BLAKES COMMENTS ON THE FUTURE OF COMPETITION POLICY IN CANADA

I. INTRODUCTION

We appreciate the opportunity to comment on the consultation discussion paper entitled "The Future of Competition Policy in Canada" and published by Innovation, Science and Economic Development Canada (the "**Consultation Paper**"). The Consultation Paper discusses a variety of proposed amendments to the *Competition Act* (the "**Act**") that touch upon the fundamental principles underlying Canada's competition law framework, and we thank the authors for their thoughtful consideration of these issues.

Set out below are comments on the specific proposals highlighted in the Consultation Paper for your consideration.[1] We agree that proposals should be assessed with reference to four main themes: (i) a high bar for intervention; (ii) the extent of the Competition Bureau's (the "**Bureau**") role; (iii) consistency in enforcement and remedies; and (iv) the challenge of data and digital markets.

- **A high bar for intervention.** The Act has been carefully drafted as a statute of general application that aligns with Canada's broader economic policy objectives, seeking to balance the interests of a number of stakeholders, including consumers and small businesses, while also seeking to promote the efficiency and adaptability of the Canadian economy and its stakeholders.[2] It is also important to keep in mind that the application of competition laws often involves an interference with the freedom of contract and property rights of private parties. While infringements on contractual freedom and property rights may be justified from the perspective of overall social welfare in many circumstances, it is important not to forget the cumulative costs of such infringements, which should not be taken lightly. Moreover, when considering potential amendments to the Act, the government should be mindful of the risk of

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1 The comments reflected in this submission are intended to contribute to the ongoing general discussion regarding competition law reform in Canada. These comments do not reflect the views of any particular client, nor should these comments be attributed to Blakes or any of its clients in connection with any particular matter.

2 *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1.

over-enforcement, which may chill efficiency-enhancing and pro-competitive activity to the ultimate harm of consumers and society as a whole.

- **The extent of the Bureau's role.** Fundamentally, the Bureau is an independent law enforcement agency responsible for the investigation of conduct and prosecution of offences under the Act. It would therefore be inappropriate to allow the Bureau to make enforcement orders in the first instance, without the adjudication of an impartial and independent tribunal. Given the significant potential consequences of such enforcement actions on Canadian businesses, it is also important that the Commissioner of Competition (the "**Commissioner**") be required to prove any alleged harm based upon objective evidence on a balance of probabilities. Moreover, the Bureau is not a specialized regulator with extensive industry-specific experience and expertise. Instead, it functions as a generalized investigator and prosecutor that deals with Canadian businesses in an extremely wide range of industries. As such, the Bureau is not well positioned to create codes of conduct that could have far reaching implications on Canadian businesses.

- **Consistency in enforcement remedies.** In general, civil remedies are available for conduct that may have either pro-competitive or anti-competitive effects depending on the circumstances, while criminal remedies are available for conduct that is inherently anti-competitive. It would be inappropriate and counterproductive to attach criminal penalties to conduct that is potentially efficiency-enhancing and pro-competitive, which risks chilling such activity to the detriment of Canadian businesses and consumers alike.

- **The challenge of data in digital markets.** Digital markets are a critical engine of economic growth, innovation, and prosperity for Canadians, and the current competition law framework is fit for the task of promoting and protecting competition in digital markets. As the Bureau itself recently concluded after carrying out a detailed consultation in its report titled *Big data and innovation: key themes for competition policy in Canada*:

  > There is little evidence that a new approach to competition policy is needed…The fundamental aspects of the analytical framework (e.g., market definition, market power, competitive effects) should continue to guide enforcement…The key principles of competition law enforcement remain valid in big data investigations.[3]

  Similarly, a recent publication by the MacDonald-Laurier Institute reviewed a number of proposed legislative changes to address the growth of tech platforms and concluded that significant amendments or an overhaul of the Canadian competition policy framework "*would be counterproductive. Canada's competition law framework is capable of adequately discouraging anti-competitive behaviour by digital platforms. The Competition Act is sufficiently flexible to deal with anti-competitive conduct.*"[4]

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[3] Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (February 19, 2018) at 4-5, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

[4] Anthony Niblett and Daniel Sokol, "Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech," *A MacDonald-Laurier Institute Publication* (November 2021), at 4 – 5, online: https://macdonaldlaurier.ca/mli-files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf.

In the remainder of this submission, we assess the proposals presented in the Consultation Paper in light of these four themes.

I. MERGER REVIEW

Discussion Topic #1: "The revision of pre-merger notification rules to better capture mergers of interest"

The purpose of the pre-merger notification rules in the Act is to create a screening mechanism allowing the Bureau to identify transactions that are sufficiently material and likely to harm competition before they close, while simultaneously not overburdening Canadian businesses or the Bureau by capturing transactions that are less likely to result in substantial competitive harm.[5]

It is important to strike an appropriate balance between these two objectives.[6] The vast majority of transactions are efficiency-enhancing and pro-competitive, and very few transactions ultimately raise issues following a Bureau review. Of the 1,271 merger reviews completed by the Bureau from FY 2017-2018 to September 30, 2022, only 34 were concluded with issues under the Act (representing less than 3% of all merger reviews).[7] However, significant costs were incurred for each of the remaining 1,237 merger reviews concluded with no enforcement action under the Act, including internal business resources devoted to the review process, delays in achieving efficiencies, legal fees, filing fees, and Bureau resources.

As a result, it would be a mistake to make any changes to the notification provisions of the Act that would significantly increase the burden on Canadian businesses to notify transactions when the vast majority of such transactions are in fact efficiency-enhancing and pro-competitive. In addition, there is no evidence that a material number of mergers harming competition have been missed due to inadequate notification thresholds, and the absence of a notification does not preclude the Bureau from challenging a transaction. Affected stakeholders frequently alert the Bureau if there are legitimate issues with a transaction. Although the Commissioner points to several significant transactions have avoided Bureau scrutiny due to high notification thresholds,[8] the Commissioner has not provided any evidence that any such merger would have had, or been likely to have, the effect of significantly lessening or preventing competition in Canada.

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[5] OECD, "Policy Roundtables - Definition of Transaction for the Purpose of Merger Control Review" (2013), at 5, online: https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf.

[6] See e.g., International Competition Network "ICN Recommended Practices for Merger Notification and Review Procedures" (May 2018), at 3-4, online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf ("*In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without a corresponding enforcement benefit.*")

[7] Competition Bureau, "Performance Measurement & Statistics Report 2022-2023", s. 3.0 and 3.2, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competition-bureau-performance-measurement-statistics-report-2022-2023.

[8] Competition Bureau, "The Future of Competition Policy in Canada" (March 15, 2023), Submission by the Competition Bureau, s. 1.1.1.

However, it is worth exploring ways to ensure that the pre-merger notification rules more effectively target the small proportion of mergers likely to raise potential issues under the Act. For example:

- The C$400 million Size-of-Parties Threshold under s. 109 of the Act can be exceeded solely through the value of the assets or revenue of the target / vendor (as applicable) and their affiliates. This could inadvertently capture transactions involving a foreign purchaser with no assets or revenues in Canada, despite the fact that such a transaction could not possibly lessen competition in Canada. Potential options for addressing this issue include: (i) amending s. 109 to require both the purchaser and target / vendor (as applicable) to have a minimum level of assets or revenues, or (ii) requiring at least two parties to the transaction to exceed the C$93 million Size-of-Transaction Threshold under s. 110 of the Act (as is already the case for amalgamations under the Act).

- The Size-of-Transaction Threshold should be amended to captures sales "*in, from, or into*" Canada. While the C$93 million Size-of-Transaction Threshold under s. 110 of the Act captures sales "*in*" or "*from*" Canada (i.e., domestic sales and exports), it does not capture sales "*into*" Canada (i.e., imports). However, all sales made to customers in Canada can affect competition, including imports "*into*" Canada, and firms may increasingly have sales into Canada without having assets in Canada in the digital economy.

- Transactions in the real estate and upstream oil & gas industries should be exempt from notification. Such transactions have represented close to one-third of all transactions notified to the Bureau in recent years.[9] However, such transactions almost never raise material competition concerns (and the Bureau retains jurisdiction to challenge any non-notifiable mergers that may raise concerns).

Such changes would help ensure that the pre-merger notification provisions better screen for those transactions likely to raise potential competition concerns without increasing administrative burdens or imposing significant costs on Canadian businesses.

Discussion Topic #2: "Extension of the limitation period for non-notifiable mergers (e.g., three years), or tying it to voluntary notification"

The existing limitation period is the product of careful consideration. The Act was extensively amended and modernized in 2009 after a comprehensive review of Canadian competition policy summarized in the *Compete to Win Report* by the Competition Policy Review Panel in 2008.[10] In keeping with international norms, the Competition Policy Review Panel explained that:

> A shorter period in which to challenge a transaction would <u>provide more certainty for the Canadian business community and international investors</u>. Moreover, the implications of a shorter time frame would engender very little change in practice, given

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[9] See e.g., Competition Bureau, "Merger Intelligence and Notification Unit – Update on Key Statistics 2019-2020", online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-intelligence-and-notification-unit-update-key-statistics-2019-2020.

[10] Competition Policy Review Panel, *Compete to Win* (June 2008), online: https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf.

> that the Competition Bureau typically provides merging parties its views on whether the transaction raises substantive concerns in advance of the completion of the merger.[11] [Emphasis added]

This remains true today. Extending the limitation period to three years would create significant uncertainty for businesses and risk disincentivizing efficiency-enhancing and pro-competitive mergers. Moreover, making a shorter limitation period conditional on voluntary pre-merger notification would lead to the unnecessary notification of numerous transactions unlikely to raise competition concerns in the first place, increase administrative burdens and impose significant costs on Canadian businesses with no clear benefit.

At the same time, there also is no evidence that extending the limitation period would result in any material corresponding benefits. It is unlikely that there will be a material number of transactions that raise issues after three years that would not have presented concerns after one year.

Discussion Topic #3: "Easing of the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction"

There is no need to change the well-defined principles for seeking an injunction. The Federal Court of Appeal recently confirmed in *Secure* that the Competition Tribunal ("**Tribunal**") has broad jurisdiction under s. 104 of the Act to grant any interim order it considers appropriate, including an "interim interim" injunction pending a decision on whether to grant interlocutory relief.[12] The Commissioner had not grounded his case under s. 104 of the Act when the Commissioner failed to obtain an "interim interim" injunction before the Tribunal in that case.[13]

The Act's injunction standard has a well-established history and is consistent with the standards used in wide variety of other legal contexts.[14] Any removal or significant lessening of the current standard would put Canadian competition law out of sync with the rest of Canadian law. Moreover, as an investigator and prosecutor, it would be inappropriate for the Bureau to also be its own judge and jury when seeking injunctive relief. The Bureau must remain accountable to independent judicial oversight when seeking to impose orders with the potential to have significant consequences on Canadian businesses.

Although the Bureau may have to review large amounts of materials received from merging parties in response to a supplementary information request ("**SIR**") when preparing to seek interim relief, this is largely a problem of the Bureau's own making. As the Tribunal noted in *Secure*, a key solution is for the Commissioner to "*reduce the amount of information that is sought in a SIR and that then needs to be assessed within a very short period of time*."[15]

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[11] *Ibid.*, at 57.

[12] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 FCA 25 at paras 56 and 67.

[13] *Ibid.*, at para 42.

[14] See e.g., *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

[15] *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4 at para 59.

Moreover, the Tribunal has made clear it will not "*delve too deeply into the merits of the case*" at the interim injunction stage,[16] and the Commissioner only has to provide "*rough estimates*" of the harm alleged when seeking to impose an interim order.[17] The Commissioner can and does routinely quantify alleged anti-competitive effects arising from mergers and should readily be able to provide at least a "rough" sense of such harm necessary to satisfy the balance of convenience test (to the extent such harm is actually likely). Lessening such a requirement to provide objective evidence of harm when seeking to impose interim orders would weaken the checks and balances on the Commissioner's power that ensure procedural fairness to merging parties.

Discussion Topic #4: "Changes to the efficiencies defence, e.g., restricting its application to circumstances where consumers or suppliers would not be harmed by the merger"

Efficiencies lead to significant benefits for the Canadian economy by generating economies of scale, higher productivity, and enhanced innovation, and for this reason, economic efficiency is a primary objective of the Act.[18] The efficiencies exception in s. 96 of the Act (often referred to as a "defence") creates a "cost-benefit" analysis that takes into account not only the potential anti-competitive costs of transactions to narrow groups of affected consumers but also their beneficial impacts on the broader Canadian economy and other stakeholders. It would be counterintuitive to count the potential costs of transactions without also counting the full potential benefits.

Efficiency gains drive productivity, which is critical for the long-term welfare of Canadians. Canada's productivity levels significantly lag that of most peer countries.[19] The Canadian government's *2022 Budget* states that, if current trends continue, Canada will have the lowest rate of GDP growth per-capital among OECD member countries in the coming years.[20] However, bringing Canada's projected growth rate to the OECD average would add approximately $4,000 to the annual income of the median family with children by 2030.[21]

It is important to keep discussions about the efficiencies defence in context. Only a small number of transactions have been cleared in reliance on the efficiencies defence in Canada. The Tribunal did not find it necessary to consider efficiencies in the recent *Rogers / Shaw* decision.[22] The

[16] *The Commissioner of Competition v Parkland Industries Ltd et al*, CT-2015-003 (Comp. Trib.) at para 74.

[17] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7 at paras 119-121.

[18] *Competition Act*, RSC 1985, c C-34, s. 1.1.

[19] See e.g., The Conference Board of Canada, "Measuring Productivity in Canada," online: https://www.conferenceboard.ca/hcp/measuring-productivity-canada-aspx/.

[20] Department of Finance Canada, "2022 Budget: A Plan to Grow Our Economy and Make Life More Affordable," at 25-26, online: https://www.budget.canada.ca/2022/pdf/budget-2022-en.pdf.

[21] *Ibid*.

[22] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 at para 400.

Tribunal found the merging parties had failed to prove their efficiencies claims in the recent *P&H* decision.[23]

Critics pointing to countries without a comparable efficiencies defence ignore significant differences between those countries in the assessment of efficiencies,[24] ignore other jurisdictions that do have an efficiencies defence,[25] ignore those who believe their country should look to Canada as an example on efficiencies,[26] and forget that Canadian competition policy must be tailored to the unique facets of the Canadian economy instead of simply copying others.[27] For example, while efficiency improvements are beneficial to any economy, they are particularly important in Canada where industries face a smaller economic base and operate over wider geographic areas compared to many businesses in the U.S. and Europe.

Critics of the efficiencies defence who claim that it may harm consumers ignore the fact that it contains a mechanism enabling the Tribunal to fully take into account any socially adverse wealth redistributions.[28] Of course, not all mergers involve low-income consumers. Many mergers involve purely business-to-business transactions. Others may involve high-income consumers of luxury products buying from businesses owned by public-sector pension funds,[29] and efficiencies

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[23] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at paras 8 and 729.

[24] For example, the US *Horizontal Merger Guidelines* at 30-31, online: https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf, adopt a so-called "consumer surplus" approach that assesses whether the efficiencies would "reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases", without requiring the efficiencies to necessarily lead to increased rivalry between competitors. However, the U.K. Competition & Markets Authority's *Merger Assessment Guidelines* at paras 8.2-8.11, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf, state that "the CMA does not take relevant customer benefits into account in its competitive assessment" and requires that efficiencies must enhance rivalry between competitors in order to be relevant.

[25] For example, as explained in OECD, *Public Considerations in Merger Control* at 3 and 17, online: https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)30/en/pdf, the Australian Competition Tribunal applies "a modified total welfare standard that balances the likely benefits to consumers, shareholders and producers and the detriments of a merger," and the South African Competition Tribunal must consider a number of efficiency-related factors when assessing mergers, including impacts on particular industrial sectors or "the ability of national industries to compete in international markets."

[26] Christine S. Wilson, Commissioner of the U.S. Federal Trade Commission, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get" (February 15, 2019), online: https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

[27] Navin Joneja and Matthew Prior, "Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement," *Competition Policy International* (December 2021), online: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/North-America-Column-December-2021-Full.pdf.

[28] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 96-98.

[29] See e.g., Michael Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at 150.

can lead to long-term growth in productivity and innovation in the Canadian economy to the benefit of all Canadians.

As discussed below, this needs to be kept in mind when considering potential proposals for amendments to the efficiencies defence.

(i) Proposals to limit the efficiencies defence to a factor in merger review

The Bureau has proposed limiting efficiencies to "*a factor that may be considered in assessing a merger*," consistent with the so-called "consumer welfare standard" of Canada's major trading partners that do not allow mergers resulting in net transfers from buyers to sellers.[30] For the reasons discussed above, such a change is not necessary. In addition, such an approach would be a mistake for several reasons:

- This would be inconsistent with the recognition of efficiencies as the paramount goal of the merger provisions of the Act.[31]

- This approach would inherently disregard the long-term productivity benefits from fixed cost savings. Variable costs, not fixed costs, drive pricing decisions that affect consumers.[32] Nonetheless, fixed cost savings are an important contributor to the overall productivity of the Canadian economy and the welfare of all Canadians.

- This approach would inherently ignore gains to the total economic welfare and productivity of the Canadian economy from variable cost savings that do not directly increase consumer welfare.[33] However, such benefits have the potential to significantly outweigh the anti-competitive effects from a merger.[34]

- Reducing efficiencies to simply a factor in a merger review could inadvertently render them entirely irrelevant under Canadian law. The test under s. 92 of the Act focuses on whether a merger will give parties increased market power, which is the "ability" to raise prices (or adversely affect quality or other dimensions of competition).[35] While efficiencies may generate strong economic incentives to lower prices (or improve quality), they generally do not affect parties' market power or consequent "ability" to raise prices. As a result, simply adding efficiencies as a "factor" under s. 93 of the Act would actually turn them into a non-factor. To avoid this problem could require a complete overhaul of s. 92 (focusing on the "likelihood" of

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30 Competition Bureau, "Examining the Canadian Competition Act in the Digital Era" (February 8, 2022), online: Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement.

31 See e.g., *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 2 and 111.

32 Brian Facey and Cassandra Brown, Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations (2017), at 287-289.

33 See e.g., CBA Competition Law section, Practical Guide to Efficiencies Analysis in Merger Reviews (May 2018) at 5, online: https://www.cba.org/CMSPages/GetFile.aspx?guid=2ab62526-6844-4293-abc8-12d49a764711, with the light blue and light green areas of the chart denoting increases in economic surplus from variable cost savings that would be ignored under a consumer welfare standard.

34 M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at 151.

35 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 44-45.

harm rather than "ability"), which would make much of the extensive existing jurisprudence relating to s. 92 irrelevant.

(ii) Proposals to limit the Commissioner's burden of proof under s. 96

Certain commentators have proposed amendments to the Act that would limit the Commissioner's burden of proof under section 96. Some have proposed a legislative amendment providing that the Commissioner need not rely on quantitative evidence under section 96 to establish a probable substantial lessening or prevention of competition from a merger.[36] Others have proposed an amendment providing that the merging parties should bear the burden of proving every element of section 96, including the quantification of any anti-competitive effects.[37] Both proposals are a reaction to the Supreme Court of Canada's decision in *Tervita*, which gave no weight to any anti-competitive effects under section 96 because the Commissioner had failed to quantify evidence that was quantifiable.[38]

First, such changes are not necessary to ensure that qualitative effects are taken into account. The Supreme Court of Canada left significant latitude in *Tervita* for the Tribunal to take into account qualitative evidence, where appropriate. The Supreme Court of Canada's decision in *Tervita* requires that "*qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue*."[39] This gives the Tribunal a significant degree of discretion to take qualitative evidence into account.[40]

Moreover, the Commissioner has significant powers to gather evidence through SIRs under section 114(2) and judicial orders under section 11 of the Act. Using such powers, the Commissioner has the ability to uncover evidence of effects from both a qualitative and quantitative perspective.

Second, concerns about a bias resulting from any discounting of qualitative anti-competitive effects is misplaced. Mergers, joint ventures, and other competitor collaborations promote innovation and productivity improvements through dynamic efficiencies, increased economies of scale, and greater incentives to develop new products and services.[41] However, many of the beneficial impacts of a merger on innovation and productivity are also very challenging for merging parties to quantify because the exact nature and timing of new or better products and processes – and the extent to which they will benefit consumers and/or result in cost savings –

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[36] Edward M. Iacobucci, Examining the Canadian Competition Act in the Digital Era (September 27, 2021) at 33, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

[37] Calvin Goldman et. al, Proposed Revision of the Efficiency Defence for Mergers in Canada's Competition Act (May 4, 2022), https://www.cdhowe.org/sites/default/files/2022-05/IM_Gol-ayl-Car-Sch_2022_0504_new.pdf.

[38] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 128-140.

[39] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 147.

[40] In *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7 at para. 121, the Tribunal also noted that in the context of a section 104 proceeding, the Commissioner need only provide "rough estimates", including a "ballpark" estimate of the deadweight loss.

[41] See e.g., Gary L. Roberts & Steven C. Salop, "Efficiencies in Dynamic Merger Analysis: A Summary," (1995) 19:4 World Competition 5 at 8.

may not be known or quantifiable in advance. One should not assume that any qualitative anti-competitive effects will necessarily be larger than the qualitative efficiencies, which are often quite significant.[42]

Third, as stated by the Supreme Court of Canada, the assessment of the efficiencies trade-off should be as objective as possible.[43] As a matter of procedural fairness, merging parties must know the case they have to meet.[44] Requiring the Commissioner to quantify the anti-competitive effects that are quantifiable merely provides an objective basis to compare the positive and negative impacts of any merger. Any decision seeking to block a merger (let alone one generating significant efficiencies for the benefit of the Canadian economy) should be based on objective and concrete evidence to the fullest extent possible, not merely speculative and subjective claims from the Commissioner. As Justice Rothstein explained following the *Tervita* decision:

> In my view, the efficiencies defence should look mostly to the net change in economic efficiency as a result of a merger, without making value judgments about whether the particular economic gains at issue are more socially desirable than the losses. Qualitative factors must be taken into account, but a great deal of subjectivity is involved in their consideration. It seemed to me that such subjective judgment on the part of the Tribunal should be limited as much as possible.[45] [Emphasis added]

Such objectivity is important for determining the net impact of a merger on economic welfare and is consistent with section 92(2) of the Act, which prevents the Tribunal from relying on presumptions based on market shares when reviewing mergers.[46] Competition policy has long moved away from such presumptions to considering actual market effects, and, in our view, it should not backslide.

Discussion Topic #5: "Revisiting the standard for a merger remedy, e.g., to better protect against prospective competitive harm, or to better account for effects on labour markets"

(i) Revisiting the standard for a merger remedy

The current legal standard for merger intervention requires demonstrating that a merger is likely to prevent or lessen competition substantially before it can be blocked, unwound, or remedied.[47] This is a well-known, objective standard with respect to which competition authorities, counsel,

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[42] Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," Canadian Competition Law Review, Vol. 32, No. 1, May 2019, at 46-47, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

[43] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 146.

[44] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 125

[45] The Honourable Marshall Rothstein, Q.C., "Afterward" in Brian Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures, and Competitor Collaborations*, LexisNexis Canada Inc. 2017 (Second Edition), at 413.

[46] *Competition Act*, R.S.C. 1985, c. C-34, s. 92(2).

[47] *Competition Act*, R.S.C. 1985, c. C-34, s. 92(1).

businesses, and courts have significant experience, with robust jurisprudence governing its interpretation to create clarity and certainty for Canadian businesses.

Changing this standard would introduce arbitrary, unfamiliar, or untested terms into Canadian jurisprudence. It risks allowing the Bureau to challenge mergers as "anti-competitive" based on highly speculative harms of a theoretical magnitude rather than objective evidence of likely real-world effects. Such a shift would create substantial uncertainty and unpredictability for Canadian businesses, which risks chilling a number of legitimate efficiency-enhancing and pro-competitive mergers.

The Consultation Paper references proposals in the United Kingdom, Australia and United States that would take alternative approaches to assessing competitive harm *ex ante*.[48] However, none of these proposals have been implemented. The UK Digital Competition Expert Panel's proposed "balance of harms" approach would allow the UK Competition and Markets Authority ("**CMA**") to consider the scale of a harm, even if of a relatively small likelihood, in assessing whether a merger may negatively affect competition. However, Andrea Coscelli, the Chief Executive of the CMA, has raised a number of concerns with this approach:

> …we believe there are practical challenges in applying this kind of test in a transparent and robust way and are worried about unintended consequences.
> In addition, in our view, the test would also bring about a fundamental shift in merger policy. While the panel's report recognises that the new test would broaden the set of mergers which may be found problematic, our initial view suggests that the likely extent of this change should…not be underestimated.[49]

As a result, it would be a mistake to throw away a well-known, objective standard that provides clarity and certainty for Canadian businesses and replace it with a standard allowing mergers to be blocked due to potentially speculative harms of a theoretical scale.

In the Bureau submission to this consultation, the Commissioner argues that repealing s. 92(2) of the Act (which prohibits the Tribunal from concluding that a merger is likely to harm competition "*solely on the basis of evidence of concentration or market share*") would be a positive initial step toward a "*structural presumption*" of harm.[50] However, the significance of market share, and how an accretion to share should be interpreted, are highly contextual factors. Market shares alone can be highly misleading indicators of the actual competitiveness of an industry given the importance of other factors like ease of entry and expansion and countervailing buyer power. Any decision seeking to block a merger should be based on objective and concrete evidence to the

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[48] Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (November 2022), at 22-23, online: https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

[49] Andrea Coscelli, "Digital Competition Expert Panel recommendations – CMA view" (March 21, 2019), online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890013/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted_.pdf.

[50] Competition Bureau, "The Future of Competition Policy in Canada" (March 15, 2023), Submission by the Competition Bureau, s. 1.4.

fullest extent possible. Canadian competition policy has long moved away from such presumptions to considering actual market effects, and, in our view, it should not backslide.

It would also be inappropriate to punish parties who pro-actively modify a transaction to remedy anti-competitive effects by removing this basic right, as the Commissioner proposes.[51] The Bureau is a law enforcement agency, and the positive burden of evidentiary proof of harm should rest with the Commissioner. As the Tribunal found in *Rogers / Shaw*, the Commissioner should conduct a fair and objective assessment of the transaction as proposed.[52]

Finally, the Commissioner's proposal to require merger remedies eliminate all anti-competitive effects of a merger[53] is inappropriate and unreasonable. The requirement that a merger remedy eliminate "substantially" all anti-competitive effects reflects the reality of assessing merger remedies *ex ante*. It would be unfair and inappropriate to reject a merger remedy on the basis of speculative concerns regarding *de minimis* or insubstantial competitive effects.

(ii) Revising the merger review standard to better account for effects on labour markets

It would be a mistake to change the purpose clause in s. 1.1 of the Act to make distributional concerns a goal of Canadian competition policy. As Professor Edward Iacobucci observed, such a proposal "*has many disadvantages relative to a focus on efficiency…it perpetuates uncertainty, and legal indeterminacy, leaving fundamental policy questions up to the discretion of the Bureau and Tribunal*" and "*invites indeterminacy and asks a great deal of competition law and its institutions.*"[54]

Furthermore, there is no need to specifically add monopsony power and labour effects as a factor under s. 93 of the Act. Effects of mergers on labour markets are already cognizable factors under Canadian competition law, including as an effect of monopsony power as discussed in the Bureau's *Merger Enforcement Guidelines*[55] and the Tribunal's recent decision in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*.[56] Moreover, s. 93 allows the Tribunal to consider "*any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.*"[57]

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[51] Competition Bureau, "The Future of Competition Policy in Canada" (March 15, 2023), Submission by the Competition Bureau, s. 1.7.2.

[52] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 at paras 122-123.

[53] Competition Bureau, "The Future of Competition Policy in Canada" (March 15, 2023), Submission by the Competition Bureau, s. 1.6.

[54] See Edward M. Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (September 27, 2021), at 61-72, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

[55] Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011), paras 9.1-9.5, online: https://competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/03420.html#s9_0.

[56] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at paras 211 to 213.

[57] *Competition Act*, R.S.C. 1985, c. C-34, s. 93(h).

It is also important to recognize the many other laws, regulations, and regulators that deal with labour market issues, which often have greater ability to address specific labour market concerns. For example, federal and provincial laws already address employee pay, including minimum wage and severance. In addition, in 2021, the Ontario government introduced a ban on non-compete clauses in employment agreements.[58]

II. UNILATERAL CONDUCT

Discussion Topic #1: "Better defining dominance or joint dominance to address situations of de facto dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market"

As the Bureau recently concluded after carrying out a detailed study in 2018 titled *Big data and innovation: key themes for competition policy in Canada*:

> Enforcers should not, for example, condemn firms merely because they are "big" or possess valuable big data. Companies that achieve a leading market position—even a dominant one—by virtue of their own investment, ingenuity, and competitive performance should not be penalized for doing so…
>
> The Bureau's enforcement framework remains intact when examining matters that involve big data. … In mergers and monopolization, the framework should continue to be based on the principle that enforcement is appropriate when a consolidation of ownership or a dominant firm's anti-competitive conduct leads to a substantial lessening or prevention of competition.[59] [Emphasis added]

We agree. Removing any requirement that firms be dominant in order to contravene s. 79 of the Act would be a mistake. The Tribunal has held that dominance is synonymous with market power,[60] and the Supreme Court of Canada has in turn defined market power as "*the ability to 'profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition.*'"[61] Therefore, it is entirely appropriate to require a finding of dominance under s. 79 of the Act because, by definition, only a dominant firm can effectively influence any dimension of competition.

With respect to the actions of firms that may together exert substantial anti-competitive influence on the market, the Act already encompasses joint dominance. In particular, the abuse of dominance provisions of the Act apply where "*one or more persons*" are dominant in a market,[62]

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58 See the *Working for Workers Act, 2021*, SO 2021, c 35 - Bill 27 at Part XV.1.

59 Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (February 19, 2018) at 5, online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-Report-BigData-Eng.pdf.

60 See, e.g., *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 423.

61 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para 44.

62 *Competition Act*, R.S.C. 1985, c. C-34, s. 79(1)(a).

which the Bureau's *Abuse of Dominance Enforcement Guidelines* explain applies to instances of joint dominance.[63]

Discussion Topic #2: "Crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects"

We believe the test for a remedial order under s. 79 of the Act remains appropriate. In particular, the test to demonstrate intent under s. 79(1)(b) is sufficiently broad, with no requirement to show subjective intent. Instead, the Tribunal will assess and weigh all relevant factors, including the "*reasonably foreseeable or expected objective effects*" of the conduct, and in making this assessment, parties are reasonably deemed to have intended the effects of their actions.[64]

Moreover, we believe it is important that the abuse of dominance provisions continue to require evidence that the impugned practices will lead to actual anti-competitive effects. Often the same conduct can have pro-competitive or anti-competitive effects depending on the circumstances. Allowing the Commissioner to only provide evidence of a "capability" of harm instead of proving actual anti-competitive effects risks turning s. 79 into a *per se* offense, with no consideration of the potential pro-competitive effects of many practices. The requirement for Commissioner to prove the anti-competitive effects of the conduct in question ensures efficiency-enhancing conduct that benefits consumers is not found to violate the abuse of dominance provisions.

Moreover, we note that there is a relatively low bar for the Commissioner to prove anti-competitive effects under s. 79, with the ability to rely on qualitative evidence and no requirement to lead quantitative evidence of a deadweight loss.[65]

Discussion Topic #3: "Creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction"

The Canadian government held a recent consultation on the suitability of the Act for modern digital markets, exploring issues such as network effects, two-sided platforms, big data, and privacy, and the consensus was that the current framework is sufficient to meet these new challenges.[66]

However, the introduction of bright-line rules for dominant firms risks unintended consequences, including significant costs to the dynamism of the Canadian economy and its reputation as a place

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63 Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (March 7, 2019), at pars 46-50, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines.

64 *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 at paras 67-70.

65 *The Commissioner of Competition v The Toronto Real Estate Board,* 2016 Comp. Trib. 7 at para 469

66 Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (February 19, 2018), online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-Report-BigData-Eng.pdf.

to do business. The recent introduction of similar rules in Europe has raised serious concerns that such rules will deter future innovation to the broader detriment of the economy as a whole.[67]

Similarly, creating a presumption of harm for businesses of a certain type, with the consequent shift in the burden of proof, would represent a departure from the longstanding legal maxim that "those who assert must prove." It would also be inconsistent with the recognition that "*most choices by private firms (even big ones, who in fact may be big precisely because of their ability to cater to consumers) are economically beneficial*."[68]

> ***Discussion Topic #4: "Condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision. Alternatively, the unilateral conduct provisions outside of abuse of dominance could be repositioned for different objectives of the Act, such as a fairness in the marketplace"***

Condensing the unilateral conduct provisions into a single provision would risk chilling potentially efficiency-enhancing and pro-competitive activity that was previously not subject to a risk of fines. The Act has deliberately reserved administrative monetary penalties ("**AMPs**") for only the most serious conduct that constitutes abuse of dominance, and recent amendments to the Act have increased the maximum amounts for AMPs to up to three times the financial benefits derived from the anti-competitive conduct or 3% of annual worldwide gross revenues.

By contrast, the other unilateral conduct provisions of the Act do not allow for the issuance of AMPs. This is appropriate because conduct addressed by other provisions of the Act (e.g., resale price maintenance) can be highly efficiency-enhancing and pro-competitive in many circumstances.[69] However, the possibility of AMPs could deter many Canadian businesses from engaging in activity that benefits consumers out of an abundance of caution.

Moreover, the fundamental objectives of the unilateral conduct provisions must remain focused on enhancing the productivity and efficiency of the Canadian economy, consistent with the remainder of the Act. As Edward M. Iacobucci explains, an objective focused on "fairness":

> …perpetuates uncertainty, and legal indeterminacy, leaving fundamental policy questions up to the discretion of the Bureau and the Tribunal. Also, while economic efficiency is always significant in competition policy matters, other values, such as privacy, or freedom of expression, only occasionally arise, leaving competition policy an unreliable instrument to promote these alternative goals. Moreover, the pursuit of values other than efficiency may result in a push to perverse results, such as

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[67] Portuese, Aurelien. "The Digital Markets Act: European Precautionary Antitrust. Information Technology and Innovation Foundation," 2021, accessed at https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust/.

[68] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (September 27, 2021), at 40, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

[69] See e.g., Julie Soloway and David Dueck, *Maintaining Resale Price Maintenance: Canada and the Convergence to a Rule of Reason*, 2015 American Bar Association Antitrust Law Spring Meeting (April 2015) and Competition Bureau, *Price Maintenance (Section 76 of the Competition Act)* (September 15, 2014) at 1 and 15, online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/cb-eg-price-maintenance-e.pdf.

> welcoming an anticompetitive merger of luxury goods suppliers because consumers in this market may be better off financially than shareholders. Institutionally, a fairness approach would require the Bureau and Tribunal to be expert in all policy values that may relate to competition policy enforcement, from economic efficiency to privacy values to the social benefits from the diffusion of political power and beyond.[70]

Adopting a less objective purpose like fairness would therefore introduce uncertainty and indeterminacy into the enforcement of the Act to the harm of Canadian businesses and consumers alike.

III. COORDINATED CONDUCT

Discussion Topic #1: "Deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity, especially given the difficulty of applying concepts like 'agreement' and 'intent' in the age of AI"

Although the possibility of algorithmically facilitated tacit coordination is an important issue to continue to monitor, the Canadian government should carefully consider the potential consequences attaching possible criminal or civil liability such conduct. The use of algorithms is an increasingly common business practices in a wide variety of contexts, which underly or facilitate a significant proportion of economic activity in Canada.

The Consultation Paper notes it is clear the Act already criminalizes instances where competitors agree to fix prices using an algorithm. However, to capture "conscious parallelism" that might be carried out using algorithms to unilaterally optimize behaviour given expectations of the likely reactions of third parties, the Consultation Paper questions whether it would make sense to remove the requirement that a discrete meeting of the minds clearly be established.

As the Bureau's *Competitor Collaboration Guidelines* rightly state:

> The Bureau does not consider that the mere act of independently adopting a course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of subsection 45(1).[71]

Changing the longstanding approach to conscious parallelism to capture potentially undesired algorithmic activity risks criminalizing both independent profit-maximizing behaviour in the ordinary course as well as a much broader range of algorithmic usages than intended. At a time when greater adoption of algorithms should be encouraged to help grow Canada's digital economy, such changes risk chilling the adoption and innovation of important new technologies.

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[70] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (September 27, 2021), at 61, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

[71] Competition Bureau, *Competitor Collaboration Guidelines* (May 6, 2021), at 16, online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-BC-CCGs-Eng.pdf.

Discussion Topic #2: "Broadening and/or strengthening the Act's civil competitor collaboration provisions to discourage more intentional forms of anti-competitive conduct, including through examining past conduct and introducing monetary penalties"

Given that many competitor collaborations can be pro-competitive and ought to be encouraged, s. 90.1 is not intended to be a punitive provision. Introducing monetary penalties or otherwise seeking to punish past conduct would therefore be undesirable and counterproductive.

The Act has two key provisions dealing with agreements or arrangements between competitors:

- The criminal conspiracy provision in s. 45 of the Act addresses agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition, which are *per se* unlawful because they are almost always harmful to competition.[72]

- The civil competitor collaboration provision in s. 90.1 of the Act addresses collaborations that may be efficiency-enhancing and pro-competitive in many circumstances. As the Bureau's *Competitor Collaboration Guidelines* note, "Such pro-competitive collaborations, even when they involve competitors, can often benefit Canadians by allowing firms to make more efficient use of resources and accelerate the pace of innovation."[73]

Therefore, s. 45 of the Act was designed to address both past and present conduct and impose serious penalties to discourage such conduct, including the imposition of significant fines or imprisonment. By contrast, s. 90.1 allowed the Tribunal to issue orders stopping such conduct where it might have anti-competitive effects, but it did not allow the imposition of fines or imprisonment to avoid discouraging or chilling desirable collaborations. However, introducing monetary penalties or otherwise seeking to punish past conduct risks turning s. 90.1 into a punitive provision that could discourage Canadian businesses from engaging in many important efficiency-enhancing and pro-competitive collaborations.

Discussion Topic #3: "Making collaborations that harm competition civilly reviewable even if not made between direct competitors"

There is no need to amend s. 90.1 to address vertical conduct. Such a change is unnecessary and risks creating duplicative provisions addressing the same types of conduct:

- The price maintenance provisions in s. 76 address common forms of vertical agreements within supply chains.

- The exclusive dealing, market restriction, and tied selling provisions in s. 77 address a variety of agreements or arrangements between parties that are not direct competitors that could lessen competition substantially.

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[72] Competition Bureau, *Competitor Collaboration Guidelines* (May 6, 2021), at 11 and 14, online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-BC-CCGs-Eng.pdf.

[73] *Ibid.*, at 6.

- The abuse of dominance provisions in s. 79 address a broad range of predatory, disciplinary, or exclusionary anti-competitive conduct, including vertical agreements or restraints intended to have an adverse effect on competition.

Given the wide variety of provisions addressing potential harm arising from collaborations between parties that are not direct competitors, there is no need for further provisions addressing such collaborations, which risks only introducing greater uncertainty for Canadian businesses.

Discussion Topic #4: "Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement"

The Consultation Paper identifies one class of agreement – so-called "pay for delay" arrangements – that could benefit from a mandatory notification requirement. However, it is already open to the Commissioner to bring an application under s. 90.1 of the Act in respect of such agreements, and in order for a significant expansion of the notification requirements to be justified, there must be a substantial set of harmful anti-competitive agreements of which the Bureau is systematically left unaware. Unless the Canadian government can point to further examples of such agreements, there is no justification for creating a broad mandatory notification requirement, which risks imposing significant costs on Canadian businesses and chilling potentially pro-competitive collaborations.

With respect to a voluntary clearance process, s. 124.1 of the Act already provides a mechanism for voluntary notification to the Commissioner. In particular, this provision allows anyone to apply to the Commissioner "*for an opinion on the applicability of any provision of this Act or the regulations to conduct or a practice that the applicant proposes to engage in.*" Given this, creating a new voluntary clearance process risks being duplicative of the current regime already in place in s. 124.1 of the Act.

Discussion Topic #5: "Reintroducing buy-side collusion – beyond only labour coordination – into the Act's criminal conspiracy provision, or considering a civil per se approach to it"

Criminalizing buy-side agreements could have unintended chilling effects on legitimate competitive conduct. Buy-side agreements can be pro-competitive or efficiency enhancing in a number of circumstances. For example, they may be especially pro-competitive for smaller or medium size enterprises who, through combined purchases, achieve greater discounts from suppliers and share the delivery and distribution costs.[74] They are also important for many oil & gas producers in Western Canada, who commonly make purchases on behalf of both their own operations and their joint venture operations. Because these joint ventures are not technically affiliates, criminalizing buy-side agreements would risk criminalizing common business arrangements used in Western Canada.

Criminal penalties are too blunt an instrument to deal with agreements or arrangements between competitors that do not fall into the "hardcore" cartel category.[75] The Act should only criminalize

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[74] James B. Musgrove, *Fundamentals of Canadian Competition Law*, 3rd Edition (2015), at 102.

[75] Competition Policy Review Panel, *Compete to Win* (June 2008) at 59.

such agreements or arrangements where they clearly and unambiguously always harm competition, which is not the case with buy-side agreements.

Moreover, under section 90.1, the Tribunal can make an order prohibiting buy-side agreements that are likely to substantially lessen or prevent competition in a market. In our view, this approach works well and does not risk discouraging legitimate forms of collaboration, such as buy-side agreements among smaller competitors that benefit from increased scale to counteract market power from large sellers in order to obtain goods and services at lower prices.

However, if buy-side agreements are criminalized, the Canadian government should introduce an exemption similar to what currently exists in s. 47 for agreements or arrangements that are "made known" to third parties. Agreements "made known" to sellers should similarly be exempt from any criminal provisions addressing buy-side agreements.

Other Recommendations

While the Canadian government is considering potential amendments to the provisions of the Act dealing with coordinated conduct, it should consider (i) addressing significant problems identified with the new proposed wage-fixing and no-poach provisions in s. 45(1.1) of the Act and (ii) removing s. 49, which has never been used and is duplicative of other provisions of the Act.

(i) Addressing Significant Problems with S. 45(1.1)

Key issues identified with the new s. 45(1.1) are the following:

- It is not limited to employers that are actual or potential competitors in any labour market. A fundamental purpose of the Act is to "maintain and encourage competition in Canada,"[76] and s. 45(1.1) is at odds with this because it applies even where there could not be any possible impact on competition.

- It applies to agreements or arrangements regarding any "terms and conditions of employment." This is vague and extremely broad in scope, potentially even applying to agreements between employers over minimum working standards or shared diversity initiatives.

These issues are particularly concerning given that s. 45(1.1) is a criminal provision with significant penalties for violators, including fines or imprisonment of up to 14 years. Therefore, before introducing any new amendments to the criminal provisions of the Act, the new s. 45(1.1) should be amended to clarify and narrow its scope, including specifying that it does not apply to agreements or arrangements between parties that are not themselves even competitors.

(ii) Removing S. 49

We would recommend that the Canadian government remove s. 49 from the Act. It is redundant to the provisions in ss. 45 and 90.1 of the Act and has never been used since it migrating over from the federal *Bank Act* in 1986.

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76 *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1.

S. 49(1) makes it a criminal offense for federal financial institutions (e.g., banks or insurance companies) to enter into agreements or arrangements with respect to the rate of interest on deposits, the rate of interest or charges on loans, the amount or kind of loans made to a customer, services provided to a customer and the charges for such services, and persons to whom a loan or other service is provided or withheld. However, it only applies to federal financial institutions, such that an agreement between two federal financial institutions could be offside s. 49, while the same agreement between a federal financial institution and a provincial credit union or insurance company would not be.

The main criminal conspiracy provision of the Act, s. 45, expressly carves out federal financial institutions, but otherwise the conduct covered by s. 49(1) would arguably be covered by s. 45, which makes it a criminal offense to fix, maintain, increase or control the price of a product or to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

However, if s. 49 is removed, we recommend keeping the exemptions currently in place in s. 49(2) and moving them to s. 45(1). The include exemptions for agreements where a joint customer has knowledge of the agreement, agreements relating to bids for or purchase, sale or underwriting of securities, or agreements requested or approved by the Minister of Finance.

IV. ADMINISTRATION AND ENFORCEMENT

Discussion Topic #1: "Giving the Bureau more leeway to act as decision-maker, e.g. through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct"

The Bureau fulfills the function of an investigator and prosecutor in the Canadian competition law framework, and it would be highly inappropriate for the Bureau to also act as its own judge and jury. The separation of the investigative and prosecutorial decisions from adjudicative decisions is critical to preserve procedural fairness for Canadian businesses. Giving the Bureau the authority to act as decision-maker would risk undermining this critical separation of powers.

Moreover, the Bureau has the ability to seek interim orders under s. 104 of the Act not only for mergers but for all forms of reviewable matters covered by ss. 75, 76, 77, and 79 of the Act. As discussed above, the injunction standard under s. 104 has a well-established history and is consistent with the standards used in wide variety of other legal contexts. The Bureau must remain accountable to independent judicial oversight when seeking to impose orders with the potential to have significant consequences on Canadian businesses.

Finally, any codes of conduct should be introduced by Parliament, not the Bureau. The Bureau is not a specialized regulator with extensive industry-specific experience and expertise. Instead, it functions as a generalized investigator and prosecutor that deals with Canadian businesses in an extremely wide range of industries. As such, the Bureau is not well positioned to create codes of conduct that could have far reaching implications on Canadian businesses.

Discussion Topic #2: "Introducing new forms of civil enforcement as alternatives to criminal prosecution for certain actions"

There is merit in considering the possibility of using new forms of civil enforcement as an alternative to criminal prosecution for certain actions. However, the Act already contains many such provisions. For example, s. 90.1 already serves as a civil enforcement alternative for competitor collaborations to the criminal conspiracy provision in s. 45 of the Act. Similarly, s.

74.01 already serves as a civil enforcement alternative to the criminal deceptive marketing provision in s. 52 of the Act. It is unclear what other alternatives to criminal prosecution might be proposed, and the impact of any such changes on the existing framework of the Act should be carefully considered before any new provisions are introduced.

Discussion Topic #3: "Allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act"

It is very important to carefully consider the potential consequences of allowing private parties to seek damages under the abuse of dominance provisions of the Act, which would risk promoting unmeritorious litigation between competitors.[77] Private damages could also have a chilling effect on otherwise pro-competitive conduct as companies would be incentivized to commence or threaten to commence meritless lawsuits against competitors in response to aggressive competition that actually benefits consumers.[78] Such additional litigation would not enhance the competitiveness of Canadian industry or markets, and these costs need to be weighed against any perceived benefits.

Moreover, the Bureau was recently given significantly greater resources that will facilitate enhanced enforcement of the Act. This will further increase the Bureau's ability to bring legitimate actions challenging anti-competitive conduct in response to complaints from private parties.[79]

Discussion Topic #4: "Pursuing a reasonable path with respect to the collection of information outside of the enforcement context, such as for the purpose of market studies, taking both public value and private burden into account"

The Bureau should not be given increased powers to collect information from Canadian businesses for market studies (or otherwise) where there is no reason to believe that the Act has been violated. Allowing the Bureau to compel the production of information for market studies would place an onerous burden on the Canadian businesses targeted by such studies to provide significant volumes of documents and data at their own cost with no clear benefit.

It is no accident that the Act does not give the Bureau jurisdiction to carry out market studies. In the 1980s, the Bureau's predecessor (the Restrictive Trade Practices Commission) undertook a costly and burdensome 5-year market study of questionable utility into the petroleum industry, which involved 200 days of hearings, evidence from over 200 witnesses, more than 1,800 exhibits and 50,000 pages of transcripts and was preceded by an eight-year inquiry by the Director of

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[77] Competition Policy Review Panel, *Compete to Win* (June 2008) at 59, online: https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf.

[78] C.D. Howe Institute Competition Policy Council, "Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act", Twelfth Report (October 20, 2016) at 3.

[79] Anthony Niblett and Daniel Sokol, "Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech," *A MacDonald-Laurier Institute Publication* (November 2021), at 5 and 28.

Investigation and Research. Following this debacle, the power to conduct market studies was not carried forward from the *Combines Investigation Act* to the Act in 1986.[80]

Through market studies or other information collection exercises, Canadian businesses would also be subject to the risk of such requests being part of a "fishing expeditions" or otherwise abused in the absence of any indication they have contravened the Act. As a result, if any such powers to compel the production of information are to be granted, they should be carefully circumscribed and require judicial authorization (as is required for orders to produce information under s. 11).

The Bureau is also fundamentally a law enforcement agency, fulfilling the function of an investigator and prosecutor in the Canadian competition law framework. Engaging in market studies and getting involved in policy development or industry regulation efforts therefore risks drawing Bureau resources away from its role as a law enforcement agency.

Other Recommendations

(i) References to the Tribunal

Section 124.2(2) of the Act allows the Commissioner to refer questions of law to the Tribunal at any time.[81] However, private parties currently have no such right. If amendments are made to the Act, consideration should be given to also granting private parties a right to refer questions of law to the Tribunal, particularly with respect to mergers given their time sensitivity. We leave open whether the same ability should apply to other provisions of the Act as well.

The Bureau often engages with parties in the shadow of the law, and relatively few cases are ultimately litigated before the Tribunal. For example, Canadian businesses often prefer certainty and want to close mergers quickly in order to begin achieving synergies, which drives them to settle with the Bureau even when they might have had a strong case in litigation. In addition, the Commissioner is also currently the only gatekeeper for applications to the Tribunal relating to the merger provisions of the Act. Only the Commissioner can bring an application to the Tribunal relating to a merger under section 92 of the Act, and only the Commissioner can refer questions of law relating to mergers (and other matters) to the Tribunal under section 124.2(2) of the Act.

Allowing private parties to bring applications to the Tribunal on questions of law would help address this imbalance. It would provide private parties a way to obtain greater legal certainty without the risk of delaying the achievement of synergies or other important business objectives, and it would bring important legal questions before the Tribunal that may never otherwise be considered.

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[80] The Canadian Bar Association, "Examining the Canadian Competition Act in the Digital Era" (January 14, 2022) at 7, online: https://www.cba.org/CMSPages/GetFile.aspx?guid=c1f198d3-6ef0-45aa-b4b2-9b7cc953a0ef.

[81] *Competition Act*, R.S.C. 1985, c. C-34, s. 124.2(2) ("*The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX*.")

(ii) Oversight for Burdensome Information Requests

The Commissioner is recommending an increase in the burden of SIRs on merging parties, including requiring merging parties to prepare detailed logs of all documents that are protected by legal privilege and to subject merging parties to oral discovery under oath in a process that would add 60 days or more to the already lengthy merger review process.[82]

However, disproportionate and unnecessary demands for information place onerous obligations on Canadian businesses and on the Canadian economy as a whole, costing significant time, money, and other resources. The Bureau has been criticized for issuing overly extensive SIRs under section 114(2) during merger reviews, with the Tribunal recommending that the Bureau "*reduce the amount of information that is sought in a SIR and that then needs to be assessed within a very short period of time*."[83] Courts have provided an important oversight function with respect to production orders sought by the Commissioner under section 11 of the Act,[84] and we would recommend introducing amendments giving the Tribunal the power to exercise a similarly important oversight function with respect to SIRs issued under section 114(2) of the Act.

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[82] Competition Bureau, "The Future of Competition Policy in Canada" (March 15, 2023), Submission by the Competition Bureau, ss. 1.1.3 and 1.1.4.

[83] See e.g., *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp. Trib. 4 at para. 59.

[84] See e.g., *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59.

ABOUT BLAKES

Blake, Cassels & Graydon LLP is one of Canada's leading business law firms. Serving a diverse domestic and international client base, our five offices in Canada and 7 offices worldwide assist companies in virtually every area of business law, including competition law.

The Blakes Competition, Antitrust & Foreign Investment Group has been involved in many of the largest and most complex mergers in Canadian history, and has led the Canadian aspects of some of the largest global transactions, including internationally recognized innovative matters. Blakes is frequently retained by major domestic and international companies, and recommended by international and domestic law firms, to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters and other competition issues.

Blakes' lawyers have worked on many of the leading merger review and conduct cases in Canada. Treatises by members of Blakes Competition & Antitrust group have been cited by the Supreme Court of Canada,[85] and Blakes' lawyers have authored many of the leading articles on competition law reform in Canada.[86]

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[85] See *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 S.C.C. 3 at paras. 85-86, 91-95, and 102, which references Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham, Ont.: LexisNexis, 2013) and Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 4th ed. (Markham, Ont.: LexisNexis, 2014).

[86] See e.g., Navin Joneja and Matthew Prior, "Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement," *Competition Policy International* (December 2021), online: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/North-America-Column-December-2021-Full.pdf; Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," *Canadian Competition Law Review*, Vol. 32, No. 1 (May 2019) at 52-54, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx; Brian Facey, Navin Joneja et al., "Mind the Gap: Merger Efficiencies in the United States and Canada," *Antitrust Magazine*, Spring 2018, Issue 32:2; and Brian A. Facey and Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (March 2, 2017), *C.D. Howe Institute Newsletter*.

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