justice, and Offices of State Attorneys General. According the Commissioner, "[t]he pharmaceutical industry is a vital part of Canada's health sector, and we will continue to collaborate closely with our international partners to ensure we are staying on top of emerging issues—with respect to mergers as well as any type of potentially anticompetitive conduct."²²

The past few years have seen competition authorities around the world take an increased interest in pharmaceutical mergers, particularly regarding their potential effects on drug prices and innovation. Commentators argue that the traditional narrow analysis of pharmaceutical mergers on individual product markets is failing to properly capture all the potential harms to innovation, and all the potential for firms to engage in anticompetitive conduct.²³

In the past, competition agencies have assessed individual product markets consisting of the markets in which the merging parties' products compete, and potential competition in likely future markets consisting of products that have reached some advanced stage of development, "traditionally, at least Phase 3 of clinical trials."²⁴ Regulators have begun to question whether, given the complex and dynamic innovation landscape in the pharmaceutical industry, such an approach may be ignoring significant harms.

ISED Introduces Merger Review Fee Remission Policy

ISED's new Remission Policy, which applies to filing fees for pre-merger notifications and/or requests for advance ruling certificates came into effect in April. Under this new policy, in certain circumstances the Bureau will

remit a portion of the filing fee paid by an affected fee-payer when a service standard is not met.²⁵ Service standards represent a non-binding time frame within which the Bureau aims to advise parties of its position in respect of a proposed transaction, assuming timely cooperation from the parties.²⁶ If the Bureau fails to meet the service standard for reasons not attributable to the merging parties, it now has to refund a portion of the service fee. As a result, the Bureau is expected to be more reticent to commence reviews without fulsome information from the merging parties.

Consent Agreement Reached in Blair's/Federated Co-op Joint Venture

The Bureau's focus on potentially anti-competitive vertical mergers continued in 2021. On July 7, 2021, the Bureau reached an agreement with Federated Co-operatives Limited ("FCL") and Blair's Family of Companies ("Blair's") related to their proposed joint venture.²⁷ FCL is a multibillion-dollar wholesaling, manufacturing, marketing and administrative co-operative owned by more than 160 independent retail co-operatives across Western Canada. Blair's is a fourth-generation family-owned and operated full service agricultural retailer, owning seven agricultural retail locations across Saskatchewan. The proposed joint venture would have been majority owned by FCL.²⁸ The Bureau classified the Proposed Transaction as "fundamentally vertical in nature—involving the interplay between the wholesale and retail levels of the agricultural input supply chain".²⁹ The Bureau found that one of FCL's independent retail co-operatives (which operated agricultural retail locations in Cupar and Lipton, Saskatchewan) was a direct competitor of Blair's agricultural retail location in Lipton, Saskatchewan. The Bureau concluded that the transaction was likely to substantially lessen competition in the retailing of crop inputs in the Lipton area and that the few proximate competitors that would remain in the Lipton area were unlikely to effectively constrain the competitive effects of the proposed transaction.³⁰

A consent agreement was reached without a supplementary information request being issued. In the agreement, FCL and Blair's agreed to divest Blair's Lipton retail location and two nearby anhydrous ammonia satellite facilities to a purchaser acceptable to the Commissioner. The agreement also incorporates a preservation order to "protect and preserve the divestiture assets until the completion of the divestiture"³¹. Incorporating a preservation order in a consent agreement is an exception to the Bureau's position in the Merger Remedies Bulletin that a hold-separate provision is necessary. The Bureau found that the circumstances required to allow for such an exception had been satisfied in this case.³²

Consent Agreement Reached for MacEwen Petroleum Acquisition of Quickie Convenience Stores

In September, MacEwen Petroleum proposed the acquisition of 51 Quickie stores, 22 of which include gas stations, in Ontario and Quebec. The Bureau concluded that the acquisition would result in a lessening of competition for the supply of retail gasoline to customers near Kemptville, Ontario (a small town about 50 km south of Ottawa). In response, the buyer entered a consent agreement to sell the Quickie gas station in Kemptville.³³ In November, the Bureau approved Centex Petroleum as the purchaser of the station.³⁴

Conspiracies, Bid-Rigging and Competitor Collaboration

Investigation of Postmedia and Torstar Closed

On January 7, 2021, the Bureau announced that it had closed its investigation into a 2017 agreement between media companies Postmedia Network Canada Corp. (“Postmedia”) and Torstar Corporation (“Torstar”).³⁵ On November 27, 2017, Postmedia, Torstar and its subsidiary Metroland Media Group announced a deal involving the exchange of 41 newspapers and the subsequent closure of 36 community and daily newspapers in Ontario.³⁶ The Bureau began its investigation following this announcement, including searches at the offices of Postmedia, Torstar and Metroland Media Group in the Greater Toronto Area and obtaining a court order requiring one former and five current employees of Torstar to be examined under oath by Bureau investigators.³⁷ To refer a case for prosecution under the criminal conspiracy provisions of the Act, the Bureau must find clear evidence demonstrating that competitors reached an agreement to fix prices, allocate markets, or lessen or eliminate the supply of a product or service. Ultimately, following a review of the available evidence, the Bureau concluded that no further action was warranted.

Bureau Provides Advice on Protecting Competition in Public Procurement

On February 5, 2021, the Bureau released its latest edition of *The Competition Advocate*, a periodical publication which offers the Bureau’s views on industries that could benefit from increased competition.³⁸ This edition, entitled “Competitive bidding processes in the public sector: Procuring good value for taxpayer money,” provides guidelines for designing procurement processes that deter bid-rigging and highlights common warning signs of bid-rigging that public officials should be aware of and remain vigilant of.³⁹

To deter bid-rigging, the Bureau suggests designing a procurement process that maximizes the pool of potential bidders, builds understanding of bidder capabilities, requires disclosure of potential subcontractors and their pricing, requires bidders to submit a certificate of independent bid determination and involves follow-up interviews with unsuccessful vendors to understand bid rationale.

Criminal Charges Laid in Connection with Bids for Condominium Refurbishment Services

On March 29, 2021, the Bureau announced that charges had been laid against four companies and three individuals accused of conspiring to commit fraud and rig bids for condominium refurbishment contracts issued by private condominium corporations in the GTA between 2009 and 2014.⁴⁰ TRI-CAN Contract Incorporated and owner Bob Vlahopoulos, JCO & Associates (912547 Ontario Inc.) and owner Jose De Oliveira and LAR Condominium Refurbishment Specialists (Lidio Romanin Construction Company Limited) and owner Tony Romanian were charged under the *Criminal Code* with conspiracy to rig bids, conspiracy to commit fraud and fraud over \$5,000. A fourth company, CPL Interiors Ltd., was charged under the conspiracy provision of the Act for its role in the alleged scheme. The alleged victims of the scheme were the condominium corporations and the condominium owners who fund them.

Bureau Updates Competitor Collaboration Guidelines

On May 6, 2021, the Bureau published the final version of its revised CCGs.⁴¹ The CCGs describe the Bureau's approach to assessing collaborations between competitors and enforcing the criminal conspiracy and civil agreements provisions of the Act. The updated CCGs replace the guidelines initially published in 2009 and, as stated in the Bureau's news release, "are intended to provide clarity to the business and legal communities on how to identify and avoid the types of collaboration that can harm competition".⁴² The updated CCGs reflect the Bureau's experience reviewing competitor collaborations, relevant decisions of the Tribunal and the courts, and feedback from a public consultation of draft CCGs in July 2020.

While the updated CCGs do not differ drastically from the previous version, they do provide insight into the Bureau's future enforcement approaches and priorities in terms of competitor collaborations. Some of the priorities that can be gleaned from the update include taking a broader approach to identifying competitors, identifying agreements that are designed to avoid scrutiny under section 45 of the Act (*i.e.*, "sham"

agreements), non-compete clauses between competitors, bids made by consortiums and common pricing algorithms or common price lists being used in price-fixing agreements.

Fifth Executive Charged and Sixth Settlement Entered in Québec Bid-Rigging Case

On June 29, 2021, a fifth engineering executive from the firm Genivar Inc. (now WSP Canada Inc.) was charged in connection with a conspiracy to rig bids for City of Gatineau infrastructure contracts.⁴³ François Paulhus was charged under the *Criminal Code* with conspiracy to rig bids, conspiracy to commit fraud and fraud over \$5,000. The other charges in this case were laid in June 2018 and resulted in four guilty pleas and two settlements after a Bureau investigation uncovered evidence of bid-rigging on 21 infrastructure contracts awarded by the City of Gatineau between 2004 and 2008.

Federal Court Denies Class Action Certification in DRAM Conspiracy Case

In a decision released on November 5, 2021, the Federal Court dismissed a motion for certification of a proposed class action lawsuit against the three leading manufacturers of Dynamic Random Access Memory chips (“DRAM”) under section 36 of the Act for breach of sections 45 and 46 of the Act. The plaintiffs alleged that the defendants conspired to suppress the global supply of DRAM and increase the price of DRAM. The Federal Court dismissed the motion and denied certification of the class action on the basis that the pleadings disclosed no reasonable cause of action because the allegations were speculative and not anchored in material facts.⁴⁴

Abuse of Dominance

Bureau Obtains Court Order to Advance Investigation of Google

On October 22, 2021, the Bureau obtained a court order from the Federal Court to advance a civil investigation into conduct by Google related to its online advertising business.⁴⁵ In particular, the Bureau is investigating whether Google has engaged in certain practices that harm competition in the online display advertising industry in Canada. The online display advertising industry is made up of various technology products that are used to display advertisements to users when they visit websites or use apps. Google’s involvement in the online display advertising industry in Canada includes selling online advertisement space to advertisers and providing

online advertising tech services to both advertisers and publishers who buy and sell online advertisement space. The Bureau requested the order to obtain more information on these practices and to determine whether they are: (1) impeding the success of competitors; and (2) resulting in higher prices, reducing choice and hindering innovation for advertising technology services, and harming advertisers, publishers and consumers. The order requires Google to produce records and written information that are relevant to the Bureau's investigation.⁴⁶

This is not the Bureau's first investigation into Google's conduct in the online display advertising industry. In 2016, the Bureau investigated allegations that Google was engaged in conduct relating to online searches, search advertising and display advertising contrary to the abuse of dominance provisions of the Act.⁴⁷ At that time, the Bureau concluded that there was inadequate evidence to support a conclusion that Google's conduct was engaged in for an anti-competitive purpose and/or that the conduct substantially lessened or prevented competition in Canada, however it committed to closely following developments of Google's conduct and stated that "should new evidence come to light of harm in the Canadian marketplace, whether through subsequent complaints or the Bureau's ongoing monitoring efforts, the Bureau will not hesitate to take appropriate action".⁴⁸

Deceptive Marketing

Company Fined \$15 Million for Subscription Trap Scam Involving Health and Dietary Supplements

On January 28, 2021, Revive You Media ("Revive") pled guilty to making false or misleading claims to promote deceptive free trial offers for health and dietary supplements in the Provincial Court of Ontario.⁴⁹ The company used claims on its website such as "risk-free trial" and "just pay a small shipping fee" to mislead consumers and provide them with a false impression that they were ordering free trials without any further obligations. In actuality, the company was signing consumers up for subscriptions with more than \$100 in monthly fees. Consumers who complained of the subscription to the company were offered partial refunds and those who threatened to contact law enforcement received full refunds. As a result of the guilty plea, Revive was fined \$15 million in penalties and is also subject to a ten-year court order prohibiting it from any direct or indirect involvement in promoting deceptive trial offers. Penalties for breaching the order include a fine at the court's discretion or up to five years in prison.

Settlement Agreement Reached with FlightHub

On February 24, 2021, the Bureau entered into a consent agreement with an on-line discount travel site, FlightHub Group Inc. (“FlightHub”) and two of its directors, Matthew Keezer and Nicholas Hart.⁵⁰ The Bureau’s investigation of FlightHub began in November 2018 and involved reviewing consumer complaints, seizing documents at the company’s headquarters in Montreal and obtaining a temporary consent agreement with FlightHub to prohibit it from using false or misleading marketing while the investigation was ongoing.⁵¹ The temporary consent agreement in this case was the first of its kind ever obtained by the Bureau during an ongoing investigation. The Bureau ultimately concluded that FlightHub had had charged hidden fees and misled consumers about its prices and services by authoring positive customer reviews and making false or misleading claims about its prices and other flight-booking services.

In the agreement, FlightHub agreed to pay \$5 million in penalties and the two directors agreed to pay penalties of \$400,000 each. The fact that FlightHub is insolvent and was granted creditor protection by the Quebec Superior Court in May 2020 was taken into consideration by the Bureau in reaching the settlement agreement. The penalties, totalling \$5.8 million, will be treated as unsecured claims in any plan of arrangement FlightHub may file under the *Companies’ Creditors Arrangement Act* (“CCAA”) and all other terms of the settlement are binding on FlightHub and the two directors for a period of 10 years, regardless of the outcome of the CCAA proceedings.

17th Annual Fraud Prevention Month Focused on Online Scams

The Bureau decided to make online scams the focus of the annual Fraud Prevention Month as Canadians became more dependent on online services as they continued to stay indoors throughout much of 2021 to stop the spread of COVID-19.⁵² The Bureau ran a campaign using the hashtag #FPM2021 on Facebook, Twitter and LinkedIn. The Bureau’s campaign focused on online shopping scams and deceptive practices, including non-delivery of goods, subscription traps and fake online reviews. The campaign addressed individuals and businesses by providing tips to help individuals identify and avoid non-delivery scams, as well as steps to take if someone believes they have been a victim of a non-delivery scam or other common scams.⁵³

Multiple Charges Laid Against Individual in Online Business Directories Case

On June 14, 2021, following an investigation, the Bureau announced that multiple criminal charges had been laid against Terry Croteau. The Bureau alleges that between 2012 and 2019 Croteau used deceptive telemarketing and false or misleading statements to induce Canadian businesses to sign up for listings in online directories.⁵⁴ Directory scams, such as the one alleged in this case, occur when “fraudsters use misleading tactics to pressure businesses to pay for directory listings of little or no value”.⁵⁵ Croteau was charged under the Act and the *Criminal Code*. Under the Act, Croteau was charged with making false or misleading statements to promote business listings, including failing to disclose the price and terms and conditions applicable to the services. Under the *Criminal Code*, Croteau was charged with fraud over \$5,000 and for uttering a forged document, specifically, a letter purporting to be from a collection agency.

Advocacy

Bureau Advocates for Open Banking to Increase Competition in Canada’s Financial Services Industry

On January 18, 2021, in comments to the Advisory Committee on Open Banking (the “Advisory Committee”), the Bureau advocated for an open banking system in Canada. Open banking is a banking practice that allows consumers to securely share their financial transaction data with financial technology companies (“fintechs”) and other financial service providers.⁵⁶ Fintechs and other financial service providers then use that data to develop competitive, innovative and consumer-centric products and services.⁵⁷ The Bureau stated that the Canadian financial services industry is characterized by significant barriers to entry and that open banking would enable greater competition in this industry by allowing consumers to more easily switch to the provider or product that best suits their needs.⁵⁸ In its comments to the Advisory Committee, the Bureau also provided regulatory recommendations to ensure that Canada’s open banking regime promotes competition and innovation.

Digital Health Care Market Study Progresses

On April 8, 2021, the Bureau issued a market study notice in relation to its ongoing study of the digital health care sector.⁵⁹ The objective of the market study is to examine existing or potential impediments to innovation and choice and explore how to support digital health care through

pro-competitive policies.⁶⁰ The market study notice sets out three broad topics of study. The first topic, Data and Information, will explore ways to increase access, use and sharing of digital health data and information. The second topic of the market study, Products and Services, will examine issues related to development, approval, procurement and commercialization of digital products and services intended for use by health care providers and patients. The third topic, Health Care Providers, will focus on the ability of providers to deliver digital care to patients.

Topics and questions for the study were developed based on feedback the Bureau received in response to its 2020 public consultation and digital health services survey.⁶¹ The Bureau intends to publish the final report for this study in the Spring of 2022.⁶²

Bureau Makes Submissions to the OECD's Competition Committee on Potential Competition

On May 25, 2021, the Bureau made a submission to the Organisation for Economic Co-operation and Development's ("OECD") Competition Committee on the topic of Potential Competition.⁶³ The Bureau's submission focused on mergers and discussed the Secure-Tervita case. In particular, the Bureau advocated for using all available enforcement tools to protect competition from mergers that eliminate likely future competition. In its submissions, the Bureau indicated that "where the temporal dimension of barriers to entry is long, a [significant prevention of competition] finding by the Commissioner can be expected if viable entry prevented by a merger may still be established, through the evidence, to have been likely to have occurred on a discernable timeline and through identifiable steps."⁶⁴

Competition's Role in Canada's Economic Recovery from the COVID-19 Pandemic

The Bureau hosted The Competition and Growth Summit (the "Summit") from June 1 to June 3, 2021. The Summit brought international and domestic experts together to discuss competition's role in Canada's economic recovery from the COVID-19 pandemic.⁶⁵ The Bureau's key takeaway from the Summit was that competition will help Canada's recovery by contributing to growth and thus Canada should look for ways to protect and promote competition. Summit participants identified approaches the federal government can use to protect and promote competition such as ensuring the competition law enforcement framework is robust and well-resourced, urging regulators, at all levels of government, to apply a "competition lens" to public policies and conducting a comprehensive review of the Act.

Commissioner Calls for Comprehensive Review of the Competition Act

On October 20, 2021, the Commissioner gave a speech at the Canadian Bar Association Competition Law Fall Online Symposium discussing the importance of competition as Canada pivots from crisis management to economic recovery.

The Commissioner acknowledged the increased funding the Bureau would be receiving from the federal budget and laid out the areas of investment for the funds which include increasing the Bureau's capacity to consider anticompetitive conduct in digital markets, strengthening the Bureau's enforcement teams and enhancing the Bureau's ability to advocate for regulatory and policy changes.⁶⁶ Despite the increased funding, the Commissioner signaled that the merger filing fee would increase within the next two years because the merger review program is funded entirely through filing fees—the increased budget would be flowing elsewhere.

The Commissioner stated that increased funding was only part of the solution and that a modernization of Canada's competition laws was required to promote competition and avoid falling out of step with the international community. The Commissioner identified specific areas of Canada's laws that require reform, including: (a) the criminal fines and civil penalties which do not meaningfully deter anticompetitive conduct or encourage compliance and are seen as the cost of doing business; (b) the legal tests to prevent anti-competitive mergers, which the Commissioner characterized as "overly strict and impractical"; (c) the efficiencies defence in merger reviews as well as the absence of private enforcement tools for mergers; and (d) gaps in the cartel laws resulting in the criminal conspiracy provisions failing to protect workers from agreements between their competing employers that fix employee wages and restrict workers' job mobility (such agreements could only at present be civilly reviewed).⁶⁷

A significant portion of the Commissioner's speech was spent discussing the *Secure-Tervita* case and the issues the Commissioner perceives with the current merger review process. The Commissioner expressed concerns about resource limitations when dealing with increasingly costly and complex merger reviews where there are often large numbers of documents to review. The Commissioner added that as a result of the Tribunal's decision in the *Secure-Tervita* case, rejecting its request for an interim injunction, "the Bureau would be adopting a litigation-focused approach for transactions where merging parties refuse to enter into a timing agreement with

the Bureau (*i.e.*, an agreement to refrain from closing a transaction once the statutory waiting period has expired).⁷⁶⁸ The Commissioner stated that where merging parties refuse to enter into a timing agreement with the Bureau, they can expect a decrease in transparency and engagement from the Bureau team assessing their transaction.

Conclusion

In summary, 2021 could mark the beginning of the next evolution of Canadian competition policy. With Canada emerging from the COVID-19 pandemic and shifting its focus to economic recovery, the Commissioner ramped up enforcement and engaged in ambitious advocacy work. Whether the steam behind the advocacy will result in tangible changes to Canada's competition law and enforcement, remains to be seen, but recent enforcement actions seem to portend a more litigious approach.

ENDNOTES

¹ The views expressed in this paper are those of the authors alone and do not necessarily represent the views of Stikeman Elliott LLP or its clients. Any errors or omissions are those of the authors.

² This article covers developments from January to November 2021 but is not intended to cover every development. Readers can refer to the Competition Bureau's website, the Competition Tribunal's website or the courts for further details.

³ SECURE Energy Services Inc., News Release, "SECURE Energy Services Inc. and Tervita Corporation Merge to Create a Stronger Midstream Infrastructure and Environmental Solutions Business" (9 March 2021), online: <<https://secure-energy.mediaroom.com/2021-03-09-SECURE-Energy-Services-Inc-and-Tervita-Corporation-Merge-to-Create-a-Stronger-Midstream-Infrastructure-and-Environmental-Solutions-Business>>.

⁴ SECURE Energy Services Inc., News Release, "SECURE Energy Services Inc. completes merger with Tervita Corporation" (2 July 2021), online: <<https://secure-energy.mediaroom.com/2021-07-02-SECURE-Energy-Services-Inc-completes-merger-with-Tervita-Corporation>>.

⁵ *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2021 Comp Trib 4, at paras 1–2.

⁶ *Ibid* at para 4.

⁷ *Ibid* at para 55.

⁸ *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7, at para 3.

⁹ *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7.

¹⁰ *Ibid* at paras 123–124.

¹¹ *Commissioner of Competition v Secure Energy Services Inc* (23 November 2021), CT-2021-002, online: Competition Tribunal <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/516071/index.do>>.

¹² Competition Bureau Canada, News Release, “Competition Bureau to review the proposed acquisition of Shaw by Rogers” (15 March 2021), online: <<https://www.canada.ca/en/competition-bureau/news/2021/03/competition-bureau-to-review-the-proposed-acquisition-of-shaw-by-rogers.html>>.

¹³ Competition Bureau Canada, News Release, “Competition Bureau obtains court orders to advance investigation of Rogers’ proposed acquisition of Shaw” (5 August 2021), online: <<https://www.canada.ca/en/competition-bureau/news/2021/08/competition-bureau-obtains-court-orders-to-advance-investigation-of-rogers-proposed-acquisition-of-shaw.html>>.

¹⁴ *Ibid.*

¹⁵ Alexandra Posadzki, “BCE opposes Rogers’ takeover of Shaw in CRTC filing, citing broadcast market dominance” (14 September 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/business/article-bce-opposes-rogers-takeover-of-shaw-in-crtc-filing-citing-broadcast/>>.

¹⁶ “Request for Information: Rogers Communications Inc./Shaw Communications Inc.” (28 September 2021), online: *Competition Bureau Canada* <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04603.html>>.

¹⁷ Pete Evans, “CRTC hearings begin on Rogers-Shaw deal that would make Big Three telcos even bigger” (22 November 2021), online: *CBC News* <<https://www.cbc.ca/news/business/rogers-shaw-crtc-1.6255093>>.

¹⁸ “Broadcasting Notice of Consultation CRTC 2021-281” (12 August 2021), online: *Canadian Radio-television and Telecommunications Commission* <<https://crtc.gc.ca/eng/archive/2021/2021-281.htm>>.

¹⁹ *Supra* note 17.

²⁰ “Transcript, Hearing February 26, 2020” (26 February 2020), online: *Canadian Radio-television and Telecommunications Commission* <<https://crtc.gc.ca/eng/transcripts/2020/tt0226.htm>>.

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