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Big changes to competition and foreign investment law and policy in Canada

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Canada's approach to competition and foreign investment law and policy underwent significant change in 2022.

In June, the most significant amendments to the *Competition Act* since 2009 were enacted. This was followed in November with the Minister of Innovation, Science and Industry (Minister) kicking off a full-scale review of the *Competition Act* with a public consultation process. The process is scheduled to close in early 2023. In 2022, we also saw a number of developments in competition litigation, including several rarely seen fully-contested merger cases.

Canadian foreign investment review also took centre stage in 2022, with a focus on investments in Canada that could be viewed as potentially injurious to Canada's national security. In early 2022, the government announced that potential connections to the Russian state would provide reasonable grounds for the Minister to believe that a foreign investment could be injurious to Canada's national security. In August, the government signaled its renewed scrutiny under the national security regime of investments for less than a control position, implementing a voluntary notification regime for non-controlling foreign investments. The government also extended the timeframe within which Cabinet may commence a national security review where no voluntary notification is made. In October, the government announced a policy discouraging investment in Canada's critical minerals sector by foreign state-owned or state-influenced enterprises and ordered divestitures of three minority investments in the sector.

Further changes to both competition and foreign investment law and policy are on the horizon for 2023.

Amendments to the *Competition Act*

After nearly a decade since the previous round of reform, the government enacted important amendments to the *Competition Act* in June 2022. The effective date for certain of these amendments was delayed for one year to give businesses an opportunity to review their practices.

Amendments that took effect in June 2022 include important changes to the abuse of dominance provisions. Among other things, these changes expanded the scope of potentially covered conduct, implemented a dramatic increase in penalties and, for the first time, created a right of private action, permitting private parties, with leave of the Competition Tribunal, to bring an application for a violation of the abuse of dominance provisions.

Notwithstanding the new private right of action, damages are still not available to a complainant; rather, recourse is limited to injunctive relief or an administrative monetary penalty (AMP). The amendments substantially increase the potential AMPs available for violations of the abuse of dominance provisions (as well as certain other violations of the Act). Such AMPs may now be as high as three times the value of the benefit obtained from the violation. If this cannot be reasonably determined, the amount may be as high as 3% of annual worldwide gross revenues.

The amendments due to come into force in June 2023 include an expansion of the criminal conspiracy provision in section 45 to cover no-poach and wage-fixing agreements between unaffiliated employers. Currently, these are addressable only as a civil reviewable matter. In addition, as of June 23, 2023, the fine available for violations of section 45 will increase from a maximum fine of $25 million per count to an unlimited fine in the discretion of the court.

The government characterized the June 2022 amendments as a preliminary step in a broader consultation process. On November 17, 2022, the Minister formally announced the launch of a comprehensive review of the *Competition Act*. The scope of what is under consideration for reform, as described in the government's consultation paper, is very broad, leaving virtually nothing off the table. The review process will consider such broad topics as the objectives of competition policy, an expansion of the rights and powers of the Commissioner, new or amended tests and thresholds to expand on the scope of what is subject to review, including on a mandatory basis, and an expansion of private enforcement, including the ability to seek damages.

While reform is not confined to specific industry sectors, the improvement or reinforcement of competition policy in increasingly digital and data-driven markets is clearly a key objective of the process. We also expect that the recommendations for reform published by the Competition Bureau in February will feature prominently in this consultation process. The Bureau's recommendations, which are explicitly being considered in the process, include eliminating the efficiencies exception for mergers and increasing scrutiny of mergers that result in market concentration.

To kickstart the reform process, the Minister is inviting Canadians to make written submissions by February 27, 2023 through an online portal. A series of roundtables will also be held with a variety of stakeholders to ensure diverse views are heard. Aside from the deadline for written submissions from the public, the timeline for completion of the review and any possible action towards legislative reform remains uncertain.

Developments in competition litigation

In the 35 years from the 1985 enactment of the *Competition Act* until 2020, the Competition Tribunal heard a total of six contested mergers. In 2022 alone, the Tribunal released its decision in *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited (P&H)*, has an additional decision pending in *Commissioner of Competition v. Secure Energy Services Inc. and Tervita Corporation (Secure and Tervita*), and at the time of writing, is hearing *Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc. (Rogers and Shaw),* the largest contested merger in the history of the *Competition Act*.

P&H

The efficiencies defence has been a central focus of recent contested merger litigation. In *P&H*, the Tribunal addressed the Commissioner's application for a divestiture order in connection with a completed acquisition of grain elevators in central Canada. Although the case was heard in 2020, the decision was not released until October 2022.

The case was decided on the basis that the Commissioner had incorrectly defined both the relevant product and the geographic markets in his assessment of the competitive effects of the transaction. As the Tribunal found that the Commissioner had not established that the acquisition contravened section 92 of the *Competition Act*, there was no need to consider P&H's claims of efficiencies.

However, given the extensive submissions made by the parties, the Tribunal considered the application of the efficiencies defence in *obiter*. The Tribunal concluded that P&H had not proven that the acquisition was likely to bring about cognizable gains in efficiency. As a result, the Tribunal would not have found that P&H had met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition from the transaction.

Secure and Tervita

In June 2022, the Tribunal heard the Commissioner's application challenging Secure's completed acquisition of Tervita. The Commissioner alleged that the merger was likely to result in a substantial lessening of competition with respect to services provided at waste disposal facilities in the Western Canadian Sedimentary Basin. The Commission further alleged that Secure's claimed efficiencies were overstated and did not offset the quantified anti-competitive effects of the transaction.

The Tribunal's decision has not yet been released. The hearing on the merits followed from the Commissioner's unsuccessful attempts to either enjoin the transaction from proceeding or to require that the purchaser hold the acquired business separate.

Rogers and Shaw

The Tribunal is currently hearing the Commissioner's application challenging Rogers' proposed acquisition of Shaw Communications. The Commissioner is seeking to block the transaction. In doing so, the Commissioner has submitted that the proposed divestiture of Shaw's Freedom Mobile to Vidéotron, a subsidiary of Quebecor Inc., is not sufficient to remedy the anti-competitive effects of the acquisition.

The hearing is proceeding on an expedited basis and is expected to continue until mid-December.

Significant developments in national security reviews

The national security review of foreign investment has been a focus of the administration of the *Investment Canada Act* for over a decade. In 2022, we saw several significant developments in the federal government's approach to national security review.

The year commenced with the government recommending that all foreign investors and Canadian businesses carefully review their investment plans to identify any potential connections to Russian investors and entities that may be involved in both controlling and minority investments. The government warned that any investment, regardless of its value, with ties, direct or indirect, to an individual or entity associated with, controlled by or subject to influence by the Russian state, would support a finding by the Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.
On August 2, 2022, amendments to the *National Security Review of Investments*

Regulations provided – for the first time – that a non-Canadian investor could voluntarily clear Canada's national security regime on a pre-closing basis where the proposed investment is not otherwise subject to mandatory notification or net benefit review. By filing a voluntary notification, a non-Canadian investor can trigger the initial 45-day review period under the national security regime on a pre-closing basis. In so doing, the investor is able to obtain certainty as to whether the proposed investment raises national security concerns prior to completing the investment.

In contrast, the amendments provide the government with more time – specifically, five years, as compared to 45 days – after the date of implementation of the investment to commence a national security review in circumstances where an investor chooses not to voluntarily notify the investment. This is clearly intended to encourage voluntary notifications.

Critical minerals

On October 28, 2022, the Minister, together with the federal Minister of Natural Resources, issued a policy relating to the treatment of foreign state-owned enterprise investment in Canada's critical minerals sector. The policy applies to any direct or indirect investment by a foreign state-owned enterprise in a Canadian business engaged in the "critical minerals" sector value chain. These include those minerals listed on the government's Critical Minerals List. The policy applies regardless of the size of the investment and irrespective of whether the investment is otherwise reviewable under the general net benefit provisions of the *Investment Canada Act*.

The policy states that any investment by a foreign state-owned enterprise (or foreign state-influenced investor) in the Canadian critical minerals sector will form the basis for a finding that the investment could be injurious to national security. This suggests that any direct or indirect investment by a foreign state-owned enterprise, or foreign state-influenced investor, of any size in the Canadian critical minerals sector should expect to receive notice that a Cabinet-level national security review of the investment may be ordered. Notably, where a notice of potential review is issued or a Cabinet-level review is ordered and the investment has not been implemented, the investment cannot proceed until the review has been completed. Where the investment is also subject to net benefit review, approval will only be issued on an "exceptional basis," with consideration given to certain factors delineated in the policy.

Less than one week after issuing the critical minerals policy, the Minister announced that the federal government had ordered the divestiture of three separate investments in Canadian critical mineral companies involved in (among other things) lithium mining activities, both within and outside of Canada.

Recognizing the importance of transparency in the national security review process more broadly, the Minister's announcement declared that the federal government would announce the outcomes of final Cabinet orders on a going-forward basis. This commitment to improved transparency is a welcome development.

We have previously discussed these critical minerals restrictions and divestiture orders in our earlier Osler Update. Additional information regarding critical minerals can also be found in our Mining Article.

Investment Canada Act Annual Report – Key Data Points

The recent focus on national security review should not, however, overshadow the fact that Canada continues to attract foreign investment from a wide range of jurisdictions. The vast majority of these investments raise no concern. Released on October 28, 2022, the *Investment Canada Act Annual Report for Fiscal Year 2021-22* revealed that during that period, the Investment Review Division certified 1,247 notifications for acquisitions of control or establishments of new Canadian businesses and approved eight applications for net benefit review – a total of 1,255 filings, representing an increase of 51.9% over the total filings in the 2020-2021 fiscal year and an increase of 21.6% as compared to the 2019-2020 fiscal year.

Extended national security reviews, being those reviews extending beyond the initial 45-day period, remained rare, occurring in the case of only 24 investments. That is the same number of investments subject to extended national security reviews in the 2020-2021 fiscal year. Of the 24 investments subject to an extended review, 16 were cleared to proceed, seven were withdrawn and one review was ongoing as of March 31, 2022. The percentage of cases that have been cleared to proceed is noteworthy and is a marked change from the early years of the national security review process when very few cases were allowed to proceed after an extended review.

Looking to 2023

The year ahead promises to feature important competition law reform as the Minister commences stakeholder engagement on improvements to the competition law and policy framework set out in the *Competition Act*. We will also continue to monitor geopolitical developments which are increasingly reflected in Canada's approach to foreign investment in Canada.