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Alicia Quesnel is a managing partner at Burnet, Duckworth & Palmer LLP. She can be contacted on +1 (403) 260 0233 or by email: akq@bdplaw.com.

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Generational changes to Canada's competition law framework

BY ALICIA QUESNEL

The Competition Act is a Canadian federal statute that governs competition in Canada. The commissioner of competition is appointed by the federal cabinet and is responsible for the administration and enforcement of the Act. The Competition Bureau, an independent law enforcement agency, assists the commissioner to carry out his or her duties. The Competition Tribunal is the federal adjudicative body in Canada responsible for cases regarding civil provisions of the Act.

Canada has been undertaking significant reform of its competition laws over the past two years, with significant amendments coming into effect on 23 June 2022, 15 December 2023, 15 December 2024, 20 June 2024 and 20 June 2025. These changes have been referred to as a "generational upgrade in our competition law framework". In many respects, the amendments align Canada's laws with those of its major trading partners, such as the UK, the European Union and the US. In other respects, the amendments are unique to Canada's own competition law framework. In any case, greater financial penalties, more active enforcement by the commissioner, as well as increased rights of enforcement by private entities will require Canadian businesses to pay much closer attention to the laws that govern competition in Canada.

New focus on labour markets. The Act has been amended to provide the commissioner with more significant enforcement rights for agreements or arrangements that undermine or substantially impact labour markets. New criminal conspiracy provisions make it unlawful for employers, whether or not they are competitors, to fix, maintain, decrease or control salaries, wages and even more broadly, terms and conditions of employment, or to agree not to solicit or hire each other's employees. Under the civil provisions of the Act, a merger or other collaboration between competitors or others that has the effect of preventing or lessening competition (or is likely to have that effect), among the sources or outlets from which a trade, industry, product or profession obtains or disposes of a product, including labour, is actionable. Collective bargaining unions continue to be exempt from these provisions.

Greenwashing and reverse onus. The provisions of the Act related to civil deceptive marketing practices have been amended to include representations related to untested or unsubstantiated environmental claims, often referred

to as greenwashing. These are untested or unsubstantiated claims of a product or service's benefits, or the benefits of a business or business activity for protecting the environment or mitigating the environmental and ecological causes and effects of climate change. If the representation relates to the benefits of a product or service, the representation must be based on an "adequate and proper test". If the representation relates to the benefits of a business or business activity, the representation must be based on "adequate and proper substantiation in accordance with internationally recognized methodology". In both cases, the onus of proving the claim falls on the person making the representation. While there is case law under the current Act with respect to the meaning of "adequate and proper test", the scope and meaning of "adequate and proper substantiation in accordance with internationally recognized methodology" is new and uncertain. Many businesses have expressed significant concern over this uncertainty.

Drip-pricing. Drip-pricing involves offering a product or service at a price that does not represent the true selling price because consumers must also pay additional charges or fees (exclusive of government taxes and charges). While the Bureau has been taking successful enforcement action against drip-pricing under the general deceptive marketing provisions, which prohibit the making of representations that are false and misleading in material respect, the addition of specific prohibitions against drip-pricing will aid in the commissioner's enforcement of these provisions.

Mergers, market concentration and reverse onus. Very significant changes have been made to the merger provisions of the Act. The Act previously included an express provision that the Tribunal was prohibited from making a finding that a merger will be likely to, or will, prevent or lessen competition substantially in a market solely based on evidence of concentration or market share. As amended, if the concentration or market share of the merging parties exceeds certain thresholds, the parties are presumed to have market power and the merger is deemed to be likely to prevent or lessen competition substantially in a market. The Act adopts the controversial Herfindahl-Hirschman Index (HHI) to calculate concentration levels, with specified thresholds that can be changed by the governor in council. If the market power presumption and deeming provision applies, the onus of proof to establish (on a balance of probabilities) that the merger will not have these impacts will be on the parties to the merger and will no longer rest on the commissioner. Finally, the Act has also been amended to repeal the efficiencies defence, and to make it clear that the purpose of an order made by the Tribunal is to "restore competition to the level that would have prevailed but for the merger".

Abuse of dominance without anti-competitive practices. The amendments expand the scope of what constitutes abuse of dominance. Previously, a party that substantially or completely controlled a class or species of business in any area in Canada – a dominant firm – had to be engaged in a 'practice of anti-competitive acts' in order to contravene these provisions. Anti-competitive acts are acts that are intended to have a negative effect on a competitor that is predatory, exclusionary or disciplinary. While that test still applies, with the new amendments, a dominant firm that meets the initial dominance criteria can contravene the Act even if it is not engaged in a practice of anti-competitive acts. The commissioner only needs to establish that the conduct is having or is likely to have, a substantial prevention or lessening of competition that is not the result of superior competitive performance. This means that businesses with high market shares can contravene these provisions simply by engaging in practices that their smaller competitors engage in. While they may not intend to abuse their dominance, if the effect of their activities is to (or is likely to) substantially lessen or prevent competition in a market, their activities will contravene the abuse of dominance provisions.

Greater scrutiny of competitor collaborations. The civil provisions related to agreements or arrangements between competitors have also been expanded. Known as the "competitor collaboration" or "strategic alliance" provisions, they were originally designed to provide the commissioner with a civil remedy to address agreements and arrangements between competitors that had, were having, or were likely to have, a substantial prevent or lessening of competition in a market. The commissioner's remedies were limited to prohibiting the conduct, with no right to impose administrative monetary penalties. The amendments expand these provisions to include agreements or arrangements between firms, even if they are not competitors, if a significant purpose of the agreement or arrangement, or any part of it, is to substantially prevent or lessen competition in a market. This will now capture arrangements or arrangements between parties that have a vertical or customer supplier relationship, for example if they are designed or intended to have the resulting anti-competitive impact. In addition, if the tribunal does not believe that simply prohibiting the conduct will restore competition in the market, then on and after 20 June 2025, it may make an order directing the parties involved to take such actions as it considers necessary to overcome the effects of the practice in the market, including the divestiture of assets or shares and the imposition of administrative monetary penalties. Finally, effective from 15 December 2024, the efficiencies defence to anti-competitive strategic alliances will no longer be available.

Expanding private rights of action and remedies. Rights of private action permit private firms to apply to the Tribunal for leave to bring a case against a firm they believe has contravened the Act if the commissioner is not then dealing with the matter or has previously dealt with the matter. Private rights of action were previously in place for matters involving refusal to deal, price maintenance and exclusive tied selling and market restrictions. The amendments to the Act permit private rights of action for firms engaged in abuse of dominance, and on and after 20 June 2025, will permit private rights of action against persons engaged in deceptive marketing practices,

including the new greenwashing provisions, and anti-competitive strategic alliances. While private parties must seek leave of the Tribunal and different tests apply for different types of conduct, the tribunal can also order the impugned parties to pay an amount, up to the benefit they received as a result of engaging in the contravening conduct, to be distributed to the party bringing the private action and others, as the Tribunal directs.

Increase in application and amount of administrative monetary penalties. Prior to the amendments, administrative monetary penalties (AMPs) could only be assessed against persons engaged in deceptive marketing practices and abuse of dominance. With the amendments, on and after 20 June 2025, AMPs can also be assessed against anti-competitive strategic alliances. In addition, the amount that can be assessed for contraventions of these provisions has substantially increased and, in the case of a corporation, may be to up to the greater of $10m and 3 percent of a corporation's annual worldwide gross revenues.

The Competition Bureau will no doubt be spending the next year, in consultation with industry, drafting new guidelines that address the new provisions. It will take some time before the full impact of these amendments is truly understood. What is apparent, however, is that businesses in Canada will need to pay much greater attention to laws that govern competition in Canada. ■

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