

## Cassels on Competition: February 2023

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In this edition: Merger notification and foreign investment review thresholds for 2023, Competition Bureau issues draft enforcement guidelines regarding new wage-fixing and no-poach provisions, Federal Court of Appeal dismisses Commissioner's challenge to the Rogers/Shaw merger, and more...

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### News You Need to Know

- The merger notification thresholds under the *Competition Act* are unchanged for 2023. The transaction size threshold continues to be **C\$93 million**, while the party size threshold remains **C\$400 million**.
- The thresholds for pre-closing “net benefit” reviews under the *Investment Canada Act* of direct acquisitions of control of Canadian businesses (that are not cultural businesses) have increased for 2023.
  - **C\$1.931 billion** (from C\$1.711 billion) in enterprise value of the Canadian business for trade agreement investors, which includes investors from the US, EU, and Japan, among others;
  - **C\$1.287 billion** (from C\$1.141 billion) in enterprise value of the Canadian business for investors from countries that are members of the World Trade Organization (WTO); and
  - **C\$512 million** (from C\$454 million) in asset value of the Canadian business for state-owned or influenced enterprises from WTO countries.
- The Minister of Innovation, Science and Economic Development Canada (ISED) has tabled the *National Security Review of Investments Modernization Act* - a bill to amend the national security-related provisions of the *Investment Canada Act*. In announcing the proposed amendments, ISED described the new bill as the most significant update of the *Investment Canada Act* since the introduction of the national security review process in 2009. The proposed amendments include a new pre-implementation filing requirement for certain investments in specific sectors, new and increased penalties for non-compliance as well as changes to the national security review process.
- The Competition Bureau has issued draft enforcement guidelines regarding the new wage-fixing and no-poach provisions which come into effect on June 23, 2023. The new wage-fixing and no-poach provisions will prohibit (i) agreements to fix, maintain, decrease, or control wages, salaries, and other

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terms and conditions of employment; and (ii) agreements between unaffiliated employers to not solicit or hire each other's employees. Interested parties have until March 17, 2023 (extended from March 3) to submit comments to the Bureau. See our comments here on what the new provisions and the draft guidelines may mean for franchise businesses.

- The Federal Court of Appeal has dismissed the Commissioner's challenge to the Rogers/Shaw merger. The appeal court dismissed with Commissioner's appeal from the bench, and without calling on Rogers or Shaw to make oral submissions. The Commissioner has announced that he will not be appealing to the Supreme Court of Canada.

## Bureau Business

- The Competition Bureau has entered into a consent agreement with Domtar Corporation to address the Bureau's concerns with Domtar's acquisition of Resolute Forest Products Inc. The Bureau concluded that the proposed acquisition would likely lessen competition substantially in the supply of northern bleached softwood kraft pulp in Eastern and Central Canada and in the purchase of wood fibre from private lands in northwestern Ontario. To secure Bureau approval, Domtar agreed to sell a pulp mill in Dryden and a pulp and paper mill in Thunder Bay to two independent purchasers approved by the Commissioner of Competition.
- The Public Prosecution Service of Canada has filed a preferred indictment against five contractors in Brandon, Manitoba. The indictment alleges that the contractors engaged in a conspiracy by manipulating at least 89 contracts awarded for refurbishment services for social housing units, with a total value of approximately C\$4.5 million.
- The Competition Bureau has published the third and final report resulting from its Digital Health Care Market Study. The final report makes three recommendations to Canadian governments and policymakers to enable healthcare providers to take advantage of the forces of competition:
  - review existing healthcare provider payment models to support the appropriate use of digital healthcare;
  - implement licensing frameworks that allow providers, where appropriate, to practice beyond provincial and territorial borders to improve digital health care delivery; and
  - review and modernize policies to facilitate the effective uptake of digital health care.
- The Competition Bureau has published a summary of its 2022 Competition and Green Growth Summit which was held in Ottawa on September 20, 2022.

## Competition Litigation Developments

- The Ontario Superior Court of Justice has dismissed the motion to certify a proposed national class action in *Hoy v Expedia Group Inc* (2022 ONSC 6650). The plaintiffs alleged that the defendants made false or misleading representations by presenting themselves as providing objective non-

biased search results of the best available accommodation and bargains but did not actually do so, contrary to the false or misleading representations provision in section 52 of the *Competition Act*. The Court rejected the *Competition Act* claim for four principal reasons: (i) the plaintiffs sought restitutionary remedies or the remedy of disgorgement, neither of which are available under the *Competition Act*; (ii) the plaintiffs neither pleaded nor planned to prove reliance which is a requisite for a claim under section 52 of the *Competition Act*; (iii) the *Competition Act* does not impose a general duty of disclosure, such that the representations by omission alleged by the plaintiffs were not actionable under section 52 of the *Competition Act*, even if they might be actionable under consumer protection legislation; and (iv) the plaintiffs did not plead any material facts in support of an allegation that the defendants made their alleged misrepresentations knowingly or recklessly, which is required to plead a valid cause of action for a breach of section 52 of the *Competition Act*.

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