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Cassels on Competition: March/April 2023

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In this edition: A merger win for the Competition Bureau, the Bureau publishes recommendations to the Government of Canada for amending the *Competition Act*, competition litigation update and more…

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News You Need to Know

- The Competition Tribunal has granted in part an application brought by the Commissioner of Competition in *Commissioner of Competition v Secure Energy Services Inc.* challenging Secure Energy Services Inc.'s acquisition of Tervita Corporation. The public version of the Tribunal's reasons are available here. The Tribunal found that the impugned transaction substantially lessened competition in 136 of 143 relevant markets for the supply of three different types of oilfield waste disposal services in Western Canada at issue in the Commissioner's application and that the divestiture of 29 facilities (rather than 41, as the Commissioner had argued) previously owned by Tervita would suffice to restore competition. The Tribunal also concluded that Secure did not meet the requirements for the efficiencies defence pursuant to section 96 of the *Competition Act*. Secure Energy has announced that it intends to appeal the Tribunal's decision.
- The Competition Bureau has published its recommendations to the Government of Canada for improving competition law in Canada. The Bureau's submission was delivered in response to the federal government's ongoing consultation on the future of competition policy and includes 50 recommendations which the Bureau describes as being intended to "modernize and strengthen" the *Competition Act*. The recommended changes are sweeping and fundamental. With respect to mergers, for example, there are numerous recommendations aimed at making it easier for the Bureau to challenge and block proposed transactions it considers to be anti-competitive; specifically, the Bureau argues that
    - the *Competition Act* should be amended to require the production of "privilege and confidentiality logs" for merger notification filings and supplementary information request (SIR) responses;
    - the Commissioner of Competition's SIR information gathering powers should be expanded to include oral examinations under oath or solemn affirmation, "together with appropriate

extensions to statutory timeframes";
- the limitation period for challenging both notifiable and non-notifiable consummated mergers should be extended from 1 year to 3 years;
- the *Competition Act* should be amended to provide for *automatic* short-term interim relief until an application for an injunction blocking a proposed transaction is heard and the Commissioner's request for an injunction pending the final determination of his merger challenge should be granted if he can show a "serious issue to be tried" and that the transaction would likely cause irreparable harm if it was allowed to proceed. In other words, the Commissioner would no longer have to satisfy the third prong of the traditional injunction test, namely that the balance of convenience – which weighs the harm to competition of not granting the injunction against the harm to the parties of granting the injunction – favours enjoining the parties from closing their transaction;
- structural presumptions should be enacted to "simplify" merger cases by shifting the burden onto merging parties to prove why a merger that significantly increases concentration would *not* substantially lessen or prevent competition;
- standards for evaluating a substantial lessening or prevention of competition – the competitive effects threshold in merger and abuse of dominance cases – should be "recalibrated" (read: lowered);
- the *Competition Act* should be amended to provide that the Tribunal's remedial order in merger cases shall restore competition to the level that would have prevailed but for the merger;
- in the light of the Commissioner's recent Rogers/Shaw debacle, (i) the Commissioner should have sufficient time and information to evaluate merger remedy proposals prior to closing; (ii) the Tribunal's jurisdiction should be limited to analysing the competitive effects of the transaction as it existed when it was challenged by the Commissioner with parties bearing the burden of proving the effectiveness of any subsequent remedies or transaction modifications; and (iii) behavioural commitments offered by parties should not be relied upon by the Tribunal to conclude that a remedy is effective absent the Commissioner's consent; and
- the efficiencies defence should be repealed.

Bureau Business

- The Competition Bureau has obtained a court order requiring the Quebec Professional Association for Real Estate Brokers (QPAREB) and its subsidiary, Société Centris, to produce records and written information for the Bureau's investigation of competition in the Quebec real estate services market. The Bureau's investigation seeks to determine whether the QPAREB has engaged in certain practices that harm competition in the real estate brokerage services market or that prevent the development of innovative online brokerage services in Quebec, contrary to the abuse of

dominance provision of the *Competition Act*.

- The Competition Bureau has reached an agreement with SIKA AG to resolve the Bureau's concerns relating to SIKA's acquisition of MBCC Group, which the Bureau had concluded would likely lessen competition substantially in the supply of admixture systems in Canada. Pursuant to the agreement, Sika has agreed to sell certain MBCC Group admixture production plants and research and development centres in Canada, the US, and Germany to an independent purchaser to be approved by the Commissioner of Competition. The agreement is a part of a broader international remedy under which Sika has agreed to sell admixture systems and construction systems businesses in Europe, Australia, and New Zealand.
- The Competition Bureau has entered into a consent agreement with Isologic Innovative Radiopharmaceuticals Inc. to address the Bureau's concerns with its contracting practices. The Bureau had concluded that those practices contravened the abuse of dominance provision in section 79 of the *Competition Act* by requiring certain customers to purchase some products exclusively from Isologic. Pursuant to the settlement, Isologic agreed to cease using certain terms in its contracts, including exclusivity clauses, and to include in its multi-year contracts a term permitting customers to terminate the contract prior to its expiration.
- The Competition Bureau has launched a new Compliance Portal. The Portal is aimed at helping individuals and businesses adhere to Canadian competition and labelling laws. It includes case studies to demonstrate compliance and help users understand the benefits of a compliance program. The Bureau is also accepting feedback on the form and substance of the Portal which can be submitted online.
- Engineering firm BPR-Infrastructure Inc. (BPR) has been ordered pursuant to a settlement with the Public Prosecution Service of Canada to pay $485,000 for bid-rigging relating to consulting engineering services for municipal infrastructure contracts in Quebec. The settlement ends the Competition Bureau's investigation of the company's role in a bid-rigging scheme that targeted municipal infrastructure contracts in Québec City and Montreal between 2002 and 2011.

Competition Litigation Update

- The Court of Appeal for Ontario has dismissed an appeal from an order granting Ford summary judgment in respect of certified class proceeding in *Rebuck v Ford Motor Company* (2023 ONCA 121). The class action related to fuel consumption estimates affixed to Ford vehicles and repeated in marketing produced which allegedly breached the misleading advertising provisions in section 52 of *Competition Act* and in provincial consumer protection legislation. In rejecting the appeal, the Court of Appeal found that the motion judge had applied the appropriate "objective test" under section 52 to determine whether consumers would be deceived or misled. The appeals court also found that Ford's marketing materials were not likely to mislead a "credulous and inexperienced" consumer, and that there had been no deceptive non-disclosure by Ford.

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