

Cassels on Competition: September/October 2022

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In this edition: Commissioner continues campaign for reform of Canadian merger regime, Rogers/Shaw update, Bureau says WestJet/Sunwing deal will hurt competition, competition litigation update, and more...

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News You Need to Know

- The Commissioner of Competition made public remarks at the Canadian Bar Association's Competition Law Fall Conference in which he continued his campaign for sweeping changes to the Canadian merger regime. In particular, the Commissioner argued that the substantive hurdles (including the efficiencies defence) that have to be overcome by the Commissioner in order to stop a proposed merger on either an interim or permanent basis are a "barrier to stopping anti-competitive mergers" and must be revisited (read: lowered).
- Rogers, Shaw, and the Commissioner of Competition are heading to a second mediation of the Commissioner's challenge to the proposed Rogers/Shaw merger. The second attempt to settle the case will take place against the backdrop of an announcement by Industry Minister François-Philippe Champagne of conditions under which he would allow Quebecor Inc. to acquire Shaw Communications Inc.'s wireless business and Quebecor's apparent acceptance of those conditions.
- The Competition Bureau has concluded that WestJet's proposed acquisition of Sunwing Vacations and Sunwing Airlines is likely to result in a substantial lessening or prevention of competition in the sale of vacation packages to Canadians. The Bureau's concerns are outlined in a report delivered to the Minister of Transport by the Commissioner of Competition. The report will inform Transport Canada's public interest review of the proposed transaction as it relates to national transportation. Transport Canada has until December 5, 2022, to complete its public interest assessment and provide it to the Minister.
- The Competition Bureau has published its new *Information Bulletin on Transparency*, a resource that explains the approach the Bureau takes in communicating with different groups of people during its investigations. The groups include those who are subject to an investigation, as well as the general public, complainants, and industry participants. Earlier this year, the Bureau invited interested parties

to provide feedback on a draft revised Bulletin. The feedback received was considered when finalizing the new Bulletin.

- The Competition Bureau will conduct a study of grocery store competition in Canada. The study will examine various issues with the goal of recommending measures that governments can take to help improve competition in the sector. The study will examine three main questions: (a) To what extent are higher grocery prices a result of changing competitive dynamics?; (b) What can we learn from steps that other countries have taken to increase competition in the sector?; and (c) How can governments lower barriers to entry and expansion to stimulate competition for consumers? Interested parties are invited to provide submissions to the Bureau on these questions and any other matters relevant to retail grocery competition in Canada. The deadline for submissions is December 16, 2022.

Bureau Business

- The Competition Bureau has published its Annual Report, highlighting its work in terms of competition enforcement (including enforcement in key sectors, merger reviews and proactive enforcement through intelligence-gathering) and competition promotion (including the Bureau's submission regarding amendments to the *Competition Act* and market study work).
- The Competition Bureau hosted the Competition and Green Growth Summit. The Summit featured three discussion panels, including an enforcers roundtable. Each panel explored tools and strategies available to governments and competition agencies in the transition to a greener economy.
 - The Commission of Competition delivered opening remarks about the role of competition law and policy in meeting commitments to the environment and sustainability. Fostering competition between businesses to provide more sustainable options and ensuring that consumers are equipped with accurate environmental claims about their practices and products were identified as two main points of intersection between competition enforcement practices and the goal of a more sustainable, eco-friendly future.??
- The Competition Bureau has announced that a fifth individual, a former regional director of engineering firm Genivar (now WSP Canada), has pled guilty as a result of the Bureau's investigation of bid-rigging on infrastructure contracts awarded by the City of Gatineau between 2004 and 2008. The bid-rigging targeted a total of 21 contracts and defrauded the municipality out of an estimated \$1.8 million. The former regional director was sentenced to pay a \$25,000 fine, in addition to a 15% surcharge on that amount. The previous four guilty pleas resulted in conditional sentences totalling five years and 11 months, as well as court-ordered community service totalling 260 hours.
- The Competition Bureau has approved Environmental 360 Solutions Ltd.'s purchase of seven facilities that supply industrial waste services and/or oil recycling services in certain regions across British Columbia, Alberta and Saskatchewan from GFL Environmental Inc. The sale was made pursuant to an April 2022 agreement between GFL and the Bureau intended to remedy the likely

substantial lessening of competition resulting from the acquisition of Terrapure Environmental Ltd.

- The Competition Bureau has published its Performance Measurement & Statistics Report 2021-2022 with updates on its activities for the period ending March 31, 2022. Highlights include:
 - the Bureau completed 135 merger reviews and of these 100% of non-complex merger reviews and 97% of complex merger reviews were completed within the Bureau's non-binding service standards;
 - the Bureau commenced 29 new non-merger enforcement cases and closed 44 ongoing non-merger enforcement cases; and
 - the top five (5) complaints received by the Bureau were: (i) false or misleading representations; (ii) deceptive telemarketing; (iii) abuse of dominance; (iv) false or misleading representation (electronic messages); and (v) sales above advertised prices.
- The Competition Bureau has published the second of three reports resulting from its Digital Health Care Market Study: *Improving health care through pro-competitive procurement policy*. This report examines current barriers in governmental procurement processes and recommends competition-enhancing policies that will foster innovation and improve access to digital health care services for Canadians. Highlights include:
 - identification of six barriers to competition for procurement in the digital health care market; namely: (i) fragmentation and complexity of the Canadian legal framework; (ii) strict demands in request for proposal (RFP) requirements; (iii) focus on price rather than value; (iv) culture of risk aversion; (v) lengthy procurement cycles; and (vi) overly prescriptive policies; and
 - three recommendations to governments across Canada to alleviate these barriers; specifically: (i) establishing a national innovation procurement centre of expertise; (ii) removing barriers that harm competition; and (iii) supporting innovation-friendly procurement processes.

Competition Litigation Update

- The Federal Court of Appeal (*Mohr v National Hockey League*) has upheld the decision of the Federal Court striking the plaintiff's statement of claim (and proposed class action) on the basis that the alleged inter-league, buy-side conspiracy with respect to the purchase or acquisition of players' services is beyond the ambit of both section 48 and section 45 of the *Competition Act*. Coincidentally, the decision comes in the wake of the Competition Bureau's announcement that it will not take enforcement action under section 48 as it is currently written.
- The Federal Court (*Difederico v Amazon.Com, Inc.*) has upheld the arbitration clause in Amazon's terms of use for its Canadian website, ordering that a proposed class action be arbitrated. The proposed class action alleges that Amazon's "fair pricing" policy amounts to price-fixing affecting all individuals or entities in Canada that purchased products on the website from June 2010 onwards. The Court found that arbitration would not deny the representative plaintiff access to justice, nor was the arbitration clause unconscionable due to alleged asymmetry in bargaining power because the

nature of the goods offered on Amazon could not be classified as important elements of everyday life that would make the representative plaintiff particularly dependent on or vulnerable to the company.

In Other News

- A 60-day consultation period has begun with respect to proposed amendments to the *Notifiable Transactions Regulations* (the NTR) under the *Competition Act* (the Act). The goal of the proposed amendments is to align the NTR with the recent amendments to the Act as a result of Bill-C-25. Among other things, the concept of affiliation under the Act was broadened to include new business structures. The Bill C-25 amendments also aligned the treatment of these new business structures with the treatment of corporations under the Act. Similar technical amendments are being proposed to the NTR in order to reflect the changes implemented by Bill C-25. Minor technical amendments to the NTR are also needed to harmonize the regulations with the Bank of Canada's current procedure for posting exchange rates. Interested parties may comment on the proposed amendments until November 30, 2022.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.