Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Canada

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2023 was marked by the most significant overhaul of Canadian competition law and policy in over a decade. The changes represent a significant victory for Canada's Competition Bureau (Bureau), which has persuaded the Canadian government that enhancing enforcement of the Canadian *Competition Act* (Act) will help reduce inflation and address issues of affordability affecting the Canadian public.

How has Canadian Competition Law Changed?

Following initial amendments to the Act that came into force in June 2022, the federal government commenced a public consultation on further amendments that concluded early in 2023. After a relatively quiet summer, there was a flurry of policy proposals and legislation beginning in September, with new amendments adopted in December 2023, and further amendments expected to become law early in the new year with the anticipated enactment of Bill C-59, the *Fall Economic Statement Implementation Act, 2023* (FES Implementation Act).

Together, the enacted and proposed amendments affect all key areas of enforcement under the Act, as we now summarize below.

Merger Review

As a result of the amendments now in force following the June 2022 and December 2023 legislative rounds:

- The Act's so-called efficiencies defence has been repealed. This defence previously prevented the Competition Tribunal (Tribunal) from prohibiting a transaction if certain efficiencies generated by the transaction would outweigh and offset any alleged anticompetitive effects. Repealing the efficiencies defence has been a goal of the Bureau for years. While the defence is no longer available, it remains to be seen how efficiencies may continue to factor into the Bureau's (and the Tribunal's) analysis of a merger. One expects that the importance will be diminished; that being said, the efficiencies defence determined the outcome of very few merger

review cases even prior to its repeal.
- There is now a new anti-avoidance provision to address transactions structured to side-step the merger notification thresholds.

If enacted, the FES Implementation Act would alter Canada's merger review process further by:

- Revising the "size of transaction" threshold for merger notification to include sales into Canada generated by foreign assets (the current $93 million threshold only considers sales in or from Canada generated by Canadian assets).
- Extending the limitation period in which the Bureau can challenge a non-notified merger from one year to three years post-closing (the existing one-year limitation period will continue to apply to notified transactions, including voluntarily notified transactions that do not meet the thresholds for notification).
- Prohibiting parties to a proposed transaction from closing the transaction until any application by the Bureau for an interim order preventing closing has been disposed of by the Tribunal.
- Repealing section 92(2) of the Act, which currently provides that the Tribunal cannot find that a proposed transaction will substantially lessen or prevent competition based solely on the resulting market share.
- Permitting the Tribunal to order a remedy where a proposed transaction would substantially lessen or prevent competition in labour markets, an area previously treated as irrelevant to merger review in Canada.

Abuse of Dominance

As the name suggests, the abuse of dominance provisions prohibit dominant firms from engaging in anticompetitive conduct that prevents or lessens competition in a relevant market.

The amendments enacted to date substantially overhaul these provisions:

- Private parties now have the ability to apply to the Tribunal for relief against alleged abuses of dominance, a major expansion of the right of private action.
- There are now different tests for abuse of dominance depending on the nature of the remedy sought. In particular, to obtain an order prohibiting a dominant firm from continuing the impugned conduct, the Bureau (or a private litigant) will only need to establish that (i) a firm is dominant (or a group of firms are jointly dominant); and (ii) the firm(s) engaged in conduct with either anticompetitive intent or effect that is not a result of superior competitive performance. There will no longer be any need to prove that the impugned conduct actually prevented or lessened competition substantially in the relevant market, unless the relief sought goes beyond a prohibition order, e.g., asks that the dominant party also pay monetary penalties.
- The types of conduct covered by the abuse of dominance provisions were also expanded. For example, the abuse of dominance provisions now treat the direct and indirect imposition of "excessive and unfair selling prices" as an anticompetitive act if such prices have been "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or an adverse effect on competition."
- The potential financial penalties have also been increased significantly. Now the Bureau can seek orders from the Tribunal for "administrative monetary penalties" to the greater of $25 million for an initial order (and $35 million for each subsequent order) and three times the value of the

benefit derived from the anticompetitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Proposed amendments in the FES Implementation Act are directed at the new right permitting a private application in respect of abuse of dominance:

- The amendments would permit the Tribunal to also order, on a private application, the disgorgement of an amount up to the value of the benefit derived from the abuse of dominance, to be payable to the applicant and any third party affected by the conduct. The Tribunal would be able to account for any disgorgement in determining administrative monetary penalties (as discussed above).
- In addition, the proposed amendments would broaden the scope for a private litigant to obtain leave to bring an application by allowing the Tribunal to grant leave where it is satisfied that it is in the public interest to do so. This is designed to avoid the current standard for granting the right to proceed with private applications, which has been construed narrowly by the Tribunal.

Competitor Collaborations

Important changes have been introduced to both the Act's criminal and civil provisions prohibiting anticompetitive competitor collaborations. That said, most of the focus has been on the civil provisions, the criminal provisions having undergone an extensive overhaul in 2009.

Criminal

By virtue of the amendments already enacted:

- The scope of the criminal prohibition against "conspiracies" was extended to prohibit unaffiliated employers (even those who do not compete) from entering into wage-fixing agreements (including agreements with respect to non-wage terms or conditions of employment) and no-poach agreements, unless such agreements can be shown to be reasonably necessary for giving effect to a lawful broader or separate agreement.
- The potential fines for violations of the criminal conspiracy offence have been increased, from a maximum of $25 million to fines "in the discretion of the court".

Civil

The amendments enacted to date have also expanded the Act's civil prohibition against competitor agreements by allowing the Bureau to apply for remedial orders even if the parties involved are not competitors. Based on government statements, it seems that the principal objective of this amendment was to specifically address the inclusion by large grocers of restrictive covenants in leases with landlords that prevent smaller grocers from establishing operations nearby. However, the amended provisions are broadly drafted and could apply to any vertical agreement with the necessary anticompetitive purpose and impact.

Separately, the amendments repeal the efficiencies defence for conduct covered by section 90.1, similar to what has been done for merger review (discussed above).

As to likely future amendments, the FES Implementation Act would:

- Permit private parties to seek leave to pursue actions under the competitor agreement provisions, another major expansion of the right of private action.
- Consistent with the proposed changes to the abuse of dominance provisions (discussed above), the amendments would permit the Tribunal to also order, on a private application, the disgorgement of an amount up to the value of the benefit derived from the impugned conduct, to be payable to the applicant and any third party affected by such conduct.
- Expand the remedies available for proceedings commenced by the Bureau, and particularly would give the Tribunal the ability to (i) impose monetary penalties of up to the greater of $10 million for the first order (and $15 million for each subsequent order) and three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues; or (ii) require respondents to take any other action, including divesting of assets or shares, necessary to overcome the effects of the unlawful agreement.
- Allow prior agreements to be challenged and subject to penalties or remedial orders up to three years following the termination of the agreement.

Misleading Advertising

The amendments enacted to date introduced an explicit prohibition against "drip pricing" – the practice of advertising a product at an unattainable price due to the failure to disclose mandatory fees – which had previously been addressed under the existing civil and criminal misleading advertising provisions. The Bureau has already moved to enforce this new provision. In an application commenced against Cineplex in May 2023, the Bureau has sought to apply this new provision. The Bureau also entered into a negotiated consent agreement with TicketNetwork, a ticket resale platform, in November 2023 to resolve the Bureau's concerns with TicketNetwork's drip pricing and other misleading claims.

Penalties for civil misleading representations have also been increased, up to the greater of $10 million for an initial order and up to three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

As to future changes, the FES Implementation Act would:

- Introduce a specific prohibition against greenwashing (the use of false or misleading advertising or claims about the relative environmental attributes of products or services for sale). Greenwashing has been an enforcement focus for the Bureau for many years, and the proposed provision would explicitly prohibit statements, warranties or guarantees "of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" that are not based on an adequate and proper test.
- Further expand the right of private action by permitting private parties to seek leave to bring applications under the misleading advertising provisions. However, private parties pursuing a claim under the misleading advertising provisions would not have access to the disgorgement

remedy that would be available for private parties under the abuse of dominance and competitor agreement provisions.

Other Important Changes

Market Study Powers

The Bureau has long sought a "market study power" that would allow it to compel information for investigations without the need to demonstrate reasonable grounds of a likely violation of the Act.

The Bureau now has secured this power, although not quite to the degree it wanted. Thus, the Bureau may now initiate a "market study" without reference to a possible violation of the Act. However, in order to secure information from industry participants, it will have to obtain a compulsory court order. The Bureau had sought the power to issue information demands unilaterally without the need to obtain judicial permission. However, concerns were raised that this would give the Bureau too much untrammelled authority and could lead to abuses.

Proposed FES Amendments

As drafted, the FES Implementation Act would introduce an assortment of further amendments to the Act, notably including:

- Expanding the "refusal to deal" provisions to permit a party to bring a claim if a supplier's refusal to provide a product under usual trade terms has substantially affected the complainant's business, in whole or in part. Current law requires evidence of an impact on the complainant's business as a whole. This proposed amendment would also explicitly include any "means of diagnosis or repair" in the definition of "product" for the purposes of this provision, in furtherance of the government's intention to introduce a "right to repair".
- Enhancing whistleblower protections to prohibit "reprisal actions" against a person for communications or cooperation with the Bureau. These protections can be enforced by application by the Bureau or a person directly and substantially affected by the alleged reprisal action.
- Reducing scope for cost awards against the Bureau if the Bureau is unsuccessful in a legal proceeding. Under the proposed amendments, successful parties would only be able to obtain cost awards against the Bureau in instances where it "is necessary to maintain confidence in the administration of justice" or where "the absence of the award would have a substantial adverse effect on the other party's ability to carry on business."
- Creating a new mechanism for the Bureau to issue a certificate to parties to a proposed agreement confirming that the Bureau is satisfied that the agreement is for the purpose of protecting the environment and is not likely to prevent or lessen competition substantially in a market. When granted, such a certificate would immunize the conduct from both the criminal and civil competitor agreement provisions in the Act. This is possibly the only proposed change in the full panoply of amendments that is not simply designed to increase the Bureau's coercive enforcement powers.

Conclusion

Shortly before the Christmas break, the government announced that it had re-appointed Matthew Boswell as Commissioner of Competition for an additional term of two years.

Mr. Boswell is the architect of the recent amendments to the Act . Whether or not one agrees with the need for and utility of these amendments, Mr. Boswell deserves credit for his success in mustering political support for such dramatic changes to Canadian competition law and policy.

It is thus only fitting that Mr. Boswell should remain Commissioner for the immediate future. It is now up to him and the Bureau to demonstrate that the various changes to the Act will be effective in addressing the various economic ills that he – and the Canadian government – have identified as requiring redress. Put simply – the Bureau now has the powers it has asked for. The time for excuses is over.

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