

ANTITRUST REFORM: CANADA TOO!

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Earlier this year the Canadian government announced a meaningful increase in the Competition Bureau's budget - \$97 million (Cdn) over the next five years, and an additional \$27 million (Cdn) per year thereafter. That was a big win.

On the flip side of the scorecard, this summer the Bureau had a setback – losing two injunction applications which sought to prevent closing and to require a 'hold separate' once closing had occurred in the Secure/Tervita transaction. See our earlier Bulletin: [Strike Two...The Commissioner Loses Second Injunction To Block Merger](#).

Noting the implications of that loss and the possibilities which the new funding should provide, and also taking some inspiration from developments and trends around the world, on October 20, 2021 the Commissioner of Competition gave a speech "[Canada Needs More Competition](#)" which put a stake in the ground as to changes he – and the Bureau team – wish to see. Spoiler alert – 'tougher' enforcement and more money!

We expect to provide commentary on some of these issues as matters develop over the coming months, but given the range of suggestions advanced by the Commissioner, in this Bulletin we simply flag the proposals in order to put them on the business community's radar – in Canada and beyond.

More Merger Money

The Commissioner highlighted the fact that while much of the Bureau's activities are funded by its general allocation from the government, which has just been increased, merger reviews are funded by filing fees – currently set at the easy to recall round number of \$74,905.57 (Cdn) per notifiable transaction. Given the increasing complexity of merger reviews, the Commissioner signalled that when those fees are next reviewed and updated – in less than two years' time – they will almost certainly increase in a noticeable way.

Injunctive Powers

The Commissioner expressed considerable concern respecting the recent injunction decisions in the Secure/Tervita case, which allowed the closing of a transaction which, he noted, the Tribunal had found was likely to cause irreparable harm. The Commissioner confirmed that at least one of the implications of the

decisions is that the Bureau will, as we had noted in our earlier Bulletin, be required to shift its energies to litigation preparation earlier in the review process. This will increase the burden on the Bureau and, at least in some cases, on the merging parties as well. The Commissioner made it clear that the Bureau will be looking to obtain statutory changes to provide a lower threshold for interlocutory relief in merger cases.

The Efficiencies Defence – Again

To no one's surprise – given that it has been the stated view of the Bureau for some time – the Commissioner's view is that Canada's merger efficiency defence is inappropriate.

One aspect of the concern relates to the complexity which efficiencies considerations add to merger reviews. In addition, the Commissioner has raised the question of whether, conceptually, transactions which increase total Canadian surplus, but which may represent a wealth transfer from consumers, is appropriate. The efficiencies defence is clearly on the Commissioner's wish list for the chopping block.

Penalties

The Commissioner also raised the question of whether the maximum penalties – \$10 million (Cdn) Administrative Monetary Penalties for Abuse of Dominance and Misleading Advertising/ \$25 million (Cdn) fines for Cartels – is too low. These penalties were either created or significantly increased a decade ago. But, it is an inflationary era – look for the price to go up!

Wage Fixing/No Poach

The current Canadian law does not allow use of criminal remedies for buy-side agreements – including wage fixing/no poach or other employment related agreements. This has been a matter of significant public comment and debate in Canada – and an area of increased and vigorous enforcement in the United States. The Commissioner suggested that, at least for employment related matters, a re-criminalization may be on the cards.

Private Abuse

Canada currently enjoys a mixed system, which allows private enforcement (damages actions) with respect to the criminal provisions of the Competition Act, as well as private applications for injunctive relief respecting certain reviewable practices. These private rights do not apply with respect to Abuse of Dominant Market Position. In his speech, the Commissioner expressed support for private challenges to Abuse of Dominance conduct. What form he believes such challenges should take was not made clear.

Advocacy

As a final point, the Commissioner noted that it is the Bureau's view that the Canadian economy suffers from a level of inefficiency created by insufficiently competitive regulatory regimes in a number of areas. He indicated that the Bureau plans to use a portion of its new resources to engage even more vigorously in advocacy efforts to seek more competitively friendly regulatory systems.

The antitrust world is currently caught up in a whirlwind of reform proposals. Here up North, we were starting to feel left out. In his October 20, 2021 speech, the Commissioner seems to have invited Canadians to the party. At the same time, while the issues the Commissioner has put on the table represent significant potential shifts in Canadian competition law enforcement, he declined an invitation to open a broader debate on the goals and objectives of competition law in Canada. We may see that aspect of the current worldwide debate come to Canada, but for now the Commissioner's focus appears to remain on consumer welfare goals. We expect to explore many of the Commissioner's proposals for reform in greater depth over the coming months. The debate is on!

by [James Musgrove](#) & [Sarah Stirling-Moffet](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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