Trends to Watch

2023 Competition/Antitrust and Foreign Investment

This publication reviews key developments in Canada during 2022, and reflects on their significance for 2023 and beyond.

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

2023 Competition Law and Foreign Investment

For the first time in over a decade, and after years of sustained advocacy by the Commissioner of Competition (the **"Commissioner"**), substantial reform was enacted to the Competition Act in 2022. Among numerous changes, highlights include the pending criminalization of certain buy-side (specifically wage fixing and no-poach) agreements, very significant increases in the financial penalties available for abuse of dominance and deceptive marketing infringements, and the adjustment of the statutory assessment factors for mergers, abuse of dominance and competitor collaborations to better enable the Competition Bureau (**"Bureau"**) to take enforcement action using unconventional theories of harm in digital markets. Tied to these developments, we have seen the Bureau continue to prosecute alleged wrongdoing in domestic cartel cases, as well as focusing its deceptive marketing efforts on so-called "greenwashing" practices.

> **For the first time in over a decade, and after years of sustained advocacy by the Commissioner of Competition, substantial reform was enacted to the *Competition Act in 2022.***

In parallel, the Bureau has – as we predicted last year – taken a tougher line on merger enforcement under the existing provisions, challenging more cases in a single year before the Competition Tribunal ("**Tribunal**") than ever before. We expect merger review in complex cases to continue to intensify in 2023.

As well, significant developments with respect to the Investment Canada Act have signalled a stricter approach to national security review, particularly in relation to sensitive industries (especially critical minerals) and to foreign investors, whether privately or publicly-owned, with connections to non-allied foreign governments. As geo-political conditions evolve, we expect national security interventions to proliferate further.

Finally, following closely behind the first phase of *Competition Act* reform, the federal government has announced a public consultation as a precursor to further – more significant – legislative amendments. Among many areas of potential reform, the government will consider whether Canada's almost-unique merger efficiencies defence should be repealed or at least watered down, whether the merger thresholds should be adjusted to facilitate more effective merger enforcement, as well as reviewing the legal test for abuse of dominance and considering if more effective sanctions could be made available for civilly-reviewable competitor collaborations. If enacted, these changes would represent a dramatic shift in Canada's competition law framework, with significant consequences for all companies that do business in Canada.

Competition Act Merger Review: More Contentious and Intensive Reviews

2022 was a very active year for the Bureau's mergers branch. Alongside several negotiated merger remedies, the Bureau continued its recent trend of challenging mergers before the Tribunal, a practice that until recently had been rare in Canadian enforcement. This increased merger activity took place against a backdrop of ongoing legislative reform in Canada. While the initial set of amendments, enacted in June 2022, took a restrained approach, the fuller review of the *Competition Act* launched in November 2022 will consider a number of significant changes to Canada's merger control laws.

A HARDENING ENFORCEMENT STRATEGY

2022 was a very active year for the Bureau's mergers branch.

Over the past year, the Bureau has stressed that it is ready, willing and able to challenge mergers through litigation before the Tribunal. While, overall, merger litigation remains uncommon in Canada, the number of cases brought by the Bureau to the Tribunal has demonstrably increased. In the 13 years since Canada's merger review regime was last meaningfully amended in 2009, the Bureau has challenged nine mergers; however, three of these have been brought since 2021 (Secure / Tervita, GFL / Terrapure and Rogers / Shaw), with the Tribunal hearing two of these cases in 2022 (GFL / Terrapure was ultimately resolved through a consent agreement). However, this litigation-ready posture does not necessarily translate into success before the Tribunal: in November 2022, it was announced that the Bureau had lost its challenge of the Parrish & Heimbecker / Louis Dreyfus grain handling merger on account of having failed to prove the merger would lessen competition substantially.

Notwithstanding this setback, other merger litigation continues:

– ***Rogers / Shaw.*** In fall 2022, the Tribunal heard the Bureau's challenge of the $26 billion merger between Rogers Communications Inc. and Shaw Communications Inc., two of Canada's leading telecommunications companies. The Bureau persisted with litigation notwithstanding a substantial structural remedy offer from Rogers, which would have seen it divest Shaw's Freedom Mobile wireless business. On December 29, the Tribunal dismissed the Commissioner's application. The Bureau has filed an appeal of the Tribunal's decision with the Federal Court of Appeal.

– ***Secure / Tervita.*** In spring 2022, the Tribunal heard the Bureau's challenge of the proposed merger between two players in the waste sector, Secure Energy Services Inc. and Tervita Corporation. The case is likely to turn on the *Competition Act's* mergers efficiencies defence, a provision that has been subject to sharp criticism from the Commissioner and which has been called out as an area of potential reform as the government considers further amendments to the *Competition Act* in 2023.

In parallel, the Bureau has also continued to demonstrate its openness to resolving merger concerns on a consensual basis, entering into seven consent agreements in 2022, each providing a structural remedy. While generally in line with the number of consent agreements registered annually, it does represent a steady increase over recent years, with three and four consent agreements being registered in 2020 and 2021, respectively.

FIRST STEPS TOWARDS REFORM

The amendments to the *Competition Act* introduced in June 2022, did not focus on the merger regime, but did introduce several notable updates:

Consistent with global trends in antitrust, the amendments expanded the list of merger assessment factors to include items with particular resonance in the digital economy.

- ***Evaluation Factors.*** Consistent with global trends in antitrust, the amendments expanded the list of merger assessment factors to include items with particular resonance in the digital economy: (a) network effects; (b) whether the merger would contribute to the entrenchment of the market position of leading incumbents; and (c) effects on price or non-price competition, including quality, choice or consumer privacy. While the Bureau's enforcement actions over the course of 2022 remained firmly rooted in more "orthodox" assessment factors, such as price effects and innovation competition. For example, all seven consent agreements and both of the merger cases heard by the Tribunal in 2022 concerned industries in which the Bureau has closely scrutinized past transactions and, for nearly all, has an established track record of securing merger remedies (i.e., retail gas, retail pharmacy, pulp and paper, waste services and telecoms).
- ***Anti-Avoidance.*** Prior to June 2022, merging parties were free to structure their transactions so as to avoid triggering mandatory notification. However, the amendments have closed off this option by establishing an anti-avoidance provision, which provides that where a transaction is "designed to avoid the application" of the *Competition Act's* merger notification requirement, the requirement will nonetheless apply to the "substance" of the transaction. The specific manner in which this provision will be applied remains to be seen. However, it is clear that transactions can no longer be deliberately structured to avoid mandatory pre-closing notification to the Bureau.
- ***Non-Cooperative Transactions.*** For mergers that are subject to a pre-closing notification obligation, both parties are required to make notification filings with the Bureau in order to trigger the applicable waiting period. As the waiting period must expire (or be waived or terminated) before the transaction can legally close, the *Competition Act* includes a provision to force a target entity to make a filing once a purchaser has notified a proposed acquisition of that entity. The June 2022 amendments significantly constrain the circumstances in which this provision applies. Whereas previously it applied any time an acquirer notified "an acquisition of equity interests in an entity", it now applies only to "an unsolicited or hostile take-over bid" where the acquirer "has commenced or has announced an intention to commence a take-over bid." Accordingly, going forward, purchasers' flexibility for sequencing *Competition Act* clearance and other transaction steps will be more limited when dealing with non-cooperative vendors.

BIGGER THINGS TO COME

The Canadian government's push for more far reaching competition law reform is already underway, with a review and consultation process running until February 2023. An initial policy paper released by the government contemplates substantial changes to merger review in Canada, including:

– ***New Pre-Merger Notification Rules.*** The government's policy paper suggests both that the financial thresholds above which transactions are subject to mandatory pre-closing review are too high and that the manner in which the rules apply can produce anomalous results. The government also appears to be keenly focused on more effectively capturing nascent acquisitions. New rules and lower threshold values could significantly reshape which transactions are - and are not - subject to mandatory notification.

– ***Longer Limitation Periods.*** When Canada's merger regime was amended in 2009, the limitation period for the Bureau to challenge a transaction was cut from three years to one year after closing. The government appears inclined to reverse course, at least for transactions that are not proactively notified to the Bureau.

– ***Easier Access to Interim Relief.*** The Bureau's ability to extend the review period before parties are permitted to close their transaction may be enhanced. The government appears concerned that the current review timelines are insufficient for the Bureau to assess the voluminous materials typically produced now in merger investigations. Easier access to interim relief for the Bureau may reshuffle power dynamics and give rise to new strategic considerations.

The Canadian government's push for more far reaching competition law reform is already underway, with a review and consultation process running until February 2023.

– ***Changes to the Efficiencies Defence.*** The efficiencies defence has faced sustained criticism from the Commissioner in recent years and the government appears determined to make significant changes. A range of options are on the table – from removal to reform – but, overall, the efficiencies defence appears unlikely to survive the next round of amendments in its current incarnation.

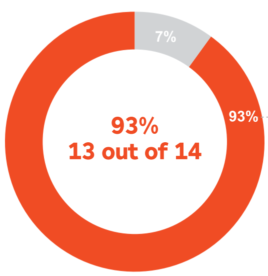
– ***Altered Standard of Competitive Harm.*** Currently, the Tribunal can only order a merger remedy where the Commissioner proves on a balance of probabilities that a substantial lessening or prevention of competition is likely. The government is considering lowering the standard itself (either generally or in specific circumstances) and altering the factors to be considered, in particular, through the elevation of labour considerations. Any such changes will need to be carefully considered when assessing a transaction's competition law risk.

ANALYSIS OF M&A INVOLVING PUBLICLY LISTED CANADIAN TARGETS

A review of the largest 30 negotiated M&A transactions announced between January 1 and December 1, 2022 that involved a publicly-listed Canadian target demonstrates that a significant proportion (33%) included a *Competition Act* closing condition.

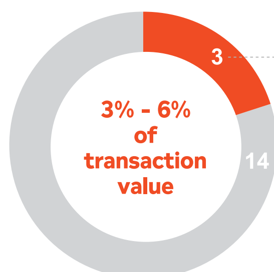
- Of those with a *Competition Act* condition, 93% (13 out of 14) required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter, rather than being satisfied on the expiry of the applicable waiting period. This suggests that merging parties are aware of the risk attached to closing a transaction prior to receiving formal Bureau clearance, which may be received after the waiting period expires.
- Nearly two thirds (9 out of 14) of agreements that had a *Competition Act* closing condition also incorporated covenants relating to remedies, with five agreements (36%) requiring the purchaser to give remedies if required, and four agreements (29%) providing that the purchaser was not required to give a remedy to obtain *Competition Act* clearance.
- Nearly half of the agreements included covenants relating to which party had carriage of regulatory strategy (six out of 14). A smaller number imposed a reverse break fee on the purchaser if the *Competition Act* closing condition was not satisfied (three out of 14). In those cases, the reverse break fee was between 3% and 6% of transaction value.

ANALYSIS OF M&A INVOLVING PUBLICLY LISTED CANADIAN TARGETS



93% (13 out of 14) with a Competition Act condition required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter.

More than two thirds (9 out of 14) of agreements that had a Competition Act closing condition also incorporated (positive or negative) covenants relating to remedies



A smaller number imposed a reverse break fee on the purchaser if the Competition Act closing condition was not satisfied **(three out of 14).** In those cases, the reverse break fee was between **3%** and **6%** of transaction value.

Investment Canada Act: Geopolitical Trends Increase National Security Risks

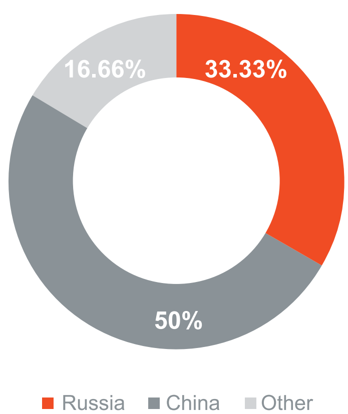
Late in 2021, the Prime Minister released his mandate letter for the Minister of Innovation, Science and Industry (the **"Minister"**). The letter put the ICA front and centre. It asked the Minister to promote economic security "by reviewing and modernizing the ICA to strengthen the national security review process and better identify and mitigate economic security threats from foreign investment".

Accordingly, building upon previous years, national security has garnered significant attention in 2022. New guidance has required transacting parties to adapt, but has also prompted a change in enforcement approach, particularly with respect to certain categories of investors, such as state-owned enterprises (**"SOEs"**) from non-aligned jurisdictions. This chapter first addresses general trends in ICA regulation before diving deeper into national security.

TRENDS FROM THE PAST YEAR

Government data for the 2021-2022 fiscal year paints a clear picture: a busier-than-ever regulator focusing on targeted net benefit and national security reviews.

– ***A record number of ICA Notifications but a limited number of "net benefit" reviews:*** Despite a record 1,255 notifications of inbound investments into Canada (as compared to 826 in 2020-2021 and 1,032 in 2019-2020), government data for the 2021-2022 fiscal year recorded only 8 net benefit reviews (as compared to 3 in 2020-2021 and 9 in 2021-2022).



NATIONAL SECURITY REVIEWS BY INVESTOR ORIGIN

– ***The highest ever number of national security reviews:*** 2021-2022 government data shows that the Minister issued the same number of national security "notices" (used by the government to extend the time available to consider whether a full national security review is warranted) as in the previous year (24 in total), but the highest number of national security review orders yet (12). Put differently, 50% of notices resulted

in an extended national security review, which can last for 200 days or more. Of these 12 extended reviews, four investors originated from Russia, and six from China. Despite the presence of investors from higher-risk jurisdictions in these cases, the final outcomes of the 12 extended national security reviews were more permissive than in prior years. Seven of the 12 were cleared unconditionally; and only four were abandoned (likely pre-empting a prohibition or divestiture order). While every case is examined on its merits, 2021-2022 compares favourably with the prior year, when over 60% of investments subject to extended review were prohibited, unwound or abandoned.

"VOLUNTARY" NATIONAL SECURITY FILING: THE MINISTER'S NEW CARROT AND STICK

We expect that the number of ICA notifications to be filed in the upcoming year will continue to rise, in part because of a voluntary filing mechanism introduced earlier this year. Under the ICA, the acquisition of control of an existing Canadian business is subject to mandatory notification or application for "net benefit" review (depending on whether applicable monetary thresholds are exceeded), while the establishment of a new Canadian business is always subject to mandatory notification. For these types of transactions, the government has 45 days from receipt of a complete filing to issue a national security notice. After this, the government can no longer challenge the investment on national security grounds.

However, the national security provisions of the ICA apply more broadly than the notification and "net benefit" review requirements. Transactions that do not constitute an acquisition of control (e.g., minority investments) or do not involve a "Canadian business" within the technical meaning of the ICA are not subject to mandatory notification, but still remain subject to a potential national security review at the government's discretion, until recently up to 45 days after closing. Effective August 2, 2022, a new mechanism provides an option for investors to obtain regulatory certainty pre-closing with respect to non-mandatorily notifiable investments. Foreign investors can now submit a voluntary filing to trigger the 45 day window for national security review. Assuming this filing is made pre-closing, a purchaser can eliminate the risk of a post-closing national security order.

We expect that the number of ICA notifications to be filed in the upcoming year will continue to rise, in part because of a voluntary filing mechanism introduced earlier this year.

This benefit does come with a trade-off for investors:

Effective August 2, 2022, a new mechanism provides an option for investors to obtain regulatory certainty pre-closing with respect to non-mandatorily notifiable investments.

where an investor to a non-notifiable investment does not submit a voluntary filing, the government has extended the period within which it can initiate the national security review from 45 days to five years post-closing, which period is more in line with limitation periods applicable for such reviews in peer jurisdictions.

INTENSIFIED SCRUTINY OF STATE OWNED – OR CONNECTED - ENTERPRISES

New policy statements also highlight areas in which investors can anticipate more exacting review under the ICA. This year, the Investment Review Division issued two policy statements concerning SOEs. While SOEs were *already* subject to enhanced scrutiny under the general national security guidelines, the statements signal an even stricter approach in some categories of transaction.

First, in the wake of Russia's invasion of Ukraine, the March 2022 *Policy Statement on Foreign Investment Review and the Ukraine Crisis*, indicated that an investor with "ties, direct or indirect" to the Russian state will support a finding that "there are reasonable grounds to believe that the investment could be injurious to Canada's national security." More broadly, for the purposes of "net benefit" review, the policy also stated that investments by Russian investors of any kind would be considered of net benefit to Canadian only in "exceptional circumstances".

This is a clear signal that not only will all such investments in critical minerals be subject to in-depth national security review, but also that the government will likely find it necessary to prohibit or unwind those transactions.

Second, the October 2022 *Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals under the* ICA provides a stricter framework for evaluating foreign investments in both Canadian entities and Canadian assets in the critical minerals sector by both SOEs and private investors considered to be "closely tied to, subject to influence from, or who could be compelled to comply with extrajudicial direction from foreign governments, particularly non-likeminded governments."

Moving forward, such investments will: (a) be approved under the net benefit regime only on an "exceptional basis" given this category of investor presents "inherent economic risk" to Canada; and (b) likely be categorized as injurious to Canadian national security.

This is a clear signal that not only will all such investments in critical minerals be subject to in-depth national security review, but also that the government will likely find it necessary to prohibit or unwind those transactions. Consistent with the government's already-broad jurisdiction to intervene on national security grounds, the critical mineral policy's expansiveness indicates the strategic importance that the government is placing on critical minerals to Canada's and its allies' economic and military well-being.

HEIGHTENED RISK OF POST-CLOSING NATIONAL SECURITY INTERVENTION IN TRANSACTIONS THAT ARE NOT NOTIFIED

The heightened risk associated with investments in the critical minerals industry by investors with ties to non-aligned foreign states was writ large in the government's November 2022 announcement ordering the divestiture of investments by three Chinese firms in Canadian-headquartered companies that have actual or potential operations in lithium and, in certain cases, other critical minerals.

All three investments appear to have been minority investments of relatively low dollar value by Chinese firms without publicly-obvious state ownership. It is unlikely that they were subject to a mandatory notification requirement under the ICA and it is most likely that none of these three investments were notified to the government given the transactions took place before the new voluntary notification regime came into effect. Accordingly, the government most likely initiated the national security process on its own initiative which confirms that it is closely monitoring the critical minerals sector, and will continue to do so in 2023 and beyond.

FLEXIBILITY FROM THE REGULATOR: "SOFT UNDERTAKINGS" TO AVOID EXTENDED REVIEW

Just as contracting parties have had to adjust to an evolving regulatory landscape, so, too, has the Minister. In the normal course, if the Minister makes a preliminary determination that an investment could be injurious to national security, the matter is referred to the federal Cabinet to order a national security review and, if such finding is confirmed, whether an order prohibiting or unwinding the transaction (or imposing such other conditions as deemed appropriate) should be issued.

While this remedial framework is well-established and likely to continue in most cases, based on recent experience, we also expect to see the Minister take proactive steps to address specific national security concerns through accepting "soft undertakings" from the investor, thus avoiding the need to refer the matter to Cabinet and the typical enforcement action that results. Given that formal enforcement under the national security provisions more often than not leads to a deal being prohibited, unwound or abandoned, this more informal approach has the potential to act as a middle-ground in cases where national security concerns are identified, but which do not require – in the Minister's opinion – formal Cabinet adjudication.

MORE CHANGES TO COME

On December 7, 2022, the federal government tabled Bill C-34: An Act to amend the Investment Canada Act (the **"Proposed Amendments"**). The common thread throughout the Proposed Amendments is the further sharpening of the Minister's national security toolkit. If these amendments are approved – as anticipated at some point in 2023 – we expect national security enforcement to further intensify for certain classes of non-Canadian investors and for non-Canadian investors generally doing transactions in sensitive sectors. The Proposed Amendments contemplate several key changes, the most important of which are:

- ***Pre-Implementation Notification.*** Transactions involving "prescribed businesses" where an investor could obtain access to "material, non-public technical information or material assets" would require pre-implementation notification. Such investments will be barred from closing until 45 days after filing, to give time for the government to issue a national security intervention before closing. While the technical details are not yet defined, we expect the mandatory pre-closing regime will apply to investments into sectors that already present higher national security risk according to the government's guidelines;
- ***Increased Fines.*** New fines would penalize departures from the pre-implementation notification regime (with a fine of at least $500,000) and enhance compliance generally (raising fines for any infraction from $10,000 to $25,000 per day);
- ***Ministerial Power to Commence Further Review.*** The Minister would have the power to unilaterally order "further review", instead of relying on Cabinet approval as is currently the case;
- ***Interim Measures.*** The Minister would be able to impose interim conditions on an investment which is subject to ongoing national security review where it considers such steps necessary to protect national security. This would depart from the current regime, where investors subject to national security review after closing are not inhibited from integrating the target Canadian business as they see fit;

– *Conditional Approval by the Minister.* The Minister would be empowered to negotiate binding undertakings with the investor, and to clear an investment on the basis of those undertakings (which currently only Cabinet may do); and

– *Judicial Review Confidentiality.* A new mechanism would allow the Minister, faced with a judicial review of a national security decision, to request that sensitive documents be provided to the judge without being disclosed to the applicants for judicial review.

The Proposed Amendments have potentially wide-ranging implications. They make it all the more important for foreign investors contemplating an investment in Canada to engage ICA counsel early to determine how the ICA's national security review regime may apply to their investments. The Proposed Amendments also change what a national security review will look like. Should they become law, reviews will involve more of a negotiation with an administrative decision-maker (the Minister) rather than unilateral decisions being taken by Cabinet.

Unilateral Conduct: A New Era for Digital Enforcement or Repurposing the Same Toolkit?

SIGNIFICANT REFORMS TO THE ABUSE OF DOMINANCE REGIME

The federal government's June 2022 reforms to the *Competition Act's* abuse of dominance regime have set up the legislative infrastructure for strengthened enforcement activity in digital markets:

– The amendments define an "anti-competitive act" as one that is "intended to have a predatory, exclusionary, or disciplinary negative impact on a competitor, or to have an adverse effect on competition", broadening the scope of abusive behaviour to include anti-competitive acts that are not necessarily targeted at a particular competitor.

– To protect innovation, the non-exhaustive list of anti-competitive acts now includes a dominant firm engaging in a selective or discriminatory response to an actual or potential competitor in order to impede its entry or expansion, or to eliminate it from the marketplace entirely.

The amendments empower private parties affected by alleged anti-competitive conduct by expanding the private right of access to include abuse of dominance.

– In assessing abuse of dominance cases, the Tribunal can now consider network effects as a barrier to entry, effects on price and non-price competition such as quality, choice and consumer privacy and the nature and extent of innovation in the market. The inclusion of non-price effects is a noteworthy attempt to strengthen the Bureau's ability to pursue digital players that offer their products or services for free, and therefore compete on dimensions other than price.

Collectively, these amendments present a pro-litigation shift and bolster the Bureau's toolkit for digital enforcement, although the years ahead will tell whether this translates into an uptick in cases brought by the Bureau.

Added to these substantive changes, infringements of the abuse of dominance provisions now carry heftier administrative monetary penalties (**"AMP"**), with corporations facing the greater of: (a) the existing penalties under the *Competition Act* (i.e., up to CAD$10 million for the first infringement and CAD$15 million thereafter); or (b) three times the value of the benefit derived from the abusive conduct, or where such value cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues. The new regime presents exponentially larger risks compared to the AMPs imposed previously, providing the Bureau with increased leverage to obtain early settlements, particularly with large multinational corporations.

Finally, the amendments empower private parties affected by alleged anti-competitive conduct by expanding the private right of access to include abuse of dominance. Private litigants must continue to obtain leave from the Tribunal by establishing a direct and substantial effect on their business, the same standard under the *Competition Act's* existing private access regime. Private litigants are not entitled to damages with the Tribunal's powers limited to imposing an AMP, making a prohibition order and, where that such an order is not sufficient, directing the dominant firm to take such actions that the Tribunal considers reasonable and necessary to overcome the effects of its anti-competitive practice. Given that damage awards are not available, it remains unlikely that a flood of private actions will be brought to supplement the Bureau's own enforcement activity in this space.

To navigate these new rules, the Bureau is expected to publish updates to the *Abuse of Dominance Enforcement Guidelines* in 2023. While the Bureau indicated that public consultations would take place in late fall 2022, no such plans have been announced as of yet. In addition, the government consultation on further reform to the *Competition Act* announced in November 2022 may lead to further reform. For example, the government has signalled a willingness: to examine the legal test for abuse of dominance to determine if it is capable of addressing de facto dominant behaviour by groups of firms; to consider bright line presumptions of dominance for firms or platforms operating in certain sectors; and to enable private parties to seek damages for unilateral conduct infringements, to incentivize them to utilize their new rights of direct action. Taken together, these adjustments may facilitate more enforcement of a portion of the *Competition Act* that the Bureau has historically found challenging to substantiate before the Tribunal.

ENFORCEMENT ACTIVITY IN 2022: SLOW PROGRESS AGAINST BIG TECH

Despite significant legislative attention, 2022 was quiet compared to years past on the digital enforcement front. Investigations into Amazon (publicly announced in 2020) and Google (publicly announced in 2021) continued to progress slowly. In 2022, the Bureau issued requests for information to market participants to advance its analysis against Google having obtained court orders forcing Google to produce records and written information relating to its online advertising business in late 2021. While these steps are perceived as a step forward, the extent to which the Bureau's investigation has actually progressed remains unclear. Both the Google and Amazon investigations are likely to continue into 2023.

Outside the digital space, in March 2022, the Bureau concluded its investigation into allegations of abusive and coordinated behaviour by manufacturers and wholesalers in the supply of crop inputs to Farmers Business Network Canada Inc. (**"FBN"**). After a nearly two-and-a-half year investigation which included a production order against the targets, the Bureau found insufficient evidence to establish contraventions of the *Competition Act*'s competitor collaboration or abuse of dominance provisions. However, the Bureau expressed concerns about certain communications between manufacturers and wholesalers, highlighting that even informal communications between competitors can lead to the establishment of an agreement or arrangement

that contravenes the *Competition Act*'s competitor collaboration restrictions. Although the investigation concluded prior to the discussed amendments coming into effect, the Bureau's considered FBN's role as an innovator and market disruptor, concluding that the alleged conduct did not frustrate FBN's innovative business model from increasing current or future competition.

GROCERY AND DIGITAL HEALTH CARE MARKET STUDIES

With inflation and supply chain issues causing challenges for consumers at the shelves, the Bureau's market study is timed to address an issue that is top of mind for most Canadians.

In October 2022, the Bureau announced a new market study entitled *Competition in Canada's Grocery Sector* to examine the extent to which higher grocery prices are resulting from changing competitive dynamics and, looking to peer jurisdictions for inspiration, how governments can lower barriers to entry and expansion (such as restrictive covenants and access to the wholesale supply of groceries). With inflation and supply chain issues causing challenges for consumers at the shelves, the Bureau's market study is timed to address an issue that is top of mind for most Canadians. The study also follows on multiple highly publicized competition issues in the grocery sector, including price-fixing class actions against major grocery chains related to bread and the decision of three major grocery chains to simultaneously cancel the $2-per-hour bonus "hero pay" for frontline workers in June 2020.

The Bureau continues to push for subpoena rights and the power to compel businesses to provide internal business records and data in the course of its market studies. By the Bureau's own admission, these tools have helped foreign competition authorities and the Bureau will feel disadvantaged without them. Instead, the Bureau will rely on voluntary stakeholder consultations, suggesting that the grocery sector market study is unlikely to surface any ground-breaking details or recommendations. While the deadline for written submissions passed on December 16, 2022, the Bureau continues to engage in stakeholder consultations until February 2023 with the aim of publishing its final report in June 2023.

The Bureau also published all three reports of its Digital Health Care Market Study focused, respectively, on the competitive role of personal health information, pro-competitive procurement policy and using competition policy to empower digital health care. Launched in 2020 during the height of the COVID-19 pandemic, the study was intended to assess impediments to access, competition and innovation in the digital health care sector, although it is not clear whether the Bureau's recommendations will lead to governmental action.

CANARI IN A COAL MINE

The Bureau's newly launched Digital Enforcement and Intelligence Branch completed its first full year in action. Nicknamed CANARI (Competition through Analytics, Research and Intelligence) and advertised as a high-tech version of the "canary in a coal mine", this new branch comprises the Intelligence Directorate, providing intelligence expertise to the Bureau's enforcement and promotional activities and the Digital Enforcement Directorate, a centre of expertise on how companies and the Bureau can leverage technology and data in the marketplace.

Despite being touted for its role in digital enforcement, CANARI's first year was largely dedicated to promotional activities, including the launch of the Collusion Risk Assessment Tool intended to assist procurement agencies with identifying potential big rigging. With plans to grow the team to up to 35 members in the coming years, CANARI is likely to play a more pivotal role in the Bureau's enforcement activities in 2023 and beyond.

With an enhanced legislative framework and the establishment of CANARI, the Bureau now has the tools in place to bring into force its digital enforcement strategy but the coming years will tell whether the Bureau can deliver on its promise for stricter enforcement in digital markets.

Cartel Activity: Beware Buy-Side Agreements

CRIMINALIZATION OF BUY-SIDE AGREEMENTS

Following similar developments in the United States and active lobbying by the Commissioner for new powers to combat anti-competitive employment practices, this year's rushed June amendments to the *Competition Act* introduced the criminalisation under section 45 of so-called wage-fixing and no-poach agreements between employers, making it per se illegal for employers to agree to fix salaries, wages or "terms or conditions of employment", or to agree to refrain from soliciting or hiring another firm's employees. The prohibition applies to unaffiliated employers, and the employers do not need to be competitors for there to be an offence.

Like other forms of cartel behaviour, the new prohibition is however subject to the ancillary restraints defence, which makes otherwise prohibited agreements lawful where they are directly related to and reasonably necessary for giving effect to the objective of a broader agreement that is not itself criminal. However, the scope and application of this defense, which has never been judicially interpreted, remains uncertain.

As for other types of "hardcore" cartels (such as price fixing and bid rigging), the penalty for violating this provision includes imprisonment for up to fourteen years or a fine to be set at the discretion of the court, or both. The maximum fine for criminal cartels is currently $25 million, but the cap will be removed with the coming into force of these amendments, on June 23, 2023.

The new criminal regime will come into force in June 2023; the moratorium, applicable solely to these amendments, is designed to enable companies operating in Canada to review their current employment practices.

The new criminal regime will come into force in June 2023; the moratorium, applicable solely to these amendments, is designed to enable companies operating in Canada to review their current employment practices (including human resources policies, codes of conduct, and compliance programs) and consider whether any changes are warranted to reduce criminal investigation risks from June 2023 onwards.

ANTICIPATED UPDATE TO THE BUREAU'S GUIDELINES ON COMPETITORS COLLABORATIONS

Given the uncertainty associated with how the Bureau will seek to enforce the new buy-side agreements prohibition, the potentially broad range of agreements that could be captured by it, as well as how the ancillary restraints defense will be applied to such agreements, and the criminal sanctions to which companies and individuals are exposed for infringements, it will be important for the Bureau to elaborate on how it intends to interpret and enforce this new prohibition.

During his October 2022 annual address to the Canadian Bar Association, Commissioner Boswell indicated that new stand-alone guidance on no-poach and wage-fixing agreements should be expected in advance of the provision coming into force. It is not yet clear whether this will also come with adjustments to the Bureau's current *Competitor Collaboration Guidelines and Immunity and Leniency Programs*.

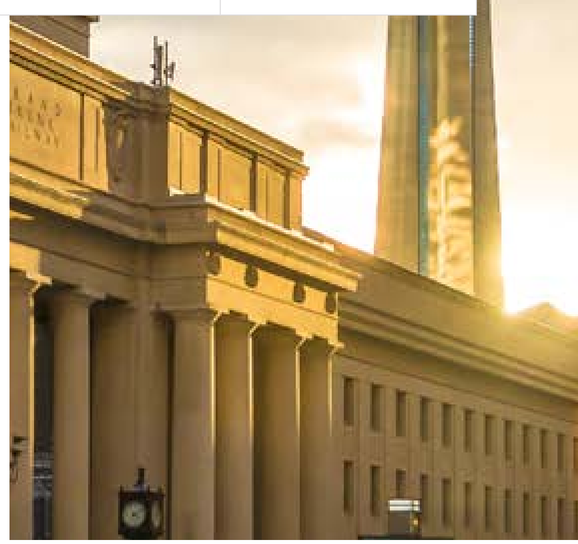
As an example, the latter, which are expected to be available for parties involved in conduct contrary to the new buy-side cartels prohibition, provide that the base fine under the leniency program requires identification of the volume of commerce affected by the impugned cartel behaviour such as price-fixing; the Bureau and PPSC will need to clarify how the base fine will be calculated with regard to wage-fixing or no poach agreements, given the inputs to such calculations necessarily will be different versus a price-fixing case.

Recognizing the relative return to normality from the COVID-19 pandemic, in November, 2022, the Bureau rescinded its temporary guidance on competitor collaborations provided to businesses to support crisis response efforts during the pandemic, which were adopted in April 2020 to signal the Bureau's flexibility regarding good faith business collaborations designed to contribute to the crisis response (such as coordination aimed at ensuring the supply of products and services critical to Canadians). According to the Bureau, such flexibility is no more warranted as "the exceptional conditions and challenges that led to [the temporary guidance] are no longer applicable".

STATISTICAL UPDATE FOR 2022

The table below includes key cartel enforcement statistics made available by the Bureau for its most recent fiscal year, ending in March 2022:

Enforcement Metric	2021-2022	2020-2021	2019-20	2018-19
Search warrants issued, including multiple orders for a single investigation	**1**	**0**	**3**	**12**
Immunity markers granted	**2**	**4**	**4**	**3**
Leniency markers granted	**0**	**0**	**0**	**0**
New cartel investigations commenced	**14**	**14**	**21**	**13**
Ongoing cartel investigations	**39**	**37**	**35**	**40**
Investigations referred to the PPSC	**2**	**0**	**4**	**1**
Investigations where criminal charges were laid following a PPSC decision	**1**	**0**	**0**	**1**



Consistent with global trends, there has not been any notable pick-up in cartel activity, both from a whistleblowing or enforcement perspective. Despite a decline in immunity markers granted (and, yet again, no leniency markers being granted), and, more generally, in cartel enforcement activities with only one search warrant issued this past year, the Bureau remains nominally active in 39 cartel investigations. This year, two investigations were also referred to the PPSC.

There have been some noteworthy developments in specific cases:

– Following criminal charges laid in the Greater Toronto Area condo refurbishment bid-rigging case in late March 2021, the construction company CPL Interiors Ltd was fined $761,967 in January 2022, after pleading guilty to its participation in a scheme to allocate customers and fix bid prices on refurbishment contracts issued by private condominium corporations between 2009 and 2014. The Bureau confirmed that the proceedings against the remaining three other competing companies and their owners were ongoing.

- On October 14, 2022, a fifth engineering executive also pled guilty in the Gatineau bid-rigging case and was sentenced to pay a $25,000 fine in addition to a 15% surcharge on the fine, following charges laid in June 2021 (reflected in the statistics above). The executive admitted to participating in the bid-rigging scheme that targeted infrastructure contracts awarded by the city of Gatineau between 2004 and 2008, while acting as regional director at one of the construction companies involved.

Looking forward, a similar trend in enforcement activities is to be expected. In subsequent years however, it will be interesting to see how the numbers will be affected in light of the coming into force of the new buy-side agreements prohibition in June 23, 2023 and the Bureau's announced willingness to align itself with other jurisdictions, in particular the United States.

In addition, the government's consultation on potential further reform to the *Competition Act* launched in November 2022 may also bring further legislative change. For example, the government's consultation paper indicates that the civil competitor collaborations regime will be examined to determine if it can adequately address past conduct or whether additional sanctions should be available for civil infringements (as is the case in many peer jurisdictions). The government also appears focused on how evolving technologies will shape anti-competitive behaviour, noting that the development of algorithmic collusion raises questions as to whether a regime requiring "agreement" between competitors to find an infringement is fit for purpose in the digital age.

Off-Market? Canada Takes a Firmer Stance Against Deceptive Marketing

The past year ushered in significant changes to Canada's deceptive marketing legislation and enforcement posture. Long a focus of the Bureau, the recent amendments to the *Competition Act* provided the Bureau with sharpened remedial tools to deter advertisers from making materially false and misleading representations to the public. These changes are well-timed as the Bureau has identified a new enforcement priority in deceptive marketing – greenwashing.

STRENGTHENING THE TOOLKIT

The amendments to the *Competition Act* that came into force in June introduced several targeted changes to the existing provisions. Arguably the most significant change to the deceptive marketing provisions was the substantial increase in the AMP that can be levied for civil infringements.

> **For multinational corporations with billions in global revenues, the potential liability under the revised regime would dwarf the prior remedial action available for civil misrepresentation cases.**

Prior to the amendments, an advertiser found liable under the civil deceptive marketing provisions faced AMPs not exceeding C$10 million for the first infringement (though in practice they typically fell well below this threshold), in addition to orders requiring cessation of the conduct and publication of corrective notices. The Bureau had long held that the capped AMPs were insufficient to deter illegal behaviour, contending that most large advertisers had little incentive to abide by Canada's misleading advertising provisions as the potential gains from consumer deception far outweighed the costs of any potential Bureau enforcement. Put differently, a large advertiser's profits from deceptively inducing consumers to buy its products, would often exceed the maximum possible fines that could be levied against the conduct.

This calculus has now changed markedly. In respect of the civil deceptive marketing provisions, courts may now issue AMPs in an amount not exceeding the *greater* of:

- C$10 million (C$15 million for each subsequent offence); and
- Three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

For multinational corporations with billions in global revenues, the potential liability under the revised regime would dwarf the prior remedial action available for civil misrepresentation cases. It remains to be seen whether this threshold will apply only to the Canadian corporation subject to investigation, or if it will apply to the subject of the enforcement action and its affiliates.

The amendments codified one additional, though perhaps less impactful, aspect of the *Competition Act's* civil and criminal deceptive marketing provisions: drip-pricing, which refers to the practice of advertising a product or service at a price that is unattainable due to additional charges and fees subsequently surfaced by the merchant in the payment process.

The practical effect of this amendment is likely minimal. The Bureau had already taken the position that drip-pricing constituted a misrepresentation to the public, successfully taking action against the practice on numerous occasions, including against several car rental companies, online ticketing re-sale platforms, online travel agency platforms, as well as initiating drip pricing inquiries in some other industries that were ultimately resolved without formal remedies.

In short, drip-pricing already fell within the Bureau's jurisdiction, and we expect the focus on this practice to continue – particularly in the digital economy following its formal codification in the *Competition Act.* Moreover, the enormous increase in financial penalties available for this conduct means the consequences of failing to recognize and proactively adjust pricing practices that could constitute drip pricing are more significant than ever.

THE BUREAU GOES GREEN

As the Bureau's toolkit was strengthened through legislative amendment, the Bureau made clear its intention to use it. Regarding deceptive marketing, it is evident that greenwashing (i.e., making misrepresentations about a product, service or company's environmental impact) will be an enforcement priority moving forward. At the Bureau's Green Growth Summit in September 2022, the Commissioner signaled this growing focus, indicating that it is "[the Bureau's] job to protect consumers from ecofraud".

> **The enormous increase in financial penalties available for this conduct means the consequences of failing to recognize and proactively adjust pricing practices that could constitute drip pricing are more significant than ever.**

Of course, greenwashing is neither a new phenomenon nor a new area of Bureau enforcement: over a decade ago, the Bureau brought an application against Albertan spa retailers for their misleading use of "Energy Star" certifications on their not-so energy efficient hot tubs, which led to modest AMPs; and, in 2016, the Bureau also succeeded in reaching a settlement with Volkswagen and Audi for falsely claiming that their diesel engines had lower emissions than the equivalent gasoline engine. Volkswagen and Audi had to pay AMPs totaling C$17.5 million, a figure which paled in comparison to the C$2.1 billion class action settlement that occurred in parallel.

However, the Bureau had not publicly pursued green-washing claims again until 2022, when so-called "ecofraud" came to the forefront of the conversation once again. In January 2022, the Bureau reached an agreement with Keurig Canada to resolve concerns over false and misleading environmental claims about the recyclability of its single-use Keurig K-Cup pods; contrary to Keurig's claims, the Bureau concluded that the pods were not widely accepted for municipal recycling programs outside of British Columbia and Quebec. Keurig agreed to pay a C$3 million penalty, donate C$800,000 to a Canadian environmental charity, and cover the costs of the Bureau's investigation. It also agreed to change its pod recyclability claims.

The Keurig case may in the future be seen as a watershed moment, because the Bureau has since launched multiple investigations into greenwashing, including against companies in sectors as diverse as financial services, energy distribution and consumer products. In at least some cases, investigations were launched in response to a "six resident complaint", a statutory mechanism which requires the Bureau to initiate an inquiry if six residents of Canada file a complaint concerning the same conduct. We expect that this trend of private greenwashing complaints will continue.

Moreover, there remains the outstanding issue of Greenpeace's complaint against a large oil and gas company from late 2021. Specifically, Greenpeace questions the credibility of the company's carbon offset program, which claims that that the company's emissions will be offset through forest restoration and other initiatives. The Bureau has not commented either way on this particular complaint.

Interestingly, many of the ongoing cases do not focus on misleading claims regarding an advertiser's specific product or service; but rather are examining broad statements that promote the environmental credentials of an organization or industry as a whole. Given the increasing importance placed on an organization's environmental, social and governance (**"ESG"**) policies and environmental records, the Bureau's interest in investigating misleading, inconsistent or exaggerated corporate environmental policies or promotions is likely here to stay. In any event, it is evident from the myriad of recent investigations that the Bureau is motivated to crack down on misleading environmental claims, in whatever form they are made.

Competition Class Actions: Canadian Courts Dig Deep into the Competition Act

Over the course of the past year, Canadian courts have not been shy to engage meaningfully with the *Competition Act*. For better or worse, courts are drawing a line in the sand and providing precedent-setting interpretations of the *Competition Act's* key provisions.

With the recent amendments to the *Competition Act* – adding new provisions and expanding the scope of old ones – we can expect this trend to continue.

KEY CASES INTERPRETING THE COMPETITION ACT

In late 2021 and 2022, the courts issued a hat trick of cases interpreting section 45 of the *Competition Act*. Two are summarized below (the third, *Jensen v Samsung Electronics Co. Ltd.*, was reported on in last year's Outlook).

For better or worse, courts are drawing a line in the sand and providing precedent-setting interpretations of the *Competition Act*'s key provisions.

Shutout for Hockey Class Action in Federal Court of Appeal

In last year's Outlook, we reported on the decision of Chief Justice Crampton of the Federal Court, in *Mohr v. National Hockey League et al.*, who granted a motion striking out a class action claim and denying the plaintiff's motion to amend. The plaintiff subsequently appealed the decision to the Federal Court of Appeal. In a judgement issued on August 17, the appeal panel dismissed the appeal in its entirety.

The panel opined on two key questions of statutory interpretation related to the *Competition Act*, concluding that the claim had no reasonable prospect of success. Specifically:

– The prohibition on anti-competitive arrangements in section 48 is limited to arrangements or agreements

between clubs or *teams in the same league* (and in this case, the allegations related to the purchase or acquisition of players' services across multiple unrelated leagues); and

– The prohibition in section 45 is restricted to agreements or arrangements with respect to the *supply or sale of products,* and does not apply to agreements among buyers for the purchase of a product or service.

This case also has broader relevance for preliminary motions in the context of class actions generally. Here, while the FCA was critical of the lower court decision, the FCA rejected the appellants' argument that the low bar of having a "reasonable cause of action" was met simply because there was no binding precedent to the contrary.

Supreme Court of British Columbia Clarifies Section 45 of the *Competition Act* to Apply Only to "Sell-side" Agreements

In *Latifi v. The TDL Group Corp.,* the plaintiff sought to bring a claim on behalf of all Tim Hortons' employees in Canada. The defendant, The TDL Group Corp. (**"TDL"**) owns the Tim Hortons brand, and is the franchisor for Tim Hortons restaurants in Canada. The plaintiff's main allegation was that the No-Hire clause in TDL's franchise agreements violate the *Competition Act* by unlawfully suppressing wages. The plaintiff claimed the wage suppression benefitted TDL and its franchisees by increasing profits, which it said violated section 45 of the *Competition Act*. The No-Hire clause prevented franchisees from hiring employees from another Tim Hortons franchise.

TDL asserted that the No-Hire clause between it and its franchisees was a "buy-side" agreement and therefore not unlawful under s. 45 of the *Competition Act*, which TDL argued applies only to inherently anti-competitive "sell-side" agreements. Justice Sharma agreed with TDL, holding (consistent with *Mohr*):

– a plain reading of s. 45 makes it clear that the section was aimed at the supply or the production of products, not the purchase of products; and

– the purpose of s. 45 was to prohibit certain conspiracies or agreements amongst competitors engaged in the supply of a product, which are deemed to be anti-competitive, where competing suppliers agree to fix prices, allocate markets, or limit output.

Justice Sharma noted that TDL and its franchisees produce and supply coffee and donuts (among other things), not employee/employment services. She concluded that s. 45 cannot apply to situations where the competitors of a product are not also the same entity who supply or produce that product — in its current formulation, s. 45 restricts sellers, not buyers.

The Changing Landscape: *Competition Act* Amendments

Jensen, Latifi, and Mohr demonstrate that while the burden on the plaintiff at certification remains low, our courts may reject claims based on untenable interpretations of the *Competition Act*.

However, going forward as of June 23, 2022, Plaintiffs will have a wider latitude to argue a breach of the *Competition Act* as a result of the recent amendments to the *Competition Act*. The amendments added new criminal

provisions (for example, wage-fixing and no-poach agreements under section 45, which provision will come into force only in June 2023, drip pricing under sections 52, and an expanded list of factors that can be considered when assessing the impact of business practices and competitor collaborations on competition) and increased penalties, allowing for a broader theory of liability that may pass muster with the courts, at least at the certification stage. We expect theories of liability like the ones above to be resurrected in new cases as a result.

LOOSE TIES: BC COURTS PLAINTIFF FRIENDLY ON JURISDICTION

In two decisions this year, the British Columbia courts have assumed jurisdiction over a foreign defendant's conduct, based on minimal ties to the jurisdiction.

- In *Cheung v. NHK Spring Co.,* the BC court certified a class action against international tech companies on the basis that jurisdiction over foreign defendants could be found, even though they did not sell their products directly in or into Canada and the alleged wrongdoing occurred entirely outside Canada. The decision is currently under appeal.
- Likewise in *Stephens v. Altria Group, Inc.,* the BC court found jurisdiction over Altria, an American producer and marketer of Tobacco, cigarettes, and related products on the basis that it is a foreign parent to its Canadian subsidiary, JUUL Labs Canada Ltd., where the allegations pertained to the Canadian subsidiary.

If they stand, these developments will undoubtedly be a source of attraction for new claims in the jurisdiction.

THE RISE OF CONSUMER CONSCIOUSNESS IN COMPETITION

The rise, and continued popularity, of ESG sustainability has brought on its own activity under the *Competition Act*. As well as increasing Bureau deceptive marketing enforcement that we have described in chapter V above, the impact will also be felt in competition litigation. Deceptive marketing actions are particularly attractive for putative classes given the relatively lower threshold needed to prove their claim (as compared to price fixing and conspiracy under section 45) and the ability to bootstrap their claims with favorable consumer protection legislation.

For example, this year has witnessed a steady increase in class actions alleging false or misleading representations

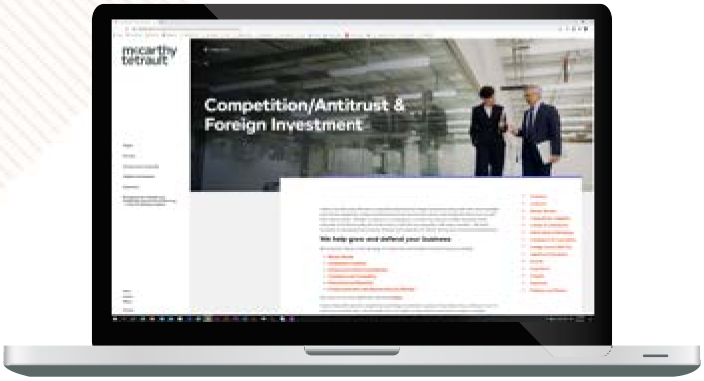
Deceptive marketing actions are particularly attractive for putative classes given the relatively lower threshold needed to prove their claim (as compared to price fixing and conspiracy under section 45) and the ability to bootstrap their claims with favorable consumer protection legislation.

and deceptive marketing practices under the *Competition Act*, also referred to as "greenwashing" in the case of environmental claims. For example, in *Hoy v. Expedia Group*, a putative class action was commenced against a group of travel service providers for deceptive marketing and breach of the *Consumer Protection Act*. The certification hearing was argued this year.

Violations of this section of the *Competition Act* can attract both Bureau enforcement activity and private class actions. On March 10, 2022, a class action was commenced against Keurig Canada Inc. for deceptive marketing related to the recyclability of its K-cups after it entered into a multi-million dollar settlement agreement with the Bureau.

We can expect to see an uptick in new claims arising from the amendments, such as the now codified prohibitions on drip pricing and no-poach agreements. Fortunately for defendants, the courts' recent willingness to engage with and interpret the *Competition Act* may give rise to the potential for more summary judgment motions, where the claims do not clearly align with the *Competition Act*'s provisions.

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



About Us

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

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

We offer full national coverage across Canada's unique common law and civil justice systems, with strong bilingual teams in Toronto and Montréal. McCarthy Tétrault LLP has deep experience across all industries and has one of the most developed industry group programmes in Canada. We leverage that base to offer useful and business-friendly solutions that are tailored to the sector our clients operate in and meet their timing and commercial requirements.

Our Group has been recognized by several leading international directories, including:

– Band 1 by *Chambers Canada*

– Tier 1 by *Legal 500*

– Elite by *Global Competition Review* – Canada Bar Survey

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 MZ400
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