Cassels

Cassels on Competition Special Edition - Sweeping and Fundamental Legislative Changes to Canadian Competition Law

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There has been a torrent of competition law-related developments in Canada since October when the federal government announced a first set of amendments to the *Competition Act* (the Act) in Bill C-56, the *Affordable Housing and Groceries Act*.

In order to fast track the enactment of Bill C-56, the minority Liberal government recently agreed to adopt certain amendments to the Act proposed by their coalition partners – the New Democratic Party – (the NDP Amendments), including:

- **Important Safeguard Removed from Market Studies Provision**: Previously, Bill C-56 required the Commissioner of Competition to obtain approval from the Minister of Industry before initiating a market study. The NDP Amendments will give the Commissioner the unilateral power to initiate market studies;
- **Increased Penalties for Abuse of Dominance**: The NDP Amendments will increase the financial penalties (AMPs) for abuse of dominance (section 79). Currently, they are the greater of $10M (or $15M for subsequent order) or three times value of benefit derived or, if that amount cannot be determined, 3% of a person's worldwide turnover. The amendments propose raising the maximum AMPs to the greater of **$25M** (or **$35M** for subsequent order) or three times value of benefit derived or, if that amount cannot be determined, 3% of a person's worldwide turnover;
- **Lower Test for Abuse of Dominance**: Currently, a remedial order can only be made under the abuse of dominance provision (section 79) if three elements are established: (a) the person against whom the order is sought is dominant in a market; (b) that person has engaged in a practice of anticompetitive acts; *and* (c) those acts have, are or will substantially lessen or prevent competition in the relevant market. The NDP Amendments will make it easier for the Commissioner and private litigants to obtain an order prohibiting a dominant firm from engaging in anticompetitive conduct by requiring them to establish only *either* (i) dominance and anticompetitive acts *or* (ii) dominance and anticompetitive effects. All three elements would still need to be established before other remedies, including AMPs, could be imposed; and
- **Excessive and Unfair Selling Prices Can Constitute Abuse of Dominance**: "Directly or indirectly imposing excessive and unfair selling prices" will be added to the non-exhaustive list of anti-competitive acts that can constitute an abuse of dominance.

While the government was hoping to fast-track Bill C-56 so that it would be enacted before year's end, delays in securing an agreement with the NDP have put that timeline in jeopardy. We anticipate that Bill C-56 will receive royal assent in January, after Parliament returns from the holidays.

On November 30th, the government also tabled *An Act to implement certain provisions of the fall economic statement* (Bill C-59). The new legislation will make further, fundamental changes to Canadian competition law.

The Floodgates for Private Competition Litigation Have Been Thrown Open

Historically, private competition litigation under the Act was a relatively limited phenomenon (outside of the class action context). The reasons for this included that private litigants could only seek to recover compensation for alleged breaches of the criminal provisions of the Act (e.g., conspiracy and bid-rigging) and, while private parties were entitled to seek leave from the Competition Tribunal to apply for an order prohibiting conduct violating certain civil provisions of the Act (i.e., refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77) and abuse of dominance (section 79)), that parties rarely satisfied the test for leave.

Bill C-59 will effect a competition litigation sea-change in Canada.

In addition to **expanding private access to the Tribunal** to include civil agreements (section 90.1) and deceptive marketing practices (section 74.1), the legislation **relaxes the test for leave** and will permit private parties to sue to recover **monetary awards** – up to the value of the benefit derived from the conduct in issue – for refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79) and civil agreements (section 90.1), but not for deceptive marketing practices, except in the case of representations to the public that are found to be materially false or misleading (section 74.01(a)), where an applicant may seek "an amount, not exceeding the total of the amounts paid to the [advertiser] for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold… in any manner that the court considers appropriate."

Changes to the Merger Regime Will Mean More Notifications and More Litigation

Bill C-59 **expands the categories of revenues to be counted** in determining whether a proposed transaction is subject to mandatory pre-closing notification under the Act.

It also **extends the limitation period** for the Commissioner to challenge completed transactions that were not notified to the Competition Bureau from one to three years.

Where the Commissioner decides to challenge a merger and files an interim injunction application, the parties will be **automatically enjoined** from closing until that application has been heard and determined.

And on the merits of a merger challenge, Bill C-59 **removes the Act's current interdiction of the Tribunal from finding that a merger is anticompetitive solely on the basis of concentration or market share**, while also adding "any effect from the change in concentration or market share that the merger or proposed merger has brought about or is likely to bring about" as a factor that may be considered by the Tribunal in determining whether an impugned transaction is anticompetitive.

Increased Competition Law Risk for Civil (Collaboration) Agreements

As discussed in our October Cassels Comment, Bill C-56 proposes to amend the civil agreements provision (section 90.1) to **capture agreements or arrangements between and among non-competitors** if a "significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market."

Bill C-59 contemplates two additional changes to this provision (which prohibits agreements or arrangements among competitors that are likely to prevent or lessen competition substantially in a market).

First, section 90.1 currently only applies to existing or proposed agreements or arrangements. As a result of Bill C-59, **section 90.1 will also capture past agreements or arrangements**.

Second, Bill C-59 **expands the potential penalties for a breach of section 90.1**. In addition to a prohibition order (which is the only sanction currently available), the Tribunal will be able to impose AMPs equal to the greater of up to $10M (or $15M for subsequent order) or three times value of benefit derived or, if that amount cannot be determined, 3% of a person's worldwide turnover and to order a person to take such action, including the divestiture of assets or shares, that are reasonably necessary to overcome the effects of the agreement or arrangement in issue.

Green Advertisers Beware!

As amended by Bill C-59, the Act's deceptive marketing provisions will **expressly prohibit certain "greenwashing" claims**; namely, the making or giving of a statement, warranty or guarantee of a product's (or service's) benefits for protecting the environment or mitigating the environmental and ecological effects of climate change that is not based on adequate and proper testing conducted *before* the

statement, warranty or guarantee was made or given.

As with the existing deceptive marketing provisions, a breach of the new greenwashing prohibition will expose advertisers to a maximum fine equal to the greater of up to $10M (or $15M for subsequent order) or three times value of benefit derived or, if that amount cannot be determined, 3% of a person's worldwide turnover.

Right to Repair

Through an expansion of the refusal to deal provision (section 75), Bill C-59 will empower the Tribunal to **compel a supplier to supply the means of diagnosis or repair** (i.e., diagnostic and repair information, technical updates, diagnostic software or tools and any related documentation and service parts, excluding information that is a trade secret).

The Commissioner Will be Able to Bring Cases Without the Risk (or Discipline) of Adverse Costs Awards

The Commissioner has been pushing for some time to be exempted from the traditional loser-pays costs rule that applies to litigants in most Canadian litigation.

Bill C-59 creates a presumption that costs will not be awarded against the Commissioner unless the Tribunal or court is satisfied (i) that an award is necessary to maintain confidence in the administration of justice or (ii) the absence of an award would have a substantial adverse effect on the other party's ability to carry on business.

We expect that Bill C-59 will also receive royal assent early in the new year. The amendments relating to private right of access will take effect one year after royal assent. Otherwise, the amendments will take immediate effect.
