

# Cassels

## Cassels on Competition: May 2022

May 27, 2022

In this edition: Significant amendments to the *Competition Act* will soon become law, Competition Bureau seeks to block the Rogers/Shaw merger, and more...

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### News You Need to Know

- Significant amendments to the *Competition Act* will soon become law.
  - Among other important changes to Canadian competition law introduced by the government's *Budget Implementation Act* (BIA), the amendments will criminalize wage-fixing and no-poach agreements between unaffiliated employers, substantially increase fines for criminal conspiracy and administrative monetary penalties for abuse of dominance and deceptive marketing practices, broaden the scope of the abuse of dominance provision to include any conduct intended to have an adverse effect on competition, create a private right of access to the Competition Tribunal for parties substantially affected by an alleged abuse of dominance, and introduce an anti-avoidance provision extending the merger notification regime to transactions designed to avoid the application of that regime.
  - With the exception of the new provisions criminalizing wage-fixing and no-poach agreements, the amendments are expected to become law next month. The wage-fixing/no-poach provisions will only take effect one year from the date the BIA becomes law in order to give employers time to adapt to the new rules.
  - A notable implication of the criminalization of wage-fixing and no-poach agreements is that employers will now face the risk of class action damages claims under the *Competition Act*.

### Bureau Business

- The Competition Bureau is seeking to block the proposed Rogers/Shaw merger. According to the Bureau, its challenge to the proposed transaction is intended to “protect Canadians from higher prices, poorer service quality, and fewer choices, particularly in wireless services.” More particularly, the Bureau alleges that “removing Shaw as a competitor threatens to undo the significant progress it

has made introducing more competition into an already concentrated wireless services market, where Rogers, Bell, and Telus (the Big 3) serve approximately 87% of Canadian subscribers.” It also claims that “the merger would substantially prevent or lessen competition by: [i] eliminating an established, independent and low-priced competitor; [ii] preventing future competition for wireless services, including 5G, within and outside Shaw’s existing service area; and [iii] preventing competition in wireless services for business customers in Ontario, Alberta, and British Columbia.”

- The Bureau has closed two investigations into pharmaceutical patent litigation settlements.
- The Bureau has announced that, following an investigation under the abuse of dominance provision, Turo Inc. (a car-sharing platform) has amended its terms of service in Canada to remove a policy that prevented users from listing the same vehicle on other car sharing platforms at the same time it is listed on Turo’s platform.
- The Bureau has announced a settlement of its misleading weight loss claims investigation of NuvoCare and its founder, Ryan Foley. The Bureau found that the impugned weight loss claims were not supported by adequate and proper testing. Under the settlement, NuvoCare and Foley will pay \$100,000 in total penalties, change or remove the offending claims, and establish and maintain a corporate compliance program.
- The Bureau will be hosting the Competition and Green Growth Summit on September 20, 2022, to examine the interaction between competition law and policy and sustainability. Registration will open soon.

## Back to Basics

- The *Competition Act* requires that parties to proposed merger transactions which exceed prescribed thresholds (which vary, in part, depending on the type of transaction) notify the Competition Bureau in advance of closing and observe a 30-day waiting period or obtain a waiver. *For amalgamations (triangular and reverse triangular mergers)*, each of the following three thresholds have to be met: (a) the aggregate value of the assets in Canada that would be owned directly or indirectly by the continuing corporation *or* the value of the annual gross revenues from sales in or from Canada generated from those assets exceed C\$93 million; (b) the aggregate book value of the assets in Canada *or* the annual gross revenues from sales in, from or into Canada of each of at least two of the amalgamating corporations and their respective affiliates exceed C\$93 million; and (c) the aggregate value of the assets in Canada *or* the gross revenues from sales in, from or into Canada of the parties to the transaction and their respective affiliates exceed C\$400 million.