ARTICLES

INTRODUCTION TO FORMER COMMISSIONER JOHN PECMAN'S ARTICLE

CCLR Editorial Team

The CCLR Editorial Team was delighted when former Commissioner John Pecman agreed to contribute an article reflecting on his long career at the Competition Bureau and looking ahead to the challenges facing his successor. We present that article with this issue. We wish to thank the former Commissioner for the obvious care and effort that went into preparing such a rich and thought-provoking piece. In it, he reviews the profound changes that have taken place in Canadian competition policy over his career, he explains his areas of focus and the Bureau's accomplishments during his time as Commissioner and, provocatively, he lays out a series of recommendations for legislative and policy changes going forward. He has given us much to think about and we anticipate that his ideas will be widely discussed over the coming months and years.

John Pecman joined the (then) Bureau of Competition Policy right out of graduate school in 1984. An economist joining a law enforcement agency, he did not imagine that he would spend over thirty years in the same organization -- including over five years as its Commissioner. However, he arrived at an exciting time for competition policy in Canada as the new Competition Act and Competition Tribunal Act of 1986 remade large parts of the Canadian law on (especially) single-firm conduct and mergers. It was arguably the most exciting time in Canadian history to become engaged in the field and over his career John has made important contributions across the Bureau, serving in a series of increasingly senior positions up to and including his time as Commissioner. Over this period he has been involved in a number of the most important cases in the Competition Act era.

Commissioner Pecman's tenure will be remembered for several signature accomplishments. He brought to the office great credibility as a highly experienced enforcement official and a refreshing openness seen in his personal approachability but, more importantly, in his willingness to actively engage with stakeholders and consult widely during the policy formulation process. His time as Commissioner saw the creation of many new guidance documents and the revision of several others, providing much greater – and very much appreciated – clarity on the Bureau's approach to a number of complicated issues. He embraced transparency and dialogue,

and championed compliance – with his model of "shared compliance" – over strictly aggressive enforcement. Indeed, he saw the tremendous value in, and energized, many non-enforcement activities such as advocacy work, regulatory interventions and industry studies.

In addition to these domestic accomplishments, John was a great competition diplomat for Canada. Ever increasing cross-border merger and cartel activity compels national and regional competition authorities to work together to share information and best practices and to try to lower costs for all parties involved in enforcement activities. To this end, under his leadership the Bureau signed a number of MOU agreements with other agencies. He was also universally recognized as one of the leaders of the International Competition Network. His widely-respected efforts raised Canada's profile putting it front and centre in global competition policy initiatives, assuring that Canada was an active contributor to, and beneficiary of, ICN activities. In recent years he was a strong champion, within the ICN, for greater support for the work of agency economists. Not a surprising focus for the first economist to be the Canadian Commissioner, perhaps, but his efforts have very positively raised the profile of competition economics at the ICN.

The 2012-2018 period could not have been an easy time to be the Canadian Commissioner of Competition. Having to address a number of new challenges arising from, for example, the new economics of the digital economy and popular concerns that competition policy should address an expanding set of goals, and to do that with an ever-shrinking budget must have been daunting. But John embraced the challenges and made great progress. His will be a difficult act to follow.

L'équipe de la Revue *est absolument ravie que l'ex-commissaire John Pecman ait accepté de lui faire part de ses méditations sur sa longue carrière au Bureau de la concurrence et les défis qui attendent son successeur. Nous souhaitons le remercier pour le soin et l'effort qu'il a mis à l'articulation de cette réflexion riche et féconde, que nous vous présentons dans ce numéro. Il y fait une rétrospective des profondes mutations des politiques canadiennes sur la concurrence qu'il a vu s'opérer au fil des ans; décrit ses principaux champs d'intervention et les réalisations du Bureau pendant son mandat comme commissaire; et joue les trouble-paix en recommandant une série de réformes des lois et politiques. Un article qui donne certes matière à réflexion; nous croyons que les idées qu'il présente alimenteront les débats pour les mois et années à venir.*

À peine John Pecman terminait-il ses études supérieures qu'il a rejoint

les rangs du Bureau de la politique de concurrence (de son ancien nom), en 1984. Économiste embauché dans un organisme d'application de la loi, il était alors loin de s'attendre à y passer les trente prochaines années – dont plus de cinq ans au poste de commissaire. Or, son arrivée coïncidait avec un tournant majeur : les nouvelles Loi sur la concurrence *et* Loi sur le Tribunal de la concurrence *de 1986 réécrivaient tout un pan du droit canadien de la concurrence, et plus particulièrement celui sur la fusion et le comportement individuel des entreprises. S'ensuivit possiblement l'un des épisodes les plus palpitants de l'histoire du pays pour travailler dans le domaine, et c'est ce que fera John Pecman, qui apportera d'importantes contributions au Bureau et en gravira les échelons jusqu'à finalement devenir commissaire. Au cours de sa carrière, il prendra part à plusieurs des affaires marquantes du régime de la* Loi sur la concurrence.

On se souviendra du mandat du commissaire Pecman, ponctué de plus d'une réalisation distinctive : l'homme a beaucoup renforcé la crédibilité du Bureau de par sa riche expérience, sa facilité d'abord – témoignant d'un rare degré d'ouverture – et, surtout, sa détermination à consulter tout un éventail de parties intéressées dans l'élaboration des politiques et à entretenir la relation avec elles. Sous sa houlette, de nombreux documents d'encadrement ont été rédigés ou refondus, ce qui a apporté des précisions – fort appréciées – sur la ligne de conduite du Bureau en ce qui a trait à diverses questions complexes. Il a épousé les principes de transparence et de dialogue, et a fait de la conformité son cheval de bataille – avec son modèle de « conformité partagée » – plutôt que la mise en application par la contrainte. En effet, il a vu toute la valeur des activités ne passant pas par la coercition (campagnes de sensibilisation, interventions réglementaires, études du monde des affaires), et œuvré à les dynamiser.

Et outre tout ce qu'il a fait au pays, John Pecman s'est aussi avéré un brillant diplomate pour le Canada en matière de concurrence. Avec la multiplication des fusions transfrontalières et des cartels, les autorités nationales et régionales sont poussées à collaborer, à échanger renseignements et pratiques exemplaires, et à tenter de réduire les coûts pour toutes les parties qui interviennent dans le processus d'application du droit; c'est pourquoi, sous sa gouverne, le Bureau a conclu des protocoles d'entente avec ses semblables. L'homme est aussi universellement reconnu comme l'une des têtes pensantes du Réseau international de la concurrence (RIC). Ses efforts méritoires ont propulsé le Canada à l'avant-scène des initiatives mondiales de réglementation de la concurrence; ils se sont avérés l'assurance non seulement que le pays participe activement aux activités du

RIC, mais aussi qu'il en bénéficie. Dans les dernières années, il s'est fait le champion des économistes au sein du réseau, prônant un meilleur soutien à leur travail. Cette intercession, si elle n'est pas surprenante venant du premier économiste à devenir commissaire de la concurrence au Canada, a grandement contribué à accroître la considération accordée dans le RIC à la science économique en matière de concurrence.

Il a dû être particulièrement ardu d'occuper les fonctions de commissaire de 2012 à 2018 : cela revenait à composer avec toutes sortes de difficultés posées, par exemple, par la nouvelle économie numérique, le foisonnement des buts de la réglementation en matière de concurrence sous la pression populaire, ou des compressions budgétaires toujours plus importantes. Qu'à cela ne tienne : John Pecman s'est montré à la hauteur de tous ces défis, et capable de véritables prouesses. Son successeur aura fort à faire pour l'égaler!

UNLEASH CANADA'S COMPETITION WATCHDOG: IMPROVING THE EFFECTIVENESS AND ENSURING THE INDEPENDENCE OF CANADA'S COMPETITION BUREAU

Former Canadian Commissioner of Competition John Pecman[1]

For three decades I had the honour of working at Canada's Competition Bureau – an agency internationally recognized as a leader in effective competition law enforcement. Though when I started as a case handler in 1984 I never expected, nor planned, to serve as Commissioner, leading the agency and the staff that have given so much to me both professionally and personally has been the highpoint of a rewarding career in service to the public. Though there is much to reflect on, my experience working to advance the principles of competition as an executive member of both the International Competition Network and the Organization for Economic Cooperation and Development certainly stands out.

In my time at the Bureau, Canada's competition law and the Bureau itself have undergone tremendous change. Now, operating in a marketplace that is evolving at a frenetic pace, I believe the Bureau stands at a crossroads in its history; where evolution, both for the Bureau and for the legislation that it enforces, is absolutely imperative. Having had the opportunity to reflect on my three decades in competition law enforcement, I believe that the time is ripe to share the insight I have gained – with the goal of igniting a discussion about improving the institutional design, legislation and function of Canada's Competition Bureau. In what follows, I propose to provide: an overview of the Bureau's current design and function, historical background on Canada's competition law and the Competition Bureau, highlights of recent developments within the Bureau, an analysis of the current issues (and trends we expect will continue) in competition law and policy – and how the Bureau has responded to these. I will conclude by providing substantive recommendations for both structural (institutional) and legislative reform.

I must preface this by saying that I am exceptionally proud of what we have accomplished together in my thirty years of employment at the Bureau – and in particular the work we have done in the last five years to strengthen the agency and prepare it for the future. When you lead an organization, it goes without saying that your successes are not yours alone but rather belong to the staff, who are the foundation upon which you stand. The Bureau is an organization that is teeming with talent and, in

that respect, is well positioned to tackle the challenges that await it in the not too distant future.

Pendant trois décennies, j'ai eu l'honneur de travailler au Bureau de la concurrence du Canada; un organisme reconnu comme chef de file mondial dans l'application efficace du droit de la concurrence. Il faut toutefois savoir qu'en 1984, à mes débuts comme responsable de cas, j'étais à cent lieues de me douter que j'allais un jour devenir commissaire et prendre les rênes de cet organisme auquel je dois tant sur les plans professionnel et personnel, ce qui fut le point d'orgue de ma gratifiante carrière au service du public. Bien des choses me reviennent à l'esprit, mais je retiens tout particulièrement mon travail de promotion des principes de concurrence comme membre de l'exécutif du Réseau international de la concurrence et de l'Organisation de coopération et de développement économiques.

Durant ma carrière au Bureau, j'ai vu énormément de changements dans le droit canadien de la concurrence et au Bureau lui-même. À présent que le marché se transforme à un rythme effréné, le Bureau se trouve à la croisée des chemins : lui-même et la loi dont il veille à l'application doivent absolument évoluer. Ayant pu réfléchir sur mes trente années dans l'application du droit de la concurrence, je crois que le moment est venu de faire part de mes expériences. J'espère ainsi susciter un débat sur l'amélioration du modèle institutionnel, de la législation, et des fonctions du Bureau de la concurrence du Canada. Dans les lignes qui suivent, je présente une vue d'ensemble de l'actuel Bureau et de ses fonctions; son historique et celui du droit de la concurrence au Canada; les faits saillants de l'actualité du Bureau; une analyse des questions de l'heure (et des tendances que nous espérons voir se maintenir) dans ce domaine du droit et les politiques y afférentes; et les mesures que le Bureau a adoptées au vu de tout cela. Je conclurai par des recommandations concrètes en vue d'une réforme structurelle (institutionnelle) et législative.

Je dois tout d'abord dire que je suis extrêmement fier de ce que nous avons accompli ensemble durant mes trente années au Bureau, et surtout du travail que nous avons abattu dans les cinq dernières pour renforcer l'organisation et la préparer aux défis de l'avenir. Quand vous êtes à la tête d'une organisation, il va sans dire que vos réussites ne sont pas que les vôtres; elles sont surtout celles du personnel, sans qui vous ne seriez pas grand-chose. Le Bureau débordant de gens de talent, il est bien placé pour s'attaquer aux problèmes qui seront notre lot dans un avenir proche.

Introduction

Competition and free markets promote the efficient allocation of resources and create strong incentives for innovation and productivity enhancements in the economy[2]. Unnecessary government regulation in place of free markets imposes costs on businesses and stifles innovation and productivity.[3] Thus, effective competition law and policy are key elements in ensuring the competitiveness and efficiency of the Canadian economy and better enable Canadian businesses to compete in the international arena.[4] Parliament recognized this fact in section 1.1 of the *Competition Act* (the *Act*). Other governments across the globe recognize that healthy markets require effective competition regimes to foster sustained economic development. Free market capitalism is now recognized by even the world's most communist and socialist regimes as the undisputed system for generating wealth and innovation. Other jurisdictions such as Australia have gone beyond traditional competition law enforcement to enhance their competitiveness by focusing on the promotion of competition and having integrated competition analysis in their legislative frameworks.[5]

The purpose of the *Act* is to ensure that market forces work to create efficient businesses with incentives to innovate, and that consumers benefit from lower prices and better products and services. The *Act* sets out a range of business activities that may undermine the operation of competitive markets. Through its investigative and enforcement authority, the Bureau combats price-fixing cartels, anti-competitive mergers and dominant firms that abuse their market power, as well as misleading advertising and other deceptive marketing practices. The Competition Bureau (Bureau) conducts investigations and recommends action to the Commissioner of Competition, who may refer criminal cases to the Public Prosecution Service of Canada (PPSC) for prosecution or work with the Department of Justice Canada to litigate civil cases. In civil reviewable matters, the Commissioner may seek remedial relief before the Competition Tribunal (Tribunal); a specialized quasi-judicial body composed of federal court judges and lay members. Limited private enforcement of competition laws are also permitted through damage suits under the criminal provisions of the *Act* or through cease-and-desist orders issued by the Tribunal for certain market restrictions. The Bureau's mandate also extends to competition advocacy – the Commissioner appears before federal and provincial boards, commissions or other tribunals, advocating for principled deregulation of markets and increased reliance

on market forces in key sectors of the economy. Notable interventions have been made in the telecommunications, financial services, energy and transportation sectors. Within the organization, the Bureau's Planning, Policy and Advocacy Directorate has responsibility for liaising with the Department of Innovation, Science and Economic Development's (ISED) Strategic and Innovation Policy Sector on amendments to legislation that will impact competition. The Commissioner and/or his representative also appear before Standing Committees of Parliament to speak to issues related to the *Act*. Additionally, as part of the Commissioner's mandate as a competition advocate, the Bureau conducts market studies and makes recommendations for improving competitive practices within certain industries.[6]

The Bureau reports to ISED (formerly Industry Canada), which is responsible for marketplace frameworks and by extension, for ensuring that Canadians have a fair, efficient and competitive marketplace. The Commissioner serves as a senior officer of ISED and reports to the Deputy Minister on non-enforcement matters. The Deputy Minister of ISED has administrative and budgetary control over the Bureau, including sign-off on all executive hires by the Bureau. As the Commissioner is appointed by the Governor-in-Council and enforcement –related decisions are not subject to ministerial review or approval,[7] the Bureau has a degree of functional autonomy from ISED and positions itself as an independent law enforcement agency. It is, however, important to note that the Bureau's stated independence from ISED does not necessarily extend to competition policy settings.[8]

This hybrid model of an enforcement agency within a government department primarily concerned with industrial policy has, at times, been the subject of some controversy and led to calls for greater structural separation to protect the Bureau from potential political interference. Public debates on this very subject arose after the failure of proposed bank mergers in 1999 and the following year, during Air Canada's acquisition of Canadian Airlines, when the federal cabinet sidelined the application of the Act to enable the consummation of the airline merger. Subsequently, the Commissioner of the day asserted that his office was perceived as not being independent from political interference, and the government needed to address this issue.[9] Similar sentiments were echoed by other competition law practitioners as well as the Chairman of the Australian Competition and Consumer Commission (ACCC) who warned of the danger of political meddling, noting the importance

of the ACCC's independence.[10] During an interview regarding *Act* amendments, then President and CEO of the Canadian Chamber of Commerce, Nancy Hughes Anthony, stated: "There is a perception that the competition commissioner [Konrad Von Finckenstein] is not allowed to work without [political] interference."[11] Thereafter, the Senate Banking Committee urged John Manley, then Minister of Finance, to minimize political interference to enable the Bureau to determine whether a bank merger was good for consumers and for the banking system.[12]

The Organization for Economic Cooperation and Development (OECD) has also raised concerns with the appearance of conflict of interest stemming from the lack of perceived independence of the Bureau from a government department that is responsible for both setting and promoting industrial policy. In a 2002 report on the role of competition policy in regulatory reform for Canada, the OECD noted that "the Commissioner appears less independent than enforcement bodies in many other OECD member countries."[13] The report goes on to state that "public perceptions about the Commissioner's independence or lack of it may be an instance of a more widespread public impression that government decisions depend on political influence as much as on policy merits."[14] In a follow-on study by the OECD in 2004, the report observed that the Bureau had taken a number of communication-related actions to publicize its enforcement independence from Industry Canada. However, the report suggests that "lingering misperceptions" could be further dispelled by presenting the Bureau's budget separate from Industry Canada or more significantly by "making it a stand-alone agency, reporting to Parliament through the Minister of Industry but responsible for its own finances and personnel, or *locating it elsewhere within the government structure*" (emphasis added).[15] The debate surrounding the autonomy and structure of the Bureau was extended to the Commissioner's influential role in legislative amendments to the Act in a paper authored by a former Commissioner in 2002.[16] The paper suggested that competition policy in Canada might be better served if the policy function were severed from the Bureau's enforcement function as is the case in Australia and the United Kingdom. Prior to this, another former Commissioner had also called for reform of the institutional framework of the Bureau, recommending an integrated agency model, similar to those found in the U.S. (Federal Trade Commission) or in Europe (Directorate General Competition), whereby the Bureau would become both investigator and adjudicator of competition cases, as opposed to the current bifurcated model, where matters are adjudicated by the courts or the Tribunal[17].

In this same vein, the report of the Competition Policy Review Panel in 2008, recommended the separation of the Bureau's enforcement function from its advocacy function, and further advocated for the creation of a Canadian Competitiveness Council, an independent agency with a broad mandate to publish about, research on, and serve as the public advocate for competition.[18]

With the increasing internationalization and complexity (both legal and economic) of competition law enforcement in Canada, the Competition Policy Review panel report also suggested that the Bureau does not have sufficient resources to effectively carry out its broad competition policy mandate.[19] The Bureau's increased scope of responsibilities directly relates to increased globalization and international trade liberalization, including the North American Free Trade Agreement and the Canada-Europe Comprehensive Economic and Trade Agreement, which increase cross-border commercial transactions in Canada, and demand for increased international cooperation in enforcement and harmonization of competition laws. With the growing number of multi-national companies operating in multiple jurisdictions and the emergence of the digital economy, cooperation and coordination with other international competition authorities enhances detection, investigation and prosecution of hard-core cartels and mass-marketing fraud and improves the effectiveness of international merger reviews. Other pressures on the Bureau include: increasing interventions and enforcements in deregulating markets (most notably in the telecommunications sector), the rapid development of new technologies, which have led to an exponential increase in cyber-crime (e.g. rising number of on-line frauds), court decisions (e.g. the Supreme Court of Canada (SCC) in *Tervita*) that require the Bureau to quantify anti-competitive effects, and the rising costs associated with handling digital records.

The Bureau has responded to the increased workload brought about by greater demands on its services by placing increased emphasis on the concept of shared compliance, captured by the Framework on Competition and Compliance,[20] to support a balanced approach to its mandate, including education, advocacy and enforcement. This serves to limit the need for costly and time consuming contested proceedings before the courts or applications to the Tribunal. In what follows, I will provide historical background on Canada's competition law and the Bureau, recent developments within the Bureau, an analysis of the current issues and trends in competition law and policy – and how the

Bureau has responded to these. I will conclude by providing substantive recommendations. The themes I touch on will include independence, resources, legislative modernization and structural reform.

Historical Background

Since the introduction of its first competition legislation – *An Act for the Prevention and Suppression of Combinations formed in the Restraint of Trade*, Canada's competition law and its various agencies, including the Bureau, have undergone major structural change, beginning in the 1950s with the establishment of the dedicated office of the Director of Investigation and Research (the Director), which is today known as the Competition Bureau. Prior to 1976, the *Combines Investigation Act*, the predecessor of the *Act*, was entirely criminal in nature. In January 1984, when I joined what was then the Bureau of Competition Policy, the *Combines Investigation Act* was still in effect in an amended form to include the services sector of the economy and civil restrictive trade practices provisions (those covering vertical restraints like exclusive dealing and tied selling) that were adjudicated before the specialized Restrictive Trade Practices Commission. The Bureau of Competition Policy was just recovering from the longstanding and costly petroleum market inquiry and was facing considerable criticism from stakeholders. There was no meaningful merger control function at the time, nor were there were any significant monopoly cases. The Bureau's focus was decidedly on cartel and retail price maintenance enforcement, despite having lost its search powers in the SCC's decision in the *Hunter v. Southam* charter challenge that same year. There was a very active division dedicated to regulated industries that was producing landmark regulatory interventions in the telecommunications and transport sectors. The deceptive marketing practices group reported directly to the Director and was housed in a separate building. The Bureau was, at that time, under the purview of the Department of Consumer and Corporate Affairs, the federal department responsible for marketplace framework regulations and consumer protection.

My very first case files involved retail price maintenance offences against *Gyrafalcon Corporation*, an exclusive distributor of Robert Bateman prints, and *Hoffman La-Roche* for the retail supply of effervescent vitamin tablets. Interestingly, the searches in both of these cases were executed with criminal code warrants and both companies pleaded guilty and were fined $50,000.

In June of 1986, Canada's competition law was once again modernized with the coming into force of both the *Act* and the *Competition Tribunal Act*. Significant changes occurred in light of the new acts including most notably:

1. The inclusion of civil provisions, the most important of which included mergers, abuse of dominance, vertically restrictive practices, refusal to supply and certain deceptive marketing provisions. These were to be handled by a specialized quasi-judicial Tribunal, whose decisions could be appealed to the Federal Court of Appeal (FCA).

2. The creation of a pre-merger notification regime, includng the addition of merger filing fees.

3. The inclusion of a requirement for the Commissioner to apply through the courts for the use of his formal investigative powers like search warrants, written returns of information and examination of witnesses under oath. This was to ensure compliance with the provisions of the Canadian Charter of Rights and Freedoms, which entered into force four years prior.

4. The elimination of the Director's market inquiry powers.

Additionally, in order to prohibit or seek divestitures in a merger under the new law, the Director was now required to demonstrate that the merger has or was likely to "prevent or lessen competition substantially". However, the Tribunal was not to make an order if the merger was likely to bring about "gains in efficiency that will be greater than, and will offset", the anti-competitive effects. This unique "efficiencies defence" included in the merger provisions was heavily influenced by the "Chicago School" approach to economics, which argued that increased profits and concentration were the natural outcome of higher efficiencies and indicative of healthy competition. At the time, policy makers were of the view that the so-called "efficiencies defence" would indeed promote the efficiency of the Canadian economy and enable Canadian companies to better compete internationally. Since that time, observers have characterized the efficiencies defence as a necessary public interest consideration within the Bureau's merger review processes, which do not promote consumer welfare – a more common objective of competition laws.[21]

Following the coming into force of the new acts, the Bureau created

a dedicated merger branch to ensure that merger review would receive the financial and human resources required to fulfill this mandate. As a young case officer, I was assigned to this branch. This assignment followed my work on the first merger before the Tribunal, the *Palm Dairies* case, which was significant for the fact that the Tribunal refused to issue a consent order approving the remedies negotiated between the Director and the parties. Later, the *Act* was amended to enable the Commissioner to register consent orders with minimal oversight. Also, at the time of the new merger review process, practitioners were expressing concerns over the small number of mergers that were being challenged before the Tribunal and remarking that the most complex cases were being settled in the Director's office,[22] most often through a restructuring of the deal to resolve competition concerns.

During my tenure as a senior case manager in the merger branch, I worked on a number of transactions where concerns were resolved through consent agreements, including ADM Industries/Maple Leaf Mills, Canadian Waste Services/Capital Environmental Resources, Abitibi-Consolidated/Donohue and Lafarge/Blue Circle. However, it was as the senior officer on the landmark Superior Propane/ICG litigation that I was able to participate in my first case before the Tribunal involving a claimed "efficiencies defence" to what the Commissioner at the time found to be an anti-competitive transaction. After two appeals to the FCA, the Tribunal's initial decision stood – allowing the merger to proceed, using a modified "balancing-weights" approach (adding wealth transfer considerations of low income households impacted by the merger) to the application of the total surplus standard.

Following the *Superior Propane* decision, the Bureau advocated for the amendment of the merger provisions by narrowing the efficiencies defence so that efficiencies would be considered as a factor in the assessment of the effects of a merger, more in keeping with a consumer welfare standard. Notably, this idea was advanced in Bill C-249, a private member's bill that received third reading in the House of Commons in 2003, but ultimately died on the order paper before any debate took place in the Senate.

Non-merger efficiency considerations were also considered by the Tribunal. I was privileged to have led the Bureau file in the Laidlaw waste disposal case where important jurisprudence was developed regarding restrictive contracting practices, including the rejection of efficiency

explanations as a justification for the anti-competitive conduct in this particular case.[23] I also note that, more broadly, the Bureau achieved a number of early successes at the Tribunal in the era of non-merger civil matters, beginning with *Nutrasweet*.

In 1995, the Mulroney government dismantled the Department of Consumer Affairs in a structural overhaul that saw the Bureau of Competition Policy become part of the Department of Industry. For all intents and purposes, there was little impact for staff at the working level, like myself. The challenge was mainly felt at the executive level of the agency, where the Director of Investigation and Research became a member of the departmental management committee, whose discussions of industrial policy related to support for national champions, among other things. These were anathema to the Bureau, which defends the principle that competition should exist on merit, and without unnecessary restraints or incentives granted by government.

It is widely accepted in competition law circles that the most egregious harm to the economy from private restraints comes from hard-core cartels.[24] As they pose the greatest threat, they are of the greatest concern to all competition law enforcement agencies and, naturally, addressing them is a top priority. In 1993, the Bureau adopted what, in my experience, is the best tool to prosecute and deter cartels - its immunity program. Further revised in 2000, the Bureau's immunity program followed in the footsteps of the US DOJ Antitrust Division's "first in" amnesty program. Under the Bureau's Immunity program, the first firm or individual that self-reports and cooperates with the Bureau receives full immunity from prosecution. Expanding this highly effective tool in 2010, the Bureau established its leniency program, which provides reduced penalties for those who self-report and cooperate, but miss the opportunity to be first in line. As the Senior Deputy Commissioner for Criminal Matters, I worked closely with the PPSC to develop the first leniency program and revise the memorandum of understanding (MOU) between the Bureau and the PPSC. Our cartel settlement programs became an international best practice, and were replicated in concept by many other competition agencies. The advent of the immunity program marked the beginning of an enormously successful period of cartel enforcement, which continues to this day.[25] In fact, during my tenure as Commissioner alone, the immunity and leniency programs brought in 27 convictions and guilty pleas.

International cooperation began to figure prominently in the Bureau's

work in the late 1990s, starting first in cartel enforcement with a case related to the sale of thermal fax paper, followed closely by others, including the vitamin, graphite electrodes, citric acid and lysine cartel investigations. Since that time, the Bureau has played a prominent leadership role in the international competition law enforcement community. The Bureau is one of the founding members of the International Competition Network (ICN), serving as its secretariat since its inception in 2001 and chairing the ICN Steering Group on two separate occasions. Additionally, the Bureau has participated actively in all five ICN working groups and presently serves as co-chair of the Agency Effectiveness Working Group. On a personal level, serving as the ICN-OECD liaison and hosting the first ICN Chief Economist Workshop (2016) with UBC, as well as the ICN Cartel Workshop (2017), stand out as important accomplishments.

The Bureau's international work extends to the OECD, where it is an active member of the Competition Committee, and to the International Consumer Protection and Enforcement Network, where it serves in a leadership role. The Bureau's active work in international cooperation is driven by its desire to promote further convergence of competition laws, improve the cost effectiveness of cross-border investigations, reduce inconsistent outcomes, support capacity building and develop trusting working relationships.

In 2008, the previously-mentioned Competition Policy Review Panel released its final report. The report, which calls competition the strongest spur to innovation and value creation, made a number of recommendations for improving the state of competition policy in Canada. This included recommendations for legislative amendments to outmoded or ineffective provisions of Canada's competition laws.[26] Ultimately, these recommendations formed the basis for the most significant amendments to the *Act* in over two decades, subsequently introduced in 2009. Included among these were changes to the Bureau's merger review regime that harmonized our process with the United States (US) by implementing a two-stage process, increased the notification threshold and decreased the limitation period on post-closing challenges to one year from three. The new amendments provided the Bureau with the ability to seek administrative monetary penalties for abuse of dominance and added de-criminalized pricing practices provisions, and civil competitor collaboration provisions.

Most notably, the new legislation brought significant change to how the Bureau dealt with the most serious cartels, increasing fines to $25 million and jail time to 14 years, while simultaneously making cartels *per se* illegal and removing the so-called "undueness provisions". Prior to these changes, price-fixing was only considered illegal if the agreement had the impact of unduly lessening competition, "a combination of some market power and some behaviour likely to injure competition".[27]

In 2011, the Bureau met another significant change, albeit this time without much fanfare, when the competition policy function was acquired by the Department of Industry in an MOU between the two organizations. This leads us to today, where the Bureau provides policy advice to the department on emerging public interest incursions to the *Act*, like the Harper government's aborted price gap legislation, or the current Bill C-49, an act to amended the Canada Transportation Act,[28] as it relates to airline joint ventures, on an as-requested basis. Without lessening the importance of the aforementioned amendments, it is important to note that the 2009 amendments are now almost a decade old. What is more disconcerting is the fact that, despite repeated requests by the Bureau for needed amendments to the competition laws to address Canada's rapidly evolving economy, ISED has not undertaken a comprehensive review of the legislation since having withdrawn the policy role from the Commissioner some eight years ago.

Appointment as Commissioner

In 2012, I found myself suddenly appointed Interim Commissioner, following the unexpected departure of then-Commissioner Melanie Aiken. At the time of my appointment I was described as a "highly experienced enforcer."[29] While that may have been true, and it may have set certain expectations about what kind of a Commissioner I would be, it left out some important information about what I intended to bring to the table. It was my objective from the outset to bring an entirely new approach to the Bureau – that is, one of an open, transparent and collaborative organization. I believe we achieved significant progress in implementing this approach. From the outset, I saw my role not as a caretaker, but as a leader, and I set out to demonstrate that both internally and externally. I demonstrated both in words and in actions that we would, together, build an organization that was focused on what I called the 4Cs - increasing Compliance, greater transparency through increased Communication, improved Collaboration, both externally

and internally, and delivering better results for Canadians. I am sure that my early statements about shared compliance, the Bureau's use of section 11 orders, and our return to advocacy work were a surprise to many, but I felt then – and continue to feel - that being transparent about where I wanted to take the organization was of the utmost importance.

In June 2013, I was appointed Commissioner and justifiably or not, I certainly felt like the "Black Swan" Commissioner – I was the first career Bureau staffer and the first non-lawyer to head the Bureau in its entire history. On top of this, I had determined that my goal during my tenure was to build a stronger, more trusted and more effective agency – one that was transparent, collaborative, flexible, and better prepared to meet the challenges it would inevitably face in the future. This would translate into significant change for both the Bureau and its stakeholders.

Internally, this began with the Bureau's realignment process, which incorporated four elements — an internal restructuring, a new governance structure, increased delegation, and a three-year strategic plan. From my perspective, this was the means to shift away from an insular, unilateral approach that saw the Bureau structure and staff operating in silos and was no longer serving it or anyone else well. To support a more collaborative approach to work, we restructured the Bureau, reducing the number of branches from eight to four. We also added the Competition Promotion Branch, which was to be the Crown Jewel of realignment – our outward facing branch tasked with tearing down the proverbial wall surrounding the Bureau. At the same time, we established a unit that would work entirely on increasing compliance – encouraging businesses to adopt credible and effective compliance programs. Further, a new governance structure was established – creating four new committees with a view to increase horizontal decision-making across the Bureau. As part of this new structure, we also increased the delegation of authority, giving additional latitude and responsibilities to Deputy Commissioners, an act that created a cascading effect of increased responsibility and greater ownership of work right down to the officer level. Finally, we developed a three-year strategic plan that outlined our guiding principles and core values, and laid out our commitments for the coming three years in five key areas: increasing compliance, empowering Canadians, promoting competition, collaborating with partners and championing excellence. This was a new direction for the Bureau – and it was not without its challenges -- but we pulled together and got the work done. I believe the Bureau is a far more collaborative and effective agency

because of it. I would like to make particular mention of the Bureau's senior management team, without whom none of this would have been achievable. Their support, particularly around the areas of operating as "one Bureau" and in increased delegation served to empower our team and facilitated our goal of increased Bureau effectiveness.

From the beginning, my goal in moving the Bureau forward was to create a culture of continuous incremental improvement, with a view to building the trust – in our work and with our stakeholders be they government, industry, the Bar or Canadian consumers. We did this in a number of ways: through shared compliance, collaboration initiatives, providing increased guidance and improved relationships with key stakeholders.

Shared Compliance

As noted earlier, I began speaking very early in my tenure about the notion of shared compliance, namely the interrelated roles of the Bureau, legal and business community towards compliance with the Act. From my perspective, adopting a collaborative approach to ensuring compliance with the law has enabled the Bureau to achieve immeasurably more than it could have acting alone – and this has benefitted consumers, businesses and the Canadian economy as a whole. We undertook this initiative in the spirit of collaboration, reaching out to our partners in international law enforcement agencies to learn from their experiences. Simultaneously, we began updating and rebranding the Conformity Continuum and Compliance Bulletin in consultation with our partners in the legal and business communities. Then, in keeping with the theme of continuous improvement, we moved forward with the establishment of a Compliance Unit to oversee and coordinate our compliance-related activities.

I believe that this approach has served the Bureau and its counterparts well – supporting increased engagement on the part of the business community and a strategic approach to competition law enforcement, both of which have advanced our objective of increasing compliance.

Increased Guidance

An integral part of the idea of increased transparency and shared compliance is increased guidance. Again, from the outset of my term, I was determined to provide greater clarity, transparency, and certainty for

the business and legal community with regard to how the Bureau would approach its work, starting with the release of the "Bulletin on Transparency". We began incrementally, increasing our use of position statements and then moved on to other documents, including updating the Intellectual Property Enforcement Guidelines, the Corporate Compliance Bulletin, the Abuse of Dominance Guidelines, and the Immunity and Leniency FAQs. More recently, we provided insight into how Big Data might impact competition law enforcement, penning a white paper on the subject.

At the time of my departure from the Bureau, there were a number of ongoing initiatives to increase guidance. The Bureau had recently released for public consultation a bulletin to provide greater insight into our approach to the assessment of efficiencies in merger reviews. As well, the Bureau was moving forward on the development of a comprehensive communications protocol. I hope that these initiatives will be successful in further improving the organization's culture of transparency. Clarity is important for the business community and in turn, supports economic growth and investment in Canada. By providing increased guidance, the Bureau supported these objectives and our key priority – increased compliance.

Improved Relationships and Collaboration

Strong working relationships are one of the hallmarks of any successful organization and the Bureau is no exception. With that in mind, during my tenure, the Bureau invested significant effort into improving our relationships with a number of key stakeholders, in particular those with whom we work most closely. I believe we have made great strides in our relationship with, the Department of Justice Competition Bureau Legal Services (CBLS), the Canadian Bar Association (CBA), and with ISED. The Competition Tribunal/Bar Liaison Committee and the Tribunal's directive on mediation are prime examples of the advances that the Bureau has made in improving our external relationships with key stakeholders. We also took steps to improve our relationship with the PPSC, and I hope that the Bureau will continue to strengthen this important relationship in the years ahead.

In that same vein, we sought to improve our formal working relationships with our law enforcement partners both domestically and internationally, through 65 new or updated cooperation agreements spanning all sectors, and by increasing collaborative enforcement.

Current Issues in Competition Law and Policy

Never has it been more challenging to be a competition agency. The increasing globalization and digitalization of commerce has made modern competition law enforcement full of risk and complexity. The current issues that agencies face mean that it is more important than ever to ensure that agencies are independent and properly resourced.

One major issue that competition agencies are faced with is the current populist concern over rising concentration and economic inequality, commonly referred to as the "hipster antitrust" movement. In a widely-read article, *The Economist* argued that, over the past several decades, many US industries, including airlines, healthcare and technology have undergone significant consolidation, leading to high corporate profits and deepening income inequality.[30] Similarly, a report by the US Council of Economic Advisers highlighted the issue of growing concentration in the US economy and suggested it could be resulting in firms gaining monopsony power over labour and depressing wages.[31]

Unsurprisingly, the concerns over increasing concentration have placed competition law enforcement in the spotlight. Some commentators have argued that the problem lies in the traditional competition framework that has consumer welfare at its centre. For example, Lina Khan of the Open Markets Institute, a US think tank, has argued that, "[t]he current framework in antitrust fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition—a shortcoming that is illuminated and amplified in the context of online platforms and data-driven markets."[32] Khan goes on to argue that, "[m]odern doctrine assumes that advancing consumer welfare is the sole purpose of antitrust. But the consumer welfare approach to antitrust is unduly narrow… [t]he rise of dominant internet platforms freshly reveals the shortcomings of the consumer welfare framework and that it should be abandoned."[33]

US policymakers have also responded by advocating for changes to antitrust laws. In their *A Better Deal* plan, the US Democratic Party criticized antitrust institutions for having "allowed large companies to get larger, resulting in higher prices and limited consumer choice in daily expenses such as travel, cable, and food and beverages. And because concentrated market power leads to concentrated political power, these companies deploy armies of lobbyists to increase their stranglehold on

Washington."[34] Among their proposals to remedy this perceived problem, they suggest:

> [N]ew merger standards that require a broader, longer-term view and strong presumptions that market concentration can result in anticompetitive conduct. These standards will prevent not only mergers that unfairly increase prices but also those that unfairly reduce competition—they will ensure that regulators carefully scrutinize whether mergers reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete. In an increasingly data-driven society, merger standards must explicitly consider the ways in which control of consumer data can be used to stifle competition or jeopardize consumer privacy.
>
> In addition, under our new standards, companies proposing the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal. By forcing consolidating companies to justify the benefits of their mergers, we will not only prevent harmful concentration, we will also incentivize companies to be better corporate citizens.[35]

The debate over the proper approach to competition law enforcement is not limited to the US—the EU has also weighed in. Notably, EU Competition Commissioner Margrethe Vestager has spoken about ensuring "fairness" in her explanation of the role of competition policy.[36] The European Commission has stretched the traditional framework in its enforcement work. For example, in Dow/DuPont the Commission put conditions on the merger over concerns that it would affect competition in "areas of innovation," rather than in clearly discernible pipeline products.[37] Radically, in response to the emergence of big technology companies such as Google, EU policymakers have suggested regulating online platforms in the same manner as public utilities[38] and breaking them up.[39] More recently, and uncharacteristically, the Senior Deputy Governor of the Bank of Canada, Caroline Wilkins has also expressed concern about the ever-increasing size and market power of big technology companies.

The problem with those advocating for a new framework for competition law enforcement is that they generally ignore the purpose of competition laws, which is not to rein in big companies or enforce specific outcomes. Rather, their purpose is to protect consumers by protecting competition and to foster economic welfare. Size in and of itself is not a competition law violation and reports that note rising concentration

lack this critical nuance. My colleague, former Acting Chairman of the US Federal Trade Commission, Maureen Ohlhausen, rightly noted that industrial concentration statistics cannot serve the same role as defining markets for competition law enforcement.[40] These statistics, for example, are misleading because they cannot discern whether the consolidation arose to achieve economies of scale, which would benefit consumers and economic welfare.

Furthermore, while inequality, fairness and political power are legitimate concerns, stretching the traditional competition framework to try to address these problems is not an appropriate solution.[41] Competition law enforcement is most effective when the goal is clear. Relying on an established economic standard such as consumer welfare provides a clear, transparent and predictable goal post for competition agencies and the businesses that have to comply with competition laws. This approach ensures that an agency's enforcement action helps consumers rather than harms them. I expressed a similar sentiment in my remarks on the EU's approach to Dow/DuPont: "What is remarkable about this argument is that in no way does it require linking innovative activity to specific innovative products that benefit consumers; instead, the argument holds that the reduction in innovative activities itself constitutes harm to competition" (*emphasis in the original text*).[42] In contrast, the Bureau's approach in the *Toronto Real Estate Board (TREB)* case shows that the traditional framework is capable of capturing harm to consumers that go beyond price to include non-price effects such as quality and innovation. In that case, we were able to identify specific innovative business practices and services that TREB's conduct was preventing consumers from accessing.

Rather than changing the approach to competition law enforcement, one way to introduce more competition into the economy that the 'concentration debate' does not emphasize enough, is to make markets more open for both domestic and international competitors. An open economy can limit market power by making markets more contestable. Despite this fact, Canada remains a relatively closed market in a number of key sectors, such as telecommunications, transportation, banking and energy, with foreign investment barriers preventing change that is essential for a modern, thriving economy. These sectors frequently have oligopolistic market structures and are further guarded by vertical integration. Government price control and other regulations remain in Canadian markets that have been unshackled in other countries. These include the sale of alcoholic beverages, dairy, poultry, taxi services and,

in some provinces, retail gasoline. This over-regulation and protection of markets, particularly where inputs are concerned, harms Canadian competitiveness and productivity, disadvantaging Canadian firms in the global marketplace. I strongly support the proposition that public restraints to competition can do much more harm to the economy than private restraints.

Despite their differences, I believe that both sides of the debate on industrial concentration would agree that consumers are better off with stronger competition agencies that can conduct more vigorous enforcement. With the recognition of the challenges that modern competition agencies like the Bureau are facing comes the understanding that these agencies must be given sufficient resources and independence to face them head-on.

Bureau Approach

In the face of these continually shifting undercurrents, and a virtually non-existent policy role, the Bureau's approach has been to hold firm to its principles of strong enforcement; strategic competition advocacy; alignment with Government of Canada priorities; providing unflinching policy advice; and continuing to operate in an open, transparent and collaborative manner. This approach has enabled the Bureau to rise to not only meet these challenges but succeed in spite of them.

Strong, Principled Enforcement

For the Bureau, strong, principled enforcement means focusing efforts in areas where the work will have the greatest impact and deliver the most significant results for Canadian consumers. This means, from a criminal perspective, targeting the most egregious offences in antitrust–hard-core cartels directed at price fixing, bid rigging, market allocation and output restriction. During my tenure the Bureau focused its efforts on behaviour of this nature and the result was impactful. For example, the Bureau's investigation into gasoline price-fixing in the province of Quebec resulted in 33 individuals and eight companies either pleading or being found guilty, over $4 million in fines levied and six sentences of imprisonment totalling over 54 months. There remains one accused awaiting trial in this longstanding case. Similarly noteworthy, its investigation into bid-rigging in the auto parts sector has resulted in over $84.7 million in fines imposed by the courts since April 2013, including the largest single fine for bid-rigging in the history of Canada. Moreover, the

work on Nishikawa in particular, was significant in demonstrating the value of international cooperation in producing both effective outcomes and avoiding duplicative, costly work.[43]

It is impossible to discuss cartel enforcement without discussion of the immunity and leniency programs which, as I have noted, have proven to be the Bureau's most effective tools in detecting, deterring and eliminating cartel behaviour. While commentators have expressed doubts about the continued efficacy of these programs, particularly following the less than ideal conclusions of the Bureau's chocolate and Durward investigations, these have not been realized. The most recent example of this is the Bureau's ongoing investigation into alleged bread price-fixing in Canada's grocery sector, which came to the Bureau's attention when Loblaw availed itself of the Immunity program. The incentives to cooperate with the Bureau are powerful and the existence of the program itself acts as a strong deterrent against the formation of cartels. Having said this, the unsuccessful conclusion of both the aforementioned cases were a strong signal that improvements were needed. That is why the Bureau moved forward with updating and improving its immunity and leniency programs.

On the mergers front, in the last half-decade the Bureau witnessed a number of momentous 'firsts'. The Parkland/Pioneer retail gasoline merger was perhaps one of the most significant cases, as it resulted in a number of firsts: the first time in the history of the Tribunal that a consent agreement was negotiated through mediation, which sent a strong signal about the Bureau's new shared compliance approach; the first case of the Tribunal ordering an injunction on a contested basis in a merger application – a tool that ultimately expedited the resolution of the matter; and the first time that coordinated effects formed part of the Bureau's theory-of-harm in a merger case brought before the Tribunal.

In a similar vein, our collaborative work on the Bell Astral merger – the first transaction to land on my desk as Interim Commissioner – sent an important signal to practitioners and business about my approach. We resolved the matter outside of litigation, using a mix of structural and behavioural remedies. It is well accepted among antitrust authorities, that, where available, structural remedies are preferable. The underlying rationale is well-known – in particular, behavioural remedies require ongoing monitoring and potentially ongoing involvement by the competition authority, and can remain inflexible as market conditions

change. Creating a new competitor through a divestiture process is the most effective way to ensure an ongoing competitive marketplace, with the market driving competition. However, there have been circumstances where behavioural relief may be needed to effectuate or bolster a structural remedy. The Bureau has only had two remedies during my tenure where the behavioural components were not used to strengthen a structural remedy, only one of which was a purely behavioural remedy. The Staples/Office Depot merger review represented another first: the Bureau's first joint filing. It was the first simultaneously litigated challenge to a merger in Canada and the US, and was a strong endorsement of our ability to collaborate with international counterparts to protect competition within Canadian borders. It was also an example of an efficient enforcement approach, which was bolstered by our existing relationship with the US Federal Trade Commission (FTC) and our agreement on best practices on cooperation in cross-border merger investigations.

Superior/Canexus remains an important case for the Bureau going forward. First, it exemplifies the Bureau's collaborative approach, as it worked closely with its U.S. counterparts during the course of the review. Second, and perhaps more importantly, our decision to not move forward with a challenge, unlike our U.S. counterparts, serves as a living example of the way in which the *Act*'s efficiency defence is both misaligned with our international partners, and harmful to Canadian businesses and consumers.[44]

The Postmedia/Sun Media review was also significant for the Bureau, given the importance that Canadians place on competitive media markets, and the concerns being raised about the diversity of voices within those markets. Although our review concluded there would not be significant anti-competitive effects arising from the above proposed transaction, we subsequently opened up an investigation into Postmedia/Torstar when evidence was uncovered that suggested potential violations of the cartel provisions of the *Act* on the part of the merging parties. The Bureau thus demonstrated that, true to its word, it would not hesitate to act.

Finally, the Loblaw/Shoppers transaction is an example of the Bureau acting as a single, unified organization. In this case, the merger review turned into a civil review that ultimately led to the Bureau's bread price-fixing investigation. This ongoing investigation, uncovered through the Immunity program, is probing the largest alleged conspiracy in the history of Canadian competition law enforcement as measured by the

affected volume of commerce and duration.[45] This case is a testament to both the persistence of the Bureau and its newly adopted "one Bureau" approach that has seen the removal of silos to enable more effective enforcement.

Enforcement in the Digital Economy

The Bureau's focus on enforcement in the digital economy was done with the recognition that the digital economy is fast becoming *the* economy and not merely a subset of it[46]. We understood the important role that strong, principled enforcement in this area would play in building trust in the digital marketplace for consumers and businesses. And so, during my tenure, we advanced a number of noteworthy cases in the digital economy under both the abuse of dominance and deceptive marketing provisions of the *Act* and demonstrated that the Bureau was not afraid to take on significant players.

Abuse of Dominance

The Bureau's case against the Toronto Real Estate Board (TREB) – which was found to have prevented its members from offering data through innovative brokerage models – was an important milestone in terms of enforcement generally and for innovation specifically. It underscored the crucial link between competition and innovation and the Bureau's role in upholding both. In this case, the Bureau identified specific innovative business practices and services that the conduct was directly stopping.

In a completely different part of the digital economy, the Bureau's e-books investigation, which concluded that an anti-competitive arrangement between four publishers and Apple led to higher e-book prices for Canadian consumers, reached a successful conclusion following a decision by the Federal Court, in relation to the main part of our case, to uphold the initial consent agreements.

Deceptive Marketing Practices

The Bureau also took on a number of significant deceptive marketing cases within the digital economy - tackling issues like drip pricing (i.e. hidden fees), astroturfing (i.e. fake reviews), and misleading advertising, and also making history through our joint work with plaintiffs and defendants on the Volkswagen file.

Astro-Turfing

In order to shop online with confidence, consumers must have assurances that reviews and ratings of a product or service are accurate. During my tenure, the Bureau also took on Bell Canada for its role in encouraging employees to post positive reviews and ratings of the free MyBell Mobile App and Virgin My Account app on the iTunes and Google Play stores. This was a precedential and important case as it was the first that did not involve the sale of a product or service. As part of an agreement reached with the Bureau, Bell Canada affirmed its commitment not to direct, encourage or incentivize its employees or contractors to rate, rank or review apps in app stores. In addition to correcting the behaviour, this sent a message early on in my tenure that the Bureau would not be afraid to take on big players or tackle complex issues in the digital space.

Drip Pricing

Drip pricing refers to the practice of adding additional fees to advertised prices later in the payment process so that consumers end up paying significantly more than they expected. The Bureau has found this conduct to be prevalent in digital markets and particularly harmful to consumers and competition.

The Bureau successfully reached consent agreements with Avis, Enterprise, Budget, Hertz and Dollar Thrifty for what the Bureau concluded were false or misleading advertising for prices and discounts on car rentals, via its websites, mobile apps, and through emails. The total penalty paid by these companies is in excess of $5 million, with a further $250,000 toward the Bureau's investigative costs. The companies involved have also agreed not to engage in this behaviour going forward.

The Bureau continued to show that it was not afraid to take on big players in the digital economy in early 2018, when it took legal action against Ticketmaster and its parent company, Live Nation, to stop them from allegedly making deceptive claims to consumers when advertising prices for sports and entertainment tickets. The Bureau recognized that this was long-standing issue for consumers who rightfully expect that the price they are presented with is the price they will pay.

Misleading Advertising

The Bureau investigated Amazon Canada for misleadingly comparing

its discounted prices to a higher "list price" without verifying that those list prices were the prevailing market price. The Bureau ultimately obtained a consent agreement, which resulted in Amazon correcting its pricing practices, not only in Canada but also in other jurisdictions.

Volkswagen

On January 12, 2018, the Bureau participated in a class action settlement with Volkswagen related to false and misleading claims about fuel economy. In tandem with the class action settlement, the parties, following a Bureau investigation, entered into a consent agreement with the Commissioner. This was historic work for the Bureau that, once approved by the courts, will provide up to $290.5 million in compensation to consumers in the Volkswagen, Audi and Porsche emissions case. In total, the Bureau's investigation of this case resulted in $2.39 billion in compensation for Canadian consumers and $17.5 million in administrative monetary penalties.

Advocate for greater competition

Reinvigorating the Bureau's advocacy work was perhaps one of the more significant aspects of my mandate. Prior to my assuming the role of Commissioner, the Bureau had, for a number of years, stepped back from promoting competition, thereby reducing the important role it plays in advocating for more competitive markets in Canada[47]. It was my firm belief then, as it is now, that advocacy is a critical part of the Bureau's mandate and an effective tool for increasing competition within the Canadian economy. We began our reinvigorated approach to advocacy by first reaching out to Canadians to gain insight about where they felt the Bureau could play a meaningful, albeit targeted role in advocating for greater competition. Based on the insight we gleaned, we embarked on a series of regulatory interventions in key areas of the Canadian economy, beginning with providing advice and recommendations that informed the development of the CRTC's Wireless Code. The Bureau's next advocacy initiative dealt with regulations governing the taxi industry. We began by providing a submission to the City of Toronto's review of taxi cab regulations, later broadening our advocacy by releasing a white paper that served to guide the development of regulations in a number of municipalities. The Bureau then launched a market study examining technology-led innovation in the financial services sector (FinTech). This in-depth study of FinTech continues to inform the development of

policy at the federal and provincial level. Most notably, the most recent federal budget incorporated a number of the Bureau's recommendations.

I believe this advocacy approach has prepared the Bureau well for the future; it has a strong record of important advocacy work over the last five years – work and experience that will serve it well as it continues to be faced with the challenges presented by a technology-driven economy.

Aligning Priorities with the Government of Canada

Since 2011, when the Bureau's policy function was claimed by ISED, its formal policy role has been largely non-existent. This placed the Bureau in the unenviable position of having to ensure its continued relevance in the context of the department it reports to. The Bureau's approach to this has been to align its overarching priorities to reflect those of the department, and, more broadly, those of the Government of Canada, particularly around the subject of innovation. At the same time, the Bureau has continued to provide intrepid policy advice through enforcement, such as its case against the Toronto Real Estate Board, which paved the way for greater innovation in the real estate sector, through advocacy initiatives such as our Fintech market study, which provided sweeping recommendations to support the growth of innovation and competition in the financial services sector, and by providing guidance on areas of growing interest, such as big data and the government's planned Innovation Superclusters.

Beyond this, the Bureau has played a role in supporting economic growth by helping to attract foreign investment through a modern, principled and predictable competition law and shared compliance enforcement. The Bureau also provided reactive input into ongoing policy processes, such as the joint venture provisions included in Bill C-49[48] and the government's examination of diversity of voices in the news media. While supporting ISED in this manner, the Bureau has continued to advocate for a comprehensive retooling of current competition policy. As I have said in the past, the current tools available in the Act can work, but it has been 10 years since they were last revised, and by any objective measure, they are overdue for a review. We can do better.

At this juncture, failure to examine and revise the Act means Canada risks lagging our counterparts and being unable to meet the needs, or adapt to the pace, of a marketplace that is evolving daily. Having said this, I firmly believe that the required amendments – which I will outline

below – consist of fine tuning rather than a drastic overhaul. In particular, Canada must not succumb to the growing, vocal calls of the so-called 'hipster antitrust movement' and amend its legislation to include a public interest function for the Bureau. Canada's current competition law, soundly based on normative economic principles, is well placed to continue to serve its valuable role. Any efforts to revise it to include considerations put forward by the populist antitrust movement would severely undermine it.

Recommendations for Reform – Moving Forward

I must preface my recommendations by repeating that, from a legislative perspective, I believe strongly that Canada's competition law must continue to be grounded in the well-established economic theory that open markets are the most effective means of allocating resources, promoting efficiencies, improving productivity, spurring innovation and increasing economic growth.

From an institutional perspective, it is my belief that the Bureau should continue with the modern vision of an open, transparent and collaborative agency, building upon the principle of shared compliance through the issuance of more guidance documents and embracing early dialogue with merging parties and during the pre-inquiry stage of other civil matters under the *Act*. Given the rapid pace of change in the digital marketplace, the Bureau must become more innovative and more efficient in its investigative process to maintain its economic relevance. It should focus its work on investigations that are meaningful and relevant in their impact on consumers, reduce its default adherence to traditional investigative processes and use greater enforcement discretion to shape its agenda and the disposition of files. In short, it must move more rapidly away from a largely technocratic approach to a more nimble one.

> ***Recommendation Highlights:*** *Establish governance that is more independent of government control - the Bureau should reside outside the department whose primary responsibility is industrial policy. Amend the Act to give express authority to the Bureau to conduct market studies and to establish a regular 5 year review of the legislation to ensure its continued adaptability in the face of a rapidly evolving marketplace. Make the Commissioner the competition policy "lead", as is the case in other leading jurisdictions. Allow the Commissioner to comment independently and publicly on potential*

legislative reforms to the Bureau's statutes, as well as other pieces of government legislation. Increase the Commissioner's independence by strengthening terms of the Commissioner's appointment, through independent funding and autonomy over spending decisions. Revisit the idea of an independent Canadian Competitiveness Council.

Recommendation 1 - Reform to Improve Governance, Resource Allocation and Independence

Independence

Simply put, the Bureau's independence is the single most important issue it faces going forward. The significance of independence as it relates to competition authorities has been underscored by myriad academics, independent think-tanks, past heads of agencies and observers[49].

Beyond the broad international consensus that competition authorities should be independent from the executive branch of government to deter political interference with their enforcement and advocacy mandate, there is support for this approach within Canada's own borders. In 2008, our Competition Policy Review Panel recommended the creation of an independent "Canadian Competitiveness Panel", responsible for the function of competition advocacy. In making this recommendation, the panel argued that this function had no place within federal government bureaucracy, as there was a strong chance that competition would "become just one of many factors considered" and that the perception of independence – an element it considered crucial – would be tainted by housing this function within government.[50]

Additionally, there is the very real concern, as articulated by Dr. Jenny, that perceived political interference via the executive branch in a competition authority's activities may "discourage investment" for fear that the playing field will not be level.[51] Competition agencies require the freedom "to make comments and otherwise participate in government and regulatory matters and, in the course of such advocacy activities to take positions that are independent of those held by others in the public and private sectors."[52] Furthermore, "[i]t is much more difficult for an authority to be captured when its decisions are public and open to scrutiny by academics or the press."[53] "There is a common perception that important decisions have been subject to political pressures to protect 'national champion' interests".[54]

When one looks at Canada, it is difficult to argue that this "common perception" does not exist. The Minister of ISED has consistently been the most lobbied figure in the Canadian federal government.[55] This strongly illustrates the level of concerted effort on the part of industry to influence the government's economic policy. It goes without saying that one of the obvious roles of an independent law enforcement agency like the Bureau is to serve as counterbalance to this heavy lobbying. This has been underscored by Dr. Jenny, who wrote: "Competition authorities are seen as among the few public bodies (and sometimes the only one) that are not 'captured' and can counteract economic lobbies."[56] It is an apparent conflict of interest for the Bureau to report to ISED, and to have competition policy functions housed within ISED, given that their primary role appears to be to advance industrial policy, to promote the growth of specific domestic businesses and to advance national champions.

Australia is a natural experiment in how unleashing a country's competition authority can result in substantial, concrete and measurable benefits to its economy. In the early 1990s, Australia found its economy suffering under the weight of heavy regulation and ineffective competition policy. Subsequent competition law reform, including the establishment in 1995 of the ACCC – an independent statutory authority[57] of the government of Australia – and other related initiatives assisted in raising the country's economic ranking from 15th in 1990 to 8th in 2002[58].

In 2008, the Australian Productivity Commission recommended sweeping changes to the country's consumer policy framework – that included creating stand-alone consumer protection legislation – and was later described as the most comprehensive law reform initiative to date in Australia.[59] In assessing the net benefit of these reforms to the Australian economy, the Commission estimated these to be between $1.5 billion and $4.5 billion each year.[60]

Other jurisdictions that have measured the impact of their competition agency's work have also found substantial benefits. For instance, the UK Competition and Markets Authority (UKCMA) estimates that between 2014-17 it produced £1,228 million in benefits to consumers against £88 million in costs.[61]

Autonomy

The Commissioner should be provided with the full weight of independence from the executive branch of government, and ideally, by

operating as an independent officer of Parliament, in the same manner as the Privacy Commissioner, Information Commissioner and Lobbying Commissioner. Independence, in my view, includes returning the policy lead to the Bureau (as in the case of the Bank of Canada as it relates to setting the country's monetary policy). The Bureau ought to function as an elite economic framework institution, and not as it is currently situated – as a "program" within ISED. With all of this in mind, I therefore put forward the following options to the federal government for consideration to establish greater independence for the Bureau:

Option 1
Conversion of Bureau to a Separate Entity

Return the policy function to the Bureau where the expertise for this complex subject area resides. Allow the Commissioner to comment independently and publicly on potential legislative reforms and report directly to Parliament for all its functions under the Competition Act. The Competition Bureau should become a separate entity with separate employer status and should be granted full authority to manage its financial affairs within spending authorities approved by Parliament. This would mirror the approach of independence from the executive that has been adopted by a number of the Bureau's counterparts, including the U.S. FTC, the ACCC, the Autorité de la concurrence in France, and Germany's Bundeskartellamt.

Option 2
Bureau to report to another Department

Follow the European Union's model and establish a new federal government department of competition and the marketplace with its own minister, which would have authority over the Bureau. Additionally, following the recommendations of the Competition Policy Review Panel, the government should create an independent policy body with responsibility for competition policy and advocacy. It should be further noted that this was a critical component of changes in Australia. While this would not directly increase the Bureau's policy role, it could provide an indirect means of ensuring greater attention to competition policy concerns. Or create a model wherein the Bureau reports to the Department of Justice, as is done in the US with the Antitrust Division, and the competition policy framework is developed in line with recommendations made by the Competition Policy Review Panel.

Option 3
Bureau made a Portfolio Partner within ISED

Enable the Bureau to operate as a satellite or "portfolio partner" of ISED which is the governence model employed by the Competition Tribunal, Statistics Canada and 15 other federal departments and agencies. A portfolio partner is a separate division or branch created by statute or by Order in Council designated a responsible Minister. Pursuant to the Financial Administration Act they are treated as a department with their level of independence from the department determined in their constituting arrangement.[62] In addition to employing this separation to ensure Bureau independence, under this model the government would also establish an independent policy body as outlined above under options 2.

The OECD,[63] among other commentators has noted with concern the current governance structure of the Bureau as part of a government department that holds responsibility for both advancing industry interests as well as enforcing regulations against these same businesses. Structural and operational autonomy are of particular importance for a law enforcement body, as these are the primary means to protect against allegations of political interference. The Bureau not only needs to be independent and impartial in practice, but must also be perceived to be adhering to these fundamental values by its stakeholders. Ultimately, the perception of these values is one of the most important elements of ensuring trust in public institutions like competition authorities. The SCC itself noted that "preserving the appearance of integrity and the fact that the government is fairly dispensing justice, are, in this context as important as the government possesses actual integrity and dispenses actual justice."[64]

In addition to the aforementioned recommendations, I would recommend that the government amend the *Act* to establish a mandatory 5 year review of the *Act*, and include a defined role for the Commissioner in this process. The Bureau's independence could also be further bolstered by strengthening the terms of the Commissioner's appointment. For example, the Commissioner currently serves at the pleasure of the Governor-in-Council, but amending this so that a Commissioner may only be removed for cause would provide greater latitude to freely express objective views on competition policy, as well as strengthening enforcement independence.

Lastly, given our unique law enforcement digital forensic requirements

from the technology requirements of ISED and Shared Services Canada and given our work with sensitive business data, the Bureau requires independent procurement authority for its IT requirements. The delays in necessary IT upgrades as a result of the Bureau's enhanced confidentiality protection and unique forensic equipment requirements, has presented real challenges for the Bureau. This has been deepened by the ever-looming threat by Shared Services Canada to subsume the Bureau's customized forensic labs, a move that could decrease the Bureau's effectiveness and increase the risk of data confidentiality breaches.

Ensure Resources Meet the Demands of the Bureau's Mandate: Increase Autonomy over Spending Decisions and Self-Sufficient Funding

Since I assumed the office of Commissioner in 2013, the Bureau's core budget has been frozen, and will be further decreased by 5% for the coming three years. This contrasts with many of our international counterparts who have seen their budgets increase recently, and this includes the UK CMA, the ACCC as well as the Brazilian and Mexican competition authorities. The Bureau's budget for the fiscal year 2017-18 is $47.9 million and this includes 364 full-time employees (FTEs), numbers that have decreased steadily since the 2011-12 fiscal year, when the budget and FTEs were $51.4 M and 400, respectively. The Bureau has a vast mandate to enforce and promote competition and innovation across all sectors of the economy, and to protect all Canadians against deceptive marketing practices. It is clear that it cannot fully meet the demands of that mandate under its current fiscal constraints. The increasing complexity of merger cases and changes to the manner in which the PPSC operates have placed additional financial constraints on the Bureau within the past five years. The Bureau is further constrained by its budget in its ability to attract and retain the skill level that is required of the economists, lawyers and other professionals that are needed to support the Bureau's work. Recruiting and retaining highly skilled staff has been a consistent challenge for the Bureau given the relative pay of qualified economists, lawyers and other skilled staff. This was further exemplified in an internal report prepared for the Bureau in 2004 which found that Canada lags behind its counterparts in the US, UK and Australia on expenditures per capita.

This is compounded by the fact that the Bureau serves an revenue centre for the Canadian government, generating fines, administrative monetary penalties and that are contributed to the government's

Consolidated Revenue Fund – the sum of which was $123M in the last 3 years alone.

2016 Comparison of Competition Agencies' Budgets[65]

Country	Budget (Millions of Euros)	Size of Staff
United States	270.4	1,068
(Department of Justice)	144	705
(Federal Trade Commission)	126.4	363
European Union (DG Comp)	103	779
Japan	93.4	748
Italy	55.2	351
Australia	48	259
United Kingdom	39	259
Germany	30.4	243
Canada	28.76	170
France	21.74	121

A myriad of Bureau stakeholders including current and past Members of Parliament, the Canadian Chamber of Commerce, the Canadian Bar Association, the Public Policy Forum, the OECD, consumer groups, and representatives of small businesses have publicly criticized the Bureau's chronic underfunding[66]. For example, the OECD stated in its 2004 study of Canada's competition policy regime that: "The Bureau should be allocated a permanent budget increase, enabling it to complete law enforcement investigations with greater dispatch and fulfill its mandate more effectively."[67] In addition, establishing greater autonomy over spending decisions and introducing more self-sufficient funding models would serve to further strengthen the Commissioner's independence and ability to express independent views on policy matters. The current model creates an apparent conflict of interest, stifling the Commissioner's ability to critique the policies of ISED and, more broadly, the government through which it receives its funding.

Given the broad mandate of the Competition Bureau to enhance the prosperity of Canadians by achieving compliance with competition laws, and its stated objective of attaining compliance through timely and

efficient enforcement, competition policy, information dissemination and increasing market transparency, it is not surprising that stakeholders are asking for a review of Bureau funding and functions. In addition to securing adequate funding, the Bureau must ensure access to and/or deliver training programs for its personnel. Under its current structure, the Commissioner, with limited resources, must play the multiple roles of competition enforcer, advocate and policy advisor to ISED, while taking on primary responsibility for the day-to-day operations of the Bureau, which includes negotiating and securing budgets and staffing within departmental and Treasury Board restraints. In my view, generally accepted principles of good corporate governance would suggest that a review of the Bureau's current structure is necessary.

Recommendation 2: Legislative and Regulatory Reform to Support a Modern Bureau

Converge Laws to Reflect International Standards.

Consumer welfare should become the sole objective of the Act. This is consistent with our German counterparts, where the competition authority determines the competition-focused considerations in a given matter and the public interest considerations are assessed in another part of government. This approach is also consistent with the Canadian government's revised approach to airline joint-ventures contained in Bill C-49[68]. The statutory efficiencies defence in merger review, which is found in no competition legislation other than South Africa's, should be repealed and replaced with the international standard for efficiencies claims.[69] In other words, efficiencies should be one factor considered among many economic factors to determine whether a merger is anticompetitive. The unintended consequence of the efficiencies defence, which was designed to promote competitive exports by Canadian firms, is that anti-competitive mergers with effects in Canada only produce benefits at the expense of other Canadian businesses, consumers and jobs.

Furthermore, the SCC's decision in *Tervita* narrows the application of the *Act* by elevating quantifiable harm and favouring static price effects over competition considerations important to the digital economy. As a result, the *Tervita* decision allocates negative effects on innovation, usually a non-price effect, to a secondary consideration in the analysis of whether or not a merger should not proceed by virtue of section 92 of the *Act*. In my view, *Tervita* favours productive efficiencies over dynamic

efficiencies which will hamper Canada's competitiveness in the global economy. In addition, in an era of growing populism and income disparity, the efficiencies defence would appear to have passed its "best before" date. Some competition law experts and academics have characterized the efficiencies provisions in the *Act* as "being in the public interest"[70]. Further, this approach has been described as de jure discrimination by the Deputy Assistant Attorney General of the United States Department of Justice, Antitrust Division, who said: "Industrial policies that expressly favor domestic competitors or expressly disfavor foreign ones are perhaps the most common example of *de jure* discrimination."[71]

The efficiencies defence is bad for business and bad for consumers. It is inconsistent with the approach being taken by many of our country's major trading partners, including most notably, the US. Our decision not to challenge the Superior/Canexus merger, on the basis of claimed s. 96 efficiencies, is indicative of the uncoordinated result that stems from the inclusion of s. 96 in our *Act*. Canada's approach to efficiencies means we are accepting reductions in competition in exchange for static and short-run fixed cost savings, which may or may not come to fruition.

This is a problem because we know that firms that are not spurred to innovate become complacent and inefficient[72]. Competition—and the opportunity to become a leader—is what forces innovation and efficiency. There is considerable public evidence that firms not subject to competitive pressure become very inefficient and fail to innovate. The Canadian wine industry is a good example of this. Prior to the 1987 Canada U.S. Free Trade Agreement (FTA), Canada's wine industry had been insulated from competition. The FTA put an end to that protection, forcing growers to innovate or fold. The result was a dramatically altered and highly competitive industry boasting innovative and unique products and entirely new lines of business. There are considerable benefits to be realized for the Canadian economy and Canadians by bringing our approach to efficiencies in line with that of other jurisdictions with modern competition laws. I believe strongly that Canada should move forward with doing so.

Return Express Market Study Powers to the Bureau

For the Bureau to be an effective advocate of competition for Canadian consumers, it needs to have formal powers to conduct market studies, including the power to compel information to conduct the studies.

The lack of formal market study powers is another way that Canada's competition regime falls below international standards. In a recent survey by the OECD, it found that 68% of the competition agencies had specific powers to undertake market studies.[73] Formal market study powers backed by the ability to compel information would allow the Bureau to study issues that currently cause substantial harm to Canadian consumers. For example, these powers would enable the Bureau to conduct a comprehensive market study into the harm to consumers caused by Canada's supply management system. The inability of the Bureau to currently conduct such a study is another sign that it is not truly independent from government.

New and Stronger Consumer Protection Law to Instill Trust in the Online Marketplace

Competition laws require finer tools and must be more nimble to fight digital abuses. Moreover, recent issues around companies' use and misuse of personal data have only served to deepen consumers concerns about how and by whom their personal information is being used. Ultimately, these concerns erode consumers' trust in the online marketplace and negatively impact competition. The government should establish new and stronger consumer protection legislation to address this. For example, the government could develop regulations to "cover online apps and services offered for free in exchange for gaining access to the user's personal data"[74].

Greater Private Access to the Competition Tribunal

In terms of other legislative amendments, changes should be considered to increase private access to the Tribunal. Increased access should include the abuse of dominance provisions and providing the Tribunal the ability to impose damages. This would provide an added deterrent against anticompetitive behaviour and generate more case law and guidance for the Bureau, the legal community and businesses. It would have the benefit of alleviating budget pressure on the Bureau; allowing them to pursue other cases, in addition to those brought by private parties. Amendments to widen private access also represent an opportunity to merge monopolistic practices provisions in the *Act*, rather than having separate provisions for matters like exclusive dealing, tied selling and market restriction.

Repair Inefficient Cartel Enforcement Model

Respected antitrust researcher and professor emeritus at Purdue, John M. Connor, has said of Canada's anti-cartel enforcement: "The negative features (of Canada's anti-cartel enforcement) include…very slow investigations, a long standing inability to indict a large share of injurious cartels, weak penalties for individuals, and recovery of overcharges that is far below what is needed for deterrence."[75]

In short, the current system is inefficient and ties up Bureau resources. There are a number of mechanisms for improving the existing system, many of which have already been adopted and have met with success by our counterparts in other agencies, both domestic and international. I recommend that the government:

a) Modify current competitor collaboration provisions in the Act to enable the Bureau to proceed against hard-core cartels using a "dual track" approach. This is consistent with the Australian model. New civil provisions should also capture vertical agreements and permit the Tribunal to impose Administrative Monetary Penalties (AMPs). A dual track would provide the Bureau with much needed flexibility. In cases where the cartel conduct is less egregious and warrants a lesser penalty, the Bureau would not have to go through the more time consuming and costly criminal process to impose a monetary penalty and could instead proceed civilly.

b) Require government procurement authorities to produce bidding information on request from the Bureau and to use independent bid certificates in the tendering process. A database of bidding information would allow the Bureau to emulate agencies, such as Brazil's Administrative Council for Economic Defense, that have deployed advanced, sophisticated tools to screen for bid-rigging.

c) Improve the Bureau's IT tools and online forensic skills, which would also support the Bureau's efficacy in detecting and prosecuting cartels. Brazil's development of effective bid rigging screening technology serves as a great example of what can be done when an agency is given the necessary technological resources[76].

d) Revise PPSC processes and require it to issue guidance around settlements. This would include modifying the due diligence requirements to speed up guilty pleas for leniency applicants and reducing the time from

marker to plea by imposing a firm one-year time limit from receipt of the marker to the time of registering a guilty plea. Failure to comply with this time limit should result in the loss of the leniency marker and the place in line. Applicants would be provided with only one opportunity to re-apply under the program.

e) Establish a stand-alone "whistleblower" program that would operate as its own office within the Bureau and would provide significant financial rewards to whistleblowers who provide information and meet certain eligibility requirements. This program should mirror the Ontario Securities Commission's "Office of the Whistleblower", which is a fully-resourced office within the OSC that handles allegations of securities violations. In the US, the Securities and Exchange Commission (SEC) has returned hundreds of millions of dollars to investors in the last 6 years as a result of its wildly successful whistle-blower program.[77] Such a program would be an extremely effective enforcement tool for the Bureau to address cartel activities, which are known to be the most egregious and most challenging type of anti-competitive behaviour to detect. In this same vein, consideration should be given to increasing credit for co-operating parties with effective corporate compliance programs. I hope that the proposal to do so that was included in the Bureau's draft revised Leniency program will be included in the final version.[78]

f) Enable the Bureau to employ more outside legal agents to support the expeditious resolution of cartel cases and to co-locate the PPSC again with the Bureau, which would increase collaboration and support an improved relationship.

g) Facilitate the increased use of alternative dispute settlement mechanisms to get cases out of the courts, thereby expediting the resolution of these cases and reducing backlog in the courts.

Create a Formal Notification Procedure for Pay-For Delay Agreements

Another issue that the Bureau cannot currently effectively address—but that is likely substantially harming Canadian consumers—is pay-for-delay settlements.[79] These are patent litigation settlements between branded and generic pharmaceutical companies in which the generic company agrees to delay entry into the market in return for a large payment by the branded company. These agreements result in taxpayers and consumers paying substantially more for vital pharmaceutical

products. In the US, the *Medicare Modernization Amendments Act* of 2003 requires that these agreements be notified to the antitrust agencies. As a result, the FTC has been able to track pay-for-delay agreements and has noticed a steady increase in recent years. It is unsurprising, then, that the FTC has been vigorously taking enforcement action to prevent pharmaceutical companies from harming US consumers through these agreements. The Bureau, in contrast, lacks the necessary powers to challenge these agreements. This contrasting situation is all the more bizarre in light of Canada's strained public healthcare system. One would think Canadian legislators would be eager to grant the Bureau powers that could contribute to reducing public expenditures on healthcare.

Recommendation 3 - Structural Institutional Reforms & Improvement of Procedural Fairness

Speed up Bureau Investigations and Tribunal Adjudication Processes to Remain Relevant with the Pace of Change in the Digital Marketplace

The Bureau should be given new tools, for example, streamlined injunction powers, which will allow it to dispose of cases in a more expeditious manner. Such tools would allow the Bureau to be better equipped at handling competition issues in rapidly changing digital markets. This recommendation is informed by the Bureau's success at using alternative dispute resolutions such as the use of meditation by the Tribunal to more rapidly resolve the Parkland/Pioneer dispute. In addition, final offer arbitration, appears to be an effective and timely method of resolving disputes by the CRTC further to the Vertical Integration Code, could be considered by the Competition Tribunal.

Provide Express Authority to "Name and Shame"

Relatedly, the Bureau could receive expressed authority to use "name and shame" techniques to avoid the need for costly litigation and speedier resolutions to anti-competitive behaviour. For example, the U.S. Food and Drug Administration has published a list of pharmaceutical companies accused of bogging down the development of low cost generic drugs. The judicious use of naming of companies accused of competition law offences provides for an efficient means for the Bureau to change marketplace conduct. Similarly, the Bureau could increase its use of warning letters to companies accused of competition law offences

to improve its effectiveness. Several of the Bureau's international counterparts, such as the UK CMA, routinely make use of warning letters.

Earlier Engagement with Targets and Merging Parties

The Bureau should continue to engage earlier in the process with targets and merging parties with the goal of narrowing issues and early resolution. A formal process requiring notification to the target of a complaint to the Bureau for certain offences could be considered to initiate this early dialogue. The Bureau, as a standard enforcement practice, should issue state of play letters during key stages of complex merger reviews and over the course of inquiries for other non-criminal offences, with the goal of tightening timelines, increasing transparency and due process considerations. Increased use of these techniques would only require the Bureau to modify its existing enforcement practices.

Create a Chief Technology Officer Position within the Bureau

ISED should allow the Bureau to create the position of Chief Technology Officer (CTO), to provide leadership on digital issues. The roles of the CTO would be to enlighten the Bureau on emerging digital issues such as the use of machine learning by companies, algorithms, digital platforms and Big Data. The CTO would also provide expert industry advice to the Bureau for investigations involving e-commerce. In an increasingly digitized world, it is becoming essential that agencies have the technical expertise on-hand to provide input on matters involving digital markets in a similar way that economists currently provide input on competition matters more broadly. The FTC has long had a Chief Technologist, the UK CMA announced the creation of a Chief Data and Digital Insights Officer and the ACCC announced the establishment of a data analytics unit. Implementing this recommendation would thus bring the Bureau in line with its key international counterparts and better prepare it to investigate the digital economy.

Conclusion

During my tenure, I strived to build trust in the Bureau among Canadians, their public representatives, governments in Canada, businesses, stakeholders such as the Canadian Bar Association, and our partners including the international antitrust community. Trust is difficult to build and requires enormous dedication, both in time and

in resources. Conversely, trust is easy to lose. Without trust, the Bureau would not be able to fulfill its important mandate to enable economic growth in Canada and to function as an elite economic framework institution. As mentioned earlier, I am immensely proud of the work done by the Bureau. The achievements that have been attributed to me should also be attributed to the Bureau's staff and management, without which none of them would have been attained. Accordingly, I make my recommendations with a view to ensuring that the Bureau continues to enjoy and build upon the trust of its stakeholders and the public, which it serves. These recommendations will allow the Bureau to better serve Canadians, a simple yet powerful guiding principle that I believe is shared by Parliament and the broader public service.

Endnotes

[1] I would like to thank Kristen Fraser, Duy Pham and Majid Charania from the Competition Bureau for their meticulous editing of this paper. All views expressed and errors are solely those of the author.

[2] This is supported by a growing body of research that includes: Canada, Competition Policy Review Panel, *Compete to Win: Final Report June 2008*, (Ottawa: Industry Canada, 2008) at 103 [Competition Policy Review Panel] ("competition drives the policy that ultimately sustains our incomes, jobs and quality of life").; Ontario, Task Force on Competitiveness, Productivity and Economic Progress, *Realizing our prosperity potential*, Third Annual Report, November 2003, (Toronto: The Institute for Competitiveness & Prosperity) at 5 (a lack of adequate competitive pressure in the province was a significant contributor to Ontario's lower productivity levels when compared with other provinces).

[3] See: William W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability*, (Chicago: University of Chicago Press, 2004) at 103 (when government policies limit competition, more efficient companies cannot replace less efficient ones, economic growth slows and nations remain poor).

[4] See generally: Michael Porter, *The Competitive Advantage of Nations*, (London: Macmillan, 1990) at 665 (the impact of competitiveness on overall domestic productivity and growth including the finding that protected firms have greater difficulty competing abroad).

[5] Competition Policy Review Panel, *supra* note 2 at 97.

[6] In 2007, the Bureau undertook market studies of: (i) the generic drug sector in response to several studies that found the price of prescription generics to be high in Canada compared to other countries; and (ii) certain professions, as studies had demonstrated that Canada's professions were more regulated than their counterparts in other countries, possibly affecting their productivity and Canada's economic growth. In 2008, the Bureau announced a follow on

study of dentistry. In 2014 the Bureau reinvigorated its work on advocacy – authoring a white paper on the ride-sharing industry, and more recently, a market study on 'fintech' and competition within the financial services sector.
[7] This is other than the Minister's ability under s.10 of the *Competition Act* to direct the Commissioner to commence an inquiry, which is rarely employed.
[8] This paper uses the term "competition policy' to include advocacy, regulatory intervention, legislative reform, research, publicity and related means by which the Bureau promotes reliance on competition for economic organization.
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[10] *Ibid.*
[11] James Baxter, "More freedom for Competition Bureau urged: Perception is watchdog controlled by cabinet, says chamber head", *National Post* (11 September 2001) A8.
[12] Michael Den Tandt, "Bank report should feed shredder", *The Globe and Mail* (28 March 2003) B2.
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[14] *Ibid* at 43.
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[19] *Ibid* at 98.
[20] Canada, Competition Bureau, *Competition and Compliance Framework*, (Ottawa: Innovation, Science and Economic Development Canada, 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>.
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[22] Warren Grover & Jack Quinn, "Recent Developments in Canadian Merger Law" in Khemani and Stanbury, eds, *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 225.
[23] *Director of Investigation and Research v Laidlaw Waste Systems Ltd* (20

January 1992), CT-1991-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1991-002_0072_38LSM-4132004-2121.pdf> at 87.
[24] See: OECD, OECD Competition Committee, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, Doc No C(98)35/FINAL – C/M(98)7/PROV, (Paris: OECD, 1998) at 1 ("[H]ard core cartels are the most egregious violations of competition law").
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[26] Competition Policy Review Panel, *supra* note 2.
[27] *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 92 DLR (4th) 36.
[28] Bill C-49, *An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, (assented to 23 May 2018, SC 2018, c 10) [Transportation Modernization Act].
[29] Shawn CD Neylan, "John Pecman Appointed as Canada's Interim Commissioner of Competition" (28 September 2012), *The Competitor* (blog), online: <https://www.stikeman.com/en-ca/kh/competitor/john-pecman-appointed-as-canada-interim-commissioner-of-competition>.
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[33] *Ibid* at 737-38.
[34] US, Democratic Party Leader, *A Better Deal: Better Jobs, Better Wages, Better Future*, (2017), online: <https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf>.
[35] *Ibid* at 1-2.
[36] See e.g. Margrethe Vestager, "Fairness and competition" (Speech delivered at the GCLC Annual Conference, 25 January 2018), online: <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en>; Margrethe Vestager, "Fighting for European values in a time of change" (Speech delivered at the Europa Lecture, Leiden University, 14 June 2017), online: <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fighting-european-values-time-change_en>.
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Technology, *Inception Impact Assessment: Fairness in platform-to-business relations* (25 October 2017), online: <https://res.cloudinary.com/gcr-usa/image/upload/v1509115796/DG_Connect_r75pjz.pdf>.

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[40] Maureen K Ohlhausen, "Does the US Economy Lack Competition?" (2016) 1 The Criterion J on Innovation 47 at 50-52.

[41] See D Daniel Sokol, "Tensions between Antitrust and Industrial Policy" (2015) 22 Geo Mason L Rev 1247 at 1249 ("An antitrust regime that makes economic analysis of competitive effects the sole method for analyzing consumer harm removes political factors from the analysis, shifting discretion from antitrust authorities to the market").

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[45] John Pecman, "Competition Bureau: What Canadians need to know about price-fixing probes", *The Globe and Mail* (2 February 2018), online: <https://www.theglobeandmail.com/report-on-business/rob-commentary/competition-bureau-what-canadians-need-to-know-about-price-fixing-probes/article37830190/>; See Information to Obtain (Search Warrant), Ontario Superior Court of Justice, Ottawa, Criminal Desk, File no. 17-13302.

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[47] Michael Koch & David Rosner, "Top Five Recent Developments in Canadian Competition Law", Goodmans LLP (blog), online: <http://www.goodmans.ca/Doc/Top_Five_Recent_Developments_in_Canadian_Competition_Law>.

[48] Transportation Modernization Act, *supra* note 28.

[49] See e.g. Frédéric Jenny, "Competition Authorities: Independence and Advocacy" in D Daniel Sokol & Ioannis Lianos, eds, *The Global Limits of Competition Law* (Stanford: Stanford Law Books, 2012) at 159 ("There is wide agreement that competition authorities should be independent both from the executive branch of government and from the business community") [Jenny].

[50] Competition Policy Review Panel, *supra* note 2 at 99.
[51] Jenny, *supra* note 49 at 160.
[52] *Ibid* at 162.
[53] *Ibid* at 163.
[54] OECD *supra* note 13 at 1.
[55] Derek Abma, "Bains most lobbied cabinet minister since Trudeau won power in 2015, hands down", The Hill Times (27 March 2017), online: <https://www.hilltimes.com/2017/03/27/bains-attracts-lobbyists-interface-industry-leader-innovation-agenda/100681>.
[56] Jenny, *supra* note 49 at 167.
[57] A statutory authority is an Australian body with the right to enact legislation.
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[63] OECD, *supra* note 13 at 19.
[64] *R v Hinchey*, [1996] 3 SCR 1128, 142 DLR (4th) 50.
[65] Global Competition Review, "Rating Enforcement 2017" (July 2017), online: <https://globalcompetitionreview.com/edition/1001035/rating-enforcement-2017>.
[66] See e.g. Goldman & Joneja, *supra* note 16; Calvin S Goodman, Robert E Kwinter & Crystal L Witterick, "Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change" (Remarks delivered at the Competition Law Roundtable of the Law and Economics Program at the University of Toronto, 13 December 2002) at 7-9; Additionally, Members of Parliament, Michael Chong and Brian Masse have, on multiple occasions highlighted insufficient funding as a problem for the Bureau.
[67] OECD, Country Studies, "Canada – Updated Report 2004" (2004 at p.20)
[68] Transportation Modernization Act, *supra* note 28.
[69] I note that South Africa appears to have moved away from its implementation.
[70] Martinez, *supra* note 21.
[71] Roger Alford, "The Pubic Interest Standard and the Dangers of Discrimination" (Remarks delivered at the Global Semiar Series in Düsseldorf,

Germany, 8 May 2018), online: <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-global-seminar-series-d>.

[72] Harvey Leibenstein, "Allocative Efficiency vs. "X-Efficiency"" (1966) 56:3 The American Economic Rev 392, online: <https://msuweb.montclair.edu/~lebelp/LeibensteinXEffAER1966.pdf> (the concept of x-inefficiency tells us that firms that are not spurred to innovate become complacent and inefficient).

[73] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *The Role of Market Studies as a Tool to Promote Competition* (Paris: OECD Secretariat, 2016) at 9, online: <https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf>.

[74] OECD, News Release, "Consumer protection laws need updating to improve consumer trust in e-commerce" (30 March 2016), online: <http://www.oecd.org/internet/consumer/consumerinthedigitaleconomy.htm>.

[75] John M Connor, "Canada's International Cartel Enforcement: Keeping Score" (2014) World Competition draft article at 7.

[76] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Latin American and Caribbean Competition Forum Session III: Promoting Effective Competition in Public Procurement: Contribution from Brazil*, DAF/COMP/LACF(2016)19, (2016), online: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)19&docLanguage=En>.

[77] Robert E Connolly & Kimberley A Justice, "It's a Crime There Isn't a Criminal Antitrust Whistleblower Statute", *Antitrust Law Daily* (5 April 2018), online: <http://business.cch.com/ald/ALD_Criminal-Antitrust-Whistleblower-Statute_04-05-2018_final_locked.pdf>.

[78] At the time of drafting, the draft revised Immunity and Leniency program was in its public consultation phase.

[79] Competition Bureau, "Patent Litigation Settlement Agreements: A Canadian Perspective" (Paper delivered at the Global Antitrust Institute, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry, 23 September 2014), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html>.