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Examining the Canadian *Competition Act* in the Digital Era

Submission by the Competition Bureau

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Introduction

This submission responds to Senator Wetston's invitation to comment on Canada's competition policy framework.¹ The Competition Bureau ("Bureau") is pleased to participate in this process.

The Bureau is an independent law enforcement agency that protects and promotes competition for the benefit of Canadian consumers and businesses. It is headed by the Commissioner of Competition ("Commissioner") who is responsible for the administration and enforcement of the *Competition Act*² ("Act") and other federal laws. In addition to the Bureau, the Competition Tribunal ("Tribunal") and the courts adjudicate matters under the Act. Innovation, Science, and Economic Development Canada develops and coordinates government policies, laws, and regulations respecting competition.³

Since the Act came into force in 1986, the world has seen a revolution of technological advancement. The unbridled innovation of the past 35 years has brought the world closer together and unlocked huge economic value. However, technology has also led to increasing digitization of the economy. The new, digital economy has grown a class of so-called "digital giants". Through their actions to collect, broker, and benefit from this new wealth of data, digital giants have obtained a high degree of influence across a wide range of economic activity. Across the globe, governments and policymakers have taken note of these digital giants. They want to ensure that competition policy frameworks can keep pace as consumers and competition are challenged by a relatively small number of powerful businesses that sit at the centre of the digital economy.

Competition policy emerged, more than a century ago, in response to a prior set of “giants” who also exerted significant control over the economy. Competition policy recognizes that competition is the best way to ensure a dynamic, resilient, and productive economy. Competitive marketplaces empower consumers. Competition drives businesses to lower prices, improve product quality, and vigorously innovate. This attracts new investment, promotes inclusive growth, and fuels the competitiveness of businesses both at home and abroad. To ensure the wealth and prosperity of both consumers and businesses, Canada needs more competition. ⁴

Senator Wetston’s invitation to comment on Canada’s competition policy framework provides an important opportunity to discuss amendments to the Act. Canada must ensure that the Act can effectively address today’s challenges. However, this discussion should not focus solely on responding to digital platforms. Many areas of the Act are ripe for review, as demonstrated by the government’s commitment to “undertake a broad review of the current legislative and structural elements that may restrict or hinder competition” in Canada. The Act applies to all economic activity in Canada. ⁵ This submission is based on the Bureau’s experience in administering and enforcing the Act across all sectors of the economy.

This submission contributes ideas and analysis to an on-going dialogue on modernizing Canadian competition policy. Other ideas may emerge to improve either the Act, or Canada’s competition policy framework more generally. Accordingly, this submission will not predetermine the Commissioner’s position in any current or future investigation or intervention pursuant to the Act.

This submission recommends modernizing the Act so that Canadian consumers and businesses can prosper in a competitive and innovative marketplace. To achieve this goal, the Act must contain the right provisions. The Commissioner also needs the right tools to ensure that

individuals and companies comply with the Act across a wide range of economic activity. This is no small undertaking. The Bureau remains focused and motivated in its role as Canada's competition authority, and looks forward to an ongoing, vigorous debate on how to best achieve these goals.

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1. The Purpose of the Act

The Act is designed to maintain and encourage competition, recognizing that a diverse array of economic benefits flow from the competitive process. Specifically, the purpose clause in section 1.1 of the Act provides:

"The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

Some commentators question whether the Act's purpose clause, unchanged since 1986, remains appropriate. For example, Professor Iacobucci refers to the purpose clause as "overinclusive" and "dangerously indeterminate". He suggests that moving away from the Act's broad economic framing towards a singular focus on promoting economic efficiency would bring greater clarity and predictability to the Act. ⁶

The Bureau strongly opposes such a change. Among other things, a singular focus on economic efficiency risks making the Act indifferent to the welfare of consumers, small and medium-sized enterprises, and other groups that are most vulnerable to anti-competitive conduct. It would remove the flexibility granted by the existing purpose clause and, therefore, risk upending decades of case law. Ultimately, greater clarity and predictability can be brought to the Act by addressing the other issues outlined in this submission.

1.1. The Act's purpose clause should maintain its broad outlook

The Federal Court of Appeal has described the Act's purpose clause as "typical". It has recognized that, "as is not uncommon in such clauses, not all of the stated purposes or objectives can be served at the same time, nor are all necessarily consistent."⁷ For example, stopping a domestic price-fixing cartel could result in lower prices for consumers and improved efficiency, but may not have any impact on Canadian participation in world markets. Yet, intervention is clearly warranted to maintain and encourage competition in Canada. In the Bureau's experience, when provisions of the Act are viewed through the lens of *maintaining and encouraging competition*, the objectives set out in the purpose clause rarely come into conflict.⁸

The purpose clause benefits from its flexibility. Its objectives provide examples of the types of economic benefits that competition brings, and thus guide the interpretation of various provisions of the Act.

Importantly, the purpose clause has not prevented the Tribunal or the courts from recognizing other benefits that are consistent with those objectives. For instance, the word "innovation" does not appear anywhere in the purpose clause, yet the Tribunal has referred to it as "the most important type of competition."⁹ Likewise, even though competitive prices and product choices are specifically mentioned in the purpose clause, the Supreme Court has recognized a broader range of

competitive harms stemming from market power, namely “the ability to profitably influence ... quality, variety, service, advertising, innovation or other dimensions of competition.”¹⁰ Finally, while only “consumers” are mentioned in the purpose clause, the Tribunal has recognized that suppliers can also be deprived of competitive prices and choices when buyers obtain market power through anti-competitive means.¹¹

It makes sense for the Act’s purpose clause to be cast broadly. This is because competition law embodies a broader range of economic values than just efficiency. For instance, cartels are prohibited not just because of their tendency to reduce efficiency, but also because they directly victimize individuals and businesses and harm their economic well-being.¹² Indeed, the Bureau is not aware of any jurisdiction in the world that orients its competition law around economic efficiency alone, and excludes other important touchstones like consumer welfare. Striking consumers from the purpose clause would be particularly odd in Canada given the Act’s deceptive marketing provisions, which produce significant benefits for consumers.

The purpose clause’s flexibility must be read in conjunction with the specific provisions of the Act, which are sometimes limiting. For example, conspiracies among competitors to suppress worker wages and employment opportunities, while contrary to competition, are not currently captured by the conspiracy provisions of the Act because of the specific wording of section 45.¹³ Similarly, the Act’s efficiencies exceptions for mergers and competitor collaborations can put less emphasis on certain benefits of competition because they are less susceptible to quantification.¹⁴ These examples of specific statutory language, and not the purpose clause itself, are what limit the Bureau from maintaining and encouraging competition in Canada. These and other examples are set out in greater detail in the sections that follow.

Recommendation 1.1 (Purpose clause): Changing the purpose clause risks fundamentally altering the Act, upending decades of established case law, and threatening the Bureau's ability to protect consumers and businesses from anti-competitive conduct. The Act should retain its existing focus of maintaining and encouraging competition in Canada in furtherance of a broad range of economic objectives.

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2. Merger Review

Mergers ¹⁵ are one avenue through which businesses can gain the ability to influence marketplace outcomes to the detriment of consumers, other businesses, and the competitive process. While most mergers in Canada do not cause concern, the Bureau pays close attention to those that could create, maintain, or enhance market power—*i.e.*, the ability of a business to materially affect pricing, product choice, innovation, or any other factor that consumers value. ¹⁶ When a merger creates, maintains, or enhances market power, the Act provides remedies to counteract these effects.

However, the merger provisions of the Act have been interpreted narrowly, in a manner that risks allowing businesses to complete anti-competitive mergers to the detriment of consumers and competition. At present:

- The Act may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger;
- The requirement to prove that a concentrative merger is likely to harm competition is not an efficient use of judicial, business, or

public sector resources;

- The standards established from analysis of more traditional industries are not suitable for assessing acquisitions of emerging competitors in the digital economy;
- The remedy standard established in the case law does not restore competition to pre-merger levels, allowing merging parties to accumulate market power and harm the economy;
- The ability to temporarily pause the completion of a merger pending the outcome of proceedings before the Tribunal is subject to legal standards that are impractical;
- The Act provides the Commissioner with only a short time to challenge a merger; and
- Some mergers can escape detection by the Bureau due to loopholes in the Act.

Legislative reform is necessary to address each of these issues. This will ensure that Canada's merger control regime remains effective and in line with international best practices.

2.1. Efficiencies should not be given primacy in merger review

Effective merger control is essential for Canadians to receive the benefits of a competitive marketplace. Anti-competitive mergers can lead to real harm in the economy, including higher prices, fewer choices, and lower levels of innovation.

The merger provisions of the Act attempt to balance the negative effects of anti-competitive mergers on Canadian consumers and businesses with the potential positive effects of business efficiencies arising out of such mergers. In 1986, Parliament included an efficiency exception in section 96 of the Act. This exception prevents the Tribunal from issuing a remedial order where doing so would eliminate efficiency gains that are

likely to be greater than, and offset, the competitive harm from the merger.¹⁷ In this circumstance, the firms are allowed to merge, even if the Tribunal has found that the merger will lead to higher prices, less choice for consumers, decreased levels of innovation, or other anti-competitive effects.

The efficiencies exception raises four important problems. In particular, it:

- permits mergers that are harmful to Canadians;
- is inconsistent with international best practice;
- is difficult—if not impossible—to implement properly; and
- suffers from a misguided original policy intent.

The efficiencies exception permits mergers that are harmful to Canadians

To understand the efficiencies exception, it is important to focus on the circumstances where it is engaged. The exception applies only after the Tribunal has found that a merger will likely cause Canadian consumers and businesses to face higher prices, fewer choices, decreased levels of innovation, or other anti-competitive effects. Following this finding that a merger will have harmful effects, the efficiencies exception requires the Tribunal to compare these anti-competitive effects with the private benefits that the merging parties can amass as a result of the transaction.¹⁸

Regardless of the size or scope of the private benefits brought about by the merger, a wide swath of Canadian consumers and businesses are harmed *in every case* where the efficiencies exception applies. These consumers and businesses now bear the burden of higher prices, fewer choices, and less innovation, with no requirement that they will receive any actual benefit from the merger.

The real force and effect of the efficiency exception has been to permit harmful mergers in the Canadian economy. The exception has excused—and, if left unchecked, will continue to excuse—mergers that are harmful to consumers, businesses, and the competitive process. The private benefits to merging parties granted by the efficiencies exception are financed by the real costs incurred by Canadians. For this reason, the efficiencies exception should not stand.

The efficiencies exception is an international outlier

Most international competition agencies have taken a more skeptical approach to efficiencies. These agencies only allow such mergers to proceed in the rare cases where efficiencies can be shown to directly benefit competition and consumers. In this regard, the Canadian efficiencies exception exists as an international outlier. This places Canada at odds with generally accepted best practices.

The United States, Canada's largest trading partner, does not have an efficiencies exception. In the U.S., enforcement agencies will consider efficiencies as part of their assessment of the competitive effects of a merger. However, in order for efficiencies to be dispositive, the parties to a merger will generally be required to demonstrate that any efficiencies are of such a great extent that they would "reverse the merger's potential to harm customers ... *e.g.*, by preventing price increases ..." ¹⁹ This contrasting treatment of efficiencies in Canada and the U.S. has resulted in situations where the Bureau allowed a merger to proceed because of the efficiencies exception, while the counterpart U.S. competition authority successfully challenged the merger. ²⁰

The U.S. approach is consistent with the recommended practices of the International Competition Network (ICN) – a forum representing over 120 competition agencies from around the world. ²¹ This can be observed in the merger enforcement guidelines of many jurisdictions:

- The European Commission: Where “the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition”, the E.C. may decide that there are no grounds for opposing the merger. ²²
- The United Kingdom: “efficiencies need to enhance rivalry in a way that counteracts the effects on competition ... Efficiencies due to the merger must be likely to strengthen the ability and incentive of the merged entity to act procompetitively for the benefit of consumers.” ²³
- Australia: “A merger that removes or weakens competitive constraints to the extent that a substantial lessening of competition results, will (unless authorised) contravene [the law] — even if the merger results in a more efficient firm with a lower cost structure.” ²⁴

In each of these jurisdictions, efficiency claims are considered as a factor in determining *whether* a merger is anti-competitive. In Canada, efficiency claims can allow a merger to proceed *in spite* of the fact that it is anti-competitive. This renders Canada’s merger policy as an exception to international best practices in merger control. It also exposes Canadian consumers and businesses to a greater risk of harm than would exist in the absence of the efficiencies exception.

The efficiencies exception is difficult to properly implement

Even prior to the efficiencies exception being enacted in Canada, many academics expressed doubt about the ability to implement such an exception. To this day, efficiencies analysis is an incredibly complicated and expensive undertaking. It requires significant volumes of data (when such data is even available), and a large number of assumptions to implement.

When Canada adopted the efficiencies exception, the approach was novel and untested. Even at that time, scholars raised serious questions about whether a case-by-case efficiencies analysis would be workable in practice:

- Nine years after he published his initial work establishing the efficiencies trade-off, Oliver Williamson argued that it is not "... feasible or rewarding for the courts to entertain explicitly an economies defense involving a full-blown trade-off assessment." He wrote that "severe operational problems would be posed if the courts were to entertain a full-blown economies defense in connection with mergers." ²⁵
- Richard Posner noted that "it is very difficult to measure the efficiency consequences of a challenged practice." He attempted, in his work, to find ways of "avoiding the prohibition of efficient, albeit anticompetitive, practices without having to compare directly the gains and losses from a challenged practice." ²⁶
- Robert Bork contended that an efficiencies exception "is a temptation to be resisted, although its superficial plausibility lends the idea a certain attractiveness". This is because "the relevant ultimate facts for antitrust purposes cannot be perceived directly or quantified." ²⁷

Despite significant improvements in economic methods, commentators continue to note the difficulties of efficiencies analysis today:

- Herbert Hovenkamp explains that "in most close cases estimating consumer welfare effects is far easier than measuring general welfare effects that require a tradeoff." ²⁸
- The C.D. Howe Institute Competition Policy Council has noted that "the efficiencies [exception] for mergers has become difficult for the

Bureau and merging parties to deal with as a result of the formalistic requirements.” 29, 30

In the digital economy, efficiencies analysis will become increasingly problematic. The Tribunal has recognized that:

“... dynamic competition is generally more difficult to measure and quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct.” 31

This factor will make implementing an efficiencies trade-off more difficult in highly innovative markets.

Although the efficiencies trade-off is a creation of economic theory, academics have—for the last 50 years—expressed misgivings about the ability of courts to implement it in the real world. More recently, the Tribunal has recognized that efficiencies analysis will become more complicated when innovation and dynamic effects of mergers are involved. The practical issues associated with its implementation render the efficiencies exception difficult—if not impossible—to rely on as a central pillar of Canadian merger control.

The efficiencies exception’s original policy intent is misguided

The efficiencies exception was originally intended to assist Canadian companies with becoming more competitive abroad. As noted by the Supreme Court in *Tervita*:

"A stand-alone statutory efficiencies [exception] was considered particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally. In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies [exception] is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition." ³²

However, the efficiencies exception applies both to firms that participate in international markets and those that act only domestically. Merging parties have availed themselves of the efficiencies exception on transactions affecting only domestic markets, and where there is no reason to expect that Canadian companies would become more competitive internationally due to the merger. ³³ Indeed, both of the fully litigated merger cases where the efficiencies exception has been determinative have affected domestic markets only. ³⁴

Even when the merging parties participate in international markets, restricting domestic competition does not support the productivity and competitiveness of the Canadian economy. In his study of international competitiveness, Michael Porter explained that:

"creating a dominant domestic competitor rarely results in international competitive advantage. *Firms that do not have to compete at home rarely succeed abroad.*" ³⁵

Other economic research has reached similar conclusions about the importance of domestic competition. For example, William Lewis explains:

"economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition ... more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor." ³⁶

Additionally, the OECD has recently recognized that:

"it is clear that industries where there is greater competition experience faster productivity growth. This has been confirmed in a wide variety of empirical studies, on an industry-by-industry, or even firm-by-firm, basis." ³⁷

Canada should not favour policy that allows concentration. Instead, it should promote innovation and economic well-being *through* competition, rather than at *the expense* of competition. ³⁸

The efficiencies exception lacks sound policy underpinnings. Originally designed to help Canadian businesses compete with international counterparts, it has been shown to act contrary to the economic well-being of Canadians.

Efficiencies should be a factor in the analysis, not an exception to the Act

The efficiencies exception is no longer supportable. It permits mergers that are harmful to Canadians. It is inconsistent with international best practices. It is difficult—if not impossible—to properly implement. It suffers from a misguided original policy intent.

That is not to say that efficiency considerations have no place within Canadian merger policy. Indeed, efficiencies are one reason why businesses merge. However, it is inappropriate for efficiencies to be given primacy in Canada's merger control regime.

Rather than treating efficiencies as an exception that allows harmful mergers, Canada should move in line with international best practice, and instead incorporate efficiencies as a factor that may be considered in assessing a merger.³⁹ Such treatment would permit a more flexible and modern approach to efficiencies analysis. It would also avoid immunizing anti-competitive mergers simply because private benefits may subjectively outweigh the tangible and provable anti-competitive effects of a merger.

Recommendation 2.1 (Efficiencies exception): The Act may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger. The efficiencies exception should be eliminated, and instead efficiencies should be considered as a factor when considering the effects of mergers.

2.2. Structural presumptions would simplify and expedite merger review

Subsection 92(2) of the Act precludes the Tribunal from concluding that a merger is likely to harm competition “solely on the basis of evidence of concentration or market share.”⁴⁰ Even when a merger creates a monopoly, the Commissioner bears the full burden of proving that the merger is likely to lessen or prevent competition substantially.

Discounting market concentration as sufficient evidence of the anti-competitive nature of a merger requires the Bureau and the Tribunal to devote significant resources to establish that such mergers are, in fact, likely to harm competition.

The U.S. takes a different approach to merger review by making use of “structural presumptions”.⁴¹ This approach first asks whether a merger will significantly enhance marketplace concentration. When that is true, the burden of proof shifts from the enforcement agency needing to

prove that a merger will likely be harmful to requiring the merging parties to show how the merger would not be anti-competitive. This approach is not only logical, but also follows the economic conclusion that mergers in highly concentrated markets are more likely to be anti-competitive. The U.S. case law has, since 1963, recognized that:

“... a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” ⁴²

Structural presumptions would simplify and strengthen the Canadian merger review regime. It would allow the Bureau and the Tribunal to focus resources and proceed more expeditiously in deciding merger reviews. As recently as 2020, the United States House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law agreed that these benefits result from structural presumptions:

“by shifting the burden of proof to the merging parties in cases involving concentrated markets and high market shares, codifying the structural presumption would help promote the efficient allocation of agency resources and increase the likelihood that anticompetitive mergers are blocked.” ⁴³

Structural presumptions are rebuttable, and fall well short of concluding that all concentrative mergers are problematic. Even with structural presumptions, it would still be necessary to show that:

- a. the merger significantly increases concentration, and

- b. there are insufficient countervailing forces to ensure that a merger does not harm competition.

Under this approach, concentration alone does not *determine* competitive harm. Rather, it focuses the investigation on the marketplace features that ultimately decide the impact of a merger on competition. This will tend to simplify cases, and save significant judicial, business, and public sector resources.

The Act should explicitly recognize the harmful impacts of mergers that contribute significantly to marketplace concentration. Failure to do so leads to conclusions that stretch credulity: that high market shares are typically transient in nature, or otherwise are not generally indicative of businesses having market power.

Recommendation 2.2 (Competition test): The requirement to prove that a concentrative merger is likely to harm competition is not an efficient use of judicial, business, or public sector resources. Structural presumptions should be enacted to simplify merger cases by shifting the burden onto the merging parties to prove why a concentrative merger would not substantially lessen or prevent competition.

2.3. The Act should better address acquisitions of emerging competitive threats

Much public attention has recently been placed on dominant firms acting to either “buy or kill” small start-ups in order to “[pre-empt] the emergence of future competition”.⁴⁴ When such conduct involves acquiring an emerging competitor,⁴⁵ it could be reviewed under the merger provisions of the Act. However, recent case law places a high

burden on the Commissioner to demonstrate that such conduct is, in fact, anti-competitive. This casts doubt on the practicality of effectively addressing killer acquisitions in Canada.

In a recent case, the Tribunal set out the burden that the Commissioner would have to meet in such cases:

“Normally, as part of an analysis of likely past, present or future entry, the Commissioner is expected to provide evidence regarding the proportion of the market that was, is or is likely to be available to new entrants. As part of this exercise, it is incumbent upon the Commissioner to identify concrete market opportunities that would likely have been, are or would likely be available to new entrants. In other words, the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, ‘within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market’.” ⁴⁶

To obtain a remedy, the Commissioner must have sufficient evidence to prove these elements on a balance of probabilities. While this may be possible in a traditional industry, such a task may be particularly difficult—or even impossible—when it involves the acquisition of a firm that is still developing the products that would challenge other competitors. Even when it is uncertain, or where there is only a low probability that an emerging firm would develop a competitive product, any acquisition of that business completely extinguishes this possibility. ⁴⁷ Predicting the future is hard at the best of times, but it can be particularly problematic in industries characterized by rapid technological progress.

This Canadian case law stands in stark contrast to case law in the U.S. In the *Microsoft* case, the D.C. Circuit Court of Appeals recognized that:

“the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.” ⁴⁸

In this decision, the court further recognized that “it would be inimical to the purpose of [U.S. competition law] to allow monopolists free reign to squash emerging, albeit unproven, competitors at will”. ⁴⁹ Canadian courts have no such overarching power or provision in the Act to protect the competitive process. Instead, the Act requires the Commissioner to identify, in the particular context of each case, the “concrete market opportunities” through which the emerging business would bring about greater competition. ⁵⁰

International competition authorities are similarly seeking to find ways to protect emerging competitors and provide them with the space needed to blossom into real competitive threats. For example:

- The Australian Competition and Consumer Commission (“ACCC”) has proposed refinements to the legal standard needed to be met for acquisitions of emerging competitors. In their amendments, the agency would only be required to show that an emerging competitor could become an effective competitor to existing incumbents on the basis of “a possibility that is not remote”. This is a lower standard than the more familiar balance of probabilities standard. The ACCC has also proposed a “deeming provision”. This would prohibit firms with substantial market power from making acquisitions that have

the effect of cementing or increasing that market power, without requiring proof of specific competitive effects. ⁵¹

- The U.K. government has proposed a lower intervention threshold for mergers involving digital giants. Under this threshold, the U.K. Competition and Markets Authority (“U.K. CMA”) would be able to intervene to stop such a merger whenever there is a “realistic prospect” that competition will be substantially lessened. This is, again, lower than their current balance of probabilities threshold. ⁵²
- In the U.S., one legislative proposal would allow competition authorities to intervene whenever there is an “appreciable risk” that business conduct could “materially” lessen competition. ⁵³

These examples contrast with the Canadian competition policy framework. In Canada, remedies are only available when the Commissioner can “identify concrete market opportunities” that an emerging competitor is likely to exploit. ⁵⁴ This can be difficult—if not impossible—when a business is still developing the products that would challenge other competitors.

Recommendation 2.3 (Prevent standard): The standards established from analysis of more traditional industries are not suitable for assessing acquisitions of emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process.

2.4. Remedies should eliminate all anti-competitive effects

Remedies can be obtained whenever a merger is likely to lessen or prevent competition substantially. However, the terms of that remedy need only be sufficient to “restore competition to the point at which it can no longer be said to be substantially less than it was before the

merger.”⁵⁵ Furthermore, the case law permits only the “least intrusive” remedy that meets the standard.⁵⁶ Accordingly, a merger remedy can leave a marketplace in a state where competition is still lessened or prevented to a degree—that degree merely cannot be considered substantial.

This means that merging parties can resolve anti-competitive mergers through remedies that still reduce competition in already concentrated markets. For example, remedies that fit the Canadian standard could involve the replacement of a highly effective competitor with a new entrant whose business is built from a remedy package containing the parties’ less desirable assets. As a result of this standard, the Commissioner has entered into consent agreements that permit an increase in concentration in affected markets, or which have replaced a strong competitor with a weaker one.⁵⁷

Canada’s remedial standard is out of step with important foreign counterparts:

- In the U.S., merger remedies are designed to maintain or restore the pre-merger level of competitive intensity.⁵⁸
- The European Commission requires that commitments made by parties to respond to competition concerns fully eliminate the anti-competitive effects of the merger.⁵⁹
- The U.K. requires an outcome that restores competition to the level that would have existed without the merger.⁶⁰
- The International Competition Network recommends that a remedy should maintain or restore the competition likely to be lost due to the merger.⁶¹

Additionally, the remedial standard available under other sections of the Act is more consistent with these international best practices. For example, remedies issued under subsections 77(2) and 79(2) of the Act

must restore competition. Even though the issue addressed by each of those provisions is competition being lessened substantially—similar to the issue addressed by the merger provisions—the remedial standards under sections 77 and 79 are stricter.

The current Canadian remedial standard for mergers allows situations where the anti-competitive effects of a merger are not fully eliminated. This allows businesses in already concentrated marketplaces to gain a higher degree of competitive advantage even when that competitive advantage has been determined to be detrimental to Canada's economic well-being. This puts Canada in a disadvantaged position compared to its international counterparts, and makes it less likely that merger remedies in Canada will achieve their desired purpose.

Recommendation 2.4 (Remedial standard): The remedy standard established in the case law does not restore competition to pre-merger levels, allowing merging parties to accumulate market power and harm the economy. The standard should be revisited to ensure that remedies preserve the pre-merger state of competition.

2.5. Merger injunction standards should be more workable

Contested merger files are complex commercial litigation. They often involve reams of documentary evidence, weeks of testimony and oral submissions, and sophisticated industry and economic analysis. Following a hearing, the Tribunal and the courts then require time to carefully consider the vast volumes of testimony and evidence in front of them. This complexity means that the length of fully contested merger files—like most competition cases—are typically measured in years.⁶²

Section 104 of the Act allows the Tribunal to issue orders ensuring that competition is protected during the period in which a broader application on the merits of a merger is being heard and decided. This

interlocutory relief is essential to the functioning of Canada's merger review system. It can prevent the merging parties, during the time when the Tribunal is fully considering the merger, from taking actions that result in higher prices, reduced consumer choice, forestalled innovation, or any other anti-competitive effect.

However, recent decisions call into question the practicality of this provision.⁶³ These decisions seem to leave the Bureau only three weeks in which to:

- i. receive, organize, and review the large volumes of business records and data needed to assess the likely effects of the merger;
- ii. disseminate that information to experts and have them provide reports on the likely effect of the merger;
- iii. incorporate that information into its own analysis, and
- iv. be in a position for the Commissioner to file injunction materials with the Tribunal, potentially among other tasks.

After the Bureau files such an application, the merging parties and Tribunal have only one week in total to respond to and adjudicate the application. These timelines, and the complexity of associated injunctive standards, places a significant burden on the Bureau, the merging parties, and the Tribunal.

Injunctions play a significant role in protecting competition

Merger review follows a standard process. For notifiable mergers, the merging parties are prohibited from closing their merger for 30 days after filing their pre-merger notifications.⁶⁴ During that 30-day period, the Bureau may request that one or more of the merging parties supply additional information relevant to the Commissioner's assessment of the merger. If this happens, the parties are prohibited from closing until after an additional 30-day period elapses following the date that

information is received by the Commissioner. ⁶⁵ The Bureau's request for additional information is commonly referred to as a Supplementary Information Request ("SIR").

Through this process, the Bureau seeks to determine whether there is sufficient evidence to conclude that the merger is likely to lessen or prevent competition substantially. To make this determination, the Bureau is often required to collect and analyze significant volumes of business records and data from both the merging parties and from third parties, such as other competitors, major customers, and suppliers. Nevertheless, the timing for this process is governed by the date that the Commissioner receives the information requested in the SIR. From that time, the Bureau has just 30 days to review the information, incorporate it into its analyses, and finalize its conclusions on the merits of a proposed merger.

However, when the Commissioner concludes that the merger is likely to lessen or prevent competition substantially, merely filing an application with the Tribunal for a remedial order does not automatically prevent the merging parties from completing their merger. If the Commissioner believes that it is necessary to prevent a merger from closing, the Commissioner must also seek injunctive relief from the Tribunal pursuant to section 104. ⁶⁶

Preventing a merger from closing can be of significant importance. Absent an order from the Tribunal, the parties are free to complete their merger upon the expiry of the 30-day period following receipt of SIR responses. Once the merger closes, the merging parties cease being competitors. They can begin to integrate their businesses and act as a single entity. To the extent that the merger allows the merged entity to raise prices, reduce consumer choice, forestall innovation, or have any other anti-competitive effect, these effects can begin to be felt immediately, and may be irreversible. ⁶⁷ Furthermore, preventing closing

provides the greatest scope for creating effective remedies. This is because it tends to preserve the quality of assets in the employ of the merging parties should a remedy be required. It is from this perspective that the Commissioner recently characterized merger review as “the first line of defence in protecting competition in the Canadian economy”. He noted that “the Bureau must be able to take timely and effective action to protect the public interest.” ⁶⁸

Recent case law imposes a high standard for injunctive relief

However, in recent cases, obtaining these necessary injunctions has proven difficult. At a time when merger review is becoming evermore complex, this creates a significant issue for the public interest and administration of justice. While the volume of information in front of the Bureau has never been higher, the Tribunal’s requirements on the Commissioner to provide witness statements, econometric modelling, expert reports, and other detailed forms of evidence—even if only as “rough estimates” ⁶⁹—at an initial stage of proceedings may frustrate the intent of making injunctive relief available.

As an example, one needs to look no further than the Commissioner’s most recent application under section 104. In that matter, the Tribunal denied the Commissioner’s application, despite finding that allowing the merger to close would likely cause irreparable harm, because the Commissioner failed to provide empirical estimates of that harm. ⁷⁰ Providing such empirical estimates is a difficult task that often requires sophisticated quantitative analysis for which the necessary underlying data may not always be available. Such analysis also requires merging parties to respond with sophisticated rebuttal evidence. Furthermore, the Tribunal is challenged with considering this competing evidence and making an ultimate determination. These factors tend to make injunction applications more difficult to bring, argue, and decide.

In that same decision, the Tribunal also established an expectation that the Commissioner should file an application for injunctive relief at least one week prior to the expiry of the second 30-day statutory waiting period.⁷¹ This has the practical effect of shortening that period from 30 days to at most 23 days. In reality, some of the Bureau's time during that 23-day period would be diverted away from its investigation, and toward the organization of evidence and filing of injunction materials.⁷² The Bureau already has a short time to integrate freshly received information into its analysis of mergers that raise significant issues. This even shorter period seriously jeopardizes the ability of the Commissioner to seek and obtain injunctions, even if the court agrees entirely with the Bureau's analysis. Put differently: the Act, in these circumstances, may be unable to protect Canadian consumers against anti-competitive effects. This is not because these effects are impossible to foresee, but because the case law has erected a formidable standard that the Commissioner must overcome.

Finally, adding to these difficulties is the Tribunal's recent decision to incorporate efficiencies-type analysis into its section 104 interim injunction analysis.⁷³ This requires the Commissioner to provide quantitative estimates of the anti-competitive effects of the merger in the injunction application.⁷⁴ When such evidence can even be developed reliably—which may not always be the case—attempting to do so often requires significant resource investment, both in terms of Bureau staff and economic experts. To further underscore the difficulty associated with these tasks, note that two Canadian competition lawyers have recently questioned whether the decision “may have the practical effect of preventing the Commissioner from enjoining a significant body of mergers at all.”⁷⁵

The merging parties and Tribunal are also significantly burdened by this process. From the time that the Commissioner files an injunction application, there is only one week in which the Bureau, the merging

parties, and the Tribunal must undertake difficult tasks. First, the merging parties must develop and file responding materials. Second, the merging parties and the Bureau must prepare for and attend an oral hearing. Third, the Tribunal must hold the oral hearing, consider the evidence, and make a final determination on the matter. Given the complexity of merger litigation, such an accelerated schedule may compromise the rights and ability of the parties to respond and the Tribunal to make a fully considered decision. This creates significant challenges to the public interest and administration of justice.

Furthermore, the timing pressures on the Bureau and the merging parties during this period of a merger review are not symmetrical. Parties' evidence of the benefits of the proposed merger would have begun to be developed in the ordinary course of planning the transaction in question. In contrast, the Bureau may only have three weeks to develop qualitative and quantitative evidence of the anti-competitive effects of the proposed merger.⁷⁶ Additionally, the incentives of the merging parties and the Bureau are not well aligned during this process. The timing pressure on the Bureau creates an incentive for the merging parties to hold back pertinent information from the Commissioner until the last minute, so that the Bureau has the least amount of time to review and incorporate that information into its analysis.

Injunctive standards should be adjusted to effectively protect competition

The standards necessary to file, hear, determine, and obtain interim injunctions should be reviewed in order to ensure that there is a workable avenue to protect competition on an interim basis. Otherwise, consumers and businesses may suffer negative and irreversible anti-competitive effects during the time when a broader application on the merits of a merger is being heard and decided.

Recommendation 2.5 (Injunctions): The ability to temporarily pause the completion of a merger pending the outcome of proceedings before the Tribunal is subject to legal standards that are impractical. These standards should be reviewed in order to ensure that there is a workable avenue to protect competition on an interim basis.

2.6. Mergers should be subject to a longer limitation period

Section 97 of the Act prevents the Commissioner from challenging a merger more than one year after it has been substantially completed. However, in circumstances where markets may evolve quickly, the limitation period risks under-enforcement of the Act, and should be expanded.

Merger review requires a prediction of how markets will likely evolve in the future. A merger review involves a “but for” analysis. This compares the likely future state of competition where the merger is allowed with the situation where the merger is prohibited.⁷⁷ The Act then provides remedies when the merger is likely to lessen or prevent competition substantially.

Predicting the future is difficult, and is made more difficult when less information is available. By extending the section 97 limitation period, it becomes easier to observe how the market may evolve following substantial completion of the merger. In this circumstance, the Bureau can retain an ability to act if circumstances change to the detriment of competition and consumers.

An extension of the section 97 limitation period need not reduce certainty for merging parties. The vast majority of merger reviews in Canada result in the issuance of either a “No-Action Letter” or an Advance Ruling Certificate in advance of the merger closing. The parties to these mergers obtain certainty that the Commissioner does not

intend to make an application to the Tribunal in respect of a merger long before the expiry of the section 97 limitation period.⁷⁸ This certainty neither depends on, nor would be affected by, a longer limitation period. Instead, a longer limitation period would provide an enhanced ability for the Bureau to protect competition by monitoring industry developments and acting against any harmful effects of a merger when marketplace events necessitate such action. This necessarily will occur only in respect of a small minority of transactions.

The one-year limitation period in Canada is shorter than some international counterparts. In the United States, there is no limitation period for merger reviews, meaning that a merger can be challenged at any point after its completion.⁷⁹ Australia's competition law provides a three-year limitation period.⁸⁰

A longer limitation period would also better allow the Bureau to detect and review merger transactions that are not subject to mandatory pre-merger notification. It is likely that some amount of these non-notifiable transactions evade detection because they are not brought to the Bureau's attention during the one-year limitation period.

Under the current framework, parties to a non-notifiable merger lack a strong incentive to cooperate with the Bureau. They have no obligation to notify the Commissioner of their merger. They may also gain by closing their merger as quickly as possible and seeking to "run out the clock" in order to reach the one-year limitation on the Commissioner's power to address the merger. Indeed, the Bureau has heard allegations that a merged firm waited approximately one year after closing their non-notifiable transaction to impose a significant price increase. That is, the business waited until it had the certainty that the merger was no longer reviewable under the merger provisions of the Act.⁸¹

The review of non-notifiable transactions is likely to become more important going forward as merger activity accelerates in digital markets. In the past decade, only five out of the hundreds of acquisitions made by the largest tech firms—Google, Apple, Amazon, Facebook and Microsoft—were notified under the Act.⁸² In the U.S., a recent market study similarly reports that a significant proportion of acquisitions by digital giants tend to fall outside of pre-merger notification requirements.⁸³ It is important that the Bureau is made aware of these transactions in order to ensure that they do not contravene the Act. Some commentators suggest extending the limitation period to three years for non-notifiable mergers will ensure that the Bureau has sufficient time to learn about the merger, undertake an investigation and, where appropriate, initiate an application within the limitation period.⁸⁴

Extending the limitation period for merger transactions would invigorate the Bureau's enforcement efforts. Such an extension would enhance the Bureau's ability to protect competition by monitoring industry developments and acting against any harmful effects of a merger when marketplace events necessitate such action. Prior to the 2009 amendments to the Act, Canada similarly had a three-year limitation period; this three-year time period should be restored.

Recommendation 2.6 (Limitation period): The Act provides the Commissioner with only a short time to challenge a merger. The limitation period in section 97 should be extended to three years.

2.7. Loopholes in pre-merger notification should be closed

Canada's pre-merger notification regime is a crucial part of the Act that requires parties to certain proposed transactions to:

- notify the Commissioner of the proposed transaction;

- provide certain information to the Commissioner; and
- wait a specified period before completing the transaction.

Pre-merger notification is essential to competition policy, in that it:

- makes the Bureau aware of the proposed transaction;
- provides the Bureau with time to analyse the impact of the proposed transaction;
- facilitates this analysis by ensuring that certain required information is submitted to the Bureau; and
- seeks to avoid the difficulties associated with remedying a completed merger, where that merger is subsequently found to be anti-competitive.

However, the present pre-merger notification regime is constrained by several significant issues. In particular, Canada's regime:

- lacks an anti-avoidance provision, which can allow merging parties to avoid notifying by "gaming" the system;
- ignores some transactions involving foreign businesses that can have negative effects on Canadians; and
- contains many technical loopholes that make it more difficult for the Bureau to detect and effectively investigate all mergers affecting Canada.

These issues increase the risk that the Bureau will either not be made aware of problematic mergers, or not have the time and information required to investigate the effects of those mergers. A review by two competition lawyers found that nearly half of the top 30 Canadian public merger transactions by deal size over the past five years were not subject to pre-merger notification. ⁸⁵

Canada needs an anti-avoidance provision

Anti-avoidance provisions in U.S. ⁸⁶ and E.U. ⁸⁷ pre-merger notification regimes provide a safeguard against merging parties structuring transactions so as not to trip the notification thresholds. Canada's pre-merger notification regime lacks such an anti-avoidance provision. The Act should be equipped with an anti-avoidance provision that would prevent parties from structuring their deal to avoid a requirement to notify.

Sales into Canada should be counted for notification purposes

For a proposed transaction to be notifiable, the aggregate value of the target's assets, or the annual gross revenues from sales in or from Canada generated from those assets, must exceed the transaction-size threshold amount—which currently sits at \$93 million. ⁸⁸ However, this formulation ignores sales made by the target into Canada that are not generated from Canadian assets. ⁸⁹ Sales into Canada remain competitively important and may be affected by the proposed transaction. Furthermore, this factor looms larger in the digital economy where firms can have sales into Canada that are not derived from Canadian assets. Therefore, such sales should properly be included in the calculations that determine whether a merger must be notified.

Technical loopholes of pre-merger notification should be addressed

Pre-merger notification is a technical area of the law. In addition to the issues identified above, there are at least seven more technical issues that should be addressed, including:

- The system does not require pre-merger notification for related transactions between the same or affiliated parties where each transaction is below threshold (such as a strategy of engaging in a "creeping acquisition"). Related acquisitions should be treated as one transaction under the pre-merger notification regime;

- An above-threshold acquisition of shares and assets where each component of the transaction is below threshold would escape the current requirements to notify. An acquisition of shares or interests (including shares or interests of entities that are not subsidiaries of one another) and assets, as well as amalgamations, should all be aggregated for purposes of calculating the threshold;
- The regime is structured such that non-corporate joint ventures are often exempt from notification.⁹⁰ This has the effect of excluding a large class of competitively significant transactions from notification requirements, merely because of transaction structure.⁹¹ Accordingly, non-corporate joint ventures should properly be made notifiable under the Act;
- Notification should be required for the acquisition of more than 20% (for public companies), 35% (for private companies) or 50% of any class of voting shares if the other thresholds are met. This would address the definition of “voting share” in subsection 108(1) that leaves room for the acquisition of up to 100% of important share classes without notification. That definition should also include any share to which votes may attach in the ordinary course of business;
- Subsection 110(6) should be amended so that the acquisition of an interest in a combination that “controls an entity that carries on an operating business” is also caught. This would harmonize subsection 110(6) with the rules for the acquisition of shares in subsection 110(3);
- Subsection 110(5) should be amended so that it captures assets contributed by affiliates of the partners in a joint venture; and
- The definition of “operating business” should be amended so that the operating business need not be in Canada to trigger notification.

Pre-merger notification loopholes should be closed

These issues have significant consequences for Canada's merger review regime. While the Commissioner retains jurisdiction to challenge non-notifiable mergers, any such merger needs to be detected and investigated before the one-year post-closing limitation period expires.

⁹² Absent effective pre-merger notification, there is a risk that Canadian consumers and businesses could suffer from an anti-competitive merger that proceeds not because of a decision by the Commissioner, but because of technical legal loopholes.

Recommendation 2.7 (Notification): Some mergers can escape detection by the Bureau due to loopholes in the Act. These loopholes in pre-merger notification requirements should be closed to ensure that the Bureau maintains the ability to detect and review economically significant mergers affecting Canada.

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3. Abuse of Dominance

Being “big” is not a problem under the Act. Businesses can gain market share through the competitive process. Doing so attracts competitive attention, and incentivizes others to seek consumer attention by innovating, differentiating, and bringing new value to market. The Act only becomes engaged when a dominant firm takes advantage of its privileged position as a market leader to act in ways that harm competition.

Section 79 of the Act provides remedies when a dominant firm abuses its market position to the detriment of competition. Even then, the provision is narrowly cast, requiring the Commissioner to prove each element of a three-part test:

- A business is dominant in a market, such that it either has the power to control marketplace outcomes, or gains that power through its abusive conduct;
- That business engages in a practice of anti-competitive acts that is intended to have a predatory, exclusionary, or disciplinary negative effect on a competitor; and
- That practice of anti-competitive acts lessens or prevents competition substantially.

This provision suffers from gaps that diminish its efficacy in policing the conduct of dominant firms. In particular:

- The abuse of dominance provision may allow dominant firms to escape scrutiny even when their conduct softens competition;
- The standards established from analysis of more traditional industries are not suitable for assessing anti-competitive conduct aimed at emerging competitors in the digital economy;
- Monetary penalties provided under the abuse of dominance provision are often too small to effectively deter anti-competitive conduct; and
- Private access to the Tribunal is currently not available for abuse of dominance cases.

Legislative reform is necessary to address each of these issues. This will ensure that dominant firms are less able to abuse their marketplace position.

3.1. Abuse of dominance should cover all forms of anti-competitive conduct

Left unchecked, dominant businesses can negatively affect the competitive process for their own benefit. The abuse of dominance provision in section 79 of the Act is designed to police this type of

conduct, and ensure that competitive forces dictate marketplace outcomes.

However, the courts have interpreted elements of the abuse of dominance provision in a narrow manner that may fail to capture harmful forms of anti-competitive conduct. Under current case law, the Tribunal has generally found abuses of dominance to be problematic only when the dominant firm engages in conduct that has an *intended negative impact on a competitor that is predatory, exclusionary, or disciplinary*.⁹³ This interpretation focuses too narrowly on the intent of that conduct in relation to a competitor, rather than in relation to the *competitive process*. This means that behaviour that is harmful to competition, but not intended to be harmful to a competitor, is potentially left unchecked. Commentators have referred to this gap as being “in most urgent need of reform”.⁹⁴

For example, consider a dominant retailer that has enacted a “price-parity” clause. This clause requires that, when its supplier sells its product directly to consumers, the supplier cannot sell that product at a lower price than the retailer. This can harm the competitive process by preventing the supplier from undercutting the retail price of the dominant firm.⁹⁵ However, this practice could aid the economic position of the supplier, allowing it to earn greater profits than they would in a more competitive environment. The harm in this example affects only the competitive process and is not necessarily intended to have a negative impact on a competitor that is predatory, exclusionary, or disciplinary. As a result, it is not certain the conduct could be addressed under section 79 of the Act. Nevertheless, in this example, consumers would be denied the benefits of competition, and be forced to pay higher prices.

This narrow interpretation of the intent of a dominant firm's actions risks missing harmful conduct. The Act has, at its purpose, the goal of maintaining and encouraging competition in Canada. Accordingly, its provisions should focus on addressing and correcting conduct that is harmful to the competitive process generally, and not just to one or more competitors.

Recommendation 3.1 (Anti-competitive acts): The abuse of dominance provision may allow dominant firms to escape scrutiny even when their conduct softens competition. This gap should be closed by ensuring that the provision captures conduct intended to harm competition, and not just conduct intended to harm a competitor.

3.2. The Act should better address conduct aimed at emerging competitive threats

Part of judging whether a business has abused a dominant position requires an assessment of whether that business' conduct lessens or prevents competition substantially. This is the same substantive test as applies to mergers in section 92 of the Act.⁹⁶ Thus, the concern expressed in section 2.3 of this submission with respect to assessing competition from emerging businesses also applies to abuse of dominance cases.

In the context of an anti-competitive act directed at an emerging business,⁹⁷ the Commissioner must demonstrate that such an act has halted the development of a significant competitive force.⁹⁸ Proving that an emerging business, at the early stages of developing the products that would challenge other competitors, would play a significant competitive role can be difficult. However, even when it is uncertain, or

where there is only a low probability that an emerging firm would develop a competitive product, anti-competitive acts directed at that business can completely extinguish this possibility. ⁹⁹

Accordingly, dominant businesses may escape scrutiny under the Act for engaging in anti-competitive behaviour not because the behaviour does not materially reduce competition, but rather because the extent of the impact is difficult to prove.

Recommendation 3.2 (Prevent standard): The standards established from analysis of more traditional industries are not suitable for assessing anti-competitive conduct aimed at emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process.

3.3. Monetary penalties should deter anti-competitive behaviour

Administrative monetary penalties play an important role in ensuring the efficacy of the Act. Properly structured, these penalties can provide a strong financial incentive for businesses to comply with the Act. However, to achieve this goal, such penalties must be “...greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct.” ¹⁰⁰ Otherwise, businesses may still realize profits from the conduct even after paying the monetary penalty. In such a situation, monetary penalties risk merely becoming a cost of doing business. ¹⁰¹

Current maximum monetary penalties under section 79 are insufficient. The maximum penalty under subsection 79(3.1) is \$10 million for an initial order, and \$15 million in the case of a subsequent order. ¹⁰² It is difficult to see how such amounts would act as an effective deterrent for

larger businesses that attract billions of dollars in annual revenue. ¹⁰³ In such a case, the Act does not impose meaningful consequences for non-compliance.

Canada's monetary penalties for abuse of dominance are significantly out of step with international jurisdictions. For example:

- In the UK, financial penalties are determined based on a number of factors, including the duration and seriousness of the conduct, and may total up to 10% of the worldwide revenues of the business. ¹⁰⁴ The U.K. CMA recently imposed a fine in excess of 155 million GBP (267 million CAD) against a pharmaceutical company for abusing its dominant position. ¹⁰⁵
- In the EU, fines are similarly based on the duration and gravity of the conduct. They may be up to 10% of a company's annual revenues. ¹⁰⁶ The European General Court recently upheld the European Commission's 2.42 billion EUR fine (3.5 billion CAD) imposed on Google for abusing its dominant position in online search. ¹⁰⁷
- In Australia, the maximum penalty for corporations for each contravention of the law is the greater of:
 - i. 10 million AUD (\$9.2 million CAD);
 - ii. if the excess profits that the company obtained as a result of the conduct can be determined, 3 times that value; and
 - iii. if those excess profits obtained cannot be determined, 10% of the company's annual revenues. ¹⁰⁸
- In South Korea, a penalty not exceeding 3% of revenues may be imposed, but a penalty surcharge not exceeding one billion won (1.1 million CAD) may be imposed if no relevant sales have been made, or it is impracticable to compute sales. ¹⁰⁹ A South Korean court recently upheld a 1.03 trillion won (1.1 billion CAD) fine imposed by

the Korea Fair Trade Commission on Qualcomm for abusing its dominant position in the market for modem chipsets. ¹¹⁰

Effective penalty amounts must exceed the profits earned from engaging in the abusive conduct. Otherwise, firms are unlikely to be deterred from such conduct. While penalty amounts should be levied at appropriate levels given the particulars of each case, the current penalties available are small and inflexible as compared to those available to international counterparts.

Recommendation 3.3 (Penalties): Monetary penalties provided under the abuse of dominance provision are often too small to effectively deter anti-competitive conduct. These penalties should be adapted to ensure that they can achieve their intended purpose of achieving compliance with the Act.

3.4. Private access should be expanded for abuse of dominance

Only the Commissioner can bring applications to the Tribunal under the abuse of dominance provision of the Act. In some circumstances, it may be appropriate for a private litigant to bring a case.

Private access serves as a complement to public enforcement by the Commissioner. Perhaps the greatest benefit of private access is that, by having a larger number of cases heard by the Tribunal, a broader body of case law would be developed. Such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses who engage in potentially reviewable conduct.

Additionally, there may be cases where the litigant is better positioned to bring a case than the Commissioner. For example, businesses are typically more familiar with the facts of the industries in which they operate. Therefore, they can often act more quickly than the Bureau,

which would need to conduct a thorough investigation to determine those facts. Another scenario is where conduct harms a particular firm that would therefore obtain a unique benefit from conduct being remedied.

In a resource constrained world, the Bureau must prioritize certain cases over others. Private access provides an avenue for all those with a legitimate complaint to seek relief in front of the Tribunal. Such an extension of private access will serve to more rapidly expand valuable case law, and bring these sections into sharper relief for both the Commissioner and Canada's business community.

Recommendation 3.4 (Private access): Private access to the Tribunal is currently not available for abuse of dominance cases. The Act should allow such access.

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4. Civilly Reviewable Competitor Collaborations

Businesses face increasing pressure to adopt flexible strategies to remain competitive in an economy that is continually changing due to globalization, technological innovation and advancements in production processes. Pro-competitive collaborations, even when they involve competitors, can benefit Canadians by allowing firms to make more efficient use of resources and accelerate the pace of innovation. At the same time, certain competitor collaborations may result in significant harm to competition.

The 2009 amendments to the Act were intended to create a more targeted criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for other collaborations. The amended criminal prohibition, found in section 45 of the Act, is reserved for agreements between competitors to fix prices, allocate markets, or restrict output. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to civil review under section 90.1 of the Act. This provision prohibits such agreements only where they prevent or lessen substantially.

Section 90.1 has existed only since 2009 and, as such, remains one of the newest substantive provisions in the Act. The past decade of experience in administering and enforcing section 90.1 has revealed significant gaps in its coverage. For instance:

- The remedies provided are insufficient;
- Only current or proposed agreements between competitors, and only current or future harm to competition, can be addressed under the provision;
- The provision contains an efficiencies exception, similar to the merger provisions, that is equally unsuitable for maintaining and encouraging competition;
- The standards established from analysis of more traditional industries are not suitable for assessing competitor collaborations that harm emerging competitors in the digital economy;
- Pharmaceutical patent litigation settlement agreements have the potential to harm competition, but can be difficult for the Bureau to detect; and
- Private access to the Tribunal is currently not available for competitor collaborations.

Legislative reform is necessary to address each of these issues. This will increase the efficacy of the Act in ensuring that competitor collaborations do not negatively impact competition.

4.1. The Act needs new remedies to address competitor collaborations

The primary remedy under section 90.1 is a prohibition order, preventing “any person ... from doing anything under the agreement or arrangement.” ¹¹¹ Remedies can only involve “any other action” with the consent of the subject party. ¹¹² Also, unlike other sections of the Act, there is no power under section 90.1 to impose administrative monetary penalties. ¹¹³

Prohibition orders can be inadequate to overcome the negative effects that an agreement between competitors may have on competition. This is recognized in other sections of the Act, including section 79 covering abuses of dominant positions which, in addition to containing a prohibition remedy, provides the power to require a person “... to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market” in the circumstances where a prohibition order, on its own, would be insufficient to achieve that goal. ¹¹⁴

Additionally, administrative monetary penalties are also available for abuse of dominance. Section 90.1 requires similar remedies to ensure that it is effective in gaining compliance with the Act.

Recommendation 4.1 (Remedies): The remedies provided for competitor collaborations are insufficient. Prescriptive remedies aimed at restoring competition and administrative monetary penalties should be available in these cases.

4.2. Past agreements and past harm should be addressed under the Act

Section 90.1 applies only to “existing or proposed” agreements between competitors.¹¹⁵ Accordingly, this leaves no recourse under the Act for agreements that existed in the past, but are no longer in effect. This temporal framing creates uncertainty over whether parties to an agreement could merely terminate any agreement that draws the Commissioner’s scrutiny, and then re-instate it at a future time.

Similarly, section 90.1 provides relief only for harm to competition that is presently happening, or is likely to happen in the future.¹¹⁶ It does not provide the power to address harm that has happened in the past, but has since ceased. This stands in contrast to the abuse of dominance provision in section 79, which provides relief for anti-competitive behaviour that has resulted in past harm.¹¹⁷

Recommendation 4.2 (Past agreements and past harm): Only current or proposed agreements between competitors, and only current or future harm to competition, are addressable under the competitor collaboration provision. Section 90.1 should be expanded to address both past agreements that are no longer in effect, and past harm to competition that has since ceased.

4.3. Efficiencies should not be given primacy in competitor collaborations

Section 90.1 tracks many of the substantive merger provisions in the Act. In this regard, subsection 90.1(4) establishes an efficiencies exception that applies to competitor collaborations. As more fully elaborated in section 2.1 of this submission, such an efficiencies exception has the effect of:

- permitting collaborations that are harmful to Canadians;

- being inconsistent with international best practices;
- being difficult—if not impossible—to properly implement; and
- being based on a misguided original policy intent.

Similar to mergers, efficiency considerations are one reason why businesses may wish to collaborate. However, it is inappropriate for efficiencies to systematically permit harmful collaborations. Accordingly, rather than treating efficiencies as an exception to the substantive provision permitting harmful collaborations, efficiencies should instead be incorporated as a factor that may be considered in determining the ultimate effect of a collaboration, like the factors set out in subsection 90.1(2) of the Act.

Recommendation 4.3 (Efficiencies): The competitor collaborations provision contains an efficiencies exception, similar to the merger provisions, that is equally unsuitable for maintaining and encouraging competition. This exception should be eliminated, and efficiencies should be properly considered as a factor when considering the effects of a competitor collaboration.

4.4. The Act should better address agreements that harm emerging competitors

Section 90.1 provides remedies when an agreement between competitors lessens or prevents competition substantially. This is the same substantive test as applies to mergers in section 92 of the Act.¹¹⁸ Thus, the concern expressed in section 2.3 of this submission with respect to assessing competition from emerging businesses also applies to competitor collaborations.

In the context of a competitor collaboration that harms an emerging business, ¹¹⁹ the Commissioner must demonstrate that such collaboration has halted the development of a significant competitive force. ¹²⁰ Proving that an emerging business, at the early stages of developing the products that would challenge other competitors, would play a significant competitive role can be difficult. However, even when it is uncertain, or where there is only a low probability that an emerging firm would develop a competitive product, an agreement between competitors that harms that business can completely extinguish this possibility. ¹²¹ Accordingly, this means that such a collaboration may escape scrutiny under the Act not because it does not materially reduce competition, but rather because the extent of its impact is difficult to prove.

Recommendation 4.4 (Prevent standard): The standards established from analysis of more traditional industries are not suitable for assessing competitor collaborations that harm emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process.

4.5. Pharmaceutical patent litigation settlement agreements should be notified

Developing new pharmaceutical products is a costly and uncertain process. New pharmaceutical products are often provided with patent protection, which can help ensure that such innovation occurs. ¹²² This can mean that, following introduction of a new drug, its owners are granted temporary exclusivity, during which no other manufacturer can produce an identical version of the drug.

However, such patent protections eventually expire. Following the end of any exclusivity, so-called “generic” drug manufacturers are allowed to create mirror copies of the drug and offer them to consumers in direct competition with the so-called “branded” version.¹²³ Generic manufacturers can also challenge whether the patent is valid or infringed, leading to disputes over the patent status of a particular product. These disputes can result in litigation and ultimately may be resolved through so-called “patent litigation settlement agreements”.

Since 2014, the Bureau has advocated that a system be established whereby the Bureau is made aware of these agreements.¹²⁴ This is because these agreements can sometimes bring about significant anti-competitive effects. In particular, these agreements can sometimes involve mechanisms where a branded drug manufacturer compensates a generic manufacturer to delay its entry into the market. Since generics are usually cheaper than branded drugs, these types of entry-delaying arrangements can lead to significant reductions in competition. This leads to higher consumer prices, less choice, and decreased levels of innovation. A 2010 study conducted by the U.S. Federal Trade Commission (“U.S. FTC”) estimated that these agreements were costing American consumers and taxpayers \$3.5 billion in higher drug costs every year.¹²⁵

Due to the private nature of patent litigation settlement agreements, they are unlikely to be brought to the Bureau’s attention by complainants. In the U.S., this issue is addressed by requiring pharmaceutical companies to notify the U.S. FTC of such agreements.¹²⁶ Beyond enabling detection and investigation, a notification mechanism also contributes to deterrence, as companies will be less likely to enter into anti-competitive arrangements that they know will be scrutinized. For example, the U.S. FTC has reported a continued decline in problematic examples of these agreements in recent years.¹²⁷

Recommendation 4.5 (Notification for pharmaceutical patent litigation settlement agreements): Pharmaceutical patent litigation settlement agreements have the potential to harm competition, but can be difficult for the Bureau to detect. The Act requires a mechanism to make the Bureau aware of such agreements.

4.6. Private access should be expanded for competitor collaborations

Similar to abuse of dominance, only the Commissioner can bring applications to the Tribunal under the competitor collaborations provision of the Act. In some circumstances, it may be appropriate for a private litigant to bring a case. In a resource constrained world, the Bureau must prioritize certain cases over others. Private access provides an avenue for all those with a legitimate complaint to seek relief in front of the Tribunal. Such an extension of private access will serve to more rapidly expand valuable case law, and bring these sections into sharper relief for both the Commissioner and Canada's business community.

Recommendation 4.6 (Private access): Private access to the Tribunal is currently not available for competitor collaboration cases. The Act should allow such access.

5. Cartels: Conspiracy and Bid-Rigging

The conspiracy and bid-rigging provisions of the Act identify categories of agreements that are so likely to harm competition, and so bereft of pro-competitive benefits, that no consideration of their competitive effects is required for a conviction. These are agreements between competitors to fix prices, rig bids, allocate markets, or restrict output.

There are significant gaps in these criminal provisions of the Act. In particular:

- Harmful buy-side conspiracies escape scrutiny under the Act's criminal provisions;
- The "made known" element to the Act's bid-rigging provision is not sufficient to protect the competitiveness of tendering processes; and
- Fines for cartel offences are inconsistent and, for conspiracies, are insufficient to deter anti-competitive behaviour.

Each of these issues should be addressed to increase the efficacy of the Act in ensuring businesses that unlawfully collude, rather than compete, face appropriate penalties for doing so.

5.1 Harmful buy-side conspiracies should be subject to criminal sanctions

Section 45 of the Act is a criminal provision that was amended in 2009 to prohibit agreements among competitors to fix prices, allocate markets, or limit the supply of a product. Since then, it has become apparent that the provision does not adequately address harmful agreements among competitors. While this provision applies directly to conspiracies among *sellers*, it does not presently address conspiracies related to *purchasers*.

¹²⁸ This limitation was recently the subject of high profile discussions about the issue of wage fixing and no-poach agreements in Canada. ¹²⁹

In particular, the omission of buy-side agreements means that the conspiracy provisions of the Act do not currently protect workers from agreements between employers that fix wages and restrict job mobility.

¹³⁰ International jurisdictions have recently identified no-poaching and wage-fixing agreements as particularly egregious. For example, in October 2021 the European Commission committed to expand its conspiracy enforcement to labour markets, including no-poach and wage-fixing agreements. ¹³¹ This followed similar labour market

enforcement in Ireland ¹³² and Italy ¹³³. The U.S. Department of Justice has also sought criminal sanctions for antitrust offences in the labour market. It brought forward its first wage-fixing case in December 2020 ¹³⁴ and its first no-poach case in January 2021 ¹³⁵. These proceedings reflect the U.S.' commitment to criminally pursue no-poach or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between employers. ¹³⁶ An important U.S. decision in November 2021 highlighted the seriousness of wage-fixing by confirming its status as a per se offence that can be prosecuted criminally. ¹³⁷ These developments put Canada out of step with our largest trading partner, as the Act currently does not contemplate criminal sanctions for buy-side conspiracies. ¹³⁸

In contrast, some buy-side agreements can be pro-competitive or benign. These include agreements between purchasers to form buying groups in order to take advantage of volume discounts. For example, small hardware or grocery stores may form such groups to acquire products at volume-discounted prices. This allows smaller businesses to compete more effectively against larger big-box stores. These agreements can benefit both sellers, as they can take advantage of the efficiencies of selling in volume to the buying group, as well as consumers who gain additional competitive alternatives. Accordingly, such arrangements should not be considered offences under the Act.

It is difficult to draw a bright line separating buy-side conspiracies that deserve criminal scrutiny under the Act, and buy-side arrangements that may be pro-competitive or benign. Both no-poaching and wage-fixing agreements are examples of harmful buy-side conspiracies that should be subject to the criminal provisions of the Act. However, further work should be done to identify whether other types of buy-side agreements—such as large purchasers agreeing on a price to purchase from small suppliers—warrant similar treatment.

Recommendation 5.1 (Buy-side conspiracies): Harmful buy-side conspiracies escape scrutiny under the Act's criminal provisions. The Act should explicitly provide an ability for the criminal prosecution of harmful buy-side conspiracies, including wage-fixing and no-poaching agreements.

5.2. “Made known” should be a defence limited to joint bidding

Section 47 of the Act makes it a criminal offence, in response to a call or request for bids or tenders, for two or more parties to agree on refraining from bidding or withdrawing a submitted bid, or for two or more bidders to agree among themselves on the terms of submitted bids. However, the offence of bid-rigging is not committed if the person requesting the bids or tenders is informed about the agreement made between the parties at or before the time of submission. This is commonly referred to as the “made known” element of the offence.

External commentators have noted that the made known element may be unduly broad for its purpose.¹³⁹ Made known is intended to increase competition by allowing beneficial bidding consortia to submit joint bids. However, its interpretation and application evolved to be applied beyond multiple bidders submitting a single joint bid to include multiple bidders submitting multiple agreed upon bids that reduce economic well-being and harm competition.

Further, the current formulation of the provision imposes the burden on the Crown to demonstrate that the agreement was *not* made known to the person requesting the bids or tenders.¹⁴⁰ Drafted by Parliament as a negative element, without additional statutory guidance, it is open to be interpreted to impose an extraordinary burden on the Crown.

Recommendation 5.2 (Making known a bid-rigging scheme): The “made known” element of the Act’s bid-rigging provision does not sufficiently protect competition. The Act should establish “made known” as a defence that may be asserted only when the conduct is directly related to the submission of a single joint bid.

5.3. Fines should be consistent and sufficient to deter anti-competitive behaviour

Criminal fines under the Act vary significantly depending on the offence committed—even when the offences cover similar types of conduct. For example, conspiracy offenders (section 45 of the Act) can receive a fine not exceeding \$25 million, whereas bid-rigging offences (section 47) are punishable by a fine amount in the discretion of the court.¹⁴¹ It is unclear why the amount of fines available to the court vary between these sections, particularly given that bid-rigging is merely a specific type of conspiracy.

Additionally, the current level of criminal fines may not be fit to achieve its intended purpose. Criminal fines under the Act are not merely a punitive measure; instead, fines play a crucial role in promoting compliance by deterring anti-competitive conduct. When maximum fines are set too low, any resulting fine amount may be overshadowed by the private gains associated with the conduct—particularly for large firms with billions of dollars in revenue. In this circumstance, such fines risk becoming merely “the cost of doing business”, rather than acting as a meaningful force to forestall highly detrimental anti-competitive conduct.¹⁴²

This issue is magnified by the fact that the Act’s maximum fines for conspiracies are out of step with those in counterpart jurisdictions internationally. Competition laws in the U.S.,¹⁴³ E.U.,¹⁴⁴ and other countries¹⁴⁵ provide dramatically larger fines that can scale up with the

revenues of the parties or the volume of commerce affected by the offence. Consequently, actual fines levied in those jurisdictions are often substantially higher than fine amounts available under the Act. For example:

- The U.S. Department of Justice obtained a 925 million USD fine (1.18 billion CAD) against Citicorp for its involvement in the LIBOR cartel; ¹⁴⁶
- The European Commission fined Daimler 1 billion EUR (1.4 billion CAD) for its participation in a cartel involving truck producers; ¹⁴⁷
- The French competition authority fined L'Oréal 189 million EUR (270 million CAD) for participating in a personal care products cartel; ¹⁴⁸ and
- The Japanese competition authority fined a road construction company 12.8 billion JPY (140 million CAD) for fixing the price of asphalt. ¹⁴⁹

Appropriate fine amounts under the Act would serve a dual purpose. First, they would send a message to businesses that Canada is as serious as any other country about preventing cartel behaviour. Second, they would allow the Act to not only punish past behaviour, but to also act as a strong deterrent to stop anti-competitive behaviour.

Recommendation 5.3 (Fines): Fines for conspiracy and bid-rigging offences are inconsistent and, for conspiracies, insufficient to deter anti-competitive behaviour. They should be made consistent across provisions and be strengthened to provide an effective deterrent to manifestly harmful cartel behaviour.

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6. Deceptive Marketing

Advertising is important for competition. It allows businesses to educate customers on their area of competitive advantage—whether it is price, quality, innovation or another attribute that is valuable to consumers. Without advertising, businesses have fewer ways of attracting customers, and consumers are less informed of their choices.

But advertisements are only valuable when they communicate truthful information. When consumers are misled, competition suffers, and markets fail. Honest competitors lose sales, and consumers end up with goods and services that are not the best choice for them. In this respect, deceptive marketing is just as harmful as other business conduct that attempts to raise prices, reduce choice, or negatively impact innovation; it distorts competition to the detriment of Canadians. Accordingly, the Act contains a number of provisions aimed at discouraging deceptive business practices.

Many of the deceptive marketing provisions have not received substantive updates in more than a decade. Since that time, enforcement experience has revealed several gaps in these provisions. In particular:

- The practice of “drip pricing”—*i.e.*, presenting a consumer with a price, while concealing mandatory fees until later in the purchasing process—is not explicitly recognized as harmful in the Act;
- The Commissioner bears a significant burden, under the ordinary selling price provision, of proving that advertised discounts are not genuine;
- The provisions are inconsistent in how they provide civil remedies and criminal penalties; and
- Monetary penalties can be too small, and other remedies can be too weak, with the effect that it can be difficult to ensure conformity with

the Act.

Each of these gaps should be addressed to ensure that consumers are empowered with accurate and truthful information upon which to base purchasing decisions.

6.1. Drip pricing should be explicitly prohibited by the Act

Advertisers may sometimes manipulate pricing information through what is often referred to as “drip pricing” practices. This occurs when an advertiser promotes something at one price, while concealing the real price from consumers until later in the purchasing process. Consumers who are attracted to the initially advertised price may decide to go ahead with a purchase. However, by the time the consumer ‘checks out’, additional mandatory costs are added, and the ultimate price for the product can be much higher.

For years now, the Commissioner has successfully taken enforcement action against this practice using the false or misleading representations provision in section 74.01 of the Act.¹⁵⁰ While this approach has been effective, it has required significant resources in order to be ready to prove to the court, in every case, why drip pricing is deceptive.

Recommendation 6.1 (Drip pricing): The practice of “drip pricing”—*i.e.*, presenting a consumer with a price, while concealing mandatory fees until later in the purchasing process—is not explicitly recognized as harmful in the Act. The enforcement of the Act would be made more effective by confirming that this is a harmful practice.

6.2. Sellers should bear the burden of proving that discounts are genuine

Another deceptive pricing technique involves fake discounts. Businesses may promote a price as being a discount when, in fact, the advertised price is the ordinary price of the product. This conduct is prohibited under the ordinary selling price (“OSP”) provisions of the Act.¹⁵¹ These provisions recognize that savings claims increase the likelihood that consumers will buy from the advertiser, and decrease the likelihood that consumers will shop around for a better deal.¹⁵² This means that consumers get less value than they bargained for, and honest competitors have less chance to earn those sales.

The current OSP framework in the Act places a heavy burden on the Commissioner to prove that savings claims are deceptive. For the Bureau to evaluate the truthfulness of a single advertisement, it is required to gather and analyze large volumes of sales and marketing data, and present these analyses to the courts in a compact and meaningful way. Conversely, the advertiser bears no burden at all to show that the claim that it made represented a genuine discount.¹⁵³

Recommendation 6.2 (Ordinary selling price): The Commissioner bears a significant burden, under the ordinary selling price provision, of proving that advertised discounts are not genuine. The burden of proof for ordinary selling price matters should be reversed, so that advertisers bear the burden of proving that advertised discounts are, in fact, truthful.

6.3. Greater flexibility is needed for deceptive marketing investigations

The Act contains a number of provisions to protect consumers from deceptive marketing practices. However, these provisions are inconsistent in how they address deceptive conduct. Some deceptive

practices are addressable civilly, while some are reviewed criminally. Others yet can be treated either civilly or criminally.

For example, the Act provides only criminal penalties for deceptive telemarketing.¹⁵⁴ These rules are important to protect consumers. However, treating all breaches of these rules as criminal may not always be in the public interest. For example, someone may market over the phone without providing all of the disclosures required under the Act. At the same time, that person may do nothing during the call to mislead a consumer. In these circumstances, it may be preferable to deal with this behaviour in the civil courts, rather than to engage in a criminal prosecution. Proceeding civilly could provide a more proportionate response to the conduct. It could also ease procedural requirements and burdens of proof relative to criminal prosecutions, potentially leading to quicker resolutions. However, that is not currently an option under the Act, which may lead to under-enforcement of these rules.¹⁵⁵

Additionally, the differing civil remedies and criminal penalties across the deceptive marketing sections mean that it can be difficult to address an issue in a single case. For example, an advertiser may make contest-related representations to consumers on a website, in mailouts, in social media, and during telemarketing calls. If there were allegations of deception in representations made across these media, then under the Act the website and the representations made in social media could be investigated under either the civil rules or criminal provisions. In contrast, the telemarketing and mailout representations could be examined only under the criminal provisions. This causes roadblocks that can prevent the Commissioner from dealing effectively with all representations in a single case.

Recommendation 6.3 (Harmonizing criminal and civil provisions):

The deceptive marketing provisions are inconsistent in how they provide civil remedies and criminal penalties. The Act should provide

both criminal and civil tracks in order to allow the seriousness of deceptive conduct to dictate how it gets addressed.

6.4. The Act needs better remedies to address deceptive conduct

Consumers deserve protection from businesses that deploy deceptive techniques. However, many large advertisers have little to fear and much to gain from this kind of consumer deception. Given this reality, it is important that the Act provide scalable and flexible tools to ensure that those who engage in deceptive marketing practices get the message that they need to comply with the law.

In terms of scalability, administrative monetary penalties have been a main tool for encouraging compliance with the prohibitions against deceptive marketing. Like the abuse of dominance provision, penalties are capped at a maximum of \$10 million for an initial order, and \$15 million in the case of a subsequent order.¹⁵⁶ Penalties capped at such amounts can be effective in ensuring compliance for many small and medium-sized businesses, but for the world's largest firms, who earn billions of dollars in revenues, these penalties could often amount to a pittance. Courts need the latitude to address deception engaged in by all businesses. This calls for the ability to impose greater penalties when circumstances require.¹⁵⁷

In terms of flexibility, there are remedies that are available to the courts when dealing with private litigants that are not available when trying to address breaches of the Act. For example, if a service provider engages in a misleading advertising campaign in order to encourage consumers to sign up for a multi-year contract, there is no authority under the Act to cancel those contracts. As such, victims can be obligated to continue paying their deceiver, even when they were misled into entering a contract. Not only are consumers harmed directly because they were

deprived of what they agreed to, but the marketplace itself is harmed, because the consumer is not able to take their money and shop for comparable services elsewhere. In such circumstances, the Act should provide greater latitude to ensure that appropriate remedies are available.

Effective remedies serve the goal of ensuring conformity with the Act. While remedies should be set given the particulars of each case, the current remedies available under the deceptive marketing practices provisions are generally small and inflexible, and should be adapted to ensure that they can achieve their intended purpose.

Recommendation 6.4 (Remedies and Penalties): Monetary penalties can be too small, and other remedies can be too weak, with the effect that it can be difficult to ensure conformity with the Act. Monetary penalties should be increased, and the Act should provide a wider range of remedies to counteract deceptive practices.

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7. Market Studies

The Act has, at its purpose, the goal of encouraging and maintaining competition in Canada. However, vigorous application of the enforcement provisions of the Act is not the only element necessary to achieve this goal. ¹⁵⁸ That is why Parliament has provided the Commissioner with a mandate to act as Canada's competition expert in government decision-making.

Sections 125 and 126 of the Act provide the Commissioner with the power to “make representations to and call evidence before” regulators at the federal, provincial, and municipal levels across Canada. ¹⁵⁹ One

way the Bureau does this is by undertaking market studies. These studies permit a broad assessment of competition across a sector of the Canadian economy. This mode of analysis is significantly different from the Bureau's enforcement mandate, which is typically focused on whether a business has contravened a specific provision of the Act. Market studies take a more holistic approach to studying marketplace features that may restrict competition. Following this analysis, market studies typically make recommendations on how such restrictions may be alleviated.

Market studies can be of great importance for informed policymaking. For example, the Bureau's 2016 market study on technology-led innovation in the Canadian financial services sector prompted significant regulatory action to support greater innovation and competition. ¹⁶⁰ Internationally, market studies have been shown to have significant benefits, including:

- Market studies conducted by the UK's competition authority guided the creation of the UK's grocery code of conduct and its open banking framework; ¹⁶¹, ¹⁶²
- Australia adopted an enforceable code of conduct to address what it identified, through a market study, as an imbalance of bargaining power between news publishers and digital platforms; ¹⁶³ and
- The U.S. FTC used its market study powers to examine past acquisitions by large tech firms to identify whether problematic transactions are being missed by the agency. ¹⁶⁴

Market studies can also play a role in assessing the impacts of enforcement action. For example, the U.S. FTC's Bureau of Economics has used its agency's market study powers to retrospectively study the impact of mergers, and merger remedies, for more than 35 years. ¹⁶⁵ Such studies can assist with calibrating a competition authority's internal

processes. They can also uncover situations where markets evolved in ways that were unexpected or unforeseen at the time of a prior enforcement review.

However, the Bureau faces two significant challenges in undertaking market studies:

- The Commissioner presently lacks the power to compel the production of information relevant to market studies; and
- The Bureau's recommendations made as part of its competition promotion activities can be ignored by decision-makers.

Addressing these issues will strengthen the Bureau's competition advocacy program, and help ensure that Canadians prosper from a competitive and innovative marketplace.

7.1. The Commissioner needs market study information gathering powers

The Commissioner does not have formal powers to compel information relevant to market studies. This contrasts with the powers of many competition authorities around the world, including the European Union, ¹⁶⁶ the United States, ¹⁶⁷ and the United Kingdom. ¹⁶⁸

In conducting market studies, the Bureau instead relies on publicly available information, information already in its possession, and information provided by stakeholders on a voluntary basis. This can limit the Bureau's analytical approach in market studies. For example, unlike enforcement files, the Bureau often does not undertake econometric analysis during market studies. This is because underlying data can be difficult to collect on a voluntary basis. A lack of relevant information can impair the Bureau's ability to diagnose competition problems. This, in turn, limits the extent of evidence-based advice that the Bureau can provide to policymakers.

External observers, including the OECD, urge that the Commissioner be provided with an express ability to compel the production of relevant information from stakeholders. ¹⁶⁹

Recommendation 7.1 (Market study information gathering powers): The Commissioner presently lacks the power to compel the production of information relevant to market studies. The Act should provide effective information gathering tools to support this important aspect of the Bureau's work.

7.2. Regulators should be required to respond to market studies

Market studies typically focus on identifying restrictions on competition. This analysis allows the Bureau to make recommendations on how such restrictions may be alleviated. Following sections 125 and 126 of the Act, these recommendations are generally directed to regulators at the federal, provincial, and municipal levels across Canada. ¹⁷⁰

However, these regulators are under no obligation to respond to recommendations that the Bureau makes in market studies. This can limit the ultimate efficacy of market studies and place a significant burden on the Bureau to attempt to orchestrate change. ¹⁷¹

Internationally, some jurisdictions have an explicit requirement for regulators to respond to market studies. In the U.K., the government has committed to publicly respond to market studies undertaken by their competition authority within a 90-day period. ¹⁷² Similarly, in New Zealand, a government official is required to respond to market studies "within a reasonable time". ¹⁷³ The OECD recognized the value of this response function in its 2016 Economic Survey of Canada, and recommended that it be implemented as part of an effective market study regime in Canada. ¹⁷⁴

Recommendation 7.2 (Responses to recommendations): The Bureau's recommendations made as part of its competition promotion activities can be ignored by decision-makers. Wherever possible, regulators and other implicated government bodies should be required to respond to Bureau recommendations within a specified time period.

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8. Cross-Cutting Issues

In addition to items that are more directly related to specific substantive provisions of the Act, there are a number of cross-cutting issues that should be addressed in order to ensure that Canada's competition policy framework remains fit for purpose. In particular:

- Competition litigation in Canada can be a time-consuming and resource-intensive process that can take several years
- The Commissioner, who acts in the public interest, faces the same cost risks as a private litigant;
- Procedural requirements relating to the Commissioner's current information gathering powers under the Act have become disproportionate, and risk unduly delaying investigations;
- Court order powers in respect of foreign persons are currently limited in their practical application;
- Targets of an investigation are currently allowed to attend examinations of persons who are providing information to a Bureau investigation;
- Non-compliance with consent agreements can presently be addressed only on a criminal standard;

- The standard for businesses to obtain leave for private access to the Tribunal may be unduly high, with the effect that most firms who apply for leave ultimately fail to meet the standard set out in the Act; and
- International cooperation between competition authorities is currently limited by a number of factors.

Reform is necessary to address each of these issues. Such reform will ensure that the Commissioner, the Bureau, and the Act keep pace in the modern context.

8.1. Civil competition litigation should be simplified and accelerated

There is a tension of timeliness in civil competition litigation. ¹⁷⁵ Competition cases are often complex examples of commercial litigation. This complexity challenges the pace of competition litigation, such that the length of such cases is often measured in years, not months. Particularly in fast-moving markets, there is concern as to whether and how competition proceedings can keep pace. ¹⁷⁶

Recent, fully litigated civil competition cases have ranged from three to seven years in length. Throughout this process, the parties to the litigation can undergo one or more fully contested proceedings at the Tribunal, the Federal Court of Appeal, and the Supreme Court of Canada, among other courts. Table 1 provides detail on the date of initial application and the date of the final decision for five recent cases.

Table 1: Duration of recent competition law litigated cases

Parties	Application Filed	End Date	Duration
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Commissioner v. Vancouver Airport Authority	<u>September 29, 2016</u>	<u>October 17, 2019</u> (Tribunal decision, not appealed)	3 years, 1 month, and 8 days
Commissioner v. The Toronto Real Estate Board	<u>May 27, 2011</u>	<u>August 23, 2018</u> (Supreme Court of Canada denied leave after second Federal Court of Appeal decision)	7 years, 2 months, and 27 days
Commissioner v. CCS Corporation (Tervita)	<u>January 24, 2011</u>	<u>January 22, 2015</u> (Supreme Court of Canada decision)	3 years, 11 months, and 29 days
Commissioner v. Visa and MasterCard	<u>December 15, 2010</u>	<u>July 23, 2013</u> (Tribunal decision, not appealed)	2 years, 7 months, and 8 days
Commissioner v. Chatr Wireless	<u>November 19, 2010</u>	<u>February 21, 2014</u> (Ontario Superior Court decision, not appealed)	3 years, 3 months, and 2 days

Competition law cases can be complex, and each litigant has a right to procedural fairness and due process in front of the Tribunal and the courts. Similarly, the Tribunal and the courts require time to carefully consider the evidence. However, these factors should be weighed against the cost of extended uncertainty that can impact the economic well-being of consumers and businesses affected by competition cases.

Recommendation 8.1 (Speed of litigation): Competition litigation in Canada can be a time-consuming and resource-intensive process that can take several years. Litigation should be simplified and accelerated wherever possible, while maintaining procedural fairness and due process, so that both the Commissioner and private businesses can quickly obtain the certainty necessary to operate in a rapidly changing world.

8.2. The Commissioner should be immunized against cost awards

Even though the Commissioner acts in the public interest, he faces the same costs risk as a private litigant. In certain cases, the Tribunal and the courts have the power to order that an unsuccessful litigant pay costs to the person who was ultimately successful.¹⁷⁷ This power is intended to reduce frivolous and vexatious, or more generally strategic, litigation. It is, however, not obvious why this principle—developed in the context of private, non-government litigants—should apply to a public official that, necessarily, acts in the public interest.

This system fails to recognize the public benefits of competition law enforcement. Unlike a private litigant, the Commissioner brings cases to protect the public interest. This public interest is served by maintaining and encouraging competition in the Canadian economy. This is significantly different than the private interests that private litigants seek to protect, where the public interest may only be served incidentally.

Cost awards have a chilling effect on the Commissioner's ability to administer and enforce the Act. The Bureau is a resource constrained public agency. The threat of significant cost awards—which have recently exceeded \$1 million¹⁷⁸—requires contingency planning during the period of any litigation. This keeps significant amounts of Bureau financial resources from being applied to other investigations.

Immunizing the Commissioner from cost awards would not be without precedent in federal legislation. Other public officials, such as the Commissioner of Patents, do not have to pay cost awards under their legislation.¹⁷⁹ Similar protection for the Commissioner would recognize the public value of the Commissioner's applications and enable more effective administration and enforcement of the Act.

Recommendation 8.2 (Cost awards): The Commissioner, who acts in the public interest, faces the same cost risks as a private litigant. The Act should explicitly immunize the Commissioner against cost awards.

8.3. Civil information gathering powers should be streamlined

Effective information gathering tools are essential to the administration and enforcement of the Act. The Bureau needs access to relevant marketplace information in a timely manner in order to advance its investigations. Information gathered from market participants forms the basis for drawing factual conclusions and assessing competitive effects. Such information can also serve as evidence in contested matters.

Section 11 of the Act provides the Commissioner with the power to seek ex parte court orders compelling oral testimony, or the production of records or written returns. However, the process for obtaining such orders, as established by relevant case law, requires the Commissioner to apply to a court with voluminous supporting materials. While procedural safeguards are appropriate, the process for obtaining court orders can be difficult and time consuming. This can cause delays to Bureau investigations. These delays can be serious when the Bureau requires information in short order, such as in the context of merger reviews that have statutory time periods,¹⁸⁰ or where there is ongoing conduct that may be causing irreparable harm.

Section 11 order requirements have become disproportionate. Filing an application for a section 11 order necessitates the preparation of an affidavit and written representations. The Bureau must also search its internal records to ensure that information sought in the proposed order is not already in the Bureau's possession. Once the time for the target to respond to the order is factored in, it can take several months for the Bureau to receive information vital to furthering its investigations. Furthermore, where section 11 orders are required against multiple businesses in the same investigation, these procedural requirements can multiply.

In contrast, competition authorities in other jurisdictions are able to compel information in civil matters without judicial authorization. For example:

- The U.S. Department of Justice ¹⁸¹ and U.S. FTC ¹⁸² can make "civil investigative demands" for documentary production, written returns, or testimony.
- The Australian Competition and Consumer Commission can directly compel such information. ¹⁸³
- The European Commission can require that information be supplied. ¹⁸⁴

Some other Canadian enforcement agencies have similar powers. For example, the Ontario Securities Commission has the power to compel documents or testimony. ¹⁸⁵

Compared with the court order process in the Act, these other processes allow demands to be issued more rapidly. Additionally, in these systems, respondents generally have the ability to challenge the demand in front of the courts. The manner for such challenges is similar to the existing

test in Canada for setting aside or varying an *ex parte* order—i.e., whether there is sufficient evidence that the order should not have been made. ¹⁸⁶

Recommendation 8.3 (Civil information gathering): Procedural requirements relating to the Commissioner's current information gathering powers under the Act have become disproportionate, and risk unduly delaying investigations. The Commissioner should have access to streamlined information gathering powers in civilly reviewable matters, to ensure that the Bureau can access relevant evidence in a timely, effective, and simple way.

8.4. Court order powers in respect of foreign persons should be clarified

The Act is limited in its ability to compel information from foreign persons. This creates a significant gap in Canada's competition policy environment. This gap can allow businesses to shield information from the Bureau when that information is held by a foreign affiliate.

While subsection 11(2) of the Act allows the courts to require a corporation to produce information from its foreign affiliates, ¹⁸⁷ the practical application of this provision is significantly limited for at least four reasons:

- First, there have been cases where the foreign affiliate has refused to supply the information, meaning that the Commissioner is denied access to information that is relevant to his inquiry; ¹⁸⁸
- Second, such orders can only compel the production of documents. They cannot require oral testimony or written returns of information, which are otherwise available under the Act;

- Third, in the case of such applications, the Commissioner is required to meet the high burden of showing that the foreign affiliate has the records in question. This is different from the substantive requirement in other section 11 orders, which requires demonstrating only that a person is *likely* to have the records; and
- Fourth, subsection 11(2) applies only when information is also sought from a Canadian corporation.

To correct these issues, the Act should provide a broader power to issue orders against foreign persons. In a world of increasingly global commerce, any distinction based on nationality can be increasingly fruitless, as conduct impacting Canada can be directed, or even executed, by those outside of the country.

Recommendation 8.4 (Information gathering from foreign persons): Court order powers in respect of foreign persons are currently limited in their practical application. These powers should be clarified to safeguard the Bureau's ability to receive all of the information necessary to support its enforcement investigations.

8.5. Targets of an investigation should be barred from examinations

Paragraph 11(1)(a) of the Act allows the courts to order a person to be examined on oath or solemn affirmation in connection with a Bureau investigation. However, when such examination involves a third party, subsection 12(4) of the Act permits any person who is a target of an investigation to be present at the examination.

The Bureau can seek to have targets excluded from the examination. Subsection 12(4) permits such exclusions when it can be established that the target's presence would either: (1) be "prejudicial to the effective conduct of the examination or [investigation]", or (2) "result in the

disclosure of confidential commercial information”. ¹⁸⁹ These conditions are often satisfied in Bureau investigations. However, the process of obtaining such an exclusion order is both cumbersome and time consuming for each of the Bureau, the party being examined, and the presiding officer that oversees the examination. ¹⁹⁰

Additionally, there is no prejudice to excluding a target from an examination. The examination is investigative and does not determine any substantive rights. If there is a subsequent proceeding, procedural fairness will be addressed at that time. Apart from, potentially, a limited right to re-examine for clarification, the target would have no right to participate in the examination at any rate. ¹⁹¹

Recommendation 8.5 (Attendance at examinations): Targets of an investigation are currently allowed to attend examinations of persons who are providing information to a Bureau investigation. This provision should be removed from the Act.

8.6. A civil standard should exist to address consent agreement compliance

Consent agreements are a key tool in the Bureau’s enforcement arsenal. Rather than engaging in costly and time-consuming litigation in every instance where the Act may be contravened, the Commissioner is provided with the power to negotiate consent agreements with the subjects of an investigation. Once these consent agreements are filed with the Tribunal or the courts, they take on the same force and effect as an order. ¹⁹²

In practice, however, it can be cumbersome to enforce compliance with a consent agreement. As consent agreements have the same force and effect as a court order, breaches of these agreements can be a criminal offence. Criminal contempt charges, whether under section 66 of the Act

or the common law, require a referral to the Public Prosecution Service of Canada (“PPSC”) for prosecution. Accordingly, the PPSC, rather than the Commissioner, retains ultimate control over whether to proceed with a prosecution. Additionally, the “beyond a reasonable doubt” criminal standard must be proven in order to succeed. Alternatively, the Commissioner can initiate civil contempt proceedings before the Tribunal under subsection 8(3) of the *Competition Tribunal Act*.¹⁹³ However, civil contempt is quasi-criminal in nature and must also be proven beyond a reasonable doubt.¹⁹⁴

To be clear: criminal liability for non-compliance is an important tool to ensure that all parties to a consent agreement live up to the obligations that they agreed to. However, this should be supplemented by a civil mechanism, including administrative monetary penalties, sufficient to enforce compliance with consent agreements. Such a system would more effectively and flexibly address instances of non-compliance.¹⁹⁵

Recommendation 8.6 (Consent agreement compliance): Non-compliance with consent agreements can presently be addressed only on a criminal standard. There should be a more accessible mechanism to allow the Commissioner to apply to the Tribunal, under the civil standard of proof, for orders requiring compliance and, where appropriate, administrative monetary penalties.

8.7. Leave requirements for private access should be lowered

Private access to the Tribunal is available for some civilly reviewable provisions of the Act.¹⁹⁶ However, in order to bring a private access application, a private litigant must first obtain leave from the Tribunal.¹⁹⁷ Some commentators claim that the standard to obtain leave is unduly high, and note that most firms who apply for leave ultimately fail to meet the standard set out in the Act.¹⁹⁸

Specifically, Paul Erik Veel highlights that it can be difficult for firms to obtain leave. He notes that firms must demonstrate that they are “substantially affected” by the conduct they wish to challenge, noting that the term “has been interpreted to require an examination of whether the business as a whole has been substantially affected rather than simply examining whether a particular product or product line of that business has been affected”. ¹⁹⁹ Veel notes that this interpretation may require a business to show that it has been “virtually ruined” before it can be granted access to the Tribunal, and may explain why so few leave applications have been allowed. ²⁰⁰

Recommendation 8.7 (Leave requirements for private access):

The standard for businesses to obtain leave for private access to the Tribunal may be unduly high, with the effect that most firms who apply for leave ultimately fail to meet the standard set out in the Act. The test to obtain private access should be examined to ensure that businesses can appropriately obtain leave.

8.8. Cooperation with international competition authorities can be deepened

The Bureau exists as part of a global community of competition authorities. This community is more important than ever as businesses operate on a more global scale, and actions in one country can have meaningful effects in others. In these circumstances, numerous competition authorities are often called upon to investigate the same conduct and find workable remedies that take into account differences in national or regional competition laws. Accordingly, international cooperation between competition authorities is essential to well-functioning competition law enforcement.

However, such cooperation is not always without friction and could be improved by:

- Ensuring that the right tools are in place to facilitate information sharing between competition authorities;
- Establishing multilateral legal assistance treaties that allow the Bureau to more effectively cooperate with its foreign counterparts in civilly reviewable matters; and
- Enabling a greater degree of compatibility between Canadian and international privacy laws.

The Act provides the Bureau with the ability to share information with our foreign partners. However, the reverse is not always true. When authorities lack such formal powers, they must rely on the targets of an investigation to give permission to share their information, and such permission can be revoked at any time.

Mutual Legal Assistance Treaties (“MLATs”) aid international cooperation and can address circumstances where foreign authorities lack formal authorization to share information or cooperate with the Bureau. Under these legally binding treaties, foreign authorities can request information or assistance from the Bureau, and vice-versa. ²⁰¹ MLATs typically allow a member authority to request the assistance of other member authorities to obtain information located in another country, using the foreign agency’s authority to conduct interviews, compel the production of relevant documents and data, or execute search warrants, as appropriate. MLATs do exist and have been used in the criminal context, ²⁰² but Canada has not entered into an MLAT for civilly reviewable conduct. Ultimately, the existence of an MLAT helps each competition authority to do its job; without it, targets of an investigation may be less willing to cooperate if they believe that the Bureau may not be able to obtain vital information located in foreign jurisdictions.

Additionally, a lack of compatibility between Canadian and foreign privacy laws has proven to be an obstacle to international cooperation on competition law enforcement. This is a reasonably technical issue, but it is of clear significance to sharing information between agencies. Foreign authorities may be willing to share information with the Bureau but, as a requirement to do so, must be assured that such information will be used, disclosed, retained, and disposed of consistently with their national privacy legislation. This has not always been possible, owing to divergent privacy standards across jurisdictions. Action to align Canada's privacy laws with international standards would serve to minimize this friction.

Recommendation 8.8 (International cooperation): International cooperation between competition authorities is currently limited by a number of factors. Such cooperation should be deepened to account for the fact that businesses operate on a global scale, and actions in one country can have meaningful effects in others.

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Conclusion

This submission illustrates the Bureau's experiences in administering and enforcing the Act. Canada faces real challenges to its competition policy framework. The Bureau is, first and foremost, a law enforcement agency. The areas for improvement identified in this submission represent the real world frictions that the Bureau experiences in applying the Act on a day-to-day basis.

Canada needs a comprehensive review of the Act to determine what Canadian competition law should look like in the 21st century. The Bureau supports an accessible and inclusive review that reaches a wide

group of stakeholders.

This consultation is an important step. Modernizing our laws for today's reality will better protect and promote competitive markets for the benefit of all Canadians and Canada's long-term economic prosperity. International counterparts are working quickly to strengthen their own tools to promote and protect competition in their jurisdictions.

Canada cannot afford to be complacent.

Competition keeps products and services affordable for Canadians and grows the economy. Competitive marketplaces are the foundation for Canada's continued prosperity. Preserving competition in the Canadian economy should remain the main goal of Canada's competition policy framework. But this framework needs updating. Inaction will harm the economy in the long term. Canada needs more competition now.

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Summary of Issues and Recommendations

1. The Purpose of the Act

- **Recommendation 1.1 (Purpose clause):** Changing the purpose clause risks fundamentally altering the Act, upending decades of established case law, and threatening the Bureau's ability to protect consumers and businesses from anti-competitive conduct. The Act should retain its existing focus of maintaining and encouraging competition in Canada in furtherance of a broad range of economic objectives.

2. Merger Review

- **Recommendation 2.1 (Efficiencies exception):** The Act may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger.

The efficiencies exception should be eliminated, and instead efficiencies should be considered as a factor when considering the effects of mergers;

- **Recommendation 2.2 (Competition test):** The requirement to prove that a concentrative merger is likely to harm competition is not an efficient use of judicial, business, or public sector resources. Structural presumptions should be enacted to simplify merger cases by shifting the burden onto the merging parties to prove why a concentrative merger would not substantially lessen or prevent competition;
- **Recommendation 2.3 (Prevent standard):** The standards established from analysis of more traditional industries are not suitable for assessing acquisitions of emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process;
- **Recommendation 2.4 (Remedial standard):** The remedy standard established in the case law does not restore competition to pre-merger levels, allowing merging parties to accumulate market power and harm the economy. The standard should be revisited to ensure that remedies preserve the pre-merger state of competition;
- **Recommendation 2.5 (Injunctions):** The ability to temporarily pause the completion of a merger pending the outcome of proceedings before the Tribunal is subject to legal standards that are impractical. These standards should be reviewed in order to ensure that there is a workable avenue to protect competition on an interim basis;
- **Recommendation 2.6 (Limitation period):** The Act provides the Commissioner with only a short time to challenge a merger. The

limitation period in section 97 should be extended to three years; and

- **Recommendation 2.7 (Notification):** Some mergers can escape detection by the Bureau due to loopholes in the Act. These loopholes in pre-merger notification requirements should be closed to ensure that the Bureau maintains the ability to detect and review economically significant mergers affecting Canada.

3. Abuse of Dominance

- **Recommendation 3.1 (Anti-competitive acts):** The abuse of dominance provision may allow dominant firms to escape scrutiny even when their conduct softens competition. This gap should be closed by ensuring that the provision captures conduct intended to harm competition, and not just conduct intended to harm a competitor;
- **Recommendation 3.2 (Prevent standard):** The standards established from analysis of more traditional industries are not suitable for assessing anti-competitive conduct aimed at emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process;
- **Recommendation 3.3 (Penalties):** Monetary penalties provided under the abuse of dominance provision are often too small to effectively deter anti-competitive conduct. These penalties should be adapted to ensure that they can achieve their intended purpose of achieving compliance with the Act; and
- **Recommendation 3.4 (Private access):** Private access to the Tribunal is currently not available for abuse of dominance cases. The Act should allow such access.

4. Civilly Reviewable Competitor Collaborations

- **Recommendation 4.1 (Remedies):** The remedies provided for competitor collaborations are insufficient. Prescriptive remedies aimed at restoring competition and administrative monetary penalties should be available in these cases;
- **Recommendation 4.2 (Past agreements and past harm):** Only current or proposed agreements between competitors, and only current or future harm to competition, are addressable under the competitor collaboration provision. Section 90.1 should be expanded to address both past agreements that are no longer in effect, and past harm to competition that has since ceased;
- **Recommendation 4.3 (Efficiencies):** The competitor collaborations provision contains an efficiencies exception, similar to the merger provisions, that is equally unsuitable for maintaining and encouraging competition. This exception should be eliminated, and efficiencies should be properly considered as a factor when considering the effects of a competitor collaboration;
- **Recommendation 4.4 (Prevent standard):** The standards established from analysis of more traditional industries are not suitable for assessing competitor collaborations that harm emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process;
- **Recommendation 4.5 (Notification for pharmaceutical patent litigation settlement agreements):** Pharmaceutical patent litigation settlement agreements have the potential to harm competition, but can be difficult for the Bureau to detect. The Act requires a mechanism to make the Bureau aware of such agreements; and

- **Recommendation 4.6 (Private access):** Private access to the Tribunal is currently not available for competitor collaboration cases. The Act should allow such access.

5. Cartels: Conspiracy and Bid Rigging

- **Recommendation 5.1 (Buy-side conspiracies):** Harmful buy-side conspiracies escape scrutiny under the Act's criminal provisions. The Act should explicitly provide an ability for the criminal prosecution of harmful buy-side conspiracies, including wage-fixing and no-poaching agreements;
- **Recommendation 5.2 (Making known a bid-rigging scheme):** The "made known" element of the Act's bid-rigging provision does not sufficiently protect competition. The Act should establish "made known" as a defence that may be asserted only when the conduct is directly related to the submission of a single joint bid; and
- **Recommendation 5.3 (Fines):** Fines for conspiracy and bid-rigging offences are inconsistent and, for conspiracies, insufficient to deter anti-competitive behaviour. They should be made consistent across provisions and be strengthened to provide an effective deterrent to manifestly harmful cartel behaviour.

6. Deceptive Marketing

- **Recommendation 6.1 (Drip pricing):** The practice of "drip pricing"—*i.e.*, presenting a consumer with a price, while concealing mandatory fees until later in the purchasing process—is not explicitly recognized as harmful in the Act. The enforcement of the Act would be made more effective by confirming that this is a harmful practice;

- **Recommendation 6.2 (Ordinary selling price):** The Commissioner bears a significant burden, under the ordinary selling price provision, of proving that advertised discounts are not genuine. The burden of proof for ordinary selling price matters should be reversed, so that advertisers bear the burden of proving that advertised discounts are, in fact, truthful;
- **Recommendation 6.3 (Harmonizing criminal and civil provisions):** The deceptive marketing provisions are inconsistent in how they provide civil remedies and criminal penalties. The Act should provide both criminal and civil tracks in order to allow the seriousness of deceptive conduct to dictate how it gets addressed; and
- **Recommendation 6.4 (Remedies and Penalties):** Monetary penalties can be too small, and other remedies can be too weak, with the effect that it can be difficult to ensure conformity with the Act. Monetary penalties should be increased, and the Act should provide a wider range of remedies to counteract deceptive practices.

7. Market Studies

- **Recommendation 7.1 (Market study information gathering powers):** The Commissioner presently lacks the power to compel the production of information relevant to market studies. The Act should provide effective information gathering tools to support this important aspect of the Bureau's work; and
- **Recommendation 7.2 (Responses to recommendations):** The Bureau's recommendations made as part of its competition promotion activities can be ignored by decision-makers. Wherever possible, regulators and other implicated government bodies should be required to respond to Bureau recommendations within a specified time period.

8. Cross-Cutting Issues

- **Recommendation 8.1 (Speed of litigation):** Competition litigation in Canada can be a time-consuming and resource-intensive process that can take several years. Litigation should be simplified and accelerated wherever possible, while maintaining procedural fairness and due process, so that both the Commissioner and private businesses can quickly obtain the certainty necessary to operate in a rapidly changing world;
- **Recommendation 8.2 (Cost awards):** The Commissioner, who acts in the public interest, faces the same cost risks as a private litigant. The Act should explicitly immunize the Commissioner against cost awards;
- **Recommendation 8.3 (Civil information gathering):** Procedural requirements relating to the Commissioner's current information gathering powers under the Act have become disproportionate, and risk unduly delaying investigations. The Commissioner should have access to streamlined information gathering powers in civilly reviewable matters, to ensure that the Bureau can access relevant evidence in a timely, effective, and simple way;
- **Recommendation 8.4 (Information gathering from foreign persons):** Court order powers in respect of foreign persons are currently limited in their practical application. These powers should be clarified to safeguard the Bureau's ability to receive all of the information necessary to support its enforcement investigations;
- **Recommendation 8.5 (Attendance at examinations):** Targets of an investigation are currently allowed to attend examinations of persons who are providing information to a Bureau investigation. This provision should be removed from the Act;

- **Recommendation 8.6 (Consent agreement compliance):** Non-compliance with consent agreements can presently be addressed only on a criminal standard. There should be a more accessible mechanism to allow the Commissioner to apply to the Tribunal, under the civil standard of proof, for orders requiring compliance and, where appropriate, administrative monetary penalties;
- **Recommendation 8.7 (Leave requirements for private access):** The standard for businesses to obtain leave for private access to the Tribunal may be unduly high, with the effect that most firms who apply for leave ultimately fail to meet the standard set out in the Act. The test to obtain private access should be examined to ensure that businesses can appropriately obtain leave; and
- **Recommendation 8.8 (International cooperation):** International cooperation between competition authorities is currently limited by a number of factors. Such cooperation should be deepened to account for the fact that businesses operate on a global scale, and actions in one country can have meaningful effects in others.

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How to contact the Competition Bureau

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Footnotes

- 1 The Honourable Howard Wetston (2021), *Consultation Invitation - Examining the Canadian Competition Act in the Digital Era*.
- 2 *Competition Act*, R.S.C., 1985, c. C-34.
- 3 For a more detailed discussion of the institutional arrangement of Canada's competition policy, see: Competition Bureau (2016), *Submission to the OECD Global Forum on competition roundtable on independence of competition authorities*.
- 4 Commissioner of Competition (2021), *Canada needs more competition*, remarks at Canadian Bar Association Competition Law Fall Conference. See also, Competition Bureau (2021), *Takeaways from the Competition and Growth Summit*.

- 5 Prime Minister of Canada (2021), Minister of Innovation, Science and Industry Mandate Letter.
- 6 E.M. Iacobucci (2021), Examining the Canadian Competition Act in the Digital Era.
- 7 Commissioner of Competition v. Superior Propane Inc., [2001] 3 FC 185 at paragraph 85.
- 8 Conflicts arise when provisions of the Act seek to promote policy goals at the expense of competition. See, for example, the efficiencies exception found in section 96 of the Act and its related case law, discussed in section 2.1 below.
- 9 Commissioner of Competition v. The Toronto Real Estate Board, 2016 Comp. Trib. 7 at paragraph 712.
- 10 Tervita Corp. v. Canada (Commissioner of Competition), [2015] 1 S.C.R. 161 at paragraph 44.
- 11 Director of Investigation and Research v. Hillside Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 at pages 17-18.
- 12 See, for example, R. v. Maxzone Auto Parts (Canada) Corp., 2012 FC 1117 describing hard core cartels as “analogous to fraud and theft” at paragraphs 54-55.
- 13 Competition Bureau (2020), Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements.
- 14 Tervita Corp. v. Canada (Commissioner of Competition), [2015] 1 S.C.R. 161 at paragraph 146.

- 15 Throughout this submission, the term “merger” should be understood to encompass the definition found in section 91 of the Act.
- 16 Competition Bureau (2011), *Merger Enforcement Guidelines* at part 2.
- 17 Competition Bureau (2011), *Merger Enforcement Guidelines* at paragraph 12.1.
- 18 For a more detailed description of the efficiencies exception, see Competition Bureau (2011), *Merger Enforcement Guidelines* at part 12.
- 19 U.S. Department of Justice and U.S. Federal Trade Commission (2010), *Horizontal Merger Guidelines* at section 6.1.
- 20 In Superior Plus Corporation’s proposed acquisition of Canexus Corporation, the Bureau concluded efficiency gains would be clearly greater than the likely significant anti-competitive effects of the transaction and cleared the transaction. Meanwhile the U.S. Federal Trade Commission challenged the transaction because of competition concerns.
- 21 See International Competition Network (2017), *ICN Recommended Practices Merger Analysis* at page 31 (“Agencies should evaluate whether the claimed efficiencies are sufficient to counteract the merger’s potential anticompetitive harm in the relevant market(s), *e.g.*, by likely enhancing the merged firm’s ability and incentive to lower prices, increase quality, or otherwise compete in a way that is beneficial to consumers.”).

- 22 European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, O.J. C 31/5 (5.2.2004) at Part VII.
- 23 United Kingdom Competition and Markets Authority (2021), Merger Assessment Guidelines at paragraphs 8.8 and 8.9.
- 24 Australian Competition and Consumer Commission (2017), Australian Merger Guidelines at paragraph 7.63.
- 25 O. Williamson (1977), Economies as an Antitrust Defense Revisited, University of Pennsylvania Law Review.
- 26 R. Posner (1976), Antitrust Law: An Economic Perspective, University of Chicago Press at page 22.
- 27 R. Bork (1978), The Antitrust Paradox at page 124.
- 28 H. Hovenkamp (2019), Is Antitrust's Consumer Welfare Principle Imperiled?, Penn Law: Legal Scholarship Repository.
- 29 C.D. Howe Competition Policy Council (2021), "Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government".
- 30 This can also raise burden issues for third parties that act as competitors in the markets being assessed, as information in their possession is often required to properly perform an efficiencies trade-off analysis. In one matter involving many local markets, the Bureau was required to obtain court orders against 11 third-party respondents in order to meet the standard necessary for the court to perform an efficiencies analysis.

- 31 Commissioner of Competition v. The Toronto Real Estate Board, 2016 Comp. Trib. 7 at paragraph 471.
- 32 Tervita Corp. v. Canada (Commissioner of Competition), [2015] 1 S.C.R. 161 at paragraph 87. Internal citations omitted.
- 33 See Competition Bureau (2020), Competition Bureau statement regarding Canadian National Railway Company's proposed acquisition of H&R Transport Limited and Competition Bureau (2017), Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC.
- 34 Commissioner of Competition v. Superior Propane Inc. et al, 2002 Comp. Trib. 16 and Commissioner of Competition v. CCS Corporation et al, 2012 Comp. Trib. 14.
- 35 M. Porter (1990), *The Competitive Advantage of Nations*, MacMillan Press, at page 662.
- 36 W. Lewis (2005), The Power of Productivity: Wealth, Poverty and the Threat to Global Stability, University of Chicago Press.
- 37 OECD (2014), Factsheet on how competition policy affects macroeconomic outcomes.
- 38 M. Chiasson & P. Johnson (2018), Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation at page 23.
- 39 In this sense, efficiencies could be treated as a factor like those in section 93 of the Act.
- 40 Subsection 92(2) of the Act.

- 41 H. Hovenkamp and C. Shapiro (1996), Horizontal Mergers, Market Structure and Burdens of Proof, Yale Law Journal.
- 42 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
- 43 United States House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (2020), Majority Staff Report and Recommendations in Investigation of Competition in Digital Markets.
- 44 OECD (2020), Start-ups, killer acquisitions and merger control.
- 45 In this context, “emerging” could refer to either the business being recently established, or that the business does not participate in one or more relevant markets of interest.
- 46 Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6 at paragraph 667. Internal citations omitted.
- 47 C.S. Hemphill & T. Wu (2020), Nascent Competitors, University of Pennsylvania Law Review.
- 48 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
- 49 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
- 50 Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6 at paragraph 667.
- 51 R. Sims (2021), Protecting and promoting competition in Australia, Competition and Consumer Workshop 2021 - Law Council of Australia.

- 52 U.K. Secretary of State for Digital, Culture, Media & Sport and the U.K. Secretary of State for Business, Energy and Industrial Strategy (2021), *A new pro-competition regime for digital markets*.
- 53 *S.225 – Competition and Antitrust Law Enforcement Reform Act of 2021*.
- 54 *Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp Trib 6 at paragraph 667.
- 55 *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 at paragraph 85.
- 56 *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 at paragraph 89.
- 57 Competition Bureau (2011), *Competition Bureau Merger Remedies Study Summary* at section 3.
- 58 U.S. Department of Justice (2020), *Merger Remedies Manual* at pages 3-4.
- 59 European Commission (2008), *Remedies Notice* at paragraph 9.
- 60 U.K. Competition and Markets Authority (2018), *Merger Remedies* at paragraph 3.30.
- 61 International Competition Network (2017), *Recommended Practices for Merger Notification and Review Procedures* at section XI, comment 1.

- 62 The most recently completed, fully litigated merger file was *Commissioner of Competition v. Tervita et al.*, which took almost four years from the date that an initial application was filed with the Tribunal until litigation was ultimately concluded following a decision by the Supreme Court of Canada.
- 63 See *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 4 and *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7.
- 64 Paragraph 123(1)(a) of the Act.
- 65 Paragraph 123(1)(b) of the Act.
- 66 Alternatively, if the Commissioner believes that he needs more time to complete his review prior to filing a section 92 application challenging the merger, and that closing (or some other act or thing) should be prevented in the interim, he must seek injunctive relief from the Tribunal pursuant to section 100 of the Act.
- 67 For example, once a merger is completed, the parties to that merger can share commercially sensitive information with each other. Such an exchange can provide full insight into competitively sensitive business information and strategies that cannot practically be forgotten in the circumstance where all or part of the merger is undone in the future.
- 68 Commissioner of Competition (2021), *Canada needs more competition*, remarks at Canadian Bar Association Competition Law Fall Conference.
- 69 *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7.

- 70 *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7.
- 71 *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7 at paragraph 56.
- 72 Furthermore, the Tribunal has concluded that it has no power under the Act to otherwise extend the statutory waiting period, even when an application for an interim injunction is before it. See *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 4.
- 73 Specifically, in the *Secure* case, Tribunal engaged in an analysis of measuring which harm is greater: 1) the irreparable harm to the public interest from allowing the anti-competitive merger to proceed, or 2) the private harm that merging parties will experience from having their merger temporarily put on hold while the case is adjudicated more fully (e.g., in terms of delayed efficiencies). See *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7 at paragraphs 108-128.
- 74 Specifically, the Tribunal commented that "... the Commissioner should be able to provide at least rough estimates, supported by evidence, of (i) the range of price effects that are likely to result from the merger; (ii) a range of plausible elasticities; (iii) a "ballpark" estimate of the deadweight loss; and (iv), where applicable, a basic sense of the extent to which non-price effects are likely to result from the merger." See *Commissioner of Competition v. Secure Energy Services Inc.*, 2021 Comp Trib 7 at paragraph 121.
- 75 Musgrove & Krane (2021), *Strike Two...The Commissioner Loses Second Injunction To Block Merger*, McMillan LLP.

- 76 Prior to this time (*i.e.*, prior to receiving SIR responses from the parties to the merger), it is unlikely that the Commissioner will have sufficient documentary or data evidence necessary to make a definitive conclusion on the likely anti-competitive effects of the proposed merger.
- 77 *Commissioner of Competition v. CCS Corporation et al*, 2012 Comp. Trib. 14 at paragraph 369.
- 78 For more information, see Competition Bureau (2010), *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act*.
- 79 OECD Directorate for Financial and Enterprise Affairs Competition Committee (2014), *Investigations Of Consummated And Non-Notifiable Mergers - United States* DAF/COMP/WP3/WD.
- 80 OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Investigations Of Consummated And Non-Notifiable Mergers - Australia* DAF/COMP/WP3/WD.
- 81 Owing to the confidentiality requirements set out in section 29 of the Act, the Bureau is unable to publicly identify the specific, non-notifiable cases where it has received complaints of significant post-merger price increases at around the time of the expiry of the one-year limitation period.
- 82 The following matters have been reported in the Bureau's merger registry: Google/Motorola (2011), Microsoft/Nokia (2013), Microsoft/LinkedIn (2016), Amazon/Whole Foods (2017) and Google/Fitbit (2021).
- 83 U.S. Federal Trade Commission (2021), *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study*.

- 84 J. Gudofsky & K. McNeece (2021), *Competitiveness in Canada – Competition Act Considerations*, submission to the House of Commons Standing Committee on Industry, Science and Technology at page 12.
- 85 J. Gudofsky & K. McNeece (2021), *Competitiveness in Canada – Competition Act Considerations*, submission to the House of Commons Standing Committee on Industry, Science and Technology at page 6. The authors add that “Given that public companies are generally larger than private companies, it stands to reason that a much smaller percentage of the largest private company transactions are subject to mandatory notification. This does not even account for the plethora of global (foreign-to-foreign) transactions that have an impact in Canada but fall below or outside of the [Act’s notification] thresholds.”
- 86 16 CFR § 801.90. See also, U.S. Federal Trade Commission (2019), *Avoidance devices won't avoid HSR penalties*.
- 87 European Commission (2004), *Merger Regulation* at article 5.2, paragraph 2. See also European Commission (2008), *Consolidated Jurisdictional Notice* at paragraph 49.
- 88 See Competition Bureau (2021), *Pre-merger notification transaction-size threshold decreases to \$93M in 2021*.
- 89 Competition Bureau (2010), *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act* at section 2.2.
- 90 See section 112 of the Act.

- 91 David Rosner (2018), Canadian Competition Law Reform: A Diagnosis and Proposals for Reform of Canada's Ineffective Merger Notification Rules, Competition Policy International.
- 92 See section 2.6 of this submission.
- 93 Canada (Commissioner of Competition) v. Canada Pipe Company Limited, 2007 2 FCR 368 at paragraph 68. Subsequent decisions of the Federal Court of Appeal have contained commentary that suggests that the concept of anti-competitive acts may be broader. See Commissioner of Competition v. The Toronto Real Estate Board 2014 FCA 29 and Commissioner of Competition v. The Toronto Real Estate Board 2017 FCA 236.
- 94 CD Howe Institute Competition Policy Council (2016), A New Competition Act for a New Federal Government.
- 95 R. Winter (2014), The Gap in Canadian Competition Law following Canada Pipe, Canadian Competition Law Review, Vol. 27, No. 2.
- 96 See Competition Bureau (2019), Abuse of Dominance Enforcement Guidelines at part 3 and Competition Bureau (2011), Merger Enforcement Guidelines at part 2.
- 97 In this context, “emerging” could refer to either the business being recently established, or that the business does not participate in one or more relevant markets of interest.
- 98 Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6 at paragraph 667.
- 99 C.S. Hemphill & T. Wu (2020), Nascent Competitors, University of Pennsylvania Law Review.

- 100 Report of the Standing Committee on Industry, Science and Technology (2002), *A Plan to Modernize Canada's Competition Regime* at page 49.
- 101 Report of the Standing Committee on Industry, Science and Technology (2002), *A Plan to Modernize Canada's Competition Regime*.
- 102 Subsection 79(3.1) of the Act.
- 103 Moreover, the expected value of a potential monetary penalty is diluted by the fact that the impugned conduct may go undetected, unenforced, or unsuccessfully litigated.
- 104 U.K. CMA (2021), *CMA's Guidance as to the Appropriate Amount of a Penalty*.
- 105 U.K. CMA (2021), *CMA finds drug companies overcharged NHS*.
- 106 European Commission (2011), *Fines for breaking E.U. Competition Law*.
- 107 General Court of the European Union (2021), *Judgment in Case T-612/17 Google and Alphabet v. Commission (Google Shopping)*, Press Release No 197/21.
- 108 Australian Competition & Consumer Commission (2021), *Fines & Penalties*.
- 109 Korea Fair Trade Commission (2021) *Abuse of Dominance*.
- 110 *"Court rules in favor of FTC over record fine against Qualcomm"*, The Korea Herald, December 4, 2019.

- 111 Paragraph 90.1(1)(a) of the Act.
- 112 Paragraph 90.1(1)(b) of the Act.
- 113 The Tribunal does have this power in abuse of dominance cases pursuant to section 79 of the Act, and for many deceptive marketing practices provisions in Part VII.1 of the Act.
- 114 Subsection 79(2) of the Act.
- 115 Section 90.1 of the Act (“If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — *whether existing or proposed* — ...”).
- 116 Section 90.1 of the Act (“If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement ... *prevents or lessens, or is likely to prevent or lessen*”).
- 117 Section 79 of the Act (“Where, on application by the Commissioner, the Tribunal finds that ... the practice *has had, is having or is likely to have* the effect of preventing or lessening competition substantially in a market ...”).
- 118 See Competition Bureau (2019), *Abuse of Dominance Enforcement Guidelines* at part 3 and Competition Bureau (2011), *Merger Enforcement Guidelines* at part 2.
- 119 In this context, “emerging” could refer to either the business being recently established, or that the business does not participate in one or more relevant markets of interest.
- 120 *Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp Trib 6 at paragraph 667.

- 121 C.S. Hemphill & T. Wu (2020), Nascent Competitors, University of Pennsylvania Law Review.
- 122 See Patent Act, R.S.C., 1985, c. P-4.
- 123 See Food and Drug Regulations, C.R.C., c. 870, and Patented Medicines (Notice of Compliance) Regulations, SOR/93-133.
- 124 Competition Bureau (2014), Patent Litigation Settlement Agreements: A Canadian Perspective.
- 125 U.S. FTC (2010), Pay-for-delay: how Drug Company Pay-Offs Cost Consumers Billions.
- 126 U.S. FTC (2020), MMA Reports: No tricks or treats—just facts.
- 127 U.S. FTC (2020), Staff Issues FY 2017 Report on Branded Drug Firms' Patent Settlements with Generic Competitors.
- 128 Competition Bureau (2020), Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements.
- 129 House of Commons Standing Committee on Industry, Science and Technology (2021), Wage fixing in Canada and fairness in the grocery sector at page 5.
- 130 P. Glossop (2021), A New Approach to Wage-Fixing and Anti-Poaching Employer Deals, C.D. Howe Institute.
- 131 M. Vestager (2021), A new era of cartel enforcement, Italian Antitrust Association Annual Conference.

- 132 *Asset funds 'operate jobs cartel'*, The Sunday Times, March 4, 2018.
- 133 *Italy fines modelling agency cartel*, Global Competition Review, November 14, 2016.
- 134 *United States v. Jindal*, Case No. 4:20-CR-00358 (E.D. Tex. Dec. 09, 2020).
- 135 *United States v. Surgical Care Affiliates, LLC et al.*, Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021).
- 136 *DOJ's First Criminal Charges for Wage-Fixing and No-Poach Labor Agreements: 6 Key Takeaways*, Latham and Watkins, February 18, 2021.
- 137 *United States v. Jindal, et al.*, No. 4:20-cr-00358 (E.D. Tex. Nov. 29, 2021).
- 138 Such conduct may be reviewed civilly under section 90.1 of the Act. However, in that circumstance, the Commissioner is required to demonstrate that the agreement has the effect of lessening or preventing competition substantially. This is distinct from the *per se* nature of criminal offences under the Act. See also United States (2008), *Submission to the OECD Roundtable on Monopsony and Buyer Power*.
- 139 O. Wakil and M. Chernenko (2015), *Bid-Rigging Enforcement Without a Bid-Rigging Provision: A Proposal for the Repeal of Section 47 of the Competition Act* at pages 10-11.
- 140 *Charge to the Jury in R. v. Durward: Trial Judge Provides Guidance in Canadian Bid-Rigging and Federal Procurement Law*, Fasken Bulletin, July 23, 2015.

- 141 Similar inconsistencies exist in the fine amounts available under sections 48 and 49 of the Act.
- 142 Report of the Standing Committee on Industry, Science and Technology (2002), *A Plan to Modernize Canada's Competition Regime*.
- 143 U.S. Federal Sentencing Guidelines (2021), *Bid-rigging, price-fixing or market-allocation agreements among competitors*.
- 144 European Commission (2006), *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*.
- 145 For a broader survey of international cartel fines, see OECD (2018), *Pecuniary Penalties for Competition Law Infringements in Australia* at tables 1 and 3.
- 146 U.S. Department of Justice (2015), *Five Major Banks Agree to Parent-Level Guilty Pleas*.
- 147 European Commission (2016), *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel*.
- 148 Autorité de la concurrence (2014), *The Autorité de la concurrence fines concerted practices between manufacturers a total of 345,2 € millions and 605,9 € millions on each market concerned*.
- 149 S. Ezaki, V. Moussis, and T. Ishida (2021), *Market Intelligence: Cartels in Japan*.
- 150 See, for example, Competition Bureau (2018), *Competition Bureau sues Ticketmaster over misleading ticket price advertising*.

- 151 Subsections 74.01(2) and 74.01(3) of the Act.
- 152 Competition Bureau (2018), *The Deceptive Marketing Practices Digest - Volume 4.*
- 153 Such an amendment would bring the OSP provisions in line with paragraph 74.01(1)(b) of the Act, which places the burden on the advertiser to prove that it has made an adequate and proper test of any performance claim.
- 154 Section 52.1 of the Act defines telemarketing as: “the practice of communicating orally by any means of telecommunication for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product”.
- 155 Paragraph 74.07(1)(2) states that sections 74.01 to 74.06, the deceptive marketing civil provisions, do not apply to: section 52.1 (deceptive telemarketing), section 53 (deceptive notice of winning a prize), section 55 (multi-level marketing), and section 55.1 (pyramid selling).
- 156 Paragraph 74.1(1)(c) of the Act.
- 157 The Bureau has obtained administrative monetary penalties at or near the \$10 million maximum on three separate occasions in deceptive marketing matters. See Competition Bureau (2011), *Competition Bureau reaches agreement with Bell Canada requiring Bell to pay \$10 million for misleading advertising;* Competition Bureau (2012), *Competition Bureau secures over \$9 million and money back to victims for business scam;* and Competition Bureau (2020), *Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims.*

- 158 G. Lang (2021), Competition Policy in Concurrences Global Dictionary of Competition Law.
- 159 Note that, in the case of provincial and municipal advocacy, the Commissioner requires the consent of a regulator prior to making representations or calling evidence. See section 126 of the Act.
- 160 Competition Bureau (2018), Canada's progress in FinTech: Regulatory highlights following the Competition Bureau's Market Study.
- 161 U.K. Competition and Markets Authority (2009), Groceries (Supply Chain Practices) Market Investigation Order.
- 162 U.K. Competition and Markets Authority (2016), Retail banking market investigation.
- 163 Australia Competition and Consumer Commission (2021), News media bargaining code.
- 164 U.S. FTC (2021), FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies.
- 165 U.S. FTC (2021), Overview of the Merger Retrospective Program in the Bureau of Economics.
- 166 European Commission (2002), Council Regulation (EC) No 1/2003 of 16 December 2002 at article 18.
- 167 U.S. FTC (2021), A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority.

- 168 U.K. CMA (2017), Market Studies and Market Investigations: Supplemental guidance on the CMA's approach at section 2.
- 169 OECD (2016), OECD Economic Surveys: Canada at page 110.
- 170 The Commissioner requires the consent of a regulator prior to making recommendations at the provincial and municipal levels. See section 126 of the Act.
- 171 The Bureau is a law enforcement agency that acts at arm's length to government and, therefore, is not well-placed to affect government policy.
- 172 U.K. Department for Business, Energy & Industrial Strategy (2021), Reforming Competition and Consumer Policy at paragraph 1.34.
- 173 New Zealand (2018), Commerce Amendment Act 2018 at section 51E.
- 174 OECD (2016), OECD Economic Surveys: Canada at page 110.
- 175 For greater certainty, this section applies only to civilly reviewable competition cases, and not to those that proceed criminally.
- 176 See, for example, U.K. Digital Competition Expert Panel (2019), Unlocking digital competition at page 6.
- 177 Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.) at section 8.1 and Federal Courts Rules, SOR/98-106 at Part 11.
- 178 Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6 at paragraph 829.

- 179 Patent Act, R.S.C., 1985, c. P-4 at section 25.
- 180 The Commissioner's power to obtain information through supplementary information requests pursuant to subsection 114(2) of the Act applies only to the merging parties, and not to other persons who may have information relevant to the Bureau's investigation.
- 181 15 U.S. Code § 1312. See also U.S. Department of Justice Antitrust Division (2012), Chapter III. Investigation and Case Development in Antitrust Division Manual, Fifth Edition.
- 182 15 U.S. Code § 57b-1. See also U.S. FTC (2021), A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority.
- 183 Competition and Consumer Act 2010, section 155. See also Australian Competition and Consumer Commission (2020), ACCC guidelines—Use of section 155 powers.
- 184 Council Regulation (EC) No 1/2003 at article 18.
- 185 Securities Act R.S.O. 1990, c. S.5, at section 13.
- 186 Federal Courts Rules SOR/98-106, at section 399.
- 187 Subsection 11(2) of the Act provides: Where the person against whom an order is sought under paragraph (1)(b) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

- 188 Affidavit of Daniel Jensen, affirmed January 27, 2021, in *Commissioner Of Competition V. Bayer Cropscience Inc.*, Federal Court Number T-178-21.
- 189 Paragraphs 12(4)(a) and 12(4)(b) of the Act.
- 190 See paragraph 11(1)(a) and sections 12-14 of the Act.
- 191 *North American Van Lines Canada Ltd. v. Canada (Director of Investigation and Research)*, 1997 CanLII 5665 (FC).
- 192 See sections 74.12 and 105 of the Act.
- 193 *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), at subsection 8(3).
- 194 *Carey v. Laiken*, 2015 SCC 17, at paragraph 32.
- 195 There already exists such a scheme in section 123.1 of the Act for failures to comply with the pre-merger notification regime.
- 196 Private access is available for section 75 of the Act, concerning refusals to deal, section 76, concerning price maintenance, and section 77, concerning exclusive dealing, tied selling and market restriction.
- 197 See section 103.1 of the Act.
- 198 See, for example, the list of all leave applications on the Tribunal's website.
- 199 Veel, P.E. (2009), *Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment*, Dalhousie Law Journal.

- 200 Veel, P.E. (2009), *Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment*, Dalhousie Law Journal.
- 201 MLATs are administered by Canada's Department of Justice.
- 202 Under this criminal MLAT, the Bureau has performed searches at locations in Canada on behalf of the U.S. Department of Justice.
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