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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* — S.C. 2022, c. 10, s. 257 is now in force; also amended by 2023, c. 8, ss. 38-40 [s. 40(2)-(4) not in force at date of publication.]. The case law annotations under the *Competition Tribunal Act* and the Administrative Monetary Penalties and Monetary Penalties Pursuant to Undertaking under Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities (CASL) have also been updated. The Competition Bureau's updated Intellectual Property Enforcement Guidelines and Enforcement Guidelines on Wage-Fixing and No Poaching Agreements have been added.

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Highlights:

- ***Competition Act*** — The *Affordable Housing and Groceries Act* amends the *Competition Act* by removing the efficiencies defence for mergers; introducing new powers for the Competition Bureau to conduct Market Studies, including the power to compel market participants to provide information; and empowering the Bureau to challenge agreements even if not between competitors that have the significant purpose of harming competition.
- ***Competition Tribunal Act*** **— Section 8.1 – Costs – Case Law Annotations —** The Tribunal concluded that on balance, the Commissioner's conduct was much more unreasonable than the conduct of the Respondents. In the Tribunal's decision on the merits, it was observed that the Commissioner's pursuit of the Initially Proposed Transaction was "divorced from reality", because that transaction was no longer something that would ever happen. On appeal, the Federal Court of Appeal observed that "[e]xamining the merger alone — a merger that, by itself, will not and cannot happen without the divestiture — would be a foray into fiction and fantasy". The Court added that "in competition terms, this was far from a close case". The Tribunal agreed that the Commissioner's pursuit of the Initially Proposed Transaction was intransigent and should now have consequences. The Commissioner's refusal to focus on the Divesture, despite repeated suggestions from the Tribunal that he do so, resulted in substantial resources having to be devoted by the Respondents and the Tribunal to something that had become legally and practically foreclosed. The Tribunal also agreed that the Commissioner adopted an unnecessarily contentious approach at numerous points during the litigation, resulting in significant additional time and effort being spent on various matters that were ultimately resolved in the Respondents' favour. That behaviour had a very significant adverse impact on the time and costs that were associated with the proceeding. The Tribunal concluded that this factor weighed in favour of awarding elevated legal costs in favour of the Respondents. The Tribunal acknowledged that Rogers and Shaw each had significant legal teams and that multiple members of both of those teams appeared to be very involved in several of the issues. In the absence of particularized support for the Commissioner's allegations, it was difficult for the Tribunal to do more than to find that this factor weighed in favour of moderately reducing the cost award that might otherwise be made. The Tribunal concluded that the Commissioner's role in bringing about the Divestiture warranted only a minor reduction of the costs that would otherwise be awarded to the Respondents. Such reduction was significantly less than the increase in costs that was warranted by the Commissioner's continued challenge of the Initially Proposed Transaction, long after that transaction became a legal and practical impossibility: *Canada (Commissioner of Competition) v. Rogers Communications Inc. and Shaw Communications Inc.*, 2023 CarswellNat 3250, 2023 Comp. Trib. 3 (Comp. Trib.).
- ***Competition Tribunal Act*** **– Section 9 – Court of Record – Case Law Annotations – Proceedings –** On appeal, Secure argued that

it was denied procedural fairness when the Tribunal, having concluded that the Merger had not substantially lessened competition in several geographic markets, ordered divestiture of only 29 of the 41 facilities that the Commissioner had proposed. Secure noted that, in closing argument before the Tribunal, it requested in the alternative, the opportunity to lead evidence and make submissions on the issue of remedy. No such opportunity was granted. Justice Locke noted that, generally, an administrative decision-maker is not required to give a warning as to what remedy it is considering granting. Justice Locke noted that Secure was fully aware of the 41 facilities that the Commissioner proposed should be divested, and of the possibility that some subset of those facilities might be ordered divested. Secure had every opportunity during the hearing to submit evidence and make submissions on the question of remedy. In short, Secure knew the case against it and was afforded an opportunity to answer it. Justice Locke concluded that there was no breach of procedural fairness: *Secure Energy Services Inc. v. Canada (Commissioner of Competition)*, 2023 CarswellNat 2840, 2023 FCA 172 (F.C.A.).

- **Enforcement Guidelines on Wage-Fixing and no poaching agreements –** In June 2022, the Federal Government made changes to the *Competition Act* that included the addition of subsection 45(1.1) to the existing criminal conspiracy provisions that protects competition in labour markets, as it prohibits agreements between employers to fix wages and restrict job mobility. Wage-fixing and no-poaching agreements undermine competition and efficient allocation of resources. The Guidelines describe the Bureau's approach to enforcing subsection 45(1.1) and should be read together with the *Competitor Collaboration Guidelines* (the CCGs). The Bureau may revisit the Guidelines in the future in light of experience, changing circumstances and legal developments.