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Top Competition and Foreign Investment Review Trends and Issues for 2018

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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 2017 will influence these areas of the law in 2018. We discuss below the top issues and trends to watch for this year.

New Leadership at the Bureau and a Year of Transition

The year 2018 will be one of transition at the Competition Bureau (Bureau), with Commissioner John Pecman's five-year term expiring on June 5, 2018, and a new Commissioner to be appointed. As the formal search process has yet to be launched, it is not yet clear whether a permanent successor will be appointed by that date or an interim Commissioner will be appointed to bridge the gap.

Whoever is chosen as Commissioner Pecman's successor will direct the Bureau's policies and priorities for the future. Commissioner Pecman identified the digital economy and innovation as areas of focus during his term, including recently reiterating his emphasis on the vital importance of embracing competition to encourage innovation in Canada; however, a new Commissioner could switch focus to, for example, more criminal or civil enforcement, or to other sectors of the economy.

While Commissioner Pecman is an economist, the position has traditionally been held by a lawyer. If the next Commissioner is an economist as well, it may be a sign that the government's vision for the agency has changed, perhaps in recognition of the Bureau's increasingly technical and quantitative enforcement role. It will also be interesting to see whether the new Commissioner is chosen from within the Bureau's ranks or from outside the organization.

We will be watching the transition carefully and expect the choice of the new Commissioner to have a significant impact on many of the trends discussed below.

The Digital Economy Likely to Continue to Be an Important Priority

The Bureau devoted considerable thought and resources to digital economy issues in 2017, culminating in the release of its draft "big data" discussion paper in November and its report on innovation in the financial services sector (fintech) in December. (For more information on the Bureau's fintech study, see our earlier bulletin.) The Bureau also reported an 80% increase in enforcement cases in the digital sector during its 2016-2017 fiscal year compared with the previous year, and the Bureau's 2017-2018 Annual Plan suggests that dozens of digital economy cases are still in the investigative pipeline.

In 2018, we expect the Bureau to continue to make digital economy issues a priority for both advocacy and enforcement activities, with a particular focus on issues involving big data. To date, the Bureau has taken a relatively balanced approach to big data issues compared to regulators in other jurisdictions, notably including the European Union. We will also watch to see whether the federal government takes a more direct policy interest in big data or prefers to leave the area to the discretion of individual regulators like the Bureau and the Office of the Privacy Commissioner.

The Bureau continues to show particular interest in online deceptive marketing practices. The Bureau's 2017-2018 Annual Plan lists "high-impact enforcement cases against deceptive marketing practices" in the digital economy as its first priority, referring specifically to practices involving online "astroturfing" (e.g., employees posing as customers to review their company's products), "drip pricing" (e.g., additional charges revealed in subsequent steps in the purchase process), and hidden terms and conditions such as "subscription traps."

For example, on January 25, 2018, the Commissioner initiated proceedings against Ticketmaster and its parent company, Live Nation, for allegedly making deceptive claims to consumers when advertising prices for sports and entertainment tickets. The Bureau's investigation determined that Ticketmaster's advertised prices were deceptive because consumers must pay additional fees added later in the purchasing process. We expect that the Bureau will remain active in this area in 2018 and that we will see enforcement efforts in areas such as paid social media endorsements that may not be adequately identified as such. Such paid posts have been an interest of other enforcers, including the U.S. Federal Trade Commission, for some time.

Overdue Clarifications of Canada's Anti-Spam Law Possible

We will also be tracking the status of changes to Canada's anti-spam law (CASL) in 2018, which became uncertain last June when the scheduled implementation of a private right of action was abruptly suspended pending further parliamentary review. (For more information on this decision, see our previous bulletin.) This review was conducted on a fast-track basis by the Standing Committee on Industry, Science and Technology, and culminated in a report it presented to Parliament on December 13, 2017. The report's 13 recommendations encourage the government to provide further guidance on the scope and application of the CASL framework and to clarify some of its key concepts, including "commercial electronic message," "implied consent," and "electronic address." The report also recommends delaying the implementation of the private right of action until clarifications and changes are made.

The speed of the review indicates that CASL remains a priority for the government and suggests that 2018 may see some much-needed progress toward clearer guidance about the scope and application of the CASL regime, and perhaps legislative changes as well. We will be tracking this important compliance issue carefully.

Merger Review Fee Increase Likely and Other Process Changes Possible

The Bureau's merger review process continued to be the subject of attention and concern during 2017. Statistics in the Bureau's quarterly report at the end of September 2017 suggest that the year will be consistent with an overall trend for the number of reviews designated "complex" to climb over the past several years, while the proportion of complex cases in which the Bureau meets its service standard continues to shrink or at best remains flat. Supplementary Information Requests are also becoming increasingly common, even in relatively straightforward mergers.

Along with others in industry and the bar, Davies' competition group has written extensively about these issues and proposed various measures in response, including adjustments to notification thresholds and new exemptions from notification requirements for certain types of transactions (see, for example, the articles published in September and November 2017). This may be the year that widespread frustration over process issues begins to translate into concrete change.

One area to watch is the Bureau's merger filing fee for pre-merger notifications and advance ruling certificate (ARC) requests. In a public consultation in late 2017, the Bureau noted that its filing fee has not increased since it was fixed at $50,000 in 2003, even as the cost and complexity of merger reviews have increased with the growing volume of documents and the evidentiary burden placed on the Bureau by the Competition Tribunal (Tribunal) and the courts. Accordingly, the Bureau is seeking approval from the Minister of Innovation, Science and Economic Development to increase the flat fee for both pre-merger notifications and ARC requests to $72,000. The Bureau predicts that the increased fee will fund 100% of the Merger Directorate's activities (including litigation, review of non-notifiable mergers and preparation of general guidance documents) and enable it to hire economic, industry and legal experts more frequently, which may suggest that reviews are likely to become even more thorough in the future. However, the Bureau also argues that increased fees will allow it to continue to improve its document management and review processes, which may help to make review more efficient and timely. The public consultation on merger filing fees may provide a platform for further constructive dialogue on potential improvements to increase the efficiency and transparency of the Bureau's merger review process.

Guidance Concerning the Efficiencies Defence

Canada's merger regime is unusual in that it expressly allows merging parties to raise a positive defence based on merger efficiencies. In certain cases, this can mean that a merger that substantially prevents or lessens competition is nevertheless allowed to occur because the efficiencies involved will be greater than, and will offset, the merger's anticompetitive effects. Legal and practical questions about when and how this defence should apply are still the subject of debate, but the Supreme Court offered some guidance in its 2015 decision

in the *Tervita* case that has yet to be reflected in published Bureau guidance, including the *Merger Enforcement Guidelines*, which have not been updated since 2011. (For more information regarding the *Tervita* decision, see our January 2015 bulletin.)

In a speech in September 2017, the Senior Deputy Commissioner of Competition for Mergers and Monopolistic Practices, Matthew Boswell, indicated that the Bureau would shortly publish new materials that would clarify the Bureau's approach to efficiencies analysis. In particular, the guidance is expected to explain how the Bureau approaches such issues as the quantification of potential price and non-price anticompetitive effects and the impact of mergers on dynamic efficiency and innovation. The guidance would also identify the types of information and supporting evidence the Bureau expects to receive from merging parties advancing efficiency claims in the merger review process. Practical advice from the Bureau on these matters will be welcome.

Technical Amendments to the *Competition Act* on "Affiliates" Likely to Pass

Agreements and transactions between "affiliates" under common control are, for good reason, exempt from a number of provisions of the *Competition Act*, including the conspiracy, price maintenance and merger notification provisions. It is generally accepted that agreements or transactions between entities under common control should not be subject to prohibitions under the *Competition Act* because such entities are not expected to compete with one another. Rather, the expectation is that they will coordinate their activities as efficiently as possible.

However, although the current definition of "affiliate" under the *Competition Act* addresses corporations under common control, it does not, for example, apply at all to trusts and does not apply fully to partnerships. While Bureau guidelines state that the Bureau will consider whether other types of entities are under common control in deciding whether to refer an agreement for prosecution under the cartel provisions, the guidelines are not binding on the Bureau or a court. Further, such guidelines are inapplicable to a determination whether a merger notification is required under the *Competition Act*.

A long-awaited set of technical amendments to the *Competition Act* is expected to be enacted in 2018. These amendments are intended to broaden the *Competition Act*'s affiliation rules to apply equally to various forms of business entities, including corporations, partnerships and trusts.

Possible Changes to Immunity Program Regime

The Bureau released a revised version of its Immunity Program for public consultation on October 26, 2017. The proposed changes to the program were designed to allow the Bureau and the Crown to be sure their cases are "prosecution ready," apparently by imposing stronger cooperation and disclosure obligations on immunity applicants. Under the proposed changes, the program would permit the Bureau to record proffers and witness interviews, create a new "interim" stage during which the applicant would receive only conditional immunity (with full immunity granted only after the Public Prosecution Service of Canada is satisfied that the applicant's cooperation is no longer required), and require more comprehensive disclosure.

As we explained in a November 2017 bulletin, the Bureau's proposed changes to the Immunity Program could have a chilling effect that would reduce the effectiveness of the program, making it more difficult for the Bureau to detect conspiracies. We will be watching closely to see whether the Bureau makes further adjustments before finalizing any revisions to the program.

Further Developments in Ongoing Abuse of Dominance Cases

In our annual forecast for 2017, we predicted that the Federal Court of Appeal's (FCA) decision in the Commissioner's litigation against the Toronto Real Estate Board (TREB) might finally end a saga, now in its fourth year, that has reached the FCA twice. The FCA issued its second decision in the proceedings on December 1, 2017, upholding the Tribunal's conclusion that TREB had abused a dominant position in the market for residential real estate brokerage services by implementing rules that limit the way its member brokers and agents can use and provide certain information to consumers over the Internet. TREB sought leave from the Supreme Court of Canada to appeal the FCA's decision on January 30, 2018, so there may yet be an epilogue – or perhaps a third act – before the dust finally settles on this important case, which has significantly broadened the scope of Canada's abuse of dominance provisions. (See our discussions of the case following the Federal Court of Appeal and Supreme Court decisions.)

At the same time, the Tribunal's hearing of the Commissioner's case against the Vancouver Airport Authority (VAA), which builds on the foundation laid by TREB, is expected to begin in 2018 following a procedural significant loss by the Commissioner before the FCA, discussed below. As we described in last year's forecast, the Commissioner has alleged that the VAA is abusing its dominant position in the market for in-flight catering services at Vancouver International Airport. The Bureau alleges that the VAA, a not-for-profit corporation responsible for the management and operation of the Vancouver airport, is – without sufficient justification – preventing new in-flight catering suppliers from competing at the airport, notwithstanding that the VAA does not itself directly compete for the supply of in-flight catering services. The progress of the VAA litigation, as well as the resolution of the TREB case, should help to clarify the scope of Canada's abuse of dominance law.

The Bureau's Evolving Disclosure Obligations and Nature of Its Public Interest Privilege

The VAA case is also of interest because of the issues it has raised on the nature of the Commissioner's disclosure obligations in litigation and the nature and extent of the Commissioner's ability to protect documents from disclosure through assertions of "public interest" privilege. The FCA weighed in on this issue in late January. It found that the Commissioner had not established a "class" of documents that are presumptively subject to public interest privilege. The FCA's decision effectively ruled out the possibility that any such class privilege can exist without legislative intervention.

In prior cases, the Commissioner had refused to supply potentially relevant documents that fell within broad categories of public interest privilege claims, such as documents provided by complainants or notes of interviews of third parties conducted by the Bureau. The FCA's decision means that the Commissioner can no longer claim privilege over entire categories of documents and must instead establish that each document meets the conditions for a claim of public interest privilege individually.

The Commissioner has confirmed that he will not appeal the decision. This ruling may substantially increase the volume of documents, particularly documents created during the investigative stage of the matter, that the Commissioner is required to produce to parties whose conduct is subject to litigation under the abuse of dominance, merger and other civil provisions of the *Competition Act*. The decision is also likely to increase the burden on the Commissioner to establish privilege claims in litigated proceedings.

The *Investment Canada Act* Process: Fewer Net Benefit Reviews

As we reported in a September 2017 bulletin, the enterprise value threshold applicable to most direct acquisitions of control of Canadian businesses by private foreign investors increased significantly in 2017, rising from $600 million in April to $1.5 billion in September. Because of the increased threshold that now applies to European and American investors, as well as investors from several other countries, we expect that net benefit reviews will be less common in 2018 than they have been in the past. Lower thresholds continue to apply for investments by state-owned enterprises and for acquisitions of cultural businesses, and transactions that are exempt from net benefit review may still be subject to notification requirements and national security review.

For more information on the *Investment Canada Act* and how it is applied, see our publication *Investment Canada Act:* Guide for Foreign Investors in Canada.

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