

2023 YEAR IN REVIEW

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2023 saw an overhaul of the competition regime in Canada and has given us reason to believe there are many more changes to come. Canada's competitive intensity was on the forefront of Canadian's minds and, accordingly, became a high priority for its politicians. Our legislation has seen extensive changes impacting virtually every major facet of the Act: the loss of efficiencies defence impacts merger review, the civil collaborations provisions have expanded to include "non-competitors", the abuse of dominance test has been wholly restructured, and the effects of the criminalization of wage-fixing and no-poaching agreements are being realized. The Bureau has become much more litigious, appealing the Rogers/Shaw decision and successfully arguing to uphold the Tribunal's decision in Secure. Competition law has become increasingly swayed by public discourse, with the Bureau publishing market studies in areas such as the grocery industry, telecoms, financial services, and cannabis. The legislature, aligned with the Bureau, clearly intends to continue modernizing the Act to intensify competition in Canada. As competition becomes increasingly embedded in—and shaped by—popular discourse, it is important to ensure that stakeholders use their voices to ensure reform is balanced against commercial interests and the appropriate checks and balances against government authority. We can expect vigorous debate as we learn to maneuver our new competition regime and drive toward pro-competitive outcomes.

En 2023, le régime de la concurrence au Canada a connu une refonte majeure, laissant entrevoir de nombreux autres changements à venir. L'intensité concurrentielle du Canada s'est imposée dans l'esprit des Canadiens, devenant ainsi une priorité majeure pour ses politiciens. Nos dispositions législatives ont subi des changements substantiels impactant pratiquement tous les aspects majeurs de la Loi sur la concurrence : l'élimination de la défense fondée sur les gains en efficacité dans le cadre de fusionnements, l'élargissement des dispositions sur les collaborations civiles pour inclure les « non-concurrents », la restructuration entière du critère de fond pour l'abus de position dominante, et la concrétisation des effets de la criminalisation des accords de fixation des salaires et de non-débauchage. Le Bureau de la concurrence est devenu beaucoup plus litigieux, en faisant appel de la décision Rogers/Shaw et en plaidant avec succès pour maintenir la décision du Tribunal dans l'affaire Secure. La Loi sur la concurrence est de plus en plus influencée par le discours public, le Bureau ayant publié des études de marché dans des secteurs tels que les épiceries, les télécommunications, les services financiers, et le cannabis. Le

législateur, partageant la même vision du Bureau, a clairement l'intention de continuer à moderniser la loi pour intensifier la concurrence au Canada. À mesure que la concurrence s'ancre de plus en plus dans le discours populaire, et qu'elle en est façonnée, il est crucial de s'assurer que les parties prenantes utilisent leur voix pour garantir que la réforme soit équilibrée par rapport aux intérêts commerciaux et qu'elle dispose des freins et contrepoids appropriés contre l'autorité gouvernementale. Nous pouvons nous attendre à un débat vigoureux alors que nous apprenons à manœuvrer dans notre nouveau régime de concurrence et à progresser vers des résultats proconcurrentiels.

Authors would like to thank Jasnit Pabla and Valeska Rebello of Osler, Hoskin & Harcourt LLP for their contributions to this article.

Overview

2023 was a blockbuster year for competition law and policy reform in Canada, with key developments including:

- In January, the Federal Court of Appeal dismissed the Commissioner of Competition's appeal of the Competition Tribunal's decision not to block the sale of Shaw Communications Inc. to Rogers Communications Inc.
- In May, the Competition Bureau published the final wage-fixing and no-poaching enforcement guidelines after a public consultation on draft guidance earlier in the year.
- Also in May, the Bureau entered into a consent agreement with Superior Plus Corp. with respect to its proposed acquisition of Certarus Ltd. and filed an application with the Tribunal alleging that Cineplex engaged in a practice of drip pricing in the online sale movie theatre tickets.
- In June, the new criminal provisions addressing wage-fixing and no-poaching agreements came into effect. The Bureau also made a series of recommendations to foster greater competition in the grocery sector, in a report entitled "Canada Needs More Grocery Competition."
- Also in June, the Ontario Superior Court levied the highest fine imposed by a Canadian court for conspiracy or bid-rigging to date: Canada Bread Company, Limited was fined \$50 million for its participation in a criminal price-fixing arrangement in respect of packaged bread.

- In August, the Federal Court of Appeal dismissed Secure Energy Services Inc.'s (“**Secure**”) appeal of the Competition Tribunal’s decision in favour of the Commissioner of Competition’s challenge of Secure’s acquisition of Tervita Corporation in March.
- In September, the department of Innovation, Science and Economic Development Canada published a report, titled “Consultation on the Future of Canada’s Competition Policy,” summarizing “what it heard” from responses to its public consultation that had run from November 2022 until March 2023 to support and inform continued overhaul of the *Competition Act*.
- Also in September, critical changes to the *Competition Act* were introduced to Parliament through Bill C-56, just days after private member Bill C-352 was introduced by NDP leader Jagmeet Singh.
- In November, significant further reform to the *Competition Act* was introduced in Bill C-59. Bill C-59 appeared to contain the final set of changes resulting from the federal government’s modernization project that had been commenced with Bills C-19 in 2022 and C-56. Also in November, significant additions to Bill C-56, concerning the abuse of dominance provisions, were added at the Committee stage.
- In December, Bill C-56 received Royal Assent, notably repealing Canada’s section 96 mergers efficiencies defence, empowering formal market studies by the Commissioner and reformulating important aspects of the abuse of dominance provisions.
- Also in December, the Competition Bureau published its “Guide to the December 2023 amendments to the *Competition Act*”.

I. Amending the *Competition Act*: A Study, Bills and an Enactment

2023 saw a continuation of the modernization of Canadian competition law initiated in February 2022 by the Minister of Innovation, Science and Economic Development (the “**Minister**”)² and which led to the first wave of amendments passed in June 2022 under Bill C-19, the *Budget Implementation Act, 2022, No. 1*. New criminal provisions addressing wage-fixing and no-poaching agreements came into effect one year later, on June 23, 2023. On November 17, 2022, Innovation, Science and Economic Development Canada (“**ISED**”) opened a public consultation to support and inform continued overhaul of the *Competition Act* (the “**Act**”),³ titled “Consultation on the Future of Canada’s Competition Policy.”⁴ The consultation period

ran from November 2022 until March 31, 2023. Three further bills proposing amendments to the Act were tabled in 2023: Bill C-56, introduced on September 21, 2023 which ultimately received Royal Assent on December 15, 2023;⁵ the 2023 Fall Economic Statement Implementation Bill, Bill C-59, introduced on November 21, 2023;⁶ and Bill C-352 a private member's bill introduced by NDP leader Jagmeet Singh on September 18, 2023.⁷ The latter two bills did not progress beyond first readings by the year end, but have since significantly advanced.

a. Results of Future of Competition Policy in Canada study

On September 20, ISED published a report summarizing “what it heard” from the responses to its public consultation. There was significant engagement: 130 submissions were received from stakeholders (including academics, practitioners, public interest groups, business associations, government associations the Competition Bureau (“**Bureau**”) itself⁸), together with over 400 responses from members of the general public. The report provides general feedback as well as comments on specific reform proposals posed in the November 2022 discussion paper.

ISED reported that the public largely believed the Act was ineffective at preventing monopolies and oligopolies in various industries, thereby resulting in higher costs, decreased innovation, and increased political power for large corporations. Additionally, the public generally found enforcement to be lacklustre, permitting large corporations to control too much of, and essential services within, the “market.” Many participants called for the Bureau to have more enforcement authority. Others called for greater transparency, education, and public input for the Bureau to make informed decisions that promote competition.

As to merger reform, ISED reported that participants in the consultation were split in their support for greater oversight and scrutiny of mergers, versus fear of a chilling effect from overreach. ISED discussed adoption of a more nuanced model than the “one-size-fits-all” legal test, creating infrastructure for parties to receive certainty around non-intervention by the Bureau in exchange for cooperation, the use of “temporary safeguards” before interim injunctions are issued, and a “more flexible system” than the Substantial Lessening or Prevention of Competition (“**SLPC**”) standard. With some notable opposition, most stakeholders called for the repeal of the efficiencies defence in section 96.

The commentary on unilateral conduct noted a split between consumers and small businesses who expressed concerns of being marginalized, and

concerns that a “big is bad” approach would result in protecting competitors rather than competition. The report indicated that many participants felt the requirement that the Commissioner prove that an anticompetitive act from a firm with a dominant position resulted in an SLPC in order to establish an abuse of dominance was “unduly strict.”

With respect to the collaborations provisions, participants “overwhelmingly called for caution” when deeming or inferring collaboration in the age of algorithmic activity and artificial intelligence. Stakeholders were evenly split on whether to expand section 90.1 to address vertical collaborations. ISED reported that a “significant majority” of participants opposed the introduction of a criminal *per se* offence for buy-side collusion, beyond the prohibition of wage-fixing and no-poaching already enacted.

There was support for measures addressing greenwashing claims. Suggested reforms included the introduction of recognizable, rigorous environmental standards and specific regulations for greenwashing, and increased penalties for deceptive marketing “that leads to environmental impact.” ISED pointed to efforts by the government to “review all levers available to it to protect and promote environmental sustainability.”

With respect to the administration and enforcement of the law, ISED reported significant interest in market study powers. Many participants reported on missing incentives for private applicants (*i.e.*, ability to claim monetary relief for abuse of dominance). Amongst a wide diversity of suggestions ranging from elimination of the Competition Tribunal (“**Tri-bunal**”) to a move toward decriminalization, participants suggested greater transparency on the part of the Bureau through annual reporting, public participation, or more detailed reports on its decisions.

b. Bill C-56

The Honourable Chrystia Freeland, Minister of Finance, sponsored Bill C-56, “An Act to amend the *Excise Tax Act* and the *Competition Act*” with the telling title “Affordable Housing and Groceries Act.” Bill C-56 was tabled in the House of Commons on September 21st and received Royal Assent on December 15th after significant additions were introduced at committee in late November.

i. Repeal of Efficiencies Defences/Exceptions

The section 96 mergers efficiencies defence was repealed, effective December 15, 2023, subject to a transition provision for transactions notified prior

to that date. The efficiencies exception (section 90.1(4) to (6)) under the civil conspiracy provision will be repealed effective December 15, 2024. Despite many commentators recommending that efficiencies be explicitly listed as a factor to consider when determining the anti-competitive effect of a proposed merger, that change was not made, leaving somewhat ambiguous the status of efficiencies in merger review in Canada.

ii. Market Studies

A longstanding source of controversy has been whether a Commissioner can (through mandate and authority) and should conduct market studies.⁹ While Commissioners have undertaken market studies, they have done so without the ability to compel information and records or testimony under oath, relying instead on voluntary disclosures by market participants. Bill C-56 addresses these issues by formally authorizing market studies and extending section 11 to permit the Commissioner to secure orders compelling information, records and testimony to support market studies (search and seizure was excluded). The Commissioner must consult with persons who are required to provide information in response to a section 11 order by providing them with a complete or partial draft report so that they may address factual inaccuracies and disclosure of confidential information prior to publication of the final report. However, they will only have three working days to respond.

A market study can be commenced if:¹⁰ (i) the Commissioner consults with the Minister and the Minister believes the market study would be in the public interest, or (ii) if the Minister directs the Commissioner to conduct an inquiry and the Minister consults with the Commissioner and determines that the inquiry is feasible, including with regard to cost.¹¹ Accounting for practical viability to avoid wasting both Bureau resources and the efforts of businesses and market participants attempting to comply with an order, while factoring in the opinion of the Minister responsible for the economy.

The procedural rules impose transparency obligations.¹² The Commissioner is required to publish draft terms of references for the inquiry and invite public comment for a period not less than 15 days. Following consideration of any resulting comments, the Commissioner must submit to Minister the final terms of reference and publish them online.¹³ The entire duration of the inquiry is not to exceed 18 months, subject to extensions of up to three month periods at the discretion of the Minister.

As market studies are by nature speculative, it remains to be seen if there will be cognizable benefits taking into account the expenditure of Bureau

resources and the significant burden placed on businesses to comply with the process. There is also a question of whether in advancing policy dialogue, the Bureau has an unfair advantage by controlling the subject and scope of these studies, even with Ministerial oversight. Given that the Bureau can use information gathered as a basis to commence or further investigations into violations of the Act, there is a further issue of the extent to which the market study powers may become a pretext for enforcement activity where the Commissioner otherwise lacks the grounds to commence an inquiry under section 10.¹⁴

Based on the voluntary market studies conducted by the Bureau and its expressed enforcement priorities, the Bureau may seek to supplement its previous findings with information obtained through its newfound powers. In 2023, the Bureau published a market study into the grocery sector,¹⁵ issued a report on the financial services industry to inform the Minister of Finance's review of the Royal Bank of Canada's acquisition of HSBC,¹⁶ and analyzed the state of competition in wholesale high-speed internet access in a submission to the Canadian Radio-television and Telecommunications Commission ("CRTC").¹⁷ Additionally, the Bureau made a submission to Health Canada in May 2023 on improving competition in the cannabis industry.¹⁸

The Bureau is expected to update its Market Studies Information Bulletin in light of Bill C-56.¹⁹

iii. Civil Arrangements and Agreements

Section 90.1(1) is a civil, reviewable matter provision currently addressing existing or proposed agreements or arrangements involving competitors. Where competition is (or is likely to be) lessened or prevented substantially, the Tribunal may issue an order prohibiting the enforcement of such agreements or arrangements (the Tribunal may make other orders on consent of the parties).

Commencing December 15th, 2024 (one year after the enactment of Bill C-56), the regime is to be expanded through the introduction of section 90.1(1.1), the effect of which is to permit orders be made under section 90.1(1) in respect of agreements even if none of the parties are competitors with one another, provided that a "significant purpose" of the agreement/arrangement or part thereof, is to lessen or prevent competition in a market. As such, Section 90.1(1) could apply to restrictive covenants in vertical agreements between a landlord and tenant, for example. Indeed, one of the apparent motivations for the amendment is property controls placed at the

behest of grocery stores which inhibit current and future use of properties or which are inserted in leases of other tenants in shopping centres in which a grocery store operates.²⁰

The scope of section 90(1.1) is unclear, particularly given that the expression “significant purpose” is not defined or commonly used in legislation and given that the purpose assessment could be applied to “part” of the agreement as opposed to evaluating a restrictive covenant in the context of the agreement as a whole. At a minimum, the inclusion of a restrictive covenant in an ordinary course agreement will demand attention. As a matter of due diligence, parties who negotiate such arrangement may be faced with the sometimes difficult and resource-consuming exercise of evaluating a potential substantial effect on competition including the exercise of market power and the economic analysis often inherent in such analysis - or risk that the term may be unenforceable. As a matter of drafting, some have questioned whether as constructed, it is clear that where section 90(1.1) applies, an order under section 90.1(1) may not be made unless all elements other than the competitor criterion are satisfied.²¹

An update of the Bureau’s Competitor Collaboration Guidelines would help clarify the uncertainty introduced by section 90.1(1).²²

iv. Abuse of Dominance

At the committee stage in late November 2023, Bill C-56 was amended to introduce significant changes to the scope and function of the abuse of dominance provisions of the Act. The amended Bill C-56 passed unanimously on Third Reading in early December.

Background—June 2022 Amendments

The 2022 amendments under Bill C-19 had created a private right of action for contravention of the abuse of dominance provisions (through sections 103.1 and 79(1)). These amendments also expanded the definition at section 78 of an anti-competitive act to include any act “intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or have an adverse effect on a competitor or on competition.”²³ The non-exhaustive list included at section 78 added a “selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor’s entry into expansion in a market.” In addition to the expanded definition, the administrative monetary penalties (“AMPs”) set out at section 79(3.1) were increased to the greater of \$10 million (\$15 million for subsequent orders) and three times the value of the

benefit derived from the anti-competitive practice or 3% of the person's annual worldwide gross revenues if the amount could not reasonably be determined, where they formerly were either \$10 million in the first instance or \$15 million for subsequent orders. This represented a significant increase of potential penalties. Lastly, the 2022 amendments introduced new factors to be considered to determine whether a practice has or is likely to have the effect of preventing or lessening competition substantially in a market: network effects, entrenchment of leading incumbents' market position, the nature and extent of change and innovation in a relevant market, and any other factor relevant to competition in the market.

Changes to the Abuse of Dominance Test

Bill C-56 restructured the abuse of dominance test at section 79(1), when a prohibition order is sought. It formerly required three elements to be established in order for a prohibition order to be granted: dominance, anti-competitive intent, and anti-competitive effects. The new section 79(1) has two alternative branches: the first requires only dominance and anti-competitive intent, while the second requires dominance and anti-competitive effects that are not the result of a superior competitive performance. In either case, the Tribunal would be empowered to issue a prohibition order. In its "Guide to the December 2023 amendments to the *Competition Act*" published December 15, 2023 ("**Guide**"),²⁴ the Bureau explains that the purpose of the amended structure is to stop conduct by a dominant firm which has either subverted competition in the marketplace or was intended to do so. For clarity, AMPs and other remedies, including divestiture (and the disgorgement of profits to private litigants once Bill C-59 passes), are only available where dominance and both anti-competitive intent and likely anti-competitive market effects are established.

Under the "effects" branch of the new section 79(1) test, the prohibition order may be made where the "conduct" of the dominant person(s) is likely to lessen or prevent competition substantially in a market in which they have a "plausible competitive interest," and where the effect is not a result of "superior competitive performance;" the latter consideration being transposed from the former section 79(4) of the Act.²⁵ One consequence of this change is that the an order may now be made under section 79(1) under the "intent" branch without consideration of whether the conduct in question is a function of superior competitive performance. Similarly, another impact of the amendments is that it is no longer clear whether and how under the "effects" branch the Tribunal will take into account legitimate business justifications which can be used to negate the presumed anti-competitive

intent arising from a practice of anti-competitive acts. After all, orders under section 79(1) are discretionary. The question is how, in exercising its discretion, the Tribunal will take account of the reasons a dominant firm (with a plausible competitive interest in a market) may engage in conduct which has the likely effect of lessening or preventing competition.

In addition to modifying the test, Bill C-56 adds section 78(k) to indicate that “anti-competitive act” includes “directly or indirectly impos[ing] excessive and unfair selling prices”, without further elaboration on what should be considered excessive or unfair. The provision may find its inspiration in Article 102(a) of the TFEU in Europe.²⁶ However, this change was not advocated by the Bureau and is controversial in that Canadian and US abuse and monopolization laws have traditionally been directed at conduct which creates, enhances or preserves market power as opposed to the exploitation of that power. As a matter of legislative drafting, the inclusive example of an anti-competitive act set out at section 78(k) does not sit well with the chapeau portion of section 78, because imposing high prices would typically not have a negative effect on a competitor nor an adverse effect on competition as such (as opposed to an adverse effect on customers).

Penalties

Building on the significant increase to the quantum of AMPs seen in the 2022 amendments to section 79(3.1), Bill C-56 further increased the minimum amount to \$25 million on first instance (\$35 million for subsequent occurrences) and preserved the alternative formulation based on the derived benefit or 3% of gross worldwide revenues.

2. Bill C-59

On November 21, 2023, Parliament tabled Bill C-59, what appears to contain the final comprehensive changes resulting from ISED’s modernization project that had been commenced with Bills C-19 and C-56. Bill C-59 touches on many aspects of the legislation from merger review, notification and injunctive practice; relaxation of the leave standard for private applications to the Tribunal under section 103.1; allowing private applications for enforcement of section 74.1 and 90.1; addition of a “right to repair” under the section 75 refusal to deal provision; a disgorgement remedy akin to damages for private applications under Part VIII; provision for the Commissioner to challenge private settlements of Tribunal proceedings; greenwashing provisions; a defence to criminal and conspiracy provisions for agreements designed to protect the environment or mitigate the effects of climate change; a limitation on costs that may be imposed against the

Commissioner in Tribunal proceedings; further whistle-blower protections in the form of a prohibition on “reprisal actions” (subject to AMPs and other remedies); and penalties for non-compliance with consent agreements.

The authors leave a more fulsome description of Bill C-59 to a future year-in-review article to consider the legislation as it may be enacted.

3. Bill C-352

Private member Bill C-352 was introduced mere days before the government Bill C-56. There is significant overlap between the two.

a. Formal Market Studies Power

Bill C-352, like Bill C-56, would introduce a market study power for the Bureau, but its formulation lacks many of the safeguards built into Bill C-56. For example, consultation with the Minister is not required to commence a market study, public consultation is not required, the duration of the market study is not limited, and there is no fact-checking mechanism. Structurally, Bill C-352 situates the market study power under section 10(1) (b), which describes inquiries that the Commissioner can make when “it has reason to believe” prescribed circumstances exist. Bill C-352 would allow the Commissioner to commence an inquiry if he has reason to believe an inquiry on market conditions would “provide insight into factors that are relevant to competition”. This evidently would afford the Bureau greater latitude to commence inquiries at its discretion than does the market study power as passed in Bill C-56.

b. Increased penalties for cartel offences and abuse of dominance

Bill C-352 would increase the penalty for criminal conspiracy (including wage-fixing and no poach agreements) to a fine capped at the greater of a \$25 million (\$35 million for subsequent occurrences) and three times the value of the benefit derived, or 10% (rather than 3%) of the person’s gross annual worldwide revenues if the benefit derived cannot be reasonably determined.

Additionally, the NDP bill proposes to increase penalties for agreements or arrangements between banks or authorized foreign banks with respect to interest rates, charges for services, loans, services, and customers. It proposes to increase the maximum fines for such agreements to \$25 million (currently \$10 million), and increase the maximum term of imprisonment

to up to 14 years (currently five years), which would bring it in line with the current section 45 general cartel provision.

c. Abuse of dominance

The NDP bill would also amend the abuse of dominance test at section 79, allowing applicants to seek a prohibition order if there is dominance and a practice of anti-competitive acts. This is similar to one branch of Bill C-56 as enacted. As with Bill C-56, Bill C-352 retains a requirement to establish actual or likely market effects if other remedies were sought.

d. Merger Review Provisions

Like Bill C-56, the NDP bill also repeals the efficiencies defence at section 96, but unlike Bill C-56, would explicitly add “gains in efficiency” as a factor to be considered when determining whether an agreement or arrangement would substantially lessen or prevent competition in a market. The NDP bill situates consideration of efficiencies within the factor “nature and extent of change and innovation in any relevant market”. Akin to Bill C-56, the proposed bill would repeal the standalone consideration of gains in efficiencies at section 90.1(4), but makes a point to include language on efficiencies rather than housing it, as Bill C-56 did, within the catchall “any other factor that is relevant to competition in the market” at section 90.1(h).

Potentially the most controversial amendment advanced by Bill C-352 is a bright line (non-rebuttable) presumption of anti-competitive effect for mergers which result in a greater than 60% combined market share (a so-called “structural presumption”). The Commissioner may apply to the Tribunal for an order to dissolve or block a merger which results in a greater than 60% share, under the new proposed section 91.1(1). Under a new section 91.2, mergers resulting in between a 30% and 60% combined share would also be subject to such orders on application by the Commissioner, but in such cases the bright line presumption can be rebutted if the parties establish that the parties to the transaction can prove that the merger results, or is likely to result in, “substantial procompetitive outcomes.” Examples of “substantial procompetitive outcomes” include price reductions, increased quality, increased consumer choice and consumer protection, as well as labour-side effects including increased wages. Including increased wages and consumer protection as examples of pro-competitive outcomes indicates that a broad array of considerations would be taken into account when rebutting the presumption. As noted, Bill C-59 was also amended in committee in early 2024, to itself include the statutory adoption of a “structural

presumption” for mergers that meet certain structural tests, but in all cases the presumption would be rebuttable.

Bill C-352 would increase the limitation period to make applications under section 92 to three years after the completion of the merger rather than one year.

In an amendment to the *Competition Tribunal Act*, the NDP bill would repeal the ability of the Tribunal to award costs of proceedings in respect of reviewable matters under the Act.

4. Competition Bureau Enforcement Activity

a. Mergers

i. Federal Court of Appeal Ends the Rogers/Shaw Saga

On January 24th, 2023,²⁷ the Federal Court of Appeal dismissed an appeal of the Tribunal’s decision against the Commissioner’s application to block the sale of Shaw Communications Inc. (“**Shaw**”) to Rogers Communications Inc. (“**Rogers**”). The Bureau had applied to the Tribunal seeking a full block of the proposed acquisition in May 2022. On December 29th, the Tribunal issued an Information Note stating that it intended to dismiss the application and that the proposed transaction and divestiture were not likely to prevent or lessen competition substantially.²⁸ Specifically, it found that the merger—as modified by the parties after the Tribunal application had been filed in order to incorporate a sale of Shaw’s discount Freedom Mobile business to a third-party, Vidéotron, with no presence in the provinces of principal concern - would not result in materially higher prices relative to the counterfactual, nor would it materially lower levels of non-price dimensions of competition. The Commissioner appealed the Tribunal’s decision on December 30th, 2022.

On January 24th, the Federal Court of Appeal (“**FCA**”) heard and unanimously dismissed the appeal. The FCA determined that the transaction (as modified by the sale of Freedom Mobile) would not be likely to prevent or lessen competition substantially, and, in *obiter*, stated that in some key aspects of the transaction would “actually promote competition.”

The primary argument advanced by the Commissioner was that the Tribunal should have considered the merger of Rogers and Shaw without the divestiture of Freedom Mobile to Vidéotron, because (amongst other reasons), the merging parties had proposed the divestiture after his application had been filed, and the Tribunal should therefore consider only

whether the original transaction would likely be anti-competitive. He argued further that any consideration by the Tribunal of the divestiture as a remedy to a pre-closing challenge would, under the statute,²⁹ require the Commissioner's consent. In any event, if the Tribunal did consider the divestiture as relevant to the proceedings, he argued that the merging parties should bear the burden of proving that the divestiture would ameliorate any substantial lessening or prevention of competition ("SLPC") shown by the Commissioner.

As noted above, the Tribunal decided to consider only the merger subject to the simultaneous closing of the divestiture, and whether that modified transaction would likely cause an SLPC, finding that there was no possibility of the original transaction closing, and that the Commissioner had had enough warning and information that his ability to argue in the alternative that the modified transaction itself was anti-competitive had not been compromised. It also noted in obiter that in any event, even if it had considered the burden to be on the merging parties to prove the sufficiency of the divestiture as a "remedy" to the original transaction, that burden had been satisfied.

The FCA agreed with the Tribunal and stated that the burden of proof would only matter where a case is "so close that a make-weight or tie-breaker is needed" or if procedural unfairness would result otherwise, neither of which the FCA found to be true in the case at hand.³⁰ The FCA considered the Act's purpose of "efficiency" in its decision, stating that a pro-competitive transaction should not be delayed or potentially extinguished by reopening the Bureau's study and assessment of the transaction. In its reasons, the FCA did acknowledge that a change in a transaction could hypothetically be so significant that the consideration by the Tribunal of the modified transaction (i.e., closing subject to the simultaneous closing of the divestiture or other "fix") was no longer fair.

The FCA also dismissed the Commissioner's additional arguments and relied on the Tribunal's reasoning. Firstly, the Commissioner relied on *Canada (Director of Investigation and Research) v Southam Inc*³¹ to assert that the respondents were required to demonstrate that the divestiture would restore competition such that the merger's anti-competitive effects would no longer be substantial.³² To distinguish the present case, the Tribunal had noted that in *Southam*, the merger had already closed and the Tribunal could therefore order a divestiture. Further, in *Southam*, the Commissioner had already discharged his burden of demonstrating that the merger had substantially lessened competition. In the present case, the

parties had only proposed the merger and the Commissioner's assertions regarding the anti-competitive effects of the transaction had yet to be demonstrated to the Tribunal.

For a second ground of appeal, the Commissioner alleged that the Tribunal should have followed certain United States cases, which the FCA dismissed on the grounds that such cases were foreign and, further, are factually distinguishable. Thirdly, the Commissioner argued that the Tribunal had not "holistically" considered the factors of the magnitude, duration, and scope of any adverse effect on price or non-price competition under section 92 of the Act. The FCA rejected this argument as well, and again pointed to the Tribunals' reasons. The Tribunal typically considers whether material price or non-price effects would likely occur, in a material part of the relevant market for a material volume of sales, for approximately two years or more.³³ The Tribunal found that Alberta and British Columbia were the only geographic markets at issue and concluded that, after the merger, four "strong competitors" would remain in those wireless markets: Bell, Telus, Rogers and Vidéotron and Freedom. Lastly, the Commissioner argued that the Tribunal had contravened section 92(1)(f)(iii)(B), the Tribunal's remedial jurisdiction, by considering the network access agreements and pricing commitments agreed to by Vidéotron, without the Commissioner's consent. The FCA pointed out that the Tribunal had not found that there was an SLPC, such that section 92(1)(f), dealing with the remedies it could order for pre-closing challenges, was not engaged.

ii. Bureau reaches Consent Agreement with Sika AG regarding its Acquisition of MBCC Group

In February, the Bureau entered into a consent agreement with Sika AG to resolve competition concerns arising from its review of Sika AG's proposed acquisition of MBCC Group.³⁴ The proposed transaction concerned the combination of the two largest suppliers of admixture systems, and who also supply construction systems in Canada.³⁵ The Bureau found that the proposed transaction was likely to substantially lessen competition in Canada because the rivalry between these two admixture suppliers was highly beneficial to consumers in Canada.

The consent agreement required Sika AG to identify a suitable divestiture buyer who would operate at arms length from Sika AG and had no interest in the divested assets, which comprised: three production plants in Canada, ten production plants and a research and development centre in the U.S., and a global research and development centre in Germany. Under

the consent agreement, Sika AG and MBCC were required to divest further businesses as part of a broader international remedy. In the event that the divestiture is not appropriately concluded, the consent agreement gave the Commissioner powers to seek orders to complete the sale, or seek further orders as needed to ensure that the transaction is not likely to prevent or lessen competition substantially.³⁶

iii. Bureau reaches Consent Agreement with Superior Plus Corp. regarding its Acquisition of Certarus Ltd.

In May, 2023³⁷ the Bureau entered into a consent agreement with Superior Plus Corp. (“**Superior**”) with respect to its proposed acquisition of Certarus Ltd. (“**Certarus**”). Superior is an over-the-road distributor of natural gas to residential, commercial, and industrial customers. Superior uses: (i) propane distribution hubs and (ii) a fleet of smaller propane tanks that lease to retail customers for onsite storage. Certarus distributes compressed natural gas to industrial retail customers that do not have access to a natural gas pipeline. In Canada, Certarus owns six natural gas compression hubs with each tied to a third-party natural gas pipeline. At the time of closing, Superior’s and Certarus’ services overlapped in over-the-road supply of portable heating chemicals (i.e., propane and natural gas) to industrial customers in Northern Ontario that lack direct pipeline access, including mining, construction and forestry customers.

The Bureau determined that the proposed transaction, valued at approximately \$1.05 billion, would likely result in a substantial lessening of competition for the retail supply of portable heating fuels for industrial customers in Northern Ontario. The consent agreement requires that Superior sell eight (of a total of 14) propane distribution hubs in Northern Ontario, including associated customer contracts and operating assets. In coming to its decision, the Bureau considered the limited number of portable heating fuel suppliers in Northern Ontario as well as the market’s high barrier to entry.

iv. Federal Court of Appeal Upholds *Secure* Decision

In August, 2023,³⁸ the FCA dismissed Secure Energy Services Inc.’s (“**Secure**”) appeal of the Tribunal’s decision in favour of the Commissioner’s challenge of Secure’s acquisition of Tervita Corporation (“**Tervita**”). Before their merger closed on July 2nd, 2021, Secure and Tervita had been the two largest suppliers of oilfield waste services in the Western Canadian Sedimentary Basin (which houses large reserves of petroleum and natural gas) and had a close rivalry for customers. In its March 2023 decision, the

Tribunal had ordered the divestiture of 29 of Secure's facilities to resolve the substantial lessening of competition found in 136 markets.³⁹ In its decision, the Tribunal had found that Secure had not "met its burden of establishing sufficient gains in efficiency" to meet the efficiencies defence and thus exempt Secure from a section 92 divestiture order.⁴⁰

The FCA rejected all of Secure's arguments and primarily dealt with its interpretation of the now-repealed efficiencies defence. The FCA upheld the Tribunal's "order-driven approach" to section 96, under which the Tribunal recognized only the gains in efficiencies that would not likely be obtained if the remedial order was made (i.e., the "foregone efficiencies"), and those foregone efficiencies are weighed against all of the anti-competitive effects that would arise from the merger.⁴¹ Secure had argued that the "order-driven" approach results in an asymmetrical calculus, whereby only a subset of gains brought by the merger (i.e., those that would not occur but for the merger and which are made impossible to achieve by the remedial order) are weighed against all of the anti-competitive effects of the merger. Secure argued in favour of weighing all of the efficiency gains made possible by the merger against all of the anti-competitive effects. In the alternative and if the order-driven approach was taken, Secure argued that gains in efficiency should be weighed against anti-competitive effects over the same time period and in the same geographic market. The FCA stated that section 96(1) could have been worded more clearly to capture this intent, and ruled against Secure on this argument as well.

v. Bureau Issues a Report regarding the Royal Bank of Canada's proposed acquisition of HSBC Canada

In September, 2023⁴² the Bureau issued its findings with respect to the potential competitive effects of Royal Bank of Canada's ("**RBC**") proposed acquisition of HSBC Bank Canada ("**HSBC Canada**"). Its findings were provided in a report to the Minister of Finance as part of the Minister's ongoing review administered by the Office of the Superintendent of Financial Institutions.⁴³ The Bureau determined that the merger would result in a "loss of rivalry between Canada's largest and seventh-largest bank" but that this loss of rivalry was not likely to result in a substantial lessening or prevention of competition. The Bureau's findings showed that while there was some evidence HSBC Canada was a material rival to RBC in certain markets, its competitive discipline was limited relative to other, larger players. Its analysis demonstrated that the post-merger shares in most relevant markets fell below levels typically sufficient for Bureau scrutiny. The Bureau's review of "hundreds of thousands of documents" showed that

HSBC Canada had limited market penetration in most financial services and found there would continue to be effective competitors post-merger.

However, the Bureau's findings did characterize the relevant financial services market as highly concentrated, with high barriers to entry and expansion in many of the relevant markets, and that there were conditions in some markets that may facilitate coordinated behaviour amongst competitors.⁴⁴

vi. Bureau reaches a Consent Agreement with Global Fuels Inc. regarding its proposed acquisition of Greenergy's Canadian retail fuel business

In October, 2023,⁴⁵ the Bureau entered a consent agreement with Global Fuels Inc. and its affiliates ("**Global Fuels**") related to its proposed acquisition of Greenergy's Canadian retail fuel business. Global Fuels is a nationwide fuel (gasoline and diesel) distributor of fuel brands including Esso, and Mobil. Greenergy is a British supplier and distributor of petrol and diesel which operates in the U.K., Ireland, and Canada. The Commissioner's study of the transaction concluded that the proposed transaction would likely result in a substantial lessening of competition in the supply of diesel and gasoline to retail customers in Chatham, Ontario, and Picton, Ontario, respectively.⁴⁶ Through the consent agreement, the Commission required Global Fuels to assign certain motor fuel supply agreements in the contested areas to an approved divestiture buyer or buyers.

b. Abuse of Dominance

vii. Quebec Professional Association for Real Estate Brokers

In February, 2023,⁴⁷ the Bureau successfully obtained a court order for the production of records in relation to its investigation into certain conduct of the Quebec Professional Association for Real Estate Brokers ("**QPAREB**") which it alleged may be contrary to the abuse of dominance and restrictive trade practices of the Act. QPAREB operates the multiple listing service (MLS) that real estate brokers rely upon for real estate transaction data. The Bureau's investigation concerns some of QPAREB's practices related to real estate data sharing restrictions which may have harmed competition in the real estate brokerage services market or prevented the development of innovative online brokerage services in Quebec.

viii. Isologic Innovative Radiopharmaceuticals Inc.

In March, 2023,⁴⁸ the Bureau entered into a consent agreement with Iso-logic Innovative Radiopharmaceuticals Inc. (“**Isologic**”) regarding certain of its contracting practices found to contravene the abuse of dominance provisions of the Act. Isologic is a dominant player in the supply of radio-pharmaceuticals used for imaging scans called single photon emission computed tomography (also known as “SPECT”) in Canada. The consent agreement follows the Bureau’s investigation into Isologic’s contractual practices of requiring customers to purchase products exclusively from Isologic, as well as requiring minimum purchases, automatic renewals, and termination fees.⁴⁹ The Bureau first launched its investigation into Isologic’s contracting practices in 2021, interviewing stakeholders such as hospitals, health clinics, and hospital buying groups. Per the consent agreement, Iso-logic agreed to cease using terms that require the customer to purchase products exclusively from Isologic. The consent agreement also requires Isologic to include a clause allowing a customer to terminate any contract that is longer than one year prior to its expiry.

ix. Dominion Lending Centres

In May, 2023,⁵⁰ the Bureau obtained a court order in relation to its investigation into Dominion Lending Centres Inc. (“**DLC**”). DLC is a service provider to mortgage brokers in Canada which specializes in technology and support services. The Bureau’s investigation concerned DLC’s alleged anti-competitive conduct contrary to the restrictive trade practices and abuse of dominance provisions of the Act. DLC’s impugned practices concern limiting mortgage brokers from using other technology services. The court order required DLC to produce records and written information relevant to the investigation.

c. Bid-Rigging and Conspiracy

The Bureau has continued to investigate and pursue bid-rigging and conspiracy charges (sections 47 and 45). It also introduced a pro-active risk assessment tool for procurement agents in June 2023. The user responds to a brief questionnaire and receives a “collusion risk score” based on their project. The tool provides recommendations on how to minimize collusion risk and directs users to reporting mechanisms for suspected wrongdoing.

x. BPR-Infrastructure Inc.

In March, 2023,⁵¹ the Superior Court of Québec ordered BPR-Infrastructure Inc., an engineering firm, to pay \$485,000 for engaging in bid-rigging related to consulting engineering services for municipal infrastructure contracts in Québec. The order was part of a settlement that required BPR-Infrastructure Inc. to follow a compliance program and implement control procedures. The BPR-Infrastructure Inc. settlement was the seventh and final such settlement following the Bureau's investigation into a bid-rigging scheme targeting municipal infrastructure contracts, which involved settlement payments of a total of \$12,535,000 from CIMA+, Dessau, Genivar (now WSP Canada), Roche Ltée, Groupe-conseil (now Norda Stelo Inc.), SNC-Lavalin, and Génus Conseil Inc.

xi. Canada Bread

In June, 2023,⁵² the Ontario Superior Court fined Canada Bread Company, Limited (“**Canada Bread**”) \$50 million for its participation in a criminal price-fixing arrangement—the highest fine imposed by a Canadian court for conspiracy or bid-rigging. The arrangement raised the wholesale price of fresh commercial bread in 2007 and again in 2011. Canada Bread pleaded guilty to four counts of conspiracy, admitting to an arrangement with competitor Weston Foods (Canada) Inc. (Weston) to increase the prices of commercial bread. Due to its cooperation with the Bureau's investigation, the Bureau recommended that Canada Bread receive leniency in sentencing, in accordance with the Bureau's leniency program and in light of its ongoing cooperation with the Bureau investigation. The investigation into alleged conspiracy by other companies such as Metro Inc., Sobeys Inc., Wal-Mart Canada Corporation, Giant Tiger Stores Limited and Maple Leaf Foods Inc., is ongoing.

The Bureau initiated its investigation in 2015. Weston and Loblaw Companies Limited (Loblaw) received immunity from prosecution for first reporting the arrangement to the Bureau and their ongoing cooperation. In December of 2017, Weston and Loblaw publicly announced their participation in the price-fixing arrangement.

xii. Nippon Yusen Kabushiki Kaisha and Kawasaki Kisen Kaisha, Ltd.

In August, 2023,⁵³ the Ontario Superior Court fined two Japanese shipping companies for participating in an international conspiracy resulting in a reduction in the shipment of vehicles to Canada. Nippon Yusen Kabushiki

Kaisha (“**NYK**”) and Kawasaki Kisen Kaisha, Ltd. (“**K-Line**”) were respectively fined \$1.5 million and \$460,000. NYK and “**K-Line**” admitted to increasing base freight rates for certain suppliers. “**K-Line**” also admitted to entering a bid-rigging agreement involving a General Motors tender for the supply of cargo shipping services to Canada between 2011 to 2012. Due to their cooperation with the Bureau’s investigation, NYK and “**K-Line**” received leniency in their sentencing.

xiii. Paving Contracts Awarded by the ministère des Transports du Québec

In September, 2023,⁵⁴ two executives were criminally charged in connection with bid-rigging for paving contracts. The Bureau’s evidence suggests that Marcel Roireau, former Vice President of Operations for Construction DLJ Inc. and Serge Daunais, former Vice President, Secretary and General Manager for Pavages Maska Inc. participated in an illegal agreement with competitors. The agreement involved submitting cover bids in response to tender requests issued by the ministère des Transports du Québec for the Montérégie region in 2008.

xiv. Inter-Cité Construction Ltée

In October, 2023,⁵⁵ Inter-Cité Construction Ltée (Inter-Cité) was required to pay \$150,000 for allocating territories for paving contracts awarded by the ministère des Transports du Québec with a competitor. As part of the settlement between Inter-Cité and the Public Prosecution Service of Canada, Inter-Cité implemented a corporate compliance program to prevent employees from participating in anti-competitive activities.

xv. Engineering firm Teknika HBA Inc. (now Les Services EXP Inc.)

In October, 2023,⁵⁶ Teknika HBA Inc. (“**Teknika**”), now Les Services EXP Inc., was ordered to pay \$200,000 as part of its settlement with the Public Prosecution Service of Canada. This is the eighth settlement agreement reached related to the Bureau’s ongoing investigation of a bid-rigging scheme targeting municipal infrastructure contracts between 2004 and 2011 in Québec City and Montréal, for a total of \$12,735,000. The fine comprises part of a settlement reached between the Public Prosecution Service of Canada and Teknika. The settlement also requires the engineering firm to follow a compliance program and implement control procedures to monitor the program’s effectiveness.

xvi. Richard Dionne and Richard Labelle

In October, 2023,⁵⁷ two individuals were criminally charged in connection with big-rigging on public road and culvert work on Guy-Lafleur Highway (then Highway 50), in Gatineau, Québec. The Bureau said that its evidence suggests that Richard Dionne, former General Manager of Sales for Québec and Ontario for the Coco Asphalt division of Coco Paving Inc., and Richard Labelle, former Sales Manager for Québec for Coco Asphalt, agreed to rig bids submitted in response to tender requests from the ministère des Transports du Québec.

xvii. Quebec City infrastructure contracts

In November, 2023,⁵⁸ two individuals were criminally charged in connection with an alleged bid-rigging conspiracy for Québec City infrastructure contracts between September 2006 and November 2010. The Bureau said that its evidence suggests that Patrice Mathieu, former Vice President of Tecslut Inc. (now Consultants AECOM Inc.), and André Côté, former Vice President of Roche Ltée, Groupe-conseil (now Norda Stelco Inc.), participated in a bid-rigging scheme that divided municipal infrastructure contracts among their respective consulting engineering firms.

d. Deceptive Marketing & Misleading Representation

i. Cineplex

In May, 2023,⁵⁹ the Bureau filed an application with the Tribunal alleging that Cineplex engaged in a practice of drip pricing in the online sale of movie theatre tickets. This is the first application since the 2022 amendments which deemed drip pricing to be false or misleading representations. The Bureau contends that online purchasers on the Cineplex website and application encountered a mandatory “online booking fee” that was added to ticket purchases without adequate disclosure and that Cineplex had generated significant revenues since introducing this fee in June, 2022. The Bureau’s application sought to: (1) stop Cineplex from continuing its deceptive advertising conduct; (2) impose on Cineplex an administrative monetary penalty; and (3) pay restitution to affected customers who purchased tickets from Cineplex online.

ii. Dufresne Group

In September, 2023,⁶⁰ the Bureau concluded an investigation into marketing practices used by The Dufresne Group Inc. and its affiliates (“TDG”)

in their retail brand stores to suggest significant savings to consumers. The Bureau concluded that TDG stores listed products at inflated regular prices enabling them to advertise actual prices as discounted to consumers. The Bureau concluded these practices gave a false or misleading impression to consumers that these “discounted” prices would not be available after a certain time. TDG employed these tactics on their websites, in-store and in various other advertising channels. TDG cooperated and settled with the Bureau, agreeing to: (1) pay a \$3.25 million penalty and \$100,000 towards the Bureau’s costs; (2) commit to marketing practices which comply with the Act; and (3) establish and maintain a corporate compliance program.

iii. Online business directories case

In April, 2023,⁶¹ the Bureau concluded its investigation into Terry Croteau’s use of deceptive telemarketing and false or misleading statements to convince Canadians to sign up for an online directory scam. Terry Croteau was sentenced under the deceptive marketing provisions of the Act for promoting his business directories through misleading statements. Croteau made misleading statements which misrepresented the identity of the caller, the purpose of the call, and the price of the services offered. He pled guilty on October 25, 2022, in the Ontario Superior Court of Justice Croteau was concurrently sentenced under the *Criminal Code of Canada* for defrauding Canadians, to 30 months in prison and the payment of a \$1.28 million fine in restitution, as well as a fine in lieu of forfeiture of \$12,466. Croteau is also prohibited from being involved in telemarketing or marketing by mail in the future.

iv. TicketNetwork

In November, 2023,⁶² the Bureau reached an agreement with TicketNetwork following its investigation into TicketNetwork’s alleged practices in its online event ticket resale business. The Bureau’s investigation concluded that TicketNetwork engaged in drip pricing for event tickets, by charging mandatory fees in addition to the advertised price, adding 38% on average and up to 52% to the advertised price. Secondly, the Bureau found that TicketNetwork advertised unobtainable discounts, and advertised (but did not clarify) that ticket prices to Canadian events were in U.S. dollars rather than Canadian currency. Thirdly, the Bureau found that TicketNetwork used misleading digital content to imply the tickets were sold directly from the venue, artist, or sports team rather than for resale.

As part of the agreement, TicketNetwork agreed to: (1) pay a \$825,500 penalty; (2) not engage in the impugned practices, and (3) establish a

compliance program, implementing new procedures to comply with the law and prevent further advertising issues in the future.

v. Rogers—Telecom services

In December, 2023,⁶³ the Bureau obtained a court order from the Federal Court of Canada to advance a civil deceptive marketing investigation into alleged marketing practices undertaken by Rogers Communications Inc. and its subsidiary, Rogers Communications Canada (together, “Rogers”). The order requires Rogers to produce records and information relating to claims Rogers made when promoting its Infinite wireless phone plans. The Bureau is specifically concerned about allegations that the unlimited data plans were coupled with reductions in data speed after a subscriber reached a certain data cap, a practice known as throttling, without adequate disclosure.

vi. Mobile Music App

In December, 2023,⁶⁴ the Bureau reached an agreement with Amp Me Inc., a mobile application operating in Canada and the U.S., to address the Bureau’s concerns about false and misleading claims made to the public regarding the price of the application and its reviews. Individuals can use Amp Me Inc. to synchronize and play music from multiple devices to amplify the sound. The Bureau’s investigation revealed that the company allegedly purchased positive reviews from third-parties between 2019 and 2022, creating a false or misleading general impression among the public and influencing the application’s overall ranking among other applications. Secondly, some claims created the false impression that the app was available free of charge, when it was in fact subject to a free trial, with charges after the trial ended.

As part of the settlement, Amp Me Inc. agreed to: (1) pay a partial penalty of \$310,000 upon signing the agreement in satisfaction of an imposed penalty of \$1,500,000 (the Bureau considered the company’s limited ability to pay a penalty); (2) pay \$40,000 to cover the Bureau’s investigation costs; (3) agree to ensure their marketing practices are compliant with the *Act*, and (4) establish and maintain a corporation compliance program.

5. New Guidelines and Bulletins

a. Enforcement Guidelines on Wage-fixing and No-poaching Agreements

The criminalization of wage-fixing and no-poaching agreements was passed in Bill C-19 in June of 2022 and came into force on June 23rd, 2023. The amendment made it *per se* illegal for unaffiliated employers to enter into an agreement to fix, maintain, decrease or control wages or terms of conditions of employment, or to solicit or hire each other's employees. Contravention of the criminal conspiracy provision is subject to imprisonment for up to 14 years or to an uncapped fine determined at the discretion of the court. Agreements entered into, on, or after June 23rd, 2023 and conduct which reaffirms or implements older agreements are both caught by the new criminalization provision.

On January 18th, 2023, the Bureau released draft enforcement guidance for public consultation until March 24th.⁶⁵ The enforcement guidelines were published on May 30th with minimal changes.⁶⁶ The guidelines clearly state that the criminal provisions target “naked restraints” on competition, as well as clarify some ambiguities in the new provision. Namely, “terms and conditions” are defined as terms and conditions that could affect a person's decision to enter or remain in an employment contract, a broad concept which could include job descriptions, non-monetary compensation, and return-to-office policies, amongst other things. “Employer” and “employee” are not defined under the Act. The guidelines define “employers” as “directors, officers, as well as agents or employees, such as human resource professionals.” Additionally, the guidelines indicate that determining whether an employer-employee relationship exists will be a question of fact and law. The application of the wage-fixing and no-poaching provisions will show whether a degree of seniority, or ability to affect personnel decisions, is required to establish a person's status as an “employer.”

The guidelines also provide hypothetical scenarios to clarify the impugned conduct. Amongst other things, the examples illustrate that the Bureau considers that the provision only applies to reciprocal agreements between employers not to solicit or not to hire: a one-way no poach agreement is not *per se* illegal. For example, Company A can legally commit to not hire employees seconded from Company B, if Company B does not put an agreement in place to prevent hiring employees from Company A.

The guidelines clearly state that the ancillary restraints defence (*i.e.*, the restraint is directly related to, and reasonably necessary for giving effect to,

the objective of the broader or separate agreement) also applies to wage-fixing or no-poach agreements. “Other legal defenses,” notably the regulated conduct defence (*i.e.*, the action in question is required or authorized by law), are also potentially available.

b. Draft Bulletin regarding 2022 Amendments to Abuse of Dominance Provisions

The Bureau published a draft “Bulletin on Amendments to the Abuse of Dominance Provisions” on October 25, 2023⁶⁷ for open consultation until December 2023. The Bulletin provides guidance on the June 2022 amendments to the abuse of dominance provisions. Amongst other things, the Bulletin explains that an “anti-competitive act” is any act intended to (i) have a negative predatory, exclusionary, or disciplinary effect on a competitor, or (ii) harm competition. The Bureau lists the following types of conduct that it views as potentially intended to harm competition as opposed to competitors: certain agreements with competitors, sharing competitively sensitive information, contracts that reference rivals such as most-favoured nation clauses, and serial acquisitions. The Bulletin provides a set of “hypothetical examples” to illustrate how the Bureau will apply the amended law to these types of conduct.

The consultation period for the Draft Bulletin was marked by the significant changes to the abuse of dominance provisions pursuant to Bill C-56 introduced in late November and enacted by mid-December. It remains to be seen whether the Bureau will reintroduce or replace the Draft Bulletin with a guidance document encompassing the 2022 and 2023 (and possibly additional) amendments to the abuse of dominance regime.

6. Bureau Submissions and Reports

a. 2023–2024 Annual Plan: Driving Competition Forward

In April, 2023, the Commissioner released the Bureau’s Annual Plan for 2023–2024, titled “Driving competition forward for all Canadians.”⁶⁸ The Bureau’s strategic objectives for the year included taking timely action on issues important to Canadians, increasing proactive enforcement (including being ready to bring cases to court), and leading the gathering and analysis of data and digital evidence, using the expertise of the Digital Enforcement and Intelligence Branch. Its last articulated strategic vision objective ties into its formal market study power received toward the end of the year. In its annual report, the Bureau stated that it would encourage policymakers and

regulators to adopt pro-competitive policies, including by hosting a Competition Policy Summit. The Summit was held on October 5th, 2023.

Other priorities highlighted by the Bureau included creating and deepening international and domestic relationships to facilitate enforcement and share intelligence.

b. Submission to Health Canada re. stronger competition in the cannabis industry

In May, 2023, the Bureau published the results of its review of competition in Canada's cannabis industry (commenced in the fall of 2022).⁶⁹ Health Canada undertook a review of the *Cannabis Act*, which has as one of its objectives the "establishment of a diverse and competitive legal industry made up of small and large players to displace the illicit market."⁷⁰ As this is a shared objective with the Bureau's mandate, the Bureau undertook a corresponding review to better understand the competitive dynamics of Canada's cannabis industry, identify any aspects of the *Cannabis Act* which may impede competition, innovation, and choice, and propose recommendations to Health Canada to strengthen competition in the cannabis industry. The scope of the Bureau's recommendations and review was limited to federal matters under mandates of the Minister of Health and Minister of Health and Addictions.

The Bureau recommended Health Canada review the cannabis licensing process and compliance costs. Secondly, it recommended that Health Canada should consider adjusting THC limits on edible products to create better product substitution between the legal and illegal cannabis markets. Thirdly, the Bureau suggested that Health Canada ease restrictions on the marketing of cannabis products to provide greater information to consumers.

The Bureau's findings drew from public information as well as confidential information shared with the Bureau by industry stakeholders through interviews with the Bureau.

c. Submission to CRTC on wholesale high-speed Internet access service framework

In June 2022, the Commissioner intervened in the proceeding initiated by Telecom Notice of Consultation CRTC 2023-56.⁷¹ The CRTC had invited responses to questions on topics related to the existing wholesale high-speed access (HSA) framework. The Bureau responded under its mandate

to advocate for the benefits of a competitive marketplace. The Bureau provided considerations for the design of the framework and identified ways to boost competition amongst Internet providers.

Per its submission, the Bureau views wholesale access as a means to promote competition in the provision of telecommunications services across Canada. The Bureau provided a suggested approach to assess the level of competitive intensity in the Canadian telecoms industry, through the comparison of price, network quality and deployment. The Bureau responded to certain questions of the CRTC on the wholesale HSA framework and provided its analysis of the impact on competition of mandating aggregate access to fibre-to-the-premises (“FTTP”) facilities, which the CRTC had put forward as its preliminary view.

Further, the Bureau suggested to the CRTC’s consideration other means of intensifying competition for fixed Internet services, namely, to minimize switching costs. The Bureau asserted that the CRTC should first update its wholesale HSA framework before shifting to retail regulation in the interests of maintaining competition.

d. Grocery Study Market Report

In its market study report titled “*Canada Needs More Grocery Competition*” dated June 27, 2023, the Bureau made a number of recommendations designed to foster greater competition in the grocery sector.⁷² The Bureau asserted that there is room for more vigorous competition because profit margins for grocers has increased by 1-2% since 2017, which represents appreciable increase of approximately \$1 billion in gross profit based on the size of the overall grocery industry (approximately \$110 billion per year).⁷³ In its study, the Bureau provided a summary of consolidation in Canada’s grocery sector, including its own involvement through merger review. Notably, eight large grocery chains operated in Canada in 1986 relative to the five major chains operating in 2023. The Bureau stated that it had reviewed fifteen mergers in the sector between 1986 and 2023 and had required remedies including the sale of certain stores to independent grocery sellers, the divestiture of warehouses, and had prohibited a buyer from entering into certain agreements with suppliers for a prescribed time period.

The Bureau drew conclusions about the patterns in Canadian’s purchasing habits, namely that proximity of grocery stores to a shopper’s home mattered, greater choice was available in urban areas, online grocery shopping was increasing in popularity, and loyalty programs drove consumer choice. It made four key recommendations, firstly suggesting provincial,

territorial, and federal governments each adopt a “Grocery Innovation Strategy” to support entry by new and international grocery competitors and the growth of independent grocers, by modernizing regulatory requirements which currently present obstacles. The Bureau suggested the government also create grants and incentive programs for independent grocers, entrants, and discount stores to compete with the “grocery giants.” Thirdly, the Bureau suggested harmonizing unit pricing across provincial and territorial stores to encourage consumers to more easily compare prices. Lastly, the Bureau suggested limiting or banning outright existing property controls which can, it alleged, make it difficult for grocery stores to lease space close to a competitor. For example, an incumbent grocery retailer may lease the anchor store of a shopping centre and prohibit the centre’s landlord from leasing space to other grocery stores. The recently passed expansion to the civil collaborations provision to include non-competitors was meant in part to target such restrictive covenants imposed by landlords.

The Bureau made commitments to promoting competition in the Canadian grocery industry, namely, to take special care when dealing with the industry, supporting the implementation of Canada’s Grocery Code of Conduct (currently under development), and revisiting the study in three years from its publication to check progress on implementation.

e. Competition in Canada from 2000 to 2020: An Economy at a Crossroads

In October 2023, the Bureau released a report on trends in competition in Canada over the past two decades.⁷⁴ Its overarching conclusion was that Canada’s competitive intensity had declined over this period, highlighting its support for amendments to Canada’s competition laws. This report was released just shy of one month after the first reading of Bill C-56 and set the stage to usher in the new amendments.

The Bureau drew four major conclusions from its study of the Canadian economy between 2000 and 2020. Firstly, it concluded that concentration levels in the most concentrated industries had increased over the two past two decades and that more industries had become highly concentrated. Secondly, it found that rank stability had increased, concluding that top players were being decreasingly challenged by competitors. In support of this contention, it found that fewer firms had entered and exited markets, and survival rates had increased. Lower entry means industries are less dynamic, such that incumbent players are not required to innovate or compete on price as much in order to remain secure in the market. The Bureau found

that there was a slight reduction in economies of scale, indicating that larger firms were not as efficient as smaller ones. Lastly, profits, profit elasticity, and markups all rose over the period, indicating to the Bureau that there is room for greater competition on price to limit profits.

7. Private Applications and Actions

On September 29, 2023, Apotex Inc. (“**Apotex**”) brought the first private application for leave to seek an order under the abuse of dominance provisions. As of the 2022 amendments, the Tribunal may grant leave to commence an application under section 79 if the Tribunal has reason to believe that the applicant would be “directly and substantially affected” in its business by the conduct at issue.

Apotex planned to manufacture and supply a generic version of a branded leukemia treatment. Health Canada approval for generic drugs requires demonstration that they are a bioequivalent to an approved branded product, proof of which requires that the generic have access to samples of the branded product. The Bureau has previously identified that tactical delays or denial of the provision of drug samples to a generic company may raise issues under section 79. Apotex alleged that the respondents, including Takeda Pharmaceutical U.S.A. Inc. and its Canadian distributor, Paladin Labs Inc., had repeatedly refused to provide Apotex the required samples of their branded leukemia treatment by contending there was insufficient market supply, and that they required Apotex to apply to Paladin for a line of credit.

In its leave application, Apotex confronted Tribunal decisions outside of the section 79 context that held that the necessary “substantial effect” on a business must be measured in the context of the entire business and not with respect to the effect on a product line or segment. Ultimately, this issue was not determined as Apotex discontinued its application on October 13, 2023, apparently because it had secured the supply of the required samples from one of the respondents. Of note, amendments proposed under Bill C-59 would relax the leave standard by allowing applicants to demonstrate a substantial effect on the whole *or part* of a business and alternatively, granting leave where to do so is in the public interest.

8. Conclusion

2023 witnessed the continued overhaul of the competition regime in Canada, with significant further changes expected to be enacted in 2024. With high interest rates and inflation, Canada’s competitive intensity was

on the forefront of Canadian's minds and, accordingly, became a high priority for its politicians. The *Competition Act* has, as a result, seen extensive changes impacting virtually every major facet of the Act: the loss of the efficiencies defence impacts merger review, the civil collaborations provisions have expanded to include agreements between "non-competitors," the abuse of dominance test has been wholly restructured, and the effects of the criminalization of wage-fixing and no-poaching agreements are being realized in the marketplace. The Bureau has arguably become more litigious, appealing the Rogers/Shaw decision and successfully arguing to uphold the Tribunal's decision in *Secure*. Without a doubt, competition law has become increasingly swayed by public discourse, with the Bureau publishing market studies in areas such as the grocery industry, telecoms, financial services, and cannabis. Parliament, aligned with the Bureau, clearly intends to continue modernizing the Act to facilitate enforcement actions by the Commissioner. As competition law becomes increasingly embedded in—and shaped by—popular discourse, it is important to ensure that stakeholders use their voices to ensure reform is balanced against commercial interests and that appropriate checks and balances against the arbitrary use of government authority are retained. We can expect vigorous debate as we learn to maneuver our new competition regime and drive toward pro-competitive outcomes.

ENDNOTES

¹ Kevin Wright is a partner with DLA Piper LLP and Reba Nauth is an associate with Osler, Hoskin & Harcourt LLP. The views expressed are those of the authors alone.

² Innovation, Science, and Social Development Canada, “Minister Champagne maintains the Competition Act’s merger notification threshold to support a dynamic, fair and resilient economy” (7 February 2022), online (news release): <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/02/minister-champagne-maintains-the-competition-acts-merger-notification-threshold-to-support-a-dynamic-fair-and-resilient-economy.html>>.

³ See *Competition Act*, RSC 1985, c C-34, ss 74.1(c), 79(3.1) [*Competition Act*].

⁴ ISED, “Future of Canada’s Competition Policy Consultation—What We Heard Report” (20 September 2023), online: <<https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report>>.

⁵ Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to on 15 December 2023).

⁶ Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023 (assented to on 20 June 2024).

⁷ Bill C-352, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess, 44th Parl, 2023 (second reading on 7 February 2024).

⁸ Competition Bureau Canada, “Submission on The Future of Canadian Competition Policy” (15 March 2023), online: <<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>>.

⁹ C.D. Howe Institute Competition Policy Council, “Competition Bureau Should not Have Power to Compel Information for Market Studies” (4 May 2017), online (pdf): <https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2017_0501_CPC.pdf>.

¹⁰ Bill C-56 passed in early 2024 with minor changes to the procedure surrounding the Bureau’s market study powers.

¹¹ *Competition Act*, *supra* note 4, ss 10.1(1) and (2).

¹² Shuli Rodal et al., “Bill to amend the Competition Act introduced in Parliament” (28 September 2023), online: <<https://www.osler.com/en/resources/regulations/2023/bill-to-amend-the-competition-act-introduced-in-parliament>>.

¹³ *Competition Act*, *supra* note 4, ss 10.1(3), 10.1(4).

¹⁴ Under section 10(b), the Commissioner may commence an inquiry where he has “reason to believe” that a crime has been or is about to be committed, that there are grounds for making of an order under Parts VII.1 or VIII or that an order under the Act has been contravened.

- ¹⁵ Competition Bureau Canada, “Canada Needs More Grocery Competition: Retail Grocery Market Study Report” (27 June 2023), online (pdf): <<https://competition-bureau.canada.ca/sites/default/files/attachments/2023/CB-Retail-Grocery-Market-Study-Report-EN-2023-06-23.pdf>> [Retail Grocery Market Study].
- ¹⁶ Competition Bureau Canada, “Report to the Minister of Finance Regarding the Proposed Acquisition of HSBC Bank Canada by Royal Bank of Canada” (1 September 2023), online (report): <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/report-minister-finance-regarding-proposed-acquisition-hsbc-bank-canada-royal-bank-canada>>.
- ¹⁷ Competition Bureau Canada, “Intervention to the CRTC on the Review of the wholesale high-speed access service framework” (22 June 2023), online: <<https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/intervention-crtc-review-wholesale-high-speed-access-service-framework>>.
- ¹⁸ Competition Bureau Canada, “Competition Bureau provides recommendations to improve competition in the cannabis industry” (26 May 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/05/competition-bureau-provides-recommendations-to-improve-competition-in-the-cannabis-industry.html>>.
- ¹⁹ Competition Bureau Canada, “Market Studies Information Bulletin” (19 September 2018), online: <<https://competition-bureau.canada.ca/market-studies-information-bulletin>>.
- ²⁰ Deputy Prime Minister of Canada, “Government introduces legislation to build more rental homes and stabilize grocery prices” (September 21, 2023), online (news release): <<https://deputyprime.minister.gc.ca/en/news/news-releases/2023/09/21/government-introduces-legislation-build-more-rental-homes-and>>; See also Retail Grocery Market Study, *supra* note 16 at 28–29.
- ²¹ Canadian Bar Association, “Bill C-56 - Affordable Housing and Groceries Act” (November 2023) at 17, online (pdf): <<https://www.cba.org/CMSPages/GetFile.aspx?guid=3af1c736-8eea-41ba-9c8a-add6c5b6f1e3>>.
- ²² Competition Bureau Canada, “Competitor Collaboration Guidelines” (6 May 2021), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines>>.
- ²³ Shuli Rodal et al., “First round of proposed amendments to the Competition Act revealed” (2 May 2022), online: <<https://www.osler.com/en/insights/updates/first-round-of-proposed-amendments-to-the-competition-act-revealed/>>.
- ²⁴ Competition Bureau Canada, “Guide to the December 2023 amendments to the Competition Act” (13 December 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act>>.
- ²⁵ Shuli Rodal et al., “Important changes to the Competition Act, including the abuse of dominance provisions, now in effect” (18 December 2023), online: <<https://www.osler.com/en/resources/regulations/2023/>>

[important-changes-to-the-competition-act-including-the-abuse-of-dominance-provisions-now-in-effect](#)>.

²⁶ Article 102 of the Treaty on the Functioning of the European Union provides that “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantive part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in, (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ...”

²⁷ Competition Bureau Canada, “Statement from the Commissioner of Competition on the Federal Court of Appeal’s decision regarding the Rogers-Shaw merger” (24 January 2023), online (bureau statement): <<https://www.canada.ca/en/competition-bureau/news/2023/01/statement-from-the-commissioner-of-competition-on-the-federal-court-of-appeals-decision-regarding-the-rogers-shaw-merger.html>>.

²⁸ Competition Tribunal, “Rogers-Shaw—Summary of Decision” (29 December 2022), online (information note): <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521164/index.do>>.

²⁹ *Competition Act*, *supra* note 4, s 92 permits the Tribunal to order different types of remedies, depending on whether the merger being challenged has already closed or is merely proposed. In particular, for pre-closing challenges, it may order a partial or full block of the transaction or make the full or partial closing conditional on another type of prohibition order, but affirmative actions such as divestitures can only be ordered with the consent of the merging parties and the applicant (i.e., the Commissioner).

³⁰ *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2023 FCA 16 at para 14 [Rogers].

³¹ *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 [Southam].

³² *Ibid* at para 20.

³³ *Rogers*, *supra* note 31 at paras 136-139.

³⁴ Competition Bureau Canada, “Competition Bureau reaches agreement with Sika AG to preserve competition in Canada’s admixture systems market” (23 February 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/02/competition-bureau-reaches-agreement-with-sika-ag-to-preserve-competition-in-canadas-admixture-systems-market.html>>.

³⁵ Admixture systems are products that alter concrete to improve and protect buildings and structures.

³⁶ See *Commissioner of Competition v Sika AG* (21 February 2023), CT-2023-001 (Revised Registered Consent Agreement) at para. IX, 38.

³⁷ Competition Bureau Canada, “Competition Bureau statement regarding the acquisition by Superior of Certarus” (31 May 2023), online (bureau statement): <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competition-bureau-statement-regarding-acquisition-superior-certarus>>.

³⁸ Competition Bureau Canada, “Federal Court of Appeal upholds Competition

Bureau's successful challenge of Secure and Tervita merger" (2 August 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/08/federal-court-of-appeal-upholds-competition-bureaus-successful-challenge-of-secure-and-tervita-merger.html>>.

³⁹ *Canada (Commissioner of Competition) v Secure Energy Services Inc.* (3 March 2023), 2023 Comp Trib 2 (Order and Reasons for Order (Public)) at para 1.

⁴⁰ *Secure Energy Services Inc. v Canada (Commissioner of Competition)*, 2023 FCA 172 at para 4.

⁴¹ *Ibid* at para 12.

⁴² Competition Bureau Canada "Competition Bureau issues report summarizing its competition assessment of RBC's proposed acquisition of HSBC Canada" (1 September 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/09/competition-bureau-issues-report-summarizing-its-competition-assessment-of-rbcs-proposed-acquisition-of-hsbc-canada.html>>.

⁴³ The Competition Bureau grants primary jurisdiction to permit mergers between financial institutions to the Minister of Finance, relegating the results of the Competition Bureau's inquiry to that of advice to the Minister of Finance.

⁴⁴ Competition Bureau Canada, "Report to the Minister of Finance Regarding the Proposed Acquisition of HSBC Bank Canada by Royal Bank of Canada" (1 September 2023), online (report): <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/report-minister-finance-regarding-proposed-acquisition-hsbc-bank-canada-royal-bank-canada#sec000>>.

⁴⁵ Competition Bureau Canada, "Competition Bureau resolves competition concerns with Global Fuels acquisition of Greenergy's retail fuel business" (26 October 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/10/competition-bureau-resolves-competition-concerns-with-global-fuels-acquisition-of-greenergys-retail-fuel-business.html>>.

⁴⁶ *Commissioner of Competition v Global Fuels Inc.* (25 October 2023), CT-2023-008 (Registered Consent Agreement) at para B.

⁴⁷ Competition Bureau Canada, "Competition Bureau obtains court order to advance an investigation of competition in the Quebec real estate services market" (20 February 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/02/competition-bureau-obtains-court-order-to-advance-an-investigation-of-competition-in-the-quebec-real-estate-services-market.html>>.

⁴⁸ Competition Bureau Canada, "Competition Bureau reaches agreement with Isologic to protect competition in healthcare" (24 March 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/03/competition-bureau-reaches-agreement-with-isologic-to-protect-competition-in-healthcare.html>>.

⁴⁹ Competition Bureau Canada, "Competition Bureau statement regarding its investigation into Isologic's contracting practices in the supply of radiopharmaceuticals" (24 July 2023), online (bureau statement):

<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competition-bureau-statement-regarding-its-investigation-isologics-contracting-practices-supply>>.

⁵⁰ Competition Bureau Canada, “Competition Bureau obtains court order to advance an investigation of Dominion Lending Centres” (19 May 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/05/competition-bureau-obtains-court-order-to-advance-an-investigation-of-dominion-lending-centres.html>>.

⁵¹ Competition Bureau Canada, “BPR to pay \$485,000 following seventh Québec bid-rigging settlement” (23 March 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/03/bpr-to-pay-485000-following-seventh-quebec-bid-rigging-settlement.html>>.

⁵² Competition Bureau Canada, “Canada Bread sentenced to \$50 million fine after pleading guilty to fixing wholesale bread prices” (21 June 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/06/canada-bread-sentenced-to-50-million-fine-after-pleading-guilty-to-fixing-wholesale-bread-prices.html>>.

⁵³ Competition Bureau Canada, “NYK and “K” Line fined for international conspiracy to reduce competition in vehicle shipping services to Canada” (17 August 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/08/nyk-and-k-line-fined-for-international-conspiracy-to-reduce-competition-in-vehicle-shipping-services-to-canada.html>>.

⁵⁴ Competition Bureau Canada, “The Competition Bureau lays charges against two executives in a bid-rigging case in Montérégie” (19 September 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/09/the-competition-bureau-lays-charges-against-two-executives-in-a-bid-rigging-case-in-monteregie.html>>.

⁵⁵ Competition Bureau Canada, “Inter-Cité Construction to pay \$150,000 in territory allocation settlement” (20 October 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/10/inter-cite-construction-to-pay-150000-in-territory-allocation-settlement.html>>.

⁵⁶ Competition Bureau Canada, “Teknika HBA Inc. to pay \$200,000 in settlement over bid-rigging on municipal contracts in Québec” (20 October 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/10/teknika-hba-inc-to-pay-200000-in-settlement-over-bid-rigging-on-municipal-contracts-in-quebec.html>>.

⁵⁷ Competition Bureau Canada, “Two individuals charged with conspiracy to rig bids for public road work on Highway 50 in Outaouais” (24 October 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/10/two-individuals-charged-with-conspiracy-to-rig-bids-for-public-road-work-on-highway-50-in-outaouais.html>>.

⁵⁸ Competition Bureau Canada, “Two individuals charged with conspiracy to rig bids for Québec City infrastructure contracts” (14 November 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/11/>

[two-individuals-charged-with-conspiracy-to-rig-bids-for-quebec-city-infrastructure-contracts.html](#)>.

⁵⁹ Competition Bureau Canada, “Competition Bureau sues Cineplex for allegedly advertising misleading ticket prices” (18 May 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/05/competition-bureau-sues-cineplex-for-allegedly-advertising-misleading-ticket-prices.html>>.

⁶⁰ Competition Bureau Canada, “The Dufresne Group to pay \$3.25 million penalty to settle Competition Bureau concerns over marketing claims” (27 September 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/09/the-dufresne-group-to-pay-325-million-penalty-to-settle-competition-bureau-concerns-over-marketing-claims.html>>.

⁶¹ Competition Bureau Canada, “30 Months in jail and \$1.28 million in restitution ordered in online business directories case” (28 April 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/06/30-months-in-jail-and-128-million-in-restitution-ordered-in-online-business-directories-case.html>>.

⁶² Competition Bureau Canada, “TicketNetwork to pay \$825,000 penalty to settle misleading advertising concerns in the ticket resale market” (21 November 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/11/ticketnetwork-to-pay-825000-penalty-to-settle-misleading-advertising-concerns-in-the-ticket-resale-market.html>>.

⁶³ Competition Bureau Canada, “Competition Bureau obtains a court order to advance investigation into Rogers’ marketing practices” (4 December 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/12/competition-bureau-obtains-a-court-order-to-advance-investigation-into-rogers-marketing-practices.html>>.

⁶⁴ Competition Bureau Canada, “Amp Me to pay penalty to address Competition Bureau concerns over misleading advertising” (5 December 2023), online (news release): <<https://www.canada.ca/en/competition-bureau/news/2023/12/amp-me-to-pay-penalty-to-address-competition-bureau-concerns-over-misleading-advertising.html>>.

⁶⁵ Competition Bureau Canada, “Enforcement Guidelines on wage-fixing and no poaching agreements” (30 May 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements>>.

⁶⁶ Between the draft and final wage-fixing and no-poach agreements guidelines, the “Penalties” section was removed, and an “Applicability” section was added. The “Applicability” section clarifies that agreements made between employers on or after June 23, 2023 and conduct that reaffirms or implements agreements that were made before that date would be captured by s 45(1.1). Further changes clarified that an “employment relationship” can evolve over time between an employer and hired individuals, explicitly including independent contractors. The final guidelines remove the definition of “conscious parallelism” and instead state that information sharing can, in certain instances, create an inference that an agreement exists between parties. The Bureau added a statement that the Bureau

will consider submissions made by the parties in support of the applicability of the ancillary restraints defence, and specifically references the regulated conduct defence to the “Other exemptions, exceptions, and legal defences” section.

Additionally, the Bureau added an example on the “Scope of restraints” which clarifies the Bureau’s review of a no-poaching agreement potentially subject to the ancillary restraints defence, and clarified its example regarding franchise agreements.

⁶⁷ Competition Bureau Canada, “Bulletin on Amendments to the Abuse of Dominance Provisions” (25 October 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/bulletin-amendments-abuse-dominance-provisions>>.

⁶⁸ Competition Bureau Canada, “2023-2024 Annual Plan: Driving competition forward for all Canadians” (17 April 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/2023-2024-annual-plan-driving-competition-forward-all-canadians>>.

⁶⁹ Competition Bureau Canada, “Competition Bureau submission to Health Canada and the Expert Panel to support the *Cannabis Act* legislative review” (26 May 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/planting-seeds-competition>>.

⁷⁰ Health Canada, “Government of Canada Launches Legislative Review of the *Cannabis Act*” (22 September 2022), online (news release): <<https://www.canada.ca/en/health-canada/news/2022/09/government-of-canada-launches-legislative-review-of-the-cannabis-act.html>>.

⁷¹ Competition Bureau Canada, “Intervention to the CRTC on the Review of the wholesale high-speed access service framework” (22 June 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/intervention-crtc-review-wholesale-high-speed-access-service-framework#sec01>>.

⁷² Retail Grocery Market Study, *supra* note 16.

⁷³ *Ibid* at 25.

⁷⁴ Competition Bureau Canada, “Competition in Canada from 2000 to 2020: An Economy at a Crossroads” (19 October 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competition-canada-2000-2020-economy-crossroads>>.