With Shaw case, competition watchdog tests corporate defence of mergers

By CHRISS HANNAY

Staff

Competition Commissioner Matthew Boswell gave a speech at the Canadian Bar Association in October that made the legal community sit up and take notice.

In forceful language, he made the case that Canada's competition law needed to be changed to fully protect the rights of consumers. And a key defence that companies use when the Competition Bureau is trying to block their mergers - that the efficiencies they gained through cutting staff and combining resources would be greater than the harm to consumers from reduced competition - had to go.

"The consequences of increased concentration, higher prices and lower competition across sectors of the economy - all in the name of merger efficiencies - are very real for consumers and our economic performance as a country," he said in a pretaped speech. "It's high time we pause and ask ourselves whether our competition laws are really working in the best interest of all Canadians."

He had a burl in his saddle over a merger the Competition Bureau had attempted to block that summer, Secure Energy Services's acquisition of Tervita Corp. The bureau's challenge was tossed by the Competition Tribunal, in part because Secure had been able to quantify how much money it would save through postmerger efficiencies, while the bureau had not yet quantified the harm to the companies' oil and gas customers.

But now, observers say, Mr. Boswell has his most public stage yet to make his case for change by applying to the tribunal for an order to block Rogers Communications Inc. in its bid to take over Shaw Communications Inc.

In fighting the merger of the two Canadian telecommunications providers, Mr. Boswell and the bureau say they are speaking on behalf of Canadians who are fed up with paying some of the world's highest cellphone prices.

Whether he can prevent the merger or force the companies to divest assets to an acceptable third party, or loses out to arguments that the deal is financially beneficial to the companies, Mr. Boswell will bring consumer affordability front and centre just as Ottawa begins revising the competition law.

"Over the last year, I would say, progressively we have seen him take firmer and firmer stands and really lay the groundwork for making a case for modernization of the act," said University of Ottawa law professor Jennifer Quaid.

The Rogers-Shaw challenge may be Mr. Boswell's first time in the spotlight after a long public service career in litigation and investigation.

He graduated from Queen's University's law school in 1997 and worked briefly in private practice before joining the public service as a Crown prosecutor.

He prosecuted gun crimes during a time of heightened violence in Toronto.

In 2005 - Toronto's "summer of the gun" - he successfully argued that police should be able to testify about street gangs in a criminal trial, which set a legal precedent.

He joined friends in 2006 at a small law

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firm, but told Canadian Lawyer magazine in a 2019 profile that he soon grew restless.

"It was great to be working with friends, but I realized that my true calling was the chase of wrongdoing or alleged wrongdoing," he said.

He worked for three years at the Ontario Securities Commission, chasing fraudsters who peddled fake investment schemes.

In early 2011, he moved to the Competition Bureau as associate deputy commissioner in the criminal matters branch. Over the next decade, he led teams that investigated cartels and monopolistic practices.

"He is really devoted to the public good," said Kenneth Jull, a lawyer at Gardiner Roberts LLP who has argued cases against Mr. Boswell, and worked with him at the Competition Bureau from 2016 to 2018.

In May, 2018, Mr. Boswell took over as interim commissioner of the bureau when John Pecman's term ended. Less than a year later, the government confirmed him to a full five-year term as commissioner.

Mr. Boswell arrived at the top spot at a time when the ascendance of tech giants was giving new life to antitrust worries.

Following the lead of European Commissioner for Competition Margrethe Vestager and others, the bureau put a renewed focus on how companies such as Alphabet Inc.'s Google and Amazon.com Inc. were handling customer data or pursuing anticompetitive practices.

The Competition Bureau won a big case on this theme in May, 2020, when Facebook agreed to pay a $9-million penalty for making false and misleading statements about the privacy of customer data.

But even with new issues emerging, one perennial debate was going on in the background: the efficiencies defence.

The Competition Act empowers the commissioner to intervene in mergers that would cause economic harm, such as reducing customer choice or raising prices.

However, merging companies have a major defence: According to Section 96 of the act, the commissioner will lose a challenge if the merging companies can show that the economic benefit to them - through, for example, consolidating offices and cutting staff - is larger than the pain their customers might experience through higher prices.

"Efficiencies gains have always been the trump card," Prof. Quaid said. She added that it is easy for companies to calculate how much money they would save through mergers. It is more time-consuming and complicated for bureau economists to come up with an acceptable model of the theoretical harm to consumers. And that "basically means efficiencies always win," she said.

The defence was part of the act when it was written in 1985, and was meant to ensure that a Canadian company could grow large enough and strong enough to compete on the world stage.

But critics of the defence - which is unique among large, developed countries - say that hope has never been borne out, and it is time to give consumers more consideration.

"This does not make sense in today's economy, particularly in this digital economy where the traditional concept of borders does not carry much weight," consumer advocate John Lawford said in a consultation last year.

Experts on competition issues say they expect Rogers and Shaw to use the efficiencies defence. In announcing the merger deal last year, the companies said they could achieve $1-billion in synergies by combining their cable and wireless businesses.

Rogers put Shaw's Freedom Mobile up for sale earlier this year after Industry Minister François-Philippe Champagne said he would never allow the merger to eliminate the wireless service.

However, the Competition Bureau said in its application this week that it does not like the divestiture options so far proposed by Rogers and Shaw.

If the companies divest Shaw's wireless business to a third party that could, to the Competition Bureau's satisfaction, be a viable competitor, the deal could proceed without further challenge.

The bureau has settled cases like that before. In 2017, the agency fought the merger of two propane retail companies - Superior Plus LP and Canwest Propane - but relented when they agreed to sell assets to competitors in 12 local markets in Western Canada.

If the Competition Bureau loses the challenge in this high-profile case on the efficiencies defence, public anger may be raised to the point that it puts political
pressure on the government to change the law, observers say.

"There's no doubt that this strong stance against Rogers and Shaw has some bearing on the review of the act," said Robin Shaban, senior economist at Vivic Research in Ottawa.

"This is an example where the commissioner is pushing the act to the limit."

Mr. Boswell has shown he has the ear of the government in recent years. The Competition Bureau received a major boost in the 2021 federal budget: $96-million over five years added to its $53.7-million base funding, and an additional $27.5-million a year after that.

In February, Mr. Champagne committed the government to a review of the Competition Act, for which Mr. Boswell had argued the year before. Some changes were included in the spring’s budget implementation bill, including more powers for the bureau to investigate offshore entities. And the government has promised further reforms.

"There's a new wave of activism," Mr. Jull said. "The bureau's got money. He's got the resources. They've got the backing of the government to put in legislative change. Matthew's really trying to make some changes."