Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2024 – Canada

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For the last few years, a series of significant, iterative amendments to Canada's *Competition Act* (**Act**) have occupied centre stage in any discussion of Canadian competition law and policy. With the last of these amendments coming into force in June 2025, attention is increasingly shifting to how the cumulative amendments will be applied. In this annual review, we summarize the recent changes to the Act, the guidance from the Canadian Competition Bureau (**Bureau**) on its enforcement approach under the new provisions, and what recent trends in public and private enforcement can tell us about what to expect in the year ahead.

A Series of Significant Amendments

Following three rounds of significant amendments, the principal changes to the Act can be summarized as follows:

1. **Merger Review:** Early changes to the merger review provisions eliminated the often controversial "efficiencies defence", introduced a new anti-avoidance provision for mandatory pre-merger notification, and expanded the relevant factors for assessing the competitive effects of transactions. The June 2024 amendments were far more significant, introducing a new rebuttable presumption that transactions resulting in market shares above certain statutory market concentration thresholds will prevent or lessen competition, revising the remedial standard for transactions that raise competition concerns, adjusting pre-merger notification thresholds to capture sales "into" Canada, and extending the period within which the Bureau can challenge a non-notifiable transaction to three years following closing.
2. **Abuse of Dominance:** The December 2023 amendments broadened the scope for enforcement under the abuse of dominance provisions by allowing the Bureau or private parties to seek a prohibition order if they can establish that the respondent firm (1) is dominant in a market; and either (2) engaged in a practice of anti-competitive acts or conduct that had the effect (or likely effect) of substantially preventing or lessening competition in a market. A broader set of remedies (including significant administrative monetary penalties) is available if all three elements can be made out. Additionally, the amendments extended the non-exhaustive list of prescribed anti-competitive acts to include, among other things, the imposition of "excessive and unfair selling prices" (discussed further below).

3. **Competitor Collaborations:** Early amendments introduced new criminal prohibitions on wage-fixing and no-poach agreements between employers, even if those employers do not otherwise compete. Subsequent amendments broadened the civil competitor collaboration provisions governing agreements between competitors to also prohibit agreements between non-competitors (e.g., parties in a vertical, customer-supplier relationship) if (1) a significant purpose of the agreement (or any part of it) is to prevent or lessen competition in any market; and (2) the effect or likely effect is to substantially prevent or lessen competition.
4. **Misleading Advertising:** The initial June 2022 amendments codified the Bureau's long-standing position that "drip pricing" (*e.*, advertising a price that is not attainable due to mandatory, non-governmental fees) is a misleading representation. The latest round of amendments introduced new provisions targeting "greenwashing" by requiring businesses advertising in Canada to substantiate certain environmental claims relating to the benefits of a business, business activity, product or service for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change.
5. **Private Rights of Action:** Beginning in June 2025, private parties will be able to bring actions, with leave from the Competition Tribunal (**Tribunal**), under the civil misleading advertising and competitor collaboration provisions. Private parties already have the ability to bring actions under the abuse of dominance provisions, with leave of the Tribunal. Importantly, beginning in June 2025 private parties will also be able to avail themselves of new "disgorgement" remedies under the civil competitor collaboration and abuse of dominance provisions, which provide for payment to affected parties up to the value of the benefit derived from the impugned conduct.

In addition to the changes outlined above, monetary penalties available at the discretion of the Tribunal under the abuse of dominance, misleading advertising, and civil competitor collaboration provisions have increased significantly. In particular, under the civil misleading representation provisions and the civil competitor collaboration provisions, the penalties available will be the greater of $10 million and three times the value of the benefit derived from the conduct (or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues). For abuse of dominance, the penalties available for a first contravention are the greater of $25 million and three times the value of the benefit derived (or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues).

Initial Bureau Guidance

In the closing months of 2024, the Bureau began releasing guidance with increasing frequency on its enforcement approach to the Act, as amended. While the Bureau's guidance has principally been released in draft form for public consultation, even this preliminary guidance may offer insights into the application of the new and amended provisions.

Initial Guidance on Property Controls

Beginning in 2023, the Bureau has raised concerns that certain types of common clauses in real estate agreements restricting the use of neighboring properties (*i.e.*, property controls) were negatively impacting competition in the grocery sector. These concerns led directly to the changes to the civil competitor collaboration provisions discussed above, which expanded the provision to

agreements between non-competitors (including, *e.g.*, landlords and tenants) that have the purpose and effect of harming competition.

The newly amended civil competitor collaboration provision is drafted broadly and is likely to apply to a range of agreements beyond the real estate and grocery sectors. That being said, in August 2024 the Bureau released for public comment an initial statement on its "preliminary enforcement approach to competitor property controls" which discussed the application of the amended provision and the abuse of dominance provision to these contractual clauses. Key points from the preliminary guidance include:

1. The Bureau identified two types of property controls of potential concern: (1) exclusivity clauses in commercial leases that limit the landlord's ability to lease other units or property to persons that compete with the tenant; and (2) covenants that run with the land and prevent subsequent owners from using the location for specified purposes that compete with a previous owner. The preliminary guidance takes a generally hostile view of these types of property controlsasserting, for example, that restrictive covenants run with the land to restrict future use and will be not "be justified outside of exceptional circumstances".
2. The Bureau takes the position that property controls "by their nature" can raise serious competition concerns, but may be justified in "limited cases… if they are necessary for a firm to make investments that increase competition". In this regard, the Bureau takes the position that such controls "must be as limited as possible to be justified", and adds that relevant considerations will include the duration of the property control and the scope of its restriction.
3. The Bureau takes the position that it can challenge property controls under either the abuse of dominance or the civil and criminal competitor agreement provisions. Notably the preliminary guidance does not engage fully with the legal tests under each of these provisions, and in particular does not provide details on how the Bureau would define the relevant geographic and product markets to assess both whether a firm is "dominant" and the competitive effect of an impugned agreement.

Excessive Pricing and Abuse of Dominance

For the purposes of the abuse of dominance provisions (discussed above), an "anti-competitive" act means conduct intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or to have an adverse effect on competition. As noted above, the December 2023 amendments provided, among other things, that such conduct includes directly or indirectly imposing excessive and unfair selling prices.

The concept of excessive and unfair selling prices is novel to Canada and initially generated significant uncertainty. However, as part of its preliminary guidance on recent amendments to the Act released in November 2024, the Bureau clarified its position that in order to fall within the abuse of dominance provisions on the basis of excessive and unfair prices, a dominant firm charging high prices must be either (i) intending to have certain types of negative effects on a competitor or an adverse effect on competition (*i.e.*, the purpose criteria) or (ii) have the effect of harming competition substantially (*i.e.*, the effect criteria). The Bureau goes on to state that "[s]imply charging high prices to consumers is not usually an abuse of dominance regardless of how high those prices are" and further recognized that high prices are not normally intended to have a negative effect on competitors or competition.

While the Bureau's guidance may evolve and is not binding on private plaintiffs, it provides helpful clarity that the Bureau views the new "excessive and unfair selling price" provision as unlikely to apply in most cases.

Consultation on Merger Enforcement Guidelines

In November 2024, the Bureau published a discussion paper for public consultation setting out topics it may consider when updating its Merger Enforcement Guidelines (MEGs). The MEGs provide general guidance on the Bureau's approach to analyzing mergers under the Act. In announcing the consultation, the Bureau indicated that it planned to update the MEGs to better reflect current practice, recent amendments, legal and economic developments, and changing features of the Canadian economy.

The discussion paper is lengthy and far-reaching, introducing a range of topics for potential updates. Of particular note in light of the recent amendments to the merger review provisions discussed above:

1. With respect to the new rebuttable presumption based on measures of structural market concentration, the Bureau states that the revised guidelines "may" outline the Bureau's approach to applying the presumption. In that regard, the Bureau notes that market concentration is a "useful, but imperfect" indicator of competitive harm and that it will therefore consider a wide variety of other evidence in its analysis and that guidance from some other agencies clarifies that "higher concentration metrics require stronger evidence for rebuttal". Conversely, the Bureau notes that competition concerns may arise even if a transaction does not exceed the statutory thresholds for the presumption.
2. As noted above, amendments to the merger review provisions expanded the non-exhaustive list of factors that may be considered when assessing the competitive impact of a transaction. One addition was the impact of the transaction on labour markets. In that regard, the discussion paper states that the Bureau already considered impacts on labour markets to be relevant to its merger reviews. The Bureau observes that, based on economic research, "labour markets may be narrow and subject to existing monopsony power". While the revised guidelines may provide further clarity on the Bureau's approach to assessing labour impacts, the implication seems to be that these impacts will be the subject of greater scrutiny in the merger review process.
3. Finally, in the wake of the repeal of the efficiencies defence, the discussion paper takes the view that:

The removal of the efficiency exception is a clear signal that efficiencies cannot save an anti-competitive merger. The merger provisions now focus only on whether a merger will lessen or prevent competition substantially. Consistent with other jurisdictions, we expect that efficiencies will not usually affect the analysis of whether a merger will lessen or prevent competition substantially.

However, the Bureau leaves some room for future guidance on when pro-competitive, rivalry-enhancing benefits could nonetheless be relevant to its analysis. It also remains to be seen whether the Competition Tribunal will share the Bureau's initial perspective, and efficiencies can be relevant to whether a merger is likely to prevent or lessen competition at all as, for example, reduced costs can create incentives to increase output or destabilize a market.

Consultation on Environmental Claims Guidance

As noted above, the June 2024 amendments to the Act introduced two new provisions requiring that certain environmental claims about the benefits of (i) a product or service be based on an "adequate and proper test" and (ii) a business or business activity be based on "adequate and proper substantiation in accordance with internationally recognized methodology".

The Bureau's draft guidance on environmental claims, released for public consultation on December 23, 2024, restated its guidance from earlier in 2024 that environmental claims should be truthful, both in their literal meaning and their general impression, should be clear and specific (not vague), should avoid exaggeration, and should avoid aspirational claims, such as goals and timelines for future environmental performance, that are not based on a "concrete, realistic and verifiable plan" with "meaningful steps underway". With respect to the new greenwashing provisions, a few additional points are worth highlighting:

1. The draft guidance states that the Bureau "will likely consider a methodology to be internationally recognized if it is recognized in two or more countries". Importantly, the guidance acknowledges that the Act does not require recognition of the methodology by governments in two or more countries, and further acknowledges that a methodology developed by an industry and accepted in two or more countries may meet the requirement, provided that substantiation through the methodology is adequate and proper.
2. Testing and third-party verification will not necessarily be required to meet the requirement of substantiation in accordance with an internationally recognized methodology, unless the methodology requires such testing or verification. However, the guidance notes that third-party verification may nonetheless be helpful to support the credibility of claims.
3. The draft guidance clarifies that the Bureau's enforcement focus is on representations made in marketing and promotional materials, "rather than representations made exclusively for a different purpose, such as to investors and shareholders in the context of securities filings". The guidance does note that if representations made in securities filings are repeated in promotional materials, the Bureau will consider them marketing representations.

Comments can be submitted to the public consultation on this draft guidance until February 28, 2025.

Key Enforcement Trends

The Bureau maintained a publicly active enforcement posture throughout 2024, with high profile litigation and an increased use of so-called section 11 orders requiring targets of Bureau inquiries and third parties to produce detailed records and written responses. Additionally, with the expansion of private rights of action beginning in June 2025, recent forays by private plaintiffs provide potential insight into how private actions may unfold in the year ahead.

Litigation

In May 2023, the Commissioner of Competition (**Commissioner**), the head of the Bureau, filed an application against Cineplex, Canada's largest cinema chain, alleging that the manner in which Cineplex added an online booking fee to the price of movie tickets purchased online contravenes both the general misleading representations provisions of the Act and the newly-introduced drip pricing provision. In September 2024, the Tribunal found in favour of the Commissioner. Cineplex has appealed the Tribunal's decision.

The Tribunal's decision is notable for a few reasons. First, under the amended penalty provisions, the Tribunal ordered Cineplex to pay an administrative monetary penalty of $38.9 million, the highest such penalty ordered to date under the Act. The value of the penalty reflects the full revenues generated from the online booking fee, which the Tribunal identified as the benefit derived from Cineplex's conduct.

Beyond the attention-grabbing penalty, however, the decision offered some general guidance on how the Tribunal will apply the misleading representation provisions. In particular, the Tribunal clarified that the "general impression" of an impugned representation should be assessed from the perspective of the "ordinary consumer of the product or service", thereby rejecting the Commissioner's view that the general impression should instead be assessed from the perspective of "credulous and inexperienced consumer" (the standard applied to consumer protection legislation). Additionally, the Tribunal held that only information visible "above the fold" (*i.e.*, without scrolling down a webpage) was relevant to assessing the general impression of a representation in this case. While case-specific facts weighed into the Tribunal's decision, pending the outcome of the appeal, the Tribunal's ruling may offer a point of caution for similarly situated advertisers.

More Frequent Use of Section 11 Orders

The past year was marked by a steady – even unprecedented – stream of applications for evidence gathering orders under section 11 of the Act, which allows the Bureau to seek court orders for the production of records, written responses, and/or oral examinations in connection with ongoing inquiries. While the Bureau's use of this power is by no means new, a few applications from the past year are notable as potential windows into Bureau enforcement in the year to come:

1. **Amazon:** In June 2024, the Bureau sought a section 11 order requiring Amazon to produce records and written responses in connection with the Bureau's ongoing investigation into whether Amazon's marketing practices (namely, the presence of fake reviews on Amazon's e-commerce platform) violate the Act. While the order was largely granted as sought, the Federal Court declined to grant a broad data request that would require Amazon to provide 36 data fields on a weekly basis (running from January 2023 to the date of the order) for all products in four specified product categories, citing concerns that the scope of the request was unknown and potentially unreasonable. In submissions to the Court and in an appeal from the Court's decision, the Bureau has taken the view that the Court erred in exercising its discretion not to issue a section 11 order including because the Court applied the principle of proportionality (that has long been applied as part of the Court's evaluation of such orders) to the section 11 order investigative process. While the appeal has not yet been argued, the Bureau's position likely foreshadows a continued and potentially aggressive use of section 11 orders in the year to come.
2. **Kalibrate:** In July 2024, the Bureau sought a section 11 order as part of its inquiry into conduct

by Kalibrate, a software supplier that offers data, analytics and consultancy services for retail gas stations. In particular, the Bureau is investigating whether Kalibrate's services enable retailers who use its services to coordinate on retail prices through Kalibrate or its software products, e.g., by adopting a common or cooperative set of pricing rules. The order and underlying inquiry reflect a growing concern among competition authorities that AI and algorithms may be used to coordinate competitive behaviour, thereby reducing competition between firms. There is no conclusion of wrongdoing at this time. However, the basis for the inquiry likely reflects the Bureau's enforcement interest in this area, and we can expect algorithmic pricing tools to continue to attract Bureau scrutiny in the year ahead.

3. **Broadridge:** Notably, the parties (including the subject of the inquiry) had each filed pre-merger notifications with the Bureau, and the resulting statutory waiting period had lapsed without the Bureau issuing a supplementary information request to extend its review. The parties completed the transaction despite concerns raised by the Bureau after the expiry of the waiting period, following which the Bureau sought section 11 orders to advance its inquiry into whether (i) the transaction had or was likely to have the effect of preventing or lessening competition and (ii) the purchaser (Broadridge) had engaged in reviewable conduct under the abuse of dominance provisions. The section 11 order was granted in November 2024. Among other things, Broadridge had argued that the Bureau could not seek section 11 orders in the context of a merger review and also could not open a concurrent review under the abuse of dominance provisions. These arguments were not accepted.

Private Applications

In July 2024, JAMP Pharma Corporation filed an application for leave with the Tribunal to commence an application against Janssen Inc., alleging that Janssen had engaged in a practice of anti-competitive acts intended to prevent or delay entry by JAMP and other potential competitors to certain Janssen products contrary to the abuse of dominance provisions. Under the Act, in order to be granted leave JAMP needed to demonstrate that there is "reason to believe" that JAMP is "directly and substantially affected in the applicant's business" by Janssen's impugned conduct.

While prior case law dealing with applications for leave under other sections of the Act had required applicants to demonstrate that the impugned conduct had a direct and substantial impact on the applicant's entire business, the Tribunal held that a private applicant under the abuse of dominance provisions is not required to show that it is "directly and substantially affected in its entire business by the practice". The Tribunal limited this decision to its analysis of the abuse of dominance provisions – notably, the test for leave will be expanded beginning in June 2025 to explicitly permit the Tribunal to grant leave under any of the provisions permitting a private right of action if the applicant's business is substantially affected, in whole or in part. The test for leave will also be expanded to permit the Tribunal to grant leave where it is satisfied that it is in the public interest to do so.

Ultimately, the Tribunal dismissed the application for leave on the basis that JAMP had failed to present sufficient, cogent evidence to support a *bona fide* belief that Janssen had engaged in a practice of anti-competitive acts or that the impugned conduct had the effect of substantially lessening or preventing competition in a market, as would be required for the underlying application against Janssen. Moreover, the Tribunal held that JAMP's evidence did not support a *bona fide* believe that JAMP was directly and substantially affected in its business.

While this application was unsuccessful, the Tribunal's willingness to adopt a broad interpretation of the legal test for leave may signal an openness to private applicants under the expanded provisions coming into force in June 2025. It remains to be seen what type of evidence will be required to support particular allegations of abuse of dominance in future leave applications.

Conclusions

For the last few years, Canadian competition law and policy has been characterized by significant and rapid change. As the final of a series of amendments come into force this year, we are beginning to see the impact of those changes. Bureau guidance has offered helpful and important clarity on some amendments, while raising new questions for others. The incoming expansion to the private rights of action under the Act raises the potential for new case law and, eventually, greater clarity, but has also introduced significant uncertainty for businesses operating in Canada as we wait to see how new leave and remedy provisions will be applied. With all these competing forces, 2025 is certain to produce interesting developments for competition practitioners and businesses operating in Canada alike.

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