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Cassels on Competition: November 2022

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In this edition: Comprehensive Review of *Competition Act* Launched, New Policy Regarding Foreign Investments in Critical Minerals Policy in Effect, Decision in P&H Merger Case (Finally) Issued, and more…

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News You Need to Know

- The Canadian government has launched a comprehensive review of the *Competition Act* (the Act). The targeted amendments announced in the 2022 federal budget were a preliminary phase in modernizing the Canadian competition regime. The review and associated public consultations announced on November 17 represents the start of the promised, comprehensive phase of the amendment process. As outlined in a white paper issued on the same day, the areas where the government believes reforms may be warranted include the following:
    - better addressing **potentially harmful mergers** that currently escape scrutiny or remedy, including through the operation of the efficiencies defence, in a timely fashion;
    - ensuring the necessary elements are in place to remedy unilateral forms of anti-competitive conduct, such as **abuse of a dominant position**, notably with regard to large online platforms;
    - more broadly recognizing and penalizing coordinated action between businesses that is harmful to competition, such as **competitor collaborations**;
    - better considering **effects on labour** throughout the Act;
    - taking into account the implications of new technology and business practices for **deceptive marketing** provisions;
    - bolstering the effectiveness of the **Competition Bureau's powers** in today's economy, including the limits on its ability to make binding decisions or seek information within and outside enforcement; and
    - potentially expanding the scope of **private recourse** and ensuring the effective operation of the Competition Tribunal.??

Those wishing to participate in the consultation process can make written submissions online until February

27, 2023.

- The Canadian government has issued a new policy under the *Investment Canada Act* (ICA) regarding foreign investments from state-owned enterprises (SOEs) and foreign-influenced private investors in critical minerals.
    - Effective October 28, 2022, investments by SOEs and foreign-influenced private investors in Canada's critical minerals sectors and at any stage of the critical minerals value chain (e.g., exploration, development and production, resource processing and refining, etc.) are subject to special rules under the ICA; specifically:
        - an acquisition of control of Canadian businesses involved in critical minerals by a foreign SOE will only be approved as being of "net benefit to Canada" on an exceptional basis; and
        - the direct or indirect participation of a foreign SOE or foreign-influenced private investor (as defined below) in *any* level of investment in a Canadian business involving critical minerals will support a finding by the Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.
    - The new policy is broad and places broad discretion in the hands of the Minister:
        - "Canadian businesses" for purposes of the ICA and the policy do not need to be Canadian-owned and do not need to have their critical minerals operations based in Canada. To be a "Canadian business" a business need only have a place of business in Canada, persons employed or self-employed (i.e., independent contractors) in connection with the business and assets (of any kind) in Canada used in carrying on the business.
        - An SOE includes not only an enterprise that is owned or controlled directly or indirectly by a foreign government, but also an entity that is "influenced directly or indirectly" by a foreign government. The ICA also provides that the Minister may deem an entity to be controlled in fact by an SOE; and
        - Foreign-influenced investors are private investors closely tied to, subject to influence from or who could be compelled to comply with extrajudicial direction from foreign governments, particularly non-likeminded governments (read: China, Russia and Iran); and
        - The policy applies to critical minerals-related investments regardless of value, whether direct or indirect, whether controlling or non-controlling, and (as noted above) across all stages of the value chain (e.g., exploration, development and production, resource processing and refining, etc.).
    - Shortly after the new policy was announced, the Canadian government ordered the divestiture of three separate minority investments in Canadian critical mineral companies (all of which were involved in, among other things, lithium mining activities):
        - Sinomine (Hong Kong) Rare Metals Resources Co., Limited is required to divest itself

of its investment in Power Metals Corp.;
        - Chengze Lithium International Limited is required to divest itself of its investment in Lithium Chile Inc.; and
        - Zangge Mining Investment (Chengdu) Co., Ltd. is required to divest itself of its investment in the Argentine subsidiary of Ultra Lithium Inc.
    - Some of the Canadian businesses had critical mineral assets within Canada, while others had assets exclusively outside of Canada.
- The Competition Tribunal has dismissed the Commissioner of Competition's challenge to the Parrish & Heimbecker (P&H)/Louis Dreyfus (LD) transaction.
    - This is only the second decision issued by the Tribunal in a contested merger proceeding since the Canadian merger regime was modernized in 2009.
    - The Commissioner claimed that by acquiring LD's grain elevator in Virden, Manitoba (Virden Elevator) (the Acquisition), P&H caused or was likely to cause a substantial reduction of competition in the supply of grain handling services (GHS) for wheat and canola for those farms that benefited from competition between the Virden Elevator and the nearby elevator owned by P&H and located in Moosomin, Saskatchewan (Moosomin Elevator).
    - The Commissioner failed to establish any element of the test for prohibiting a merger under section 92 of the *Competition Act*. More particularly, the Commissioner's positions as to product market, geographic market and anti-competitive effects were all rejected by the Tribunal; specifically:
        - The Tribunal rejected the Commissioner's proposed product market (i.e., the sale of GHS), finding that it was "not grounded in commercial reality and in the evidence". The Tribunal instead adopted P&H's proposed product market, namely, the purchase of wheat and canola by P&H.
        - The Tribunal also rejected the Commissioner's proposed geographic market, which was alleged by him to consist of just the Virden and Moosomin Elevators. Again, the Tribunal sided with P&H, holding that the relevant geographic market for the purchase of wheat was more likely than not to comprise *at least* seven Elevators, including the Virden and Moosomin Elevators. As to the relevant geographic market for the purchase of canola, it included *at least* 10 Elevators as well as four crushing plants.
        - Finally, the Tribunal found that the Commissioner had not established that the Acquisition lessened competition substantially in any relevant market or was likely to do so in the future. The Tribunal concluded that the Acquisition did not materially reduce, and was not likely to reduce materially, the degree of price or non-price competition in the purchase of wheat and canola in the relevant geographic markets, relative to the degree that would likely have existed in the absence of the merger. In particular, it held that the evidence showed that the price effects of the Acquisition were immaterial, that several effective remaining competitors remained after the Acquisition, and that post-merger market shares were below the 35% safe harbour

threshold. The Tribunal determined that the Acquisition caused some lessening of competition for the purchase of wheat, but the evidence did not allow it to conclude that such lessening reached the substantiality level required by section 92.

    - Davit Akman, the Chair of our Competition & Foreign Investment Group, was co-lead counsel to P&H with respect to both the merger notification/review process and the Commissioner's subsequent challenge.
- The Competition Bureau has rescinded its temporary guidance on competitor collaborations issued in response efforts during the COVID-19 pandemic. According to the Bureau, the exceptional conditions and challenges that warranted the temporary guidance (and which called for the rapid establishment of business collaborations to ensure the supply of products and services critical to Canadians) are no longer applicable.

Competition Litigation Update

- The British Columbia Supreme Court (*Ewert v Nippon Yusen Kabushiki Kaisha*) has dismissed an application by certain defendants in a certified class action proceeding seeking orders facilitating a Single Common Issues Proceeding (SCIP) before that Court. The SCIP application sought to consolidate the common issues related to alleged breaches of the criminal conspiracy provision in section 45 of the *Competition Act* for three closely-related class actions commenced in British Columbia, Ontario, and Quebec into a single class proceeding covering the entire country. In response, the plaintiffs proposed to proceed with a SCIP in Quebec. In dismissing the application, the Court concluded that it was "satisfied that the plaintiffs should presumptively be able to choose the forum in which this litigation proceeds [and that] [t]he defendants have not proven the existence of a clearly more appropriate alternative, nor have they demonstrated that another forum enjoys a significant advantage over the plaintiffs' selected forum [i.e., Quebec]".
- The Ontario Court of Appeal (*Johnson v Ontario*) has established the test for when a class member will be permitted to opt-out of a class action after the opt-out deadline has passed. The test stated by the Court of appeal requires the party seeking to opt-out late to show that: (1) their neglect in complying with the court-imposed deadline to opt-out is excusable; and (2) the extension would not result in prejudice to the class, the defendant, or the administration of justice.
