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Trends to Watch

2022 Competition Law and Foreign Investment

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

2022 Competition Law and Foreign Investment Trends To Watch

This publication reviews key developments in Canada during 2021 and reflects on their significance for 2022 and beyond.

First, the prospect of a real debate on substantial reform of the *Competition Act* has gained momentum. Driven by the divergence in Canada's approach to the enforcement of buy-side agreements between competitors (such as no-poach agreements) compared with some other jurisdictions, and the Competition Bureau's (Bureau) recent experience in litigating allegedly anti-competitive mergers where the parties have invoked Canada's unique efficiencies defence, the Bureau has joined other domestic stakeholders in advocating for legislative reform. Second, in the meantime, parties can expect the Bureau to take a harder line on merger enforcement, particularly where parties look to close their transaction prior to the Bureau concluding its review. Likewise, national security review of transactions under the *Investment Canada Act* has intensified in 2021, with the government codifying in revised guidelines a more expansive approach to its intervention policy that was introduced during the COVID-19 pandemic.

Key stakeholders in the federal Parliament and the Commissioner of Competition, Matthew Boswell, have indicated their support for a comprehensive review of the *Competition Act*, and in particular the tools it provides to the Bureau in the modern, increasingly digitalized economy.

Finally, through significant expansion in its budget and the imminent creation of a specialized digital economy branch, the Bureau continues to focus on digital enforcement, both in respect of abuse of dominance and deceptive marketing and misleading advertising. In a sign that the Bureau is looking to emulate peer agencies in other countries, it is pursuing investigations against several major technology companies. While cartel enforcement continues to focus on domestic cases, the Bureau is expected to scrutinize buy-side agreements carefully under the civil regime and is advocating to recriminalize these practices.

Reform is in the Air: Is the *Competition Act* Fit for (21st Century) Purpose?

Thirteen years after the last major competition policy debate in Canada led to a significant overhaul of the regime, several developments in 2021 have moved the conversation beyond specific enforcement priorities to a broader discussion on the legislative framework that underpins competition law enforcement in Canada. Key stakeholders in the federal Parliament and the Commissioner of Competition, Matthew Boswell, have indicated their support for a comprehensive review of the *Competition Act*, and in particular the tools it provides to the Bureau in the modern, increasingly digitalized economy.

These developments have advanced — and accelerated — in 2021 in distinct stages.

POLITICAL MOMENTUM FOR REFORM

In February 2021, the House of Commons *Standing Committee on Industry, Science and Technology* (INDU) resolved to study competitiveness in Canada. In a series of meetings, and with the benefit of submissions and testimony from key stakeholders including the Canadian Bar Association, businesses and individual experts, INDU debated the extent to which the *Competition Act* remains fit for purpose. Much of INDU's focus centred on the extent to which wage-fixing (and buy-side agreements between competitors more generally) should be subject to potential criminal, rather than civil prosecution. INDU's interest stretches back to June 2020, when it summoned executives from major Canadian grocery retailers to answer questions relating to their almost-simultaneous decisions to cut COVID-19 pay premiums for workers.

While INDU's work putatively considered all aspects of Canada's regime, its June 2021 report focused on wage-fixing, recommending the amendment of s. 45 of the *Competition Act* to prohibit (once again) cartel-like practices between competitors related to the purchase of goods and services, including wage-fixing agreements. INDU also advocated the distribution of greater resources to the Bureau to enable more effective enforcement.

THE COMMISSIONER ADDS HIS WEIGHT TO THE DEBATE

The Commissioner of Competition, Matthew Boswell, expanded on this theme during his annual address to the CBA Competition Section's fall conference in October 2021, supporting more wholesale reform in addition to the recriminalization of buy-side competitor agreements

The Bureau would like to see the efficiencies defence fully repealed, or at least statutorily limited in some way.

This speech crystallized the Bureau's position on a range of topics, and the Commissioner highlighted several areas where legislative reform may be warranted, questioning whether "the Bureau has the right tools under the *Competition Act* to take necessary and meaningful enforcement action."

– The Commissioner first raised the weak maximum available civil penalties and criminal fines under the existing regime (currently administrative monetary penalties of up to C$10 million for certain civil infringements, and criminal fines up to C$25 million for hard-core cartels) as well as the absence of private

enforcement tools for certain infringements, such as abuse of dominance.

– After the Bureau's recent experience in seeking interim relief in the *Secure/Tervita* transaction, the Commissioner also highlighted the "*overly strict and impractical legal tests*" that are inhibiting the Bureau from preventing consummation of anticompetitive mergers. Central to the Commissioner's critique of Canada's merger control laws is the efficiencies defence, the contours of which have been defined by case law over time, leading in the Commissioner's view, to the creation of an (overly) "high bar" for the Bureau to challenge mergers successfully. Without question, the Bureau would like to see the efficiencies defence fully repealed, or at least statutorily limited in some way.

GOVERNMENT OPENS THE DOOR FOR BROAD REFORMS OF COMPETITION AND FOREIGN INVESTMENT LAW

While the new Liberal government did not identify *Competition Act* reform as a key legislative goal during the Governor General's Throne Speech at the official opening of Parliament in November 2021, the mandate letter released to the Minister of Innovation, Science and Industry in December 2021 set a more assertive tone than mandates in recent years, especially in respect of competition law and foreign investment regulation. Broadly consistent with recent messaging from the Commissioner and INDU, the Prime Minister's instructions are the strongest endorsement yet from the government regarding antitrust reform and the bolstered use of national security reviews under the *Investment Canada Act*. The Prime Minister has instructed the Minister to undertake a broad review of the *Competition Act* in order to identify any areas of the regime in need of modernization, which will likely involve assessing the extent to which the Bureau has the proper tools to review and address anticompetitive conduct in the increasingly digitalized economy.

With respect to the *Investment Canada Act*, the mandate letter strikes a decidedly protectionist tone, calling for the review of the *Investment Canada Act* to strengthen the national security review process and better identify and mitigate economic security threats from foreign investment.

The Prime Minister has instructed the Minister to undertake a broad review of the *Competition Act* in order to identify any areas of the regime in need of modernization, which will likely involve assessing the extent to which the Bureau has the proper tools to review and address anticompetitive conduct in the increasingly digitalized economy.

Accordingly, there is growing traction and political sponsorship in Canada to — at the very least — undertake a substantive review of the *Competition Act*. Many stakeholders and commentators discuss the potential for reform by comparing the Canadian regime with the competition laws of other countries, particularly the United States, U.K. and European Union. While international comparisons are inevitable, any wholesale reform of the Canadian regime must be carried out carefully, to avoid unintended consequences and ensure that any amendments work to advance Canadian policy objectives and economic interests.

Moreover, the Bureau will deploy significantly increased financial resources over the next five years to enforce the *Competition Act* and drive its enforcement priorities. The question remains whether the Bureau already has sufficient legislative tools in its armoury to fulfil its mandate, but has until now been underfunded; or whether there is a genuine substantive "gap" in the *Competition Act* that merits rectification.

Merger Review: Hardening of Bureau Enforcement Stance

Merger review activity at the Bureau has increased substantially over the past year. While 2020 saw a serious decline in the number of Bureau merger reviews, undoubtedly related to the COVID-19 pandemic, 2021 has seen a return to normal. In the six months ended March 31, 2021 (the Bureau's year-end), the Bureau received 120 merger filings, a more than 200% increase over the number of filings received in the previous six-month period (April to September 2020). There was a similarly dramatic rise in the number of Bureau reviews of non-notifiable mergers over the same period, with the Bureau initiating 12 such reviews in the second half of its fiscal year, as compared to only two reviews in the first half.

Despite fewer filings, the Bureau's 2021 fiscal year saw an overall level of merger enforcement activity consistent with previous years; with the Bureau issuing 11 Supplementary Information Requests (SIRs, the equivalent of a Second Request in the U.S. or Phase 2 in Europe), registering two consent agreements and identifying three transactions as being abandoned due to competition concerns. Proportionally, the Bureau issued SIRs in respect of approximately 6% of notified transactions; and for approximately 45% of transactions that received a SIR, a remedy was required or the transaction was abandoned. This is broadly consistent with the level of enforcement activity seen over the previous six years, during which time with the Bureau issued SIRs in respect of approximately 6% of merger filings and achieved a remedy or had the transaction abandoned in approximately 38% of SIR cases.

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In calendar year 2021, three transactions have been subject to a remedy through registered consent agreements, all of which involved structural divestitures. In *MacEwen/Quickie Convenience*, which involved the acquisition of 55 retail gas stations, the parties agreed to divest a station in one local area. In *Paper Excellence/Domtar*, a merger between pulp and paper manufacturers, the parties agreed to divest a pulp mill. Finally, in *FCL/Blair*, which concerned the retailing of crop inputs, the parties and the Bureau agreed to a structural divestiture prior to SIR compliance, which is atypical in Canada, where remedy discussions generally only begin following SIR compliance.

That year also saw the Bureau engage in less common merger enforcement activity; advancing three merger challenges before the Competition Tribunal (initiating challenges in *Secure/Tervita* and *GFL/Terrapure* and continuing to litigate *Parrish Heimbecker/Louis Dreyfus Company*) and carrying out two high-profile merger reviews in parallel with specialized Canadian regulatory approval processes.

MERGER INJUNCTIONS

In Canada, merging parties commonly provide for positive Bureau clearance as a condition to closing for notifiable transactions, in addition to the mere expiry of the statutory waiting period. However, in recent years, a number of mergers have closed in the face of ongoing Bureau reviews. In summer 2021, the Bureau tried and failed to prevent closing of a transaction it considered to raise concerns. The Bureau's defeat at the Competition Tribunal provoked a strong reaction from the Bureau, which has signalled a potentially more contentious approach to merger reviews in response.

In *Secure/Tervita*, the Bureau brought an application to the Competition Tribunal challenging the merger and seeking an interim injunction to prevent closing prior to adjudication of the merger challenge. The Tribunal's decision rejecting the Bureau's injunction application provides useful guidance for merger parties, particularly in circumstances where the parties may be interested in closing their transaction without positive clearance from the Bureau:

- **The parties' conduct prior to closing will influence the onus placed on the Bureau.** Canadian case law establishes a higher burden for obtaining "mandatory" rather than "restraining" injunctive relief. Post-closing injunctive relief will generally be considered "mandatory". However, the Tribunal found that "high-handed" conduct on the part of the merging parties will allow the Bureau to benefit from the lower burden applicable to "restraining" relief even when seeking "mandatory" relief.
- **Competitive effects during the interim period qualify as irreparable harm.** The Tribunal confirmed that evidence of negative competitive effects during the period prior to the final determination of the merger challenge is sufficient to establish irreparable harm. It is not necessary for the Bureau to show that, absent the injunction, an effective go-forward remedy could not be achieved upon conclusion of the merger challenge.
- **The Bureau must quantify harm to outweigh any efficiencies evidenced by the parties.** Where the merger parties put forward evidence of damages they will suffer as a result of an injunction (including lost efficiencies), the Bureau must put forward at least a ballpark quantification of the alleged competitive harm. Where the Bureau fails to do so, the parties' damages will provide grounds for the Tribunal to refuse to enjoin.

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The Bureau has made clear that it considers the obligation to quantify harm at the injunction stage to be a high bar and that this will significantly impact the Bureau's approach to merger reviews. In a fall 2021 speech, the Commissioner warned that the Bureau will need to pursue a litigation-focused approach with less transparency and engagement. The practical implications of this are likely to become clearer over the coming year; however, the Bureau can be expected to be more adamant in requiring timing agreements from the parties and be more likely to initiate

injunction proceedings earlier in the review process in the absence of a satisfactory timing commitment.

POST-CLOSING CHALLENGES

On November 30, 2021, the Bureau challenged the already-completed acquisition of Terrapure Environmental Inc. by GFL Environmental Inc., more than three months after closing, because of concerns for industrial waste services and oil recycling services in Western Canada. In a statement, GFL indicated that it closed the acquisition following the expiration of the statutory waiting period. This matter shows, on the one hand, that some parties are ready to close despite an ongoing review, and, on the other hand, that in such circumstances the Bureau will not hesitate to seek post-closing remedies.

CONFIDENTIALITY IN MERGER CHALLENGES

In January 2021, the Bureau sought a confidentiality order from the Competition Tribunal to conceal the identity of five witnesses providing evidence in its challenge of the proposed acquisition by Parrish & Heimbecker of a grain elevator from the Louis Dreyfus Company. The Tribunal rejected the Bureau's motion, confirming that economic or commercial harm specific and limited to an individual witness is insufficient for obtaining a confidentiality order. Rather, the Bureau is required to provide clear and convincing evidence of a public dimension to the alleged harm.

The Tribunal rejected the Bureau's motion, confirming that economic or commercial harm specific and limited to an individual witness is insufficient for obtaining a confidentiality order

The Tribunal's decision provides an important reminder for both merger parties and merger complainants. For merger parties, it confirms the Tribunal's commitment to a fair and transparent process. However, it highlights that complainants may ultimately need to identify themselves publicly and bear the associated commercial risk.

PARALLEL REVIEWS

In the past year, two high-profile mergers have been subject to parallel regulatory review under both the *Competition Act* and more specialized Canadian regulatory regimes.

Air Canada's proposed acquisition of Transat was subject to public interest review under the *Canada Transportation Act* (CTA), which applies to any merger that is notifiable under

the *Competition Act* and involves transportation undertakings. Where the Canadian Minister of Transportation determines that such a merger raises public interest issues, the Bureau loses jurisdiction to challenge the transaction and takes on an advisory role to the Minister, with ultimate approval authority for the transaction resting with the federal Cabinet.

Rogers Communications' proposed acquisition of Shaw Communications is subject to *Competition Act* review as well as telecommunications related review processes by the Canadian Minister of Innovation, Science and Industry and the Canadian Radio-television and Telecommunications Commission (CRTC).

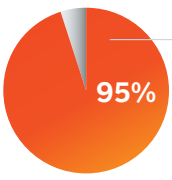
Parallel regulatory review processes raise unique strategic considerations that are important to assess proactively. For example, CTA and CRTC reviews may involve more public participation (including public hearings) than a Competition Bureau review and may substantially influence regulatory approval timelines. Parallel reviews can present both valuable opportunities and unique challenges, which should be carefully weighed in developing a co-ordinated regulatory strategy.

ANALYSIS OF M&A INVOLVING PUBLICLY LISTED CANADIAN TARGETS

A review of the largest 50 negotiated M&A transactions announced between January 1 and December 1, 2021 (of which one does not have a publicly available transaction agreement at the time of writing) that involved a publicly listed Canadian target demonstrates that a significant proportion (39%) included a *Competition Act* closing condition.

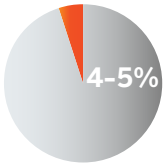
- Of those with a *Competition Act* condition, 95% (18 out of 19) required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter, rather than being satisfied on the expiry of the applicable waiting period. This suggests that merging parties are aware of the risk attached to closing a transaction prior to receiving formal Bureau clearance.
- Approximately half (10 out of 19) agreements that had a *Competition Act* closing condition also incorporated covenants relating to remedies, with two agreements (11%) requiring the purchaser to give remedies if required, and eight agreements (42%) providing that the purchaser was not required to give a remedy to obtain *Competition Act* clearance.
- A significant proportion of agreements included covenants relating to which party had carriage of regulatory strategy (nine out of 19). A smaller number imposed a reverse break fee on the purchaser if the *Competition Act* closing condition was not satisfied (two out of 19). In those cases, the reverse break fee was between 4% and 5% of transaction value.

M&A Analysis



18 out of 19 (95%) required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter

10 out of 19 agreements had a *Competition Act* closing condition also incorporated covenants relating to remedies



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Investment Canada Act — National Security Review Expands Further

CONTINUED FOCUS ON NATIONAL SECURITY AMID THE ONGOING COVID-19 PANDEMIC

Foreign investment review in Canada continued to be marked by the COVID-19 pandemic, in particular through continued use of the national security review provisions of the *Investment Canada Act* (ICA) to scrutinize a broader variety of transactions. While some 2020 COVID-19 developments, notably the extended timelines for ordering a national security review of certain investments, were allowed to expire in 2021, other COVID-related developments were continued. In particular, the April 2020 *Policy Statement on Foreign Investment Review and COVID-19*, which provides for "enhanced scrutiny" of foreign investments relating to public health or the supply of critical goods and services to Canadians or to the Canadian government, and of foreign investments involving SOEs, remains in force.

In March 2021, the Canadian government issued updates to its *Guidelines on the National Security Review of Investments*. While the prior iteration of the guidelines did not make specific reference to SOEs, the updated Guidelines explicitly state that investments by SOEs, or by private investors assessed as being closely tied to or subject to direction from foreign governments, are subject to enhanced scrutiny under the national security provisions of the ICA. This change permanently codifies the April 2020 *Policy Statement*, ensuring such scrutiny will continue after the pandemic. Other notable changes include the addition of "critical minerals and critical mineral supply chains" and "sensitive personal data" to the list of non-exhaustive factors that the Canadian government will consider when assessing an investment under the ICA, and additional detail about existing relevant factors, such as involvement in defence, sensitive technology, and critical infrastructure. These changes, generally, bring the *Guidelines* in line with the approach taken by Canada's major trading partners and in particular the United States.

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TOP TRENDS TO WATCH

Several key trends in foreign investment review began developing in 2021, and are expected to continue in 2022:

- *Continuing limited number of "net benefit" reviews*: The number of transactions subject to a "net benefit review" and approval was constant as between the 2018-2019 and 2019-2020 fiscal years, indicating that the high thresholds continue to exclude a significant number of transactions from pre-closing "net benefit" scrutiny, a trend that is anticipated to continue in 2022.
- *Increased use of national security "notices and potential" increase in national security reviews*: Government data published in 2021 covering reviews in the

2019-2020 year showed a slight uptick in the number of national security "notices" (a tool used by the government to extend the time available to consider whether a full national security review is warranted), but the same number of transactions (seven) were ultimately subject to a national security review. Notably, the period covered by this data ends just after the declaration of the COVID-19 pandemic in March 2020, and data is not yet available for 2020-2021. We anticipate that the 2020-2021 data will show a significant rise in the use of national security notices, a trend likely to continue following the federal government's December 2021 mandate letter calling for more expansive national security enforcement. 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 revised *Guidelines*. Transactions that involve SOE investors or targets that engage the assessment factors set out in the *Guidelines* may also want to consider protections in the transaction agreement, such as a closing condition that requires the expiry of the jurisdictional period for national security review in order to be satisfied.

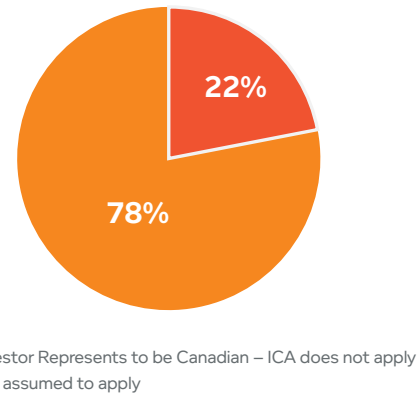
- *Increased complexity of foreign investment reviews worldwide.* Over the past years, an increasing number of countries have implemented or strengthened national security regimes, which was hastened by the COVID-19 pandemic and fears of opportunistic foreign investment. In 2022, we anticipate this will continue, increasing the complexity surrounding transaction timing and intergovernmental coordination.
- *Legislative examination of the ICA:* In March 2021, a Parliamentary Standing Committee released its report evaluating the ICA, which found that while the ICA remains strong in many respects, it "would *benefit from a more cautious, responsive, and transparent approach to regulating foreign investments.*"

  To this end, the Standing Committee Report made several recommendations for legislative improvements to the ICA, including decreasing the threshold for net benefit review for state-owned enterprises; increasing protections for strategic sectors including health, pharmaceutical, and innovation/IP, data and expertise; requiring the Minister to provide reasons underlying a net benefit determination and to publish the conditions imposed on the investor; and closing a lacuna that exempts from notification an acquisition of an asset that does not comprise a Canadian business. As of this publication, the re-elected Trudeau government has not clarified its approach to foreign investment policy, but we expect continued political scrutiny of the ICA in 2022.

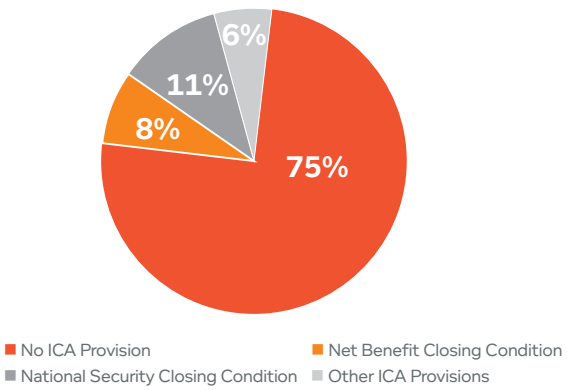
A review of the largest 50 negotiated M&A transactions announced between January 1 and December 1, 2021 that involved a publicly listed Canadian target reveals that parties continue to incorporate ICA risk allocation into their agreements. Eleven of 49 published agreements (22%) included a rep that the buyer was not a "non-Canadian" (and therefore the ICA did not apply). Of 38 transactions that therefore could be susceptible to ICA approval:

- Three transactions (8%) had a closing condition that required a "net benefit" approval under the ICA.
- Four transactions (11%) had a closing condition relating to national security reviews, all of which required the filing of a Part III notice prior to closing.
- Two additional transactions (6%) included a covenant regarding filing of a notice under Part III, with one prohibiting filing prior to closing and the other requiring filing prior to closing.

Canadian Public M&A Deals Susceptible to ICA



Canadian Public M&A Deals with ICA Provisions



Cartel Activity: Buy-Side, Sell-Side, the Bureau Decides

AFFIRMATION THAT CRIMINAL CARTEL PROVISIONS DO NOT APPLY TO BUY-SIDE AGREEMENTS…AT LEAST NOT YET

In May 2021, the Bureau reaffirmed that buy-side agreements between competitors (i.e. agreements which relate to the purchase of a product or service, including no-poach and wage-fixing agreements among employers), are not captured by the *Competition Act*'s criminal cartel provisions, as they do not constitute agreements between competitors to fix prices, allocate markets or reduce output in respect of the supply of a product. They may still be reviewable under the *Competition Act*'s civil provisions. This confirms the position taken by the Bureau in December 2020, following the rise of antitrust enforcement against such agreements in the United States in particular.

However, during his October 2021 annual address to the Canadian Bar Association, Commissioner Boswell expressed his support for expanding the cartel offence to include buy-side competitor agreements, which he suggests should be addressed as part of a future reform of Canada's competition legislation.

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UPDATED COMPETITOR COLLABORATION GUIDELINES

In May 2021, the Bureau issued a revised version of its *Competitor Collaboration Guidelines*, first published in 2009, to provide clarity on how to identify and avoid the types of collaboration that can harm competition. The updates are meant to reflect decisions of the Competition Tribunal and the courts since 2009, feedback collected through a public consultation in July 2020 and the Bureau's experience in reviewing collaborations between competitors.

Key changes include:

- confirmation that buy-side agreements will not be treated as a criminal cartel, for now;
- in rare instances, a non-compete agreement between competitors may contravene the *Competition Act*'s criminal cartel provision (where the non-compete amounts to a stand-alone restraint, such as a market allocation agreement);

- confirmation that consortium bids that substantially lessen or prevent competition will be subject to review under the regime's civil provisions;
- extension of the notion of "competitor" by stating that agreements between parties that are competitors in respect to any product or service may be subject to review, even if the specific competing product or service is not the subject of the arrangement;
- reiteration that and agreements to use common pricing algorithms could form the basis of a cartel offence.

CARTEL ENFORCEMENT STATISTICS

Key cartel enforcement statistics made available by the Bureau for its most recent fiscal year:

	2020-21	2019-20	2018-19	2017-18
☑ Number of search warrants issued, including multiple orders for a single investigation	0	3	12	40
☑ Number of immunity markers granted	4	4	3	7
☑ Number of leniency markers granted	0	0	0	1
☑ New cartel investigations commenced	14	21	13	15
☑ Ongoing cartel investigations	37	35	40	42
☑ Number of investigations referred to the PPSC	0	4	1	0

These statistics illustrate the continued decline in the Bureau's cartel enforcement activities. As in the past three years, no leniency marker was granted in the last fiscal year. Although no search warrants were issued this year, we expect that raids at employees' residences could become the norm considering the work-at-home environment that has prevailed with the pandemic.

The Bureau however continues to pursue 37 ongoing cartel investigations, including 14 commenced in 2021, although no referral was made to the PPSC this year. In March 2021, the Bureau also laid charges under the *Criminal Code* and the *Competition Act* in connection with an alleged conspiracy to commit fraud and bid-rigging for condominium refurbishments in the Greater Toronto Area and reiterated that investigating cartels was a top priority.

Sharper Teeth and Deeper Pockets: The Competition Bureau Takes on Big Tech

Regime change in the United States has ushered in a new era of antitrust activism. President Biden has signalled that enforcement against the so-called "FAANGs" (Facebook, Amazon, Apple, Netflix, Google, and similar companies) will be a priority for his administration, appointing high-profile, Big Tech critics like Lina Khan and Jonathan Kanter to lead on competition policy and enforcement. Given the countries' close economic ties and the United States' sphere of influence over Western economies, Canada's competition enforcement strategy will necessarily be informed, if not influenced, by these developments. Consistent with peer jurisdictions, the Bureau has been positioning itself to take a stronger stance on digital enforcement.

The Bureau's scrutiny of technology and data industries has been gaining momentum in recent years, with several market studies published, position statements rendered, and investigations launched in the digital space. For example, in May 2020, the Bureau reached a settlement with Facebook regarding its misleading privacy claims. Following an investigation that examined the social media giant's privacy practices, the Bureau determined that Facebook gave users the false impression that they could control who could see and access their personal information on the platform, despite Facebook sharing users' data with third-party developers in a manner inconsistent with its privacy claims. Accordingly, Facebook agreed to pay a C$9 million penalty and to cover the costs of the investigation.

The Bureau's scrutiny of technology and data industries has been gaining momentum in recent years, with several market studies published, position statements rendered, and investigations launched in the digital space.

Later that year, the Bureau went public with its investigation into Amazon's conduct, focused on whether Amazon employs restrictive trade practices in its Canadian marketplace amounting to an abuse of dominance. In particular, the Bureau is investigating any Amazon practices that may impact third-party sellers' willingness to offer their products for sale through other channels, the ability of third-party sellers to succeed on Amazon's marketplace without using Amazon's "Fulfilment By Amazon" service or advertising on the marketplace, and any efforts by Amazon to influence consumers to purchase their products over those offered by third-party sellers (so-called "self-referencing"). It appears that this investigation is ongoing and will continue in 2022.

The Bureau has also focused on digital enforcement outside of Big Tech. Driven by the onset of the pandemic, digital health care has remained a banner cause for the Bureau, having launched a public consultation in 2020 to assess any impediments to access, competition and innovation in the sector. Initial feedback from key stakeholders, such as health networks, regulators, professional associations, and digital health care providers,

was published in 2021. Stakeholders flagged the lack of interoperability between providers (raising privacy implications), challenges relating to remuneration, and issues regarding procurement and commercialization processes for health technologies in Canada.

The Bureau's digital enforcement strategy is only likely to pick up steam.

On October 22, 2021, the Bureau obtained a federal court order to advance its civil investigation into conduct by Google relating to its online advertising business. The Bureau's request to force Google to produce records and written information on its display advertising business in Canada was granted. Though little has been made public, it appears that the Bureau is attempting to discern whether Google's practices have impeded the success of competitors in online display advertising, and whether such conduct resulted in high prices, reduced choice, and/or hindered innovation for ad tech services. The Bureau's investigation is ongoing.

That same month, Commissioner Boswell detailed the Bureau's plans for tackling concentration and anticompetitive conduct in the digital economy. Pointedly titled "*Canada Needs More Competition*," the Commissioner's speech to the Canadian Bar Association emphasized the urgency of increasing Canada's enforcement of the *Competition Act* to assist with Canada's economic recovery post-pandemic and to keep up with the international shift toward more expansive antitrust enforcement. Chief among the action items was increased digital enforcement and promoting compliance in the digital marketplace, where — according to the Commissioner — breaching antitrust laws has become merely the "cost of doing business".

An increased budget will greatly assist the Bureau in these endeavours. The federal government has earmarked an additional C$96 million in funds for the Bureau over the next five years and C$27.5 million per year thereafter. In addition to increasing its litigation capacity and access to external subject-matter experts, a priority investment will be to increase the Bureau's capacity to take on new and more complex matters in digital markets. The Bureau will create a new Digital Enforcement and Intelligence Branch, led by Deputy Commissioner Leila Wright. This branch is envisioned to become the Canadian centre of expertise on technology and data issues, and act as an early-warning system for potential competition issues in the digital and the traditional economies. While it will not run its own cases, it will provide intelligence expertise and support to the Bureau's enforcement branches, in respect of mergers, unilateral and co-ordinated conduct. The new branch will also contribute to advocacy and pro-competitive policy work, which will be valuable given the global antitrust focus on competition policy in the context of digital markets. For example, the Bureau joined its counterparts from the G7 and guest nations at an Enforcers Summit on November 29-30, 2021, to discuss opportunities for international co-operation focused on improving competition in digital markets.

The federal government has earmarked an additional **$96 million** in funds for the Bureau over the next five years and **$27.5 million** per year thereafter

Though the impact of the Bureau's digital enforcement strategies remains to be seen, it is apparent that the Bureau — along with its international counterparts — will be fixated on disciplining digital market participants in the coming years.

Deceptive Marketing and Misleading Advertising

With the rapid expansion of the digital economy, the global pandemic and increasing emphasis on environmentalism, businesses must continue to be vigilant about deceptive marketing. In the coming year, we anticipate the Bureau's focus will be on building consumer trust and protecting consumers from the impact of health-related scams and so-called "greenwashing."

THE IMPACT OF COVID-19 AND HEALTH-RELATED SCAMS

The pandemic has affected all facets of our society. Not surprisingly, health-related scams have proliferated and will likely remain an issue in the coming months. As Canadians rely on the digital marketplace more than ever, we anticipate the Bureau's focus will be on protecting Canadians from online shopping scams, including subscription traps, non-delivery of goods and fake online reviews. The Bureau continues to demonstrate a willingness to target businesses using the pandemic to exploit vulnerable purchasers, and we expect them to apply diligently the *Competition Act* going forward.

- **Bureau COVID-19 response team:** In early 2020, the Bureau assembled a COVID-19 response team to actively monitor the marketplace for deceptive marketing practices related to the pandemic. As of September 2021, the Bureau issued approximately 40 compliance warnings to businesses across Canada to stop potentially misleading claims that products or services can prevent or protect against the virus. The Bureau reports that the majority of the businesses took corrective action, including ceasing the sale of such products or stopping the claims all together.Performance claims regarding virus protection or other health benefits will likely attract the Bureau's attention as the world moves forward through the pandemic.

Revive You Media was fined C$15 million and became subject to a 10-year prohibition order preventing it from any direct or indirect promotion of trial offers.

- **Beware subscription traps:** The pandemic brought renewed focus on products claiming to improve health. The Bureau investigated alleged misleading advertising by Revive You Media in its promotion of free trials for health and dietary supplements that trapped consumers into monthly subscriptions. The Bureau found that the Canadian company's website gave the false impression that consumers were ordering free trials without any further obligations. In reality, the company was registering purchasers for subscriptions with more than C$100 in monthly fees. Revive You Media was fined C$15 million and became subject to a 10-year prohibition order preventing it from any direct or indirect promotion of trial offers.
- **Non-delivery of goods scam:** Consumers are falling victim to scams in which they purchase a product online that never arrives. Although to date

the Bureau has not reported enforcement action in this area, it advised consumers to check the seller's contact details, pay by credit card, keep accurate records of the purchase, and read reviews. This advice highlights the importance of using accurate and truthful advertising.

- **Astroturfing continues to be monitored:** Astroturfing is the practice of posting false online reviews that appear to be from consumers. In February 2021, the Bureau announced that it entered into a consent agreement with FlightHub and two of its directors over allegations that the online travel booking company misled consumers about prices and services, made millions in revenue from hidden fees, and posted false online reviews about its services. We anticipate continued efforts by the Bureau to monitor astroturfing and influencer marketing and encourage businesses to review their policies when it comes to online reviews.
- **Unexpected COVID-19 issue:** In July 2021, the Bureau launched an investigation into Canada Tax Reviews for making potentially false or misleading claims related to government benefit programs developed during the pandemic. The Canadian accounting firm was ordered by the Federal Court of Canada to produce records and information related to its promotion of services to consumers wanting to apply for programs such as the Canada Emergency Response Benefit and the Canada Recovery Benefit. Although there are no conclusions of wrongdoing yet, the investigation shows the Bureau's ability to adapt to new and unexpected activities targeting vulnerable Canadians.

GREENWASHING

More than ever, consumers are concerned about climate change. They are seeking cleaner and greener products and services to counteract and prevent the harmful consequences of their lifestyle on the environment. In response, advertisements increasingly include claims that their products or services are biodegradable, eco-friendly or safe for the environment. When such claims are false or misleading, businesses are at risk of engaging in the illegal practice labelled "greenwashing".

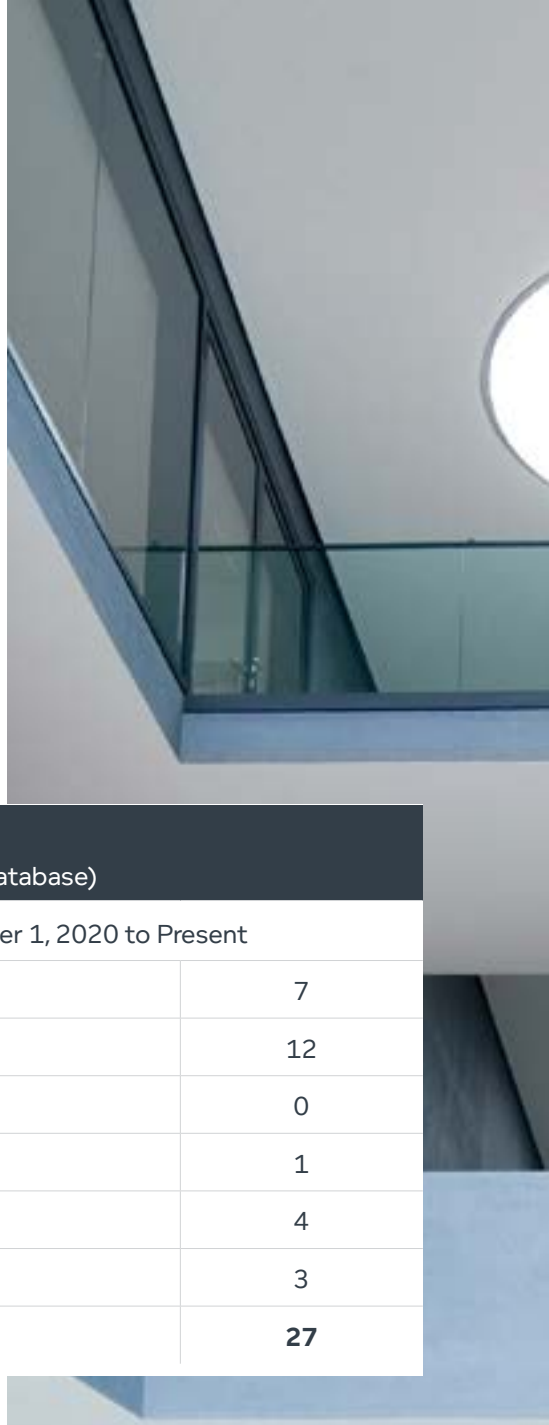
We expect enforcement activities to escalate as businesses may be tempted to make unverifiable carbon neutral claims to attract environmentally conscious consumers.

The Bureau previously went after retailers for misleading consumers into trusting that their products were Energy Star-qualified and it has conducted several inquiries into environmental performance claims. With all of the recent attention on COP26 and global warming, we expect enforcement activities to escalate as businesses may be tempted to make unverifiable carbon neutral claims to attract environmentally conscious consumers. Environmental groups and organizations have submitted a number of greenwashing complaints to the Bureau in recent years, some of which have developed into enforcement action, and we expect this trend will continue.

Competition Class Actions: Bumps in the Road for Plaintiffs

CHANGES TO THE ONTARIO CLASS ACTIONS REGIME

In our *2021 Outlook*, we reported on the new class proceedings regime in Ontario arising from 2020 amendments to the Ontario *Class Proceedings Act*, 1992 (the CPA). The CPA amendments would result in both substantive and procedural challenges to plaintiffs who want to commence class actions in Ontario. Those included a more rigorous substantive test applied at certification, among other procedural and financial barriers. Though the full effect of the amendments has yet to be seen (applying to actions commencing after October 1, 2020), we are beginning to see a shift in plaintiff's choice of jurisdiction for new class actions across Canada.



Year-Over-Year Comparison
(from Canadian Bar Association National Class Action Database)

October 1, 2019 to October 1, 2020		October 1, 2020 to Present	
Ontario	3	Ontario	7
British Columbia	4	British Columbia	12
Alberta	3	Alberta	0
Saskatchewan	1	Saskatchewan	1
Quebec	2	Quebec	4
Federal Court	0	Federal Court	3
TOTAL	**13**	**TOTAL**	**27**

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.

Prior to the amendments, class actions were fairly well distributed between key common law provinces, with no class actions commenced at the Federal Court level during the year preceding the amendments. Since the CPA amendments, though the number of class actions by volume generally increased, we also see an increased volume in British Columbia, as well as more class actions commenced in the Federal Court. As noted below, however, plaintiffs have suffered some early defeats before the Federal Court.

PROMOTING PRELIMINARY MOTIONS PRE-CERTIFICATION

The first decision interpreting the new s. 4.1 of the CPA (codifying the presumption that dispositive motions should be heard before certification) was released on September 24, 2021. In *Dufault*, TD filed a sequencing motion requesting that its summary judgment motion on the Plaintiff's claim be heard before certification. TD argued that its grounds for summary judgment could potentially dispose of the proceeding entirely, and that if successful, significant time and resources would be saved. The plaintiffs, on the other hand, argued that it would be more efficient to have the motion heard concurrently with certification (as was the ordinary course prior to the amendments).

In his decision, Justice Belobaba concluded that defendants have a "presumptive right" to have their potentially dispositive motions, or motions that would potentially narrow the issues in the proceeding, heard before certification, which can only be displaced if the plaintiff establishes "good reason" for the proposed motion to be heard together with certification.

> *"Other judges, myself included, will take the first 58 words of the sequencing provision as a strong legislative signal that early motions by the defendant that can indeed narrow or dispose of a case before certification should presumptively be heard before certification."*

This precedent will be useful for defendants seeking to bring potentially dispositive motions before certification.

CLASS ACTIONS IN THE FEDERAL COURT

Court Sends Antitrust Class Action Claim to the Penalty Box

On May 27, 2021, Chief Justice Crampton of the Federal Court granted a motion striking out a class action claim and denying the plaintiff's motion to amend.

In *Mohr v. National Hockey League et al*. the plaintiff alleged a vast conspiracy among all the major hockey leagues in North America and Hockey Canada to deny junior hockey players career opportunities and compensation. The suit sought C$825 million in damages and received extensive national media coverage. The defendants brought a motion to strike the claim in its entirely arguing that: (i) the plaintiff erroneously pleaded a violation of s. 48 of the *Competition Act*, as the provision applies only to agreements between teams and clubs within the same

league, and not to an inter-league conspiracy as alleged by the plaintiff; and (ii) the general conspiracy offence in s. 45 of the *Competition Act* did not apply to the conduct alleged, as the defendants were not "competitors" for the product or service at issue and, in any event, s. 45 does not apply to agreements among buyers for the purchase of a product or service. The Court accepted both arguments, acknowledging them to be "an insurmountable hurdle for the plaintiff." Notably, the Mohr decision represents the first substantive analysis of s. 48 of the *Competition Act* by a Canadian Court. Among other things, it confirms that s. 45 of the *Competition Act* does not apply to agreements between buyers of a product or service.

Certification Denied in DRAM

In November 2021, in *Jensen et al v. Samsung et al.*, the Federal Court dismissed a motion to certify a proposed class action alleging that three leading manufacturers of dynamic random access memory chips (DRAM) conspired to limit the global supply and raise the price of DRAM contrary to the *Competition Act*.

In this class action, the plaintiffs alleged that the defendants conspired to "suppress DRAM supply and increase DRAM prices" in violation of ss. 45 and 46 of the *Competition Act*. Justice Gascon dismissed the plaintiffs' motion, finding that the plaintiffs failed to plead a reasonable cause of action or provide any evidentiary basis to support the existence of the alleged conspiracy. Specifically, the Court concluded that: (i) the claim "contains only vague and general allegations that amount to mere speculation and conjecture on an alleged agreement between the Defendants" lacked adequate particularity and specificity; and (ii) the allegations were akin to "conscious parallelism" where, in the absence of an actual agreement to limit competition, competitors unilaterally adopt similar or identical business practices or pricing, which is not unlawful in and of itself.

It remains to be seen whether the foregoing decisions are limited to their particular facts, or a harbinger of difficulties for plaintiffs seeking to bring competition class actions in the Federal Court.

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.

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FOR MORE INFORMATION, PLEASE CONTACT THE COMPETITION/ANTITRUST & FOREIGN INVESTMENT GROUP AT McCARTHY TÉTRAULT:

mccarthy tétrault

VANCOUVER
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5

CALGARY
Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9

TORONTO
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2

QUÉBEC CITY
500, Grande Allée Est, 9e étage
Québec QC G1R 2J7

NEW YORK
55 West 46th Street, Suite 2804
New York, New York 10036
United States

LONDON
1 Angel Court, 18th Floor
London EC2R 7HJ
United Kingdom