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CANADIAN COMPETITION LAW

AFFLECK & McCRACKEN

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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. This release also includes updates to the *Competition Act*—Amended by S.C. 2023, c. 31, ss. 3-13 [s. 8 comes into force on December 15, 2024]. This release also features updates to case law annotations under the *Competition Tribunal Act*. This release also includes updates to Appendix C. Ancillary Statutes, including updates to Appendix § C:5 *Food and Drugs Act*—Amended by 2022, c. 17, s. 63; 2023, c. 12, ss. 64-67 [ss. 64, 67(2), (5), (6) not in force at date of publication.]; 2023, c. 26, ss. 500-502, 505, 506 [ss. 501(2), 502(2) not in force at date of publication.]; and updates to Appendix § C:7 *Canada Investment Act*—Amended by 2024, c. 3, s. 18 [Not in force at date of publication.]; 2024, c. 4, ss. 2-8, 9(1) (Fr.), (2), (3) (Fr.), (4) (Fr.), (5), (6) (Fr.), 10-21 [Not in force at date of publication.]. This release also features updates to Appendix E. Annual Report Excerpts including the addition of the Competition Bureau performance measurement & statistics report 2023-2024, and the addition of the 2024-2025 Annual Plan—Onwards and upwards: Strengthening competition for Canadians. This release also features updates to Appendix H. Enforcement Guidelines including the addition of an updated version of the Competition Bureau's Merger Review Process Guidelines, and the addition of the Competition Bureau's Compliance Hub.

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Highlights:

- ***Competition Tribunal Act*—Section 30—In-Camera Proceedings—Case Law Annotations—Confidentiality Orders—**Justice Little noted that the confidentiality interest at stake had at least two public interest dimensions. One was the public interest in protecting confidential information covered by the terms of the Tribunal's confidentiality orders issued under the *Competition Tribunal Rules*, recognizing its established approach to confidentiality issues in litigated proceedings. Another was the public interest in the confidentiality of the Commissioner's statutory merger review process. Justice Little explained that key elements of the merger review process, including the issuance of a Supplementary Information Request ("SIR") occur before the Commissioner files an application under section 92. Both of those public interests may be acute when the information concerns a merger of companies whose shares are publically traded. Justice Little recognized that the SIR was the Commissioner's request for information, rather than a merging party's response to it. Justice Little did not believe that fact on its own negated the public interest in its confidentiality. The information in a SIR is informed by the merging party's or parties' filings under section 114 and by any information they may have voluntarily provided. Justice Little concluded that the risk of harm to the public interests in this case, and likely in general for SIRs, was apparent and serious. The proposed redactions covered the SIR itself and short passages elsewhere in the application record that reflected its contents. Justice Little agreed that there was no alternative to the targeted redaction of the specified information in the application record. Justice Little concluded that the harm to those public interests outweighed the public interest in open courts in the circumstances. The confidentiality issues arose on a section 11 application during an inquiry under the *Competition Act*. The Commissioner was at the investigation stage and required additional information. The section 11 application occurred before the Commissioner's determination of whether to file an application under one of the substantive provisions of the *Competition Act*. On the section 11 application, the Commissioner had to disclose to the Court the extent of the records already in the Commissioner's possession and had to address whether producing the records sought was excessive, disproportionate or unduly burdensome, having regard in part to the overlap of the prior production during the merger with the proposed production under the Specifications in the draft section 11 order. In this context, Justice Little noted that treating the SIR and its contents as confidential under Rule 151, at the stage of a section 11 application intruded minimally into the open court principle and the objectives and values that support it. Through targeted redactions and the application of the Rule 151 test, the key objectives of section 11 are maintained and advanced, including judicial supervision and authorization of the Commissioner's requests for documents and information, the Commissioner's ability to use confidential and commercially sensitive information obtained from a respondent to satisfy

the legal requirements for a section 11 order, and the public's ability to scrutinize both the Commissioner's request and the Court's process and decision to grant, modify, or deny the order requested: *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2024 CarswellNat 425, 2024 FC 239 (F.C.).

- ***Competition Tribunal Act*—Part 8—Private Access Proceedings—Case Law Annotations—**The application for leave under section 103.1 was not properly constituted and could not be accepted for filing. First, the Notice of Application did not set out any material facts that could support a Tribunal order granting leave. It referred to a Statement of Grounds and Material Facts attached to the proposed Notice of Application under section 79, but no such statement was attached or otherwise filed. The attempted filings for the application for leave under section 103.1 also did not include a memorandum of fact and law, although the Notice of Application refers to such a memorandum. Second, the proposed Notice of Application under section 79 of the *Competition Act* was inadequate on its face. To be acceptable for filing, it must contain at least some allegations of fact that could support a viable claim under that provision. No material facts were set out to support a cause of action under section 79. Third, both the Notice of Application under section 103.1 and the proposed Notice of Application under section 79 included a paragraph that referred to an affidavit of Gaskin and correspondence with the Competition Bureau. Neither the affidavit nor the correspondence was filed with the proposed Notice of Application. It is an applicant's responsibility to file notices of application and supporting materials that are acceptable for filing. Fourth, the Commissioner of Competition must be served with a copy of an application under section 103.1. It is not proper practice for an applicant to file a notice of application under the *Competition Act* against a party characterized as a "Third Party" to the lawsuit. It is proper practice for an applicant to name one or more proposed "respondents" in a notice of application filed with the Tribunal. It was unclear how the "Competition Bureau Canada" could be alleged to have engaged in conduct falling under section 79 of the Competition Act. The Tribunal directed the Registry not to accept any of the documents tendered by Gaskin for filing to commence an application under section 103.1 of the *Competition Act*, in their present forms: *Winston Gaskin et. al. v. Rogers Communications Inc. et. al.*, 2024 CarswellNat 1218, 2024 Comp. Trib. 2, 2024 CanLII 31438 (Comp. Trib.).
- **Competition Bureau—Compliance Hub—Core Principles of a Credible and Effective Compliance Program—**A compliance program is a set of business practices scaled to an organization's size, resources and risks. Organizations of all sizes can benefit from having a compliance program, but that does not mean all businesses must have the same compliance program. To be credible, a program must at a minimum show a business' genuine commitment to obeying the law and competing fairly. To be effective, the program must inform all those acting for the organization, that compliance is important. It must inform them of their legal duties and internal compliance measures. It should also provide the tools to prevent and detect misconduct.