

## Cassels on Competition: February 2022

February 17, 2022

In this edition: Major changes to the Canadian *Competition Act*, Bureau focuses on greenwashing, new merger notification and *Investment Canada Act* thresholds announced, and more...

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### News You Need to Know

- Major changes to the Canadian *Competition Act* are coming.
- The Government of Canada has announced its intention to conduct a comprehensive review of the *Competition Act*, Canada's principal competition statute. Of note, the federal government intends to address wage-fixing agreements between employers, expand the ability of those harmed by anti-competitive conduct to sue, and increase penalties for anti-competitive behavior. Certain specific industries also appear to be on the government's radar; namely, oil and gas, telecom, and financial services industries.
- The Canadian Competition Bureau has published a lengthy submission detailing amendments to the *Competition Act* which it argues are necessary to ensure that Canadian competition law can effectively address challenges in the digital era. If adopted, those amendments would represent a seismic shift in Canadian competition law and would risk upending decades of case law as well as traditional principles and frameworks of Canadian competition law (also developed over decades) which many (if not most), including the Bureau itself until very recently, believe are fully capable of confronting and addressing anti-competitive behavior in the digital era. Changes proposed by the Bureau would (i) make it easier for the Commissioner of Competition to challenge and block proposed mergers (including by eliminating the efficiencies defence, reducing the burden of proof on the Commissioner to prove that a merger is anti-competitive, and lowering the standard for the Commissioner to obtain interim injunctions preventing parties from closing their transactions); (ii) criminalize certain "buy-side" conspiracies, including no-poach and wage-fixing agreements; (iii) authorize the imposition of penalties for abuse of dominant position exceeding the profits earned by the dominant firm; (iv) create a private right of action for those allegedly harmed by alleged abuses of dominance and anti-competitive civil competitor collaborations; (v) give the Commissioner the power to compel the production of documents or information from targets of civil investigations without prior judicial authorization; and (vi) immunize the Commissioner against costs awards if he brings unmeritorious litigation.
- The Federal Court of Appeal has ruled that the Competition Tribunal has the power to temporarily block mergers in urgent circumstances.

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- The transaction size threshold in 2022 for pre-merger notifications under the *Competition Act* will remain at its 2021 level of C\$93 million.
- The largest price-fixing class action in Canadian history has been certified (in part). An Ontario court certified the proposed class action in *David v. Loblaws* against the largest Canadian producers and retailers of packaged bread (but only on behalf of certain proposed classes of purchasers). The case was dismissed against the parent companies of certain of the defendants.

## Cassels Comments

- We are thrilled to welcome Davit Akman to the team as Chair of the firm's Competition & Foreign Investment Group. A leader in his field, Davit advises market-leading domestic and international firms on all aspects of Canadian competition and foreign investment review law, including mergers & acquisitions, cartels and other criminal matters, private actions (including class actions), advertising and marketing practices, abuse of dominance, and other reviewable trade practices.

## Bureau Business

- Construction company CPL Interiors Ltd. was fined C\$761,967 after pleading guilty to bid-rigging in connection with condo refurbishment in the Greater Toronto Area. According to a Bureau news release, CPL Interiors received leniency in sentencing for its full cooperation throughout the Bureau's investigation and its agreement to testify in any resulting prosecutions.
- Keurig Canada Inc. entered into a consent agreement with the Bureau to pay a C\$3 million fine in connection with misleading claims regarding the recyclability of its single-use coffee pods. The Bureau found that outside of British Columbia and Quebec, the pods are not widely accepted by municipalities for recycling. As part of the settlement, Keurig Canada also agreed to donate C\$800,000 to a Canadian charitable organisation focused on environmental causes and to pay C\$85,000 in costs for the Bureau's investigation. Keurig Canada is also required to make changes to its recyclability claims and publish corrective notices.
- The Bureau is focused on "greenwashing" claims. In light of the Keurig Canada settlement and a recent Bureau news release, firms should be vigilant to avoid false, misleading, or unsupported environmental claims regarding their products, services, or businesses, more generally.
- The Bureau and Health Canada's Health Products and Food Branch issued a joint notice to stakeholders highlighting the importance of their continued collaboration to support Canadians' access to safe, effective, and affordable pharmaceutical and biologic medicines. Companies operating in the pharmaceutical sector should expect continued special scrutiny from the Bureau.

## Foreign Investment Update

- Certain financial thresholds for 2022 for pre-closing “net benefit” reviews under the *Investment Canada Act* have increased; specifically, the new thresholds are:
  - C\$1.711 billion in enterprise value for direct investments by private sector trade agreement investors (that are not state-owned enterprises (SOEs)) and by non-trade-agreement investors where the Canadian business was controlled by a trade agreement investor immediately before the investment;
  - C\$1.141 billion in enterprise value for direct investments by WTO investors (that are not SOEs) and for non-WTO investors where the Canadian business was controlled by a WTO investor immediately before the investment; and
  - C\$454 million in asset value for investments by WTO investors that are SOEs and for non-WTO investors that are SOEs where the Canadian business was controlled by a WTO investor immediately before the investment.
- The Director of Investments published his 2020-21 Annual Report on the Investment Canada Act. Points of note include: (i) a decrease in the number of applications for review and notifications filed relative to 2019-2020; (ii) 24 investments received notices of a potential national security review, with 11 undergoing reviews (up from the average of 5.2 per year between 2017 and 2020), four investments being cleared without conditions, four being withdrawn, two requiring divestitures and one being blocked; and (iii) an update to the Guidelines on the National Security Review of Investments to add sensitive technologies, sensitive personal data, critical minerals and investments by state-owned or state-influenced investors as factors that indicate potential national security concerns.

## Merger Breakdown

- As merger activity continues to surge, the Competition Bureau has signaled a more aggressive approach to merger review. In a speech last fall to the National Competition Law Section of the Canadian Bar Association, the Commissioner of Competition stressed that “Canada needs more competition” and that he views effective and rigorous merger review as a critical tool for realizing that objective. Recent cases (including the Commissioner’s challenge in December 2021 to GFL Environmental Inc.’s acquisition of Terrapure Environmental Inc.) confirm that the Bureau is prepared to back that statement up and that the merger reviews in Canada are likely going to take longer, be more expensive and be more likely to end up in court.
- The Bureau recently entered into a consent agreement with Karta Halten B.V. (Paper Excellence) and its affiliates, relating to Paper Excellence’s proposed acquisition of Domtar Corporation. Following its review of the proposed transaction, the Bureau concluded that the transaction was likely to result in a substantial lessening of competition in the purchase of wood fibre from the Thompson/Okanagan region of British Columbia where Paper Excellence currently owns a high concentration of pulp mills. To resolve these concerns, Paper Excellence has agreed to sell Domtar’s pulp mill in Kamloops, British Columbia, to an independent purchaser.

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- ProSoils Inc.'s purchase of the Blair's Family of Companies' retail crop input facility in Lipton, Saskatchewan has been approved by the Bureau. This purchase arises from a July 2021 consent agreement requiring, among other things, the sale of Blair's Lipton facility to resolve the Bureau's concerns related to a proposed joint venture between Blair's and Federated Co-operatives Limited.

## Back to Basics

- All acquisitions of control of Canadian businesses by non-Canadians are subject to the *Investment Canada Act* (ICA). For the purposes of the ICA, a non-Canadian includes any entity that is not controlled or beneficially owned by Canadians. Any non-Canadian that acquires control of a Canadian business or establishes a new Canadian business must file either a post-closing notification or a pre-closing application for review.

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**Cassels on Competition** is brought to you by the our Competition & Foreign Investment Group and is edited by Tegan O'Brien and Olivia Ells.

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