Kluwer Competition Law Blog

The Davies Forecast of Top 5 Trends and Issues for Canadian Competition Law in 2020

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Here is Davies' annual forecast of Canadian competition law developments for the year ahead.

1. FOCUS ON THE DIGITAL ECONOMY

Given the Competition Bureau's stated priorities during the tenure of current Commissioner of Competition Matthew Boswell, we expect the digital economy to remain an area of focus for the Bureau in 2020. As Commissioner Boswell has stated, "explosive growth means that digital is more important to our economy than many of the more traditional sectors."

The Competition Bureau took a number of steps in 2019 to position itself for a more active enforcement stance in the digital space in 2020. For one, it appointed a new Chief Digital Enforcement Officer to help focus its enforcement efforts. The Bureau also issued a "call-out" to invite market participants to let it know about potentially anticompetitive conduct in the digital economy. The consultation period for this call-out ended in November 2019, and we are now waiting to see whether it will actually lead to enforcement action.

The Bureau's digital focus may also encourage it to seek amendments to the Competition Act that it believes would enhance its enforcement efforts in this area. For instance, the Commissioner has publicly stated his concern that the penalties available under the Competition Act are insufficient to deter anticompetitive conduct by large tech firms.

We also expect the Bureau to continue to use its "soapbox" to advocate for broader regulatory reforms to enhance competition in the digital sector. Notably, the Bureau is of the view that regulations in many sectors of the Canadian economy discourage innovation and should be rescinded or updated.

One interesting issue to watch will be the interplay between the Commissioner of Competition's reformist ambitions and the views of the new federal"Data Commissioner" whose mandate – once appointed – is expected to include responsibility for new regulations for large digital companies. There could be some bureaucratic infighting on the horizon to see who sets the tone for the digital agenda in Canada.

2. MISLEADING ADVERTISING

The Bureau's focus on enforcement in the digital space is particularly relevant to its mandate to pursue instances of misleading advertising.

In particular, we expect to continue to see active enforcement against misleading online pricing representations due to "drip pricing." For example, in June 2019, the Bureau announced that Ticketmaster had agreed to pay CDN $4.5 million to settle allegations of false and misleading representations on its website. In the Bureau's opinion, Ticketmaster's online price representations were misleading because the initial advertised price did not account for or advise consumers of the mandatory fees that would be added in later stages of the purchasing process.

"Influencer marketing" is another issue the Bureau will be watching in 2020. The Bureau made this clear when it sent letters in late 2019 to nearly one hundred brands and marketing agencies involved in influencer marketing in Canada, cautioning then to make sure their practices comply with the Competition Act. The Bureau is especially concerned that any material connections between brands and influencers be clearly and conspicuously disclosed in any advertising, including social media posts. In the Bureau's view, it is important for consumers to know whether they are receiving an independent review or opinion, or viewing a paid endorsement.

3. SCRUTINY OF NON-NOTIFIABLE TRANSACTIONS

The Bureau is also concerned about mergers in the digital space, and particularly the impact on future competition of the acquisition of smaller targets by larger technology companies ("creeping" or "killer" acquisitions).

This issue featured prominently in the Bureau's "call-out" for instances of anticompetitive conduct in the digital sector (referenced above), and also dovetails with the Bureau's more general priority of identifying anticompetitive merger transactions that fall below the Competition Act's pre-merger notification thresholds.

Our experience over the past year is that the Bureau has definitely been more active in monitoring and investigating non-notifiable mergers, and all signs point to that trend continuing in the coming year The Bureau has expanded the resources it devotes to this exercise, and it will no doubt be emboldened by its success in unwinding (on consent) a non-notifiable merger that it believed substantially lessened competition in the market for supplying a certain type of software used in the oil and gas industry.

As a result, merging parties can no longer safely assume that non-notifiable transactions will fly under the Bureau's radar regardless of their impact on

competition. Parties will need to carefully evaluate the likely competitive effects even of non-notifiable transactions, and decide on an appropriate strategy if possible issues do surface (which could range from the proverbial "keep your head down and hope for the best" strategy all the way to voluntarily seeking clearance from the Bureau as if the transaction were notifiable).

4. NON-CONTROLLING COMMON OWNERSHIP

The Bureau (along with some other competition regulators around the world) continues to be intrigued by the theory that there is a competition issue with large institutional investors acquiring interests in competing firms in concentrated industries. The putative concern is that the "common ownership" of stakes in competing companies) even non-controlling interests) reduces their incentives to actively compete, increases the risk of inappropriate information sharing, and ultimately leads to higher prices and less innovation in those markets.

While the Bureau has yet to issue a formal statement on the issue, it continues to request detailed information about minority
shareholders from merging parties as part of its merger reviews. We don't expect this (often annoying) line of inquiry to be abandoned in 2020, but we also question whether the Bureau would be prepared to take enforcement steps to address perceived common ownership concerns in isolation. Any such enforcement step could very well have a chilling effect on future investment, be unworkable in practice and raise a host of other legal and policy issues.

5. A NEW EMPHASIS ON INJUNCTIONS

In a speech in May 2019, the Commissioner of Competition warned that the Bureau may resort more often to injunctive relief to "interrupt or halt" anticompetitive conduct. This could involve merger review cases as well matters involving alleged violations of the Competition Act's abuse of dominance and misleading advertising provisions.

The Bureau has not had a great track record in obtaining injunctive relief over the years, which has meant that applications for injunctions are now few and far between. So any concerted effort to go this route would be a noteworthy change in approach, but one that would undoubtedly be contested by parties because the law surrounding injunctive relief under the Competition Act is largely undeveloped.

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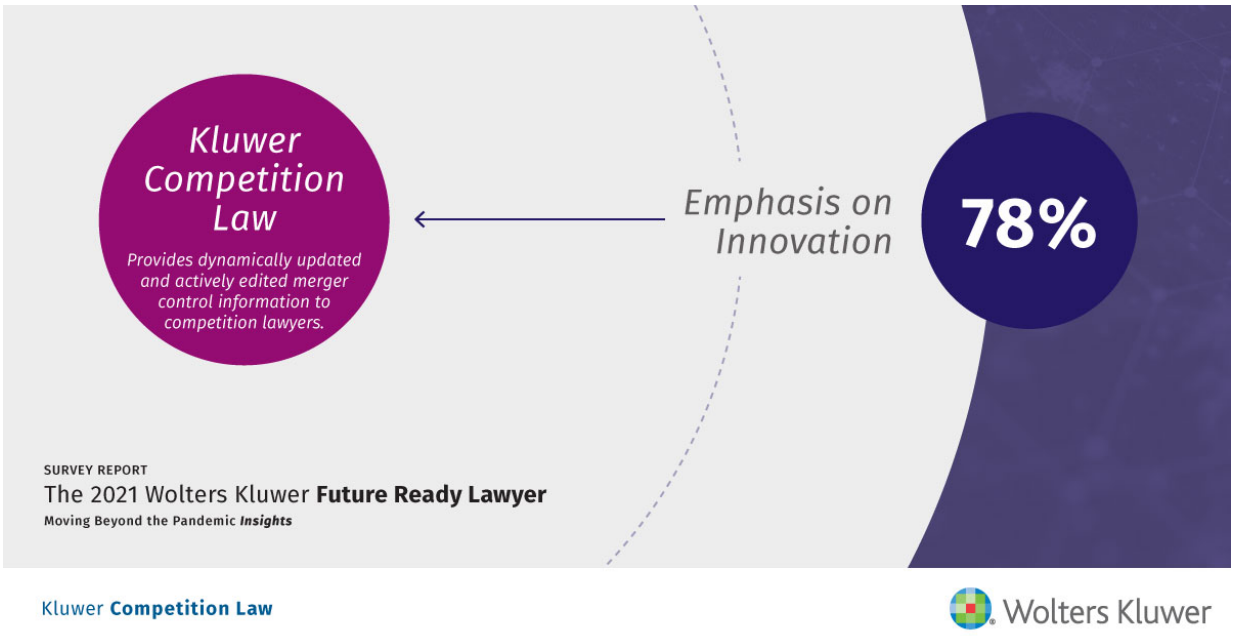

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“>Mergers, Minority shareholding
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