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Top Competition and Foreign Investment Review Trends and Issues for 2019

In our 2019 annual forecast of what lies ahead for Canadian competition law and foreign investment review, we set out our views on the top issues and trends to watch this year. With the appointment of the next Commissioner of Competition expected shortly, a federal election ahead in the fall of 2019, and notable recent and upcoming decisions and guidance from the Competition Bureau, the courts and the Competition Tribunal, developments in 2019 are likely to have a significant impact on companies in Canada.

New Leadership at the Competition Bureau and a Year of Transition

2019 will be a year of transition at the Competition Bureau as Interim Commissioner Matthew Boswell's current one-year term expires on May 31, 2019. The federal government is expected to announce the appointment of a Commissioner early in the new year.

Whoever is chosen as the next Commissioner will likely direct the Bureau's policies and priorities for the next five years. Although Interim Commissioner Boswell has continued to focus on the digital economy and innovation agenda previously set by Commissioner John Pecman, a new Commissioner could well emphasize different themes, including more criminal or civil enforcement, for example, or a focus on other sectors of the economy.

We will be watching the transition carefully and expect the choice of Commissioner to have a significant impact on many of the other trends discussed below. For example, if a new Commissioner is appointed from within the Bureau, we do not expect a significant departure from the Bureau's current course; however, an outsider may well be more likely to shift the Bureau's priorities.

The Digital Economy

In keeping with the federal government's broader efforts to ensure Canada is well-positioned to capitalize on economic and investment opportunities provided by the digital economy, the focus on digital economy issues and promoting innovation is likely to remain a top advocacy and enforcement priority for the Bureau in 2019. In fact, according to the Bureau's 2018-2019 Annual Plan, more than 45 digital economy matters are currently in the Bureau's investigative pipeline (see our publication on the Bureau's 2018-2019 Annual Plan).

The Bureau is building its digital enforcement capacity to better understand new and evolving technologies such as pricing algorithms and blockchain technologies. The Bureau has added a new role within its ranks – the Chief Digital Enforcement Officer – who is tasked with building the Bureau's knowledge and capacity in this field. To our knowledge, this position has not yet been filled and the Bureau is looking for someone externally with the relevant expertise.

There is little doubt that digital economy issues will surface in the forthcoming election, and we will be keeping a close eye on how the Bureau's approach and enforcement priorities evolve, especially under the next Commissioner and given increasing international focus on "big data" issues, including whether and how to regulate alleged "dataopolies" and the potential for algorithms to facilitate collusion. (For an in-depth discussion of the emergence of algorithms and corresponding competition issues, please see this article co-authored by Davies partner Anita Banicevic.)

With coordination between the Office of the Privacy Commissioner of Canada and the Competition Bureau limited by their respective statutory powers, and greater enforcement powers vested in the Competition Bureau, the Bureau has been clear that it views inadequate disclosure of privacy and data collection policies to be a violation of the deceptive marketing practices provisions of the *Competition Act*. We expect to see increased enforcement by the Bureau of inadequate or misleading privacy and data collection policies beginning in 2019.

Increasingly Prolonged Merger Reviews and Higher Filing Fees

A number of recent mergers, including Luxottica/Essilor, Dow/Dupont, Bayer/Monsanto and Agrium/Potash Corp, have taken well over a year to obtain approvals from global competition regulators. As discussed by Davies partner John Bodrug in *The Globe and Mail*, these transactions reflect a discouraging trend toward increasingly prolonged merger reviews and illustrate the risks that need to be taken into account by companies considering strategic mergers. Within Canada, the Bureau's average review time for complex mergers has increased significantly in recent years, from about 36 days in 2015-16 to almost 53 days in 2017-18.

Moreover, effective May 1, 2018, the Bureau increased its filing fee for merger notifications from C$50,000 to C$72,000. The Bureau also announced that, going forward, this filing fee will be subject to inflation and will be reviewed annually. The Bureau has not made any firm commitments to improve turnaround times as a result of the increased fee revenue. Although the Bureau may point to increased concentration in certain industries and novel issues in emerging markets as driving the need for increased review times, this trend toward lengthier and costlier reviews by the Bureau increases market uncertainty and risks discouraging investments and economic growth. Meanwhile, the U.S. Department of Justice has recognized longer merger review periods as a problem and in September 2018 implemented new procedures aimed at expediting its merger review process. We have made a number of proposals to increase the efficiency of the merger review process in Canada.

Uncertainty in National Security Reviews Under the *Investment Canada Act*

In 2018, the Canadian government rejected the proposed acquisition of Aecon Group Inc., a major Canadian construction services firm, by China Communications Construction Company International Holding Limited on national security grounds. (Davies was counsel to Aecon in this transaction.) This use of the *Investment Canada Act*'s national security review provisions, coupled with indications that the current U.S. government has taken an increasingly firm stance against Chinese investment (including news reports that the United States has lobbied other governments, such as Canada's, against Huawei's involvement in building out 5G telecom infrastructure), highlight that the *Investment Canada Act* process cannot be viewed as a rubber stamp for foreign investment, particularly from Chinese state-owned enterprises. At the same time, however, the Canadian government has gone to great lengths to indicate that all investments are reviewed on a case-by-case basis and that Canada is still very much open for business.

The government's Aecon decision did little to provide clarity for future investors. The government provided no public reasons for initiating the national security review or for ultimately turning down the investment. As a result, the scope of permissible investments by Chinese and other state-owned enterprises under the current Canadian government remains unclear. Given this lack of transparency or guidance, it is more important than ever for foreign investors to carefully prepare for engaging with the government and to obtain expert advice to help guide them through the process.

New Guidelines May Render "Efficiencies Defence" Inefficient

Canada's merger regime is unusual in that it allows merging parties to raise a positive defence based on merger efficiencies. In certain cases, this can mean that a merger that substantially prevents or lessens competition may nevertheless be exempt from challenge under the merger provisions of the *Competition Act* because the efficiencies involved will be greater than, and will offset, the merger's anticompetitive effects. The Supreme Court of Canada (SCC) offered guidance about the application of the efficiencies defence in its 2015 *Tervita* decision (see our publication on *Tervita*). In 2018, the Bureau issued a draft *Practical Guide to Efficiencies in Merger Reviews*, seeking to provide the Bureau's updated views on the application of the efficiencies defence.

Following their release, the draft guidelines were subject to criticism and requests for revision from the competition bar. For example, the Canadian Bar Association commented that certain aspects of the guidelines do not reflect a practical approach or are inconsistent with existing jurisprudence. For instance, the Bureau recommends that parties asserting an efficiencies defence provide their initial efficiencies analysis and supporting information early in the merger review process. However, providing such analysis before the Bureau has identified any specific competition concern would typically add significant complexity, time and costs to merger reviews, rendering this approach impractical in many cases.

The Bureau has also signalled a desire for legislative change, particularly given comments by former Commissioner John Pecman suggesting that Canada, like the United States, should require claimed efficiencies to be passed on to consumers in order to validly offset competitive harm arising from a merger, or that it should remove the efficiencies defence altogether.

Revised guidelines are expected to be published in 2019, and we wait to see how these updated guidelines will reflect public comments.

Chilling Effect of Changes to the Immunity and Leniency Program

The Bureau released a revised version of its Immunity and Leniency Program in September, 2018. As we explained in an earlier publication, the Bureau's changes to the Immunity and Leniency Program could have a chilling effect that would reduce the attraction and effectiveness of the program in the future, ultimately making it more difficult for the Bureau to detect and prosecute conspiracies and other unlawful conduct. We expect the uncertainty created by the new process will be reflected in fewer immunity and leniency applications in 2019.

The changes to the program impose stronger cooperation and disclosure obligations on immunity applicants with the goal of allowing the Bureau and the Crown to be sure their cases are "prosecution ready." The new program permits the Bureau to record witness interviews, provides for a new "interim" stage during which the applicant receives only conditional immunity (with full immunity granted only after the Public Prosecution Service of Canada is satisfied that the applicant's cooperation is no longer required) and requires more comprehensive disclosure to benefit from full immunity.

Moreover, automatic coverage will no longer be provided for all directors, officers and employees under a corporate immunity agreement. Instead, individuals seeking immunity will need to demonstrate their knowledge of, or participation in, the unlawful conduct and their willingness to cooperate with the Bureau's investigation to benefit from the corporate immunity.

Under the leniency program, applicants were previously eligible to receive fine reductions of 50% for a first-in leniency applicant, 30% for the second-in applicant and on a case-by-case basis for subsequent applicants. Under the new program, fine reductions will now turn on the value of the applicant's cooperation with the Bureau's investigation, taking into account the timing of an application, speed of disclosure and the relevance of the evidence provided. Accordingly, a second-in or subsequent leniency applicant could receive a greater percentage discount than a first-in applicant if it provides more valuable evidence and cooperation.

Harsher Sentences for *Competition Act* Offences

In November 2018, the Québec Court of Appeal handed down prison terms (available in French only) ranging from 18 to 36 months for three individuals who colluded to obtain public works contracts worth more than $15 million. The ruling reversed the lower court's conditional sentences to be served in the community, ranging from 18 months to 24 months. The Court of Appeal found that the trial judge was wrong to minimize the seriousness of the crimes, which included *Criminal Code* offences for fraud, conspiracy to commit fraud, forgery, use of forged documents and conspiracy to make and use forged documents.

The court proceedings followed a joint investigation by the Bureau and Québec's Permanent Anti-corruption Unit. The investigation related to a system of collusion that targeted public works contracts with municipalities in the Saint-Jean-sur-Richelieu region of Québec.

Although the case did not involve *Competition Act* offences, the Québec Court of Appeal's imposition of significant prison time for criminal fraud offences was publicized by the Bureau in its November 2018 Month in Review, which suggests that the Bureau may be seeking serious jail time for *Competition Act* offences in the future.

Further Developments in Abuse of Dominance Cases

In August 2018, the SCC denied leave to the Toronto Real Estate Board (TREB) to appeal the 2017 Federal Court of Appeal (FCA) decision upholding the Competition Tribunal's findings that restrictions by TREB on the display and end use of certain property data, including sold prices, on TREB members' password-protected virtual office websites (VOWs) amounted to an abuse of dominance. As a result, subject to certain exceptions, including where affirmatively directed by the seller or with respect to publicizing the seller's personal information and instructions intended for TREB members only (such as name, home access instructions, residents of the home and mortgage information), TREB is not permitted to limit the way members use or display the relevant data on their VOWs. The SCC's decision exhausted the final appeal available to TREB and put an end to the seven-year proceedings in favour of the Bureau. (See our discussions of the case following the Federal Court of Appeal and Supreme Court decisions.)

The TREB case significantly broadened the scope of Canada's abuse of dominance provisions, making clear that firms can control a market, and therefore be subject to abuse of dominance claims, even when they don't compete in the relevant market themselves. This expanded scope of the abuse of dominance provisions may lead to more abuse investigations by the Bureau in 2019 and beyond.

Indeed, in October 2018, the Tribunal began hearings for the Commissioner's case against the Vancouver Airport Authority (VAA). As we described in our 2018 forecast, the Commissioner has alleged that the VAA is abusing its dominant position in the market for in-flight catering services at Vancouver International Airport. The Bureau alleges that the VAA, a not-for-profit corporation responsible for the management and operation of the Vancouver airport, is preventing – without sufficient justification – new in-flight catering suppliers from competing at the airport, notwithstanding that the VAA does not itself directly compete for the supply of in-flight catering services. A decision in the VAA case is expected in 2019.

SCC Decision on *Godfrey*: Implications for Competition Class Actions

In December 2018, the SCC heard the appeal of *Godfrey v Sony Corporation*. The Court is expected to provide guidance on a number of issues at the core of competition class actions, including the requirement that the plaintiff provide a reasonable methodology for establishing harm on a class-wide basis in order to meet the certification test applicable in most Canadian jurisdictions. The SCC also heard arguments on whether the *Competition Act* forms a complete code for price-fixing conspiracy claims, potentially displacing the common law conspiracy causes of action in these cases.

In addition, the Court was asked to consider whether "umbrella purchasers" can assert statutory and common law claims in connection with alleged price-fixing conspiracies. Umbrella purchasers are those who purchase products directly or indirectly from non-conspirators, but who nevertheless allege they were overcharged because price-fixing by the cartel participants raised the general market price, thereby also causing firms that did not participate in the cartel to raise their prices. (For more detail on the judicial history of this issue, refer to our previous publication.)

The Court's decision is expected to be released in mid-2019 and will have important implications for the scope of liability in competition class actions.

Also important in the context of competition class actions, in the August 2018 decision of *Hughes v Liquor Control Board of Ontario*, the Ontario Superior Court of Justice awarded $2.35 million in costs to the successful defendants. Justice Perell granted the defendants' motions for summary judgment and dismissed the case in its entirety on the basis that the practices complained of were the result of well-considered, long-standing and recently affirmed provincial government policy, and therefore immune from suit under the "regulated conduct defence" that has been enshrined in Canadian law for close to a hundred years (see our discussion of Justice Perell's decision). Although the decision is currently under appeal, if it is upheld, it may have a disciplinary effect on tenuous competition class actions, at least in Ontario.

Davies represented the LCBO in defending the proposed class action in the *Hughes* case.

Scrutiny of Non-controlling Common Ownership in Concentrated Industries

Competition authorities around the world have been considering the effects on competition of simultaneous ownership of shares in competing companies by one or more financial investors, where none of the shareholdings is large enough to give an owner control of any of those companies.

Some academic papers have concluded that common ownership by large institutional investors (e.g., BlackRock, Vanguard, Fidelity and State Street) in competing firms in concentrated industries has resulted in higher prices and less innovation in those markets. Concerns relate to both (i) unilateral effects of such ownership on the incentives of each firm to compete and (ii) increased risk of coordination between the firms in the industry.

The European Commission cited common shareholdings in explaining the basis for requiring divestitures in the Dow/Dupont merger at lower market concentration thresholds than might otherwise have been the case. The U.S. antitrust authorities, on the other hand, have cautioned that the economic analysis of common ownership is too uncertain to warrant policy changes at this time. However, the Federal Trade Commission (FTC) is currently soliciting public comment on this issue. Further guidance with respect to the FTC's position on the competitive effects of common ownership is expected in the coming year.

In Canada, the Bureau has been consulting on its approach to common ownership and has increasingly been requesting information about minority shareholders from merging parties as part of its merger reviews.

Future Bureau investigations of the impact of minority share ownership on competition may be facilitated by the recent amendments to the *Canada Business Corporations Act* (CBCA), which now require certain CBCA corporations to keep registers of beneficial owners, in addition to legal shareholders.

However, it remains to be seen whether the Bureau would be prepared to take enforcement steps to address common ownership concerns. For example, while some papers have proposed limits on common shareholdings in concentrated markets, this may be unworkable in practice and raise a host of other policy issues. In addition, companies may be subjected to remedies that they cannot predict as the composition of their shareholders changes and some shareholders may have interests or objectives of which the companies are not aware.

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