Cassels

Cassels on Competition: August 2023

August 31, 2023

In this edition: Commissioner of Competition ordered to pay millions in costs to Rogers and Shaw, Competition Bureau publishes its Performance Measurement & Statistics Report, competition litigation update, and more…

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News You Need to Know

- The Commissioner of Competition has been ordered to pay over $12.96 million (plus applicable taxes) in costs to Rogers and Shaw in connection with the Commissioner's failed challenge to the Rogers-Shaw merger. The costs order is a fitting end to what was, in the words of the Federal Court of Appeal, "far from a close case." The costs order should be exhibit A (together with the findings by the Competition Tribunal – which the Court of Appeal said were "unshakeable" - that the transaction would not likely prevent or lessen competition substantially and "in some key aspects [would] actually promote competition") in rejecting the Commissioner's recommendation in the context of the federal government's consideration of potential amendments to the *Competition Act* that he be immunized from adverse cost awards in litigation matters.
- The Federal Court of Appeal of Canada has dismissed an appeal by Secure Energy Services of a Competition Tribunal decision which ordered Secure to sell 29 (of 41) facilities in order to resolve ongoing harm to competition in western Canada following Secure's merger with Tervita Corporation. Importantly, in light repeated (and unsupported) claims by the Commissioner of Competition and others that the efficiencies defence in section 96 of the *Competition Act* "permits anti-competitive mergers that are harmful to Canadians," the Commissioner prevailed despite Secure's reliance on that defence. (The defence allows otherwise anticompetitive mergers to proceed if the merging parties can prove that their efficiency gains are greater than and offset the anticompetitive effects of the merger *and would not likely be attained if the Tribunal issued a (full or partial) divestiture order*.) In affirming the Tribunal's conclusion that Secure had failed to establish the efficiencies defence, the appeal decision is also notable in confirming that in determining whether the merging parties have succeeded in making out the defence the Tribunal is to weigh the alleged gains in efficiency brought about by the proposed transaction against all of the anticompetitive effects of the proposed merger, including in markets that would not affected by the Tribunal's divestiture order. As Secure protested

(to no avail in the Court of Appeal), this creates an asymmetry – which may be decisive in certain cases – between the Commissioner and the merging parties; while the merging parties cannot rely on efficiencies in markets not affected by the divestiture order (because those efficiencies would not be lost as a result of a divestiture order), the Commissioner can rely on anticompetitive effects in those markets.

Bureau Business

- The Competition Bureau has published its Performance Measurement & Statistics Report for the financial year ending March 31, 2023. Highlights include:
    - the Bureau completed 208 merger reviews of these 98.50% were non-complex merger reviews and 92% of complex merger reviews were completed within the Bureau's non-binding service standards (i.e., 14 calendar days for non-complex transactions and 45 calendar days for complex transactions);
    - on average, the Bureau took 10.06 days to review non-complex mergers and 38.75 days to review complex mergers;
    - the Bureau commenced 57 new non-merger enforcement cases and closed 47 ongoing non-merger enforcement cases;
    - the Bureau's enforcement cases (merger and non-merger) were primarily in the areas of infrastructure, digital economy, health, finance, and telecommunications; and
    - the top five (5) complaints received by the Bureau were: (i) false or misleading representations; (ii) false or misleading representation – electronic message; (iii) deceptive telemarketing; (iv) abuse of dominance; and (v) sale above advertised price.
- The Bureau has registered a consent agreement with the Competition Tribunal relating to Shell Canada Limited's proposed acquisition of Sobeys Capital Incorporated's retail gas stations in western Canada. To resolve the Bureau's concerns that the proposed transaction would substantially reduce or prevent competition in Brooks, Alberta, Fort St. John, British Columbia and Mission, British Columbia, Shell has agreed to divest assets in each of those markets to a buyer (or buyers) to be approved by the Commissioner of Competition.
- The Bureau has approved Dryden Fibre Canada, ULC's purchase of Domtar's pulp mill in Dryden and Atlas Holdings LLC's purchase of Domtar's pulp and paper mill in Thunder Bay. These purchases arise from a December 2022 consent agreement requiring the sale by Domtar of the Dryden and Thunder Bay mills to resolve the Bureau's concerns relating to Domtar's acquisition of Resolute Forest Products Inc.
- Transport Canada has issued guidelines regarding its review process for proposed mergers and acquisitions involving a transportation undertaking subject to a public interest review under sections 53.1 to 53.6 of the *Canada Transportation Act* (CTA). Pursuant to those provisions, pre-closing approval under the CTA is required for proposed transactions involving a "federal transportation undertaking" that are notifiable under the *Competition Act*. The new guidelines outline the factors

that may be considered by the Minister of Transport to determine whether proposed transactions raise public interest issues in relation to national transportation, the information that should be included in any notice to the Minister of Transport and the process pertaining to a notice filed under section 53.1 of the CTA.

- Two shipping companies have pleaded guilty and were fined $1.5 million and $460,000, respectively, for their role in an international conspiracy that reduced competition for the shipment of vehicles to Canada.

Competition Litigation Update

- In *Energizer Brands LLC v Gillette Company*, the Federal Court of Canada rejected Energizer's allegation that Duracell's comparative advertising claims contravened the misleading advertising provision in section 52 of the *Competition Act*. Our Competition and IP colleagues, Jennifer McKenzie, Mark Davis and Steven Henderson, provide an excellent and informative comment on the case here.
- In *Live Nation Entertainment Inc v Gomel*, the British Columbia Court of Appeal remitted misleading advertising claims against Tickemaster under section 52 of the *Competition Act* to the certification motions judge for reconsideration. The proposed class against alleges that Ticketmaster's Terms of Use and Purchase Policy contain misrepresentations that have "distorted" and caused a "general inflationary effect" in the secondary market, causing widespread loss to secondary market ticket purchasers (including those who purchase tickets from Ticketmaster's competitors) and significant financial gain to Ticketmaster. At certification, the motions judge had declined to certify the *Competition Act* claims on the basis that the plaintiff had failed to adequately plead detrimental reliance on the alleged misrepresentations, with the result that there was nothing to show or support the causal link between the alleged misrepresentations and harm to the plaintiff that is a condition precedent to liability under the misleading advertising provision in section 52. The Court of Appeal disagreed that a plaintiff is always required to plead and prove detrimental reliance, holding that "if there is an alternative means of establishing the causal link required to make out a [misleading advertising] claim […] a plaintiff need not plead and prove detrimental reliance. The outcome will depend on the circumstances and the nature of the claim."
- In *Lilleyman v. Bumble Bee Foods LLC* (2023 ONSC 4408), the Ontario Superior Court of Justice dismissed a proposed price fixing class action alleging a conspiracy to fix the price of canned tuna in Canada. The decision is notable for at least the following reasons:
    - First, it confirms that a proposed representative plaintiff is "obliged at least to show that there is some evidentiary foundation to conclude that the alleged conspiracy with attendant harm to the Class Members could or might have occurred in Canada". The Court found that there was no basis in fact for the existence of the alleged conspiracy;
    - Second, it applies well-settled rules of pleading, which have too often been given mere lip service in the Canadian competition class action jurisprudence. In applying those rules, the

Court found that there were at least fourteen substantive pleading deficiencies that were ultimately fatal to the plaintiff's request for certification; and

- Third, it meaningfully applies the Supreme Court of Canada's direction that certification is meant to be a meaningful screening device. For example, with respect to the plaintiff's expert's evidence, the Court concluded that "[a]lthough [the plaintiff's expert's] report appears theoretically sound, she relies on inadequate, insufficient, unreliable, unsubstantiated, and unreliable data. The report contains material factual errors and false assumptions that make her application of economic principles to reach an opinion unsound and incorrect."
