

Canadian Competition and Foreign Investment Law

The 2015 Year in Review

mccarthy
tetrault



Canadian Competition and Foreign Investment Law: The 2015 Year in Review

The Competition Bureau's stated aim is to prioritize the investigations and enforcement actions that will have the greatest impact on the Canadian economy and consumers. The Bureau's efforts to implement this can be seen across a wide swath of the competition law landscape, including: challenging a gas station merger at the Competition Tribunal, pursuing enforcement action against car rental companies and department store retailers for their advertising of prices, and its ever increasing competition advocacy efforts in the broadcasting industry. This **2015 Year in Review** covers these and other top stories in more detail. The events of 2015 set the stage for the Bureau to continue on its path of challenging business practices, competitor collaborations and transactions that present competition concerns in consumer-facing and critical sectors of the Canadian economy.

CARTEL ENFORCEMENT

While some of the Competition Bureau's enforcement activities resulted in fines and guilty pleas in 2015, it faced significant setbacks in cases involving government contracts and chocolate. Another notable event from 2015 was a court decision impacting settlement privilege in criminal proceedings: where a cartel member provides information against other members of the cartel to the Crown in exchange for immunity from criminal prosecution, that information must be disclosed to the other members that are charged. For detailed discussion see: **Cartel Enforcement**

MERGERS (COMPETITION ACT)

We cover contested mergers – *Tervita*, *Parkland* and *Staples* – which provide insight into efficiencies, interim injunctions, and cross-border cooperation, respectively. We also report on a number of deals reviewed by the Competition Bureau in industries such as media & books, pharmaceuticals and hotels. These and other events in 2015 continue to underscore the benefits of concluding competition analysis as early as possible in order to develop an appropriate strategy and avoid challenges. For detailed discussion see: **Mergers (Competition Act)**.

MERGERS (INVESTMENT CANADA ACT — FOREIGN INVESTMENT REVIEW)

National security reviews of proposed mergers continue to be hot topic. As we have discussed in the past, the Canadian government has been steadily increasing its focus on national security and rejecting mergers due to national security concerns. This has been a concern for foreign investors (especially state-owned enterprises (SOEs) and Canadian businesses. 2015 was an eventful year in national security: for the first time, the national security review process is being challenged, a uranium mine deal was approved and a SOE's attempt to build a new fire alarm systems factory was blocked. Other important events from 2015 which will impact foreign investment into 2016 and the future include the extension of national security review timelines and the increase of the "net benefit" review threshold to \$600 million. For detailed discussion see: **Mergers (Investment Canada Act — Foreign Investment Review)**.

REVIEWABLE PRACTICES

Consistent with the Bureau's aim to prioritize investigation and enforcement actions in consumer facing industries, the Bureau's abuse of dominance cases in 2015 involved investigations, settlements and Tribunal decisions impacting residential water heaters, realtors and home sellers, medical devices and consumer products. For detailed discussion see: **Reviewable Practices**.

MISLEADING ADVERTISING

The Competition Bureau has been very active in price advertising enforcement: in 2015, a retailer was ordered to pay a \$3.5 million administrative monetary penalty (AMP), the Bureau announced it is seeking \$30 million in AMPs from two rental car companies over non-optional fees, and two major department store retailers were ordered to produce records and information in connection with the Bureau's investigation into their regular price claims for mattresses. These events signal this is an area which companies should keep an eye on in 2016 and beyond. In other news, the Bureau accepted sizable consumer refunds and donations, among other things, to address concerns it had with certain companies' activities. For detailed discussion see: **Misleading Advertising**.

CLASS ACTIONS

The courts continue to wrangle over the availability of common law and equity remedies for contraventions of the *Competition Act*, in view of Section 36 which provides a statutory cause of action in such situations. Access to the Competition Bureau's investigative file in criminal matters by class action plaintiffs is hotly contested by the Federal Government. For detailed discussion see: **Class Actions**.

OTHER DEVELOPMENTS

In 2015, the Competition Bureau stepped up its advocacy efforts (including providing commentary on the broadcasting industry) as well as published comprehensive guidelines dealing with corporate compliance programs and intellectual property enforcement. Also, the Bureau underwent an internal re-organization which consolidated several of its branches by streamlining its structure into three primary pillars: (i) mergers and civil matters; (ii) cartels and deceptive marketing; and (iii) advocacy and compliance. For detailed discussion see: **Other Developments in 2015**.

Cartel Enforcement

BID-RIGGING – GOVERNMENT CONTRACTS

2015 was an eventful year for the Competition Bureau's bid-rigging cases involving government contracts at the municipal and federal level.

The Bureau lost a major bid-rigging case in respect of Government of Canada contracts for information technology services when seven individuals and three companies were acquitted after an eight month jury trial in *R v. Durward*. The case began in 2005 when the Bureau opened its investigation after Public Works and Government Services Canada ("PWGSC") raised concerns about certain bidding processes. Subsequently, several individuals and companies were charged in 2009, following which the Bureau secured guilty pleas from two individuals. The case moved forward with some of the accused electing trial by jury (a first for bid-rigging prosecutions) and others a bench trial. After the acquittal verdict, the Crown decided not to appeal and abandoned its case against the others who were awaiting the judge alone trial.

In another case, the Crown stayed bid-rigging charges against the owner of First Porter Consultancy, a company which provided real estate advisory services to the federal government. The charges were laid against the owner in 2013 for his alleged involvement in an agreement to rig bids for federal government contracts for real estate advice. The charges resulted from the Bureau's investigation that began in 2009 after concerns were raised by PWGSC. As part of the same investigation, a corporation cooperating under the Bureau's Leniency Program pleaded guilty to bid-rigging and was fined \$125,000 in 2012.¹

In respect of an alleged conspiracy to rig bids for the supply of water services to municipalities in Québec, one company (Les Entreprises Paysagistes Gaspard inc.) pleaded guilty and was fined \$117,000, while criminal charges were laid against three other companies (Aquarehab Inc., 9083-0126 Québec Inc. and Gestion Muni-Max Inc.) and their respective presidents, as well as the vice-president of 9083-0126 Québec Inc.²

A former employee of Microtime Inc. pleaded guilty for participating in an alleged conspiracy to rig bids for information technology services to Library and Archives Canada (LAC) and received an 18-month conditional sentence,³ was fined \$23,000 and ordered to perform 60 hours of community service.⁴ Microtime and six individuals (from Microtime and LAC) were charged in 2014 for allegedly conspiring to rig bids for information technology services to LAC.

¹ *Individual Charged with Bid-rigging Federal Government Contracts:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03576.html>

² *Criminal charges laid in a Competition Bureau investigation:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03964.html>

³ As a result of the *The Safe Streets and Communities Act* which came into force in November 2012, judges can no longer impose a conditional sentence on individuals convicted of offences such as bid-rigging, cartels and misleading advertising. Individuals convicted of such offences under the *Competition Act* will therefore either spend time in a jail cell or receive only a fine as punishment. The conduct in this case occurred prior to *The Safe Streets and Communities Act*.

⁴ *Ontario individual sentenced after pleading guilty to bid-rigging:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03936.html>

A company was fined \$10,000 for bid-rigging in respect of municipal contracts for specialized sewer services in Québec. Since 2012, four other companies have been fined a total of \$150,000 and an individual was ordered to perform 100 hours of community service.⁵

CHOCOLATE CASE ENDS – STAY OF PROCEEDINGS

2015 marked the end of the Bureau's alleged chocolate price fixing case which began in July 2007 after Cadbury Adams Canada Inc. contacted the Bureau to secure immunity from prosecution. In late 2007, the Bureau executed search warrants on the other members of the alleged cartel, including Hershey Canada Inc., Nestle Canada Inc., and Mars Canada Inc. Under the Bureau's leniency program, Hershey cooperated with the Bureau and pleaded guilty to price fixing and was fined \$4 million in June 2013. Nestle, Mars and others were charged with price-fixing in June 2013. In February 2015, a court held that all factual information provided by the co-operating parties, Cadbury and Hershey, must be disclosed to the parties that were charged (for further detail on this decision, see *Settlement Privilege in Criminal Proceedings*, below). In the fall of 2015, without providing reasons (as is customary), the Public Prosecution Service of Canada (PPSC) entered a stay of proceedings against all of the parties that were charged, with the stay against Nestle on November 17, 2015 marking the end of the matter. The Bureau's press release announcing that the final price-fixing charges were dropped pointed out that the decision to stay the charges was "taken independently by the PPSC".⁶

SETTLEMENT PRIVILEGE IN CRIMINAL PROCEEDINGS

In *R. v. Nestle Canada*,⁷ the Ontario Superior Court of Justice held that where a member of a price-fixing cartel provides information against other members of an alleged cartel to the prosecution in exchange for immunity from criminal prosecution, that information must be disclosed to others who are charged with price-fixing. The court held that, where the disclosing party has resolved the charges (or potential charges) against them, settlement privilege does not protect against disclosure of the information to another accused against whom the information may be used. As such, corporations and individuals in Canada should be aware of the implications of providing information to law enforcement or regulatory authorities in return for a plea deal. Will this decision deter parties from applying for immunity or leniency? The Commissioner of Competition, John Pecman, does not think so, "particularly since [the Bureau's Immunity and Leniency Programs] already make it clear that disclosure of such information is likely".⁸ For further detail on the decision, see our article *R. v. Nestle Canada Inc.: Settlement Privilege in Criminal Proceedings*.⁹

OTHER FINES AND GUILTY PLEAS

As part of the long-standing regional retail gas price-fixing case in Québec, Les Pétroles Global Inc. was fined \$1 million for its role in the conspiracy. This stems from charges that were laid in

⁵ *Guilty plea in the Québec sewer services cartel*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04014.html>

⁶ *Final price-fixing charges stayed in chocolate case*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04003.html>

⁷ 2015 ONSC 810: <https://www.canlii.org/en/on/on/onsc/doc/2015/2015onsc810/2015onsc810.html?resultIndex=1>)

⁸ *Remarks by John Pecman, Commissioner of Competition*, February 17, 2015: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03873.html>

⁹ *R. v. Nestle Canada Inc.: Settlement Privilege in Criminal Proceedings*, David Porter and Trevor Courtis: http://www.mccarthy.ca/article_detail.aspx?id=7104

2008 and a guilty finding in 2013 on the basis of the corporation's general manager's participation in the cartel.¹⁰ In a contested sentencing hearing, the prosecution was seeking a fine of \$4.6 million, based on 20% of the accused sales during the conspiracy period. While recognizing the importance of this proxy for the Bureau's Leniency program, the Court declined to apply a mathematical approach to the determination of the fine. Based on the prosecution's expert testimony estimating at \$645,000 as the accused's gain resulting from the illegal conduct, the Court applied the sentencing factors outlined in Section 718.21 of the *Criminal Code* to arrive at a fine of \$1 million.

In another major conspiracy investigation, the motor vehicle component investigation, Toyo Tire & Rubber Co., Ltd., a Japanese manufacturer of tires and other rubber components, plead guilty to bid-rigging and was fined \$1.7 million for its role relating to the supply of anti-vibration components to Toyota Motor Corp., Ltd.. This is the eighth guilty plea in the Bureau's motor vehicle components investigation.¹¹

OTHER CARTEL HIGHLIGHTS

- In 2015, the Bureau released its OECD submission focusing on cartel activity in the construction industry¹². The submission states that“(t)he Bureau has investigated more instances of alleged collusion in the Canadian construction industry than in any other industry in Canada”. The Bureau listed 10 market characteristics that are present in industries (such as the construction industry) that are prone to collusion, including: product/service homogeneity, few or no close products/services, few players, repetitive bidding, and complex subcontracting relationships. The submission also provides an overview of the government's response, such as the Department of Public Works and Government Services Canada's updated Integrity Regime which applies to construction contracts, goods and services contracts and real property transactions for federal public procurement¹³ (discussed further below) as well as various Bureau education and prevention initiatives.
- A new Integrity Regime for public procurement for Canadian government departments came into place on July 3, 2015. The Integrity Regime is intended to replace the Integrity Framework put in place in 2012. Under the Integrity Regime, a supplier is ineligible to do business with the government if it, or any members of its board of directors, have been convicted or discharged (either absolutely or conditionally)¹⁴ in the last three years of certain offences under Canadian law or a similar foreign offence, including collusion, bid-rigging or any other offence under the *Competition Act*. The debarment period is 10 years from the date of determination, but can be reduced to five years where suppliers can demonstrate that they have cooperated with law enforcement

¹⁰ *R. v. Pétroles Global inc.*, 2013 QCCS 4262. This decision confirmed that mid-level managers with limited decision-making autonomy may qualify as “senior officers” and therefore engage the corporation's criminal liability.

¹¹ *Toyo Tire fined \$1.7 million for participating in bid-rigging conspiracy*:
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04013.html>

¹² *Serial Offenders: A Discussion on Why Some Industries Seem Prone to Endemic Collusion*, October 30, 2015:
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03989.html>

¹³ Public Works and Government Services Canada is the body which conducts most public procurements for Canadian government departments.

¹⁴ If a supplier is granted a record suspension or has satisfied the conditions of their absolute or conditional discharge, they will be eligible to bid.

or undertaken remedial actions. In addition to providing for the possibility of shortened debarment period, another significant change in the Integrity Regime is the elimination of automatic debarment for affiliate conduct. For further detail, see our article *Canada Implements New Integrity Regime for Public Procurement*.¹⁵

- The Bureau's Cartels Directorate (formerly the Criminal Matters Branch) granted immunity and/or leniency markers to 19 different parties (FY2014-2015).
- The Bureau signed a Memorandum of Understanding (MOU) with the Ontario Provincial Police to "forg[e] a stronger partnership to combat cartels, bid rigging, false or misleading representations and deceptive marketing practices as defined in the *Competition Act* and the Criminal Code of Canada".¹⁶ The Bureau also signed an MOU with the RCMP.¹⁷

¹⁵ *Canada Implements New Integrity Regime for Public Procurement*, John W. Boscariol, Robert A Glasgow: http://news.mccarthy.ca/en/news_template.asp?pub_code=7126&news_code=2352&single_page=1

¹⁶ *Competition Bureau and the OPP strengthen investigative ties*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03975.html>

¹⁷ *Strengthening ties to fight crimes against consumers and businesses*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04001.html>

Mergers (Competition Act)

CONTESTED MERGERS – TERVITA, PARKLAND AND STAPLES

Tervita

In 2015, the Supreme Court of Canada released its long awaited decision in *Tervita Corporation et al v. Commissioner of Competition*.¹⁸ In a 6-1 decision, the Supreme Court allowed Tervita's appeal and set aside the divestiture order made by the Competition Tribunal (Tribunal) that had been upheld by the Federal Court of Appeal (FCA). The Supreme Court agreed with the FCA's conclusion that the merger would likely result in a substantial prevention of competition, but overruled the conclusions of the Tribunal and the FCA that the merger was not saved by the efficiencies defence. For further detail of the Tribunal's decision see our article: *Supreme Court of Canada Issues Landmark Merger and Efficiencies Decision*.¹⁹

This is the first Supreme Court decision on the "prevention" of competition test. The Supreme Court held that the timeframe to determine whether one of the merging parties would, "but for" the merger, be likely to enter the market must be discernible. The Supreme Court warned against looking too far in the future, but recognized that the inherent time delay to enter an industry because of barriers to entry is an important consideration. The Supreme Court agreed with the Tribunal's controversial conclusion that there was sufficient evidence to support a finding of a substantial prevention of competition as a result of the merger.

However, in regard to the efficiencies defence, the Supreme Court concluded that the Commissioner did not meet his burden of quantifying the quantifiable anti-competitive effects of the merger and did not prove any qualitative anti-competitive effects of the merger. As such, the anti-competitive effects raised by the Commissioner were assigned no weight by the Supreme Court and, by default, were offset by the modest overhead efficiency gains proven by Tervita.

While the facts of the case are unique, the Supreme Court's decision is a significant loss for the Commissioner. Going forward, the Supreme Court has provided guidance on the proper application of the efficiencies defence. Most notably, the Supreme Court has made it very clear that in contested merger litigation the burden of proving anti-competitive effects rests with the Commissioner. This will likely have an impact on the scope of information requests in the context of merger review, with a corresponding increase in the time required to clear transactions that raise competition concerns. In a speech following the Supreme Court decision, Commissioner Pecman said that "in cases where litigation is a real possibility, we'll need to gather more information from merging parties and, in some instances, third parties".²⁰ The Commissioner also indicated that the Bureau's information gathering process may involve including additional questions in supplementary information requests (SIRs) "or issuing section

¹⁸ 2015 SCC 3: <https://www.canlii.org/en/ca/scc/doc/2015/2015scc3/2015scc3.html?resultIndex=1>, 2013 FCA 28: <https://www.canlii.org/en/ca/fca/doc/2013/2013fca28/2013fca28.html?resultIndex=1> and 2012 Comp. Trib. 14. Tervita was formerly known as CCS Corporation.

¹⁹ *Supreme Court of Canada Issues Landmark Merger and Efficiencies Decision*, Donald Houston, Dominic Thérien, Michele Siu, Jonathan Bitran: http://www.mccarthy.ca/article_detail.aspx?id=7005

²⁰ *Remarks by John Pecman, Commissioner of Competition*, February 17, 2015: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03873.html>

11 orders to merging parties after SIRs have been issued, something that we have not previously done, including after the filing of a section 92 application.”²¹

Parkland

*Commissioner of Competition v. Parkland Industries Ltd.*²² is one of the rare merger cases to be brought before the Tribunal. The proposed transaction was Parkland’s acquisition of gas stations and gas supply agreements, comprising substantially all the assets of Pioneer Energy. The Bureau claimed that the transaction would likely result in a substantial lessening of competition in 14 local markets and sought an interim order directing Parkland to hold separate and preserve the assets in those areas, pending the Tribunal’s determination of whether the transaction was anticompetitive. The Tribunal issued the order sought for six of the local areas, but declined to do so for the eight remaining areas.

The Tribunal found that the Bureau did not satisfactorily prove the size of the geographic markets and therefore found sufficient evidence of irreparable harm only in the six local areas where Parkland had conceded competition concerns or that high market shares would result. Parkland had offered commitments to address the competition concerns and avoid an order, but the Tribunal rejected the proposal because it was too vague. Eventually, the Bureau and Parkland entered into a consent agreement stipulating remedies for those six local areas. Interestingly, the consent agreement is the first of its kind to have been reached through a mediation process in a Competition Tribunal proceeding.²³

Staples

On December 7, 2015, the Bureau announced it would challenge Staples’ proposed acquisition Office Depot (operating in Canada under the name Grand & Toy). In the Bureau’s view, the acquisition would leave Staples with over 80% of sales of various office products in Canada and the loss of Office Depot’s competitive presence will not be replaced by existing suppliers or by new suppliers entering because barriers to entry and expansion are high. In a rare move, the Bureau and the United States Federal Trade Commission (FTC) simultaneously filed challenges to the deal in their respective jurisdictions.²⁴

INDUSTRY FOCUS

A number of transactions in the areas of media & books, pharmaceuticals, and hotels were reviewed by the Competition Bureau in 2015.

Media & Books

In 2015, the Bureau approved mergers in the newspaper, magazine and bookstore industries. In all three transactions, the Bureau acknowledged declining markets and the increasing importance of digital formats. These transactions follow on the heels of the

²¹ Remarks by John Pecman, Commissioner of Competition, *The Competition Bureau: A Year of Internal Reform and Accomplishments*, June 9, 2015: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html>

²² 2015 Comp. Trib. 4

²³ *Competition Bureau and Parkland reach mediated resolution that will see gas stations and assets sold in Ontario and Manitoba*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04049.html>

²⁴ *Competition Bureau challenges a merger between Canada’s two largest office supply companies*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04012.html>

Transcontinental/Québecor community newspaper transaction cleared by the Bureau last year on the basis of a consent agreement, although the Bureau allowed Transcontinental to retain ownership of newspapers for which a buyer could not be found.

- **Newspapers:** The Bureau approved Postmedia's acquisition of Québecor's English language Sun newspapers.²⁵ In clearing the transaction, the Bureau concluded that Postmedia's broadsheet newspapers and the Sun tabloid newspapers are not close rivals and have different readerships and, therefore, different advertising. Despite acknowledging increasing competitive pressure from digital alternatives, the Bureau found that print newspaper advertising is not completely substitutable with other forms of advertising, including digital.
- **Magazines:** The Bureau approved TVA's acquisition of consumer magazines from Transcontinental.²⁶ The Bureau cited effective remaining competition and the ability of advertisers to reach the same demographics via other means.
- **Bookstores:** The Bureau approved Renaud-Bray's acquisition of primarily French language bookstores from Archambault.²⁷ The Bureau considered both "bricks and mortar" and online sales of printed books. It noted that there has been a substantial increase in the online sale of printed books. In finding that the sale of e-books in Québec is relatively limited, the Bureau indicated that its conclusions would not have changed regardless of whether the sale of e-books was included in the relevant product markets.

It is important that the Bureau has explicitly recognized changing dynamics and digital competition in this industry. Nonetheless, given sufficient remaining sources of traditional competition in the three areas, the Bureau did not need to thoroughly evaluate these issues in its reviews. It remains to be seen how the Bureau would react to a transaction where establishing digital competition would be necessary to avoid a remedy.

Pharmaceuticals

The Bureau has sharpened its focus on the pharmaceutical industry lately with the release of revised guidance on how it evaluates whether patent life cycle management techniques (e.g., patent litigation settlements and product hopping) are anticompetitive (see discussion below, *Draft Updated IP Enforcement Guidelines Addressing Pharma Patent Litigation Settlements, Standard Setting and Patent Trolls*). We expect the Bureau to continue to closely scrutinize activity in the pharmaceutical industry, whether in terms of business practices or pharmaceutical transactions.

²⁵ Competition Bureau statement regarding the proposed acquisition by Postmedia Network Inc. of the English-language newspapers of Québecor Media Inc.: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03899.html>

²⁶ Competition Bureau clears TVA Group's acquisition of Transcontinental's magazines: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03876.html>

²⁷ Competition Bureau statement regarding the acquisition by Renaud-Bray of Archambault retail stores: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03988.html>

Relying on remedies, the Bureau approved two prominent transactions in 2015:

- The first transaction consisted of three parts: (i) GlaxoSmithKline and Novartis initiating a joint venture for over-the-counter products; (ii) GlaxoSmithKline buying Novartis' vaccines business; and (iii) Novartis buying GlaxoSmithKline's oncology business. Although only part (i) required notification under the *Competition Act*, the Bureau reviewed the entire transaction. The Bureau was concerned about Novartis' acquisition of certain oncology drugs, but cleared the transaction on the basis of a United States FTC consent agreement which mandated divestiture of those drugs to Array BioPharma.²⁸
- Pfizer's acquisition of Hospira (a business which specializes in injectable drugs), was subject to a consent agreement in which Pfizer was required to divest Canadian assets related to four products.²⁹ In the Bureau's view, the divestitures were required to maintain sufficient competition, noting that one of the products in question was still in development and not yet commercially available.

Hotels

There has been a flurry of hotel transactions amid consolidation in the industry. The Bureau cleared Marriott's acquisition of Delta,³⁰ while other sizable hotel deals such as Marriott's \$12 billion proposed acquisition of Starwood are still undergoing regulatory review. The Bureau typically analyzes hotel transactions on a local basis, so even large transactions may present limited overlap.

FAILURE TO COMPLY WITH PRE-MERGER NOTIFICATION OBLIGATIONS

In May 2015, the Bureau announced it had taken steps to address a company's failure to notify two proposed acquisitions which met the notification thresholds under the *Competition Act*. Parties that complete a merger without submitting a notification are subject to criminal prosecution and may be liable to a maximum fine of \$50,000. In this case, the Bureau considered the fact that the company immediately reported the situation once it realized its failures. As a result, the Bureau took the view that the company should adopt a compliance program to ensure its future compliance with the Act. The compliance program includes measures such as appointing two senior executives as compliance officers who will be responsible for the compliance program and the requirement to seek a legal opinion for all transactions exceeding \$5 million in value to determine if pre-merger notification is required.³¹

²⁸ *Competition Bureau Statement Regarding the Three-Part Inter-Conditional Transaction between GlaxoSmithKline plc and Novartis AG involving their Consumer Healthcare, Vaccines and Oncology businesses:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03874.html>

²⁹ *Competition Bureau statement regarding Pfizer's acquisition of Hospira:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03979.html>

³⁰ *Competition Bureau clears Marriott's acquisition of Delta:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03890.html>

³¹ For a merger to be notifiable, there are two financial thresholds that must be met: the "size of parties threshold" (where the combined Canadian assets or revenues of the parties and their respective affiliates in, from or into Canada exceed \$400 million) and the "size of transaction threshold" (where the target's assets in Canada or revenues from sales in or from Canada generated from those assets exceed \$87 million (2016)).

The Bureau was satisfied that these measures sufficiently remedied the company's failures to notify and mitigated the likelihood of future non-compliance.³²

OTHER MERGER HIGHLIGHTS FROM 2015

- Notable mergers cleared by the Bureau this year include:
 - Lafarge/Holcim building materials merger;³³
 - Kraft/Heinz food products merger;³⁴
 - Bell's and Rogers' acquisition (50% each) of Glentel cellphone stores;³⁵ and
 - Kingspan's and Ag Growth's acquisitions of Vicwest's building products division and steel agricultural products division, respectively.³⁶
- In September 2015, the Bureau released guidelines to assist in determining whether an acquisition of loans, mortgages or receivables is notifiable under the *Competition Act*. The guideline is intended to clarify the meaning of "goods" in the section of the Act dealing with exemptions from merger pre-notification.³⁷
- In the last two years the Bureau has asked Canadians to provide their view of certain mergers: Postmedia's acquisition of Québecor's 175 daily newspapers, specialty publications and digital properties in 2014, and the retail merger between Renaud-Bray and Groupe Archambault in 2015. To facilitate public input, the Bureau has setup an online feedback form on its website.³⁸
- The Bureau completed 244 merger reviews in its fiscal year 2014-2015 as compared with 233 merger reviews for fiscal year 2013-2014.
- The Bureau released 9 position statements on its review of mergers, as compared with 15 in 2014.
- The pre-merger notification transaction-size threshold for 2016 increased to \$87 million from the 2015 threshold of \$86 million. The party size threshold remains \$400 million.

³² Competition Bureau takes steps to ensure Parrish and Heimbecker complies with pre-merger notification obligations: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03948.html>.

³³ Competition Bureau statement regarding the proposed acquisition by Holcim of Lafarge: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03920.html>

³⁴ Competition Bureau statement regarding the merger between Heinz and Kraft: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03965.html>

³⁵ Competition Bureau statement regarding BCE and Rogers' acquisition of GLENTEL: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03924.html>

³⁶ Competition Bureau statement regarding Kingspan's acquisition of Vicwest and AGI's acquisition of Westeel: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03963.html>

³⁷ Pre-Merger Notification Interpretation Guideline Number 16: Definition of "Goods" (Paragraph 111(a) of the Act): <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03985.html>

³⁸ Overview of Merger Review Process and Merger Feedback Form: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/frm-eng/GH%C3%89T-83KK9Y#form>

Mergers (*Investment Canada Act* — Foreign Investment Review)

NATIONAL SECURITY REVIEWS – CHALLENGES, APPROVALS AND REJECTIONS

For the first time, the *Investment Canada Act*'s (ICA) national security review process is being challenged. According to materials filed before the Federal Court of Canada, O-Net Communications applied for judicial review of the Canadian Government's (Governor in Council's) order to divest its investment in ITF Technologies (a specialty fiber components and modules provider in Québec) on the basis of that the investment would be injurious to national security. O-Net is a high technology company (optical networking, automation and touch panel) listed on the Hong Kong Stock Exchange. In its application, O-Net argues that it was not provided with the basis of the decision nor was it provided with an opportunity to respond. O-Net also argues that its investment is not a threat to national security. However, references to military applications on ITF's website may provide some insight into the possible cause for the government's national security concern: "ITF specializes in high-level solutions for specialized photonic applications such as underwater transmission, military manufacturing and manufacturing systems".³⁹ This matter is currently before the court.

Canada's Minister of Natural Resources approved Paladin Energy Ltd.'s request to be the majority owner and operator of the Michelin uranium mine in Newfoundland and Labrador. Paladin is an Australian uranium production company. Its proposal was reviewed under the Non-Resident Ownership Policy in the Uranium Mine Sector (NROP) and national security review process under the ICA. Under NROP, non-Canadians are not allowed to own more than 49% of an uranium producing mine. However, an exemption is permitted in cases where no Canadian partners can be found – which was the case for Paladin when it demonstrated that no Canadian company wanted to be a majority owner.⁴⁰

According to media reports, a Chinese state-owned enterprise's investment to establish a new Canadian business was blocked on national security grounds⁴¹. Beida Jade Bird's proposal to build a new fire alarm systems factory in Québec was blocked based on national security grounds because of the site's proximity to Canadian Space Agency facilities located under two kilometres away. Beida Jade Bird planned on building fire-alarm systems for the Chinese market. Interestingly, the Québec government had given Beida Jade Bird \$3 million in loans and a \$1 million grant in respect of its project. The Québec government is still assisting Beida Jade Bird and says the company plans to locate its factory elsewhere, likely still in Québec.

"NET BENEFIT" REVIEW THRESHOLD INCREASED TO \$600 MILLION

Long awaited changes to the "net benefit" review threshold for World Trade Organization (WTO) investments by non-state-owned enterprise investors came into force in 2015. This threshold,

³⁹ See http://www.itftechnologies.com/ITF/Articles.php?locale=en&Type_No=40&ID_Article=2

⁴⁰ Minister Rickford Announces Approval of Majority Ownership of Proposed Uranium Mine in Newfoundland and Labrador: <http://www.newswire.ca/news-releases/minister-rickford-announces-approval-of-majority--ownership-of-proposed-uranium-mine-in-newfoundland-and-labrador-518023881.html>.

⁴¹ Ottawa's 'national security' review a warning to foreign investors, Jeff Gray, Globe and Mail: <http://www.theglobeandmail.com/report-on-business/ottawas-national-security-review-a-warning-to-foreign-investors/article25219593/>

which determines whether a non-Canadian investor must seek approval from the Minister of Innovation, Science and Economic Development (formerly the Minister of Industry) under the ICA by filing an application for review, changed from the \$375 million (2016) of “asset value” to \$600 million “enterprise value” (which will eventually rise to \$1 billion enterprise value in 2019). The amendments set out complex formulas for calculating the enterprise value of public entities, non-public entities and Canadian businesses acquired by way of an acquisition of assets. It is important to note that the asset value based method for determining the value of a Canadian business is still in place for (i) state-owned enterprise investors, (ii) Canadian cultural businesses and (iii) non-WTO investments. For further detail, see our article *Investment Canada Act Update: Amendments to National Security Review Timelines and “Net Benefit” Review Threshold*.⁴²

PREFERENTIAL “NET BENEFIT” REVIEW THRESHOLD CONTEMPLATED FOR TRANS-PACIFIC PARTNERSHIP COUNTRIES

In 2015, twelve Pacific Rim countries reached an agreement on the Trans-Pacific Partnership (TPP). In addition to Canada, parties to the TPP include Brunei, Chile, Japan, Australia, New Zealand, Singapore, Peru, Malaysia, Mexico, the United States, and Vietnam. Among other things, the TPP agreement contemplates that TPP countries will benefit from a higher review threshold of \$1.5 billion under the ICA; this means that any acquisition of a Canadian business with an enterprise value of less than that amount will not be subject to review under the ICA, except for national security purposes. However, the new threshold would not apply to acquisitions of Canadian cultural businesses. Also, the threshold for acquisitions by foreign state-owned enterprises will remain at the generally applicable threshold for state-owned enterprises of \$375 million (2016) in “asset value”. It remains to be seen whether the TPP agreement will be ratified. For further detail regarding the TPP, see our article *Official Trans-Pacific Partnership Text Released*.⁴³

OTHER FOREIGN INVESTMENT HIGHLIGHTS FROM 2015:

- **National security review timelines extended:** The timelines for various stages of the national security review process were extended, potentially resulting in the total review period increasing to 200 days (or longer with the consent of the investor) from 130 days.⁴⁴
- **More onerous disclosure requirements:** the 2015 amendments to the ICA also gave rise to additional onerous reporting requirements for investments that are subject to review or post-closing notification under the ICA. For example, the investor will be required to provide information relating to: its board of directors, five highest paid officers and individuals that own 10% or more of the investor; whether it is influenced by a foreign state; and sources of funding for the investments.
- **The 2016 review threshold** for (i) acquisitions by SOE investors, (ii) acquisitions of Canadian cultural businesses or (iii) non-WTO investments increased to \$375 million based on the book value of the Canadian business’ assets from the 2015 threshold of \$369 million.

⁴² *Investment Canada Act Update: Amendments to National Security Review Timelines and “Net Benefit” Review Threshold*, Oliver Borgers, Michele Siu: https://www.mccarthy.ca/article_detail.aspx?id=7069

⁴³ *Official Trans-Pacific Partnership Text Released*, John W. Boscariol, Robert A Glasgow: http://www.mccarthy.ca/article_detail.aspx?id=7171

⁴⁴ *Investment Canada Act Update: Amendments to National Security Review Timelines and “Net Benefit” Review Threshold*, Oliver Borgers, Michele Siu: https://www.mccarthy.ca/article_detail.aspx?id=7069

Reviewable Practices

WATER HEATERS CASE ENDS

The Bureau's application against Direct Energy Marketing Limited was resolved by way of a consent agreement in which Direct Energy agreed to pay an administrative monetary penalty (AMP) of \$1 million.⁴⁵ This marks the end of the Bureau's case against Direct Energy which began in 2012 when the Bureau filed its application against Direct Energy seeking an AMP of \$15 million. The consent agreement also provides that if Direct Energy re-enters the residential water heater market in the next ten years it must establish and maintain a corporate compliance program.⁴⁶ At the same time the Bureau initiated its case against Direct Energy, it also filed an application against another water heater rental supplier, Reliance Comfort Limited Partnership. The case against Reliance was resolved in 2014 when Reliance agreed to pay a \$5 million AMP and \$500,000 to the Bureau for its investigation costs.⁴⁷

REALTORS AND HOME SELLERS

Last fall, the Tribunal reheard the Commissioner's application against the Toronto Real Estate Board (TREB).⁴⁸ This case deals with alleged anticompetitive restrictions that TREB places on its realtor members regarding how much Multiple Listing Service (MLS) information they are allowed to post online. In the first hearing of the case, the Tribunal found that an abuse of dominance order could not be made against TREB because it does not compete with its members. The FCA disagreed and sent the case back to the Tribunal for redetermination. At this time, the Tribunal's decision has not yet been released. For more detail on this case, see our article, *Supreme Court of Canada Dismisses Toronto Real Estate Board's Leave to Appeal — Competition Tribunal Must Reconsider Commissioner's Application*.

In another case impacting realtors, the Tribunal disagreed with the Bureau's interpretation of its consent agreement with the Canadian Real Estate Association (CREA). The consent agreement, entered into in 2010, had been reached to address the Bureau's concerns relating to abuse of dominance. Under the consent agreement, CREA agreed to allow its member realtors to offer a "mere posting" option for property listings to MLS without requiring their customers to sign up for additional services. The Bureau argued before the Tribunal that CREA breached the consent agreement by imposing restrictions on how seller contact information can be displayed on member realtors' websites. In its decision released in 2015, the Tribunal sided with CREA and the Bureau chose not to appeal.⁴⁹

⁴⁵ *Agreement with Direct Energy to resolve concerns in Ontario water heater industry:*
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03997.html>

⁴⁶ In March 2015, the Competition Tribunal held that the Commissioner of Competition can pursue an order against Direct Energy, even though Direct Energy had exited the rental water heater industry in 2014.

⁴⁷ National Energy was an intervenor in support of the Commissioner's cases against Reliance and Direct Energy, claiming that the respondents' practices created artificial barriers to entry. In an ironic twist, in 2014, National Energy agreed to pay \$7 million for its deceptive marketing practices in persuading consumers to rent their water heaters.

⁴⁸ CT-2011-003: <https://www.canlii.org/en/ca/cact/doc/2011/2011cact15/2011cact15.html?resultIndex=2>

⁴⁹ *Commissioner of Competition will not appeal decision on Canadian Real Estate Association matter:*
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03944.html>

INSULIN PUMP MANUFACTURER AGREES TO AMEND WARRANTY TERMS

A supplier of insulin pumps for diabetic patients, Medtronic of Canada Ltd., agreed to amend warranty terms relating to use with non-Medtronic equipment. The terms indicated that the warranty would be voided if non-Medtronic products were used with the Medtronic insulin pump. In the Bureau's view, these terms limited competition and restricted consumer choice. In response to the Bureau's concerns, Medtronic revised the warranty terms: the warranty will only be voided if damage results from the use of non-Medtronic products with the Medtronic insulin pump.⁵⁰

CONTINUED FOCUS ON CONSUMER PRODUCTS COMPANIES

The Monopolistic Practices Directorate's (MPD) high profile investigations into the practices of other consumer products and services companies, such as Apple, Google and Loblaw's, continued in 2015. The MPD is advancing "several important cases with high impact on the Canadian economy and consumers, a number of which are focused on our priority areas of promoting competition in the digital economy and supporting innovation in Canadian markets."⁵¹

⁵⁰ *Competition Bureau Reaches Agreement with Insulin Pump Manufacturer to Resolve Competition Concerns:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03887.html>

⁵¹ *Remarks by John Pecman, Commissioner of Competition, The Competition Bureau: A Year of Internal Reform and Accomplishments*, June 9, 2015: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html>

Misleading Advertising

FOCUS ON PRICE ADVERTISING - AMPS, APPLICATIONS AND INVESTIGATIONS

A retailer entered into a 10-year consent agreement with the Bureau and agreed to pay a \$3.5 million AMP to resolve concerns regarding price advertising for custom and select ready-made framing. In the Bureau's view, the retailer "did not ensure that the frames were offered for sale in good faith prior to promoting them at substantial discounts". The retailer also agreed to establish a corporate compliance program, as well as ensure that price claims for all its products comply with the Act's ordinary selling price provisions.⁵²

The Bureau also initiated a misleading advertising application against Aviscar Inc. and Budgetcar Inc. alleging that the two companies promote car rentals at prices and discounts that are not attainable because customers are required to pay additional fees over the initial advertised rental price. It is seeking a \$10 million administrative monetary penalty (the maximum amount) against each of the two Canadian operating companies, and also the US public parent company, Avis Budget Group Inc., on the basis that it planned and was essential in the making of the challenged representations. The Bureau is also seeking restitution to customers and the publication of corrective notices.

Also of note: this is the first time the Bureau is proceeding under the new provisions of the Act that came into force as part of *Canada's Anti-Spam Legislation* (CASL) by seeking remedies for misleading discounts offered in the subject matter and main text of promotional emails. These new provisions allow the Bureau to bring an application for any false or misleading representations included in subject lines, without having to demonstrate materiality or the impact on consumers' decision to buy the advertised product or service. For further detail, see our article *Competition Bureau seeks \$30M against Avis and Budget over non-optional fees*.⁵³

Finally, early in 2015, two major department store retailers were ordered by the Federal Court to produce certain records and information to the Bureau in connection with the Bureau's investigation into the retailers' regular price claims with respect to the promotion and sale of mattresses.⁵⁴

PREMIUM TEXT MESSAGING SETTLEMENTS

The Bureau settled with two wireless carriers in respect of its case before the Ontario Superior Court in which the Bureau sought to hold the carriers responsible for alleged representations of third parties. One of the carriers agreed to pay up to an estimated \$5.42 million in refunds to current and former customers regarding certain premium text messaging charges on customers' wireless phone bills for a particular period.⁵⁵ The other carrier, on a similar basis, agreed to

⁵² *Michaels to pay \$3.5 M penalty to settle frames and custom framing services price advertising case:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03923.html>

⁵³ *Competition Bureau seeks \$30M against Avis and Budget over non-optional fees*, Dominic Thérien: <http://www.consumerretailadvisor.com/2015/03/competition-bureau-seeks-30m-against-avis-and-budget-over-non-optional-fees/>

⁵⁴ *Commissioner of Competition v. Sears Canada Inc.*, T-87-15; *Commissioner of Competition v. Hudson's Bay Company*, T-88-15.

⁵⁵ *Rogers agreement with Competition Bureau nets record refunds for wireless consumers:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03889.html>

issue rebates of up to \$7.34 million and also promised to donate \$250,000 for research on consumer issues.⁵⁶ Both carriers also agreed to other measures relating to consumer education of wireless charges. The case against the other defendants is ongoing.

OTHER HIGHLIGHTS FROM 2015

- **Consent Agreements:** The Bureau reached an agreement with a manufacturer of sports equipment with respect to concerns it had relating to certain performance claims made in advertisements.⁵⁷ Among other things, the manufacturer agreed to stop making the performance claims, donate \$475,000 of sports equipment to charity and implement an enhanced corporate compliance program. In another matter, a communications company affirmed its commitment not to encourage its employees to review, rate or rank the company's apps in app stores in order to address the Bureau's concerns relating to online reviews.⁵⁸ Among other things, the company also agreed to pay an AMP of \$1.25 million. In the Bureau's view, online reviews and ratings posted by employees of the company, without disclosing that they were employees of the company, "created the general impression that they were made by independent and impartial consumers and temporarily affected the overall star rating for the apps".
- **Sentences and Fines:** Three individuals were sentenced for deceptive telemarketing in relation to a business directories operation. The sentences varied amongst the individuals, which included fines ranging from \$10,000 to \$50,000, conditional sentences of 2-months to 15-months, and community service hours from 120 hours to 175 hours.⁵⁹
- **Memorandum of Understanding with Ontario Ministry:** the Competition Bureau signed a MOU with the Ontario Ministry of Government and Consumer Service to "enhance consumer protection in the marketplace and strengthen compliance with, and enforcement of, the federal *Competition Act* and Ontario's *Consumer Protection Act*." Commitments included notifying each other about enforcement activities and advising on strategic priorities, trends and policies.⁶⁰
- **Deceptive Marketing Practices Digest Launched:** The Bureau's first issue of the digest focusses on the digital economy and addresses online advertising, disclaimers and astroturfing (ads designed to look like independent reviews).⁶¹

⁵⁶ *Telus customers to receive \$7.34 million in rebates as part of Competition Bureau agreement:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04017.html>

⁵⁷ Consent agreement between Commissioner of Competition and Sport Maska Inc: http://www.ct-tc.gc.ca/CMFiles/CT-2015-011_Registered%20Consent%20Agreement_2_38_10-14-2015_4246.pdf

⁵⁸ Consent agreement between Commissioner of Competition and Bell Canada: http://www.ct-tc.gc.ca/CMFiles/CT-2015-011_Registered%20Consent%20Agreement_2_38_10-14-2015_4246.pdf

⁵⁹ *Montreal-based deceptive telemarketers sentenced:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03967.html>

⁶⁰ *Ontario Ministry of Government and Consumer Services and Competition Bureau unite to strengthen consumer protection and support competition:* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03888.html>

⁶¹ *The Deceptive Marketing Practices Digest*, June 10, 2015. See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>

Class Actions

LIMITS ON TORT AND RESTITUTIONARY CLAIMS

Canadian courts have considered whether breaches of the *Competition Act* can form the basis for tort and restitutionary claims. In *Watson v. Bank of America Corporation*,⁶² a class action which dealt with allegations of price-fixing, the British Columbia Court of Appeal found that tort and restitutionary claims can be available as causes of action in addition to the statutory cause of action in section 36 of the *Competition Act*. This reversed the trial decision, which relied on another British Columbia Court of Appeal decision from 2014, *Wakelam v. Wyeth Consumer Healthcare*.⁶³ The Court in the *Watson* appeal distinguished *Wakelam* as barring only certain restitutionary claims arising from the Act. On the other hand, in *Shah v. LG Chem, Ltd.*,⁶⁴ the Ontario Superior Court of Justice rejected the availability of tort and restitutionary claims in a class action involving alleged price-fixing. In light of the fact that Parliament specifically created a damages scheme for contraventions of the Act in section 36, many argue that it is unfair that a defendant could be subjected to additional liability stemming from the common law or equity.

ACCESS TO THE BUREAU'S INVESTIGATIVE FILE IN CRIMINAL MATTERS

In one of the class actions related to the retail gas cartel in Québec,⁶⁵ the Québec Court of Appeal affirmed the trial judge's decision granting the plaintiff's leave to examine the Competition Bureau officer in charge of the criminal investigation. The Court rejected the Attorney General's argument that pursuant to the *Crown Liability and Proceedings Act*, the Federal Government is immune from oral discovery in proceedings where it is not a party. The Court also found that the order made was not disproportionate because the trial judge limited the scope of the examination.⁶⁶

⁶² 2015 BCCA 362: <https://www.canlii.org/en/bc/bcca/doc/2015/2015bccca362/2015bccca362.html?resultIndex=1>

⁶³ 2014 BCCA 36: <https://www.canlii.org/en/bc/bcca/doc/2014/2014bccca36/2014bccca36.html?resultIndex=1>

⁶⁴ 2015 ONSC 6148: <https://www.canlii.org/en/on/onsc/doc/2015/2015onsc6148/2015onsc6148.html?resultIndex=1>

⁶⁵ *Canada (Procureure générale) v. Thouin*, 2015 QCCA 2159; application for leave to appeal to be filed.

⁶⁶ In *Jacques v. Imperiale & al*, 2014 CSC 66: <https://www.canlii.org/fr/qc/qcca/doc/2015/2015qcca2159/2015qcca2159.html?autocompleteStr=2015%20QCCA%202159&autocompletePos=1>, the plaintiff (represented by the same law firms) obtained disclosure of wiretap evidence gathered by the Bureau. The trial judge in *Thouin* authorized the disclosure of this evidence to Thouin and limited the examination of the Bureau investigator to evidence related to the 14 geographic areas covered by the class action.

Other Developments in 2015

EYE ON BROADCASTING

The Bureau has been actively monitoring the broadcasting industry. As part of a broader effort to increase its advocacy efforts, the Bureau made submissions to the Canadian Radio-television and Telecommunications Commission (CRTC) regarding video-on-demand services⁶⁷ and negotiations between television channels and cable/satellite providers,⁶⁸ agreeing with the CRTC's position in both instances:

- The Bureau favoured incentivizing cable/satellite providers and internet service providers not to restrict access to video-on-demand services to their own subscribers. The Bureau argued that such restrictions limit consumer choice and disadvantage competitors who do not offer video-on-demand services, because consumers who wish to access, or continue accessing, a video-on-demand service must select, or stay with, the corresponding cable/satellite or internet service provider.
- The Bureau cautioned about the use of penetration-based wholesale pricing for television channels, whereby the per subscriber price that cable/satellite providers pay to carry a channel drops as the proportion of its subscribers who subscribe to that channel increases. Similarly, the Bureau's rationale was that its view protects consumer choice and evens the playing field for competitors that do not own television channels, because penetration-based pricing can incentivize cable/satellite providers to bundle channels in order to increase the penetration of channels that would be less popular if subscribers could "pick-and-pay".

On the enforcement side, the Bureau chose not to take action after investigating Rogers' 12 year, \$5.2 billion deal with the NHL for exclusive rights to all national games, even though Rogers already held exclusive rights to some regional NHL games.⁶⁹ The Bureau concluded that cable/satellite providers already considered Rogers' Sportsnet to be a "must have" channel and, that in the case of a dispute about the wholesale price of Sportsnet, the CRTC could provide an effective remedy. The Bureau also found that advertisers were able to resist price increases or had equally effective alternatives to advertising on NHL games. Interestingly, the Bureau did not address the deal's effect on non-traditional broadcasting (e.g., mobile, online).

UPDATED CORPORATE COMPLIANCE PROGRAMS GUIDANCE

In June 2015, the Bureau released its updated Corporate Compliance Bulletin.⁷⁰ The bulletin is intended to ensure compliance with the Act.⁷¹ It sets out the benefits for companies who put in place and follow "credible and effective" competition law compliance programs, as well as the basic elements of such programs. The most notable element in the revised bulletin is that

⁶⁷ Bureau Submission: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03910.html>

⁶⁸ Bureau Submission: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03918.html>

⁶⁹ Bureau Position Statement: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03994.html>

⁷⁰ [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf)

⁷¹ The bulletin also covers the other statutes that the Competition Bureau administers and enforces: provisions enacted by the Canada's anti-spam legislation (CASL), the Consumer Packaging and Labelling Act and the Precious Metals Marking Act.

despite a competition law breach, a pre-existing credible and effective program may still be beneficial to a company. With respect to companies seeking leniency for criminal cartel and bid-rigging offences, a pre-existing credible and effective program may be considered as a mitigating factor in the Bureau's recommendation of the appropriate fine to the PPSC. In non-criminal matters, a pre-existing program may be considered as a mitigating factor for the magnitude of the administrative monetary penalty sought by the Bureau. In the appropriate circumstances, the Bureau may take into account the pre-existence of a credible and effective compliance program when deciding whether to pursue a matter along a criminal or civil track (when both are available). The Bureau may also be more inclined to consider an alternative form of resolution (versus litigation) where a credible and effective program was in place at the time of the contravention. For further detail, see our article *5 Things All Companies Need to Know About the Competition Bureau's updated Corporate Compliance Programs Bulletin*.⁷²

DRAFT UPDATED IP ENFORCEMENT GUIDELINES ADDRESSING PHARMA PATENT LITIGATION SETTLEMENTS, STANDARD SETTING AND PATENT TROLLS

Following an initial consultation process concluded last year, the Bureau released draft revised *Intellectual Property Enforcement Guidelines* (IPEGs) for public consultation on June 9, 2015. These new draft IPEGs will not change the Bureau's general enforcement policy with respect to IP rights, but do provide additional guidance on its approach to: (i) pharmaceutical patent litigation settlements, (ii) standard essential patents, and (iii) patent assertion entities. For further detail, see our article *Competition Bureau Issues Draft Updated IP Enforcement Guidelines Addressing Pharma Patent Litigation Settlements, Standard Setting and Patent Trolls*.⁷³ The final version of the IPEGs is expected in the spring of 2016.

COMPETITION BUREAU RE-ORGANIZATION

In 2015, the Bureau underwent internal reorganization and combined eight branches into four. The four new branches are: (i) the *Mergers and Monopolistic Practices Branch* (combines the former Mergers Branch and Civil Matters Branch), (ii) the *Cartels and Deceptive Marketing Practices Branch* (combines the former Criminal Matters Branch and Fair Business Practices Branch), (iii) the *Competition Promotion Branch* (combines the former Economic Policy and Enforcement Branch, Legislative and International Affairs Branch and Public Affairs Branch), and (iv) the *Corporate Services Branch* (includes the Electronic Evidence Unit and the Information Centre). The new structure is intended to "increase collaboration and organizational synergies within the Bureau, provide greater flexibility in allocating resources to strategic priorities, and establish a more complementary balance between the Bureau's enforcement and competition promotion activities."⁷⁴

⁷² *5 Things All Companies Need to Know About the Competition Bureau's updated Corporate Compliance Programs Bulletin*, Oliver Borgeers, Michele Siu and Dominic Thérien:
http://www.mccarthy.ca/article_detail.aspx?id=7135

⁷³ *Competition Bureau Issues Draft Updated IP Enforcement Guidelines Addressing Pharma Patent Litigation Settlements, Standard Setting and Patent Trolls*, Don Houston, Dominic Thérien and Jonathan Bitran:
http://www.mccarthy.ca/article_detail.aspx?id=7116

⁷⁴ *Competition Bureau restructures to maximize its contribution to a more competitive marketplace*:
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03897.html>

Our Competition/Antitrust Law Group

Domestic and international businesses operating in Canada must be vigilant about respecting the civil and criminal provisions of the *Competition Act*, and on the lookout for opportunities to gain a competitive edge. McCarthy Tétrault has one of the leading competition and antitrust practices in Canada. Our group and its partners are consistently ranked at the top of key Canadian and international ranking services, including *Chambers Global*, *Lexpert*, *Global Competition Review* and *Euromoney*. We help you cut through the complex maze of issues to avoid problems and minimize risks, and if necessary, defend your interests with vigour.

INCOMPARABLE EXPERTISE

Our services flow into two main streams — advice and litigation. We advise you on private and public mergers and acquisitions, structuring deals, business practices and day-to-day compliance matters. We help you understand the criminal and non-criminal provisions of the Act and develop comprehensive and effective compliance programs. Our competition litigators are among the most reputed in Canada. We represent you in proceedings before the Competition Tribunal or the courts.

Clients in every sector turn to McCarthy Tétrault to address their competition and antitrust needs. We integrate exceptional expertise across the firm in all areas of law and in Canada's two legal systems — civil and common law — to address any client issue.

MERGERS

Competition issues have become more prominent in merger transactions. We regularly act for clients on large transactions, both domestic and international, which raise complex competition issues. We have extensive experience working with clients and lawyers in the U.S. and abroad on cross-border and international transactions that raise competition issues in multiple jurisdictions.

CARTELS AND CLASS ACTIONS

We have a wealth of expertise in cartel matters. In the cartel area, we represent clients in criminal proceedings, Competition Bureau investigations, and civil proceedings, including class actions. McCarthy Tétrault's experience in defending competition class actions, as well as class actions in general, is unsurpassed in Canada. Over the past 20 years, our lawyers have represented clients involved in almost all national and international cartel cases in Canada.

COMPETITION TRIBUNAL PROCEEDINGS

In Canada, merger cases, abuse of dominance and other significant civil matters are dealt with by the Competition Tribunal. We have an unsurpassed track record of litigating cases before the Tribunal and have been frequently retained by the Commissioner in Tribunal proceedings.

COMPETITION ADVICE AND COMPLIANCE PROGRAMS

We provide you with valuable assistance to ensure that your business practices are in compliance with competition laws and help you avoid the potentially severe consequences of a Competition Bureau investigation.

INDUSTRY LEADERSHIP

Members of our National Competition/Antitrust Law Group are consistently recognized among the world's top lawyers by the leading international directories. McCarthy Tétrault's competition lawyers have advised the Government on legislative amendments and enforcement practices and have acted as counsel on landmark competition cases, both for and against the Government. Our knowledgeable and widely published lawyers have written and lectured extensively on all aspects of competition law and have held executive positions in the National Competition Law Section of the Canadian Bar Association.

For more information, please contact:

CALGARY	TORONTO	TORONTO	MONTRÉAL
Rick W. Pawluk 403-206-5522 rpawluk@mccarthy.ca	Oliver J. Borgers 416-601-7654 oborgers@mccarthy.ca	Donald B. Houston 416-601-7506 dhouston@mccarthy.ca	Madeleine Renaud, Ad. E. 514-397-4252 mrenaud@mccarthy.ca