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Cassels on Competition: June 2022

June 24, 2022

In this edition: Significant *Competition Act* amendments now in effect, Rogers/Shaw merger update, Canada prohibits Canadian telecommunications service providers from deploying Huawei and ZTE, competition litigation updates from British Columbia and Ontario, and more…

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News You Need to Know

- Significant amendments to the Canadian *Competition Act* became law on June 23, 2022.
    - Among other important changes to Canadian competition law, the amendments 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 take immediate effect. The wage-fixing/no-poach provisions take effect in a year – on June 23, 2023 – in order to give employers time to adapt to the new rules.
- On May 30, 2022, the Commissioner of Competition entered into an interim consent agreement with Rogers and Shaw. The interim agreement prohibits the companies from closing their merger without agreement from the Commissioner or a decision from the Competition Tribunal on the Commissioner's application challenging the proposed transaction.
    - Cassels competition partner Michael Osborne recently joined BNN Bloomberg to discuss the Commissioner's bid to block the Rogers-Shaw deal.

Foreign Investment Update

- The Government of Canada has announced its intention to prohibit Canadian telecommunications service providers from deploying Huawei and ZTE equipment and managed services in their 4G and 5G networks. The announcement stresses the importance of security in wireless networks and highlights “serious concerns about suppliers such as Huawei and ZTE who could be compelled to comply with extrajudicial directions from foreign governments in ways that would conflict with Canadian laws or would be detrimental to Canadian interests.”
- Starting on August 2, 2022, non-Canadians investing in Canadian businesses will be able to make voluntary filings pursuant to amendments to the *Investment Canada Act*’s National Security Review of Investments Regulations. Foreign investors acquiring minority interests and making other investments in new or existing Canadian businesses that do not trigger a filing obligation under the ICA, will be able to file before closing to obtain a determination within 45 days as to whether their investment raises national security concerns. Where no filing is made, the government will have up to five years after closing (up from the current 45 days) to review the investment under the national security regime.

Bureau Business

- The Competition Bureau has published recommendations for increasing the availability and adoption of innovative digital health care services in Canada.
- The Commissioner of Competition recently delivered public remarks emphasizing the important role played by competition in the Canadian economy and discussing the steps being taken by the Bureau to promote and protect competition in Canada.
- The Commissioner has entered into a consent agreement with Neighbourly Pharmacy Inc. related to its proposed acquisition of Rubicon Pharmacies in Western Canada. Neighbourly and Rubicon operate the only two pharmacies in two small Saskatchewan towns. To resolve the Bureau’s concerns, Neighbourly has agreed to sell one of the two pharmacies in each town.
- The Bureau has approved Kruger Specialty Papers Holding L.P., an affiliate of Kruger Inc., as the purchaser of Paper Excellence’s pulp mill in Kamloops, British Columbia. The sale of the mill to an independent purchaser was required by the consent agreement relating to Paper Excellence’s acquisition of Domtar Corp.
- The Commissioner’s application against GFL Environmental Ltd. has been resolved through a consent agreement in respect of GFL’s acquisition of Terrapure Environmental Ltd. The agreement addresses the Bureau’s concerns about the prevention or lessening of competition in Western Canadian markets for industrial waste services and oil recycling services by requiring GFL to divest seven facilities in the relevant markets to a buyer acceptable to the Commissioner.
- The Bureau has launched a Collusion Risk Assessment Tool and is encouraging public and private sector procurement officers and purchasing agents to use the tool to help protect their processes from potential bid-rigging.

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Competition Litigation Developments

- The Supreme Court of British Columbia has held that the criminal conspiracy provision in section 45 of the *Competition Act* does not apply to vertical agreements. In its recently released decision in *Williams v. Audible Inc.*, the Court found that section 45 is intended only to criminalize a "narrow range of conduct," namely "agreements *between competitors* to fix prices, allocate markets, or restrict output, that constitute naked restraints that can only have negative effects."
- The Ontario Superior Court of Justice recently dismissed on the its merits a class action alleging misleading advertising contrary to section 52 of the *Competition Act*. The decision in *Rebuck v. Ford* is notable in confirming that representations that "compl[y] with federal government guidelines … cannot fairly or reasonably amount to a breach of federal competition law" and that the alleged false or misleading "general impression" conveyed by an impugned representation should be established by way of consumer focus group or survey or appropriate expert evidence, particularly where the alleged facial misrepresentation is not inherently obvious.

Back to Basics

- 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 under the *Investment Canada Act*. Determining whether an acquisition of control has occurred is a fact specific inquiry.
- "Control" of corporations is deemed ***not*** to occur unless 1/3 or more of voting shares are acquired (subject to the control in fact test for cultural businesses and state-owned enterprise acquisitions). Control is ***presumed*** to be acquired for acquisitions of between 1/3 and a majority of voting shares, but this presumption can be rebutted if there is no control in fact. Control is acquired where are majority of voting shares are acquired.
- An acquisition by a non-Canadian of all or substantially all of the assets used in carrying on a Canadian business also constitutes an acquisition of control.
