Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Canada

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The past year in Canada saw the Commissioner of Competition, Matthew Boswell (the "**Commissioner**"), launch a concerted campaign to reform Canadian competition law and policy. The Commissioner's view is that competition law should play a central role in facilitating the recovery of the Canadian economy following the COVID-19 pandemic, but that the current version of the Competition Act (the **"Act"**) is ill-equipped to achieve this goal. As we move into 2022, the Commissioner's advocacy effort for reform is gaining traction, having secured some measure of support from the Liberal government. Where this will ultimately lead still remains to be seen. For the moment, however, there is a good chance that Canadian competition law will be more restrictive by the end of 2022 than it was at the beginning.

The Call for Competition Law Reform

Commissioner of Competition's Speech of October 2021

In an October 2021 address to Canada's competition bar, the Commissioner offered a full-throated defence of vigorous competition law enforcement as a key driver of Canada's post-pandemic economic recovery. He then outlined the challenges which he says the Competition Bureau (the **"Bureau"**) faces in enforcing Canadian competition law effectively, and described the sweeping review of Canada's competition legislation which he argues is needed to meet these challenges.

In support of his call for reform, the Commissioner cited the evolution in Canada and elsewhere to new digital and technology-based economies and the growing "shift towards more aggressive enforcement of competition laws" in other jurisdictions.

Although the Commissioner had previously raised the need for reforms to Canada's competition law regime, his October 2021 remarks represented a new willingness to engage openly in the policy debate and constituted his most forceful statement to date in favour of legislative amendments.

The Commissioner did not go into great detail about his ideas for proposed

amendments, but he did offer a sampling of the changes that he would like to see made to the Act:

(i) stiffer penalties for anticompetitive conduct;

(ii) repeal or reform of the "efficiencies defence" available to merging parties under Canadian law;

(iii) extension of Canada's cartel offence to buy-side competitor agreements (such as no-poaching and wage-fixing agreements); and

(iv) expanded private enforcement tools, particularly with respect to the abuse of dominance provisions in the Act.

The Commissioner asserted that "modernizing" Canadian competition law in at least these ways would benefit Canada's long-term economic prosperity, particularly as other jurisdictions work to strengthen their own competition laws.

Competition Bureau Submission to Wetston Review

What do former Commissioners do after leaving the Bureau? Well, at least one of them, Howard Wetston, became an appointed member of Canada's federal Senate. And as the old maxim goes, you can take the individual out of the Bureau, but you can't take the Bureau out of the individual. All of which is a long way of saying that, given his past work experience, Senator Wetston decided that he would be the ideal person to further the debate over competition law reform in Canada, and so launched his own independent consultation process. Senator Wetston commissioned a study by a leading academic on the future of Canadian competition law and invited submissions and comments.

It is by no means clear that Senator Wetston's freelance effort will have any impact on official government consideration of the reform issue. But the Commissioner obviously saw this as an excellent opportunity to advance the case for reform, and so on February 8, 2022, the Bureau released the submission that it had filed with the Senator. In contrast to the Commissioner's October 2020 speech, the Bureau's submission sets out a detailed wish list containing numerous and substantial recommendations for amending the Act (some of which the Commissioner had also mentioned in his October 2021 speech), including the following:

(i) significant changes to the current merger review regime, such as

- shifting the burden of proof to merging parties to prove that a "concentrative merger" would not substantially lessen or prevent competition;
- requiring that merger remedies restore competition to pre-merger levels and not just eliminate any "substantial" lessening or prevention of competition;
- easing the legal standards applicable to injunctive relief before the Competition Tribunal (the "**Tribunal**);
- expanding the scope of mergers that must be notified to the Bureau pre-closing;

- extending the limitation period for challenging a merger post-closing to three years, from one year; and
- elimination of the "efficiencies defence".

(ii) the specific inclusion of wage-fixing and other buy-side agreements in the criminal conspiracy provision;

(iii) increased monetary penalties for violations of the abuse of dominance, competitor collaboration, conspiracy and deceptive marketing provisions;

(iv) private access to the Tribunal for abuse of dominance and competitor collaboration cases;

(v) new Bureau powers to unilaterally compel oral testimony or the production of documents in civilly reviewable matters without the need to first obtain a court order;

(vi) revisions to the deceptive marketing provisions to

- (A) explicitly recognize drip pricing as a harmful practice; and
- (B) shift the burden of proof to advertisers to prove that advertised discounts are accurate; and

(vii) strengthened Bureau authority to conduct and compel responses to "market studies".

This is an ambitious menu of proposed amendments. Some of the proposals are old, such as the suggestion to give the Bureau a "market study" power, which the Bureau has repeatedly failed to secure. Others are new, such as the proposal to change the standard for evaluating merger remedies. Some of the proposals are borrowed (from the US), such as the proposal to criminalize wage fixing and non-poaching agreements. And others are blue, in the sense that they are meant to assuage the Bureau's regret at various litigation losses by changing the relevant law (count the campaign to eradicate the efficiencies defence among those). All of them, however, are clearly designed to make it easier for the Bureau to intervene in the marketplace and, if ever adopted, will create a tougher and even more imbalanced enforcement environment in Canada.

Federal Government Announces Intention to Review Competition Law and Policy

The Commissioner's reform campaign received an important – and official – vote of confidence on February 7, 2022, when the federal Minister of Innovation, Science and Industry announced that the federal government intends to "carefully evaluate potential ways to improve [the] operation," of Canadian competition law, including the following:

(i) closing loopholes that allow for harmful conduct;

(ii) more clearly addressing hidden fees (known as "drip pricing");

(iii) tackling wage-fixing agreements, which are not currently within the scope of the Act's criminal conspiracy provisions;

(iv) increasing access to justice for those injured by anticompetitive conduct;

(v) adapting the law to better tackle emerging forms of harmful behaviour in the digital economy; and

(vi) modernizing the penalty regime to ensure genuine deterrence of harmful business conduct.

The Minister's announcement is clearly in line with amendments advocated by the Commissioner and gives Canadian government imprimatur to the Commissioner's reform efforts. It also aligns Canada with other jurisdictions, including the United States, the United Kingdom, and Australia, that are also looking to amend their competition laws in order to enhance enforcement.

Interestingly, the Minister's February 7 announcement did not expressly mention the efficiencies defence as a potential topic for review. However, in a newspaper interview, the Minister suggested that changes to the efficiencies defense would indeed be considered, another "win" for the Commissioner.

The Minister's announcement did not provide details about the proposed framework for the proposed review of the Act, nor did he set any timeline. In his newspaper comments, though, the Minister said that reforms could occur in multiple stages, with some initial changes "in the coming months" that would have "an immediate and tangible impact for consumers and businesses in Canada," with a "more comprehensive modernization" of the Act to follow. The Minister also stressed that competition law reform is "certainly top of mind", because it supports the Canadian government's agenda of addressing "the rising cost of living, corporate concentration and a fair chance at participating in the economy".

Based on the Minister's comments, we would expect to see some limited amendments to the Act being proposed in the near future – probably relating to increased penalties for certain violations; expanding the Act's criminal cartel provisions to cover wage fixing and no-poaching agreements affecting employees; and amendments to deal with "drip pricing" – with more "big picture" items dealt with in a longer-term consultation process This also could be the forum in which the Bureau's long wish list of proposed amendments submitted to Senator Wetston is considered. But the exact path to reform is unclear for the moment.

A Bulked-Up Bureau Is Likely to Enhance Enforcement Efforts

Regardless of how the effort to amend the Act progresses over 2022, we expect that the Bureau's enforcement efforts will be stepped up this year because of the government's decision in 2021 to infuse the Bureau with additional funding, in the amount of $96 million over the next five years, and $27.5 million of additional funding per year thereafter. In his October 2021 speech (referenced above), the Commissioner

indicated that the new funds will be used to

(i) increase the Bureau's "capacity to take on new and more complex anticompetitive conduct, especially in digital markets";

(ii) strengthen the Bureau's enforcement team through new hires, with an emphasis on building litigation capacity and the use of external experts; and

(iii) enhance the Bureau's ability "to advocate for pro-competitive regulatory and policy changes."

As part of the capacity-building referenced in the Commissioner's speech, the Bureau has established a Digital Enforcement and Intelligence Branch as a "centre of expertise on digital business practices and technologies." This new Branch will "act as an early-warning system for potential competition issues in the digital and traditional economies" and provide expertise to the other Bureau directorates.

In outlining how the new funds will be used, however, the Commissioner was careful to note that it would not directly benefit the Bureau's merger review program, notwithstanding the need to "properly fund operations in line with current realities and demands" Although the number of merger reviews declined precipitously in 2020 due to the pandemic, merger filings are now on the upswing in Canada (as elsewhere). This has not seemed to affect the review times for straightforward transactions, but more complex reviews appear to be taking longer than normal, possibly due at least in part to a resource crunch. This is likely setting the stage for an increase to the merger review filing fee, which is currently set at $74,905.57.

Closing During an Ongoing Bureau Review: The Impact of the *Secure Energy* Decision

One of the potential issues that both merging parties and the Bureau face is how to deal with a situation where the applicable waiting period has expired but the Bureau has not yet completed its review and provided clearance. At law, parties are entitled to close once the waiting period has expired; Bureau clearance is not a legal prerequisite. In practice, parties will often agree to delay closing for a period of time to allow the Bureau to complete its review or to negotiate remedies with the Bureau if that becomes necessary to get the deal through. On occasion, however, parties are not willing to delay closing at all, or if they have so agreed, get tired of waiting for the Bureau's answer. In those circumstances, the Bureau must obtain injunctive relief to either delay closing for a period of time so it can complete its review or prevent closing until the Bureau's challenge to the merger is adjudicated.

Over the past several years, there have been more instances of parties "closing over the Bureau", i.e., not waiting for the Bureau to complete its review. Most of those situations were ultimately resolved by way of post-closing remedies or the Bureau simply going away. But in one such case in 2021,the Bureau sought to prevent the parties from closing, and then used its failure to do so as one more reason to push for amendments to the Act.

In March 2021, Secure Energy Services Inc. and Tervita Corporation, two oilfield waste services companies, announced a planned merger. In their submissions to the Bureau to support the transaction, the parties relied, among other things, on the Act's efficiencies defence, arguing that the merger was likely to generate significant efficiencies that would outweigh and offset any alleged anticompetitive effects of the transaction. The Bureau was not persuaded and, as the expiry of the waiting approached, asked the parties to delay closing to give it more time to investigate. The parties demurred and advised the Bureau that they would be closing the transaction following the expiry of the statutory waiting period, as was their right.

The Commissioner responded by filing materials with the Competition Tribunal challenging the merger and seeking various forms of interim relief from the Tribunal to prevent closing. The Tribunal denied the Commissioner's applications for interim injunctive relief, and a Bureau appeal to the Federal Court of Appeal was similarly denied. The parties closed the transaction, although its ultimate fate will be decided later in 2022 when the matter comes up for hearing before the Tribunal.

In his remarks in October 2021, the Commissioner voiced his displeasure with the *Secure Energy* case, asserting that it "further crystallizes the need for a comprehensive review" of Canada's competition laws.

In particular, the Commissioner used the case as a platform to launch yet another tirade against the Act's efficiencies defence. The Commissioner objected to the fact that, in denying the Bureau's injunction application, the Tribunal had relied in part on the Commissioner's failure to provide even a "ballpark" estimate of alleged economic harm that the transaction would allegedly generate. The Commissioner criticized this holding as "overly strict and impractical" and said that it demonstrated how the efficiencies defence could be used to permit anticompetitive mergers.

The Commissioner also used the occasion to warn merging parties that if they were not willing to extend the statutory review time frames for complex cases, including those involving an efficiencies claim, the Bureau would need to "pursue a litigation-focused approach that is costly and less predictable", and that would "of necessity, mean less transparency and engagement from [Bureau] case teams in matters with no meaningful and reasonable timing commitment."

The *Secure Energy* case clearly touched a nerve at the Bureau and influenced the Commissioner to include in his amendment wish list not only repeal of the efficiencies defence but also changes to the legal standard for injunctive relief to make it easier for the Bureau to stop transactions from closing on an interim basis. The Commissioner's comments also mean that merging parties will have to take into account the Commissioner's threats about a less transparent and more litigation focussed approach if they are contemplating closing a transaction before the Bureau has completed its review. For example, the Bureau may decline to accept further submissions on the merits or only entertain discussions on remedies if there is a hold separate order in place.

Implications

There is no question that competition law issues rose to a level of prominence in 2021 to which we in Canada are not accustomed. The Commissioner is angling for comprehensive reform and the government seems to be in his corner, at least to some degree. The coming year will see to what extent high-minded pronouncements translate into concrete measures.

In our view, the case for far-reaching reform is very much open to debate. Most fundamentally, it is by no means clear that the Bureau requires expanded powers and higher penalties to properly or efficiently enforce the law. The Bureau already has very extensive enforcement tools at its disposal. To many observers, the Bureau's enforcement difficulties are not the product of legislative deficiencies but the result of its lack of litigation capabilities when it does decide to bring cases, with the *Secure Energy* case being the latest exhibit in this regard.

For example, notwithstanding the Commissioner's complaints, the Bureau has never explained why it was incapable of providing the "ballpark" estimate of economic harm required by the Tribunal, despite (i) having reviewed the Secure Energy transaction for over three months by the time the parties exercised their right to close the transaction, (ii) having engaged outside economic experts, and (iii) having had the benefit of clear direction from the Supreme Court of Canada in a prior case that the Bureau bears the burden of quantifying anticompetitive harm. As formulated by the Tribunal, all the Bureau was required to demonstrate was "at least some 'rough' or initial sense" of the harm, which is hardly an onerous evidentiary burden to meet."

Although this may be wishful thinking, we believe that any discussion of expanding the Bureau's authority should also be tied to an examination of the Bureau's priority-setting, case selection, litigation capabilities, use of resources and accountability. It may be that any failings in Canadian competition enforcement could be addressed by focussing on improving the Bureau's performance rather than by embarking on a draconian overhaul of Canadian law and policy.

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