SIGNIFICANT CHANGES COMING TO CANADA'S *COMPETITION ACT*

Posted on May 3, 2022

Categories: Insights, Publications

The Federal Government introduced a budget bill on April 26, 2022 that included a series of significant changes to Canada's *Competition Act*. While the government indicated that it views these amendments as uncontroversial, they will affect relationships between employers and employees, whether companies can be sued for certain contracting practices, how businesses advertise prices and how companies can structure their transactions to minimize regulatory risk.

This bulletin provides a brief overview of the proposed amendments. If you would like more information about these developments, or would like us to provide you with a more detailed presentation on how these proposed amendments will affect your business, please reach out to any member of the Competition & Antitrust group, or your usual McMillan contact.

No Poach Agreements and Wage-Fixing Criminalized

In response to events during the pandemic and changes in enforcement practices in the United States, the government has proposed a new criminal prohibition for agreements between employers regarding wages, working conditions and hiring practices. These provisions become effective one year after the proposed amendments receive royal assent. For a detailed discussion of this proposed amendment, please see McMillan's companion bulletin Competition Act Amendments Introduce New Criminal Offence Against Wage-Fixing and No-Poach Agreements. The government is also planning to remove the statutory maximum fine for criminal agreements and leave the fine to the court's discretion.

Stronger Abuse of Dominance Regime

The government is making three major changes to the abuse of dominance laws that can sanction businesses for engaging in exclusionary or other practices that lessen or prevent competition substantially.

First, the government has introduced a new penalty threshold of three times the financial benefit derived from the conduct in question. However, if this amount cannot be reasonably determined, the Competition Tribunal can order a penalty of up to 3% of a corporation's annual *worldwide* gross revenues. Currently, the penalty for

abuse of dominance is capped at $10 million for a first offence and $15 million for a subsequent offence.

Second, the government has broadened the scope of conduct to include "*any act intended to have an adverse effect on competition*", as an alternative to an act intended to harm a competitor. The government also expanded the list of anti-competitive acts to include "*a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market*". The proposed amendments include additional factors that the Competition Tribunal may consider when assessing whether a practice has the effect of substantially preventing or lessening competition, including whether the practice creates or maintains an entry barrier or the effect of the practice on price or non-price dimensions of competition (such as quality, choice or consumer privacy).

Third, private parties will be able to commence abuse of dominance applications before the Competition Tribunal with leave or authorization from the Tribunal. The Competition Act currently provides private parties the right to bring applications to the Tribunal in respect of the other reviewable practices, but not abuse of dominance applications. The criteria for obtaining leave from Tribunal would remain unchanged: the private party must demonstrate that its business is "*directly and substantially affected*" by the conduct in issue. The primary remedy for an abuse of dominance is an order prohibiting the abusive conduct, although the Tribunal can order broader remedies to restore competition. The proposed amendments would allow a private party to request that the Tribunal order monetary penalties, too, but they would not be paid to the applicant and instead be payable to the government. The right for private parties to sue for damages before the Competition Tribunal remains unavailable.

New Drip Pricing Prohibition and Higher Penalties for Misleading Advertising

The proposed amendments include a provision specifically stating that "drip pricing" conduct is false or misleading under both the criminal and civil provisions of the *Competition Act*. The new rule would cover price representations that are not attainable due to fixed obligatory charges or fees, exclusive of federal or provincial sales taxes. As noted in a C.D. Howe Institute Intelligence Memo authored by McMillan partners, Josh Krane and James Musgrove, these proposed amendments will create new challenges for businesses looking to advertise to Canadians. The amendments also propose to increase the corporate penalties for misleading advertising significantly to mirror the changes to the penalties for abuse of dominance.

New Anti-avoidance Rule for Merger Notifications

Several types of transactions require pre-merger notification to the Competition Bureau when they exceed applicable monetary thresholds.[1] The proposed amendments contain a broadly and vaguely worded anti-avoidance provision to catch transactions deliberately structured to avoid the application of the merger

notification provisions of the Act. Details around how that would work are unknown at this time.

What's Next?

These proposed amendments are expected to be followed by a more comprehensive review of the *Competition Act* and additional amendment proposals. We will continue to update you on developments as they unfold.

[1] [ps2id id='1' target='/]The Bureau can review and challenge a merger for up to one year after closing even if not subject to mandatory notification.

by McMillan Competition Group

A Cautionary Note