

FEBRUARY 14, 2022

## Canadian Competition Law Reform and Trends in 2022

As we look ahead to the trends and issues likely to be at the forefront of Canadian competition law policy and enforcement in 2022, it is clear that discussion of significant potential legislative reforms will be an important focus. In addition, key developments in merger review and class actions, and increased funding for the Competition Bureau (Bureau) can be expected to affect public and private enforcement of Canada's competition law in 2022 and beyond. We discuss our views on each of the key trends and resulting implications in more detail below. We will be addressing key developments and trends in Canadian foreign investment review law in a separate publication forthcoming shortly.

### Key Trends in Canadian Competition Law in 2022

1. [Federal government to review competition laws as Bureau issues wish list.](#)
2. [A bulked-up Bureau is likely to enhance enforcement efforts, including in digital markets.](#)
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### **Federal Government to Review Competition Laws as Bureau Issues Wish List**

On February 7, 2022, the federal Minister of Innovation, Science and Industry [announced](#) that he will review the *Competition Act* (Act) to “carefully evaluate potential ways to improve its operation,” including the following:

- i. closing loopholes that allow for harmful conduct;
- ii. more clearly addressing hidden fees (known as “drip pricing”);
- iii. tackling wage-fixing agreements, which are not currently within the scope of the Act’s criminal conspiracy provisions;
- iv. increasing access to justice for those injured by anticompetitive conduct;
- v. adapting the law to better tackle emerging forms of harmful behaviour in the digital economy; and
- vi. modernizing the penalty regime to ensure genuine deterrence of harmful business conduct.

The Minister’s announcement responds to his mandate to consider whether Canada’s competition laws need to be updated (as stated in his most recent mandate letter from the Prime Minister); his response also dovetails with increased calls from the Bureau and other observers for competition law reform. As we noted in a [bulletin](#), in an [October 2021 speech](#), the Commissioner of Competition advocated for statutory reforms, citing the prominence of new digital and technology-based economies and “the shift towards more aggressive enforcement of competition laws” in other jurisdictions. Adding to the public discourse, Senator Howard Wetston, a former Commissioner of Competition, commissioned a paper to evaluate the effectiveness of Canada’s competition policy in light of recent economic trends, including the growth of the digital economy. Senator Wetston issued a public call for comments on competition law reforms following the publication of the paper in the fall and recently published the submissions he received.

The Bureau also recently published its [submission](#) to Senator Wetston, soon after the Minister announced his review of the Act. The Bureau's submission sets out a detailed wish list containing numerous and substantial recommendations for amending the Act. Consistent with the Commissioner's previous comments, the Bureau's submissions emphasized the gaps between competition laws in Canada and other jurisdictions and argued that standards established from analysis of more "traditional" industries are "not suitable" in the digital economy. In the course of its lengthy submission, the Bureau advocated for several specific reforms to the Act, including the following:

- i. elimination of the "efficiencies defence," which the Bureau argues allows anticompetitive mergers to proceed – to the potential detriment of the public;
- ii. significant changes to the current merger review regime, including
  - a. shifting the burden of proof to merging parties to prove that a "concentrative merger" would not substantially lessen or prevent competition;
  - b. requiring that merger remedies restore competition to pre-merger levels and not just eliminate any "substantial" lessening or prevention of competition;
  - c. easing the legal standards applicable to injunctive relief before the Competition Tribunal (Tribunal);
  - d. closing certain perceived technical "loopholes" in the pre-merger notification regime to expand the scope of mergers that must be notified to the Bureau pre-closing; and
  - e. extending the limitation period for challenging a merger post-closing to three years, from one year.
- iii. expanded scopes for the provisions relating to abuse of dominance, competitor collaborations and conspiracy, including the specific inclusion of wage-fixing and other buy-side agreements in the criminal conspiracy provision;
- iv. increased monetary penalties for violations of the abuse of dominance, competitor collaboration, conspiracy and deceptive marketing provisions;
- v. private access to the Tribunal for abuse of dominance and competitor collaboration cases;
- vi. new Bureau powers to unilaterally compel oral testimony or the production of documents in civilly reviewable matters without the need to first obtain a court order;
- vii. revisions to the deceptive marketing provisions to
  - a. explicitly recognize drip pricing as a harmful practice; and
  - b. shift the burden of proof to advertisers to prove that advertised discounts are accurate; and
- viii. strengthened Bureau authority to conduct and compel responses to market studies.

Many of the Bureau's proposals are clearly designed to make it easier for the Bureau to intervene in the marketplace and will undoubtedly face some resistance from the business community, given the obvious imbalance, uncertainty and burden such proposals would introduce.

Looking ahead, we expect to hear more from the Bureau and others on competition law reform as the Minister conducts his review. Notably, any reforms to the Act would need to be made through the legislative process and could not be implemented unilaterally by the Bureau. Should the call for amendments gain traction, it will be interesting to see whether any proposed expansion of the Bureau's powers is tied to enhanced transparency and accountability in the Bureau's priority-setting and the efficient use of Bureau resources, particularly given recently announced increases to the Bureau's budget, discussed below.

## **A Bulk-Up Bureau Is Likely to Enhance Enforcement Efforts, Including in Digital Markets**

The 2021 federal budget included \$96 million in new funding for the Bureau over the next five years, with \$27.5 million of additional funding per year thereafter. In his October 2021 speech (referenced above), the Commissioner indicated that the new funds will be used to

- i. increase the Bureau's "capacity to take on new and more complex anticompetitive conduct, especially in digital markets";
- ii. strengthen the Bureau's enforcement team through new hires, with an emphasis on building litigation capacity and the use of external experts; and
- iii. enhance the Bureau's ability "to advocate for pro-competitive regulatory and policy changes."

The digital economy has remained a consistent enforcement priority for the current Commissioner (see, for example, [our comments](#) on his November 2020 speech). This focus continued in 2021, with ongoing investigations into Amazon and Google. As part of the capacity-building referenced in the Commissioner's speech, the Bureau established a Digital Enforcement and Intelligence Branch as a "centre of expertise on digital business practices and technologies." This new Branch will "act as an early-warning system for potential competition issues in the digital and traditional economies" and provide expertise to the other Bureau directorates.

In outlining how the new funds will be used, the Commissioner was careful to note that the new funding will not directly benefit the Bureau's merger review program, and he foreshadowed a merger filing fee review in the next two years to "properly fund operations in line with current realities and demands." Although Canadian merger filing fees increased by 44% in 2018, the Commissioner's comments suggest that further increases may be coming. The current filing fee is \$74,905.57.

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## **Merger Review Remains a Top Bureau Priority**

In 2021, the volume of merger reviews rebounded significantly from pandemic-induced declines, a trend we expect to continue in 2022. As we noted in last year's [forecast](#), the significant economic impacts of the COVID-19 pandemic in 2020 resulted in more than a 20% year-over-year decline in the number of merger reviews the Bureau conducted. Notably, merger reviews had already picked up by the second half of the Bureau's term, a trend that continued in 2021 as we saw a nearly 63% year-over-year increase in merger reviews concluded between March and September. To date, no parallel increase has occurred in the number of merger reviews leading to enforcement action.

Anecdotally, the significant increase in merger filings appears to have disparate impacts on the timing of reviews. Many straightforward transactions that raise no plausible substantive competition concerns seem to be cleared faster than they were historically, past experience would suggest. Conversely, certain complex reviews requiring significant Bureau resources appear to take longer than normal.

Merger review will likely be a focus in discussions regarding the need for competition law reform. In the Bureau's submission to Senator Wetston advocating for reforms to the current merger review process, the Bureau argued that the current standards applicable to injunctive relief before the Tribunal effectively limit to 23 days the Bureau's review of materials received from the merging parties, at which point injunction materials must be filed. As a result, the Bureau asserts that some of its time during its initial review could be "diverted away from its investigation, and toward the organization of evidence and filing of injunction materials". These arguments echo themes from the Commissioner's comments on the *Secure Energy* decision in 2021, in which he suggested that the current legal standards could, in some cases, force the Bureau to take a less transparent, more litigation-focused approach to merger review.

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## **Risk of Closing During an Ongoing Bureau Review: *Secure Energy* Decision**

In March 2021, Secure Energy Services Inc. and Tervita Corporation, two oilfield waste services companies, announced a planned merger. In their submissions to the Bureau to support the transaction, the parties argued, among other things, that the merger was likely to generate significant efficiencies that would outweigh and offset any alleged anticompetitive effects of the transaction (the so-called efficiencies defence permitted under the Act). Promptly following the expiry of the statutory waiting periods, the parties exercised their right to close the transaction, despite the Bureau's ongoing review.

On the eve of closing, the Commissioner challenged the merger and sought various forms of interim relief from the Tribunal to prevent the closing. The Commissioner's subsequent filings requested that the transaction be unwound or, in the alternative, that the parties' businesses be held separate pending determination of the Commissioner's challenge on the merits of the merger. The Tribunal denied the Commissioner's applications for interim injunctive relief, and a Bureau appeal to the Federal Court of Appeal was similarly denied. (The Federal Court of Appeal did, however, later clarify that the Tribunal has jurisdiction to order the interim relief that had been sought by the Commissioner, although that decision did not impact the Tribunal's refusal to grant relief in this case.) The Bureau's substantive merger challenge continues before the Tribunal, with trial scheduled for May and June 2022.

In his remarks in October 2021, the Commissioner highlighted two aspects of the *Secure Energy* decision, which could affect merger reviews in the years to come. First, the Commissioner reiterated his long-standing criticisms of the efficiencies defence – namely, that it permits anticompetitive mergers (including those that result in monopolies or raise prices for consumers) to proceed. Furthermore, the Commissioner expressed concern with the Tribunal's requirement that a "ballpark" estimate of economic harm be provided to support an application for interim injunctive relief where an efficiencies claim is made. Second, the Commissioner suggested that, if merging parties were not willing to extend the statutory review time frames for complex cases, including those involving an efficiencies claim, the Bureau may need to "pursue a litigation-focused approach that is costly and less predictable for merging parties." The Commissioner acknowledged that such an approach would "of necessity, mean less transparency and engagement from [Bureau] case teams in matters with no meaningful and reasonable timing commitment." Taken together, these comments suggest that merging parties should carefully weigh the costs and benefits of closing a transaction before the Bureau has completed its review.

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### **Revisions to *Competitor Collaboration Guidelines* Reflect a More Expansive Approach to Reviewing Competitor Agreements**

After publishing draft revisions to its *Competitor Collaboration Guidelines* in July 2020, the Bureau released the final version of the revised guidelines in May 2021. Among other things, the draft revisions of the guidelines contemplated an expanded scope for reviewing joint purchasing agreements between competitors. However, the Bureau subsequently clarified in a November 2020 statement that it would not assess buy-side agreements, including so-called no-poach and wage-fixing agreements, under the current criminal provisions of the Act. (Relatedly, as noted above, the Bureau has now called for amendments to the Act that would bring wage-fixing and other buy-side agreements within the ambit of the criminal conspiracy provision.)

Significant changes in the final version of the revised guidelines included

- i. a more extensive discussion of hub-and-spoke conspiracies (in which a supplier or customer coordinates a conspiracy with its customers or suppliers, respectively), which could suggest a heightened enforcement focus from the Bureau;
- ii. a suggestion that non-compete clauses entered into in connection with a merger may, in rare circumstances, be subject to review under the criminal provisions of the Act;
- iii. a reminder that agreements between competitors to use a common pricing algorithm could form the basis of an illegal price-fixing agreement, although an independent decision to adopt a particular pricing algorithm is not, in and of itself, sufficient to form the basis of a criminal offence;
- iv. an extended definition of "competitor" for the reviewable matters provisions to include firms that compete on other products or services beyond the scope of an impugned agreement.

For a more in-depth discussion of the revised *Competitor Collaboration Guidelines*, including practical tips for businesses, please see our [May 2021 bulletin](#).

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### **Competition Class Actions Meet (Mild) Resistance**

Class actions founded in alleged violations of the Act are the dominant form of private competition litigation in Canada. While we expect class actions to remain prominent in Canadian competition law in the year ahead, key decisions from the federal and provincial courts in 2021 demonstrated that their success is by no means assured.

In a highly anticipated decision in *Mohr v National Hockey League*, the Federal Court granted a motion brought by the defendant hockey leagues from across North America (including the NHL, AHL, ECHL, CHL, OHL, WHL and QMJHL) to strike out a class action claim alleging a conspiracy to limit negotiation opportunities for and compensation to junior hockey players that signed standard player agreements. In his decision, Chief Justice Crampton found that the defendants were not “competitors” under the criminal conspiracy provisions in section 45 of the Act, and he confirmed the widely held view that these provisions do not apply to agreements for the *purchase* of a product or service. Additionally, the Chief Justice found that the conspiracy provisions relating to professional sport, contained in section 48 of the Act apply only to intra-league, and not inter-league, agreements. This narrow scope was found to “[fit] more comfortably with the overall scheme of section 48” and its legislative history. Section 48 prohibits agreements between “teams and clubs engaged in professional sport as members of the same league” – and between directors, officers or employees of those teams and clubs – that “limit unreasonably” opportunities for any person to participate in professional sport or to negotiate with and play for the team or club of the person’s choice.

Separately, recent certification decisions in competition law class actions have clarified the relatively low bar plaintiffs must meet. In both *Jensen v Samsung Electronics Co. Ltd.*, and *Hazan c Micron Technology Inc.*, (DRAM Class Actions), the Federal Court of Canada and the Québec Superior Court, respectively, denied certification of class actions alleging foreign price-fixing in the sale of DRAM chips on the grounds that the motion for certification failed on the reasonable cause of action criterion and on the common issues requirement. Ultimately, these courts found the claims to be too speculative because there was an insufficient degree of specificity in the allegations.

Similarly, in *David v Loblaw*, a case involving allegations of a price-fixing conspiracy to manipulate the price of packaged bread, the Ontario Superior Court certified a class action against retailers and producers of packaged bread only in part. In its decision on certification, the Court found that no cause of action was supportable against the parent companies under the Act and that the record failed to support the far-reaching claims of so-called umbrella purchasers – namely, those who “bought products on which the alleged price-fixing had a knock-off, or indirect, effect.” Together with the DRAM Class Actions, this decision confirms the important gatekeeper role that courts have at the certification stage of class actions.

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