Intelligence MEMOS

From: George N. Addy

To: Competition Law Observers

Date: February 27, 2023

Re: *Competition Act* Amendments Should Await a Performance Review

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In the past 18 months calls for amendments to Canada's competition legislation have been growing.

A research initiative from retired Senator Howard Wetston and an ongoing campaign by the competition commissioner and others have pushed the idea that the law needs updating. As a result, a federal Discussion Paper has been produced and is open for comment until March 31.

Some changes may well be worth discussing, but others, including giving the commissioner more powers and resources, should not be considered until after an independent review of commissioner and bureau performance.

Some quick background: The *Competition Act* is a federal statute designed to protect the market; the bureau is its law enforcement agency; and the commissioner is its head. He or she – at the moment Matthew Boswell – is a referee overseeing behaviour in the marketplace. He acts when competition rules are breached.

The Act is not an all-encompassing social or economic policy instrument. The commissioner is not there to second-guess whether a business decision was smart or not, whether jobs in Nova Scotia would be better than jobs in Alberta or whether a new plant would be better in B.C. than Ontario. Those are decisions for the businesses involved.

Nor is the bureau a sector regulator. Some Canadian sectors are very concentrated by government design, the result, for instance, of foreign ownership restrictions. Concentration in these instances is not a sign of market failure but rather a government policy choice. Any competition enforcement must take place within that constraint.

Another thing, the *Competition Act* is not an all-encompassing consumer protection statute. Its role is to ensure markets are competitive so a vibrant economy can give consumers a wide choice of goods and services at the best prices. That is the bureau's job. There are many other federal, provincial and municipal entities that play a deeper, more direct consumer protection role.

The current review has roots in Commissioner Boswell's concern the bureau has a poor won-lost record before the Competition Tribunal, which adjudicates its cases. In essence, he's saying the job is too tough, he can't win, and amendments are needed to make his life easier. Amending the Act because the commissioner has a bad won-lost record or wants his job to be easier is simply wrong. The commissioner's job is tough and it should be.

Meanwhile, there is one big unexamined issue: Are the commissioner and the bureau currently doing their jobs correctly? Comments in three recent court decisions raise serious questions about how the law is currently being enforced.

In a case involving acquisition of grain elevators, Federal Court Justice Denis Gascon, sitting as a member of the tribunal, found the commission analysis was not "grounded in commercial reality and the evidence" and that the market definition approach advanced by the commissioner "(failed) on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective."

In the Tribunal decision in the case of Rogers Communications Inc.'s acquisition of Shaw Communications Inc., Canada Federal Court Chief Justice Paul Crampton characterized the commissioner's insistence that the tribunal ignore the fact that Rogers was divesting itself of Freedom Mobile as "divorced from reality."

Finally, the Federal Court of Appeal rejected the commissioner's appeal of the Rogers-Shaw decision from the bench, without even calling on counsel for the two companies.

In reviewing the trial evidence, the court highlighted factual findings supported by ample evidence that the transactions would not cross the threshold of likely preventing or lessening competition substantially and that some key aspects of the deal actually promoted competition. And it said it wasn't even a close case, as it backed up Chief Justice Crampton's judgment that the commissioner's approach "would be a foray into fiction and fantasy."

Comments from the bench in three courts to the effect that the commissioner's theories did not reflect reality, the facts, the evidence, the law or economics, that his proposed course of action was pointless and that his approach was a foray into fiction and fantasy should raise serious questions about what the commissioner is doing.

We clearly need a review of the bureau's performance before rolling out a series of amendments.

Before responding to pleas for more powers and authority, we should look very closely at how the commissioner has been operating. And, yes, he doesn't act alone, so we should also look into the legal representation and advice being provided by the Department of Justice – so as to prevent more public resources being spent on "pointless" cases.

Before encouraging more expensive trips to fantasyland, let's first have an independent panel review how the commissioner and bureau have been doing their jobs. It's Governance 101.

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