



Reply to the Attention of: Joshua Krane & James Musgrove
Date: April 16, 2021

VIA EMAIL

Hon. Sherry Romanado
Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Madam Chair and Honourable Members:

Competitiveness in Canada

Thank you for the opportunity to comment on the Committee's important work in connection with competitiveness in Canada.

About Us

McMillan LLP has one of the leading competition law practices in Canada. Our expert team of 32 practitioners routinely advises Canadian and foreign firms on the application of Canada's competition laws in connection with pricing and distribution matters, competitor collaborations and joint ventures, and merger matters. We have offices across Canada and work with companies in all of Canada's major industrial sectors including technology, financial services, forestry, agriculture, oil & gas, manufacturing, among others.

We support the Committee's efforts to ensure that Canada's competition laws are fit for the task of protecting the Canadian economy and Canadian consumers from anti-competitive conduct. We believe that free, competitive markets are the best protections for Canadian consumers and businesses, as well as the best way to ensure the growth and continued health of the Canadian economy, as we emerge from the COVID-19 pandemic.

Canada enjoys a robust and broadly appropriate competition law regime. While improvements to any regime are possible, our overriding recommendation is that the Government of Canada ensure that the Competition Bureau has the staff and financial resources that it needs to enforce the current competition laws. We also recommend that any changes to the *Competition Act* should be tailored carefully to address specific policy aims and avoid unintended negative consequences. It is important to ensure that Canada's competition enforcement agency is able to address conduct of concern, and has the resources to take on even the largest firms, as circumstances warrant.

While the Competition Bureau's resources are, in our view, less than adequate for the job it faces, its powers are not. The Bureau has an extensive toolkit of powers to investigate and prosecute anti-competitive mergers and conduct. This toolkit includes: (i) the ability to obtain subpoenas, search warrants and wiretaps to collect information and documents from companies and individuals, (ii) the ability to seek injunctions preventing a harmful merger, misleading advertising or other potentially anti-competitive conduct from continuing, (iii) the ability to seek fines in the millions of dollars for price-fixing, bid-rigging, misleading advertising and abuse of dominance, and (iv) the ability to stop companies and individuals from continuing to harm competition after demonstrating a breach of Canada's competition laws.

We recognize that the *Competition Act* is not a panacea to address all forms of harmful business conduct and we encourage the committee to consider alternatives as well. In this regard, we comment on three possible changes to the *Competition Act*: (i) criminalizing wage-fixing and no-poach agreements, (ii) giving the Bureau subpoena or similar powers in support of market studies and (iii) giving the Bureau the power to assess effectiveness of

merger remedies. We discuss each in turn below, and then return to the issue of the Bureau's resources.

1. Wage-fixing and No-poach Agreements

Last year, the Committee heard from the Commissioner of Competition that the criminal price-fixing provisions of the *Competition Act* do not apply to wage-fixing or no-poach agreements between competing employers. By contrast, the U.S. Department of Justice has started resorting to criminal prosecutions in connection with alleged no-poach and wage-fixing agreements.

We understand the importance of protecting workers from exploitation by their employers and ensuring a competitive wage market, and consequently we would support a targeted amendment to the *Competition Act* in this regard. However, we caution that any legislative changes in this area should be tailored appropriately to address these issues and fall within Parliament's legislative authority under the *Constitution Act, 1867*. Any changes to the criminal provisions of the *Competition Act* should ensure they do not criminalize other forms of collective purchasing agreements. Joint purchasing, or buying group activity, is well recognized as a way that small and mid-sized enterprises can achieve scale efficiencies to compete more effectively with larger rivals. It is important that any amendments to allow for criminal enforcement related to wage-fixing or no-poach agreements not be drafted so broadly as to create a chill on joint purchasing or similar activity. When it last amended the *Competition Act* in 2009, Parliament carved out agreements related to the purchase of goods and services from the threat of criminal sanction, because buying groups allow smaller firms to share the benefits of volume discounts.

We also note that the provinces have the authority to legislate on employment matters and impose rules on employers that modify market outcomes (e.g., minimum wage laws, limitations on work hours, payments for overtime work, etc.). These laws allow provincial courts to impose fines and order imprisonment, if necessary. The *Competition Act* also exempts union and collective bargaining activities, consistent with these activities falling principally under provincial jurisdiction. Any changes to the *Competition Act* that potentially encroach on provincial jurisdiction could give rise to legal challenges.

2. Market Studies

The Committee also heard from the Commissioner that the *Competition Act* does not give the Bureau powers to compel the production of information in support of market studies or take steps to restructure markets. Our view, both as a matter of principle and for practical reasons, is that the Bureau would be better off directing its resources to enforcement activities, rather than market studies.

Historically, these market studies, when they were conducted under Canada's previous competition law regime, were lengthy and costly affairs that produced little in the way of economic benefits to Canada. Our view is that the Bureau will achieve much more useful and productive results for Canadians by focusing on specific anti-competitive conduct, through vigorous enforcement efforts not via broad market studies.

We have written about these issues elsewhere and attach a copy of those views.

3. Merger Remedy Effectiveness

The Commissioner has also asked for the power to study the effectiveness of remedies following the conclusion of a merger review. It is important to ensure that merger remedies, when imposed, are effective, both in order to improve such remedies in the future and to

provide evidence as to when and where remedies are not appropriate. Consequently, we would favour providing mechanisms to determine whether merger remedies have been effective, but would encourage that data reporting mechanisms be negotiated in consent agreements. However, it is important that such powers be carefully defined so that they do not allow a second attack on a merger, once a remedy is in place and they are focused on the information needed to ensure compliance with the *Competition Act*. Not only is it unfair to challenge the same transaction repeatedly but, as a practical matter, parties will simply not agree to settle without a guarantee of finality.

The same can be said about extending the one-year limitation period to challenge a merger, which the Commissioner raised in his remarks before this Committee on April 7. Extending the limitation period will only create uncertainty in the market without any upside to Canadians because as a practical matter, so few mergers are challenged and even fewer are challenged after closing.

That is not to say, however, that a firm's post-merger conduct cannot or should not be challenged. If the Commissioner has reason to believe that a merger has allowed a company to take measures to prevent or lessen competition substantially by squeezing a rival, increasing entry barriers, locking up customers or suppliers, or engaging in other exclusionary, predatory or disciplinary tactics, the Commissioner can seek a remedy from the Competition Tribunal to restore competition under the existing abuse of dominance provisions. That is different, however, from having two bites at the apple in merger challenges.

4. Bureau Funding

As noted at the outset, in our view the single most important and effective step this Committee could take to improve competition law enforcement in Canada, and the

competitiveness of the Canadian economy, would be to ensure that the Competition Bureau is provided with appropriate resources. The Bureau's budget, in nominal dollars, has been flat for a decade, at approximately \$50M.¹ In practice that means the Bureau's budget has been reduced substantially over that period of time (the 2011 equivalent budget would be approximately \$60M today). In consequence, the Bureau's staffing compliment has been reduced by more than 60 people, or close to 20%.

At the same time as the Bureau's budget has been falling, the issues with which the Bureau contends have become more complex, and the volume of data involved even in simple cases has multiplied exponentially. By way of illustration, the Bureau collected over 100 *terabytes* of data for one of its ongoing investigations.² The firms the Bureau investigates have become much larger and better resourced. The Bureau is adapting to new technologies and has stressed the importance of developing and using digital detection tools to pursue new and complex conduct in the digital economy.

The government spends many multiples of the Bureau's budget in support of specific industries and firms – often with no return. A modest but meaningful increase in funding for the Competition Bureau has the potential to make a truly meaningful difference for Canadians, and we submit that it is long overdue.

We thank the Committee for its work in this important area and would be pleased to discuss our submission with you.

Yours truly,

McMillan LLP

¹ Annual Report of the Commissioner of Competition for the Year Ending March 31, 2011, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03505.html>.

² <https://www.cbc.ca/news/politics/digital-economy-regulation-competition-1.5156743>.



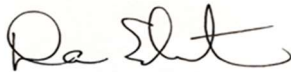
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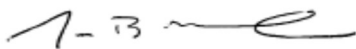
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