Canada needs more competition

From: Competition Bureau Canada

Speech

Pre-recorded remarks from Matthew Boswell, Commissioner of Competition

Canadian Bar Association Competition Law Fall Conference

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Good afternoon and thank you for inviting me to speak at this year's Fall CBA competition law conference.

Before I begin, I would like to acknowledge that I am recording this message to you from the traditional unceded territory of the Algonquin Anishnaabeg People, and I am grateful to be speaking to you from these lands.

It's unfortunate that we have to gather again remotely. While I know we would rather be meeting in person, these discussions are essential, especially as Canada pivots from pandemic crisis management to economic recovery. This year's conference serves to raise awareness of the power competition can play in building a more prosperous Canada.

As I've said before in various settings, Competition matters. It is a key catalyst of productivity and economic growth. It attracts investment, stimulates the creation of high-skilled jobs and fuels exports of Canadian products, services, and ideas.

In simpler terms,

- Competitive prices and product choices matter to consumers, particularly those struggling to make ends meet in the wake of the pandemic.
- Competitive wages and employment opportunities matter to workers, particularly those who remain unemployed or underemployed.
- Open and contestable markets matter to entrepreneurs and businesses of all sizes, but especially to small- and medium-sized enterprises who were among the hardest hit by the pandemic and who will need to reopen and expand in order to replace lost jobs.
- Competitive markets are also important to governments and taxpayers, who expect value for money on increased spending in the near-term, and who will want to grow the economy to pay down national debt over the longer-term.

Today, competition matters more than ever. In Canada, a robust competition policy agenda will be critical to rebuilding stronger, more resilient and more inclusive economies from coast to coast to coast.

Globally, we are witnessing a dramatic international shift towards more aggressive enforcement of competition laws. This includes sweeping proposals to review and revamp existing competition laws. Governments around the world are looking for ambitious solutions to not only drive recovery efforts, but to tackle legacy challenges and build back better. We are seeing new policies that put competition at the heart of economic recovery and growth, particularly in digital markets.

Since I took over as Commissioner in 2018, you have heard me express serious concerns about our budget. In short, to successfully fulfill our mandate, I believed the Bureau needed more resources.

I'm pleased to say that the Bureau will receive an additional $96 million dollars over the next 5 years and $27.5 million per year ongoing. As such, for us, the next few years will bring about welcome change and growth.

We have earmarked three key areas for investment:

- We will increase our capacity to take on new and more complex anticompetitive conduct, especially in digital markets. This includes the creation of a new Digital Enforcement and Intelligence Branch. This Branch will grow to become a centre of expertise on technology and data and act as an early-warning system for potential competition issues in the digital and traditional economies;
- We will strengthen our enforcement teams by hiring more people, including bringing on more litigation capacity, and *external* experts; and,
- We will enhance our capacity to advocate for pro-competitive regulatory and policy changes at all levels of government in Canada.

We are excited to put these funds to work to benefit Canadians. This is good news for consumers and businesses who will benefit from more timely and robust action to protect the public interest.

However, I do want to clarify a point. The Bureau's merger review program will *not* benefit directly from these changes, as it's funded entirely through filing fees. Merger reviews have become more expensive and complex, particularly in light of recent court decisions. There will be another merger filing fee review in less than two years and this will provide an opportunity to properly fund operations in line with current realities and demands.

These recent investments are absolutely a step in the right direction, but they are only part of the solution in our efforts to better protect the public interest and promote competition.

Money alone will not solve Canada's competition challenges which include high levels of business concentration, weak business dynamism and widespread regulatory barriers to competition.

In the last 6 months alone, many commentators have raised concerns about whether the Bureau has the right the tools under the *Competition Act* to take necessary and meaningful enforcement action and protect competition in Canada.

Some of the concerns highlighted by commentators include:

Weak maximum available criminal fines and civil penalties. These fines and penalties don't meaningfully deter anti-competitive conduct or promote compliance for large companies in today's digital marketplace, they are merely the cost of doing business;

Overly strict and impractical legal tests to prevent anti-competitive mergers;

The absence of private enforcement tools to deter anti-competitive behaviour such as abuse of dominance; and

Gaps in our cartel law, which mean that those conspiracy provisions do not protect workers from egregious agreements between competitors that fix employees wages and restrict workers' job mobility.

I can tell you unequivocally that, in the ten plus years I have served the public interest in competition matters, I have encountered these problematic issues and many others.

As a law enforcement agency, job number one is, and will continue to be, to enforce the law.

Our voice in the conversation about the law is informed by experience enforcing and applying the law as it stands today and it is one of the voices in the conversation.

As I have said before, my experiences, and those of my colleagues, have led me to conclude that Canada needs a comprehensive review of the *Competition Act*. We need to have a debate in Canada about what our competition law should look like in the 21st century. Modernizing our laws for today's reality will better protect and promote competitive markets for the benefit of all Canadians and Canada's long-term economic prosperity.

We cannot afford complacency, particularly as our international partners work quickly to strengthen their own tools to promote and protect competition in their jurisdictions.

Canada needs more competition to keep products and services affordable for Canadians and to grow its economy. The status quo is impacting Canadians now. Inaction will harm the economy in the long term. As we recover from the wide-spread economic impacts of a global pandemic, it's time to make competition a priority.

The recent injunction decision by the Competition Tribunal on Secure's acquisition of Tervita further crystallizes the need for a comprehensive review of our laws. In its decision, the Tribunal denied our injunction against a merger and clarified the high bar that needs to be met to prevent mergers that we allege are anti-competitive.

In many ways, merger review is the first line of defence in protecting competition in the Canadian economy. While only a small number of mergers raise serious competition issues, those that do can cause very significant and irreparable harm to consumers and the economy. In these cases, the Bureau must be able to take timely and effective action to protect the public interest.

I will be blunt. The tribunal allowed a transaction to proceed that it concluded would likely cause irreparable harm to the public interest and competition. Yet, this transaction was allowed to proceed prior to the hearing of all of the evidence on the Application. This raises valid concerns about the state of competition laws in Canada.

In short, the Tribunal concluded that the Bureau had an obligation to provide a "ballpark" estimate, in dollars, of the harm to the economy at the injunction stage. The Tribunal concluded that it required this estimate to weigh against the evidence of harm Secure would suffer due to the delayed realization of the claimed efficiencies.

This decision has significant implications for how we conduct future merger reviews, particularly in cases where there are competition concerns and parties are unwilling to provide a timing agreement to delay completion of their merger.

In such cases, we will have very little time to conduct a rigorous and thorough review of the evidence – including reviewing potentially hundreds of thousands of documents and significant volumes of data – to prepare an injunction application.

Given our mandate to protect the public interest, this may mean that we must pursue a litigation-focused approach that is costly and less predictable for merging parties. This, of necessity, will mean less transparency and engagement from case teams in matters with no meaningful and reasonable timing commitment. Not surprisingly, we will prioritize protection of the public interest and preparation for litigation in those cases.

More broadly, the Secure merger also highlights the role of efficiencies under Canadian competition law – a much debated issue over the last 35 years. With increased clarity from the courts on the application of the defence, it's important to take stock of where we are now.

The efficiencies defence, which is unique to Canada, requires a trade-off analysis whereby an anticompetitive merger is allowed to proceed if it produces gains in efficiency that are greater than and offset its anti-competitive effects. This creates a path for anti-competitive mergers to be cleared if the efficiencies are large enough.

Even for mergers that result in monopolies.

Even for mergers that raise prices for consumers.

While some early commentators hailed Canada as a leader in its pro-efficiency treatment of mergers, with the passage of time, three things have now become clear from a law enforcement perspective.

First, since the efficiencies defense was included in our law in 1986, no other G-7 country has followed Canada's approach. This should be cause for concern. In fact, most likeminded countries are looking to toughen up already tougher merger review laws.

Second, the efficiencies defence raises significant practical challenges for the Bureau to estimate and measure anti-competitive harm, especially in fast moving digital markets. These are markets where competition often depends on non-price dimensions such as innovation and quality, which are inherently difficult to measure.

Third, we are clearly seeing more and more use of this defence as parties realize how impactful it can be. Since 2015, there have been four mergers where either the Bureau or the courts have concluded a merger is likely to result in anti-competitive effects, including higher prices. Yet the efficiencies were thought to outweigh those effects. There are currently two more merger challenges before the Competition Tribunal where the efficiencies defence is in play

The consequences of increased concentration, higher prices and lower competition across sectors of the economy – all in the name of merger efficiencies – are very real for consumers and our economic performance as a country. It's high time we pause and ask ourselves whether our competition laws are really working in the best interest of all Canadians.

Around the world, countries are already tackling these challenges head-on. Internationally, the review of competition laws has become a priority. The US, UK, Europe and Australia are actively working to modernize their laws and increase competitive intensity in their economies. These countries are not only developing stronger laws to protect consumers they are becoming more vigorous in enforcing existing laws.

In the US, there is an intense focus on the need for increased competition in the economy. Not only is there a new bipartisan package of bills before Congress to strengthen US competition laws, but there is also a recent White House Executive Order that aims to promote competition in many areas of the American economy.

The Executive Order is noteworthy for two reasons:

1) it illustrates the central role that promoting competitive markets plays in the US's economic recovery agenda, and

2) the US administration is taking a whole-of-government approach to develop and coordinate federal actions in support of a more competitive U.S. economy.

As multiple peer countries move to modernize their suite of competition laws and take action to boost competitive intensity across their industries, Canada remains at a standstill. Lower competitive intensity at home would not only be felt through higher prices but further weaken our productivity and global competitiveness in the long run. Although new investments in the Bureau will help us do more to protect the public interest, our laws must be modernized to keep pace in a fast-moving environment.

As the person responsible for the enforcement of our competition laws, I strongly believe that Canada needs to act quickly. Acting now to create the right circumstances for competition is key to building a stronger economy that works for all Canadians, especially the poorest segments of society.

Fourteen years ago, the federal government commissioned a report on the state of Canada's competition policy regime. The final report of the Competition Policy Review Panel, entitled *Compete to Win*, included two noteworthy conclusions:

- competition is the key to increasing Canadian productivity and prosperity, and
- Canada does not place sufficient importance on competition.

The word "digital" appeared only twice in the *Compete to Win* 134-page final report. At that time, Netflix didn't offer streaming service in Canada and we were still renting movies from Blockbuster. Today, autonomous cars share the road and goods are purchased using blockchain technology.

It has also been 14 years since the last review of the *Competition Act*.

So much has changed since then. It's a new era. The pace of change is speeding up as is the urgency to re-examine our laws. Canada is lucky to have an incredibly knowledgeable community of competition law practitioners and thought leaders. Individuals, like you, with dynamic ideas on how to improve competition policy here at home. And there is plenty of inspiration to draw from abroad.

As Commissioner, I will continue to protect and promote competition as a driver of economic and inclusive growth in the wake of a global health crisis.

Thanks again for inviting me to speak at this year's CBA competition law fall conference.

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