

WHAT'S IT ALL ABOUT, MATTHEW?—SOME THOUGHTS ON THE FUTURE OF COMPETITION POLICY IN CANADA

James Musgrove and Hannah Johnson*

*This paper explores the proposals for Competition Act amendments advanced by Innovation, Science and Economic Development Canada in its discussion paper, *The Future of Competition Law in Canada*. It argues that the discussion paper proposes significant—in some cases transformative—changes to a framework law that, while imperfect, has served Canada well over the years. This paper suggests that the need for such fundamental change has not been persuasively articulated in the discussion paper, and that a number of the changes are likely to be damaging to the Canadian economy, materially increasing the risks of “Type I Errors” and chilling aggressive competitive conduct.*

*Le présent article explore les propositions de modifications à la Loi sur la concurrence mises de l'avant par Innovation, Sciences et Développement économique Canada dans son document de travail, *L'avenir de la politique de la concurrence au Canada*. Il soutient que le document de travail propose des changements importants, transformateurs dans certains cas, à une loi-cadre qui, bien qu'imparfaite, a bien servi le Canada au fil des ans. Le présent article laisse entendre que le besoin d'un tel changement fondamental n'a pas été énoncé de façon convaincante dans le document de travail et qu'un certain nombre de ces changements risquent de nuire à l'économie canadienne, d'accroître considérablement les risques d'« erreurs de type I » et de freiner la conduite concurrentielle agressive.*

1. Overview—What are we trying to do?

With apologies to Burt Bacharach and Hal David, the title of this paper is intended to highlight the importance of understanding the goals of competition law and policy, and knowing what is sought to be achieved by amendments to the statute—particularly when considering changes to a framework statute that is generally acknowledged to have worked well. In our view, the goals of the potential amendments to the *Competition Act* explored in the Discussion Paper *The Future of Competition Policy in Canada*¹ (the “Discussion Paper”) are not clear, or clearly articulated. Indeed, it is not entirely evident that the question of what goals the amendments seek to achieve has been asked in a disciplined way.

Striving to achieve a goal first involves determining what exactly the goal is. The authors of the Discussion Paper know this. They note “The

fundamental question may be: what is competition law for?”² They go on to say that while some may wish to debate the purpose clause in the *Competition Act*, “for ease of discussion, this paper assumes that the objectives of the *Competition Act* have for the most part not changed, and focuses on how the substantive provisions of the law could be improved to better achieve them”.³ However, a review of the Discussion Paper reveals that it focuses on a host of possible changes that would fundamentally alter what the competition law is for, without articulating these goals, or why such goals are desirable. In this article, we explore the changes contemplated, and offer thoughts on the advisability of some of these proposals.

2. Impetus for Change

A) Change is All Around

The Discussion Paper begins its *Executive Summary* with the statement “Competition law has been thrust into the centre of the Canadian policy debate”⁴, and the *Introduction* starts with the observation that “Competition law and policy are having a moment of reckoning.”⁵ Indeed, the Discussion Paper expressly notes that newspaper op-eds are an inspiration for the wholesale changes contemplated.⁶ These seem slender reeds on which to base significant changes to framework legislation. A cynic—indeed, not necessarily a cynic—might suggest that we are considering upending a significant framework statute, which has served Canada well, because it is a trendy thing to do, our friends and neighbours are considering it and change is in the antitrust zeitgeist. Not because a thoughtful case has been articulated for the desirability of such wholesale change.

To justify possible changes to the *Competition Act*, the Discussion Paper notes, among other things, concerns about affordability and the cost of living, market concentration, the emergence of digital giants, and inequality⁷, but it does little to tie these purported problems with the need for reform to the *Competition Act*. For instance, few would suggest that the inflationary pressures which Canada, and much of the world, is experiencing are a result of antitrust issues.⁸ Nor growing economic inequality—and the evidence suggests that Canada, as opposed to some other societies, is not experiencing meaningfully increased economic inequality.⁹ Nor is there conclusive evidence for increased market power.¹⁰ There has been a rise in large digital firms, lots of entry, much change, innovation and disruption, but in our view no clear evidence of any antitrust problem, if we define antitrust problems as we traditionally have—as related to consumer welfare. Certainly, the Discussion Paper does not seek to demonstrate such a problem. It merely

states a number of economic concerns, implicitly laying them (or those which actually exist in Canada) at the feet of competition law.

B) Lose a Case, Amend the Act

There is some truth in the observation that, over the years, the *Competition Act* seems to have been amended from time to time in response to litigation defeats by the Competition Bureau, and the current amendment efforts may, in part, have similar inspiration. It is hard to avoid noticing that the Competition Bureau has experienced some losses in litigation over the past few years—particularly in areas of the *Act* on which the Discussion Paper concentrates. Below we explore a small historic sample of litigation-motivated amendments to the *Competition Act*, which have at best a mixed record.

The classic example of litigation-inspired amendment may have been the Bureau's defeat in the *Freight Forwarders* case.¹¹ That litigation outcome was followed by a paper prepared by senior Bureau officials advocating change¹², which ultimately resulted in the 2009/2010 amendment to create a *per se* cartel offence.¹³ That may be the most significant such example, but there are a number of less prominent ones as well.

In the case of *R. v Rowe*¹⁴ the defendants moved successfully to quash a bid-rigging charge, on the basis that they agreed to withdraw a bid, which was not a defined offence under Section 47 of the *Act* at that time. Subsequently Section 47 was amended to specifically add, as prohibited conduct, agreeing to withdraw a bid or tender.¹⁵

In the *Premier Career Management* case¹⁶ the Tribunal in the first instance had determined that misrepresentations made by the respondents were not made “to the public”, pursuant to Section 74.01(1)(a) of the *Act*, because they were made in an office which was not open to the public. The Federal Court of Appeal overturned the decision¹⁷, concluding that the representations were made to various members of the public, one at a time. However, between the time of the original decision and the appeal, Section 74.01(1)(a) was amended (as well as the relevant parallel provision in Section 52) to add Section 74.03(4)(c), which provides that in proceedings under Section 74.01 (and 74.02) it is “not necessary to show that the representation was made in a place to which the public has access.”¹⁸

In a somewhat similar situation, a firm was charged with making false or misleading representations to the public by way of “scam” lottery promotions. The representations were all made to persons outside of Canada.

The Ontario Superior Court Judge acquitted¹⁹ on the basis that the term “representation to the public” in Section 52(1) meant representation to the public in Canada. The Ontario Court of Appeal found²⁰ that the “public” was not restricted to the public in Canada. However, again, an amendment was made March 12, 2009 to add Section 52(1.1) (b)²¹ which provides that the persons to whom the representation is made need not be in Canada.

In an early skirmish in the *Petro Canada/Superior Propane* case²², (which is famous for its consideration, later in the proceedings, of the efficiencies defence) the Bureau sought an injunction to prevent closing of the transaction. The Bureau failed on the basis that the relevant injunction standard in Section 100, as it then existed, required the Commissioner to show that the merger was likely to prevent or lessen competition substantially. After that defeat, the government amended Section 100 to remove the requirement that the Commissioner must demonstrate a likely substantial prevention or lessening of competition, replacing it with a requirement that the Commissioner simply certify that more time is required to assess the transaction.²³

More recently, of course, the injunction powers under Section 104 (which applies after a proceeding challenging the transaction has been filed—in contrast to the Section 100 injunction, which is relevant before a Section 92 challenge is commenced) received attention in the context of the *Secure/Tervita* merger.²⁴ The Commissioner sought to enjoin closing of the transaction, on an “interim interim” basis, pending the hearing of the full injunction proceeding. The Tribunal concluded it did not have the power under Section 104 to grant such “interim interim” relief. That defeat seems to have provoked the Commissioner to seek additional injunctive power.²⁵ On appeal²⁶ in *Secure/Tervita*, the Federal Court of Appeal determined that the Tribunal did in fact have the power to grant interim interim relief.

These examples suggest that from time to time, when the Commissioner has experienced a litigation setback, one response has been to seek to amend the *Act*. A litigant who can also amend the law enjoys advantages the next time they litigate. That is one reason why it’s Good to be the King.²⁷ However, while the desire to “fix” a problem is understandable—and losing a case generally looks to a litigant to be a problem in need of fixing—not every defeat for the Competition Bureau is a problem requiring amendments to the *Act*. If that were so, it would mean that the Bureau only takes uncontroversial cases—or always picks its fights wisely.²⁸ In fact, the Bureau quite properly in our view takes on uncertain cases in some instances. Losing such cases is not evidence that the law is flawed. On the other hand, while every litigation defeat does not necessitate statutory amendment, that does not mean that

one should never amend the *Act* when an issue is discovered in litigation—but caution is appropriate. Even if decisions are wrong—and of course, many are not—court-created problems can rectify themselves—sometimes on appeal in the very case, as we have seen, and sometimes in subsequent cases.

To take a significant example, the finding in *Canada Pipe*²⁹ that anti-competitive acts have to be aimed at a competitor, was effectively “remedied” in the *TREB*³⁰ case, where the Tribunal and Court of Appeal said that it was sufficient if the conduct was aimed at any competitor in the marketplace—effectively reading out substantive meaning from the word “competitor”. Arguably, then, the judicially created “problem” was judicially corrected, and the 2022 amendment to add reference to “injury to competition”³¹ was unnecessary because of the change to the test effected judicially in *TREB*. While some problems correct more quickly than others, and as noted some “problems” are not problems at all, legislative amendments bring their own risks and uncertainties. A common law system, by its very nature, depends on organic development.

Those points are not to deny that sometimes cases do illustrate real statutory problems—such as the *Rowe* case³², which determined that an agreement to withdraw a bid was not caught by the bid-rigging provision. An amendment closed that loophole—appropriately in our view.

Our general comment, however, is threefold. Firstly, it sometimes makes sense to wait after a decision comes out that is surprising or unwelcome to the Bureau to allow the jurisprudence to develop—at least to wait for appeals. Judicially created “problems” may be solved judicially. Secondly, and as a related point, statutory amendments are rigid and inflexible. It is difficult for statutorily created problems to fix themselves—so care needs to be taken not to jump too quickly to a statutory solution. Thirdly, and to foreshadow aspects of this paper, some “unwelcome” judicial decisions are not unwelcome to all, nor are they necessarily bad law or policy. Losing a case does not mean the law is wrong.

It is understandable that a party does not like to lose a case and indeed quite natural that when the government loses a case, the agency involved is likely to believe that the decision is wrong and/or unjustified. That is perfectly natural, but it may not be the best basis for statutory amendment. As noted above, it is appropriate for the Commissioner of Competition to take cases that may or may not be successful—and appropriate for the Tribunal/courts to sometimes find for the Commissioner and sometimes find against

her. Nothing about losing a case suggests that there is anything inherently wrong.

Finally, on a related topic, in June of 2022, significant amendments were made to a variety of provisions of the *Competition Act*.³³ Like with taking time for judicial decisions to play out, it may make sense to let those amendments play out, before significant new changes are added. Indeed, as we note below, the Commissioner has already proposed “corrections” to amendments less than a year old.³⁴

3. The Nature of the Proposed Amendments

Having briefly elaborated on some of the drivers of the current statutory review, and suggesting that the reasons for change may not be as rigorously articulated or as robust as one might hope, we next note that while the Discussion Paper avoids proposing specific statutory amendments the thrust of the discussed changes are all in one direction—to lower the tests and hurdles for showing a *Competition Act* violation, to give the Competition Bureau additional remedies, and to give private plaintiffs more rights; in short, to lower the bar for enforcement action generally. This is the same thrust as the just-passed 2022 amendments.³⁵ All of this suggests that the authors of the Discussion Paper believe, in our view without demonstration, that the errors and problems are all of one kind—too little enforcement. And, that “tougher” laws are the answer.

Famously in antitrust/competition law, we worry about two types of errors. These two types are creatively named Type I errors and Type II errors. Type I errors, “false positives”, are errors of over enforcement, where something which is not problematic and did not damage (and may benefit) the economy is found to be unlawful. Type II errors, “false negatives”, occur when something does in fact damage the economy but is erroneously not prohibited. Both types of errors are damaging, but the Discussion Paper concerns itself exclusively with Type II errors. Yet, making enforcement “tougher”—making proof of a competition violation or competitive injury easier and less rigorous, and ramping up penalties/consequences, will inevitably ramp up Type I errors as it reduces Type II errors.³⁶ The Discussion Paper provides no discussion of the trade-off—indeed, it does not even acknowledge it.

Our concern about Type I errors is not primarily about economic harm or inefficiency in the specific erroneously decided case. That will of course exist, but we should be more concerned about the damage to the economy generally which such errors will cause. To take a specific example from a

recent case, if the Vancouver Airport Authority (VAA) had lost its Abuse of Dominance case³⁷, and been prohibited from restricting the number of catering companies operating at the airport, we should not worry, primarily, about the catering market at the Vancouver Airport, or even about the fate of the Airport. That is even though, as the Tribunal found, the challenged policy protected a legitimate business interest in making the Airport more attractive, so a decision against VAA would have been an error that injured both it and the economy. But, what we should really worry about is how such a decision would affect the approach of thousands of other entirely unrelated businesses which would, as a result of that decision, worry whether they had the right to decide how many suppliers they want to deal with. And they may, as a result, make sub-optimal, inefficient, decisions. That is, as you enforce more aggressively, lower the barriers to finding conduct anti-competitive, and increase the penalties/consequences for firms found to have violated the *Act*, you increase the risk of Type I error in any particular case. More problematically, you increase the risk of businesses pulling their competitive punches for fear of facing litigation and themselves being the victims of such errors.

4. Some Specific Comments

Next, we turn to specific areas of possible amendment. The Discussion Paper outlines large set of possible changes to the *Competition Act*—of greater or lesser importance. We have chosen to comment on some, but not all, of the proposed changes. We note that while these changes will affect a wide variety of businesses, the amendments may disproportionately impact the technology sector, firms engaged in collaborative or networked industries, firms with a significant market share and firms that find themselves in the political or public opinion cross-hairs from time to time.

A) Mergers—Some Thorny Issues

i) Nascent Firm Mergers—Lower Review Standard

One of the most difficult issues which the Discussion Paper addresses, and indeed one of the most difficult issues in competition law, is the challenge posed by the acquisition of nascent potential competitors. Those who see this as a problem generally characterize it as a killer acquisition/strangle in the cradle strategy, employed by large firms against those which they think may grow into a threat—particularly in the tech sector.³⁸ It is indeed a difficult issue, as the Discussion Paper recognizes.³⁹ There are no doubt cases in which an established company does perceive a threat from a new entrant—and consequently buys it up. Sometimes the incumbent firm will

have been right—there was a threat, which was eliminated. Sometimes it will have been wrong—there was no real threat. Sometimes (we argue very often) the incumbent firm will be interested in the new entrant not because it is a “threat”, but because it has a particular product or technology which is a good fit with the incumbent’s offering, and combining them presents an opportunity to improve the offering.⁴⁰ Or, again, the incumbent thinks will be a good fit, but the combination fails.

These examples illustrate two points—one, that you cannot tell much about anti-competitive intent or effect from the fact that an incumbent firm seeks to buy a new entrant; and two, that it is very difficult to tell, when a firm is in a nascent state, whether it is at all likely to offer a competitive threat later. Hard for the incumbent firm to determine, and hard for the enforcement agency/court.

Even retrospectively, identifying a competitive threat is difficult. The acquisitions of WhatsApp, Instagram and YouTube, by Facebook and Google are often cited as examples of failed antitrust merger policy⁴¹, but even the success those firms have achieved, post acquisition, does not necessarily tell us much from an antitrust perspective.⁴² How well would they have done without the capital, expertise and synergies of Facebook and Google? We just do not know. Even if they had done well as stand-alone firms, would they have developed into meaningful rivals to their acquirer, or simply other firms with different offerings? These are very hard questions to understand, even after the fact, and the further after the fact, the harder it is.⁴³

In addition, while these transactions are regularly mentioned as illustrating the nascent firm problem, hundreds and hundreds of small firms have been acquired by tech giants over the last ten or fifteen years. Based on the kind of precautionary principle articulated in the Discussion Paper—an “appreciable risk”⁴⁴—there would be wholesale intervention, with no justiciable standards. That is because there is always a risk, and when the buyer is big and powerful, the risk can always be said to be “appreciable.” The very argument that the target firm is so small/young that it is impossible to know if it will ever offer a competitive threat—so no intervention is justified—gets turned on its head. You cannot know whether there is a competitive threat or not, so there is a risk. And if the acquirer is a giant, with an existing strong market position, then it is easy to assert that if the nascent firm were otherwise to develop into a rival, the injury to competition from the merger would be very large. It becomes an allegation which is impossible to disprove. As a result, no doubt some transactions that would otherwise lead to harm would be blocked, but it is likely that many many more which

are benign will also be prohibited. And, as the Discussion Paper notes, the ability to sell is often the impetus for start-up firms in the first place, or provides the capital necessary to come effectively to market.⁴⁵ So, without that market for acquisitions, the firm might never have existed at all.

In other words, the risks run two ways—and the stakes are not trivial. Our intuition is that lowering the test for intervention in mergers below a likely substantial lessening of competition standard will do more harm than good. It will take away incentives for new firms to form in the first place, and it will prevent many efficiency enhancing, consumer benefiting integrations and product improvements. Few if any problematic mergers will be enjoined.⁴⁶ Others may have a different intuition—that such a change will prevent significant competition reducing killer acquisitions. But a decision of this importance—since it has very significant implications for innovation and consumer welfare—should probably not be left to intuition.

The digital revolution, since it is the technology sector in respect of which the issue of *killer acquisitions* is raised most frequently, has been highly economically beneficial to Canadians and indeed the world, and has served to lower barriers to entry in many cases.⁴⁷ It could of course have been more beneficial if antitrust law had been able to distinguish those nascent competitors that should not be acquired by a dominant incumbent from the many others that do not present any threat to competition. But that is a big “if.” Caution is warranted before we implement changes that could put at risk a model of innovation and incentives for entry that has delivered overwhelming consumer benefits (albeit having done so with some anti-competitive consequences). Indeed, if a precautionary principle is relevant at all⁴⁸ it is with respect to statutory changes that may undermine a successful pro-competitive model, which has delivered huge consumer benefits. Consequently, given the strength and resiliency of the economy, including its ability to self-correct market power problems⁴⁹, we propose the Antitrust Hippocratic Oath: First, Do No Harm.

ii) Limitation Periods

A second issue explored in the Discussion Paper is whether the one year limitation period to challenge completed mergers should be extended—for transactions generally or for those which have not been subject to notification or pre-closing review. In 2009 the limitation period was decreased from three years to one year, and at the same time a new mechanism to obtain large volumes of information from merging parties through the

Supplementary Information Request process was put in place.⁵⁰ One was seen as a trade-off against the other.

In cases where there has been notification, mandatory or voluntarily, we see no need to disrupt the one-year limitation period. One year is sufficient time to determine if a transaction merits challenge. Challenges more than a year after closing pose very significant information problems, and create uncertainty and disincentives to investment. The issues were explored recently by the American Bar Association Antitrust Law Section, which commented on them as follows:

Given the absence of a bar to delayed merger challenges in the United States, the question is how long after consummation should plaintiffs (whether government or private parties) be allowed to challenge a transaction and on what grounds? In addition to questions of fairness (to the parties and other stakeholders, such as employees), there are also questions of efficiency. Never ending uncertainty may deter welfare enhancing transactions from occurring. And post-consummation entities may delay or temper significant and beneficial investment if the threat of a post-consummation challenge looms indefinitely.

Practical difficulties proving competitive harm will increase as time passes. When using a standard of what was foreseeable at the time of the merger, the ability, many years later, to reconstruct from what was known, then, and determine the foreseeability of future events will inevitably be a fraught exercise. Further, there are difficulties in determining whether alleged harm flows from the merger or other exogenous post-consummation market forces. For example, years later, assets acquired in a past merger may be important to a firm's current market power. But it is difficult to determine whether it was the merger, technological developments, competitor exit, or other factors that caused the increase in market power (i.e., the but for world). Only rarely will acquired assets, independent of subsequent events, lead to competitive problems years after consummation. Punishing mergers based on post-consummation changes in the market (like technological developments or competitor exit) imposes no-fault liability on merged entities.

Finally, successfully implementing post-consummation remedies can be challenging. Remedies many years later are all the more difficult to implement. The constituent businesses of the merged firm may often be so integrated that practically no divestiture can be made which could survive independently and replace lost competition. It may not even be possible to divest an asset to another operating business which could result in an effective competitive rival. Even if a remedy is possible, its costs may exceed the benefits to be achieved.⁵¹

This issue has also been canvassed by a number of thoughtful U.S. anti-trust scholars.⁵²

Given the foregoing, if the Competition Bureau has had formal notice of a transaction, and had the opportunity to review it in detail, we see no material benefit to extending the limitation period for challenge, with the resulting uncertainty, disincentive to integration, innovation and investment, beyond one year post closing. However, when a transaction falls beneath the notification threshold and was not subject to voluntary reporting we have some sympathy for the Bureau's concern that not all problematic transactions may come to its attention within one year. In those cases, we can see an argument for restitution of a three-year limitation period.

iii) Notification Thresholds

The Discussion Paper suggests a reduction to the notification thresholds, and particularly the size of parties threshold. The size of parties threshold has been unchanged since 1986, so has in practice become very significantly reduced. Especially if non-notifiable mergers return to a three-year limitation period, we see no compelling case for reducing notification thresholds. We further note that the adjustment to the size of transaction threshold in line with GDP growth, which has recently been paused, should resume.

iv) Interim Relief

As noted above, the Discussion Paper suggests that there may be a need for greater injunctive powers to prevent closing of potentially problematic transactions. We observed above that this suggestion seems to have been inspired by the failure to obtain an "interim interim" injunction in the *Secure/Trevita*⁵³ transaction. However the Court on appeal confirmed that the Tribunal does have the power to grant such injunctions⁵⁴, so the immediate issue may have been overtaken by events.

Leaving aside the case specifics, we do think that a set of mechanisms which appropriately balance the merging parties' need to close transactions in a timely way with the Bureau's need to have the ability to enjoin problematic transactions, and ideally, which also minimize procedural battles, would be advantageous. We are disinclined to favour a more robust injunction power since, as noted, significant injunctive powers exist already, and because injunctive battles will result in time and energy being invested in interlocutory proceedings. The inevitable result of these battles is that both the Bureau and the merging parties are forced to focus their attention on

the injunction, rather than the substantive issues. However, we think that the recent *Rogers/Shaw* transaction⁵⁵, which moved from case filing to decision in less than eight months, and to appeal in an additional month, may suggest a model. If the Commissioner commits to a hearing (and the Tribunal to a decision) within an eight or nine month timeline, then the trade-off may be an automatic injunction to prevent closing for the nine months. If the Bureau does not commit to that timeline, then the parties should be free to close at their own risk. This approach would have the advantage of getting a resolution to mergers on a timeline that at least many transactions may be able to withstand, while giving the Bureau a fair opportunity to have its case heard on the merits, pre-closing. This approach avoids the significant costs, distraction and delay associated with injunction fights. We will have a bit more to say about timing issues and procedures below.

v) Efficiencies Defence

Much has been written, by many, about the efficiencies defence and its appropriateness⁵⁶, so we will be brief. It is certainly true that the drafters of the *Competition Act* sought, as a fundamental goal of the “new” *Competition Act*, to achieve an efficient economy⁵⁷, and as recognized in the case law, efficiency was to be a trump factor in merger review when it could be demonstrated.⁵⁸ As the drafters of the new *Act* liked to boast, and as detractors of the efficiencies defence now repeat endlessly as a criticism, Canada is largely unique in its mergers efficiencies defence. We are not sure, however, why this uniqueness should be denigrated. It might just as well be seen as a matter for some pride. The underlying logic remains, to us, compelling.

Statistically, the efficiencies defence does not affect a lot of cases. Of the 8000 or so notifiable mergers since the *Competition Act* was enacted, the efficiencies defence has been known to make a difference in only a handful of cases—so in a sense the appropriate role for efficiencies is largely a symbolic question. Of course in cases where the defence is advanced it involves significant effort by the parties to address, but if it is a legitimate policy that should not be a determinative factor.⁵⁹ With or without an efficiencies defence, very few mergers will be approved on the basis of their efficiencies outweighing their anticompetitive effects. But it seems to us that in addition to being justifiable on policy grounds in its own right, the efficiencies defence is an important symbol, in that economic efficiency is an important goal of the *Competition Act*. Section 96 is the poster child for the *Act*'s concerns about efficiency. If the efficiencies defence is removed, then the importance of economic efficiency within the *Act* generally—and arguably its importance as a

government policy—will be undermined. Making efficiencies a “factor” in merger analysis would make it essentially unjusticiable.

Oponents of the defence also raise concerns with its use in respect to purely domestic mergers⁶⁰—but this criticism we think is misguided. One result of making firms more efficient is that they can compete with international rivals, but another much more important result is that the Canadian economy uses its resources more efficiently. The goal was to improve the overall efficiency of the Canadian economy—whether for export or domestic consumption. Only efficiencies achieved in Canada “count” as cognizable efficiencies—so this objection is not well founded in our view.

While we do favour retention of the efficiencies defence, we also think that the requirement to quantify efficiencies, which the court articulated in *Tervita*⁶¹, may go too far. It makes sense as a litigant wishing to advance a strong case to quantify what can be quantified, but failing to quantify matters should not represent an absolute bar to consideration of qualitative evidence. This may be an appropriate, limited, statutory amendment.

vi) Impact on Workers/Labour Markets

Finally, we note that the Discussion Paper raises the question as to whether merger analysis should give particular consideration to labour issues. We note, as a first point, that the Bureau’s enforcement of the merger provisions has always considered monopsony power in relevant cases⁶²—even when there is no output effect. In our view, a pure wealth transfer without output effects is not a substantial lessening of competition, and so in our view the Bureau’s approach in this regard is in error—but the Bureau’s current approach to enforcement under the *Act* as it stands does in fact consider monopsony issues and therefore the market for purchase of inputs, including labour. So, that does not necessitate a statutory amendment.

More fundamentally, we think there is considerable danger in seeking to address goals beyond competitive issues in a competition law regime. It is difficult enough to get the competitive issues right, without mixing in unrelated goals. If we seek to protect labour and employment, why not the environment, equity and diversity, health and safety, truth and reconciliation—the possible list is virtually endless. The Commissioner of Competition and Tribunal do not have the expertise⁶³, and the approach risks—indeed it guarantees—confusing the focus of any analysis. As Lawson Hunter⁶⁴ has pointed out, either you have a statute focused on a judicially determinable issue, which requires a tight focus, or you have a broad policy decision—a

“net benefit” test for all transactions, not just foreign acquisitions. That is inevitably a political decision, as it is in the *Investment Canada Act*.⁶⁵

C) Unilateral Conduct

i) Tech—This Time It’s Different

The second big area on which the Discussion Paper focuses is possible amendments to the Unilateral Conduct provisions of the *Act*, inspired by, as the Discussion Paper puts it, “[t]he rise of Big Tech.”⁶⁶ But the *Act* is one of general application, and applies to tech just like it does to banking, construction, manufacturing, natural resources industries or anything else.⁶⁷ As recently as 2017, the Competition Bureau concluded in its “Big Data” discussion paper that Canada’s Abuse of Dominance laws were up to the task of evaluating big data/tech issues.⁶⁸ Like considerations involving tech, consideration of network effects and two-sided markets are not new to the *Act*.⁶⁹ Therefore, our view is that the Abuse of Dominance provisions are sufficiently flexible to address conduct by digital giants/platforms/gatekeepers, as they do the conduct of other powerful economic actors. As we explained at some length recently, our view is that Canada’s abuse of dominance provisions are able to adequately address anticompetitive market conduct, particularly in relation to digital platforms and gatekeeping issues.⁷⁰ We illustrated that point by exploring the historical success of the *Competition Act* in addressing such “current” issues as gatekeepers, access to data and self-preferencing, in cases such as *Interac*⁷¹, *Neilsen*⁷², *Tele-Direct*⁷³, *TREB*⁷⁴ and *VAA*⁷⁵ amongst others. We noted that the *Act* was, as the Competition Bureau itself had recently concluded, “fit for purpose”.

ii) Intent to Injure Competition/Innovation

The Discussion Paper articulates the importance of protecting innovation as an aspect of competition, and notes that the requirement for an intended negative effect on a competitor in order to demonstrate a practice of anti-competitive acts was too narrow a focus. It acknowledges, however, that both the *TREB* case⁷⁶, and the 2022 amendments to the *Act*⁷⁷ broadened the interpretation of anti-competitive acts defined in the *Canada Pipe*⁷⁸ case as those with an intended negative effect on a competitor to an intended negative effect on competition. Nevertheless, and despite this significant change, the Discussion Paper asserts that the Abuse of Dominance provision has “very narrow” application and advocates that a broader, less specific test be employed.⁷⁹ We do not agree, nor are we persuaded that “this provision may become more problematic as the economy grows more complex and intertwined.”⁸⁰ Complexity is not new. Further, as noted above, many of the

Abuse of Dominance cases over the years have dealt with complex markets and issues, including data, gatekeepers and two-sided markets, amongst others.

Whether particular industries are more complex than others (and as practitioners of competition law know, when you dig into markets, most turn out to have a meaningful level of complexity), that does not change the principles which apply. Further, it is important that the basis upon which conduct may be challenged is clear—particularly as such challenges come with hugely enhanced Administrative Monetary Penalties (AMPs), but also because if people don't know the rules, it is hard to abide by them. The vast majority of compliance with competition law, like all law, flows not from enforcement, but from self-regulation. The guidelines for unilateral conduct compliance are already challenging, given the inherent difficulty in distinguishing aggressive competition on the merits from anti-competitive conduct. While we do not favour *per se* rules or presumptions in this area, as they will inevitably stifle pro-competitive aggressive and creative conduct⁸¹ (as discussed further below), nevertheless we favour making the standards as clearly defined as possible. That is a delicate but important balance.

iii) Preventative Rules/Proactive Enforcement

The Discussion Paper explores the concepts of “preventive” rules or presumptions⁸², and “proactive encouragement of competitive alternatives.”⁸³ Whatever those things are, they are not competition law as we have understood it in Canada. Some industries are subject to specific regulatory regimes. That may be appropriate in some cases, but these industry-specific regimes have developed outside of competition law. In any event, we have been moving away from regulation where we can given the recognition of the benefits of competitive markets. Likewise with promoting specific firms or industries. The promotion of competitors, as opposed to establishing marketplace rules that allow for competition, has generally not been a successful approach to strengthening the economy and increasing consumer welfare. Promoting new competitors may, sometimes, make sense as industrial policy (although we note a significant lack of success by most governments in this area) but that is not competition law.

There is, or used to be, a consensus that the best outcomes for the economy are likely to flow from the “free market.” Establishing general framework rules and then letting the genius of the marketplace operate. If that basic set of assumptions favouring the market and free enterprise is being challenged as a bedrock assumption underlying our approach to competition

law, and to the economy more generally (as perhaps in some quarters it is), then the challenge should be articulated directly, rather than trying to hem in the most dynamic parts of our economy with “antitrust” rules, which are in reality disguised government regulation and industrial policy.

iv) Joint Dominance

The Discussion Paper explores the concept of joint dominance—that is, conduct by a number of firms none of which alone enjoys significant market power. It raises the question as to what degree of “jointness” is necessary for firms to be jointly dominant, absent an express agreement to act together. We agree that the question of what degree “jointness” is necessary for joint dominance is complex, and would benefit from clarity.⁸⁴ The Discussion Paper, however, does not offer such clarity. The issue is genuinely difficult, so while we agreed that clarity would be beneficial, merely saying this does not much advance the discussion. There is no obvious easy fix.

If there is an agreement to act in a coordinated way, the issue is relatively simple. Without an agreement, and particularly given that remedies include not only cease and desist orders but very significant penalties, the issue is challenging. This is not to say that we oppose mechanisms to better define when firms may be regarded as acting jointly, and therefore may be subject to a joint dominance analysis. We merely recognize that such an exercise will be complex, and certainly should not be done in a rushed legislative process. Indeed, this seems exactly the sort of thing which should be worked out judicially.

In addition to not understanding what, if anything, the Discussion Paper is actually suggesting with respect to joint dominance, there is also, as we noted, the issue of remedy. Firms without significant market share/market power, acting alone, without agreement with other firms, and particularly firms that do not have knowledge that they are regarded as jointly dominant, may be appropriately subject to cease and desist orders (depending on being able to define conduct from which they should desist) but other remedies, including AMPs, seem inappropriate. Any amendments to joint dominance should address remedies in the case of joint dominance without agreement.

v) Substantial Lessening of Competition

The Discussion Paper states that “the requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, a substantial lessening or prevention of competition may be unduly strict.”⁸⁵

We disagree. If there is no injury to competition (subject to determining what “substantial” is), why on earth would we intervene? The Discussion Paper refers to the European approach to dominance, which is alleged to focus on conduct with less attention to harm. First of all, this is a simplistic view of European competition law⁸⁶, which has moved toward a greater focus on harm and potential harm. More fundamentally, *per se* prohibition of reviewable practices would entirely upend Canadian competition law, which (along with competition law in Europe, the U.S. and worldwide) has for decades been moving away from *per se* prohibition except for hard-core conduct (i.e., conduct that almost always is so inherently anticompetitive that it warrants condemnation without further inquiry).⁸⁷ To take a frequently discussed “problem” in the tech sector, self-preferencing, a *per se* prohibition would prevent or limit a large number of efficiency-enhancing, consumer-friendly product offerings. For example, a platform could use the knowledge of consumer preferences it gains from facilitating transactions by others on the platform to itself offer more attractive products. The platform preferences itself by using this information, but consumers benefit, and the economy is more efficient. This is the key problem with *per se* rules—except in the very clearest, least ambiguous cases they prohibit conduct which is frequently pro-competitive, and as a result tend to injure consumers and the economy. Further, if the *per se* prohibited matters are not precisely defined—there appears to be no effort to do so in the Discussion Paper, and of course it is very difficult to do in legislation as well—firms will be subject to *per se* prohibition respecting conduct of which they cannot know the precise boundaries, which would not only be inefficient, it would be fundamentally unfair.

This cannot be the intended outcome—or if it is, Canadians will end up considerably poorer and with a less innovative economy.

vi) Other Restraints of Trade

The Discussion Paper notes that many of the reviewable practices found in sections 75, 76, 77, 80 and 81 are subsets of Abuse of Dominance, although with slightly different tests. We agree, and join the Discussion Paper in asking the question as to whether those specific provisions—some of them rarely or never used—serve a useful purpose. Indeed the provision which has most frequently been the basis of Tribunal proceedings—the Refusal to Deal provision, Section 75—focuses primarily on injury to competitors rather than to competition, and deals with issues more appropriately addressed as a matter of contract. We think that this provision, and indeed all of Sections 75-77, 80 and 81, could be repealed with no loss to economic

or enforcement efficiency, and with the additional benefit of considerably less complexity in the legislation.

However, the Discussion Paper also asks whether some of these reviewable practices could be “repositioned” to provide for “fair” competition. We suggest that this idea is fundamentally flawed. “Fairness”, like some other hard to define qualities, often lies in the eye of the beholder. It is, at best, difficult to define, and adopting it as a standard for the cited practices retrospectively puts successful business conduct at risk. When fairness is discussed, it tends to refer to the treatment of competitors—a concept which was, rightly in our view, and indeed in the view of the Discussion Paper⁸⁸, de-emphasized in the Abuse of Dominance test.

Competing on the merits can be rough—pretty “unfair” to those who lose the competition. It is conduct that is aggressive, and wins by supplanting—often crushing—less effective, efficient competitors. Indeed especially if competition is very aggressive and delivers consumer benefits, it is likely to drive rivals out—but it is exactly the behaviour we want to encourage if we believe in the benefits of competitive markets. The difficulty of drawing a line between such aggressive, procompetitive conduct and improper, anticompetitive exercises of market power is the challenge at the heart of all unilateral conduct law. Adding in an “unfairness” test makes this all the more confusing without adding any useful guidance.

D) Competitor Collaborations

i) Need for an Agreement

A fundamental tenet of Canadian competition law has been that for a conspiracy there is a need for an agreement—a meeting of the minds.⁸⁹ In certain oligopolistic markets, injury to competition similar to that which flows from competitor agreements (although generally less certain or prolonged) may result from non-collusive conduct—i.e. from firms observing what their competitors do and drawing conclusions as to what course of action would be best. You observe that the market leader is not seeking market share, but raising prices. So you raise prices too. This “conscious parallelism” has never been illegal, even though (and this is why economists tend to call it “tacit collusion”) the result can be similar to prohibited cartel activity (although it is likely to break down more quickly. Conscious parallelism is not illegal at least in part because it is unclear what one could possibly outlaw. Observing the market carefully and accurately? Drawing logical conclusions as to a beneficial course of conduct? Deciding, given the

observation and conclusions, on the most profitable way to act? Would the remedy be an order to compete irrationally?

To this background, the Discussion Paper brings the new concept of pricing algorithms. There may be something new here—but maybe not, or not always. If your algorithm is programmed to collude with a competitor’s algorithm, then that sounds to us like intended conduct, which could be prohibited and punished under a traditional theory of cartel behaviour. If amendments were directed specifically to this sort of conduct, then, subject to appropriate drafting, we see no principled objection to that. It may not be necessary to do so—we think the existing law is likely sufficient—but if there is doubt, we have no principled objection to address the issue. It may be appropriate to do so in the *Competition Act*, or it may be more appropriate to do so in more specific legislation, but the principle seems, to us, to be unobjectionable.

What about algorithms that learn on their own? Not to agree with one another, but to observe and make logical moves. We do not really understand if that is possible or not, but let’s assume that it is. We do not, for the reasons noted, prohibit conscious parallelism by humans. Why should we for computers? And, if we can and do—if we make a law that says you must, somehow, prohibit your algorithm from drawing logical conclusions from what it observes—we are back to the same problem we have when people do it.

Whatever we do with machines, given the advent of pricing algorithms, there is not an argument that conscious parallelism itself should be criminalized—or even non-criminally prohibited. Indeed, as we noted, to do so would be to effectively require conduct which is irrational. That is why it has not been prohibited before, and why it cannot be now.

ii) Scope of Civil Enforcement

The Discussion Paper starts its consideration of Section 90.1 by noting, correctly, that section 45 is reasonably tightly circumscribed, focused on “hard-core” cartels, and that because section 90.1 does not “punish” behaviour, but provides only forward-looking cease and desist orders, there may be incentives to conduct oneself in ways contrary to section 90.1 until ordered to stop. That is theoretically correct, but before significant effort is invested in “fixing” section 90.1—by expanding it to allow for punishment for past behaviours, or expanding it beyond agreements between competitors—it may be appropriate to ask, is it needed at all? Indeed, that was a question we asked in 2009⁹⁰, noting that the formerly broader criminal

conspiracy provision, despite being theoretically applicable to a variety of types of agreements beyond hard-core cartels, had only been employed with respect to the type of hard-core cartels that were captured by the amended section 45 anyway. So, we suggested, there was no practical need for section 90.1. That has proven broadly correct—section 90.1 has had very limited application since its enactment.⁹¹

More fundamentally, picking up on the Discussion Paper's suggestion to simplify the civil provisions of the *Act* other than Abuse of Dominance, and noting the amendment to the Abuse of Dominance provision to capture conduct that is aimed at injuring competition, we suggest that truly problematic agreements, between competitors or not, can be addressed under the Abuse of Dominance provision. Absent market power, such agreements are unlikely to significantly injure competition. With market power, and if they injure competition, the Abuse of Dominance provisions (in some cases perhaps joint dominance) are likely to apply. This also addresses the "retrospective" issue, and the possibility of penalties, if appropriate. Additionally, it continues the useful exercise of simplifying the *Competition Act*.

iii) Buy-Side "Cartels"

The Discussion Paper's suggestion that buy-side agreements be subject to cartel prosecution strikes us as fundamentally flawed. The amendments of a decade ago were expressly designed to eliminate what was seen as over inclusiveness of the pre-existing section 45, capturing types of agreements that are not hard-core conduct. To re-capture buy-side agreements and, even worse, in a *per se* regime, would be grossly over inclusive. It would potentially criminalize virtually all agreements between competitors—buying or selling—which is especially broad when one recalls that on the buy side, "competitors" can mean those who compete to buy inputs—a very wide set of firms. The Discussion Paper suggests there may be a need in such circumstances to craft appropriate defences—but we know the difficulty and ambiguity which surrounds the Section 45(4) defence now. In essence, this may suggest a return to the old "undueness" rule, but now with a *per se* presumption and the need to make out a positive defence. This proposal strikes us as, fundamentally flawed in itself, and more so because such agreements would be subject to class action damages claims, as well as prosecution.

As reflected above, agreements other than hard-core cartels involving market power, and which injure competition, can be subject to review, and possibly to harsh penalties, under the Abuse of Dominance provision. Re-criminalizing virtually any competitor agreement, in addition to turning

its back on the rationale for amendments of a decade ago, is, in our view, nonsensical.

iv) Sections 48 and 49

Finally, an amendment not suggested in the Discussion Paper—but which fits with the theme of simplifying the *Act*—is a suggestion to repeal Sections 48 and 49. Section 48 deals with with professional sport, and section 49 applies with respect to certain specific agreements among federal financial institutions. The Competition Bureau, in its recent Submission⁹², noted that section 48 is redundant given section 45(1.1), and we agree. The Bureau does not address section 49, which has its origins as a provision of the *Bank Act*. While Section 49 has now been expanded to insurance companies and other financial institutions, its prohibitions read quite oddly with respect to non-banks. Also, with the passage of a *per se* Section 45, Section 49 is redundant and it carries with it rigidity, in that there is no Section 45(4) defence available under Section 49. In addition, it is in a practical sense a dead letter—never having been the subject of a prosecution. Finally, it is unfair, treating like entities non-alike, in that it affects financial institutions differently than all other economic actors, and does not apply to virtually identical financial institutions. For no good reason whatsoever (except its peculiar history and constitutional concerns) it does not apply to provincially incorporated financial institutions. There is no reason to retain Section 49.

E) Deceptive Marketing Practices

The Discussion Paper starts its consideration of possible changes to the deceptive marketing practices provision by noting the increased ability of businesses to communicate with consumers and sell products as a result of digital commerce, suggesting that the increased ability gives rise to new areas of concern.⁹³ We do not see it that way. It appears to us that the increased availability of a plethora of product information to customers, and the ability to compare products with minimal effort, all from the comfort of one's home, has made the market more transparent and allowed consumers to make increasingly informed competitive choices.

The specific areas of concern the Discussion Paper notes—native advertising, influencers, online reviews, fine print disclosure, subscription traps, etc.⁹⁴—are not new concerns. Indeed, we have written about a number of these over the years.⁹⁵ All of them are caught by the *Act* now. Oddly, the Discussion Paper expressly acknowledges this: “the *Act*'s deceptive marketing provisions have been interpreted broadly, and apply to all manner of

business promotions in Canada, and in this sense are seen as a powerful tool in the digital economy.⁹⁶ Despite this acknowledgement, the Discussion Paper asks whether additional rules or enforcement tools, including more specific definitions of types of misleading advertising actions, would be useful. In our view, no. They would create rigidity—the recent drip pricing amendment⁹⁷ has already created unanticipated challenges.⁹⁸ In fact, our view is that a movement to simplify the misleading advertising provisions—which now runs to some twelve pages in the statute—is in order. A simple prohibition on materially false or misleading representations, with appropriate guidelines as to how the Bureau would enforce the basic rule, would achieve a better, less rigid result.

F) Proposals regarding Administration and Enforcement

i) Codes of Conduct

The Discussion Paper commences its consideration of administration and enforcement issues by noting that the *Act* does not allow for the imposition of codes of conduct. That is certainly true, and for good reason—it would transform the Commissioner of Competition from an enforcer—a role all Commissioners have zealously guarded over the years and which the Discussion Paper reflects⁹⁹—to a regulator, but not one limited to a particular industry or sector. We have discussed, above, the difference between regulation and competition policy, noting the benefit for consumers of competition over regulation whenever possible. We have sufficient examples to know that the two roles—regulator and enforcer—do not sit well together, and that regulating an industry is difficult.¹⁰⁰ We regularly get it wrong even when the regulator has deep knowledge of the specific industry.

The basic premise of competition and the *Competition Act* is that we set basic rules and norms of behaviour—as clearly delineated as possible—and then allow agile, creative, motivated competitors to offer consumers products they value. Indeed, to the extent we have one, that is Canada's basic industrial policy. Returning to regulation would be a significant step back. The suggestion in the Discussion Paper that the Commissioner should be empowered to establish codes of conduct is contrary to the *Act's* fundamental structure and approach.

That is, we believe that the best, most innovative, productive and efficient Canada will result from unleashing competitive forces, with the minimum necessary regulatory overlay. The Discussion Paper seems to be toying with a much more heavily regulated, less free enterprise economy.

ii) Interim Measures

The Discussion Paper points out that the pace of *Competition Act* enforcement can be an issue, and that interim measures may sometimes be necessary. It also points out, however, that the *Act* already provides for interim measures. It then, quite strangely, notes that the European Commission is itself a decision maker, rather than an enforcement agency, and, conflating a different issue, notes that US Enforcement Agencies can issue subpoenas without third party authorization.

There is a lot to be unpacked there. First, with respect to the comparison with the European Commission, that is a comparison to an inquisitorial system. The structure of the Canadian system is fundamentally different. We have an adversarial system, including under the *Competition Act*, which involves both an enforcer and an independent decision maker. Indeed, it was to avoid the difficulty surrounding the role of Judge Judy and Executioner¹⁰¹ that the Restrictive Trade Practices Commission was replaced almost forty years ago.¹⁰² And, as a practical matter, decisions of the European Commission are fairly slow, even though they do employ an inquisitorial model.

With respect to the US FTC's power to issue subpoenas, the Section 11 Order provided in the Canadian *Act* is actually quite effective—so it is not a source of delay for the Bureau—and it avoids the constitutional issues noted above.

Finally, as noted above, the *Act* already provides for injunctive relief—if the Commissioner makes out the case. The power already exists.

iii) Speed of Proceedings

While we do not think any additional injunctive powers are needed—indeed, we think a focus on injunctions may take focus away from reaching decisions on the merits—we do think the speed with which cases are processed can and should be improved. In the discussion of mergers, above, we note the speed with which the *Rogers/Shaw* merger transaction was decided—eight months—nine with the appeal.¹⁰³ The Canadian International Trade Tribunal (CITT), for example, makes use of a statutory timetable to ensure a timely result. In mergers and advertising cases, a nine month timetable seems reasonable, as long as injunctive relief is not sought since an injunction would add significant overall time to proceedings. In Abuse of Dominance cases, double that—eighteen months—seems possible. *Mastercard/Visa* proceeded to trial in eighteen months.¹⁰⁴

If nine months can resolve most merger and advertising matters, and eighteen months can resolve most Abuse of Dominance matters, we believe that the issue of injunctive relief will be much less pressing.

iv) Civil Damages for Abuse

The Discussion Paper suggests that a more “robust” framework for enforcement would allow civil damages claims, including presumably class actions, for reviewable conduct—primarily Abuse of Dominance. As we have explored recently and in detail¹⁰⁵ the genius of the *Competition Act* is to differentiate between conduct which is virtually always harmful—hard-core cartels—and more ambiguous things—typically vertical conduct—which may injure competition, but which may be pro-competitive and efficiency enhancing. For the former, we provide criminal penalties and damages—because we are not worried about chilling pro-competitive conduct. For the latter, we examine the conduct on a case-by-case basis, and the primary remedy is a cease and desist order, because we are concerned about chilling aggressive competition.

This bifurcated structure of the *Act* was recently re-confirmed by the Federal Court of Canada:

The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions ... Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects... These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal...can order the conduct to cease.¹⁰⁶

As we pointed out in our recent paper,¹⁰⁷ the clarity of that dichotomy has been eroded somewhat, but still remains broadly correct and appropriate.

The bifurcation of the *Competition Act*, and of the applicable remedies, was a conscious choice by the statute’s drafters.¹⁰⁸ Conduct that is always or almost always economically damaging need not be subject to detailed economic analysis before challenge, nor need there be a concern about chilling such conduct. So neither criminal penalties nor damages actions by those allegedly injured are a concern in that regard. Likewise, there is limited concern that private parties may bring actions strategically, since the criminal conduct is

relatively clearly defined, and discouraging such conduct does not damage the economy.

Conversely, if the impact of the conduct is economically ambiguous and often efficient, as is the case with civilly reviewable conduct, and determining the line between reviewable conduct which damages competition and that which does not is tricky (which it often is), then there is legitimate concern about chilling potentially pro-competitive conduct. Consequently, the conduct should be subject to detailed economic examination to ensure that it is not condemned out of hand and the available remedies designed to avoid over-deterrence of such conduct. In those circumstances, a primary cease and desist order remedy makes sense. As noted, however, Parliament added the possibility of AMPs for abuse of dominance in 2009.¹⁰⁹

Arguably, the bifurcation of the Canadian *Competition Act* is its genius, in that it allows the government to challenge inherently economically ambiguous conduct in circumstances in which it believes that there is an injury to competition, but it does not allow challenges—at least challenges leading to damages actions—by competitors or other person in the distribution chain seeking to protect their own economic interests. Consequently, firms are more likely to engage in efficiency-enhancing vertical conduct that may injure competitors or others in the distribution chain than they would be in a regime that allowed such firms to seek damages.¹¹⁰

If we allow damages actions for reviewable conduct we will meaningfully discourage aggressive competition, in our view to the material detriment of the economy. On top of that, given the ambiguity of the conduct in most cases, it will be virtually impossible to determine, prior to a final hearing, whether or not such a case can be proven. So, virtually all such cases will be certified as class actions—and as we know as a practical matter virtually all certified class actions will lead to settlements—regardless of the merits.

As explored above, it is not the case itself, or the parties to particular cases, which are our primary concern. What we worry about is chilling pro-competitive conduct by other actors, unrelated to the particular case. The problem is that the risk of such class action alleging reviewable conduct may sometimes discourage anticompetitive conduct, but will also chill aggressive but pro-competitive conduct. Here, we are not even talking about an actual Type I error—we are talking about the likelihood of certification. Not error by way of final judgement, just the likelihood of certification, which will cause firms to shy away from aggressive competitive conduct. It is exactly contrary to the structure of the *Competition Act*, and constitutes danger for the efficiency of the economy, and for consumer welfare.

v) Market Studies

Finally, we note that the Discussion Paper proposes that the Bureau obtain compulsory powers to require the provision of evidence to conduct market studies. Well, who are we to complain? Where such studies have been established elsewhere, they have resulted in significant work for counsel. But, self-interest aside, that may not be the best use of resources. As we have argued elsewhere¹¹¹, historically market studies have been extensive, expensive exercises with limited positive results. They can be punishing to the companies involved, and there is risk that we will simply round-up the usual suspects for such studies.

So, while there are more problematic issues considered in the Discussion Paper than granting the Bureau enhanced powers for market studies, there is nevertheless a meaningful cost involved in granting such powers—and they are not consistent with the Bureau’s primary role as an enforcer.

We agree that the Bureau’s role as competition advocate can be important for the Canadian economy. But, contrary to a focus on private actors, we think that the big, low hanging fruit to be harvested from competition advocacy has to do with regulatory restrictions on competition. Without doubt, government regulation creates the most significant, long lasting monopoly issues in the economy. Competition advocacy with respect to government actions may help improve things, and should not require additional statutory powers, since the government can cooperate with itself. Since that would be a big payoff, we suggest that advocacy efforts focus on government action.

5. Some Concluding Thoughts

We started this article by asking the question, what are the potential amendments designed to do? We noted that while the Discussion Paper touches on the question, it provides little substance.

If we are not told what it is all about, we have to try to figure it out. We have in Canadian competition law the concept of objective intent. We draw the intent from the reasonably foreseeable consequence of the conduct.¹¹² The reasonably foreseeable consequence of the vast majority of the amendments contemplated in the Discussion Paper would be to make challenge to conduct easier—easier for the Commissioner and easier for private parties. Easier, and with greater consequence. Whether it is easier to challenge mergers; easier to challenge aggressive competition which injures competitors (but may well benefit consumers); easier to challenge competitor

collaborations—including on the “buy” side the inevitable consequences will be less aggressive competition, a less efficient economy, less innovation, less attractive consumer offerings. People will pull their competitive punches.

The evidence on the face of the Discussion Paper, as we have explored, appears to be that these proposals are not inspired by demonstrable problems with the law. The Commissioner has lost some cases, as Commissioners should, but that is not a problem with the law. Nor, indeed, is there demonstrable problem with the economy—which notwithstanding problems such as slow growth and low productivity, is nevertheless producing more material well-being than ever before. Slow growth is a problem throughout the developed countries of the world, whatever their competition laws. Low productivity appears to be a particularly Canadian problem—at least in comparison with the United States—but reducing emphasis on efficiency in the *Competition Act* strikes us as a peculiar way to address it.

The rise of new technologies—which seems to represent a particular focus for those proposing competition law changes—has made life obviously and demonstrably better for Canadians and people throughout the world. Indeed, as the Discussion paper observes: “Digital innovation is transforming Canada’s economy and improving Canadians’ quality of life enhancing productivity, diversifying the consumer experience, connecting people and opening up new markets.”¹¹³ Rather than a demonstrable problem with the law or the economy, this wholesale proposal to transform Canadian competition law appears to be responding to trends, in Canada and elsewhere. We suggest that that is a poor reason to consider fundamental changes to a law which has served Canada well.

Before undertaking wholesale change which will undermine a statute that has worked, in our view, quite well, we submit that some caution is appropriate. Indeed, it is necessary. As we urged above, take the antitrust Hippocratic Oath: First, Do No Harm.

ENDNOTES

* With thanks to Shaniel Lewis for her assistance.

¹ Innovation, Science and Economic Development Canada (ISED), “The Future of Competition Policy in Canada Innovation, Science and Economic Development Canada” (2022) at 12, online: <<https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>> [Discussion Paper].

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ We confess to have contributed ourselves. See Joshua Krane, Mark Opashinov and William Wu, “Vigorous enforcement, not studies, are what Canada’s competition laws need”, *National Post* (13 April 2021), online: <<https://nationalpost.com/opinion/opinion-vigorous-enforcement-not-studies-are-what-canadas-competition-laws-need>>. The authors note that studies under the previous statute “led to multi-year investigations into industries perceived to be the giants of the day — most famously the petroleum inquiry — but produced few economically positive outcomes.”

⁷ Discussion Paper, *supra*, note 1, at 4.

⁸ See OECD, “Competition and Inflation”, OECD Competition Policy Roundtable Background Note, (2022), online: <<http://www.oecd.org/daf/competition/competition-and-inflation-2022.pdf>>.

⁹ See Sarah Burkinshaw, Yaz Terajima, Carolyn A. Wilkins, “Income Inequality in Canada,” (2022) Bank of Canada Staff Discussion Paper 2022-16.

¹⁰ See Carl Shapiro, “Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets” (2019) 33:3 *J Economic Perspectives* 69.

¹¹ *R v Clarke Transport Canada Inc* (1995), 130 DLR (4th) 500, 64 CPR (3d) 289 (Ont Ct (Gen Div)) [*Freight Forwarders*].

¹² Harry Chandler and Robert Jackson, “Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada’s Competition Act”, Remark, (2000).

¹³ Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009 (as passed by the House of Commons 12 March 2009) [Bill C-10].

¹⁴ *R v Rowe*, 29 CPR (4th) 525, 60 WCB (2d) 553 [*Rowe*].

¹⁵ *Competition Act*, RSC 1985, c C-34, s 47.

¹⁶ *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2008 Comp Trib 38.

¹⁷ *Canada (Commissioner of Competition) v Premier Career Management Group Corp.*, 2009 FCA 295.

¹⁸ *Competition Act*, *supra* note 15, s 74.03(4)(c).

¹⁹ *R v Stucky*, [2006] OJ No 4933 at para 66, 53 CPR (4th) 369.

²⁰ *R. v Stucky*, 2009 ONCA 151.

- ²¹ *Competition Act*, RSC 1985, c C-34, ss 52(1.1)(b) and 74.03(4)(b).
- ²² *Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15, rev'd 2001 FCA 104 [*Superior Propane*].
- ²³ *Competition Act*, *supra* note 15, s 100.
- ²⁴ *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4 [Secure/Tervita].
- ²⁵ Competition Bureau, “Examining the Canadian Competition Act in the Digital Era” (8 February 2022), online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era>>.
- ²⁶ *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 FCA 25 [Secure Appeal].
- ²⁷ In this case, His Majesty in Right of Canada.
- ²⁸ Competition Bureau Canada, “Submission to OECD: Public Interest Considerations In Merger Control” (14 June 2016), online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/submission-oecd-public-interest-considerations-merger-control>>.
- ²⁹ *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233 at para 284 [Canada Pipe].
- ³⁰ *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2013 Comp Trib 9, rev'd 2014 FCA 29 [TREB].
- ³¹ Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (as passed by the House of Commons 9 June 2022) [Bill C-19].
- ³² Rowe, *supra* note 14.
- ³³ *Competition Act*, *supra* note 15.
- ³⁴ Competition Bureau of Canada, “The Future of Competition Policy in Canada” (March 15, 2023), online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada>> [Competition Bureau Submission].
- ³⁵ Bill C-19, *supra*, note 31.
- ³⁶ See generally Frank E. Easterbrook, “The Limits of Antitrust” (1984) 63 *Tex L Rev* 1 at 14–17 (noting this point in the context of an argument for legal presumptions erring in favour of allowing some problematic conduct to escape enforcement on the basis that Type II errors are less costly). See also Herbert Hovenkamp, “Antitrust Error Costs” (2022) 24:2 *U Pa J Bus L* 293 (providing a more recent overview of the “error cost” literature and a critique of Easterbrook’s position).
- ³⁷ *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24.
- ³⁸ The Discussion Paper notes that the strategy of strangling threats in the cradle is not unique to the digital economy (Discussion Paper, *supra* note 1 at 21). We

agree that it is an age-old strategy (see Exodus 2:1-10; Matthew 2:16-18) but, as explained here, comes with age-old challenges as well. Moses was indeed a threat to Pharaoh; Christ turned out to be in an entirely different market than Herod; and neither Moses nor Christ were successfully identified.

³⁹ See for instance Kristen C Limarzi and Harry R S Phillips, “Killer Acquisitions,” Big Tech and Section 2: A Solution in Search of a Problem” (2020) 2:2 Antitrust Chronicle 7. See also Jonathan Jacobson and Christopher McFarrige, “Acquisitions of Nascent Competitors” (2020) The Antitrust Source.

⁴⁰ “Nascent competitor” acquisitions “tend to add useful new features to products consumers already love, eliminate little or no current competition, supply the acquired firm’s users with far greater support and innovation, and provide a valuable exit ramp for investors, encouraging further investment in innovation”: Jacobson and McFarrige, *supra* note 39 at 1.

⁴¹ See Jacobson and McFarrige, *supra* note 39. Other oft-cited examples include Google/DoubleClick, Google/Waze, and Amazon/Quidsi.

⁴² There are good ex-post retrospectives, commissioned by the CMA for example, that evaluate whether the decision that the Authorities have come to was reasonable based on the evidence that was, or would reasonably have been, available at the time. See e.g. Elena Argentesi et al, “Ex-post Assessment of Merger Control Decisions in Digital Markets” (2019) at 5-13, online: <https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV_UK_version-1.pdf>.

⁴³ See ABA Antitrust Law Section, “Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Scrutiny” (Competition/Consumer Protection Policy and North America Committee Task Force Report, April 2020), online: <<https://ourcuriousamalgam.com/wp-content/uploads/Consummated-Mergers-Policy-Task-Force-Apr-2020-FINAL.pdf>> [ABA Report].

⁴⁴ Discussion Paper, *supra*, note 1 at 20.

⁴⁵ See also Jacobson and McFarrige, *supra* note 39: “Such acquisitions provide a valuable exit ramp for investors, encouraging future investment in innovation”.

⁴⁶ See Jacobson and McFarrige, *supra* note 39 at 1: “Consumer harm is at best speculative, And most importantly critics have identified no instance in which meaningful competition has been lost or consumers heard.” See also David Emanuelson and Danielle Drory, “The Potential Chilling Effects of Lowering Standards for Tech M&A Enforcement” (2020) 34:2 Antitrust 14.

⁴⁷ Discussion Paper, *supra*, note 1 at 20.

⁴⁸ See Joshua Krane & James Musgrove, “The Dangers of Precautionary Principle Challenges to Nascent Mergers” (CD Howe Intelligence Memorandum, 24 February 2022).

⁴⁹ Frank H Easterbrook, “Limits of Antitrust” (1984) 63: 1 Tex L Rev 1.

⁵⁰ *Competition Act*, *supra* note 15, s 92.

⁵¹ ABA Report, *supra* note 43 at 10-11.

⁵² See Timothy J Muris and Jonathan E Nuechterlein, “First Principles for Review of Long-Consummated Mergers” (2020) 5 Criterion J Innovation 29

(arguing that post-consummation developments not foreseeable at the time of the transaction may not be used to challenge consummated mergers). See also Donald F Turner, “Conglomerate Mergers and Section 7 of the Clayton Act” (1965) 78 Harv L Rev 1313 at 1347 and fn 53 (discussing concerns about the relevance of post-acquisition evidence); Robert Pitofsky, “Proposals for Revised United States Merger Enforcement in a Global Economy” (1992) 81 Geo LJ 195 at 223-224 (discussing problems with post-merger evidence as a basis for illegality); Philip E Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 4th ed (Wolters: 2014) 267-70 (discussing the use and interpretation of post-consummation evidence in detail).

⁵³ *Secure/Tervita*, *supra* note 24.

⁵⁴ *Secure Appeal*, *supra* note 26.

⁵⁵ *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1.

⁵⁶ A little of it has been written by us—See James Musgrove & Janine MacNeil, “Section 96 of the *Competition Act*: A Brief history” (Presentation to the Canadian Corporate Council Association National Spring Conference, 27-29 April 2003) [unpublished].

⁵⁷ See Dr Lawrence A Skeoch & Bruce C McDonald, “Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs” (31 March 1976), online: *Consumer and Corporate Affairs Canada* <<https://publications.gc.ca/site/eng/9.883678/publication.html>>.

⁵⁸ *Superior Propane*, *supra* note 22.

⁵⁹ Even in the two leading cases, *Superior Propane* and *Tervita*, it is generally recognized that had the Commissioner approached the evidence differently it is unlikely that the defence would have prevailed.

⁶⁰ Discussion Paper, *supra*, note 1 at 25.

⁶¹ *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 123-126

⁶² Competition Bureau, “Merger Enforcement Guidelines” (6 October 2011), online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-enforcement-guidelines>>.

⁶³ See *Burns Lake Native Development Corporation et al v Commissioner of Competition and West Fraser Timber Co Ltd et al*, 2005 Comp Trib 19 at paras 35-36.

⁶⁴ Lawson AW Hunter and Susan Hutton, “Foreign investment review in Canada: ‘Be careful what you wish for’” (30 May 2011), online: *Stikeman Elliott LLP* <<https://www.stikeman.com/fr-ca/savoir/droit-canadien-concurrence/foreign-investment-review-in-canada-be-careful-what-you-wish-for>>.

⁶⁵ *Investment Canada Act*, RSC 1985, c 28 (1st Supp), s 21 [ICA].

⁶⁶ Discussion Paper, *supra* note 1, at 30.

⁶⁷ *Ibid* at 31.

⁶⁸ Competition Bureau, “Big Data and Innovation: Implications to Competition Policy in Canada” (17 November 2017), online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/big-data-and-innovation-implications-competition-policy-canada>>.

⁶⁹ See James Musgrove, Neil Campbell and Joshua Chad, “Competitors at the Gate: The Evolution of Canada’s Abuse of Dominance Regime and its Application to Digital Players” (2022) 52 U Mem L Rev 999. See also Carl Shapiro, “Protecting Competition into American Economy” (2019) 33:3 J Economic Perspectives 69; Edward Iacobucci, “Examining the Canadian Competition Act in the Digital Era” (September 2021), online: *Faculty of Law, University of Toronto* <<https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>>; Anthony Niblett and Daniel Sokol, “Up to the Task: Why Canada Don’t Need Sweeping Changes To Competition Policy To Handle Big Tech” (November 2021), online: *MacDonald Laurier Institute* <https://macdonaldlaurier.ca/files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf>.

⁷⁰ Musgrove et al, *supra* note 69 at 52.

⁷¹ *Director of Investigation and Research v Bank of Montreal et al*, [1996] CCTD No 12, 68 CPR (3d) 527.

⁷² *The Director of Investigation and Research v The D&B Companies of Canada Ltd*, [1995] CCTD No 20, 64 CPR (3d) 216 [Nielsen].

⁷³ *Director of Investigation and Research v Tele-Direct (Publications) Inc*, [1997] CCTD No 8, 73 CPR (3d) 1.

⁷⁴ TREB, *supra* note 30.

⁷⁵ *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24.

⁷⁶ TREB, *supra* note 30.

⁷⁷ Bill C-19, *supra* note 31.

⁷⁸ *Canada Pipe*, *supra* note 20.

⁷⁹ Discussion Paper, *supra*, note 1 at 34.

⁸⁰ *Ibid* at 30.

⁸¹ Bruce B Wilson, Remarks before the Fourth New England Antitrust Conference, “Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions” (6 November 1970).

⁸² Discussion Paper, *supra* note 1, at 36.

⁸³ *Ibid* at 35.

⁸⁴ *R v Canada General Electric Co*, 75 DLR (3d) 664; 15 OR (2d) 360.

⁸⁵ Discussion Paper, *supra* note 1, at 36.

⁸⁶ See Eleanor M Fox, “Monopolization and Abuse of Dominance: Why Europe is Different” (2014) 59 Antitrust Bull 1; ABA Antitrust Law Section, “Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards” (1 September 2019), online: *American Bar* <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf>.

⁸⁷ Wilson, *supra* note 81. The list of nine potentially offending technology

licensing practices was first outlined here. The nine practices were regarded, during the 1970s, as effectively per se prohibited, yet as economic thinking developed none are now regarded as deserving of per se condemnation, and indeed many are presumptively lawful. The none no nos as described are: 1. Royalties not reasonably related to sales of the patented products; 2. Restraints on licensees' commerce outside the scope of the patent (tie-outs); 3. Requiring the licensee to purchase unpatented materials from the licensor (tie-ins); 4. Mandatory package licensing; 5. Requiring the licensee to assign to the patentee patents that may be issued to the licensee after the licensing arrangement is executed (exclusive grant backs); 6. Licensee veto power over grants of further licenses; 7. Restraints on sales of unpatented products made with a patented process; 8. Post-sale restraints on resale; and 9. Setting minimum prices on resale of the patent products.

⁸⁸ Discussion Paper, *supra* note 1, at 33-34.

⁸⁹ *Atlantic Sugar Refineries Co v Canada (Attorney General)*, [1980] 2 SCR 644, 115 DLR (3d) 21; *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 190 (Côté J dissenting, but not on this point). See also *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para 98; *R v Proulx*, 2016 QCCA 1425 at para 32; *R v Canada Cement Lafarge (1973)*, 12 CPR (2d) 12 at para 5, 1973 CarswellOnt 1031 (Ont Prov Ct); *R v Cominco (1980)*, 46 CPR (2d) 154 at para 34, 1980 CarswellAlta (Alta Sup Ct). The issue of the legality of conscious parallelism was addressed in Canadian Competition Bureau, "Big Data and Innovations Key Themes for Competition Policy in Canada" (19 February 2008) at 9-10, online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/big-data-and-innovation-key-themes-competition-policy-canada>>. See also *Tenser et al v Samsung et al*, 2021 FC 1185.

⁹⁰ Esther Rossman and James Musgrove, "Canadian Competition Law: The Next 25 Years" (Paper delivered at the CBA 16th Annual Competition Law Fall Conference, 24-25 September 2009).

⁹¹ See *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14; *Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2017 FC 382; *Canada (Commissioner of Competition) v Indigo Books & Music Inc*, 2015 FC 256; *The Commissioner of Competition v Air Canada*, 2012 CACT 20.

⁹² Competition Bureau Submission, *supra* note 34.

⁹³ Discussion Paper, *supra* note 1, at 47.

⁹⁴ *Ibid* at 47-48.

⁹⁵ See e.g. James Musgrove and Joshua Chad, "Under the Influence: The Canadian Competition Bureau's Stand on Misleading Product Endorsements" (McMillan Advertising and Marketing Bulletin, December 2019); James Musgrove, Joshua Chad and M Niski, "Astroturfing, Flogging, Endorsements and the Evolving Law in Canada" (OBA Advertising and Marketing Law: Social Digital, Online Compliance Conference, 21 October 2016); James Musgrove et

al, “The Complete Canadian Law of Disclaimers” (The Canadian Institute’s 18th Annual Advertising and Marketing Law Conference, 25-26 January 2012); James Musgrove and David Young, “Old Wine on Line: Is There Really Anything New Under the Advertising Sun?” (Canadian Institute Special Internet Summit, June 2000); “Marketing Law in a Borderless World—Developments in Canada and Elsewhere” (Canadian Bar Association Annual Competition Law Conference, 18-19 September 1997).

⁹⁶ Discussion Paper, *supra* note 1, at 47.

⁹⁷ Bill C-19, *supra*, note 31.

⁹⁸ See Joshua Krane and James Musgrove, “Drip Pricing Amendments To The Competition Act” (CD Howe Intelligence Memorandum, 3 May 2022). We also note that the Competition Bureau itself has proposed additional amendments to the provision, less than a year after its enactment. This is illustrative both of the dangers of frequent amendment, and also of the problems of overly specific, prescriptive, provisions.

⁹⁹ Discussion Paper, *supra* note 1, at 13: “The Bureau acts as a law enforcement agency ... The Act does not proactively dictate how to conduct business, allocate resources among shareholders, or designate entrants, participants winners or losers in the free market. Direct management of business conduct, through codified rules or *ex-ante* structures or regulations—while tremendously influential to the state of competition—fall generally outside of the Act’s purview.”

¹⁰⁰ See “Capital Markets Modernization Taskforce: (Final Report, January 2021), online: <<https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf>>. The Ontario Securities Commission (“Commission”) recently separated the adjudicatory and regulatory function at the Commission citing that this separation ensures independence of its functions, enhances corporate governance and provide opportunities for greater strategic focus; Stuart M Chemtob, “The Role of Competition Agencies in Regulated Sectors” (5th International Symposium on Competition Policy and Law: Institute of Law Chinese Academy of Social Sciences: 11-12 May 2007) at 14, online: <<https://www.justice.gov/atr/file/519376/download>>. This states that if competition is best regulated by day to day regulation then this role is better suited to regulatory agencies than competition enforcers. Peter Alexiadias and Caio Mario Da Silva Perira Neto, “Competing Architectures For Regulatory and Competition Law Governance” (June 2019). This delves into the structural architecture of competition law and notes that a vast number of OECD countries have competition enforcement agencies that are distinct from regulatory agencies. Independence from government influence is also integral to regulation.

¹⁰¹ With apologies to Matt Groening.

¹⁰² *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641.

¹⁰³ One might also note, perhaps not coincidentally, that the Rogers/Shaw reasons for decision were a more reasonable length than many sets of Competition Tribunal reasons.

¹⁰⁴ We note the Discussion Paper—at footnote 126—pegs it incorrectly at three years. The case was filed on December 15, 2010, the hearing began May 8, 2012 and the Tribunal reserved for over a year before rendering a judgement July 23, 2013, which was, of course, unacceptably long time to reserve. *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated et al*, 2013 Comp. Trib. 10.

¹⁰⁵ James Musgrove and Janine McNeil, “Blurred Lines: How *Dow Chemical* and *Royal J & M* May Confuse Remedies Under the *Competition Act*” (2022) 35:1 Can Comp L Rev 46.

¹⁰⁶ *Jensen v Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para 90

¹⁰⁷ Musgrove and McNeil, *supra* note 105.

¹⁰⁸ *House of Commons Debates*, 33-1, vol 10 (5 June 1986) at 14026 (Mr. Bill Dom, Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post). See also Dr Lawrence A Skeoch and Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Canada: Department of Consumer and Corporate Affairs, 1976) at 281-283, 316-333.

¹⁰⁹ Bill C-10, *supra* note 13 at s 428.

¹¹⁰ Musgrove and McNeil, *supra* note 105, at 50.

¹¹¹ Joshua Krane and James Musgrove, “Competition Act Changes: Proceed with Caution” (CD Howe Intelligence Memorandum, 10 May 2021).

¹¹² See for example *Direction of Investigation and Research v The Nutrasweet Company*, (1989) Doc #176a; *Canada Pipe*, *supra* note 29; *Nielsen*, *supra* note 72.

¹¹³ Discussion Paper, *supra* note 1, at 7.