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REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

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ARTICLES

LEAVING PRIVACY TO THE PRIVACY COMMISSIONER

Cullen Schreiter[1]

The Competition Bureau no longer needs to play the role of privacy enforcer. Canada's competition authority envisioned itself as a necessary defender of Canadians' privacy interests where those interests could not be adequately protected elsewhere. Bill C-11, in introducing the Consumer Privacy Protection Act, transforms the Office of the Privacy Commissioner from mediator and conciliator to a dedicated privacy enforcer with the ability to make orders and recommend fines. With this welcome departure from the ombuds model, the Privacy Commissioner is better positioned than the Competition Bureau to take regulatory action against deceptive privacy claims: deceptive claims about what, how, and why consumers' personal information is being collected, used, and distributed. Faced with overlapping mandates, the Competition Bureau should enter into a referral agreement with the Office of the Privacy Commissioner for such claims, taking a significant enforcement effort off the Bureau's books and allowing each regulator to fulfill their own mandate.

Editor's Note: *This paper was accepted for publication prior to the 2021 Federal election call, which resulted in Bill C-11 dying on the order paper. The paper remains unchanged as the arguments in the paper are still relevant, given similar attempts to reform Canada's privacy law to include harsher penalties and to mirror those in Europe's General Data Protection Regulation are likely in the future.*

Le Bureau de la concurrence n'a plus à jouer le rôle de protecteur de la vie privée. L'autorité canadienne en matière de concurrence se voyait comme un défenseur nécessaire des intérêts des Canadiens en matière de protection de la vie privée lorsque ces intérêts ne pouvaient être adéquatement protégés ailleurs. Le projet de loi C-11, en introduisant la Loi sur la protection de la vie privée des consommateurs, transforme le Commissariat à la protection de la vie privée du Canada, qui passe de médiateur et conciliateur à protecteur de la vie privée habileté à rendre des ordonnances et à recommander des amendes. Cette innovation par rapport au modèle de l'ombudsman est bienvenue. Le Commissariat est mieux placé que le Bureau de la concurrence pour prendre des mesures réglementaires contre les déclarations trompeuses en matière de protection des renseignements personnels des consommateurs—déclarations trompeuses sur la nature des renseignements recueillis, sur la raison pour laquelle ils sont recueillis et sur la façon dont ils sont utilisés. Pour éviter le

chevauchement des mandats, le Bureau de la concurrence devrait conclure une entente de renvoi avec le Commissariat à la protection de la vie privée à l'égard de ces déclarations, soulageant le Bureau d'un effort important d'application de la loi et permettant à chaque organisme de s'acquitter de son mandat propre.

Note de la rédaction : *Cet article a été accepté pour publication avant le déclenchement des élections fédérales de 2021, qui a entraîné la mort au Feuilleton du projet de loi C-11. L'article demeure néanmoins tout aussi pertinent, dans la mesure où des tentatives similaires de réforme du droit canadien de la vie privée visant à durcir les sanctions, sur le modèle du Règlement général sur la protection des données de l'Union européenne, sont à prévoir.*

"We will take action."[2] The Competition Bureau (the "Bureau") began 2020 with a warning shot: Canada's competition regulator, with order-making powers and administrative monetary penalties at its disposal, would be stepping into the privacy space to address misleading, deceptive privacy claims about what, how, and why consumers' personal information and data was being collected, used, and distributed. Over the course of the next year, the Bureau would earn its first victory against a pre-eminent technology company's privacy practices, and landmark privacy legislation would facilitate a closer relationship between the Bureau and the Office of the Privacy Commissioner (the "OPC"). At the same time, however, Bill C-11, the *Digital Charter Implementation Act, 2020*,[3] also obviates the need for the Bureau to act as privacy enforcer by redefining the OPC's role, shifting it from its past as a mediator and conciliator to a new future as an enforcer. With new enforcement powers under the *Consumer Privacy Protection Act*,[4] broader than those currently enjoyed by the Bureau, the OPC would occupy the role the Bureau intended to fill as Canada's privacy enforcer. As such, this paper argues that the Bureau should leave policing deceptive privacy claims to the Privacy Commissioner to better serve Canadians by referring all such claims to the OPC.

The Bureau's foray into privacy law

The Bureau views deceptive privacy claims as an extension of the deceptive marketing provisions of the *Competition Act*[5] (the "*Act*"), particularly in the digital era. The Deputy Commissioner of the Bureau's Deceptive Marketing Practices Directorate, Josephine Palumbo, has stated that "the issues of privacy and deceptive marketing practices intersect in the online marketplace" such that the Bureau would act "when firms make false or

misleading statements about the type of data they collect, why they collect it, and how they will use, maintain and erase it."[6] Sections 52 and 74.01(a) of the *Act* provide a dual-track, criminal and civil regime for addressing false and misleading representations. These provisions prohibit (1) a representation, omission, or practice (2) that was likely to mislead the public and (3) that was materially misleading.[7] For the Bureau, these provisions apply to consumers' data "just as they do in more familiar contexts" on the basis that "firms should not mislead consumers"[8] into "provid[ing] information that they would not otherwise have offered or acquire products that they might not otherwise select."[9] In particular, the Bureau focuses on the "real" cost of data collection in exchange for "free" online products and services. Such non-monetary transactions fall under the *Act*'s ambit and, given that the *Act* relies on consumers' general impressions, cannot be "papered over" with privacy policies and other terms and conditions to "cure the deception."[10] With this understanding of how the *Act* applies, the Bureau set out to "vigorously pursue online marketing practices that undermine consumer trust in the digital marketplace."[11]

The Bureau's first target was Facebook, which, in 2018, was involved in the Cambridge Analytica scandal where Facebook users' data was harvested by a third-party and ultimately used for political messaging and influence.[12] The Bureau launched an investigation, ultimately finding that Facebook violated section 74.01(a) of the *Act*, specifically that Facebook had provided the general impression that Facebook users controlled who could see or access their personal information, and that third-party applications would not have access to the data of users' "friends" on the platform after April 30, 2015. In reality, at various times between 2012 and 2018, neither impression was true. Without admitting guilt, Facebook agreed to pay a $9 million administrative monetary penalty and another $500,000 in costs.[13] In announcing the settlement, the Bureau signalled that this unprecedented enforcement action was not a one-off: "we strongly encourage anyone who feels they have been misled by privacy claims to file a complaint with the Bureau."[14]

In addressing Facebook's deceptive privacy claims, the Bureau was effectively claiming the mantle of Canada's privacy enforcer, a space already occupied by the OPC, whose mission is to protect and promote Canadians' privacy rights.[15] Alongside the *Privacy Act*,[16] the OPC, led by the Privacy Commissioner, administers the *Personal Information and Electronic Documents Act*,[17] Canada's federal private sector privacy law. Like the Competition Bureau, the OPC has been increasingly concerned with the use of personal information as currency.[18] In particular, the OPC has

recognized that changes in the breadth and depth of technology adoption has made it harder for individuals to provide meaningful consent, as individuals struggle "to know which organizations are processing their data and for what purposes."[19] Under both the *Competition Act* and *PIPEDA*, deceptive privacy claims were prohibited, in the latter because obtaining consent through deception was not permitted.[20] The Bureau understood that addressing misleading privacy claims was "complementary with" the OPC's mandate.[21] The OPC also recognized its "mutual interest" in policing deceptive privacy claims,[22] leading the OPC to advocate for greater cooperation between itself and the Bureau.[23]

Bill C-11 brings the Bureau further into the privacy fold, while also making its role redundant. Bill C-11 provides the Commissioner of Competition and the Privacy Commissioner with the ability to enter into an information sharing agreement to develop procedures for disclosing information "if the information is relevant to their powers, duties or functions."[24] At the same time, Bill C-11 grants the OPC greater enforcement powers to address deceptive privacy claims.

The Bureau's role as a privacy enforcer is made redundant by Bill C-11

Prior to Bill C-11, Canada's private sector privacy law was enforced by an ombuds model, rather than an adversarial process. *PIPEDA* provides 10 fair information principles that "form the ground rules" for how private sector companies that collect, use, or disclose personal information in the course of commercial activity must treat such personal information.[25] *PIPEDA*'s aim is to balance Canadians' rights to their personal information with the reasonable commercial interest in using that information.[26] As such, *PIPEDA* is not prescriptive but rather "offers the necessary tools and guidance of a self-correcting scheme."[27] As stated by former Privacy Commissioner Jennifer Stoddart, "each organization, given its business model and other regulatory requirements, must find ways to adhere to these principles and achieve the balance between its own legitimate needs and the rights of individuals to their privacy."[28] Given this emphasis on balancing, flexibility, and self-determination, the Privacy Commissioner is more mediator and conciliator than judge and executioner.[29] The Privacy Commissioner does not punish wrongdoers, instead aiming to achieve a satisfactory outcome between complainant and the wrongdoing organization.[30] Put simply, the Privacy Commissioner "is a neutral third-party mandated to communicate openly with both parties and work actively with them to resolve their dispute, achieve a fair outcome and develop a transformative culture of privacy."[31]

To this end, the Privacy Commissioner does not rely on enforcement or disciplinary powers but "depends[s] on the power of persuasion, as well as the credibility of the office."[32] Like a traditional ombuds office, *PIPEDA*'s enforcement powers are tied to a complaints-driven process, whereby the Privacy Commissioner can conduct an investigation and make recommendations in response to a complaint.[33] However, the Privacy Commissioner does not have the power to issue binding orders to ensure an organization's compliance with any such recommendations.[34] In other words, the OPC cannot force an organization to do anything it does not want to do.

The risk that organizations will choose not to comply with OPC recommendations has increased alongside the commodification of Canadians' personal information. *PIPEDA* was drafted prior to the emergence of "Web 2.0," a business model based on publishing user-generated content,[35] and the ubiquity of data collecting devices and technologies, such as the smartphone. As Scassa states, *PIPEDA* was "designed for an economy in which personal information was a by-product of doing business, rather than a core commercial asset capable of limitless exploitation."[36] As the role of personal data in commerce increases, the desire to voluntarily comply with the OPC's recommendations decreases. The OPC's investigation into Facebook for its role in the Cambridge Analytica scandal—where approximately 622,000 Canadian Facebook users' information was disclosed to a third-party application—is one such example. In its joint investigation with the Office of the Information and Privacy Commissioner of British Columbia, the OPC found that Facebook failed to receive adequate consent, safeguard users' personal information, or implement *PIPEDA*'s principles.[37] Additionally, Facebook had made commitments to the OPC following an earlier investigation in 2009 to modify third-party applications' access to users' personal information by using a "permissions" model for these applications.[38] During its investigation of the Cambridge Analytica scandal, the OPC found that its concerns about Facebook in 2009 "remained unaddressed for a further 5 years" and that Facebook had failed to "meaningfully implement its 2009 commitments to the OPC."[39] Following the release of the OPC's report on the Cambridge Analytica scandal, which also documented Facebook's failure to live up to its 2009 commitments to the OPC, Facebook chose not to implement any of the OPC's recommendations.[40] The OPC has filed an application to the Federal Court seeking a declaration that Facebook contravened *PIPEDA* and an order requiring Facebook to implement specific changes, including a prohibition on Facebook further collecting, using and disclosing any personal information of users in any manner that contravenes *PIPEDA*.[41] In return, Facebook applied for a judicial review of

the OPC's investigation.[42] Ultimately, and in spite of Facebook's history of non-compliance with the OPC's recommendations, the OPC was powerless to address one of the largest privacy violations in Canadian history, other than taking a "naming and shaming" approach and entering into potentially lengthy litigation.[43]

Commentators agree on how to remedy *PIPEDA*'s and the OPC's shortcomings: provide the OPC with order-making and financial penalty powers, similar to those available to the Bureau. Houle and Sossin recommended additional order-making powers for the OPC, including the ability to issue fines and penalties, because "all the available data from provincial enforcement suggests that only the threat of penalties which affect the bottom-line can lead to a change in business behaviour, and ultimately, in business culture."[44] Scassa agreed: "companies may be unwilling to change lucrative business practices without hard obligations to comply. In some cases, significant monetary penalties may be necessary not just to compel compliance, but to deter future breaches of the law."[45] This approach found support within government as well: Privacy Commissioner Daniel Therrien;[46] the House of Commons Standing Committee on Access to Information, Privacy and Ethics;[47] and Innovation, Science, and Economic Development Canada[48] each recommended that the Privacy Commissioner be given appropriate enforcement powers, including the ability to make orders and impose fines for non-compliance. The Bureau, meanwhile, could wield all the powers others wished the OPC had: the Commissioner of Competition can apply to court for an order prohibiting deceptive marketing practices[49] and can also seek to impose administrative monetary penalties up to $10 million, with an additional $15 million for each subsequent offence.[50]

Against this background, the Cambridge Analytica scandal acting as the Bureau's steppingstone into privacy law was no accident. Cambridge Analytica was a watershed moment in privacy law. As Privacy Commissioner Therrien remarked, "the Cambridge Analytica scandal highlighted the unexpected uses to which personal information can be put, and … uncovered a privacy framework that was actually an empty shell."[51] The scandal demonstrated that "there is a crisis in the collection and processing of personal information online" that "cannot continue."[52] As such, Facebook faced a global response, with fines from the United Kingdom,[53] Italy,[54] and the United States, where the Federal Trade Commission issued a US$5 billion penalty and subjected the company to new corporate and commercial restrictions.[55] Unlike its global peers, the OPC was unable to issue a similarly strong, or even symbolic, response to Facebook's conduct; as ultimately occurred, the OPC risked Facebook not engaging with the OPC's

recommendations and ignoring them. The Bureau was thus the only federal regulator capable of issuing a forceful Canadian response to Facebook's conduct, demonstrating a commitment to protecting Canadians' privacy while establishing a novel application of the *Competition Act*'s deceptive marketing provisions.

However, if the *CPPA* is enacted, the OPC will be ready and capable for the next watershed moment. The *CPPA* specifically prohibits deceptive privacy claims: section 16 of the *CPPA* prohibits organizations from using false or misleading information or deceptive or misleading practices to obtain an individual's consent for the collection, use, or disclosure of that individual's personal information.[56] The *CPPA* provides the OPC with the ability to enforce this prohibition by issuing compliance orders requiring the organization to stop these claims and to publicize measures taken to address the issue, among other things.[57] Additionally, the *CPPA* provides that, similar to the Bureau, the OPC could recommend penalties to the newly formed Personal Data Protection Tribunal of up to the higher of $10 million or 3 percent of the organization's gross global revenue in the prior fiscal year.[58] To put this change into perspective, applying these new penalties to the Facebook case, the OPC could have recommended a penalty of up to $2.1 billion as compared to the Bureau's maximum administrative penalty of $10 million (for a first offence).[59]

Importantly, the potential for criminal sanctions under section 52 of the *Act* does not necessarily mean that the Bureau can provide added value to policing deceptive privacy claims alongside the OPC. Under section 52, a person that knowingly or recklessly makes a representation, directly or indirectly, to the public that is false or misleading can face significant penalties, including a fine at the direction of the court or imprisonment for a term of up to 14 years, or both. To some, these substantial penalties offer heightened deterrence against making deceptive privacy claims, particularly since the *CPPA* does not include criminal sanctions. However, the *CPPA* is designed to be Canada's 21st century privacy law and, once it is enacted, Parliament will have determined that criminal charges are not the preferable way of sanctioning privacy violations. This approach is consistent with the absence of any recommendations for criminal sanctions in prior assessments of potential *PIPEDA* reforms,[60] and other jurisdictions pursuing significant financial penalties for deceptive privacy claims—not imprisonment. The Bureau pursuing criminal charges for deceptive privacy claims under section 52 would run counter to Parliament's preferred path for dealing with such claims as expressed in the *CPPA* and represent significant regulatory overreach with severe penal consequences. Notably, it is

unclear whether the Bureau would even pursue a prosecution under section 52 for deceptive privacy claims, considering that it elected not to pursue such charges in the Facebook case despite the scale of the breach and the party's status as a repeat offender.[61]

Accordingly, should Bill C-11 (and the *CPPA*) receive Royal Assent, it will no longer be necessary for the Bureau to enforce deceptive privacy claims; the OPC would be able to more effectively exercise its mandate to protect Canadians' privacy, backed by the power to recommend significant financial penalties for such conduct.

Two regulators are not better than one

Overlapping jurisdiction between the Bureau and the OPC over deceptive privacy claims has the potential to harm both Canadian businesses and consumers. The Bureau's jurisdiction is nothing if not crowded. Take merger control, for example: depending on the industry at issue, the Bureau shares merger control jurisdiction with the Canadian Radio-television and Telecommunications Commission;[62] the Minister of Transport;[63] the Office of the Superintendent of Financial Services ("OFSI");[64] and the Minister of Innovation, Science and Industry.[65] Indeed, the Bureau already shares jurisdiction for false and misleading representations made by federal financial institutions with OFSI.[66] By also prohibiting deceptive privacy claims, the CPPA would introduce another layer of overlap for the Bureau to navigate.

Such overlap harms Canada's business environment. Canada dropped from fourth to 23rd in the World Bank's Ease of Doing Business rankings between 2006 and 2019.[67] Canada's position in the World Economic Forum's Competitiveness Index has also fallen.[68] While Canada's public sector performance on this index has improved, Canada still ranks 38th out of 140 countries in the burden of government regulation. The efficiency of Canada's legal framework for settling disputes has also been reduced.[69] Regulatory overlap is one of the culprits for this poor performance. Canadian business leaders have identified reducing regulatory burden as the one thing the Canadian government can do to improve Canada's business environment.[70] As the Canadian Chamber of Commerce noted, "Canada's complex network of overlapping regulations from all levels of government has created a costly and uncertain environment to operate a business."[71] The Advisory Council on Economic Growth further stated that Canada could "stimulate more investment and attract more capital" by setting "the global gold standard for regulatory efficiency and predictability."[72]

Engendering further overlap between the Bureau and OPC would be contrary to the vision of effective regulation shared by the Canadian government and the Bureau. The Canadian government has invested in a regulatory reform agenda "to make the Canadian regulatory system more agile, transparent and responsive."[73] The government's External Advisory Committee on Regulatory Competitiveness recommended that these reforms should focus on "reducing irritants and inefficiencies that add unnecessary cost, duplication and/or delay for business and citizens" to "save time and money, and free up resources that can be put to better uses such as enhancing innovation and competitiveness."[74] The Bureau, meanwhile, has advocated for regulation only "when there is good evidence to show that, without regulation, policy objectives will not be met."[75] Commissioner of Competition Matthew Boswell has stated that regulation "should be evidence-based and not overly restrictive."[76] Following adoption of the *CPPA*, the Bureau continuing to pursue deceptive privacy claims would go against these principles, given the OPC's mandate and expanded enforcement powers to address these claims. No evidence or policy objective supports the Bureau continuing to deploy its limited resources to police conduct over which the OPC has jurisdiction, creating unnecessary costs, duplication, and delay in the enforcement process as the regulators coordinate their actions.

Allowing this overlap to subsist would be particularly problematic because the Bureau is not required to address consumer complaints in the same way as the OPC. To date, protecting Canadians' privacy has been based on a complaint-driven model, whereby the OPC is legislatively required to investigate consumer's privacy complaints, an approach the *CPPA* maintains.[77] The Bureau, meanwhile, has no such obligation. Indeed, a 2019 audit of the Bureau found that it did not have defined procedures for triaging complaints and no defined criteria for determining the value of a complaint, which could "cause inconsistencies, omissions, errors and delays in how complaints are assessed, referred, or closed."[78] By soliciting privacy complaints, the Bureau is pulling consumers from a regulator that is *required* to investigate their complaints towards one that *may* do so.

The Bureau would also be soliciting complaints for conduct that is likely to be widespread, pervasive, and overwhelming. The Bureau itself has highlighted one type of deceptive privacy claim that would run afoul of the *Act*: a mobile phone flashlight application that collects location information, as the application is collecting information incidental to the consumer's main objective for using the application and not related to the functionality upon which the user is focused.[79] With this example in mind, 89.5% of Canadian

households owned a mobile phone in 2017.[80] In that same year, a study found that 70% of smartphone applications reported users' personal data to third-party tracking companies.[81] A user's personal information would become available to these third-parties as soon as the user allows access to even a single application, even if the user declines application permissions on all other applications.[82] In other words, most Canadians are likely to have a smartphone application reporting their personal information to a third-party in a manner incidental to the user's main objective for using the application, contrary to that user's general impression of how the application would treat their personal information. A general privacy policy or other terms and conditions will not cure that deception. Put simply, most Canadians are likely to have been deceived by smartphone applications in a way that contravenes the *Act*. As only one example of a particular deceptive privacy claim, using only one data collection method on only one kind of device, policing deceptive privacy claims may well become a resource and time-consuming enforcement and triaging endeavour for the Bureau to pursue.

Put simply, the Bureau lacks the resources necessary to meaningfully address consumers' deceptive privacy complaints, while also ensuring consumers and businesses continue to benefit from a competitive Canadian economy. For the last decade, the Bureau's budget was stagnant: the Bureau's 2019–2020 budget of $53.7 million and workforce of 382 employees[83] represented a 4% increase and 5% decrease, respectively, in the Bureau's budget and workforce from 2011–2012.[84] These resource limitations were juxtaposed against the Bureau's vision of itself as a more proactive enforcer employing "timely and evidence-based enforcement action"[85] as well as "[doing] everything in its powers to protect consumers and businesses from anti-competitive activity throughout the COVID-19 pandemic."[86] With the 2021 federal budget, the Bureau is set to receive a substantial resource injection, with $96 million over five years (starting in 2021-2022) and $27.5 million ongoing to enhance competition to "protect consumers, lower prices and spur innovation" in the digital economy.[87] Policing widespread, pervasive and overwhelming deceptive privacy claims will diminish the effect these newfound resources will have on the competitive outcomes they seek to generate, eating away at the regulatory enforcement capacity these funds were provided to build in the first place. Importantly, unlike with deceptive privacy claims, no other regulator can provide the same outcomes for competition as the Bureau can with these additional resources. Indeed, as Commissioner Boswell has pointed out, when it comes to addressing

competition concerns in Canada, the Bureau is the sole regulator responsible: "we are it for Canada."[88]

The *CPPA* provides an opportunity for the Bureau to lessen its burden. While the Bureau may be on its own for competition enforcement, the Bureau can rely on the OPC, Canada's dedicated privacy enforcer, to protect Canadians from deceptive privacy claims. *PIPEDA*'s ombuds model was initially chosen, in part, to avoid "overlap and proliferation of rules of law, especially within the federal system."[89] While the Bureau has previously been steadfast in its commitment to enforcing the *Competition Act* despite any overlap with *PIPEDA*,[90] the *CPPA* changes the equation, making the OPC the more appropriate enforcer for these claims than the Bureau. The overlap would be real, with the potential to harm both businesses and consumers.

To eliminate this overlap and to promote regulatory efficiency, in establishing an information sharing agreement between them, the Bureau and OPC should formalize a structure that facilitates the Bureau's referrals of all deceptive marketing claims regarding the collection, use, and/or distribution of data or personal information from the Bureau to the OPC. Doing so will help the Bureau further the Canadian government's goal of addressing regulatory overlap to foster a better business environment, provide consumers with a single regulator that is legislatively mandated to address their deceptive privacy complaints, and allow the Bureau to focus its efforts and resources on its core competition mandate to the benefit of Canadian businesses and consumers, especially as Canada emerges from the COVID-19 pandemic.

Conclusion

Bill C-11 represents an opportunity for the Bureau. Canada's competition authority envisioned itself as a necessary defender of Canadians' privacy interests where such interests could not be adequately protected elsewhere, demonstrated by the Bureau and OPC's differing enforcement outcomes in addressing Facebook's conduct for the Cambridge Analytica scandal. Should the *CPPA* be proclaimed into law, Canada will have something it has not had previously: a dedicated privacy enforcer with the ability to make orders and recommend fines. In such event, the Bureau would no longer *need* to take action on deceptive privacy claims; the OPC would fulfill that role. In the face of overlapping mandates, establishing a referral agreement for such claims with the OPC would take a significant enforcement effort off the Bureau's books, one pervasive and widespread enough to potentially

overwhelm its limited resources and mandate. Such an arrangement would allow each regulator to fulfill their own mandate: the OPC protecting Canadians' privacy through a complaints-driven regime, and the Bureau benefitting Canadian businesses and consumers by ensuring the competitiveness of the Canadian economy. To use Commissioner Boswell's words, such an arrangement would be "evidence-based and not overly restrictive." Put simply, the *CPPA* presents an opportunity for the Bureau to put its words into action when it comes to the enforcement of deceptive privacy claims by walking away and leaving the field to a dedicated privacy enforcer, the OPC. It is an opportunity the Bureau should seize.

ENDNOTES

[1] Cullen Schreiter is an associate in the Competition, Antitrust & Foreign Investment group at Blake, Cassels & Graydon LLP. The author thanks Kevin MacDonald and Gregory Sheppard for their comments. The author retains sole responsibility for any errors and the views expressed herein. The opinions expressed herein are those of the author and do not necessarily reflect the views of Blake, Cassels & Graydon LLP or its clients.

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[4] *Ibid*, cl 2 [*CPPA*].

[5] *Competition Act*, RSC 1985, c C-34.

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[16] *Privacy Act*, RSC 1985, c P-21.

[17] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

[18] Office of the Privacy Commissioner of Canada, "The strategic privacy priorities" (14 December 2018), online: <https://www.priv.gc.ca/en/about-the-opc/opc-strategic-privacy-priorities/the-strategic-privacy-priorities/>.

[19] Office of the Privacy Commissioner of Canada, Discussion Paper, "A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act" (May 2016), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/consent_201605/> at "Challenges to meaningful consent: New technologies and business models".

[20] See Office of the Privacy Commissioner of Canada, "Submission to the Competition Bureau Re: Consultation on Big Data and Innovation Discussion Paper" (17 November 2017), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_cb_171117/#fn2-rf> ["OPC Big Data Submission"]. See also *PIPEDA*, *supra* note 17, Schedule 1, cl 4.3.5.

[21] Honest Advertising, *supra* note 2.

[22] OPC Big Data Submission, *supra* note 20.

[23] Office of the Privacy Commissioner of Canada, Report, "2019-2020 Annual Report to Parliament on the Privacy Act and Personal Information Protection and Electronic Documents Act" (2020), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/>.

[24] *CPPA*, *supra* note 4, ss 115(1)-(2); *Digital Charter Implementation Act*, *2020*, *supra* note 3, cl 14.

[25] Office of the Privacy Commissioner of Canada, "Privacy Guide for Businesses" (2020), online: <https://www.priv.gc.ca/media/2038/guide_org_e.pdf> at 7; *PIPEDA*, *supra* note 17, s 4. Some organizations are regulated by provincial privacy legislation in Alberta, British Columbia, and Quebec that has been found to be substantially similar to *PIPEDA*.

[26] *PIPEDA*, *supra* note 17, s 3.

[27] Jennifer Stoddart, "Cherry Picking Among Apples and Oranges: Refocusing

Current Debate About the Merits of the Ombuds-Model Under PIPEDA" (20 June 2006), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2005/omb_051021/> at "I.a. Structure of the Act" ["Cherry Picking"].

[28] Jennifer Stoddart, "Privacy in the Era of Social Networking: Legal Obligations of Social Media Sites" (2011) 74:2 Sask L Rev 263 at 264.

[29] House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Towards Privacy By Design: Review of the Personal Information Protection and Electronic Documents Act*, 42-1 (February 2018) at 8 (Chair: Bob Zimmer) [*Towards Privacy by Design*].

[30] Teresa Scassa, "Moving on From the Ombuds Model for Data Protection in Canada" (2019) 17:1 CJLT 90 at 90 ["Moving on From the Ombuds Model"].

[31] Cherry Picking, *supra* note 27 at "IV.a Complaint-Driven Model".

[32] Carolyn Steiber, "57 Varieties: Has the Ombudsman Concept Become Diluted?" (2000) 16:1 Negotiation J 49 at 56.

[33] Linda C Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harv Hum Rts J* 1 at 9.

[34] See *Towards Privacy by Design*, *supra* note 29 at 8.

[35] France Houle & Lorne Sossin, "Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectiveness Study" (August 2010), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/pipeda_h_s/#fn31-rf> at "2.1 The technology dimension: Emergence of Web 2.0".

[36] Teresa Scassa, "Reforms to the *Personal Information Protection and Electronic Documents Act* must give the privacy commissioner real enforcement powers" (7 June 2018), online: *Policy Options* <https://policyoptions.irpp.org/magazines/june-2018/enforcement-powers-key-pipeda-reform/>.

[37] Office of the Privacy Commissioner of Canada, Report of Findings, "Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia" (25 April 2019), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-002/> at paras 1, 41-42, 85, 114, 165, 182.

[38] *Ibid* at para 20.

[39] *Ibid* at paras 164, 183.

[40] See Office of the Privacy Commissioner of Canada, News Release, "Facebook refuses to address serious privacy deficiencies despite public apologies for "breach of trust" (25 April 2019), online: <https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c_190425/> [Facebook refuses to address serious privacy deficiencies].

[41] The Federal Court has the power to make this order under *PIPEDA*, *supra* note 17, s 16. See Office of the Privacy Commissioner of Canada, News Release, "Privacy Commissioner files Notice of Application with the Federal Court against

Facebook, Inc" (6 February 2020), online: <https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200206/>.

[42] *Facebook Inc. v Canada (Privacy Commissioner)* (15 April 2020), Ottawa, ON CA T-473-20 (application for judicial review).

[43] *Facebook refuses to address serious privacy deficiencies*, *supra* note 40.

[44] Houle & Sossin, *supra* note 35 at "Recommendation #3: Granting limited order-making powers".

[45] Moving on From the Ombuds Model, *supra* note 30 at 95.

[46] House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 42-1, No 47 (16 February 2017) at 1610 (Daniel Therrien, Privacy Commissioner).

[47] *Towards Privacy by Design*, *supra* note 29 at 61.

[48] Innovation, Science and Economic Development Canada, "Proposal to Modernize the Personal Information Protection and Electronic Documents Act" (21 May 2019), online: <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00107.html> at "C. Tools to address non-compliance or offences" [*Proposal to Modernize*].

[49] *Competition Act*, *supra* note 5, s 74.01(a).

[50] *Ibid*, s 74.1(c).

[51] Office of the Privacy Commissioner of Canada, Speech, "Appearance before the Standing Committee on Access to Information, Privacy and Ethics (ETHI) before the International Grand Committee on Big Data, Privacy and Democracy" (28 May 2019), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2019/parl_20190528/>.

[52] House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 42-1, No 124 (1 November 2018) at 1215 (Privacy Commissioner Daniel Therrien).

[53] United Kingdom Information Commissioner's Office, News Release, "ICO issues maximum £500,000 fine to Facebook for failing to protect users' personal information" (25 October 2018), online: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/facebook-issued-with-maximum-500-000-fine/> ["ICO issues maximum fine"]. Facebook was fined the maximum allowable fine of £500,000 under the *Data Protection Act 1998*, 1998 c 29 (UK), but the Information Commissioner made clear that she would have imposed a higher penalty had the conduct taken place under the European Union's General Data Protection Regulation. See also EC, *Commission Regulation (EC) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*, [2016] OJ, L119/1.

[54] Mark Scott, "Facebook fined €1M over Cambridge Analytica scandal" (28 June 2019), online: *Politico* <https://www.politico.eu/article/facebook-fined-cambridge-analytica/>.

[55] United States Federal Trade Commission, News Release, "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook" (24 July 2019), online: <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>.

[56] *CPPA*, *supra* note 4, s 16.
[57] *Ibid*, s 92(2).
[58] *Ibid*, s 94(4).
[59] Facebook's overall annual revenue in 2019 was US $70,697,000,000. See United States Securities and Exchange Commission, *Form 10-K: 2019 Annual Report, Facebook Inc* (Washington, DC: 2020), online: <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf> at 42.
[60] See e.g. *Towards Privacy by Design*, *supra* note 29; *Proposal to Modernize*, *supra* note 48.
[61] The Bureau will pursue the civil track unless (a) there is clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation and (b) if such evidence is available, the Bureau is satisfied that criminal prosecution is in the public interest, having regard to the seriousness of the alleged offence alongside certain mitigating factors. See Competition Bureau of Canada, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act" (22 September 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html>.
[62] The Canadian Radio-television and Telecommunications Commission must approve any change of control or ownership of a licensed undertaking under the *Broadcasting Act*, SC 1991, c 11. See *Television Broadcasting Regulations*, 1987, SOR/87-49, s 14; *Radio Regulations*, 1986, SOR/86-982, s 11; *Discretionary Services Regulations*, SOR/2017-159, s 10.
[63] The Governor in Council, on recommendation of the Minister of Transport, must approve transactions involving a "transportation undertaking" or an "air transportation undertaking", the latter of which also involves a notification to the Canadian Transportation Agency for a determination that the transaction would result in that undertaking being a "Canadian" undertaking. See *Canada Transportation Act*, SC 1996, c 10, ss 53.1(1)(a)-(b), 53.2(1), 53.2(7).
[64] The Office of the Superintendent of Financial Services must approve acquisitions or increases of a significant interest and/or control of a federally regulated entity. See *Bank Act*, SC 1991, c 46, ss 373(1), 377.1(1), 395, 875(1), 883(1), 905; *Trust and Loan Companies Act*, SC 1991, c 45, ss 375(1), 375.1(1), 387; *Insurance Companies Act*, SC 1991, c 47, ss 407(1), 407.1(1), 419, 927(1), 932(1), 946; *Cooperative Credit Associations Act*, SC 1991, c 48, ss 354(1), 354.1(1), 358.
[65] The Minister of Innovation, Science and Industry must approve reviewable investments by non-Canadians. See *Investment Canada Act*, RSC 1985 c 28, s 16.
[66] *Bank Act*, *supra* note 64, s 980.1; *Trust and Loan Companies Act*, *supra* note 64, s 533(1.1); *Insurance Companies Act*, *supra* note 64, s 1023.1; *Cooperative Credit Associations Act*, *supra* note 64, s 465(1.1).
[67] "Making regulation a competitive advantage" online: *Deloitte* <https://www2.deloitte.com/ca/en/pages/finance/articles/regulatory-competitiveness.html> at 6; World Bank, "Ease of Doing Busines Rankings" online: *Doing Business* <https://www.doingbusiness.org/en/rankings>.

[68] Klaus Schwab, "The Global Competitiveness Report" (2019) at 14, online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf>.
[69] *Ibid* at 139.
[70] "Competitiveness Scorecard: Measuring our success on the global stage" (5 March 2019), online: *Business Council of Canada* <https://thebusinesscouncil.ca/report/competitiveness-scorecard/>.
[71] "Death by 130,000 Cuts: Improving Canada's Regulatory Competitiveness" (May 2018), online: *Canadian Chamber of Commerce* <https://static1.squarespace.com/static/5afb304d506fbeacf1448abf/t/5f74cf57a8d7d83aedc0288e/1601490783193/180531DeathBy130000CutsImprovingCanadasRegulatoryCompetitiveness.pdf> at 2.
[72] *Ibid* at 12.
[73] Department of Finance Canada, Budget Plan, "Equality Growth: A Strong Middle Class" (27 February 2018), online: <https://budget.gc.ca/2018/docs/plan/budget-2018-en.pdf> at 118.
[74] Laura Jones *et al*, "External Advisory Committee on Regulatory Competitiveness Recommendation Letter" (29 July 2019), online: *Government of Canada* <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/modernizing-regulations/external-advisory-committee-regulatory-competitiveness/external-advisory-committee-regulatory-competitiveness-recommendation-letter-july-2019.html>
[75] Competition Bureau Canada, "Balancing regulation and competition" (4 October 2016), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>.
[76] Competition Bureau Canada, Speech, "*Advancing Competition in a Changing Marketplace*" (10 October 2018), online: <https://www.canada.ca/en/competition-bureau/news/2018/10/advancing-competition-in-a-changing-marketplace.html>.
[77] *PIPEDA*, *supra* note 17, s 12; *CPPA*, *supra* note 4, s 83.
[78] Innovation, Science and Economic Development Canada, Report, "*Audit of the Competition Bureau Report*" (May 2019), online: <https://www.ic.gc.ca/eic/site/ae-ve.nsf/eng/h_03895.html> at "4.4: Intake and Triage".
[79] Big Data Discussion Paper, *supra* note 8 at "V.A. Collection of data".
[80] Canadian Radio-television and Telecommunications Commission, Report, "*Communications Monitoring Report 2019*" (January 2020), online: <https://crtc.gc.ca/pubs/cmr2019-en.pdf> at 28.
[81] Narseo Vallina-Rodriguez & Srikanth Sundaresan, "7 in 10 smartphone apps share your data with third-party services" (The Conversation, 29 May 2017), online: *The Conversation* <https://theconversation.com/7-in-10-smartphone-apps-share-your-data-with-third-party-services-72404>.
Narseo Vallina-Rodriguez *et al*, "Tracking the Trackers: Towards Understanding the Mobile Advertising and Tracking Ecosystem" (26 October 2016) online (pdf): <https://arxiv.org/pdf/1609.07190.pdf> at 5.
[82] Saksham Chitkara *et al*, "Does this App Really Need my Location? Context-Aware Privacy Management for Smartphones" (2017) 1:3 Proc ACM Interact

Mob Wearable Ubiquitous Technol 1, online: <https://www.ftc.gov/system/files/documents/public_comments/2017/09/00006-141375.pdf> at 2.

[83] Competition Bureau Canada, Report, "Annual Report of the Commissioner of Competition for the Year Ending March 31, 2020" (6 November 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04542.html#sec06-1> at "Financial snapshot" [*2020 Annual Report*].

[84] "Is Canada's Competition Watchdog on a Leash? Ottawa Must Champion Competition Enforcement" (8 November 2018) at 8, online (pdf): *C.D. Howe Institute Competition Policy Council* <https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Final%20Communique%20Nov%202018.pdf>.

[85] Competition Bureau Canada, "Competition in the digital age: The Competition Bureau's Strategic Vision for 2020-2024" (11 February 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/$file/Strategic-Vision-2020-24-En.pdf> at 5-6, 10.

[86] Competition Bureau Canada, "COVID-19: What the Competition Bureau is doing" (6 May 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04525.html>.

[87] Department of Finance Canada, Report, "Budget 2021: A Recovery Plan for Jobs, Growth and Resilience" (19 April 2021), online: <https://www.budget.gc.ca/2021/report-rapport/p2-en.html#chap4> at Chapter 4.

[88] House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 43-2, No 9 (3 December 2020) at 1240 (Matthew Boswell, Commissioner of Competition).

[89] Houle & Sossin, *supra* note 35 at "1.2.1: Choice of government institution".

[90] Big Data Key Themes, *supra* note 9 at "Deceptive marketing claims" ("The Bureau will continue to enforce provisions of the Act even if the offending actions may be subject to enforcement under PIPEDA").

YEAR IN REVIEW 2021: COMPETITION LAW LOOKS FORWARD

Susan Hutton, Laura Rowe, Tessa Martel & Justin Mayne[1]

In 2021, Canada's Competition Bureau faced a rapidly changing world. In addition to several challenging mergers, the global COVID-19 pandemic continued, alongside growing concern over the political influence of tech giants, and their relationship to economic inequality. Against a backdrop of broad social change there were increasing calls to modernize Canada's competition policy. The Bureau's enforcement actions were focused on big tech companies, including the launch of an investigation into Google Inc's marketing practices, and a review of the proposed acquisition of Canadian telecom company Shaw Communications Inc by its rival, Rogers Communications Inc.

En 2021, le Bureau de la concurrence du Canada a dû faire face à un monde en rapide évolution. Outre plusieurs fusions difficiles, la pandémie mondiale de COVID-19 se manifestait toujours, de même que les préoccupations croissantes concernant l'influence politique des géants de la technologie et leur relation avec l'inégalité économique. Dans ce contexte de grands changements sociaux, les appels à la modernisation de la politique de concurrence du Canada se sont multipliés. Les mesures d'application de la loi du Bureau ont été axées sur les grandes entreprises de technologie, notamment le lancement d'une enquête sur les pratiques de marketing de Google Inc et l'examen du projet d'acquisition de l'entreprise de télécommunications canadienne Shaw Communications Inc par son rival, Rogers Communications Inc.

Introduction & Highlights

In 2021, Matthew Boswell, the Commissioner of Competition (the "Commissioner"), started the second half of his term at the helm of Canada's Competition Bureau (the "Bureau") with a notably stronger advocacy stance, declaring that Canada needs a comprehensive review of the *Competition Act* (the "Act"). The Bureau dealt with several difficult merger cases with a notable loss in its bid for an interim injunction as it prepared to challenge Secure Energy Services Inc's ("Secure") acquisition of Tervita Corporation ("Tervita"), which could indicate a more litigious approach by the Bureau when conducting merger reviews. The Bureau also published updated Competitor Collaboration Guidelines ("CCGs") for the first time since their initial release in 2009, updating its guidance on competitor collaborations, conspiracies and bid-rigging. The Bureau also

commenced a civil abuse of dominance investigation into Google Inc.'s ("Google") conduct in the online display advertising industry.[2]

Highlights of 2021 included:

- In January, the Bureau advocated in favour of open banking in Canada to bolster competition in Canada's financial services industry.
- In March, the Bureau announced that it would be reviewing the proposed $26-billion acquisition of Shaw Communications Inc. ("Shaw") by Rogers Communications Inc. ("Rogers"), an acquisition that will also require approval from the Canadian Radio-television and Telecommunications Commission (the "CRTC") and the federal department of Innovation, Science and Economic Development Canada ("ISED").
- In March, the Bureau joined counterparts from the US, UK and EU to form a working group to update and refine the analysis of mergers in the pharmaceutical industry.
- In May, the Bureau published updated CCGs for the first time since the guidelines were issued in 2009.
- In June, the Bureau challenged the proposed merger between oil and gas waste service providers Secure and Tervita under section 92 of the Act. The Commissioner's application for interim relief delaying the closure of the deal was dismissed (the section 92 application will not be decided until 2022).
- In July, the Bureau targeted deceptive marketing practices related to Canada's pandemic relief programs.
- In October, MacEwen Petroleum Inc. ("MacEwen Petroleum") entered into a consent agreement concerning its proposed acquisition of Quickie retail stores, agreeing to sell the Quickie gas station located in Kemptville, Ontario.
- In October, the Federal Court of Canada issued an order to advance the Bureau's investigation into Google's conduct in the online display advertising industry.
- In October, the Commissioner called for a comprehensive review of Canada's competition laws to address competition challenges.

Mergers

Bureau Challenges Merger of Oil and Gas Waste Service Providers Secure and Tervita

On March 9, 2021, Secure and Tervita announced a transaction to combine their oil and gas midstream infrastructure and environmental solutions business.[3] This merger represents the combination of the two largest suppliers of oil and gas waste services in the Western Canadian Sedimentary Basin ("WCSB"), and in some areas, the only two competitors. The Bureau brought a last-minute application before the Competition Tribunal ("Tribunal") on June 29, 2021—only three days before the transaction was set to close, and one day before the end of the statutory waiting period.[4]

The Commissioner's application challenging the merger was brought under section 92 of the Act. Simultaneously, the Commissioner brought an application under section 104 of the Act, seeking an interim injunction preventing the merging parties from closing until the section 92 application had been disposed of.[5] In light of the urgency of the situation, the Commissioner also requested "an emergency case conference […] where we will seek an interim order preventing the respondents from closing the transaction until the section 104 application is heard."[6] With respect to this "interim, interim" relief, the Tribunal held that it lacked the jurisdiction to grant such relief pending the hearing of the section 104 application.[7]

The Commissioner's application under section 104 was heard on August 8, more than a month after the deal closed. Therein, the Commissioner sought to unwind the transaction, and in the alternative, an order requiring certain identified facilities formerly owned by Tervita to be "held separately and operated independently" from Secure.[8]

On August 16, the Tribunal dismissed the section 104 application, which satisfied the first two elements of the *RJR Macdonald* test for injunctive relief (serious issue to be tried/strong *prima facie* case, irreparable harm), but not the third (balance of convenience).[9] When applying the "balance of convenience" test, the Tribunal asked, "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits?" The Tribunal held that Secure had "provided clear and non-speculative evidence regarding the general extent of the harm that it will suffer if the relief requested by the Commissioner is granted." Further, the Tribunal held that the Commissioner had failed to quantify the harm likely to arise from the transaction.[10]

Despite these setbacks, the Commissioner is proceeding with his original section 92 application. In the latest development, the hearing of Secure's November 8 motion to compel production of third-party documents was canceled, as the parties had resolved the issues raised therein.[11]

Bureau Reviews Proposed Acquisition of Shaw by Rogers

On March 15, 2021, Rogers announced a proposed acquisition of Shaw and the Bureau immediately released a statement that the transaction would be reviewed, according to the Bureau's mandate "to review mergers to determine whether they are likely to result in a substantial lessening or prevention of competition."[12] The Bureau subsequently obtained orders from the Federal Court compelling Bell Canada ("Bell"), Telus Communications Inc, Xplornet Communications Inc. and Vidéotron to produce records and written information related to mobile wireless services.[13]

Initially, the Bureau restricted its analysis of the proposed merger to the mobile wireless services market.[14] However, in a filing made to the CRTC, Bell argued that regulators should take a broader approach, and account for the fact that the merging parties both provide wireline and broadcast television services.[15] Subsequently, the Bureau expanded its analysis to consider several broadcasting issues, including competition for consumer and small business internet services, fibre transport services, downstream competition among broadcast distribution undertakings ("BDUs") and other content viewing platforms, and the provision of relay distribution undertakings, which allow BDUs without a direct wireline or satellite connection to provide certain programming.[16]

By its nature, the proposed $26-billion transaction requires the approval of three regulatory agencies: the Bureau, the CRTC, and, because of the change of ownership of wireless spectrum, ISED.[17] Although Shaw and Rogers both participate in broadcast TV, cable, Internet, and wireless, hearings at the CRTC are limited to assessing the effect of the transaction on broadcast and cable TV.[18] By acquiring Shaw, Rogers stands to acquire "16 television channels across BC, Alberta, Saskatchewan and Manitoba; all of Shaw's cable, satellite and pay-per-view television services; and a 25 per cent ownership in CPAC, the public affairs channel."[19] Shaw also offers Internet services, and owns Corus Entertainment (a mass media company) and the mobile wireless telephone provider Freedom Mobile—which represents 8% of mobile wireless subscribers in Ontario, Alberta, and British Columbia.

Rogers and Shaw argue that the proposed transaction is necessary for Canadian telecommunications to remain competitive in a broader

international context. They argue that the acquisition will allow Rogers to make the investments required to build a nation-wide 5G network that can place Canada's digital economy on a footing to "move to the next frontier,"[20] and that it will likely result in an estimated $1-billion of annual efficiencies, thus permitting it to pass muster under the Act even if—which has yet to be alleged or proven—it were found likely to substantially lessen or prevent competition.

Bureau Joins Multilateral Pharmaceutical Merger Task Force

In March, the Bureau joined with counterparts from the US, UK and EU to form a working group to develop updated approaches for analyzing the effects of pharmaceutical mergers.[21] Initiated by the US Federal Trade Commission, the working group includes the European Commission Directorate General for Competition, the UK's Competition and Markets Authority, the US Department of Justice, and Offices of State Attorneys General. According the Commissioner, "[t]he pharmaceutical industry is a vital part of Canada's health sector, and we will continue to collaborate closely with our international partners to ensure we are staying on top of emerging issues—with respect to mergers as well as any type of potentially anticompetitive conduct."[22]

The past few years have seen competition authorities around the world take an increased interest in pharmaceutical mergers, particularly regarding their potential effects on drug prices and innovation. Commentators argue that the traditional narrow analysis of pharmaceutical mergers on individual product markets is failing to properly capture all the potential harms to innovation, and all the potential for firms to engage in anticompetitive conduct.[23]

In the past, competition agencies have assessed individual product markets consisting of the markets in which the merging parties' products compete, and potential competition in likely future markets consisting of products that have reached some advanced stage of development, "traditionally, at least Phase 3 of clinical trials."[24] Regulators have begun to question whether, given the complex and dynamic innovation landscape in the pharmaceutical industry, such an approach may be ignoring significant harms.

ISED Introduces Merger Review Fee Remission Policy

ISED's new Remission Policy, which applies to filing fees for pre-merger notifications and/or requests for advance ruling certificates came into effect in April. Under this new policy, in certain circumstances the Bureau will

remit a portion of the filing fee paid by an affected fee-payer when a service standard is not met.[25] Service standards represent a non-binding time frame within which the Bureau aims to advise parties of its position in respect of a proposed transaction, assuming timely cooperation from the parties.[26] If the Bureau fails to meet the service standard for reasons not attributable to the merging parties, it now has to refund a portion of the service fee. As a result, the Bureau is expected to be more reticent to commence reviews without fulsome information from the merging parties.

Consent Agreement Reached in Blair's/Federated Co-op Joint Venture

The Bureau's focus on potentially anti-competitive vertical mergers continued in 2021. On July 7, 2021, the Bureau reached an agreement with Federated Co-operatives Limited ("FCL") and Blair's Family of Companies ("Blair's") related to their proposed joint venture.[27] FCL is a multibillion-dollar wholesaling, manufacturing, marketing and administrative co-operative owned by more than 160 independent retail co-operatives across Western Canada. Blair's is a fourth-generation family-owned and operated full service agricultural retailer, owning seven agricultural retail locations across Saskatchewan. The proposed joint venture would have been majority owned by FCL.[28] The Bureau classified the Proposed Transaction as "fundamentally vertical in nature—involving the interplay between the wholesale and retail levels of the agricultural input supply chain".[29] The Bureau found that one of FCL's independent retail co-operatives (which operated agricultural retail locations in Cupar and Lipton, Saskatchewan) was a direct competitor of Blair's agricultural retail location in Lipton, Saskatchewan. The Bureau concluded that the transaction was likely to substantially lessen competition in the retailing of crop inputs in the Lipton area and that the few proximate competitors that would remain in the Lipton area were unlikely to effectively constrain the competitive effects of the proposed transaction.[30]

A consent agreement was reached without a supplementary information request being issued. In the agreement, FCL and Blair's agreed to divest Blair's Lipton retail location and two nearby anhydrous ammonia satellite facilities to a purchaser acceptable to the Commissioner. The agreement also incorporates a preservation order to "protect and preserve the divestiture assets until the completion of the divestiture"[31]. Incorporating a preservation order in a consent agreement is an exception to the Bureau's position in the Merger Remedies Bulletin that a hold-separate provision is necessary. The Bureau found that the circumstances required to allow for such an exception had been satisfied in this case.[32]

Consent Agreement Reached for MacEwen Petroleum Acquisition of Quickie Convenience Stores

In September, MacEwen Petroleum proposed the acquisition of 51 Quickie stores, 22 of which include gas stations, in Ontario and Quebec. The Bureau concluded that the acquisition would result in a lessening of competition for the supply of retail gasoline to customers near Kemptville, Ontario (a small town about 50 km south of Ottawa). In response, the buyer entered a consent agreement to sell the Quickie gas station in Kemptville.[33] In November, the Bureau approved Centex Petroleum as the purchaser of the station.[34]

Conspiracies, Bid-Rigging and Competitor Collaboration

Investigation of Postmedia and Torstar Closed

On January 7, 2021, the Bureau announced that it had closed its investigation into a 2017 agreement between media companies Postmedia Network Canada Corp. ("Postmedia") and Torstar Corporation ("Torstar").[35] On November 27, 2017, Postmedia, Torstar and its subsidiary Metroland Media Group announced a deal involving the exchange of 41 newspapers and the subsequent closure of 36 community and daily newspapers in Ontario.[36] The Bureau began its investigation following this announcement, including searches at the offices of Postmedia, Torstar and Metroland Media Group in the Greater Toronto Area and obtaining a court order requiring one former and five current employees of Torstar to be examined under oath by Bureau investigators.[37] To refer a case for prosecution under the criminal conspiracy provisions of the Act, the Bureau must find clear evidence demonstrating that competitors reached an agreement to fix prices, allocate markets, or lessen or eliminate the supply of a product or service. Ultimately, following a review of the available evidence, the Bureau concluded that no further action was warranted.

Bureau Provides Advice on Protecting Competition in Public Procurement

On February 5, 2021, the Bureau released its latest edition of *The Competition Advocate*, a periodical publication which offers the Bureau's views on industries that could benefit from increased competition.[38] This edition, entitled "Competitive bidding processes in the public sector: Procuring good value for taxpayer money," provides guidelines for designing procurement processes that deter bid-rigging and highlights common warning signs of bid-rigging that public officials should be aware of and remain vigilant of.[39]

To deter bid-rigging, the Bureau suggests designing a procurement process that maximizes the pool of potential bidders, builds understanding of bidder capabilities, requires disclosure of potential subcontractors and their pricing, requires bidders to submit a certificate of independent bid determination and involves follow-up interviews with unsuccessful vendors to understand bid rationale.

Criminal Charges Laid in Connection with Bids for Condominium Refurbishment Services

On March 29, 2021, the Bureau announced that charges had been laid against four companies and three individuals accused of conspiring to commit fraud and rig bids for condominium refurbishment contracts issued by private condominium corporations in the GTA between 2009 and 2014.[40] TRI-CAN Contract Incorporated and owner Bob Vlahopoulos, JCO & Associates (912547 Ontario Inc) and owner Jose De Oliveira and LAR Condominium Refurbishment Specialists (Lidio Romanin Construction Company Limited) and owner Tony Romanian were charged under the *Criminal Code* with conspiracy to rig bids, conspiracy to commit fraud and fraud over $5,000. A fourth company, CPL Interiors Ltd., was charged under the conspiracy provision of the Act for its role in the alleged scheme. The alleged victims of the scheme were the condominium corporations and the condominium owners who fund them.

Bureau Updates Competitor Collaboration Guidelines

On May 6, 2021, the Bureau published the final version of its revised CCGs.[41] The CCGs describe the Bureau's approach to assessing collaborations between competitors and enforcing the criminal conspiracy and civil agreements provisions of the Act. The updated CCGs replace the guidelines initially published in 2009 and, as stated in the Bureau's news release, "are intended to provide clarity to the business and legal communities on how to identify and avoid the types of collaboration that can harm competition".[42] The updated CCGs reflect the Bureau's experience reviewing competitor collaborations, relevant decisions of the Tribunal and the courts, and feedback from a public consultation of draft CCGs in July 2020.

While the updated CCGs do not differ drastically from the previous version, they do provide insight into the Bureau's future enforcement approaches and priorities in terms of competitor collaborations. Some of the priorities that can be gleaned from the update include taking a broader approach to identifying competitors, identifying agreements that are designed to avoid scrutiny under section 45 of the Act (*i.e.*, "sham"

agreements), non-compete clauses between competitors, bids made by consortiums and common pricing algorithms or common price lists being used in price-fixing agreements.

Fifth Executive Charged and Sixth Settlement Entered in Québec Bid-Rigging Case

On June 29, 2021, a fifth engineering executive from the firm Genivar Inc. (now WSP Canada Inc.) was charged in connection with a conspiracy to rig bids for City of Gatineau infrastructure contracts.[43] François Paulhus was charged under the *Criminal Code* with conspiracy to rig bids, conspiracy to commit fraud and fraud over $5,000. The other charges in this case were laid in June 2018 and resulted in four guilty pleas and two settlements after a Bureau investigation uncovered evidence of bid-rigging on 21 infrastructure contracts awarded by the City of Gatineau between 2004 and 2008.

Federal Court Denies Class Action Certification in DRAM Conspiracy Case

In a decision released on November 5, 2021, the Federal Court dismissed a motion for certification of a proposed class action lawsuit against the three leading manufacturers of Dynamic Random Access Memory chips ("DRAM") under section 36 of the Act for breach of sections 45 and 46 of the Act. The plaintiffs alleged that the defendants conspired to suppress the global supply of DRAM and increase the price of DRAM. The Federal Court dismissed the motion and denied certification of the class action on the basis that the pleadings disclosed no reasonable cause of action because the allegations were speculative and not anchored in material facts.[44]

Abuse of Dominance

Bureau Obtains Court Order to Advance Investigation of Google

On October 22, 2021, the Bureau obtained a court order from the Federal Court to advance a civil investigation into conduct by Google related to its online advertising business.[45] In particular, the Bureau is investigating whether Google has engaged in certain practices that harm competition in the online display advertising industry in Canada. The online display advertising industry is made up of various technology products that are used to display advertisements to users when they visit websites or use apps. Google's involvement in the online display advertising industry in Canada includes selling online advertisement space to advertisers and providing

online advertising tech services to both advertisers and publishers who buy and sell online advertisement space. The Bureau requested the order to obtain more information on these practices and to determine whether they are: (1) impeding the success of competitors; and (2) resulting in higher prices, reducing choice and hindering innovation for advertising technology services, and harming advertisers, publishers and consumers. The order requires Google to produce records and written information that are relevant to the Bureau's investigation.[46]

This is not the Bureau's first investigation into Google's conduct in the online display advertising industry. In 2016, the Bureau investigated allegations that Google was engaged in conduct relating to online searches, search advertising and display advertising contrary to the abuse of dominance provisions of the Act.[47] At that time, the Bureau concluded that there was inadequate evidence to support a conclusion that Google's conduct was engaged in for an anti-competitive purpose and/or that the conduct substantially lessened or prevented competition in Canada, however it committed to closely following developments of Google's conduct and stated that "should new evidence come to light of harm in the Canadian marketplace, whether through subsequent complaints or the Bureau's ongoing monitoring efforts, the Bureau will not hesitate to take appropriate action".[48]

Deceptive Marketing

Company Fined $15 Million for Subscription Trap Scam Involving Health and Dietary Supplements

On January 28, 2021, Revive You Media ("Revive") pled guilty to making false or misleading claims to promote deceptive free trial offers for health and dietary supplements in the Provincial Court of Ontario.[49] The company used claims on its website such as "risk-free trial" and "just pay a small shipping fee" to mislead consumers and provide them with a false impression that they were ordering free trials without any further obligations. In actuality, the company was signing consumers up for subscriptions with more than $100 in monthly fees. Consumers who complained of the subscription to the company were offered partial refunds and those who threatened to contact law enforcement received full refunds. As a result of the guilty plea, Revive was fined $15 million in penalties and is also subject to a ten-year court order prohibiting it from any direct or indirect involvement in promoting deceptive trial offers. Penalties for breaching the order include a fine at the court's discretion or up to five years in prison.

Settlement Agreement Reached with FlightHub

On February 24, 2021, the Bureau entered into a consent agreement with an on-line discount travel site, FlightHub Group Inc. ("FlightHub") and two of its directors, Matthew Keezer and Nicholas Hart.[50] The Bureau's investigation of FlightHub began in November 2018 and involved reviewing consumer complaints, seizing documents at the company's headquarters in Montreal and obtaining a temporary consent agreement with FlightHub to prohibit it from using false or misleading marketing while the investigation was ongoing.[51] The temporary consent agreement in this case was the first of its kind ever obtained by the Bureau during an ongoing investigation. The Bureau ultimately concluded that FlightHub had had charged hidden fees and misled consumers about its prices and services by authoring positive customer reviews and making false or misleading claims about its prices and other flight-booking services.

In the agreement, FlightHub agreed to pay $5 million in penalties and the two directors agreed to pay penalties of $400,000 each. The fact that FlightHub is insolvent and was granted creditor protection by the Quebec Superior Court in May 2020 was taken into consideration by the Bureau in reaching the settlement agreement. The penalties, totalling $5.8 million, will be treated as unsecured claims in any plan of arrangement FlightHub may file under the *Companies' Creditors Arrangement Act* ("CCAA") and all other terms of the settlement are binding on FlightHub and the two directors for a period of 10 years, regardless of the outcome of the CCAA proceedings.

17th Annual Fraud Prevention Month Focused on Online Scams

The Bureau decided to make online scams the focus of the annual Fraud Prevention Month as Canadians became more dependent on online services as they continued to stay indoors throughout much of 2021 to stop the spread of COVID-19.[52] The Bureau ran a campaign using the hashtag #FPM2021 on Facebook, Twitter and LinkedIn. The Bureau's campaign focused on online shopping scams and deceptive practices, including non-delivery of goods, subscription traps and fake online reviews. The campaign addressed individuals and businesses by providing tips to help individuals identify and avoid non-delivery scams, as well as steps to take if someone believes they have been a victim of a non-delivery scam or other common scams.[53]

Multiple Charges Laid Against Individual in Online Business Directories Case

On June 14, 2021, following an investigation, the Bureau announced that multiple criminal charges had been laid against Terry Croteau. The Bureau alleges that between 2012 and 2019 Croteau used deceptive telemarketing and false or misleading statements to induce Canadian businesses to sign up for listings in online directories.[54] Directory scams, such as the one alleged in this case, occur when "fraudsters use misleading tactics to pressure businesses to pay for directory listings of little or no value".[55] Croteau was charged under the Act and the *Criminal Code*. Under the Act, Croteau was charged with making false or misleading statements to promote business listings, including failing to disclose the price and terms and conditions applicable to the services. Under the *Criminal Code*, Croteau was charged with fraud over $5,000 and for uttering a forged document, specifically, a letter purporting to be from a collection agency.

Advocacy

Bureau Advocates for Open Banking to Increase Competition in Canada's Financial Services Industry

On January 18, 2021, in comments to the Advisory Committee on Open Banking (the "Advisory Committee"), the Bureau advocated for an open banking system in Canada. Open banking is a banking practice that allows consumers to securely share their financial transaction data with financial technology companies ("fintechs") and other financial service providers.[56] Fintechs and other financial service providers then use that data to develop competitive, innovative and consumer-centric products and services.[57] The Bureau stated that the Canadian financial services industry is characterized by significant barriers to entry and that open banking would enable greater competition in this industry by allowing consumers to more easily switch to the provider or product that best suits their needs.[58] In its comments to the Advisory Committee, the Bureau also provided regulatory recommendations to ensure that Canada's open banking regime promotes competition and innovation.

Digital Health Care Market Study Progresses

On April 8, 2021, the Bureau issued a market study notice in relation to its ongoing study of the digital health care sector.[59] The objective of the market study is to examine existing or potential impediments to innovation and choice and explore how to support digital health care through

pro-competitive policies.[60] The market study notice sets out three broad topics of study. The first topic, Data and Information, will explore ways to increase access, use and sharing of digital health data and information. The second topic of the market study, Products and Services, will examine issues related to development, approval, procurement and commercialization of digital products and services intended for use by health care providers and patients. The third topic, Health Care Providers, will focus on the ability of providers to deliver digital care to patients.

Topics and questions for the study were developed based on feedback the Bureau received in response to its 2020 public consultation and digital health services survey.[61] The Bureau intends to publish the final report for this study in the Spring of 2022.[62]

Bureau Makes Submissions to the OECD's Competition Committee on Potential Competition

On May 25, 2021, the Bureau made a submission to the Organisation for Economic Co-operation and Development's ("OECD") Competition Committee on the topic of Potential Competition.[63] The Bureau's submission focused on mergers and discussed the Secure-Tervita case. In particular, the Bureau advocated for using all available enforcement tools to protect competition from mergers that eliminate likely future competition. In its submissions, the Bureau indicated that "where the temporal dimension of barriers to entry is long, a [significant prevention of competition] finding by the Commissioner can be expected if viable entry prevented by a merger may still be established, through the evidence, to have been likely to have occurred on a discernable timeline and through identifiable steps."[64]

Competition's Role in Canada's Economic Recovery from the COVID-19 Pandemic

The Bureau hosted The Competition and Growth Summit (the "Summit") from June 1 to June 3, 2021. The Summit brought international and domestic experts together to discuss competition's role in Canada's economic recovery from the COVID-19 pandemic.[65] The Bureau's key takeaway from the Summit was that competition will help Canada's recovery by contributing to growth and thus Canada should look for ways to protect and promote competition. Summit participants identified approaches the federal government can use to protect and promote competition such as ensuring the competition law enforcement framework is robust and well-resourced, urging regulators, at all levels of government, to apply a "competition lens" to public policies and conducting a comprehensive review of the Act.

Commissioner Calls for Comprehensive Review of the Competition Act

On October 20, 2021, the Commissioner gave a speech at the Canadian Bar Association Competition Law Fall Online Symposium discussing the importance of competition as Canada pivots from crisis management to economic recovery.

The Commissioner acknowledged the increased funding the Bureau would be receiving from the federal budget and laid out the areas of investment for the funds which include increasing the Bureau's capacity to consider anticompetitive conduct in digital markets, strengthening the Bureau's enforcement teams and enhancing the Bureau's ability to advocate for regulatory and policy changes.[66] Despite the increased funding, the Commissioner signaled that the merger filing fee would increase within the next two years because the merger review program is funded entirely through filing fees—the increased budget would be flowing elsewhere.

The Commissioner stated that increased funding was only part of the solution and that a modernization of Canada's competition laws was required to promote competition and avoid falling out of step with the international community. The Commissioner identified specific areas of Canada's laws that require reform, including: (a) the criminal fines and civil penalties which do not meaningfully deter anticompetitive conduct or encourage compliance and are seen as the cost of doing business; (b) the legal tests to prevent anti-competitive mergers, which the Commissioner characterized as "overly strict and impractical"; (c) the efficiencies defence in merger reviews as well as the absence of private enforcement tools for mergers; and (d) gaps in the cartel laws resulting in the criminal conspiracy provisions failing to protect workers from agreements between their competing employers that fix employee wages and restrict workers' job mobility (such agreements could only at present be civilly reviewed).[67]

A significant portion of the Commissioner's speech was spent discussing the *Secure-Tervita* case and the issues the Commissioner perceives with the current merger review process. The Commissioner expressed concerns about resource limitations when dealing with increasingly costly and complex merger reviews where there are often large numbers of documents to review. The Commissioner added that as a result of the Tribunal's decision in the *Secure-Tervita* case, rejecting its request for an interim injunction, "the Bureau would be adopting a litigation-focused approach for transactions where merging parties refuse to enter into a timing agreement with

the Bureau (*i.e.,* an agreement to refrain from closing a transaction once the statutory waiting period has expired)."[68] The Commissioner stated that where merging parties refuse to enter into a timing agreement with the Bureau, they can expect a decrease in transparency and engagement from the Bureau team assessing their transaction.

Conclusion

In summary, 2021 could mark the beginning of the next evolution of Canadian competition policy. With Canada emerging from the COVID-19 pandemic and shifting its focus to economic recovery, the Commissioner ramped up enforcement and engaged in ambitious advocacy work. Whether the steam behind the advocacy will result in tangible changes to Canada's competition law and enforcement, remains to be seen, but recent enforcement actions seem to portend a more litigious approach.

ENDNOTES

1 The views expressed in this paper are those of the authors alone and do not necessarily represent the views of Stikeman Elliott LLP or its clients. Any errors or omissions are those of the authors.

2 This article covers developments from January to November 2021 but is not intended to cover every development. Readers can refer to the Competition Bureau's website, the Competition Tribunal's website or the courts for further details.

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6 *Ibid* at para 4.

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BOOK REVIEW

JOHN S. TYHURST, *CANADIAN COMPETITION LAW AND POLICY*

Simon Kupi, Dentons Canada LLP

Despite Canada holding the distinction of enacting the world's first competition legislation in 1889, the development of its regulatory framework has followed a circuitous road. Canada's early criminal law–based prohibitions proved largely toothless in reigning in anti-competitive mergers and conduct before the courts, while decades of start-stop reform initiatives failed to remedy the situation. Only with the changes leading up to the 1986 *Competition Act* did the more economics-influenced modern regime familiar to practitioners today begin to take shape.

Few authors would be better placed to pen a comprehensive account of the evolution of Canada's competition framework than litigator John Tyhurst. Tyhurst's career accolades include contributing to the 1986 reform process, serving as counsel to Competition Bureau for a decade, appearing for the Commissioner of Competition in several leading Supreme Court cases, and more recently teaching competition law at the University of Ottawa. In *Canadian Competition Law and Policy*, Tyhurst provides a broad overview of the *Competition Act*'s framework distinguished, most of all, by the author's detailed attention to the statute's policy context and history. As the latest entry in Irwin Law's longstanding *Essentials of Canadian Law* series, the text also continues that imprint's tradition of synthesizing legal subjects in a comprehensive but accessible and easy-to-read manner. As such, Tyhurst's work is particularly suited to a student audience, although its depth of coverage should also make it a useful reference text for practitioners.

In Chapter 1, Tyhurst first provides a high-level introduction to competition enforcement, characterizing it as the metaphorical "referee in a hockey game" of Canada's market economy. Tyhurst then guides the reader through the *Competition Act*'s enforcement and adjudicative mechanisms and their history in Chapter 2, presenting a detailed and often colourful account of the actors as well as the political, economic and social drivers behind how Canada's competition framework evolved over time. Tyhurst continues with an overview of the *Competition Act*'s statutory objectives and relevant economic concepts in Chapter 3. Here, the book's liberal use of

explanatory graphs and tables is particularly effective at simplifying topics, such as the hypothetical monopolist framework, that might prove less intuitive to students or others new to competition law.

Not unlike other texts on the market, *Canadian Competition Law and Policy* dedicates a chapter to market definition analysis in Chapter 4. However, readers will appreciate Tyhurst's extensive use of case law examples as well as his touching on "two-sided" and "zero-priced" market issues central to modern digital economy cases. Chapter 5, on mergers, similarly goes well beyond simply rehashing the *Merger Enforcement Guidelines*. Particularly useful is Tyhurst's detailed discussion of the controversial efficiencies defence—no doubt aided by Tyhurst's own experience as counsel to the Commissioner in the Supreme Court's *Tervita* proceeding. For example, beyond describing the concepts themselves, Tyhurst uses a table to present the Competition Tribunal's specific quantification of the efficiencies, "socially adverse" wealth transfer and deadweight loss at issue in *Superior Propane*.

Chapter 7 addresses both criminal and civil enforcement of agreements among competitors. As in other parts of the text, here Tyhurst valuably weaves in relevant U.S. and other international authorities. Tyhurst does so not only to contextualize the development of Canada's headline conspiracy and civil collaborations provisions, but also the less frequently studied export cartel and professional sport agreement provisions, for example. The coverage of the *Competition Act*'s abuse of dominance, vertical distribution practices and pricing provisions in Chapters 8, 9 and 10, respectively, is likewise in-depth, tracking relevant Canadian decisions from 1951's *Eddy Match* through to 2019's *Vancouver Airport Authority*. Again, Tyhurst drives home the policy foundations underlying these provisions, whether in parsing through the work of Chicago School and post-Chicago economists, the recommendations of the Economic Council of Canada or more recent legislative materials tied to the 2000s-era *Competition Act* amendments. The text then concludes in Chapter 11 with an overview of the misleading advertising provisions, which Tyhurst argues to be no less fundamental to the statute's market-serving aims.

While Irwin Law previously released a compendium of essays in 2006 on competition class actions, followed by another in 2009 on the competition/intellectual property interface, *Canadian Competition Law and Policy* is its first publication in the competition area in over a decade and the first of this scope. It joins an increasingly rivalrous field occupied by longstanding texts such as LexisNexis' *Competition and Antitrust Law – Canada and the*

United States and Carswell's *Fundamentals of Canadian Competition Law* (currently in their fifth and third editions, respectively), as well as a "new entrant" in Emond Montgomery's 2018-published *Competition Enforcement and Litigation in Canada*, among other recently published or updated texts focused on specific topics. As the latest of these publications, one potential shortcoming of Tyhurst's 528-page text is the relative brevity of its otherwise valuable discussion of the emerging, digital economy–related competition policy issues that have preoccupied legislators and competition authorities in Canada and worldwide in recent years.

This hardly detracts, however, from the success of Tyhurst's larger effort to breathe life into the policy substance of Canada's law as it stands today. Each chapter triangulates between legislative, academic, historical and international sources to provide the reader with a broad and multi-faceted appreciation of each of the *Competition Act*'s core provisions and the institutions and processes surrounding them. It does so without sacrificing detailed, practical and well-referenced commentary on key cases and legal tests. At the same time, Tyhurst's plain language and ample use of illustrations, tables, graphs, pull-quotes and lists keeps the text accessible and digestible throughout. All of this makes *Canadian Competition Law and Policy* a worthy addition to law library bookshelves for students, practitioners and others seeking a comprehensive and current guide to Canada's competition framework.

JAMES H. BOCKING MEMORIAL AWARD ESSAY

GETTING TO THE ROOT OF INDIA'S FARMERS' PROTESTS: REFLECTIONS FOR CANADIAN COMPETITION POLICY

Shruti Ramesh

Competition policy issues in major global economies abroad can be instructive when considering the renewed interest in the role of antitrust policy in Canada and other "developed" countries. One competition policy debate is currently materializing in India, where the "farmers' protests" organized in response to proposed deregulation of the agricultural sector have been said to be the largest organized protests in human history. India's farmers see deregulation and the potential removal of agricultural subsidies as fatal to their livelihood and ultimately believe stronger competition regulation is necessary to address India's inequality crisis. Growing concern with inequality in developed countries makes India's farmers' protests a useful case study in considering what ought to be the goals of competition policy domestically. This paper uses the farmers' protests to examine the potential role of competition law to address broader policy goals such as inequality, while outlining key limitations in evaluating proposed policy reform.

L'étude des enjeux entourant les politiques de concurrence dans les grandes économies de la planète peut être instructive lorsque l'on considère l'intérêt renouvelé pour le rôle des politiques antitrust au Canada et dans les autres pays dits développés. Un débat sur les politiques de concurrence prend forme actuellement en Inde, où les « manifestations d'agriculteurs » organisées en réaction au projet de déréglementation du secteur agricole seraient les plus grandes manifestations organisées de l'histoire de l'humanité. Les agriculteurs de l'Inde considèrent le projet de déréglementation et d'élimination des subventions agricoles comme fatal pour leur moyen de subsistance et croient que la crise des inégalités en Inde exige une réglementation plus rigoureuse de la concurrence. Alors que l'inquiétude à l'égard des inégalités grandit dans les pays développés, le cas des agriculteurs indiens peut nous aider à déterminer quels devraient être les objectifs des politiques nationales en matière de concurrence. Cet article s'appuie sur les manifestations des agriculteurs indiens pour examiner le rôle potentiel du droit de la concurrence dans l'atteinte d'objectifs politiques plus larges comme la réduction des inégalités, tout en soulignant les principales limites de l'évaluation du projet de réforme.

1. Introduction

At the time of writing,[1] India is in the midst of what has been referred to as the largest organized protests in human history.[2] The protests (hereinafter the "farmers' protests") have been organized by farmer unions and their representatives in response to three acts pertaining to farming passed by the Parliament of India early in the Fall of 2020.[3] Broadly, the new bills are supported by India's Prime Minister Narendra Modi and the Bharatiya Janata Party (BJP), who claim these policies for agriculture reform will liberalize the industry both domestically and internationally, and will impose national standards on the currently state-segregated agriculture market.[4] Conversely, Indian farmers see deregulation and the potential removal of longstanding agricultural subsidies as fatal to their livelihood, primarily due to mounting levels of debt and limited alternative ways to earn a living faced by literally millions of farming families.[5] While these laws were passed with the intention of bolstering competition in the market, they impact over half of India's labour force, leading to perceptions of exacerbated income inequality and debt burden to the point that that India's farmers currently face both an economic crisis, and a crisis of high suicide rates.[6]

With the protest happening in India, the natural assumption may be that the farmers' protests have little relevance to competition law and policy in countries in the Global North like Canada and the United States. However, the rationale for considering an international competition policy case study is twofold: first, the forces of globalization and deregulation accompanied by rapid technological advancement have all played a role in shaping how markets are (re)defined, and the scope of conduct which competition and antitrust law may seek to regulate. These changing demands of the competitive landscape of how commerce is facilitated demand effective responses from competition enforcement agencies such as Canada's Competition Bureau. Indeed, there is currently significant pushback against the status quo of competition and antitrust law in Canada, in part due to a variety of non-competition concerns (*e.g.* inequality, privacy, and the democratic process).[7] The same dynamic appears to be on display in India, with the protests taking place in response to pro-competitive agricultural policy reforms; although the reforms may be motivated by a focus on economic efficiency, they are recognized as having implications beyond efficiency, and this has catalyzed mass civil unrest.

The secondary rationale for studying the farmer' protests is that competition policy issues in major global economies abroad can be instructive when

considering the renewed interest in the role of antitrust policy in Canada and other "developed" countries. Increased deregulation and globalized markets make it increasingly important for domestic enforcement agencies such as Canada's Competition Bureau to be appraised of market reform happening with Canada's major trading partners. India in particular is a member of the BRICS[8] block of countries, projected to experience rapid economic growth, predicted to become one of the dominant global suppliers of manufactured goods and services in the next 2-3 decades.[9] The Competition Bureau has articulated as a goal strengthening and collaboration with BRICS competition enforcers in order to advance their respective competition policy and enforcement goals.[10]

At its core, this paper uses India's farmers' protests as a case study to consider whether the current dominant focus of competition policy on efficiency and consumer welfare is too narrow, and whether competition policy ought to be re-oriented from the dominant consumer welfare standard to deal with broader policy goals such as protecting small suppliers and dealing with issues of inequality. To be clear, this paper does not seek to argue that antitrust law should aspire towards an equitable redistribution of wealth and income, but rather seeks to examine whether antitrust law may contribute to exacerbating existing inequalities that have led, in part, to the farmers' protests. As noted above, the new agriculture bills were motivated by a focus on economic efficiency; it is the effect of deregulation beyond economic efficiency that has led to the mass organized protests.

This discrepancy between intent versus perceived impact of the farming bills highlights one of the central questions this paper aims to address; whether competition enforcement authorities can remain credible and relevant if they maintain a narrow focus on efficiency without regard to how competition policy can have transition effects on smaller producers. By extension, the paper considers whether competition policy should be reformed so that stronger enforcement may have the externality of addressing issues of economic inequality. Whether or not it ought to be the role of antitrust regulators such as Canada's Competition Bureau to factor in non-economic policy goals is a highly divisive question given rising concerns about inequality in the Global North. It is important to note, however, that this paper is intended to serve as an exploratory exercise using a case study involving live issues concerning competition policy, rather than provide a definitive answer to these complex policy questions.

The paper will proceed by providing a brief background and overview to the farmers' protests, including an explanation of the contentious laws

pertaining to competition and deregulation of the agriculture industry. This background will illustrate the potential deleterious impacts that exacerbated inequality and deregulation can have on small producers, and society generally. The paper will then proceed to a discussion of economic inequality in Canada and the United States, and examine the arguments that have been made in the literature about the connection between inequality and market power. This discussion will set the stage for evaluating the possibility and merits of competition policy as an intervention for addressing inequality. Limitations and concerns with proposed competition policy reform will be addressed briefly before concluding. Notably, the limitations section will consider the arguments raised in the Competition Bureau's recent "Competition and Growth" summit, which dealt with the question of how to best facilitate inclusive economic growth in Canada's post-pandemic economy. Much of the discussion at the Competition and Growth summit advanced the argument that deregulation is in fact necessary to bolster competitiveness, an important consideration when evaluating what lessons can be taken from India's farmers' protests.[11]

2. Background and Overview of the India Farmers' Protests: A Case Study

India is the world's largest democracy, with a population of approximately 1.5 billion people.[12] The Indian diaspora, consisting of over 18 million people, is the largest diasporic population in the world.[13] Over two million Canadians are of South Asian descent, many of whom are from India's agriculture states such as Punjab, Haryana, and Madhya Pradesh.[14] For this reason, the topic of India's farmers protests is one of deep economic and personal significance for many Canadians. The protests are well-poised to be a case study to consider the impacts of deregulation and promoting a market economy based on free-market principles, and whether such promotion is underpinned by outdated competition policy. Before delving into the policy discussion, it is important to first situate the economic and political climate that led to the farmers' protests.

a) Setting the Stage for the Farmers' Protests: Examining India's Post-independence Agriculture Market and the Green Revolution

India's independence from Britain in shortly after World War II was immediately followed by years of drought, famine,[15] and political turmoil due to ongoing conflict with the newly formed and divided nations of Pakistan and Bangladesh. Many of India's poorest did not have sufficient

access to food.[16] In early 1969, then president of the Rockefeller Foundation, George Harrar called a meeting with leaders of the world's major foreign assistance agencies to address the problem of global food scarcity.[17] The subsequent mobilization of plans to develop the world's agricultural systems and increase overall food production was termed the "Green Revolution" and was initiated in India in late 1969.[18] The Green Revolution emphasized providing developing countries with access to scientific advancement in farming techniques, as opposed to supporting them with food supply through aid organizations.[19] Working closely with noted plant scientist Normal Borlaug, the Green Revolution had the impact of introducing new varieties of seeds that were "stocky, disease resistant, and highly responsive to fertilizer".[20] With the introduction of these genetically modified seeds and high yielding crop varieties, and the use of more advanced farming technology, India's food shortage was ameliorated. Although the use of pesticides and fertilizers led to land degradation that reduced the diversity of crops that were able to be planted,[21] improved rural infrastructure greatly increased the efficiency of rural farmers production capacities, and led India to produce to a surplus of wheat and rice that addressed the food security concerns of the nation.[22]

The Green Revolution also led to the establishment of a nation-wide agricultural marketing system. The purpose of this system was to ensure fair prices for small-scale farmers, given the cost and uncertainty of the new farming technologies introduced. The central government began to offer farmers subsidies in the form of Minimum Support Prices (MSP)[23] for various crops such as wheat and rice, which would generally be significantly higher than the international price.[24]. Practically, this worked through the central government creating a complex procurement system by stationing government agents in the wholesale markets known as *mandis* to buy the crops for which an MSP was established.[25] The *mandis* are run by committees of commission agents who act as middleman by brokering sales and financing transactions. In theory, the *mandi* system guaranteed farmers an income, particularly where the open market price is less than the production cost incurred, while ensuring food production would be sufficient to meet the subsistence needs of India's growing population.[26]

In brief, this newly industrial system worked well initially; the early days of the Green Revolution yielded significant economic prosperity for the Indian economy through greatly increasing the agricultural output and efficiency of major farming states like Punjab and Uttar Pradesh.[27] The increases in agricultural output from states like Punjab were able to greatly increase the incomes of farmers that comprised more than 80% of India's workforce at

the time.[28] Notwithstanding this short-term economic prosperity, the Green Revolution was not met without criticism. For instance, the loss of indigenous crop varieties due to excessive use of pesticides and fertilizers led to a significant loss in biodiversity of agriproducts.[29] It was concerns for the farmers' economic sovereignty and lack of sufficient income generation for smaller-scale farmers that led to subsequent calls for reform in the agriculture sector.

b) After the Green Revolution: Calls for Reform and the Disputed Farming Acts

During the onset of the Green Revolution, Indian agriculture as noted above accounted for approximately 80% of the workforce, and just over 50% of the Gross Domestic Product.[30] At present, agriculture continues to comprise over 50% of India's workforce. However, the sector's contribution to the country's GDP has seen a sharp decline, to less than 20% of the GDP.[31] Put simply, the money in farming is disintegrating—the decline in agriculture's contribution to India's GDP is largely driven by an increasingly globalized and technology-driven economy and a fast-growing service sector. Despite employing a large segment of the labour force and overall increases in agricultural output following the Green Revolution, the value of this output is falling.[32]

Economic concerns with the Green Revolution stemmed from the lack of sustainability that the newly industrialized farming practices had for marginal (or smaller scale) farmers. First, farmers faced high costs of continuing to sow high-yielding seed varieties due to their pesticide and irrigation needs, and they had limited alternatives available due to land degradation from pesticide use. Many farmers faced periods of stagnation in production due to vast mono-cropping, combined with increased input costs of cultivation to invest in labour and farming technologies.[33] As costs of farming mounted, the government subsidies in the form of MSPs, although adjusted biannually, did not account for this increased cost burden. This is particularly relevant because the vast majority (over two thirds) of India's farmers are considered marginal, owning less than one hectare of land—and although there is an MSP set by the government, the majority of them do not actually receive it at the *mandi*.[34]

The increased expenses, repeated stagnation, and diminishing profit margins resulted in many rural farmers to take out loans to help sustain their livelihoods.[35] These loans were often given at high interest rates, and as costs spiralled, crushing debt for millions of small farmers and an accompanying

epidemic of suicides amongst farmers resulted across the country. According to the most recent *Accidental Deaths and Suicides Report* by India's National Crime Reports Bureau, an average of 28 farmers in India are dying by suicide per day due to this financial precarity –amounting to over 10,000 farmer suicides per year,[36] with the suicide rate projected to continue growing given the impact of the new farming laws. One farmer named Nirmal Singh who lost his father, son, and sister to farming debt-related suicide, said of the crisis "we are left with no tears, it has turned our hearts into stone".[37] Taking one's life with the pesticide Sulfas has become so commonplace in India that the brand name itself has become synonymous with taking one's life.[38]

Due to these widespread struggles with debt, farmers have been calling for reform since the 1990s. Asks have included terms such as government support in reducing production of monocultures of certain crops that deplete groundwater and require high volumes of pesticides,[39] subsidies for diesel for agricultural use, and having the MSPs, currently informally set and not legally enforceable, become a codified legal right for farmers. The central government was also of the mind that it was time for reform, but the farming bills that were introduced diverged significantly from the asks of the farmers.

c) The Contentious Farming Bills: Background and Overview

In 2017, the central government of India introduced a number of "model" farming acts for states to adopt. For context, India's Constitution contains a similar division of powers as the Canadian Constitution, assigning different responsibilities or "heads of power" to different levels (*i.e.,* the federal or state level) of government. The domains of "agriculture", "markets and fairs", and "trade and commerce within a state" are responsibilities assigned to state governments under the constitution.[40] The central federal government is responsible for promoting "freedom of trade, commerce, and intercourse" through regulating inter-state and international trade. Historically, laws regulating the agriculture market have been enacted by states, with the regulatory framework varying and being enacted by a state-level Agricultural Produce Marketing Committee (APMC).[41] The APMC is responsible for issuing the licenses to commission agents who played a mediating role to enable farmers to sell to buyers via closed tenders and auctions.[42] The central government was finding that APMCs had not in fact implemented their recommendations, and more urgently, that there was widespread corruption and collusion within the *mandi* system that was

harming competition and ultimately damaging the agricultural sector.[43] This was the context in which the three farming acts were introduced.

The first of the new farming laws is the *Farmer's Produce Trade and Commerce Act, 2020*.[44] This Act seeks to limit APMC oversight and jurisdiction and allow agricultural produce transactions to take place outside of the *mandi* system. This is done in tandem with providing a "facilitative framework" to allow electronic trading and e-commerce of farmers' produce and prohibiting state governments from imposing levies on farmers for trade conducted in an "outside trade area".[45] The second Act is the *Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020*.[46] This Act aims to create a framework for contract farming between farmers and buyers before the production of farming produces, allowing "sponsors" to engage with farmers via written contracts, and frees downstream players in the supply chain from state APMC regulations by permitting them to operate outside the purview of any state legislation.[47] This Act also contains a dispute resolution mechanism aimed at protecting farmers if terms of deals set with farmers are not followed. Finally, the third Act is the *Essential Commodities (Amendment) Act, 2020*.[48] This final Act amends an existing Act that allowed the central and state governments to impose limits on stockpiling certain goods to prevent hoarding and subsequent market manipulation.[49] The amendment allows for the removal of some of these restrictions in exceptional circumstances such as war or famine.

While the above is a simplified explanation of the proposed agricultural reform, collectively the new Acts lead to a deregulated agricultural market with reduced barriers to entry for new competitors. The primary provisions of the proposed legislation had the aim of assisting smaller farmers who lacked the countervailing power to negotiate better prices for produce or invest in technology to improve their productivity, by allowing them to sell outside of their designated markets and earn fairer prices. However, farmers believe that the three Acts will result in a fragmented and deregulated market that could lead to volatile prices for farmers due to their vulnerability to large corporate competitors;[50] these concerns, and frustration with the central government for not responding to the farmers' asks for regulatory reform, ultimately catalyzed the farmers' protests.

d) The Farmers' Protests: 2020—present

When the farming Acts were first announced in July 2020, smaller-scale protests began in the farming states of Punjab and Haryana. Once the Acts

received Royal Assent in September 2020, farm unions across the country mobilized in protest.[51] When the local protests were not garnering government response, in late September 2020 farm unions all over India called for a *Bharat Bandh*, or nation-wide shutting down, to protest the new farming laws.[52] On November 26, 2020, a nation-wide general strike was held organized by 10 trade unions across the country, in which an estimated 250 million people participated, making it arguably the largest strike in human history.[53] Millions rallied from Punjab, Haryana, Uttar Pradesh, Karnataka, Kerala, and Tamil Nadu amongst other states in the 24-hour general strike which resulted in several states being completely shut down, including public transport and other essential services. In the more prominent agricultural states, railway and other transportation services were suspended for more than two months due to the protests leading up to and following the general strike.[54]

The strike was followed by the infamous *Delhi Chalo* mobilization on November 30, 2020 (literally, "let's go to Delhi"),[55] in which upwards of 40,000 protesting farmers and their supporters marched to the nation's capital, setting up camps and demonstrations on major roadways and neighbouring towns.[56] Support for the protestors mounted, with media outlets estimating that the number of farmers in the encampments to be in the hundreds of thousands. On India's Republic Day January 26, 2021, many of the protesting famers held a parade in which they drove a large convoy of tractors into Delhi to protest.[57] Today, nearly three months after the Republic Day demonstrations, there are still many tens of thousands of farmers camped outside of New Delhi, engaging in peaceful protest in an attempt to get the government to listen to their demands and to draw public attention to the dire circumstances of millions of India's small-scale farmers. Their demands echo the calls for reform farmers have been making for decades, and include a repeal of the laws, formalizing agricultural subsidies, and assurances that the market will not become liberalized and the current procurement system will remain in place.[58]

By way of legal response, in January 2021, the Supreme Court of India issued a stay order on the implementation of the farm laws in order to facilitate talks between the protestors and the government.[59] As of today, a dozen rounds of talks have taken place between the central government and the farmers' union representatives, all of which were inconclusive, escalating tensions between the two parties. The crux of their disagreement is that the central government maintains that the new laws will promote competition in the agricultural industry, which is ultimately beneficial. In contrast, the farmers maintain that this increased competition will render

their livelihoods vulnerable and exacerbate existing inequality between the wealthier segments of the population and the half of the labour force that continues to work in agriculture and largely live in poverty. The stay order remains today, although the Supreme Court of India has established a committee[60] to carry out tasks related to the law's eventual implementation.[61] In addition, although several state governments have tabled counter-legislation against the farm acts in light of the farmers' concerns, none of these acts have been passed by their respective state governors due to pressure from the central government. Further, farmers have maintained that they will settle for nothing less than the full repeal of the farm laws, leaving all parties at a stalemate, with tensions rising. Most recently, the Lakhimpur Kheri massacre on October 3, 2021 in Uttar Pradesh resulted in eight deaths and several injuries, as protestors were run over by an SUV from the convoy of the Union Minister of State for Home Affairs.[62] Authorities closed schools and cut internet and cellphone service in the region while attempting to diffuse the situation. The massacre is a symptom of the cycle of acrimony between farmers and the central government over the past year, and the increased political polarization this issue has brought—particularly ahead of several important state elections slated to take place in the next year.[63]

The response of other actors to the farmers' protests has been highly divisive. The Indian central government and its supporters maintain that farmers are ill-informed and their calls for the government to regulate the agricultural industry in a way that explicitly protects small suppliers and addresses the regressive economic effects they shoulder is too much government intervention. The central government is preferring a less interventionist approach with an aim of promoting a more liberalized market economy.[64] The farmers conversely argue that it is government intervention that led to the mounting debt faced they are facing, and it is not merely desirable but necessary for any agricultural reform to address issues of inequality and financial precarity affecting smaller-scale farmers.

The tension between farmers and the state has led to peaceful protest giving way to violence. At every turn, protestors have been met with a heavily militarized police response, in which police have employed tear gas and water cannons, in addition to constructing barriers in attempts to stop protestors.[65] Police violence has been the direct cause of at least five protestor deaths. The persistence of the protest movement has led to the Indian government on more than one occasion shutting down cellular and internet access near protesting camps to prevent them from communicating. Media outlets controlled by allies of the government have been criticized for showing skewed portrayals of the protests,[66] and journalists willing to

be critical of the central government's actions have been subject to sedition charges, which are punishable by life imprisonment.[67] In this sense, the protests have snowballed into larger discussions about rights to dissent and fears that unchecked economic and political power of corporations influencing government and media threatens faith in the very fabric of India's democracy.[68]

It is this connection between competition policy, economic inequality, and inequality's potential to threaten democracy that has drawn the attention of prominent public figures such as singer-entrepreneur Rihanna and climate activist Greta Thunberg, whose social media posts about the protests have elevated the farmers' struggles to a global platform.[69] Canada's Prime Minister Justin Trudeau was the first international politician to voice concerns about the Indian central government's mishandling of the farmers' protests.[70] Solidarity movements have been organized across Canada and the United States with members within and outside the Indian diaspora voicing concern neoliberal economic reform and insufficient competition enforcement renders vulnerable small producers who are already economically marginalized.[71]

This is where the policy question arises. In pursuing agriculture deregulation, the Indian government is aiming to implement pro-competitive free market policies to increase economic efficiency in a sector that is languishing. Although the reforms have the aim of increasing competition in the market, the removal of agricultural subsidies and perceived lack of safeguards in place for small producers is perceived as fatal to their livelihood, as they are vulnerable to large corporations exercising their market power. The harsh economic circumstances of India's farmers is unquestionable; what remains in contention is whether antitrust policy is in fact the proper forum to address non-economic policy objectives such as inequality.

This paper will now move to examine economic inequality in the local context and how it has been linked to market power, before considering the varying perspectives (and tensions therein) on what policy objectives ought to be captured within the scope of competition and anitrust law. These tensions, as will become clear, are also demonstrated by the struggle between the farmers and the central government in India's farmers' protests.

3. Economic Inequality and its Connection to Market Power

India's farmers' protests have been described as "laying bare the dire reality" of what significant income and wealth inequality can do to society,

particularly against the backdrop of the ongoing COVID-19 pandemic.[72] This reality is not unique to the developing world. In fact, economic inequality has received increased attention in the developed world in a highly politicized way. This increased concern around inequality unsurprising in the context of developed nations' recovery from the financial crisis of 2007-2008, in which many observed for the first time that "the rising tide has not lifted all boats".[73] The pandemic has only sharpened the global focus on inequality; COVID-19 has been described as a "social x-ray"[74] of sorts, highlighting previously unseen problems in our body politic and globally. In India and Canada alike, poorer workers who subsist on seasonal labour or agriculture disproportionately bear the cost of the pandemic, exacerbating existing inequalities stratified by race, class, and caste.[75] Conversely, Canada's top 20 billionaires gained an average of $2 billion dollars each since the start of the pandemic, widening the wealth gap between richest and poorest, with the former being criticized for "pandemic profiteering" while large segments of the population struggle to meet their basic needs.[76]

To be clear, inequality is not in and of itself a bad thing. Scholars of antitrust law such as Baker & Salop have pointed out that a degree of inequality is a natural by-product of a market economy. It is the very existence of inequality that attracts investment, innovation, and incentivizes participation in the market—because for there to be the possibility of "winning" in a market economy, there also by necessity needs to be the possibility of "losing".[77] Inequality as an inherent feature of capitalism is not a new idea; French economist Thomas Piketty had as his central thesis in "Capital in the Twenty-First Century" that a trend towards increased economic inequality has been decades in the making as a feature (albeit an undesirable one in Piketty's framing) of free market capitalism.[78] Without attempting to tackle the question of at what level inequality becomes undesirable, the fact remains that economic inequality is growing, both in magnitude and visibility, and it is affecting Canadians across the country.

The fact of growing inequality can be attributed to a range of factors, including globalization resulting in the off-shoring of certain jobs,[79] the development of labour-saving technologies,[80] and a related reduction in bargaining power for workers.[81] Canadian economist Carolyn Wilkins in her remarks at the 2018 G7 symposium in Montebello Quebec noted that while technological progress has, and will continue foster economic growth, it has also driven rising economic inequality.[82] Recent commentators on antitrust policy Khan & Vaheesan have sought to establish the impact of market power (defined as a firm's ability to drive prices and returns above competitive levels) on economic inequality, arguing that market power not

only gives firms "tremendous political clout", but also enables regressive redistribution in the market place.[83] Recent research from the Organisation for Economic Co-operation and Development (OECD) using data from Canada and seven other high-income economies provides some empirical support for market power contributing to economic inequality: the OECD report found that market power, stemming from a lack of competition, increases the wealth of the richest 10% of the population by between 12% and 21% while reducing the income of the poorest 20% by between 14% and 19%.[84] Scholars of antitrust populism (also referred to as Neo-Brandeisan or, pejoratively, as "Hipster" antitrust theorists) argue that notwithstanding the inevitability of inequality, "even bracketing its moral undesirability, *extreme* economic inequality subverts political equality and threatens … democracy [*Emphasis added*]".[85] This threat to democracy in the face of extreme inequality is precisely what we are seeing in the aftermath of India's farmers' protests.

The connection between market power and inequality is not undisputed, however. The existing body of literature linking market power to inequality is primarily driven by "evidence of increasing corporate concentration and mark-ups, declining business dynamism and investment, and the rise of superstar firms in digital markets with winner-take-all characteristics".[86] The International Monetary Fund (IMF) recently published a chapter investigating macroeconomic trends in advanced economies over the past three decades.[87] The chapter did in fact find a modest rise in market power across the economies studied,[88] and that an uneven rise in corporate market power could contribute to wage inequality between firms, as well as an overall rise in wealth inequality in some advanced economies.[89] However, the chapter makes clear that the precise macroeconomic implications of rising market power have not yet been firmly established, and the broad market concentration usually used as a measure of market power is likely oversimplified, leading to potentially overbroad conclusions being drawn. In a similar vein, antitrust scholars such as Daniel Crane have argued that the nature of the relationship between market power and economic inequality is misunderstood.[90] At the core of this rebuttal of "monopoly regressivity" is the claim that exercises of market power have "complex crosscutting effects" and therefore cannot be generalized as being economically regressive in a robust and meaningful way.[91] However, populist antitrust scholars have countered this argument with examples from different industries such as agriculture, airlines, and telecommunications, demonstrating that the accumulation and exercise of market power by dominant firms cannot be unilaterally neutral, and is likely to have some "regressive income and wealth effects".[92]

Market power, while by no means the exclusive cause of income and wealth inequality, is more likely than not a contributor. Nobel Prize laureate Joseph Stiglitz noted that the creation and exercise of market power can contribute to the development and proliferation of inequality because the creation and exercise of market power tends to raise the return to capital.[93] Technological change has created more markets with intellectual property protections facilitating firms achieving market power.[94] Scholars have also observed that more permissive antitrust regimes in recent decades have also more likely than not increased the prevalence of market power, and subsequently increased economic inequality.[95] Looking to the farmers' protests, while their response to deregulation was pre-emptive, it was not baseless; both domestically and abroad, deregulation of the agriculture sector both in India and in other countries has seen the small farmer's share "dramatically decreasing, while consumers pay largely the same … price".[96] While the relationship between market power and inequality is not yet understood with precision, there is undoubtedly a correlation between the two. It is the rise of market power, the rise of inequality, and the concerns of the relationship between the two trends that underpins the current challenge to antitrust orthodoxy.

As noted earlier in this section, inequality itself is not the problem; it is extreme inequality that raises concerns about the welfare of society's most disadvantaged, and of the state of our democracy as a whole. While the extreme example of the India's farmers' protests may seem far away from the reality of economic inequality in Canada, it is important to note that regulatory reform in markets such as agriculture and subsequent civil unrest are not unprecedented; many economies in developed and developing countries (including Canada and the United States) undertook similar agricultural reform in the late 20th century to encourage private sector participation, with similar concerns raised about the welfare of small producers.[97] In light of exacerbated inequality during the pandemic, we cannot dismiss the circumstances of India's farmers as an issue unique to a "developing country" and instead take it as a lesson to prevent similar civil unrest from occurring closer to home. The connection between market power and inequality has become a point of increased discussion amongst competition law scholars, as has debate about whether competition law and policy is a suitable intervention to deal with these concerns. These perspectives will be considered in the next section as we discuss whether, and to what extent, Canadian competition policy can and ought to consider addressing goals beyond the dominant consumer welfare standard such as ameliorating economic inequality.

4. Should Competition Policy Address Issues of Inequality?

Thus far in our discussion we have used the farmers' protests in India as a case study to illustrate not only the moral undesirability of such extreme economic inequality, but also the possible impacts that market power, and antitrust enforcement could theoretically have in promoting more progressive (or regressive) economic outcomes. Although the agricultural reform in India is intended to be pro-competitive, farmers concerns stem from the longstanding economic precarity they have been experiencing, and they perceive the new farming laws will exacerbate existing economic inequality for small farmers; they argue that agriculture reform should do the opposite, and aim to ameliorate economic inequality. Now we will consider the question of whether the pursuit of outcomes unrelated to economic efficiency *should* be a formalized part of our own competition policy regime in Canada.

We are currently experiencing an "antitrust counter-revolution"[98] of sorts, with the role of antitrust policy receiving renewed interest in jurisdictions such as the United States, the European Union, and by extension, Canada. Of primary concern is whether competition law should retain its current focus on consumer welfare and economic efficiency or should seek to achieve a broader subset of goals, including tackling progressive issues of wealth and income inequality, and implementing safeguards around the growing political power of large corporations. Although addressing the economic power of large corporations has always been a goal of antitrust law, there is a growing sentiment that a merger review process that is overly focused on economic efficiencies may not adequately safeguard society from firms' achieving significant market power. For example, Canada's Commissioner of Competition Matthew Boswell gave remarks on October 20, 2021 at the Canadian Bar Association at the Canadian Bar Association Fall Symposium of the Competition & Foreign Investment Group urging for the repeal of the efficiencies defense in section 96 of the *Competition Act* to achieve a more robust and less permissive antitrust enforcement regime.[99]

The body of scholarship addressing the purpose of antitrust law is immense. Scholars of different vintages and political leanings have offered accounts either advancing or problematizing the consumer welfare standard that animates contemporary competition law policy in Canada. Rather than exhaustively summarizing the literature on the schools of thought, we will provide a brief discussion of the key points before returning to the farmers' protests and considering what lessons we can glean for Canadian competition policy.

a) Considering the Status Quo of Competition and Antitrust Policy: the Chicago School

It is uncontested that modern competition policy in Canada and the United States is premised on the Chicago School in that it focuses solely on promoting competition, defined by reference to the "effect of corporate behaviour on consumers, especially in terms of impact on product quality, and … price".[100] The Chicago school views markets as naturally competitive, with relatively little need for state intervention to promote competition. As a result of the Chicago School's dominance for the past several decades, non-competition factors have been of mostly marginal significance in domestic and international competition law enforcement frameworks. Of course, relative to the United States, Canada's economy remains small.[101] Nonetheless, the Chicago School has been the prevailing influence on Canadian competition policy since the enactment of Canada's *Competition Act* in 1986.[102]

While focused primarily on efficiency, Canada's *Competition Act* appears to leave some room for consideration of additional policy goals beyond the consumer welfare standard. The *Competition Act*'s purpose clause states:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices. [*Emphasis added*].[103]

The Federal Court of Appeal in *Canada (Commissioner of Competition) v Superior Propane Inc*[104] provides some additional discussion of the purpose clause of the *Competition Act*. The Court emphasized that the Competition Tribunal erred in law by adopting a "total surplus standard" in considering the efficiency defense under section 96.[105] The Court noted that the total surplus standard only considers the "deadweight loss of wealth to the economy", and that this cannot correctly be the standard by which efficiencies are measured under section 96, as by using this standard "an anti-competitive merger is allowed to proceed when efficiency gains are greater than and offset this deadweight loss to the economy."[106] Rather than limiting analysis of efficiencies to deadweight loss, having regard to the purposes set out in section 1.1 of the *Act*, the Court found that a wider range of effects should be considered in balancing in balancing the interests of producers and consumers.[107] A unique feature of Canada's competition

regime seems to be the explicit incorporation of additional public policy goals, making room for "enforcement decisions that do more than protect consumers from price increases".[108] That Canada's regime is not divorced from broader industrial policy objectives has been the basis for arguing that Canada's competition policy is in a "more advantageous position to adapt to new political challenges compared with its U.S. and EU counterparts".[109] These include challenges to the Chicago School's purist consumer welfare approach and subsequent calls for policy reform.

b) Antitrust Populism and Concerns with Growing Inequality

The Chicago School has not been without significant criticism from the antitrust community, particularly after the late 2000's financial crisis.[110] As discussed earlier in this paper, burgeoning concern about economic inequality during the post-recession recovery period led to calls for a "more sophisticated form of capitalism, one imbued with a social purpose".[111] European scholars such as Anthony Atkinson have argued that economies in developed countries, particularly the United States, have erred in deviating from the *Sherman Act*'s original focus on preventing economic concentration in the American economy by keeping a large number of small competitors in business to an unadulterated consumer welfare standard.[112] Growing political pressure for competition policy reform has contributed to the popularity of the Neo-Brandesian antitrust movement, which is also referred to as "antitrust populism".

Antitrust populism is not entirely new—in many ways, it signifies a return to the original policy intentions behind establishing antitrust laws in the first place. Competition and antitrust policy began as an explicitly political agenda to limit the political power of trusts.[113] Scholars of the Neo-Brandesian antitrust movement are concerned with issues such as income inequality, unemployment, stagnant wage growth, and the danger that growing economic and political power of large firms poses to these public policy goals. It is these concerns that lead proponents of this movement to see antitrust policy as an avenue for intervention to address perceived symptoms of unchecked (or rather, insufficiently checked) market power beyond higher prices paid by consumers.

Prominent commentators of the antitrust populist movement Lina Khan and Sandeep Vaheesan speak to how powerful corporate actors can "inflict major damage on the … economy, society, and democracy", which we see very clearly in the case of India's farmers' protests.[114] The corollary of this potential for harm is that a revived antitrust enforcement movement can

play an important role in reversing the dramatic rise in economic inequality and other perceived effects of market power. Khan and Vaheesan actually use the example of the agriculture sector in one of their papers, demonstrating how after decades of mergers, food retail and agricultural inputs have become highly concentrated, resulting in an industry "shaped like an hourglass", with millions of consumers and farmers on either end "connected through a few large companies".[115] Consolidation along the supply chain has led to worse outcomes for farmers, and for consumers, "transferring wealth from both farmers and consumers to processors, distributors, and retailers in the middle".[116] In this example, the authors demonstrate how more stringent antitrust enforcement would have promoted the interests of smaller producers and consumers alike, while promoting more progressive economic outcomes even where economic progressivity is not a specific goal. Panelists at the Competition Bureau's recent "Competition and Growth Summit" also discussed the regressive impacts of Canada's supply management system, and the implicit tax imposed on poor households as a result of rising costs *e.g.* of dairy, that is "nearly five times greater than rich households as a percentage of income".[117]

In that vein, it is important to note that arguments in favour of antitrust enforcement having broader policy aims do not purport that the consumer welfare standard is wholly bad; in fact, the consumer welfare standard also helps to address inequality because it prevents conduct that would harm consumers to the exclusive benefit of shareholders.[118] Neo-Brandesian scholars merely argue that "consumer welfare" as defined by short-term price effects alone is "unequipped to capture" the effects and architecture of market power in the modern economy.[119] The reasons they give for this vary, but include the fact that there is no price in certain markets such as technology (*e.g.* to use services like Facebook), and that traditional conceptions of market power, and relatedly, that measuring market power in a comprehensive and robust way is challenging. In the previously referenced IMF report,[120] the difficulty in measuring market power was underscored, with different potential definitions of market power being proffered in order to address the ambiguity presented by exclusively focusing on market power as it relates to consumer welfare.[121]

It is with these critiques of antitrust populists in mind that we can approach the question of Canadian competition policy reform.

c) Reform Possibilities and Limitations for Canadian Competition Policy

Neo-Brandeisian or populist members antitrust scholars generally concede that their arguments are vulnerable to empirical criticism;[122] what cannot be disputed however, is the increased awareness and engagement with antitrust policy amongst non-practitioners, and the increased importance of public confidence in enforcement agencies such as Canada's Competition Bureau. Conversely, the now-dominant Chicago school was backed by empirical scholarship,[123] a fact noted even by notable Chicago School critics such as Frederick Scherer.[124] However, the Chicago school is not without its limitations—notably in its exclusive focus on price theory. For instance, Robert Pitofsky was known for criticizing the Chicago school for relying more on over-simplified theory than facts.[125] Richard Posner further noted that where the Chicago School is particularly vulnerable to criticism is "the assumption that price discrimination is on the whole socially beneficial because it moves the monopolist's output closer to the competitive level and hence reduces the misallocative effects of monopoly."[126] Arguably, the Chicago School model and its animating assumptions are somewhat oversimplified, cutting "across market structures" and ignoring "details of different industries and individual firm behaviour".[127]

Despite its vulnerability to criticism, the Chicago School became the dominant framework for antitrust policy. While the impact of the Chicago School is undisputable, arguably it was a political victory rather than a purely empirical one that led to the dominance of the consumer welfare standard.[128] Antitrust policy increasingly relied on an "incomplete, distorted conception of competition" by adopting simplifying assumptions of self-correcting markets composed of "rational, self-interested market participants".[129] Both schools involve simplifying assumptions, and both require political will to be exerted in favour of their respective policy aims. That the Neo-Brandeisan school of antitrust has less economic support should not be fatal to its argument against the Chicago school's exclusive focus on price and economic efficiency; rather, its theories should be put to the test to see if they can be empirically verified.

What do the imperfect options presented mean for Canadian competition policy reform? An explicit focus on equality has been critiqued by scholars such as Carl Shapiro, who argues for more stringent antitrust enforcement, but cautions advocates of the Neo-Brandeisan school that "the role of antitrust in promoting competition could well be *undermined* if antitrust is called upon or expected to address problems not directly

related to competition".[130] Returning to India's farmers' protests, consider that agricultural subsidies and other interventions to incentivize agricultural surpluses were not just present in India, but also in countries like Canada and the United States.[131] In thinking about the agricultural reform that took place in the Green Revolution, the primary objective was efficiency in farming; however, a number of other reforms unrelated to farming efficiency were also introduced, in order to ensure, for example, that farmers were able to earn a stable income. That these reforms were all undertaken in tandem seems to illustrate that policies with one objective (*i.e.*, efficiency) can ostensibly be affected by social and political pressure unrelated to that objective, and policy can be reformed to accommodate the needs of society beyond consumer welfare.

Perhaps the most significant misconception about antitrust populism is that arguments in favour of heightened antitrust enforcement to combat wealth inequality are arguing that antitrust is the sole solution for advancing progressive economic goals. This is not the case; most Neo-Brandeisian scholars purport that antitrust is but one additional regulatory tool, along with stricter corporate and securities regulation, progressive taxation, and strengthened employment policy, to ultimately tackle wealth inequality, and advance the cause of social justice.[132] This is precisely the middle ground found by scholars such as Baker and Salop, who argue for increased budgets for enforcement agencies and transitioning towards more interventionist antitrust regulatory standards; this way, progressive economic goals can be advanced without raising concerns about inconsistency and unpredictability that comes with a nebulous "public interest" standard of review.[133] It is this middle ground that Canada will likely find the greatest potential for competition policy reform: focusing on expanding enforcement capacity, while maintaining a commitment to predictable conduct review to ensure the end goal of promoting competition is still animating Canada's competition policy regime.

In the Competition Bureau's recent "Competition and Growth Summit" referenced above,[134] the Bureau notes that even prior to the COVID-19 pandemic, there were concerns of "deeper inequality in advanced economies" such as Canada. As such, competition policy has been identified as a "lever" governments can, and ought to use to promote inclusive growth.[135] This does not involve abandoning consumer welfare standard; when consumer welfare is threatened, it is often the poorest and most vulnerable in society that are most affected by higher prices and reduced quality of choice that results from anticompetitive markets.[136] Further, as discussed above, welfare loss as a result of monopolized markets disproportionately affects

lower-income households, and on the global stage, disproportionately affects lower income countries.[137] The takeaways from the Competition and Growth Summit were a general consensus that governments should: eliminate or reduce unnecessary regulatory barriers to competition; address any significant gaps in competition law enforcement frameworks; and, ensure that competition authorities are adequately resourced to protect and promote competition in their jurisdictions.

Rather than abandoning the consumer welfare standard altogether, the approach that perhaps ought to be taken is twofold: first, as noted by panelists as the Bureau, increased competition enforcement through increased capacity (*i.e.* through budgetary allocations), will facilitating innovation and greater productivity, a connection that is already well-documented.[138] Simply promoting more interventionist standards is, of course, not competition policy reform, nor will increasing competition enforcement capacity necessarily result in reducing inequality. As a second step, the Bureau can play a role in competition policy not being considered in a silo, by encouraging regulators and other policymakers to consider a competition lens in implementing their respective mandates. The Bureau has already taken a step towards this, having published a toolkit last year to assist regulators voluntarily undergoing competition assessments.[139] I would argue that this could be taken a step further, and have Bureau consultation as a step in certain regulatory spaces, particularly those where pervasive inequality has already been flagged as an issue. An example flagged earlier in this paper was the regressive impacts of Canada's supply management system; to address this issue in a pro-competitive, but also pro-equality way could be to specifically target supply management (*i.e.* of dairy, poultry), as well as agriculture for competition assessment to see how regulatory barriers and anticompetitive conduct can be better addressed. Targeting the Bureau's efforts in areas where inequality is an issue, and approaching policymaking in tandem with regulators rather than in a silo, can help bridge the gap between competition policy's impact on economic efficiency, and the broader impact increased enforcement can have on the lives of Canadians including, and beyond consumer welfare. This "tag-team" approach could take the form of the Bureau working with regulators to cut domestic barriers to entry in non-manufacturing industries; it can work to ease barriers to entry relating to rapid technological development; further, it can make explicit a policy priority to address issues beyond consumer welfare. Incremental steps are already being taken in this direction, but the Competition Bureau like any other regulatory body is tasked with allocating scarce resources and setting priorities. By making explicit an expanded scope of activity that the Bureau seeks to regulate, it can better work in tandem with regulators to

address both issues of competition enforcement, but also broader social/political issues that exist within industries.

Returning to the farmers' protests, this could look like the central government assisting with providing transition funding to farmers who were reliant on the subsidies to survive; smaller-scale farmers could be provided with assistance to improve the efficiency of their farming practices, *e.g.* through the use of improved farming technologies. While this is by no means a comprehensive solution to a complex and longstanding issue of socioeconomic equality, this paper argues that competition policy and enforcement do not operate in a vacuum; it can be affected by social/political concerns that are not traditionally "competition" concerns. A pro-competitive agricultural reform that results in the mass suicides of small-scale producers is not, in good faith, policy that improves the economic or social welfare of a country. Ultimately, the farmers' protests are a lesson for Canada to reflect on our own issues of inequality, and how competition policy reform needs to be undertaken in a more holistic, and less siloed way.

5. Concluding Thoughts: Takeaways for Canada from the Case of the Farmers' Protests

In Canada and abroad we are experiencing unprecedented levels of economic inequality, particularly in light of the COVID-19 pandemic. When we see examples of mass civil unrest stemming from inequality such as the case study of India's farmers—the suicide crisis, the protests, and the attempts at government censorship—we are provided with a salient example why extreme inequality is something to be fastidiously avoided.

In the introduction for this piece, I stated my reason for choosing India's farmers' protests as a case study to consider the proper role of antitrust policy was twofold; globalization, deregulation and rapid technological advancement have played a role in shaping markets and are impacting the scope of conduct which competition and antitrust law may seek to regulate and how. The second rationale is that debates about competition policy in major global economies abroad can be instructive when considering antitrust policy in Canada. In concluding, I will aim to make this connection more salient.

The world's largest protest in the world's largest democracy is undoubtedly the result of a failure in government regulation of the agriculture sector. I sought to use an extreme example of the economic *and* political outcomes of neoliberal policy reform to illustrate precisely why we cannot simply dismiss small producers in an economy as merely being too weak to

compete—they are also people trying to earn a livelihood; it is irresponsible policy to liberalize the agriculture market without supporting farmers in India in finding alternative ways to make a living.

In terms of lessons to be learned from the farmers' protests; although the agricultural reform in India was predominately motivated by increasing economic efficiency, the public, both locally and internationally is recognizing that the reforms have implications beyond efficiency. Notably, that this efficiency is coming at the cost of the economic stability of small-scale farmers. A markedly similar dynamic appears to be on display in developed countries such as Canada and the United States, which we see in the ongoing debates about the rightful role of competition and antitrust policy. Just as we can't dismiss small farmers in India as inefficient actors who should exit the industry, we cannot dismiss concerns about inequality, and democracy in Canada.

Accepting that we cannot be complacent in the face of extreme inequality brings us to a cascade of questions. Can competition enforcement authorities remain credible and relevant if they maintain a narrow focus on efficiency? If not, how should they go about incorporating other policy goals in a way that ensures reliability and predictability in the enforcement regime? Put in other words, should the answer be more stringent antitrust enforcement of monopsony and abuse of dominance issues, or do enforcement agencies need to broaden their scope? Globally, the antitrust community is considering answering these very questions. These discussions are being reflected in increased attention being given to antitrust enforcement agencies. For instance, in Part II of the new Federal Budget released on April 19, 2021, the Government of Canada has outlined as an explicit goal to promote a fair and competitive marketplace through "empowering the Competition Bureau through increased capacity and new digital tools that will help ensure a competitive marketplace".[140] Specifically, the Budget 2021 proposes to provide $96 million over five years, starting this year, and $27.5 million ongoing to enhance the Bureau's enforcement capacity.[141]

Antitrust populist sentiments will likely play a contributing role in empowering agencies like Canada's Competition Bureau in terms of continuing to expand its enforcement capacity. Canada's Competition regime in particular, with its explicit prioritization of ensuring equitable opportunity for small and medium-sized enterprises has the potential to expand its policy scope beyond a strict adherence to the consumer welfare standard. In the absence of progressive wealth distribution measures such as taxation,

however, more stringent antitrust enforcement in itself will more likely than not have a role in reducing income and wealth inequality. This paper is subsequently arguing not that competition/antitrust regulators should neglect concern for economic efficiency altogether in favour of a nebulous public interest standard, but rather, that the Bureau should work in tandem with regulators to promote a more cohesive approach to policy-making. The Bureau has already began this progression by encouraging regulators to undertake competition assessments; this is the first step in a long march towards a more comprehensive competition policy that can have within its scope broader social and policy issues.

Antitrust cannot and ought not to be considered a silver bullet solution to inequality. We see precisely from the example of the farmers' protests that the factors contributing to the extreme inequality in India that has led to mass civil unrest are complex and multifaceted. These issues demand similarly multifaceted solutions; tax policy, employment policies and job creation initiatives, are all avenues that need to be considered in tandem with economic and trade policy. It is understandable that "if all you have is a hammer, everything looks like a nail"—but we have many more tools in our toolkit beyond antitrust policy reform to address such complex policy issues as inequality.

ADDENDUM

On Friday November 19, 2021, Indian Prime Minister Narendra Modi announced he would repeal the three farming laws discussed in this paper in the new parliamentary session starting in late November. Farmers see this as a hard-fought victory after over a year of protests. The central government's concession on this issue shows both the power of collective action, and the vulnerability of economic reform to the social and political realities of people on the ground; the law cannot operate in a vacuum. With the farming laws repealed, the inefficiencies of the agricultural subsidies and widespread anticompetitive conduct in the government regulated wholesale markets remain live; these issues will undoubtedly be at the forefront of the rapidly approaching elections in several grain-belt states. Returning to Canada, the repeal of pro-competitive agricultural reform in the face of mass political pressure reinforces the need for a re-visiting and re-articulation of the goals of our own competition and antitrust policy, and to what extent efficiency ought to be its animating goal.

ENDNOTES

[1] This essay was last reviewed on November 7, 2021.

[2] Simran Singh, "The Farmers' Protests are a Turning Point for India's Democracy—and the World Can No Longer Ignore that", *Time Magazine* (11 February 2021), online: <https://time.com/5938041/india-farmer-protests-democracy/>.

[3] "Why are Indian Farmers Protesting?", *The Economist* (5 February 2021), online: <https://www.economist.com/the-economist-explains/2021/02/05/why-are-indian-farmers-protesting>.

[4] *Ibid*.

[5] Salimah Shivji, "Burdened by Debt, and Unable to Eke out a Living, Many Farmers in India turn to Suicide", *Canadian Broadcasting Corporation*, (30 March 2021), online: <https://www.cbc.ca/news/world/india-farmers-suicide1.5968086#:~:text=But%20over%20the%20years%2C%20problems,to%20crushing%20debt%20for%20many>.

[6] Karandeep Singh, "'The Lockdown Killed my Father': Farmer Suicides Add to India Virus Misery", *The New York Times* (8 September 2020), online: <https://www.nytimes.com/2020/09/08/world/asia/india-coronavirus-farmer-suicides-lockdown.html>.

[7] This policy debate is exemplified by the discussions that occurred at the Competition Bureau's recent (June 2021) "Competition and Growth Summit". See "Canada Needs Competition: takeaways from the Competition and Growth Summit" online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04595.html>.

[8] The others being Brazil, Russia, China, and South Africa.

[9] See *e.g.* O'Neil et al., "How Solid Are BRICS?", *Goldman Sachs* (1 December 2005), online: <http://www2.goldmansachs.com/hkchina/insight/research/pdf/BRICs_3_12-1-05.pdf>. Note that although the specific numeric claims have been adjusted since the publication of the original Goldman Sachs report, the term "BRICS" is still used by competition enforcement agencies to denote countries of rapidly increasing global economic growth and power—see *e.g. infra* note 10.

[10] Competition Bureau Canada, "Competition Law in a Global Economy—A Canadian Perspective", *BRICs International Competition Conference* (21 November 2013), see notes online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>.

[11] See *supra* note 7 for the Executive Summary of the Summit's discussion topics.

[12] United Nations Department of Economic and Social Affairs, "World Population Prospects 2019" (2019), online: <https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf> at 12.

[13] United Nations Department of Economic and Social Affairs, "International Migration 2020 Highlights" (2020), online: <https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesa_pd_2020_international_migration_highlights.pdf> at 2.

[14] Statistics Canada, "Immigration and Ethnocultural Diversity Highlight Tables"

online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/imm/index-eng.cfm>.

[15] Mishra et al., "Drought and Famine in India, 1870-2016", (2019) Advancing Earth and Space Science 46:4 2075 at 2076.

[16] See Mervyn Piesse, "Hunger Amidst Scarcity: The Indian Food Security Enigma", *Future Directions International* (19 March 2019), online: <https://www.futuredirections.org.au/wp-content/uploads/2019/03/Hunger-Amid-Abundance-The-Indian-Food-Security-Enigma.pdf>.

[17] Lowell S. Hardin, "Meetings that Changed the World: Bellagio 1969: The Green Revolution" (2008) 455 Nature 470.

[18] Kathryn Sebby, "The Green Revolution of the 1960s and its Impact on Small Farmers in India" (2010) 10 University of Nebraska Environmental Studies Thesis, online: <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1027&context=envstudtheses>.

[19] *Supra* note 16.

[20] *Ibid.*

[21] Nelson et al., "The Impact of the Green Revolution on Indigenous Crops of India" (2019) 6:8 J of Ethnic Foods 1.

[22] Thulsasiraman et al., "Need for balance between short food supply chains and integrated food processing sectors: COVID-19 takeaways from India" (2021) Journal of Food Science and Technology.

[23] Nives Dolsak and Aseem Prakash, "Fights over Indian Farm Laws Ignore Green Revolution's Climate and Economic Problems" *Forbes Magazine* (16 February 2021), online: <https://www.forbes.com/sites/prakashdolsak/2021/02/16/fights-over-indian-farm-laws-ignore-green-revolutions-climate-and-economic-problems/?sh=43e88ccf3b36>.

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