Interview with Matthew Boswell, Commissioner of Competition, Competition Bureau of Canada

Editor's Note: Matthew Boswell was appointed Commissioner of Competition on March 5, 2019, for a five-year term. He first joined the Competition Bureau in January 2011, and served in various senior management positions throughout the organization, leading merger reviews and directing major investigations targeting criminal cartels, abuse of dominance and deceptive marketing practices. Before joining the Bureau, Mr. Boswell worked in a private practice in Toronto, served as Assistant Crown Attorney with the Ministry of the Attorney General of Ontario, and was a Senior Litigation Counsel at the Ontario Securities Commission, where he primarily prosecuted securities fraud and related matters.

This interview was conducted for the Source on April 21, 2020, by Joseph Krauss, a partner at Hogan Lovells US LLP and an editor of the Source.

THE ANTITRUST SOURCE: Matt, first, thank you so much for making yourself available in these difficult times. You were appointed the Commissioner of Competition in March 2019. At that time, what were the key priorities that you hoped to accomplish during your five-year term?

MATTHEW BOSWELL: I think the priorities then—and that was after I had been the interim Commissioner for nine or ten months, I think—are still the priorities that exist today, and that are set out in our four-year strategic vision that came out in February, just before this coronavirus pandemic began to impact the world.

At a high level, the vision—and it’s a vision that was arrived at by a lot of internal consultation with people at all levels in the Bureau as well as looking at the external environment and looking at our history—is really to become a world-leading competition agency that is at the forefront of the digital economy and champions a culture of competition for Canada. This is something that I and the senior executive team at the Bureau have been talking about at length since I took over as the interim Commissioner.

In order to accomplish that, we decided that it was important to focus in on three key items. In the past, at the Bureau we have had multiple priorities in any given year, and we were of the view that we had to really focus our efforts and stay very much on-track in terms of our core work, which is to enforce the laws under our remit; to promote competition in Canada through advocacy and outreach; and to invest in our people, to invest in their training, in the tools they have access to, to invest in their ability to use different techniques to advance their work.

The training aspect is something that had fallen by the wayside a bit at the Bureau over the years because of our budgetary constraints, so it’s something we are putting a lot of emphasis on. It’s particularly important given the data-driven digital economy that our teams have to work in to advance important enforcement cases, to advance well thought-out, evidence-based advocacy and promotion of the law.

That is, at a high level, the strategic vision for the organization, where at the end of the day, when my term is over in 2024, we can look back and say that we made significant progress—I
don’t think it’s realistic that we’ll accomplish everything we’re setting out to accomplish, but significant progress—to make the Bureau into a world-leading competition agency in terms of the digital economy and to advance the culture of competition in Canada, something that many commentators have pointed out has been absent in Canada.

That's where we stand. I think it’s important, obviously, to point out that the current situation throws a bit of a curveball into the straight-line march toward realizing this vision on our priorities. That said, we have transitioned at the Bureau quite well, I would say, to working remotely. Our entire team in our headquarters and in our regional offices is all working remotely now. We are able to move forward with different types of enforcement cases and merger review. Of course, there are several challenges that come with the new reality, but I’m very proud of how we have been able to seamlessly transition to working from home so that we can keep driving toward achieving the vision and our priorities.

ANTITRUST SOURCE: Have you taken any concrete steps towards realizing those priorities and vision that you could share with us? Are there specific things that you’ve done on any of those three major items that you mentioned?

MATTHEW BOSWELL: One of the official headings in our strategic vision is “Protecting Canadians Through Enforcement Action.” That means:

- Taking more cases—taking cases that aren’t necessarily 100 percent winners but they’re responsible cases;
- Advancing the law in Canada—we have done that in the last year in terms of bringing some cases forward; and
- Bringing timely action.

One of the things that I think is very important in terms of enforcement in Canada is looking at all the tools in our toolbox and using things like injunctions on a more frequent basis. In our case, on the deceptive marketing side, we recently had a temporary consent agreement, which is effectively an injunction, against an online seller of airline tickets. We were able to do this relatively quickly. In the mergers area we have had some interim hold-separate orders before ultimate consent agreements.

So we are taking action. It’s not something where you can turn on a dime overnight. It’s a culture within the Bureau to say: “Okay, let’s move more quickly. Maybe we don’t have the perfect case, but let’s get it in front of a court to try to prevent the harm in the interim.” That’s certainly one aspect.

In terms of digital, we are doing an incredible amount in the Bureau’s digital economy focus. Last summer we hired a Chief Digital Enforcement Officer to look at multiple aspects of the way we enforce the law in the digital economy, to look for new tools that we can use, to look for the appropriate training that we can provide to our teams, and to bring in a more diverse background of people to assist us in investigating digital economy cases so we have people who truly understand what’s going on under the surface in the digital economy. A very important issue, and a significant challenge, for competition agencies around the world is to have the right mix of talent on these investigations.

In terms of digital, we hosted a data forum last May where we brought together other enforcers from around the world, policy leaders, and think tank representatives to look at issues of data and how they interrelate with competition issues and consumer issues. We were planning on having a digital summit this May or June and bringing people once again to Ottawa, mainly enforcement
people, to share techniques on enforcing in the digital economy. We’re now repositioning that as something that we’ll probably do virtually.

Those types of events obviously tie back to our vision to be a world-leading competition agency in the digital economy. But they’re also about collaboration across jurisdictions with similar competition law frameworks so that we are not all working in isolation trying to tackle these incredible problems of investigating and enforcing in the digital economy, but sharing lessons learned, sharing techniques, and sharing software in fact used to advance cases in a more efficient and effective manner.

So those are a couple of examples.

In terms of advocacy, we are taking steps, to the extent we can—obviously, we have significant budget restraints in Canada; that’s not a surprise to anyone who observes the Canadian Competition Bureau, and the Bureau’s budget constraints have been commented on a lot by various stakeholders in Canada—but we’re seizing opportunities to encourage competition and innovation in areas that matter to Canadians.

We are intervening in other regulatory proceedings. We just intervened in a wireless hearing with our telecom regulator to advocate for solutions that increase competition in Canada to the benefit of Canadians.

Finally, in terms of investing in our people and in our organization, we are bringing onboard extensive additional training to assist our officers in all different aspects of their work. We’re bringing on new software and tools for them to use so that they can process large amounts of data and records electronically much faster to advance their cases.

Sorry I kind of went on there a bit, but there’s a lot going on, and has been going on, to advance these three priorities at the Bureau with the overarching digital economy theme to everything we’re doing. This is, obviously, only going to become more important in my view, especially given the implications of coronavirus and the world being forced to rely more and more on online marketplaces and platforms. So the pressure is really mounting for us to be at the top of our game in terms of digital economy competition and consumer protection.

ANTITRUST SOURCE: Looking at your background not only within the Bureau but in various litigation roles with the Securities Commission and as an Assistant Crown Attorney, do you think these previous positions have influenced your approach in terms of how you are going to face some of the challenges in getting the Bureau to be a world-class competition authority?

MATTHEW BOSWELL: I would say the answer to that is I like to think so. Having been an Assistant Crown Attorney in Toronto, I realized and I became very comfortable with the fact that enforcement authorities can bring responsible cases and advance the facts but you can still lose and you have to get comfortable with the fact that that is a possible outcome. You can’t always be looking for perfect cases.

We don’t have a great body of jurisprudence in Canada on competition cases. We need to develop that jurisprudence. It’s helpful for everyone. It’s also valuable for deterrence to demonstrate that we are willing to take matters to court, that we are willing to commit to these cases. And, as I say, I’m not talking about irresponsible cases. I’m talking about cases that might be on the edge, there may be aspects that are in the gray zone, but we should be bringing those, subject of course to our legal resources and financial resources for experts and so on. We should be bringing those.

As a prosecutor both for securities and criminal cases, you do come to accept that you are going to lose cases, but there is value in bringing the cases and showing justice being done.
**ANTITRUST SOURCE:** There clearly has been a close relationship between the U.S. antitrust authorities and the Bureau going back many years. How has this relationship evolved over the last decade? Are there any initiatives that you would hope to achieve to further that relationship with the U.S. authorities, either in competition, advertising, consumer protection, or other areas?

**MATTHEW BOSWELL:** I think one of the areas of focus beyond the priorities that we have set out in terms of international cooperation has been the recognition that we have to focus some of our international efforts on our key partners. Of course, the United States is a key partner to the Canadian Competition Bureau. Our economies are incredibly integrated, there is a tremendous amount of trade, a shared border, now a new free trade agreement about to come into place.

But, all that said, the relationship between the Bureau, the FTC, the U.S. DOJ—and others as well, I should point out: the U.S. Postal Inspection Service, the consumer branch of the Civil Division of the U.S. DOJ—these are excellent, excellent relationships that have thrived for years and years and years, with strong pick-up-the-phone relationships at all levels.

I don’t have any specific plans to enhance those because they are working so well. We have merger team leader meetings with our U.S. colleagues. We have abuse-of-dominance case team meetings with our U.S. colleagues. Our senior leaders in consumer protection are frequently in contact with the FTC on consumer protection issues. We have bilateral meetings. We cooperate on training. We have staff exchanges. We have executed search warrants on behalf of the U.S. agencies. We have relied on the Safe Web ACT to assist us in cases. These are incredible relationships that we value so much in Canada. I think it’s imperative that we continue along that trajectory. Especially in a global world where these companies are operating in multiple jurisdictions, we have to cooperate in order to be effective.

**ANTITRUST SOURCE:** I notice that in November 2018 the Bureau worked with the Organization for Economic Co-operation and Development (OECD) to advance research on gender equality in competition. How has the Bureau incorporated that mission into its work?

**MATTHEW BOSWELL:** Just a bit of background. I’m not sure the extent to which you’re aware.

In 2015 the newly elected government at the time prioritized and promoted gender equality as a high-level priority in Canada and instituted something called Gender-Based Analysis Plus (GBA+) as a requirement for all government policymaking. We were asked to do this GBA+ assessment of a competition policy chapter in a free trade agreement. It led some folks at the Bureau into thinking that we ought to do some more work on the relationship between competition, competition law, competition policy, and gender equality.

Since then, we have been one of the driving forces at the OECD in terms of looking at this issue. They produced a research paper that is incredibly interesting and valuable, and we participated in that. We actually championed the research and fostered discussions on this at the OECD Global Forum on Competition in 2018. And then, in 2019, we chaired a session on Gender and Competition at the OECD Conference on Gender Equality and Business.

And we have incorporated it into our work in one sense. One example I can give you is that we did a market study into the broadband Internet market in Canada. As part of our study, we had some public opinion research done where we, as part of the public opinion research, asked a gender identity question that allowed us then to look at the results and see what differences there were based on gender identification and how that was playing out in the broadband market in Canada.

So it’s something that we continue to work on. We’ve actually promoted the OECD getting a grant from the Government of Canada to fund further research into this issue.
One thing we found when we started looking into it is that it’s an issue in terms of competition policy that really had not been looked into at all in the past. That was one of the reasons we thought it’s worthwhile to look into these issues, certainly given our government’s strong policy in favor of gender equality.

ANTITRUST SOURCE: Do you think it will have an impact on your enforcement methodology or case selection or staff selection? What do you think its implications will be long term?

MATTHEW BOSWELL: I think one of the things—and I wouldn’t say this definitively—where it could certainly come into play—and we’ve seen some interesting research on this; as I say, there’s an OECD paper—is on case selection. As you may know, in the deceptive marketing area of our work, we certainly have a never-ending list of potential cases in terms of complaints coming in about conduct across the economy, so we have to put a lot of attention on picking what cases we might advance in that area. One of the criteria, of course, is cases that matter to Canadians and resonate with Canadians. This could be the relationship between gender equality and, for example, this aspect of our work could drive our case selection in the future.

But we are certainly not there now. We are still participating in the research and looking into the issue to better understand how we might use it to better enforce our laws.

ANTITRUST SOURCE: We spoke earlier about the impact that the COVID-19 pandemic has had on the Bureau in terms of working remotely. Are there other changes or other challenges that you have had to address and come up with some novel approaches in the current environment?

MATTHEW BOSWELL: Yes. I would say that relatively early into the current crisis, we began to receive some communications from the legal community and the business community that there might be a need for guidance and/or loosening of our approach to competitor collaborations. This wasn’t a sea of requests, but they were certainly strong requests.

We initially indicated that of course we would take a reasonable and principled enforcement approach in the current context. But we continued to think about the issue and look at the situation in Canada and look at the situation around the world.

Then, on April 8 we issued guidance to the business community that certainly goes further than anything the Bureau has done in the past, in terms of competitor collaborations that might cross the line in terms of cartel conduct. We put a document on our website about this. It acknowledges that we recognize the exceptional circumstances and the circumstances may call for the rapid establishment of business collaborations of limited duration and scope so that services and supplies get to Canadians in this particularly difficult time. It set out some criteria and signaled that in the circumstances where there’s a clear imperative for the companies to collaborate in the short term to respond, where the collaborations are undertaken in good faith and don’t go further than necessary, the Bureau will generally refrain from exercising scrutiny.

That was our general guidance, which was aimed at being as helpful as we could be. Our criminal cartel provisions, like yours in the United States, are very serious offenses—in Canada they have the potential for lengthy sentences and serious fines—so we wanted to signal enforcement discretion in this area, provided that people were doing it for the right reasons and not to gain a competitive advantage.

We also indicated that we had put together a team if businesses wanted additional informal guidance, where they could give us some information about the scope of the collaboration—what
they were talking about, how it would assist in dealing with the problems in terms of COVID-19, why it was necessary—then we could provide them informal guidance about how I might exercise my enforcement discretion in that context. That is certainly one thing we have done to try to be of assistance.

We have received some feedback recently from the Canadian Bar Association taking issue with the use of some of the language we used in our guidance document, but we continue to believe it provides for a fair bit of flexibility and a willingness on our part to provide that informal guidance so that these appropriate collaborations can go ahead to deal with the crisis.

The second thing I just wanted to mention, was how on the deceptive marketing side we have taken steps to react to protect Canadians from false or misleading representations. It’s common to see this type of stuff emerge in times of crisis—deceptive marketing, mass marketing fraud, even—and we have seen a surge of complaints in this area since February.

We put together a dedicated team for this as well, who are monitoring social media, who are assessing the complaints we get in, who are in contact with our domestic law enforcement partners and our international partners, such as the FTC, on complaints they are seeing; conduct that might be coming out of Canada directed toward Americans. This team is on the go all day looking at these.

In the short term, we are taking action in terms of reaching out directly to the companies that are making the alleged false or misleading representations and giving them very clear warnings, or that are facilitating the representations. We have done that, I think, about 17, maybe 20, times so far.

We are seeing a very positive reaction to that in that representations are being changed quickly; products are being pulled off shelves, whether virtual or real shelves, if there are these alleged false or misleading representations. So it’s working well. We are seeing it in all sorts of areas. I won’t get into all the different types, but you can imagine the claims that are being made about how things can either prevent you from getting it or treat you. We are working as quickly as we can to stop this kind of conduct.

Those would be two examples of things we are proactively doing to be helpful, to enforce in this current unfortunate situation.

ANTITRUST SOURCE: I’d like to switch gears a little bit into some specific merger and cartel issues. In a speech last November, you quoted a few studies that found that Canadian industries are on average twice as concentrated as their U.S. counterparts, and levels of consolidation in Canada have risen over the last 20 years. What do you think these findings mean for Canada? What can or should the Bureau do to address rising levels of consolidation?

MATTHEW BOSWELL: I think in terms of what they mean for Canada is we don’t have as competitive a domestic economy as I guess we would like, certainly from the Bureau’s perspective. This has been pointed out. There was a blue ribbon panel in 2008 here in Canada on competition policy, called the L.R. (Red) Wilson Panel. At that time, they pointed out that Canada does not have a culture of competition. This is something that, as I pointed out in our priorities, the Bureau is very focused on advocating for: that we have more competitive intensity inside Canada to benefit our productivity, our GDP, and basically to benefit consumers with more choice, better products, lower prices—all of the things that come with a healthy competitive landscape.

Of course, concentration in and of itself is not an issue for competition law enforcement, if it exists—big is not bad; big behaving badly is bad—but that means we have to be more vigilant in the sectors of the economy where there is significant concentration because that does heighten
the risk of anticompetitive behavior, coordination among firms. The concentration point effectively means we have to be on the watch to make sure that in those particular sectors there isn’t inappropriate anticompetitive conduct.

I think the other thing that I was talking about in that speech—or maybe it was in the Q&A session afterwards—was that Canada is now second-to-last among OECD countries in terms of what’s called the Product Market Regulation (PMR) indicator that the OECD prepares, I think, every ten years. That looks at regulatory restrictions on competition. Very sadly, in 2018 Canada was 33rd out of 34 OECD countries, which I was quite shocked by when I discovered it. That looks at issues like administrative burden of regulations, barriers to entry created by regulations, restrictions on foreign direct investment and trade.

These are serious issues from the Bureau’s perspective in terms of competition in Canada. We think that we ought to have a mandatory competition impact assessment framework for all our laws and regulations in this country at all levels—municipal, provincial, federal—to address this product market regulation issue that ties back to concentration. It is difficult for new entrants to enter, and we have a system set up that isn’t as competitive as it could be or should be and that hurts our productivity, that hurts our GDP. These are issues that we are going to advocate on throughout my tenure at the Bureau.

**ANTITRUST SOURCE:** We talked earlier about the digital age and the digital economy that we are in, that we are all touching much more given the circumstances. What initiatives has the Bureau prioritized in order to advance competition goals in this much more pervasive digital age?

**MATTHEW BOSWELL:** In terms of advancing competition goals, a good example might be our digital enforcement callout to the Canadian business community, as well as other parts of the Canadian landscape, to invite small businesses, businesses operating in the tech sector, media businesses—really anybody who had a perspective on it—to come in and talk to the Bureau about their observations in terms of competition or competition problems in primarily certain aspects of the digital economy—online platforms, online marketplaces, online advertisement.

This was something that was a bit different than what the Bureau has traditionally done in terms of reaching out. That was basically a callout across the country. We got significant pickup on it and heard from people in a variety of different areas of the economy and who operate different businesses in the online economy. That has informed—I can’t really say much beyond this—some of the areas where we are going to be focusing our digital enforcement work, particularly with respect to looking into unilateral conduct, abuse-of-dominance-type situations. That’s one example.

I can go back to some of the earlier stuff I was discussing about the Chief Digital Enforcement Officer and our work to bring the international community together, our work with the G7 to come to an understanding on how we all view competition in the digital economy and how they intersect.

**ANTITRUST SOURCE:** One thing that has been of particular interest here in the United States is what has become known as “killer acquisitions,” acquisitions of smaller tech companies by larger tech companies that may be seen as stymieing innovation. Is the Bureau doing anything to better understand the effect of those and to increase enforcement, if required, of killer acquisitions?

**MATTHEW BOSWELL:** I guess what I can say at a high level is that in September 2019 we changed our Merger Notification Unit to become what we now call the Merger Intelligence and Notification Unit. This changed the focus from simply taking in filings and processing the filings—I shouldn’t
say “simply”; there’s a lot of work there—to also monitoring for non-notifiable transactions in Canada.

This is consistent with our vision of more proactive enforcement of the law. Normally, although we have jurisdiction over non-notifiable transactions—we have jurisdiction over all mergers in Canada—we only become aware of potentially problematic non-notifiable transactions through complaints. But now we have shifted a bit to proactively monitoring the marketplace, identifying transactions that could potentially be problematic, that fall under the thresholds for our notification regime, and then taking steps to triage and examine some of those to ensure that they aren’t in fact problematic. As I say, this began around September of 2019—maybe a bit before then—and we have dug up some non-notifiable transactions that we then examined.

This is something we are going to continue to do. It will continue to be important, given probably the impact of COVID-19 as well, in terms of more transactions falling under the notifiable threshold. It’s incredibly important, as you mentioned, in the digital economy where you have small firms being swallowed up, whether for the intellectual property they have or the particular platform they have or whether it’s to simply kill a competitor. I’m not saying that is the case, but it is worth taking a look and having a unit that is unearthing transactions that might be problematic.

Obviously, once again, it is something that we can do, but we can only do it in a limited way given our budget constraints. We don’t have hundreds of people sitting around doing nothing at the Bureau, so we do as much as we can within our current envelope.

**ANTITRUST SOURCE:** I want to shift away from mergers to the new Abuse of Dominance Enforcement Guidelines that were issued in March 2019. Now that they have been in place for over a year, what are the key takeaways from the changes in terms of either policy or your enforcement agenda by virtue of those new Guidelines?

**MATTHEW BOSWELL:** I think one of the key takeaways that people seem to discuss a fair bit is this notion about taking away the 35 percent market share safe harbor in the Guidelines. That change in the Guidelines, obviously, from our perspective reflects the Bureau’s approach, informed as well by the jurisprudence of Canada’s Competition Tribunal, which hears our abuse-of-dominance cases. The jurisprudence in Canada has long held that a market share of less than 50 percent would generally not give rise to a finding of dominance, but it is also clear that this doesn’t imply that market power can never be found below 50 percent.

The change in the Guidelines here simply reflects that it is possible, depending on the particular facts of the case, that a firm could be found to be dominant under 35 percent. In fact, in the Credit Cards case, the Tribunal found that MasterCard actually had a dominant position with less than 35 percent. This is more than anything just an effort to be very clear that there isn’t a “magic line,” that it depends on the facts of the particular case.

We have also had, of course, firms that don’t compete in the market at all that have been found to have market power. The Tribunal held in the Toronto Real Estate Board case that the Toronto Real Estate Board held market power in the supply of residential real estate brokerage services in the Greater Toronto Area—but they didn’t actually compete in that market; they were a trade board. In the Vancouver Airport Authority case as well, they had market power by controlling access to the airside of the airport.

So we are just trying to be very clear and transparent in terms of legal practitioners understanding that there isn’t in fact a bright line.
ANTITRUST SOURCE: U.S. agencies have promoted leniency and self-reporting initiatives in recent years for cartel activity as well. How has the Bureau used leniency programs to aid in its investigation and prosecution of cartels? Do you feel it has been effective from a Canadian perspective?

MATTHEW BOSWELL: The Bureau was, I think, the second jurisdiction, behind the United States, to implement a leniency program. Like our colleagues at the U.S. DOJ, it has historically been the most effective method to detect, deter, and prosecute cartel activity in Canada. We had a surge in immunity and leniency applications in the early 2010s, cases that everyone is very familiar with—the auto parts cases and financial cases—and that drove our work significantly.

We continue to believe in the power of immunity and leniency programs, particularly in the value of immunity and first-in leniency, in Canada because, all things going according to plan, both those situations provide immunity to corporate executives and directors in terms of their involvement in the cartel.

We made some changes in 2018 and 2019 to reflect some things we had learned over the last couple of years and to reflect some initiatives that the Public Prosecution Service of Canada wanted included in our programs. We think that our programs, as I say, continue to offer tremendous benefit, and they have been changed a bit with a focus on prosecution readiness. That, as I say, ties back to the fact that we have a bifurcated model: Unlike the U.S. DOJ, we, the Bureau, are the investigators. We gather the evidence, we then assemble the evidence and provide a referral to the Public Prosecution Service of Canada (PPSC), they make the decision as to whether to prosecute the case based on factors that are well known in Canada, and then they prosecute the case.

So one thing that we changed in our programs was prosecution readiness and making some things more clear, things that had previously been included in our Frequently Asked Questions, and we incorporated those directly into our policies. For example, generally in Canadian criminal law, statements from conspirators or parties or witnesses generally are taken—where feasible, and certainly in a large investigation like this—under video, and that has been made clear in the policies.

We have also changed some aspects of the policies to deal with issues where there are documents in the possession of the cooperating parties that might be subject to solicitor-client privilege and how to address those issues. Obviously, we don’t want to violate solicitor-client privilege issues, but we have to have a method to make sure we have all of the documents that are relevant that are not privileged.

So we have done a lot of work. We’ve had a very positive experience over 20 or 30 years with immunity and leniency. We are seeing, just like many of our colleagues around the world, a significant drop-off in applications for immunity or leniency. This is something that has been talked about at length in multiple different fora. It was discussed at the ABA/IBA International Cartel Workshop in February, where I laid out some of the numbers in terms of Canada’s current number of applications.

The only last point I’d make, is yes, we think they are incredibly important programs. We value them very much. We administer them jointly with the prosecutors. But we are also putting more emphasis internally on what people call ex-officio detection of cartel conduct using other tools, and other networks, to have problematic conduct brought to our attention so that we can investigate further. This is, of course, primarily domestic cartel-related, but includes better relationships with other domestic law enforcement police forces, who can tip us off if they see bid rigging or price fixing in the course of a fraud investigation, with procurement agencies, who can provide problematic bidding to us to investigate further, and developing screens and algorithms to apply to bidding information to generate red flags for potential bid rigging. So we are doing a lot of work outside of immunity and leniency to drive detection.
**ANTITRUST SOURCE:** You mentioned the Bureau’s collaboration with the Public Prosecution Service and the different roles that each agency plays. Have there been any differences of opinion in how the leniency program works with guilty pleas or consent orders?

We have seen references to a recent bid-rigging charge that was handled via consent orders instead of guilty pleas. The press has suggested that there might have been differences of opinion for what the Bureau may have preferred as compared to what the Prosecution Service ended up doing. Can you comment on this or more generally on the collaborative relationship with how the Bureau and the Prosecution Service work together and perhaps work against each other sometimes?

**MATTHEW BOSWELL:** I would say that there are certainly advantages to our bifurcated model, and of course, there are challenges that we work on all the time with our prosecutorial colleagues. That’s like any relationship—there are ups and downs and there are disagreements. But I would say presently there is a good working relationship with the PPSC, the prosecutors, strong personal relationships between the two organizations that work together closely day-in and day-out.

In terms of your referring to the sort of alternative method of resolving some bid-rigging cases in the Province of Quebec, using a provision that’s in the Competition Act, Section 34 Subsection 2, this is something that ultimately has to be brought to a court. There is no guilty plea, but the court has to be satisfied that there was a commission of an offense or activity towards the commission of an offense. This was done on notice to the Bureau, on notice to me, that this was something that the prosecutors were proposing to do as part of one of the decisions they make in terms of prosecutions, which is whether it is in the public interest to lay charges to have a full trial. In this particular matter, they suggested to the Bureau that this might be a way to resolve these particular cases. As I say, I was consulted and I didn’t object.

What I can say is that there were a variety of factors that went into those resolutions that I should point out did result in significant—they’re not fines, but they’re agreed-upon payments to the Government of Canada to the tune of, I think, over CAN$6 million. The three companies in question had participated in a voluntary reimbursement program to municipalities that had been victimized by a bid-rigging scheme, so damages were paid to the municipalities.

There were overlapping investigations by other law enforcement agencies for this conduct. Some charges were laid by provincial attorneys against some of the same parties. The individuals involved in the bid-rigging conduct were not covered by these resolutions, and in fact to date with respect to one particular area of the Province of Quebec four individuals have been charged criminally with bid rigging. Those four individuals have now all since pled guilty and obtained what are called in Canada conditional sentences, effectively house arrest sentences, varying from 12 months up to, I think, 20-some-odd months, for their participation in these bid-rigging schemes. This also comes out of a huge inquiry in Quebec into bid-rigging conduct in municipal contracts.

In the overall picture, the Public Prosecution Service thought it was an appropriate way to resolve these particular matters, and the Bureau was consulted and we didn’t object. As I say, the relationship with the PPSC is a good working relationship. Obviously, there are moments when we disagree, and we work through those disagreements towards advancing matters in the best possible way.

**ANTITRUST SOURCE:** One last question. Are there any other initiatives outside of the COVID-19 pandemic emergency that you would like to highlight in terms of misleading advertising?

**MATTHEW BOSWELL:** This is an area of focus for the Bureau. It has been for me—I used to run our
Cartels and Deceptive Marketing Practices Branch. In the last few years the focus has been on consumer trust in the digital age and going after companies that are engaged in false or misleading practices.

I guess the best example is with respect to price. We have taken a series of cases against large corporations for what we call “drip pricing.” Drip pricing is where you get an advertisement on your phone or your tablet that such-and-such product is X dollars; and then you start clicking through the buying process and at the end of it, it’s “X + 20%” or “X + 50%.”

This is something we’ve seen in the ticket industry. In February, we resolved a case with StubHub for this alleged practice of drip pricing where additional mandatory fees were added as you went through the process. You’re going to have to pay the fees anyway; they could have been included in the up-front price. StubHub agreed to pay a CAN$1.3 million penalty in February, to enter into a compliance program and a consent agreement in Canada.

Before StubHub, we last June resolved a case against Ticketmaster for the same type of alleged conduct, drip pricing, where they paid a CAN$4 million penalty in Canada and Bureau costs and other things as well as implementing a compliance program for this kind of conduct. Prior to that, we went after four of the large car rental companies for the same type of conduct. They all resolved at the Bureau, paying administrative monetary penalties.

So alleged online false or misleading representations are an area of focus. We want to send a message not just to specific companies but to businesses throughout Canada that this is something we are monitoring; we’re not afraid to take enforcement action against it.

In October we got a temporary consent agreement against a company called flighthub.com and justfly.com for online false or misleading representations where we were talking about hidden fees for seat selection and cancellation of flights. It’s a flight reseller.

We are constantly monitoring the marketplace, and an area of focus at the Bureau is trust in the online world. We have to have trust in the online economy. If we, as Canadian consumers, are all going to operate in it now, every day, it’s important that we have trust in that economy.

**Antitrust Source:** Thank you, Matt. This has been really interesting and we expect our readers will find it interesting to hear your perspective, initiatives, and insights into the Bureau’s work. Thank you again for the time you’ve given us, and we hope that you, your family, and your colleagues in the Bureau stay safe and healthy.