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'Holy battle': Competition Bureau chief readies for fight to shake up merger laws

Jake Edmiston · Postmedia News ; Posted: 57 minutes ago ; Updated: 7 minutes ago ; 7 Min Read

For those paying attention, Matthew Boswell looks like a man hurtling toward something -- maybe a fight, maybe a legacy. The federal competition commissioner has been on a speaking tour lately, giving interviews and presentations, expressing his dissatisfaction with the Canadian competition law he is tasked with enforcing.

The Competition Act, Boswell has argued, is too old for the digital age, too out of step with our allies and too toothless to stir any fear in deep-pocketed corporations. He has pointed to "high levels of business concentration" and warned that Canada can't afford to be complacent during major international shift toward stronger antitrust enforcement, including in the United States where the Biden administration has charted an aggressive course against dominant corporate powers in Silicon Valley and elsewhere.

Boswell, a former Crown prosecutor who took the top job at the Competition Bureau in 2019, appears to be charting a course of his own, with an injection of federal funding in the last budget and rising public awareness around competition issues.

"I think he's really pushing hard," said

Jennifer Quaid, a professor who specializes in competition policy at the University of Ottawa's faculty of law. "He is on a mission."

In a speech to an assembly of competition lawyers at the Canadian Bar Association last month, Boswell delivered what was probably the strongest talk from any commissioner of Canada's competition bureau in over a decade, akin to a police chief criticizing the criminal code, as Michael Laskey, a partner at Toronto law firm Stikeman Elliott LLP, put it recently.

But in all the loud and large talk about modernizing Canada's approach to competition, the section of the speech that's liable to court the most controversy could be Boswell's challenge of a single facet of the Competition Act: section 96.

"There will be a holy battle over that, mark my words," Quaid said.

There will be a holy battle over that, mark my words

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Section 96 is known, at least in the legal community, as the efficiencies defence, because it allows for a merger to go ahead if the efficiencies or cost savings associated with the deal outweigh and offset the negative impacts on competi-

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tion.

"Efficiencies are generally things like, you know, a bunch of people will be laid off, we'll sell some trucks, we'll close down some trucking routes. Those are the things that count as efficiencies, and they're weighed off against higher prices for consumers," he said. "We should be talking about that and wondering, are we doing the right thing in this country for consumers?"

Boswell, who recently lost a challenge in an oil industry merger that employed the efficiencies defence, argues that the provision has created a path for anti-competitive mergers to slip past the bureau if the efficiencies are large enough, "even for mergers that result in monopolies." And, he notes, since Section 96 was adopted in Canada in 1986, "nobody else in the world has followed Canada's lead on this," and in fact many seem to be toughening their merger rules.

"My point is that people need to be aware of this," he said. "Average Canadians -- Canadians who are at the end of an anticompetitive merger -- should be aware of what the trade off is and what it means for them, potentially, in paying higher prices, dealing with a monopoly or an even smaller oligopoly."

It's clear that this is about more than a single section of a law. Section 96 seems to exist on a fault line in corporate Canada, touching on a fundamental disagreement about what competition rules are actually supposed to achieve.

"Canada has traditionally had an extremely narrow view on the role of competition law," Quaid said.

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Canada's lead on this

Matthew Boswell

That view believes competition policy should be laser-focused on creating economic growth, and leave everything else to other areas of law. As Quaid put it, the prevailing school of thought is more interested in growing the pie than worrying about who gets a slice -- part of a concept in economics called total welfare. If a merger allows for more cost savings, which benefits shareholders and grows the economy, that's seen as a win. And if that merger also results in layoffs, they can be addressed through other government policies, such as unemployment insurance or retraining programs.

"Part of the concern," Quaid said, "is if you don't allow mergers to go through between two Canadian companies because you're worried about the impacts in the Canadian market, well then you just destroyed the chance of having any competitive firms on the world stage."

It's a notion that Boswell believes the country needs to be disabused of, and to assist, he likes to recite a quote from the Harvard University economist Michael Porter: "Unless a firm is forced to compete at home, it will usually lose its competitiveness abroad."

In his push for reform, Boswell is coming to represent an emerging school of thought that wants competition rules to prioritize social values, such as fairness, rather than just economic growth.

"On the one hand, people say, 'Look, we should keep competition policy narrow and simple and tidy. We can fix the messy problems somewhere else,'" Quaid said. But the response from the

other side is often: "The messy problems never get fixed."

The efficiencies defence, in Quaid's view, stands out as a uniquely Canadian compromise on competition. "At the end of the day, if the companies can make more money, if more resources can be allocated to the economy -- even if they're mostly in the hands of shareholders or the owners of businesses -- that's good," she said. "Despite the fact that we say we care about competitive markets, we're willing to compromise on that."

This week, Sen. Howard Wetston -- a former head of the Competition Bureau in the early days of Section 96 -- announced he is inviting comments on a paper he recently commissioned, as part of "a continuing effort to ensure Canada has an effective and impactful" competition law.

"I can't think of a better time to do that," Wetston said on Thursday, adding that he doesn't believe a "start-from-scratch" approach is necessary at this point. "That is not the case at all."

The paper -- written by Edward Iacobucci, a University of Toronto law professor and Toronto Stock Exchange chair in capital markets -- recommends a series of amendments to the law but also cautions against "sweeping" changes. One of the recommendations is the Competition Act needs to narrow its purpose further, to focus entirely on economic efficiency.

As it stands, efficiency is one of several objectives laid out in the act, along with maintaining competitive prices for consumers. Those principles are usually in lock-step, since efficiency typically means prices are set competitively, Iacobucci

Iacobucci said. But not always, as demonstrated by the sort of tradeoffs contemplated in the efficiencies defence.

Those duelling priorities in the act mean the courts are left to decide which priority to favour, which adds unpredictability and uncertainty, he said. "I worry that trying to cram too many policy objectives into the Competition Act will result in confusion about what values are going to prevail in any given case.

In his paper, Iacobucci used luxury cruise lines as an example. If the act was interested in economic equality, he suggested, then it would allow a merger of cruise lines even if it meant higher prices for customers. In that case, the shareholders are likely poorer than the people taking the fancy cruises, therefore "an increase in prices will lead to more economic equality."

He considered using "fairness" as the single, overarching purpose of the act, which would allow adjudicators to consider other values -- equality, privacy, freedom of expression, the diffusion of political powers -- without favouring one over the other. But it would also cause uncertainty, he found, because so much would be left to the discretion of the adjudicator.

Do we want to leave all of those values in play in a single act?

Edward Iacobucci

"Do we want to leave all of those values in play in a single act? In a single policy instrument?" he asked.

Iacobucci ended up leaning toward economic efficiency as the best objective for the act -- not because it's more important than equality or fairness, but

"because competition law is not a suitable policy instrument" to address issues. He said he's still concerned about those other issues, including protecting workers, but believes it's better to depend on labour law and other policies "rather than relying on the Competition Act to occasionally protect workers by stopping mergers that might result in layoffs."

Consultations on the paper will run to the middle of next month.

"Competition law has not been a very hot topic many times in history," Iacobucci said, "This seems to be one of those times."

Boswell himself acknowledged his speech to the bar association speech was some kind of milestone.

"The bureau, generally, we've been getting louder over the last several years about competition," he said. "Maybe that was the culmination, or the loudest that we've been."

After all the strong talk, the fight could be coming next. In fact, it looks like it already started, because what counts as a holy battle between warring factions in the world of competition law, is probably at its ugliest a spirited policy debate.

When Boswell heard of the suggestion that his attack on Section 96 could lead to such a fight, he laughed.

"Possibly," he said.

* Email: | Twitter: ja-keedmiston

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