THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Vol. 36 | 2023 | N° 1

CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

CALL FOR PAPERS

The *Canadian Competition Law Review* (formerly the *Canadian Competition Record*) is published twice a year by the Canadian Bar Association Competition Law and Foreign Investment Review Section. The *Canadian Competition Law Review* welcomes submissions of original articles, case comments, book reviews, and essays on significant current issues of competition law and economics in French or English. Submissions are subjected to an editorial review process and are peer-reviewed by selected scholars and practitioners before acceptance for publication. Submissions are only accepted electronically at the following address: cancomplrev@cba.org. Please contact us by email at the same address for more information on our publishing procedures and policies.

DEMANDE DE COMMUNICATIONS

La *Revue canadenne du driot de la concurrence* (anciennement le Canadian Competition Record) est publiée deux fois par an par la Section du droit de la concurrence et de l'investissement étranger de l'Association du Barreau canadien. La *Revue* accepte les articles, commentaires d'arrêts, comptes rendus critiques de livres, et essais originaux en français et en anglais sur des dévelopements significatifs et actuels en matière de droit et économie de la concurrence. Les textes soumis seront examinés par le comité de rédaction et par un comité de lecture composé d'universitaires et d'avocats en pratique privéeavant d'être sélectionnés pour publication. Les textes sont uniquement acceptés en format électronique à l'adresse suivante : cancomplrev@cba.org. Veuillez communiqur avec nous à la même adresse pour en savoir davantage sur nos politiques de publication.

EDITORIAL BOARD / COMITÉ DE RÉDACTION

ABOUT THE *CANADIAN COMPETITION LAW REVIEW*

Material published in the *Canadian Competition Law Review* does not express the views of the position of the Canadian Bar Association and the CBA Competition Law and Foreign Investment Review Section, or of the organization to which the authors belong. The *Canadian Competition Law Review* is distributed regularly to members of the Competition Law and Foreign Investment Review Section. To obtain further information on subscriptions, please contact cancomplrev@cba.org or visit us on the web: http://www.cba.org/Publications-Resources/CBA-Journals/Canadian-Competition-Law-Review.

À PROPOS DE LA *REVUE CANADIENNE DU DROIT DE LA CONCURRENCE*

Les textes publiés dans la *Revue* ne représentent pas l'opinion ou la position de l'Association du Barreau canadian, de la Section du droit de la concurrence et de l'investissement étranger de l'ABC, ou de l'organisation dont fait partie l'auteur. La *Revue* est distribuée régulièrement aux membres de lla Section du droit de la concurrence et de l'investissement étranger de l'ABC. Pour plus de détails sure nos abonnements, veuillez nous contacter à l'adresse suivante : cancomplrev@cba.org ou visitez notre site web http://www.cba.org/Publications-Resources/CBA-Journals/Canadian/Competition-Law-Review?lang=fr-CA.

ISSN 1929-6851 (Online) / ISSN 1929-6843 (Print)

THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

TABLE OF CONTENTS/TABLE DES MATIÈRES

CCLR VOLUME 36, NUMBER 1

ARTICLES

2023 ADAM F. FANAKI COMPETITION LAW MOOT—WINNING FACTA / CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

ARTICLES

TOWARDS AN EFFICIENCIES STANDARD THAT BENEFITS CANADIANS

Andy Baziliauskas and Lisa Stockley[1]

This commentary offers an alternative economics-based rationale for the adoption of a consumer welfare standard for the assessment of mergers under Section 96 of the Competition Act that is not based on 'fairness' considerations, or any of the other objections recently voiced by the Competition Bureau in response to Senator Howard Wetston's consultation. Our main conclusion is that if the purpose of the merger provisions of Canadian competition law is to regulate mergers to the benefit of Canadians, and if Canada's national treatment obligations under international treaties prevent the differential treatment of Canadian and foreign shareholders in the efficiencies trade-off, then the consumer welfare standard may offer advantages over the current total welfare standard. Our observations are based on an economic analysis that demonstrates the extent to which Canadians benefit from merger efficiencies (and wealth transfers) generally depends almost exclusively on the extent to which merging firm profits flow to Canadian shareholders and does not depend on whether or not a merger reduces costs at operations located in Canada. This economic analysis is consistent with the Competition Tribunal's fourth efficiencies filter in Tervita. In its earlier Superior Propane Redetermination decision, however, the Competition Tribunal concluded that the Competition Act mandates that merger efficiencies should be included as a benefit in the efficiencies trade-off only if they reduce costs at operations located in Canada regardless of shareholder nationality, which would preclude the application of the fourth filter in Tervita. We show that if future transactions subject to Canadian merger law are expected to involve firms with substantial non-Canadian shareholdings—as has historically been the case—and if discrimination against foreign shareholders is not feasible, then a consumer welfare standard may maximize benefits to Canadians. If discrimination against foreign shareholders is feasible, as implied in Tervita, then a total surplus standard that includes efficiencies (and wealth transfers) as a benefit only to the extent that merging firms' profits flow to Canadians, maximizes benefits to Canadians. Given the ambiguity in Tribunal decisions regarding the treatment of efficiencies that flow to foreigners, future amendments to the Act should clarify the efficiencies exception to better reflect its intent.

Ce commentaire présente une autre justification fondée sur l'économie pour l'adoption d'une norme de bien-être des consommateurs pour l'évaluation des fusions en vertu de l'article 96 de la Loi sur la concurrence qui n'est pas fondée sur des considérations d'« équité » ou sur toute autre objection récemment formulée par le Bureau de la concurrence en réponse à la consultation du sénateur Howard Wetston. Notre conclusion principale est que si les dispositions du droit canadien de la concurrence sur la fusion visent à réglementer les fusions au profit de la population, et si les obligations nationales du Canada en matière de traitement en vertu des traités internationaux empêchent le traitement différentiel des actionnaires canadiens et étrangers dans le compromis en matière d'efficacité, alors la norme sur le bien-être des consommateurs pourrait offrir des avantages par rapport à la norme actuelle sur le bien-être total. Nos observations sont fondées sur une analyse économique qui démontre que la mesure dans laquelle les Canadiens et les Canadiennes tirent profit des gains en efficience des fusions (et des transferts de richesse) dépend en général presque exclusivement de la mesure dans laquelle les profits des entreprises fusionnées sont versés aux actionnaires canadiens et ne dépend pas de la réduction ou non des coûts des activités situées au Canada. Cette analyse économique est conforme au quatrième filtre d'efficience du Tribunal de la concurrence dans l'affaire Tervita. Toutefois, dans sa décision antérieure dans l'affaire Superior Propane Redetermination, le Tribunal de la concurrence a conclu que la Loi sur la concurrence exige que les gains en efficience des fusions soient inclus comme un avantage dans le compromis en matière d'efficience seulement s'ils réduisent les coûts des activités situées au Canada, peu importe la nationalité des actionnaires, ce qui empêcherait l'application du quatrième filtre dans Tervita. Nous démontrons que si l'on s'attend à ce que les transactions futures assujetties aux lois canadiennes sur les fusions impliquent des entreprises ayant des participations non canadiennes importantes, comme cela a toujours été le cas, et si la discrimination à l'égard des actionnaires étrangers n'est pas possible, une norme de bien-être des consommateurs pourrait maximiser les avantages pour la population du Canada. Si la discrimination à l'égard des actionnaires étrangers est possible, comme l'indique l'arrêt Tervita, alors une norme d'excédent total qui inclut les gains d'efficience (et les transferts de richesse) comme avantage seulement dans la mesure où les profits des entreprises fusionnées sont versés à la population du Canada maximise les avantages pour les Canadiennes et les Canadiens. Compte tenu de l'ambiguïté des décisions du Tribunal concernant le traitement des gains en efficience qui sont versés aux étrangers, les modifications futures à la Loi devraient clarifier l'exception dans les cas de gains en efficience afin de mieux refléter son intention.

Introduction

It seems obvious that the *Competition Act* (the "*Act*"), in conjunction with all laws within Canada, should seek to enhance the wellbeing of Canadians. In fact, the 1996 Economic Council of Canada report on competition policy, which the federal government requested to begin the process of reforming Canadian competition law, states, "[e]ssentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view to enhancing the *wellbeing of Canadians*" (emphasis added).[2] The Competition Bureau (the "Bureau") prominently echoes this sentiment on its website: "[t]he Competition Bureau is an independent law enforcement agency that protects and promotes competition *for the benefit of Canadian consumers and businesses*" (emphasis added).[3] Yet, the expressed purpose of the *Act*, which is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy,"[4] tells only half the story.

Nowhere does the *Act* explicitly mandate that the purpose of promoting "the efficiency and adaptability of the Canadian economy" is to benefit Canadians or enhance the wellbeing of Canadians. By defining the purpose of the *Act* to be the promotion of the efficiency of the Canadian economy without explicitly tying it as a path for benefitting Canadians, Parliament has created a tension: what if the efficiency of the Canadian economy comes at the expense of the wellbeing of Canadians?

Some economists may argue that there is no tension: an economy that is operating efficiently is also the economy that can serve Canadians best. The core of this argument is that efficient economies maximize the total gains from trade available in the economy (often referred to as 'total surplus' or the economic 'pie') but it is agnostic about which agents in the economy reap those benefits of the gains from trade. If the distribution of surplus is, in some way, deemed less than socially optimal, then policy tools (like taxes and subsidies) can be used to redistribute the *pie* in ways that maximize social objectives. But the purpose of *efficiency* is to make the *pie* as big as possible, and the distribution of that *pie* is not something with which economists should meddle. That is a job for politicians.

Still, as currently interpreted by the Competition Tribunal (the "Tribunal") in some cases,[5] and possibly the Bureau, the *Act* may blindly seek to enhance the efficiency of the Canadian economy even if the result is to shift welfare from Canadians to non-Canadians. When assessing a merger (or

any economic policy), 'effects on the Canadian economy' is not synonymous with 'effects on Canadians' because there are many non-Canadians participating in the economy. Permitting a merger in the name of improving the efficiency of 'the Canadian economy' can result in net harm to Canadians. The current application of the efficiencies defence illustrates this thesis. After the Commissioner of Competition (the "Commissioner") has established that a merger has or will likely result in a substantial lessening or prevention of competition ("SLPC") to the detriment of Canadians (e.g., by identifying material price increases to Canadian buyers of the merging firms' products), the parties may prevail notwithstanding the SLPC by adducing evidence that the transaction creates efficiencies that are greater than and offset the anticompetitive effects that result from the merger. That is, that the transaction makes the *pie* bigger, even if the distribution of the new larger *pie* is unfavorable for consumers. If all the agents capturing slices of this new bigger *pie* are Canadians (e.g., Canadian consumers, Canadian businesses, etc.) then there is no tension between 'effects on Canadians' and 'effects on the Canadian economy': the enhanced efficiency of the Canadian economy supports the welfare of Canadians. But if some of the agents capturing the *pie* are not Canadians (e.g., if some are foreign shareholders of the merging firms), it is not immediately apparent that the enhanced efficiency of the Canadian economy does support the welfare of Canadians. In fact, quite the opposite may be true. The harms of the SLPC are likely to accrue primarily to Canadians, while many of the benefits of the efficiency may be accruing to non-Canadians, even if they enhance the efficiency of the Canadian economy. Maximizing the size of the Canadian economic *pie* doesn't necessarily maximize how much *pie Canadians* get to eat.

Amendments to the Competition Act

In his response to Professor Edward Iacobucci's discussion paper[6] for Senator Howard Wetston's consultation on possible amendments to the *Act*, the Commissioner recommended that the current efficiencies exception in Section 96 of the *Act* be eliminated and that efficiencies instead should be considered as a factor in assessing the effects of mergers.[7] Among the Commissioner's other rationales for the elimination of the efficiencies exception are that the current efficiencies exception permits mergers that are harmful to Canadians and "suffers from a misguided original policy intent."[8] While these rationales are related to our discussion, they are based on a distinction between the harms to consumers and businesses that purchase the relevant product and the 'private' benefits from efficiencies that accrue to producers. We instead focus on the distinction between the effects of mergers on Canadians and non-Canadians, regardless of whether they are consumers

or producers. Nonetheless, both arguments suggest that the current total welfare standard does not sufficiently address concerns about the distribution of economic surplus.

One of the Commissioner's other reasons for suggesting an elimination of the efficiencies defence in its current form is that it is an 'international outlier.' Under the current efficiencies exception, mergers are generally only blocked if consumer harms are outweighed by producer benefits. The Commissioner, in contrast, cites with approval the US Horizonal Merger Guidelines, which state that merging firms will generally be required to show that efficiencies are of such a sufficient extent that they would "reverse the merger's potential to harm customers … *e.g.*, by preventing price increases …"[9] That is, he points to the consumer welfare standard for consideration as it is an internationally accepted alternative approach to Canada's current efficiencies exception.[10]

The Commissioner concludes that efficiencies should be a factor in the analysis, not an exception to the *Act*, moving Canada in line with international best practice. While he arrives at this conclusion without explicit recommendation of how this would manifest, he quotes the US consumer welfare standard as consistent with international practice. [11] If the US approach is adopted in Canada, then when assessing efficiencies, only variable cost reductions likely to be passed through to consumers would be considered. Not only would this create a more aggressive approach to merger review in Canada, it may also serve to support the objective of directly benefiting Canadians, not just the Canadian economy. While this may not be the intent behind the Commissioner's endorsement of treating efficiencies as a factor, as we discuss below, it may be an additional reason to consider this amendment.

In *Tervita*, the Tribunal[12] and the Supreme Court of Canada[13] both adopted the total surplus standard for the efficiencies trade-off.[14] Under a total surplus standard a merger is allowed if and only if the net economic effects of the merger on both consumers and producers is positive; that is if total economic surplus increases (i.e., the *pie* gets bigger). A common objection to a total surplus standard (like that voiced by the Commissioner above) is that the wealth transfer from consumers to producers is treated as neutral; so long as total surplus increases, who wins and who loses is irrelevant to the analysis. Absent other interventions, an increase in total surplus does not mean that everyone is better off. Often, efficiency is maximized only when some welfare is transferred from losers to winners. Public interest may not be in favour of this exchange.

At times, total surplus can be maximized *only* when socially adverse outcomes are present. Consumers are generally, but certainly not always, economically worse off than the shareholders of the merging firms. Yet it is often the consumers who bear the harm of a merger and the shareholders who are the beneficiaries of the increase in total surplus. This consideration has led the Tribunal to consider the 'balancing weights' standard in some cases,[15] under which some or all of the wealth transfer counts as a negative in the efficiencies trade-off. A consumer welfare standard goes even further than a 'balancing weights' approach because it always treats all of the wealth transfer from consumers to producers as a social cost of the merger. The 'balancing weights' approach is intended to promote *fairness*. But 'balancing weights', or in the extreme, a consumer welfare standard, can address a separate, but related issue. It can be used as a tool when seeking to ensure that efficiency is not being prioritized over the welfare of Canadians.

Many of the mergers that have been reviewed by the Bureau involve firms that have significant non-Canadian shareholdings, and there is no reason to believe future mergers will be any different. Efficiencies from the rationalization of operations based in Canada may make the Canadian economy more efficient if the resources released by the efficiencies remain in Canada and are used to produce additional economic output in other industries.[16] However, the direct benefits from these efficiencies accrue to the merging firms' shareholders in the form of higher profits,[17] and if some of these shareholders are foreigners, then a corresponding portion of the benefits of efficiencies flow to non-Canadians.[18] If the ultimate goal of Canadian merger enforcement is to maximize benefits to Canadians, and not to promote the efficiency of 'the Canadian economy' when these objectives conflict, then the efficiencies considerations in merger review should recognize the nature of these flows.[19] To do otherwise by focusing on promoting the efficiency of 'the Canadian economy' whether or not efficiencies benefit Canadians implies that some mergers that harm Canadians to the benefit of non-Canadians will be allowed.[20]

If the goal were for the *Act* to independently promote the welfare of Canadians, the total surplus standard would *only* count the surplus accruing to and lost by Canadians. Only producer harms and benefits from efficiencies and wealth transfers that flow to Canadian shareholders, regardless of the location of rationalized operations,[21] and consumer harms from price increases and wealth transfers that flow from Canadian consumers, should be considered. Under this 'total Canadian welfare' standard, mergers would be blocked if and only if total harms to Canadians outweigh total benefits to Canadians.

However, the Tribunal has indicated that national treatment obligations under Canada's trade and investment agreements may prevent the Tribunal from fully discriminating between Canadian and non-Canadian shareholders in the application of the merger provisions.[22] If this is the case, and if future mergers are expected to involve firms with significant non-Canadian shareholdings, continued use of a non-discriminatory total surplus standard will allow some mergers that increase total surplus and make the Canadian economy more efficient, even if they harm Canadians. This is because some efficiency benefits that accrue to non-Canadians (e.g., foreign shareholders) would be used to offset harms to Canadians (e.g., consumers) in the trade-off.

If formal discrimination, whereby efficiency benefits accruing to foreign shareholders are discounted relative to benefits to Canadian shareholders,[23] is not feasible in the form of a 'total Canadian welfare' standard, the consumer welfare standard may, instead, better achieve the goal of maximizing the benefits of mergers to Canadians compared to the current total surplus standard. A consumer welfare standard is a blunt instrument that may be the best option to maximize benefits to Canadians given international treaty constraints. This standard disregards all producer benefits entirely in favour of consumers. The consumers are Canadians.[24] The producers *may not* be. A consumer welfare standard that applies to all mergers would therefore be a way to in effect discriminate against non-Canadian shareholders if discrimination is not feasible on a case-by-case basis because of Canada's international treaty obligations.

The remainder of this commentary begins with a detailed discussion of the relationship between merger efficiencies and economic surplus in merger review, including how Canadians are affected depending on their shareholdings of the merging firms. We then discuss Tribunal decisions in *Superior Propane Redetermination* and *Tervita,* which, along with a limited discussion in *Parrish & Heimbecker,* are the only merger decisions that deal directly with the treatment of efficiency benefits that flow to foreign shareholders. We then explain how a consumer welfare standard may maximize benefits to Canadians if merging firms in the future are expected to have substantial non-Canadian shareholdings and Canadian national treatment obligations prevent discrimination against foreign shareholders. We also briefly comment on the appropriate treatment of efficiencies if discrimination against foreign shareholders *is* feasible. This is followed by a section that provides some statistics on the extent of foreign ownership of firms involved in mergers recently reviewed by the Bureau and of firms that operate in Canada more generally. This analysis shows that most recent

complex mergers reviewed by the Bureau involve firms that appear to have significant foreign shareholdings.

The Effects of a Merger on Economic Efficiency

Allocative efficiency is achieved when every customer who is willing to pay more for a good than it costs to produce buys that good. That is, the total amount of available gains from trade are realized (i.e., the *pie* is as big as possible). A merger that results in higher prices, and thus lower output, because it increases the merged firms' market power reduces allocative efficiency. Some consumers whose value for the product was higher than the pre-merger price but lower than the post-merger price will no longer purchase the product. Consequently, some mutually beneficial gains from trade that were realized before the merger are not realized after the merger, and this results in a reduction in total economic surplus. This is the nature of the allocative inefficiency from post-merger price increases.[25]

If the merged firm can produce the same level of output at a lower overall resource cost compared to the pre-merger cost, or if it can produce more output at the same resource cost, then the merger is said to generate efficiencies.[26] Changes to cost structures that reduce the amount of resources used to produce the same amount of output are said to generate efficiencies because the released inputs will be employed elsewhere to produce some other output.[27] As such, the total output that can be produced with available inputs grows.[28] For example, if a merger allows the merged entity to use fewer tons of steel without reducing output, that unused steel is redeployed elsewhere in the economy to make some other goods. The economy expands and becomes more efficient because it can now produce more output from the same amount of resources. If the released resources were used originally in operations located in Canada and are redeployed to produce output in operations located elsewhere in Canada, then the Canadian economy expands. That is, the Canadian economy becomes more efficient. If the released resources are redeployed in another country, whether they were used in Canadian or foreign operations pre-merger, then the other country's economy expands.

Quantification of Merger Effects

When a policy or regulation simultaneously generates both inefficiencies and efficiencies the overall economic effect of the policy is generally assessed through a cost-benefit analysis ("CBA"). CBA is widely used by economists and governments to evaluate the overall impacts of policy proposals. The Canadian government requires that "regulatory proposals and

decisions are based on evidence, robust analysis of costs and benefits, and the assessment of risk, while being open to public scrutiny."[29] The Treasury Board requires all regulatory proposals that are expected to impose annual costs of $1 million or more are to be quantified and monetized though a CBA.[30] They are not alone; governments around the world mandate CBA for policy proposals.[31]

CBA is a decision standard that is used to guide decisions as to whether a policy or regulation should be implemented from an economic-efficiency point of view. If overall benefits to individuals exceed the costs to individuals, then the proposal is deemed to be economically efficient.[32] The gains and losses in a CBA are not necessarily monetary, but they do need to be monetized, or quantified, to make them commensurable. Economists have developed a wide variety of tools to quantify the effects of various policies, which often involve estimating non-monetary effects in monetary terms. For example, environmental effects and loss of life have been quantified be economists and used by governments in cost-benefit analyses.[33]

The total surplus standard applied to evaluate whether efficiencies outweigh the anticompetitive effects of a merger is a CBA. In the context of mergers and first proposed by Oliver Williamson,[34] a total surplus approach to evaluating the overall economic effects of a merger involves first quantifying the anti-competitive effects resulting from post-merger price increases (and/or non-price effects) and merger-specific efficiencies, and then assessing whether the efficiencies are larger, in monetized terms, than the anti-competitive effects. If the inefficiencies from the anti-competitive effects are lower than the merger-specific efficiencies, then total surplus increases if the merger is consummated, which means that the winners from the merger could hypothetically fully compensate the losers for their losses and still be better off. If total surplus increases, then the merger is deemed to be economically efficient.[35]

Who is Harmed and who Benefits from a Merger?

The largest source of harm to consumers from a merger that allows the merged firm to increase prices is generally the transfer of wealth from consumers to the merged firm though increased prices. Consumers who continue to purchase the product because their subjective value for the product exceeds the post-merger price now pay a higher price and thereby receive a lower consumer surplus. For example, if the price increases from $10 per unit to $11 per unit, some consumers will no longer purchase the good because of the price increase while some other consumers continue

to purchase at the new higher price. If the amount that continues to be purchased is 100 units, the consumers who buy these goods pay a total of $100 dollars more for the output they continue to consume than they would have at the old price, and thus have lost $100 in consumer surplus. Although this represents a harm to consumers, it is also a benefit to the producers of $100. This benefit to producers takes the form of higher revenues, and therefore higher profits. Since the increase in profits directly accrues to the shareholders of the merging firms,[36] this wealth transfer is a benefit to the shareholders of the merging firms.[37] A transfer of wealth from consumers to shareholders is not an allocative inefficiency, it is just a redistribution of the *pie*.

As discussed above, mergers that result in fewer units of output being produced, and subsequently consumed, create allocative inefficiency, which results in economic harms that are borne by consumers and producers of the relevant product.[38] In a CBA, the harm from allocative inefficiency is measured as the deadweight loss ("DWL") from lost consumer surplus and DWL from lost producer surplus, respectively. The reduction in the production and consumption of output is economically inefficient because consumers value the output more than it costs the economy to produce, so that a mutually beneficial trade goes unrealized, and the combined producer and consumer DWL measures the economic value of these unrealized gains from trade.

The harm to consumers from the foregone consumption—the DWL from lost consumer surplus—can be measured as the difference between the subjective value that consumers place on the product and the pre-merger price multiplied by the number of foregone units.[39] The total harm to consumers is calculated as this DWL from the consumers who cease to purchase the output combined with the wealth transfer from the consumers who continue to buy the product at the higher post-merger price.

If producers were earning a positive variable margin on the foregone output that is no longer produced and sold because of price increases resulting from the merger, then they too suffer some harm. The loss of the margin on the foregone output is the producer DWL. The producer DWL is typically calculated as the difference between the pre-merger price and the marginal production cost multiplied by the number of foregone units. This harm to producers takes the form of lower profits to the shareholders of the merging firms.[40] Still, firms typically would only choose to merge if this harm to producers was dwarfed by cost savings and the wealth transfer from increased prices in consummated mergers—otherwise, there would be no incentive to merge in the first place.

The economic benefits of a merger are the merger-induced reductions in the use of economic resources to produce output, which release resources for deployment in other sectors of the economy. These benefits are generally captured by the merging firms in the form of lower production and other costs.[41] Reductions in production costs increase the profits of the merging firm, and these profits are ultimately distributed to the firms' shareholders.[42]

For example, suppose that because of a merger, the newly joined entity will require one fewer worker to achieve the same level of output.[43] Suppose that a released worker's compensation was $50,000 per year before the firms merged and implemented the efficiencies that made her employment by the firm unnecessary. Upon release of this worker, the merged firm's costs are reduced by $50,000 per year, and its profits correspondingly increase by $50,000.

The value of the released worker to the rest of the economy is her value in her next best alternative employment, which is presumably where she will be redeployed. While not necessary, it is often assumed that labour markets are competitive and there is no lack of demand for labour, such that the worker's value in her post-merger employment will be equal to her value in her pre-merger employment. Practically speaking, this assumption is akin to assuming her next job will also pay her a wage of $50,000. Fundamentally, though, this assumption is that the value of the worker's output has been unchanged by her place of employment: her labour created $50,000 worth of value before the merger and $50,000 worth of value after the merger.

'Value' to the economy should not be confused with the surplus created by the deployment to a new use. The key point here is that if the worker is re-employed in competitive labour and product markets—which is the assumption that is usually adopted in CBA unless there is reason to believe otherwise—the $50,000 in value created by the redeployment of the worker is not economic *surplus*. The distinction between the value of the resource in an alternative use and the surplus created by the release of the resource is important to understand. The value of the resource in its alternative use is the amount that the employer is willing to pay, which is, in a competitive market, the marginal value product of the resource in its new employment and as such no new surplus is created for the employer. Furthermore, if the resource is re-employed to produce output in a competitive market, then consumers of the output receive no new surplus.[44] Finally, since the worker receives the same compensation in her new employment, her surplus does not change. The redeployment of the worker therefore does not create any new economic surplus in her new deployment.[45]

Despite this critical distinction, measuring new economic surplus for an efficiencies analysis requires us to measure this worker's value at her next best alternative employer. In the example we have described until now, where the value of her output is the same regardless of her employer, the cognizable efficiencies are simply the cost savings at the merged firm: the $50,000 they are no longer paying the worker. But if there were reasons to believe that in the next best alternative, the released worker would only have a value (and therefore compensation) of $40,000,[46] then the cognizable efficiencies would be only $40,000 as well—although total efficiencies would be calculated as the $50,000 in cost savings at the merged firm less the $10,000 reduction in the value of the worker in the alternative use.[47] Regardless of the worker's value in her next best alternative employment, the party that has captured the economic surplus from the release of the worker consists of the shareholders of the merging firm.

As explained above, if the efficiencies result from a reduction in the use of resources in Canadian operations, and the released resources are redeployed elsewhere in the Canadian economy, the Canadian economy expands. In this sense, the Canadian economy becomes more efficient, since it can now produce more output with the same amount of resources.[48] As aligned with Section 1.1 of the *Act*, this hypothetical merger has promoted the efficiency of the Canadian economy.

However, to the extent that the shareholders of the merging firms are non-Canadians, the beneficiaries of this expansion of the Canadian economy are also non-Canadians. If all of the shareholders of the merging firms are non-Canadians, the expansion of the Canadian economy through merger efficiencies provides no direct benefits to Canadians. Similarly, if the merging firms are entirely owned by Canadians and the merger reduces the costs of operations in Argentina and released resources are redeployed elsewhere in Argentina, then the efficiencies expand the Argentinian economy but the direct benefits of this economic expansion accrue entirely to Canadians in the form of higher profits. The extent to which Canadians benefit from merger efficiencies therefore depends on the extent to which Canadian shareholders benefit from efficiencies and does not depend at all on the location of the rationalized facilities.[49]

Consider another simple example. Two firms that are 100% owned by Argentinians merge and expect to combine their two operations in Winnipeg and thereby reduce their Canadian plant maintenance workforce by ten. We assume that there are no output reductions for the merging firms resulting from the reduced workforce. The released maintenance workers earned

wages totaling $1 million annually, and if they are immediately redeployed to other plants in Canada at the same wage they will produce incremental output worth $1 million. The efficiencies from the merger after the integration of Canadian operations are therefore $1 million per year. The following are all of the direct effects of the direct merger efficiencies: 1) the Argentinian shareholders of the merging firms gain $1 million dollars; 2) the released workers change jobs, and; 3) the Canadian economy increases its output by $1 million dollars. The only individuals directly affected by the merger are the Argentinian shareholders of the merging firms, and the released maintenance workers who are unlikely to receive any benefits from the rationalization (and in fact may suffer harms associated with dislocation). The firm that employs the released workers and the consumers of the product produced by the workers in their new employment do not gain any surplus for the reasons discussed above regarding the nature of competitive markets.

There may be circumstances under which only some of the benefits of efficiencies are captured by the merging firms' shareholders, and the rest may accrue to Canadians. For example, if released resources are redeployed in an area in Canada that has excess production capacity or excess unemployment, this may result in 'multiplier' effects from redeployment that increase production and surplus beyond the direct contribution of the released resources. And if a large number of resources are released and redeployed elsewhere in Canada, or are redeployed in uncompetitive labour or product markets in Canada, then they may increase Canadian surplus in the markets in which they are redeployed since their effects may be more than 'marginal'. Furthermore, the increased profits accruing to foreign shareholders may be reinvested in Canada and provide surplus benefits to Canadians. If such benefits do exist, however, they are likely to be second-order effects and in any case they should be included in the efficiencies trade-off—they are not additional benefits that are normally excluded from a properly conducted cost-benefit (or efficiencies) analysis.[50]

Treatment of Foreign Shareholders in Tribunal Decisions

The appropriate treatment of foreign shareholders in relation to efficiencies under the *Act* is unclear. In *Rogers-Shaw*,[51] the Commissioner and his experts argued that the portion of the wealth transfer that benefits certain shareholders, including affluent and foreign shareholders, is socially adverse and therefore should not offset the wealth transfer from Canadian consumers.[52] In Rogers' Closing Submission, it noted that it is not clear whether the Commissioner intended to claim that cost savings from operations

in Canada that would flow through to foreign shareholders are not cognizable.[53] In anticipation of such a claim, Rogers cited *Superior Propane I* and *Superior Propane Redetermination* as the legal authorities relating to the treatment of foreign shareholders in an efficiencies analysis. Rogers claimed that "no decision by the Tribunal or a Court has ever discounted the merging parties' efficiencies based on the proportion of their shareholders who are foreign. The focus when considering efficiencies from a merger is the real resource savings to the Canadian *economy*—not the transfer of wealth to shareholders" (cite to *Superior Propane I* omitted).[54] It also asserted that in *Superior Propane Redetermination*, the Tribunal found that "excluding efficiencies based on the nationality of shareholders constitutes discrimination under Canada's international obligations/trade and investment treaties and would be inconsistent with Canada's treaty obligations (including the obligation under USCMA to provide "national treatment" to investors from the United States and certain other countries)." [55] Finally, "as it concerns balancing weights, there is no case in which the Tribunal has treated a 'transfer' to foreign shareholders differently from a transfer to domestic shareholder[s] and no support in the Act."[56] The Tribunal did not opine on this issue because it concluded that the merger would not likely result in a substantial prevention or lessening of competition and it therefore did not need to address the efficiencies trade-off.[57]

In *Superior Propane Redetermination*, the Commissioner had similarly argued that the wealth transfer from consumers to producers should be a mitigating factor in the efficiencies trade-off.[58] In other words, the impact of price increases borne by consumers who continue to buy the good is socially adverse even if it does not result in allocative inefficiency (i.e., even if it creates no DWL). The caveat to this argument was the Commissioner's suggestion that this socially negative effect need only be considered insofar as it is a harm to *Canadian* consumers.[59] That is, the adverse impact on foreign consumers should have no weight in the analysis.

In this case, the Tribunal also appeared to hold that the application of the *Act* as it relates to efficiencies should be the same regardless of the nationality of ownership of the merging firms; that is, in applying the efficiencies trade-off, the Tribunal is bound by Canada's international treaty obligations to treat foreign shareholders equally to Canadian shareholders.[60] This is the implication cited by Rogers in *Rogers-Shaw*. It further found that efficiencies should count as a benefit of a merger only if they are cost savings on Canadian operations, and efficiencies on operations located outside of Canada should not be included:

> "[I]n the Tribunal's view, efficiency gains and deadweight loss (i.e. losses in efficiency) in foreign markets resulting from an anti-competitive merger in Canada are to be excluded in the application of section 96. This is clearly stated in the statute and is not a discretionary matter for the Tribunal. Accordingly, if the deadweight loss in foreign markets is an excluded effect, so are all other effects in foreign markets."[61]

In *Tervita*, however, which was decided after *Superior Propane*, the Tribunal's fourth screen for cognizable efficiencies "filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders."[62] This screen implies that efficiencies are considered in the total surplus trade-off only to the extent that they benefit Canadian shareholders, regardless of where rationalized operations are located.[63] As such, the view of the Tribunal in this case is based on the understanding that efficiencies should be considered only to the extent that they provide benefits to Canadians, not 'the Canadian economy', which implies that Canada's national treatment obligations are not a barrier to discriminating against foreign shareholders. However, the treatment of foreign shareholders in relation to efficiency was *obiter dictum* in *Tervita*, and since the Tribunal did not explicitly acknowledge in that decision that the fourth filter is inconsistent with its prior reasoning in *Superior Propane Redetermination*, the legal status of efficiency benefits that accrue to foreign shareholder remains unclear.

How the Adoption of a Consumer Welfare Standard Could Benefit Canadians

Assuming that all of the consumer harms from post-merger price increases are borne by Canadians,[64] if some positive portion of the efficiencies and wealth transfer accrue to non-Canadian shareholders, then the net benefit (benefits less costs) of the merger to Canadians will be less than the change in total surplus, because some portion of the economic benefits of the merger accrue to non-Canadians. This is true even if the merger efficiencies are cost reductions in operations located in Canada. This implies that a total surplus standard that does not discriminate between Canadian and non-Canadian shareholders may allow some mergers that harm Canadians overall.

Consider a merger in a market with the following features:

1) The pre-merger price is $100 per unit;

2) Consumers purchase 1 million units (and all consumers are Canadians);

3) The variable margin of producers of the relevant product is 30% of revenues; and

4) The market demand elasticity is -1.

Suppose that because of a merger:

1) There are efficiencies of $4 million per year as a result of merger-induced resource cost savings; and;

2) The merger increases the price of the relevant product by 10%.

Under a total surplus standard, efficiencies outweigh anticompetitive effects, because the sum of DWL from lost consumer surplus ($0.5 million) and DWL from lost producer surplus ($3 million) is less than the $4 million in efficiencies. The wealth transfer from consumers to producers of $9 million is neutral and does not affect the trade-off.[65] Total harm to consumers is $9.5 million (DWL of $0.5 million, wealth transfer of $9 million) and the total net benefit to producers is $10 million (efficiencies of $4 million and wealth transfer of $9 million, less DWL from lost producer surplus of $3 million). This is just another way of showing that total surplus increases, because producer benefits are greater than consumer harms, by $1 million.

Now suppose that 25% of the merging firms' profits accrue to foreign shareholders. Then Canadian shareholders receive 75% of the $10 million in producer benefits, or $7.5 million. Again, assuming that all consumer harms are borne by Canadians, harms to Canadians would now exceed benefits to Canadians by $2 million. If 50% of shareholder benefits accrue to non-Canadians, producer benefits to Canadians are only $5 million, and consumer harms would exceed Canadian benefits by $4.5 million.

If a total surplus standard is applied to assess the efficiencies trade-off and the purpose of the trade-off is to allow only mergers that benefit Canadians (and not 'the Canadian economy'), then then portion of efficiency gains accruing to non-Canadians would be given zero weight and wealth transfers from Canadians to non-Canadians should not be considered neutral (that is, it should be treated as a harm to consumers without an offsetting benefit to producers).[66] This would ensure that only mergers where the benefits to Canadian shareholders exceed to harms to Canadian consumers are allowed.[67]

However, if Canada's international treaty obligations prevent differential treatment of Canadian and non-Canadian shareholders, and since lending any weight to producers' capture of wealth through efficiencies or transfers puts Canadian welfare at risk, then one option is to discount producer effects altogether–regardless of the nationality of the producers. This is a consumer welfare standard, under which only the effects of a merger on consumers are considered in a determination of whether to allow a merger, and efficiencies are considered only to the extent they are passed through to consumers in the form of lower prices. So long as the consumer welfare standard would be applied in all merger cases regardless of foreign ownership, rather than selectively in mergers of firms with large foreign shareholdings, it would not violate Canada's international treaty obligations.

If foreign shareholders cannot be discriminated against because of Canada's national treatment obligations, a consumer welfare standard may maximize the benefits of merger enforcement to Canadians if it is expected that non-Canadians will continue to have a substantial ownership interest in firms involved in mergers that are reviewable under Canadian merger law. Below, we provide some statistics that demonstrate that non-Canadians own a substantial financial interest in many, if not most, firms that were historically involved in complex mergers reviewed by the Bureau. Non-Canadians also own a significant proportion of large firms with operations Canada, which are more likely to be involved in mergers. These facts suggest that continued application of the current total surplus approach, which is in some cases modified by a balancing weights standard, could sometimes result in allowing mergers that harm Canadians. For the reasons discussed above, this is the case even if only efficiencies on Canadian operations 'count' in the trade-off.[68]

Treatment of Efficiencies if Discrimination Against Foreign Shareholders is Feasible

If it is feasible, notwithstanding Canada's national treatment obligations, for the Tribunal to discriminate between efficiency benefits that flow to Canadians and non-Canadians, then, for the reasons discussed above, the preferrable approach to the efficiencies trade-off *if* the objective of merger policy is to maximize benefits to Canadians is to apply the Tribunal's fourth screen in *Tervita*. This approach is agnostic about the location of rationalized operations: efficiencies on Canadian operations should be included as a benefit in the trade-off only to the extent that the financial benefits of merger cost reductions flow through to Canadian shareholders, and efficiencies on non-Canadian operations should also 'count', but again only to

the extent that the transfer flows to Canadian shareholders. Similarly, if the wealth transfer is considered to be neutral, then this neutrality should only be applied to the extent that the shareholders of the merging firms are Canadians, since otherwise the transfer would benefit foreigners at the expense of Canadians. This would also be consistent with *Superior Propane Redetermination* where the Tribunal, relying on the fact that the purpose of the *Act* is to "maintain and encourage competition in Canada … to promote the efficiency and adaptability of the Canadian economy",[69] found that efficiency gains in foreign markets are to be excluded from the trade-off. Perhaps future amendments to the *Act* can eliminate uncertainty regarding the treatment of foreign ownership while also ensuring that the *Act* provides maximum benefits to Canadians should that be its purpose.

Foreign Ownership of Firms in Mergers Reviewed by the Bureau

Whether or not a consumer welfare standard is justified on the basis of promoting the welfare of Canadians exclusively depends on whether the non-Canadian shareholders can be treated differently from Canadian shareholders under Section 96, and also on whether it is expected that a significant proportion of producer benefits in future mergers would accrue to non-Canadians. In other words, are the issues identified here relevant in practice? It is obviously impossible to forecast how much of future merger benefits will flow to non-Canadians because we cannot know what the shareholder composition by nationality of future mergers will be. We can, however, consider the ownership of firms involved in previous mergers reviewed by the Bureau and the current ownership of Canadian firms by non-Canadians.

Statistics on Foreign Ownership of Canadian Firms

According to a Statistics Canada publication,[70] in 2016, although 99.2% of enterprises in Canada were domestic, the remaining 0.8% of enterprises that were multinational enterprises ("MNEs") held 67% of the assets in the Canadian economy. Half of MNEs were majority Canadian-owned with foreign affiliates ("MOFAs") and these entities held 49% of assets in the Canadian economy. Non-Canadians are likely to have significant ownership interests in MNEs that are majority Canadian-owned. Foreign-majority owned MNEs with Canadian affiliates ("FMOCAs") held 18% of assets in the economy. According to another Statistics Canada report,[71] in 2019, 14.8% of assets in Canada were owned by foreign-controlled firms, and 27% of total operating revenues were earned by foreign-controlled firms.

We are not aware of research that estimates the foreign shareholdings of firms with operations in Canada. This would be a very complex task. Even most large firms that are majority Canadian-owned or Canadian-controlled are likely have significant foreign shareholding such that when these firms are involved in mergers a significant proportion of efficiency (and wealth transfer) benefits to the firms accrue to non-Canadians. For example, an expert for the Commissioner in *Rogers-Shaw* estimated that foreign shareholders would own 25.5% of a merged Rogers-Shaw firm,[72] even though both companies are Canadian-controlled and majority Canadian-owned.

Previous Merger Reviews by the Bureau

Many, and perhaps most, of the mergers recently reviewed by the Bureau have involved firms that are either majority-owned by foreign investors or have significant non-Canadian shareholdings. Between May 2018 and the end of 2021, the Bureau published Position Statements for nineteen mergers.[73] In thirteen of these mergers, both merging firms appeared to be majority-owned by foreign entities. Five mergers (MacEwen/Quickie, Federated Cooperatives/Blair's, CN/H&R, Metro/Jean Coutu, and TMR/AIM) involved firms that appeared to be primarily owned by Canadians, and one (La Coop Fédérée/Cargill) involved a largely Canadian-owned firm and a foreign-owned firm. Several of the merging firms that appear to be primarily Canadian owned also have substantial foreign ownership. For example, CN has significant non-Canadian ownership. The four largest shareholders of CN, including the Bill & Melinda Gates Foundation and three investment funds based in the US, combined own approximately 20% of CN, and other non-Canadian firms and institutions also had significant shareholdings.[74]

Superior Plus' proposed acquisition of Canexus in 2016 was cleared by the Bureau because it concluded that "efficiency gains would be clearly greater than the likely significant anticompetitive effects of the transaction".[75] In its response to Senator Wetston's consultation, the Bureau cited this case as an example of contrasting treatment of efficiencies in Canada and other countries, as the Bureau cleared this merger and yet the merger was challenged by the US agencies (and was ultimately abandoned because of the US challenge). Although Superior Plus and Canexus were Canadian companies, they appear to have had significant non-Canadian shareholdings at the time of the proposed merger. In 2016, at least 25% of the shares of Superior Plus were owned by investment funds and similar entities that were based outside of Canada, and therefore presumably had mainly non-Canadian investors.[76] The funds included The Vanguard Group, Norges Bank Investment Management, Dimensional Fund Advisors LP, and Grantham Mayo

Van Otterloo & Co. LLC. Canexus appears also to have been about 25% non-Canadian owned in 2016, with significant foreign shareholdings by CM-CIC Asset Management Société anonyme of France and Dimensional Fund Advisors LP among others.[77] It is not clear if the Bureau discounted the merger efficiencies that would accrue to foreign shareholders when assessing whether efficiencies outweighed the anti-competitive effects of the merger.

If history is a guide and future mergers are expected to continue to involve firms with significant non-Canadian shareholdings—and there is no reason to think otherwise—and if discrimination against foreign shareholders in not feasible, a consumer welfare standard may better achieve the goal of maximizing the benefit of Canadians assuming some of the producer efficiencies from mergers will be captured by foreign shareholders of the merging firms.

Conclusions

Merger efficiencies that reduce the costs of operations located in Canada may benefit 'the Canadian economy', but they generally only provide net benefits to Canadians if the increase in firm profits that result from cost reductions flow to Canadians through their claims on the profits of merging firms. Efficiencies from a merger of foreign-owned firms that results in the redeployment of now-redundant resources to another sector of the Canadian economy increase the output of the Canadian economy but do not necessarily increase surplus that flows to Canadians. A merger of firms with substantial foreign ownership that results in substantial efficiencies but increases prices to Canadians therefore transfers wealth from Canadians to non-Canadians. This harm to Canadians to the benefit of non-Canadians is an inevitable outcome of the non-discrimination rule in *Superior Propane Redetermination* if a merger between firms with significant foreign shareholdings is allowed because of the efficiencies defence. If Canadian merger law is to maximize the benefits of mergers to Canadians, then it should discriminate against foreign shareholders in favour of Canadians. If Canada's national treatment obligations prevent discrimination on a case-by-case basis, then a potential approach is a blanket consumer welfare standard which discounts producer benefits regardless of nationality so long as future mergers are expected to involve firms with significant foreign shareholdings. If discrimination against foreign shareholders on a case-by-case basis is feasible, then the fourth filter in *Tervita*, which counts only merger cost reductions that flow to Canadians through their shareholdings of the merging firms, whether or not rationalized facilities are located in Canada,

could instead be applied. Future amendments present an opportunity to amend and clarify the *Act* to resolve the current ambiguity with respect to the treatment of foreign shareholders and ensure that the enforcement of the merger provisions benefit Canadians.

ENDNOTES

[1] Andy Baziliauskas, Principal, and Lisa Stockley, Associate Principal, are both PhD economists specializing in matters of antitrust and competition at Charles River Associates. The opinions and conclusions expressed in this article are solely those of the authors and should not be attributed in any way to any other individual or organization. The authors would like to thank Margaret Sanderson, Frank Mathewson, and the referees of the CCLR—Dimitri Dimitropoulos and Ian Cass—for their valuable comments, as well as Rahim Lila and Matthew Cormier for their assistance in editing draft proofs. Any remaining mistakes are our own.

[2] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: The Queen's Printer, July 1969) at 19, online: *Government of Canada* <publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf>.

[3] Government of Canada, "Competition Bureau Canada" (last modified 16 March 2023), online: *Innovation, Science and Economic Development Canada*, online: <ised-isde.canada.ca/site/competition-bureau-canada/en>.

[4] *Competition Act*, RSC 1985, c C-34, s 1.1.

[5] As we explain below, the treatment of efficiencies benefits that accrue to foreign shareholders in *Superior Propane* differs from treatments in more recent cases where the issue was *obiter*, so the ultimate resolution of this issue is unclear.

[6] Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021), online: *Senate of Canada* <sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

[7] Competition Bureau, "Examining the Canadian *Competition Act* in the Digital Era, Submission by the Competition Bureau" (8 February 2022), online: *Innovation, Science and Economic Development Canada* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>.

[8] *Ibid.*

[9] US Department of Justice and US Federal Trade Commission, *Horizontal Merger Guidelines*, (Guidelines), (2010), 30-31, online: *US Department of Justice* <http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

[10] It is worth noting that the heads of the US agencies under the Biden administration have indicated that focus on the consumer welfare standard (and the narrow technical exercise involved in its application) may be misguided given the purpose of antitrust is to protect "competition". See e.g. Department of Justice, "Antitrust Enforcement: The Road to Recovery", (Remarks delivered by Assistant Attorney General Jonathan Kanter), (University of Chicago Stigler Center, 21 April 2022), online: *US Department of Justice* <http://www.justice.gov/opa/

speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

[11] For a robust defence of the consumer surplus standard in the US, see Russell Pittman, "Consumer Surplus as the Appropriate Standard for Antitrust Enforcement" (2007) US Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper No EAG 07-9.

[12] *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 [*Tervita CT*].

[13] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita*].

[14] The Bureau's Merger Enforcement Guidelines, since the first version in 1991, also adopt a total welfare standard. See Director of Investigation and Research, Information Bulletin No 5, "Merger Enforcement Guidelines" (March 1991) 49-50, online: *Innovation, Science and Economic Development Canada* <publications.gc.ca/collections/collection_2021/isde-ised/RG54-2-5-1991-eng.pdf>.

[15] For an explanation of the balancing weights standard, see Roger Ware and Ralph A Winter, "Merger Efficiencies in Canada: Lessons for the Integration of Economics into Antitrust Law" (2016) 61:3 The Antitrust Bulletin 365.

[16] If there are delays in or transition costs associated with the redeployment of released resources in Canada, the benefits of efficiencies to the Canadian economy are less than the direct cost reductions.

[17] Some share of profits of foreign shareholders that is subject to Canadian corporate income taxes will be re-captured by Canadians. See e.g. *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 at para 83, aff'd 2023 FCA 16, (Expert Report of Roger Ware). Additionally, some profits may be reinvested in ways that can, in theory, benefit Canadians as well.

[18] Conversely, if efficiencies are reductions in costs of operations located in another country, then they may make the other country's economy more efficient if released resourced are redeployed in that country, but if the firm has Canadian shareholders some of the benefits of these efficiencies flow to Canadians.

[19] When merging firms have a mix of Canadian and non-Canadian shareholders, it can be extremely difficult not only to sort shareholders into Canadian and non-Canadian, but also to identify which firm's shareholders benefit from efficiencies. This commentary does not discuss this complication in any detail. It is sufficient for the purposes of the argument to assume that a significant proportion of increased profits from merger efficiencies and wealth transfers flow to non-Canadians and the harm to consumers from merger price increases is borne mainly by Canadians.

[20] Below we provide a simple example in which foreign-owned merging firms release workers at Canadian operations. The merging firms produce the same amount of output with fewer workers, and the workers are redeployed elsewhere in the Canadian economy. The redeployment of these workers expands the output of the Canadian economy, thereby making it more efficient, but the benefits of

this redeployment accrue to foreign shareholders in the form of lower costs, and therefore higher profits.

[21] This would be consistent with the Tribunal's fourth filter in *Tervita CT*, which "filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders": *Tervita CT*, *supra* note 12 at para 262). Other Tribunal decisions have questioned whether such discrimination is possible under Canada's international treaty obligations. We discuss this in more detail below.

[22] For example, as discussed below, *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 Comp Trib 16, 18 CPR (4th) 417, aff'd 2003 CAF 53 [*Superior Propane Redetermination*].

[23] For example, through a balancing weights approach that partially or fully discounts harms and benefits that accrue to non-Canadians.

[24] In this commentary we ignore the fact that in many mergers reviewed by the Bureau, some of the consumer harms may be borne by non-Canadians. Such harms should be discounted as anti-competitive effects if a total surplus standard is applied. The Commissioner argued, and the Tribunal agreed, that the portion of the transfer to foreign consumers should be excluded from the section 96 analysis in *Superior Propane Redetermination*, *supra* note 22 at paras 192 and 198.

[25] A merger may also result in other inefficiencies, such as productive inefficiencies, reductions in product quality, or dynamic inefficiencies through a reduction in (or slowing down of) innovation. For further discussion of such other inefficiencies, see e.g. Matthew Chiasson and Paul A Johnson, "Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation" (2019) 32:1 CCLR 1.

[26] Efficiencies may also take the form of an increase in the quality of goods and services supplied to consumers at the same production cost, as well as dynamic efficiencies through increased investment in innovation. For further discussion of such other efficiencies, see e.g. Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm than Good for Economic Efficiency and Innovation" (2019) 32:1 CCLR 33.

[27] Cost reductions that release resources that are not redeployed elsewhere in the economy are not cognizable efficiencies because they do not result in an increase in economic output. For example, if a firm releases workers who are unlikely to be employed elsewhere in the economy, then the reductions in labour cost are not cognizable efficiencies. If the workers are likely to remain unemployed for, say, one year, then one year's worth of labour costs are not cognizable efficiencies.

[28] Note that cost reductions that are not the result of a reduction in the use of resources in production are not recognized as efficiencies. For example, cost reductions from increased bargaining power with input suppliers are simply a transfer from input suppliers to the merging firms, and do not reduce the use of resources. These types of costs are synergies, and partly explain why in some cases the synergies announced by merging firms exceed claimed efficiencies.

[29] Government of Canada, "Canada's Cost-Benefit Analysis Guide for Regulatory

Proposals" (last modified 29 March 2022), s 1, online: *Government of Canada* <http://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cost-benefit-analysis-guide-regulatory-proposals.html>.

[30] Government of Canada, "Policy on Cost-Benefit Analysis" (last modified 29 March 2022), s 6.1.3, online: *Government of Canada* <www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-cost-benefit-analysis.html#toc6>.

[31] See e.g. Congressional Research Service, *Cost Benefit Analysis in Federal Rulemaking*, (8 March 2022), online: *Congressional Research Service* <crsreports.congress.gov/product/pdf/IF/IF12058#:~:text=Cost-benefit%20analysis%20involves%20describing,and%20otherwise%20in%20qualitative%20terms>:"Since the 1970s, federal agencies have been required to consider the costs and benefits of certain regulations that are expected to have large economic effects. Under current requirements, most agencies are to design regulations in a cost-effective manner and ensure that the benefits of their regulations justify the costs."

[32] Under the Kaldor-Hicks criterion that underlies cost-benefit analysis, a decision is economically efficient if the winners from a policy change could hypothetically compensate the losers and still be better off from the change. This criterion does not require the winners to actually compensate the losers, only that the amount that winners gain exceeds the amount of harm to the losers, such that overall gains exceed overall losses. In principle, the government could undertake such compensation through wealth transfers *via* income taxation.

[33] Economists typically estimate non-monetary gains and losses to individuals by estimating either compensating variation ("CV") or equivalent variation ("EV"). CV measures the amount of dollars that would have to be given to (or taken from) an individual to allow her to be as well off with the project under consideration as she was in the status quo. The EV is the amount that a consumer would pay to avoid a change. CV and EV often only differ only by a relatively small 'income effect'.

[34] Oliver Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs" (1968) 58:1 Am Economic Rev 18.

[35] There are some effects that are more difficult to quantify. This does not mean they are unquantifiable. We leave aside the question of how to deal with difficult-to-quantify effects in this commentary.

[36] Some portion of higher profits may be captured by taxes transferred to the Canadian governments or investments that may benefit Canadians.

[37] The shareholders of non-merging firms also benefit if their prices also increase.

[38] If the direct buyers of the relevant product use the product as an input into the production of products that are sold in downstream markets and direct buyers pass-through post-merger prices to downstream consumers, then some of the harm is borne by these downstream consumers.

[39] This value need not be constant as is implied by the simplified equation in this

sentence. Economists have tools for estimating the size of this deadweight loss when the subjective value of the good is differentiated across consumers.

[40] Again, for the purposes of this commentary we ignore other forms of inefficiencies and efficiencies, such as those described in footnotes 25 and 26, that could result from a merger.

[41] As noted above, some profits accruing to foreign shareholders will be captured by Canadians through corporate taxes.

[42] As noted above, identifying which firm's shareholders benefit from efficiencies and wealth transfers can be very complex. We ignore this complexity in our commentary. It is sufficient for our claim that a substantial proportion of merger efficiencies in the future accrue to non-Canadian shareholders.

[43] The in-line hypothetical addresses efficiencies that may be considered 'marginal' in so far as the change in the use of the redeployed input is not substantial enough to change the overall market conditions of any other industry. This may not always be the case. In some mergers, the volume of redeployed resources may be substantial enough to, say, impact the market dynamics in another industry which can create additional efficiencies or inefficiencies to be taken into account in a well-defined trade-off analysis.

[44] In competitive markets there is no consumer surplus on the last unit of the good sold. In fact, this is a defining feature of allocative efficiency. Adding an additional resource to a competitive output market, such as the single redeployed worker in our example, would have such a small impact on the total market size that the output price would not adjust and the consumer expected to purchase the incremental output would also receive zero surplus (i.e., he is indifferent between buying and not buying the product).

[45] Adding the $50,000 in value created by the worker in her new employment to the $50,000 in cost savings achieved by the merging firm would amount to double counting. If the redeployment of the worker does create some new economic surplus in her new employment, this surplus should be included in the efficiencies calculation. To our knowledge, such incremental surplus has never been added in an efficiencies analysis.

[46] As noted above, redeployment delays and transition costs may further reduce the economic surplus resulting from cost reductions.

[47] In this case, the worker's surplus is reduced by $10,000 because her compensation is now lower. Before the merger, she traded her labour for $50,000 and received some amount of gains from that trade (i.e., surplus). After the merger, she trades her labour for $40,000 and thus receives $10,000 fewer gains from that trade, making her surplus from selling her labour $10,000 lower. The net overall surplus change from the merger is the $50,000 in cost savings to the merging firm (which is new producer surplus) less the worker's surplus loss of $10,000.

[48] We note again, however, that any delays and transition costs associated with redeploying resources in Canada should be netted out of any reductions at the firms' operations.

[49] As noted above, even cost reductions on Canadian operations do not

necessarily expand the output of the Canadian economy. For example, if Canadian head office cost reductions involve the release of senior executives and these executives go on to work in other countries, they expand the output in other countries, not Canada.

[50] If these multiplier benefits exist and are included in the trade-off, then any negative multiplier effects from reducing resource deployment in the operations of the merging firms must also be considered.

[51] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1, aff'd 2023 FCA 16 [*Rogers-Shaw*].

[52] *Ibid*, (Final Written Argument of the Commissioner of Competition) at para 154.

[53] *Rogers-Shaw*, *supra* note 51 (Respondent's Final Arguments) at Appendix 2, Response to Question 6.

[54] *Ibid.*

[55] *Ibid*.

[56] *Ibid*.

[57] *Rogers-Shaw*, *supra* note 51, at para 410.

[58] *Superior Propane Redetermination*, *supra* note 22 at para 192.

[59] *Ibid*.

[60] "A "total Canadian welfare standard" as defined by Professor Ross may or may not be discriminatory under Canada's international obligations, but the Act is not. In the Tribunal's understanding, those obligations require "national treatment" in the application of Canadian laws." See *Superior Propane Redetermination*, *supra* note 22 at para 197).

[61] *Ibid* at para 196.

[62] *Tervita CT*, *supra* note 12 at para 262.

[63] In *Parrish & Heimbecker*, the Tribunal stated the screen in *Tervita* somewhat differently, as "[t]he claimed gains in efficiency must not be achieved outside Canada and must instead flow back to Canadian shareholders. Under this fourth screen, savings from operations in Canada that would flow through to foreign shareholders are eliminated." See *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at para 657. While the Tribunal's statement in Tervita appears to clearly allow for the inclusion of efficiencies on foreign operations that flow back to Canadian shareholders, the Parrish & Heimbecker statement appears to be more ambiguous in that it says that 'claimed efficiency must not be achieved outside Canada', although the 'must instead flow back to Canadian shareholders' (emphasis added) language creates some ambiguity.

[64] As discussed above, although the Bureau assesses whether a merger is likely to result in an SLPC based on whether final consumers are Canadians or firms who purchase the relevant products are based in Canada, any harms from price increases may be borne by non-Canadians to the extent that buying firms based in Canada are owned by non-Canadians or the buying firms pass through price increases to their downstream customers. We assume for the purposes of this commentary that all harms are borne by Canadians, or at least that the proportion

of harms that are borne by Canadians exceeds the proportion of producer benefits that accrue to Canadians.

[65] Given a demand elasticity of 1, a 10% increase in price leads to a 10% decrease in quantity. Thus, firms produce and consumers purchase 100,000 fewer units (10% of 1,000,000). The post-merger price is $10 per unit higher than the pre-merger price and, assuming a linear downward sloping demand curve, the consumer DWL is calculated as (100,000 x $10)/2 = $500,000. The pre-merger variable margin was assumed to be a constant $30 per unit (30% of each $100 unit) and as such, the producer DWL is calculated as (100,000 x $30) = $3,000,000. There would also be a wealth transfer from the remaining consumers to the producers as a result of the increased price of (900,000 x $10) = $9,000,000.

[66] The portion of the producer DWL borne by non-Canadian shareholders would also be given zero weight.

[67] There is no publicly available evidence indicating that the Bureau has argued that efficiencies should be discounted in the trade-off because some of the benefits of efficiencies would flow to non-Canadian shareholders. As noted above, in *Superior Propane* the Bureau did argue that in some circumstances the wealth transfer could be discounted if the merging firms are owned by foreigners, but to our knowledge the Bureau has never explicitly argued that the portion of increased profits from merger efficiencies that flows to non-Canadian shareholders should be discounted in any way. In *Rogers-Shaw*, the Bureau also argued that the portion of the wealth transfer that accrues to foreign shareholders is socially adverse (see *Rogers-Shaw*, *supra* note 51, (Final Written Argument of the Commissioner of Competition) at para 154) but did not claim that the portion of efficiencies that accrues to foreign shareholders should be discounted.

[68] As discussed above, in *Superior Propane Redetermination*, the Tribunal found that only efficiencies on Canadian operations can be counted as a benefit of a merger.

[69] *Superior Propane Redetermination*, *supra* note 22 at para 196.

[70] Statistics Canada, *Multinational Enterprises in Canada*, (1 April 2019), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/11-621-m/11-621-m2019001-eng.htm#a2>.

[71] Statistics Canada, *Foreign-controlled enterprises in Canada, by financial characteristics and selected country of control*, (31 January 2022), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3310008401>.

[72] *Rogers-Shaw*, *supra* note 51 (Expert Report of Lars Osberg) at para 11.

[73] Government of Canada, "Position statements regarding concluded merger reviews" (last modified 20 January 2022), online: *Competition Bureau* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04449.html>.

[74] CNN Business, "Canadian National Railway Co", online: *CNN Business* <money.cnn.com/quote/shareholders/shareholders.html?symb=CNI&subView=institutional>.

[75] Competition Bureau, "Examining the Canadian Competition Act in the Digital Era, Submission by the Competition Bureau" (8 February, 2022), online:

Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>.

[76] S&P Capital IQ via S&P Global Market Intelligence.

[77] *Ibid.*

MERGER BONDS: A NEW REMEDY FOR AN OLD PROBLEM

Brandon Schaufele,
Associate Professor, Business, Economics and Public Policy
Director, Ivey Energy Policy and Management Centre
Ivey Business School, Western University

Merger control is beset with uncertainty. Mergers promise to unlock potential economic efficiencies yet introduce the prospect that the newly merged firms may behave anti-competitively. Denying a merger for which efficiencies outweigh anti-competitive harm forgoes socially beneficial combinations. The opposite is equally true: approving a merger that yields few efficiencies but leads to anti-competitive conduct harms consumers. Competition authorities, as regulators, must weigh the probabilities of these future outcomes, potential efficiencies versus potential anti-competitive conduct, when making an ex-ante decision whether to challenge a transaction. That is, they must take a decision before the uncertainty is resolved. This paper introduces a novel behavioural remedy, referred to as a merger bond, that may help alleviate and transfer some of the risks arising from ex-ante merger control. Merger bonds are financial contracts that act as assurances against anti-competitive conduct, bridging the gap between ex-ante and ex-post merger review. They offer several advantages that complement existing merger control remedies.

Le contrôle des fusions est soumis à l'incertitude. Les fusions promettent de réaliser des gains en efficience économiques, mais laissent entrevoir la possibilité que les entreprises nouvellement fusionnées se comportent de manière anticoncurrentielle. Le refus d'une fusion pour laquelle les gains en efficience l'emportent sur tout préjudice anticoncurrentiel mine les combinaisons bénéfiques pour la société. Le contraire est également vrai : l'approbation d'une fusion qui produit peu de gains en efficience et qui engendre une conduite anticoncurrentielle nuit aux consommateurs. Les autorités en matière de concurrence, en tant qu'organismes de réglementation, doivent évaluer les probabilités de ces résultats, soit les gains potentiels en efficience par rapport aux comportements anticoncurrentiels potentiels, lorsqu'elles prennent la décision ex ante de contester une transaction. C'est-à-dire qu'elles doivent prendre une décision avant que l'incertitude ne se résorbe. Cet article présente un code de conduite novateur, appelé une obligation de fusion, qui peut aider à atténuer et à transférer certains des risques découlant du contrôle ex ante des fusions. Les obligations de fusion sont des contrats financiers qui servent d'assurances contre la conduite anticoncurrentielle, ce qui permet de combler l'écart entre l'examen ex ante et l'examen ex post des fusions. Elles offrent plusieurs avantages qui complètent les recours existants en matière de contrôle des fusions.

Uncertainty is a defining characteristic of merger control. Consider, for example, a typical notifiable merger. Before contacting the Bureau about a proposed transaction, the merging parties must be prepared to argue that little harm to consumers will ensue from the merger. They may claim that prices will remain flat, quality will improve, and new innovations will be introduced to the market.[1] Companies also often claim that they will exploit synergies and achieve efficiencies, facilitating lower costs per unit output. Competition authorities might offer a different perspective: efficiencies, the merger opponents argue, are often unrealized but prices are likely to rise and quality to deteriorate. Of course, because merger review is ex-ante, neither side has certainty about which outcomes will be realized. That is, when the merger is proposed, neither efficiencies nor anti-competitive harms are observed.[2] They are uncertain. Efficiencies and anti-competitive effects materialize in the future and are fundamentally unknown when the Bureau must take a decision to challenge the transaction.[3] The best the Bureau can do is formulate a prediction about prospective effects. Uncertainty is only resolved later, sometimes years later.

The uncertainty of merger control is a consequence of having to make a prospective assessment under the merger control procedures adopted within the Canadian legal framework—i.e., the *Competition Act* (the "*Act*").[4,5] Because the process of Canadian merger review is ex-ante, the Bureau engages in complex analysis to forecast the magnitude of prospective harms and benefits.[6] If the Bureau underestimates the anti-competitive harm of a merger, or overgenerously credits merger-related efficiencies claimed by the parties, it may be too lenient and fail to challenge a merger that harms Canadian consumers. If the Bureau incorrectly recognizes few efficiencies, it may be too strict. It will then deprive the Canadian economy of productivity-enhancing opportunities. This risk of excessive restrictiveness or unwarranted leniency is mirrored in the oft-discussed trade-off between Type I errors, challenging mergers that are not anti-competitive, and Type II errors, permitting transactions that harm competition.[7] Both choices—being too lenient or too strict—involve formulating estimates of consumer harm and efficiencies. Both also involve risk. And, critically, this risk is not socially neutral with respect to producers and consumers.[8]

The risk of over- and underenforcement arises because the Bureau must predict merger effects that are inherently uncertain prior to observing post-merger market outcomes. Any prediction inevitably comes with errors. The Bureau will get it wrong some of the time. Indeed, the Bureau may be prone to both idiosyncratic errors, where the facts or context around a specific case lead to the wrong decision, and systematic errors, where the Bureau

is systematically biased towards a particular outcome. However, under current procedures, the Canadian merger review process assigns the bulk of the risk of errors to consumers, rather than the merging firms. To state differently, because the Bureau acts before any anti-competitive effects can be observed, consumers, rather than firms, bear most of the risk of incorrect prediction.[9] If Canadians are risk averse, as they surely are, this makes them worse off.[10]

It need not be this way. New remedies, or regulatory tools, can be introduced into merger control that reassign at least a share of these risks. This note proposes one such procedure, one that relies on financial instruments, a bond, to transfer some of the risk from consumers to the merging parties. I call this proposal a "merger bond".[11] A merger bond is simply a financial contract, specifically a surety. It is a surety held under terms negotiated between the Bureau and the merging parties.[12] For example, a merger bond, might be a financial assurance made on behalf of the merging parties, before the merger is consummated, for a pre-defined period, to not engage in anti-competitive conduct, such as, say, increasing prices. If the conditions defined in the contract underlying the bond are satisfied (e.g., the merged firms did not engage in anti-competitive price increases), all funds associated with the bond are returned to the merging parties. If the covenants in the underlying bond agreement are violated, the merging parties forfeit the financial value of the bond (i.e., they lose the assurance). Merger bonds are behavioural remedies with a twist. By delaying decisions in response to uncertainty, they have the potential to act as an additional regulatory instrument in a competition enforcer's toolbox, one that bridges the longstanding trade-off between ex-ante and ex-post merger enforcement.[13]

In what follows, I outline the idea of a merger bond. This note is intended to spark discussion and contribute to Canada's renewed interest in competition policy.[14] Immediate motivation arises from Innovation, Science and Development (ISED) Canada's recent consultation on the Canadian *Competition Act*. As ISED's *The Future of Competition Policy in Canada* states "the nature of competition … is changing as firms increasingly compete for consumers in dynamic ways and on features other than prices, challenging some of the traditional methods of analysis".[15] Exploring flexible and novel remedies offers new, sector-neutral avenues to improve welfare, and may help enforcement agencies better address "potentially harmful mergers that currently escape … remedy".[16] However, the idea of a merger bond extends beyond merits of specific legislative updates to a more general competition policy application. To this end, I include an Appendix with technical details. This Appendix sketches a mathematical framework that

can be used to assess how specific economic parameters factor into pricing a merger bond.[17]

Merger bonds are a method to share the risks of mergers and delay uncertain decisions through the creation of a financial instrument. By financially securitizing some of the risks from merger approval, it can be shifted from consumers to the merging parties. Instead of having the Bureau perform once-and-for-all ex-ante merger review, a merger bond requires merger proponents to post financial assurance, a bond. After the bond is posted, the Bureau allows the merger to proceed. Then, following some pre-determined period, say, for instance, seven years, the Bureau evaluates the post-merger outcomes. If the merging parties avoided anti-competitive behaviour, the principal of the bond is returned to the merged firm. If the newly merged firm did however engage in anti- competitive conduct, it forfeits the bond. The funds will be given to Canadians as compensation or directed appropriately as established in statute.[18]

The idea of a merger bond is meant to be provocative.[19] Requiring pre-merger financial assurance is a radical idea given current merger control regulation. Still, consider the following supplemental merger review procedure. First, merger proponents notify the Bureau that they intend to merge, exactly as now. Next, while the Bureau is conducting its analysis of the likely competitive effects of the merger, the Bureau and the companies enter into negotiations on a review agreement. (The term "review agreement" is used to distinguish it from existing notions of consent agreements.) A review agreement is a contract stipulating the value of the surety and the terms of an ex-post merger evaluation. If an agreement is reached, the merger is approved and the merging parties post funds (or assurances) with a third-party agency. If an agreement cannot be reached, the standard merger review proceeds as normal. In this scenario, merger bonds can be viewed as a tweak or add-on to existing procedures, not a full-fledged reformation of practice. Merger bonds are merely another tool, a new remedy that bolsters the existing review process. They do not eliminate existing procedures.[20]

Merger bonds would likely be most useful for mergers between large, established firms. Mature, stable industries with meaningfully-sized competitors and well-defined product markets lend themselves well to ex-post evaluation and, hence, merger bonds. Because of the many unknowns, merger bonds are likely less suited for addressing the issue of dominant incumbents pre-emptively purchasing nascent competitors, companies that might grow into formidable challengers.

The central feature of merger bonds is the ability of the Bureau to delay a decision under considerable uncertainty regarding the effects of the merger until better information is available.[21] Therein, it presents an opportunity to shift some of the risks of merger control from consumers to the merging parties. Colloquially, merger bonds require firms to put money where their mouth is. If companies are hesitant or unwilling to post a bond, Canadians should be wary of any claims made by the merging parties regarding the effects of the merger. The companies' assertions about increased competition and lower prices may not be credible, and claimed efficiencies may not be realizable.[22]

There are other advantages to merger bonds beyond the primary benefit of the risk transfer. These include:

- The proposed procedure requires ex-post evaluation of the merger at a point in time when better information about market outcomes is available. Among other things, such ex-post merger review can uncover insights that can be applied to future mergers.

- In circumstances in which merging parties must raise capital to post a merger bond, capital markets may reveal information about the perceived risk of these merger bonds—and the likelihood of perceived anti-competitive effects of the merger.

- Financial assurance could potentially help address liability gaps in existing Canadian competition legislation.[23] (A liability gap refers to the limits on private parties' ability to seek civil remedies under the *Act*.)

- Merger bonds supply incentives for specific deterrence.

- The bond principal can be used to compensate consumers in the event anti- competitive behaviour is detected.

Merger bonds work by delaying decisions until better information is available. To be clear, ex-post merger review is still expected to be contentious. But because firm conduct will have actually occurred, the dispute will be based on observed market conduct rather than a but-for estimate of future conduct. This can be especially valuable when there are concerns over non-price merger effects such as reduced product quality and weaker innovation incentives. These are precisely the hard-to-predict effects highlighted by Chiasson and Johnson.[24] The prospects of deprecated quality and weaker research and development efforts are particularly challenging to

assess ex-ante. They will also be hard to measure ex-post, but substantially less so. More generally, better information can only improve merger assessment. Instead of engaging in hard-to-resolve issues about uncertain future harms, parties can evaluate actual outcomes after a pre-defined period.

The notion of ex-post merger review has been advocated in recent comments on the future of the *Competition Act*. For instance, the Public Interest Advocacy Centre (PIAC) argues that Canada should "[m]andate ex-post merger reviews to be undertaken after a period of at least five to ten years from merger approvals, particularly for those mergers that carried significant risk of market concentration. The results of such reviews should be publicly disclosed."[25] Likewise, the Bureau seeks to extend its ability to conduct market studies, claiming that "[m]arket studies can play a role in assessing the impacts of enforcement action."[26]

The presumptive value of ex-post merger review, as recommended by PIAC, is learning. Ex-post merger review acts as a scorecard. It offers an after-the-fact evaluation of whether claimed merger-related efficiencies and/or the anticipated consumer harms materialized. Any learnings can then inform future enforcement action.[27] Indeed, ISED suggests empowering the Bureau to conduct additional merger retrospectives "as a means of refining analytical approaches and applying lessons learned".[28]

Yet, ex-post merger review can take on many forms and, indeed, competition authorities in other countries use ex-post reviews to study remedies or evaluate mergers ex-post. However, if ex-post merger review is useful for understanding the effects of mergers, the obvious questions is: why not make it determinative? Ex-post merger review could actively inform existing decision-making. Canada could make all notifiable mergers ex-post reviewable, while also, in situations where a review agreement is successfully negotiated, transferring the risks of consumer harms from anti-competitive conduct to the merging firms through a merger bond. Financial assurance is a regulatory instrument that makes this feasible. The proposed merger review process addresses the inherent uncertainty by delaying it to have better information on the competitive effects of the merger. Option value exists in waiting to make a decision.[29,30]

Another benefit of the merger bond proposal is that it leverages capital markets. Many firms will need to raise market capital to complete the merger and to cover the regulatory surety. Providers of capital are experts at estimating risk and will conduct analyses before lending funds. Thus, the Bureau will learn the financial market's estimate of the eventual outcome

of the merger review. Specifically, the financial market's perspective will be reflected in the cost of raising money. A high probability of bond forfeiture will imply a high cost of capital. The reverse is equally true. If raising funds to post the merger bond is easy for the merging parties, then the market is confident that there are realizable efficiencies and a low likelihood of any consumer harm that would require the merged firm to forfeit the merger bond. As described, a core challenge of ex-ante merger review involves prediction and financial market lenders are experts at predicting bond repayment, which builds in a degree of redundancy to the forecasting exercise. Moreover, while there is likely little existing, specific expertise in "pricing" anti-competitive harms, capital markets are likely to develop this expertise quickly.

Merger bonds can also be compared to the application of statutory bonding in other domains of the economy.[31] Statutory bonding is used, as an example, in new mine development[32] and as assurance required under Canada's Pipeline Safety Act (2015).[33] Statutory bonds in these cases are viewed as a substitute and backstop for a private liability regime. In these sectors, like with this proposal, bonds are designed to guard against future risks.

Compared with other jurisdictions, the *Act* provides limited scope for private action on competition issues. [34] Moreover, as Ross (2022) states, there is "near consensus on loosening the reins on private enforcement of the Act."[35] The lack of private actions under the *Act* reflects a liability gap: because the risk of being sued is limited, firms face weak (private) incentives to avoid anti-competitive conduct. Existing barriers to private action include both legal and economic hurdles. Merger bonds can work to fill the liability gaps along both dimensions. Removing legal hurdles, as has been suggested by several commentators, enables private action to act as a substitute for a merger bond. Both private litigation and merger bonds can offer compensation to harmed consumers if firms engage in anti-competitive behaviour post-merger. Moreover, both private action and merger bonds incentivize firms to avoid anti-competitive conduct. If merged firms face the threat of private action, with accompanying damages, they will proactively exercise caution to avoid any anti-competitive conduct.[36] Merger bonds provide identical incentives: firms will forfeit the value of their bond if found to have engaged in anti-competitive conduct.

Yet, even if the *Act* were updated to remove legal barriers to private action, there remain economic justifications for merger bonds. Most notably, firms may be judgement proof. That is, it is difficult to recover damages from

a bankrupt company that harmed competition and consumers. Likewise, incentives for private litigation may be insufficient to warrant entrepreneurial firms to pursue a private action. The risk of failure may be too high or the award if successful may be too small. Posting a bond, therefore, restores these incentives, ensuring that companies exercise sufficient care.

In practice, there are many regulatory, procedural, and legal dimensions of merger bonds that require further development. Any novel instrument needs to reflect the legal, business, and statutory context in which it is employed. Still, evidence on the effectiveness of existing merger remedies is fragmented and inconclusive.[37] Merger control lacks easy solutions. The objective of this note is to inject some creativity into the discussions surrounding the future of Canadian competition policy. Merger bonds can contribute to the suite of methods that move beyond the conventional antitrust toolkit, offering new classes of remedy. Along with proposals such as Ducci's "randomization as antitrust remedy",[38] merger bonds depart from the conventional tools of competition enforcement, while remaining faithful to the conventional spirit of competition policy.

Mergers promise potential economic efficiencies, but also lead to risks for consumers. Denying a merger when efficiencies outweigh any anti-competitive harm forgoes socially beneficial combinations but undoing a harmful merger is exceedingly difficult. The challenge is that the competition authority must make a decision whether to challenge a proposed transaction before the uncertainty about the effects of the transaction is resolved. A financial instrument such as a merger bond can be designed to alleviate some of this risk. As Canada wrestles with the future of its competition law, this is a good opportunity to consider the merits of alternative tools and to consider new approaches and policy instruments like merger bonds.

APPENDIX: THE ECONOMICS OF PRICING MERGER BONDS

A fundamental question with merger bonds is how prices should be set. There are many methods to price risk, but few determine the value of uncertain future anti-competitive harms. For illustrative purposes, I present one method to spark discussion, not to be understood as the ideal methodology. Several other approaches are feasible.

In brief, the intuition is as follows. Through merging, the merging firms are essentially asking consumers, via Canada's merger control framework, to switch from the current state of the world with certainty, say a given service quality, to a state of the world where, *as a consequence of the merger*, future service quality is uncertain. Because the merger obliges consumers to accept new risks, they should be compensated. Risk in this example reflects the *possible* deterioration in service quality. The question is how much compensation would risk-averse consumers require to be indifferent between a certain outcome and the newly created uncertain outcome. The required level of compensation reflects the fair price of a merger bond as consumers should be indifferent between the status quo and accepting the risky outcome plus the compensation.

The level of this compensation can be derived by taking the consumer's certainty equivalent indirect utility function and setting it equal to expected indirect utility at the point of indifference. Taking second-order Taylor approximations of both sides of the indifference condition, rearranging and solving for the certainty equivalent compensation yields a value that can be interpreted as the price of a merger bond.[39] The specific expression proposed for pricing a merger bond depends on six parameters and one negotiated term. Each of the six parameters are, in principle, estimable using observable market data in the pre-merger state of the world. Thus, the formula is straightforward to apply. Moreover, as discussed, the parameters have intuitive interpretations and offer nice properties that support the motivation for merger bonds.

The example I use focuses on a possible deterioration in product or service quality, holding product price and other attributes fixed. That is, the prospective harm to consumers arises because the newly merged firm might cut back on call centres or reduce the number of employees devoted to maintenance (say, for example, leading to more dropped calls on a telecommunications network or delays in addressing customer complaints). Alternatively, they may source lower quality materials, thereby reducing

the durability of the product. Deteriorated quality then trickles through to inferior consumer outcomes, harming consumers.

This expression and its derivation are based on Schlee and Smith (2020)[40] and Smith (2014).[41] The expression I propose to price a merger bond is:

$$\text{Bond Price} = M\left(\frac{1}{4}\pi(s(R-\eta)+\theta)\cdot\left(\frac{Q_1-Q_0}{Q_0}\right)^2\right)$$

where M, π, s, R, η and θ are the six parameters. The baseline level of quality is Q_0 and Q_1 is the threshold or trigger level of future quality with a deterioration in quality implying that $Q_1 < Q_0$. The term $(Q_1 - Q_0)/Q_0$ represents the percent change in quality on which to underwrite the bond. This expression is the negotiated outcome of the review agreement. If quality drops below Q_1, then bond forfeiture is triggered, and the bond principal is used to compensate consumers (or for another purpose as stipulated within the statutory framework).

M represents market size. The formula is written with M representing a single, aggregate market. Other specifications could index this parameter so that it reflects market-by-market measures of size.[42] Several methods can be applied to determine market size and, while the details of determining the value of this parameter are important in any specific application, the essential point is that bond prices increase with market size. As the merger affects a larger market, firms must offer more financial assurance. Larger potential consumer harms require larger bonds.

Next, π is the hedonic price of quality. Most firms sell multi-attribute goods and services. A single price is charged for the bundle of characteristics of which quality represents one of several attributes. The price of the quality attribute—holding all other effects constant—is measured as π. An extensive economic and marketing literature has developed on estimating hedonic prices.[43] As a result, it is straightforward to obtain hedonic prices using pre-merger data. It is equally straightforward to generalize the expression to account for other attributes. Importantly, as with market size, the price of the "quality" attribute is positively related bond price. Those goods for which consumers value quality the most lead to higher required sureties.

The third parameter in the bond pricing formula is s, the budget share of the good in a representative consumer's expenditure bundle. This too is positively related to bond price because merging firms selling more important goods, as measured by the share of household budgets, need to post larger bonds. In other words, if 10% of a household's budget is devoted to the good supplied by the merging firms, the prospect of consumer harm

from anti-competitive conduct is greater than if merely 1% of household expenditures are dedicated to that good. The expenditure budget share encapsulates this.

The parameter R is the coefficient of risk aversion for a representative consumer and is directly related to the motivation for merger bonds. Because consumers are risk averse, there is value in transferring the risk of anti-competitive conduct from consumers to firms. As with hedonic prices, there is a vast literature on measuring risk aversion.[44] In the context of Canadian merger control regulation, guidance on this parameter would typically come from the Treasury Board of Canada.[45] Intuitively, the more risk averse affected consumers are, the more these consumers want to avoid uncertainty, the greater should be the financial assurance.

The final two parameters in the bond pricing expression are η and θ. η is the income elasticity of the good and θ is the price elasticity of the good. Both parameters feature in existing merger evaluation and are readily estimable from market data. Both also have nice interpretations within the bond pricing formula. η enters negatively, which means that goods or services with greater income elasticities post smaller bonds. Necessities tend to have small income elasticities while luxuries have large income elasticities. Because the income elasticity is negatively correlated with bond price, firms that produce luxuries should post smaller financial assurance than firms supplying essentials. This parameter functions as an "equity property" of the bond pricing formula. Holding other parameters constant, society is likely less concerned about anti-competitive conduct in high-end products compared with goods deemed essential. The difference between high-end and essential is measured by the income elasticity of consumption. Finally, θ is the price elasticity of a change in quality. The intuition is that the deadweight loss from anti-competitive conduct increases in the price elasticity, so have a greater influence of the magnitude of the assurance required.

Readers familiar with the economics of taxation will notice a parallel between the bond pricing formula and measures of deadweight loss from a specific tax. In taxation, two common properties are frequently invoked: (1) deadweight losses increase in the square of the tax rate and (2) deadweight losses increase in the magnitude of elasticity. Both the square of the quality change and the price elasticity included in this formula play similar roles in the bond pricing formula.

As stated, there are many formulas that one could derive to price a merger bond. The essential feature of this expression is its simplicity, namely, how

key concepts from the economics of risk can be connected to *ex-ante* merger control. Given this connection, the formula offers a method to think through the information needed to adequately price a bond, but also shows how the potential for anti-competitive effects might harm consumers. Uncertainty has a cost. Merging firms create uncertainty; yet, under the existing legal framework, consumers bear most of the risk from this uncertainty. The process of deriving the formula highlights how a prospective change in quality, from the status quo to a potentially lower level of service, creates risk for consumers. Lower quality may not be realized, but that is irrelevant—new risk is created by the merger. This risk should not be borne by consumers (at least, not without compensation). If possible, the risk should be shifted to the parties generating the uncertainty and largely controlling whether any anti-competitive effects arise.

ENDNOTES

[1] Schwanen is clear that innovation is a broader and more dynamic concept than efficiency, one that extends beyond competition policy. While improved efficiency can unlock resources that can be devoted to research or product development, competition law has, to date, tended to avoid innovation effects, preferring to discuss quality or price effects. (Daniel Schwanen, "Commentary No. 636: Calibrating Competition Policy for the Digital Age", *C.D. Howe Institute* (February 2, 2023), online: <https://www.cdhowe.org/public-policy-research/calibrating-competition-policy-digital-age>.) Moreover, as Iacobucci notes, "Economic efficiency [including both consumer surplus and production efficiencies] is always at stake in competition matters" (Edward M. Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era", *Government of Canada* (September 27, 2021) at 56, online: <https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.) Other objectives can often be best addressed with other policies.

[2] Ross convincingly argues that "[o]ne strength of Canadian merger law is that it recognizes that anticompetitive effects and efficiencies are two distinct effects that may be produced by a merger. Any particular merger may lead to either, both or neither effects being observed. When they both arise in a case, they are typically of opposite signs in terms of social welfare—the efficiencies a positive consequence, the lessening of competition (and deadweight loss) a negative consequence. Under the total welfare standard we then just add them up to come to a decision". (Thomas W. Ross, "Proposals for Amending the Competition Act" (2022) 35:1 Can Competition L Rev 1 at 22.

[3] The focus of this paper is on Bureau decision-making as it is the party who decides whether to challenge a transaction. However, merging parties, who may or may not have better information, must also address uncertainty. Ultimately, it may be the Tribunal who is asked to decide.

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

[5] It is worth noting that this ex-ante merger control is common. Many other countries evaluate mergers prior to approving or challenging the transaction.

[6] Quantifying anti-competitive effects (e.g., price increases, quality degradations, reduced incentives for innovation, etc.) is necessary because the Bureau must decide whether to challenge a proposed merger before the firms actually merge. The Bureau—acting on behalf of Canadians—weighs the likely anti-competitive effects and potential offsetting efficiencies before challenging a merger. The conventional rationale for this approach is that it is exceedingly costly to force a divestiture after firms have invested in combining (i.e., proverbially, it is hard to unscramble the egg). Moreover, Ross, *supra* note 2 at 24, argues that "the increased complexity of mergers has made it challenging or impossible to review all of the new information, prepare court filings, obtain a hearing date, and complete a hearing" within the Bureau's standard statutory time constraints.

[7] See e.g. European Union Competition Law Review, "Error Types: The Role of Error Analysis in Antitrust Cases and Why Antitrust Cases are Vulnerable to Erroneous Decisions", *European Union Competition Law*, online: <https://www.eucomplaw.com/error-types/>.

[8] Occasionally overlooked, it remains important to emphasize that competition law is designed to promote innovation and support competition. It acts as a safeguard against anti-competitive conduct that harms consumers.

[9] Firms may not face the "risk" of errors arising from too strict enforcement in the same way that consumers do, but there are costs—namely, the opportunity cost of foregoing efficiency promoting activities if the Bureau is too strict.

[10] This is true regardless of whether any anti-competitive harm arises from the merger. This is known as a risk externality. Risk externalities reduce consumer welfare given three conditions are satisfied. First, consumers are not directly party to the decision to merge. Second, there is risk or uncertainty with respect to the effects of the merger. Third, consumers are risk averse. These three conditions are satisfied for most mergers, hence consumers are made worse off due to merging firms failure to internalize risk.

[11] It is important not to get hung up on the word "bond". The notion of a merger bond is intended to be generic, referring both to a particular merger control procedure plus an associated financial assurance posted by merger proponents. There is nothing about bonds that is critical to the framework.

[12] The bond would be held by an arms-length third party, not the Competition Bureau.

[13] Financial assurance or sureties can take any of several forms, including cash, cash equivalents (certified cheques, money orders, bank drafts), surety bonds, qualified trusts or irrevocable standby letters of credit. Christopher Langdon, Patrick Deutscher and Dave Nikolejsin, "Adjusting to BC's Increased Reclamation Bonding Requirement", *McCarthy Tetrault* (August 19, 2022), online: <https://www.mccarthy.ca/en/insights/blogs/mining-prospects/adjusting-bcs-increased-reclamation-bonding-requirements>.

[14] On the renewed interest in Canadian competition policy, see Howard Wetston, "Consultation Invitation - Examining the Canadian Competition

Act in the Digital Era", *Senate of Canada* (October 27, 2021), online: <https://sencanada.ca/media/368379/letter-pdf.pdf>. John Lorinc, "It's time for Canada to create competition policies that actually benefit consumers", *The Globe and Mail* (September 21, 2022), online: <https://www.theglobeandmail.com/business/rob-magazine/article-competition-act-consolidation-regulation-canada/>; Vass Bednar, "Is the Competition Bureau's efficiency defence still defensible?", *Financial Post* (August 30, 2022), online: <https://financialpost.com/telecom/vass-bednar-is-the-competition-bureaus-efficiency-defence-still-defensible>. Interest in competition law and policy is echoed internationally as well. See e.g., Dany H. Assaf, and Omar Wakil, "Competition Act and Investment Canada Act Amendments" (Torys Webinar: February 8, 2023).

[15] Innovation, Science and Development Canada ("ISED"), *The Future of Competition Policy in Canada* (Government of Canada: 2022) at 9, online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>.

[16] *Ibid* at 5.

[17] For the purposes of this note, I omit the details leading to this formula. They are available upon request. Of note, a range of comparable approaches can likewise determine the appropriate value of a merger bond. Discussion of these is beyond the scope of this paper.

[18] An immediate critique is that merger bonds allow merging companies' ability to "buy" an anti-competitive merger. In one sense, this is accurate: by forfeiting the bond when the merged firm has engaged in anti-competitive behaviour, barring additional remedies, the parties have effectively purchased the right to engage in anti-competitive conduct. However, this perspective is incomplete on two accounts. First, it neglects the roles of uncertainty and is imprecise about the counterfactual. If, for instance, the counterfactual state of the world involves a positive probability that the anti-competitive merger would be approved without requiring a merger bond, then requiring that the companies post a bond, which they will ultimately forfeit, leaves Canadians unambiguously better off. They at least obtain the value of the bond. The second reason is more compelling. Competition in many industries, particularly regulated sectors with natural monopoly-like technologies, can be characterized as "competing for the market" rather than "competing in the market." As Demsetz first argued, when there is competition for the market, it is possible to arrange outcomes (e.g., using the bond funds to subsidize prices), to achieve welfare enhancing outcomes: Harold Demsetz, "Why Regulate Utilities?" (1968) 11:1 JL and Econ 55. Demsetz and subsequent authors often suggested using auctions. Competition among bidders for the right to be the monopoly provider of a good or service would drive the combined auction plus market price to the first-best level. In many ways, a forfeit merger bond resembles this competition for the market perspective. This means that an appropriately priced merger bond, even if forfeited, does not necessarily leave consumers worse off.

[19] There are alternative ways to think about merger bonds. For instance, a

bond could apply exclusively to a divestiture when there is uncertainty whether a particular divestiture fully addresses the anti-competitive harm arising from the transaction. Such a "remedy bond" could be used to safeguard against divestitures that do not remedy the anti-competitive effects of the merger. More immediately, and more interestingly, the ISED Minister's conditions—and associated monetary penalties—imposed on Videotron and Rogers related to the Rogers-Shaw transaction are effectively a version of a merger/remedy bond. See ISED, "Statement from Minister Champagne concerning competition in the telecommunication sector", *Government of Canada* (March 31, 2023), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2023/03/statement-from-minister-champagne-concerning-competition-in-the-telecommunication-sector.html>.

[20] In the United States there exists a right of private action, under Section 7 of the *Clayton Act*, to sue for damages following a merger as has been done, for example, in the T-Mobile-Sprint Merger (*Dale et al v Deutsche Telekom AG et al*, 1:22-cv-03189, Northern District of Illinois) and *Steves and Sons Inc v JELD-WEN Inc*, 988 F (3d) 690; see also Erin L. Fishcer, "Private Merger Challenges Under Section 16 of the Clayton Act: Caution Post—*JELD-WEN*" (2021) 170 U Pa L Rev 141; The National Law Review, "The 4th Circuit Affirms Groundbreaking Divestiture Order in Private Clayton Act Suit Challenging Completed Merger", *National Law Review* (March 4, 2021), online: <https://www.natlawreview.com/article/4th-circuit-affirms-groundbreaking-divestiture-order-private-clayton-act-suit>. Thus, private merger enforcement could be a substitute for merger bonds, something that is clearly permitted by some statutes. For any violation of the antitrust laws, plaintiffs may seek treble damages under section 4 of the Clayton Act or relief in equity under section 16 of the Clayton Act. Currently, there are two challenges with private merger enforcement. First, actions for damages are subject to a four-year statute of limitations. Any attempt to compensate consumers for anti-competitive effects after this limitation period is not possible. Second, as highlighted by Ross, *supra* note 2, private actions in Canada are much more limited and tend to be focused on price-fixing and deceptive practices.

[21] Uncertainty creates a policy dilemma for the Bureau. Approving a merger promises short-term, private gains to the merging parties. However, it also leads to uncertain, long-term risks for Canadians. Even if both merging firms and the Bureau are relatively confident that the merger will generate production efficiencies, it is still possible that, after a few years, eliminating a competitor harms competition. Currently, it is these uncertain future implications that dog Canadian merger review.

[22] As Ross, *supra* note 2 at 20, highlights "there is a great deal of evidence now that firms, in general, do not achieve the efficiencies that they claimed will be available post-merger".

[23] On existing liability gaps, see Iacobucci, *supra* note 1; Ross, *supra* note 2.

[24] Matthew Chiasson and Paul A. Johnson, "Canada's (In)efficiency Defence: Why Section 96 May do More Harm than Good for Economics Efficiency and Innovation" (2019) 32:1 Can Competition L Rev .

[25] Public Interest Advocacy Centre, "PIAC comments on Senator Wetston's Inquiry on Canadian Competition Act in the Digital Era", *Public Interest Advocacy Centre* (December 16, 2021), online: <https://www.piac.ca/2021/12/16/piac-comments-on-senator-wetstons-inquiry-on-canadian-competition-act-in-the-digital-era/>.

[26] This is the Bureau recommendation 7.1 in their response to the solicitation of Senator Wetston: Competition Bureau of Canada, "Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau", *Government of Canada* (February 8, 2022), online: <https://www.competitionbureau.gc.ca/eic/site/cb- bc.nsf/eng/04621.html>.

[27] Indeed, the Organization for Economic Cooperation and Development (OECD) advocates for market studies for precisely this reason: OECD, "Market Studies and Competition", *OECD* (accessed February 24, 2023), online: <https://www.oecd.org/daf/competition/market-studies-and-competition.htm>.

[28] ISED, *supra* note 15 at 23.

[29] Avinash Dixit and Robert Pindyck, *Investment Under Uncertainty*, (Princeton University Press: 1994).

[30] Further, knowing that they must undertake ex-post review, the Bureau could tailor its information collection methodologies to best measure the effects of the merger during the review.

[31] EcoFiscal Commission, *Responsible Risk: How putting a price on environmental risk makes disasters less likely*, (July 2018), online: <https://ecofiscal.ca/wp-content/uploads/2018/06/Ecofiscal-Commission-Risk-Pricing-Report-Responsible-Risk-July-11-2018.pdf>.

[32] Langdon et al, *supra* note 13.

[33] *Pipeline Safety Act*, SC 2015, c 21.

[34] See Iacobucci, *supra* note 1, and Ross, *supra* note 2, as examples.

[35] Ross, *supra* note 2 at 14.

[36] This follows from a classic result in the analysis of the economics of tort law. See e.g., Robert Cooter and Ulen Thomas, *Law & Economics*, 5th ed (Boston: Pearson Addison Wesley, 2007).

[37] On the evidence for merger remedies, see John Kwoka, Mergers, *Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*, (Cambridge: The MIT Press: 2015).

[38] Francesco Ducci, "Randomization as an Antitrust Remedy" (forthcoming) Berkeley Bus LJ. See also Michael Gal and Nicolas Petit, "Radical Restorative Remedies for Digital Markets" (2021) 36 BTLJ 617.

[39] Readers seeking details can contact the author. For additional discussion, see Edward Schlee and V. Kerry Smith. "The Welfare Cost of Uncertainty in Policy Outcomes" (2020) NBER Working Paper No 22864.

[40] *Ibid.*

[41] V. Kerry Smith, *Can Environmental Bonds Manage Policy Induced Risks?* (2014) [unpublished].

[42] For example, $\text{Bond Price} = \sum_i M_i \left(\frac{1}{4} \pi(s_i(R - \eta_i) + \theta_i) \cdot \left(\frac{Q_1 - Q_0}{Q_0} \right)^2 \right)$.

[43] Sherwin Rosen, "Hedonic prices and implicit markets: product differentiation in pure competition" (1974) J 82:1 Political Economy 34; Michael Greenstone, "The Continuing Impact of Sherwin Rosen's 'Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition'" (2018) 125:6 J Political Economy 1891.

[44] See e.g., Levon Barseghyan et al, "Estimating Risk Preferences in the Field" (2018) 56:2 J Economic Literature 501.

[45] For example, within its Guide to Integrated Risk Management: Treasury Board of Canada, "Guide to Integrated Risk Management", *Government of Canada* (2022), online: <https://www.canada.ca/en/treasury-board-secretariat/corporate/risk-management/guide-integrated-risk-management.html>.

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

James Musgrove and Hannah Johnson*

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

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

1. Overview—What are we trying to do?

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

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

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

2. Impetus for Change

A) Change is All Around

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

To justify possible changes to the *Competition Act,* the Discussion Paper notes, among other things, concerns about affordability and the cost of living, market concentration, the emergence of digital giants, and inequality[7], but it does little to tie these purported problems with the need for reform to the *Competition Act*. For instance, few would suggest that the inflationary pressures which Canada, and much of the world, is experiencing are a result of antitrust issues.[8] Nor growing economic inequality—and the evidence suggests that Canada, as opposed to some other societies, is not experiencing meaningfully increased economic inequality.[9] Nor is there conclusive evidence for increased market power.[10] There has been a rise in large digital firms, lots of entry, much change, innovation and disruption, but in our view no clear evidence of any antitrust problem, if we define antitrust problems as we traditionally have—as related to consumer welfare. Certainly, the Discussion Paper does not seek to demonstrate such a problem. It merely

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

B) Lose a Case, Amend the Act

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

The classic example of litigation-inspired amendment may have been the Bureau's defeat in the *Freight Forwarders* case.[11] That litigation outcome was followed by a paper prepared by senior Bureau officials advocating change[12], which ultimately resulted in the 2009/2010 amendment to create a *per se* cartel offence.[13] That may be the most significant such example, but there are a number of less prominent ones as well.

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

In the *Premier Career Managemen*t case[16] the Tribunal in the first instance had determined that misrepresentations made by the respondents were not made "to the public", pursuant to Section 74.01(1)(a) of the *Act*, because they were made in an office which was not open to the public. The Federal Court of Appeal overturned the decision[17], concluding that the representations were made to various members of the public, one at a time. However, between the time of the original decision and the appeal, Section 74.01(1)(a) was amended (as well as the relevant parallel provision in Section 52) to add Section 74.03(4)(c), which provides that in proceedings under Section 74.01 (and 74.02) it is "not necessary to show that the representation was made in a place to which the public has access."[18]

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

The Ontario Superior Court Judge acquitted[19] on the basis that the term "representation to the public" in Section 52(1) meant representation to the public in Canada. The Ontario Court of Appeal found[20] that the "public" was not restricted to the public in Canada. However, again, an amendment was made March 12, 2009 to add Section 52(1.1) (b)[21] which provides that the persons to whom the representation is made need not be in Canada.

In an early skirmish in the *Petro Canada/Superior Propane* case[22], (which is famous for its consideration, later in the proceedings, of the efficiencies defence) the Bureau sought an injunction to prevent closing of the transaction. The Bureau failed on the basis that the relevant injunction standard in Section 100, as it then existed, required the Commissioner to show that the merger was likely to prevent or lessen competition substantially. After that defeat, the government amended Section 100 to remove the requirement that the Commissioner must demonstrate a likely substantial prevention or lessening of competition, replacing it with a requirement that the Commissioner simply certify that more time is required to assess the transaction.[23]

More recently, of course, the injunction powers under Section 104 (which applies after a proceeding challenging the transaction has been filed—in contrast to the Section 100 injunction, which is relevant before a Section 92 challenge is commenced) received attention in the context of the *Secure/Tervita* merger.[24] The Commissioner sought to enjoin closing of the transaction, on an "interim interim" basis, pending the hearing of the full injunction proceeding. The Tribunal concluded it did not have the power under Section 104 to grant such "interim interim" relief. That defeat seems to have provoked the Commissioner to seek additional injunctive power.[25] On appeal[26] in *Secure/Tervita,* the Federal Court of Appeal determined that the Tribunal did in fact have the power to grant interim interim relief.

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

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

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

Those points are not to deny that sometimes cases do illustrate real statutory problems—such as the *Rowe* case[32], which determined that an agreement to withdraw a bid was not caught by the bid-rigging provision. An amendment closed that loophole—appropriately in our view.

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

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

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

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

3. The Nature of the Proposed Amendments

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

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

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

recent case, if the Vancouver Airport Authority (VAA) had lost its Abuse of Dominance case[37], and been prohibited from restricting the number of catering companies operating at the airport, we should not worry, primarily, about the catering market at the Vancouver Airport, or even about the fate of the Airport. That is even though, as the Tribunal found, the challenged policy protected a legitimate business interest in making the Airport more attractive, so a decision against VAA would have been an error that injured both it and the economy. But, what we should really worry about is how such a decision would affect the approach of thousands of other entirely unrelated businesses which would, as a result of that decision, worry whether they had the right to decide how many suppliers they want to deal with. And they may, as a result, make sub-optimal, inefficient, decisions. That is, as you enforce more aggressively, lower the barriers to finding conduct anti-competitive, and increase the penalties/consequences for firms found to have violated the *Act*, you increase the risk of Type I error in any particular case. More problematically, you increase the risk of businesses pulling their competitive punches for fear of facing litigation and themselves being the victims of such errors.

4. Some Specific Comments

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

A) Mergers—Some Thorny Issues

i) Nascent Firm Mergers—Lower Review Standard

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

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

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

Even retrospectively, identifying a competitive threat is difficult. The acquisitions of WhatsApp, Instagram and YouTube, by Facebook and Google are often cited as examples of failed antitrust merger policy[41], but even the success those firms have achieved, post acquisition, does not necessarily tell us much from an antitrust perspective.[42] How well would they have done without the capital, expertise and synergies of Facebook and Google? We just do not know. Even if they had done well as stand-alone firms, would they have developed into meaningful rivals to their acquirer, or simply other firms with different offerings? These are very hard questions to understand, even after the fact, and the further after the fact, the harder it is.[43]

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

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

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

The digital revolution, since it is the technology sector in respect of which the issue of *killer acquisitions* is raised most frequently, has been highly economically beneficial to Canadians and indeed the world, and has served to lower barriers to entry in many cases.[47] It could of course have been more beneficial if antitrust law had been able to distinguish those nascent competitors that should not be acquired by a dominant incumbent from the many others that do not present any threat to competition. But that is a big "if." Caution is warranted before we implement changes that could put at risk a model of innovation and incentives for entry that has delivered overwhelming consumer benefits (albeit having done so with some anti-competitive consequences). Indeed, if a precautionary principle is relevant at all[48] it is with respect to statutory changes that may undermine a successful pro-competitive model, which has delivered huge consumer benefits. Consequently, given the strength and resiliency of the economy, including its ability to self-correct market power problems[49], we propose the Antitrust Hippocratic Oath: First, Do No Harm.

ii) Limitation Periods

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

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

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

> Given the absence of a bar to delayed merger challenges in the United States, the question is how long after consummation should plaintiffs (whether government or private parties) be allowed to challenge a transaction and on what grounds? In addition to questions of fairness (to the parties and other stakeholders, such as employees), there are also questions of efficiency. Never ending uncertainty may deter welfare enhancing transactions from occurring. And post-consummation entities may delay or temper significant and beneficial investment if the threat of a post-consummation challenge looms indefinitely.
>
> Practical difficulties proving competitive harm will increase as time passes. When using a standard of what was foreseeable at the time of the merger, the ability, many years later, to reconstruct from what was known, then, and determine the foreseeability of future events will inevitably be a fraught exercise. Further, there are difficulties in determining whether alleged harm flows from the merger or other exogenous post-consummation market forces. For example, years later, assets acquired in a past merger may be important to a firm's current market power. But it is difficult to determine whether it was the merger, technological developments, competitor exit, or other factors that caused the increase in market power (i.e., the but for world). Only rarely will acquired assets, independent of subsequent events, lead to competitive problems years after consummation. Punishing mergers based on post-consummation changes in the market (like technological developments or competitor exit) imposes no-fault liability on merged entities.
>
> Finally, successfully implementing post-consummation remedies can be challenging. Remedies many years later are all the more difficult to implement. The constituent businesses of the merged firm may often be so integrated that practically no divestiture can be made which could survive independently and replace lost competition. It may not even be possible to divest an asset to another operating business which could result in an effective competitive rival. Even if a remedy is possible, its costs may exceed the benefits to be achieved.[51]

This issue has also been canvassed by a number of thoughtful U.S. antitrust scholars.[52]

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

iii) Notification Thresholds

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

iv) Interim Relief

As noted above, the Discussion Paper suggests that there may be a need for greater injunctive powers to prevent closing of potentially problematic transactions. We observed above that this suggestion seems to have been inspired by the failure to obtain an "interim interim" injunction in the *Secure/Trevita*[53] transaction. However the Court on appeal confirmed that the Tribunal does have the power to grant such injunctions[54], so the immediate issue may have been overtaken by events.

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

the injunction, rather than the substantive issues. However, we think that the recent *Rogers/Shaw* transaction[55], which moved from case filing to decision in less than eight months, and to appeal in an additional month, may suggest a model. If the Commissioner commits to a hearing (and the Tribunal to a decision) within an eight or nine month timeline, then the trade-off may be an automatic injunction to prevent closing for the nine months. If the Bureau does not commit to that timeline, then the parties should be free to close at their own risk. This approach would have the advantage of getting a resolution to mergers on a timeline that at least many transactions may be able to withstand, while giving the Bureau a fair opportunity to have its case heard on the merits, pre-closing. This approach avoids the significant costs, distraction and delay associated with injunction fights. We will have a bit more to say about timing issues and procedures below.

v) Efficiencies Defence

Much has been written, by many, about the efficiencies defence and its appropriateness[56], so we will be brief. It is certainly true that the drafters of the *Competition Act* sought, as a fundamental goal of the "new" *Competition Act*, to achieve an efficient economy[57], and as recognized in the case law, efficiency was to be a trump factor in merger review when it could be demonstrated.[58] As the drafters of the new *Act* liked to boast, and as detractors of the efficiencies defence now repeat endlessly as a criticism, Canada is largely unique in its mergers efficiencies defence. We are not sure, however, why this uniqueness should be denigrated. It might just as well be seen as a matter for some pride. The underlying logic remains, to us, compelling.

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

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

Opponents of the defence also raise concerns with its use in respect to purely domestic mergers[60]—but this criticism we think is misguided. One result of making firms more efficient is that they can complete with international rivals, but another much more important result is that the Canadian economy uses its resources more efficiently. The goal was to improve the overall efficiency of the Canadian economy—whether for export or domestic consumption. Only efficiencies achieved in Canada "count" as cognizable efficiencies—so this objection is not well founded in our view.

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

vi) Impact on Workers/Labour Markets

Finally, we note that the Discussion Paper raises the question as to whether merger analysis should give particular consideration to labour issues. We note, as a first point, that the Bureau's enforcement of the merger provisions has always considered monopsony power in relevant cases[62]—even when there is no output effect. In our view, a pure wealth transfer without output effects is not a substantial lessening of competition, and so in our view the Bureau's approach in this regard is in error—but the Bureau's current approach to enforcement under the *Act* as it stands does in fact consider monopsony issues and therefore the market for purchase of inputs, including labour. So, that does not necessitate a statutory amendment.

More fundamentally, we think there is considerable danger in seeking to address goals beyond competitive issues in a competition law regime. It is difficult enough to get the competitive issues right, without mixing in unrelated goals. If we seek to protect labour and employment, why not the environment, equity and diversity, health and safety, truth and reconciliation—the possible list is virtually endless. The Commissioner of Competition and Tribunal do not have the expertise[63], and the approach risks—indeed it guarantees—confusing the focus of any analysis. As Lawson Hunter[64] has pointed out, either you have a statute focused on a judicially determinable issue, which requires a tight focus, or you have a broad policy decision—a

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

C) Unilateral Conduct

i) Tech—This Time It's Different

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

ii) Intent to Injure Competition/Innovation

The Discussion Paper articulates the importance of protecting innovation as an aspect of competition, and notes that the requirement for an intended negative effect on a competitor in order to demonstrate a practice of anti-competitive acts was too narrow a focus. It acknowledges, however, that both the *TREB* case[76], and the 2022 amendments to the *Act*[77] broadened the interpretation of anti-competitive acts defined in the *Canada Pipe*[78] case as those with an intended negative effect on a competitor to an intended negative effect on competition. Nevertheless, and despite this significant change, the Discussion Paper asserts that the Abuse of Dominance provision has "very narrow" application and advocates that a broader, less specific test be employed.[79] We do not agree, nor are we persuaded that "this provision may become more problematic as the economy grows more complex and intertwined."[80] Complexity is not new. Further, as noted above, many of the

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

Whether particular industries are more complex than others (and as practitioners of competition law know, when you dig into markets, most turn out to have a meaningful level of complexity), that does not change the principles which apply. Further, it is important that the basis upon which conduct may be challenged is clear—particularly as such challenges come with hugely enhanced Administrative Monetary Penalties (AMPs), but also because if people don't know the rules, it is hard to abide by them. The vast majority of compliance with competition law, like all law, flows not from enforcement, but from self-regulation. The guidelines for unilateral conduct compliance are already challenging, given the inherent difficulty in distinguishing aggressive competition on the merits from anti-competitive conduct. While we do not favour *per se* rules or presumptions in this area, as they will inevitably stifle pro-competitive aggressive and creative conduct[81] (as discussed further below), nevertheless we favour making the standards as clearly defined as possible. That is a delicate but important balance.

iii) Preventative Rules/Proactive Enforcement

The Discussion Paper explores the concepts of "preventive" rules or presumptions[82], and "proactive encouragement of competitive alternatives."[83] Whatever those things are, they are not competition law as we have understood it in Canada. Some industries are subject to specific regulatory regimes. That may be appropriate in some cases, but these industry-specific regimes have developed outside of competition law. In any event, we have been moving away from regulation where we can given the recognition of the benefits of competitive markets. Likewise with promoting specific firms or industries. The promotion of competitors, as opposed to establishing marketplace rules that allow for competition, has generally not been a successful approach to strengthening the economy and increasing consumer welfare. Promoting new competitors may, sometimes, make sense as industrial policy (although we note a significant lack of success by most governments in this area) but that is not competition law.

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

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

iv) Joint Dominance

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

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

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

v) Substantial Lessening of Competition

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

We disagree. If there is no injury to competition (subject to determining what "substantial" is), why on earth would we intervene? The Discussion Paper refers to the European approach to dominance, which is alleged to focus on conduct with less attention to harm. First of all, this is a simplistic view of European competition law[86], which has moved toward a greater focus on harm and potential harm. More fundamentally, *per se* prohibition of reviewable practices would entirely upend Canadian competition law, which (along with competition law in Europe, the U.S. and worldwide) has for decades been moving away from *per se* prohibition except for hard-core conduct (i.e., conduct that almost always is so inherently anticompetitive that it warrants condemnation without further inquiry). [87]To take a frequently discussed "problem" in the tech sector, self-preferencing, a *per se* prohibition would prevent or limit a large number of efficiency-enhancing, consumer-friendly product offerings. For example, a platform could use the knowledge of consumer preferences it gains from facilitating transactions by others on the platform to itself offer more attractive products. The platform preferences itself by using this information, but consumers benefit, and the economy is more efficient. This is the key problem with *per se* rules—except in the very clearest, least ambiguous cases they prohibit conduct which is frequently pro-competitive, and as a result tend to injure consumers and the economy. Further, if the *per se* prohibited matters are not precisely defined—there appears to be no effort to do so in the Discussion Paper, and of course it is very difficult to do in legislation as well—firms will be subject to *per se* prohibition respecting conduct of which they cannot know the precise boundaries, which would not only be inefficient, it would be fundamentally unfair.

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

vi) Other Restraints of Trade

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

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

However, the Discussion Paper also asks whether some of these reviewable practices could be "repositioned" to provide for "fair" competition. We suggest that this idea is fundamentally flawed. "Fairness", like some other hard to define qualities, often lies in the eye of the beholder. It is, at best, difficult to define, and adopting it as a standard for the cited practices retrospectively puts successful business conduct at risk. When fairness is discussed, it tends to refer to the treatment of competitors—a concept which was, rightly in our view, and indeed in the view of the Discussion Paper[88], de-emphasized in the Abuse of Dominance test.

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

D) Competitor Collaborations

i) Need for an Agreement

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

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

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

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

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

ii) Scope of Civil Enforcement

The Discussion Paper starts its consideration of Section 90.1 by noting, correctly, that section 45 is reasonably tightly circumscribed, focused on "hard-core" cartels, and that because section 90.1 does not "punish" behaviour, but provides only forward-looking cease and desist orders, there may be incentives to conduct oneself in ways contrary to section 90.1 until ordered to stop. That is theoretically correct, but before significant effort is invested in "fixing" section 90.1—by expanding it to allow for punishment for past behaviours, or expanding it beyond agreements between competitors—it may be appropriate to ask, is it needed at all? Indeed, that was a question we asked in 2009[90], noting that the formerly broader criminal

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

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

iii) Buy-Side "Cartels"

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

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

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

iv) Sections 48 and 49

Finally, an amendment not suggested in the Discussion Paper—but which fits with the theme of simplifying the *Act*—is a suggestion to repeal Sections 48 and 49. Section 48 deals with with professional sport, and section 49 applies with respect to certain specific agreements among federal financial institutions. The Competition Bureau, in its recent Submission[92], noted that section 48 is redundant given section 45(1.1), and we agree. The Bureau does not address section 49, which has its origins as a provision of the *Bank Act*. While Section 49 has now been expanded to insurance companies and other financial institutions, its prohibitions read quite oddly with respect to non-banks. Also, with the passage of a *per se* Section 45, Section 49 is redundant and it carries with it rigidity, in that there is no Section 45(4) defence available under Section 49. In addition, it is in a practical sense a dead letter—never having been the subject of a prosecution. Finally, it is unfair, treating like entities non-alike, in that it affects financial institutions differently than all other economic actors, and does not apply to virtually identical financial institutions. For no good reason whatsoever (except its peculiar history and constitutional concerns) it does not apply to provincially incorporated financial institutions. There is no reason to retain Section 49.

E) Deceptive Marketing Practices

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

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

business promotions in Canada, and in this sense are seen as a powerful tool in the digital economy."[96] Despite this acknowledgement, the Discussion Paper asks whether additional rules or enforcement tools, including more specific definitions of types of misleading advertising actions, would be useful. In our view, no. They would create rigidity—the recent drip pricing amendment[97] has already created unanticipated challenges.[98] In fact, our view is that a movement to simplify the misleading advertising provisions—which now runs to some twelve pages in the statute—is in order. A simple prohibition on materially false or misleading representations, with appropriate guidelines as to how the Bureau would enforce the basic rule, would achieve a better, less rigid result.

F) Proposals regarding Administration and Enforcement

i) Codes of Conduct

The Discussion Paper commences its consideration of administration and enforcement issues by noting that the *Act* does not allow for the imposition of codes of conduct. That is certainly true, and for good reason—it would transform the Commissioner of Competition from an enforcer—a role all Commissioners have zealously guarded over the years and which the Discussion Paper reflects[99]—to a regulator, but not one limited to a particular industry or sector. We have discussed, above, the difference between regulation and competition policy, noting the benefit for consumers of competition over regulation whenever possible. We have sufficient examples to know that the two roles—regulator and enforcer—do not sit well together, and that regulating an industry is difficult.[100] We regularly get it wrong even when the regulator has deep knowledge of the specific industry.

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

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

ii) Interim Measures

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

There is a lot to be unpacked there. First, with respect to the comparison with the European Commission, that is a comparison to an inquisitorial system. The structure of the Canadian system is fundamentally different. We have an adversarial system, including under the *Competition Act*, which involves both an enforcer and an independent decision maker. Indeed, it was to avoid the difficulty surrounding the role of Judge Judy and Executioner[101] that the Restrictive Trade Practices Commission was replaced almost forty years ago.[102] And, as a practical matter, decisions of the European Commission are fairly slow, even though they do employ an inquisitorial model.

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

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

iii) Speed of Proceedings

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

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

iv) Civil Damages for Abuse

The Discussion Paper suggests that a more "robust" framework for enforcement would allow civil damages claims, including presumably class actions, for reviewable conduct—primarily Abuse of Dominance. As we have explored recently and in detail[105] the genius of the *Competition Act* is to differentiate between conduct which is virtually always harmful—hard-core cartels—and more ambiguous things—typically vertical conduct—which may injure competition, but which may be pro-competitive and efficiency enhancing. For the former, we provide criminal penalties and damages—because we are not worried about chilling pro-competitive conduct. For the latter, we examine the conduct on a case-by-case basis, and the primary remedy is a cease and desist order, because we are concerned about chilling aggressive competition.

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

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

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

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

> relatively clearly defined, and discouraging such conduct does not damage the economy.
>
> Conversely, if the impact of the conduct is economically ambiguous and often efficient, as is the case with civilly reviewable conduct, and determining the line between reviewable conduct which damages competition and that which does not is tricky (which it often is), then there is legitimate concern about chilling potentially pro-competitive conduct. Consequently, the conduct should be subject to detailed economic examination to ensure that it is not condemned out of hand and the available remedies designed to avoid over-deterrence of such conduct. In those circumstances, a primary cease and desist order remedy makes sense. As noted, however, Parliament added the possibility of AMPs for abuse of dominance in 2009.[109]
>
> Arguably, the bifurcation of the Canadian *Competition Act* is its genius, in that it allows the government to challenge inherently economically ambiguous conduct in circumstances in which it believes that there is an injury to competition, but it does not allow challenges—at least challenges leading to damages actions—by competitors or other person in the distribution chain seeking to protect their own economic interests. Consequently, firms are more likely to engage in efficiency-enhancing vertical conduct that may injure competitors or others in the distribution chain than they would be in a regime that allowed such firms to seek damages.[110]

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

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

v) Market Studies

Finally, we note that the Discussion Paper proposes that the Bureau obtain compulsory powers to require the provision of evidence to conduct market studies. Well, who are we to complain? Where such studies have been established elsewhere, they have resulted in significant work for counsel. But, self-interest aside, that may not be the best use of resources. As we have argued elsewhere[111], historically market studies have been extensive, expensive exercises with limited positive results. They can be punishing to the companies involved, and there is risk that we will simply round-up the usual suspects for such studies.

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

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

5. Some Concluding Thoughts

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

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

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

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

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

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

ENDNOTES

* With thanks to Shaniel Lewis for her assistance.

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

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

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

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

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

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

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

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

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

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

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

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

16 *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2008 Comp Trib 18.

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

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

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

20 *R. v Stucky*, 2009 ONCA 151.

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

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

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

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

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

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

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

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

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

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

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

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

[49] Frank H Easterbrook, "Limits of Antitrust" (1984) 63: 1 Tex L Rev 1.

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

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

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

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

[53] *Secure/Tervita*, *supra* note 24.

[54] Secure Appeal, *supra* note 26.

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

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

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

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

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

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

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

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

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

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

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

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

[67] *Ibid* at 31.

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

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

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

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

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

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

[74] TREB, *supra* note 30.

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

[76] TREB, *supra* note 30.

[77] Bill C-19, *supra* note 31.

[78] *Canada Pipe*, *supra* note 20.

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

[80] *Ibid* at 30.

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

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

[83] *Ibid* at 35.

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

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

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

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

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

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

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

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

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

[92] Competition Bureau Submission, *supra* note 34 .

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

[94] *Ibid* at 47-48.

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

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

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

[97] Bill C-19, *supra*, note 31.

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

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

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

[101] With apologies to Matt Groening.

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

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

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

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

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

[107] Musgrove and McNeil, *supra* note 105.

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

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

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

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

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

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

YEAR IN REVIEW 2022: *COMPETITION ACT* REFORM GAINS PACE

Simon Kupi and Camila Maldi[1]

In 2022, the federal government announced a much-anticipated process to study reform of the Competition Act*, expediting the passage of an initial set of amendments in June and initiating public consultations on further amendments in November. Amidst ongoing debate over the future of Canada's mergers framework, the Competition Tribunal heard two Commissioner challenges and issued two major decisions—including in the closely watched* Rogers/Shaw *litigation—while an earlier Federal Court of Appeal ruling in the* Secure/Tervita *case provided the Commissioner his only litigation victory of the year. As Commissioner of Competition Matthew Boswell made the case for competition law's role both in driving economic growth and reducing inflationary pressures, the Bureau's activities touched on high-profile, consumer-facing topics such as "greenwashing" and retail grocery competition and key sectors including energy, agriculture, aerospace, tech and health care.*

En 2022, le gouvernement fédéral a annoncé un processus très attendu pour étudier la réforme de la Loi sur la concurrence*, accélérant l'adoption d'une série initiale de modifications en juin et lançant des consultations publiques sur d'autres modifications en novembre. Dans le cadre du débat en cours sur l'avenir du cadre des fusions du Canada, le Tribunal de la concurrence a entendu deux contestations du commissaire et a rendu deux décisions importantes, y compris dans le très étroitement surveillé litige* Rogers/Shaw*, tandis qu'une décision antérieure de la Cour d'appel fédérale dans l'affaire* Secure/Tervita *a procuré au commissaire sa seule victoire de l'année en matière de litige. Alors que le commissaire de la concurrence, Matthew Boswell, invoquait le fait que le droit de la concurrence stimulait la croissance économique et réduisait les pressions inflationnistes; les activités du Bureau ont porté sur des sujets très médiatisés et axés sur les consommateurs, comme l'écoblanchiment et la concurrence dans les épiceries de détail, ainsi que sur des secteurs clés comme l'énergie, l'agriculture, l'aérospatiale, la technologie et les soins de santé.*

Introduction

Competition policy debate loomed large in the Canadian public consciousness in 2022—with the *Rogers/Shaw* merger dispute garnering widespread interest, the work of the Competition Bureau ("**Bureau**") touching on hot-button topics from grocery pricing to "greenwashing," and a federal consultation process opening the door to

potentially wide-reaching reform of the *Competition Act* ("***Act***"). Whether that process gives rise to more fundamental change in the *Act*'s framework remains to be seen. However, Commissioner of Competition ("**Commissioner**") Matthew Boswell seized the opportunity to press for the Bureau's vision of reform in 2022—notably with respect to the *Act*'s mergers framework, which he described as enabling "high levels of concentration—even monopolies—in the Canadian economy."[2] Mergers also dominated the agenda of the Competition Tribunal ("**Tribunal**"), which held two major hearings and rendered decisions in two of the three Commissioner challenges active during the year. These decisions were the first to be issued by the Tribunal on the merits of a section 92 case in over a decade.[3]

Among 2022's highlights were the following developments:

- In January, the Bureau entered into a consent agreement with Keurig Canada Inc. ("**Keurig**") in which Keurig agreed to a $3 million penalty, among other remedies, to address Bureau concerns with Keurig's claims as to the recyclability of its "K-Cup" single-use coffee pods.

- In February, the Federal Court of Appeal released a decision finding that the Tribunal could issue so-called "interim interim" relief pending its determination of a section 104 interim relief application in a contested merger case. This decision reversed a 2021 Tribunal ruling preventing the Commissioner from temporarily blocking the merger of Secure Energy Services Inc. ("**Secure**") and Tervita Corporation ("**Tervita**") on the eve of its closing.

- In May, the Commissioner filed his challenge to the acquisition by Rogers Communications Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**"). This high-profile case was ultimately both heard and decided by year-end under an expedited Tribunal process that resulted in a significant defeat for the Bureau—with the Tribunal going so far as to find that the merger would likely benefit, not lessen, competition.

- In June, the federal government passed into law several targeted amendments to the *Act* as the first phase of its intended "modernization" of the statute.[4] The amendments included the introduction of a new criminal prohibition on wage-fixing and no-poach agreements, increases to fines and penalties, provisions enabling private access to the Tribunal in abuse of dominance cases and other important changes.

- In October, the Tribunal released its long-awaited decision with respect to a 2019-initiated Commissioner challenge of the acquisition of a grain elevator by Parrish & Heimbecker, Limited ("**P&H**"), dismissing the application largely on the basis of its rejection of the Commissioner's approach to market definition.

- Also in October, the Bureau initiated a new market study into retail grocery competition, including with respect to whether higher grocery prices are resulting from "changing competitive dynamics in the sector." 2022 also saw the Bureau conclude and report its findings from the digital health care market study that it had initiated in 2020.

- In November, the federal government launched a public consultation on further amendments to the *Act* alongside its release of a wide-ranging discussion paper framing potential areas for reform, entitled *The Future of Competition Policy in Canada* ("**Discussion Paper**").

Legislative Amendments and Bureau Guidance

First Tranche of *Competition Act* Amendments Takes Effect

In early 2022, Minister of Innovation, Science and Economic Development Francois-Philippe Champagne (the "**Minister**") described the federal government's plans to pursue reform of the Act in stages, with an initial suite of targeted amendments being implemented ahead of a broader review to consider more substantive changes to the Act.[5] On June 23, amendments falling into the former category were passed into law within the federal government's omnibus budget bill, Bill C-19.[6] The Bureau described the changes as serving to "fix certain loopholes in the law, tackle business practices harmful to workers and consumers, increase penalties and access to justice, and adapt the law to today's digital reality."[7] In particular, Bill C-19 made the following amendments to the Act (with most coming into force immediately save for the exceptions noted below):

- Adding a new criminal prohibition on wage-fixing and no-poaching agreements between employers within the conspiracy provisions of the Act (effective from June 23, 2023);[8]

- Establishing new maximum administrative monetary penalties under the deceptive marketing and abuse of dominance provisions of the Act;[9]

- Removing the $25 million limit on fines under the Act's conspiracy

provisions in favour of leaving the amount of such fines in the discretion of the court (effective from June 23, 2023);[10]

- Confirming as a false or misleading representation the practice of "drip pricing" (where a product or service is offered at a price that is unattainable due to additional mandatory, non-governmentally-imposed fixed charges or fees);[11]

- Expanding the *Act*'s lists of factors to be considered by the Tribunal in evaluating competitive effects under the abuse of dominance, mergers and competitor collaboration provisions of the Act to include specific mention of network effects, non-price effects on competition and other items;[12]

- Adding new language to the abuse of dominance provisions defining an "anti-competitive act" as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition,"[13] while including among the list of enumerated anti-competitive acts "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market;"[14]

- Providing private parties the ability to seek leave from the Tribunal to initiate abuse of dominance proceedings under private access provisions previously limited to alleged conduct under sections 75 through 77 of the *Act* (refusal to supply, resale price maintenance, exclusive dealing, tied selling and market restriction);[15]

- Expanding the Commissioner's evidence-gathering powers with respect to information believed to be in the possession of persons or affiliates located outside of Canada;[16]

- Introducing an "anti-avoidance" provision to the Act's mergers provisions that deems transactions designed to avoid notification to be notifiable;[17] and

- Implementing clarifying amendments under the merger provisions with respect to the calculation of statutory waiting periods and the Bureau's business hours for filing.[18]

Most of the amendments reflected changes recommended by the Bureau in its earlier February 2022 submission[19] in response to Senator Howard Wetston's October 2021 invitation for comment on "whether Canada's

competition policy framework, and the *Competition Act* in particular, remain appropriate in the digital age."[20] In particular, the Bureau's submission had called for amendments criminalizing wage-fixing and no-poaching agreements,[21] raising maximum penalties,[22] expressly prohibiting drip pricing,[23] expanding private access to the Tribunal to abuse of dominance[24] and preventing merger notification avoidance,[25] among others.

Bureau Publishes Updated Information Bulletin on Transparency

In October, the Bureau issued an updated *Information Bulletin on Transparency* ("**Bulletin**") outlining its approach to communications during Bureau investigations.[26] The Bureau described the revised Bulletin as reflecting "the evolution of our practices" since the preceding version of the Bulletin was released in 2014.[27] Among the new Bulletin's changes was a less restrictive approach to Bureau disclosures regarding active investigations. In 2014, the Bureau noted that it typically does not make ongoing inquiries known other than by confirming such inquiries where they have been made public through other means.[28] By contrast, the 2022 Bulletin now indicates that the Bureau may make public statements on a "case-by-case" basis where doing so "will help, and not harm, our ongoing work, and to administer and enforce our law."[29]

Consultations Begin on Further Amendments to the *Competition Act*

In November, the Minister launched a consultation inviting public input with respect to the second phase of the federal government's proposed review of the *Act* while simultaneously releasing its Discussion Paper.[30] The government indicated that the consultation "will be wide-ranging and consider the role and functioning of the Act and its enforcement regime, whether key aspects of the regime are fit for purpose, and whether the law can stand up to new challenges brought about by the evolution of our economy, especially digital transformation."[31]

Among the host of potential changes it explores, the Discussion Paper highlights several targeted at perceived concerns that the *Act* allows pre-emptive acquisitions of innovation or disruptive firms, or so-called "killer acquisitions," to go undetected or avoid scrutiny, including changes to the *Act*'s merger notification rules, one-year post-closing limitation period and competitive effects tests.[32] Referencing the Bureau's evidentiary challenges in the *Tervita* and more recent *Secure* cases, the document also discusses the possibility of "a more practical mechanism" for interim relief[33] while

describing the government as being "resolved to examine possible reform of the efficiencies defence"[34] up to and including abolishment.

The Discussion Paper similarly cites concerns around the *Act*'s reach over dominant platforms and algorithmic collusion in raising potential substantive changes to reduce the Commissioner's evidentiary burden under the abuse of dominance[35] and competitor collaboration[36] provisions. Notwithstanding the June 2022 amendments to extend section 45 to wage-fixing and no-poach agreements cited above, the Discussion Paper also raises the possibility that buy-side collusion more generally could be brought back into the scope of that provision or be made subject to a broadened *per se* civil provision (with no requirement to demonstrate anti-competitive effects).[37] Elsewhere, the document discusses providing the Bureau with unilateral powers to, among other things, compel information for market studies,[38] impose industry-specific codes of conduct[39] and act as a "decision-maker of first instance"[40] without resorting to litigation. With respect to private enforcement, the Discussion Paper also returns to the long-debated topic of whether private parties should be able to claim damages before the Tribunal or the courts for violations of the Act's civil provisions.[41]

Mergers

Federal Court of Appeal Determines Tribunal Has the Power to Grant "Interim Interim" Relief

In February, the Federal Court of Appeal granted the Commissioner's appeal of a Tribunal decision denying his request for "interim interim" relief (as the Commissioner had then styled it) to delay the then-imminent closing of a mid-2021 merger between Secure Energy Services Inc. ("**Secure**") and Tervita Corporation ("**Tervita**") pending the hearing of a separate application for interim relief under section 104 of the *Act*.[42] In the June 2021 ruling under appeal, the Tribunal had held itself to be without jurisdiction to grant the initial interim order sought,[43] concluding the *Act* to have set out a "complete code" on interim relief under sections 100 and 104 foreclosing that sought by the Commissioner.[44]

Following a hearing in January 2022, a unanimous panel of the Federal Court of Appeal disagreed with that conclusion, exercising its discretion to hear the appeal despite it being rendered moot by the merger's July 2021 closing.[45] The court found that, where a section 92 application has been filed, section 104's language is sufficiently broad to afford the Tribunal the power to grant both the "interim interim" relief sought by the Commissioner as well as subsequent "interim" relief, analogizing superior courts'

powers to grant similar orders prior to making interlocutory relief decisions.[46] The Commissioner welcomed the Federal Court of Appeal's ruling, characterizing it as a confirmation of the Tribunal's power to "temporarily block mergers in urgent circumstances."[47]

GFL Agrees with Commissioner to Divest Facilities Acquired from Terrapure Following Tribunal-Directed Mediation

In April, the Commissioner entered into a consent agreement with GFL Environmental Inc. ("**GFL**") to resolve his November 2021 Tribunal challenge to GFL's purchase of Terrapure Environmental Ltd. ("**Terrapure**").[48] GFL agreed to sell facilities in seven regions of Alberta and B.C. in order to address the Commissioner's concerns regarding impacts in markets for industrial waste and oil recycling services in which GFL and Terrapure closely competed. The consent agreement resulted from a Tribunal-directed mediation process first used to resolve the Commissioner's 2016 *Parkland* merger dispute.[49] In October, the Commissioner approved Environmental 360 Solutions Ltd. as the divestiture buyer for the facilities in issue.[50]

Tribunal Dismisses Commissioner Challenge in Expedited *Rogers/Shaw* Decision

In May—in what would become the most closely watched Tribunal proceeding in many years—the Commissioner filed his challenge to the proposed $26 billion acquisition of Shaw by Rogers, seeking a full block of the transaction under section 92 and interim relief under section 104.[51] Rogers and Shaw subsequently agreed with the Commissioner to postpone their closing of the merger pending a Tribunal decision.[52]

In an unusually expedited process, the Tribunal held an 18-day hearing to consider the Commissioner's challenge between early November and mid-December, followed shortly thereafter by the release of its decision[53] on New Year's Eve, dismissing the Commissioner's case. The proceeding had garnered even more attention following a Canada-wide outage of Rogers' wireless network in June 2022 that itself became a contested element in the hearing.[54] The case took a further turn in August when Rogers, Videotron Ltd. ("**Videotron**") and Shaw subsidiary Freedom Mobile Inc. ("**Freedom**") announced a $2 billion transaction contemplating Shaw's sale of Freedom to Videotron ahead of the merger's closing[55]—thus ostensibly "fixing it first." The Commissioner contended that the merger would be anti-competitive with or without the sale of Freedom to Videotron.

In its December decision, the Tribunal concluded that the transaction, modified by the Freedom sale, was not likely to result in a substantial lessening or prevention of competition in telecommunications services in Alberta or B.C. as alleged by the Commissioner.[56] The Tribunal instead concluded that increased competitive intensity was likely to ensue post-closing due to the transaction preserving four competitors in those provinces, the expansion plans of "experienced market disruptor" Videotron and Rogers' strengthened position against rivals Bell and Telus.[57] The Tribunal also found that Rogers' post-closing market shares in Alberta and B.C. would be well below and only slightly above the *Merger Enforcement Guidelines*' 35% "safe harbour" threshold, respectively, and that Videotron would likely erode the shares held by its "Big 3" rivals over time.[58]

The Commissioner immediately appealed to the Federal Court of Appeal, arguing, among other things, that the Tribunal's decision not to evaluate the proposed transaction without the Videotron divestiture component prejudiced its case. Following another expedited process, this appeal was ultimately dismissed in early 2023, with the court finding that the Tribunal's approach to the divestiture or other alleged errors would not have affected its result.[59] Immediately thereafter, the Commissioner confirmed his intention not to pursue a further appeal.[60] The Tribunal process' resolution left the transaction subject to a remaining approval from the Minister that was ultimately granted in the first quarter of 2023.[61]

Tribunal Holds Hearing in *Secure/Tervita* Merger Case

In May and June, the merits of the Commissioner's section 92 challenge to the July 2021–consummated merger of Secure and Tervita were subsequently heard over a 19-day Tribunal hearing. Six expert witnesses and 16 lay witnesses appeared between the litigants.[62]

The Commissioner's case focused primarily on alleged non-price effects from post-merger waste facility closures on oil and gas customers of the formerly competing energy service companies in Western Canada, including increases in their transportation costs to remaining facilities, waiting times to deliver their waste and other impacts. The Commissioner argued for a Tribunal order requiring Secure to divest some 41 facilities previously owned by Tervita in order to restore competition in 143 markets served by both competitors pre-closing.[63] The Tribunal also heard competing expert evidence with respect to the efficiencies asserted by Secure in defense of the merger under section 96 of the *Act*, including claimed cost savings from rationalizing field facilities and consolidating corporate offices.[64]

Neighbourly Pharmacy Agrees to Divest Two Saskatchewan Pharmacies in Bureau Consent Agreement regarding Rubicon Pharmacies Acquisition

In June, the Commissioner and Neighbourly Pharmacy Inc. ("**Neighbourly**") reached a consent agreement with respect to Neighbourly's proposed acquisition of Rubicon Pharmacies, a rival pharmacy owner and operator that served as Neighbourly's only competitor in the towns of Kamsack and Shaunavon, Saskatchewan. The agreement requires Neighbourly to sell one pharmacy in each town in order to preserve competition for pharmacy products and services.[65]

Pembina and KKR Agree to Sell Interest in KAPS Pipeline to Address Bureau Concerns that Joint Venture Acquisition Would Prevent Competition

In July, the Commissioner reached a consent agreement to address its concerns with a gas processing joint venture between Pembina Pipeline Corporation ("**Pembina**") and global investment firm KKR acquiring a 51% interest in Energy Transfer Canada ULC ("**ETC**"), a midstream company in which KKR held a pre-existing 49% interest.[66] The transaction would have resulted in Pembina and KKR acquiring ETC's one-half stake in the KAPS Pipeline System, a condensate and natural gas liquids ("**NGLs**") pipeline system under development in Alberta. The consent agreement required the sale of the KAPS interest to address Bureau concerns that the transaction could weaken a future competitive alternative to Pembina's existing pipelines for transporting NGLs between northwest Alberta and Fort Saskatchewan, Alberta. In December, Pembina and KKR subsequently announced an agreement to sell the KAPS interest to private equity firm Stonepeak Partners for C$662.5 million.[67]

Bureau Enters into Consent Agreements in Separate Retail Gas Station Acquisitions

In August, the Commissioner entered into three consent agreements to resolve competition concerns with transactions involving retail gas station acquisitions.

Two such consent agreements related to the proposed sale of 337 Husky-branded stations by Cenovus Energy Inc. under separate purchase agreements with Parkland Corporation ("**Parkland**") and Federated Cooperatives Limited ("**FCL**"). The Commissioner's concerns with impacts on local gas prices were resolved through the agreements requiring Parkland

and FCL to divest six stations and one station, respectively, in addition to providing for the transfer of other gas stations and associated contracts to Parkland rather than FCL.[68]

Several days later, the Commissioner entered into a consent agreement with respect to an unrelated transaction in which Alimentation Couche-Tard Inc. ("**Couche-Tard**") sought to purchase Wilsons, a gas station operator in the four Atlantic provinces. Couche-Tard agreed to sell 46 Wilsons gas stations and supply agreements, as well as one of Couche-Tard's own gas stations, to resolve the Bureau's concerns.[69]

Tribunal Rejects Commissioner's Application Seeking Grain Elevator Divestiture in *P&H* Decision

In October, the Tribunal issued a decision dismissing a section 92 merger challenge in a long-running proceeding—initiated by the Commissioner nearly three years' prior in December 2019—concerning the acquisition by grain company P&H of one of 10 grain elevators from Louis Dreyfus Company Canada ULC.[70] The Commissioner alleged that the acquisition of a grain elevator near Virden, Manitoba was likely to cause a substantial lessening of competition in the supply of wheat and canola grain handling services for farms served by that elevator and a nearby P&H-owned elevator in Moosomin, Saskatchewan. He sought the divestiture of either the Virden or Moosomin elevator by P&H.

P&H's outcome largely turned on the Tribunal's finding that the Commissioner's proposed product market in grain handling services "was not grounded in commercial reality and in the evidence."[71] The Tribunal instead concluded that the relevant product was the purchase of wheat and canola by P&H, with the elevators in issue falling within a broader geographic market capturing at least 7 elevators for wheat and 10 for canola.[72] While the Tribunal accepted that the transaction caused some lessening of competition for the purchase of wheat, it found this to fall under the substantiality threshold in section 92 of the Act.[73]

In *obiter*, however, the Tribunal went on to consider P&H's claimed efficiencies, noting the "extensive submissions" made by the parties on that issue.[74] The Tribunal concluded that P&H's evidence of the merger leading to increased throughput at the Virden grain elevator was insufficiently reliable to demonstrate any section 96 efficiencies, and that other claimed efficiencies not quantified by P&H warranted a "zero" weight under the Supreme Court of Canada's *Tervita* framework.[75]

The Commissioner did not pursue an appeal of the decision. Notably, *P&H* was the first Tribunal decision to be issued on the merits of a section 92 application since 2012's *Tervita*,[76] and together with that decision, only the second to be issued following the adoption of a two-stage merger review framework in 2009.

Bureau Flags Competition Issues in Minister of Transport-Led Review of Westjet's Acquisition of Sunwing

In late October, the Commissioner released his advisory report with respect to the proposed acquisition of Sunwing Vacations Inc. and Sunwing Airlines Inc. by the Westjet Group that had been announced in March 2022.[77] This report was part of a *Canada Transportation Act* ("**CTA**") public interest review of the transaction which had been initiated by the Minister of Transport in May. The Commissioner sets out numerous concerns with respect to the transaction, alleging a likelihood of price increases and subsequent declines in service and variety for Canadian travelers over 31 routes to the Caribbean and Mexico served by both airlines. As decision-maker under the CTA process, the federal government ultimately opted to conditionally approve the transaction in the first quarter of 2023.[78]

Domtar Agrees to Sell Mills to Resolve Bureau Monopoly and Monopsony Power Concerns with Resolute Forest Products Acquisition

In December, pulp and paper company Domtar Corporation ("**Domtar**") entered into a consent agreement with the Bureau with respect to its proposed acquisition of Resolute Forest Products.[79] The Bureau had concluded that the transaction would provide Domtar with a post-closing market share exceeding 35% in the supply of northern bleached softwood kraft pulp ("**NBSK**") in Eastern and Central Canada. The Bureau also identified monopsony power concerns around Domtar's ability to purchase wood fibre from private lands in northwest Ontario at prices below competitive levels. Under the consent agreement, Domtar agreed to divest a pulp mill in Dryden, Ontario and a pulp and paper mill in Thunder Bay to two independent purchasers.

Product markets for NBSK and wood fibre had previously been the focus of the Bureau's review of Domtar's own acquisition by Paper Excellence in late 2021, with the Bureau in that case similarly requiring Paper Excellence to sell a Kamloops mill to address wood fibre monopsony concerns affecting competition in B.C.'s southern interior and coastal regions.[80]

Conspiracies and Bid-Rigging

Company Pleads Guilty to Role in Condominium Refurbishment Bid-Rigging Scheme in the Greater Toronto Area

In January, construction company CPL Interiors Ltd. ("CPL") was fined $761,967 after pleading guilty under section 45 of the Act to allocating customers and fixing bid prices with rivals in connection with 31 refurbishment contracts issued by condominium corporations in the Greater Toronto Area between 2009 and 2014.[81] CPL received leniency in sentencing for cooperating with the Bureau's investigation.

Bureau Introduces Online Risk Assessment Tool for Procurement Agents

In June, the Bureau launched a new "Collusion Risk Assessment Tool" on its website described as allowing public or private sector procurement officers and purchasing agents to "gain an early warning" about potential bid-rigging risks and mitigation strategies.[82] The tool generates a risk score and lists recommended mitigation practices after bid process details are entered through an online questionnaire. The Bureau indicated that the initiative had been led by its newly formed Digital Enforcement and Intelligence Branch.[83]

Fifth Executive Pleads Guilty Following Quebec Infrastructure Contracts Investigation

In October, a former executive of Genivar Inc. (now WSP Canada Inc.), Francois Paulhus, pled guilty to one count of *Criminal Code* conspiracy for his role in a bid-rigging scheme affecting 21 City of Gatineau infrastructure contracts awarded between 2004 and 2008.[84]

Paulhus' plea followed four guilty pleas in 2019 from other executives involved in the Gatineau scheme, as well as approximately $12 million in bid-rigging settlements with engineering firms in 2019–20 relating both to the Gatineau contracts and similar procurements in Québec City, Montreal, Laval and St-Eustache over the 2003–2011 period.[85]

Charges Laid Against Contractors in Alleged Social Housing Refurbishment Conspiracy in Brandon

In December, the Bureau announced that charges had been laid against five contractors in Brandon, Manitoba for allegedly conspiring to allocate

among themselves contracts to refurbish social housing units awarded by the Manitoba Housing and Renewal Corporation between 2011 and 2016.[86] According to the Bureau, the charges flow from evidence the accused individuals manipulated at least 89 such contracts valued at approximately $4.5 million. The accused were charged both under the *Criminal Code* and section 45 of the Act.

Deceptive Marketing

Bureau Reaches Over $3 Million Settlement with Keurig over Recyclability Claims and Emphasizes the Rise of "Greenwashing"

In January, Keurig Canada Inc. ("**Keurig**") entered into a consent agreement to resolve the Bureau's concerns that claims about the recyclability of its "K-Cup" single-use coffee pods were false or misleading. The Bureau's investigation had indicated that those pods were not widely accepted for recycling other than in B.C. and Quebec municipalities.[87] The Bureau also found that the cups often required additional steps to prepare them for recycling in some municipalities than were suggested by Keurig. As part of the settlement, Keurig agreed to pay a $3 million penalty, donate $800,000 to an environmental charity and make changes both to its recyclability claims and the K-Cups' packaging, among other commitments.

Later in January, the Bureau issued a press release warning consumers of a rise in "greenwashing" activity whereby businesses create a false, misleading or unsupported impression of their products or services as having a reduced environmental impact.[88] At the Bureau-hosted "Competition and Green Growth" summit in October, Commissioner Boswell made similar points, noting that it was the Bureau's "job to protect consumers from eco-fraud" in the context of businesses responding to increased consumer demand for "green" products and services.[89]

Following on the heels of the "six resident" complaint from environmental activists that gave rise to the Keurig investigation,[90] at least three similar complaints alleging deceptive environmental claims were filed over the course of 2022, each triggering new Bureau inquiries.[91] In February 2022, however, the Bureau informed a group of complainants that it had closed a previously initiated inquiry into claims made by disposable wipes producers of those wipes being "flushable," citing a lack of evidence supporting further action.[92]

Natural Health Products Company Pays $100,000 to Settle Case Involving Unsupported Weight Loss Claims

In April, the Bureau reached a consent agreement with NuvoCare Health Science Inc. ("**NuvoCare**") and its founder after an investigation concluding that NuvoCare had made weight loss and fat burning claims regarding its natural health products that were not supported by testing.[93] The agreement requires NuvoCare and its founder to pay $100,000 in penalties, change or remove the weight loss claims at issue and establish a corporate compliance program. Since May 2020, NuvoCare had been operating under a Tribunal-registered temporary consent agreement prohibiting it from continuing to make the claims during the Bureau's investigation.[94]

The Bureau had previously issued a general warning to marketers of natural health products in 2019 to review their advertising for weight loss claims not specifically approved by Health Canada that were false, misleading or unsubstantiated.[95] The NuvoCare case is the latest in a long chain of Bureau deceptive marketing cases targeting substances or technologies promoted for their weight loss benefits.[96]

Bureau Obtains Order to Advance Inquiry into Furniture Retailer Promotions

In November, the Bureau announced that it had obtained a court order to compel The Dufresne Group and its affiliates ("**Dufresne**") to produce records for an investigation into Dufresne's furniture retailing business under the Act's civil deceptive marketing provisions. The Bureau indicated that it was investigating alleged practices involving 1) "urgency cue claims" relating to end dates of sales that may be false or misleading (such as claims around a promotion's end date where the promotion is renewed or replaced by another promotion) and 2) potentially inflated regular prices used in the context of savings claims.[97] With respect to the latter, the Bureau had previously entered into settlements with the Hudson's Bay Company in 2019[98] and Michaels in 2015[99] concerning similar allegations around products (sleep sets and frames, respectively) discounted on the basis of inflated regular prices.

Abuse of Dominance

Bureau Closes Investigation into Alleged Anti-Competitive Behaviour in the Agricultural Crop Inputs Sector

In March, the Bureau closed its investigation into allegations that numerous manufacturers or wholesalers of seeds, fertilizer and other agricultural crop inputs had worked together to disadvantage, restrict or block the supply of those inputs to Farmers Business Network Canada Inc. ("**FBN**").[100] FBN had recently entered the Canadian market with a novel business model allowing growers to buy crop inputs on its digital platform and access a range of marketing and analytics tools. The Bureau found the evidence insufficient to support a finding of anti-competitive intent under the abuse of dominance provisions, adding that the alleged conduct did not appear to be frustrating FBN's innovations from increasing current and future competition in the markets at issue. While expressing concern over evidence of market participants targeting FBN in their communications, the Bureau also concluded there to be insufficient evidence of a horizontal agreement or arrangement being reached for the purposes of section 90.1 of the Act.

Carsharing Firm Agrees to Remove Exclusivity Policy in Response to Bureau Concerns

In May, the Bureau announced that Turo, the operator of Canada's largest peer-to-peer platform allowing car owners to rent their vehicles, had removed a policy preventing its users from listing their vehicle on other platforms.[101] Turo's decision was in response to Bureau concerns that the policy likely heightened barriers to entry for competing platforms or potential new entrants in the peer-to-peer carsharing market. The Bureau's position statement cited that market as an example of a fast-moving digital market at risk of "tipping" in favour of a single large competitor early in its growth.[102] The Bureau had previously flagged tipping as a heightened competition concern in certain digital markets in the context of its 2019 "call-out" seeking information on potential anti-competitive conduct in the digital economy.[103]

Intellectual Property—Competition Interface

Joint Notice Issued on Bureau Collaboration with Health Canada's Health Products and Food Branch

In January, the Bureau issued a joint notice with Health Canada's Health Products and Food Branch ("**HPFB**") of their intent to continue

collaborating on matters relevant to issues around access to pharmaceuticals and biologics, including in the context of Bureau investigations.[104] The notice highlighted the ongoing cooperation between the Bureau and HPFB with respect to generic manufacturers' access to branded drug samples required to develop their products following concerns expressed by both bodies between 2018 and 2020 about limitations on this access.

Bureau Closes Two Pharmaceutical Patent Litigation Settlement Investigations

In May, the Bureau announced that it had closed two investigations into patent litigation settlements between branded and generic drug manufacturers.[105] While the Bureau's position statement does not disclose the details of these reviews, the Bureau ultimately found neither settlement to have contravened the Act. The Bureau restated the position in its *Intellectual Property Enforcement Guidelines* that it will not further investigate such agreements under section 79 or 90.1 of the Act where they provide for generic drug entry prior to patent expiry and do not include compensation from the branded to the generic manufacturer.

In its February 2022 submissions in response to Senator Wetston's competition policy consultation, the Bureau expressed its support for amendments to the Act requiring parties to patent litigation settlements to notify the Bureau of these agreements, similar to the notification regime for such agreements used by the U.S. Federal Trade Commission.[106] The federal government's November 2022 Discussion Paper likewise cites the potential benefit of a notification or voluntary clearance mechanism given the agreements' "substantial commercial impact."[107]

Bureau Closes Abuse of Dominance Inquiry into Relabeled Biologic Drugs

In June, the Bureau announced the closure of a preliminary inquiry into potential anti-competitive effects resulting from the relabelling of "biologic" drugs by pharmaceutical manufacturers.[108] Biologics are more complex branded drugs derived from living organisms that face competition from chemically similar, and typically lower priced, "biosimilar" drugs. In its inquiry, the Bureau investigated concerns with biologic manufacturers seeking approval to market their drugs under different brand names and potentially selling them at reduced prices to deter competition from biosimilars. While the Bureau acknowledged that such practices could raise issues under section 79 of the Act, it closed its inquiry due to the drugs under review not yet being marketed in Canada.

The Bureau had previously investigated whether a biologic manufacturer's practices, including contracts with hospitals, infusion clinics and insurers that promoted the biologic's use, were predatory or exclusionary with respect to competing biosimilars.[109] It likewise closed this inquiry in 2019, citing insufficient evidence of the practices' competitive effects.

Advocacy

Bureau Releases Digital Health Care Market Study Reports

Over separate reports released in June, October and November, the Bureau set out the findings and recommendations flowing from the market study it had initiated in 2020 to "examine how to support digital health care in Canada through pro-competitive policies."[110] In its first report, the Bureau identified barriers to entry associated with electronic medical records (EMR) databases.[111] It recommended harmonizing relevant privacy and data rules as well as establishing "anti-blocking" and interoperability rules to facilitate the exchange of information between EMR systems. The second report made recommendations to address separate issues identified by the Bureau around fragmented, prescriptive and lengthy government procurement processes.[112] The third report recommended reviewing and amending policies impacting health care providers, including payment models and licensing requirements, to better accommodate digital health services.[113]

Bureau Announces New Retail Grocery Market Study

In October, the Bureau announced that it had launched a market study into grocery store competition. The study will include within its scope: 1) the extent to which higher grocery prices are resulting from changing competitive dynamics in the sector, including the role of the pandemic and supply chain disruptions; 2) what can be learned from other countries' steps to increase competition in the sector; and 3) how governments can lower barriers to entry and expansion to increase competition.[114] The Bureau targeted releasing a final report in June 2023.

Numerous countries have initiated similar studies implicating the grocery sector, including a broader, ongoing U.S. Federal Trade Commission inquiry into supply chain disruptions announced in 2021[115] and a New Zealand Commerce Commission study into grocery competition[116] that concluded in 2022. The Bureau's announcement coincided with significant media and political scrutiny into rising grocery prices, including questioning of grocery company representatives by a Parliamentary committee in

late 2022.[117] It also follows earlier competition-related controversies in the sector, including the simultaneous cancellation of pandemic "hero pay" bonuses by grocers that precipitated the June 2022 wage-fixing amendments[118] and a domestic bread price-fixing scheme that became public in 2017 (and which remained under investigation[119] by the Bureau in 2022).

The Bureau's study will not extend to issues around retailer purchases from suppliers except to the extent these purchases impact retail competition.[120] Over the course of 2022, a Steering Committee of industry groups representing grocery retailers and suppliers separately worked to negotiate an industry code of conduct following an industry dispute over increases to supplier fees charged by grocers in 2020.[121] The notice makes express reference to the negotiations,[122] which continued into 2023.

Conclusion

2022 saw many significant and high-profile developments for Canadian competition law. The Bureau's deceptive marketing settlement with Keurig highlighted its role in policing "greenwashing" activity increasingly under scrutiny from stakeholders in an ESG-conscious environment. The Bureau's initiation of a retail grocery study accompanied a newfound emphasis by the Commissioner on "the importance of competition to keep prices in check in key sectors of the economy"[123] amidst ongoing inflation concerns. The Bureau announced consent agreements or completed investigations across a range of sectors, including energy, agriculture, aerospace, tech and health care. Between the *Rogers/Shaw*, *Secure/Tervita* and *P&H* cases, 2022 was also notable for an unprecedented level of merger litigation activity, including the issuance of the first fully litigated Tribunal merger decisions in over a decade. With the federal government now in the second phase of its intended approach to reform of the *Act*, these developments will frame a vigorous debate around whether Canada's competition framework remains fit for purpose in 2023 and beyond.

ENDNOTES

[1] Both of Dentons Canada LLP. The views expressed in this article are those of the authors alone, and do not necessarily reflect the views of Dentons Canada LLP or its clients.

[2] Matthew Boswell, "Seizing the Moment to Build a More Competitive Canada" (Remarks at the Canadian Bar Association Competition Law Fall Conference, delivered on 20 October 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/10/seizing-the-moment-to-build-a-more-competitive-canada.html> ["Boswell CBA Speech"].

[3] Namely, since the Tribunal issued its *Tervita* decision in May 2012 (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14).

[4] As described in Innovation, Science and Economic Development Canada, "Consultation on the future of competition policy in Canada," online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada>.

[5] Christine Dobby, "Ottawa announces review of Canada's competition law, with focus on wage fixing, deceptive pricing and 'anti-consumer practices'," (7 February 2022), online: Toronto Star <https://www.thestar.com/business/2022/02/07/in-an-exclusive-interview-innovation-minister-says-ottawa-to-consider-changes-to-competition-law-launch-comprehensive-review.html>

[6] Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022, cls 256–79 (assented to 23 June 2022) ["Bill C-19"].

[7] Competition Bureau Canada, "Guide to the 2022 amendments to the *Competition Act*" (24 June 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act>.

[8] See Bill C-19, *supra* note 6, cl 257(1) (introducing the new prohibition as s 45(1.1) of the *Act*).

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

[10] See Bill C-19, *supra* note 6, s 257(1) (amending s 45(2) of the *Competition Act* to this effect).

[11] See *Competition Act*, *supra* note 9, ss 52(1.3), 74.01(1.1).

[12] See *Competition Act*, *ibid*, ss 79(4)(a)–(d), 90.1(2)(g.1)–(g.3), 93(g.1)–(g.3).

[13] See *Competition Act*, *ibid*, s 78(1).

[14] See *Competition Act*, *ibid*, s 78(1)(j).

[15] See e.g., *Competition Act*, *ibid*, ss 79(1) (amended to contemplate the application of "a person granted leave under section 103.1"), 103.1 (now referencing s 79 throughout).

[16] See e.g., *Competition Act*, *ibid*, s 11(5).

[17] See *Competition Act*, *ibid*, s 113.1.

[18] See *Competition Act*, *ibid*, ss 108(3), (4).

[19] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era – Submission by the Competition Bureau" (8 February 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> ["Bureau Wetston Submission"].

[20] See Hon. Howard Wetston, QC, "Consultation Invitation – *Examining the Competition Act in the Digital Era*" (27 October 2021), online: <https://sencanada.ca/media/368379/letter-pdf.pdf>.

[21] Bureau Wetston Submission, *supra* note 19, s 5.1.

[22] *Ibid*, ss 3.3, 5.3, 6.4.

[23] *Ibid*, s 6.1.
[24] *Ibid*, s 3.4.
[25] *Ibid*, s 2.7.
[26] Competition Bureau Canada, "Information Bulletin on Transparency" (25 October 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/information-bulletin-transparency> ["2022 Transparency Bulletin"].
[27] *Ibid*, s 1.
[28] Competition Bureau Canada, "Communication During Inquiries" (26 June 2014), s 3.3, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/communication-during-inquiries>.
[29] 2022 Transparency Bulletin, *supra* note 26, s 3.3.1.
[30] Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (17 November 2022), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada> ["Discussion Paper"].
[31] Innovation, Science and Economic Development Canada, "Making Competition Work for Canadians: A consultation on the future of competition policy in Canada" (17 November 2022), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/making-competition-work-canadians-consultation-future-competition-policy-canada>.
[32] Discussion Paper, *supra* note 30 at 21–24.
[33] *Ibid* at 24, n 52.
[34] *Ibid* at 26–27.
[35] *Ibid* at 39.
[36] *Ibid* at 42–43.
[37] *Ibid* at 46.
[38] *Ibid* at 53–54.
[39] *Ibid* at 49.
[40] *Ibid* at 51–52.
[41] *Ibid* at 53.
[42] *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2022 FCA 25 ["*Secure FCA*"].
[43] *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation,* 2021 Comp Trib 4.
[44] *Ibid* at paras 43, 50.
[45] *Secure FCA*, *supra* note 42 at paras 21–40.
[46] *Ibid* at paras 56–57.
[47] Competition Bureau Canada, "Federal Court of Appeal confirms that the Competition Tribunal has the power to temporarily block mergers" (14 February 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/02/federal-court-of-appeal-confirms-that-the-competition-tribunal-has-the-power-to-temporarily-block-mergers.html>.

[48] Competition Bureau Canada, "Competition Bureau reaches agreement with GFL to preserve competition for industrial waste and oil recycling services in western Canada" (14 April 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/04/competition-bureau-reaches-agreement-with-gfl-to-preserve-competition-for-industrial-waste-and-oil-recycling-services-in-western-canada.html>.

[49] See Competition Bureau Canada, Position Statement, "Parkland's acquisition of Pioneer" (1 April 2016), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/parklands-acquisition-pioneer>.

[50] Competition Bureau Canada, "Competition Bureau preserves competition in supply of industrial waste and oil recycling services in western Canada" (18 October 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/10/competition-bureau-preserves-competition-in-supply-of-industrial-waste-and-oil-recycling-services-in-western-canada.html>.

[51] Competition Bureau Canada, "Competition Bureau seeks full block of Rogers' proposed acquisition of Shaw" (9 May 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/05/competition-bureau-seeks-full-block-of-rogers-proposed-acquisition-of-shaw.htm>.

[52] Competition Bureau Canada, "Competition Bureau reaches agreement with Rogers and Shaw to prohibit closing pending the outcome of the Commissioner's application to challenge merger" (30 May 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/05/competition-bureau-reaches-agreement-with-rogers-and-shaw-to-prohibit-closing-pending-the-outcome-of-the-commissioners-application-to-challenge-merger.html>.

[53] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 [*Rogers/Shaw*].

[54] Andrew Willis, "Rogers outage will weigh on Shaw takeover hearings, Ottawa says" (29 August 2022), online: The Globe and Mail <https://www.theglobeandmail.com/business/article-rogers-outage-will-weigh-on-shaw-takeover-hearings-ottawa-says/>.

[55] Videotron Ltd., Press Release, "Rogers, Shaw and Quebecor sign definitive agreement for sale of Freedom Mobile" (11 August 2022), online: <https://corpo.videotron.com/en/pressroom/rogers-shaw-and-quebecor-sign-definitive-agreement-sale-freedom-mobile>.

[56] *Rogers/Shaw*, *supra* note 53 at paras 2–3.

[57] *Rogers/Shaw*, *ibid* at paras 6–8.

[58] *Ibid*.

[59] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 FCA 16.

[60] Competition Bureau Canada, "Statement from the Commissioner of Competition on the Federal Court of Appeal's decision regarding the Rogers-Shaw merger" (24 January 2023), online: <https://www.canada.ca/en/competition-bureau/news/2023/01/

statement-from-the-commissioner-of-competition-on-the-federal-court-of-appeals-decision-regarding-the-rogers-shaw-merger.html>.

[61] Pete Evans, "Rogers takeover of Shaw approved, with conditions" (31 March 2023), online: CBC News <https://www.cbc.ca/news/business/rogers-shaw-approval-1.6797175>.

[62] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2 at paras 56–96.

[63] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2 (Written Closing Submissions of the Applicant at para 10).

[64] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2 (Expert Report of Andrew Harrington; Reply Expert Report of J. Gregory Eastman).

[65] Competition Bureau Canada, "Competition Bureau preserves competition in supply of pharmacy products and services in Saskatchewan" (7 June 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/06/competition-bureau-preserves-competition-in-supply-of-pharmacy-products-and-services-in-saskatchewan.html>.

[66] Competition Bureau Canada, "Competition Bureau takes action to protect competition in pipeline transportation for natural gas liquids in Western Canada" (22 July 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/07/competition-bureau-takes-action-to-protect-competition-in-pipeline-transportation-for-natural-gas-liquids-in-western-canada.html>.

[67] "Pembina to sell near $500 million stake in KKR-backed gas pipeline system" *Reuters* (12 December 2022), online: <https://ca.news.yahoo.com/pembina-sell-near-500-million-131042218.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABHleRNXoSdY1sszGEZ-eF-B7VVa8KZOlTbe-SeZF4PTHdnVS_i57f_ukKCO6OgRaOhOdFDxIu9uenJrlLpQBAcqwo-Cpz1RQbR0JL8dnjimdqjAzyex7gJJvKqgKZM1wmLJrJ9ZeaRoR7OgPgzW-ssC7CQ7x9iFrkkla-ziu6L9>.

[68] Competition Bureau Canada, "Competition Bureau takes action to resolve competition issues with the sale of Husky brand gas stations in southern Ontario and western Canada" (25 August 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/08/competition-bureau-takes-action-to-resolve-competition-issues-with-the-sale-of-husky-brand-gas-stations-in-southern-ontario-and-western-canada.html>.

[69] Competition Bureau Canada, "Competition Bureau resolves competition issues with Couche-Tard's acquisition of Wilsons gas stations in Atlantic Canada" (30 August 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/08/competition-bureau-resolves-competition-issues-with-couche-tards-acquisition-of-wilsons-gas-stations-in-atlantic-canada.html>.

[70] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18.

[71] *Ibid* at 6.

[72] *Ibid*.

[73] *Ibid* at para 7.

[74] *Ibid* at paras 8, 727–62. By contrast, the Tribunal opted not to issue reasons on efficiencies (despite hearing evidence and argument from the parties on that issue) in the subsequent decision it issued in *Rogers/Shaw*, *supra* note 52 at para 410.
[75] *Ibid* at paras 745–49.
[76] *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14.
[77] Competition Bureau Canada, "Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act (04690) – Proposed Acquisition by WestJet Airlines Ltd. of Sunwing Vacations and Sunwing Airlines" (25 October 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/reports-and-studies/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act>.
[78] Transport Canada, "Government of Canada approves acquisition of Sunwing Vacations and Sunwing Airlines by WestJet Airlines Ltd. with strict terms and conditions" (10 March 2023), online: <https://www.canada.ca/en/transport-canada/news/2023/03/government-of-canada-approves-acquisition-of-sunwing-vacations-and-sunwing-airlines-by-westjet-airlines-ltd-with-strict-terms-and-conditions.html>.
[79] Competition Bureau Canada, "Competition Bureau reaches agreement with Domtar Corporation to preserve competition in Canada's pulp and paper industry" (29 December 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/12/competition-bureau-reaches-agreement-with-domtar-corporation-to-preserve-competition-in-canadas-pulp-and-paper-industry.html>.
[80] See Competition Bureau Canada, Position Statement, "Competition Bureau statement regarding its review of Paper Excellence's acquisition of Domtar" (8 December 2021), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-its-review-paper-excellences-acquisition-domtar>.
[81] Competition Bureau Canada, News Release, "CPL Interiors fined $761,967 after pleading guilty in GTA condo refurbishment bid-rigging scheme" (17 January 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/01/cpl-interiors-fined-761967-after-pleading-guilty-in-gta-condo-refurbishment-bid-rigging-scheme.html>.
[82] Competition Bureau Canada, "Collusion risk assessment tool for procurement agents," online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/bid-rigging-price-fixing-and-other-agreements-between-competitors/collusion-risk-assessment-tool-procurement-agents>.
[83] Competition Bureau Canada, News Release, "Attention procurement agents: Use our Collusion Risk Assessment Tool to protect your contracts from bid-rigging" (16 June 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/06/

attention-procurement-agents-use-our-collusion-risk-assessment-tool-to-protect-your-contracts-from-bid-rigging.html>.

[84] Competition Bureau Canada, News Release, "$25,000 sentence for fifth engineering executive to plead guilty in Gatineau bid-rigging case" (14 October 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/10/25000-sentence-for-fifth-engineering-executive-to-plead-guilty-in-gatineau-bid-rigging-case.html>; *R v Paulhus*, 2022 QCCQ 6809.

[85] Competition Bureau Canada, News Release, "CIMA+ to pay $3.2 million in latest Québec bid-rigging settlement" (8 December 2020), online: <https://www.canada.ca/en/competition-bureau/news/2020/12/cima-to-pay-32-million-in-latest-quebec-bid-rigging-settlement.html>.

[86] Competition Bureau Canada, "Contractors in Brandon, Manitoba, charged with conspiracy related to social housing projects" (19 December 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/12/contractors-in-brandon-manitoba-charged-with-conspiracy-related-to-social-housing-projects.html>.

[87] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: <https:/88/www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[88] Competition Bureau Canada, "Be on the lookout for greenwashing" (26 January 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/01/be-on-the-lookout-for-greenwashing.html>.

[89] Matthew Boswell, "Competing for Green Growth" (Remarks at the Competition and Green Growth Summit, delivered on 20 September 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/09/competing-for-green-growth.html>.

[90] See Ecojustice, "Application for Inquiry Re: Keurig Canada Inc.'s apparent false and misleading material representations of its K-cup product as a "Green" and easily recyclable product for Canadian consumers" (2 May 2019), online: <https://ecojustice.ca/wp-content/uploads/2022/01/Ecojustice-and-University-of-Victoria-Environmental-Law-Centre-Application-for-Inquiry-into-Keurig-Canada-Inc.pdf>.

[91] Specifically, in April, a complaint was filed with respect to a bank's public statements regarding its climate change commitments: see James Bradshaw, "Competition Bureau launches inquiry into RBC's green advertising," (11 October 2022), online: The Globe and Mail <https://www.theglobeandmail.com/business/article-rbc-green-advertising-competition-bureau/>. In September, another group of complainants requested an inquiry into an industry association's statements about natural gas: "Canada's Competition Bureau opens investigation into the Canadian Gas Association's alleged greenwashing of methane gas as clean" (10 November 2022), online: <https://cape.ca/press_release/canadas-competition-bureau-opens-investigation-into-the-canadian-gas-associations-alleged-greenwashing-of-methane-gas-as-clean/>. In November,

a further complaint was filed regarding the Sustainable Forest Initiative's forest certification standard: Ecojustice, "Competition Bureau launches investigation into greenwashing complaint against North America's largest forest certification scheme" (31 January 2023), online: <https://ecojustice.ca/pressrelease/competition-bureau-launches-investigation-into-greenwashing-complaint-by-environmental-groups-against-north-americas-largest-forest-certification--scheme/>.

[92] Mia Rabson, "A look at the Competition Bureau's investigation on 'flushable' wipes," (9 October 2022), online: Global News <https://globalnews.ca/news/9187493/competition-bureau-flushable-wipe/>.

[93] Competition Bureau Canada, News Release, "Competition Bureau resolves its concerns in misleading weight loss claims case" (27 April 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/04/competition-bureau-resolves-its-concerns-in-misleading-weight-loss-claims-case.html>.

[94] Competition Bureau Canada, News Release, "Competition Bureau protects consumers from the potential harm of NuvoCare's weight loss claims" (13 May 2020), online: <https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-protects-consumers-from-the-potential-harm-of-nuvocares-weight-loss-claims.html>.

[95] Competition Bureau Canada, News Release, "Weight loss claims must be true and supported by testing" (8 February 2019), online: <https://www.canada.ca/en/competition-bureau/news/2019/02/weight-loss-claims-must-be-true-and-supported-by-testing-false-misleading-or-unsubstantiated-claims-are-illegal-under-the-competition-act.html>.

[96] See e.g. Competition Bureau Canada, "Weight loss products: The Competition Bureau's take on an age-old issue" in *The Deceptive Marketing Practices Digest*, Vol 5 (4 March 2020), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/deceptive-marketing-practices-digest-volume-5#wb-tphp> (referencing past Bureau challenges to weight loss claims involving devices using heat, infrared waves, tablets, electronic muscle stimulation, creams and patches, among others).

[97] Competition Bureau Canada, "Competition Bureau obtains court order to advance investigation into Dufresne Furniture's marketing practices" (22 November 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/11/competition-bureau-obtains-court-order-to-advance-investigation-into-dufresne-furnitures-marketing-practices.html>.

[98] Competition Bureau Canada, News Release, "Hudson's Bay to pay $4.5 million to settle Competition Bureau investigation" (8 May 2019), online: <https://www.canada.ca/en/competition-bureau/news/2019/05/hudsons-bay-to-pay-45-million-to-settle-competition-bureau-investigation.html>.

[99] Competition Bureau Canada, News Release, "Michaels to pay $3.5 M penalty to settle frames and custom framing services price advertising case" (6 May 2015), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/news-releases/

michaels-pay-35-m-penalty-settle-frames-and-custom-framing-services-price-advertising-case>

[100] Competition Bureau Canada, Position Statement, "Competition Bureau statement regarding its investigation into alleged anti-competitive conduct of wholesalers and manufacturers of crop inputs in western Canada" (15 March 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-its-investigation-alleged-anti-competitive-conduct>.

[101] Competition Bureau Canada, Position Statement, "Competition Bureau Competition Bureau statement regarding its inquiry into an exclusivity policy imposed by Turo" (18 May 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-its-inquiry-exclusivity-policy-imposed-turo>.

[102] *Ibid*.

[103] Competition Bureau Canada, "Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy" (2019), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/competition-bureau-call-out-market-participants-information-potentially-anti-competitive-conduct>.

[104] Competition Bureau Canada, "Joint notice on collaboration between the Competition Bureau and Health Products and Food Branch of Health Canada" (10 January 2022), online: <https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/announcements/joint-notice-collaboration-competition-bureau-health-products-food-branch.html>.

[105] Competition Bureau Canada, "Competition Bureau closes two investigations into pharmaceutical patent litigation settlements" (20 May 2022), online: <https://www.canada.ca/en/competition-bureau/news/2022/05/competition-bureau-closes-two-investigations-into-pharmaceutical-patent-litigation-settlements.html>.

[106] See Bureau Wetston Submission, *supra* note 19, s 4.5.

[107] Discussion Paper, *supra* note 30 at 44.

[108] Competition Bureau Canada, Position Statement, "Completion of Preliminary Investigation into Relabelled Biologic drugs" (27 June 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/completion-preliminary-investigation-relabelled-biologic-drugs>.

[109] Competition Bureau Canada, Position Statement, "Inquiry into alleged anti-competitive conduct by Janssen" (20 February 2019), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/inquiry-alleged-anti-competitive-conduct-janssen>.

[110] See Competition Bureau Canada, "Digital Health Care Market Study,"

online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/digital-health-care-market-study>.

[111] Competition Bureau Canada, "Unlocking the power of health data (Digital Health Care Market Study – Part 1)" (23 June 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/unlocking-power-health-data>.

[112] Competition Bureau Canada, "Improving Health Care Through Pro-competitive Procurement Policy (Digital Health Care Market Study – Part 2)" (5 October 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/improving-health-care-through-pro-competitive-procurement-policy>.

[113] Competition Bureau Canada, "Empowering health care providers in the digital era (Digital Health Care Market Study – Part 3)" (24 November 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/Empowering-health-care-providers-in-the-digital-era>.

[114] Competition Bureau Canada, "Market Study Notice: Competition in Canada's Grocery Sector" (24 October 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/market-study-notice-competition-canadas-grocery-sector> ["Market Study Notice"].

[115] See Federal Trade Commission, "FTC Launches Inquiry into Supply Chain Disruptions" (29 November 2021), online: <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

[116] See New Zealand Commerce Commission, "Market study into the grocery sector," online: <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector>.

[117] Ann Hui, "MPs call for grocery CEOs to face questioning over rising food prices" (5 December 2022), online: The Globe and Mail <https://www.theglobeandmail.com/business/article-loblaw-empire-food-prices-greedflation-investigation/>.

[118] Jake Edminston, "How the COVID 'hero pay' scandal prompted Ottawa to make wage-fixing illegal" (28 June 2022), online: Financial Post <https://financialpost.com/news/economy/how-hero-pay-scandal-prompted-ottawa-make-wage-fixing-illegal>.

[119] Sophia Harris, "It's been 5 years since the bread price-fixing probe started. We still don't have any answers" (22 January 2023), online: CBC News <https://www.cbc.ca/news/business/bread-price-fixing-loblaw-1.6719884>.

[120] Market Study Notice, *supra* note 114 at para 9.

[121] Susan Krashinsky Robertson, "Grocery industry making progress on code of conduct, but work will stretch into the new year" (1 December 2022), online: The Globe and Mail <https://www.theglobeandmail.com/business/article-grocery-sector-code-of-conduct/>.

[122] Market Study Notice, *supra* note 119.

[123] Boswell CBA Speech, *supra* note 2.

2023 ADAM F. FANAKI COMPETITION LAW MOOT—WINNING FACTA / CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

NOTE FROM THE EDITORIAL BOARD

Dear Readers,

The Editorial Board is pleased to publish the problem as well as the winning facta from the fifth annual Adam F. Fanaki Competition Law Moot, held in Toronto in March, 2023. This annual competition, organized by the Competition Bureau, the Competition Tribunal and the Canadian Bar Association, honours the memory of Adam F. Fanaki, a pillar in the international competition and antitrust bar who practised at leading Canadian law firms and also spent several years with the Competition Bureau, rising to become the Senior Deputy Commissioner of Competition and the head of the Mergers Branch, and serving also as Special Counsel to the Commissioner of Competition. While Adam's contributions have already helped to shape the trajectory of competition law in Canada, the Fanaki Moot bears his name in recognition of his ongoing impact in our community.

The Fanaki Competition Law Moot provides law students across Canada with a unique opportunity to grapple with complex civil or criminal legal issues in the competition sphere. Mooters receive feedback from prominent members of the Canadian competition law community by arguing before judging panels comprised of practitioners, judicial members of the Competition Tribunal or other courts, and representatives of the Competition Bureau, the Department of Justice or the Public Prosecution Service of Canada.

This year, mooters contemplated an intricate deceptive marketing case focusing on the impact of privacy representations on consumers. Prizes were awarded for the Best Faculty, Best Oralist, Best Team, and Best Factum for both respondents and appellants. The Editorial Board would like to congratulate the Western University team (Mark Penner and Giovanni Perri) as the recipients of the Best Factum—Appellant Award and the University of Toronto team (Edmund Nilson and Max van der Weerd) as recipients

of the Best Factum—Respondent Award. We invite our readers to enjoy these exemplars of written advocacy from budding lawyers and to join us in congratulating all of those who took part in the 2023 Adam F. Fanaki Competition Law Moot.

A summary of the problem and of the principal arguments on both sides appears below, but we invite you to read them in their entirety in the following pages.

The Problem:

This year's Adam F. Fanaki Competition Law Moot problem grappled with the intersection of data privacy claims and the deceptive marketing provisions of the Competition Act (the "Act"). As part of its global marketing campaign to advertise its new smartphone, the "PearGab 6", Pear Inc. used several privacy-oriented taglines and vignettes to promote the device (the "Privacy Representations"). However, months after initially launching the new smartphone, Pear announced that it had fallen victim to a security breach that allowed an unauthorized party to access sensitive personal information stored on PearGab 6 devices. Despite the breach, Pear continued to feature the Privacy Representations in its marketing campaign for the new smartphone. The Commissioner of Competition brought an application for a temporary order under section 74.11 of the Act, requiring Pear to stop making the Privacy Representations. This provision of the Act has not been judicially interpreted by the courts, allowing the parties to make several submissions regarding the correct interpretation of the statutory language. The Competition Tribunal dismissed the Commissioner's request for a temporary order. While the Tribunal did find that "it appears" to the Tribunal that Pear had engaged in reviewable conduct under paragraph 74.01(1)(a), the Commissioner failed to establish that serious harm is likely to ensue unless the temporary order is issued. The Commissioner appealed the decision.

Appellant's Arguments:

The Appellants argued that the Tribunal erred in setting a higher bar than Parliament intended when interpreting the threshold "it appears to the court" in the language of s. 74.11(1). While the Appellants agreed with the Tribunal that Pear's Privacy Representations were reviewable conduct under paragraph 74.01(1)(a), the Appellants argued that the Tribunal erred in finding that the Privacy Representations were not related to performance, and therefore were not bound to the proper and adequate testing requirement of paragraph 74.01(1)(b). Lastly, the Appellants maintained that the Tribunal erred in finding that serious harm would not likely ensue absent

a temporary order being granted. Rather, the Appellants submitted that serious harm to both competition and consumers is likely to occur if the Privacy Representations continue.

Respondents' Arguments:

The Respondents argued that the Tribunal was correct in interpreting the threshold "it appears to the court" in s. 74.11(1) as requiring the Commissioner to establish evidence that Pear engaged in reviewable conduct on a balance of probabilities. The Respondents submitted that the Tribunal erred in finding that the Privacy Representations were false or misleading in a material respect, largely due to their application of the wrong consumer perspective in the general impression test, and holding that privacy was material to the ordinary consumer. The Respondents did agree with the Tribunal in finding that the Privacy Representations were not statements relating to the performance or efficacy of the PearGab 6, as these were only conveying Pear's values and were too vague to be subject to testing. Lastly, the Respondents sided with the Tribunal in holding that serious harm is not likely to ensue absent a temporary order.

NOTE DU COMITÉ DE RÉDACTION

Chers lecteurs,

Le Comité de rédaction a le plaisir de publier le problème ainsi que les mémoires gagnants de la cinquième édition du Concours de plaidoirie Adam-F.-Fanaki en droit de la concurrence, qui a eu lieu à Toronto en mars 2023. Ce concours annuel, organisé par le Bureau de la concurrence, le Tribunal de la concurrence et l'Association du Barreau canadien, honore la mémoire d'Adam F. Fanaki, un pilier de la communauté internationale du droit de la concurrence et du droit antitrust qui a exercé dans de grands cabinets juridiques canadiens et qui a également passé plusieurs années au Bureau de la concurrence. Me Fanaki est devenu sous-commissaire principal de la concurrence et chef de la Direction des fusions, et a agi également comme avocat spécial du commissaire de la concurrence. Bien que les réalisations d'Adam aient déjà contribué à façonner la trajectoire du droit de la concurrence au Canada, le concours porte son nom en reconnaissance de son impact continu dans notre communauté.

Le Concours de plaidoirie Adam-F.-Fanaki en droit de la concurrence offre aux étudiants et étudiantes en droit de partout au Canada une occasion unique de s'attaquer à des questions juridiques civiles ou criminelles complexes dans le domaine de la concurrence. Les participants reçoivent des

commentaires de membres éminents de la communauté du droit canadien de la concurrence en plaidant devant des comités d'évaluation composés de praticiens, de membres de la magistrature du Tribunal de la concurrence ou d'autres tribunaux, et de représentants du Bureau de la concurrence, du ministère de la Justice ou du Service des poursuites pénales du Canada.

Cette année, les participants ont travaillé sur une affaire complexe de pratiques commerciales trompeuses axée sur l'incidence des déclarations de confidentialité sur les consommateurs. Des prix pour la meilleure faculté, le meilleur plaidoyer, la meilleure équipe et le meilleur mémoire ont été décernés tant aux appelants et appelantes qu'aux défendeurs et défenderesses. Le Comité de rédaction tient à féliciter l'équipe de l'Université Western (Mark Penner et Giovanni Perri), lauréate du prix du meilleur mémoire—Partie appelante et l'équipe de l'Université de Toronto (Edmund Nilson et Max van der Weerd), lauréate du prix du meilleur mémoire—Partie défenderesse. Nous invitons nos lecteurs à profiter de ces exemples de plaidoyer écrits par des juristes en devenir et à se joindre à nous pour féliciter toutes les personnes qui ont participé au Concours de plaidoirie Adam F. Fanaki en droit de la concurrence 2023.

Vous trouverez ci-dessous un résumé du problème et des principaux arguments des deux côtés, mais nous vous invitons à les lire dans leur intégralité dans les pages suivantes.

Le problème :

Cette année, le problème du concours portait sur le recoupement des allégations relatives à la protection des données et des dispositions concernant les pratiques commerciales trompeuses de la Loi sur la concurrence (la « Loi »). Dans le cadre de sa campagne publicitaire mondiale visant à promouvoir son nouveau téléphone intelligent, le « PearGab 6 », Pear inc. a utilisé plusieurs slogans et capsules axés sur la confidentialité pour promouvoir l'appareil (les « déclarations de confidentialité »). Toutefois, quelques mois après avoir lancé son nouveau téléphone intelligent, Pear a annoncé avoir été victime d'une violation de sécurité qui permettait à une partie non autorisée d'accéder à des renseignements personnels sensibles stockés sur des appareils PearGab 6. Malgré la violation, Pear a continué de présenter les déclarations de confidentialité dans sa campagne de marketing pour le nouveau téléphone. Le commissaire de la concurrence a présenté une demande d'ordonnance temporaire en vertu de l'article 74.11 de la Loi exigeant que Pear cesse de faire les déclarations de confidentialité. Cette disposition de la Loi n'a pas fait l'objet d'une interprétation judiciaire par les

tribunaux, ce qui a permis aux parties de présenter plusieurs observations concernant l'interprétation correcte du libellé. Le Tribunal de la concurrence a rejeté la demande d'ordonnance temporaire du commissaire. Même si le Tribunal a conclu « d'après lui » que Pear avait eu un comportement susceptible d'examen en vertu de l'alinéa 74.01(1)a), le commissaire n'a pas établi qu'un préjudice grave est susceptible de s'ensuivre à moins que l'ordonnance temporaire ne soit rendue. Le commissaire a interjeté appel de la décision.

Arguments de la partie appelante :

La partie appelante a fait valoir que le tribunal a commis une erreur en fixant la barre plus haut que ce qui est prévu par le législateur lorsqu'il a interprété « d'après lui » le libellé du paragraphe 74.11(1). Bien que la partie appelante ait convenu tout comme le tribunal que les déclarations de confidentialité de Pear étaient susceptibles d'examen en vertu de l'alinéa 74.01(1) a), elle a fait valoir que le tribunal avait commis une erreur en concluant que les déclarations de confidentialité n'étaient pas liées au rendement de l'appareil et qu'elles n'étaient donc pas liées à l'épreuve suffisante et appropriée énoncée à l'alinéa 74.01(1)b). Enfin, la partie appelante a soutenu que le tribunal avait commis une erreur en concluant qu'un préjudice grave ne s'ensuivrait probablement pas en l'absence d'une ordonnance temporaire. Les appelants ont plutôt fait valoir qu'un préjudice grave à la concurrence et aux consommateurs est susceptible de se produire si les déclarations de confidentialité se poursuivent.

Arguments de la partie défenderesse :

La partie défenderesse a fait valoir que le Tribunal a eu raison d'interpréter « d'après lui » le paragraphe 74.11(1) comme exigeant du commissaire qu'il établisse la preuve que Pear a eu un comportement susceptible d'examen selon la prépondérance des probabilités. La partie défenderesse a soutenu que le Tribunal a commis une erreur en concluant que les déclarations de confidentialité étaient fausses ou trompeuses sur un point important, en grande partie en raison de son application du point de vue erroné du consommateur dans la prise en compte de l'impression générale, et en concluant que la confidentialité était importante pour le consommateur ordinaire. La partie défenderesse était d'accord avec la conclusion du Tribunal que les déclarations de confidentialité n'étaient pas des déclarations relatives à la performance ou à l'efficacité du PearGab 6, car celles-ci ne communiquaient que les valeurs de Pear et étaient trop vagues pour être soumises à une épreuve. Enfin, la partie défenderesse a donné raison au Tribunal

en estimant qu'un préjudice grave n'est pas susceptible de se produire en l'absence d'une ordonnance temporaire.

Contents/Table des matières

2023 ADAM F. FANAKI COMPETITION LAW MOOT PROBLEM

COMMISSIONER OF COMPETITION V PEAR INC

A. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to subsection 74.11(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking a temporary order requiring Pear Inc. ("**Pear**") not to engage in conduct that the Commissioner alleges is reviewable under Part VII.1 of the Act.

2. Pear is a leading producer of electronic devices and software products. Its product portfolio includes laptops, tablets and smartphones, together with the operating systems that power these devices and a large number of widely used applications, which it makes available through its own application store.

3. On March 15, 2022, Pear unveiled its newest smartphone, the PearGab 6, and an updated version of its mobile operating system (Rootz Deep Earth), which is currently only available for the PearGab 6. Contemporaneously, Pear launched a large scale, multi-channel advertising campaign for its new offering (the " **PearGab 6 Campaign**"). Each advertisement featured Pear's mascot, an anthropomorphic pear named Pyrus, and highlighted a different feature of the PearGab 6. Among the features highlighted in Pear's advertising campaign was "Pyrus' Privacy Promise", which was promoted using a number of taglines and marketing vignettes (collectively, the "**Privacy Representations**").

4. On August 6, 2022, Pear disclosed that it had detected a security breach affecting Rootz Deep Earth (the "**Security Breach**"). Two days later, Pear announced that its internal investigation had determined that an unauthorized third party appeared to have obtained access to sensitive data of PearGab 6 users. While Pear indicated that it had not yet been able to identify which users had their data accessed, its preliminary analysis indicated that the data of more than a million users was likely implicated.

5. Since the Security Breach, Pear has continued to run the PearGab 6 Campaign, including the Privacy Representations. The Commissioner's application seeks a temporary order requiring Pear not

to engage in making the Privacy Representations or substantially similar conduct.

6. For the reasons set out below, the Tribunal finds that Pear appears to be engaged in reviewable conduct under Part VII.1 of the Act; however, the Tribunal is not satisfied that serious harm is likely to ensue unless the order is issued.

7. Having found that the Commissioner has failed to establish that serious harm is likely to ensue absent the order sought, the Tribunal does not consider it necessary to consider whether the balance of convenience favours issuing the order, and the Commissioner's application is dismissed.

B. The Parties

8. The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

9. Pear is a leading technology company. Headquartered in Chile, it is globally active and produces some of the world's most popular devices and software. Its innovative products, user-friendly design and cohesive ecosystem have allowed it to grow into one of the world's most valuable companies.

10. Pear's portfolio of personal electronic devices operate exclusively on Pear's own Rootz operating systems, which support both Pear's own software applications and third party applications. Pear's suite of applications includes a web browser, a mobile wallet (Bag of Seeds), an email client and a health and wellness application (Pear a Day), among many others. Through its broad product offering, Pear collects and maintains a large volume of user data.

C. Factual Background

I. I. PearGab 6 Launch and the PearGab 6 Campaign

11. Pear is considered a leading innovator and generally seen as a first mover, introducing product features and capabilities that set new standards, which others quickly rush to emulate. Consistent with Pear's overall reputation, the PearGab is one of the world's most popular smartphones. While the PearGab's advanced features command a premium price, typically over $1,000 for the latest

model, it is consistently ranked among the top five selling smartphones across Canada.

12. On March 15, 2022, Pear's CEO, Nelly Stench, unveiled the PearGab 6, which runs on an updated version of Pear's mobile operating system, Rootz Deep Earth, and would be available in select countries, including Canada, as of April 1, 2022. To coincide with the March 15 product launch, Pear initiated an international multichannel marketing campaign, which began the same day with TV commercials, online advertisements, promotional influencer posts, billboards and print advertisements in newspapers and magazines, with each of the foregoing channels activated in Canada.

13. The PearGab 6 Campaign highlighted five different features of the PearGab 6: its ability to capture 3D pictures, its "superfast" browsing speeds, its availability in seven new colours, including burnt greige, its lightweight large screen design and Pyrus' Privacy Promise. Certain marketing materials referred to each of these features, while others highlighted just one.

14. The Pyrus' Privacy Promise was described in the PearGab 6 Campaign, as well as on Pear's website more broadly, as a "robust set of features and tools designed to protect your data." The Pyrus' Privacy Promise marketing materials included:

    a. a print ad with an image of Pyrus sound asleep with the tag line "we're up worrying about your privacy so you don't have to be";

    b. a short video ad in which Pyrus is shown using the PearGab 6 for a range of activities including taking pictures of a newborn baby pear, applying for a mortgage and updating medical information, with a voiceover that states: "We know you trust us with the things that matter most; that's why data security is at the core of the PearGab 6. Privacy; that's Pyrus' promise to you."; and

    c. a digital display ad that featured a picture of a PearGab 6 device, with different images cycling through on its screen to promote each of the five highlighted features; one such image showed Pyrus dressed as a security guard in front of a bank vault with the "Pyrus' Privacy Promise" appearing across the bottom.

15. The advertising agency retained by Pear for the PearGab 6 Campaign, Wally's Wacky Publicity (WWP), described the campaign's central theme as "balance" and indicated that it has been specifically designed to ensure that each of the five highlighted features is given equal prominence over the course of the PearGab 6 Campaign. Pear's public financial reports described the PearGab 6 Campaign as "Pear's largest ever", with an annual worldwide budget of more than $800 million.

16. When the PearGab 6 became available on April 1, 2022, Pear announced that it had already sold 500,000 units globally, including 20,000 in Canada. Since that time, sales have grown considerably and Pear estimates that at least 150,000 PearGab 6 units have been sold in Canada to date.

II. Security Breach

17. On August 6, 2022, Pear released a short statement indicating that it had detected unusual activity on PearGab 6 devises, urging users to immediately install an update for the Rootz Deep Earth operating system and promising to provide more details as its internal investigation advanced.

18. On August 8, 2022, Pear held a press conference where it announced that its internal investigation had confirmed that there had been a "malicious breach" of Rootz Deep Earth and that an unauthorized third party had obtained access to user data stored on PearGab 6 devices, including users' financial information stored in Bag of Seeds and personal health information from Pear a Day. Pear's investigation remains ongoing and it has yet to identify all impacted users, but it estimates that at least one million users were impacted globally, with at least some affected users in Canada.

19. On August 10 and 14, respectively, Pear's two leading smartphone competitors, Frugle and Mattspoke, announced that certain of their own smartphone devices had been the victim of cyberattacks, pursuant to which their own users' data had been compromised.

20. While none of Pear, Frugle nor Mattspoke are yet to release the resultsof their respective internal investigations, industry experts believe all three attacks to be the work of JesterRoast, an anarchist collective that is believed to be responsible for seven other high profile cyberattacks over the past two years.

III. The Commissioner's Investigation

21. On September 9, 2022, the Competition Bureau (the "**Bureau**") sent a letter by registered mail to Pear advising it that it received complaints with respect to Pear's ongoing promotion of the Privacy Representations (the "**Complaints**") following the Security Breach and of the Bureau's role in enforcing the deceptive marketing provisions of the Act. The Bureau invited Pear to make any submissions it considered relevant to the Bureau's consideration of the Complaints. The Bureau also specifically requested that Pear provide to the Bureau testing to substantiate the Privacy Representations. The Bureau noted that, under the Act, the onus is on the advertiser to ensure that any statement or guarantee of performance is based on adequate and proper testing.

22. On September 15, 2022, Pear responded to the Bureau's letter, writing that truth in advertising is a vital value for Pear and that, in response to the Bureau's letter, it carefully reviewed the Privacy Representations and that it remained satisfied with the validity of such representations. Pear noted that the Security Breach in fact "demonstrated the sincerity of Pyrus' Privacy Promise; which was evidenced by the seriousness and urgency with which Pear responded to the breach." Pear asserted, however, that the Privacy Representations communicate an "ethos" and "underlying design principle", which are not conducive to testing. While data privacy "is front and center throughout Pear's development process", Pear indicated that no specific testing was undertaken in connection with the Privacy Representations.

23. On September 30, 2022, the Commissioner commenced an inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that she has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act, specifically pursuant to paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

24. The Commissioner's inquiry is ongoing and it brings this application in an effort to halt the Privacy Representations while she proceeds as expeditiously as possible to complete her inquiry.

D. Position of the Parties

25. Under subsection 74.11(1) of the Act, a court (which, as defined in section 74.09 of the Act, includes the Tribunal), may order a person

not to engage in conduct reviewable under Part VII.1 of the Act where it appears to the court that:

a. the person is engaging in conduct that is reviewable under Part VII.1 of the Act;

b. serious harm is likely to ensue unless the order is issued; and

c. the balance of convenience favours issuing the order.

26. The parties' positions with respect to each element are set out in turn below.

I. Reviewable Conduct under Part VII.1 of the Act

27. As a threshold matter, the Commissioner submits that in requiring "only" that "it appears to the court" that a person is engaging in reviewable conduct under Part VII.1 of the Act, subsection 74.11(1) establishes a low standard, which the Commissioner can discharge by demonstrating that her allegations are neither frivolous nor vexatious.

28. The Commissioner contends that, in the present case, this standard is satisfied with respect to both paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

29. With respect to paragraph 74.01(1)(a), the Commissioner asserts that the Privacy Representations (i) were made to the public for purposes of promoting the PearGab 6, (ii) created the general impression that the PearGab 6 would safeguard the privacy of user data, (iii) were material as consumers may be induced into purchasing the PearGab 6 on the basis of the Privacy Representations and (iv) were demonstrably false in light of the Security Breach.

30. With respect to paragraph 74.01(1)(b), the Commissioner submits that Pyrus' Privacy Promise is explicitly framed as a "guarantee" of performance and that, by Pear's own admission, no specific testing was undertaken to support this claim.

31. Pear asserts that the Commissioner's interpretation of the threshold applicable to subsection 74.11(1) is wrong and maintains that, in any event, it is not engaged in reviewable conduct under Part VII.1 of the Act.

32. Pear submits that it is not sufficient for the Commissioner to demonstrate that her allegation of reviewable conduct is neither frivolous nor vexatious. Rather, Pear contends that, as a matter of statutory interpretation, by requiring that "it appears to the court" that reviewable conduct is being engaged in, the Act "clearly requires the Commissioner to put forward sufficient evidence so as to allow the Tribunal to reach an affirmative finding that the alleged transgression has occurred." While Pear impresses the importance of this issue as a matter of law, it contends that even under the Commissioner's own interpretation, the first requirement of subsection 74.11(1) is not satisfied here.

33. In response to the Commissioner's allegations under paragraph 74.01(1)(a), Pear disputes both that the Privacy Representations are "material" within the meaning of the Act and that they are "false or misleading." With respect to materiality, Pear contends that privacy protection is "at most, an ancillary feature of its products." As Pear's counsel put it in oral argument: "Pear sells smartphones, not data vaults." In furtherance of this claim, Pear referred to a consumer study it commissioned as part of its most recent product development cycle. The study found that the three most important smartphone features for users are (i) a wide range of available applications, (ii) excellent connectivity and (iii) a powerful camera; "data security" was not identified as the most important smartphone feature by any study participants. Moreover, the study found that 82% of consumers either had "no knowledge" or only "limited knowledge" of their smartphone's privacy settings.

34. Pear further contends that even if the Privacy Representations were considered material, they are not false or misleading. Pear submits that when considering the general impression of a representation, the analysis must not be "divorced from reality through consideration of a generic consumer"; and, rather, the "ordinary consumer within the context of the product at issue" must be considered. Pear asserts that with respect to the PearGab 6, the ordinary consumer would be aware of the unavoidable risk of a malicious data attack, not least of all in light of the consistent press coverage such attacks have received in recent years.

35. Finally, with respect to the Commissioner's allegation that the Privacy Representations are reviewable under paragraph 74.01(b), Pear submits that the Privacy Representations represent mere puffery

and do no constitute a statement or guarantee. Pear further contends that, in any event, the Privacy Representations do not pertain to the performance, efficacy or length of life of any product and, rather, as set out in its letter to the Bureau, represent an overarching design philosophy. Accordingly, Pear asserts that the Privacy Representations fall outside the scope of paragraph 74.01(1)(b) of the Act.

II. Serious Harm is Likely to Ensue Unless the Order is Issued

36. The Commissioner asserts that if the Tribunal is satisfied that Pear appears to be engaging in conduct contrary to Part VII.1 of the Act (as required under the first branch of the subsection 74.11(1) test), then, on the basis of that finding, the Tribunal can infer that serious harm is likely to ensue if Pear is permitted to continue to make the Privacy Representations.

37. In furtherance of this position, the Commissioner emphasises that Part VII.1 is intended to protect competition and the proper functioning of the market. The seriousness of the harm to competition that occurs as a result of reviewable conduct is demonstrated by the material penalties the Act prescribes for such conduct. Accordingly, the Commissioner submits, where reviewable conduct under subsection 74.01(1) is occurring and is likely to continue to occur, as the Commissioner alleges to be the case here, serious harm is necessarily likely to ensue.

38. Pear rejects the Commissioner's approach and contends that the second branch of subsection 74.11(1) must necessarily require the Commissioner to demonstrate harm separate from the mere occurrence of reviewable conduct. In Pear's submission, the Commissioner's assertion would render the second branch of subsection 74.11(1) superfluous, which cannot have been Parliament's intent.

39. Pear submits that the second branch of subsection 74.11(1) must have meaning of its own and, in the present case, no such harm has been put forward by the Commissioner. Moreover, Pear asserts, there is no harm to be found. In particular, Pear contends that the PearGab 6 Campaign has saturated the media for several months, with recent WWP survey data showing that 90% of Pear's target demographic was at least "moderately familiar" with the PearGab 6 Campaign and able to recall each of the five promoted features. As such, Pear submits that to the extent the Privacy Representations are material within the meaning of the Act (which Pear disputes) "there

is no putting the message back in the bottle." Similarly, Pear submits that should the Tribunal find that the Privacy Representations appear to be reviewable under paragraph 74.01(1)(b) of the Act, in order for the second branch of subsection 74.11(1) to have any meaning, the "mere making of a statement without adequate and proper testing must be treated as a simple foot fault"; in particular as even true claims can constitute reviewable conduct under paragraph 74.01(1)(b). Pear urges that the Tribunal must find "real and specific harm" as being likely to ensue as a result of the continued making of the Privacy Representations, of which it contends there is none in the present case.

III. The Balance of Convenience Favours Issuing the Order

40. The Commissioner submits that where an injunction is sought to protect the public interest or to enforce public rights, such as the Commissioner claims to do here, courts must be, and have been, very reluctant to conclude that the public interest in having the law obeyed is outweighed by the hardship the injunction would impose upon the person subject to the injunction. The Commissioner asserts that there is no basis here for the Tribunal to depart from this precedential practice.

41. Pear asserts that there is no harm occasioned by a refusal to grant the order sought by the Commissioner as, for the reasons set out above, Pear is not engaged in reviewable conduct under Part VII.1 of the Act and serious harm is not likely to ensue if the order is not issued.

42. However, Pear has not put before the Tribunal the harm (if any) that it would suffer if the order sought by the Commissioner is made and has not challenged that the balance of convenience favours issuing the order in the event that the Tribunal finds in favour of the Commissioner with respect to the first two branches of subsection 74.11(1).

43. Accordingly, in the present case, the Tribunal will consider the first two branches of subsection 74.11(1) to be dispositive and the balance of convenience will not be further considered in these reasons.

E. The Issues

44. As set out above, the parties bring into issue the first two branches of subsection 74.11(1) and raise a number of novel and important

considerations with respect to each. As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:

a. What standard does subsection 74.11(1) of the Act establish for the granting of a temporary order? Stated differently, what burden does the Commissioner bear?

b. Under paragraph 74.01(1)(a), what is the appropriate test for materiality and how is the general impression test to be applied?

c. Under paragraph 74.01(1)(b), what is the test for determining whether a representation constitutes a statement or guarantee of performance?

d. What constitutes serious harm for purposes of paragraph 74.11(1)(a)? Is the continuation of reviewable conduct itself sufficient harm?

F. The Tribunal's Analysis

45. The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence available to it. For the reasons below, the Tribunal has concluded that:

46. While the language of subsection 74.11(1) establishes a relatively low standard in requiring only that it "appear to the court" that a party is engaging in reviewable conduct, in order for the Commissioner to discharge her burden, she must demonstrate at least on a balance of probabilities that there is evidence of such conduct.

a. In order for a representation to be false or misleading in a material respect, the representation must influence the purchasing decision of a credulous and inexperienced generic consumer. Materiality does not require that a representation be shown to be the *sine qua non* of a purchasing decision; it is sufficient that it be pertinent and influential to the decision-making process. The Tribunal finds that the Privacy Representations created the general impression that the PearGab 6 offered privacy protection, including from cyberattacks. It appears to the Tribunal that the Privacy Representations are false or misleading in a material respect, such that they appear to constitute reviewable conduct under paragraph 74.01(1)(a) of the Act.

b. The Privacy Representations were presented as a "promise"; the

literal meaning of this is clear and its general impression must be understood as statement or guarantee within the meaning of paragraph 74.01(1)(b). However, not all statements or guarantees must be substantiated by testing under paragraph 74.01(1)(b) of the Act. It does not appear to the Tribunal that the Privacy Representations relate to the performance, efficacy or length of life of a product, and as such, it does not appear to the Tribunal that Pear is engaged in reviewable conduct under paragraph 74.01(1)(b) of the Act.

c. Paragraph 74.11(1)(a) of the Act must have independent meaning; it cannot be merely redundant of the analysis required under subsection 74.11(1) as to whether a person is engaging in reviewable conduct under Part VII.1 of the Act. The Tribunal finds that the Commissioner has failed to demonstrate that serious harm is likely to ensue unless the order she seeks is issued.

I. The Applicable Standard for subsection 74.11(1)

a. Subsection 74.11(1) allows this Tribunal to order a person not to engage in conduct when it "appears to the court" that that person is engaging in reviewable conduct under Part VII.1 of the Act. The current version of subsection 74.11(1) has not yet been judicially applied and, as such, this Tribunal has not had opportunity to establish the nature of the threshold it invokes.

47. Upon the initial adoption of subsection 74.11(1) in 1999, the prior form of this provision stated that:

> Where, on application by the Commissioner, a court finds a strong prima facie case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that
>
> […]

48. The current form of subsection 74.11(1) came into force on July 1, 2014. The Commissioner submits that Parliament's amendments "speak clearly" and that the displacement of a "strong prima facie case" with "it appears to the court" was intended to establish a low standard and to facilitate the ability of the Tribunal to enjoin

potentially reviewable conduct. The Commissioner contends that it follows that, subsection 74.11(1), in its current form, requires only that the allegation that a person is engaging in reviewable conduct be neither frivolous nor vexatious. Stated differently, in the present case, the Commissioner proposes that it is sufficient for the Tribunal to be satisfied that it is neither frivolous nor vexatious to allege that the Privacy Representations are reviewable under either paragraph 74.01(1)(a) or 74.01(1)(b).

49. The Tribunal agrees with the Commissioner that the history of subsection 74.11(1) is appropriately considered in interpreting its meaning. However, while the legislative history informs the assessment of Parliament's intent, this represents only one facet of statutory interpretation. As the Supreme Court of Canada explained in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

50. In considering the provision's text, context and purpose, the Tribunal finds that whether it "appears to the court" that certain conduct is occurring is a meaningful threshold. An order requiring a respondent not to engage in certain conduct can be highly consequential to that respondent's business. For this Tribunal to order a person to cease particular conduct, the Commissioner must investigate the matter and present sufficient evidence to show that the conduct is indeed <u>likely</u> occurring on a balance of probabilities.

51. It would be unjust to allow this Tribunal to make an order enjoining conduct without first requiring the Commissioner to satisfy this burden. It is unlikely that the drafters of subsection 74.11(1) intended for this Tribunal to have the power to enjoin conduct that, on a balance of probabilities, does not appear to be occurring; particularly given that it is well established that the conduct in issue is speech.

52. The Commissioner need not meet the standard of a "strong prima facie case", nor must she necessarily present "clear and non-speculative" evidence. She must simply convince the Tribunal that, on balance, the respondent appears likely to be engaging in the conduct

alleged. The respondent similarly has the opportunity to convince the Tribunal that it does not appear to be engaged in reviewable conduct.

53. Accordingly, in considering below whether Pear is engaged in reviewable conduct under Part VII.1 of the Act, the Tribunal will consider whether on a balance of probabilities there is evidence that such conduct is likely occurring.

II. Paragraph 74.01(1)(a)—False or Misleading in a Material Respect

54. The first provision of Part VII.1 pursuant to which the Commissioner alleges Pear's conduct is reviewable is paragraph 74.01(1)(a). In order for Pear to be engaged in reviewable conduct under that paragraph, the Privacy Representations must (i) have been for the purpose or promoting, directly or indirectly, a product or other business interest, (ii) have been made to the public, and (iii) be false or misleading in a material respect. For the reasons that follow, it appears to the Tribunal that Pear's Privacy Representations satisfy each of the foregoing elements and are, accordingly, reviewable under paragraph 74.01(1)(a).

55. In the present case, it is not at issue whether Pear made the Privacy Representations for the purposes of promoting a business interest or that they were made to the public. The Privacy Representations were part of a multichannel advertisement campaign, which included TV commercials, digital advertisements, billboards and print campaigns, which was clearly directed at promoting sales of the PearGab 6. Both parties agree that it is indisputable that these representations were made to the public for purposes of promoting a business interest. As such, whether the Privacy Representations are reviewable under paragraph 74.01(1)(a) turns on whether they are false or misleading in a material respect.

a. The General Impression

56. First, the Tribunal will consider the general impression conveyed to consumers, in addition to the literal meaning of the representation, based only on the representations actually made to the public.

57. Pear contends that when considering the general impression of a representation, the general impression analysis must be made through the lens of a consumer with a perspective relevant to the product at

issue. In the present case, its assertion is that such a consumer would have contextual knowledge regarding data security that would act as a qualification for the representations in question. Such a consumer would know that cyberattacks are unavoidable, effectively an act of god, regardless of any privacy protections in place. This would of course inform their general impression of the Privacy Representations.

58. The Tribunal disagrees with Pear's contention. In evaluating the appropriate consumer lens, the Supreme Court in *Richard v. Time*, 2012 SCC 8, ("***Richard***") is instructive. It tells us that the relevant consumer is deemed to be "credulous and inexperienced"—a purposely low standard. Further, the "credulous and inexperienced consumer" is a generic consumer, not a consumer who is otherwise informed, prepared to consider the advert within an unspoken context. The Privacy Representations were made to the public at large, looking to attract persons wanting smartphones but also those who were not looking for smartphones but may be persuaded by the advertisements to purchase one. The consumers should be prepared to trust merchants, in this case Pear, on the basis of the general impression conveyed to them by the representation. It is therefore appropriate when evaluating the general impression to consider the perspective of the ordinary hurried purchaser—one who takes "no more than ordinary care to observe in that which is staring them in the face upon their first contact with an advertisement" (*Richard* at para 67), and not only that of a consumer with prior knowledge relevant to the purchase of smartphones.

59. In any event, the general impression must be based on the representations actually made to the public. Per *Richard* at para 57, it relates to "both the layout of the advertisement and the meaning of the words used." The Privacy Representations created the impression, both with respect to the literal words and the overall context, that the PearGab 6 would protect user privacy; moreover, the Privacy Representations suggested that users need not worry about their privacy when using the PearGab 6 because of its data protection features. The Privacy Representation did not explicitly exclude cyberattacks from the scope of their assurances or otherwise reference the frequency or unavoidable risk of cyberattacks; consumers' consideration of such factors cannot be assumed.

60. It follows that the general impression conveyed to the public was that the PearGab 6 offered privacy protection, including from cyberattacks.

61. The Tribunal accepts that cyberattacks have become a not uncommon occurrence and that it may be expected that a consumer with even a passing familiarity of such attacks would appreciate the unavoidable risk they represent. Further, the Tribunal does not rule out the possibility that the preponderance of purchasers of the PearGab 6, particularly during the initial months after its release, may be expected to have such familiarity. However, the Tribunal considers none of this to be germane to the question at hand; which, rather, requires consideration of the general impression created for a generic, credulous and inexperienced consumer.

62. As the general impression has been determined, the Tribunal will now determine whether, on that basis, the Privacy Representations are false or misleading.

63. The Commissioner argues that, upon viewing the Privacy Representations, the ordinary consumer would understand the PearGab 6 offered users privacy protection, including from cyberattacks. The ordinary consumer would infer from the advertisements that if they bought a PearGab 6, they could safely use the device without fear of their privacy being breached by bad actors.

64. Upon examination of the Privacy Representations and consideration of the evidence provided, the Tribunal agrees with the Commissioner. The ordinary consumer would understand from the Privacy Representations that the PearGab 6 offered errorless security, which proved incorrect within six short months of launching the device. The Privacy Representations included no indication that the PearGab 6's privacy protections could be breached and that user's data was—to a degree—vulnerable.

65. The fact that a consumer could have disabused him or herself of the false impression (for example, by reading news reports of cyberattacks) does not provide a defence for the falsehood (*Go Travel Direct Inc. v Maritime Travel Inc.*, 2009 NSCA 42). It is the representations that the Act is focused on, not the actions of potential consumers. It is not incumbent on consumers to conduct additional research regarding the validity of a merchant's claim. It is the merchant's responsibility to provide all material facts that impact a consumer's understanding

of the merchant's representation. If anything, Pear's failure to reference something as material as the unavoidable susceptibility of the PearGab 6 to cyberattacks when promoting the device's privacy protections constitutes a negative representation or omission, which is itself misleading (*R v Shell Canada Ltd*, O.J. No. 290).

66. The Tribunal therefore finds that the Privacy Representations appear to be false and misleading.

a. Materiality

67. Having determined that the Privacy Representations, on the basis of their general impression, appear to be false and misleading, the Tribunal must now assess the materiality of these misrepresentations. Courts have affirmed that the word "material" refers "to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase" (*Commissioner of Competition v. Sears Canada Inc.*, 2005 CACT 2 at para 335). The Tribunal must determine whether the Privacy Representations could lead a consumer to a course of conduct that, on the basis of the representations, they believe to be advantageous. Put more simply, materiality is established if it is likely to influence an ordinary consumer's purchasing decision.

68. The Commissioner argues that the Privacy Representations were material as they may have induced consumers into purchasing the PearGab 6, a $1,000 device. Given the intended uses of the PearGab 6, including its storage of user's sensitive health and financial data, the Commissioner contends that the Privacy Representations would be a critical factor in purchasers' buying decisions.

69. Pear disagrees with the Commissioner's assertion, contending instead that privacy protection is at most an ancillary feature of the PearGab 6 and would not induce consumers to purchase the device. To support its claim, Pear produced an internal study which showed that privacy was not one of the smartphone's three most important features for users and demonstrated consumers' general ignorance to smartphone privacy settings.

70. The data provided by Pear does not evidence that privacy is immaterial to consumers' buying decisions. For one, Pear's question to consumers in its self-conducted study is distinct from the question at hand. When asked what a smartphone's "most important features"

are, most respondents would naturally consider applications that one actively uses and provide users with convenience or enjoyment, rather than passive features that the users unconsciously depend on in the day-to-day, like privacy protections. Further, users' lack of understanding of privacy settings only demonstrates general ignorance to the technical application of privacy functions. It does not demonstrate an apathy toward privacy protection in general. The ordinary and credulous consumer is often technologically unskilled.

71. The Tribunal does, however, accept Pear's assertion that privacy may not be the only—or most significant—consideration for consumers when buying a smartphone. But that is not the test. The Tribunal must consider the degree to which the representations may influence the consumers' purchasing decisions. Privacy protection was clearly persuasive enough to consumers for Pear to run dedicated advertisements on privacy across multiple channels, all of which highlighted its privacy protection as a key benefit to consumers. It is difficult to accept that Pear would expend resources, producing advertisements for television, print, digital channels, and more, had it not believed privacy protection to be a material consideration for consumers.

72. Accordingly, the Tribunal agrees with the Commissioner, it appears that the Privacy Representations were false and misleading in a material respect, such that Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act.

III. Paragraph 74.01(b)—Statement or Guarantee of Performance

73. Having concluded that the Privacy Representations appear to constitute reviewable conduct under paragraph 74.01(1)(a), the Tribunal is satisfied that, for purposes of subsection 74.11(1), Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act. Accordingly, consideration of whether or not the Privacy Representations also appear to constitute reviewable conduct under paragraph 74.01(1)(b) is not necessary to the disposition of the Commissioner's application. However, the parties each made detailed submissions on the issue, and the Tribunal has considered them carefully.

a. Reviewable Conduct under paragraph 74.01(1)(b)

74. Paragraph 74.01(1)(b) of the Act provides that:

> A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> […]
>
> makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

75. As such, in order for the Privacy Representations to constitute reviewable conduct under that paragraph, the Privacy Representations (i) must have been made for the purpose of promoting a product or business interest, (ii) must have been made to the public, (iii) must constitute a statement, warranty or guarantee of the performance, efficacy or length of life of a product and (iv) must not be based on adequate and proper testing.

76. As discussed in connection with paragraph 74.01(1)(a) of the Act, it has not been contested by Pear that the Privacy Representations were made for the purpose of promoting the PearGab 6 and that they were made to the public. Consistent with the discussion above, the Tribunal is satisfied that the first two elements of paragraph 74.01(1)(b) are satisfied here.

77. By Pear's own admission no testing was carried out in connection with the Privacy Representations prior to the PearGab 6 Campaign. No evidence was led by either party with respect to whether any such testing was conducted subsequent to Pear's September 15 letter. However, an adequate and proper test for purposes of paragraph 74.01(1)(b) must be undertaken prior to the related representation being made to the public (*Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2 at para 125; *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315 at para 293 ("***Chatr***")). While paragraph 74.01(1)(b) has been found to establish a flexible standard for assessing whether a claim has been adequately and properly tested, "there must be a test" (*Chatr* at para 344). As no testing was carried out, the Tribunal finds that the Privacy Representations satisfy the final element of paragraph 74.01(1)(b).

78. Accordingly, the question of whether or not the Privacy Representations constitute reviewable conduct under paragraph 74.01(1)(b) of the Act turns on whether or not the Privacy Representations constitute "a statement, warranty or guarantee of the performance, efficacy or length of life of a product" (a "**Performance Claim**"). While, as discussed above, it appears to the Tribunal that the Privacy Representations are false and misleading in a material respect, to the extent the Privacy Representations are a Performance Claim, they constitute reviewable conduct under Part VII.1 of the Act entirely independent of the Tribunal's earlier finding. A Performance Claim must be based on adequate and proper testing; the truth of the statement provides no defence under paragraph 74.01(1)(b).

a. Are the Privacy Representations a Performance Claim?

79. The Commissioner contends that the application of paragraph 74.01(1)(b) to the Privacy Representations is unambiguous: Pear has a made "promise"; a mere synonym for a "guarantee." However, the Commissioner's assertion addresses only one half of the Performance Claim requirement under paragraph 74.01(1)(b). The Act does not require proper and adequate testing for all claims, rather, only those that pertain to "performance, efficacy or length of life of a product."

80. As Marrocco J. observed in *Chatr*, in contrasting the application of the Act with the approach of the Federal Trade Commission ("**FTC**") in the United States:

> Section 74.01(1)(b) applies only to performance claims. In the United States, the FTC substantiation policy applies to "objective claims." The only claims exempted from the FTC substantiation requirement are subjective or immaterial claims.

81. Accordingly, two questions must be considered in order to determine whether the Privacy Representations constitute a Performance Claim. First, do the Privacy Representations constitute a "statement, warranty or guarantee"? Second, if so, do they pertain to "performance, efficacy or length of life of a product"?

82. With respect to the first question, the Tribunal agrees with the Commissioner that it is indisputable that the literal meaning of a "promise" is a "statement, warranty or guarantee". However, consistent with subsection 74.03(5), the Tribunal must also consider the general impression of the Privacy Representations.

83. The Tribunal agrees with Pear that, in assessing the general impression, the context of the Privacy Representations must be taken into account. However, with respect, the Tribunal cannot accept Pear's contention that the association of the "promise" with a fictional character, and one that is a fanciful anthropomorphic pear at that, establishes the Privacy Representation as "mere puff", rather than a serious "statement, warranty or guarantee." Pear, in its letter to the Bureau, explicitly affirmed the sincerity of Pyrus' Privacy Promise. Pear cannot at once assert both that the Privacy Representations are a genuine reflection of Pear's "ethos" and that they should not be understood as such by consumers. Advertisers cannot insulate themselves from Part VII.1 of the Act simply by having their mascots speak for them. The Tribunal is satisfied that the Privacy Representations appear to constitute a "guarantee".

84. However, even if a discount ought to be applied to a promise from a pear, the Tribunal considers the first branch of the Performance Claim test to establish a low threshold. While "warranty" and "guarantee" communicate a fairly strong form of assurance, paragraph 74.01(b) also applies to "statements". Even accepting Pear's position that the association with Pyrus renders the promise puff, the Tribunal would nonetheless consider that the Privacy Representations appear to constitute a "statement".

85. Having found that the Privacy Representations satisfy the first branch of the Performance Claim test, it is necessary to consider whether the substance of the Privacy Representations is of the kind covered by paragraph 74.01(1)(b).

86. Paragraph 74.01(1)(b) identifies three subject matters: (i) performance, (ii) efficacy and (iii) length of life. The Commissioner has not suggested that the Privacy Representations relate to length of life and the Tribunal considers it plainly to be the case that they do not. The Commissioner does assert that the Privacy Representations relate to both the "performance" and the "efficacy" of the PearGab 6, the meanings of which she contends are broad. In oral argument, the Commissioner acknowledged that there is a class of "objective statements" that would fall outside the ambit of paragraph 74.01(1)(b), but she submits that this class is narrow.

87. While the Commissioner suggested that it is not necessary for this case to define the outer limit of "performance" and "efficacy"

claims, she asserted that such terms must capture "anything that a product does, achieves or provides through some action"; with the class of "objective statements" that fall outside the ambit of paragraph 74.01(1)(b) being fairly limited and including "static, physical attributes." The Commissioner asserts that privacy is the result of the "continuous performance" of a large number of processes and functions and a promise of privacy (such as, the Commissioner contends, the Privacy Representations) is accordingly a performance guarantee within the meaning of paragraph 74.01(1)(b).

88. With respect, the Tribunal considers the Commissioner's proposed standard to be vague and uncertain. It is also inconsistent with the language of the Act: such a broad interpretation of performance and efficacy would render "length of life" redundant. Rather, the Tribunal accepts Pear's position that in order for a statement to pertain to "performance" or "efficacy" it must relate to a specific and measurable achievement.

89. Pear's assertion that its products were "designed" to protect a user's data privacy is an objective statement. Pear either did or did not specifically consider data privacy in its design process and, if it did, it should be able to produce evidence to this effect. However, because the Privacy Representations do not relate to a specific or measurable achievement, the Act does not require it do so.

90. It does not appear to the Tribunal that the Privacy Representations pertain to "performance, efficacy or length of life of a product" and accordingly it does not appear to the Tribunal that Pear is engaged in conduct reviewable under paragraph 74.01(1)(b) of the Act.

IV. Paragraph 74.11(1)(a)—Serious Harm is Likely to Ensue

91. The second element of the test under subsection 74.11(1) requires that the Commissioner satisfy the Court that serious harm is likely to ensue from the reviewable conduct unless the order sought is issued by the Tribunal.

92. For the reasons that follow, the Tribunal is not satisfied that the Commissioner met her burden under paragraph 74.11(1)(a).

a. The Threshold under paragraph 74.11(1)(a) of the Act

93. The Commissioner argues that section 74.11 sets out a lower standard than the one applicable for interlocutory injunctions at common law

for the Tribunal to conclude that harm will occur absent the order sought.

94. The Tribunal agrees with the Commissioner that the demonstration of a "serious" harm is different than the one applicable at common law where "irreparable" harm must be demonstrated. As explained by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, "irreparable" refers to harm that is not susceptible or difficult to be compensated in damage. It refers to the nature of the harm rather than its "magnitude" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311). Under section 74.11 of the Act, the Commissioner need not demonstrate that the harm could not be compensated monetarily, but rather that the harm at issue is serious.

95. In addition, the Commissioner need only demonstrate that serious harm is likely to ensue absent the order sought, rather than that harm has occurred or will necessarily occur, as is the case to obtain interlocutory relief at common law. In this regard, the language at paragraph 74.11(1)(a) expressly differs from the test applicable for common law interlocutory relief, and in light of statutory interpretation rules, the Tribunal is satisfied that it was Parliament's intent to provide for a lower threshold to obtain interim relief under section 74.11 of the Act.

96. The Tribunal disagrees, however, with the Commissioner's submission that in the event the Tribunal finds that Pear appears to be engaged in reviewable conduct under paragraphs 74.01(1)(a) and/or 74.01(1)(b) of the Act, an inference can then be made that serious harm is likely to ensue from the conduct. The mere occurrence of reviewable conduct is not sufficient to satisfy the second branch of the test. On the contrary, the Commissioner must demonstrate (i) the seriousness of the harm that is likely to ensue from the conduct and (ii) that the harm alleged ensues from the reviewable conduct, here the Privacy Representations made as part of the PearGab 6 Campaign. Such demonstration can only be made by putting forward specific evidence of likely harm.

a. Application to the case at hand

97. The Tribunal finds that in the present case, the Commissioner has not directed the Tribunal to any real and specific serious harm to consumers or competition.

98. The Commissioner contends that she is presumed to bring this application in the public interest and that section 74.01 of the Act is intended to protect competition and the proper functioning of the market. In the Commissioner's view, the seriousness of the harm to competition and consumers that occurs as a result of deceptive marketing practices is demonstrated by the fact that the legislator made such conduct reviewable and that material penalties are prescribed by the Act for such conduct.

99. The Tribunal agrees with the Commissioner that the scheme of Part VII.1 of the Act is consistent with the conclusion that Parliament considered the conduct made reviewable thereunder sufficiently deleterious as to warrant material sanction. However, this is not sufficient to satisfy the second branch of the test under subsection 74.11(1) of the Act. The seriousness of the harm to competition or consumers must be made out with specificity on the evidence. Concluding otherwise would render the second branch of the test for interim relief superfluous, which would be to suggest that Parliament has spoken in vain.

100. The Commissioner asserted in oral argument that the continued dissemination of the Privacy Representations harms both consumers, who may purchase a PearGab 6 and unwittingly be exposed to cyberattacks through unjustified reliance on Pear's privacy protections, and the market, as the Privacy Representations will, in the Commissioner's view, distort competition and create a disincentive for genuine advancements in data protection. The Tribunal does not dispute that such harms could arise and support a finding in the Commissioner's favour under paragraph 74.11(1)(a). However, the Commissioner bears the burden of demonstrating, on the evidence, that such harms are likely and would be serious. The Commissioner has not discharged this burden.

101. While, pursuant to paragraph 74.03(4)(a), for purposes of paragraph 74.01(1)(a) it is not necessary to establish that any person was deceived or misled, the same cannot be said for establishing that serious harm is likely to ensue under subsection 74.11(1).

102. Considering the evidence presented by Pear with respect to the widespread and effective dissemination of the PearGab 6 Campaign, including the Privacy Representations, since its launch, there is nothing to indicate that the continuance of the PearGab 6 Campaign

will have any effect on the target consumers, as they have already been exposed to the Privacy Representations for months now. Further, data security has not been found to be an important smartphone feature for 82% of surveyed consumers; as such, it is unclear to what extent more PearGab 6 devices will be sold from the continuation of the Privacy Representations as compared to their cessation.

103. Against this factual backdrop, the Commissioner has adduced no evidence with respect to the magnitude of consumers, if any, that are likely to be misled or with respect to the extent, if any, to which the potential harms raised in oral argument are likely to ensue.

104. Since the burden falls on the Commissioner to demonstrate that a real and specific serious harm is likely to ensue from the reviewable conduct unless the order she seeks is issued, and she has not done so, the Tribunal finds that the Commissioner has not met her burden of proof under subsection 74.11(1) of the Act.

G. Order

105. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 18th day of October 2022.

SIGNED on behalf of the Tribunal by the Panel Members.

Team No. 10567

2023 ADAM F. FANAKI COMPETITION LAW MOOT/
CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

BEST FACTUM—APPELLANT—WESTERN UNIVERSITY FACULTY OF LAW

Mark Penner and Giovanni Perri

COMPETITION APPEAL TRIBUNAL

BETWEEN

CANADA (COMMISSIONER OF COMPETITION)

Appellant

AND

PEAR, INC

Respondent

FACTUM OF THE APPELLANT

Part I—Statement of Facts

1. This is an appeal from a decision of the Competition Tribunal ("the Tribunal") on the application of the Commissioner of Competition ("the Appellant") pursuant to subsection 74.11(1) of the *Competition Act*, RSC 1985, c C-43 ("the *Act*"). The Appellant seeks a temporary order requiring Pear, Inc ("the Respondent") not to engage in deceptive conduct that the Appellant alleged was reviewable under Part VII.1 of the *Act* ("the Order").

   Competition Act, RSC 1985, c C-43.

2. The Tribunal dismissed the Appellant's application on the basis that the Appellant failed to show that any real and specific serious harm was likely to ensue under paragraph 74.11(1)(a) from the Respondent's reviewable conduct (at para 104).

3. The Respondent is an industry-leading technology company whose portfolio includes both electronic devices and software products; its cutting-edge PearGab line of smartphones consistently ranks among the best-selling smartphones in Canada. The Respondent's products and software operate exclusively on its Rootz Deep Earth operating system. The Respondent collects and maintains a large volume of user data including financial data, through the Bag of Seeds application, and medical data, through the Pear a Day application (at para 10).

4. On March 15, 2022, the Respondent announced its latest smartphone, the PearGab 6, and an updated version of Rootz Deep Earth optimized specifically for the new smartphone. The launch was widely publicized through a multichannel marketing campaign (the "PearGab 6 Campaign") to generate interest ahead of its launch in Canada. The PearGab 6 has been a commercial success, both globally and within Canada.

5. The PearGab 6 Campaign made representations about five features of the device: 1) its ability to capture 3D pictures; 2) its "superfast" browsing speeds; 3) its available colours; 4) its lightweight large screen; and 5) the Pyrus Privacy Promise (the "Privacy Representations"). The latter is the subject of the present appeal.

6. Consistent with the PearGab 6 Campaign theme of "balance", each of the five features was marketed equally and prominently (at para 15). Some of the PearGab 6 Campaign's materials referred to multiple features while others highlighted only one.

7. All parties agree that the information communicated through the Privacy Representations can be accurately summarized as a "robust set of features and tools designed to protect your data" (at para 14). This promise has been communicated to consumers in three ways: 1) a print ad with an image of Pyrus, an anthropomorphic pear; 2) a short video featuring Pyrus; and 3) a digital ad that featured a PearGab 6 displaying pictures that represented each of the aforementioned five features, including one picture of Pyrus dressed as a security guard in front of a bank vault.

8. The Privacy Representations communicated to consumers that data security was at the core of the Respondent's corporate ethos and that the PearGab 6 was engineered to secure sensitive personal information, from financial data to medical records to family photos.

9. On August 6, 2022, the Respondent released a statement that it had detected unusual activity on PearGab 6 devices. On August 8, 2022, the Respondent confirmed that the activity was a malicious data breach affecting at least one million users globally, including some in Canada. Sensitive financial and health information stored on PearGab 6 smartphones through the Bag of Seeds and Pear a Day applications was accessed by an unauthorized third party.

10. In light of these events, the Competition Bureau ("the Bureau") opened an inquiry into the Respondent's ongoing promotion of the PearGab 6's data security credentials. On September 30, 2022, the Appellant commenced an action with the Tribunal that the Respondent had engaged in deceptive conduct with respect to the Privacy Representations.

Part II—Statement of Points In Issue

11. The Appellant will argue the following issues on appeal:

    a. Whether the Tribunal erred in interpreting the standard to be applied in subsection 74.11(1) of the *Act* for the granting of a temporary order.

    b. Whether the Tribunal erred in finding that the Respondent engaged in paragraph 74.01(1)(a) reviewable conduct.

    c. Whether the Tribunal erred in finding that the Respondent engaged in paragraph 74.01(1)(b) reviewable conduct.

    d. Whether the Tribunal erred in finding that the Appellant failed to demonstrate that serious harm was likely to ensue from any relevant reviewable conduct in which the Respondent may have engaged if the order sought was not granted.

Part III—Statement of Submissions

I. The Applicable Standard for Subsection 74.11(1)

12. Parliament's 2014 amendment to the *Act* reformed the applicable standard for subsection 74.11(1). The Appellant submits that Parliament's decision to replace the phrase "a strong *prima facie* case" in subsection 74.11(1) with "it appears to the court" was a clear and substantive change. Parliament intended to allow the Commissioner to assess potentially reviewable conduct by: 1) removing a need to

present evidence that reviewable conduct is or is likely occurring; and 2) to lower the standard by which allegations are assessed. This is supported by the *Act*'s legislative history, in conjunction with its text, context and purpose.

Competition Act, *supra* para 1, s 74.11(1).

13. In *Re Rizzo & Rizzo Shoes Ltd*, the Supreme Court of Canada ("SCC") introduced the proper approach to statutory interpretation, which requires a "textual, contextual and purposive analysis of the statute or [the] provision in question" (*Re Rizzo*).

Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27 at 40, 48 [*Re Rizzo*].

a. Textual, Contextual, and Purposive Analysis of Subsection 74.11(1)

14. The ordinary meaning of the word 'appears' supports the Appellants' claim. The Canadian Oxford Dictionary defines 'appear' as "be evident" or "seem" (*Oxford*). Accordingly, when something seems to be occurring, other evidence supporting the statement is not required. A witness to a person displaying physical cues associated with sadness does not require additional evidence that the alleged emotional state is being experienced to infer that that person appears sad. Thus, the ordinary meaning of the word 'appears' supports the argument that reviewable conduct under subsection 74.11(1) does not require evidence, as reviewable conduct can appear on its face to be reviewable, without meeting the legal indicia required under paragraphs 74.01(1)(a) or (b).

Katherine Barber, ed, *The Canadian Oxford Dictionary*, (Don Mills, ON: Oxford University Press Canada, 1998) sub verbo "appear" [*Oxford*].

15. Contextual arguments further support the Appellant's position. Subsection 74.11(1) is contained within a distinct provision of the *Act*. Parliament's decision to separate orders under paragraph 74.1(1)(a) from temporary orders under subsection 74.11(1) supports the notion that Parliament intended the provisions to differ in their respective uses. If the Commissioner is required to present sufficient evidence that conduct is likely occurring on a balance of probabilities, a court or tribunal would be making a determination on whether a person is engaging in reviewable conduct, as is required under paragraph 74.1(1)(a). To accept this interpretation leads to an increase

in the standard, ultimately amalgamating paragraph 74.1(1)(a) with subsection 74.11(1), rendering subsection 74.11(1) redundant, illogical, and impracticable (*Pointe-Claire*). As previously held by the SCC in *R v Paul*, interpretations which lead to absurd outcomes, such as the one mentioned above, cannot be said to be the true intent of Parliament (*Paul*).

Pointe-Claire v Québec (Labour Court), [1997] 1 SCR 1015 at 1064 [*Pointe-Claire*].

R v Paul, [1982] 1 SCR 621 at 662 [*Paul*].

16. The context of subsection 74.11(1) is similar to a prohibitive interlocutory injunction because: 1) it is a temporary remedy; 2) which allows for the prohibition of a specific act; and 3) requires similar indicia of harm and convenience. Accordingly, the Appellant submits that Parliament intended subsection 74.11(1) to quasi-codify the three-part test in *RJR-MacDonald Inc v Canada (Attorney General)*, where the SCC held that a "prolonged examination of the merits is generally neither necessary nor desirable" (*RJR*). Therefore, the removal of 'a strong *prima facie* case' from the provision better reflects that the threshold question should be a preliminary assessment, considering only whether the allegations are frivolous or vexatious (*RJR*).

RJR-MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 at 338, 335 [*RJR*].

17. Section 1.1 of the *Act* states that one of the *Act*'s intended purposes is to provide Canadians with competitive prices and product choices. False or misleading statements are a serious issue that can lead consumers to make purchasing decisions on false pretences. Consumers are thus unable to accurately compare information between competing products. Moreover, this conduct could distort the market price of goods by allowing firms who make false and misleading statements to charge a premium for their product, on the basis of their superior product claims. Once a false or misleading statement is made, the above harms are hard to unwind, especially considering the wide reach of modern marketing campaigns. Furthermore, the Bureau received more deceptive marketing complaints than complaints related to any other area within its jurisdiction annually over the past five years (Statistics Report).

Competition Act, *supra* para 1, s 1.1.

Competition Bureau Canada, "Competition Bureau Performance Measurement & Statistics Report 2021-2022" (last modified 22 January 2022), online: *Government of Canada* <ised- isde.canada.ca/site/competition-bureau-canada/en/competition-bureau-performance-measurement- statistics-report-2021-2022> [Statistics Report].

18. Subsection 74.11(1) should be interpreted as a proactive measure aimed at mitigating the potential damages of prevalent conduct. This interpretation is consistent with the purpose of Part VII.1 of the *Act*. Conversely, the Tribunal's interpretation would negate the responsiveness of subsection 74.11(1) by placing too high a burden for the Commissioner to discharge in a timely manner. Further, policy concerns regarding undue adverse business effects are safeguarded under the Appellant's interpretation. The Commissioner is still required to fulfill the tests laid out in paragraphs 74.11(1)(a) and (b), and any respondent still possesses the ability to counter allegations of reviewable conduct brought forth by the Commissioner.

II. Reviewable Conduct Under Part VII.1 of the Act

19. The Tribunal may grant an order under the first requirement in subsection 74.11(1) where a person is engaging in conduct reviewable under Part VII.1 of the *Act*.

Competition Act, *supra* para 1, s 74.11(1).

20. The Appellant maintains that the standard in subsection 74.11(1) described above as well as the standard set out by the Tribunal are both satisfied concerning the allegations against the Respondent under paragraphs 74.01(1)(a) and (b) of the *Act*.

a. Paragraph 74.01(1)(a)—False or Misleading in a Material Respect

21. The Appellant submits that the Tribunal did not err in finding that the Respondent engaged in reviewable conduct under paragraph 74.01(1)(a) of the *Act*.

22. For the Respondent's conduct to be reviewable under paragraph 74.01(1)(a), the Privacy Representations must: 1) have been for

the purpose or promoting, directly or indirectly, a product or other business interest; 2) have been made to the public; 3) be false or misleading; and 4) in a material respect. The Tribunal correctly concluded that the Privacy Representations were false and misleading in a material respect, such that the Respondent is engaging in conduct reviewable under Part VII.1 of the *Act* (at para 72).

Competition Act, *supra* para 1, s 74.01(1)(a).

i. Representations Made to the Public to Promote a Business Interest

23. Whether the Privacy Representations were made to the public for the purpose of promoting a business interest is not at issue in the present case (*Premier Career*).

Canada (Commissioner of Competition) v Premier Career Management Group Corp, 2009 FCA 295 at para 52 [*Premier Career*].

ii. The General Impression

24. Subsection 74.011(4) requires that to determine whether representations constitute reviewable conduct, the general impression conveyed by the representation as well as its literal meaning shall be taken into account. The Appellant submits that the Tribunal correctly held that the appropriate standard for considering the general impression is through the lens of the "relevant consumer," and relates to both the layout and words used in an ad (*Richard*).

Competition Act, *supra* para 1, s 74.011(4).

Richard v Time, 2012 SCC 8 at para 49 [*Richard*].

25. The relevant consumer is generic, "credulous and inexperienced," and otherwise uninformed (*Richard*). This is a purposely low standard, whereby the relevant perspective is that of the ordinary, hurried purchaser who takes no more than ordinary care when observing an advertisement (*Richard*). The Ontario Superior Court of Justice ("ONSC") adopted and contextualized the *Richard* standard in *Canada (Competition Bureau) v Chatr Wireless Inc*, adding that, in cases where the representations involved technologically complex products, the relevant consumer is credulous and "technically" inexperienced (*Chatr*).

Richard, *supra* para 24 at paras 72, 67, 57.

Canada (Competition Bureau) v Chatr Wireless Inc, 2013 ONSC 5315 at para 132 [*Chatr*].

26. The ONSC in *Chatr* considered the general impression of three advertising campaigns which made references respectively to "fewer dropped calls," "no worries about dropped calls" and a "no worries network" (*Chatr*). The taglines were accompanied by images of Chatr customers using their cellular devices unconcerned about communicating wirelessly (*Chatr*). Based on the taglines and associated imagery, the ONSC was satisfied that the ads gave the general impression to consumers that the Chatr network was more reliable than other wireless carriers and protected consumers against dropped calls (*Chatr*).

Chatr, *supra* para 25 at paras 142, 164, 207, 208.

27. The Privacy Representations are analogous to the impugned ads in *Chatr*. Thus, the *Chatr* ordinary person standard is the correct standard for the application of general impression. The video ad mentioned sensitive user data and stated that "security is at the core of the PearGab 6" (at para 14). Likewise, the digital display ad featured security-related imagery in the form of Pyrus dressed as a security guard. Thus, a credulous and technically inexperienced consumer would have the general impression that one of the PearGab 6's features is data security. When consumers saw Pyrus storing medical and financial data in a PearGab 6, they would have had the impression that their own PearGab 6s would be able to secure that same information. Similarly, in *Chatr*, the relevant consumer would have the general impression that their calls would not drop using the Chatr network when observing people talking in covered spaces or on a subway (*Chatr*).

Chatr, *supra* para 25 at paras 136–138.

28. Furthermore, the Privacy Representations did not exclude cyber-attacks from the scope of the PearGab 6's protection. According to the Respondent's own research, 82% of consumers either had no knowledge or only limited knowledge of their smartphone's privacy settings (at para 33). This is not to be interpreted as apathy towards data security, but simply ignorance regarding the technical

application of privacy functions (para 70). Absent an explicit reference to cyberattacks in the Privacy Representations, a credulous and technically inexperienced consumer would have the impression that the promise to secure sensitive personal information stored on the PearGab 6 through proprietary applications would include security from cyberattacks.

29. Accordingly, the Appellant submits that the Tribunal correctly found that the Privacy Representations, with respect to their literal words and overall meaning, created the general impression that the PearGab 6 could keep sensitive personal information secure from external threats, including cyberattacks (at paras 59, 60).

iii. False or Misleading

30. The Appellant submits that the Tribunal correctly concluded that the Privacy Representations were false and misleading.

31. The Tribunal found that the ordinary consumer would infer from the Privacy Representations that the PearGab 6 offered errorless security, such that consumers' privacy would be protected (at para 64). The Tribunal also found that the Privacy Representation did not indicate that there was a potential for the PearGab 6's privacy protection to be breached nor that user data was vulnerable (at para 64).

32. *Vidéotron, senc c Bell Canada* similarly found advertisements promoting Bell's new fibre optic system to be false as Bell advertised that its services were available throughout Québec (*Vidéotron*). In reality, however, the services were only available to a small portion of the overall target market (*Vidéotron*). The Superior Court of Québec concluded that the representations created the general impression that services were widely available and were thus false and misleading (*Vidéotron*). Similarly, the general impression in the present case, that user data was protected from cyberattacks, was proven to be false after the August 6, 2022 data breach.

Vidéotron, senc c Bell Canada, 2015 QCCS 1663 [*Vidéotron*].

33. The ability for a consumer to disabuse themselves of the false impressions in the Privacy Representations is not a defence for their falsehood (*Maritime Travel* NBCA). Having established that the PearGab 6 would secure sensitive personal information, the Respondent cannot argue that it was incumbent on users to conduct additional research.

Users are not expected to understand that errorless security excludes protection from cyberattacks nor are they required to take precautions accordingly. It is the Respondent's responsibility to provide all material facts that may impact a consumer's impression of the Privacy Representations (at para 65). Thus, the Respondent's failure to explain that the PearGab 6 does not provide errorless security against cyberattacks is not a defence but is rather an omission, which is itself misleading (at para 65).

Go Travel Direct Inc v Maritime Travel Inc, 2009 NSCA 42 at para 28 [*Maritime Travel* NSCA].

34. Therefore, the Appellant submits that the Tribunal was correct in finding that the Privacy Representations, on the basis of their general impression, appear to be false and misleading.

iv. Materiality

35. The Appellant maintains that the Tribunal did not err when it found that the Privacy Representations were false and misleading in a material respect, such that the Respondent is engaging in conduct reviewable under Part VII.1 of the *Act*.

36. The Tribunal in *Commissioner of Competition v Sears Canada Inc* defined materiality as "the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase" (*Sears*). Thus, the question at this stage is whether an "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered" (*Sears*).

Commissioner of Competition v Sears Canada Inc, 2005 CACT 2 at paras 335, 333 [*Sears*].

37. In *Chatr*, the ONSC held that a credulous and technically inexperienced consumer of wireless services would be induced by promises of more reliable and cost-effective wireless services (*Chatr*). Likewise, consumers of devices that store sensitive information (including, but not limited to, medical and financial data) would be induced by promises of increased data security.

Chatr, *supra* para 25 at para 262.

38. At para 71, the Tribunal concluded that although data security may not be the most important consideration for a consumer when purchasing a smartphone, the consumer's purchasing decision is nevertheless influenced. The Respondent stated that consumers are generally ignorant of their smartphones' privacy settings (at para 69). Through this statement, the Respondent affirmed that consumers are vulnerable to misrepresentations about data protection. As the Tribunal noted, this does not mean that consumers are not affected by data privacy representations, only that they cannot adequately determine whether those representations are false or misleading.

39. Although the Respondent's internal study found that data security is not the most important feature to consumers, the Privacy Representations were nevertheless included and highlighted as a key benefit to consumers throughout the PearGab 6 Campaign. Each feature of the PearGab 6 was given equal prominence during the PearGab 6 Campaign (at para 15). Therefore, had the Respondent not believed data security to be a material consideration to consumers, it would not have made it one of the five 'balanced' pillars of the PearGab 6 Campaign.

40. Accordingly, the Appellant submits that the Tribunal was correct in finding that the representations were false and misleading in a material respect, such that the Respondent is engaging in reviewable conduct under Part VII.1 of the *Act*.

b. Paragraph 74.01(1)(b)—Statement or Guarantee of Performance

41. For the Respondent's conduct to be reviewable under paragraph 74.01(1)(b), the Privacy Representations must: 1) have been made to the public in the form of a statement, warranty or guarantee; and 2) be related to the performance, efficacy or length of life of a product. The Appellant submits that the Tribunal was correct in finding that the Privacy Representations were promises made to the public. However, the Tribunal erred in finding that those promises were not related to performance, such that proper and adequate testing was not required.

i. Representations Made to the Public

42. The Privacy Representations were promises made to the public for the purpose of promoting the PearGab 6 (at para 82).

43. The Privacy Representations are not mere puffery. Therefore, they fall within the scope of a "statement, warranty or guarantee." *Telus Communications Co v Bell Mobility, Inc* considered puffery to be statements that do not impress upon a consumer that a particular fact is true. The British Columbia Supreme Court held that consumers would not conclude that Bell was not operating on the same network as Telus from the impugned advertisement's claim that Bell had the "most powerful network" (*Bell Mobility*). Similarly, in *Maritime Travel Inc v Go Travel*, Justice Hood linked puffery to materiality, holding that statements which affect a consumer's buying decision are not puffery (*Maritime Travel* NSSC). *R v Stucky* also identified vagueness and exaggerated praise as factors relating to non-materiality and held that vague statements do not persuade consumers to purchase (*Stucky*).

Telus Communications Co v Bell Mobility, Inc, 2007 BCSC 518 at para 19 [*Bell Mobility*]. *Maritime Travel Inc v Go Travel*, 2008 NSSC 163 at para 39 [*Maritime Travel* NSSC].

R v Stucky, 2006 CanLII 41523 (Ont SC) at para 76, rev'd on other grounds 2009 ONCA 151 [*Stucky*].

44. In this case, the Privacy Representations are material and not vague. While none of the relevant ads contained any technical information about how the PearGab 6 actually protected privacy, the Respondent still told consumers that their sensitive personal information would be secure. The Privacy Representations in the video ad even provided examples of the types of sensitive personal information that the PearGab 6 was capable of protecting.

45. The Respondent also created two specific applications through which PearGab 6 users could secure sensitive personal information: Bag of Seeds, used to secure financial information; and Pear a Day, used to secure personal medical information. These applications were highlighted in the Privacy Representations. In so doing, the Respondent demonstrated that the Privacy Representations were intended to be material. The Respondent gave consumers a material reason to purchase the PearGab 6 and created the means by which consumers could, and did, act on that reason. Having done so, it would be unfair for the Respondent to be permitted to downplay the Privacy Representations as mere puff only after a cyberattack occurred.

ii. Performance, Efficacy or Length of Life

46. Reviewable conduct under paragraph 74.01(1)(b) is restricted to representations relating to the performance, efficacy or length of life of a product. Moreover, the provision requires that marketers conduct "proper and adequate" testing to substantiate any representation covered under one of the three above categories (*Chatr*). The Respondent has admitted that it did not test the data protection capabilities of the PearGab 6 (at para 77). Therefore, the issue at this stage is not whether testing occurred, but whether the Privacy Representations fall within the scope of this provision.

Competition Act, *supra* para 1, s 74.01(1)(b).

Chatr, *supra* para 25 at para 25.

47. The Appellant submits that the Tribunal was incorrect to find that the Privacy Representations did not fall within the scope of paragraph 74.01(1)(b). The Appellant accepts the Tribunal's interpretation of paragraph 74.01(1)(b), that performance claims must relate to specific and measurable achievements (at para 88). However, the Appellant contends that the Privacy Representations fall within that limitation. The Respondent specifically contemplated data security in the design process of the PearGab 6 and also developed an update for Rootz Deep Earth immediately following the cyberattack. In other words, the Respondent devoted time and resources to building and maintaining the data security features on the PearGab 6 because it considers data security to be part of the performance of its smartphones.

48. The Respondent directed the Tribunal to its own internal market research to show that privacy protection is not one of the primary reasons that consumers purchase its products (at para 33). While that may be true, in its submissions relating to materiality under paragraph 74.01(1)(a), the Respondent still characterized privacy protection as an ancillary reason for purchase – not central, but relevant (at para 69). Moreover, the Respondent made a conscious decision to advertise its privacy guarantee alongside four other representations which outlined the PearGab 6's various technical capacities (e.g., its browsing speed, its 3D picture capturing capacity, etc.).

49. Browsing speed and camera capacity are clearly related to the performance of the device. Accordingly, had the Respondent failed to conduct adequate and proper testing for either the representation that the PearGab 6 was capable of capturing 3D pictures or browsing the Internet at "superfast" speeds, the jurisprudence on this issue would support a finding that those were statements, warranties or guarantees within the meaning of paragraph 74.01(1)(b). *Canada (Commissioner of Competition) v Imperial Brush Co* explained that performance claims are "designed to convince the purchaser that there is some objective basis upon which the purchaser can rely" (*Imperial Brush Co*). Browsing speeds, data security, and camera quality were just that. They were promises that the device will provide the services for which it has been designed.

Canada (Commissioner of Competition) v Imperial Brush Co, 2008 Comp Trib 2 at para 76 [*Imperial Brush Co*].

50. Similarly, the ONSC in *Chatr* held that representations about dropped call rates made by wireless service providers were performance claims (*Chatr*). When consumers purchase wireless services, they do so with the intention of making successful mobile phone calls. Dropped calls are therefore directly related to the provider's performance of that service (*Chatr*). Likewise, it was perfectly clear to the Tribunal in *Imperial Brush Co* that representations that a chimney cleaning fire log helped to eliminate creosote (hazardous soot that can lead to chimney fires) were tied to the firelog's performance. The only reason to purchase such a product is to clean soot out of a chimney (*Imperial Brush Co*).

Chatr, *supra* para 25 at para 291.

Imperial Brush Co, *supra* para 49 at paras 17–18, 128, 143.

51. The Privacy Representations in this case are no different. The Respondent created the applications for the purpose of storing sensitive personal information and admitted that data privacy is at least an ancillary reason for purchasing the smartphones. Further, the Respondent asserted that the PearGab 6 was designed to protect that sensitive information (at para 89). In short, the Privacy Representations described one of the five functions of the PearGab 6, all five of which were engineered to give consumers reasons to purchase and use the device.

52. The Tribunal held that the general impression of the Privacy Representations was that the PearGab 6 would protect sensitive personal information from data breaches, including cyberattacks (at para 60). This is an intended function of the device. When the Respondent was reviewing its marketing strategy to ensure its compliance with the *Act*, it ought to have considered that a credulous and technically inexperienced consumer would have the impression that data security related to the performance of the PearGab 6.

53. The Respondent should not be permitted to argue that the Privacy Representations do not relate to performance in order to escape its obligation to substantiate its claims through testing. The Respondent cannot convey to an ordinary consumer that privacy is part of the functionality of the PearGab 6 by piggybacking the Privacy Representations onto other representations about that device's performance while simultaneously telling the Tribunal that it is not.

54. Consider the Bureau's investigation of Reebok-CCM. Reebok-CCM marketed its hockey helmets so as to create the impression that the helmets would protect players from head injuries, including concussions ("Reebok-CCM"). The testing conducted in support of those claims was inadequate even though it conformed to then-current industry standards, as it determined only whether a helmet was capable of preventing skull fractures, but not concussions ("Reebok-CCM"). Hockey helmets, just like smartphones, serve multiple functions. Reebok-CCM attempted to make representations on both areas of protection while only testing one ("Reebok-CCM"). The Respondent in this case did the same. The Respondent presumably tested the other performative aspects of the PearGab 6, and then paired that with untested Privacy Representations.

> Canadian Competition Bureau, "Agreement with Competition Bureau requires Reebok-CCM to donate $475,000 in equipment to charity" (21 December 2015), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/news-releases/reebok-ccm-ceases-certain-resistance-hockey-helmet-performance- claims> ["Reebok-CCM"].

55. The Privacy Representations do not constitute a vague, overarching design philosophy. A promise that the PearGab 6 could keep sensitive personal information secure from data breaches was a guarantee of performance in the same way that a promise that the PearGab 6

could capture 3D pictures or browse the Internet at superfast speeds were guarantees of performance.

56. In conclusion, the Privacy Representations are related to the performance of the PearGab 6, which ought to have placed the Respondent under an obligation to substantiate its claims through testing. Since the Respondent did not conduct any testing, the Tribunal erred in finding that the Privacy Representations did not constitute reviewable conduct under paragraph 74.01(1)(b).

III. Serious Harm is Likely to Ensue Unless the Order is Issued

57. Section 74.11 allows a court to issue a temporary order against an individual if the Bureau can prove that serious harm is likely to ensue unless the order is issued. In establishing that serious harm is likely to ensue, the Appellant agrees with the Tribunal that 'irreparable harm' refers to the nature of the harm, not its magnitude (*RJR*).

Competition Act, *supra* para 1, s 74.11(1)(a).

RJR, *supra* para 16 at 341.

58. The Tribunal erred in finding that the Appellant did not establish that serious harm is likely to ensue unless the requested Order was granted. The Appellant submits that serious harm to competition is likely to occur if the Privacy Representations are allowed to continue. User privacy, in particular, as a growing non-price dimension of competition, occupies a more salient place in competition law now than it did in decades past (Iacobucci). In *Karasik v Yahoo! Inc*, the ONSC held that data breaches carry with them unquantifiable risks of harm to classes of users (*Yahoo!*).

Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021) at 13, 12, 7, online (pdf): *Senate of Canada* <https://sencanada.ca/media/3 68377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf> [Iacobucci]. *Karasik v Yahoo! Inc*, 2021 ONSC 1063 at paras 35, 37 [*Yahoo!*].

59. Parliament is alive to this concern. Through the *Personal Information Protection and Electronic Documents Act* and the newly-introduced *Consumer Privacy Protection Act* (currently Bill C-27), Parliament is updating and strengthening its legislative regime to specifically address the protection of sensitive personal information in digital

markets. Parliament does not act frivolously. If data breaches of sensitive personal information are not likely to cause serious harm, Parliament would not have taken, and would not continue to take, steps to protect consumers.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5.

C-27, *Digital Charter Implementation Act, 2022*, 1st Sess, 44th Parl, 2021, Part 1.

60. The European Parliament has moved towards an *ex ante* approach to regulation of large digital platforms, due in part to concerns that antitrust enforcement is too slow (*Digital Markets Act*). The British Government's Furman Report has identified similar issues (Furman Report). In concert with these reports, United Kingdom jurisprudence has trended towards only requiring plaintiff parties to prove that a data breach was "non-trivial" and beyond *de minimus* to obtain damages for harm ensuing from the breach. (*Lloyd*; *Rolfe*).

EC, *Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act),* [2022] OJ, L 265/2 [*Digital Markets Act*].

Digital Competition Expert Panel, "Unlocking digital competition" (2019), online (pdf): *GOV.UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78 5547/unlocking_digital_competition_furman_review_web.pdf> [Furman Report].

Lloyd v Google LLC, 2021 UKSC 50 [*Lloyd*].

Rolfe v Veale Wasbrough Vizards LLP, 2021 EWHC 2809 (QB) [*Rolfe*].

61. In this case, the Privacy Representations create a disincentive for *bona fide* technological advancements in data security (at para 100). If one of the leading smartphone manufacturers is permitted to falsely promote an errorless data security function without any substantive testing, false and misleading promotion will become the industry standard. As a first mover in its industry, features developed by the Respondent are quickly emulated by other competitors (at para 11). Therefore, serious harm to competition is likely as the Respondent,

and its competitors, will be able to reap the marketing benefits of a secure smartphone without actually making one.

62. As submitted above at paras 17–18, Part VII.1 of the *Act* is intended to provide consumers with competitive product choices. The Privacy Representations magnify the potential for asymmetric information and reduce consumer choice by falsely promoting an errorless and secure operating system. Without information to the contrary, a credulous and technically inexperienced consumer would not appreciate the risks associated with storing sensitive personal information on a smartphone. By opting to use the PearGab 6, ordinary consumers unknowingly put their privacy at risk.

63. In *Thomson Newspapers Co v Canada*, the SCC majority agreed with Justice Gonthier in dissent that even though the influence of polls on voter choice was uncertain, its existence was still a legitimate harm (*Thomson*). The actual impact of the cyberattack is "unknowable" (*Yahoo!*). However, it is known that the Privacy Representations influenced consumers to store their sensitive information on the PearGab 6 despite the risk of harm resulting from data breaches. Ultimately, this eliminates consumer choice and erodes user privacy. In this way, serious harm ensued directly from the Respondent's reviewable conduct. The Privacy Representations encouraged users to store financial and health data in their respective PearGab 6 devices. While two of the Respondent's competitors were also subjected to the cyberattack, the Privacy Representations put, and continue to put, specific types of data in harm's way.

Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877 at paras 58, 104–105 [*Thomson*].

Yahoo!, *supra* para 58 at para 37.

64. Therefore, the Respondent submits that serious harm exists and ensues from the Privacy Representations such that the requested Order should be granted under section 74.11.

IV. The Balance of Convenience Favors Issuing the Order

65. The Respondent did not lead any evidence before the Tribunal of any harm that it would suffer if the Order sought by the Appellant were granted. Therefore, the Appellant submits that the public interest in having the law obeyed and the harm that is likely to ensue unless the

Order is issued are not outweighed by the hardship the Order would impose upon the Respondent.

Part IV—Remedy Sought

66. The Appellant seeks a temporary prohibition under subsection 74.11(1) of the *Act* requiring the Respondent not to engage in making the Privacy Representations or substantially similar conduct. Granting the Order is consistent with other persuasive authorities. The Tribunal held in *Sears* that a prohibition order is consistent with the harm that subsection 74.01(3) was created to address (*Sears*). The Appellant submits that it is reasonable to extend the *Sears* holding to subsection 74.01(1). Reviewable price representations under subsection 74.01(3) are designed to mislead consumers in a material way. Representations under subsection 74.01(1) are the same. The requested Order will prevent misleading promotional information and representations not substantiated by testing from continuing to be received by consumers.

Sears, *supra* para 36 at para 375.

67. The Appellant submits Parliament lowered standard in subsection 74.11(1), such that the Commissioner is only required to show that the allegations are not frivolous or vexatious. However, if that standard is not accepted, the Appellant has shown that Respondent still committed reviewable conduct under both paragraphs 74.01(1)(a) and (b). The Appellant has also shown that serious harm is likely to ensue from that reviewable conduct if the requested Order is not granted. The balance of convenience favours granting the Order. Therefore, the appeal should be allowed.

APPENDIX A

A. Jurisprudence

B. Secondary Sources

C. Legislation

D. *Text of Statutes, Regulations & By-Laws* Competition Act, RSC 1985, C C-43

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.

1.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation.

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market, has not sold a substantial volume of the

product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

> **(a)** has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.011 (4) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that

> **(a)** serious harm is likely to ensue unless the order is issued; and
>
> **(b)** the balance of convenience favours issuing the order.

74.111 (1) If, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in or has engaged in conduct that is reviewable under paragraph 74.01(1)(a), and the court is satisfied that the person owns or has possession or control of articles within the jurisdiction of the court and is disposing of or is likely to dispose of them by any means, and that the disposal of the articles will substantially impair the enforceability of an order made under paragraph 74.1(1)(d), the court may issue an interim injunction for- bidding the person or any other person from disposing of or otherwise dealing with the articles, other than in the manner and on the terms specified in the injunction.

Team No. 10370

2023 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

BEST FACTUM—RESPONDENT—UNIVERSITY OF TORONTO FACULTY OF LAW

Edmund Nilson and Max van der Weerd

IN THE COMPETITION APPEAL TRIBUNAL (ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN

THE COMMISSIONER OF COMPETITION

Appellant

AND

PEAR INC

Respondent

FACTUM OF THE RESPONDENT

COUNSEL FOR THE RESPONDENT

[February 10, 2023]

OVERVIEW

1. Pear Inc. ("**Pear**") is a global, user-oriented technology company that offers a suite of innovative products and a cohesive ecosystem designed to improve customers' lives. Pear products are premium. Customers choose Pear because of the overall value proposition of both the products and the ecosystem.

2. This case arises out of a single data breach, which the Commissioner of Competition ("**Commissioner**") alleges impugns Pear's advertising. Specifically, in marketing Pear's latest phone—the PearGab 6—Pear has promoted a number of features, including a commitment to privacy. The privacy-focused statements (collectively the

"**Privacy Representations**") reflect Pear's overall ethos and principled approach to the protection of customer data. Pear takes seriously the trust given to it by its customers.

3. To promise fully errorless security is clearly beyond the capability of any technology company. This is obvious to the average consumer. Pear remains committed to protecting user data to the best of its ability and to the highest of industry standards. In the wake of the breach, Pear responded promptly to notify the public and patch vulnerabilities, reflecting the sincerity of Pear's commitment to its professed design principles. Therefore, the Privacy Representations do not mislead. In seeking to limit Pear's advertising, the Commissioner is asking for the power to limit Pear's ability to honestly communicate these values to potential customers.

4. The Competition Tribunal (the "**Tribunal**") refused to grant a temporary order under subsection 74.11(1) of the *Competition Act* (the "*Act*") in a decision dated 18 October 2022 (the "**Tribunal Decision**"). Pear asks the Competition Appeal Tribunal (the "**Appeal Tribunal**") to uphold the Tribunal Decision.

Competition Act, RSC 1985, c C-34, s 74.11(1) [*Competition Act*].

5. Pear submits that on a balance of probabilities the existing evidence does not demonstrate that Pear has made misleading representations under either 74.01(1)(a) or 74.01(1)(b) of the Act. Under 74.01(1)(a), the general impression created by the Privacy Representations was not misleading in a material respect. Under 74.01(1)(b), the Privacy Representations were not a statement or guarantee of performance. Finally, even if the Privacy Representations are misleading, serious harm is unlikely to ensue as required under subsection 74.11(1)(a) of the Act. Pear therefore requests the Appeal Tribunal uphold the Tribunal Decision and deny the Temporary Order.

Competition Act, *supra* para 4, at ss 74.01(1) and 74.11(1).

Part I—Statement of Facts

I. Pear is Committed to Data Security

6. The Privacy Representations reflect Pear's commitment to privacy and promoting its robust set of privacy features. Despite this

commitment and these features, in August 2022, hackers were able to breach Pear's mobile operating system, installed on the PearGab 6.

Canada (Commissioner of Competition) v Pear Inc (18 October 2022) at paras 16, 18 [*Tribunal Decision*]

7. Data security is an issue for all modern technology companies and it is a priority for Pear. A single instance of failure does not undermine Pear's years-long commitment to protecting customers. Pear was neither the first nor the only company to suffer a data breach—in fact Pear's two leading competitors announced a similar data breach only days later, likely perpetrated by the same hacker collective (*Tribunal Decision*). In response to the incursion, Pear has worked diligently to not only inform customers but also improve its protections in a continued attempt to provide best-in-class security.

Tribunal Decision, *supra* para 6, at para 19.

II. Consumers Are Informed of the Risks

8. Data breaches are widespread and well-publicized. Put differently, "cyberattacks have become a not uncommon occurrence" (*Tribunal Decision*). In this case, Pear was not the only victim—its leading competitors were hacked concurrently. The universal nature of these threats means the average consumer is aware that no data is truly and inviolably safe. Any consumers making a significant investment in a Pear device—approximately $1,000—must be understood to do so without being blind to inherent data risk. This is not to say consumers know and understand the technical realities of data security, but rather that the average consumer is aware that the use of any hardware or software product exposes them to risk.

Tribunal Decision, *supra* para 6, at para 61.

9. Pear does not promise perfection—no one can. Instead, Pear promises to worry about customer data and privacy. These phones are not flippant purchases. Smartphones are vital to modern life and consumers choose the phone that best fits their needs, aware that no option is perfect or without risk. Pear's consumers, who are a segment of the market with enough enthusiasm for personal electronics to purchase Pear's premium products, understand this.

10. To facilitate an informed choice, potential PearGab purchasers have a right to know about Pear's values. Customers are capable of evaluating the risks on the basis of publicly available information. Pear has been upfront about the data breach and the steps taken to address it. Consumers make an informed evaluation of Pear's Privacy Representations as one of a constellation of factors informing their ultimate purchase decision.

III. Privacy Is Not a Material Influence on Purchasing Decision

11. Pear's market research found that 82% of smartphone users have limited or no knowledge of the security settings on their phones, reflecting the relatively low priority of these features (*Tribunal Decision*). Instead, security and privacy are secondary factors that are rarely considered when deciding what smartphone to purchase. The Privacy Representations in question are but one of five main features highlighted in the PearGab 6 marketing campaign, and, on the evidence, a feature of low salience for consumer behaviour. Pear believes that data security and privacy should and do matter and thus has made the business decision to promote these aspects of its brand; however, specific customer behaviour should not be understood to be motivated by the Privacy Representations.

Tribunal Decision, *supra* para 6 at para 33.

IV. The Data Breach Has Been Addressed

12. Some Pear customer data became vulnerable because of the August 2022 security breach; however, that data breach has been addressed with subsequent patches. Current and future Pear customers' data is not vulnerable simply on the purchase of a new PearGab 6 smartphone. Vulnerability requires additional successful attacks, something Pear is committed to preventing and works diligently to stop. Encouraging the purchase of a PearGab 6 device is only risky to customer data if PearGab 6 users are uniquely vulnerable to a security breach relative to other smartphone users. This assertion has not been made and is wholly unsupported by the evidence.

Part II—Statement of Points in Issue

13. The central issue is whether there is sufficient cause to overturn the Tribunal's decision to deny the Commissioner's application under subsection 74.11(1) of the *Act*.

14. To decide this issue, the Court must determine:

i. Did the Tribunal correctly impose a balance of probabilities standard for obtaining a temporary order under subsection 74.11(1)?

ii. Did the Tribunal err in finding the Privacy Representations to be false and misleading in a material respect under subsection 74.01(1)(a)?

iii. Did the Tribunal appropriately hold that the Privacy Representations do not constitute a statement or guarantee of performance under subsection 74.01(1)(b)?

iv. Did the Tribunal avoid palpable and overriding error in concluding that serious harm was unlikely to ensue for consumers and competitors under subsection 74.11(1)(a)?

15. The answer to each of these questions is "yes." This court must likewise deny the Commissioner's request for a temporary order.

Part III—Statement of Submissions

I. Subsection 74.11(1) Requires Reviewable Conduct on the Balance of Probabilities

16. The standard required by subsection 74.11(1) is a question of law and should be reviewed on a standard of correctness (*Vavilov*). In 2014, the language of subsection 74.11(1) changed from requiring the court find "a strong *prima facie* case that a person is engaging in reviewable conduct" to requiring that it "appears to the court [that a person] is engaging in conduct that is reviewable" (*Competition Act*). This new wording has not yet been judicially interpreted (*Tribunal Decision*). Pear submits that the Tribunal correctly found that this linguistic change demands the evidence prove reviewable conduct on the balance of probabilities.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 37 [*Vavilov*].

Competition Act, *supra* para 4, at s 74.11(1).

Tribunal Decision, *supra* para 6, at para 46.

a. The Legislative Context is Consistent with a Balance of Probabilities

17. Amending a law does not imply a change in that law (*Interpretation Act*). This stands for the principle of stability in the law (*R v DLW*). While this is not to say that amendments are meaningless, changes—and especially substantial changes—should be explicitly stated in the law. Parliament does not dramatically change the law by implication. In addition, statutory interpretation must be conducted with an eye towards the entire context of the relevant language, including plain meaning, legislative history and intent, and related jurisprudence that might shed light on appropriate understanding (*Canada Trustco*).

Interpretation Act, RSC 1985, c. I-21, s 45(2) [*Interpretation Act*]. *R v DLW*, 2016 SCC 22 at para 21 [*DLW*].

Canada Trustco Mortgage Co v Canada, 2005 SCC 54 at para 10 [*Canada Trustco*].

18. Understanding the amendment requires first understanding the standard a strong *prima facie* case would have imposed. The best guide to the standard comes from *R v Canadian Broadcasting Corp*, where the Supreme Court of Canada required a strong *prima facie* case for mandatory interlocutory injunctions. In defining a strong *prima facie* case, the court held that there "is a burden on the applicant to show a case of such merit that it is *very* likely to succeed at trial" (*Canadian Broadcasting*, emphasis added). "Very likely" means more than just likely and implies something more than a balance of probabilities. In that case, the Crown had to demonstrate that it was very likely to prove the CBC was in contempt of court. In this case, the Commissioner would have had to demonstrate that she was very likely to prove that Pear is engaged in reviewable conduct on the merits.

R v Canadian Broadcasting Corp, 2018 SCC 5 at para 17 [*Canadian Broadcasting*].

19. In reading "appears to the court" as a balance of probabilities standard, the Tribunal lowered the standard from "a strong *prima facie* case." The Tribunal acknowledged the possibility that the standard was changed in its decision (*Tribunal Decision*). According to Pear and the Tribunal's reading of "appears to the court," the Commissioner no longer has to demonstrate that she is *very likely* to prove

that Pear is engaged in reviewable conduct. Instead, she must merely demonstrate that she is *likely* to prove that Pear is engaged in reviewable conduct.

Tribunal Decision, *supra* para 6, at para 52.

20. Furthermore, Pear submits that a lower standard is not the same as an insignificantly low standard. The *Interpretation Act* and the fundamental principle of stability in the law (*DLW*) make clear that as a matter of statutory interpretation the magnitude of the change should be read minimally. Lowering the standard from "strong *prima facie* case" to "not vexatious or frivolous" (*Tribunal Decision*) as the Commissioner argues is too significant a change to impose by implication alone.

Interpretation Act, *supra* para 17.

DLW, *supra* para 17.

Tribunal Decision, *supra* para 6, at para 48 describing the Commissioner's position.

21. To read "appears to the court" as "not vexatious or frivolous" is also to deny the meaning and effect of the language. As an agent charged with acting in the public interest, the Commissioner should be presumed not to bring vexatious or frivolous litigation. To impose so low a standard here is redundant with our basic expectations of public officials. It would, in effect, give the Commissioner determinative power—power that has been explicitly reserved for the Tribunal. Giving subsection 74.11(1) meaning therefore requires a more substantive evaluation of the Commissioner's preliminary case. Parliament should be presumed to be aware of the not vexatious or frivolous standard as it exists in *RJR-MacDonald* and yet deliberately chose a different standard that must necessarily be interpreted to be more stringent. The court was correct to interpret the legislative intent and broader legislative context as imposing a balance of probabilities standard.

RJR-Macdonald Inc v Canada (Attorney General), [1994] 1 SCR 311 at p 335, 111 DLR (4th) 385 [*RJR- Macdonald*].

b. Plain Reading and Jurisprudence Support a Balance of Probabilities Standard

22. This legislative context is further reinforced by a plain language and jurisprudential understanding of the entire phrase; in other words, the critical phrase is not that it "appears to the court" but rather that "it appears to the court [that a person] is engaging in conduct that is reviewable." The *Oxford English Dictionary* offers many possible definitions of "appears;" however, in this context the most sensible definitions are either "to be clear or evident to the understanding" or "to be taken as, to seem." In plain language then, "appears to" can be understood as synonymous with "seems". If it seems to the court that reviewable conduct is occurring, that is understood as the court believing that reviewable conduct is more likely than not occurring.

Competition Act, *supra* para 4, at s 74.11(1).

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "appear, v".

23. In other examinations of "it appears to the Court," courts have appropriately considered the entirety of the phrase. In *Maheu*, the relevant phrase is "it appears to the Court that … there is reason to believe" and the Court emphasizes that subordinate clause in developing its ultimate standard. Similarly, in *Eastern Platinum*, the legislation in question reads, "it appears to the court that it is in the best interests of the company" (*BCA*). Viewed holistically, the courts in *Maheu* and *Eastern Platinum* can be understood to read the relevant clauses as "it is likely that there is reason to believe" and "it is likely in the best interests of the company" as they develop the overall standard to be applied. A similar approach here would read subsection 74.11(1) as "it is likely [a person] is engaging in conduct that is reviewable." In other words, both plain language and jurisprudence support a balance of probability standard.

Maheu v IMS Health Canada, 2003 FCT 1 at paras 53-56[*Maheu*] (aff'd 2003 FCA 462). *2 5 3 8 5 2 0 Ontario Ltd v Eastern Platinum Limited*, 2020 BCCA 313 at para 26 [*Eastern Platinum*]. *Business Corporations Act*, SBC 2002, c 57, s 233(1)(d) [*BCA*].

c. Broader Social Context Likewise Demands a Balance of Probabilities Standard

24. Determining the appropriate burden of proof in this case also requires consideration of the broader consequences of granting temporary orders, specifically economic and *Charter* consequences. Economically, deceptive marketing practices distort the market by inappropriately influencing consumer purchases; however, overly zealous regulation of marketing likewise distorts the market. If it is too easy for the Commissioner to stifle marketing that is, in fact, not misleading, that absence of advertisement likewise deprives consumers crucial knowledge and inappropriately influences purchases. Walking the fine line of too-much versus too-little regulation requires the additional consideration demanded by a balance of probabilities standard.

25. Temporary orders under subsection 74.11(1) are issued in cases relating to allegedly deceptive marketing practices; in other words, temporary orders under subsection 74.11(1) almost invariably regulate and limit speech. *Charter* values make it clear that the government should be reticent and circumspect when contemplating the regulation of speech (*Keegstra*). Parliament cannot be understood to allow the Commissioner and the Tribunal to limit speech on the basis of litigation that is merely not vexatious or frivolous. The Commissioner must demonstrate something more and show that on the balance of probabilities a person is engaged in reviewable conduct.

Constitution Act 1982, RSC 1985, App II, No 44, Sched B, Pt 1, s 2 [*Constitution Act*]. *R v Keegstra*, [1990] 3 SCR 697, [1990] SCJ No 131 [*Keegstra*].

d. Giving "Appears to the Court" Consistent Meaning Requires a Balance of Probabilities Standard

26. The phrase "appears to the court" is used twice in subsection 74.11(1) and five times across the whole of section 74.11. The first instance has been the focus of Pear's submissions and the arguments before the Tribunal; however, "appears to the court" must be given consistent meaning across the entirety of section 74.11.

Competition Act, *supra* para 4 at s 74.11.

27. Looking at the other uses of "appears to the court," a balance of probabilities standard is clearly intended. In both 74.11(1)(a) and 74.11(1.1), "appears to the court" is explicitly linked to "likely." Moreover, to apply a "not vexatious or frivolous" standard across the entirety of the section is to trivialize the burden on the Commissioner and allow the Commissioner to regulate speech far too easily. The foregoing policy arguments become all the more forceful on the understanding that trivializing "appears to the court" at the beginning of subsection 74.11(1) would by extension trivialize the substance of the entire section. The Tribunal must be empowered to meaningfully review the Commissioner's determinations of reviewable conduct and ensuing harm.

e. A Balance of Probabilities Standard Is Not a Decision on the Merits

28. A balance of probabilities standard is likely to be the same standard applied in the context of a final merits decision. Imposing a balance of probabilities here, however, does not duplicate the final merits decision. A temporary order under subsection 74.11(1) is based on preliminary information. As the Commissioner's investigation progresses, more information and evidence will emerge until the case is complete and a full hearing—with a full range of remedies—is appropriate. A balance of probabilities standard preserves the independent meaning of subsection 74.11(1) while still giving it substance.

II. Pear Did Not Make a False and Misleading Statement in a Material Respect

29. The Tribunal wrongly held that the PearGab 6 campaign violated subsection 74.01(1)(a) by making a "representation to the public that is false or misleading in a material respect" to promote a product (*Competition Act*). The PearGab 6 campaign is not misleading or material. The correct legal test is a question of law and should be determined on a standard of correctness (*Vavilov*), while the test's application is a mixed question of fact and law and will be determined according to either a standard of correctness or palpable and overriding error depending on the degree to which it is factually suffused (*Housen*).

Competition Act, *supra* para 4 at s 74.01(1)(a).

Vavilov, *supra* para 16 at para 37.

Housen v Nikolaisen, 2002 SCC 33 at para 36 [*Housen*].

a. The Test for False or Misleading Statements is the General Impression Test

30. The test for whether a statement is false or misleading is the "general impression" test, which assesses whether the average consumer forms a general impression of an advertisement that is misleading. The general impression is that formed "after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used" (*Richard*). The test also draws from section 52(4) of the *Competition Act*, which states that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account" in criminal misleading advertising cases (*Competition Act*).

Richard v Time Inc., 2012 SCC 8 at para 57 [*Richard*].

Competition Act, *supra* para 4 at s 52(4).

31. The average consumer protected by the general impression test is similar to the "ordinary hurried purchaser" of trademark law (*Richard*). This consumer is not a "moron in a hurry," and is owed a "certain amount of credit" (*Mattel*). The average consumer's level of care also varies depending on the product. In misleading advertising cases, this means that more expensive products, like vacations and expensive electronics, will be approached with more care by consumers (*Maritime Travel*).

Richard, supra para 30 at paras 64-65.

Maritime Travel Inc v Go Travel, 2009 NSCA 42 at para 68 [*Maritime Travel*]. *Mattel U.S.A. Inc. v 3894207 Canada Inc.*, 2006 SCC 22 at paras 56-58 [*Mattel*].

32. The correct test is not that of a "credulous and inexperienced" consumer, as that formulation of the test is only for the "purposes of the [*Consumer Protection Act*]," and arises from Quebec law (*Richard*). The average consumer for the purposes of the *Competition Act* is that of the "credulous and technically inexperienced consumer," as used in *Chatr*. The Tribunal's misapplication of the standard taints their entire analysis.

Richard, supra para 30 at para 72.

Canada (Commissioner of Competition) v Chatr Wireless Inc., 2013 ONSC 5315 at para 132 [*Chatr*].

b. The General Impression is Not "Errorless Security"

33. The Tribunal mistakenly held that the general impression created by Pear's Privacy Representations was "errorless security" (*Tribunal Decision*). Instead, the general impression is that privacy is an important value to Pear. None of the Privacy Representations claim that the PearGab 6 offers errorless security. Pear promotes a robust set of privacy features, as well as a company culture that values privacy. Pear's tag line "we're up worrying about your privacy so you don't have to be" clearly states that Pear still worries about consumer privacy and by implication still worries about a breach (*Tribunal Decision*). Even if Pear had claimed that PearGab 6 users would be worry free, this claim should be interpreted contextually, with reference to what Pear's competitors offered and with the understanding that advertising contains some puffery (*Rushak*). In *Chatr*, a promise of "no worries about dropped calls" was interpreted relative to the performance of Chatr's competitors, not as a promise of errorless performance. A similar interpretation where Pear's claims are viewed relatively rather than absolutely should be applied here.

Tribunal Decision, *supra* para 6 at paras 14 and 61.

Rushak v Henneken, 1991 CarswellBC 223 at para 23, [1991] 6 WWR 596.

Chatr, supra 32 at paras 141-142.

34. The average PearGab 6 consumer understands the risk of cyberattacks. A PearGab 6 is not an incidental purchase, it is a premium smartphone that typically retails for over $1000, and purchasers would have a commensurate level of knowledge. The average consumer will also be aware of the risk of cyberattacks. The concept of privacy necessarily implies interested third parties who would like access to data. Understanding the risk of cyberattacks also requires no technical knowledge. Consumers do not need to understand how cyberattacks are performed to understand the risk. Nor do they need to conduct additional research, given the well-publicized nature of many cyberattacks. A preponderance of PearGab 6 purchasers

have enough familiarity with cyberattacks to recognize the threat they pose (*Tribunal Decision*). It may be that some consumers are unaware of the risk of cyberattacks, but the average consumer is not the lowest common denominator. The average PearGab 6 consumer understands the risk of cyberattacks and would interpret the Privacy Representations as a comment on Pear's commitment to privacy relative to its competitors.

Tribunal Decision, *supra* para 6 at para 61.

35. There is no evidence that the PearGab 6's privacy protections are inferior; if anything Pear's commitment to privacy meets or exceeds its competitors. Although the PearGab 6 was compromised, the operating systems of Pear's principal competitors were also impacted. The only thing that distinguishes the PearGab 6 attack from the attacks on its competitors is that Pear was the first company to report a breach, upon which it immediately notified its users and issued an emergency patch. Pending the ongoing investigations into these data breaches, any definitive declarations on relative security are premature, but Pear's early reporting of the breach indicate a company that is better able to detect breaches or more willing to report them. All the evidence suggests is that hacker collectives like JesterRoast, which has performed at least seven high profile cyberattacks in two years, remain a threat against which Pear remains vigilant.

Tribunal Decision, *supra* para 6 at paras 17-20.

c. The Test for Materiality is the Likely Effect Test

36. The Tribunal correctly identified the test for material misrepresentations, whether consumers will "likely be influenced" by a misleading representation in making a purchase (*Kenitex*). This impression must be created by the misleading element of the advertisement, not by some other factor (*Sears*). This test also does not consider by what the average consumer *should* be influenced, but by what they *are* influenced. It is distinct from normative concerns. The Tribunal's emphasis on the importance of privacy overlooked this.

R v Kenitex Canada Ltd., 1980 CarswellOnt 1459 at para 10, 51 CPR (2d) 103 [*Kenitex*].

Canada (Commissioner of Competition) v Sears Canada Inc., 2005 Comp. Trib. 2 at para 336, 2005 CarswellNat 8137 [*Sears*].

Tribunal Decision, *supra* para 6 at para 70.

d. Privacy is not Material to the Ordinary Consumer

37. Privacy is not material to consumers because there is no evidence that consumers' purchasing decisions are influenced by privacy. Instead, there is evidence that Pear's consumers are indifferent to privacy. When Pear surveyed consumers about their purchasing priorities, not one consumer prioritized data security. Similarly, 82% of surveyed consumers have not familiarized themselves with their phone's privacy settings. Consumers who do not care about privacy are unlikely to make decisions based on privacy-related advertising, regardless of whether they should care about privacy. The PearGab 6 campaign included the Privacy Representations because privacy is part of the design philosophy underpinning the PearGab 6, and because privacy is an important part of Pear's brand, promoted alongside its mascots to increase recognition.

Tribunal Decision, supra para 6 at para 33.

III. The Privacy Representations Do Not Constitute a "Statement, Warranty or Guarantee of Performance"

38. The PearGab 6 campaign did not violate subsection 74.01(1)(b) by making "a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof" (*Competition Act*). The Tribunal correctly held that the Privacy Representations were not representations about the PearGab 6's performance or efficacy. The Tribunal erred in holding that the comments were statements under the subsection, placing undue weight on the literal meaning of the word "promise" and setting too low a standard for the word "statement" for the purposes the subsection. The formulation of the applicable test is a question of law, subject to correctness review (*Vavilov*). The test's application is a question of mixed fact and law (*Housen*).

Competition Act, *supra* para 4 at s. 74.01(1)(b).

Vavilov, *supra* para 16 at para 37.

Housen, *supra* para 29.

a. The Privacy Representations Are Not a "Statement, Warranty or Guarantee"

39. The Tribunal erred in its interpretation of subsection 74.01(1)(b) by setting the threshold for a "statement" within the meaning of the *Act* too low, failing to recognize that the correct test requires a representation with greater than usual authority. Modern principles of statutory interpretation require that "the words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Vavilov*). The Tribunal's reading of "statement" disregarded the role of "warranty or guarantee" within the Act, making both words redundant. Similarly, the Tribunal did not consider the definition of statement, which is "a formal written or oral account of facts, theories, opinions, events, etc., (now) esp. as requested by authority, or issued to the media" (*OED Online*). In place of the Tribunal's all-encompassing understanding of statement, "statement" as it exists in 74.01(1)(b) should be read as requiring a level of authority and gravitas. This would also be consistent with the purpose of the subsection, which is to preserve the reliability of advertising that represents itself having above-average reliability.

Vavilov, *supra* para 16 at para 117.

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "statement, n".

40. As the Tribunal held, the general impression test applies to subsection 74.01(1)(b). This means that the "general impression conveyed by a representation as well as its literal meaning" should be considered, and that the literal meaning of a representation is not solely determinative of whether a representation falls within the scope of the *Act* (*Richard*). The Tribunal placed excessive weight on the literal meaning of the word "promise" that was used in the Privacy Representation and neglected the importance of the advertisement's general impression.

Richard, supra para 30 at para 45.

Tribunal Decision, *supra* para 6 at para 82.

41. Applying the correct interpretation of the Act to the case at bar, Pear's comments are not authoritative enough to fall within the Act. "Pyrus' Privacy Promise," the representation most likely to be argued to be a warranty or guarantee, is clearly puff (*Carbolic Smoke Ball Company*). In this context, "promise" was chosen for its alliterative quality, not for its specific meaning. Similarly, the promise is delivered by an anthropomorphic pear. The average consumer would not impart the word "promise" with the authority necessary to bring it within the meaning of subsection 74.01(1)(b). The Privacy Representations made during the campaign as a whole also lack the authority necessary to qualify as statements within the meaning of the *Act*.

Tribunal Decision, *supra* para 6 at para 14.

Carlill v Carbolic Smoke Ball Company, [1893] 1 QB 256, 57 JP 325.

b. Pear's Privacy Representations Do Not Pertain to Performance or Efficacy

42. The Tribunal held that the Privacy Representations do not pertain to performance, efficacy, or length of life. The Tribunal required that performance and efficacy claims relate to a "specific and measurable achievement." For a representation to fall under subsection 74.01(1)(b) it must be testable, otherwise the Act would risk excluding truthful but untestable claims and would be overly broad (*Tribunal Decision*).

Tribunal Decision, *supra* para 6 at para 88.

43. Alternatively, if the Tribunal's test is wrong, privacy would still not be a claim of performance or efficacy. Performance refers to "the accomplishment or carrying out of something undertaken," while efficacy refers to the "power or capacity to produce effects" (*OED Online*). As *Imperial Brush* stated, the terms refer to the "manner in which the [product] will perform." The test for if an attribute qualifies as a measure of performance or efficiency is therefore whether it is a means of accomplishing an objective. This excludes objectives themselves and their underpinning values.

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2022) sub verbo "performance". John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2022) sub verbo "efficacy".

Canada (Commissioner of Competition) v Imperial Brush, 2008 Trib. Conc. 2 at para 201, 2008 CarswellNat 216 [*Imperial Brush*].

44. Under the Tribunal's test, the Privacy Representations were broad and amorphous value statements. They do not contain indicators of "achievement" that would be conducive to testing. Although there are means of testing issues that are related to privacy, privacy itself is a vague, value-based category that is not testable.

Tribunal Decision, *supra* para 6 at para 89.

45. Even if the Tribunal's standard is wrong, the Privacy Representations still represent broad value statements, not a means of achieving objectives. The PearGab 6 campaign did not make any representations about the manner in which a task would be undertaken, but rather about the underlying values of the company. In other words, privacy is not the manner, but a subjective, protean goal. In *Imperial Brush*, the defendants were not required to test what a "clean chimney" constituted. However, this granular exercise is exactly what the appellants are asking Pear to do.

Imperial Brush, *supra* para 43.

IV. Consumers and Competitors are Unlikely to Suffer Serious Harm

a. Subsection 74.11(1)(a) Requires Serious Harm

46. Subsection 74.11(1)(a) requires that "serious harm is likely to ensue unless the order is issued" (*Competition Act*). The test for serious harm is a question of law. The Tribunal correctly noted that serious harm is a different standard compared to the irreparable harm standard at common law (*Tribunal Decision*). Specifically, irreparable harm "refers to the nature of the harm suffered rather than its magnitude" (*RJR-MacDonald*). By using serious harm, Parliament has allowed considerations of economic harm otherwise prohibited at common law; however, Parliament has also specifically imported notions of magnitude into the evaluation. To give meaning to this section, the Tribunal correctly required the Commissioner to demonstrate both the serious magnitude of the alleged harm and its connection to the reviewable conduct; it cannot simply be presumed on a finding of reviewable conduct.

Competition Act, *supra* para 4 at s 74.11(1)(a).

Tribunal Decision, *supra* para 6 at para 94.

RJR-MacDonald, *supra* para 21 at p 341.

47. An overall comparison of the Temporary Order requirements relative to *RJR-MacDonald's* interlocutory injunctions requirement further supports this position. The test for granting an injunction requires only that "the claim is not frivolous or vexatious" (*RJR-MacDonald*)—a low bar. Pear has argued that subsection 74.11(1) requires an evaluation of claims on the more stringent balance of probabilities standard. Parliament has therefore made the requirements more stringent relative to common law injunctions. While "serious" compared to "irreparable" admits more types of harm, the importation of magnitude should similarly be read as more stringent.

RJR-MacDonald, *supra* para 21 at p 335.

48. Understanding serious harm also requires a full contextual analysis (*Canada TrustCo*). As the foregoing analysis of "appears to the court" suggests, Parliament has already lowered the threshold for issuing a temporary order by changing the requirement from a "strong *prima facie* case." Parliament cannot be understood to have imposed a meaningless or trivial bar when the regulated conduct will inevitably be speech. To allow a prohibition on speech without a meaningful demonstration of harm is inimical to our constitutional ideals. The Commissioner bears the burden of demonstrating serious harm and must meet that burden.

Canada Trustco, *supra* para 17.

Constitution Act, *supra* para 25.

b. There is No Palpable and Overriding Error in How the Tribunal Applied the Serious Harm Standard

49. As a question of mixed law and fact, how the Tribunal evaluated serious harm is subject to review on a standard of palpable and overriding error (*Vavilov*). The Federal Court of Appeals has clarified this standard, saying "to interfere on factually suffused questions of mixed fact and law, we must find palpable and overriding error or

an 'obvious error' going to the 'very core of the outcome of the case'. This is a high threshold" (*Rogers*). Whether the Privacy Representations will likely give rise to serious harm is clearly factually suffused and therefore merits review on a standard of palpable and overriding error.

Vavilov, *supra* para 16 at para 37.

Canada (Commissioner of Competition) v Rogers Communications Inc et al, 2023 FCA 16 at para 7 [*Rogers*].

50. Pear submits that there was no such error in how the Tribunal applied the standard. It is reasonable in evaluating the likelihood of serious harm to require specific relevant evidence. It is not enough for the Commissioner to say that harm *could* occur; the Commissioner must show that *serious* harm is *likely*.

51. Pear, in contrast, led evidence on this point. Specifically, Pear has highlighted that most target consumers have already been exposed to the PearGab 6 Campaign, limiting the possibility that additional consumers will change their behaviour because of additional exposure. Further, with its survey data, Pear has demonstrated that data security is not a primary motivator for smartphone purchasers, weakening and making suspect the necessary inference that sales of the PearGab 6 would be significantly different absent the Privacy Representations.

Tribunal Decision, *supra* para 6 at para 102.

52. The Tribunal can only rely on the evidence presented at trial. To rely on Pear's evidence on this point when the Commissioner has "adduced no evidence with respect to the magnitude of consumers … likely to be misled or with respect to the extent … to which the potential harms … are likely to ensue" cannot be considered a palpable and overriding error.

Tribunal, *supra* para 6 at para 103.

c. Serious Harm is Unlikely to Ensue

53. The Tribunal rightly found that serious harm is unlikely to ensue. There are two possible relevant harms to consider. The first is economic harm. This theory of harm requires customers to buy PearGab

6 phones they otherwise would not have on a mistaken belief about the relative security of Pear's phones. Such misguided customer decisions are unlikely to occur at the scale required to meet this high standard.

54. The economic theory of harm assumes that purchasers of the PearGab 6 rely on the Privacy Representations. Pear's evidence, accepted by the Tribunal, establishes that this is not the case. Data security was not the most important smartphone feature for any surveyed consumers and most are unfamiliar with their privacy settings (*Tribunal Decision*). Moreover, because of the effective dissemination of the PearGab 6 campaign, consumers are making purchase decisions with an awareness of the Privacy Representations whether the temporary order is issued or not. Finally, consumers are making their decision aware of the data breach and its implications on both privacy and data security. Consequently, it is unlikely that any consumers will buy a PearGab 6 device because of the allegedly misleading Privacy Representations, let alone a sufficient number to give rise to sufficiently serious economic harm under 74.11(1)(a).

Tribunal Decision, *supra* para 6 at para 33.

55. The second theory of harm—personal harm—is even less likely than economic harm. This theory posits that not only will individuals buy the PearGab 6 device that they would not have absent the Privacy Representations, but those individuals will then also unwittingly have data stolen in the event of a future breach. In other words, personal harm relies not only on the tenuous logic of altered consumer behaviour, but also requires a subsequent data breach to occur.

56. Undoubtedly data security is a pressing issue, and a data breach can be damaging to those affected. However, a temporary order preventing the dissemination of the Privacy Representations does not in effect protect vulnerable consumer data. That task is better accomplished by data protection legislation like *PIPEDA* and the proposed *Digital Charter Implementation Act*. This is a misleading advertising case, not a data security case. Censoring the Privacy Representations does not magically make data more secure.

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

Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the*

Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts, 1st Sess, 44th Parl, 2022 (second reading 28 November 2022). [*Digital Charter Implementation*].

Part IV—Remedy Sought

57. Pear requests the Appeal Tribunal uphold the lower Tribunal's refusal to issue a temporary order under section 74.11(1) of the *Competition Act* and permit Pear to continue to advertise its Privacy Representations while the Commissioner continues her investigation.

APPENDIX A—TABLE OF AUTHORITIES

A. Legislation

Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2022 (second reading 28 November 2022).

Business Corporations Act, SBC 2002, c 57.

Competition Act, RSC 1985, c C-34.

Interpretation Act, RSC 1985, c. I-21.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5.

B. Jurisprudence

2538520 Ontario Ltd v Eastern Platinum Limited, 2020 BCCA 313.

Canada (Commissioner of Competition) v Chatr Wireless Inc., 2013 ONSC 5315.

Canada (Commissioner of Competition) v Imperial Brush, 2008 Trib. Conc. 2, 2008 CarswellNat 216.

Canada (Commissioner of Competition) v Pear Inc (18 October 2022).

Canada (Commissioner of Competition) v Rogers Communications Inc et al, 2023 FCA 16.

Canada (Commissioner of Competition) v Sears Canada Inc., 2005 Comp. Trib. 2, 2005 CarswellNat 8137

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Canada Trustco Mortgage Co v Canada, 2005 SCC 54.

Carlill v Carbolic Smoke Ball Company, [1893] 1 QB 256, 57 JP 325.

Constitution Act 1982, RSC 1985, App II, No 44, Sched B, Pt 1.

Housen v Nikolaisen, 2002 SCC 33.

Maheu v IMS Health Canada, 2003 FCT 1.

Maritime Travel Inc v Go Travel, 2009 NSCA 42.

Mattel U.S.A. Inc. v 3894207 Canada Inc., 2006 SCC 22.

R v Canadian Broadcasting Corp, 2018 SCC 5.

R v DLW, 2016 SCC 22.

R v Keegstra, [1990] 3 SCR 697, [1990] SCJ No 131.

R v Kenitex Canada Ltd., 1980 CarswellOnt1459, 51 CPR (2d) 103.

Richard v Time Inc., 2012 SCC 8.

RJR-Macdonald Inc v Canada (Attorney General), [1994] 1 SCR 311, 111 DLR (4th) 385.

Rushak v Henneken, 1991 CarswellBC 223, [1991] 6 WWR 596.

C. Secondary Sources

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "appear, v".

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "statement, n".

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "performance".

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "efficacy".