
# ROUND ONE OF *COMPETITION ACT* AMENDMENTS PASSED; NATIONAL SECURITY REVIEW REGIME AMENDED

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**Categories:** Insights, Publications

As we reported in two bulletins (here and here) on May 3, 2022, the Canadian government introduced significant amendments to the *Competition Act* as a part of the *Budget Implementation Act*, 2022. As is generally the case with budget bills, it passed on June 23, 2022 (without changes to the proposed *Competition Act* amendments) and received royal assent on the same day. While the government characterized these *Competition Act* amendments as largely non-controversial (with more significant changes to be subject to an upcoming consultation), many of these changes will have significant impact on business practices.

Separately, the Canadian government published final regulations amending the national security review regime under the *Investment Canada Act* ("**ICA**"), creating a process for voluntary notification for transactions not otherwise subject to a filing requirement under the ICA.

I. *Competition Act* Amendments

The following is a brief summary of the key amendments to the *Competition Act*. Most of these amendments came into force on June 23, 2022, when the budget bill received royal assent. The amendments to the no-poach/wage fixing rules will be delayed for one year.

(1) Evidence from Affiliates and Firms Outside of Canada

The *Competition Act* has been amended to allow orders that companies ordered to produce information must provide information in the possession of their affiliates – and also orders that require persons outside of Canada to provide information. There may be jurisdictional challenges to this new provision.

(2) Increased Fines

Fines for conspiracy – including the newly enacted conspiracy provision with respect to wage fixing and no poach agreements – are now in the determination of the court, rather than capped at $25 million.

(3) Increased Administrative Monetary Penalties

The maximum Administrative Monetary Penalties ("**AMPs**") for abuse of dominance and civil misleading

advertising have been increased to three times the benefit derived from the conduct or, if that amount cannot be reasonably determined, 3% of the corporation's worldwide gross revenue.

(4) Drip Pricing

Drip Pricing ("a representation of a price that is not attainable due to fixed obligation charges or fees not required by statute") now constitutes a false or misleading representation, for both criminal and civil misleading advertising.

(5) Abuse of Dominance

The most extensive changes to the *Competition Act* in this first round is to the Abuse of Dominant Market Position provisions.

i. Firstly, and perhaps most significantly, private parties may seek leave of the Competition Tribunal to bring an application with respect to abuse of dominance if they can demonstrate that they are directly and substantially affected by the conduct.
ii. The definition of anti-competitive act is amended to mean "an act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition".
iii. The list of illustrative anti-competitive acts has been expanded by adding "a selective discriminatory response to an actual or potential competitor for the purpose of impeding or preventing that competitor entry into, or expansion in, a market, or eliminating the competitor from a market".
iv. The Tribunal has been given a new list of issues it may consider in determining whether conduct has or is likely to prevent or lessen competition substantially:

    a. The effect on barriers to entry, including network effects;
    b. The effect on price or non-price competition, including quality, choice or consumer privacy;
    c. The nature and extent of change and innovation in a relevant market; and
    d. Any other factor relevant to competition.

(6) Civil Competitor Agreements

The civil agreements provision in section 90.1 of the *Competition Act* has been amended by adding three additional factors which the Tribunal may consider in determining whether there is likely to be a substantial prevention or lessening of competition:

i. Network effects;
ii. Whether the agreement leads to an entrenchment of the market position of leading incumbents; and
iii. The effect of the agreement on price or non-price competition – including quality, choice and consumer

privacy.

(7) Merger Provisions

There are a number of changes to the merger provisions of the *Competition Act*:

i. The list of considerations for the Tribunal, in determining whether the merger is likely to lead to a substantial prevention or lessening of competition, is expanded by the same three new factors as noted above with respect to Section 90.1;
ii. Certain time limits respecting merger notifications are clarified;
iii. The rules with respect to unsolicited/hostile takeover bids have been clarified; and
iv. A new anti-avoidance provision is added to the merger notification regime – if a transaction or proposed transaction is designed to avoid the application of the merger notification provisions, then the notification requirements will nonetheless apply to the transaction.

All of the above provisions are in force as of June 23, 2022.

(8) Employment Related Conspiracies

A final provision will come into force one year later, on June 23, 2023, in order to give businesses time to adapt to the existence of a new criminal offence.

One of the key aspects of the 2009 amendments to the *Competition Act* was to clarify that only certain specific types of agreements could constitute criminal conspiracies, and in particular only agreements with respect to the supply, not the purchase of products.[1] As a consequence, agreements with respect to purchasing labour – both with respect to wages and with respect to agreements related to no hire/no poach – were not covered by the criminal provision. This led to some public comment and criticism. Employment-related agreements have also been an area of increased enforcement in the United States. In response, a specific criminal provision has been introduced to prohibit agreements to fix, maintain, decrease or control wages or terms and conduct of employment, or agreements to not solicit or hire the employees of another firm.

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As noted at the outset, the government considered the provisions outlined above, enacted as part of the budget bill, sufficiently uncontroversial as to not merit consultation. In fact, some of the amendments are quite sweeping and significant, and are likely to provide significant uncertainty for a time to come, as courts work out their implications.

In addition, as noted, the government plans to engage in a consultation process with respect to a wider range of possible amendments. Stay tuned!


II. Changes to the National Security Review Regime

Currently, there is a mandatory filing when a non-Canadian investor establishes or acquires control of a Canadian business. The Canadian government may initiate a national security review of the investment within 45 days of receiving the filing. While a minority acquisition of a Canadian business and the acquisition or establishment of a business with only limited Canadian aspects (such as a Canadian place of operation, Canadian employees or Canadian assets, but not all) are not subject to a filing, such investments are nonetheless subject to a potential national security review, creating uncertainty for investors.

The amended regulations will permit non-Canadian investors to submit a voluntary notification for such investments that are not subject to a mandatory filing. The government may initiate a national security review within 45 days of receiving a voluntary filing. This provides investors certainty regarding a potential national security review before implementing the investment. However, where a voluntary filing is not made, the government would have up to five years after the investment's implementation to initiate a national security review, significantly extending the existing 45-day period.

Therefore, where an investment presents potential national security risk factors (see our prior bulletin), investors are encouraged to make voluntary filing pre-implementation.

The amended regulations will come into force on August 2, 2022.

[1] See *Mohr v NHL*, 2021 FC 488; *Latifi v TDL Group*, 2021 BCSC 2183.

by McMillan Competition Group

**A Cautionary Note**