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Top Competition and Foreign Investment Review Trends and Issues for 2017

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In our annual forecast of the year ahead for Canadian competition and foreign investment review law, we evaluate how developments in 2016 will influence these areas of the law in 2017. We discuss below the top issues and trends to watch for this year.

Liberalization of Canada's Foreign Investment Review Regime

The Canadian government has indicated an interest in liberalizing Canada's foreign investment review regime in 2016. We are tracking three important developments in 2017.

The first of these is the significant increase in the "net benefit" review threshold applicable to most direct acquisitions of control of Canadian businesses by WTO investors under the *Investment Canada Act*. Today, such acquisitions of control are generally subject to a pre-closing review if the enterprise value of the Canadian business exceeds $600 million. If no relevant amendments are made to the *Investment Canada Act*, that threshold will increase to $800 million on April 24, 2017 and to $1 billion in 2019. However, the federal government signalled in its 2016 Fall Economic Statement and in a recent press release that it would increase the threshold to $1 billion in 2017 instead, two years ahead of schedule. Legislation necessary to implement this change has not yet been introduced, but once passed, it will serve to further reduce the number of foreign acquisitions that are subject to net benefit approval and may be viewed as creating a more attractive climate for foreign investment in Canada.

The second important development is the publication of the long-awaited *Guidelines on the National Security Review of Investments* (National Security Guidelines). The *Investment Canada Act*'s national security review process has been criticized for its lack of transparency since its creation in 2007, particularly in light of the wide scope of transactions potentially subject to national security review. Notably, the *Investment Canada Act* does not define what constitutes a national security interest or clarify what might be injurious to such an interest. The new National Security Guidelines attempt to address these criticisms by setting out a non-exhaustive list of nine factors that the government will consider when assessing any national security risk associated with a proposed investment by a non-Canadian. The guidelines also offer recommendations on how to navigate the national security review process. In addition, the government plans to amend the *Investment Canada Act* to require annual reporting on the administration of the national security provisions, which should help to improve the transparency of the review process. It remains to be seen whether these guidelines will translate into the greater practical certainty that the business community has hoped for, but they are an encouraging step toward increased transparency in this area. The anticipated changes in this area may well surface in the forthcoming federal budget.

In a related development, the government agreed in late 2016 to rescind and reconsider a divestment order made by the former Conservative government under the national security provisions against the Chinese investor O-Net Communications Holdings Limited. The order was cancelled on January 9, 2017. Although the Liberal government may ultimately decide to reaffirm the divestiture order, its apparent interest in adding transparency to the process suggests that it may be more forthcoming in its review this time around.

Please see our publications for more background on the increased net benefit review threshold and the publication of the National Security Guidelines or for more information on the O-Net matter.

New Directions and Case Law for Abuse of Dominance

The year 2017 is likely to be important for Canadian abuse of dominance jurisprudence. The Commissioner of Competition's litigation against the Toronto Real Estate Board (TREB), discussed in our last annual forecast, may finally come to a close. TREB's appeal from the Competition Tribunal's April 2016 redetermination decision was heard by the Federal Court of Appeal in December 2016, and a ruling is expected in 2017. The Commissioner's recent case against the Vancouver Airport Authority (VAA), which involves some similar legal issues, is also scheduled to proceed to mediation and a possible hearing in late 2017. (See our discussions of the case following the Federal Court of Appeal and Supreme Court decisions.)

The TREB saga is noteworthy for establishing that a person does not need to compete in a particular market in order to have and abuse a dominant position in that market. Whatever the Federal Court of Appeal decides about TREB in 2017, its 2014 finding that the abuse of dominance provisions can apply to conduct that affects a market in which the dominant entity does not itself compete significantly expanded the scope of the abuse of dominance provisions. This may open the door to proceedings against persons occupying dominant positions in related upstream or downstream markets, including trade associations and other "gatekeepers" that do not participate directly in a particular market but have influence over how competition in that market occurs. We expect the Commissioner to continue to test the scope of the abuse of dominance provisions in 2017.

The VAA litigation, in which the Commissioner has alleged that the VAA is abusing its dominant position in the market for in-flight catering services at the Vancouver airport, is an example of an abuse of dominance case that builds on the 2014 Court of Appeal decision in TREB. The Bureau alleges that the VAA, a not-for-profit corporation responsible for the management and operation of Vancouver International Airport, is preventing new in-flight catering suppliers from competing at the airport without sufficient justification, notwithstanding the fact that the VAA does not itself directly compete for the supply of in-flight catering services. The Bureau has also challenged the VAA's policy of requiring suppliers wishing to provide in-flight catering services at the airport to lease land from the VAA as a condition of access. The VAA argues that it is acting within its statutory mandate and is therefore not subject to the *Competition Act*. It insists that it must be free to regulate these services as it sees fit in order to ensure the efficient operation of the airport. These legal questions have important implications not only for other ancillary services around the airport such as taxis and buses, but also for the management of other important commercialized infrastructure such as ports and harbours. The case could also bear on the federal government's ongoing consideration of the Emerson Report proposal to privatize some Canadian airports.

Continuing Enforcement Focus on Innovation and the Digital Economy

In our previous annual forecast, we predicted that the Competition Bureau would increase its focus on the digital economy and other innovative industries. The Bureau had almost as many commenced, closed or ongoing enforcement cases in the digital economy during the six months ended September 30, 2016 as in the entire previous year. Several signals indicate that the digital economy will continue to be an important enforcement priority for the Bureau in 2017.

In May 2016, the Bureau launched its fintech market study investigating technology-led innovation in the financial services sector. The study includes such products as peer-to-peer banking, e-wallets, crowdfunding, and "robo-advisers." (The study does not include crypto-currencies such as Bitcoin). The results of that study, which will explore the competitive impact of fintech on the industry, barriers to entry faced by new entrants and the need for regulatory reform to promote competition while maintaining consumer confidence in the sector, are scheduled to be published in spring 2017. Depending on the results, the Bureau may produce a follow-up white paper or other advocacy on how regulation and regulatory design can help to foster fair and innovative competition in financial services.

We also expect the Bureau to continue to pay close attention to abuse of dominance issues in innovative markets in 2017, especially with regard to the emergence of data as a competitively significant input into products and services. In April 2016, the Bureau discontinued an investigation into allegations that Google Inc. had engaged in conduct contrary to the abuse of dominance provisions of the *Competition Act*. During the investigation, the Bureau considered the ability of firms to leverage data and network effects to occupy a dominant position in a market. Though the Tribunal's decision in the TREB case mentioned above is currently under appeal, it also supports the Commissioner's view that restrictions on the access and use of data could constitute an abuse of dominant position.

In general, those active in high-innovation sectors should be mindful of competition law scrutiny in 2017, even if their industries are currently highly competitive. The Bureau has been emboldened by the Tribunal's 2016 holding in TREB that a substantial lessening or prevention of competition can occur even in a highly competitive and innovative market. As the Bureau expressed in a recent press

release regarding the discontinuance of an investigation into Apple's iPhone distribution practices, "as a general principle, a finding that a market is innovative and dynamic does not necessarily preclude a finding that conduct has reduced competition, insofar that a market may be more competitive in the absence of that conduct."

Bid-Rigging as an Enforcement Priority

As the Canadian government continues to promote infrastructure projects across the country, we anticipate that the Bureau will continue to focus on bid-rigging in 2017, which may lead to more high-profile investigations or experimentation with novel investigative tools.

In its 2016-17 Annual Plan, the Bureau signalled its intention to "raise awareness throughout the procurement community and among potential bidders about bid-rigging related to infrastructure spending, given increasing public-sector investment" and to "use innovative data-screening mechanisms to detect potential bid-rigging."

The Bureau is also likely to continue to work with Public Services Procurement Canada (PSPC) on a "Screens Pilot Project." This project is intended to help identify and address possible bid-rigging in procurement processes on the basis of international benchmarking, algorithmic screening and other quantitative approaches. The Bureau and PSPC are also planning to establish a dedicated hotline for tips related to bid-rigging and other forms of corruption and fraud in federal contracts.

Although the Bureau's enthusiasm for bid-rigging enforcement is genuine and should be taken seriously, it must also be viewed in context. The Bureau has been "cracking down" on bid-rigging and running educational outreach programs for years. So far, however, these efforts have collapsed in contested proceedings, with dozens of charges resulting in acquittals or being abandoned after years of delay. As the Commissioner and the Competition Law Section of the Public Prosecution Service of Canada push forward with new bid-rigging outreach efforts and investigative tools in 2017, they would be wise to keep the lessons of the past few years in mind.

Deceptive Marketing in Electronic Media

Digital marketers will have good reason to tread carefully in 2017. As we have already reported, Canada's Anti-Spam Legislation (CASL) will see a potentially significant expansion in July 2017, when a new private right of action comes into effect for private parties who have been "affected" by misleading representations in an electronic message to sue the persons responsible. In this context, "electronic message" is defined very broadly and includes text messages, social media and blog posts, websites, VoIP and mobile applications, as well as any information contained in titles, subject lines, URLs and metadata. This change will provide an easier mechanism for those affected by misleading representations in electronic messages to bring class actions against digital marketers, with potentially serious consequences, including potentially significant statutory damages.

The Bureau is also likely to continue to focus on deceptive marketing in electronic media as an enforcement priority in 2017. The Bureau reached a consent agreement with car rental companies Avis and Budget in June 2016 over representations made on websites, mobile applications and emails, as well as in traditional media, and the Bureau appears keen to continue to use its powers regarding deceptive marketing in electronic media. On January 11, 2017, Amazon settled a case with the Bureau involving misleading representations about the ordinary selling price of products for sale on its website. In a speech to the Canadian Marketing Association in October 2016, the Commissioner highlighted the importance of fair and honest advertising on digital platforms, making reference to the Avis/Budget case and a 2015 case in which Bell paid a $1.25-million fine after its employees posted reviews of its mobile applications without disclosing that they were affiliated with the company. The Commissioner's remarks, in conjunction with the coming into force of the new private right of action under CASL, may signal a period of heightened private and public scrutiny for digital marketing of all kinds.

Streamlining of Tribunal Process

The Tribunal has a mandate to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit. We expect that the Tribunal, the Bureau, and the bar will continue to explore new ways to streamline the Tribunal process in 2017.

In March 2016, mediation was used in a contested hearing before the Tribunal for the first time in the Commissioner's case challenging Parkland's acquisition of the Pioneer gas station business. The mediation process was successful and the parties reached a resolution in the form of a consent agreement before trial. (Read our article for more information on the use of mediation in the Parkland case.) In June

2016, the Tribunal issued a Practice Direction setting out a procedure for requesting mediation, selecting a mediator, determining the scope of mediation, and conducting a mediation. In December 2016, the Competition Bureau reached an agreement with Moose Knuckles in a marketing practices case, also through a mediation process. The VAA abuse of dominance case noted above is scheduled for mediation in late July 2017, and the Tribunal encourages parties to attempt mediation in all cases.

Merger Litigation

There is a growing perspective in the bar and the business community that the Bureau's merger review process is becoming longer, more burdensome and less predictable, which may contribute to a shift in incentives causing more reviews to result in litigation. The Bureau's public statistics confirm this impression: the average length of complex reviews and the number of Supplementary Information Requests issued has trended upward over the past few years, whereas the percentage of complex reviews in which the Bureau has met its service standards has trended downward. At the same time, there is growing frustration about the lack of transparency and accountability over the Bureau's lengthening review process and a mounting sense that negotiated outcomes such as consent agreements are becoming increasingly onerous, complex and inflexible.

Although the current timeline for full litigation on the merits may not be practical in some contexts, as the alternatives to litigation become less attractive and the Tribunal process becomes more streamlined, parties to complex mergers may be more likely to seek resolution through the Tribunal, including through mediation, rather than consent to extensions of already lengthy reviews.

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