

MEMORANDUM

To: Commissioner of Competition
From: James Musgrove
Date: September 27, 2018

Dear Ms/Mr. Commissioner:

Congratulations!

You have just been appointed to one of the most interesting, and important, positions in our country. And, you get to hang around with CBA types – how cool is that! Also, and more seriously, your organization, the Competition Bureau, enjoys an esprit de corps and enthusiasm rare in government, or business. You are blessed with colleagues who believe in and are enthusiastic about their mission. That is a particularly good thing because (more about that below) belief in competition law is not a terribly widely shared view.

So, you have an exciting new appointment, and an important mission to accomplish with enthusiastic, motivated colleagues. You have five years to get some important work done. But, what? Opinion varies widely, and ultimately yours is the one that matters, but as an aid to help you hit the ground running (five years is not as long as it seems), and because the urge to give advice is about as strong as the urge to ignore it, the following constitute a modest proposal, or two, for your next five years.

A. Administrative

These are issues that are not within the Commissioner's power, but they are things you can lobby for. The following may be worth the effort:

1. Seek authority to develop proposals for amendments to the Act "in house".
2. Budget Increase – The Bureau provides a GREAT value for money. New suggested slogan: "Canada needs more Bureau". Consider comparing the Bureau's annual budget of approximately \$50 million to the amounts spent on direct government supports for industry.¹

B. Statutory Amendments

Again these are not within the Commissioner's direct control – but appropriate amendments are worth pushing for. Some suggestions follow:

1. Repeal Section 49 and 75; seriously consider repealing Sections 77, 80/81 and 84.
2. Amend the test in Section 76 to parallel the abuse provision and require a substantial lessening or prevention of competition.
3. Add an express statutory power to engage in advocacy, beyond Sections 125/126.
4. Make the power to refer matters to the Tribunal for a reference (s. 124.2) reciprocal.

C. Administrative Changes

¹ Federal government subsidies to industry of between \$5.1 - \$23.1B/yr between 1980 and 2009. See June 2014 Fraser Institute Report – "Government Subsidies in Canada: A \$684 Billion Price Tag".

1. Consider a path to simplify and expedite Tribunal matters, even if it means ignoring counsel of caution.
2. Find ways to leverage industry expertise which resides in one branch, when issues arise in another area of the Bureau's activities.
3. Provide meaningful opinions under s. 124.1.

D. Enforcement Stance

1. Mergers
 - a. Think about the implications of changing trade policy.
 - b. Entry is really real. Really.
 - c. We need to be open – more open – to efficiency arguments – both with respect to static and also dynamic/innovative efficiency.
 - d. On balance, are we challenging enough mergers?
2. Cartels
 - a. Continue to work hard to improve the immunity/leniency program.
 - b. Try to bring cases to conclusion faster.
 - c. If there is an international case with a real Canadian connection, and the parties have sought immunity/leniency elsewhere but not in Canada, consider whether that is a case to bring.

3. Abuse

- a. It is worth doing a retrospective on vertical conduct cases, to see which ones, where remedies have been ordered, have made a marketplace difference.
- b. This is the most intellectually stimulating aspect of competition law. Don't be seduced.

4. Consumer Protection

- a. This may not, necessarily, be the most intellectually stimulating area of competition law – but it is darn important.
- b. More and simpler, cases here may be useful. The Tribunal process really needs to speed up.
- c. Look for systematic opportunities to improve consumer protection for an industry.
- d. Is OSP really a big deal?
- e. This is a profile area for the Bureau – and for the concept of competition law enforcement.

5. Advocacy

This is the way the Bureau can have the biggest impact on the well being of Canadians. As noted, an amendment to provide an express power to undertake advocacy, if possible, would be helpful.

Additionally

- a. Seek to find a way to protect voluntarily provided information in market studies.

- b. Be courageous!

E. Popular Support for the Mandate

For a long time I have been concerned that, while everyone who attends conferences like this cares about competition law issues, virtually no one else does. Well, that isn't so odd. Most specialist disciplines are minority tastes. But, if we don't find ways to reach out to others, then we will lose support for what we do.

The Bureau's budget is a tiny fraction of what we spend on industry support. There is (especially in these times) much more support for trade remedy law than for competition law. So, as my final suggestion, I think the Commissioner may wish to work hard to promote, publicly, the importance of competition law enforcement. It is tricky, but I suggest it is important.

F. Conclusion

Commissioner, I end where I began, which is to offer congratulations on your appointment. It is a fantastic opportunity to do good for your country. I urge you, after the mandatory listening tour, to determine your agenda and pursue it. Ferris Bueller reminds us that life moves fast – and 5 years moves even faster. But, Ferris also reminds us to have fun along the way. So, define an agenda, have fun implementing it, and make Canada an even better place!

Good luck Commissioner – and Congratulations!