Cassels

Cassels on Competition: July 2022

July 27, 2022

A look at the new provision criminalizing wage-fixing and no-poach agreements, the Bureau investigation into labeled biologic drugs is closed, a competition litigation update from British Columbia, and more…

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News You Need to Know

- As discussed in last month's edition, on June 23, 2022, significant amendments to the Canadian *Competition Act* became law. In this and future editions of Cassels on Competition, we'll be examining those amendments in detail.
- This month, our focus is on the new provision criminalizing wage-fixing and no-poach agreements. Read our comments here.

Bureau Business

- The Competition Bureau has closed an investigation into potential anti-competitive harm from relabeled biologic drugs.
    - However, the Bureau indicates that it believes that competition could be harmed by such relabeling by making it less likely that patients will switch away from the original biologic drug, thereby reducing incentives for pharmaceutical companies to develop and market biosimilars. Biosimilars are highly similar versions of original biologic drugs that are often less expensive than the original biologics.
    - The Bureau cautions that "[i]n future, if it's found that a relabelled biologic is marketed in Canada and there is compelling evidence of harm to competition, the Bureau will investigate and take appropriate action. Of particular concern would be the introduction of relabelled biologics if they are accompanied by other practices that may raise barriers to entry and expansion for biosimilars."

- The Bureau has issued a report finding that there are significant barriers that prevent new

companies from entering the Canadian market for the supply of electronic medical record (EMR) systems with competitive and innovative new products.

- EMR systems are used by family doctors and other primary health care providers to store medical histories, lab results and other information.
- The Bureau recommends steps it says policymakers can take to increase competition.
- This is the first of three reports from the Bureau's digital health care market study.

Competition Litigation Update

- The Supreme Court of British Columbia (*Petty v Niantic Inc.*) has stayed *Competition Act* claims made in a proposed consumer class action based on the arbitration clause in the defendants' terms of service.
    - The Court held that the prospect that an arbitrator may lack the jurisdiction to award damages under the *Competition Act* was not a ground for finding the arbitration clause at issue to be void, inoperative, or incapable of performance. The Court also confirmed that the determination as to the arbitrator's jurisdiction to decide claims under the *Competition Act* should be left to the arbitrator in the first instance.

Back to Basics

- Any level of investment by a non-Canadian in a Canadian business may be prohibited outright or authorized with conditions under the national security regime of the *Investment Canada Act* (ICA).
    - Factors increasing the risk of a national security review include whether the investor is Russian, Chinese, or otherwise state-owned or -influenced, whether the investor has any direct or indirect Russian, Chinese, or other state-owned or -influenced shareholders, whether the Canadian business to be acquired or established is in a strategic sector (e.g., defence, critical minerals, etc.), and the physical location of the Canadian business (e.g., it is close to a military base).
    - In March 2021, the Minister responsible for administering the ICA issued Guidelines on the National Security Review of Investments.
