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2023 OSLER LEGAL OUTLOOK

Ch-ch-changes: navigating the shifting tides of Canadian competition law

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Change has been the dominant theme of competition law in Canada over the past 18 months. We expect this to continue until at least 2025. Following the federal government's landmark review of the *Competition Act*, significant legislative changes have already broadened the scope of conduct that can be subject to penalties or remedies. These changes have opened the door for more private enforcement. And additional significant changes are on their way.

These developments, together with the Competition Bureau's capacity-building initiatives resulting from a substantially increased budget, will certainly embolden the Commissioner of Competition (the Commissioner) and strengthen competition law enforcement in Canada. Expert and timely advice regarding the scope of the new and pending measures – and their implications – will assist business to prepare for and adapt to this brave new world.

Significant amendments have already been implemented

Since June 2022, a significant number of changes to the *Competition Act* have been implemented. The first wave of amendments was recently described by the Minister of the Department of Innovation, Science and Economic Development (ISED) as the "down payment" for the comprehensive reform to come. These and future reforms are intended to ensure that the *Competition Act* is "fit for purpose."

The measures already implemented include substantial increases to criminal fines and civil administrative monetary penalties. Wage fixing as well as no-poach agreements between unaffiliated employers have been criminalized. The amendments also introduced private enforcement rights for abuse of dominance and expanded the types of conduct captured by the abuse of dominance provision. Our Osler Update describes these amendments in more detail.

Additional significant amendments have now been proposed

In September 2023, the federal government introduced Bill C-56, which proposes three discrete but important amendments to the *Competition Act*. The first is the establishment of a market studies power that will enable the Commissioner to compel oral examinations and

the production of business documents or data under oath. The second is an expansion of the civil agreements provision to capture certain agreements containing restrictions on competition between firms that are not competitors. Last but not least is the repeal of the efficiencies defence for mergers – a unique and controversial feature of Canada's merger law. Bill C-56 is progressing through the legislative process alongside the Budget Implementation Bill. For further details regarding Bill C-56, refer to our Osler Update. Additional changes to Bill-C-56 are being discussed, including a change to the test for establishing an abuse of a dominant position.

The *Fall Economic Statement Implementation Act, 2023* (the Budget Implementation Bill), introduced in Parliament on November 28, 2023, proposes substantial amendments to the *Competition Act* that, if implemented, will have far-reaching consequences for businesses. The amendments will lead, among other things, to a further increase in enforcement activity by the Commissioner and by private parties, as well as heightened exposure for market participants to additional significant penalties and damages.

The Budget Implementation Bill proposes a number of fundamental changes to the existing legislation, including the establishment of private actions, with leave, and a form of damages for civil competitor collaborations. Additionally, the Bill establishes a form of damages for contravention of the other civil reviewable trade practices provisions of the *Competition Act*, including those relating toa refusal to deal, exclusive dealing, tied selling, price maintenance and abuse of dominance. The changes also include an expansion to the thresholds for leave and a new provision explicitly addressing greenwashing as a deceptive marketing practice. The evidentiary burden for demonstrating that a merger exceeds the anticompetitive threshold will also be altered and the period within which the Commissioner may challenge a non-notified transaction will be extended. For further details, refer to our Osler Update.

Cumulatively, these proposed amendments, together with the changes already implemented as described above, will fundamentally change Canada's competition laws and have important implications for companies doing business in Canada. At the time of publication, the Budget Implementation Bill had been tabled in Parliament. Bill C-56 had completed second reading in the House of Commons and was being studied by the Standing Committee on Finance.

Reports informing Parliament's agenda

ISED's *What We Heard* report was released almost simultaneously with the introduction of Bill C-56. This report summarizes the numerous submissions ISED received in the course of its broad *Future of Competition Policy in Canada* [PDF] consultation launched in 2022. It suggests that nearly everything is on the table for possible reform.

Moreover, the pressure on Parliament to act quickly in pursuing its reform agenda has been intensified by the Competition Bureau's publication on October 19, 2023 of its findings in *Competition in Canada from 2000 to 2020: An Economy at a Crossroads*. This report presents the findings of an in-depth study of competition across the Canadian economy over a 20-year period.

The Bureau's analysis found that Canada's competitive intensity has fallen significantly over the years. Specifically, the report found that concentration had risen in the most concentrated industries and that the number of highly concentrated industries had increased. Also, according to the report, the largest firms in particular industrial sectors are being challenged less and less by their smaller competitors. The report found that fewer firms have entered industries overall, suggesting that many industries have become less dynamic. Finally, the report noted that profits and markups have risen overall and that these increases were generally greater for firms already earning higher profits and markups.

Reform is also occurring elsewhere

Importantly, Canada's reconsideration of how it approaches competition law and policy is not occurring in a vacuum. It follows trends occurring in other jurisdictions.

For example, in the United States, President Biden's administration has been implementing a "whole-of-government effort to promote competition in the American economy" with a clear focus on stronger enforcement of antitrust law. Unlike Canada, where change is occurring through legislative amendments, modernization in the United States has been and continues to be driven by directions from the executive branch of government.

In particular, U.S. antitrust agencies are being mandated to enforce the existing antitrust laws more vigorously through updated guidance and litigation. These agencies have been emboldened, among other things, to do more to protect labour from anti-competitive practices and to address competition law concerns arising from the consolidation of specific sectors (including healthcare, transportation, agricultural and technology).

Implications for the future

Changes to the *Competition Act* and to enforcement will have dramatic effects on businesses operating in Canada. A stronger governmental focus on enhancing competition at the same time as government is providing tools to increase public and private enforcement can be expected to change how competition law is assessed in Canada. Businesses must be prepared on all fronts.