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Competition law developments: Enforcement priorities and notable cases

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In March 2019, Matthew Boswell was appointed as the Commissioner of Competition for a term of five years. Since Commissioner Boswell's appointment, two clear enforcement priorities have emerged that are likely to shape his tenure: enforcement in the digital economy and the detection and review of non-notifiable mergers.

This year also saw two significant developments in competition law jurisprudence. In *Commissioner of Competition v. Vancouver Airport Authority*, the Competition Tribunal confirmed that business justification for conduct is the paramount consideration in an abuse of dominance case. In *Pioneer Corp. v. Godfrey*, the Supreme Court of Canada revisited and reset the ground rules governing the availability of collective relief for consumers in Canada, particularly in respect of class actions that seek damages for anti-competitive harm.

Digital economy

The Commissioner's interest in the digital economy aligns with antitrust enforcement trends globally, as antitrust agencies grapple with the application of antitrust principles and economic tools to the rapidly changing and developing digital marketplace. Indeed, the Competition Bureau has in recent years increased its focus on the digital economy, as evidenced by the release of its September 2017 paper "Big data and innovation: Implications for competition policy in Canada," its February 2018 report "Big data and innovation: Key themes for competition policy in Canada" and its hosting of a Data Forum in May 2019. More recently, the Bureau hired IBM associate partner George McDonald in July 2019 to be its first Chief Digital Enforcement Officer.

In September 2019, the Bureau announced that it will engage with market participants to address potential competition concerns in certain core digital markets (e.g., online search, social media, display advertising and online marketplaces). In connection with its focus on these core digital markets, the Bureau has requested that market participants provide information on a confidential basis relating to: (a) potential explanations for why certain digital markets have become highly concentrated; (b) identification of prior or ongoing conduct that may be anti-competitive; and (c) the impact of such conduct on competitors. Whether the Bureau's "call out" to the market will result in future enforcement action or guidance remains to be seen.

Non-notifiable mergers

The Bureau must be notified of merger transactions that satisfy certain financial thresholds in advance of closing. The transaction size threshold – based on the target's assets in Canada

or gross revenues from sales in or from Canada – is indexed to inflation and therefore subject to annual adjustments. The transaction size threshold was set at $96 million for 2019, with the adjustment for 2020 expected to be announced in early 2020.

The Bureau has the authority to review and challenge any merger until one year after closing regardless of whether it was subject to mandatory notification. In practice, voluntarily notifying the Bureau of a potential transaction in order to avoid this risk has been unusual. As a result, the Bureau may only become aware of a potentially problematic transaction (often as a result of complaints) after the transaction has closed and the parties' operations have already been combined.

In September 2019, the Bureau announced enhancements to its information-gathering efforts on non-notifiable mergers, including the re-branding of the Merger Notification Unit as the Merger Intelligence and Notification Unit. Leading up to this formal announcement, the Commissioner announced in May 2019 that the Unit detected in its first two months two potentially problematic transactions in which there was no indication that the merging parties had intended to voluntarily engage with the Bureau prior to closing.

The Bureau's new focus on non-notifiable mergers may reflect at least in part a concern that the annual upward adjustment to the transaction size threshold increases the risk each year that transactions that raise competition concerns may escape detection or may only be detected after closing. At this time, it is unclear whether drawing greater attention to non-notifiable transactions will create a greater incentive for parties to voluntarily engage with the Bureau prior to closing. It also remains to be seen whether the Bureau will send a strong signal to the legal and business communities by showing an increased willingness to seek to block or challenge non-notifiable transactions that were not brought to the Bureau's attention voluntarily.

Commissioner of Competition v. Vancouver Airport Authority

In September 2016, the Commissioner filed an application with the Tribunal for an order under the abuse of dominance provision seeking relief against the Vancouver Airport Authority in respect of its decision to allow only two in-flight caterers to operate at Vancouver International Airport and its refusal to grant licences to two new providers of in-flight catering services at the airport. In October 2019, the Tribunal dismissed the Commissioner's application, finding that while the Vancouver Airport Authority had substantial control of in-flight catering services, it had not engaged in a practice of anti-competitive acts and its conduct did not have, nor was it likely to have, the effect of preventing or lessening competition *substantially* in a market.

Notably, the Tribunal affirmed that when determining whether a firm has engaged in a practice of anti-competitive acts (a key element of an abuse of dominance finding), it must assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct and any legitimate business justifications advanced by the respondent, in attempting to discern whether the "overall character" or "overriding purpose" of the conduct was anti-competitive in nature. The Tribunal stated that a legitimate business justification must be a credible efficiency-based or pro-competitive rationale that is linked to the firm. This link can be established by demonstrating the types of efficiencies that are likely to be attained as a result of the conduct, showing how the conduct establishes improvements in quality or service, or otherwise explaining how the conduct is likely to assist the firm to better compete.

The Tribunal's decision is also significant in that it provides, for the first time, a detailed assessment of the potential application of the regulated conduct defence to the civil

provisions of the *Competition Act*. The Tribunal held that the defence does not apply to the abuse of dominance provision and, while not explicit, the Tribunal's reasoning strongly suggests that the defence would not be available to shield conduct from scrutiny under any of the civil reviewable practices provisions of the *Competition Act*.

Pioneer Corp. v. Godfrey

In conjunction with the Bureau's enforcement activities, the plaintiffs' class action bar has continued to act as an aggressive "private" enforcer of Canada's competition laws. In addition to filing a number of new significant claims, the plaintiffs' bar secured a significant victory before the Supreme Court of Canada in September 2019 that has reshaped the landscape for private enforcement in Canada. In a decision involving a twin set of appeals in *Pioneer Corp. v. Godfrey*, the Supreme Court has provided critical new guidance and resolved appellate conflict on four fundamental issues relating to class certification and the scope of private relief for damages under the *Competition Act*. These include: the evidentiary standard for class certification; the ability of "umbrella purchasers" to assert a claim for damages; the ability of class members to pursue parallel claims in tort or restitution that fall outside the statutory remedy under the *Competition Act*; and finally, the operation of the statutory limitation period governing private damage claims under the *Competition Act*.

In its decision, the Court dismissed the two appeals, and upheld the certification of a class action in British Columbia that included direct, indirect and umbrella purchasers of optical disk drives and products containing such drives. (An optical disk drive is a form of storage media contained in a range of consumer and business electronic products.) In a majority ruling, the Court held that the class plaintiffs had satisfied the evidentiary threshold for certification of an indirect purchaser class (i.e., those whose purchase was made through an intermediary rather than directly from a defendant) by adducing an expert methodology that could demonstrate the existence of some loss to some purchasers at the "indirect purchaser level" – a standard far lower relative to the standard of certification that exists in other areas of law in Canada or in U.S. courts. The Court also found that section 36 of the *Competition Act* is not a "complete code" for civil claims seeking compensation for anti-competitive conduct. In other words, the Court found that class plaintiffs may assert parallel claims in tort and in restitution that rely on a violation of the *Competition Act* – thereby accessing remedies in the form of disgorgement of profits and punitive damages.

In addition, the Court held that the class plaintiffs could assert claims on behalf of a broader class that included "umbrella purchasers" – namely, purchasers who had purchased the disputed product from suppliers/competitors who were **not** involved in the alleged price-fixing conspiracy. The Court acknowledged that the inclusion of "umbrella purchasers" could increase the exposure of defendants, but the Court concluded that such an interpretation would advance the deterrence functions of the *Competition Act*.

And, in another favourable ruling for the plaintiffs' bar, the Court found that the two-year limitation period in section 36 of the *Competition Act* incorporates a principle of discoverability – namely, it remained open for a class plaintiff to assert claims under the *Competition Act* in respect of historical conduct, provided that the class plaintiff could establish that the disputed conduct could only reasonably have been discovered within the two-year window.

Finally, and perhaps most importantly, the Court underscored that the certification of a class and the identification of a number of common issues did nothing to diminish the class plaintiffs' significant burden to establish liability to a class at the common issues trial. In a helpful ruling, the Court noted that, in order for individual class members to be entitled to a remedy at trial, "the trial judge must be satisfied that each has actually suffered a loss where proof of loss is essential to a finding of liability." In summary, the Court has provided

important direction on a number of key issues relating to the certification of competition class actions in Canada. And while a number of those rulings favoured the plaintiffs' bar, the Court strongly signalled that the fate of many of these cases will have to be determined at trial.