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Canadian Competition Law Outlook

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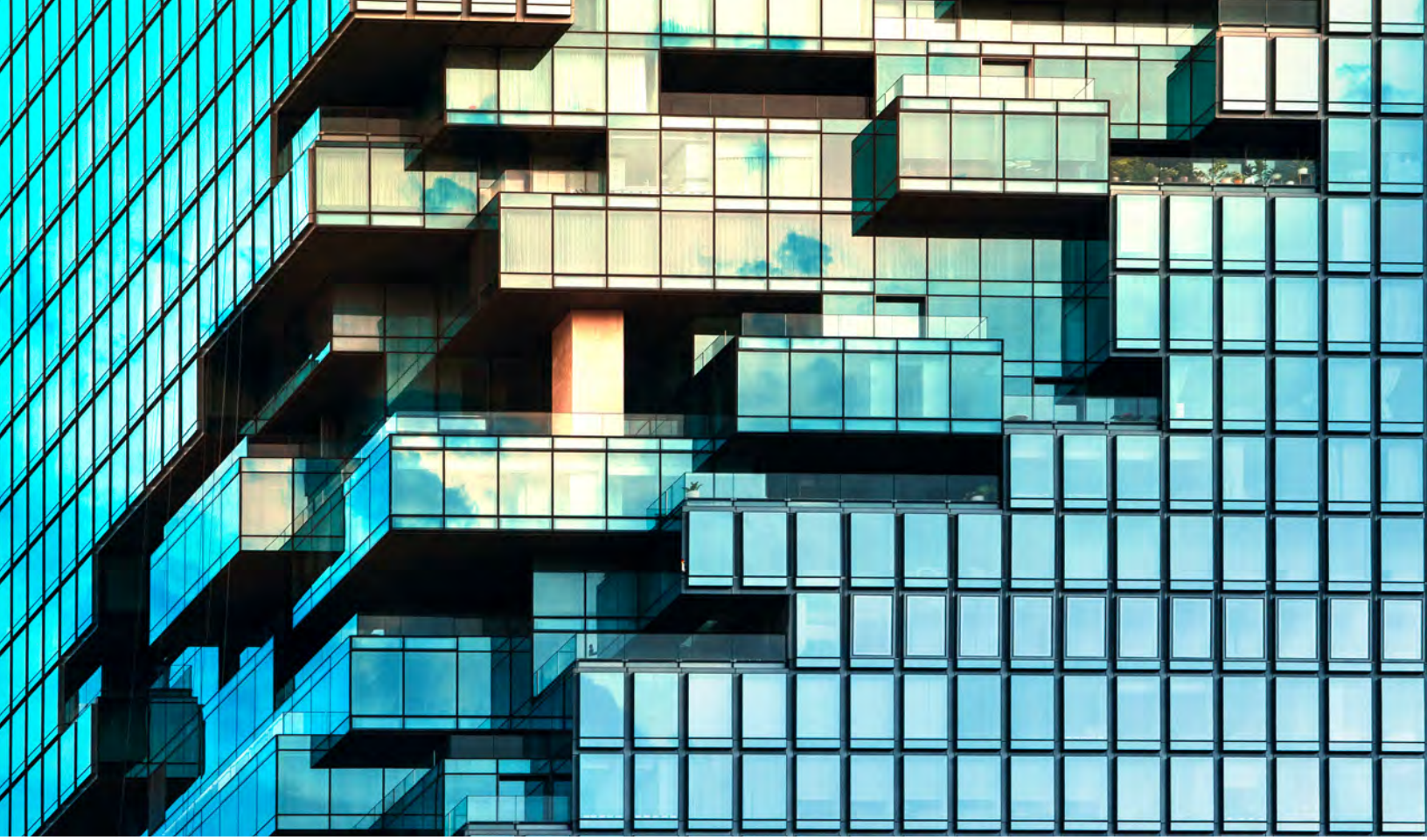

Canadian Competition Law Outlook: Continued Expansion and Increased Enforcement as Reforms Continue to Take Shape in 2024

Competition law in Canada continues to expand in scope and importance. Given recent and pending reforms, a wider range of practices can be subject to investigations under the *Competition Act* (Act), penalties for non-compliance are more significant, and private parties will soon be able to bring disgorgement claims for practices that were otherwise considered relatively benign.

Since the beginning of 2022, the one constant for the Act has been expansion. The scope of the Act was expanded in 2022 and again in 2023. It will be further amended in 2024. These three waves of amendments amount to the most sweeping set of changes to the Act in a generation and will have broad implications for businesses in Canada.

The following is a summary of the most important recent and proposed amendments.

- **2022 Amendments — Higher Fines, New Prohibition on Wage-Fixing and No-Poach Agreements.** Several important amendments to the Act were enacted and came into effect on June 23, 2022. The amendments included increased administrative monetary penalties (AMPs) for abuse of dominance and misleading advertising, broadening the scope of abuse of dominance, introducing a private right of access for abuse of dominance, specifying "drip pricing" as deceptive marketing, and introducing an anti-avoidance

rule for merger notification. In addition, wage-fixing and no-poach agreements became criminal offences, and the C$25-million cap on fines for a breach of the Act's criminal conspiracy provision was eliminated as of June 23, 2023. For more details regarding the 2022 amendments, see our *Blakes Bulletin: Proposed Competition Law Amendments in Canada Set to Significantly Expand the Scope of the Competition Act*.

- **2023 Amendments — New Market Study Powers, Expanded Scope of Abuse of Dominance Provision and Expanded Competitor Collaboration Provision.** The Act was amended again to introduce a new market study power, eliminate the efficiencies defence for mergers and overhaul the abuse of dominance provision by (i) making it easier to meet the legal test, (ii) introducing a new anticompetitive act relating to price gouging ("directly or indirectly imposing excessive or unfair selling prices"), and (iii) increasing, again, the AMPs for abusive conduct. These amendments came into effect on December 15, 2023. In addition, as of December 15, 2024, certain collaborations between non-competitors could be subject to enforcement under the civil collaborations provision, and the efficiencies defence for civil collaborations will be eliminated. For more details regarding the 2023 amendments, see our *Blakes Bulletin: Competition Law Update: Parliament Approves Next Wave of Competition Act Amendments*.

- **2024 Amendments (Proposed) — New Private Right of Action for Damages, Expansion of Pre-Merger Notification Regime.** In late 2023, the government proposed further amendments to the Act that will, if enacted, significantly expand private parties' ability to sue and seek remedies for breaches of the Act, expand the possible remedies for anti-competitive civil collaborations (e.g., joint ventures) to include AMPs and divestitures, enhance both the merger notification regime and the Competition Bureau's (Bureau) ability to challenge mergers, and expressly capture greenwashing as misleading advertising. For more information regarding these proposed amendments, see our *Blakes Bulletin: Revamping the Rules: Canadian Competition Act Update*.

Future Implications

The most recent set of amendments is likely to become law in the early part of 2024. Additional amendments may be forthcoming, considering that the federal government's discussion paper, *The Future of Competition Policy in Canada*, and the Bureau's submission to the government's consultation on the Act, suggested additional reforms to the Act that are not reflected in any of the recent amendments.

As described below, the new competition law landscape creates a number of practical implications for businesses in Canada. At a high level, the key takeaways for businesses are:

- **More complex and dangerous regulatory landscape.** Risks for non-compliance with the Act are increasing, and companies should reassess their conduct in light of the new rules.
- **Competition law compliance measures need to be updated.** There are a number of substantive and procedural changes to provisions dealing with a wide range of business practices. Compliance measures should be updated to ensure that existing programs and protocols are up to date.
- **Spectre of private enforcement.** The forthcoming expansion of private enforcement of the Act (including monetary compensation for civil breaches of the Act) means that companies should pay more attention to complaints from competitors, customers and suppliers, and the possibility of strategic litigation based on competition law grounds.

Abuse of Dominance: Market Leaders Beware

The Act's abuse of dominance provisions are the only provisions that were subject to the three sets of amendments introduced to date. In 2022, a right of private access was introduced for abuse, the maximum AMPs were significantly increased and the scope of anti-competitive acts that could qualify for abuse of dominance were broadened. In 2023, the legal test for abuse was revised, AMPs were further increased and additional anti-competitive acts were introduced. In 2024, further amendments will introduce the ability for private parties to obtain compensation for successfully pursuing an abuse of dominance application. Key elements of the 2022 and 2023 amendments are outlined below:

- **Revised legal test.** Abuse of dominance previously required a finding of (a) dominance, (b) a practice of anti-competitive acts, and (c) a likely substantial lessening or prevention of competition. Now, the Competition Tribunal (Tribunal) can issue a prohibition order based only on a finding of (a) plus, either (b) or (c). However, all three elements must still be met for a mandatory order (e.g., divestiture) or AMP to be issued.
- **Broadened anti-competitive acts.** In 2022, a wider definition of an "anti-competitive act" was introduced, capturing any act intended to "have an adverse effect on competition," in addition to those intended to have a predatory, exclusionary or disciplinary negative effect on a competitor." In addition, two new anti-competitive acts have been introduced: "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market" and "directly or indirectly imposing excessive and unfair selling prices."
- **Increased AMPs.** The maximum AMP is the greater of C$25-million (C$35-million for repeat conduct), and three times the value of the benefit (or, if that cannot be reasonably determined, 3% of worldwide revenues). This is a significant increase from the maximum AMP of C$10-million (C$15-million for repeat conduct) at the beginning of 2022.

Key takeaways for businesses:

- **Enforcement Increase.** The Bureau and private parties will be incentivized to pursue abuse of dominance applications before the Tribunal given the broader scope of the offence and the ability for private parties to obtain compensation if successful.
- **Conduct reassessment.** Firms that may be dominant should reassess their conduct given changes to the legal test for abuse, the broadened scope of conduct that may be considered an anti-competitive act and significantly increased penalties for abuse.

Merger Reviews: Bureau Likely to Be More Assertive

The Bureau will continue to aggressively oppose mergers, including non-notifiable mergers, that it views as anti-competitive. The Bureau has challenged four mergers before the Tribunal since 2019. This follows a period of more than a decade where the Bureau only challenged three mergers in total. Of the four more recent challenges, one was resolved via a consent agreement while the other three led to full hearings before the Tribunal. The Bureau's Merger Intelligence and Notification Unit will continue to support the Bureau's merger enforcement efforts including by reviewing press releases, trade publications and other sources to identify non-notifiable mergers that may give rise to concerns. The Bureau's efforts will also be aided by proposed amendments to the Act, enhancing the Bureau's ability to investigate and challenge mergers by:

- **Broadening the net.** Sales "into" Canada will be included in the requisite "size of transaction threshold" for mergers.
- **Modifying substantive elements.** Labour market effects will be expressly included in determining whether a proposed merger will prevent or lessen competition substantially. In addition, effects from increases in market share or concentration and the likelihood that the proposed transaction will result in express or tacit coordination between competitors will be added as factors to be considered in determining the competitive effects of a merger.
- **Enhancing ability to prevent closing.** The proposed amendments will automatically impose an interim injunction prohibiting parties from closing while the Commissioner of Competition has a pending application to seek more time to review the merger or to prevent a merger from closing until a challenge on the merits is concluded.
- **Extending limitation period for non-notifiable mergers.** Under the proposed amendments, a merger that has not been notified to the Bureau can be challenged for up to three years after closing. The current limitation period is one year after closing. The one-year limitation period will continue to apply for mergers that have been notified to the Bureau.

Key takeaways for businesses:

- **Continued focus on merger enforcement.** Businesses should expect that the Bureau will continue its focus on merger enforcement, including actively following media and business press to identify non-notifiable mergers that may give rise to concerns.
- **Greater risks for non-notifiable mergers.** Given the proposed three-year post-closing limitation period to challenge non-notifiable mergers (increased from one year), merging parties may consider seeking pre-closing clearance from the Bureau in appropriate circumstances.

Misleading Advertising: Be Careful What To Say (and How to Say It)

Deceptive marketing will continue to be a key enforcement area in 2024, and the Bureau will continue to actively pursue investigations, including exercising its authority under the Act to obtain court orders requiring parties to produce information relevant to the Bureau's review in appropriate cases. Moreover, the misleading advertising provisions of the Act will continue to evolve in 2024, including proposed amendments to:

- **Introduce express consideration of environmental claims.** Codify greenwashing as deceptive marketing under the civil misleading advertising provisions of the Act. Greenwashing involves making representations regarding a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change unless prior adequate testing substantiates those claims.
- **Address drip pricing.** Amend the criminal and civil misleading advertising provisions to state that drip pricing in online and electronic communications is false or misleading. Drip pricing involves advertising a price that is ultimately not obtainable due to mandatory fees, other than taxes. This aligns with the 2022 amendments to the Act that introduced identical drip pricing clauses into the general misleading advertising provisions.
- **Expand private access.** Introduce a new private right of access for private parties (with leave from the Tribunal) for deceptive marketing. Penalties could include prohibition orders, compensation for persons who bought the products as a result of the misleading advertising and AMPs.

Key takeaways for businesses:

- **Increased scrutiny of environmental claims.** Advertisers must carefully consider the wording and general impression conveyed by environmental claims and ensure that any such claims are supported by adequate and proper testing prior to making them.
- **Continued focus on drip pricing.** Advertisers should reevaluate and update their pricing policies and review their internal compliance programs to avoid engaging in drip pricing practices both online and offline.
- **Risk of private enforcement.** The introduction of a private right of access will provide private parties (e.g., consumer advocacy groups, environmental groups) with another avenue to challenge allegedly misleading claims by proceeding directly to the Tribunal rather than through the Bureau.

Increased Penalties: A Heavier Hammer

Beginning in 2022, numerous amendments have been introduced to increase penalties for non-compliance with the Act and to deter anticompetitive conduct.

In 2022, AMPs for abuse of dominance and civil deceptive marketing were increased to the greater of C$10-million (C$15-million for a subsequent offence) and three times the value of the benefit or, if that cannot be reasonably determined, 3% of worldwide revenues. The C$10-million and C$15-million AMPs for abuse of dominance have since been increased to C$25-million and C$35-million, respectively.

In 2023, the maximum fine under the criminal conspiracy provision of the Act, including the new criminal prohibition against wage-fixing and no-poach agreements, was amended to be at the discretion of the court (increased from a maximum of C$25-million). This is in addition to potential jail time and any civil liability from class actions.

In 2024, the Bureau will obtain new tools to address non-compliance for:

- **Failure to file pre-merger notifications.** Currently, the only remedy for failure to notify a merger is criminal prosecution with a maximum penalty of C$50,000 (while the current filing fee exceeds C$80,000). Proposed amendments will allow the Bureau to seek an AMP of up to C$10,000 per day of non-compliance and any other relief the court considers appropriate.
- **Non-compliance with a consent agreement.** A consent agreement is equivalent to a court order and breach of a consent agreement is a criminal offence. However, the Bureau would need to seek a civil contempt order to enforce compliance. This requires a show cause hearing and proof beyond a reasonable doubt, making it a cumbersome mechanism to utilize. Proposed amendments will allow the Tribunal to order compliance, impose an AMP of up to C$10,000 per day of non-compliance and order any other relief it considers appropriate.
- **Civil competitor collaborations.** Today, the only remedy for an anti-competitive competitor collaboration is a prohibition order. Proposed amendments will expand these remedies by permitting the Tribunal to make mandatory orders (e.g., divestiture) and to impose an AMP of up to C$10-million (C$15-million for a subsequent offence) or three times the value of the benefit derived from the agreement or, if the benefit cannot be reasonably determined, 3% of worldwide revenues.

Key takeaways for businesses:

- **Increased for risks of non-compliance.** Companies should be cognizant that the potential financial consequences of non-compliance have become significantly more expensive.
- **Easier enforcement for Bureau.** Criminal prosecution or civil contempt, both of which have the stringent "beyond a reasonable doubt" standard, are often the only options for disciplining non-compliance. The proposed civil mechanisms, which will have the looser "balance of probabilities" standard, will make it easier for the Bureau to bring and succeed in applications challenging non-compliance.

Private Action: Claims for Monetary Compensation Available for Wide Range of Conduct

Private parties have long had the ability to seek leave of the Tribunal to bring an application with respect to certain restrictive trade practices under the Act. However, relatively few applications have been brought, and even fewer have been granted leave. In 2022, this right of private access was expanded to include the abuse of dominance provisions of the Act. In 2023, the first case (subsequently discontinued) was brought seeking leave to bring an abuse of dominance application. Proposed amendments to the Act will broaden the scope of private access, lower the threshold for obtaining leave and introduce a disgorgement remedy for private applications. More information below:

- **Lowering the threshold.** The threshold for a private party to obtain leave to bring an application will be reduced by requiring only that the applicant's business be substantially affected in whole or in part or where the private party has demonstrated that it is in the public interest to do so. The existing requirement of proving that an applicant's whole business is affected has been a stumbling block in getting leave.
- **Broadening the scope.** The right of private access will be expanded to permit private parties to seek leave of the Tribunal to bring an application under the civil deceptive marketing provisions and the civil competitor collaboration provisions.
- **Providing compensation.** The Tribunal will be permitted to order payment to private applicants in the amount of the benefit derived from the conduct at issue for violations of the Act's civil reviewable trade practices provisions (refusal to deal, price maintenance, exclusive dealing, market restriction, tied selling, abuse of dominance, and civil competitor collaborations). For misleading advertising, the Tribunal will be permitted to order restitution in private actions.

Key takeaways for businesses:

- **Expected increase in private litigation.** With a lower threshold for obtaining leave and the introduction of compensation for successful applications, private litigants will be incentivized to pursue matters before the Tribunal.
- **Enhanced opportunity for strategic litigation.** Expanded rights of private access enhance the opportunity for third parties to pursue private access to the Tribunal in furtherance of commercial goals.

Blakes Resources

Blakes has a number of client resources designed to help businesses navigate the complex and evolving Canadian competition law landscape. If you are interested in receiving a copy of these resources, please contact any member of the Competition, Antitrust & Foreign Investment group visit www.blakes.com/insights.

Market Studies Toolkit

Competition Law Investigations and Compliance: A Toolkit for Managing Risk

Toolkit for Merger Planning and Review: A Guide to Getting Your Deal Done in Canada

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