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CANADIAN COMPETITION LAW

This professional resource is designed to keep you fully informed of current legislation and to give you interpretation and analysis from Canadian specialists in competition law. It covers all aspects of the law pertaining to foreign companies doing business in Canada. Presented in a convenient loose-leaf format, Canadian Competition Law offers complete coverage of all areas of business conduct governed by the *Competition Act*, including: an overview of the Competition Act; price discrimination and advertising allowances; telemarketing and pyramid selling; misleading representations – criminal and civil; price maintenance; and agreements in restraint of trade.

This release features updates to the commentary in Chapters 2 (Prohibited Agreements) and 1 (Competition Act Procedure). This release also features updates to the Department Materials including the addition of Corporate Compliance, Compliance and Enforcement and Creating an effective Compliance Program (Web pages date modified: January 20, 2022); Speech: Canada Needs More Competition (October 20, 2021); and the ICC Antitrust Compliance Toolkit.

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Highlights:

- **Prohibited Agreements — What is an "Agreement" for the Purposes of Section 45 of the Act? —** Justice Gascon explained that the section 45 conspiracy offence at the source of the Plaintiffs' proposed class action was rooted in the existence of an agreement to engage in the prohibited conduct. There had to be adequate allegations in the pleadings as well as some minimal evidentiary background that the Defendants explicitly or tacitly agreed to act in the furtherance of a common goal. Justice Gascon concluded that both were missing. First, the pleadings of the alleged wrongful act, namely a section 45 conspiracy, were purely speculative, are not supported by material facts, and therefore did not disclose a reasonable cause of action. Second, the Plaintiffs' motion failed on the common issues requirement as their core allegation of an actionable conspiracy between the Defendants under section 45 of the Act was not supported by the minimum evidentiary basis required under the some-basis-in-fact standard. Justice Gascon agreed that the Statement of Claim did not contain a sufficient description of the essential and prominent component of a section 45 conspiracy, namely the existence of an unlawful agreement. The Plaintiffs' pleadings failed to provide material facts showing that the Defendants entered into an agreement to suppress the supply of DRAM, either directly or indirectly, and arrived at a mutual understanding. An unlawful agreement being the most essential requirement underlying the claim in damages brought by the Plaintiffs, this radical defect was fatal to their cause of action: *Jensen v. Samsung Electronics Co. Ltd.*, 2021 CarswellNat 4914, 2021 FC 1185 (F.C.).

- **Competition Act Procedure — Request by the Commissioner for interim relief —** Having regard to the urgency of the situation, the Commissioner requested an emergency case conference seeking an interim order preventing the respondents from closing the transaction until the section 104 application was heard. At the case conference hearing, the Commissioner recognized that the relief available under section 104 is itself interim relief. Therefore, he characterized the relief sought pending the hearing of the Section 104 Application as being "interim, interim" relief. The Tribunal concluded that it did not have the jurisdiction to issue the specific interim and unprecedented relief sought by the Commissioner. Insofar as interim relief in relation to proposed transactions is concerned, the statutory scheme is sufficiently detailed and specific that it must be viewed as providing "a complete code." At its core, that code consists of the two types of interim orders provided for in sections 100 and 104 of the Act. Insofar as the relief contemplated by section 104 is concerned, it is available any time after the filing of an application under section 92. Given the detailed nature of the merger review scheme set forth in the Act and the Rules, Parliament can be taken to have addressed its mind to the specific types of relief it wished to make available to the Commissioner and the different points in time at which such relief is available pursuant to sections 100, 104 and 92, respectively. In not providing for the type of relief that the Commissioner was now seeking, it could be inferred that Parliament decided not to grant the Tribunal the jurisdiction to provide such relief. That relief would constitute a new, third type of interim relief that would seriously curtail

respondents' rights to procedural fairness: *Canada (Commissioner of Competition) v. Secure Energy Services Inc. and Tervita Corporation*, 2021 CarswellNat 2465, 2021 Comp. Trib. 4 (Comp. Trib.).

- **Departmental Materials — Speeches and Position Papers by the Commissioner of Competition Bureau — Canada Needs More Competition (October 20, 2021) —** The Bureau will receive an additional $96 million dollars over the next 5 years and $27.5 million per year ongoing. Three key areas have been earmarked for investment: the Bureau will increase its capacity to take on new and more complex anticompetitive conduct, especially in digital markets. This includes the creation of a new Digital Enforcement and Intelligence Branch. This Branch will grow to become a centre of expertise on technology and data and act as an early-warning system for potential competition issues in the digital and traditional economies; The Bureau will strengthen its enforcement teams by hiring more people, including bringing on more litigation capacity, and external experts; and, the Bureau will enhance its capacity to advocate for pro-competitive regulatory and policy changes at all levels of government in Canada.