OCTOBER 28, 2021

Commissioner of Competition Urges Reboot of Canadian Competition Law

In his annual address to Canada's competition bar last week, the Commissioner of Competition, Matthew Boswell, offered a full-throated defence of vigorous competition law enforcement as a key driver of Canada's post-pandemic economic recovery. Rather than outlining the Competition Bureau's achievements over the past year, as has been the recipe for previous addresses in this forum, the Commissioner focused primarily on the challenges he says the Bureau faces in enforcing Canadian competition law effectively, and the sweeping review of Canada's competition legislation he argues is needed to meet these challenges.

In support of his call for reform, the Commissioner cited the shift in Canada and elsewhere to new digital and technology-based economies and drew on the growing populist and political interest in competition law globally and the "shift towards more aggressive enforcement of competition laws" in other jurisdictions. Although the Commissioner has previously raised the need for reforms to Canada's competition law regime (see our comments from earlier this year), his latest remarks represent a new willingness to engage openly in the policy debate and constitute his most forceful statement to date in favour of specific legislative amendments.

Key Takeaways

- The Commissioner has expressed his support for stiffer penalties for anticompetitive conduct, repeal or reform of the "efficiencies defence" available to merging parties under Canadian law, extension of Canada's cartel offence to buy-side competitor agreements (such as no-poaching agreements) and opening abuse of dominance enforcement to private litigants.
- The digital economy remains a key focus for the Competition Bureau, with new funding allocated to increase the Bureau's digital expertise and enforcement, and calls for law reform to better address anticompetitive conduct by large digital firms.
- The Commissioner's comments suggest that merger reviews may become more litigation-focused, less transparent, and lengthier.

We discuss the Commissioner's main points in more detail below.

1. New Funding Earmarked for Digital Expertise and Litigation Capacity

The Commissioner, like his predecessors, has repeatedly bemoaned the Competition Bureau's limited resources and the impact of limited funding on its ability to deliver on its mandate. However, the 2021 federal budget provided an additional (and unprecedented) infusion of funds to the Bureau, consisting of $96 million in new funding for the Bureau over the next five years, with $27.5 million of additional funding per year thereafter. In his remarks, the Commissioner indicated that the new funds will be used to advance the Bureau's work in three principal areas:

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

ii. strengthening the Bureau's enforcement team through new hiring, with an emphasis on building litigation capacity and the use of external experts; and

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

The newly announced Digital Enforcement and Intelligence Branch is one element of the Bureau's investment in increased digital capacity, and reflects the Commissioner's sustained focus on the digital economy and "Big Tech" (see our previous comments). The Commissioner's stated goal is for the new branch to "become a centre of expertise on technology and data and act as an early-warning system for potential competition issues in the digital and traditional economies." Among other enforcement activities relating to the digital

economy, the Bureau has continued an investigation into alleged abuse of dominance by Amazon in Canada and has launched an inquiry into online advertising markets. The Commissioner's comments suggest that we may see an increase in investigations and enforcement in connection with digital platforms.

Additionally, the Commissioner was careful to note that the Bureau's merger review program will not directly benefit from the increased funding, and he foreshadowed a merger filing fee review in the next two years to "properly fund operations in line with current realities and demands." Although Canadian merger filing fees experienced a step-change (44%) increase in 2018, the Commissioner's remarks suggest that further increases may be coming.

2. Merger Review Remains a Source of Tension

In the decisions in *Secure Energy Services* released in July and August of this year, the Competition Tribunal denied the Commissioner's applications for interim injunctive relief with respect to the merger of Secure Energy Services Inc. and Tervita Corporation. During the Commissioner's review, the parties had argued, among other things, that the merger was likely to generate significant efficiencies that would outweigh and offset any alleged anticompetitive effects of the transaction. In addition to raising the efficiencies defence, the merging parties exercised their rights to close the transaction promptly upon expiry of the statutory waiting period, despite the Bureau's ongoing review. The Commissioner challenged the merger and sought various types of interim relief from the Tribunal to prevent closing and, later, to require that the transaction be unwound or, in the alternative, that the parties' businesses be held separate pending determination of the Commissioner's challenge on the merits. The Competition Tribunal and Federal Court of Appeal denied the injunction requests, and the Bureau's substantive merger challenge continues before the Tribunal, with trial scheduled in May and June 2022.

In his recent address, the Commissioner asserted that the *Secure Energy Services* case "further crystallizes the need for a comprehensive review" of Canada's competition laws. He then highlighted two aspects of the decisions that he said have important implications for merger reviews in the future:

i. First, the Commissioner expressed concern about the Tribunal's requirement that the Bureau must at least provide a "ballpark" estimate of economic harm to support an application for interim injunctive relief where efficiencies claims are involved. What is perhaps surprising is that the Bureau did not present such ballpark evidence despite having reviewed the Secure Energy Services transaction for over three months by the time the parties moved to close the transaction, and despite clear direction from the Supreme Court of Canada in a prior case that the Bureau bears the burden of quantifying anticompetitive harm. Nonetheless, in the Commissioner's view, if parties choose to hold the Bureau to its statutory review time frames in complex cases (which time frames were significantly extended in 2009 through the addition of a unilateral Bureau power to issue subpoena-like production requests), the Bureau may be required to pursue "a litigation-focused approach" to merger review that would be costly, less predictable, less transparent and less engaged with the merging parties.

ii. Second, the Commissioner repeated the Bureau's long-standing dissatisfaction with the efficiencies defence under Canadian law, saying that it permits anticompetitive mergers (including those that result in monopolies and raise prices for consumers), is inconsistent with the approach of other G-7 countries and raises significant practical challenges for the Bureau in measuring and estimating anticompetitive harm.

Although the Commissioner criticized the Competition Tribunal's decision as adding to the "overly strict and impractical legal tests to prevent" anticompetitive mergers, it should be noted that the "balance of convenience" test for injunctive relief, on which the Commissioner's case foundered in the *Secure Energy Services* proceedings, is not a product of competition law *per se* but rather is a long-standing common law rule of general application to all requests for extraordinary interim relief. That test requires courts to weigh the potential harm caused by the injunction against the harm likely to occur in its absence. It is not clear whether and why the Commissioner believes that such a test should not apply to the injunctive relief he seeks in merger cases. It is also not apparent why the Bureau was particularly hampered in meeting its burden to demonstrate "at least some 'rough' or initial sense of the irreparable harm" in the *Secure Energy Services* proceedings after months of review and having engaged outside economic experts.

Nevertheless, the Commissioner's comments on the *Secure Energy Services* decisions suggest that merging parties should continue to carefully weigh the costs and benefits of agreeing to extend review time frames beyond statutory waiting periods in any particular case, as a refusal to do so could result in a less transparent and more litigation-focused merger review process. The potential lack of Bureau transparency is cause for concern, especially as the Commissioner did not explain why such an approach would be necessary or appropriate for an enforcement agency acting in the public interest – or even why it would assist the Bureau in meeting statutory timelines or estimating anticompetitive effects. Such an approach also cuts directly across the Bureau's service standards for completing merger reviews, which were introduced as a limited *quid pro quo* for the payment of filing fees by merging parties. It may be noted as well that the Commissioner chose not to pursue other available means of extending pre-closing review time frames in the *Secure Energy Services* matter, and these other means (i.e., seeking a so-called section 100 order from the Tribunal to prevent closing for a limited period of time) will remain available to the Commissioner in future cases.

3. A Vigorous Call for Competition Law Reform

In addition to the call for reform implied by his comments on the *Secure Energy Services* decision, the Commissioner raised the following specific potential reforms:

i. increased penalties and fines;

ii. expanded private enforcement tools, particularly with respect to the abuse of dominance provisions in the *Competition Act*; and

iii. inclusion of buy-side agreements, including wage-fixing and no-poach agreements, in the Act's cartel provisions.

The Commissioner asserted that "modernizing" Canadian competition law in these ways will benefit Canada's long-term economic prosperity, particularly as other jurisdictions work to strengthen their own competition laws. Additionally, the call for reform seems driven by the Bureau's digital focus, as the Commissioner emphasized the scope of technological change since the last review of the Act 14 years ago.

Conclusion

The Commissioner's explicit calls for reform in his remarks last week are the most forceful and comprehensive presentation of his views calling for legislative amendment and indicate a willingness to embrace a public role in the policy debate. In doing so, the Commissioner has aligned the Bureau with calls for competition law reform in the global public discourse and with reform efforts underway in other jurisdictions.

Much of what the Commissioner argues is open to debate, in terms of both his analysis of specific issues and his prescriptions for resolving them. 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. From that perspective, the Commissioner's statement in his speech that the Bureau will be allocating increased resources to build its litigation capacity may be the most significant pronouncement he made, and could obviate the need for further dramatic enhancements to the Bureau's already potent enforcement arsenal.

All of this is proper fodder for future discussion. In the interim, while it remains to be seen what reform will look like in the Canadian context, if it occurs at all, it is important for businesses to closely monitor the public debate and consider what proposed changes to the law or enforcement practices could mean for them.

Key Contacts: Anita Banicevic, John Bodrug, Mark Katz and Charles Tingley

This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.

© 2025 DAVIES WARD PHILLIPS & VINEBERG LLP