Paul-Erik Veel
416-865-2842
pveel@litigate.com

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Is Increased Enforcement of the Competition Act Coming?

On February 8, 2022, the Competition Bureau released several recommendations for amending the *Competition Act* in its response to Senator Wetston's call for submissions on Canada's competition policy framework. The paper, entitled " Examining the Canadian C*ompetition Act* in the Digital Era", identifies areas that the Competition Bureau believes are ripe for modernization. The paper, and Senator Wetston's request for submissions, occur during a time when the federal government has indicated an openness to amending the *Competition Act*. While nothing in the Bureau's submission has the force of law, the Bureau's views on these matters will undoubtedly be taken very seriously, and some of the amendments the government is already considering mirror those in the Bureau's submission. Consequently, the Bureau's paper provides insight into the future direction of competition law in Canada.

Below, we summarize some of the Bureau's key proposed changes. Leaving aside proposed merger review changes (as mergers are outside of the types of matters we generally deal with), the proposed changes can be grouped into five important themes.

First, a handful of the Bureau's proposed changes relate to expanding the scope of the *Competition Act* to proscribe additional conduct. Most notably, the Bureau proposes to expand the Act to include "buyer-side" conspiracies within the scope of section 45. Recent jurisprudence has held, consistent with the Bureau's policy statement on the issue, that such conspiracies are not actionable under the criminal provisions of the *Competition Act*. This is likely a reversal of a 2009 *Competition Act* amendment that removed purchaser conspiracies, thereby limiting enforcement of such activity. Canada's current approach can be contrasted with the approach taken by the United States, which does penalize buyer-side conspiracies. However, the proposal recognizes that "buyer-side" conspiracies can in some circumstances be harmful.

Second, the Bureau proposed a host of changes that, while not creating new proscribed conduct, would make various existing provisions of the *Competition Act* substantially easier to enforce. For example:

- With respect to ordinary selling price provisions of the Act, the Bureau proposes putting the burden on advertisers to prove that advertised discounts are truthful, rather than forcing the Commissioner to prove such statements are deceptive.
- The Bureau's submission proposes explicitly making drip pricing—a pricing strategy where consumers are initially presented with one price, only for additional fees to be included later in the purchase process—unlawful under the Act. While the Bureau has taken action in past drip pricing cases under the more general deceptive marketing provisions of the Act, the proposed provision would strengthen the Bureau's power to prosecute such cases.
- With respect to competitor collaboration, the Bureau proposes bringing past agreements within the scope of the applicable provision, as well as removing the efficiencies defence.

Third, the Bureau recommended increasing penalties for conduct that contravenes the Act. In particular, the Bureau recommended increasing administrative monetary penalties for both abuse of dominance and deceptive marketing practices, as well as increasing fines available in conspiracy cases. It also recommended making administrative monetary penalties available for breaches of the competitor collaboration provisions at section 90.1.

Fourth, the Bureau proposed a series of reforms that would have the effect of increasing private enforcement of competition law, particularly at the Competition Tribunal. It proposed allowing private parties to seek leave to commence proceedings either under the abuse of dominance or competitor collaboration provisions, the enforcement of which are currently the exclusive domain of the Commissioner. The Bureau also recommended potentially lowering the standard to make leave to proceed easier to obtain under section 103.1 of the Act.

Fifth, the Bureau has proposed a host of procedural changes, including:

- immunizing the Commissioner from cost awards;
- increasing its ability to gather information in civil reviewable matters; and
- changing the process for examinations under section 11 of the Act.

It will be important for businesses to watch these developments going forward. While only a handful of these changes impact the

substance of the Act, many will likely increase both the probability and consequences of enforcement.