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OUTLOOK SERIES 2021
Competition/Antitrust & Foreign Investment

2021 Competition Law and Foreign Investment

Trends to Watch

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Prepared by the Competition/Antitrust & Foreign Investment Group at McCarthy Tétrault.

2021 Competition Law and Foreign Investment Trends To Watch

This publication reviews the key developments in Canada during 2020, and reflects on their significance for 2021 and beyond.

First, like many other jurisdictions, the Competition Bureau (the "**Bureau**") continues to prioritize the digital economy, although without any current plans to reform its legislative mandate. The Bureau continues to invest in its intelligence gathering function across all areas of enforcement, stepping up resources in mergers, cartels and unilateral conduct in response to increasing pressure to sift through larger volumes of data more efficiently. Second, while cartel enforcement is focused on domestic (primarily bid-rigging) cases in light of the global slow-down in international cartel enforcement, the Bureau's active deceptive marketing practices case-load is showing no sign of slowing down.

Like many other jurisdictions, the Competition Bureau continues to prioritize the digital economy, although without any current plans to reform its legislative mandate.

Finally, the prevailing landscape has undoubtedly been shaped by the impact of the COVID-19 pandemic, which has driven procedural complications for parties undergoing merger review, caused the Bureau to provide guidance on competitor collaborations specifically addressing the pandemic's disruptive effect, and potentially has had the greatest impact on national security screening under the *Investment Canada Act*. In the latter case, this may represent a more permanent hardening of enforcement stance even after the worst of the pandemic is over. Domestic stakeholders, foreign investors and their respective advisors need to be aware of these developments and their implications.

Investment Canada Act – Increased Risk of National Security Review

IMPACT OF COVID-19

The pandemic triggered a wave of reform around the globe with respect to direct foreign investment, as governments attempted to secure their economies from unprecedented fallout and protect their industries from "opportunistic acquisitions". In Canada, the government adopted measures to subject foreign investment to increased scrutiny under the *Investment Canada Act* ("**ICA**"), most notably under the ICA's national security regime.

Unlike certain other jurisdictions, the Canadian government did not – in response to the pandemic – lower the financial thresholds allowing it to review acquisitions of Canadian businesses by foreign investors to determine whether such investments are of "net benefit to Canada". However, last spring **the government introduced a COVID-19 policy that provides for enhanced scrutiny of all investments made by state-owned investors, and investments by any foreigner related**

to public health or the supply of critical goods and services to Canadians or the government. Although the policy reiterates that foreign investment is "essential in ensuring that Canadian businesses are able to invest in innovation and to compete in the global economy", there has been a cognizable increase in the number of transactions subjected to national security review measures since the pandemic commenced. By way of example, in late December the Canadian government blocked the proposed acquisition of Canadian gold-mining company TMAC Resources by Shandong Gold on national security grounds.

In addition to this new policy, last summer, pursuant to the *Time Limits and Other Periods Act (COVID-19)*, a Ministerial Order was issued that temporarily extended certain periods relating to the national security review process under the ICA. As a result of this Order, until the end of 2020, the government had more time to exercise its national security review powers. The Ministerial Order was not renewed for 2021 and the shorter statutory national security timelines will therefore apply to transactions that will be notified going forward.

TOP TRENDS TO WATCH

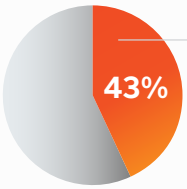
The following key 2020 trends in foreign investment review are expected to continue in 2021:

- **Limited number of "net benefit" reviews:** The number of transactions subject to a "net benefit review" and approval has been declining precipitously since 2015 when the ICA was amended to introduce higher enterprise value thresholds. Although the 2021 review thresholds (currently CAD1.565 billion in enterprise value for private sector trade agreement investors, and CAD1.043 billion in enterprise value for private sector WTO investors) slightly decreased from 2020, the number of net benefit reviews will continue to be limited.
- **Increased number of national security reviews:** While there have been fewer transactions subject to net benefit reviews, there has been an uptick in the use of national security powers. **The seven national security reviews ordered in the most recent fiscal year for which statistics are available make up nearly one-third of the national security reviews ordered since the national security provisions were added to the ICA in 2009. Although published figures for 2019-2020 are not yet available, this trend is expected to continue. Accordingly, the potential risk of national security review should be evaluated on every transaction, especially for state-owned investors which are subject to enhanced scrutiny under the government's COVID-19 policy.**
- **Implications for transaction structures and agreements:** The increased risk of enhanced scrutiny under the COVID-19 policy raises a number of strategic and timing considerations for transaction agreements, such as the use of exempt structures (e.g., debt investments) and, where a review is expected, contractual protections (e.g., through covenants or reverse termination fees).

M&A INVOLVING PUBLICLY-LISTED CANADIAN TARGETS

Of the largest 30 transactions involving publicly listed Canadian targets between January and November 2020, 13 included a representation that the purchaser was "Canadian" for ICA purposes, implying that, at most, 17 of the transactions involved a non-Canadian purchaser. Of these 17 transactions, **five contained an ICA closing condition, including several that required the expiry of the jurisdictional period for a national security review in order to be satisfied**. Within these five agreements, it was also common for the parties to set out the parameters of any remedies to be offered to obtain approval (3 out of 5 agreements), and in all cases imposed a "commercially reasonable efforts" obligation on the purchaser to satisfy the ICA condition.

Investment Canada Act



13 agreements out of 30 (43%) included a representation that the purchaser was Canadian within the meaning of the *Investment Canada Act*

5 out of 17 agreements involving a non-Canadian buyer contained an ICA closing condition

Of the five agreements with a closing condition:

3 set out parameters of any remedies to be offered

5 imposed a "commercially reasonable efforts" obligation on the purchaser

Competition Policy: Strategic Direction in the Digital Economy

There continues to be a healthy debate in the global competition community around the underlying purpose of competition law, with the potential to expand its philosophical remit beyond strict consumer welfare objectives. The debate also turns on what (if any) legislative changes should be made in order to equip competition agencies with the means to identify and enforce against anti-competitive conduct in the digital economy. Within this environment, the Bureau has largely committed to undertake enforcement using the tools already available to it.

The Bureau sees merit in increasing the efficiency and capacity of the tools it uses to gather intelligence and to review evidence

Without question, the **digital economy remains a key strategic priority for the Bureau**. In February 2020, the Bureau published a *Strategic Vision for 2020-2024*, emphasizing its focus on protecting consumers, which now almost universally participate in digital marketplaces. Key to this strategy is tougher and more timely enforcement – using existing tools and developing evidence gathering methods – to identify and address problematic conduct. Like other agencies, the Bureau has acknowledged that enforcement proceedings take time, but has declared itself willing to seek interim injunctive relief from the Competition Tribunal ("**Tribunal**") while an investigation is ongoing.

Similarly**, the Bureau sees merit in increasing the efficiency and capacity of the tools it uses to gather intelligence and to review evidence**. Digital markets produce vast quantities of data and the Bureau is seeking to ramp up its use of algorithms, AI and other technologies to drive a more efficient investigative process. Having appointed a Chief Digital Enforcement Officer in 2019, the Bureau moved several other initiatives forward in 2020, including the formation of a Monopolistic Practice Intelligence Unit to act as the Bureau's eyes and ears in its search for potentially problematic abuse of dominance and other unilateral conduct. Undoubtedly, this aims to improve the Bureau's detection methods in the digital economy.

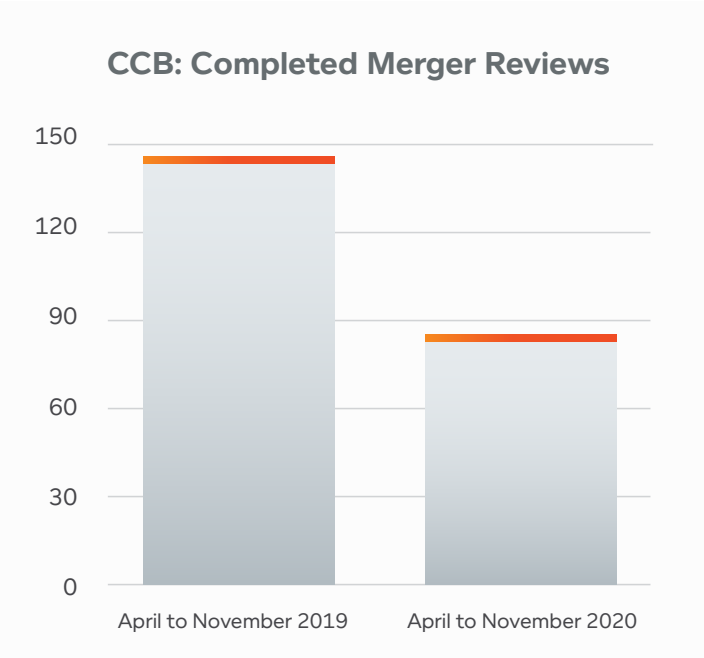
A key development was the Bureau's commencement of an abuse of dominance investigation against Amazon in August, replicating the efforts of some other enforcement agencies around the world. **The commencement of such investigations is not typically publicized in Canada, but the Bureau has taken the unusual step of issuing a general call for inputs from relevant stakeholders.** It remains to be seen how this model would function in practice, given that calls for inputs are voluntary in nature and historically the Bureau has used its powers to compel evidence through court-sanctioned orders under section 11 of the *Competition Act*. Parties that come forward voluntarily have been assured of confidential treatment, and the Bureau has followed up with targeted questionnaires to market participants. **This enforcement method, if replicated in the future, would represent a significant change in the Bureau's evidence gathering processes, and reflects the Bureau's desire to identify and address potentially harmful conduct on an expedited basis.**

In all of its efforts, the Bureau stays in close contact with its partner agencies around the world. As policy objectives and enforcement methods develop in countries like the US, the UK and Australia, it is conceivable that the Bureau will seek to follow suit. **Companies active in digital markets - especially those that most frequently touch the lives of consumers - should expect the current focus on the digital economy to accelerate in Canada in 2021 and beyond.**

Merger Review

LONGER TIMELINES; INCREASING INTERAGENCY COOPERATION ON REMEDIES

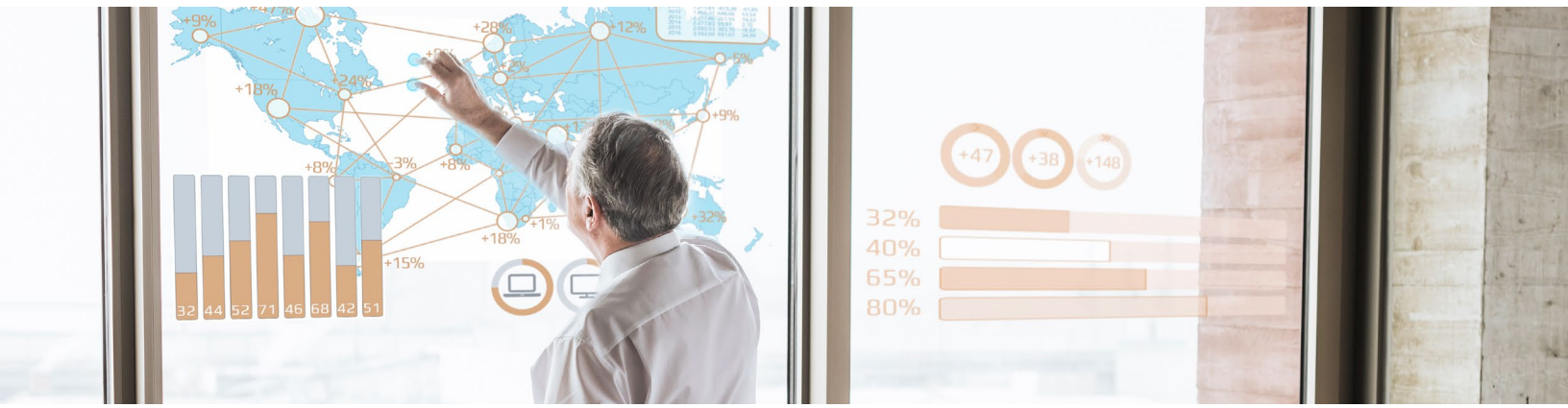
Merger review activity at the Bureau has undoubtedly been affected by the COVID-19 pandemic. In the eight month period from April 1, 2020 to November 30, 2020, just 88 merger reviews were concluded, compared with 148 completed reviews in the same period in 2019, representing a decline of 40% in the number of notifiable transactions.



The pandemic has also had an impact on the ability of the Bureau to complete market outreach to customers and other stakeholders, which forms the backbone of its initial 30 day review. In some instances, this may have impeded the Bureau's ability to conclude its review within the initial statutory 30-day waiting period. In transactions which raise substantive questions, this heightens the risk (and may continue to do so) of the Bureau issuing Supplementary Information Requests ("**SIRs**", the equivalent of a Second Request in the US or Phase 2 in Europe). **It will be interesting to see whether the Bureau's 2021 annual statistics (published each spring) confirm an uptick in the prevalence of SIRs but no corresponding increase in remedied transactions**.

In the calendar year 2020, **three transactions have been subject to remedy** through registered consent agreements, all of which involved structural divestitures of overlapping businesses. In *Evonik/Peroxychem*, a transaction which was not notifiable, the parties agreed to divest a hydrogen peroxide production facility in British Columbia, which remedy formed the basis for a subsequent settlement with the United States Federal Trade Commission. In *Elanco/Bayer Animal Health*, the Bureau worked with competition agencies in the United States, Europe and Australia to obtain another structural remedy in the animal health sector. Finally, in *WESCO/Anixter*, the Bureau required the divestiture of WESCO's utility and data communication distribution business units to obtain clearance. While the Bureau has not formally challenged any merger in 2020, its challenge to Parrish Heimbecker's acquisition of the Louis Dreyfus Company's grain elevator business remains ongoing and is generating procedural guidance from the Tribunal.

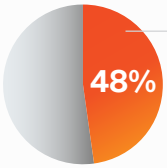
These transactions also demonstrate the **continued close cooperation between the Bureau and agencies in other jurisdictions** where the identified competition law issues are not unique to Canada. Given one of the Bureau's stated strategic priorities is to expand even further its key relationships with other competition law agencies, transacting parties should be prepared for this cooperation to continue and expand in 2021 and beyond.



M&A INVOLVING PUBLICLY-LISTED CANADIAN TARGETS

A review of the largest 30 M&A transactions announced between January and November 2020 that involved a publicly-listed Canadian target demonstrates that a significant proportion (48%) included a *Competition Act* closing condition. Of those with a *Competition Act* condition, **75% required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter**, rather than being satisfied on the expiry of the applicable waiting period. This suggests that merging parties are increasingly aware of the risk attached to closing a transaction prior to receiving formal Bureau clearance.

Competition Act



12 agreements (out of 25 with negotiated transaction agreements in the top 30) (48%) included a *Competition Act* closing condition

Of those 12 agreements with a *Competition Act* closing condition, **9 agreements** (75%) required substantive comfort in the form of an advance ruling certificate or no-action letter

Nearly all (11 out of 12) agreements that had a *Competition Act* closing condition also incorporated covenants relating to remedies (in the event required to obtain clearance). Notably, several covenants provided that any proposed remedy should not limit the purchaser's ability to own, control or operate the target business. A smaller proportion of agreements included covenants relating to regulatory strategy (3 out of 12) or the imposition of a reverse break fee on the purchaser if the *Competition Act* closing condition was not satisfied (2 out of 12). In those cases the **reverse break fee was between 2 and 3.5% of transaction value**.

Competition Act

Remedies re *Competition Act* clearance: 11 of 12 agreements with *Competition Act* closing condition incorporated **covenants relating to remedies**

Only 3 out of 12 agreements included **covenants relating to regulatory strategy**

Only 2 out of 12 agreements imposed a **reverse break fee on the purchaser** in event *Competition Act* closing condition was not satisfied

WILL THE FAILING FIRM DEFENCE BE REVIVED?

The past year also saw the Bureau accept the so-called "failing firm" defence for the first time in many years, which defence may coincidentally have increased relevance due to the COVID-19 pandemic. The two events are unrelated, but the American Iron & Metal Company Inc. ("**AIM**") / Total Metal Recovery Inc. ("**TMR**") transaction is a useful reminder of the high bar set by the Bureau's analysis, which requires the merging parties to demonstrate not only that the struggling firm is, in fact, failing, but also that there is no competitive alternative that would have enabled the failing firm to survive as a meaningful competitor.

Parties considering transactions involving distressed businesses should carefully consider the Bureau's analysis in AIM/TMR to determine whether the "failing firm" defence applies, and also be mindful that the Bureau conducted a three-month inquiry before accepting the arguments.

While COVID-19 is not expected to change the analytical framework, the economic impact of the pandemic on certain sectors may result in more businesses meeting the first criterion to be considered "failing". **Parties considering transactions involving distressed businesses should carefully consider the Bureau's analysis in AIM/TMR to determine whether the "failing firm" defence applies, and also be mindful that the Bureau conducted a three-month inquiry before accepting the arguments**.

BUREAU'S INSISTENCE ON TIMING AGREEMENTS FOR THE EFFICIENCIES DEFENCE

In April 2020, the Bureau released details from the first **use of its model timing agreement governing the assessment of efficiencies claims** made by merging parties, in the Canadian National Railway Company ("**CN**") / H&R Transport Limited ("**H&R**") transaction. Unique to Canada, the statutory efficiencies defence – where established – acts as a full defence against a finding by the Tribunal that a transaction would be likely to prevent or lessen competition substantially in Canada. The analysis of efficiencies claims is complex, putting the Bureau under significant time pressure to determine if the claimed efficiencies outweigh the potential anti-competitive effects. The Bureau developed the model timing agreement specifically to address this issue.

The model timing agreement does provide merging parties with the Bureau's feedback at prescribed times on both competitive effects and claimed efficiencies, allowing them to better evaluate the strength of their efficiencies case, and negating the risk of a post-closing challenge by the Bureau**. However, the procedure also comes with substantial downsides, notably by significantly extending the review timeline in Canada. In CN/H&R, public disclosures suggest that the Bureau's review took more than 100 days from the point that the timing agreement was entered into, and it is conceivable that the assessment could take longer in other cases**.

Importantly, the timing agreement remains optional – parties may assert the efficiencies defence regardless of whether they have entered into a timing agreement with the Bureau – but the Bureau's current position is to require such an agreement from merging parties who wish to receive comfort on efficiencies prior to closing, regardless of how long that takes.

Cartel Enforcement and Competitor Collaborations

COMPETITOR COLLABORATIONS DURING THE PANDEMIC

In April 2020, in response to the ongoing pandemic, the Bureau published guidance on its enforcement approach to competitor collaborations limited in scope to the supply of products and services critical to Canadians arising from disruptions caused by COVID-19.

In line with similar initiatives from competition regulators in various other jurisdictions, the Bureau's guidance confirms that it will refrain from strictly enforcing the criminal conduct provisions of the *Competition Act* where competitors are acting in good faith, they are motivated by a desire to contribute positively to the crisis, their response is intended to operate only for a short-term while the crisis remains, and any coordination is limited to what is strictly necessary to obtain the underlying objectives of the collaboration. The Bureau's guidance also sets out a procedure by which firms can apply to the Bureau for comfort before implementing their arrangement, thereby guarding against future investigation and prosecution.

While the guidance was certainly a step in the right direction as part of the pandemic's first-wave response, its practical usefulness was questionable, even when it was first introduced. First, as indicated above the guidance only refers to conduct in relation to the supply of "critical" goods and services (presumably drugs and medical equipment). Second, the Bureau is not subject to a specific timetable in which it must conclude its analysis, and the Bureau's guidance has no effect on private claims. It is therefore not surprising that **as of October 2020, the Bureau had not received any requests for specific guidance on COVID-related collaborations**.

IMPORTANT GUIDANCE ON BUY-SIDE AGREEMENTS — INCLUDING NO-POACH AND WAGE-FIXING AGREEMENTS

In November, **the Bureau clarified that buy-side agreements, including no-poach and wage-fixing agreements among employers, are not captured by the criminal cartel provisions of the** *Competition Act*. The rise of antitrust enforcement against no-poach and wage-fixing agreements in the United States, clearly impelled the Bureau to issue its statement on the parallel approach to these issues in Canada. The Bureau's new guidance is consistent with the longstanding view in the cartel defence Bar that buy-side agreements are outside the scope of section 45 of the *Competition Act*, because the primary cartel offence is limited to agreements relating to downstream production or supply - rather than upstream purchasing. **However, the Bureau's new guidance leaves open the possibility that no-poach or other buy-side agreements may be investigated and remedied under section 90.1 of the Act, the civil regime prohibiting competitor collaborations that are "likely to prevent or lessen competition substantially".**

EXPECTATION OF CONTINUED FOCUS ON DOMESTIC ENFORCEMENT

There were no contested cartel or bid-rigging trials in Canada in 2020, either in international or domestic cases, and the Bureau did not secure any guilty plea from corporations or individuals.

The Public Prosecution Service of Canada ("**PPSC**"), however, entered into four additional settlements with engineering firms in relation to bid-rigging schemes that targeted municipal contracts. To date, six engineering firms have been ordered to pay more than CAD12 million as part of these investigations. These settlements, that take

into account the fact that the engineering firms have already reimbursed overpayments under a specific provincial regime, do not involve criminal guilty pleas or convictions; rather, they are pursuant to prohibition orders under section 34 of the *Competition Act*. **Similar to resolutions under Remediation Agreements, these prohibition order settlements allow the engineering firms to avoid being disqualified from public contracts under federal and provincial "debarment regimes". Although negotiated Remediation Agreements (also known as Deferred Prosecution Agreements, or "DPAs") have recently been introduced in Canada, such agreements are not available for cartel and bid-rigging offences under the *Competition Act*.**

The table below includes key cartel enforcement statistics made available by the Bureau for its most recent fiscal year:

	2019-20	2018-19	2017-18
☑ Number of search warrants issued, including multiple orders for a single investigation	3	12	40
☑ Number of immunity markers granted	4	3	7
☑ Number of leniency markers granted	0	0	1
☑ New cartel investigations commenced	21	13	15
☑ Ongoing cartel investigations	35	40	42
☑ Number of investigations referred to the PPSC	4	1	0

On the one hand, these statistics tend to show a decline in enforcement activities, both with respect to search warrants and, most notably, new leniency markers granted. The immunity and leniency programs, which used to be the Bureau's most important enforcement tools, were recently revised to place additional burdens on applicants. **Although consistent with international trends, the fact that only one leniency marker has been granted over the last three years could indicate that the recent changes to the immunity and leniency programs have undermined the programs' effectiveness, and may impact the Bureau's ability to advance its investigations**.

The Bureau, however, continues to be active with 35 ongoing investigations, including 21 new investigations in its last fiscal year – an increase from previous years. The Bureau has stated that it continues to invest in developing data screening tools to help identify possible bid-rigging in government procurement processes, and also continues to receive information through the Federal Contracting Fraud Tip Line. **We expect that the Bureau will continue to focus on domestic cartel and bid-rigging enforcement cases. Despite the fact that the *per se* cartel provisions have now been in force for more than 10 years, there is still no case law under the current criminal conspiracy provision. With four referrals to the PPSC in the Bureau's last fiscal year, we may see the first charges under the 12 year-old regime in 2021**.

Deceptive Marketing and Misleading Advertising

LIFE AFTER FACEBOOK: THE BUREAU FORMALLY MOVES INTO THE PRIVACY DOMAIN

The Bureau has long been planting seeds to suggest its movement into the privacy domain. For example, in March 2020 the Bureau issued guidance emphasizing that public representations may fall afoul of the *Competition Act*'s deceptive marketing provisions if they "lead consumers to give companies access to data that they would not otherwise provide, or acquire digital products and services they might not otherwise select".

The Bureau's May 2020 settlement with Facebook marked its first formal foray into this domain following an investigation into allegedly false or misleading representations regarding the disclosure of personal information and the extent to which users could control access to their personal information. Although Facebook denied the Commissioner of Competition's allegations, to settle the Bureau's concerns, Facebook paid an administrative monetary penalty ("**AMP**") of CAD9 million.

Looking forward, it will be interesting to see whether the *Consumer Privacy Protection Act* influences future amendments to the *Competition Act*, as well as how these two regimes evolve to address the overlaps between them.

In its press release, the Bureau said "it will not hesitate to crack down on any business that makes false or misleading claims to Canadians about how they use personal data". **The Bureau's focus on privacy claims raises important questions about where the Bureau's jurisdiction ends and the Office of the Privacy Commissioner's ("OPC") begins. Although the Bureau views its mandate as "complementary" to that of the OPC, the overlap creates uncertainty for businesses that now face two regulators scrutinizing privacy claims, with the potential for conflicting investigative outcomes.**

The Bureau's involvement raises the prospect of penalties currently unavailable under Canada's federal privacy legislation, including the payment of AMPs. This may soon change, however, as the newly introduced *Consumer Privacy Protection Act* contemplates potential AMPs for privacy violations that could go well beyond the AMPs that are available under the *Competition Act*. The new privacy legislation contemplates AMPs that are "the higher of CAD10,000,000 and 3% of the organization's gross global revenue in its financial year before the one in which the penalty is imposed". **Looking forward, it will be interesting to see whether the *Consumer Privacy Protection Act* influences future amendments to the *Competition Act*, as well as how these two regimes evolve to address the overlaps between them.**

DECEPTIVE PRACTICES IN A DIGITAL WORLD – THE BUREAU'S PIVOT TO ONLINE MARKETING PRACTICES

Protecting consumers in digital marketplaces remains a Bureau priority. **In light of the rapid increase in online commerce due to the COVID-19 pandemic, there is no doubt that the Bureau will amplify its monitoring and enforcement of online marketing and advertising practices.**

- **Beware of COVID-19 claims:** The Bureau has actively monitored the marketplace for deceptive marketing claims related to COVID-19, and will likely continue to do so in 2021. In early May, the Bureau issued a warning to businesses advising against making false or misleading claims that their products and services can prevent, treat or cure COVID-19. The Bureau has also issued direct compliance warnings to a number of businesses, including a major national retailer.
- **Awaiting first influencer marketing enforcement action:** After the Bureau released its general warning letter to advertising agencies, it published guidelines for influencers in January 2020. The guidelines stress that an influencer must disclose all material connections it has with the promoted business, product or service, and how to adequately disclose these connections. A "material connection" is defined as having "the potential to affect how consumers evaluate the influencer's independence from a brand" (e.g. receiving payment, free products/services, discounts, free trips, or a personal/family relationship). **Although to date the Bureau has not taken enforcement action with respect to influencer marketing, companies and agencies should prioritize their influencer marketing compliance measures**.
- **Time to review your "astroturfing" policy?:** The Bureau also investigated alleged astroturfing conduct by Videotron, a telecom player, and obtained a production order in August to compel the company to produce records related to its employees' online conduct and the promotion of the company's products and services. The Bureau alleges that employees posted exaggerated reviews of the company's offerings without disclosing their affiliation to the company. Based on available public records, **this case may have practical consequences on an employer's duty to monitor its employees and contractors online conduct**.
- **Increased use of injunctions:** Further to the Commissioner of Competition's message that he will increasingly consider the use of injunctive relief, the Bureau was successful in obtaining a consent agreement with respect to weight loss claims following its application for a temporary order. **The use of injunctive relief in misleading advertising cases is a new enforcement trend that is expected to continue in 2021.**

Competition Class Actions

A NEW CLASS PROCEEDINGS REGIME IN ONTARIO

On October 1, 2020, Bill 161, the *Smarter and Stronger Justice Act, 2020*, came into force, amending the Ontario *Class Proceedings Act, 1992* (the "**CPA**"). The CPA amendments implement a number of substantive and procedural changes that make it more difficult for plaintiffs to bring competition class actions in Ontario.

The most significant substantive change to the legislation is a more rigorous test to be applied at certification, in which the plaintiffs need to prove that the action would be the preferable procedure for the resolution of the common issues. **Influenced by the U.S. model, this preferable procedure analysis now requires that (a) common issues predominate over individual issues in order for a class action to be considered the preferable procedure; and (b) the procedure is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant**. This is in contrast to the old test that only required there to be common issues, the resolution of which would advance the litigation.

The amendments also raise several procedural and financial barriers to advancing claims in Ontario. For example, while prior jurisprudence typically held that defense motions to

narrow or dispose of the proceeding should be delayed until at least the certification stage, the amendments now encourage dispositive motions in advance of the motion for certification. Lastly, the amendments impose financial constraints and increased disclosure obligations that may impact a plaintiff's ability to obtain third party funding.

Overall, these amendments make Ontario a less attractive forum for plaintiffs seeking to bring competition class actions. Even before Bill 161, plaintiffs were starting to bring more class actions in the Federal Court. As a statutory Court, the Federal Court has limited jurisdiction to hear companion common law claims, but it has the benefit of Canada wide jurisdiction. The *Competition Act* specifically provides for civil competition claims to be brought in the Federal Court of Canada, or in provincial Superior Courts. Bill 161 may accelerate a shift in cases to the Federal Court.

IMPLICATIONS OF THE SUPREME COURT'S DECISION IN GODFREY

The past 15 years have seen a steady increase in the number of class actions being brought pursuant to the civil provisions of the *Competition Act*. These cases usually involve allegations of bid rigging or price fixing, which can attract civil and criminal liability. In 2013, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Supreme Court of Canada articulated the tests to apply when evaluating whether to certify a competition class action. In the years that followed, a number of issues arose in competition class actions, leading to inconsistent approaches to certification. In late 2019, the Supreme Court of Canada released its highly-anticipated 8-1 decision in *Pioneer Corp. v. Godfrey* ("***Godfrey***"), deciding four key issues that have featured in many of these types of class actions:

- **Issue 1 – limitation period:** The majority found that the discoverability principle applies to the limitation period contained in the statutory cause of action in section 36 of the *Competition Act*.
- **Issue 2 – umbrella purchasers:** The majority found that principles of remoteness or indeterminate liability do not foreclose the right of umbrella purchasers to seek damages in price-fixing class actions.
- **Issue 3 – complete code:** The Supreme Court found that the enactment of the statutory cause of action in section 36(1) of the *Competition Act* did not oust common law and equitable actions by its express terms or by necessary implication.
- **Issue 4 – loss as a common issue:** The majority held that in order for loss-related questions to be certified as common issues, a "plaintiff's expert methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level". The majority went on to say that at trial, however, only class members that actually suffered a loss would be in a position to recover.

The overall effects of Godfrey on the future of competition class actions remain unclear. While the Supreme Court's answer with respect to issues 1 and 3 clarified what types of arguments or causes of action can be alleged into conspiracy class actions, its decision on issues 2 and 4 postpones to the merits stage debates that were previously occurring at certification. As such, class action plaintiffs who pass the certification stage may face significant hurdles at trial.

In 2021, look for defendants (especially those outside Ontario) to place more emphasis on defence strategies attacking the merits of plaintiffs' claims, and less on the procedural aspects of class certification.

About Us

McCarthy Tétrault LLP is a leading Canadian law firm with offices in every major business centre in Canada, and in New York and London.

Our Competition/Antitrust & Foreign Investment Group ("Group") is a leading Canadian competition law practice, offering wide coverage in all aspects of Canadian competition law and foreign investment review including mergers / transactions, criminal and civil investigations, litigation and class actions, misleading advertising and deceptive practices, and other contentious matters.

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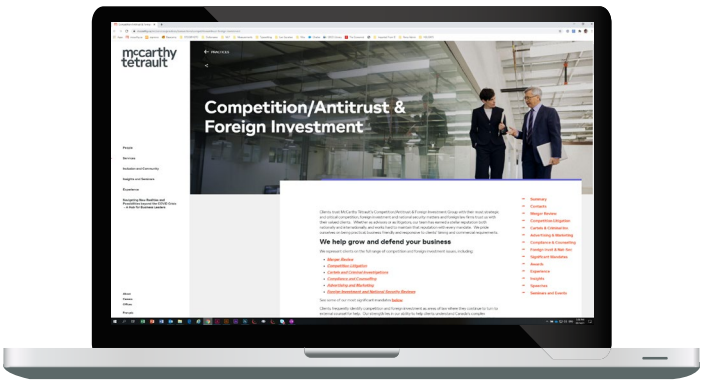

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