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### CRITICAL REFLECTIONS ON THE INSTITUTIONAL DESIGN OF CANADIAN COMPETITION POLICY

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2011 marque le 25<sup>e</sup> anniversaire de l'entrée en vigueur de la *Loi sur la concurrence* de 1986 et constitue un moment propice pour évaluer si les nouveaux arrangements institutionnels mis en place par la Loi ont bien fonctionné ou sont déficients à certains égards. Afin de lancer cette évaluation, nous avons mené des entrevues avec chaque ancien commissaire de la concurrence (ou directeur des enquêtes et recherches) depuis 1986, la présidente du Tribunal de la concurrence depuis les huit dernières années, et un économiste ayant occupé des fonctions au sein du Tribunal de la concurrence et du Bureau de la concurrence. Les entrevues ont porté sur la performance du Bureau de la concurrence et du Tribunal de la concurrence, ainsi que sur de possibles options de réforme. Il existe un consensus que le statu quo institutionnel est insatisfaisant, mais moins de positions partagées quant à des options de réforme.

#### I. Introduction

2011 marks the 25<sup>th</sup> anniversary of the enactment of the *Competition Act*<sup>1</sup> of 1986, which inaugurated the modern era of competition policy in Canada. It is an opportune juncture to stand back from the day-to-day details of the administration of competition policy in Canada and evaluate whether the new institutional arrangements introduced by the *Competition Act* of 1986 have worked well or have been found wanting in some respects.

The earlier history of Canadian competition policy in Canada will not be re-traced in detail here.<sup>2</sup> In broad strokes, it is sufficient to recall that with the enactment of the first competition statute in Canada in 1889,<sup>3</sup> cartels and shortly thereafter mergers and monopolization were addressed through criminal prohibitions, enforced in the ordinary criminal courts of the provinces. While this criminal law framework yielded a steady trickle of convictions for price fixing conspiracies, it proved almost completely ineffective in addressing potentially anti-competitive mergers or monopolization, in part due to the criminal burden of proof, the nebulous public interest test that had to be satisfied, and restrictive interpretations of the statutory provisions by the courts.<sup>4</sup> Attempts in the 1920s and 1930s to move beyond the criminal law framework to incorporate forms of civil or administrative review of anticompetitive practices were struck down by the Privy Council and the Supreme Court of Canada as *ultra vires* the federal parliament.<sup>5</sup>

By the mid-1960s, a tentative political consensus had emerged that Canadian competition laws needed to be strengthened, particularly in the area of mergers and monopolization, and the federal government commissioned the Economic Council of Canada to undertake a study of the area and recommend policy changes. The Economic Council, in its 1969 report,<sup>6</sup> recommended that a wide range of potentially anti-competitive practices, including mergers and monopolization, should be subject to civil review by an expert tribunal and not dealt with through criminal prohibitions enforced in all-purpose criminal courts (a view subsequently endorsed by the Skeoch-McDonald Report in 1976).<sup>7</sup> Despite many fits and starts, the Stage 1 amendments to the *Combines Investigation Act*<sup>8</sup> in 1976 and the Stage 2 amendments in 1986 (which saw the *Combines Investigation Act* replaced by the *Competition Act*, more or less in its current form) largely gave effect to the Economic Council's recommendations in this respect. In particular, a wide range of reviewable practices, including mergers and abuse of dominance, were made reviewable in contested cases by the newly consti-

tuted Competition Tribunal, comprising a mix of Federal Court Trial Division judges and expert lay members, on application of the Commissioner of Competition on behalf of the Competition Bureau, while certain practices remained subject to criminal prohibitions enforceable in the criminal courts – *e.g.*, price fixing, predatory pricing, price discrimination, and resale price maintenance. Subsequent amendments to the *Competition Act* permitted private complainants limited access to the Competition Tribunal for injunctive relief (but not damages) with respect to a subset of reviewable practices (but not mergers or abuse of dominance), created a second civil review track for potentially anti-competitive horizontal arrangements while adopting something close to a *per se* criminal prohibition of hardcore price fixing or market allocation agreements amongst competitors, and de-criminalized predatory pricing, price discrimination, and resale price maintenance. The Tribunal was also given power to impose administrative monetary penalties (AMPs) for abuse of dominance.<sup>9</sup> Early doubts about federal constitutional jurisdiction over features of the new regime were largely put to rest by the decision of the Supreme Court of Canada in *General Motors vs. City National Leasing*,<sup>10</sup> upholding civil features of the legislation pursuant to the federal parliament's general trade and commerce power. That said, while there has yet to be a decided case in the competition context, we expect there to be constitutional challenges to the AMPs regime, in particular whether it is compatible with a civil rather than a criminal regime, just as there have been in other settings.<sup>11</sup>

In this paper, we critically analyze the central institutions in Canadian competition policy, drawing on interviews with past Commissioners of Competition and others with experience in the field. We asked our interviewees to evaluate the performance of the courts, the Tribunal and the Bureau, according to normative criteria or values for evaluating competition law institutions which we think are likely to be relatively uncontroversial. However, each value implies an obverse value, and interactions with other values, thus rendering the weighting of, or trade-offs among, values a quintessential polycentric and highly contestable exercise. The key dyadic values are listed below, following which we report our interviewees' assessments, and posit that integrating the Bureau and the Tribunal in some manner may better serve the purposes of Canadian civil competition law enforcement than does the present model.<sup>12</sup>

#### **a. Independence – Accountability**

On the one hand, competition law institutions should be free from day-to-day political interference. Independence helps to depoliticize enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political administration to the next. On the other hand, at least in a representative democracy, it is difficult to defend institutional independence without some form of accountability, *e.g.*, with respect to appointments, budgetary allocations, financial expenditures, periodic mandate and performance review.

#### **b. Expertise – Detachment**

Competition law matters typically require high levels of expertise in their resolution – expertise with respect to particular industries, expertise in marshalling and interpreting empirical data, and expertise in industrial organization theory. However, too close an involvement in the industry in question or excessively doctrinaire commitments to particular theoretical paradigms may compromise detachment in evaluating or adjudicating novel arrangements or evolving economic or theoretical environments.<sup>13</sup>

#### **c. Transparency – Confidentiality**

In order to enhance the performance and public credibility of competition laws, high levels of transparency in performing investigative, enforcement, and adjudicative functions are desirable. Conversely, much of the information that a competition law agency is required to evaluate from the immediate parties involved as well as from competitors, suppliers, and customers is highly commercially sensitive; and public disclosure may be seriously damaging to legitimate business interests.<sup>14</sup>

#### **d. Administrative Efficiency – Due Process**

Competing concerns also exist between administrative efficiency and due process protections. Many matters with which a competition law agency may be seized are time-sensitive (*e.g.*, merger review). However,

timeliness in disposition is in tension with the value of due process in providing all affected or interested parties a right to be heard, to adduce evidence, and to contest the position of parties adverse in interest.

### e. Predictability – Flexibility

In a legal system based on the rule of law, significant value is placed on the predictability and consistency with which laws are applied. In such a legal system, affected parties can order their affairs with a fairly high level of confidence in the nature of the rules that govern those affairs. But the value of predictability is in tension with the obverse value of flexibility where the evolution of economic theory and the idiosyncrasies of particular industries, transactions, or practices may require re-evaluation and refinement of pre-existing rules, policy positions, or adjudicative decisions. This often leaves a large domain of uncertainty in the application of competition laws.<sup>15</sup>

In balancing these various values, a complex, subjective, and inevitably highly contentious optimizing calculus is involved. Moreover, the complexity of this calculus is, in fact, greater than the primary dyadic value tensions identified above in that many of the values interact with one another in polycentric, mutually reinforcing or antithetical ways. These values and the trade-offs they entail need to be kept in mind when analysing the institutional performance of Canada's competition bodies.

## II. Views from the Front Lines

### A. Drawing on Experience

Over the period of August to October 2010, we interviewed, either in person or by conference calls lasting from 45 minutes to an hour, all former Commissioners of Competition over the almost 25-year period since the current institutional arrangements were implemented in the round of reforms reflected in the *Competition Act* of 1986: in sequence, Lawson Hunter, Calvin Goldman, Howard Wetston, George Addy, Konrad von Finckenstein, and Sheridan Scott.<sup>16</sup> Some former Commissioners have gone on to chair major sector-specific regulatory bodies, while others have become leading members of the Canadian competition bar. In addition, we interviewed Madam Justice Sandra Simpson, Federal Court Judge and Chair of the Competition Tribunal since 2003, and Lilla Csorgo, economist lay member of the Competition Tribunal from 2005 - 2007 and Senior Economic Advisor to the Commissioner of Competition and T. D. MacDonald Chair holder at the Competition Bureau from 2007 - 2009, to provide the perspective of an economist on current institutional arrangements. We posed the following four sets of questions to each interviewee:

- Does the current bifurcated agency (Competition Bureau–Competition Tribunal) structure work well? Can it be improved? Is more radical reform called for, such as integrating all investigative and adjudicative functions within a single agency (the integrated agency model), or replacing the Competition Tribunal with, *e.g.*, the Federal Court in contested civilly reviewable matters?
- Does the mandate of the Competition Bureau require re-evaluation with respect to explicit or implicit exemptions or exceptions, such as the regulated conduct defence, and overlapping jurisdiction between the Bureau and sector-specific regulators (such as the Canadian Radio-television and Telecommunications Commission (CRTC) or the Canadian Transportation Agency)?
- With respect to case-by-case decision-making by either the Bureau or the Tribunal, are appropriate protections in place to ensure: full and timely notice of allegations, notice of evidence relied on, appropriately constrained investigative powers, an effective right to challenge Bureau determinations before either the Tribunal or a court, and proportionality of remedies to violations?
- With respect to institutional performance norms, in the case of both the Bureau and the Tribunal, are appropriate standards adhered to in terms of the following values: timeliness; expertise; predictability; transparency about decisions; public consultation; public accountability; and independence?

We review the responses of our interviewees below, indicating where, on the one hand, substantial consensus exists or where, on the other hand, substantial dissensus prevails.

## B. Structure

Most interviewees agreed that the current bifurcated agency structure has not worked well over its history. The Competition Tribunal, at least in contested cases, has often engaged in highly protracted, adversarial proceedings, sometimes with an elapsed time of two years or more between the Notice of Application by the Commissioner to the Tribunal to the issuance of its final decision.

The Tribunal's record in this respect has significantly improved recently. The adoption of a "chess clock" rule for allocating time envelopes to each party in contested matters seems to hold out some promise of disciplining contested hearings, as do rule changes requiring all witness statements to be pre-filed in full (avoiding examination in chief).<sup>17</sup> For example, the timing from application to disposition in a recent refusal to deal case was thirteen months, with the timing from the hearing to the decision being six months.<sup>18</sup> In addition, on urgent matters such as an application for an interim order in merger proceedings, the Tribunal has issued decisions within eight days of notice of the matter.<sup>19</sup>

The consensus among interviewees, however, is that timeliness of disposition is still a major concern with Tribunal proceedings in contested cases. It is possible, for example, that parties are especially reluctant to take more complex cases to the Tribunal because of doubts about timeliness, which may explain the continued consensus concern about timeliness despite the clearly observed improvement in the timeliness of Tribunal decision-making recently. In order to encourage a greater rate of litigation before the Tribunal, a number of interviewees argued that there was a strong case for legislating timelines for decision-making by the Competition Tribunal, from the date of application by the Commissioner or a private party to final disposition, as is already the case with decision-making by the Canadian International Trade Tribunal in trade remedy cases and is also already the case in merger review by the European Commission.

Beyond issues of timeliness, most interviewees were highly skeptical that the Tribunal has been able to bring substantial expertise to bear on its deliberations, noting the mixed to weak quality of many lay member appointments, as well as the lack of pre-existing, specialized expertise on the part of most judicial members. One interviewee noted that the idea that lay expertise is sought with current appointments is undermined by the selection of lawyers (and not competition lawyers) for positions with the Tribunal. Not only does this lack of expertise affect the quality of ultimate determinations but it was suggested that it may affect the ability of the Tribunal to engage in rigorous case management by judicial members who lack the expertise and confidence to discipline the advocacy strategies of the parties to contested proceedings.<sup>20</sup>

Interviewees noted that there is a feedback effect from the lack of expertise: the very light caseload of the Tribunal since its creation has inhibited the development of a specialized body of expertise, which in turn has inhibited hearings before the Tribunal. Most interviewees were skeptical that the case load is likely to increase in the future. In the case of mergers, which are typically extremely time sensitive, it is difficult to conceive of many contested merger cases ever coming before the Tribunal. Mergers are more likely to be resolved in the Commissioner's office (albeit with much attenuated due process and transparency relative to the Tribunal).<sup>21</sup>

In light of these perceived shortcomings, different reforms were suggested by the interviewees. One suggestion was to reform the Competition Tribunal, with panels of perhaps two Federal Court judges and one economist. The economist would be a full decision-maker, unlike under the *status quo* in which the lay members (who may not be economists) cannot make decisions of law; the consensus among interviewees was that this restriction lacks a justification. One possibility is that this reconstituted Tribunal would review matters of law or matters of mixed law and fact based on the Commissioner's own evidentiary record, rather than hearing all evidence *de novo*, with a remand power in the event of evidentiary inadequacies. This option has some appealing qualities, but interviewees noted that given the Tribunal's light case load it may be difficult to justify the full-time appointment of an economist. This may argue for the appointment by Order-in-council of a roster of economists from whom one would be chosen on a case-by-case basis by the Chair of the Tribunal to serve as a member of an adjudicative panel. Interviewees noted that this seemed a more desirable arrangement than the current practice at the Tribunal of appointing *ad hoc* staff economists

to advise Tribunal members informally on particular cases where their role and inputs are not transparent.

For many interviewees, the Competition Tribunal, at least in anything resembling its present form, is “unsalvageable.” Interviewees taking this view tended, by substantial consensus, to favour reconstituting the Competition Bureau as a commission with a body of three to five commissioners, including a Chair of the Commission, recognizing that as a practical matter most competition policy decisions will be made in the Bureau in settlement discussions with the parties and that these decisions should not be dependent entirely on the views and mind-set of a single commissioner. With such a structure, the general view was that at least one of the commissioners should be a senior industrial organization economist with full co-decision making responsibilities.

One concern with a multi-member commission is that political considerations may militate in favour of ensuring representation of major regions, language, ethnic, and gender groups, leading to an excessively large commission with highly variable expertise. Most concern from interviewees, however, focused on the authority that would be vested in this commission. Many believed that the commission should not have responsibility for both investigating and adjudicating because of a concern about bias, or perceived bias, from such dual roles. Others were less concerned about such matters, citing provincial securities commissions and the Federal Trade Commission as examples. The primary perceived strength of overlapping adjudication and investigation functions is the increased expertise that the commissioners, as both adjudicators and investigators, would develop. The alternative is that the commissioners would only investigate, and engage in settlement discussions with parties, but would not ultimately adjudicate. Rather, any matter in dispute would be referred either to a reconstituted Tribunal or possibly the Federal Court. But even those that supported the idea of an integrated body responsible for both investigation and adjudication agreed that there would still need to be some external form of check and balance on decisions taken by such a multi-member commission, but in this respect there was much less consensus on what form this external check or balance should take.

The relationship between investigation and adjudication is clearly an important issue where reasonable people can disagree. One option is to abolish the Competition Tribunal and simply replace it with the Federal Court Trial Division, where a single judge, perhaps drawn from a sub-set of Trial Division judges that are prepared to commit to developing expertise in competition matters, would perform the adjudicative functions presently performed by the Competition Tribunal, subject to further appeals to the Federal Court of Appeal (as at present, in the case of decisions of the Competition Tribunal). However, other interviewees were of the view that Federal Court Trial Division judges would exacerbate the concerns over lack of expertise in external adjudicative bodies. Moreover, this option would not address timeliness issues if proceedings before the Federal Court were to involve *de novo* hearing of the evidence. Another concern about vesting supervisory authority in the Federal Court was that it would be difficult for that body to accommodate competition policy-specific procedures within an otherwise general adjudicative framework.

In order to address the timeliness question before the Federal Court, one suggestion would be that the commission would develop an evidentiary record, and appeals to the Federal Court Trial Division would be limited to matters of law or mixed law and fact, with the possibility of remand to the commission in the event of factual or evidentiary inadequacies in its record. These concerns in turn raise questions as to how a multi-member commission would develop an evidentiary record which could be reviewable on appeal. One possibility is to contemplate a highly inquisitorial process before the commission in contested cases. For example, the investigative staff of the commission and the private parties involved could submit competitive impact assessments to the commission, along with supporting written expert opinions, perhaps subject to written interrogatories by parties adverse in interest, with a highly truncated oral hearing before the commission, followed by a written reasoned decision. If the commission's decision-making processes, at least in contested cases, were structured in this fashion, a yet further option would be to provide for appeals not to the Federal Court Trial Division but to the Federal Court of Appeal, although this option again would raise questions of relevant expertise in members of the Federal Court of Appeal in competition matters.

### C. Mandate

There are several issues relating to the scope of Canadian competition policy. Most interviewees were of the view that the current scope and boundaries of the regulated conduct defence are highly unclear, and a majority of interviewees favoured a legislative amendment to the *Competition Act* to clarify this scope and increase predictability for all affected parties.

With respect to overlapping jurisdiction of the Competition Bureau and sector-specific regulators, especially with respect to merger review, the consensus of interviewees was that no special merger review regime is required in the case of airline and rail mergers, and political oversight of mergers in these two sectors, as at present, is unwarranted. Most interviewees also were of the view that there is no case for a special merger review regime in the telecommunications sector, while recognizing that in the banking and broadcasting sector financial stability and cultural concerns may warrant special review procedures that recognize considerations specific to these two sectors. However, even in these two cases, the consensus amongst interviewees was that the Competition Bureau should undertake the initial assessment of the competitive implications of a proposed merger and make public its findings and recommendations, while leaving sector-specific regulators free to reach other findings and recommendations. Other regulators would be disciplined, however, by the requirement of providing a public document setting out their reasons for diverging from the views of the Competition Bureau, thus ensuring adequate levels of transparency in decision-making between the two affected agencies.

Similarly, while some expressed concern about the Bureau's lack of expertise in certain dynamic regulated sectors like telecom, the consensus was that where a sector-specific regulator purports to apply competition principles, *e.g.*, with respect to predatory pricing, it should defer to the Bureau in making an initial assessment of the issues at hand and follow a procedure similar to that proposed for merger reviews in such a sector in the event of diverging from the Bureau's views of the relevant competition policy concerns.

### D. Due Process Protections

Most interviewees were of the view that with respect to criminal prosecutions for violations of the *Competition Act*, there are adequate general procedural protections for defendants, given that these matters are tried in the ordinary criminal courts and are subject to the application of the Charter of Rights and Freedoms.<sup>22</sup> In civil matters, there have been concerns in the recent past over the Bureau's utilization of section 11 orders, available by *ex parte* application to the Federal Court, demanding production of classes of documents named in these orders. Specifically, concerns have arisen as to the breadth of these demands, not only with respect to immediate parties to transactions, but competitors, suppliers, and customers. Some interviewees also favoured providing notice to affected parties in *ex parte* applications for section 11 order in civil matters (but not, for obvious reasons, in criminal matters); others were concerned that publicity about competition investigations may create unwarranted reputational costs for firms who may not ultimately have done anything anticompetitive. Some interviewees were of the view that supplementary information requests (SIRs) introduced in recent amendments to the *Competition Act* (similar to so-called "second requests" under the *Hart-Scott-Rodino Act*<sup>23</sup> in the United States) will substitute for section 11 applications in merger cases (at least with respect to the parties to the transactions), and similar concerns about the potential for excessive frequency and scope of SIRs will arise.

Further concern expressed to us by some interviewees relates to the inability or unwillingness of case officers responsible for particular files or more senior officials to whom they report to isolate and communicate to the parties in a timely fashion the critical issues of concern to them in an investigation. Such early communication would permit the parties, again in a timely fashion, to address these concerns either by way of demonstrating that they are unwarranted or that remedial options may be available that effectively address them. Some interviewees were of the view that this delay reflects, at least in some cases, lack of experience by case officers along with a hesitancy on their part to communicate to the parties views that their superiors might disagree with, or alternatively a litigation mentality that one should hold one's cards close to one's vest in the event an investigation should lead to litigation.

### E. Systemic Performance Qualities of the Competition Bureau

Most interviewees focused on three issues pertaining to the institutional performance of the Bureau: independence, accountability, and expertise, with some mention being made of a fourth factor, timeliness of decision-making.

With respect to independence, former Commissioners unanimously reported that their decisions as Commissioners in particular cases had never been influenced by the Minister or his or her political staff, and indeed that no such efforts had been attempted. However, the majority of interviewees were of the view that the Bureau, which is currently constituted as a statutory agency within Industry Canada, would be better assured of institutional independence, in a systemic sense, if the Bureau received its own parliamentary budget allocation separate from Industry Canada, thus avoiding the need for the Commissioner to negotiate or curry favour with the Deputy Minister of Industry (and indirectly the Minister) in securing budgetary allocations. A minority of interviewees were of the view that the Bureau's systemic independence would be better assured if it were removed from Industry Canada and constituted as a separate statutory agency (similar to the CRTC). This would have the virtue of completely detaching the Bureau from current policy concerns of Industry Canada, which may not always be entirely consistent with the objectives of competition policy, while at the same time entailing the vice of removing the Bureau from at least the potential of providing inputs into general areas of government economic policy-making – a vice that some interviewees felt to be of little consequence, because the Bureau is rarely consulted on such matters now.

With respect to accountability, a number of interviewees expressed concern that amendments to the *Competition Act* that provide for the registration of consent agreements in merger cases with the Competition Tribunal, and automatic enforcement thereof as orders of the Tribunal, without review by the Tribunal, has been an undesirable development in that little public scrutiny of the agreement is possible given the skeletal nature of the agreements. This is exacerbated by the fact that the Bureau provides no or inadequate technical backgrounders or competitive impact assessments by which the broader public can evaluate the appropriateness of such orders, or other settlement arrangements. By extension, some interviewees also expressed concerns that the Bureau inadequately utilizes technical backgrounders to explain its decisions in major cases to discontinue or settle a matter, thus rendering its decision-making processes less than adequately transparent. Some interviewees also expressed concern that there is very little retrospective evaluation of the ultimate market results following orders in particular cases. With respect to expertise, most of the interviewees were of the view that while the Bureau has had some success in recruiting case officers with Masters degrees in economics, it has been less successful in recruiting and retaining suitably qualified Ph.D. economists. In addition, concerns were expressed that often Ph.D. economists are either unwilling or not encouraged to involve themselves heavily in particular investigative or enforcement files, but rather operate in corners of the Bureau focusing on theoretical/technical issues. To address the perceived lack of economic input into actual cases, some interviewees favour the appointment of a Senior Economic Advisor to the Commissioner to advise on broader policy matters, while with respect to particular cases under investigation, there could be a requirement that the economists on such a team prepare a written assessment of the economic issues at stake in the case and submit this report not only to the case officer but to the head of the division to whom the case officer reports. While many interviewees noted the lack of consistent input from senior experienced economists in the Bureau's activities (as with the Competition Tribunal), they also noted that the Canadian academy currently produces very few economists with the industrial organization and applied skill sets required in regulatory environments such as the Competition Bureau (but also in other areas of economic policy making, such as energy policy).

With respect to timeliness of decision-making within the Bureau, some interviewees were critical of the protracted nature of Bureau decision-making in many cases, and argued for legislated deadlines, as opposed to merely internal service deadlines, in order to focus and discipline the Bureau's efforts.<sup>24</sup>

### III. Conclusion

We have reviewed the central institutions in Canadian competition policy, drawing on reflections on the performance of these institutions from observers who are uniquely positioned to provide insight: every past Competition Commissioner, the Chair of the Competition Tribunal, and an economist who has served both on the Tribunal and with the Bureau. In our view what emerges from this canvass is that the core institutional question confronting Canadian competition policy, particularly with respect to civil matters, is how best to structure the institutional relationship between investigation and adjudication.

As we have argued in the past,<sup>25</sup> perceived shortcomings of the performance of the current institutional framework stem in large part from the existing structure. Concerns have been expressed about timeliness, expertise and public accountability of both the Bureau and the Tribunal. Some causes of this concern are exogenous to institutional structure; for example, if relatively few industrial organization economists are being trained in Canada, this has nothing to do with the Bureau and the Tribunal. But others we believe relate intimately to the institutional set-up. For example, timeliness at the Tribunal may relate to the lack of expertise at the Tribunal, which in turn relates to the small caseload that it hears. Relatively inexperienced adjudicators on the Tribunal cannot develop such expertise on the job because of the rarity of cases, which in turn contributes to the rarity of cases. Timeliness at the Bureau may also depend ultimately on the challenges that parties face in considering litigation before the Tribunal. The Tribunal has, for all practical purposes, ceased to provide an external check on the Bureau's decision-making. Parties, especially in mergers, thus effectively require the Bureau's approval because they are not in a position to threaten credibly to take disagreements to the Tribunal. Moreover, third parties have limited rights to bring complaints before the Tribunal. This allows the Bureau considerable leverage both in conducting its inquiries and in reaching settlements with the parties. While there is no reason to suppose that officers at the Bureau would act unprofessionally, there is little discipline on their discretion, which may contribute to delay as risk-averse case officers probe every possible competition angle in a case. Accountability also relates obviously to the institutional framework. With public adjudication at the Tribunal occurring only rarely, the Bureau can enforce the law with relatively little public oversight. Settlement discussions behind closed doors are the norm and publicity the exception.

Given the connection between the central criticisms of current institutional performance and the current institutional structure, we believe that this structure deserves thorough review and reform. The difficulty for reform is that while there is a consensus on the shortcomings of the *status quo*, there is no such agreement over fundamental aspects of reform. In particular, while our interviews suggest that there is general support for the idea of a multi-person commission, there is division over its particular role, as well as the institutional framework for review of its decisions.

As we have argued in the past,<sup>26</sup> we are drawn to greater *de jure* integration of the investigative and adjudicative functions within a Competition Commission. We understand the concerns about bias that arise from such integration, but believe that the benefits from increasing expertise, timeliness and accountability in the adjudication process justify the risk of bias. At present, adjudication, when it arises (which is very rarely), involves adjudicators who for the most part lack considerable expertise in the competition policy sphere. By bringing greater adjudicative responsibilities within the commission, the decision-makers will be fully immersed in the field and the expertise, timeliness and accountability problems will be mitigated considerably. While there are interaction effects of a number of kinds, the core reason to integrate investigation and adjudication is that expert adjudicators are better able to provide timely decisions, which will increase formal adjudication, which will increase accountability.

We have identified four responses to concerns about bias, which clearly do not individually or collectively eliminate these concerns, but do diminish the role such concerns should play in shaping institutional reform. First, under the *status quo*, there is already *de facto* integration of investigation and adjudication within the Bureau. Parties are very wary of litigation before the Tribunal, which grants considerable power to the Bureau to extract settlements. Investigators are *de facto*, and with consent agreements to some extent *de jure*, already adjudicators under the *status quo*, yet there is very little publicity about the inputs into and bases for their decisions. Formalizing adjudication within the Bureau would have the advantage of poten-

tially rendering certain features of the process more transparent. The Bureau could be required to produce reasons for its decisions, for example. In short, concerns about bias cannot be invoked to reject proposed reforms in favour of the *status quo*.

Second, concerns about bias can be addressed within the reform. Reform could take advantage of a multi-person commission, for example, by ensuring that commissioners vested with decision-making authority in any given case are not involved in the investigation associated with that particular case.

Third, in our view it is essential in contemplating reform not to treat concerns about bias as a kind of trump card. In civil matters, the typical remedy is a cease-and-desist order. The mildness of the remedy, which could even be institutionalized by eliminating AMPs if the commission adjudicates a matter, undermines concerns about bias. Moreover, while concerns about bias are relatively weak under the status quo, concerns about expertise, accountability and timeliness are widespread and strong. Allowing residual concerns about bias to exist within an institutional framework may well be appropriate in light of the potential gains to be had on these other dimensions.

Fourth, we are open to persuasion that appeals should lie to the Federal Court of Appeal on matters of law, mixed law and fact, and fact (with leave) from commission decisions (as is the case currently with decisions of the Tribunal), although this option comes at a cost – lack of timeliness and expertise in decision-making. The latter concern would be mitigated if the Federal Court of Appeal were to show more deference to decisions of an expert commission than it has to decisions of the Tribunal.

## Endnotes

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<sup>1</sup> *Competition Act*, RSC 1985, c C-34 [hereinafter *Competition Act*].

<sup>2</sup> See Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, 2003), ch. 1. [Canadian Competition Policy].

<sup>3</sup> *An Act for the Prevention and Suppression of Combines Formed in Restraint of Trade*, SC 1889, c 41.

<sup>4</sup> See Paul Gorecki and W.T. Stanbury, "The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952" in R.S. Khemani and W.T. Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991); See also Canadian Competition Policy, *supra*.

<sup>5</sup> See *Re Board of Commerce Act and Combines Fair Prices Act of 1919*, (1920) 60 SCR 456. [1922] AC 1919 (P.C.), and *Reference re Dominion Trade and Industry Commission Act, 1935*, [1936] S.C.R. 379. See generally Canadian Competition Policy, *supra*.

<sup>6</sup> Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

<sup>7</sup> L.A. Skeoch and B.C. McDonald, *Dynamic change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Supply and Services, 1976).

<sup>8</sup> *Combines Investigation Act*, RSC 1970, c C-23.

<sup>9</sup> See ss. 78 and 79 of the *Competition Act*, *supra* note 1.

<sup>10</sup> *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641 (1989), 255.

<sup>11</sup> There have been a number of cases considering, and to date upholding, the constitutionality of various financial penalties in different administrative contexts. See, e.g., *Martineau v. M.N.R.* 2004 SCC 81 (considering constitutionality of financial penalties in customs context); *U.S. Steel 2010 FC 642* (considering constitutionality of AMPs in context of possible breaches of undertakings pursuant to Investment Canada Act); *Re Rowan*, 2009 LNONOSC 941, affirmed 2010 ONSC 7029 (considering constitutionality of AMPs in securities regulation context).

<sup>12</sup> The identification and explanation of these values is largely drawn from a previous paper, Michael Trebilcock and Edward Iacobucci "Designing Competition Law Institutions" (2002) 25 *World Competition* 361.

<sup>13</sup> This balance between expertise and detachment was one of the goals of the newly created Competition Tribunal. The appointment of both judicial and non-judicial members to the Tribunal was, Goldman explains, "designed to provide both procedural fairness and additional expertise in the assessment of complex competition cases". See Calvin S. Goldman, "The Merger Resolution Process Under the Competition Act: A Critical Time in its Development" (1990) 22:1 *Ottawa Law Review* 1 at 10.

<sup>14</sup> In 1986, when the current merger provisions of the Competition Act came into force, the Tribunal had jurisdiction to order any action to eliminate an alleged substantial lessening or prevention of competition. As a result of early Tribunal decisions regarding consent order applications in cases such as *Canada (Director of Investigation and Research) v. Palm Dairies Ltd.* (1986) 12 CPR (3d) 540 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. Imperial Oil Ltd.* (1990) 31 CPR (3d) 277 (Comp. Trib.), the Competition Bureau and the business community developed a preference for "fix it first" solutions and post-closing undertakings to remedy competition issues arising from a merger, bypassing the consent order provisions. See Goldman, *supra*. However, this response to the perception of intrusive consent orders was clearly not transparent, with most contestable mergers negotiated in the Commissioner's office with little oversight from the public.

<sup>15</sup> Uncertainty is especially problematic for companies attempting a merger. As former Commissioner Goldman noted in 1990, "parties to a proposed merger are very anxious to avoid that one word which can prove to be a real impediment to the transaction proceeding – 'uncertainty'", see Goldman, *supra* at 11.

<sup>16</sup> The current Commissioner of Competition, Melanie Aitken, declined our invitation to comment on any of these matters.

<sup>17</sup> See Competition Bureau, *Merger Review Process Guidelines* (Gatineau, QC: Competition Bureau, 18 September 2009).

<sup>18</sup> *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. et al.*, (2009) Comp. Trib. 6.

<sup>19</sup> *The Commissioner of Competition v. Labatt Brewing Company Ltd. et al.*, (2007) Comp. Trib. 3.

<sup>20</sup> That this is the perception does not imply that it is true – there is clear evidence that in recent cases like *Nadeau* that the Tribunal has been very aggressive in case management.

<sup>21</sup> See Calvin Goldman and Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner," (2010) *Loyola University Chicago Law Journal* 535 at 546-548. This has been a feature of the Competition Bureau for quite some time, see Goldman, *supra*.

<sup>22</sup> While AMPs did not arise in our conversations with the interviewees, there clearly exist concerns about the due process rights associated with a civil penalty that some have analogized to a criminal fine. As noted above, we expect litigation on this question in the near future.

<sup>23</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub L No 94-435, 90 Stat 1383.

<sup>24</sup> Merger cases for which the parties file statutory notification materials under Part IX of the Competition Act are subject to statutory waiting periods, but these waiting periods are not binding upon the Bureau. The Commissioner may challenge a merger, despite expiry of the waiting period, up until one year after closing. No statutory time limits of any kind exist for the review of mergers which are the subject of requests for advance ruling certificates or "no-action" letters but not notifications (the vast majority of mergers), nor for criminal matters (there is no limitation period for criminal prosecutions in Canada), and there is a three-year limitation period for bringing abuse of dominance cases under the Competition Act (after the practice has ceased) but no limitation period for other civilly reviewable matters. Given the need for business certainty, the current limitation periods impose no practical constraints on the duration of Bureau investigations.

<sup>25</sup> See Trebilcock and Iacobucci, (2002), *supra*; Trebilcock and Iacobucci, "Designing Competition Law Institutions: Values, Structure and Mandate," (2010) 41 *Loyola University Chicago Law Journal* 455.

<sup>26</sup> Trebilcock and Iacobucci, (2010), *ibid*.