YEAR IN REVIEW 2022: *COMPETITION ACT* REFORM GAINS PACE

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In 2022, the federal government announced a much-anticipated process to study reform of the Competition Act*, expediting the passage of an initial set of amendments in June and initiating public consultations on further amendments in November. Amidst ongoing debate over the future of Canada's mergers framework, the Competition Tribunal heard two Commissioner challenges and issued two major decisions—including in the closely watched* Rogers/Shaw *litigation—while an earlier Federal Court of Appeal ruling in the* Secure/Tervita *case provided the Commissioner his only litigation victory of the year. As Commissioner of Competition Matthew Boswell made the case for competition law's role both in driving economic growth and reducing inflationary pressures, the Bureau's activities touched on high-profile, consumer-facing topics such as "greenwashing" and retail grocery competition and key sectors including energy, agriculture, aerospace, tech and health care.*

En 2022, le gouvernement fédéral a annoncé un processus très attendu pour étudier la réforme de la Loi sur la concurrence*, accélérant l'adoption d'une série initiale de modifications en juin et lançant des consultations publiques sur d'autres modifications en novembre. Dans le cadre du débat en cours sur l'avenir du cadre des fusions du Canada, le Tribunal de la concurrence a entendu deux contestations du commissaire et a rendu deux décisions importantes, y compris dans le très étroitement surveillé litige* Rogers/Shaw*, tandis qu'une décision antérieure de la Cour d'appel fédérale dans l'affaire* Secure/Tervita *a procuré au commissaire sa seule victoire de l'année en matière de litige. Alors que le commissaire de la concurrence, Matthew Boswell, invoquait le fait que le droit de la concurrence stimulait la croissance économique et réduisait les pressions inflationnistes; les activités du Bureau ont porté sur des sujets très médiatisés et axés sur les consommateurs, comme l'écoblanchiment et la concurrence dans les épiceries de détail, ainsi que sur des secteurs clés comme l'énergie, l'agriculture, l'aérospatiale, la technologie et les soins de santé.*

Introduction

Competition policy debate loomed large in the Canadian public consciousness in 2022—with the *Rogers/Shaw* merger dispute garnering widespread interest, the work of the Competition Bureau ("**Bureau**") touching on hot-button topics from grocery pricing to "greenwashing," and a federal consultation process opening the door to

potentially wide-reaching reform of the *Competition Act* ("***Act***"). Whether that process gives rise to more fundamental change in the *Act*'s framework remains to be seen. However, Commissioner of Competition ("**Commissioner**") Matthew Boswell seized the opportunity to press for the Bureau's vision of reform in 2022—notably with respect to the *Act*'s mergers framework, which he described as enabling "high levels of concentration—even monopolies—in the Canadian economy."[2] Mergers also dominated the agenda of the Competition Tribunal ("**Tribunal**"), which held two major hearings and rendered decisions in two of the three Commissioner challenges active during the year. These decisions were the first to be issued by the Tribunal on the merits of a section 92 case in over a decade.[3]

Among 2022's highlights were the following developments:

- In January, the Bureau entered into a consent agreement with Keurig Canada Inc. ("**Keurig**") in which Keurig agreed to a $3 million penalty, among other remedies, to address Bureau concerns with Keurig's claims as to the recyclability of its "K-Cup" single-use coffee pods.

- In February, the Federal Court of Appeal released a decision finding that the Tribunal could issue so-called "interim interim" relief pending its determination of a section 104 interim relief application in a contested merger case. This decision reversed a 2021 Tribunal ruling preventing the Commissioner from temporarily blocking the merger of Secure Energy Services Inc. ("**Secure**") and Tervita Corporation ("**Tervita**") on the eve of its closing.

- In May, the Commissioner filed his challenge to the acquisition by Rogers Communications Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**"). This high-profile case was ultimately both heard and decided by year-end under an expedited Tribunal process that resulted in a significant defeat for the Bureau—with the Tribunal going so far as to find that the merger would likely benefit, not lessen, competition.

- In June, the federal government passed into law several targeted amendments to the *Act* as the first phase of its intended "modernization" of the statute.[4] The amendments included the introduction of a new criminal prohibition on wage-fixing and no-poach agreements, increases to fines and penalties, provisions enabling private access to the Tribunal in abuse of dominance cases and other important changes.

- In October, the Tribunal released its long-awaited decision with respect to a 2019-initiated Commissioner challenge of the acquisition of a grain elevator by Parrish & Heimbecker, Limited ("**P&H**"), dismissing the application largely on the basis of its rejection of the Commissioner's approach to market definition.

- Also in October, the Bureau initiated a new market study into retail grocery competition, including with respect to whether higher grocery prices are resulting from "changing competitive dynamics in the sector." 2022 also saw the Bureau conclude and report its findings from the digital health care market study that it had initiated in 2020.

- In November, the federal government launched a public consultation on further amendments to the *Act* alongside its release of a wide-ranging discussion paper framing potential areas for reform, entitled *The Future of Competition Policy in Canada* ("**Discussion Paper**").

Legislative Amendments and Bureau Guidance

First Tranche of *Competition Act* Amendments Takes Effect

In early 2022, Minister of Innovation, Science and Economic Development Francois-Philippe Champagne (the "**Minister**") described the federal government's plans to pursue reform of the Act in stages, with an initial suite of targeted amendments being implemented ahead of a broader review to consider more substantive changes to the Act.[5] On June 23, amendments falling into the former category were passed into law within the federal government's omnibus budget bill, Bill C-19.[6] The Bureau described the changes as serving to "fix certain loopholes in the law, tackle business practices harmful to workers and consumers, increase penalties and access to justice, and adapt the law to today's digital reality."[7] In particular, Bill C-19 made the following amendments to the Act (with most coming into force immediately save for the exceptions noted below):

- Adding a new criminal prohibition on wage-fixing and no-poaching agreements between employers within the conspiracy provisions of the Act (effective from June 23, 2023);[8]

- Establishing new maximum administrative monetary penalties under the deceptive marketing and abuse of dominance provisions of the Act;[9]

- Removing the $25 million limit on fines under the Act's conspiracy

provisions in favour of leaving the amount of such fines in the discretion of the court (effective from June 23, 2023);[10]

- Confirming as a false or misleading representation the practice of "drip pricing" (where a product or service is offered at a price that is unattainable due to additional mandatory, non-governmentally-imposed fixed charges or fees);[11]

- Expanding the *Act*'s lists of factors to be considered by the Tribunal in evaluating competitive effects under the abuse of dominance, mergers and competitor collaboration provisions of the Act to include specific mention of network effects, non-price effects on competition and other items;[12]

- Adding new language to the abuse of dominance provisions defining an "anti-competitive act" as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition,"[13] while including among the list of enumerated anti-competitive acts "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market;"[14]

- Providing private parties the ability to seek leave from the Tribunal to initiate abuse of dominance proceedings under private access provisions previously limited to alleged conduct under sections 75 through 77 of the *Act* (refusal to supply, resale price maintenance, exclusive dealing, tied selling and market restriction);[15]

- Expanding the Commissioner's evidence-gathering powers with respect to information believed to be in the possession of persons or affiliates located outside of Canada;[16]

- Introducing an "anti-avoidance" provision to the Act's mergers provisions that deems transactions designed to avoid notification to be notifiable;[17] and

- Implementing clarifying amendments under the merger provisions with respect to the calculation of statutory waiting periods and the Bureau's business hours for filing.[18]

Most of the amendments reflected changes recommended by the Bureau in its earlier February 2022 submission[19] in response to Senator Howard Wetston's October 2021 invitation for comment on "whether Canada's

competition policy framework, and the *Competition Act* in particular, remain appropriate in the digital age."[20] In particular, the Bureau's submission had called for amendments criminalizing wage-fixing and no-poaching agreements,[21] raising maximum penalties,[22] expressly prohibiting drip pricing,[23] expanding private access to the Tribunal to abuse of dominance[24] and preventing merger notification avoidance,[25] among others.

Bureau Publishes Updated Information Bulletin on Transparency

In October, the Bureau issued an updated *Information Bulletin on Transparency* ("**Bulletin**") outlining its approach to communications during Bureau investigations.[26] The Bureau described the revised Bulletin as reflecting "the evolution of our practices" since the preceding version of the Bulletin was released in 2014.[27] Among the new Bulletin's changes was a less restrictive approach to Bureau disclosures regarding active investigations. In 2014, the Bureau noted that it typically does not make ongoing inquiries known other than by confirming such inquiries where they have been made public through other means.[28] By contrast, the 2022 Bulletin now indicates that the Bureau may make public statements on a "case-by-case" basis where doing so "will help, and not harm, our ongoing work, and to administer and enforce our law."[29]

Consultations Begin on Further Amendments to the *Competition Act*

In November, the Minister launched a consultation inviting public input with respect to the second phase of the federal government's proposed review of the *Act* while simultaneously releasing its Discussion Paper.[30] The government indicated that the consultation "will be wide-ranging and consider the role and functioning of the Act and its enforcement regime, whether key aspects of the regime are fit for purpose, and whether the law can stand up to new challenges brought about by the evolution of our economy, especially digital transformation."[31]

Among the host of potential changes it explores, the Discussion Paper highlights several targeted at perceived concerns that the *Act* allows pre-emptive acquisitions of innovation or disruptive firms, or so-called "killer acquisitions," to go undetected or avoid scrutiny, including changes to the *Act*'s merger notification rules, one-year post-closing limitation period and competitive effects tests.[32] Referencing the Bureau's evidentiary challenges in the *Tervita* and more recent *Secure* cases, the document also discusses the possibility of "a more practical mechanism" for interim relief[33] while

describing the government as being "resolved to examine possible reform of the efficiencies defence"[34] up to and including abolishment.

The Discussion Paper similarly cites concerns around the *Act*'s reach over dominant platforms and algorithmic collusion in raising potential substantive changes to reduce the Commissioner's evidentiary burden under the abuse of dominance[35] and competitor collaboration[36] provisions. Notwithstanding the June 2022 amendments to extend section 45 to wage-fixing and no-poach agreements cited above, the Discussion Paper also raises the possibility that buy-side collusion more generally could be brought back into the scope of that provision or be made subject to a broadened *per se* civil provision (with no requirement to demonstrate anti-competitive effects).[37] Elsewhere, the document discusses providing the Bureau with unilateral powers to, among other things, compel information for market studies,[38] impose industry-specific codes of conduct[39] and act as a "decision-maker of first instance"[40] without resorting to litigation. With respect to private enforcement, the Discussion Paper also returns to the long-debated topic of whether private parties should be able to claim damages before the Tribunal or the courts for violations of the Act's civil provisions.[41]

Mergers

Federal Court of Appeal Determines Tribunal Has the Power to Grant "Interim Interim" Relief

In February, the Federal Court of Appeal granted the Commissioner's appeal of a Tribunal decision denying his request for "interim interim" relief (as the Commissioner had then styled it) to delay the then-imminent closing of a mid-2021 merger between Secure Energy Services Inc. ("**Secure**") and Tervita Corporation ("**Tervita**") pending the hearing of a separate application for interim relief under section 104 of the *Act*.[42] In the June 2021 ruling under appeal, the Tribunal had held itself to be without jurisdiction to grant the initial interim order sought,[43] concluding the *Act* to have set out a "complete code" on interim relief under sections 100 and 104 foreclosing that sought by the Commissioner.[44]

Following a hearing in January 2022, a unanimous panel of the Federal Court of Appeal disagreed with that conclusion, exercising its discretion to hear the appeal despite it being rendered moot by the merger's July 2021 closing.[45] The court found that, where a section 92 application has been filed, section 104's language is sufficiently broad to afford the Tribunal the power to grant both the "interim interim" relief sought by the Commissioner as well as subsequent "interim" relief, analogizing superior courts'

powers to grant similar orders prior to making interlocutory relief decisions.[46] The Commissioner welcomed the Federal Court of Appeal's ruling, characterizing it as a confirmation of the Tribunal's power to "temporarily block mergers in urgent circumstances."[47]

GFL Agrees with Commissioner to Divest Facilities Acquired from Terrapure Following Tribunal-Directed Mediation

In April, the Commissioner entered into a consent agreement with GFL Environmental Inc. ("**GFL**") to resolve his November 2021 Tribunal challenge to GFL's purchase of Terrapure Environmental Ltd. ("**Terrapure**").[48] GFL agreed to sell facilities in seven regions of Alberta and B.C. in order to address the Commissioner's concerns regarding impacts in markets for industrial waste and oil recycling services in which GFL and Terrapure closely competed. The consent agreement resulted from a Tribunal-directed mediation process first used to resolve the Commissioner's 2016 *Parkland* merger dispute.[49] In October, the Commissioner approved Environmental 360 Solutions Ltd. as the divestiture buyer for the facilities in issue.[50]

Tribunal Dismisses Commissioner Challenge in Expedited *Rogers/Shaw* Decision

In May—in what would become the most closely watched Tribunal proceeding in many years—the Commissioner filed his challenge to the proposed $26 billion acquisition of Shaw by Rogers, seeking a full block of the transaction under section 92 and interim relief under section 104.[51] Rogers and Shaw subsequently agreed with the Commissioner to postpone their closing of the merger pending a Tribunal decision.[52]

In an unusually expedited process, the Tribunal held an 18-day hearing to consider the Commissioner's challenge between early November and mid-December, followed shortly thereafter by the release of its decision[53] on New Year's Eve, dismissing the Commissioner's case. The proceeding had garnered even more attention following a Canada-wide outage of Rogers' wireless network in June 2022 that itself became a contested element in the hearing.[54] The case took a further turn in August when Rogers, Videotron Ltd. ("**Videotron**") and Shaw subsidiary Freedom Mobile Inc. ("**Freedom**") announced a $2 billion transaction contemplating Shaw's sale of Freedom to Videotron ahead of the merger's closing[55]—thus ostensibly "fixing it first." The Commissioner contended that the merger would be anti-competitive with or without the sale of Freedom to Videotron.

In its December decision, the Tribunal concluded that the transaction, modified by the Freedom sale, was not likely to result in a substantial lessening or prevention of competition in telecommunications services in Alberta or B.C. as alleged by the Commissioner.[56] The Tribunal instead concluded that increased competitive intensity was likely to ensue post-closing due to the transaction preserving four competitors in those provinces, the expansion plans of "experienced market disruptor" Videotron and Rogers' strengthened position against rivals Bell and Telus.[57] The Tribunal also found that Rogers' post-closing market shares in Alberta and B.C. would be well below and only slightly above the *Merger Enforcement Guidelines*' 35% "safe harbour" threshold, respectively, and that Videotron would likely erode the shares held by its "Big 3" rivals over time.[58]

The Commissioner immediately appealed to the Federal Court of Appeal, arguing, among other things, that the Tribunal's decision not to evaluate the proposed transaction without the Videotron divestiture component prejudiced its case. Following another expedited process, this appeal was ultimately dismissed in early 2023, with the court finding that the Tribunal's approach to the divestiture or other alleged errors would not have affected its result.[59] Immediately thereafter, the Commissioner confirmed his intention not to pursue a further appeal.[60] The Tribunal process' resolution left the transaction subject to a remaining approval from the Minister that was ultimately granted in the first quarter of 2023.[61]

Tribunal Holds Hearing in *Secure/Tervita* Merger Case

In May and June, the merits of the Commissioner's section 92 challenge to the July 2021–consummated merger of Secure and Tervita were subsequently heard over a 19-day Tribunal hearing. Six expert witnesses and 16 lay witnesses appeared between the litigants.[62]

The Commissioner's case focused primarily on alleged non-price effects from post-merger waste facility closures on oil and gas customers of the formerly competing energy service companies in Western Canada, including increases in their transportation costs to remaining facilities, waiting times to deliver their waste and other impacts. The Commissioner argued for a Tribunal order requiring Secure to divest some 41 facilities previously owned by Tervita in order to restore competition in 143 markets served by both competitors pre-closing.[63] The Tribunal also heard competing expert evidence with respect to the efficiencies asserted by Secure in defense of the merger under section 96 of the *Act*, including claimed cost savings from rationalizing field facilities and consolidating corporate offices.[64]

Neighbourly Pharmacy Agrees to Divest Two Saskatchewan Pharmacies in Bureau Consent Agreement regarding Rubicon Pharmacies Acquisition

In June, the Commissioner and Neighbourly Pharmacy Inc. ("**Neighbourly**") reached a consent agreement with respect to Neighbourly's proposed acquisition of Rubicon Pharmacies, a rival pharmacy owner and operator that served as Neighbourly's only competitor in the towns of Kamsack and Shaunavon, Saskatchewan. The agreement requires Neighbourly to sell one pharmacy in each town in order to preserve competition for pharmacy products and services.[65]

Pembina and KKR Agree to Sell Interest in KAPS Pipeline to Address Bureau Concerns that Joint Venture Acquisition Would Prevent Competition

In July, the Commissioner reached a consent agreement to address its concerns with a gas processing joint venture between Pembina Pipeline Corporation ("**Pembina**") and global investment firm KKR acquiring a 51% interest in Energy Transfer Canada ULC ("**ETC**"), a midstream company in which KKR held a pre-existing 49% interest.[66] The transaction would have resulted in Pembina and KKR acquiring ETC's one-half stake in the KAPS Pipeline System, a condensate and natural gas liquids ("**NGLs**") pipeline system under development in Alberta. The consent agreement required the sale of the KAPS interest to address Bureau concerns that the transaction could weaken a future competitive alternative to Pembina's existing pipelines for transporting NGLs between northwest Alberta and Fort Saskatchewan, Alberta. In December, Pembina and KKR subsequently announced an agreement to sell the KAPS interest to private equity firm Stonepeak Partners for C$662.5 million.[67]

Bureau Enters into Consent Agreements in Separate Retail Gas Station Acquisitions

In August, the Commissioner entered into three consent agreements to resolve competition concerns with transactions involving retail gas station acquisitions.

Two such consent agreements related to the proposed sale of 337 Husky-branded stations by Cenovus Energy Inc. under separate purchase agreements with Parkland Corporation ("**Parkland**") and Federated Cooperatives Limited ("**FCL**"). The Commissioner's concerns with impacts on local gas prices were resolved through the agreements requiring Parkland

and FCL to divest six stations and one station, respectively, in addition to providing for the transfer of other gas stations and associated contracts to Parkland rather than FCL.[68]

Several days later, the Commissioner entered into a consent agreement with respect to an unrelated transaction in which Alimentation Couche-Tard Inc. ("**Couche-Tard**") sought to purchase Wilsons, a gas station operator in the four Atlantic provinces. Couche-Tard agreed to sell 46 Wilsons gas stations and supply agreements, as well as one of Couche-Tard's own gas stations, to resolve the Bureau's concerns.[69]

Tribunal Rejects Commissioner's Application Seeking Grain Elevator Divestiture in *P&H* Decision

In October, the Tribunal issued a decision dismissing a section 92 merger challenge in a long-running proceeding—initiated by the Commissioner nearly three years' prior in December 2019—concerning the acquisition by grain company P&H of one of 10 grain elevators from Louis Dreyfus Company Canada ULC.[70] The Commissioner alleged that the acquisition of a grain elevator near Virden, Manitoba was likely to cause a substantial lessening of competition in the supply of wheat and canola grain handling services for farms served by that elevator and a nearby P&H-owned elevator in Moosomin, Saskatchewan. He sought the divestiture of either the Virden or Moosomin elevator by P&H.

P&H's outcome largely turned on the Tribunal's finding that the Commissioner's proposed product market in grain handling services "was not grounded in commercial reality and in the evidence."[71] The Tribunal instead concluded that the relevant product was the purchase of wheat and canola by P&H, with the elevators in issue falling within a broader geographic market capturing at least 7 elevators for wheat and 10 for canola.[72] While the Tribunal accepted that the transaction caused some lessening of competition for the purchase of wheat, it found this to fall under the substantiality threshold in section 92 of the Act.[73]

In *obiter*, however, the Tribunal went on to consider P&H's claimed efficiencies, noting the "extensive submissions" made by the parties on that issue.[74] The Tribunal concluded that P&H's evidence of the merger leading to increased throughput at the Virden grain elevator was insufficiently reliable to demonstrate any section 96 efficiencies, and that other claimed efficiencies not quantified by P&H warranted a "zero" weight under the Supreme Court of Canada's *Tervita* framework.[75]

The Commissioner did not pursue an appeal of the decision. Notably, *P&H* was the first Tribunal decision to be issued on the merits of a section 92 application since 2012's *Tervita*,[76] and together with that decision, only the second to be issued following the adoption of a two-stage merger review framework in 2009.

Bureau Flags Competition Issues in Minister of Transport-Led Review of Westjet's Acquisition of Sunwing

In late October, the Commissioner released his advisory report with respect to the proposed acquisition of Sunwing Vacations Inc. and Sunwing Airlines Inc. by the Westjet Group that had been announced in March 2022.[77] This report was part of a *Canada Transportation Act* ("**CTA**") public interest review of the transaction which had been initiated by the Minister of Transport in May. The Commissioner sets out numerous concerns with respect to the transaction, alleging a likelihood of price increases and subsequent declines in service and variety for Canadian travelers over 31 routes to the Caribbean and Mexico served by both airlines. As decision-maker under the CTA process, the federal government ultimately opted to conditionally approve the transaction in the first quarter of 2023.[78]

Domtar Agrees to Sell Mills to Resolve Bureau Monopoly and Monopsony Power Concerns with Resolute Forest Products Acquisition

In December, pulp and paper company Domtar Corporation ("**Domtar**") entered into a consent agreement with the Bureau with respect to its proposed acquisition of Resolute Forest Products.[79] The Bureau had concluded that the transaction would provide Domtar with a post-closing market share exceeding 35% in the supply of northern bleached softwood kraft pulp ("**NBSK**") in Eastern and Central Canada. The Bureau also identified monopsony power concerns around Domtar's ability to purchase wood fibre from private lands in northwest Ontario at prices below competitive levels. Under the consent agreement, Domtar agreed to divest a pulp mill in Dryden, Ontario and a pulp and paper mill in Thunder Bay to two independent purchasers.

Product markets for NBSK and wood fibre had previously been the focus of the Bureau's review of Domtar's own acquisition by Paper Excellence in late 2021, with the Bureau in that case similarly requiring Paper Excellence to sell a Kamloops mill to address wood fibre monopsony concerns affecting competition in B.C.'s southern interior and coastal regions.[80]

Conspiracies and Bid-Rigging

Company Pleads Guilty to Role in Condominium Refurbishment Bid-Rigging Scheme in the Greater Toronto Area

In January, construction company CPL Interiors Ltd. ("CPL") was fined $761,967 after pleading guilty under section 45 of the Act to allocating customers and fixing bid prices with rivals in connection with 31 refurbishment contracts issued by condominium corporations in the Greater Toronto Area between 2009 and 2014.[81] CPL received leniency in sentencing for cooperating with the Bureau's investigation.

Bureau Introduces Online Risk Assessment Tool for Procurement Agents

In June, the Bureau launched a new "Collusion Risk Assessment Tool" on its website described as allowing public or private sector procurement officers and purchasing agents to "gain an early warning" about potential bid-rigging risks and mitigation strategies.[82] The tool generates a risk score and lists recommended mitigation practices after bid process details are entered through an online questionnaire. The Bureau indicated that the initiative had been led by its newly formed Digital Enforcement and Intelligence Branch.[83]

Fifth Executive Pleads Guilty Following Quebec Infrastructure Contracts Investigation

In October, a former executive of Genivar Inc. (now WSP Canada Inc.), Francois Paulhus, pled guilty to one count of *Criminal Code* conspiracy for his role in a bid-rigging scheme affecting 21 City of Gatineau infrastructure contracts awarded between 2004 and 2008.[84]

Paulhus' plea followed four guilty pleas in 2019 from other executives involved in the Gatineau scheme, as well as approximately $12 million in bid-rigging settlements with engineering firms in 2019–20 relating both to the Gatineau contracts and similar procurements in Québec City, Montreal, Laval and St-Eustache over the 2003–2011 period.[85]

Charges Laid Against Contractors in Alleged Social Housing Refurbishment Conspiracy in Brandon

In December, the Bureau announced that charges had been laid against five contractors in Brandon, Manitoba for allegedly conspiring to allocate

among themselves contracts to refurbish social housing units awarded by the Manitoba Housing and Renewal Corporation between 2011 and 2016.[86] According to the Bureau, the charges flow from evidence the accused individuals manipulated at least 89 such contracts valued at approximately $4.5 million. The accused were charged both under the *Criminal Code* and section 45 of the Act.

Deceptive Marketing

Bureau Reaches Over $3 Million Settlement with Keurig over Recyclability Claims and Emphasizes the Rise of "Greenwashing"

In January, Keurig Canada Inc. ("**Keurig**") entered into a consent agreement to resolve the Bureau's concerns that claims about the recyclability of its "K-Cup" single-use coffee pods were false or misleading. The Bureau's investigation had indicated that those pods were not widely accepted for recycling other than in B.C. and Quebec municipalities.[87] The Bureau also found that the cups often required additional steps to prepare them for recycling in some municipalities than were suggested by Keurig. As part of the settlement, Keurig agreed to pay a $3 million penalty, donate $800,000 to an environmental charity and make changes both to its recyclability claims and the K-Cups' packaging, among other commitments.

Later in January, the Bureau issued a press release warning consumers of a rise in "greenwashing" activity whereby businesses create a false, misleading or unsupported impression of their products or services as having a reduced environmental impact.[88] At the Bureau-hosted "Competition and Green Growth" summit in October, Commissioner Boswell made similar points, noting that it was the Bureau's "job to protect consumers from eco-fraud" in the context of businesses responding to increased consumer demand for "green" products and services.[89]

Following on the heels of the "six resident" complaint from environmental activists that gave rise to the Keurig investigation,[90] at least three similar complaints alleging deceptive environmental claims were filed over the course of 2022, each triggering new Bureau inquiries.[91] In February 2022, however, the Bureau informed a group of complainants that it had closed a previously initiated inquiry into claims made by disposable wipes producers of those wipes being "flushable," citing a lack of evidence supporting further action.[92]

Natural Health Products Company Pays $100,000 to Settle Case Involving Unsupported Weight Loss Claims

In April, the Bureau reached a consent agreement with NuvoCare Health Science Inc. ("**NuvoCare**") and its founder after an investigation concluding that NuvoCare had made weight loss and fat burning claims regarding its natural health products that were not supported by testing.[93] The agreement requires NuvoCare and its founder to pay $100,000 in penalties, change or remove the weight loss claims at issue and establish a corporate compliance program. Since May 2020, NuvoCare had been operating under a Tribunal-registered temporary consent agreement prohibiting it from continuing to make the claims during the Bureau's investigation.[94]

The Bureau had previously issued a general warning to marketers of natural health products in 2019 to review their advertising for weight loss claims not specifically approved by Health Canada that were false, misleading or unsubstantiated.[95] The NuvoCare case is the latest in a long chain of Bureau deceptive marketing cases targeting substances or technologies promoted for their weight loss benefits.[96]

Bureau Obtains Order to Advance Inquiry into Furniture Retailer Promotions

In November, the Bureau announced that it had obtained a court order to compel The Dufresne Group and its affiliates ("**Dufresne**") to produce records for an investigation into Dufresne's furniture retailing business under the Act's civil deceptive marketing provisions. The Bureau indicated that it was investigating alleged practices involving 1) "urgency cue claims" relating to end dates of sales that may be false or misleading (such as claims around a promotion's end date where the promotion is renewed or replaced by another promotion) and 2) potentially inflated regular prices used in the context of savings claims.[97] With respect to the latter, the Bureau had previously entered into settlements with the Hudson's Bay Company in 2019[98] and Michaels in 2015[99] concerning similar allegations around products (sleep sets and frames, respectively) discounted on the basis of inflated regular prices.

Abuse of Dominance

Bureau Closes Investigation into Alleged Anti-Competitive Behaviour in the Agricultural Crop Inputs Sector

In March, the Bureau closed its investigation into allegations that numerous manufacturers or wholesalers of seeds, fertilizer and other agricultural crop inputs had worked together to disadvantage, restrict or block the supply of those inputs to Farmers Business Network Canada Inc. ("**FBN**").[100] FBN had recently entered the Canadian market with a novel business model allowing growers to buy crop inputs on its digital platform and access a range of marketing and analytics tools. The Bureau found the evidence insufficient to support a finding of anti-competitive intent under the abuse of dominance provisions, adding that the alleged conduct did not appear to be frustrating FBN's innovations from increasing current and future competition in the markets at issue. While expressing concern over evidence of market participants targeting FBN in their communications, the Bureau also concluded there to be insufficient evidence of a horizontal agreement or arrangement being reached for the purposes of section 90.1 of the Act.

Carsharing Firm Agrees to Remove Exclusivity Policy in Response to Bureau Concerns

In May, the Bureau announced that Turo, the operator of Canada's largest peer-to-peer platform allowing car owners to rent their vehicles, had removed a policy preventing its users from listing their vehicle on other platforms.[101] Turo's decision was in response to Bureau concerns that the policy likely heightened barriers to entry for competing platforms or potential new entrants in the peer-to-peer carsharing market. The Bureau's position statement cited that market as an example of a fast-moving digital market at risk of "tipping" in favour of a single large competitor early in its growth.[102] The Bureau had previously flagged tipping as a heightened competition concern in certain digital markets in the context of its 2019 "call-out" seeking information on potential anti-competitive conduct in the digital economy.[103]

Intellectual Property—Competition Interface

Joint Notice Issued on Bureau Collaboration with Health Canada's Health Products and Food Branch

In January, the Bureau issued a joint notice with Health Canada's Health Products and Food Branch ("**HPFB**") of their intent to continue

collaborating on matters relevant to issues around access to pharmaceuticals and biologics, including in the context of Bureau investigations.[104] The notice highlighted the ongoing cooperation between the Bureau and HPFB with respect to generic manufacturers' access to branded drug samples required to develop their products following concerns expressed by both bodies between 2018 and 2020 about limitations on this access.

Bureau Closes Two Pharmaceutical Patent Litigation Settlement Investigations

In May, the Bureau announced that it had closed two investigations into patent litigation settlements between branded and generic drug manufacturers.[105] While the Bureau's position statement does not disclose the details of these reviews, the Bureau ultimately found neither settlement to have contravened the Act. The Bureau restated the position in its *Intellectual Property Enforcement Guidelines* that it will not further investigate such agreements under section 79 or 90.1 of the Act where they provide for generic drug entry prior to patent expiry and do not include compensation from the branded to the generic manufacturer.

In its February 2022 submissions in response to Senator Wetston's competition policy consultation, the Bureau expressed its support for amendments to the Act requiring parties to patent litigation settlements to notify the Bureau of these agreements, similar to the notification regime for such agreements used by the U.S. Federal Trade Commission.[106] The federal government's November 2022 Discussion Paper likewise cites the potential benefit of a notification or voluntary clearance mechanism given the agreements' "substantial commercial impact."[107]

Bureau Closes Abuse of Dominance Inquiry into Relabeled Biologic Drugs

In June, the Bureau announced the closure of a preliminary inquiry into potential anti-competitive effects resulting from the relabelling of "biologic" drugs by pharmaceutical manufacturers.[108] Biologics are more complex branded drugs derived from living organisms that face competition from chemically similar, and typically lower priced, "biosimilar" drugs. In its inquiry, the Bureau investigated concerns with biologic manufacturers seeking approval to market their drugs under different brand names and potentially selling them at reduced prices to deter competition from biosimilars. While the Bureau acknowledged that such practices could raise issues under section 79 of the Act, it closed its inquiry due to the drugs under review not yet being marketed in Canada.

The Bureau had previously investigated whether a biologic manufacturer's practices, including contracts with hospitals, infusion clinics and insurers that promoted the biologic's use, were predatory or exclusionary with respect to competing biosimilars.[109] It likewise closed this inquiry in 2019, citing insufficient evidence of the practices' competitive effects.

Advocacy

Bureau Releases Digital Health Care Market Study Reports

Over separate reports released in June, October and November, the Bureau set out the findings and recommendations flowing from the market study it had initiated in 2020 to "examine how to support digital health care in Canada through pro-competitive policies."[110] In its first report, the Bureau identified barriers to entry associated with electronic medical records (EMR) databases.[111] It recommended harmonizing relevant privacy and data rules as well as establishing "anti-blocking" and interoperability rules to facilitate the exchange of information between EMR systems. The second report made recommendations to address separate issues identified by the Bureau around fragmented, prescriptive and lengthy government procurement processes.[112] The third report recommended reviewing and amending policies impacting health care providers, including payment models and licensing requirements, to better accommodate digital health services.[113]

Bureau Announces New Retail Grocery Market Study

In October, the Bureau announced that it had launched a market study into grocery store competition. The study will include within its scope: 1) the extent to which higher grocery prices are resulting from changing competitive dynamics in the sector, including the role of the pandemic and supply chain disruptions; 2) what can be learned from other countries' steps to increase competition in the sector; and 3) how governments can lower barriers to entry and expansion to increase competition.[114] The Bureau targeted releasing a final report in June 2023.

Numerous countries have initiated similar studies implicating the grocery sector, including a broader, ongoing U.S. Federal Trade Commission inquiry into supply chain disruptions announced in 2021[115] and a New Zealand Commerce Commission study into grocery competition[116] that concluded in 2022. The Bureau's announcement coincided with significant media and political scrutiny into rising grocery prices, including questioning of grocery company representatives by a Parliamentary committee in

late 2022.[117] It also follows earlier competition-related controversies in the sector, including the simultaneous cancellation of pandemic "hero pay" bonuses by grocers that precipitated the June 2022 wage-fixing amendments[118] and a domestic bread price-fixing scheme that became public in 2017 (and which remained under investigation[119] by the Bureau in 2022).

The Bureau's study will not extend to issues around retailer purchases from suppliers except to the extent these purchases impact retail competition.[120] Over the course of 2022, a Steering Committee of industry groups representing grocery retailers and suppliers separately worked to negotiate an industry code of conduct following an industry dispute over increases to supplier fees charged by grocers in 2020.[121] The notice makes express reference to the negotiations,[122] which continued into 2023.

Conclusion

2022 saw many significant and high-profile developments for Canadian competition law. The Bureau's deceptive marketing settlement with Keurig highlighted its role in policing "greenwashing" activity increasingly under scrutiny from stakeholders in an ESG-conscious environment. The Bureau's initiation of a retail grocery study accompanied a newfound emphasis by the Commissioner on "the importance of competition to keep prices in check in key sectors of the economy"[123] amidst ongoing inflation concerns. The Bureau announced consent agreements or completed investigations across a range of sectors, including energy, agriculture, aerospace, tech and health care. Between the *Rogers/Shaw*, *Secure/Tervita* and *P&H* cases, 2022 was also notable for an unprecedented level of merger litigation activity, including the issuance of the first fully litigated Tribunal merger decisions in over a decade. With the federal government now in the second phase of its intended approach to reform of the *Act*, these developments will frame a vigorous debate around whether Canada's competition framework remains fit for purpose in 2023 and beyond.

ENDNOTES

[1] Both of Dentons Canada LLP. The views expressed in this article are those of the authors alone, and do not necessarily reflect the views of Dentons Canada LLP or its clients.

[2] Matthew Boswell, "Seizing the Moment to Build a More Competitive Canada" (Remarks at the Canadian Bar Association Competition Law Fall Conference, delivered on 20 October 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/10/seizing-the-moment-to-build-a-more-competitive-canada.html> ["Boswell CBA Speech"].

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[7] Competition Bureau Canada, "Guide to the 2022 amendments to the *Competition Act*" (24 June 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act>.

[8] See Bill C-19, *supra* note 6, cl 257(1) (introducing the new prohibition as s 45(1.1) of the *Act*).

[9] See *Competition Act*, RSC 1985, c C-34, ss 74.1(c), s 79(3.1) ["*Competition Act*"].

[10] See Bill C-19, *supra* note 6, s 257(1) (amending s 45(2) of the *Competition Act* to this effect).

[11] See *Competition Act*, *supra* note 9, ss 52(1.3), 74.01(1.1).

[12] See *Competition Act*, *ibid*, ss 79(4)(a)–(d), 90.1(2)(g.1)–(g.3), 93(g.1)–(g.3).

[13] See *Competition Act*, *ibid*, s 78(1).

[14] See *Competition Act*, *ibid*, s 78(1)(j).

[15] See e.g., *Competition Act*, *ibid*, ss 79(1) (amended to contemplate the application of "a person granted leave under section 103.1"), 103.1 (now referencing s 79 throughout).

[16] See e.g., *Competition Act*, *ibid*, s 11(5).

[17] See *Competition Act*, *ibid*, s 113.1.

[18] See *Competition Act*, *ibid*, ss 108(3), (4).

[19] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era – Submission by the Competition Bureau" (8 February 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> ["Bureau Wetston Submission"].

[20] See Hon. Howard Wetston, QC, "Consultation Invitation – *Examining the Competition Act in the Digital Era*" (27 October 2021), online: <https://sencanada.ca/media/368379/letter-pdf.pdf>.

[21] Bureau Wetston Submission, *supra* note 19, s 5.1.

[22] *Ibid*, ss 3.3, 5.3, 6.4.

[23] *Ibid*, s 6.1.
[24] *Ibid*, s 3.4.
[25] *Ibid*, s 2.7.
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[27] *Ibid*, s 1.
[28] Competition Bureau Canada, "Communication During Inquiries" (26 June 2014), s 3.3, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/communication-during-inquiries>.
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[32] Discussion Paper, *supra* note 30 at 21–24.
[33] *Ibid* at 24, n 52.
[34] *Ibid* at 26–27.
[35] *Ibid* at 39.
[36] *Ibid* at 42–43.
[37] *Ibid* at 46.
[38] *Ibid* at 53–54.
[39] *Ibid* at 49.
[40] *Ibid* at 51–52.
[41] *Ibid* at 53.
[42] *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2022 FCA 25 ["*Secure FCA*"].
[43] *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation,* 2021 Comp Trib 4.
[44] *Ibid* at paras 43, 50.
[45] *Secure FCA*, *supra* note 42 at paras 21–40.
[46] *Ibid* at paras 56–57.
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[54] Andrew Willis, "Rogers outage will weigh on Shaw takeover hearings, Ottawa says" (29 August 2022), online: The Globe and Mail <https://www.theglobeandmail.com/business/article-rogers-outage-will-weigh-on-shaw-takeover-hearings-ottawa-says/>.

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[57] *Rogers/Shaw*, *ibid* at paras 6–8.

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[70] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18.

[71] *Ibid* at 6.

[72] *Ibid*.

[73] *Ibid* at para 7.

[74] *Ibid* at paras 8, 727–62. By contrast, the Tribunal opted not to issue reasons on efficiencies (despite hearing evidence and argument from the parties on that issue) in the subsequent decision it issued in *Rogers/Shaw*, *supra* note 52 at para 410.
[75] *Ibid* at paras 745–49.
[76] *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14.
[77] Competition Bureau Canada, "Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act (04690) – Proposed Acquisition by WestJet Airlines Ltd. of Sunwing Vacations and Sunwing Airlines" (25 October 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/reports-and-studies/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act>.
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[79] Competition Bureau Canada, "Competition Bureau reaches agreement with Domtar Corporation to preserve competition in Canada's pulp and paper industry" (29 December 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/12/competition-bureau-reaches-agreement-with-domtar-corporation-to-preserve-competition-in-canadas-pulp-and-paper-industry.html>.
[80] See Competition Bureau Canada, Position Statement, "Competition Bureau statement regarding its review of Paper Excellence's acquisition of Domtar" (8 December 2021), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-its-review-paper-excellences-acquisition-domtar>.
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