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# CANADIAN COMPETITION LAW REVIEW

# REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

THE CANADIAN
BAR ASSOCIATION

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# CANADIAN COMPETITION
LAW REVIEW

# REVUE CANADIENNE
# DU DROIT
DE LA CONCURRENCE

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# 2024 YEAR IN REVIEW

Debbie Salzberger, Alykhan Rahim, Lucinda Chitapain and Samantha Steeves

*2024 marked a watershed moment in Canadian competition law, with some of the most significant legislative reform in decades now fully in force. The passage of both Bill C-56 and C-59 has reshaped the Competition Act, introducing a structural presumption for mergers, expanding private enforcement rights, and creating new provisions targeting environmental claims, among other things. These changes reflect a growing political and public appetite for stronger competition enforcement, resulting in increased activity from the Bureau, including its first merger remedy under the new structural presumption and a series of high-profile investigations and consent agreements.*

*The Bureau's enforcement posture has become more assertive, and its policy agenda more ambitious. It has issued a flurry of draft guidelines and launched consultations on topics ranging from greenwashing to property controls, signaling a desire to shape the interpretation of the new regime. Yet, uncertainty remains—particularly around the scope of private access, the interpretation of "significant purpose" in civil collaborations, and the substantiation of environmental claims. As we move into 2025, stakeholders will need to navigate this changed landscape with care, balancing compliance with practicality to ensure that reform continues to serve both competitive markets and commercial realities.*

*En 2024, le droit de la concurrence au Canada a connu un tournant décisif, avec l'entrée en vigueur de certaines des plus importantes réformes législatives des dernières décennies. L'adoption des projets de loi C-56 et C-59 a profondément refaçonné la Loi sur la concurrence, en introduisant notamment une présomption structurelle sur les effets concurrentiels des fusions, en élargissant l'accès privé au Tribunal de la concurrence, et en créant de nouvelles dispositions visant les déclarations environnementales. Ces changements reflètent un appétit politique et public croissant pour un renforcement de l'application de la loi en matière de concurrence, ce qui s'est traduit par une intensification des activités du Bureau, y compris sa première mesure corrective dans un cas de fusion selon la nouvelle présomption structurelle, ainsi qu'une série d'enquêtes très médiatisées et d'accords amiables.*

*Le Bureau adopte désormais une approche plus affirmée dans son application de la loi et poursuit un programme politique plus ambitieux. Il a publié une série d'avant-projets de lignes directrices et lancé des consultations sur des sujets allant de l'écoblanchiment aux contrôles de propriété, signalant*

*sa volonté d'influencer l'interprétation du nouveau régime. Toutefois, des incertitudes persistent—notamment en ce qui concerne la portée de l'accès privé, l'interprétation de la notion de « objectif important » dans les collaborations civiles, et la justification des déclarations environnementales. Alors que 2025 progresse, les intervenants devront naviguer avec prudence dans ce paysage transformé, en conciliant conformité et pragmatisme afin que la réforme continue de servir à la fois la concurrence sur les marchés et les réalités commerciales.*

## I. Overview

The last two years have seen a near complete overhaul of the competition regime in Canada, with arguably the most significant amendments to the *Competition Act* (the "**Act**")[1] being approved by the Senate of Canada in 2024. The amendments in Bill C-59 have reshaped the Canadian competition landscape by strengthening the merger control regime, expanding the scope for private enforcement, and introducing new provisions to address environmental claims and agreements, among others. The Competition Bureau (the "**Bureau**") has begun using these new enforcement tools, bringing its first drip pricing case to the Tribunal and obtaining, for the first time, a merger remedy anchored in the new structural presumption. The Bureau has also focused its attention on property controls and environmental claims, creating greater enforcement risk for businesses taking actions in these areas.

Overall, these amendments have resulted in greater, and to some extent unpredictable, enforcement risk both from the Bureau and, increasingly, private parties. In an attempt to combat this uncertainty, the Bureau has published a series of preliminary guidelines and launched multiple consultations in 2024, all intended to clarify the Bureau's enforcement priorities as a result of these changes. However, ambiguity still remains as to the practical implications of many of these new provisions, especially with the new environmental claims provisions and the new private access leave test. The upcoming year is likely to be very busy for competition law in Canada. The Bureau will continue to finalize and publish guidance materials clarifying its approach to enforcement and hopefully bring key cases to the Competition Tribunal (the "**Tribunal**"). Private parties will test the boundaries of the private access regime. Both of these will aid in establishing much-needed jurisprudence in this new legal landscape.

## II. The First Round of Amendments to the Competition Act Are (Finally) Complete

2024 saw the coming into force of further amendments to modernize Canada's competition law. Following a February 2022 announcement from the Minister of Innovation, Science and Economic Development (the "**Minister**")[2] of the government's intention to "carefully evaluate potential ways to improve" the Act, the government undertook a four-month consultation process to solicit input on how best to modernize the Canadian competition framework and better equip the Bureau to "protect consumers and enhance public trust in the contestability and reliability of the marketplace".[3] The feedback from this consultation process, which the federal government made available in a public report,[4] informed the development of two pieces of legislation, Bill C-56 and Bill C-59, each of which introduced meaningful changes to the Act.

Bill C-56,[5] titled the *Affordable Housing and Groceries Act*, received Royal Assent on December 15, 2023 at which time a preliminary set of amendments to the Act came into effect, including (i) repeal of the efficiencies defense for mergers, (ii) a restructuring of the abuse of dominance framework to expand the scope of potentially abusive behaviour, reduce the legal burden to establish abuse of dominance and increase the quantum of financial penalties, and (iii) the introduction of formal market study powers for the Commissioner of Competition (the "**Commissioner**") including the ability to obtain court orders for the production of information, records and testimony to support market studies.[6] Bill C-56's amendments to the Act's civil prohibition on anti-competitive agreements or arrangements, discussed further below, came into effect on December 15, 2024.

Bill C-59, an omnibus bill presenting various proposals from the federal government's 2023 budget and fall economic statement to amend a broad range of legislation, was tabled in Parliament by then Deputy Prime Minister and Minister of Finance, Chrystia Freeland, on November 21, 2023.[7] It then underwent months of debate in the House of Commons, during which little time or attention was given to the provisions proposing to amend the Act. Bill C-59 completed its third and final reading in the House of Commons on May 28, 2024 and was sent to the Senate of Canada, which passed the bill in just three weeks. Bill C-59 received Royal Assent on June 20, 2024, at which point most of its amendments to the Act came into effect.

The following summarizes the Bill C-56 and Bill C-59 amendments to the Act introduced or implemented in 2024.

## A) Substantive and Procedural Updates to the Merger Control Regime

The Act's merger control regime, as amended, will increase the number of transactions subject to mandatory merger review and recalibrate the substantive review framework. The Bureau's *Merger Enforcement Guidelines*, which are the primary resource for the Bureau's interpretation of the Act's merger control regime, will also be undergoing a comprehensive review.[8] As part of this review, the Bureau launched a consultation process on November 7, 2024 seeking input from various stakeholders, which consultation process concluded on January 12, 2025.[9]

### i) Merger Notification

Under the Act, a mandatory pre-merger notification filing is usually triggered where three key criteria are met (additional criteria and exemptions also apply in particular circumstances): (i) the target carries on an operating business, defined as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work"; (ii) the parties to the transaction (together with their affiliates) have a combined aggregate book value of assets in Canada, or combined annual gross revenues from sales in, from and into Canada, exceeding C$400 million, referred to as the size-of-parties threshold, and (iii) the assets in Canada of the target together with its controlled subsidiaries (in a share transaction) or the target assets in Canada (in an asset transaction) have a book value exceeding C$93 million, or generate annual gross revenues from sales in and from Canada in excess of C$93 million (the monetary value of this threshold can be adjusted annually based on GDP growth), referred to as the size-of-transaction threshold.

While the size-of-parties threshold remains unchanged, the relevant revenues to be considered for the size-of-transaction threshold has been expanded to consider sales in, from and into Canada from all assets subject to the transaction. The inclusion of import sales in the size-of-transaction threshold means that transactions involving a target with cross-border business are now more likely to be notifiable to the Bureau, even where the target does not have a material presence or sales within Canada (although the target entity / assets would still need to meet the operating business requirement).

Furthermore, the size-of-transaction threshold was previously assessed separately for share acquisitions and asset acquisitions, even where both acquisitions were occurring as part of a single transaction. Under the revised

regime, the assets and revenues associated with asset and share acquisitions must be aggregated where both acquisitions form part of the same transaction.

Finally, for all mergers that are not notified to the Bureau, whether mandatorily under Part IX of the Act or voluntarily through a request for an advance ruling certificate, the Bureau will now have three years post-closing to bring a challenge before the Tribunal. The limitation period remains at one-year for all notified mergers.

### ii) Merger Review

Arguably the most significant change to the Act is the introduction of a structural presumption, whereby a transaction that results in, or is likely to result in, an increase to the Herfindahl-Hirschman Index ("**HHI**") of more than 100 and either (i) an HHI of more than 1,800 or (ii) a combined market share of more than 30%, is presumed to be anti-competitive, unless the merging parties can prove otherwise on a balance of probabilities. The new structural presumption closely mirrors the structural presumption in the U.S. DOJ's 2023 Merger Guidelines.[10] However, the U.S. guidelines can be revoked or amended at any time and can be applied on a discretionary basis, whereas this new structural presumption is enshrined in law, creating a much more permanent feature of the Canadian regime with limited scope for discretionary enforcement.

The Bureau has been a strong proponent of structural presumptions, stating as part of its submissions to the Minister's consultation that a structural presumption is "not only logical, it follows the economics-based conclusion that mergers in highly concentrated markets are more likely to be anti-competitive, and ensures that the Bureau's investigative and litigation resources are used efficiently in cases where the presumption is met."[11] With the Bureau's wish being granted, the structural presumption is expected to play a central role in the Bureau's approach to merger enforcement going forward.

In addition, sections 92 and 93 of the Act have been amended to expressly include new substantive assessment factors as part of the Tribunal's assessment of whether a substantial prevention or lessening of competition ("**SPLC**") is likely to result from a proposed merger or has resulted from a completed merger. While the list is not exhaustive, the set of factors now expressly includes (a) the transaction's impact on labour markets, (b) the transaction's impact on concentration or market shares and (c) the potential for increased express or tacit coordination. The inclusion of the

transaction's effects on labour markets is indicative of the federal government's broader goal of ensuring effective competition in the labour market, building upon 2022 amendments to introduce prohibitions on no-poach and wage fixing agreements into the Act.

### iii) Merger Remedies

The Act has been amended to allow the Tribunal to impose a higher remedial threshold upon litigated mergers. The Tribunal can now make orders requiring the parties to restore competition to pre-merger levels, rather than to the point at which it can no longer be said to be substantially less than it was before the merger. Notably, no transitional provisions are associated with the new remedial standard, meaning that the Tribunal could apply the new standard to any matter put before it, even if the transaction closed or was notified prior to the enactment of Bill C-59. As a result of this amendment, remedy negotiations with the Bureau will now also require parties to offer and agree to remedy packages that restore competition to pre-merger levels.

Bill C-59 has also established an immediate and automatic prohibition on closing a merger when the Bureau applies for an interim order to enjoin closing (either under section 100 or 104 of the Act), until the injunction has been heard and disposed of by the Tribunal. It is also arguable that this change will allow private parties to stall a merger through the filing of a section 104 application. Specifically and as discussed in greater detail below, Bill C-59 has opened the Act's civil collaboration provision under section 90.1 to private actions and allows private parties to seek injunctive relief under section 104 in connection with such actions. While section 90.1 does not explicitly refer to mergers and the Bureau has never used it as an alternative merger remedy, its terms are broad enough to capture such agreements.[12] As such, if a section 104 order is sought in connection with an application under section 90.1, and provided that the merger is an agreement that comes within the ambit of section 90.1, this will trigger the automatic closing prohibition.

## B) Private Enforcement under the Act

Bill C-59 has expanded the scope for private enforcement under the Act, by extending the right of private access to cover civil collaborations (section 90.1) and deceptive marketing practices (section 74.01). In addition to expanded access, private applicants will also have a new, lower test to meet to obtain leave from the Tribunal to bring an application.

For refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79), and civil collaborations (section 90.1), leave may be granted where only part of an applicant's business is affected, or if the Tribunal determines it is in the "public interest" to grant leave. The latter option for granting leave, the "public interest" test, is entirely new to private competition litigation under the Act while the former option is a substantial reduction to the current leave standard, which requires an applicant to demonstrate that its entire business is directly and substantially affected by the agreement. For deceptive marketing practices (section 74.01), leave may be granted only where the Tribunal is satisfied that it is in the public interest to do so.

Potential disgorgement awards for private litigants have also been added for applications under sections 75, 76, 77, 79, and 90.1. Where the Tribunal finds in favour of a private applicant, it can order disgorgement in an amount up to the value of the benefit derived from the conduct at issue, to be distributed amongst the private applicant and any other person affected by the conduct. As part of the federal government's consultation process, the absence of strong financial incentives was cited as a primary driver behind the lack of private competition litigation in Canada to date.[13] While it remains to be seen whether disgorgement opportunities are sufficient to incentivize private enforcement, the introduction of private disgorgement itself marks a major departure from past practice where financial penalties, to the extent they could be ordered, were limited to administrative monetary penalties ("**AMPs**") payable to the Bureau.

The amendments related to private access under the Act do not come into effect until June 20, 2025.

## C) Strengthening Civil Prohibitions on Anti-Competitive Agreements

Amendments in Bill C-56 to expand the scope of the Act's civil collaborations provisions (section 90.1) came into effect on December 15, 2024, which marked the one year anniversary of the passage of Bill C-56. In its previous form, section 90.1 applied only to agreements that include actual or potential competitors. In its new form, both an agreement between competitors (without reference to its purpose) and any other agreement (regardless of the competitive relationship between the parties) for which "a significant purpose" is to prevent or lessen competition in any market may be subject to Bureau enforcement and / or remedial orders by the Tribunal.

Notably, an infringement may occur where only "part of" the agreement has a significant purpose to prevent or lessen competition (rather than the entire agreement) and the purpose is to "prevent or lessen competition", a lower standard than the *substantial* prevention or lessening of competition that applies elsewhere in the Act.

What constitutes a "significant purpose" is an ambiguous concept. The term is not defined in the Act, does not appear elsewhere in the Act or in any other federal legislation, and has never been judicially considered in Canada. Parliamentary debates in respect of Bill C-56 offer no meaningful assistance in interpreting the term — they simply indicate that the amendments sought to target all agreements "aimed at reducing competition", even where the agreeing parties were not competitors.[14] It is similarly unclear how the Bureau or, when the right to private access comes into effect in June 2025, a private litigant will divine whether the purpose of the agreement was to prevent or lessen competition. All of these points will need to be clarified as part of the Bureau's guidance or by the Tribunal once it has an opportunity to adjudicate these provisions.

Bill C-59 has further broadened the scope of the Act's civil collaboration prohibitions by enabling the Tribunal to make orders in respect of past agreements or arrangements, provided they have not been terminated for more than three years. Whereas voluntary cessation of an agreement or arrangement that violated section 90.1 was previously sufficient to shield parties to the agreement or arrangement from enforcement, putting an end to problematic agreements or arrangements may no longer be enough to insulate parties from liability.

Moreover, the cost of non-compliance has increased for parties to an impugned agreement. In addition to prohibition orders (which the Tribunal previously had jurisdiction to make), the Tribunal can now also impose structural orders, such as the divestiture of assets or shares, or AMPs of up to the greater of (a) $10 million (or $15 million for subsequent infringements), or (b) three times the value of the benefit derived from the agreement or arrangement or, if that amount cannot be reasonably determined, up to 3% of the person's annual worldwide gross revenues.

Since its introduction in 2009, only two applications have been brought under section 90.1, both of which were resolved by consent agreements.[15] Together with the introduction of a right of private access (discussed in the previous section), the scope for public and private enforcement of the Act's civil collaboration provisions has been significantly enhanced; however, it

remains to be seen whether these changes will have the intended effect of increasing enforcement activity.

## D) Environmental Claims

### i) Deceptive Marketing

While environmental claims have always been subject to the Act's deceptive marketing regime, Bill C-59 introduced two express violations where a person makes a representation to the public:

a) in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on an adequate and proper test; or

b) with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology.

With respect to the first provision, this amendment simply clarifies for advertisers that such statements will generally be assessed in the same way as performance claims (consistent with the number of cases related to environmental claims already brought by the Bureau under the civil deceptive marketing provisions). That said, the new statutory language, which expressly includes statements regarding the social or ecological dimensions of climate change, may arguably broaden the scope of the deceptive marketing regime.

The second provision, which requires "adequate and proper substantiation" for statements about a "business or business activity", significantly broadens the scope of reviewable conduct, which was previously restricted to statements about a product. Instead of an adequate and proper test standard as exists under the Act's deceptive marketing regime, the new provisions require adequate and proper substantiation in accordance with internationally recognized methodology. Preliminary guidance on these provisions, including the scope of enforcement and what constitutes an internationally recognized methodology, was provided by the Bureau as part of draft guidelines[16] published in December 2024, which were subject to a consultation process that ended on February 28, 2025.

### ii) Environmental Certificates

The Act now contains a certification mechanism, by which the Bureau can certify certain environment-related agreements and exempt them from the criminal and civil collaboration provisions of the Act. Private parties are able to request a certificate from the Bureau, which certificate can last up to a maximum of 10 years (subject to extensions by the Bureau), that authorizes a proposed environmental collaboration subject to any terms imposed by the Bureau in the certificate. In order to grant such an exemption, the Bureau must be satisfied that (a) the agreement is made for the purpose of protecting the environment; and (b) the agreement is not likely to prevent or lessen competition substantially.[17]

From a procedural standpoint, the Bureau must consider such a request as soon as practicable, though there is no set timeline. When applying for the certificate, parties must provide relevant information at the Bureau's request. Once issued, the certificate must be registered with the Tribunal and thereafter, the conspiracy, bid-rigging, and civil collaborations provisions of the Act will not apply with respect to the sanctioned agreement.

Given that this new mechanism provides no safe harbour for collaborative agreements that the Bureau determines are either not made for the purpose of protecting the environment or are likely to prevent or lessen competition substantially, it is unclear how private parties contemplating such collaborations are incentivized to come forward and seek a certificate. This is particularly so in light of the existing alternatives available under the Act which serve to insulate some environmental collaborations from the Act's criminal provisions. For example, the "ancillary restraints defense" protects anti-competitive agreements that are ancillary to a broader legitimate agreement and are reasonably necessary for achieving the objective of that broader agreement.

## E) Updates to Price Representations

The Act's restriction on drip pricing was previously silent as to which obligatory charges or fees could be excluded from the upfront price of a product or service, allowing sellers to exclude their own regulatory charges or fees from the upfront price. In its amended form, the restriction specifies that the charges or fees that can be excluded from the upfront price of a product or service are only those imposed directly on the purchaser by law, effectively requiring sellers to use "all in pricing".

With respect to ordinary price selling, the amendments have shifted the onus from the Bureau onto sellers or advertisers to prove that any discounts being offered are not false or misleading. In its submissions to the Minister's consultation process, the Bureau cited evidentiary difficulties in establishing violations and argued that the onus should be on sellers to prove that they have met the required volume or time related tests under section 74.01(3).[18]

### F) Introduction of a Right of Repair

The Act now includes an express right to repair, preventing manufacturers from refusing to provide to third-parties the "means of diagnosis and repair" so long as doing so does not require disclosure of any trade secrets. Under the Act, means of diagnosis and repair is defined as any diagnostic, maintenance, repair and calibration information, technical updates, diagnostic software or tools and any related documentation and service parts.

### G) Protection Against Reprisal Actions

A new civil regime has been introduced whereby the Commissioner or an affected party can apply to the Federal Court or provincial superior court for a prohibition order and/or an administrative monetary penalty to protect those who assist the Commissioner from retaliatory conduct intended to "penalize, punish, discipline, harass or disadvantage" their cooperation.

## III. Competition Bureau Enforcement Activity

### A) Mergers

#### i) Bureau approves purchaser for divestiture assets from Secure/Tervita transaction

On February 5, 2024, the Bureau announced its approval of R360 Environmental Solutions Canada Inc., an affiliate of Waste Connections, Inc., as the buyer of 29 facilities owned by Secure Energy Services ("**Secure**").[19] Secure acquired these facilities as part of its acquisition of Tervita Corporation, a competing supplier of oilfield waste services in the Western Canadian Sedimentary Basin.

Secure and Tervita closed their merger on July 2, 2021, following which the Bureau initiated proceedings to challenge the merger before the Tribunal. Secure was ultimately ordered to divest these facilities by the Tribunal in a March 2023 decision in order to resolve a substantial lessening of competition found in 136 markets.[20] Secure's appeal of the Tribunal's decision was dismissed by the Federal Court of Appeal ("**FCA**") in August 2023,[21]

and its application for leave to appeal the FCA's decision to the Supreme Court of Canada was dismissed in February 2024.[22] The Bureau concluded that the divestiture of these facilities, which includes 17 treatment, recovery, and disposal facilities, four standalone water disposal wells, six landfills and two caverns, would reintroduce competition for oilfield waste services in the Western Canadian Sedimentary Basin.

### ii) Bureau reaches consent agreement with Béton Provincial regarding its acquisition of the ready-mix concrete business of CRH Canada Group Inc

In March 2024, the Bureau entered into a consent agreement with Béton Provincial to address competition concerns resulting from its acquisition of the Québec-based concrete operations of CRH Canada Group Inc.[23] Béton Provincial, headquartered in Québec City, operates concrete production assets, ready-mix concrete batch plants and quarries for aggregates in Québec, Ontario and New Brunswick. The Bureau's review concluded that the transaction would likely result in a substantial lessening of competition for the supply of ready-mix concrete in the Laurentides, as a result of a loss of rivalry between the parties' ready-mix concrete batch plants in the region.[24] Under the consent agreement, Béton Provincial is required to divest CRH's plant in Mont-Tremblant along with associated operating assets, employees and customer contracts to an independent purchaser approved by the Commissioner of Competition.

### iii) Report to the Minister of Transport regarding the Bunge/Viterra Merger

On April 23, 2024, the Bureau released its report to the Minister of Transport concluding that Bunge Limited's ("**Bunge**") proposed acquisition of Viterra Limited ("**Viterra**") would likely result in substantial anti-competitive effects and a significant loss of rivalry between two key competitors in key agricultural markets in Canada.[25]

Under section 53(1) of the *Canada Transportation Act*,[26] transactions involving a transportation undertaking that are notifiable under the Act must be concurrently notified to the Minister of Transport. Where the Minister of Transport initiates a public interest review of the transaction, as it did in this case, the Bureau loses jurisdiction to challenge the transaction and, instead, assumes a consultative role in the public interest review by reporting on any competition concerns associated with the transaction.

The Bureau's analysis considered the competitive effects of a combination of Bunge and Viterra on the markets for the origination of grain and the production and sale of oilseed products as well as the competitive effects upon the market for handling of grain at terminal elevators at ports as a result of the combination of Viterra's terminal elevator operations with Bunge's existing minority interest in the G3 group of companies ("**G3**"), which operates terminal elevators at some of the same ports as Viterra.

With respect to the market for grain origination, the Bureau concluded that the transaction would result in Bunge acquiring Western Canada's largest grain elevator company, resulting in a substantial lessening of competition for the purchase of canola in the areas around Altona, Manitoba and Nipawin, Saskatchewan. The Bureau also noted that the transaction could harm competition with respect to pricing, innovation, entry, and quality of service in local areas where G3 (which is also active in the grain origination market) and Viterra compete. With respect to oilseed production, Bunge and Viterra own two of three canola crushing plants in Eastern Canada. As such, the Bureau concluded that, following completion of the transaction, Bunge would have an increased ability to limit the supply of refined canola oil products to customers it perceives to be its competitors in downstream markets for oil distribution and further processing.

Finally, with respect to terminal elevator operations at ports, the Bureau concluded that, notwithstanding the potential for Bunge to influence G3's competitiveness with respect to entry, expansion and innovation as a result of its minority interest, the transaction would be unlikely to result in a SPLC with respect to the use of terminal elevator capacity in any relevant area in Canada as a result of effective remaining competition and significant excess capacity.

In January 2025, the Minister of Transport announced the approval of Bunge's acquisition of Viterra, subject to terms and conditions aimed at protecting competition in the Canadian grain and oilseed sector.[27] The terms and conditions include:

- Bunge's divestiture of six grain elevators in Western Canada;
- Strict and legally binding controls on Bunge's minority ownership stake in G3;
- A price protection program for certain purchasers of canola oil in Central and Atlantic Canada;

- Retaining Viterra's head office in Regina for a minimum of five years; and

- A binding commitment from Bunge to invest at least $520 million in Canada within the next five years.

### iv) Bureau reaches consent agreement with Bell Media Inc regarding its acquisition of Outedge Media Canada LP

In June 2024, the Bureau entered into a consent agreement with Bell Media Inc. ("**Bell**") in connection with its acquisition of Outedge Media Canada LP ("**Outedge Canada**") to resolve competition concerns over outdoor advertising services in Ontario and Québec.[28] Both Bell, a communications and media company servicing residential, business and wholesale customers, and Outedge Canada provide outdoor advertising services using their respective inventories of billboards, street furniture and transit displays. The Bureau analyzed advertisers' willingness to substitute across different media types (e.g. television, radio, online) and across different out-of-home mediums and concluded that the relevant product market was no broader than the sale of outdoor advertising services.[29]

The Bureau's investigation concluded that the merger was likely to substantially lessen competition for outdoor advertising services in Québec City, Trois-Rivières, Sherbrooke, the Greater Montréal Area and the Greater Toronto Area, where there are a limited number of rival suppliers and other providers face significant barriers to entry or expansion, such as strict by-laws and lengthy permitting processes.[30] Under the consent agreement, Bell was required to divest a total of 669 advertising displays, including digital displays, across the five markets. In designing the remedy, the Bureau gave consideration to the parties' respective portfolio of displays to ensure that the divestiture purchaser would acquire a sufficiently diverse set of assets to effectively compete with Bell across these markets.

### v) Bureau approves National Bank of Canada's acquisition of Canadian Western Bank

In September 2024, the Bureau cleared National Bank of Canada's $5 billion acquisition of Canadian Western Bank, both of which are Schedule 1 banks under the *Bank Act*. This marks the second Canadian bank merger to receive Bureau approval in the past three years, the other being Royal Bank of Canada's 2022 acquisition of HSBC Bank Canada which involved a lengthier review by the Bureau. The transaction received approval from the Minister of Finance and Office of the Superintendent of Financial

Institutions in December 2024, clearing the way for the transaction to close in 2025.

### vi) Bureau reaches consent agreement with TransAlta Corporation regarding its acquisition of Heartland Generation

On November 13, 2024, the Bureau entered into a consent agreement with TransAlta Corporation ("**TransAlta**") to resolve concerns regarding the substantial lessening of competition in Alberta's wholesale electricity market that would have resulted from its acquisition of Heartland Generation ("**Heartland**").[31] Both TransAlta and Heartland are power generators and marketers of electricity with a portfolio of generation assets in Alberta.

All electricity supplied into Alberta's electricity grid is sold through Alberta's wholesale electricity market operated by the Alberta Electricity System Operator ("**AESO**"). For each hour of the day, electricity generators make offers that set out the amount of electricity they are willing to generate from a particular generation asset and a price based on the expected supply and demand for the hour. AESO then sorts and dispatches offers from the lowest-priced offer to the highest-priced offer for each hour of the day until all electricity required to meet demand in the hour has been dispatched. The Bureau's review of the transaction focused on TransAlta's post-transaction ability to increase the wholesale price of electricity within any given hour using a practice known as economic withholding, whereby electricity generated from an asset is offered at a higher price to reduce the likelihood that such electricity will ultimately be dispatched to satisfy demand.

The Bureau concluded that TransAlta would have the ability and incentive to engage in economic withholding of all or a portion of the electricity generated from Heartland's simple cycle gas plants (also known as "peaking" units) during hours where renewable sources of electricity were insufficient to meet demand, thereby raising the wholesale price of electricity to the benefit of the balance of TransAlta's portfolio of generating assets.[32] Based on its merger simulation economic model, the Bureau concluded that the hours in which price impacts were likely to be greatest were summer super-peak hours (5am-8am & 5pm-12am) and all hours during winter months, during which demand for electricity is high and the availability of wind and solar power tends to be lower. Notably, the Bureau considered the parties' share of total generating capacity in Alberta but concluded that, in this market, market shares were not an accurate measure of market power.

Under the consent agreement, TransAlta agreed to divest its interests in the Poplar Hill, Rainbow Lake 4 and Rainbow Lake 5 generation facilities

being acquired from Heartland, two of which are "peaking" units upon which the Bureau's theory of harm was predicated.

#### vii) Bureau obtains first remedy related to a structural presumption merger in RONA Inc's acquisition of All-Fab Building Components LP

On December 23, 2024, the Bureau entered into a consent agreement with RONA Inc. ("**RONA**") in respect of its acquisition of All-Fab Building Components LP ("**All-Fab**") to remedy concerns related to competition for the design, manufacture and supply of roof and floor trusses in Saskatoon, Saskatchewan.[33] Both RONA and All-Fab are manufacturers of roof and floor trusses and distributors of building materials under multiple banners.

The Bureau's review focused on two geographic areas – namely, Edmonton, Alberta and Saskatoon, Saskatchewan.[34] While the Bureau found sufficient competitive discipline in Edmonton, the Bureau concluded that the parties' post-transaction market share would exceed 30% in some geographic market scenarios in Saskatoon and that the concentration index (i.e., the HHI) exceeded 1800 and increased by more than 100 under any geographic market scenario, such that the structural presumption in subsection 92(3) of the Act was likely met in the Saskatoon area. The Bureau also concluded that competitive discipline upon the parties was limited and barriers to entry were high as a result of limited access to truss designers and qualified staff, cost of equipment, access to relationships with suppliers and the need to build a reputation of quality service with customers.

To remedy the Bureau's concerns, RONA agreed to divest the truss manufacturing facility owned by its banner ZyTech Building Systems located in Martensville, Saskatchewan (a city immediately north of Saskatoon) to a third party purchaser approved by the Bureau. This is the first time that the Bureau relied on the rebuttable structural presumption in taking action to remedy an anti-competitive merger.

### B) Abuse of Dominance

#### i) Bureau reaches consent agreement with the Yukon Real Estate Association regarding its membership requirements

On April 25, 2024, the Bureau announced that it had entered into a consent agreement with the Yukon Real Estate Association (the "**YREA**"), a trade association representing real estate agents and salespeople in the Yukon. [35] Members of the association have exclusive access to the Multiple

Listing Service ("**MLS**") for viewing listings and conducting brokerage services. The consent agreement resulted from the Bureau's investigation into the YREA's membership practices, which revealed that the YREA engaged in anti-competitive acts by requiring prospective members to reside in the Yukon for one year before becoming eligible for membership. By implementing and enforcing this residency requirement, the Bureau concluded that the YREA created barriers to new competition, particularly for alternative business models and fee structures. Ultimately, the Bureau determined that the YREA's conduct likely resulted in a substantial lessening of competition for MLS-based residential real estate brokerage services in the Yukon, in violation of the Act's abuse of dominance provisions.

Among other things, the consent agreement prohibits the YREA from requiring that members be physically present in, or have a representative physically present in, the Yukon and prevents the YREA from enforcing discriminatory policies against non-resident members. [36]

This YREA investigation bears a close resemblance to the Bureau's examination of the membership practices of the Northwest Territories Association of Realtors (the "**NWTAR**") in late 2023.[37] In that case, the Bureau found that the NWTAR had engaged in anti-competitive behavior by denying membership to individuals attempting to compete remotely with its existing members. Consequently, NWTAR and the Bureau entered into consent agreement, prohibiting the NWTAR from enforcing discriminatory membership practices. [38]

### ii) Bureau advances its investigation into Kalibrate's gas and pricing services

In July 2024, the Bureau obtained a court order in connection with its inquiry into Kalibrate Canada Inc. ("**Kalibrate**"). Kalibrate provides data services, including competition intelligence, location consulting, and pricing services, to the retail gas industry. Through its investigation, the Bureau is looking to determine whether Kalibrate's services have an adverse effect on competition between gas stations in Canada, in a manner contrary to the restrictive trade practices and abuse of dominance provisions of the Act. The court order requires Kalibrate to produce records and information relevant to the Bureau's investigation.

### iii) Bureau advances its investigation into the Canadian Real Estate Association's policies

In October 2024, the Bureau obtained a court order to advance its inquiry into potential anti-competitive conduct by the Canadian Real Estate Association ("**CREA**"). [39] CREA is an industry association representing over 160,000 real estate brokers, agents, and salespeople working through 65 real estate boards and associations across Canada. The Bureau's investigation is focused on CREA's commission rules and its "REALTOR Cooperation Policy". Specifically, the Bureau is examining whether: (i) CREA's commission rules discourage buyers' realtors from competing to offer lower commission rates or affect competition in other ways, which could result in less competition and higher costs for both buyers and sellers; and, (ii) CREA's Realtor Cooperation Policy makes it more difficult for alternative listing services to compete, reduces competition among realtors, or gives larger real estate brokerages an unfair advantage over smaller ones.

CREA's commission rules mandate that sellers' agents offer compensation to buyers' agents for properties listed on an MLS system, while its REALTOR Cooperation Policy requires residential real estate listings to be placed on an MLS system within three days of being marketed to the public, with some exceptions. The court order compels CREA to produce records and information pertinent to the Bureau's investigation. In response, CREA has asserted that "its rules and policies are both pro-competitive and pro-consumer," but that it, nonetheless, intends to cooperate with the Bureau. [40]

In parallel, the Bureau has invited stakeholders—home buyers, sellers, realtors, and other market participants—to share their experiences regarding real estate commissions and CREA's policies within the Canadian real estate market.

### iv) Bureau advances its investigation into Dye & Durham's business practices

In November 2024, the Bureau obtained a court order to gather information and further an ongoing investigation into alleged anti-competitive conduct by Dye & Durham Limited ("**Dye & Durham**"). [41] Dye & Durham offers legal software products and services, including conveyancing software designed to assist legal practitioners with residential real estate transactions. The Bureau's investigation is focused on whether Dye & Durham has engaged in practices that harm competition in Canada's conveyancing software industry. The alleged anti-competitive behavior under scrutiny includes, but is not limited to: refusing to allow third-party conveyancing

software to interoperate with Dye & Durham software; tying or bundling of Dye & Durham's conveyancing software with other Dye & Durham software; exclusive dealing with suppliers; and preventing customers of Dye & Durham conveyancing software from switching to third-party conveyancing software.

The court order requires Dye & Durham to produce records and written information relevant to the Bureau's investigation. In a public statement, Dye & Durham raised concerns regarding the Bureau's allegations, stating that "the Bureau's filing materials improperly contextualize commercial relationships and standard industry practices in software and data services, such as subscription and contract terms, discounted pricing, and product suite offerings". [42]

### v) Bureau files application with the Tribunal alleging anti-competitive conduct against Google regarding its online advertising

On February 29, 2024, the Bureau obtained a court order requiring Google to produce records and written information relevant to the Bureau's ongoing investigation into Google's advertising practices in Canada.[43] The Bureau's investigation, which commenced in 2020, concerns claims that Google has engaged in certain practices that harm competition in the online display advertising industry in Canada. Originally focused on allegations that Google was leveraging its market power in the supply of video advertising in the market for advertiser buying tools, the scope of the investigation shifted to determining whether Google is leveraging its market power across display advertising technology services and using predatory pricing in certain display advertising technology services.

On November 28, 2024, the Bureau filed an application with the Tribunal, alleging that Google engaged in anti-competitive conduct in online advertising in Canada.[44] In its application, the Bureau requested an order that, among other things, would require Google to sell two of its advertising tools, direct Google to pay an administrative monetary penalty, and prohibit Google from continuing to engage in anti-competitive conduct.

The United States Department of Justice brought a case against Google in January 2023 for similar conduct, alleging that Google monopolized the market for search advertising.[45] The case was heard before the Federal District Court of Virginia in November 2024.[46] As at the end of 2024, a decision had not yet been issued.

## C) Bid-Rigging and Conspiracy

### i) Sentences imposed and settlements reached in bid-rigging case for asphalt contracts in Granby region

On January 15, 2024, the Bureau announced that that it had entered into a settlement agreement with Construction DJL Inc., requiring the company to pay $1.5 million in connection with its engagement in alleged bid-rigging for ministère des Transports du Québec paving contracts in the Granby region of Québec.[47] As a result of its alleged participation in the scheme from 2008 to 2009 with competitors Sintra Inc. and Pavages Maska Inc. to submit rigged bids, the company was also ordered to follow its corporate compliance program and to maintain appropriate control procedures to ensure its effectiveness. This settlement takes into account that the individuals involved in the scheme no longer work for the company as well as Construction DJL's previous reimbursement of overpayments related to the bid-rigging scheme through the Québec government's Voluntary Reimbursement Program.

On May 23, 2024, the Bureau announced that it had also reached a settlement with Pavages Maska Inc. in connection with the same bid-rigging scheme in the Granby region, ordering the company to pay $100,000.[48] Pavages Maska's settlement took into account that the individuals involved in the scheme had a limited role and no longer worked for the company as well as Pavages' implementation of a corporate compliance program and appropriate control procedures.

Further, in September 2023, charges were laid against two individuals in connection with the alleged conspiracy, Serge Daunais, formerly vice-president of Pavages Maska Inc., and Marcel Roireau, vice-president of operations for Construction DJL Inc.[49] On September 5, 2024, the Bureau announced that Mr. Roireau had been sentenced to twelve months house arrest after pleading guilty to his involvement in rigging bids for asphalt contracts in the Granby region from 2008 to 2009.[50] On January 14, 2025, the Bureau announced that Mr. Daunais had pleaded guilty for his involvement in the bid-rigging conspiracy and was ordered to pay a $20,000 fine.[51]

### ii) Individual sentenced in bid-rigging case for public contracts in Québec

On October 28, 2024, the Bureau announced that André Côté, a former executive for engineering firm Roche ltée, Groupe-conseil (now Norda Stelo), had been sentenced as a result of his participation in a bid-rigging

conspiracy in Québec.[52] Evidence gathered by the Bureau found that Mr. Côté participated in a bid-rigging scheme between September 1, 2006 and November 19, 2010, in which several individuals employed by consulting engineering firms conspired to divide municipal infrastructure contracts in Québec City among the firms. The former executive received a 14-month conditional sentence, consisting of seven months house arrest and a seven-month curfew. He is also required to complete 100 hours of community service. Mr. Côté was one of two individuals originally charged in November 2023 in connection with the bid-rigging conspiracy.[53]

## D) Deceptive Marketing and Misleading Advertising

### i) Bureau reaches a consent agreement with SiriusXM Canada over subscription price advertising

On June 5, 2024, the Bureau entered into a consent agreement with SiriusXM Canada ("**Sirius**"), concluding the Bureau's drip pricing investigation into Sirius' subscription price representations.[54] The Bureau alleged that Sirius advertised its satellite radio and streaming subscription plans at prices that were not attainable due to an additional mandatory Music Royalty and Administrative Fee, which increased the monthly cost of a plan by 10-20% above the advertised price. As part of the consent agreement, Sirius agreed to pay a $3.3 million administrative monetary penalty as well as an additional $30,000 to cover the cost of the Bureau's investigation. Sirius also agreed not to engage in drip pricing, nor promote subscription plans at prices that were not attainable. The consent agreement further required Sirius to enhance its compliance program and implement new procedures to comply with Canadian competition laws.

### ii) Bureau obtains a second court order in its Amazon investigation

On June 12, 2024, the Bureau announced that it had obtained a second court order from the Federal Court of Canada to gather information to advance its ongoing investigation into potential false or misleading claims by Amazon.[55] The Bureau's investigation, originally launched in November 2021, concerns claims made by Amazon that may be influenced by reviews and ratings, which could affect how products are ranked and displayed on Amazon's website and mobile app. The court order requires Amazon to produce records and written information that are relevant to the Bureau's investigation into whether these claims raise concerns under the deceptive marketing provisions of the Act.

### iii) Competition Tribunal finds that Cineplex engaged in drip pricing

On September 23, 2024, the Tribunal ruled in the Bureau's favour, finding that Cineplex engaged in drip pricing by adding a mandatory $1.50 fee when customers purchased tickets online, which was not applied to in-person sales.[56] In concluding that the online ticket prices were misleading, the Tribunal ordered Cineplex to pay a $38.9 million administrative monetary penalty, equivalent to the amount Cineplex collected from consumers as a result of the booking fee between June 2022 and December 2023. Cineplex was also ordered to cover a portion of the legal fees and disbursements incurred by the Bureau and was prohibited from engaging in similar deceptive practices for 10 years.[57] This was the first case that required the Tribunal to apply the recently enacted drip pricing provisions of the Act, which came into force in December 2023.

## IV. New Guidelines, Bulletins and Consultations

### A) Immunity and Leniency Programs under the *Competition Act*

On June 19, 2024, the Bureau and the Public Prosecution Service of Canada issued updated Immunity and Leniency Programs guidance to include the new criminal wage-fixing and no-poaching provisions of the Act.[58] The criminalization of wage-fixing and no-poaching agreements was passed in Bill C-19, which came into force on June 23, 2022.[59] The amendments made it *per se* illegal for unaffiliated employers to enter into agreements to fix, maintain, decrease or control wages or terms or conditions of employment, or to solicit or hire each other's employees.[60]

The Immunity and Leniency Program offers immunity from prosecution or lenient treatment to an individual or business who is willing to terminate their participation in serious criminal activity under the Act and provide cooperation to an investigation. The updated guidelines extend this program to conduct that may otherwise fall under the criminal wage-fixing and no-poach provisions of the Act. In particular, they provide that an employer who enters into a wage-fixing or no-poaching agreement that affects Canadian employees, contrary to subsection 45(1.1) of the Act, may seek immunity or leniency under the program. These changes represent the most significant amendments to the immunity and leniency program since the changes in 2018, requiring that prospective immunity and leniency applicants fully disclose the facts and evidence relating to the violation,

including documentary production and recorded witness testimony, before final immunity or leniency is granted.

### B) Enforcement Guidelines on Agreements Between Companies to Protect the Environment

On July 22, 2024, the Bureau issued preliminary guidance on the new environmental certificates program.[61] This new, voluntary pre-approval regime for environmental collaborations enables the Commissioner to issue a certificate insulating parties to an agreement from the application of sections 45, 46, 47, and 49 (covering criminal cartel agreements and bid rigging) and 90.1 (covering civil competitor collaborations that harm competition) of the Act. The new guidance provides that the Bureau can issue a certificate, which will then be registered with the Tribunal, if it is satisfied that the proposed agreement is for the purpose of protecting the environment and does not harm competition (i.e., result in an SPLC). Certificates are only available for proposed agreements, not existing agreements.

The guidelines further outline the process for parties to a potential agreement to apply for an environmental certificate. A request to apply for the program must include the following initial information: (i) a copy of the proposed agreement and a description of the proposed collaboration; (ii) a description of the business rationale; (iii) a description of why the proposed collaboration is necessary to protect the environment; (iv) a complete description of the parties to the proposed agreement; and (v) a description of the products and services relevant to the agreement. Once the request is received by the Bureau, it will then follow up with the parties to seek additional, more specific information about the proposed collaboration. The applicants must provide any information requested by the Bureau regarding the proposed agreement. If it is determined that the certificate was obtained based on incomplete or inaccurate information provided by the parties, it may be found to be invalid.

### C) Draft Enforcement Guidelines on Real Estate "Property Controls"

On August 7, 2024, the Bureau issued draft guidance on the use of property controls in commercial real estate.[62] Competitor property controls are restrictions on the use of commercial real estate. The Bureau's draft guidelines address two common forms of property controls: exclusivity clauses and restrictive covenants. Exclusivity clauses prohibit a landlord from leasing a unit or a piece of land to a company that competes with an existing tenant, or limit what or how products can be sold. Restrictive covenants,

on the other hand, prevent a purchaser or owner of a commercial property from using the location to operate or lease to operators of certain types of businesses that compete with a previous owner. The draft guidance provides that property controls may be enforced under either the abuse of dominance provisions or the anti-competitive collaboration provisions of the Act.

In its guidelines, the Bureau states that it considers there to be limited circumstances where property controls may increase overall competition, and may therefore escape enforcement action under the abuse of dominance regime. In particular, the Bureau's guidelines provide that an exclusivity clause may be pro-competitive if, for example, no retailer would otherwise make an investment to become a key tenant in a new shopping plaza. Provided that the scope of the exclusivity clause does not go further than necessary to encourage new entry or to allow a tenant to make investments to develop their storefront, the Bureau's guidance states that it would consider such a restriction to be justified.

On the other hand, the guidance clarifies that the use of restrictive covenants by dominant firms is considered by the Bureau to be an anti-competitive business practice in almost all cases. Notably, the preliminary guidelines list factors that the Bureau will consider to determine whether a firm, or group of firms in a joint dominance scenario, is dominant, and indicate that the scope of the property control itself (in terms of covered products, competitors or geographic areas) may be taken into account when assessing dominance. Absent any evidence of a pro-competitive justification, the guidelines provide that competitor property controls used by dominant firms will be deemed anti-competitive.

The Bureau's proposed guidelines, however, provide limited insight with respect to its enforcement approach under the expanded section 90.1 framework. The guidelines only confirm that section 90.1 could apply to competitor property controls where there is proof that the agreement has the effect of harming competition and that the Bureau will typically consider all parties to the agreements (i.e., the tenants and lessors) to be the targets of any section 90.1 investigation.

This preliminary guidance was open for public consultation until October 7, 2024. Updated guidance is expected in 2025.

### D) Market Studies Information Bulletin

On October 23, 2024, the Bureau released its Market Studies Information Bulletin, providing general guidance and information on how the Bureau

plans to conduct its market studies following the amendments in Bill C-56.[63] Prior to these amendments, the Bureau could only rely on publicly available information, information already in its possession, and information provided by stakeholders on a voluntary basis in completing its market studies. Now, the Bureau also has the power to apply for a court order to compel a legal person to provide it with relevant information for the completion of a market study.[64] This bulletin was intended to replace the 2018 Market Studies Information Bulletin and, more specifically, provide guidance regarding this new means for the Bureau to access relevant information.[65]

The bulletin also outlines a series of steps that the Bureau will take before launching a market study, including (i) identifying relevant industries; (ii) identifying relevant sectors; and (iii) deciding on the scope of the market study. When identifying relevant industries, the bulletin clarifies that the Bureau is guided by public interest and will seek to identify sectors that are important to the Canadian economy, taking into consideration areas where its resources and expertise may provide the most value. When selecting a sector for the market study, the bulletin further states that the Bureau will ask a series of questions to determine whether carrying out the market study is in the public interest. These questions include, among others: is there behaviour the Bureau is concerned about; will the study be useful for the Bureau's enforcement or advocacy work; and does the Bureau have the resources needed to complete it fully and on time?

Finally, the bulletin provides an overview of how the Bureau launches market studies. First, the Commissioner must consult with the Minister regarding its intention to commence a market study or, in the alternative, the Minister can direct the Commissioner to conduct a market study if they believe it is in the public interest to do so. Following this initial consultation with the Minister, the Bureau publishes proposed terms of reference for the public to comment on as part of the draft market study notice. The public then has 15 days to comment on the proposed terms of reference before the Bureau develops its final terms of reference. Once the Minister approves the final terms of reference, they are published on the Bureau's website and the market study period officially begins. The Bureau must finish its study and publish its findings within 18 months. However, the Bureau can ask the Minister to extend the initial period for up to three more months at a time if issues arise.

The Bureau accepted feedback on the preliminary information bulletin until December 23, 2024. The Bureau intends to publish a final version of the bulletin in March 2025.

## E) Preliminary Guidance on Changes to the *Competition Act*

On November 7, 2024, the Bureau published preliminary guidance on how it plans to enforce the updated mergers and restrictive trade practices provisions of the Act following the amendments in Bills C-56 and C-59.[66] More specifically, the guidelines are broken up into various sections that discuss amendments to the mergers, abuse of dominance, civil anti-competitive collaboration, refusal to deal and private access provisions of the Act. The preliminary guidelines also invite feedback and suggestions on more questions that the Bureau could answer regarding the amendments in updated versions of the guidance.

The mergers section discusses, among others, the new structural presumption, outlining that the Bureau will find it helpful for merging parties to provide detailed data on market shares, if available, as early on as possible in the review process. The guidance further clarifies that the Bureau may consider multiple measures of market share to confirm whether a merger meets the presumption thresholds. The section on mergers also confirms that the Bureau will apply the same general analysis in labour markets as it does in other buyer markets where the merging firms purchase inputs for their business. However, in the context of labour markets, the Bureau will focus on whether the merger will harm competition substantially for workers.

Another section of the preliminary guidance discusses the abuse of dominance amendments. Among other clarifications, this section indicates that the Bureau will not consider high prices on their own to be excessive and unfair pricing under the new provisions of the Act. Instead, it outlines that charging high prices is only an abuse of dominance when it is done by a dominant firm and either meets the definition of an anti-competitive act because it is intended to have certain negative effects on a competitor or an adverse effect on competition, or has the effect of harming competition substantially.

The civil anti-competitive collaboration section of the guidance discusses the expansion of the provision to apply to agreements among non-competitors. The guidance provides examples of agreements that do not involve competitors that may still harm competition and therefore may fall offside of the Act. For example, an agreement between a retailer and supplier providing the retailer a right of last offer (i.e., the opportunity to match a competitor's lower price) may fall offside the Act if the agreement disadvantages competing retailers and makes competition less intense in the market.

The proposed guidance also clarifies that even though efficiencies have been removed as a defence for civil anti-competitive agreements, the Bureau will still consider efficiencies in its analysis as to whether an agreement results in an SPLC, though to a lesser extent than it did previously.

The final sections of the guidance discuss the amendments to the refusal to deal provisions of the Act regarding the refusal to supply a means of diagnosis or repair, as well as the expansion of the private right of access regime. In particular, guidance on the private access regime outlines that the Bureau views private access to the Tribunal as a complement to the Bureau's enforcement of the Act. However, the Bureau also acknowledges that it must make choices as to how to use its limited resources to protect competition in ways that matter most for Canadians.

## F) Public Consultation on the Merger Enforcement Guidelines

On November 7, 2024, the Bureau launched a public consultation, inviting stakeholders to provide comments on the Bureau's proposed updated Merger Enforcement Guidelines following the recent amendments to the merger provisions of the Act.[67] The Merger Enforcement Guidelines are intended to provide general direction on the Bureau's analytical approach to merger enforcement. Accordingly, this consultation is meant to invoke a much deeper analysis (and associated feedback) regarding the application of the amendments to the merger enforcement regime than the feedback requested on the Preliminary Guidance to Changes to the *Competition Act* discussed above. The Merger Enforcement Guidelines were last updated in 2011. Since then, the Canadian landscape for merger review has changed significantly, as has the Bureau's enforcement posture surrounding mergers.

To facilitate stakeholder feedback, the Bureau prepared a discussion paper that outlines possible areas for it to consider in the updated guidelines and initial guiding questions for stakeholders to provide input.[68] In the discussion paper, the Bureau outlines that it intends to adapt the guidelines to, among others: adhere to the recent amendments to the Act; take into account its experiences since 2011 across various industries; include new findings or approaches from developments in economic research; and discuss new features of competition in Canada and international markets, including digital markets and technologies. Overall, the Bureau states that it intends to ensure that the guidelines provide a clear framework and are flexible enough to apply to the varied and changing market settings in Canada.

The Bureau's public consultation ended on January 12, 2025. While submissions were not made public at the time of this writing, it is expected that

many key stakeholders, including the Canadian Bar Association, provided submissions to the Bureau.

## G) Proposed Enforcement Guidelines on Environmental Claims

On July 22, 2024, the Bureau announced the launch of a public consultation to gather feedback on the interpretation of the new environmental claims and greenwashing provisions of the Act.[69] On the same day, the Bureau released Volume 7 of its "Deceptive Marketing Practices Digest", intended to provide interim guidance on how businesses can ensure they stay on the right side of the new environmental claims and greenwashing provisions.[70]

During the consultation period the Bureau received over 200 submissions from a variety of stakeholders. The overwhelming majority of the submissions highlighted the need for the Bureau to provide greater certainty through its draft guidelines as to how it intends to enforce the new greenwashing provisions. Many also raised alarm bells surrounding the potential chilling effect that this lack of certainty, if left unremedied, could have on innovation and environmental ambition for Canadian businesses. In particular, numerous submissions stressed the need for the Bureau to provide guidance on how it intended to interpret the vague and, until now, undefined concept of an "internationally recognized methodology". Further, several stakeholders expressed concern as to how the Bureau's enforcement of the greenwashing provisions will interact with securities regulation surrounding environmental disclosure. Stakeholders further brought attention to the reversal of the burden of proof for proving environmental claims under the new greenwashing provisions. Where previously the Bureau was responsible for proving a claim was misleading, these stakeholders argued that the burden is now on businesses to prove that their environmental claims are valid, leading to concern surrounding the new legal risks this may create for Canadian businesses. The consultation period closed on September 27, 2024.

Following the closing of the consultation period, on December 23, 2024, the Bureau released its proposed guidelines concerning environmental claims (the "**Draft Greenwashing Guidelines**").[71] The Bureau is expected to issue final guidance by June 2025, before the private access regime becomes applicable to these provisions.

As a result of the amendments in Bill C-59, there are now four provisions of the Act that are relevant to the review of environmental claims, two

of which are entirely new. *First*, environmental claims remain reviewable under the false and misleading provisions in paragraph 74.01(1)(a) of the Act, which prohibits a person from making representations to the public that are false or misleading in a material respect for the purpose of promoting a product or business interest.[72] *Second*, environmental claims remain reviewable under the product performance claims provisions of the Act in paragraph 74.01(1)(b), which prohibits a person from making a representation to the public, for the purpose of promoting a product or any business interest, 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 adequate and proper testing.[73] As both of these provisions were in force prior to the amendments, the Draft Greenwashing Guidelines do not shed any new light on their enforcement.

*Third*, environmental claims may be reviewable under a new provision in paragraph 74.01(1)(b.1) of the Act, which prohibits a person from making a representation to the public in the form of a statement, warranty or guarantee of a product or service's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on adequate and proper testing.[74] The proposed guidelines adopt the principles established by the courts and previous Bureau guidance with respect to performance claims (under section 74.01(1)(b)), which must similarly be adequately and properly tested prior to the claim being made.

*Fourth*, environmental claims may be reviewable under a new provision in paragraph 74.01(1)(b.2) of the Act, which prohibits a person from making a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology.[75] In contrast to the test for the environmental benefits of a product or service, the requirement to substantiate claims promoting the "benefits of a business or business activity" with an "internationally recognized methodology" was an entirely new concept and has never been subject to judicial interpretation. The Bureau's draft guidelines are therefore the first and only interpretative guidance regarding this new requirement.

In an effort to provide greater clarification as to what constitutes an "internationally recognized methodology", the Draft Greenwashing Guidelines outline that:

- A methodology that has been recognized in two or more countries will generally be considered by the Bureau to be "internationally recognized", provided it results in adequate and proper substantiation. However, the Bureau does not interpret the Act as requiring that the methodology be recognized by the governments of two or more countries.

- The particular internationally recognized methodology used to substantiate claims must be appropriate for the Canadian context, with regard to factors such as the geography and climate.

- While the Act does not require third party verification, "internationally recognized methodologies often require third party verification."

- The Act does not require businesses to use the "best methodology available" to substantiate claims and, where more than one internationally recognized methodology is available, any such methodology will meet the requirements of the provision.

- If no testing methodology exists for a particular claim, advertisers and businesses may rely on internationally recognized methodologies that "together can create substantiation for the claim, or that are used for substantiating similar claims." Where a business concludes that there is no way to substantiate a claim, "it should avoid making that claim, and instead make claims that it can back up."

- For methodologies required or endorsed by Canadian governments, the Bureau assumes that any such methodologies are consistent with internationally recognized methodologies. However, the Bureau is of the view that responsibility lies with businesses to conduct thorough due diligence to confirm that the government-approved, Canadian methodology is recognized internationally.

These details provide a useful indication of how the Bureau is likely to examine the internationally recognized methodology concept in active enforcement cases, and underscores the continuing importance for companies to ensure that their substantiation efforts are grounded in reputable metrics and/or standards prior to making any promotional statements.

The Draft Greenwashing Guidelines also make it clear that the Act's deceptive marketing provisions, including the new greenwashing provisions, are intended to capture marketing and/or promotional representations made to the public "for the purpose of promoting a product or business interest",

which is consistent with the statutory language. In other words, where a representation is made "*exclusively* for a different purpose, such as to investors and shareholders in the context of securities filings" the Bureau is of the view that such claims fall outside the purview of the Act's deceptive marketing provisions. Similarly, the Bureau has made clear that where information contained in regulatory disclosures is then used in a business's promotional or marketing materials, such claims will fall within the Bureau's likely enforcement scope. There are, however, some grey areas. For example, while some disclosures on environment-related activities may be mandatory, some firms may choose to disclose more than is statutorily required, resulting in questions as to whether such voluntary disclosures were made for the purpose of promoting a business interest.

Finally, the Draft Greenwashing Guidelines confirm that the Bureau will not seek to enforce against any individual or entity for breaches of the new greenwashing provisions prior to their enactment. However, the reassurance that the Bureau will not apply the new provisions retroactively provides no comfort with respect to the other provisions of the deceptive marketing regime. Those provisions, especially the general provisions relating to materially false and misleading statements and the requirement for adequate and proper testing to support performance claims, have been in force for many years, and the Bureau could enforce against claims made prior to June 2024 on that basis; indeed, those provisions were the basis for its greenwashing enforcement activity until Bill C-59 was enacted.

## V. Bureau Submissions and Reports

### A) 2024–2025 Annual Plan: Strengthening Competition for Canadians

In April 2024, the Commissioner released the Bureau's Annual Plan for 2024-2025, entitled "Onwards and Upwards: Strengthening Competition for Canadians."[76] The Bureau's strategic objectives for the year include protecting Canadians through enforcement and promoting competition in Canada.

Regarding enforcement, the Bureau intends to utilize "all of the tools" at its disposal, including recent legislative amendments, to prevent, detect, and address anti-competitive activities. As with the 2023-2024 Annual Plan, the Bureau will position itself to be prepared to bring cases to court and leverage the expertise of the Digital Enforcement and Intelligence Branch to advance its investigations. The Annual Plan also confirms that the Bureau's enforcement efforts will continue to focus on certain sectors of the economy,

including online marketing, telecommunications, financial services, health, and infrastructure. Additionally, it will address deceptive marketing practices related to environmental claims and junk fees, such as drip pricing.

In terms of promoting competition, the Bureau stated that it would encourage policymakers and regulators to adopt pro-competitive policies. The Bureau also intends to advocate for increased competition in key sectors using its new market study powers and aim to create and deepen international and domestic relationships.

### B) Bureau Makes Recommendations to Strengthen Competition in Canada's Financial Sector

In March 2024, the Bureau made a submission in response to the Department of Finance's public consultation concerning competition in the Canadian financial sector.[77] The consultation sought to identify barriers to banking services; improve the acquisition and merger process for banks to foster greater competition; and, explore measures to encourage competition while supporting jobs in the financial sector.[78] Reiterating its findings with respect to the Royal Bank of Canada's acquisition of HSBC Bank Canada, the Bureau noted that Canadian financial services markets are concentrated, with five large banks providing most of the services to Canadians; there are high barriers to entry and expansion in many financial services markets; and, conditions in some financial services markets may facilitate coordinated behavior among firms.

The Bureau put forward two recommendations to promote competition within the financial sector:

- First, the Bureau recommended that the Department of Finance adopt a consumer-driven banking framework aimed at increasing competition and innovation; and
- Second, the Bureau urged policymakers to reconsider the application of the stress test at mortgage renewal for uninsured borrowers, with a view towards allowing more borrowers with uninsured mortgages to benefit from competition among lenders.

Additionally, the Bureau suggested that the Department of Finance consider concentration and market share when assessing future financial transactions and regularly report on competition indicators in Canadian banking.

### C) Artificial Intelligence and Competition Discussion Paper

In March 2024, the Bureau released a discussion paper setting out its preliminary assessment of the implications of artificial intelligence ("**AI**") on competition in Canada.[79] Notably, the discussion paper highlights three key competition-related concerns within the AI industry.

First, the Bureau identifies data as a critical barrier to entry. It states that "participation in AI development markets heavily relies on the ability to access data and compute inputs," noting an emerging market for data providers specifically for AI purposes. The Bureau indicates that both the volume and quality of data are essential for creating competitive AI models from the ground up.[80] Consequently, new entrants may find it challenging to compete against established incumbents who have been developing data collection technologies and collecting user data for years.[81]

Second, the Bureau warns that pricing algorithms might facilitate tacit collusion among competitors. Unlike manual price setting, algorithmic pricing can near-instantaneously integrate significant amounts of competitive information, such as competitor pricing, supply, demand, and customer personal data. The discussion paper cautions that, when multiple competing firms use algorithms to set prices, these systems could theoretically enable competitors to communicate indirectly in ways that enforcers might find difficult to detect.[82]

Lastly, the Bureau notes that vertical relationships play a significant role in AI markets. AI development firms depend on data to train their technologies, while AI deployment firms rely on AI development firms to access these technologies and create new AI products or services. The Bureau observes that competition issues could arise if vertically-integrated firms engage in practices that exclude downstream competitors from the market, such as refusing to supply necessary data.[83]

## VI. Private Applications

### A) *JAMP v Janssen*

On November 20, 2024, the Tribunal dismissed JAMP Pharma Corporation's ("**JAMP**") application for leave to commence an application against Janssen Inc. ("**Janssen**") under the abuse of dominance provisions of the Act.[84] This was the first application considered by the Tribunal since the Act was amended in 2022 to allow private parties to seek leave to bring abuse of dominance claims.[85]

In its application for leave, JAMP alleged that Janssen—in its dominant position with respect to biologic drugs containing ustekinumab—engaged in numerous anti-competitive acts to prevent competitors from launching biosimilar products to its ustekinumab drug product (known as STELARA). In particular, JAMP submitted that Janssen engaged in "sham" litigation and gamed the regulatory system to dissuade the entry of biosimilars, developed a fighting brand to create confusion and uncertainty in the market and delay switching, and engaged in predatory pricing, among other anti-competitive acts. JAMP argued that Janssen's anti-competitive conduct substantially lessened competition in the supply of ustekinumab in Canada.[86] JAMP sought extensive remedies including broad prohibition orders and monetary penalties.[87]

Janssen challenged JAMP's application for leave on the basis that its conduct did not amount to a violation of the Act's abuse of dominance provision. Janssen argued that, in any event, JAMP could not satisfy the leave test as only *part* of its business (i.e., its biosimilar to STELARA)—rather, than its *entire* business—would have been directly and substantially affected any alleged misconduct.[88] In its reply submission, JAMP took the position that the Act's leave test did not require an applicant to show that the entirety of its business was affected but, even where only *part* of its business was directly and substantially affected, an applicant could meet this component of the leave test.[89]

Ultimately, the Tribunal concluded that JAMP did not adduce sufficient evidence to give rise to a *bona fide* belief that an order could be made under the Act's abuse of dominance provisions. That is, the Tribunal found no cogent and credible evidence suggesting that Janssen engaged in anti-competitive behaviour that is contrary to the Act's abuse of dominance regime or that Janssen's conduct could have the effect of substantially lessening or preventing competition in the ustekinumab market.[90]

The Tribunal also found that JAMP did not provide sufficient evidence to support a *bona fide* belief that it was directly and substantially affected in its business by any misconduct.[91] In so doing, the Tribunal determined that the Act does not require that an applicant be directly and substantially affected in its entire business. Even where only part of an applicant's business is directly and substantially affected by the abuse of a dominant position, leave may be granted.[92]

Of note, the Tribunal's decision confirms that, unlike abuse of dominance applications, leave applications raised under the Act's refusal to deal (section

75) and exclusive dealing, tied selling and market restriction (section 77) provisions require that the applicant prove that it is affected in the *entirety* of that competitor's business.[93] This distinction will be done away with once the new leave test comes into effect in June 2025, which provides that for refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79) and civil collaborations (section 90.1), leave may be granted even if only part of an applicant's business is affected, or if the Tribunal determines it is in the "public interest" to grant leave.[94]

### B) *Winston Gaskin v Rogers*

In February 2024, a self-represented litigant, Winston Gaskin, filed a notice of application for leave to commence an abuse of dominance case against Rogers Communications Inc.[95] Mr. Gaskin's proposed notice of application does not detail the alleged anti-competitive conduct. However, the notice sets out the remedies sought, which includes an order: (i) prohibiting the respondents, for a period of 10 years, from engaging in "any practices that pertain to the leasing, ownership, acquisition, operation, procurement, management or supply of telecommunications leasing or infrastructure ownership related to telecommunications and cable, fiber or data centres or other like assets in Western Canada"; (ii) requiring the respondents to pay an administrative monetary penalty; and, (iii) requiring the respondents to pay $40 million in damages. [96]

In April 2024, the Tribunal ordered the court registry to reject the documents tendered by Mr.Gaskin in connection with the leave application.[97] Having regard to the requirements of the Act and the *Competition Tribunal Rules*, the Tribunal determined that Mr. Gaskin's application materials were not properly constituted and materially deficient.[98] The Tribunal made clear that its ruling does not bar Mr. Gaskin from filing acceptable application materials that comply with the statutory requirements.[99]

### C) *Goshen v The Saskatchewan Health Authority and The Ministry of Health*

In October 2024, Goshen Professional Care Inc. ("**Goshen**"), the owner and operator of a private care home in Emerald Park, Saskatchewan, filed a notice of application seeking leave to commence an action against the Saskatchewan Health Authority (the "**SHA**") under the Act's refusal to deal and abuse of dominance provisions.[100] In brief, Goshen entered into an Accountability Agreement with the SHA regarding a pilot project whereby the SHA utilized Goshen's services, providing Goshen 40 long-term care

(publicly funded) residents for their 80-bed home.[101] Goshen alleges that, midway through the contractual period, the SHA unilaterally terminated the agreement, stating that the SHA would be transferring its residents to Goshen's competitor under a new public-private partnership pilot project.[102] The SHA informed Goshen that it was ineligible for the new pilot project because that new project was limited to homes "in Regina".[103] Goshen asserts that, as a consequence of the SHA's actions, its lender required full repayment of the outstanding loans, which ultimately gave rise to insolvency proceedings against Goshen.[104]

Goshen claims that the SHA's rationale for excluding Goshen's private care home from the pilot project was arbitrary and/or designed to wrongfully deprive Goshen of the supply for residents from the public system.[105] In so doing, Goshen alleged that, the SHA, alongside the Ministry of Health, abused its dominant position in the elder care market to deprive Goshen of the supply of care home contracts and residents, and to substantially undermine Goshen's financial viability.[106]

As at January 2025, the SHA and the Ministry of Health had not filed any reply materials and the matter has been paused, pending the Saskatchewan Court of King's Bench decision with respect to concurrent bankruptcy proceedings.[107] The Commissioner, however, has certified that the alleged misconduct is not the subject of any current or former Bureau enforcement action or inquiry.[108]

## VII. Conclusion

The recent amendments to the Act are transformative. The strengthened merger control regime, the broadened scope for private action, and the new provisions addressing non-horizontal anti-competitive agreements, deceptive marketing and environmental claims mark a new era of competition enforcement in Canada. While the newly introduced amendments respond to public calls for stronger competition regulations, they also introduce uncertainty for businesses at a time when the Canadian economy is being tested by geopolitical turmoil.

In 2024, the Bureau's emphasis on public consultations and the development of guidance provided further clarity on practical implications of these changes. In the coming years, the further development of guidance documents, coupled with dialogue between policymakers, businesses, and the Bureau will be crucial in navigating the evolving competition landscape, particularly in the context of international economic instability. It remains to be seen what impact the amendments, and the Bureau's enforcement

priorities, may have on Canada's economic resilience, perhaps most notably with respect to merger review and enforcement in the absence of an efficiencies defence.

## ENDNOTES

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

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

[3] Innovation, Science, and Economic Development Canada, *Future of Canada's Competition Policy Consultation—What We Heard Report* (Ottawa: ISED, 2023), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report> [ISED, *Future of Canada's Competition Policy Consultation*].

[4] *Ibid.*

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

[6] A comprehensive review of the amendments introduced as part of Bill C-56 is available in the Canadian Competition Law Review's 2023 Year In Review publication; see Kevin Wright & Reba Nauth, "2023 Year in Review" (2024) 37:1 Can Competition L Rev at 2, online: <https://cclr.cba.org/index.php/cclr/article/view/849/834>.

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

[8] Competition Bureau Canada, *Merger Enforcement Guidelines* (Ottawa: CBC, 2011) online: <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/merger-enforcement-guidelines>.

[9] Competition Bureau Canada, *Reviewing the merger enforcement guidelines* (Ottawa: CBC, 2024) online: <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/reviewing-merger-enforcement-guidelines>. For a further discussion of this consultation process, see Section IV(f) below.

[10] US, Department of Justice and the Federal Trade Commission, *2023 Merger Guidelines* (18 December 2023) online: <https://www.justice.gov/atr/merger-guidelines>.

[11] Competition Bureau Canada, *The Future of Competition Policy in Canada – Submission by the Competition Bureau* (Ottawa: CBC, 2023) online: <https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada>.

[12] Casey Halladay & Erin Keogh, "Stricter Review of Commercial Agreements

Is Here: The Expansion of Section 90.1 of the Competition Act" (24 June 2024), online: <mccarthy.ca/en/insights/articles/stricter-review-commercial-agreements-here-expansion-section-901-competition-act>.

[13] ISED, *Future of Canada's Competition Policy Consultation, supra* note 3.

[14] "Bill C-56, An Act to amend the Excise Tax Act and the Competition Act", 3rd reading, *House of Commons Debates,* 44-1, No 265 (11 December 2023) at 1300 (Alexis Brunelle-Duceppe).

[15] In 2011, the Bureau filed an application against Air Canada, United Continental and United Airlines alleging that a coordinated arrangement of air services between Air Canada and United Airlines violated section 90.1 of the Act, *supra* note 1. The Bureau entered into a consent agreement with the parties to resolve its concerns, whereby Air Canada and United Continental agreed to refrain from coordinating prices, available seats at each price, and pooling revenue, as well as refrain from sharing commercially-sensitive information. In 2017, the Bureau filed an application pursuant to section 90.1 against HarperCollins, claiming that HarperCollins' agreements with six other publishers to switch their distribution models for e-books from wholesale to agency would result in a substantial lessening of competition. The Bureau and HarperCollins ultimately entered into a consent agreement in January 2018, which permitted retailers to sell the e-books at discounts.

[16] Competition Bureau Canada, *Environmental claims and the Competition Act* (Ottawa: CBC, 2024) online: <https://competition-bureau.canada.ca/how-we-foster-competition/consultations/environmental-claims-and-competition-act>.

[17] The inclusion of the civil collaboration provisions (section 90.1) within the scope of the exemption is also unusual, as section 90.1 requires, as a constituent element, a SPLC. The intent appears to be to provide parties with greater certainty, by having this determination made prior to entering into the agreement, rather than seeing parties implement an initiative and risk enforcement action. But any such certainty is limited, as the Bureau can apply to have the certificate rescinded or varied if it ultimately does result in a SPLC.

[18] ISED, *Future of Canada's Competition Policy Consultation, supra* note 3.

[19] Competition Bureau Canada, "Competition Bureau approves Waste Connections as buyer of 29 Secure facilities to resolve competition concerns" (5 February 2024), online: <canada.ca/en/competition-bureau/news/2024/02/competition-bureau-approves-waste-connections-as-buyer-of-29-secure-facilities-to-resolve-competition-concerns.html>.

[20] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 CanLII 27447 at para 1 (CACT).

[21] *Secure Energy Services Inc v Canada (Commissioner of Competition)*, 2023 FCA 172.

[22] Competition Bureau Canada, "Supreme Court dismisses Secure Energy's application to appeal the successful challenge of Secure and Tervita merger" (26 February 2024), online: <canada.ca/en/competition-bureau/news/2024/02/

supreme-court-dismisses-secure-energys-application-to-appeal-the-successful-challenge-of-secure-and-tervita-merger.html>.

[23] *Commissioner of Competition v Béton Provincial Ltée* (21 March 2024), CT-2024-001, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521258/1/document.do> (registered consent agreement).

[24] Competition Bureau Canada, "Competition Bureau reaches agreement to protect competition for ready-mix concrete in Quebec" (26 March 2024), online: <canada.ca/en/competition-bureau/news/2024/03/competition-bureau-reaches-agreement-to-protect-competition-for-ready-mix-concrete-in-quebec.html>.

[25] 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* (Ottawa: CBC, 2024), online: <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act>.

[26] *Canada Transportation Act*, SC 1996, c 10, s 53(1).

[27] Transport Canada, "Government of Canada announces approval of Bunge Global SA's acquisition of Viterra Limited" (14 January 2025), online: <canada.ca/en/transport-canada/news/2025/01/government-of-canada-announces-approval-of-bunge-global-sas-acquisition-of-viterra-limited.html>.

[28] *Commissioner of Competition v Bell Media Inc* (7 June 2024), CT-2024-005, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521271/1/document.do> (registered consent agreement).

[29] Competition Bureau Canada, *Competition Bureau statement regarding the acquisition by Bell of Outedge Canada* Ottawa: CBC, 2024), online: <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-bureau-statement-regarding-acquisition-bell-outledge>.

[30] Competition Bureau Canada, "Competition Bureau reaches agreement with Bell to protect competition for outdoor advertising in Ontario and Quebec" (10 June 2024), online: <canada.ca/en/competition-bureau/news/2024/06/competition-bureau-reaches-agreement-with-bell-to-protect-competition-for-outdoor-advertising-in-ontario-and-quebec.html>.

[31] *Commissioner of Competition v TransAlta Corporation* (13 November 2024), CT-2024-008, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521312/1/document.do> (registered consent agreement).

[32] Competition Bureau Canada, *Competition Bureau statement regarding its consent agreement with TransAlta* (Ottawa: CBC, 2024), online: <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-bureau-statement-regarding-its-consent-agreement-transalta>.

[33] *Commissioner of Competition v RONA Inc* (20 December 2024), CT-2024-011, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521336/1/document.do> (registered consent agreement).

[34] Competition Bureau Canada, *Competition Bureau statement regarding its review of RONA's acquisition of All-Fab* (Ottawa: CBC, 2024), online: <competition-bureau.canada.

ca/how-we-foster-competition/education-and-outreach/competition-bureau-statement-regarding-its-review-ronas-acquisition-all-fab>.

[35] Competition Bureau Canada, "Competition Bureau reaches agreement to protect real estate competition in the Yukon" (25 April 2024), online: <canada.ca/en/competition-bureau/news/2024/04/competition-bureau-reaches-agreement-to-protect-real-estate-competition-in-the-yukon.html>.

[36] *Commissioner of Competition v Yukon Real Estate Association* (25 April 2024), CT-2024-003, at para 3, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521266/1/document.do> (registered consent agreement).

[37] Competition Bureau Canada, "Competition Bureau reaches agreement to protect real estate competition in the Northwest Territories" (29 November 2023), online: <canada.ca/en/competition-bureau/news/2023/11/competition-bureau-reaches-agreement-to-protect-real-estate-competition-in-the-northwest-territories.html>.

[38] *Commissioner of Competition v Northwest Territories Association of Realtors* (29 November 2023), CT-2023-010, at paras 3-4, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/521234/1/document.do> (registered consent agreement).

[39] Competition Bureau Canada, "Competition Bureau advances investigation into the Canadian Real Estate Association's policies" (3 October 2024), online: <canada.ca/en/competition-bureau/news/2024/10/competition-bureau-advances-investigation-into-the-canadian-real-estate-associations-policies.html>.

[40] The Canadian Real Estate Association, "CREA Responds to Competition Bureau Investigation" (3 October 2024), online: <www.crea.ca/media-hub/news/crea-responds-to-competition-bureau-investigation/>.

[41] Competition Bureau Canada, "Competition Bureau obtains court order to advance an investigation into Dye & Durham's business practices" (7 November 2024), online: <canada.ca/en/competition-bureau/news/2024/10/competition-bureau-obtains-court-order-to-advance-an-investigation-into-dye--durhams.html>.

[42] Dye & Durham, "Dye & Durham Comments on Competition Bureau Investigation" (7 November 2024), online: <dyedurham.com/dye-durham-comments-on-competition-bureau-investigation/>.

[43] Competition Bureau Canada, "Competition Bureau expands its investigation into Google's advertising practices" (29 February 2024), online: <canada.ca/en/competition-bureau/news/2024/02/competition-bureau-expands-its-investigation-into-googles-advertising-practices.html>.

[44] Competition Bureau Canada, "Backgrounder: Competition Bureau sues Google for anti-competitive conduct in online advertising in Canada" (28 November 2024), online: <canada.ca/en/competition-bureau/news/2024/11/backgrounder-competition-bureau-sues-google-for-anti-competitive-conduct-in-online-advertising-in-canada.html>.

[45] Department of Justice, "Justice Department Sues Google for Monopolizing Digital Advertising Technologies" (24 January 2023), online: <justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>.

[46] Jody Godoy & David Shepardson, "Google's US antitrust trial over online ad empire draws to a close" *Reuters* (25 November 2024), online: <reuters.com/technology/googles-us-antitrust-trial-over-online-ad-empire-draws-close-2024-11-25/>.

[47] Competition Bureau Canada, "Construction DJL Inc. to pay $1.5 million for bid-rigging on public contracts in Québec" (15 January 2024), online: <canada.ca/en/competition-bureau/news/2024/01/construction-djl-inc-to-pay-15-million-for-bid-rigging-on-public-contracts-in-quebec.html>.

[48] Competition Bureau Canada, "Pavages Maska Inc. to pay $100,000 for bid-rigging in the Granby region" (23 May 2024), online: <canada.ca/en/competition-bureau/news/2024/05/pavages-maska-inc-to-pay-100000-for-bid-rigging-in-the-granby-region.html>.

[49] Competition Bureau Canada, "The Competition Bureau lays charges against two executives in a bid-rigging case in Montérégie" (19 September 2023), online: <canada.ca/en/competition-bureau/news/2023/09/the-competition-bureau-lays-charges-against-two-executives-in-a-bid-rigging-case-in-monteegie.html>.

[50] Competition Bureau Canada, "One-year sentence for Construction DJL executive who rigged bids for public contracts in Québec" (5 September 2024), online: <canada.ca/en/competition-bureau/news/2024/09/one-year-sentence-for-construction-djl-executive-who-rigged-bids-for-public-contracts-in-quebec.html>.

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[53] Competition Bureau Canada, "Two individuals charged with conspiracy to rig bids for Québec City infrastructure contracts" (14 November 2023), online: <canada.ca/en/competition-bureau/news/2023/11/two-individuals-charged-with-conspiracy-to-rig-bids-for-quebec-city-infrastructure-contracts.html>.

[54] Competition Bureau Canada, "Sirius to pay $3.3 million penalty to settle concerns over subscription price advertising" (5 June 2024), online: <canada.ca/en/competition-bureau/news/2024/06/sirius-to-pay-33-million-penalty-to-settle-concerns-over-subscription-price-advertising.html>.

[55] Competition Bureau Canada, "Competition Bureau continues its investigation into Amazon's marketing practices" (12 June 2024), online: <canada.ca/en/competition-bureau/news/2024/06/competition-bureau-continues-its-investigation-into-amazons-marketing-practices.html>.

[56] Competition Bureau Canada, "Competition Bureau wins deceptive marketing case against Cineplex" (23 September 2024), online: <canada.ca/

en/competition-bureau/news/2024/09/competition-bureau-wins-deceptive-marketing-case-against-cineplex.html>.

[57] *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 CanLII 93716 at paras 488-90 (CACT).

[58] Competition Bureau Canada, "Immunity and Leniency Programs under the *Competition Act*" (19 June 2024), online: <competition-bureau.canada.ca/immunity-and-leniency-programs-under-competition-act>.

[59] 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, 2021, cl 257(1) (assented to June 23, 2022).

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[63] Competition Bureau Canada, "Market Studies Information Bulletin" (last modified 23 October 2024), online: <competition-bureau.canada.ca/how-we-foster-competition/consultations/market-studies-information-bulletin>.

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[72] Act, *supra* note 1, s 74.01(1)(a).
[73] *Ibid*, s 74.01(1)(b).
[74] *Ibid*, s 74.01(1)(b.1).
[75] *Ibid*, s 74.01(1)(b.2).
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# THE EVOLVING COMPETITION LAW LANDSCAPE IN CANADA: WHERE ARE WE NOW?

Chris Margison, Tony Di Domenico and Musa Mansuar

*Recognizing the critical role of the Competition Act in promoting dynamic and fair markets, Canada's Minister of Innovation, Science and Industry, the Honourable François-Philippe Champagne, announced on February 7, 2022 that he would carefully consider ways to modernize and improve its operation. Following this announcement, significant competition law reform has taken place in Canada, including the passage of Bills C-19, C-56 and C-59. All provisions of the Bills are now in force.*

*These Bills include amendments that touch on virtually all facets of competition policy in Canada. According to the Government's 2023 Fall Economic Statement, these amendments are "generational changes" that "will help bring Canada into alignment with international best practices to ensure that our marketplaces promote fairness, affordability, and innovation". Arguably, these amendments are the most significant changes to the Act in almost 40 years—changes that fundamentally alter and transform the competition law landscape in Canada.*

*This article discusses the key changes to the Act in the areas of abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action. In doing so, it answers questions that many have been asking—including where are we now?*

*Reconnaissant le rôle essentiel de la Loi sur la concurrence dans la promotion de marchés dynamiques et équitables, le ministre de l'Innovation, des Sciences et de l'Industrie du Canada, l'honorable François Philippe Champagne, a annoncé le 7 février 2022 qu'il allait réfléchir avec attention aux moyens de moderniser et d'améliorer son application. À la suite de cette annonce, le droit de la concurrence au Canada a subi une réforme importante, notamment l'adoption des projets de loi C-19, C-56 et C-59, dont l'ensemble des dispositions sont maintenant en vigueur.*

*Ces projets de loi comprennent des modifications qui portent sur presque tous les aspects de la politique de la concurrence au Canada. Selon l'Énoncé économique de l'automne de 2023 du gouvernement, elles constituent un « changement générationnel » et elles « permettront au Canada de s'aligner sur les meilleures pratiques internationales afin de s'assurer que les marchés au pays favorisent l'équité, des prix abordables et l'innovation ». Ces modifications constituent sans contredit les changements les plus importants à la Loi*

*depuis les 40 dernières années, lesquels modifient et transforment fondamentalement le portrait du droit de la concurrence au Canada.*

*Les auteurs traitent des principaux changements de la Loi dans les domaines de l'abus de position dominante, de l'examen des fusions, des cartels criminels, de la collaboration entre concurrents, des pratiques commerciales trompeuses et des droits d'action privés. Ils répondent ainsi aux questions que se posent bon nombre de personnes, dont la suivante : Où en sommes-nous maintenant?*

## Introduction

Recognizing the critical role of the *Competition Act* (the "**Act**") in promoting dynamic and fair markets, Canada's Minister of Innovation, Science and Industry, the Honourable François-Philippe Champagne, announced on February 7, 2022 that he would carefully consider ways to modernize and improve its operation.[1] Following this announcement, significant competition law reform has taken place in Canada, including the passage of Bill C-19 on June 23, 2022,[2] Bill C-56 on December 15, 2023[3] and Bill C-59 on June 20, 2024[4] (collectively, the "**Bills**"). All provisions of the Bills are now in force.

The Bills include amendments that touch on virtually all facets of competition policy in Canada. According to the Government's 2023 Fall Economic Statement, these amendments are "generational changes" that "will help bring Canada into alignment with international best practices to ensure that our marketplaces promote fairness, affordability, and innovation."[5] Arguably, these amendments are the most significant changes to the Act in almost 40 years—changes that fundamentally alter and transform the competition law landscape in Canada.

This article discusses the key changes to the Act in the areas of abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action. In doing so, it answers questions that many have been asking—including where are we now?

## I. Abuse of Dominance

### 1) New Framework

The Bills made significant changes to the abuse of dominance provisions, including, most importantly, introducing a new framework that applies a different test depending on the remedy being sought. These changes will have a profound and widespread impact on businesses operating in Canada.

Simply being a dominant firm, or even a monopoly, does not in and of itself engage the abuse of dominance provisions. Rather, the abuse of dominance provisions seek to ensure that a person with market power competes with others on merit—whether by ingenuity, competitive performance or investment—rather than by abusing its market power.

Historically, it was necessary to establish *each* of the following three elements to obtain a remedy under the abuse of dominance provisions:

- **Dominance**: One or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof.

- **Practice of Anti-Competitive Acts**: That person or those persons must have engaged in or be engaging in a practice of anti-competitive acts. As discussed below, an anti-competitive act relates to the "intent" or reasonably foreseeable effects of an action, and is often referred to as the "anti-competitive intent" element of abuse of dominance.

- **Anti-Competitive Effects**: The practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

Bill C-56 introduced the following new framework, which applies a different test depending on the remedy being sought:

- **Prohibition Order**: In order for a prohibition order to be imposed, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in *either* (1) a practice of anti-competitive acts *or* (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require *either* anti-competitive intent *or* anti-competitive effects.

- **Other Remedies**: In order for any additional or alternative orders (such as orders requiring the divestiture of assets or shares) and/or administrative monetary penalties ("**AMPs**") to be imposed, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in *both* (1) a practice of anti-competitive acts *and* (2) conduct (that

> is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require *both* anti-competitive intent *and* anti-competitive effects.

In light of this change, which significantly reduces the standard that must be satisfied to obtain a prohibition order, it will be particularly important for potentially dominant firms to carefully review their business practices to ensure that issues do not arise under the abuse of dominance provisions. For example, many common business practices, such as exclusive dealing, tying and bundling, could potentially raise concerns under these provisions even if they do not result in any meaningful competitive effects in the market.

### 2) Definition of Anti-Competitive Act

Bill C-19 defines the term "anti-competitive act" to mean "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Notably, jurisprudence arising from the abuse of dominance provisions historically held that an "anti-competitive act" is one that is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor in a relevant market. As such, the amendments codify this previously accepted definition, and also close an alleged "loophole" in which dominant firms could escape scrutiny when their conduct harms competition but does not have a negative effect on a competitor.

The *Bulletin on Amendments to the Abuse of Dominance Provisions* (the "**Abuse Bulletin**"), which was released for public comment in October 25, 2023 and is still in draft, discusses the updated definition of "anti-competitive act."[6] In this regard, the Abuse Bulletin notes that, in general, the Competition Bureau (the "**Bureau**") will continue to apply its existing analysis to identify anti-competitive acts, including considering subjective evidence of intent, the reasonably foreseeable consequences of the conduct, and any pro-competitive or efficiency-enhancing justifications for the conduct.[7]

With respect to the addition of "adverse effect on competition", the Abuse Bulletin notes that this should be considered to capture "any form of conduct that has the purpose of negatively affecting the competitive process", such as "conduct that softens competition, benefitting one or more competitors", conduct that reduces firms' abilities or incentives to compete, or conduct that makes conscious parallelism "more likely or effective" or otherwise

facilitates coordination.[8] By way of example, the Abuse Bulletin notes that this may include the following:

- agreements between competitors (such as licensing agreements or joint venture agreements);[9]
- sharing competitively sensitive information (which can include a single firm unilaterally choosing to disclose information; firms sharing competitively sensitive information in a reciprocal manner; competitively sensitive information being shared through intermediaries such as trade associations, joint ventures or pricing algorithm developers; or the use of meet-or-release clauses that result in mutual knowledge of pricing decisions);[10] or
- contracts that reference or depend on rivals (i.e., where a contract contains terms that relate to a different commercial relationship involving at least one of the two contracting parties, such as most favoured nation clauses, price parity clauses, non-discrimination clauses or meet-or-release clauses).[11]

Given the above, it is clear that a wide range of commercial agreements and practices could potentially be viewed as having an intended adverse effect on competition. Again, this re-enforces the need for potentially dominant firms to carefully review commercial agreements and practices—even if they do not result in any meaningful competitive effects in the market.

### 3) List of Anti-Competitive Acts

Subsection 78(1) of the Act include a non-exhaustive list of examples of anti-competitive acts, including, for example, using fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor; pre-empting scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market; and selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Bill C-19 expanded the list of anti-competitive acts in section 78 of the Act to include "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." While the Abuse Bulletin recognizes that this new example may clarify the scope of section 78, it notes that the list under section 78 has always been non-exhaustive and, in the Bureau's opinion, the abuse of

dominance provisions previously applied to this type of conduct.[12] As such, the Bureau is of the opinion that this amendment does not expand the scope of the abuse of dominance provisions.

More importantly, Bill C-56 expanded the list of anti-competitive acts in section 78 of the Act to include "directly or indirectly imposing excessive and unfair selling prices"—something that arose from the government's attempt to address rising prices in the Canadian economy. While this example was added after the Abuse Bulletin was released, the Bureau has issued some preliminary guidance as to when, in its view, charging high prices could potentially raise concerns under the abuse of dominance provisions.[13]

Specifically, the Burau has stated that "[s]imply charging high prices to consumers is not usually an abuse of dominance regardless of how high those prices are", even if it amounts to "price gouging."[14] Rather, charging high prices would only be an abuse of dominance where it is done by a dominant firm and either (1) meets the definition of an anti-competitive act (i.e., is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or an adverse effect on competition) or (2) has the effect of harming competition substantially. In this regard, the Bureau notes as follows:

> If a firm charges too high a price this normally encourages customers to seek out other options which helps its competitors. So, high prices are not normally intended to have a negative effect on a competitor.
>
> Similarly, a firm usually does not charge high prices so that it can adversely affect competition. Firms make investments and take risks in the hope of making profits. High prices may therefore be how a firm is rewarded for those investments or risks. High prices can also attract new firms to enter the market.
>
> …
>
> We expect it will be rare that we investigate claims of excessive and unfair pricing. For us to investigate, we would typically need a credible reason to suspect it is an anti-competitive act or that it has the effect of harming competition substantially. This would include a clear theory of how the pricing harms competition.[15]

While the Bureau expects that investigations of excessive and unfair pricing will be rare, it does provide the following example of when charging excessive and unfair prices could be considered anti-competitive:

> … charging excessive and unfair prices may be an anti-competitive act when [the prices] amount to a "constructive refusal" to supply. A constructive refusal occurs when a firm says it is willing to supply a product, but only in a way that means purchasing it is not a real option, such as because it is too expensive. The outcome is the same as if it simply refused to supply.
>
> A constructive refusal to supply through excessive and unfair pricing can also be a means to achieve other types of anti-competitive behaviour. For example, a dominant firm may tie two products together by charging an excessive and unfair price if they are purchased separately instead of together.[16]

Determining whether pricing falls within the scope of this new example appears to involve consideration of three elements. First, prices must be "excessive". Based on the experience in foreign jurisdictions, determining whether a price is excessive may involve (1) confirming the price that is being or has been imposed; (2) establishing an appropriate benchmark against which the price is to be measured; and (3) determining whether the difference between the actual price and the benchmark is excessive. The benchmarks used by competition authorities to assess whether prices are excessive have included both (a) price-cost comparisons and profitability analyses and (b) price comparisons across geographies, time and/or competitors.[17] Second, prices must be "unfair". While there is no guidance interpreting fairness, it is possible that fairness will be evaluated having regard to the interests of both the buyer and the seller, including (1) the need for a supplier to recover its costs and investments; (2) the commercial risk being borne by the supplier; and (3) any other legitimate reasons for imposing a particular price. Third, prices must be "imposed". Accordingly, prices resulting from negotiations with a purchaser that has significant buying power may not fall within the scope of this example.

### 4) Competitive Effects Factors

Bill C-19 introduced a list of factors to be considered for the purposes determining whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. These factors include (1) the effect of the practice on barriers to entry in the market, including network effects; (2) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy; (3) the nature and extent of change and innovation in a relevant market; and (4) any other factor that is relevant to competition in the market that is or would be affected by the practice.

Notably, the Bureau (and the courts) already considered these factors as part of its analysis under the abuse of dominance provisions. In fact, many of these factors were included in previous guidance from the Bureau. As such, similar to the expanded list of anti-competitive acts discussed above, the Abuse Bulletin confirms that these amendments do not change the Bureau's enforcement approach.[18] However, it does signal that there may be an increased emphasis on the importance of these factors in future abuse of dominance reviews.

Importantly, with respect to consumer privacy, the Abuse Bulletin also confirms that the Bureau does not view the introduction of "consumer privacy" as creating a new, stand-alone goal or purpose for the Act (i.e., protection of privacy), but simply confirms that privacy is a relevant feature of product quality with respect to which firms may compete (e.g., by offering greater privacy protection).[19]

### 5) Increased Administrative Monetary Penalties

Each of Bill C-19 and Bill C-56 increased the size of AMPs available under the abuse of dominance provisions. Prior to these amendments, AMPs could be imposed in amounts of up to $10 million for a first violation and $15 million for subsequent violations. However, these amendments increased the maximum size of the AMPs that can be imposed under the abuse of dominance provisions to the greater of (1) $25 million (or $35 million for each subsequent order under the abuse of dominance provisions) or (2) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

To date, courts and tribunals have upheld the constitutionality of AMPs. For example, in *Canada (Commissioner of Competition) v. Gestion Lebski Inc.*,[20] the Competition Tribunal (the "**Tribunal**") held that the AMPs available for misleading advertising were constitutional. The Tribunal accepted the argument that AMPs were designed to encourage compliance, not to punish. The maximum AMPs, which at the time were $100,000 for individuals and $200,000 for corporations, were not considered large enough to be considered truly penal in nature. As such, the Tribunal held that *Charter* guarantees were not available to defendants subject to the AMPs.

That said, Google Canada Corporation and Google LLC (collectively, "**Google**") recently filed a Notice of Constitutional Question challenging the existing AMP provisions (the "**NCQ**").[21] In its NCQ, Google argues that "the extraordinary financial penalty sought by the Commissioner [in

an abuse of dominance application filed in November 2024]—an amount that could well be measured in the billions of dollars, given the worldwide gross revenues of Google—is a true penal sanction" for which "Google is entitled to the protection in this proceeding of rights guaranteed by the *Charter* and the *Bill of Rights*."[22] The Commissioner subsequently filed a Notice of Motion seeking to strike Google's NCQ in its entirety.[23] In this regard, the Commissioner argues, among other things, that Google's NCQ is premature because "[t]he Tribunal has not yet awarded or even considered the awarding of any AMP, let alone the quantum of such an AMP"; that "Google's position disregards both the jurisdictional limits on the Tribunal's discretion … and the fact that the determination of an appropriate AMP is a context dependent exercise"; and that "Google's motion flies in the face of the presumption that [the] Tribunal will interpret and exercise its discretion under the Act in a way that does not result in *Charter* rights being infringed."[24] It remains to be seen when and how the Tribunal will address Google's NCQ.

Regardless of the outcome of Google's NCQ, the ability of the Tribunal to potentially order the payment of significant AMPs further enforces the need for potentially dominant firms take steps to ensure they do not engage in conduct that could run afoul of the abuse of dominance provisions. This includes, among other things, implementing and/or updating their competition law compliance policies to take into account these "generational changes" to the Act.

## II. Merger Review

The Bills made significant changes to the merger review provisions, including, most importantly, introducing rebuttable structural presumptions and revising the standard for merger remedies. These changes will have a resounding and far-reaching impact on the merger review process in Canada.

### 1) Rebuttable Structural Presumptions

In order to obtain a remedy from the Tribunal, the Commissioner must establish that a merger results in, or is likely to result in, a substantial prevention or lessening of competition (an "**SPLC**"). If the Commissioner is unable to meet this threshold, the Tribunal cannot order a remedy in respect of the merger.

Historically, the Act prevented the Tribunal from finding that a merger results in an SPLC solely on the basis of evidence of concentration or

market share. However, Bill C-59 removed this limitation and, at the same time, introduced what are known as "rebuttable structural presumptions", namely a presumption of anti-competitive effects for mergers where certain market share and/or Herfindahl-Hirschman Index ("**HHI**") thresholds are exceeded. If and when these thresholds are exceeded, the onus shifts to the merging parties to rebut the presumption of anti-competitive effects.

With the passage of Bill C-59, the Act now includes the same structural presumptions found in the *2023 US Merger Guidelines*,[25] which are set out below:

**Table 1**

| Indicator | Threshold for Structural Presumptions |
|---|---|
| Post-merger HHI | Market HHI greater than 1,800<br>AND<br>Change in HHI greater than 100 |
| Merged Firm's Market Share | Share greater than 30%<br>AND<br>Change in HHI greater than 100 |

Importantly, Bill C-59 also provides that "the Governor in Council may by regulation prescribe different values than those provided in [the Act]." This provision appears to address concerns that the structural presumptions are included in guidelines in the US (which can be changed relatively easily) and in legislation in Canada (which is much more challenging to change).

Going forward, it will be necessary for merging parties to carefully review mergers to determine if either of the above thresholds is exceeded. While exceeding the above thresholds will not necessarily be fatal to a transaction, the merger review exercise to secure clearance from the Bureau is expected to be more rigorous and challenging, particularly where concentration levels and/or market shares are high. In this regard, the *2023 US Merger Guidelines* state that "[t]he higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it."[26] This approach may also be adopted in Canada.

## 2) Remedial Standard

The merger provisions allow the Tribunal to order a remedy where it finds that a merger results in, or is likely to result in, an SPLC. Consistent with these provisions, the Supreme Court of Canada held in *Canada (Director of Investigation and Research) v. Southam Inc.* that "the appropriate remedy

for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[27]

Following the passage of Bill C-59, the remedies ordered by the Tribunal will need to restore competition to the level that would have prevailed but for the merger (in the case of a completed merger) or preserve the level of competition that would prevail but for the merger (in the case of a proposed merger), such that *no* lessening or prevention of competition is permitted. This represents a fundamental shift in the approach to merger remedies in Canada—a shift that merging parties will need to carefully consider when negotiating antitrust risk language in their transaction agreements.

It remains to be seen what impact this change will have on the use of and/or approach to consent agreements in the mergers context. In this regard, subsection 105(1) of the Act provides that "[t]he Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under [the merger provisions] may sign a consent agreement." Subsection 105(2), in turn, provides that "[t]he consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person." As such, it appears that the remedies included in a consent agreement must also restore competition to the level that would have prevailed but for the merger (in the case of a completed merger) or preserve the level of competition that would prevail but for the merger (in the case of a proposed merger). That said, the consent agreements filed in connection with the RONA/All-Fab[28] and TransAlta/Heartland[29] transactions state that "the implementation of this Agreement is necessary to ensure that any substantial lessening of competition will not result from the Transaction"—perhaps signalling that the Commissioner is open to remedies in the consent context that do not fully restore or preserve competition in markets in which there is an SPLC.

From a practical perspective, merging parties will want to consider the impact that this new remedial standard may have on their transactions and transaction documents. For example, purchasers that agree to a full "hell or highwater" provision in the context of a transaction that could potentially raise significant competition concerns may now face increased risks.[30] This is because, all else being equal, more assets, revenue, EBITDA, contracts or routes may need to be divested to fully restore or preserve competition in markets in which there is an SPLC than to "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."

### 3) Efficiencies Defence

Bill C-56 repealed the efficiencies defence, which previously prevented the Tribunal from making a remedial order in relation to an anti-competitive merger where it found that the efficiencies likely to arise from a merger were greater than, and would offset, the anti-competitive effects of the merger. When contemplating mergers, businesses must now be cognizant that efficiencies originating from such mergers will no longer be sufficient to save a merger which would otherwise be found to result in an SPLC.

Importantly, efficiencies have not been added as a factor in section 93 of the Act. That said, the Commissioner acknowledged during testimony before the Standing Senate Committee on National Finance that it will continue to be open to the Bureau to consider efficiencies during the merger review process:

> … the pro-competitive efficiencies of a merger could absolutely be considered in the framework of considering whether the merger substantially lessens or prevents competition. There is a line, section 93(h), that allows the Tribunal and, of course, the Bureau, to consider any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger. All our colleagues around the world look at efficiencies in their merger reviews in the sense of whether there are efficiencies that will be pro-competitive or that will enhance rivalry. Yes, we would absolutely look at that, and if they were there, then maybe the merger could go ahead. [31]

Notwithstanding the above, it remains to be seen what types of efficiencies the Bureau is willing to consider as part of the merger review process going forward and how much weight will be given to any such efficiencies.

### 4) Expansion of Relevant Factors When Assessing Competitive Effects

Section 93 of the Act include a non-exhaustive list of factors that the Tribunal may have regard to for the purpose of determining whether a merger is likely to result in an SPLC. Bills C-19 and C-59 have added new factors to this list, including the following:

- "network effects within a market";
- "whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents";

- "any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy";
- "the change in concentration or market share that the merger or proposed merger has brought about or is likely to bring about"; and
- "any likelihood that the merger or proposed merger will or would result in express or tacit coordination between competitors in a market."

As the factors that may be considered by the Tribunal are non-exhaustive and these "new" factors were previously considered by the Bureau and the Tribunal to some degree, this is not a significant change to the law. However, it does signal that there may be an increased emphasis on the importance of these factors in future merger review.

### 5) Labour Considerations

Pursuant to subsection 92(1) of the Act, the Tribunal can make an order where it finds that a merger is likely to result in an SPLC. Bill C-59 amends paragraphs 92(1)(b) and (c) to explicitly state that the SPLC can arise in respect of labour (i.e., "among the sources from which a trade, industry or profession obtains a product, including labour" and "among the outlets through which a trade, industry or profession disposes of a product, including labour"). On a plain reading, this change clarifies that a product would include labour, such that impacts on the competitiveness of labour markets will be considered when evaluating mergers.

It is widely accepted that subsection 92(1) of the Act has always applied to labour markets. That said, as with the additional factors added to section 93, this change signals that there may be an increased emphasis on the importance of labour markets in future merger review.

### 6) Limitation Period

Previously, the Commissioner could challenge a completed merger up to one year after closing (unless the Commissioner had issued an advance ruling certificate in relation to the merger)—regardless of whether the Commissioner was notified of the transaction. Bill C-59 changes this, creating different limitation periods for notified transactions and non-notified transactions. In particular, the Commissioner can now challenge a notified transaction up to one year after closing (unless the Commissioner has issued an advance ruling certificate in relation to the merger) and a non-notified transaction up to three years after closing.

Historically, merging parties rarely notified the Commissioner of small transactions that did not exceed the applicable thresholds for mandatory pre-merger notification in Canada—even transactions that could potentially raise competition concerns. However, the revised approach to the limitation period may create an incentive for merging parties to make a competition filing in advance of closing in the case of non-notifiable transactions—something that will need to be assessed on a case-by-case basis.

## 7) Injunctions

Bill C-59 added sections 100(3.1) and 104(1.1) to the Act. These provisions provide that if an application is made for an interim order under section 100 or 104 of the Act, the proposed merger shall not be completed until the application under section 100 or 104 has been disposed of by the Tribunal. In effect, this creates an automatic "interim interim" injunction where an injunction has been sought in the mergers context.[32] It will be necessary for merging parties to consider the impact that this change could have on transaction timing and take it into account when negotiating the outside date in their transaction agreements.

## 8) Pre-Merger Notification

Proposed transactions may be subject to pre-merger notification in Canada where certain financial thresholds are satisfied. Immediately prior to the passage of Bill C-59, these financial thresholds were as follows:

- **Size-of-Parties**: The parties to the transaction (together with their affiliates) have (1) in the aggregate, assets in Canada with a book value of more than $400 million or (2) in the aggregate, annual gross revenues from sales in, from or into Canada of more than $400 million.

- **Size-of-Transaction**: The book value of the assets in Canada being acquired, or the gross revenues from sales in or from Canada generated from those assets, exceeds $93 million.

Bill C-59 has made two technical changes to the size-of-transaction threshold, each of which will result in additional transactions being subject to pre-merger notification in Canada.

### a) Sales Into Canada Need to be Included

Historically, when calculating the size-of-transaction threshold, only assets in Canada and the gross revenues from sales in or from Canada

generated from those assets were taken into account. However, Bill C-59 revises the calculation of this threshold to include the value of sales in, from *or into* Canada generated from assets in or outside of Canada. This change could result in a merger of two foreign companies with no assets in Canada being subject to pre-merger notification in Canada if the target has sufficient sales into Canada and an operating business in Canada. Notably, this brings the Canadian notification regime closer to many international regimes (such as those in Europe), which consider primarily a company's turnover within a country.

### b) Aggregation of Components of Proposed Transaction

Historically, if a proposed transaction involved both an acquisition of assets and an acquisition of shares, there was no requirement to aggregate the applicable asset and gross revenue values across each component of the transaction for the purpose of determining whether the size-of-transaction threshold was exceeded. Rather, each component of the transaction was looked at separately, with the result that a proposed transaction would not be notifiable if neither component of the proposed transaction exceeded the size-of-transaction threshold on its own—even if the proposed transaction exceeded this threshold when considered wholistically.

This is no longer the case. Specifically, as a result of the recent amendments, the applicable asset and gross revenue values must now be aggregated across the various components of a proposed transaction. For example, if a transaction involves both an acquisition of assets and an acquisition of shares, then (1) the value of the assets in Canada for the asset component will need to be aggregated with the value of the assets in Canada of the entity the shares of which are being acquired and (2) the applicable gross revenues for the asset component will need to be aggregated with the applicable gross revenues of the entity the shares of which are being acquired. This change is intended to fill a perceived gap in the pre-merger notification provisions.

### c) Anti-Avoidance Provision

In addition to the two technical changes summarized above, Bill C-19 introduced an anti-avoidance provision. This provision states that "[i] f a transaction or proposed transaction is designed to avoid the application of [the pre-merger notification provisions, these provisions] apply to the substance of the transaction or proposed transaction." In other words, notification and pre-closing approval is required for transactions that were deliberately structured to avoid the application of the Act's pre-merger notification regime. This anti-avoidance provision will not apply when there are

legitimate reasons for structuring a transaction in a certain way, such as to take advantage to tax benefits that may be available in some structures but not others.

## III. Cartels, Agreements and Collaboration

The Bills have also made several significant changes to the criminal cartel and civil collaboration provisions in the Act. These changes include the introduction of a criminal provision prohibiting wage-fixing and no-poaching agreements between unaffiliated employers and the extension of the civil collaboration provisions to past agreements and, in certain cases, to agreements between non-competitors.

### 1) Criminal Cartel Provisions

Bill C-19 added a criminal cartel provision prohibiting wage-fixing and no-poaching agreements between unaffiliated employers and increased the fines available under the criminal cartel provisions. Each of these changes is discussed below.

#### a) Wage-Fixing/No-Poaching Agreement Offence

Effective June 23, 2023, Bill C-19 added subsection 45(1.1) to the Act, which prohibits agreements between unaffiliated employers to "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" and "not solicit or hire employees." As with the existing criminal cartel provisions, this provision allows wage-fixing and no-poaching agreements to be inferred from circumstantial evidence and includes both an ancillary restraints defence and a regulated conduct defence. This change was intended to align Canada's approach to these types of agreements with the highly controversial approach adopted by the United States Department of Justice—an approach that has not been fully embraced by courts in the United States.

Importantly, on May 30, 2023, the Bureau released guidelines that describe its approach to the interpretation and application of this provision (the "**Wage-Fixing Guidelines**").[33] It is worth emphasizing the following points from the Wage-Fixing Guidelines:

- **Naked Restraints versus Legitimate Collaborations**: The provision is directed at "naked restraints" on competition, namely restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture.[34] Restraints that further a legitimate collaboration, strategic alliance or joint venture

may be reviewed by the Bureau under the civil collaboration provisions, which only apply to agreements that are likely to result in an SPLC.[35] This approach echoes the Bureau's traditional two-step approach when deciding whether to review an agreement under the criminal cartel provisions (section 45) or the civil collaboration provisions (section 90.1).

- **Scope of Employers**: The provision applies to agreements between "unaffiliated employers", regardless of whether they compete in the supply of a product or service.[36] In this regard, as indicated in the Wage-Fixing Guidelines, "employers" include not only businesses, but also directors, officers, agents and employees, such as human resource professionals.[37] Accordingly, and by way of example, the Bureau views agreements between an officer of one company and a director of another company as captured.[38] In that case, each of the individuals and companies could, according to the Bureau, potentially be subject to prosecution under the provision.[39]

- **Wage-Fixing Agreements**: Agreements to fix, maintain, decrease or control salaries, wages and other terms and conditions of employment come within the scope of the provision. Significantly, the Wage-Fixing Guidelines note that "terms and conditions" include the responsibilities, benefits and policies associated with a job, including, for example, job descriptions, allowances (such as per diem and mileage reimbursements), non-monetary compensation, working hours, location and non-compete clauses, and other directives that may restrict an individual's job opportunities.[40] That said, the Wage-Fixing Guidelines make clear that the Bureau's enforcement generally is limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.[41]

- **No-Poaching Agreements**: Consistent with the language in the provision, the Wage-Fixing Guidelines indicated that the no-poach offence applies only where unaffiliated employers agree to not solicit or hire "each other's" employees.[42] Issues will not arise in situations where only one employer agrees not to poach another employer's employees—something that is definitely relevant in the context of purchase and sale transactions. Put differently, "one-way" no-poach agreements will not raise issues under the Act.

Employers should ensure that they are not involved in practices with other unaffiliated employers (whether or not those employers are competing

businesses) that (1) may be considered wage-fixing or no-poach agreements/arrangements or (2) involve improper information sharing or other practices that could be perceived as facilitating such agreements/arrangements. The need for businesses to comply with these provisions cannot be overstated, as employers that breach them could face significant criminal penalties. They may also be subject to damages claims (primarily in the form of class actions) from those who allegedly suffered damage as a result of an alleged illegal agreement.

#### b) Increased Fines

Bill C-19 also increased available fines under the criminal cartel provisions from a maximum of $25 million to an amount "in the discretion of the court." As a result, a person found to have breached these provisions (including the new provision prohibiting wage-fixing agreements and no-poaching agreements) could face fines in the discretion of the court and/or imprisonment for a term of up to 14 years. These are some of the highest penalties for cartel conduct anywhere in the world.

### 2) Civil Collaboration Provision

Historically, section 90.1 of the Act (the civil competitor collaboration provision) has allowed the Tribunal to issue certain remedies in respect of existing or proposed agreements between competitors or potential competitors that are likely to result in an SPLC. However, Bills C-56 and C-59 have significantly expanded the scope of this provision and increased the remedies available to the Tribunal.

#### a) Collaborations Between Non-Competitors

Since December 15, 2024, section 90.1 of the Act has applied to collaborations among parties that are not competitors, provided that a "significant purpose" of the collaboration, or any part of it, is to prevent or lessen competition in any market. While this change was motivated by restrictive covenants in the retail grocery industry that limit new entrants' ability to lease premises near incumbent retail locations, it could potentially apply to any commercial agreement—including agreements between a firm and its customers or suppliers. That said, the Bureau still has the burden of showing that a given agreement or arrangement is likely to result in an SPLC.

It bears noting that many agreements between firms and customers/suppliers can already be reviewed under other provisions of the Act that apply to "vertical" collaborations. However, these provisions require, in many

cases, several complex elements to be made out. As such, the government may be signalling that it is looking for a "simpler" way to regulate vertical relationships and that, in turn, it intends for closer scrutiny to be given to such collaborations in the future.

Going forward, businesses will need to be cognizant of any aspects of their contracting practices with customers and suppliers which could potentially be considered (or perceived) as intended to prevent or lessen competition and whether those practices in fact do, or are likely to, result in an SPLC.

### b) Past Agreements

Section 90.1 of the Act historically applied only to "existing or proposed" agreements. The Bureau and other commentators raised concerns with this approach. For example, in its submission in response to the Wetston consultation, the Bureau stated as follows:

> … this [approach] leaves no recourse under the Act for agreements that existed in the past, but are no longer in effect. This temporal framing creates uncertainty over whether parties to an agreement could merely terminate any agreement that draws the Commissioner's scrutiny, and then re-instate it at a future time.[43]

Similarly, section 90.1 of the Act historically provided relief only for harm to competition that was presently happening or was likely to happen in the future. It did not provide the power to address harm that had happened in the past but has since ceased. This stood in stark contrast to the abuse of dominance provisions in section 79, which provide relief for anti-competitive behaviour that has arisen in the past, is arising in the present and is likely to arise in the future.

To address these concerns, Bill C-59 has expanded the scope of section 90.1 of the Act to capture past conduct, provided that such conduct has occurred in the last three years. Given this change, parties will no longer be able to pre-emptively resolve potential concerns under section 90.1 of the Act simply by terminating or withdrawing from potentially anti-competitive agreements. This re-enforces the need for parties—whether or not competitors—to carefully assess their agreements with a view to determining whether issues could arise under the Act, including the civil collaboration provisions.

### c) Efficiencies Defence

Bill C-56 repealed the efficiencies defence, which previously prevented the Tribunal from making an order in respect of an otherwise anti-competitive agreement where it found that the agreement had brought about or was likely to bring about gains in efficiency that would be greater than, and would offset, the effects of any prevention or lessening of competition that would result or is likely to result from the agreement. As such, businesses will need to be cognizant that efficiencies originating from agreements will not be sufficient to save an agreement which would otherwise be found to give rise to an SPLC.

Importantly, Bill C-56 did not add efficiencies as a factor in subsection 90.1(2) of the Act. That said, consistent with the Commissioner's approach to the treatment of efficiencies in the mergers context, it is expected that the Commissioner will likely continue to be open to considering efficiencies in the context of section 90.1. However, it remains to be seen what types of efficiencies the Commissioner may be willing to consider and how much weight will be given to any such efficiencies.

### d) Remedies

Prior to the passage of Bill C-59, the remedies available under section 90.1 were limited to a prohibition order or any other order on consent of the parties. However, this is no longer the case, as Bill C-59 has expanded the scope of remedies available under section 90.1 to include AMPs, the divestiture of assets or shares, or any other action that is reasonable and necessary to overcome the effects of the agreement or arrangement. For example, the Tribunal is now permitted to order the payment of AMPs not exceeding the greater of (1) $10 million (or $15 million foreach subsequent order under section 90.1) or (2) three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues. This is similar to the remedies currently available elsewhere in the Act, such as under the abuse of dominance provisions, and is likely to result in more frequent reliance on section 90.1 by the Commissioner and private parties.

As noted above, Google recently challenged the constitutionality of the significantly increased AMPs in the abuse of dominance context. The decision in that case will likely extend to the AMPs available under other sections of the Act as well, including section 90.1.

## IV. Deceptive Marketing Practices (Ordinary Sales Pricing, Drip Pricing and Greenwashing)

Transformative amendments to the Act's deceptive marketing provisions will require that companies, among other things, maintain sufficient pricing records to support discount claims; carefully consider when and how prices are disclosed to consumers; and substantiate certain types of environmental claims. Companies that fail to do so could be subject to significant penalties, including large AMPs.

### 1) Ordinary Selling Price Provisions

The ordinary selling price ("**OSP**") provisions prohibit a supplier from making materially false or misleading representations to the public as to the OSP (i.e., the regular, non-sale price) of a product. OSP claims underpin claims of discounts or sales (e.g., 50% off). The OSP must be supported by one of two tests: either a substantial volume of the product was sold at that price or a higher price within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (time test).

Under these provisions, the Commissioner, through the Bureau, has historically borne the burden of proving that advertised discounts are not genuine having regard to the volume test and the time test. For example, in its submission to Senator Wetston, the Bureau stated that "[f]or the Bureau to evaluate the truthfulness of a single advertisement, it is required to gather and analyze large volumes of sales and marketing data, and present these analyses to the courts in a compact and meaningful way."[44] In light of these concerns, the Bureau recommended that the burden of proof regarding ordinary selling price matters be reversed, as currently "the advertiser bears no burden at all to show that the claim that it made represented a genuine discount."[45]

Consistent with this recommendation, Bill C-59 shifts the burden to suppliers to prove that discounts from their own prices are genuine having regard to the volume tests and/or the time test (i.e., that the claimed regular price meets the volume test or the time test). Ultimately, this change reinforces the importance for suppliers to maintain sufficient pricing records to ensure that they can prove that advertised discounts are genuine when the advertised price is compared to their own ordinary prices. Failure to maintain such records could significantly increase risk under the OSP provisions.

### 2) Drip Pricing Provisions

Drip pricing involves advertising a price that is not attainable due to additional mandatory fixed fees or charges. Since 2016, the Bureau has taken enforcement action against numerous companies for their drip pricing practices under the general false or misleading representations provision (i.e., paragraph 74.01(1)(a) of the Act). These cases have resulted in, among other things, the imposition of AMPs of more than $38 million.

New drip pricing provisions have been added to the civil (section 74.01(1.1)) and criminal (section 52(1.3)) prohibitions on false or misleading representations and to the civil (section 74.011(3.1)) and criminal (section 52.01(4.1)) electronic messaging provisions. These provisions provide that the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed on a purchaser of the product by or under an Act of Parliament or the legislature of a province. Put differently, these provisions seek to deem drip pricing to be false or misleading.

Further, the exemption to the drip pricing provisions is limited to "obligatory charges or fees … *imposed on a purchaser of the product* by or under an Act of Parliament or the legislature of a province" (emphasis added). According to the Bureau, this captures charges or fees that represent federal, provincial or territorial sales taxes and does not capture charges, fees or other costs incurred by or imposed on a business for the purpose of complying with various laws, which are then passed on to customers.[46]

### 3) Greenwashing Claims

"Greenwashing" involves making environmental (i.e., "green") claims that leave consumers with the false or misleading impression that a product or service is "environmentally friendly" when, in fact, it is not. In Canada, greenwashing—as a form of misleading advertising—is largely governed by the civil and criminal false or misleading advertising provisions in the Act.

On June 5, 2025, the Bureau released final guidelines that aim to clarify its enforcement approach and interpretation with respect to provisions of the Act that apply to environmental and climate claims (the "**Greenwashing Guidelines**").[47] The Greenwashing Guidelines were published in response to June 2024 amendments to the Act that added new provisions dealing specifically with environmental claims. Guidance in the Greenwashing Guidelines relating to the application of the general provisions to

environmental claims closely mirrors guidance previously released by the Bureau in Volume 7 of the Deceptive Marketing Practices Digest.[48]

Greenwashing is not a new issue for the Bureau, which has investigated many instances of potential greenwashing in the past. That said, greenwashing claims have become increasingly prevalent in recent years. For example, a global sweep of over 500 websites by the International Consumer Protection Enforcement Network and the UK Competition and Markets Authority in 2020 found that over 40% of these websites appeared to be using green advertising tactics that could be considered misleading and therefore may be in contravention of applicable consumer protection laws.[49]

In response to the increasing prevalence of environmental advertising, many jurisdictions around the world are revisiting their legislation, policies and guidance relating to the regulation of environmental claims. Consistent with this focus on environmental claims, the recent amendments to the Act have added two civil provisions intended to address unsubstantiated environmental claims.

- **Representations Relating to Product** (paragraph 74.01(1)(b.1)): This provision prohibits a person from making a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change *that is not based on an adequate and proper test*, the proof of which lies on the person making the representation.

- **Representations Relating to Business or Business Activity** (paragraph 74.01(1)(b.2)): This provisions prohibits a person from making a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change *that is not based on adequate and proper substantiation in accordance with internationally recognized methodology*, the proof of which lies on the person making the representation.

### 4) Existing interpretation will be applied where possible

The Greenwashing Guidelines apply a contextual approach to the interpretation of the new environmental claims provisions. The Bureau explicitly states that it will assume that the same interpretation and considerations previously set out by courts in the context of the general deceptive

marketing provisions will also apply to the terms "adequate and proper" and "test" in respect of new paragraph 74.01(1)(b.1).[50] This means that testing or substantiation must be "fit, apt, suitable or as required by the circumstances."[51] The Bureau further explains that what qualifies as "adequate and proper" will depend on the general impression a representation creates for consumers.

With respect to terms that have not yet been interpreted by the courts, but which have a clear ordinary meaning, the Bureau indicates that it will rely on this ordinary meaning until those terms are subject to interpretation in the courts.[52] This guidance applies in respect of terms such as "benefits", "climate change", "ecological", "environment", "mitigating", "protecting", "restoring" and "social".

### 5) Internationally Recognized Methodology

One key aspect of paragraph 74.01(1)(b.2) that is new to the Act and which was the subject of significant public commentary is the phrase "substantiation in accordance with internationally recognized methodology." While many submissions during the public comment period requested that the Bureau provide specific direction as to which methodologies would meet this standard, the Greenwashing Guidelines provide only general direction and leave it to businesses to determine whether this standard is satisfied.

First, the Bureau defines "substantiation" as "establishing by proof or competent evidence" (but does not necessarily involve testing) and "methodology" as "a procedure used to determine something."[53] The Greenwashing Guidelines go on to indicate that the Bureau will *likely* consider a methodology to be internationally recognized if it is "recognized in two or more countries", although not necessarily by governments in those countries.[54] The Bureau emphasizes that the chosen methodology must also be shown to be "adequate and proper" substantiation of the claim, as that term has been interpreted by prior jurisprudence.[55]

Furthermore, the Greenwashing Guidelines draw a clear distinction between "methodologies" and "international standards", emphasizing that while international standards may contain or reflect internationally recognized methodologies, the two concepts are not the same.[56] Businesses are not required to comply with an international standard, nor must they be members of a specific multistakeholder standards body, to substantiate environmental claims using internationally recognized methodologies.

## 6) Additional Key Issues

The Greenwashing Guidelines address several key issues regarding environmental claims under the Act, including the following:

- **Required or Recommended Methodologies**: The Greenwashing Guidelines clarify that the Bureau will assume that methodologies required or recommended by federal, provincial or territorial government programs in Canada for the substantiation of environmental claims are consistent with internationally recognized methodologies.[57] In this regard, the Greenwashing Guidelines state that "it is unlikely that the Bureau will pursue enforcement action under paragraph 74.01(1)(b.2) if an advertiser has followed such a methodology, provided that the chosen methodology provides adequate and proper substantiation for the claim."[58]

- **Claims Regarding New Technologies**: The Greenwashing Guidelines acknowledge concerns about the impact of the new provisions on claims related to emerging climate technologies, warning that unsupported claims could lead to "greenhushing". However, they provide flexibility by allowing businesses to rely on multiple internationally recognized methodologies that are used to substantiate similar claims or that can be used together to substantiate the claim.[59]

- **Regulatory Disclosure**: The Greenwashing Guidelines indicate that "the provinces and territories are responsible for the regulation of securities"; that "[t]hese regulations can include evolving frameworks for the voluntary and mandatory communication of certain environmental information to current and prospective securities investors"; and that "[t]he Bureau does not concern itself with these representations."[60] However, if a business reuses any of the environmental claims for the purposes of promoting a product or business interest outside of the sale of securities (such as in marketing materials), the Bureau will apply the Act as appropriate.[61]

- **Claims About the Future**: The Greenwashing Guidelines note that "claims about the future can be considered greenwashing if they represent little more than wishful thinking."[62] According to the Greenwashing Guidelines, businesses should ensure that such claims are well-founded and are adequately and properly substantiated in accordance with internationally recognized methodology.[63] Before making these kinds of claims, businesses should have (1) a clear understanding of what needs to be done to achieve what is being claimed; (2) a

concrete, realistic and verifiable plan to accomplish the objective, with interim targets; and (3) meaningful steps underway to accomplish the plan.[64]

- **No Requirement for Public Disclosure**: The Greenwashing Guidelines note that businesses are not required to publicly disclose their substantiation or testing data, although doing so may reduce enforcement risks.[65]

### 7) Increased Financial Penalties

The amendments have significantly increased the size of AMPs that can be awarded against both individuals and corporations found to have breached the civil deceptive marketing practices provisions, including the provisions relating to OSP claims, drip pricing and environmental claims. In particular:

- **Individuals**: Maximum allowable AMPs have been increased from $750,000 (for a first violation) to the greater of (1) $750,000 (for a first violation) or (2) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.

- **Corporations**: Maximum allowable AMPs have been increased from $10 million (for a first violation) to the greater of (1) $10 million (for a first violation) or (2) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

The penalties under the criminal track (which include imprisonment for a term not exceeding 14 years and/or a fine in the discretion of the court) have not been changed.

## V. Private Competition Litigation

Traditionally, competition risk in Canada has arisen primarily from public enforcement by the Bureau without meaningful private risk, other than in relation to criminal conduct, such as cartels. However, the amendments change this. In particular, as discussed in more detail below, the amendments provide private parties with access to the Tribunal under more sections of the Act; seek to lower the leave test that must be satisfied by private parties wanting to bring a private action to the Tribunal; and permit the Tribunal to award monetary relief to successful applicants.

### 1) Expanded Scope of Conduct Captured

The Bills have expanded the number of provisions under which private parties can seek leave to bring applications before the Tribunal. In this regard, Bill C-19 initially extended private rights of access to section 79 (abuse of dominance) and Bill C-59 further extended private rights of access to section 74.1 (deceptive marketing) and section 90.1 (civil competitor collaboration). Prior to the passage of these Bills, private rights of access were only available with respect to sections 75 (refusal to deal), 76 (price maintenance) and 77 (exclusive dealing, tied selling and market restriction).

Perhaps the most significant types of conduct captured are the abuse of dominance and civil collaboration provisions, the new stand-alone greenwashing provisions and the new "right to repair" within the existing refusal to deal provision:

- **Abuse of Dominance:** As stated above, the abuse of dominance provision would only require a party to show that a "dominant" firm has engaged in either (1) a practice of anti-competitive acts or (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. This is in contrast with the prior version of the abuse of dominance provision, which requires both anti-competitive intent and effects. However, both anti-competitive intent and effects need to be demonstrated in order for monetary relief to be awarded.

- **Competitor Collaborations:** As stated above, this provision not only captures collaborations between competitors or potential competitors, but also collaborations among parties that are not competitors, to the extent that a "significant purpose" of the collaboration is anti-competitive (notably, the amendments do not elaborate on when an anti-competitive purpose would be considered a "significant purposes"). As such, the competitor collaboration provision may apply to essentially any commercial agreement—including agreements with customers and suppliers.

- **Greenwashing:** As stated above, the stand-alone greenwashing prohibitions are intended to address unsubstantiated environmental claims, whether relating to "a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" or "the benefits of

a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change." A person making an environmental claim must ensure that the claim is supported by "an adequate and proper test" or "adequate and proper substantiation in accordance with internationally recognized methodology", the proof of which lies on the person making the claim.

- **Refusal to deal (and Right to Repair):** The amendments make several changes to the refusal to deal provision in the Act. First, the amendments change the requirement for a person to be substantially affected in its entire business to a requirement that a person be substantially affected in the whole or part of its business. Second, the amendments extend this provision to include the supply of the means of diagnosis or repair, creating the ability for a person to compel a company to provide the means of diagnosis or repair in certain cases. So-called "right to repair" laws already exist in other jurisdictions that seek to ensure that consumers can have devices serviced or repaired by independent firms (i.e., firms other than the original manufacturer).

### 2) Leave Test

In order for private parties to bring a private right of action before the Tribunal, they must first apply for and obtain leave of the Tribunal. Bill C-59 eases the test that private parties were previously required to meet in order to bring a private action before the Tribunal, other than the test applicable to section 76 (price maintenance) of the Act that remains unchanged.

Historically, the Tribunal could grant leave to bring an application under sections 75 and 77 of the Act if it had reason to believe that the applicant was directly and substantially affected with respect to the entirety of its business. Going forward, the new leave test, which applies to sections 75, 77, 79 and 90.1 of the Act, provides that the applicant need only be directly and substantially affected with respect to *part* of its business. Notably, in many unsuccessful leave applications to date, the applicant has failed to prove it was substantially affected with respect to its entire business.

Additionally, Bill C-59 introduces a second potential leave mechanism for these provisions, which applies where the Tribunal is satisfied that it is in the public interest to grant leave to an applicant. Similarly, Bill C-59 permits the Tribunal to grant leave to bring a private application under section 74.1 of the Act where it is satisfied that it is in the public interest to do so. While the scope of public interest is currently unknown, a public interest test

could open the door to representative-style proceedings and public interest litigants.

### 3) Private Monetary Relief

Bill C-59 creates the ability for applicants to receive monetary relief in connection with successful applications brought under section 75, 76, 77, 79 or 90.1 and the deceptive marketing provisions of the Act.

In the case of successful applications under these sections of the Act, the Tribunal can order that the person against whom the order is made pay "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, the manner that the Tribunal considers appropriate." With this choice of language, the monetary amount that an applicant may seek is not damages. However, it resembles a form of disgorgement, the quantification of which can be very difficult in many circumstances.

Further, for Part VII.1 (deceptive marketing practices) and where representations to the public are found to be materially false or misleading, an applicant can seek "an amount, not exceeding the total of the amounts paid to the [advertiser] for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold… in any manner that the court considers appropriate." This choice of language (which is already contained in the Act but now available to private parties) is akin to restitution.

### 4) A Form of a Class or Collective Action Regime

Bill C-59 includes two amendments that suggest the creation of a form of a class or collective action regime before the Tribunal.

First, the inclusion of the phrase "be distributed among the applicant and any other persons affected by the practice, in any manner that the Tribunal considers appropriate" suggests a broad discretion for the Tribunal to order monetary relief to a large group of persons (businesses and individuals) affected by the alleged conduct.

Second, Bill C-59 expressly gives the Tribunal the power to establish a payment, claims and notice process akin to the powers of courts in a class action context. These powers include "specifying how the payment is to be administered"; "the appointment of an administrator to administer the payment and specifying the terms of administration"; "requiring that

potential claimants be notified in the time and manner specified by the Tribunal"; "specifying the time and manner for making claims"; and "specifying the conditions for the eligibility of claimants."

Collectively, these features appear to give the Tribunal the power to order the payment of monetary relief to a significant group of affected persons and to manage the related notice, payment and claims process. This effectively creates a form of a class or collective action regime, but with differences to the existing class action regime in the civil courts. Significantly, Bill C-59 does not create a certification process that has historically served as a procedural screening mechanism, where a court decides, at an early stage, whether a class action is the appropriate procedural mechanism to advance an action. However, the leave requirement may provide an opportunity to screen claims that should be disposed of at an early stage—although this remains to be seen in light of what appears to be a significantly lowered leave test.

## Conclusion

The amendments introduced through Bill C-19, Bill C-56 and Bill C-59 represent the most significant changes to the Act in nearly 40 years. These reforms, which impact nearly every aspect of Canadian competition law—including abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action—have fundamentally reshaped the competition law landscape in our country. In light of these sweeping reforms, the modernization of the Act marks a pivotal moment in the evolution of Canada's competition policy, with wide ranging implications for businesses operating in Canada. Whether these "generational changes" ultimately foster fairness, affordability and innovation, as intended, remains to be seen.

## ENDNOTES

[1] Innovation, Science and Economic Development Canada, News Release, "Minister Champagne maintains the *Competition Act*'s merger notification threshold to support a dynamic, fair and resilient economy" (7 February 2022).
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[7] *Ibid* at para 17.
[8] *Ibid* at paras 18, 28, 38.
[9] *Ibid* at paras 5, 18, 21–25.
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[21] *Commissioner of Competition v Google Canada Corporation and Google LLC* (14 February 2025), Competition Tribunal, CT-2024-010 (Notice of Constitutional Question).
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[23] *Commissioner of Competition v Google Canada Corporation and Google LLC* (4 June 2025), Competition Tribunal, CT-2024-010 (Commissioner's Notice of Motion to Strike the Constitutional Question).
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[26] *Ibid* at 6.
[27] [1997] 1 SCR 748 at para 85, 1997 CanLII 385 (SCC).
[28] *Commissioner of Competition v RONA Inc* (20 December 2024), Competition Tribunal, CT-2024-011 (Registered Consent Agreement).
[29] *Commissioner of Competition v TransAlta Corporation* (13 November 2024), Competition Tribunal, CT-2024-008 (Registered Consent Agreement).
[30] Such provisions require that purchasers do anything and everything necessary to secure approval under the Act.
[31] Senate, Standing Committee on National Finance, *Evidence*, 44-1 (13 December 2023) at 88:34 (Matthew Boswell).
[32] It bears noting that prior jurisprudence provided for "interim interim" relief in the context of section 104 of the Act. See *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25 at paras 63, 65, in which the Federal Court of Appeal found that there is nothing in either the "context of section 104" or the "goal of encouraging completion of merger review before closing" which "suggests that the broad power of the Tribunal to issue 'any interim order that it considers appropriate' should be read more narrowly than a plain textual reading suggests—with the result that this provision captures both "interim" orders and "interim interim" orders.
[33] Canada, Competition Bureau, *Enforcement Guidelines on Wage-Fixing and No Poaching Agreements* (Ottawa: Competition Bureau, 2023).
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[50] *Supra* note 47 at "Claims about the environmental benefit of a product—Key Concepts."

[51] *Ibid* at "Product performance claims – Key Concepts."

[52] *Ibid* at "Claims about the environmental benefit of a product—Key Concepts."

[53] *Ibid* at "Claims about the environmental benefit of a business or business activity – Key Concepts."

[54] *Ibid.*

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[56] *Ibid* at "Frequently asked questions—No. 20."

[57] *Ibid* at "Frequently asked questions—No. 23."

[58] *Ibid.*

[59] *Ibid* at "Frequently asked questions—No. 25."

[60] *Ibid* at "Frequently asked questions—No. 8."

[61] *Ibid*.

[62] *Ibid* at "Principle 6: Environmental claims about the future should be supported by substantiation and a clear plan."

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# DECEPTIVE MARKETING LAW AFTER CINEPLEX

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*In Canada (Commissioner of Competition) v Cineplex, the Competition Tribunal considered two major deceptive marketing law issues: the legal standard when applying the general impression test, and how section 74.01(1.1) (the drip pricing provision) is interpreted and applied. The decision provided guidance to these issues but left many more questions unanswered. We surveyed questions related to (1) the method of constructing the ordinary citizen legal standard adopted by the Tribunal, (2) the specific principles used in interpreting and applying section 74.01 and its relationship to other provisions in the Competition Act, and (3) the likelihood of restitution orders as remedies in future cases. Guided by the Tribunal's reasons in Cineplex, the purposes of competition law, the underlying behavioural economic principles of deceptive marketing law, and approaches to similar issues in foreign jurisdictions, we offer potential directions for the law in answering certain questions we have identified.*

*Dans l'affaire Canada (Commissaire de la concurrence) c Cineplex, le Tribunal de la concurrence s'est penché sur deux questions majeures en droit des pratiques commerciales trompeuses : les normes juridiques appropriées dans l'application du critère de l'impression générale et l'interprétation ainsi que l'application du paragraphe 74.01(1.1) de la Loi sur la concurrence (la disposition concernant l'indication de prix dits « partiels »). La décision a permis de clarifier certains aspects de ces questions, tout en laissant de nombreuses autres interrogations en suspens. Les auteurs ont recensé plusieurs questions en lien avec (1) la méthode retenue par le Tribunal pour établir la norme juridique du citoyen ordinaire, (2) les principes spécifiques utilisés pour interpréter et appliquer l'article 74.01 et sa relation avec d'autres dispositions de la Loi sur la concurrence, et (3) la probabilité d'accorder des ordonnances de restitution à titre réparatoire dans de futures affaires. À la lumière des motifs du Tribunal dans l'affaire Cineplex, des objectifs de la Loi sur la concurrence, des principes de l'économie comportementale qui sous-tendent le droit des pratiques commerciales trompeuses et des approches adoptées pour des questions similaires dans des ressorts à l'étranger, les auteurs proposent des pistes qui permettraient au droit de répondre à certaines questions soulevées.*

## Part I. Introduction

In the recent decision of *Canada (Commissioner of Competition) v Cineplex Inc*,[1] the Competition Tribunal (the "Tribunal") had the opportunity to address two key issues in deceptive marketing law. First, whether the consumer perspective standard employed in consumer protection law to determine if a representation is false or misleading also applies in competition cases. Second, *Cineplex* was the first case interpreting the new "drip pricing" provision under section 74.01(1.1) of the *Competition Act*.[2] Thus, it is an important decision that will guide future deceptive marketing cases in Canada. Although the case tackled each of these matters directly, there remain several lingering questions on deceptive marketing law following the *Cineplex* decision. This paper identifies these questions and, where possible, offers paths that future cases could take in developing the law further.

Part II provides a general background of relevant deceptive marketing law and economic principles. Section II-A outlines the purposes of deceptive marketing regulation in the competition context, contrasting it with provincial consumer protection legislation. Section II-B surveys the development of the consumer perspective up to the *Cineplex* decision and judicial debate about whether to adopt the standard used in consumer protection legislation as set out in *Richard v Time Inc*.[3] Sections II-C through E focuses on drip pricing, providing an overview of the economic and legal definitions. Section II-F concludes by summarizing the *Cineplex* decision and its conclusions on the appropriate consumer perspective, and the interpretation of the drip pricing provision.

Part III then outlines the lingering questions. The succeeding parts each address a category of questions. Part IV addresses questions on the consumer perspective: first, the appropriate perspective for representations made to the public at large; and second, whether the test operates by adjusting a common baseline, or defining the consumer purely based on each case's facts. For both questions, we look to Australia and New Zealand for guidance.

Part V addresses statutory interpretation issues. First, the remaining questions on how the drip pricing provision is interpreted and applied. We look to the Tribunal's reasons in *Cineplex* and the objectives of competition law for guidance. With respect to the new language in the Act regarding "fixed obligatory charges or fees", we argue that (1) the term "fixed" refers to a seller's ability to set and pre-determine a surcharge's amount and structure; (2)

the term "obligatory" also can include considerations of search and switching costs; and (3) the consumer perspective could be considered throughout the entire analysis under the provision. Second this Part addresses how the new drip pricing provision affects the closely related "sale above advertised price" provision. We argue that the two can coexist, targeting somewhat different conduct despite being somewhat redundant: they can be used as alternatives to pursuing a claim for drip pricing with slightly different standards under each. Third, whether *Cineplex* can be used to inform proceedings under the criminal track for deceptive marketing and civil recovery under the criminal provision.

Part VI addresses the final issue of remedies. We argue that the case implies that "restitution" orders[4] are unlikely to be successful in deceptive marketing generally. In Part VII, we conclude that there are many issues that still remain after *Cineplex*, although the case has brought some clarity to the law. Further legal developments should be guided by the purposes of competition law and the underlying economic harms of drip pricing and deceptive marketing.

## Part II. Background

### A. Purposes of Deceptive Marketing in Competition Law and Consumer Protection

Deceptive marketing is addressed both by provincial consumer protection statutes and the federal *Competition Act*. For example, Ontario's *Consumer Protection Act*[5] uses similar language to the *Competition Act* concerning deceptive representations. The Ontario *Consumer Protection Act* classifies the making of a "false, misleading or deceptive representation" as an unfair practice,[6] while the *Competition Act* prohibits making a representation that is "false or misleading in a material respect."[7] Both statutes capture false or misleading representations made to consumers. Despite this, they do not serve the same underlying purpose. This section compares the purposes of deceptive marketing in the consumer protection and competition law contexts. It illustrates the different harms to which these similar measures are targeted.

Provincial consumer protection legislation is aimed at the consumer. In the context of deceptive advertisements, consumer protection law aims to shift the relationship between consumers and suppliers. It acknowledges the imbalance of power between merchants and consumers and aims to correct it.[8] In the context of deceptive advertising, consumer protection achieves this by shifting the merchant relationship from *caveat emptor*

to *caveat venditor* – let the seller beware.[9] This policy and legislative shift provides a framework for trade practices that better protect vulnerable consumers.[10] The scope of consumer protection legislation is thus captured by its name – protection for the consumer. The regulation of business practices is focused on the extent to which those practices could harm the consumer.

The *Competition Act* is aimed at maintaining competition in the market. The Act's purpose statement references consumers only through the goal of "provid[ing] consumers with competitive prices and product choices" among other purposes focused on businesses, the Canadian economy, and Canadian and world markets.[11] Even its reference to consumers is not consumer *protection*, but rather in providing consumers with direct benefits of competition in better prices and selection. Consumers are a consideration under the *Competition Act*, but the *Competition Act* is not directly aimed at consumer welfare like provincial consumer protection legislation. Instead, it aims to enhance consumer welfare indirectly, through laws that protect and promote competitive markets.

Deceptive marketing case law acknowledges this. Early cases present the *Competition Act*'s objective in targeting deceptive marketing as a form of market regulation.[12] In considering the ordinary price representation provision under section 74.01(3) (a specific type of deceptive marketing regarding promotional versus regular prices), the Tribunal identified three purposes in *Canada (Commissioner of Competition) v Sears Canada Inc* ("*Sears*")[13] These included protecting consumers, but also "protect[ing] businesses from the anti-competitive effects of deceptive ordinary selling price representations" and "protect[ing] competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations".[14] While consumers are considered, so are the anti-competitive effects on businesses and the market.[15] Thus, while consumer protection is part of deceptive marketing in competition law, it is not the only part. The purposes identified in *Sears* look to the market as a whole.

While provincial consumer protection legislation and the *Competition Act* overlap in their regulation of deceptive marketing, each regime has a different purpose. Consumer protection legislation centres on the consumer. The *Competition Act*'s aim is broader. As the Federal Court of Appeal held in *Canada (Commissioner of Competition) v Premier Career Management Group Corp*,[16] "a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality."[17] Deceptive marketing distorts markets by

encouraging firms to be deceitful, rather than to produce quality products.[18] Accurate information is a precondition of workable competition.[19] Where false information is fed to consumers, competition is necessarily harmed.[20] It is this market distortion, not consumer protection *per se*, that the *Competition Act* is concerned with. In protecting against market distortion, the *Competition Act* indirectly protects consumers.

Based on these differences, the Tribunal confirmed in *Cineplex* that the *Competition Act* is "not a consumer protection statute".[21] It identified three objectives for the deceptive marketing provisions:

1) to enhance and protect the proper functioning of markets, so markets are not distorted by misinformation; to protect consumers from purchasing goods or services based on inaccurate information;

2) to encourage competition on the merits by incenting firms to provide accurate and truthful information to the public, particularly as to the price of goods and services, for the benefit of both consumers and honest competitors; and

3) to support the production and supply of higher quality goods and services at lower prices.[22]

The Tribunal reaffirmed a broader ambit than consumer protection. These purposes prioritize competition, market function, and the quality of goods. This focus on market distortion and market functionality suggests that the harms targeted by the deceptive marketing provisions are economic in nature. While the consumer is affected, the harms targeted affect the market as a whole.

## B. False and Misleading Advertising

Reviewable false and misleading advertising is governed primarily by section 74.01(1)(a) of the *Competition Act*.[23] Reviewable conduct is defined as the making of representations to the public that are false or misleading in a material respect.[24] This is a three-step test: there must be representations, which are false and misleading, and are so in a material respect. The existence of a representation is a factual determination without a set definition in the jurisprudence.[25] Materiality is defined as whether the consumer would likely be influenced by the false or misleading representation.[26] These elements were not a significant issue in *Cineplex*.

The element that has received the most judicial attention in deceptive marketing practice case law is how to assess whether a representation is

false or misleading. This was a major issue in *Cineplex* and the jurisprudence preceding it. The *Competition Act* provides some guidance. Section 74.03(5) prescribes that the "general impression" and the "literal meaning" of the representation must be considered.[27] The literal meaning is self-explanatory[28] – it is the general impression that has captivated courts and the Tribunal. While determining whether the general impression is false or misleading is a highly factual matter,[29] determining the general impression requires a legal assessment to identify the appropriate consumer perspective. This section surveys the development of the consumer perspective in the jurisprudence until the decision in *Cineplex*.

## 1. The Time Before Time

Assessing the general impression requires defining the consumer from whose perspective the advertisement is viewed. Historically, Canadian deceptive marketing law used the "ordinary citizen" as its consumer perspective.[30] This test originated in criminal deceptive marketing cases.[31] Its canonical expression is found in *R v Kenitex*:[32]

> [B]y definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal.[33]

The *Kenitex* formulation was adopted by the Tribunal for section 74.01(1) in *Sears*[34] and affirmed in *Commissioner of Competition v Gestion Lebski Inc*.[35] Neither provides a deep analysis of the consumer perspective.

Over time, the standard adapted to consider the audience to which the representation was directed, becoming the "average consumer."[36] Courts looked to characteristics of the intended audience, such as "relevant demographics of the intended audience, relative intelligence levels and the level of care that the intended audience would apply in purchasing the product."[37] In short, courts and the Tribunal were required to determine the general impression through the eyes of its intended audience.[38] This test was adopted by several courts and included in the Competition Bureau's ("Bureau") enforcement guidelines on the application of the *Competition Act* to internet representations.[39] These guidelines instructed businesses reviewing their advertisements for compliance to "adopt the perspective of the average consumer."[40]

A salient example is *Maritime Travel Inc v Go Travel Direct.Com Inc.*[41] This case considered alleged deceptive marketing on the part of Go Travel

Direct.Com's advertisement comparing the price of a trip from its service and Maritime Travel's. Justice Hood surveyed the applicable law, finding that the relevant perspective was that of an average person seeing the advertisement in its intended form.[42] The context of the intended audience was a crucial factor. He analyzed various cases on this point, discussing the relative sophistication of consumers in different markets.[43]

Justice Hood found the consumer in *Maritime Travel* to be a "literate person of average intelligence."[44] This consumer would be contemplating spending between $700 and $1,000.00 per person on a trip. Such a person would "read the ad carefully" and "would have ample opportunity to consider it and its wording with care."[45] This formulation of the test is highly contextual, unlike the general standard set out in *Kenitex* and adopted in *Sears*. The release of *Time* altered the paradigm by introducing a less contextual standard.

### 2. Richard v Time: Enter the Credulous and Inexperienced Consumer

*Time*'s application to the *Competition Act* has been unclear. *Time* was decided under provincial consumer protection laws, whose objectives differ to the *Competition Act*.[46] *Time* held that, when deciding the general impression for consumer protection, the consumer was to be described as "credulous and inexperienced."[47] While courts have applied *Time* in the competition law context, they have been reluctant to adopt its standard, which prescribes a less sophisticated consumer.[48]

In *Time*, Mr. Richard was mailed a letter implying that he won a contest from Time Magazine. In fact, the mailer was only an entry into a sweepstakes. Mr. Richard brought an action for misleading advertising under Québec's *Consumer Protection Act*.[49] Relevant to our analysis is the Supreme Court's determination of the relevant consumer perspective in deciding whether an advertisement constitutes a false or misleading representation. To determine the standard, the Court stressed that the "average consumer does not exist, but is the product of a legal fiction, personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the [Québec *Consumer Protection Act*] is attributed."[50] To Court had to determine what level of sophistication of the fictional consumer from whose perspective an impugned advertisement would be analyzed so as to best realize the purposes of the Québec *Consumer Protection Act*.[51]

Given the relevant statute's goal of protecting consumers, the Court endorsed lower court decisions characterizing the consumer as "not very

sophisticated."[52] The Court defined the standard with a consumer that is "credulous" and "inexperienced."[53] This consumer is neither reasonably prudent nor well-informed.[54] The perspective was grounded in the consumer protection purpose of the Québec *Consumer Protection Act*.[55] The Court found that "[t]o meet the objectives of the [Québec *Consumer Protection Act*], the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations."[56] This is a low standard, as opposed to one requiring reasonableness or due care by the consumer.

### 3. Post-Time Confusion

As the objectives of the *Competition Act*'s deceptive marketing provisions are broader than those in the consumer protection regime, it is not immediately obvious that *Time*'s standard would apply to competition cases. Nevertheless, the standard saw some adoption in this context, most notably in *Canada (Commissioner of Competition) v Chatr Wireless Inc*.[57]

*Chatr* considered representations from Chatr Wireless that, among other things, it provided "fewer dropped calls than new wireless carriers."[58] In determining the appropriate consumer perspective, the Ontario Superior Court of Justice looked to *Time*. However, the Court noted the different purposes of the two acts and the role of competition law as market regulation. This difference in purpose was held as relevant to determining the perspective.[59]

Unlike in the *Time* decision, where the representations were made to the public at large, the representations here were aimed at consumers wanting unlimited texting and wireless services, a specific market segment.[60] While the Court accepted that these consumers were credulous, they could not be said to be inexperienced with wireless talk and text services by virtue of their being in that specific market segment.[61] Thus, the Court did not conclude that the consumer was generally inexperienced. In this case, the standard was modified; the consumer was held to be inexperienced with the "technical information contained in the advertisements,"[62] such as the claim that Chatr would drop fewer calls because of its cell site density. The *Chatr* standard was adopted in various future cases, mostly in the telecommunications context.[63]

Ten years later, the Ontario Court of Appeal had the opportunity to consider the standard in *Rebuck v Ford Motor Company*.[64] Unfortunately, while the Court addressed the difference in purpose between Ontario's *Consumer*

*Protection Act* and the *Competition Act*, it ultimately declined to determine the appropriate consumer perspective.[65]

In the cases surveyed above where the *Time* standard was used, it was modified based on the circumstances of that case. In *Chatr*, the Court explicitly considered the consumer to whom the advertisement was targeted, in line with the "ordinary citizen" standard. By the time *Cineplex* was heard, there was no definitive answer in the case law, though there appeared to be a move towards the *Time* standard. The Tribunal in *Cineplex* was thus poised to determine whether *Time*'s standard would stick.

## C. Parliament Introduces the Drip Pricing Provision

In 2022, Parliament introduced section 74.01(1.1), the "Drip Pricing" provision. Section 74.01(1.1) creates a specific sub-category of false and misleading representations aimed at price representations that have been partitioned. The provision captures any price representation that is "not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation".[66] However, obligatory charges or fees imposed by or under an Act of Parliament or the legislature of a province are excluded.[67] This provision provides that conduct that meets these terms is false or misleading in all circumstances, eschewing the need for the normal analysis.

The provision is not well-defined in the Act—there is minimal guidance on what types of price representations are covered by the provision. To understand the prohibition, it is important to consider drip pricing in the economic sense and the legal sense. The next two sections define each of these conceptions of drip pricing.

## D. The Economist's Conception of Drip Pricing

This section provides an overview of drip pricing as understood in the behavioural economics and consumer psychology literature. Drip pricing has been widely researched over the years. The potential negative effects of drip pricing identified or confirmed by these studies caused competition and consumer protection authorities to take action to regulate price representations, in some cases leading to amended or new legislation.[68] It is important to understand (1) the types of pricing practices that make up drip pricing, (2) the impact of drip pricing on consumer decisions, and (3) the broader effects of drip pricing on markets.

### 1. Pricing Practices that Constitute Drip Pricing

The basic concept of drip pricing is a strategy where the seller initially presents the price of one part of the product ("base price"), then presents the price of other components ("surcharge") later in the purchasing process.[69] Drip pricing is very closely related to price partitioning. Price partitioning generally includes the practice of dividing up the presentation of the base price and surcharge.[70] The difference between drip pricing and price partitioning is timing. In drip pricing, the surcharge is presented after the base price. In price partitioning, both can be presented at the same time. The surcharge can be mandatory or optional.[71] Because drip pricing is an incident of price partitioning, the effects of price partitioning often can be seen in drip pricing.[72]

Drip pricing and price partitioning become more complex when sellers add a qualitative dimension to price representations. Sellers can control how and when to present the elements of the price in marketing, including by emphasizing the base price. Sellers may notify consumers that additional surcharges will be levied later in the process. However, this notice may emphasize the base price, making that messaging more prominent than information about surcharges.

### 2. Effects on Consumer Decisions

Consumer decision-making processes can differ when presented with drip-pricing and when presented with all-inclusive pricing. Drip pricing may cause consumers to underestimate the total price of the product,[73] largely due to the way price information is presented to them. Underestimation can lead to errors in purchasing decisions (e.g., purchasing too much of a product or purchasing the more expensive option because of a perceived lower price).[74]

One explanation for this effect is the anchoring and adjustment theory, initially proposed by Tversky and Kahneman. This theory posits that people estimate values by starting with an initial value or starting point (anchor) and then adjusting that value (adjustment) to arrive at a final estimate.[75] However, biases often influence the way the initial value is adjusted, resulting in an insufficient adjustment.[76] In the drip pricing context, the consumer starts with the lower represented base price of the product (anchoring), and then may inadequately account for the surcharges that are introduced at later stages of the purchasing process (adjustment).[77] The adjustment is inadequate because consumers give more attention to the information presented first (i.e., the lower base price) and less attention to the information

presented later (i.e., the surcharge), thereby underestimating the impact of the surcharge on the total price.[78]

Another explanation for consumer errors in purchasing decisions that is commonly discussed in the literature is related to the fact that drip pricing increases consumers' search costs, which can skew their perception of prices and price comparisons. Drip pricing makes the adjustment stage of price estimation more difficult because price comparisons across different products are more complex when the price is divided up and presented differently.[79] The increased difficulty increases search costs – time and psychological costs associated with piecing together the different price components throughout the purchasing process.[80] When the costs of fully and accurately estimating a product's price are high, consumers tend to use lower-effort processing strategies.[81] Consumers may believe that there is minimal benefit in considering alternatives if they assume that the amount of the surcharge across product options is similar to that of the option with the lowest base price.[82] When consumers expect higher costs of leaving the transaction to evaluate alternatives after surcharges are revealed, they may perceive the purchase that they have already started to be the optimal option.[83] Consumers might even justify their decisions to avoid the psychological cost of admitting that a bad purchase was made.[84]

Contextual and psychological factors that influence the way consumers process price representations can further affect consumer decisions. One consideration is consumer experience. Huck and Wallace proposed that with experience over time, consumers may become annoyed by drip pricing and shift the demand for the products of one firm to another.[85] This could disincentivize drip pricing. However, that would require consumers to have sufficient market power. More research is needed to explore the effect of drip pricing on consumer experience.[86]

A second consideration is consumer perceptions of fairness, which may impact purchasing decisions. Banerjee et al suggest that consumers with low expectations of drip pricing, but who encounter an unpleasant surprise of drip pricing, perceive the transaction to be less fair and would less likely make the purchase.[87] Conversely, consumers with high expectations of drip pricing and encounter drip pricing will perceive the transaction to be more fair and would more likely make the purchase.[88] Moriuchi and Murdy, Chu et al, and Totzek and Jergensen suggest that timing of the surcharge's disclosure will influence the consumer's perception of whether the surcharge was fair.[89] This may incentivize firms to provide added transparency when

prices are dripped.[90] However, consumer expectations are likely to vary from industry to industry.[91]

A third consideration is how the price information is presented. Kim demonstrates that the way that prices are visually represented and partitioned affects how well consumers can recall and process on the price information in that representation.[92] Morwitz, Greenleaf and Johnson also demonstrated that consumers are more likely to use mental shortcuts (i.e., heuristics) to calculate the total price when the surcharge was presented as a percentage rather than a dollar amount.[93] Using mental short cuts leads to incorrect calculation of the total price, which in turn leads to suboptimal decision-making.[94]

In sum, the literature in economics and consumer psychology has provided evidence of drip pricing affecting consumer decisions by influencing the way consumers take in and process pricing information. When this influence is common across consumers, drip pricing can affect the way markets behave.

## 3. Impact on Markets

Drip pricing can have an impact on the broader markets by distorting competition. If markets were operating with perfect competition, sellers would not be able to increase profits through the use of drip pricing.[95] However, some studies have demonstrated that sellers do profit from drip pricing and price partitioning, evincing a distortion of perfect competition.[96] This is largely because drip pricing and price partitioning can change demand by influencing consumer decisions.[97]

The studies have demonstrated different reasons for the shift in demand. Morwitz, Greenleaf and Johnson found that the anchoring and adjustment effect increases demand for sellers who use drip pricing.[98] Huck and Wallace, and Ellison and Ellison explain that higher search costs caused by drip pricing, as explained above, cause the distortion in demand.[99] Rasch, Thöne and Wenzel's results demonstrate that drip pricing can lead to lower levels of competition within a market.[100] They find that even if consumers are fully informed of the prevalence of drip pricing, the level of competition is insufficient to drive prices down to the level where all-inclusive pricing is used.[101] They find that the higher search costs imposed onto consumers by drip pricing lead consumers to make decisions based on initial base price representations, rather than the total pricing. The overall result is that consumers are worse off and that sellers can increase their profits. Furthermore, Ellison and Ellison explain that sellers compete for consumers' attention

before introducing the surcharges to consumers.[102] They theorize that while base prices are advertised at near cost to the seller, profits are ultimately earned through the surcharge.[103]

### 4. Conclusion

The behavioural economics and consumer psychology literature has identified a number of potential issues with drip pricing. Although more research is needed on the specific nature of the relationship between the context in which drip pricing arises and consumer decisions, there has been enough evidence for competition and consumer protection authorities to be concerned about the effects of drip pricing. However, the legal conception of the types of representations that should be addressed through regulation is not as developed as the economic conception. The next section discusses how the law on drip pricing has developed and evolved in Canada.

## E. Legal Conception of Drip Pricing

The development of drip pricing regulation has seen a few major shifts over its history in Canada. This section will survey the development of regulating drip pricing and identify the types of price representations that have historically been considered drip pricing by Canada's Bureau. This section will also assess the usefulness of past enforcement activities in informing the new drip pricing provisions. The characteristics of what constitutes drip pricing under the *Competition Act* were and remain uncertain, even after the Act's amendment to add the provision specifically targeting drip pricing.

### 1. Pre-Drip Pricing Provision

Prior to the enactment of the drip pricing provision, there was generally little legal guidance as to what constituted drip pricing despite the Bureau's recognition of drip pricing as a form of deceptive marketing as early as 2015.[104] Enforcement actions were taken under the false and misleading advertising provision (section 74.01(1)) and the sale above advertised price provision (section 74.05(1)). Most enforcement actions against drip pricing were concluded through consent agreements with businesses including car rental companies, ticket agents, and telecommunications.[105] Although the term "drip pricing" was not used in any of these consent agreements, the Bureau has stated that they are / has used them as examples of drip pricing.[106] The Bureau's conception of drip pricing is useful in assessing what the legal conception of drip pricing entails. The facts of these consent agreement cases have common features that indicate that the Bureau's conception of

drip pricing is broader than the economist's conception (outlined above) and includes both drip pricing and price partitioning.

First, in all the consent agreement cases, the Bureau argued that there were price representations that were "not in fact attainable" because the sellers required consumers to pay "additional Non-Optional Fees."[107] The focus of the analysis was attainability: whether the price adduced from the general impression was the actual price being paid.[108] The focus on attainability pushed the scope of the Bureau's conception of drip pricing beyond the basic economic conception, which focuses on the absence of disclosing surcharges with the initial representation of the base price. The attainability of an initial price representation can be impeded by inadequate disclosure of surcharges – not just nondisclosure – with the initial price representation.

Second, only in *The Commissioner of Competition v Stubhub Inc, Stubhub Canada Ltd*[109] and *The Commissioner of Competition v Ticketmaster LLC, TNOW Entertainment Group, Inc, and Ticketmaster Canada LP*[110] were the non-optional fees not presented with the initial price representation, and in the later stages of the transaction.[111] This suggests that the Bureau's conception of drip pricing also incorporates incidents of price partitioning.

Third, how the additional non-optional fees were presented to the consumers – in addition to when they were presented – was a factor in determining whether the prices were properly represented. In *The Commissioner of Competition v Hertz Canada Limited and Dollar Thrifty Automotive Group Canada Inc*,[112] *The Commissioner of Competition v Enterprise Rent-A-Car Canada Company*,[113] and *The Commissioner of Competition v Discount Car & Truck Rentals Ltd*,[114] the wording used to describe the fees, how they were used, and where they were placed created the general impression that they were taxes or fees required by governments and authorized agencies.[115] In *The Commissioner of Competition v Comwave Networks Inc*,[116] the non-optional fees were disclaimed in the fine print of the price representations. In *Commissioner of Competition v Aviscar Inc and Budgetcar Inc/Budgetauto*,[117] the words used to describe the non-optional fees, where the words were placed, and how they were combined with actual taxes created a general impression that consumers would be getting a discount when they were not.[118] This indicates that qualitative factors in the actual price advertisement are relevant.

Notwithstanding the consent agreement cases, the Bureau's definition of drip pricing seemed to have changed in its formulation over the years. In 2015, the Bureau referred in its *Deceptive Marketing Digest* to drip pricing as

"advertisers offer[ing] an attractive price for a good or service, but consumers who respond to the representation discover that unexpected additional costs are added to the prominently advertised price."[119] In the 2020 update of the Bureau's *Deceptive Marketing Digest*, drip pricing was referred to as "the practice of offering attractive headline prices and then adding additional mandatory fees later in the transaction."[120] The "unexpected" aspect of the additional fees was dropped, broadening the definition.

### 2. Drip Pricing Provisions

In 2022, the *Competition Act* was amended to include a drip pricing provision.[121] The Bureau had requested for the inclusion of the provision to make enforcement easier – having the *Competition Act* recognize drip pricing as deceptive would eliminate the need for the Bureau to prove why drip pricing is deceptive.[122] The general impression test is to be applied to drip pricing since the general impression test applies to all of section 74.01. However, while the provision governs what constitutes the legal conception of drip pricing, the provision does not provide clear guidance on the types of price representations considered drip pricing. In its commentary about the amendments, the Bureau noted that the provision at minimum cements the practice of drip pricing as a form of false and misleading advertising, although the provision does not explicitly make reference to drip pricing.[123]

The consent agreement cases discussed in section II-E(1) of this paper, above are of limited use in interpreting the provision. If the application of the new drip pricing provision is intended to remain consistent with prior enforcement activities, then the consent agreement cases demonstrate that the provision addresses both drip pricing in the economic sense and some instances of price partitioning (those with inadequate disclosure of surcharges), as both could be captured by the provision's language. However, although the provision uses similar language related to attainability contained in consent agreements, the consent agreements do not provide a clear definition of attainability. The provision also uses the new term "fixed obligatory" fees, which is a shift from the "non-optional" fee language used in consent agreements. It is uncertain if these terms are equivalent.

About one year after the new provisions came into effect, the Bureau brought a drip pricing case against Cineplex before the Tribunal.[124] The decision interpreted the drip pricing provision and brought some additional guidance to the scope of the new provision. The Tribunal also took the opportunity to revisit the formulation of the general impression test and

how the test is to apply. The next section provides a summary of the decision and its main legal outcomes.

## F. Summary of *Canada (Commissioner of Competition) v Cineplex Inc*

The previous sections outlined two issues in deceptive marketing law that needed clarification: first, the legal standard for the consumer perspective in the general impression test; and second, the interpretation of the scope of section 74.01(1.1). These two issues were argued before the Tribunal in *Cineplex*. This section summarizes the *Cineplex* decision on these issues.

### 1. Background and Facts

Cineplex charged an online booking fee. The fee was $1.50 per ticket, capped at four tickets. The fee was not uniform. Members of the Scene+ loyalty program paid $1.00 per ticket, capped at four tickets.[125] Members of the CineClub loyalty program had no fee.[126] The design of Cineplex's webpage and app did not readily make the booking fee apparent when consumers were at the stage of selecting their tickets.

After selecting the number of tickets, a "floating ribbon" appeared at the bottom of the webpage. The ribbon contained a "PROCEED" button and a subtotal which included both the ticket price and the booking fee. Although information about the booking fee was available to the consumer on the webpage, it was not visually apparent,[127] and consumers needed to scroll down to the bottom of the page to find the breakdown of the subtotal containing the booking fee. This was the case throughout the booking process.[128]

### 2. The Consumer Perspective: Welcoming Back the Ordinary Citizen

The Tribunal declined to use the *Time* standard to assess the general impression and reintroduced the ordinary citizen standard, describing it as "appropriate for the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions".[129] The standard was constructed "with a view to protecting and enhancing undistorted markets and honest competition."[130] The *Competition Act*'s market-protection objectives were front and centre in the decision.

In looking to the objectives, the reasons note that section 74.01(1) concerns a wide variety of representations which may be directed at the public at large or specific market segments.[131] Therefore, the standard requires sufficient flexibility to capture multiple types of representations, price or

non-price, made either to the public at large or to certain classes of consumers.[132] Thus, the consumer in each case will have their own characteristics, which are not and cannot be pre-defined by legal rules.[133]

To determine the consumer perspective, the Tribunal or Court must look at the "ordinary consumer of the product or service,"[134] who is usually the consumer "to whom the representation is made, directed or targeted."[135] The definition of this consumer was further refined by a list of contextual factors:

1) the nature of the representation at issue,

2) the characteristics of the members of the public to whom the representation was made, directed or targeted,

3) the nature of the product or service involved, and

4) the particular circumstances of the case.[136]

The *Cineplex* construction of the ordinary citizen standard is contextual, unlike *Time*'s blanket standard. In this way it is more reminiscent of the later "average citizen" standard than the formulation of the ordinary citizen in *Kenitex* and *Sears*. Under *Cineplex*, the ordinary citizen is determined in the context of the impugned representations. The public at large will have different needs than a specific subset of consumers. This standard is responsive to all markets, types of representations, and classes of consumers.

### 3. Application of the Literal Meaning and General Impression

The Tribunal found that the price representations were representations of the ultimate price the consumer would pay, not specifically an "at-theatre" price. The literal meaning was that the represented price was a final price.[137] The general impression was viewed from the perspective of an "ordinary citizen moviegoer" using the site or app.[138] Ironically, the contents of this perspective was not hotly contested.[139] The bulk of the analysis considered the fourth factor, the circumstances of the making of the price representations. The most salient circumstance was the design of the website itself. Specifically, it was designed to facilitate easy movement through the purchase process and "encourage the user's conversion into a ticketholder."[140] This was found not to cause the consumer to carefully scrutinize the page.[141]

The Tribunal's decision on general impression was primarily based on this website design. Consumers were not expected to scroll below the floating ribbon as there was no reason to do so.[142] The design of the page

dissuaded the ordinary consumer from scrolling down, thus hiding the booking fee.[143] Since the website hid information, the general impression was that the represented price was the final price, not an at-theatre price.

This discussion touches, albeit obliquely, on the ways drip pricing capitalizes on consumer psychology. For example, the Tribunal referred to the countdown timer and the "funnel" design of the site, both of which pressure consumers to make a snap decision.[144] The new consumer perspective accurately reflects the goals of the *Competition Act* and is generally successful in clarifying the law. A focus on the circumstances of the case, rather than a pre-existing standard, allows the analysis to be tailored to the market in need of protection. The standard is not perfect, however, and we address some unresolved issues and lingering questions in the final section.

## 4. Interpretation of the Elements under Section 74.01(1.1)

The Tribunal found that the elements of section 74.01(1.1) were met. The requirements can be outlined as the following:

1) There was a making of a "representation of a price."

2) The price is "not attainable due to" a charge or fee that was "fixed" and "obligatory."

3) Amounts imposed by or under an Act of Parliament or a provincial legislature are exempt.

The first requirement was easily decided. The literal meaning and general impression of the representations demonstrated that they were the display of movie ticket prices.[145] The third requirement was not an issue as the exemption did not apply to Cineplex's booking fees.[146]

The second element required more analysis. It was further broken down into three requirements:

1) The represented price was not "attainable" due to fees or charges.

2) The fees or charges were

   a) "Fixed" and

   b) "Obligatory".

No authoritative or persuasive guidance on section 74.01(1.1)'s interpretation existed. The Hansard is sparse[147] and there had been no case law. The

Tribunal found it unnecessary to define "attainable," "fixed," and "obligatory" in the abstract or for all possible purposes.[148] Instead, a fact-based, contextual approach was taken. All three components were found to have been met.

"Fixed"

The Tribunal rejected the Commissioner's proposed definition of "fixed" to mean that the advertiser determined the fee's amount before making the representation. However, the Tribunal accepted the Commissioner's evidence to find that the fee was fixed:

1) The $1.50 was set before the booking fee's introduction, and Cineplex had deliberated the precise level to set the booking fee.

2) By the time that the consumer selects tickets on the Tickets Page, the booking fee is already predetermined.

3) The fact that consumers with different memberships pay a different, predetermined fee does not change the fact that the fee is fixed for each consumer.

The Tribunal then rejected Cineplex's proposed definition of "fixed" to mean "not variable."[149] The Tribunal also rejected that Cineplex's evidence on whether the booking fee was fixed.

1) The cap on the booking fee at four tickets has no effect on the per-ticket fixed fee. This cap also does not affect enough consumers to matter.[150]

2) The fee's dependency on customer decisions alone is insufficient to render the fees as not fixed. Such a proposition would be too "broad and amorphous."[151]

Furthermore, the Tribunal ruled out the possibility of creating two or more levels of fixed charges or fees and charging different categories of customers in itself is sufficient to avoid the application of section 74.01(1.1).[152] The fact that Cineplex charged "pre-determined" and "set amount[s]" to different consumers did not alter the fact that the fee is "fixed."[153]

"Obligatory"

In determining whether a fee or charge was obligatory, a consideration is whether the consumer had a choice to pay the fee or charge. The consumer is required to have been aware that they have the choice.[154]

The Tribunal concluded that the booking fee was obligatory. Firstly, the fee applied to all consumers. Secondly, consumers did not have the choice not to pay. The consumers were not properly informed of the choices, thus, the choice to purchase the tickets in-theatres was meaningless.[155] The ticket prices were not advertised as "in-theatre" prices and "online" prices. And the display would lead an ordinary consumer to believe that the online prices are the only prices to be paid.

"Not Attainable Due to Charges or Fees"

The Tribunal delineated three factors to determine whether a represented price is attainable:

1) The impugned price representation,

2) The channel in which the representations were made and where consumers saw them, and

3) Whether consumers pay a fixed obligatory charge or fee to complete the purchase in that same channel.[156]

Applying these factors, the Tribunal found that the represented ticket prices were not attainable due to the booking fees. The impugned price representation was the ticket prices on the Tickets Page. The ticket prices were represented as the prices that consumers must pay if purchasing through the website, which is the channel in which the price representations were made, seen and acted upon. Neither the literal meaning nor the general impression suggested that the ticket prices only applied to in-theatre purchases.

## Part III. Lingering Questions after *Cineplex*

*Cineplex* makes strong strides in clarifying the law on deceptive marketing. It will be a key decision not just in future drip pricing cases, but other deceptive marketing cases brought under section 74.01(1)(a). However, there are several issues left in the law post-*Cineplex*.

The first set of issues concern the consumer perspective. First, it is not clear from *Cineplex* what the consumer perspective would be when a

representation is made to the public at large. We consider whether this standard would resemble *Time* and look to Australian and New Zealand jurisprudence for potential construction. Second, the method of applying the consumer perspective is ambiguous. There could be either a common baseline perspective that is further refined based on the facts, or there could be constructed bottom-up from the facts directly. We examine the benefits and drawbacks of each.

Second are statutory interpretation issues on defining and applying the elements of reviewable conduct section 74.01(1.1). First, *Cineplex* provides an example of how the factual matrix is used to support the finding of a charge that is "fixed." However, the Tribunal does not explicitly outline any principles of what "fixed" means in the context of section 74.01(1.1). We consider the reasons given in the decision and the objectives of competition law to argue that "fixed" refers to pre-determination or the ability to set the fee or charge. Second, it is uncertain whether or how search and switching costs might play a role in determining whether a charge was "obligatory." We consider the heavy burden that considering search and switching costs might have on sellers. Third, the Tribunal did not explain the extent to which the consumer perspective is considered when analyzing the "fixed," "obligatory," and "not attainable" requirements under section 74.01(1.1). The Tribunal had considered consumer perspective under "obligatory" and "not attainable" but not under "fixed." We argue that the consumer perspective can be considered in all three requirements. Following this are two statutory interpretation issues. We address the degree to which the drip pricing provision and the sale above advertised price provision are duplicative, arguing that there is room for both in the *Competition Act*. Next, we argue that the *Cineplex* standard for consumer perspective and drip pricing should inform cases under the criminal deceptive marketing provision.

Finally, we briefly address the Tribunal's decision not to issue a restitution order. We argue that the decision suggests that restitution will be seldom used in the drip pricing context. However, the fine issued should be sufficient to meet the aims of competition remedies.

## Part IV. Constructing the Ordinary Citizen

For all of *Cineplex*'s guidance on the ordinary citizen, there are two remaining questions on how to construct the ordinary citizen. First, where a representation is made to the public at large, what are the characteristics of the ordinary citizen? Are they meaningfully different to the credulous and inexperienced consumer in *Time*? Second, the methodology laid out by the

Tribunal is somewhat unclear. It can be interpreted as requiring a common baseline ordinary citizen who is then deviated from, or a fully contextual analysis. This section examines each in turn.

### A. The Ordinary Citizen and the Public At Large

The public at large is the broadest possible cross-section of society. The reasons in *Cineplex* do not explain as to what this cross-section looks like. It cannot be assumed that the "ordinary moviegoer" is the same as the public at large.[157] Thus, *Cineplex* does not address the question and so the characteristics of the public at large to determine consumer perspective are unclear.

One possible solution would be adopting the credulous and inexperienced consumer standard from *Time*. On its face, this is a reasonable choice. *Time* concerned a representation to the public at large. Further, its standard incorporates the wide range of knowledge and reasoning abilities present in such a cross-section.[158] Where representations are made to everyone, then credulous and inexperienced people are part of the target audience. If there is any place for the credulous and inexperienced consumer, it would be here.

Adopting this standard raises issues with the objectives of the *Competition Act* and its deceptive marketing provisions. The *Time* standard was based on the goals of consumer protection legislation, which as discussed above are different from competition concerns.[159] Competition law's aim in regulating deceptive marketing is primarily to protect the proper functioning of *markets*, not protect *consumers*. So long as businesses are providing accurate information to consumers, workable competition and effective markets are protected.[160] This is why the Tribunal chose not to adopt *Time*'s standard. Thus, the standard does not need to capture the credulous and inexperienced consumer.

Australia and New Zealand offer one way of constructing the ordinary citizen when the public at large is the target audience. Both use a variation of the ordinary citizen approach to consumer perspective. In Australia, the standard is the "reasonable consumer".[161] The New Zealand Court of Appeal refers to it as the "typical consumer."[162] The two are substantially similar.

In *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited*,[163] the Federal Court of Australia discussed the range of persons likely to read an advertisement made to the "world at large."[164] *Jetstar* internet advertisements for airline services, which the Australian Competition and Consumer Commission alleged were not attainable, similar to the *Cineplex* decision.[165] The Court described this range of persons as including:

> […] the shrewd and the ingenuous, the educated and the uneducated, the experienced and inexperienced in commercial transactions; it will include the astute, the informed, those who are sceptical and read the small print, those who are intelligent and those who are well informed, and it will also cover many who do not possess those characteristics and those who are less informed and those with average intelligence.[166]

Despite this wide range of persons, the court is not to consider everyone included in that range. It must exclude certain extreme outliers, the "extremely stupid, the unusually gullible and those whose reactions are extreme or fanciful."[167] Thus, the consumers considered are the "'ordinary' or 'reasonable' members of that class."[168] The question then becomes "whether a not insignificant number of persons within that class are likely to have already been led into error by the impugned conduct or likely to be led into error in the future by such conduct."[169] The resultant class of consumers is "all the consumers in the class targeted except the outliers."[170]

This does not mean that the consumer is well-informed or has a robust reasoning capacity. The consumer "[…] of somewhat less than average intelligence and background knowledge."[171] Indeed, the Federal Court of Australia cautions that it is not entitled to assume that the consumer "will be able to supply for himself or herself omitted facts or to resolve ambiguities."[172] This is then between "average" as understood by the New Zealand Court of Appeal and the standard in *Time*. It includes people with below and above average intelligence and information, but not those whose perspective is "extreme." This approach can capture the mental shortcuts and behaviour that consumer psychology is concerned with.[173]

When considering the public at large, this approach slots neatly into *Cineplex*'s reasons for rejecting *Time*. It provides explicit guidance on whom to exclude when determining consumer perspective for competition law. The outliers identified in these cases exist in Canada and are analogous to the credulous and inexperienced consumers protected in *Time*.[174] Further, the ordinary citizen standard in *Kenitex*, and reintroduced in *Cineplex* suggested a more prudent consumer. Adopting the outliers exclusion would tailor the standard to fit the market-regulation objectives of the *Competition Act*, avoiding turning it into a consumer protection statute.

An "ordinary" person is not likely to have an extreme reaction or to be unusually gullible. Competition law does not need to bend over backwards to protect outliers, as that is not its purpose. In cases of general advertising, the Tribunal should adopt a definition of the ordinary citizen in the context of the public at large like that used in Australian and New Zealand case

law. The law should recognize the existence of outliers and exclude them from the consumer standard. Doing so ensures a focus on the accuracy of information, reasonably understandable to the ordinary person, and not on protecting those who do not represent the general population.

### B. Is There a Common Baseline for the Ordinary Citizen?

The process of constructing the ordinary citizen on a set of facts can be interpreted in two ways. One starts from a common baseline and then uses contextual factors to deviate from the baseline and construct the ordinary citizen within the targeted group. The other is purely contextual, where the ordinary citizen is a cross-section of the public constructed entirely from the evidentiary record without reference to any baseline.

The Tribunal refers to the standard in *Kenitex*, which held that "[t]he ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal."[175] However, this is only referred to when describing the history of general impression law rather than when the standard is actually laid out. The Tribunal does use the phrase "the legal perspective… should remain that of the ordinary consumer of the product or service."[176] This does suggest the adoption of a previous standard. However, *what* previous standard this refers to is not clear in the reasons. Whether this is the general ordinary citizen standard in *Kenitex* or the average person in cases like *Maritime Travel* is not explicit.

When considering whether the ordinary moviegoer is particularly credulous or inexperienced, the Tribunal remarked that "The Commissioner did not point to any evidence that an ordinary consumer on the Cineplex website has any unusual characteristics related to credulity or readiness to believe on-screen representations, and I find none."[177] This statement can be interpreted under either construction of the standard. Either the Commissioner was required to show why the Tribunal should deviate from a set standard, or that the Commissioner failed to establish, based purely on the facts, that the ordinary moviegoer was particularly credulous and inexperienced.

There are two potential pathways the law could take. The first is the highly contextual approach implicit in *Cineplex*, where each case is considered in its own context without reference to a baseline ordinary citizen. In this path, different contexts would be bespoke bubbles. They would interact with each other only by analogy to each other, with similar standards likely used for

cases in the same industry, akin to the post-*Chatr* cases. There is nothing inherently wrong with this standard. The Tribunal provided guidance on how to identify the characteristics of the intended audience, and similar standards have been employed in the section 52 context. How this would play out and whether these constructions adequately meet the needs of competition law is a matter for future case law. Where everything is based on individual facts, conclusions cannot be drawn *a priori*.

With a heavily contextual analysis there are a few risks. First, Canadian competition case law tends to develop at a snail's pace, with cases few and far between. Further common law elaboration is likely to take years, leaving the contours of the standard and its application to different markets unknown.[178] Second, if the ordinary citizen is unmoored from a general standard then it may be difficult for courts and the Tribunal to fashion a robust and consistent analysis of the ordinary citizen. *Time* and *Kenitex* each provide a sense of what kind of person the ordinary citizen is meant to be. Without this, decision-makers will need to exercise more discretion and elaborate on the factors laid out in *Cineplex* which could lead to inconsistent decision-making.

An alternative proposal would be to incorporate the general standard in Australian and New Zealand case law, discussed in the previous section, as the baseline. One would start with the largest cross-section of consumers and adjust using characteristics of the targeted consumers. This framework can generally be transferred to the Canadian context without difficulty. Like the *Cineplex* standard, the Australian and New Zealand framework considers the target class of consumers. The same contextual elements are present, though implied in that context. In defining the target class, the factors in *Cineplex* can help to contour that set of consumers.

What would a consumer perspective that takes cues from Australia and New Zealand's jurisprudence look like? It would first define the class of consumers are the targets of the advertisement, minus any outliers. Then, the characteristics of that class would be defined by considering the *Cineplex* factors. This would in turn modify the general standard of persons with "less than average intelligence and background knowledge" to best fit the circumstances.

*Chatr* is a good example of this kind of reasoning. It began with a baseline of the credulous and inexperienced consumer. Given that the consumers in that case were necessarily experienced with unlimited wireless services, Justice Marrocco then adjusted the perspective accordingly, finding that

the consumers were only "technologically inexperienced."[179] In *Chatr*, the baseline was deviated from to fit the context of that particular case. The Australian and New Zealand definition and its exclusion of outliers provides clear instruction on how to conceptualize a given class of consumers. It is entirely in line with the standard provided in *Cineplex* and the objectives of the *Competition Act*.

One note of caution for using these cases is that the ultimate question to be answered in Australian and New Zealand law is whether "a not insignificant number of persons within that class are likely to have already been led into error by the impugned conduct or likely to be led into error in the future by such conduct."[180] This does differ from the Canadian context, where materiality is determined by whether the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."[181] While a notable difference, this does not affect the determination of consumer perspective. Rather, this difference goes to the materiality of the misrepresentation, and so it should not be an impediment to adopting the useful suggestions from the Australian and New Zealand cases.[182]

Regardless of which methodology is adopted, a more contextual analysis may make compliance with the deceptive marketing regime more difficult. The advantage of a fixed standard like *Time* is that in all cases, firms can more readily predict its applicability. Where the standard is contextual, it may not always be easy to predict the characteristics of the consumer. This could lead to diverging interpretations about what constitutes deceptive marketing and thus more uncertainty. We take no position on which of the methodologies we outline would be more effective. That is a matter for future case law to determine. With this section, we mean to offer two constructions of the standard and clarify ways the jurisprudence may develop.

## Part V. Statutory Interpretation Issues

### A. Interpretation and Application of Section 74.01(1.1)

Although the Tribunal provided some guidance on the definition of section 74.01(1.1), much uncertainty remains. First, the definitions of the three requirements of section 74.01(1.1) are not well-developed. Second, the Tribunal's characterization and application of those requirements overlap, and the distinction between the requirements is hard to identify.

1. What factors should be considered in determining whether the fees were "fixed"?

The Tribunal's fact-based analysis provides minimal guidance on how the "fixed" requirement will be satisfied in future cases. The "fixed" requirement should refer to a seller's ability to set, i.e., pre-determine, the fee's amount and structure. This interpretation is supported by the Tribunal's reasons.

First, although the Tribunal did not adopt the Commissioner's proposed definition of "fixed", the Tribunal's reasons for finding that the booking fee was "fixed" seem to align very closely with the Commissioner's proposed definition. The Tribunal focused on Cineplex's ability to set and pre-determine the amount and structure of the fee as an indicator of whether the fee is "fixed." Although different types of consumers were charged different booking fees, the amounts of the fees were already set by the time the consumer began the purchasing process.[183] Therefore, the ability to pre-determine fees' amount and structure appears to be an important consideration.

Second, the Tribunal rejected Cineplex's proposed definition that "fixed" means "not variable."[184] The Tribunal concluded that Cineplex's proposed definition was contrary to Parliament's intent and the purposes of section 74.01(1.1). It is uncertain whether a fee's variability can at all be relevant to determining whether the fee is "fixed."

Third, the Tribunal did not seem to foreclose the possibility that a fee's dependency on consumer choices could be a relevant consideration.[185] The Tribunal only stated that "without more," the dependency itself is "too broad and amorphous."[186] There was no explicit rejection that dependency could not be relevant at all. However, this begs the question of what "more" is needed for the dependency to render a charge or fee as not fixed.

Interpreting "fixed" to mean "set" or "pre-determined" also accords with the function and purposes of section 74.01(1.1) and the *Competition Act* more broadly. Although the deceptive marketing provisions have a large consumer protection aspect, their ultimate objective is protecting competition and undistorted markets. In the context of section 74.01(1.1), competition is protected by preventing sellers from misrepresenting price information within the market. The provision should only apply when sellers have control over pricing and are not bound or obligated to price a product a certain way. If this was not required, enforcement against the sellers would be ineffective in protecting competition – they are not the source of the problem. Essentially, the "fixed" requires some level of fault on the sellers for causing the distortion in pricing information.

There is also a fine line between market players behaving anti-competitively and market conditions not facilitating competition. The former is dealt with by competition enforcement measures under the *Competition Act*, and the latter should be dealt with by economic policy. Sellers being unable to "fix" the surcharge is different from sellers merely passing costs onto consumers. When sellers pass costs onto consumers, they still have control over how the fees are set. One extreme example of a fee that is not "fixed" is the charge for paying with a debit card. The usage charge is obligatory because it must be paid. It makes the initial price unattainable because it is added to the total amount that the consumer pays for the product. However, the seller does not pre-determine this charge. The bank sets when and how much to charge.

2. Do perceived switching costs factor into assessing whether there is optionality and choice when determining the "obligatory" requirement?

The Tribunal also did not set out specific principles in deciding whether a charge or fee is "obligatory." The Tribunal's analysis appears to focus on choice and optionality. First, the consumer must pay a fee in the transaction's purchase channel. Second, the consumer needs to be "aware" of alternative channels that do not charge the fee.[187] However, if the availability of choice and optionality is the focus of "obligatory," awareness might not always suffice.

The Tribunal did not consider how perceived search and switching costs might impact the analysis. Whether an alternative without the booking fee existed was assessed from the ordinary consumer's perspective. However, if an ordinary consumer perceived high switching costs, the consumer might not have perceived a plausible alternative to exist, even if the consumer was aware of *an* alternative.[188] The key would be *when* the consumer was made aware of the alternative. If the consumer was made aware that there were alternative channels that did not require the fee to be paid at the start of the transaction, the charge would essentially be the price for the added convenience of making the transaction through the specific channel. If the consumer was instead made aware of alternatives that did not require the charge late into the transaction, the charge might be considered obligatory because of the perceived search and switching costs associated with leaving the transaction and looking into the alternative.

If search and switching costs are to be included in the analysis, it would mean that the seller might be responsible for minimizing such costs arising from partitioning prices. When such an obligation might arise will depend

on the facts. It will be an onerous one for sellers because the of general uncertain nature of behavioural economics and consumer psychology evidence. It will be difficult to know exactly when search and switching costs created by a specific pricing practice will be high enough to deprive an ordinary consumer of a choice. Imposing such an onerous obligation can only be justified once the Commissioner has provided evidence that demonstrates the high switching costs for the particular price representations being challenged. Given the uncertain nature of behavioural economic and consumer psychology evidence, the Commissioner will likely have a very high evidentiary burden to set out that the specific price representations being challenged will impose high search and switching costs on the ordinary consumer.[189]

3. To what extent is consumer perspective relevant to the analysis for each requirement of section 74.01(1.1)?

The Tribunal referred to the ordinary citizen and the general impression when establishing that the "obligatory" and "not attainable" requirements had been met.[190] The Tribunal focused on whether the general impression conveyed by the price representation suggested that the booking fee was mandatory for the channel. However, the Tribunal referred to "the eyes of the Tribunal with the benefit of the very detailed review" of the channel as a way of coming to establish that the price representations were "not attainable."[191] The Tribunal also did not refer to the ordinary citizen or the general impression when discussing whether the booking fee was "fixed."

The consumer perspective could be considered under every requirement for section 74.01(1.1). Under the "fixed" requirement, a fee or charge's dependency on a consumer's choices might be relevant.[192] When consumer choice is considered, the consumer's perspective might be relevant. The consumer perspective must be considered for the "not attainable" requirement because this requirement is what links the entire analysis of the provision to the initial price representation. Although the Tribunal's reasons contained both the general impression and the perspective "through the eyes of the Tribunal,"[193] it should be clarified here that the general impression should hold more weight than the Tribunal's perspective. A parallel can be drawn here with the final step of the analysis under section 74.01(1)(a), whether the general impression is false and misleading. Similarly, the "not attainable" step is satisfied by establishing that the price representation, adduced by the general impression, cannot be attained.

4. Further Considerations for Developing the Jurisprudence around Section 74.01(1.1)

Given the general lack of authoritative guidance on the interpretation of section 74.01(1.1), the provision's interpretation will need to evolve, based on the facts presented in the cases that arise. However, two broad considerations should also guide the interpretation of section 74.01(1.1).

First, the structure of section 74.01(1.1) is important.[194] The grammatical structure of the provisions should be properly considered, and then inferences can be drawn from the structure. At the core of section 74.01(1.1) are price representations that "[are] not attainable due to… charges or fees." Section 74.01(1.1) captures representations that features "fixed" and "obligatory" charges. Consistent with modern rules of statutory interpretation, these terms should be given a large and liberal interpretation.[195] However, these terms should not be interpreted so broadly that section 74.01(1.1) requires all-inclusive pricing. As the Tribunal in *Cineplex* established, this is not what the provision requires.[196]

Second, the different requirements under section 74.01(1.1) should be able to come together coherently to generally describe the types of pricing representation that are captured by the provision. The Tribunal decision did not outline a clear idea of the types of price representation that section 74.01(1.1) is intended to capture. With Cineplex's price representations being captured under section 74.01(1.1), there is still continuity in the type of price representations subject to deceptive marketing enforcement. Cineplex's booking fee is consistent with the types of representations found to be deceptive in the consent agreement cases. Section 74.01(1.1) then captures at least two types of price representations:

1) A non-optional surcharge is presented after the base price is initially presented. This is the basic economic conception of drip pricing. Examples include *StubHub*, *Ticketmaster*, and *Jetstar*.

2) A non-optional surcharge is presented with the base price, but the surcharge is not presented in clear manner. This is price partitioning with an added layer of marketing representations. Examples include *Avis & Budget*, *Hertz & Dollar Thrifty*, and *Enterprise*.

## B. The New Drip Pricing Regime and Section 74.05(1): Sale above advertised price

The drip pricing provisions should not be considered in isolation from other relevant provisions; related provisions in a statute inform the interpretation of each other.[197] As discussed, the *Competition Act* has another provision that has been used to target drip pricing: the sale above advertised price provision under section 74.05(1). In a class certification case under section 74.05, the Federal Court noted that the alleged conduct had been described as drip pricing by the Bureau.[198] This long-standing provision's continued availability alongside section 74.01(1.1) presents some interesting questions of application and interpretation.

Section 74.05(1) clearly covers conduct beyond drip pricing. It requires only that a product be sold at a higher price than advertised.[199] If an advertisement stated that a product was $30, but at point of purchase the seller priced it at $40 without any extra fees, then that conduct would not be covered by the drip pricing provision, but it is a sale above advertised price. Section 74.05(1) would also cover negligence, refusal to honour the advertised price, the seller arguing that a "mistake" was made without evidence, or intentionally false price representations. A prior criminal provision covering the same conduct has been used to convict sellers where shelf and checkout prices did not match newspaper advertisements.[200] These are sales above advertised prices, but not necessarily drip pricing. There is a broad scope for this provision outside drip pricing.

The two can still overlap. A sale above advertised price can include the imposition of hidden fees and in the Bureau's eyes at least *has* been sufficient to cover drip pricing.[201] There are two possibilities for interpreting the overlap. First, that section 74.01(1.1)'s purpose is to contain the practice of drip pricing within itself, to the exclusion of section 74.05(1). This would reduce the scope of section 74.05(1). The alternative is accepting the overlap, with both provisions able to cover drip pricing, just in different ways.

The first interpretation is what Ruth Sullivan describes as a paramountcy argument, arguing that the two provisions conflict when applied to a drip pricing case and that section 74.01(1.1) ought to prevail.[202] It is attractive due to the specificity of the statement "for greater clarity" and the title of section 74.01(1.1) as "drip pricing", both implying that the provision intended to entirely capture drip pricing. However, this leads to the

undesirable conclusion that Parliament intended to restrict the operation of section 74.05(1) without directly amending it.

The second option is more likely to succeed. Ruth Sullivan has stated that "[s]o long as overlapping provisions *can* apply, it is presumed that they are meant to apply."[203] This is a well-accepted presumption in the case law.[204] Courts are not fond of displacing this presumption. As the Supreme Court stated in *Thibodeau v Air Canada*,[205] "[o]verlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results."[206] For there to be conflict, the provisions must be "so inconsistent with … or repugnant" to each other that they are "incapable of standing together."[207] That is not the case with sections 74.01(1.1) and 74.05(1). The two operate in different circumstances, and even in the drip pricing context they operate with different tests and requirements. Both can act as for liability for the same (or at least substantially similar) conduct, in a drip pricing case.

Extrinsic evidence supports allowing overlap. The Bureau's recommendations to Parliament characterize a potential drip pricing provision as a clarificatory tool. The Bureau noted that while section 74.01 was successfully used to fight drip pricing, the *Competition* Act failing to recognize it as harmful led to "significant resources" being needed to prove that it was deceptive.[208] This is also evident in Senate Hansard. The Honourable Lucie Moncion described one of the purposes of the amendments as to "clarify that posting of partial prices is false or misleading representation."[209] While Hansard is not dispositive, it is an important interpretive tool.[210]

The plain text of section 74.01(1.1) supports overlap.[211] The legislation begins with "for greater clarity", indicating that it has the clarificatory role advocated by the Bureau. This is also true from its function, which states that if a practice is drip pricing, it is necessarily false and misleading. The text and context do not suggest that section 74.05(1)'s role in regulating drip pricing was meant to be abrogated from. Given the requirement of large and liberal interpretation, absent clear textual direction the scope of each provision should not be reduced.

The two provisions are likely to operate in a state of overlap in drip pricing cases.[212] They are complimentary streams of liability; the Commissioner or private parties may argue both or either provision. Outside of drip pricing cases, there is a broad scope of activity that section 74.05(1) regulates. Section 74.01(1.1) does not require a reading down of section 74.05(1).

## C. *Cineplex*'s Applicability to Criminal Deceptive Marketing Cases

As *Cineplex* was a civil case decided under section 74.01 before the Tribunal, rather than a superior court, and it is not binding in the criminal deceptive marketing context. Thus, the ordinary citizen standard may develop differently in criminal cases under section 52, or private recovery cases based on underlying criminal action.[213] This could lead to different standards between the civil and criminal provisions. There are compelling reasons to adopt the ordinary citizen standard in the section 52 context. First, the ordinary citizen standard originated in the section 52 jurisprudence.[214] Second, when the two provisions are compared, the only difference between them is that section 52 requires *mens rea*, while section 74.01(1) does not.

The only difference between the two provisions is that the criminal provision includes the language "knowingly or recklessly."[215] The same *conduct* (i.e., the *actus reus*) is targeted by each provision – what makes one criminal is *intent*. There is no principled reason to differentiate the consumer perspective from which to view the underlying conduct based on the type of proceeding. The same applies to the drip pricing provisions, which are identical in both contexts.[216] Section 52 has been used to inform civil deceptive marketing cases. In *Sears*, the Tribunal used the criminal provision to inform interpretation of the then-new civil provisions.[217] Given the similarities between the two provisions, this relationship should work in reverse.

A consistent interpretation will allow the two types of cases to inform each other, contributing to the development of the case law. This is especially important for section 36(1) recovery actions. While these actions are based on underlying criminal conduct, they are civil provisions at heart. Applying the ordinary citizen standard in the section 52 context will bring the two types of civil action to a consistent conceptual ground. Given recent amendments now allowing for private actions to the Tribunal under section 74.01(1),[218] a consistent interpretation of deceptive marketing conduct would streamline legal argument by applying the same standard to similar civil actions.

The next part will briefly discuss the Tribunal's decision on the appropriate remedy in *Cineplex*. We recognize that the topic of remedies is broad, and an entire article can be written on the Tribunal's decision in *Cineplex* on this topic. However, the decision to choose an administrative monetary penalty over a restitution order is worth highlighting.

## Part VI. Administrative Monetary Penalties and Restitution Orders

The Tribunal ultimately ordered that Cineplex refrain from making false representations about the Booking Fee, refrain from substantially similar conduct, and pay an administrative monetary penalty of $38,978,000.[219] In coming to this conclusion, the Tribunal found that a restitution order under section 74.1(1)(d) was inappropriate.[220] The lack of a restitution order in this case suggests that they are unlikely to be used in future similar large-scale cases with a low per-consumer refund. The Tribunal's analysis for whether restitution was appropriate surveyed the following factors:

1) How distinguishable and certain the amount of booking fees paid was, compared to other payments.[221]

2) The practicalities of distributing the refunded money.[222]

3) Evidence that such an order would work.[223]

4) The impact on Tribunal resources.[224]

5) Whether consumers would take up the refunds, given the low amount of value per-consumer.[225]

6) Fairness considerations:[226]

    a) That Cineplex continued to make the representations.

    b) Uncertainty of the Tribunal's jurisdiction to reverse Scene+ points redemptions used to pay the online booking fee.[227]

The Tribunal also rejected Cineplex's suggestion that consumers received the "value that they were told they were getting", that is, "advanced seat selection."[228] This was given little weight. The Tribunal held that receipt of some value "does not excuse reviewable conduct."[229]

The Tribunal had substantial information about who paid what amount of booking fees and when. Although this information was not perfect,[230] it was still possible to calculate a per-customer refund of the booking fee given that purchases were tied to account information. The issue was primarily one of distribution – how to get thousands of small refunds out to those affected.[231] In future cases of large-scale drip pricing, information may be much worse, making it even more unlikely that restitution would be ordered in such cases.

The size of the refund also militates against the use of restitution. In *Cineplex*'s case, the amount would be $1.50 or $1.00 per ticket, a small amount in isolation. The Tribunal stated in a side note that "[t]here are also concerns about whether all consumers will take up their (small) refunds."[232] Just because an amount is material for finding reviewable conduct under section 74.01(1)(a) does not mean that it is material enough for a consumer to actively take up their refund. The mental shortcuts that a consumers use when prices are dripped do not necessarily mirror onto the case of taking up a refund of a few dollars. It takes less effort to accept a dripped price then to take time out of one's life to claim that small refund. For similar cases, then, restitution is even less likely to be appropriate or effective.

A lack of restitution orders does not mean that remedies will be ineffective. The administrative monetary penalty ordered in *Cineplex* was historically high and equivalent to the amount Cineplex earned from the Booking Fee.[233] In terms of sending a deterring signal to the market and Cineplex, this amount should be impactful.

## Part VII. Conclusion

*Cineplex* is an important step forward in deceptive marketing law. It will guide future cases both in and out of the drip pricing context. However, no one case is a complete answer to all issues and all situations. We have identified some questions that remain after *Cineplex* and provided potential directions the law could take and considerations for future development in this area. Regardless of whether these proposals are adopted, the Tribunal and the courts should pay close attention to the purposes of the *Competition Act* and to the underlying economic harms of drip pricing and deceptive marketing generally when deciding future cases.

## ENDNOTES

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1 2024 Comp Trib 5 [*Cineplex*].

2 *Competition Act*, RSC 1985, c C-34.

3 2012 SCC 8 [*Time*].

4 An order under s 74.1(1)(d) of the *Competition Act*, *supra* note 2. Although this provision does not use the word "restitution", it was argued as restitution in *Cineplex* and the term was used in the Tribunal's judgment (see *Cineplex*, *supra* note 1 at paras 442–43).

5 *Consumer Protection Act*, *2002*, SO 2002, c 30, Schedule A.

6 *Ibid*, s 14(1) ("[i]t is an unfair practice for a person to make a false, misleading or deceptive representation"). See also *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 5(1) "[a] supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction); *Consumer Protection Act*, CQLR, c P-40.1, s 219 ("[n]o merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer").

7 *Competition Act*, *supra* note 2, s 74.01(1)(a).

8 *Prebushewski v Dodge City Auto (1984) Ltd*, 2005 SCC 28 at para 33; *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 at para 136 [*Bernstein*].

9 *Time*, *supra* note 3 at para 43, citing *Regina v Colgate-Palmolive Ltd*, 1969 CanLII 1005 at 102 (ONSC).

10 *Bernstein*, *supra* note 8 at paras 135–36.

11 *Competition Act*, *supra* note 2, s 1.1.

12 See Anita Banicevic, "Assessing General Impression under the Competition Act: The Credulous Man Who Never Was There" (2016) 29:2 Can Competition L Rev 54 at 64; see also *R v Stucky*, 2009 ONCA 151 at paras 38–48 [*Stucky*] (particularly noting at para 39 that the primary objective of the act is to "protect Canadian businesses").

13 2005 Comp Trib 2 [*Sears*].

14 *Ibid* at para 93.

15 See *Cineplex*, *supra* note 1 at para 227; *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2009 FCA 295 at paras 61–63 [*Premier*].

16 *Premier*, *supra* note 15.

17 *Ibid* at para 63.

18 *Ibid* at para 62.

19 John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 496, citing Frederic M Scherer, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin, 1980) at 42 ("[t]he

prescriptions for workable competition from economists include that there be no "unfair, exclusionary, predatory or coercive tactics," and that sales promotion be informative, or not misleading").

[20] Tyhurst, *supra* note 19 at 497; *Premier*, *supra* note 15 at para 62; see also Glenn Ellison & Sara Fisher Ellison, "Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy" (2018) 18 Innovation Pol'y & Econ 1; Alexander Rasch, Miriam Thöne & Tobias Wenzel "Drip pricing and its regulation: Experimental evidence" (2020) 176 J of Econ Behaviour & Organization 353; Florian Baumann & Alexander Rasch, "Exposing false advertising" (2020) 53:3 Can J Econ 1211.

[21] *Cineplex*, *supra* note 1 at para 233. But see *Lin v Airbnb, Inc*, 2019 FC 1563 at para 57 [*Lin*], where Gascon J held that deceptive marketing is closely related to consumer protection and that the *Competition Act* has been recognized as consumer protection legislation. See also *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 at para 61. The *Competition Act* can play a consumer protection role, but its purposes are broader as recognized in *Cineplex*.

[22] *Cineplex*, *supra* note 1 at para 233.

[23] Misleading advertising as a criminal offence is handled by s 52 of the *Competition Act*, *supra* note 2. This includes a drip pricing provision under s 52(1.3).

[24] *Competition Act*, *supra* note 2, s 74.01(1)(a).

[25] In *Sears*, *supra* note 13 at paras 321–23, the representations were defined by reference to a statutory provision limiting the kind of representations that could be considered. In *Cineplex*, *supra* note 1 at paras 238–40, the Tribunal defined the representations after a lengthy discussion of the facts.

[26] *Sears*, *supra* note 13 at para 333, citing *R v Kenitex Canada Ltd et al* (1980), 51 CPR (2d) 103, [1980] OJ No 2758 (Ont Co Ct) [*Kenitex*]. See also *Sears*, at paras 334–36.

[27] *Competition Act*, *supra* note 2, s 74.03(5) ("[i]n proceedings under sections 74.01 and 74.02, 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" [emphasis added]).

[28] The literal meaning is "what it says on its face, interpreted in its ordinary sense" (see *Cineplex*, *supra* note 1 at para 242, citing *Time*, *supra* note 3 at para 47; see also *Sears*, *supra* note 13 at paras 327, 330–31).

[29] Once the literal meaning and general impression are determined, the tribunal or court then asks whether either or both are false or misleading. Extrinsic evidence can be used, but this evidence cannot modify the general impression already determined (see *Bell Mobility Inc v Telus Communications Co*, 2006 BCCA 578 at para 18 [*Bell Mobility*]; *Maritime Travel Inc v Go Travel Direct.Com Inc*, 2008 NSSC 163 at para 17 [*Maritime Travel*], aff'd 2009 NSCA 42 at para 5 [*Maritime Travel Appeal*]). This is a heavily fact-based inquiry without a specific legal test (see e.g., *Cineplex*, *supra* note 1 at paras 394–417; *Sears*, *supra* note 13 at paras 333–44).

[30] There was a brief period where the "credulous man" test was considered. However, a bill that would have codified this test never received royal assent (see Adam Newman, "Richard v Time: The Return of the Credulous Man" (2013) 26:2 Can Competition L Rev 275 at 278–80). For the purposes of this discussion, that test is irrelevant.
[31] See generally Newman, *supra* note 30 at 280.
[32] *Kenitex*, *supra* note 26.
[33] *Ibid* at 107.
[34] *Sears*, *supra* note 13 at para 326.
[35] *Commissioner of Competition v Gestion Lebski Inc*, 2006 Comp Trib 32 at para 155.
[36] Banicevic, *supra* note 12 at 61.
[37] *Ibid.*
[38] *Ibid* at 63.
[39] Competition Bureau, "Application of the Competition Act to Representations on the Internet" (16 October 2009) at 4, online (pdf): <publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2010/ic/Iu54-1-2009-eng.pdf> [Competition Bureau, *Internet Representations*]; Banicevic, *supra* note 12 at 61–63. For a case applying this perspective, see e.g., *Maritime Travel Appeal*, *supra* note 29.
[40] *Internet Representations*, *supra* note 39 at 4.
[41] *Maritime Travel*, *supra* note 29.
[42] *Ibid* at para 17, citing *Bell Mobility*, *supra* note 29 at paras 16–19.
[43] *Maritime Travel*, *supra* note 29 at paras 18–23.
[44] *Ibid* at para 43.
[45] *Ibid.*
[46] See Banicevic, *supra* note 12 at 64–65.
[47] *Time*, *supra* note 3 at para 72.
[48] See e.g., Banicevic, *supra* note 12 at 64–65, 68–69; *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 at paras 123–31 [*Chatr*] (modifying *Time*'s standard to fit the circumstances). See also Newman, *supra* note 30.
[49] *Supra* note 6.
[50] *Time*, *supra* note 3 at para 62.
[51] *Ibid* at 61–62.
[52] *Ibid* at paras 65–72.
[53] *Ibid* at para 69.
[54] *Ibid* at para 71.
[55] *Ibid* at para 50.
[56] *Ibid.*
[57] *Chatr*, *supra* note 48.
[58] *Ibid* at para 6.
[59] *Ibid* at para 127.
[60] *Ibid* at para 129.
[61] *Chatr*, *supra* note 48 at para 131.

[62] *Ibid*.
[63] *Bell Canada v Cogeco Cable Canada GP Inc*, 2016 ONSC 6044; *Telus Communications v Shaw Communications Inc*, 2020 BCSC 1354; see also *Canada (Commissioner of Competition) v Canada Tax Reviews Inc*, 2021 FC 921 (where the Federal Court, in a motion to set aside and vary, assumed the application of the *Chatr* test only for that proceeding).
[64] 2023 ONCA 121.
[65] *Ibid* at para 26 (it should be noted that this case was based on s 52(1), a criminal provision, under which an action for recovery under s 36(1) was brought).
[66] *Competition Act*, *supra* note 2, s 74.01(1.1). Note that the wording is slightly different to the initial enactment in *Budget Implementation Act*, *2022*, *No 1*, SC 2022, c 10, s 259. This difference is immaterial.
[67] *Ibid*.
[68] See Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (2022) at 47–48, online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>. See also Federal Trade Commission, "*Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011*" (2022), online: <federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>; *Digital Markets, Competition and Consumers Act 2024* (UK), ss 230(2)(b)–(c), (g), (4).
[69] Somak Banerjee et al, "The impact of consumer expectations and familiarity on deceptive pricing in advertising: a view from drip pricing practice" (2024) 43:2 Intl J of Advertising 254 at 256–57; Peter O'Loughlin, "Cognitive Foreclosure" (2022) 38:4 Ga St U L Rev 1097 at 1154; Tom Blake et al, "Price Salience and Product Choice" (2021) 40:4 Marketing Science 619 at 619; Rasch, Thöne & Wenzel, *supra* note 20 at 353–54; Shelle Santana, Steven K Dallas & Vicki G Morwitz, "Consumer Reactions to Drip Pricing" (2020) 38:1 Marketing Science 188 at 188; Kenneth Jull & Nicole Spadotto, "Digital Advertising and Purchasing: Fun or a New Type of Deception?" (2020) 33:1 Can Competition L Rev 1 at 3; Eric A Greenleaf et al, "The price does not include additional taxes, fees, and surcharges: A review of research on partitioned pricing" (2016) 26:1 J of Consumer Psychology 105 at 107; Stefan Huck & Brian Wallace, *The Impact of Price frames on Consumer Decision Making* (London, UK: Office of Fair Trading, 2010) at 6; Gorkan Ahmetoglu, Adrian Furnham & Patrick Fagan, "Pricing practices: A critical review of their effects on consumer perceptions and behaviour" (2014) 21 J of Retailing and Consumer Services 696 at 697.
[70] O'Loughlin, *supra* note 69 at 1154; Jull & Spadotto, *supra* note 69 at 14; Greenleaf et al, *supra* note 69 at 106; Vicki G Morwitz, Eric A Greenleaf & Eric J Johnson, "Consumer's Reactions to Partitioned Prices" (1998) 35:4 J of Marketing Research 453 at 453.
[71] See Banerjee et al, *supra* note 69 at 256–57.
[72] See Dirk Totzek & Gabriel Jurgensen, "Many a little makes a mickle: Why do consumers negatively react to sequential price disclosure?" (2020) 38:1 Psychology

& Marketing 113 at 114; Santana, Dallas & Morwitz, *supra* note 69 at 189; Huck & Wallace, *supra* note 69 at 22–23.

[73] See Santana, Dallas & Morwitz, *supra* note 69; Greenleaf et al, *supra* note 69; Huck & Wallace, *supra* note 69; Hyeong Min Kim, "The effect of salience on mental accounting: how integration versus segregation of payment influences purchase decisions" (2006) 19:4 J Behavioural Decision Making 289; Morwitz, Greenleaf & Johnson, *supra* note 70. See also Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases" (1974) 185 Science 1124.

[74] See Santana, Dallas & Morwitz, *supra* note 69 at 207; Huck & Wallace, *supra* note 69 at 59.

[75] Tversky & Kahneman, *supra* note 73 at 1128.

[76] *Ibid* at 1128–30.

[77] Santana, Dallas & Morwitz, *supra* note 69 at 207; Morwitz, Greenleaf & Johnson, *supra* note 70; Tversky & Kahneman, *supra* note 73. See also Jull & Spadotto, *supra* note 69.

[78] Greenleaf et al, *supra* note 69 at 116; Morwitz, Greenleaf & Johnson, *supra* note 70; Tversky & Kahneman, *supra* note 73.

[79] Blake et al, *supra* note 69; Greenleaf et al, *supra* note 69 at 116; Morwitz, Greenleaf & Johnson, *supra* note 70.

[80] Santana, Dallas & Morwitz, *supra* note 69; Nicholas G Rupp, "Drip Pricing and Costly Search: Evidence from the Airline Industry" (15 December 2023) online (SSRN): <ssrn.com/abstract=4666048>; Huck & Wallace, *supra* note 69. See also Morwitz, Greenleaf & Johnson, *supra* note 70; Ellison & Ellison, *supra* note 20.

[81] Greenleaf et al, *supra* note 69; Morwitz, Greenleaf & Johnson, *supra* note 70.

[82] Santana, Dallas & Morwitz, *supra* note 69.

[83] *Ibid*. See also Prabhanjan Didwania, "Drop By Drop: Understanding the Role of Anchor and Surcharges in Drip Pricing" (2022) online: <ssrn.com/abstract=4138758>.

[84] Santana, Dallas & Morwitz, *supra* note 69 at 203; Jull & Spadotto, *supra* note 69 at 24.

[85] Huck & Wallace, *supra* note 69 at 93.

[86] See Greenleaf et al, *supra* note 69 at 120; Huck & Wallace, *supra* note 69 at 93.

[87] Banerjee et al, *supra* note 69.

[88] *Ibid*.

[89] Emi Moriuchi & Samantha Murdy, "Consumer Reactions to Drip Pricing: The Moderating Effect of Price Fairness in the Sharing Economy Accommodation" (2024) 0:0 Cornell Hospitality Q 1 at 8–10; Wujin Chu et al, "Fairness perception of ancillary fees: Industry differences and communication strategies" (2020) 55 J Retailing & Consumer Services 102092; Totzek & Jurgensen, *supra* note 72 at 124–25.

[90] Chu et al, *supra* note 89, s 7.3 (The study's managerial implications suggest that with increased perception of fairness, and thereby better associations with a firm's brand, that comes with added transparency, there are incentives for firms to be more transparent when prices are dripped).

[91] *Ibid*.

[92] Kim, *supra* note 73 at 387.
[93] Morwitz, Greenleaf & Johnson, *supra* note 70 at 458–60.
[94] *Ibid*.
[95] Ellison & Ellison, *supra* note 20 at 7–8.
[96] *Ibid* at 8; Rasch, Thöne & Wenzel, *supra* note 20; Morwitz, Greenleaf & Johnson, *supra* note 70 at 462.
[97] Rasch, Thöne & Wenzel, *supra* note 20; Morwitz, Greenleaf & Johnson, *supra* note 70 at 462; Huck & Wallace, *supra* note 69 at 56, 62–63.
[98] Morwtiz, Greenleaf & Johnson, *supra* note 69.
[99] Huck & Wallace, *supra* note 69 at 56, 62–63; Ellison & Ellison, *supra* note 20 at 11–15.
[100] Rasch, Thöne & Wenzel, *supra* note 20.
[101] *Ibid* at 368.
[102] Ellison & Ellison, *supra* note 20 at 8, 10, 12–15; Glenn Ellison, "A Model of Add-On Pricing" (2005) 120:2 QJ Econs 585.
[103] *Ibid* at 6–12.
[104] See *Aviscar Inc et al* (11 March 2015), CT-2015-001, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463135/index.do>; Competition Bureau, "The Deceptive Marketing Practices Digest, vol 1" (2010) at 4, online (pdf): <competition-bureau.canada.ca/sites/default/files/attachments/2022/cb-digest-deceptive-marketing-e.pdf> [Competition Bureau, *Deceptive Marketing Digest Volume 1*]. Note that these documents are not legally binding.
[105] *Commissioner of Competition v Aviscar Inc and Budgetcar Inc/Budgetauto Inc* (6 February 2016), CT-2015-001, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462953/index.do> [*Avis & Budget*]; *The Commissioner of Competition v Comwave Networks Inc* (13 September 2016), CT-2016-014, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462928/index.do> [*Comwave*]; *The Commissioner of Competition v Hertz Canada Limited and Dollar Thrifty Automotive Group Canada Inc* (24 April 2017), CT-2017-009, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462884/index.do> [*Hertz & Dollar Thrifty*]; *The Commissioner of Competition v Ticketmaster LLC, TNOW Entertainment Group, Inc, and Ticketmaster Canada LP* (27 June 2019), CT-2018-005, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465258/index.do> [*Ticketmaster*]; *The Commissioner of Competition v Enterprise Rent-A-Car Canada Company* (22 February 2018), CT-2018-006, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462781/index.do> [*Enterprise*]; *The Commissioner of Competition v Discount Car & Truck Rentals Ltd* (11 October 2018), CT-2018-012, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465282/index.do> [*Discount Rentals*]; *The Commissioner of Competition v Stubhub Inc, Stubhub Canada Ltd* (13 February 2020), CT-2020-002, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/466483/index.do> [*Stubhub*].
[106] See Competition Bureau, "The Deceptive Marketing Practices Digest, vol 5" (2020), online (pdf): <competition-bureau.canada.ca/deceptive-marketing-practices-digest-volume-5> [Competition Bureau, *Deceptive*

*Marketing Digest Volume 5*]; Competition Bureau, "The Deceptive Marketing Practices Digest, vol 6" (2023), online (pdf): <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/deceptive-marketing-practices-digest-volume-6#sec02>; see also *Lin*, *supra* note 21 at para 37 ("[…] "sale above advertised price" now contained at section 74.05 of the Competition Act. This reviewable conduct is sometimes referred to by the Competition Bureau as fragmented pricing or drip pricing").

[107] See *Avis & Budget*, *supra* note 105 at 2; *Comwave*, *supra* note 105 at 2; *Hertz & Dollar Thrifty*, *supra* note 105 at 2; *Ticketmaster*, *supra* note 105 at 2; *Stubhub*, *supra* note 105 at 1.

[108] See David Ada Friedman, "Regulating Drip Pricing" (2020) 31 Stan L & Pol'y Rev 51 at 88–91.

[109] *Supra* note 105.

[110] *Supra* note 105.

[111] *Ibid* at 2 ("consumers were required to pay additional Non-Optional Fees that were added later in the purchasing process"); *StubHub*, *supra* note 105 at 2 ("the initial price shown on the Event Page does not include the Non-Optional Fees added on the Check-Out Page").

[112] *Supra* note 105.

[113] *Supra* note 105.

[114] *Supra* note 105.

[115] *Hertz & Dollar Thrifty*, *supra* note 105 at 2 ("created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers"); *Enterprise*, *supra* note 105 at 2 ("the Respondent's wording and placement of such disclosures did not create a general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers"); *Discount Rentals*, *supra* note 105 at 2 ("created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental companies to collect from consumers").

[116] *Supra* note 105.

[117] *Supra* note 105.

[118] *Avis & Budget*, *supra* note 105 at 2.

[119] Competition Bureau, *Deceptive Marketing Digest Volume 1*, *supra* note 104 at 4.

[120] Competition Bureau, *Deceptive Marketing Digest Volume 5*, *supra* note 106.

[121] *Competition Act*, *supra* note 2, s 74.01(1.1).

[122] Competition Bureau, "Examining the Canadian Competition Act in the Digital Era" (8 February 2022), s 6.1, online: <competition-bureau.canada.ca/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec06_1>.

[123] See Competition Bureau, "The Future of Competition Policy in Canada" (15 March 2023), s 4.8, online: <competition-bureau.canada.ca/en/how-we-foster-competition/

promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-4-8>.

[124] *Commissioner of Competition v Cineplex Inc* (18 May 2018), CT-2023-003, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521195/index.do>.

[125] *Cineplex*, *supra* note 1 at para 123.

[126] *Ibid*.

[127] On the top right, an advertisement for joining CineClub contained a small encircled "i" that, when clicked, presented information about the booking fees (*Cineplex*, *supra* note 1 at paras 147–48).

[128] *Cineplex*, *supra* note 1 at para 152.

[129] *Ibid* at para 278.

[130] *Ibid* at para 273.

[131] *Ibid* at paras 271–72.

[132] *Ibid* at para 273.

[133] *Ibid* at para 274.

[134] *Ibid* at para 278.

[135] *Ibid* at para 249.

[136] *Ibid* at para 278.

[137] The literal meaning was dealt with quickly. The Tickets Page did not distinguish between at-theatre and online prices, nor did it state expressly that there were different prices, nor did it draw consumers' attention to the fact that prices could vary (*Cineplex*, *supra* note 1 at para 284).

[138] *Cineplex*, *supra* note 1 at para 286.

[139] See the discussion in *Cineplex*, *supra* note 1 at paras 290–291 (the Commissioner having no submissions as to the characteristics of the consumer once the *Time* standard was rejected; Cineplex's only submission being that "everyone knows how to and does scroll on websites and mobile application").

[140] *Cineplex*, *supra* note 1 at para 293.

[141] *Ibid* at para 294.

[142] *Ibid* at para 298.

[143] *Ibid*.

[144] *Ibid* at para 293. These are some of the effects of drip pricing identified by Jull and Spadotto in their review of economic literature on drip pricing (see Jull & Spadotto, *supra* note 69 at 22–26).

[145] *Ibid* at para 342.

[146] *Ibid* at para 382.

[147] Drip pricing has few mentions in parliamentary debates, mostly without substantive discussion. In the House of Commons, drip pricing was only given a cursory mention as something addressed in the amendments to the *Competition Act* (see "Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures", 2nd reading, *House of Commons Debates*, 44-1, No 65 (5 May 2022) at 1235 (Francesco Sorbara). There is also one mention in the Senate, where the drip pricing provision is described as a clarificatory provision. "Bill C-19, An Act to implement certain provisions of the

budget tabled in Parliament on April 7, 2022 and other measures", 3rd reading, *Senate Debates*, 44-1, No 58 (22 June 2022) at 1520 (Hon Lucie Moncion) [*Bill C-19 Senate Debates*].

[148] *Cineplex*, *supra* note 1 at para 335.

[149] *Ibid* at para 355.

[150] *Ibid* at para 353.

[151] *Ibid* at para 356.

[152] *Ibid* at para 357.

[153] *Ibid* at para 352.

[154] *Ibid* at para 373.

[155] *Ibid*.

[156] *Ibid* at para 379.

[157] Several facts suggest that these two are different groups. For example, the representations were made on the Cineplex website to people specifically looking to purchase movie tickets, many of whom had an account. This is different to a billboard advertisement, or a mailer like in *Time*, especially if the ordinary moviegoer was a member of Scene+ or CineClub.

[158] "[T]he expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a wellinformed person. […] [C]ourts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations" (*Time*, *supra* note 3 at para 71).

[159] *Time*, *supra* note 3 at paras 33, 44, 50–51.

[160] Tyhurst, *supra* note 19 at 496–97; see also *Premier*, *supra* note 15 at 62.

[161] *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited*, [2015] FCA 1263 [*Jetstar*]; *Google Inc v Australian Competition and Consumer Commission*, [2013] HCA 1 [*Google*].

[162] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, [2014] NZCA 418 [*Godfrey Hirst*] at para 26 ("'Average' is not a good choice of word because of the potential for confusion with its mathematical meaning, which would take as the standard the consumer falling in the middle of the class").

[163] *Jetstar*, *supra* note 161.

[164] *Ibid* at para 26.

[165] *Ibid* at paras 156–60.

[166] *Ibid* at para 26.

[167] *Ibid* at para 29. Similar outliers language is used in New Zealand (see *Godfrey Hirst*, *supra* note 162 at para 47; see also *Commerce Commission v Viagogo AG*, [2024] NZHC 713 at paras 59–60).

[168] *Jetstar, supra* note 161 at para 29, citing *Google*, *supra* note 161 at para 7. See also *Jetstar* at para 167, citing *Godfrey Hirst*, *supra* note 162 at para 143.

[169] *Jetstar, supra* note 161 at para 167.

[170] *Godfrey Hirst*, *supra* note 162 at para 48.

[171] *Jetstar*, *supra* note 161 at para 26.

[172] *Ibid*.

[173] See generally Tversky & Kahneman, *supra* note 73; Morwitz, Greenleaf & Johnson, *supra* note 70; Greenleaf et al, *supra* note 69.
[174] *Time*, *supra* note 3 at paras 71–72.
[175] *Cineplex*, *supra* note 1 at para 251, citing *Sears*, *supra* note 13 at paras 325–27 and *Kenitex*, *supra* note 26 at 107.
[176] *Cineplex*, *supra* note 1 at para 278.
[177] *Ibid* at para 290.
[178] This may not hold true for the future for two reasons. Firstly, if section 52 cases and private recovery under section 36(1) use the same standard, there would be a larger body of case law to develop the test. Secondly, the introduction of a private access regime for deceptive marketing cases (see *Fall Economic Statement Implementation Act*, SC 2024, c 15, s 254(1), (6) [*Fall Economic Statement Implementation Act*]) may lead to a further influx of cases.
[179] *Chatr*, *supra* note 48 at paras 130–31.
[180] *Jetstar*, *supra* note 161 at para 26.
[181] *Sears*, *supra* note 13 at para 333, citing *Kenitex*, *supra* note 26.
[182] It should be noted that in New Zealand, the consumer is expected to exercise a reasonable degree of care when viewing an advertisement. The standard must be "reasonable having regard to all the circumstances including the characteristics of the target group of consumers. By "characteristics" we refer to the consumers' level of knowledge, acumen, ability and the like" (*Godfrey Hirst*, *supra* note 162 at para 51, cited with approval in *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd*, [2015] NZCA 602 [*Tasman*]). Depending on the circumstances, a consumer may be expected to make further inquiries to rectify any "misunderstanding about the nature or characteristics of a product" (*Tasman* at para 257). While no such positive obligation exists in Canadian law, similar considerations exist. The consumer's ability to make such inquiries has been considered in Canadian deceptive marketing law (See e.g., *Sears*, *supra* note 12 at paras 213–18). Thus, while notable, this difference should not militate against adopting the New Zealand model.
[183] *Cineplex*, *supra* note 1 at paras 350–52. This seems to suggest that pure price discrimination is insufficient to escape the application of section 74.01(1.1).
[184] *Ibid* at para 355.
[185] *Ibid* at para 356.
[186] *Ibid*.
[187] *Ibid* at paras 368–69.
[188] See e.g., Santana, Dallas & Morwitz, *supra* note 69; Huck & Wallace, *supra* note 69.
[189] See *Cineplex*, *supra* note 1 (discussing Dr. On Amir's expert report at 36–37). Dr. Amir's evidence report made a similar argument for requiring the Commissioner to bring stronger evidence tying the applicability of certain behavioural economics and consumer psychology principles to the specific facts in *Cineplex*.
[190] *Cineplex*, *supra* note 1 at paras 368, 380.
[191] *Ibid* at para 380.

[192] *Ibid* at para 356.
[193] *Ibid* at para 380.
[194] Starting with the structure of the provision is starting with the plain and literal meaning of the provision (Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 130 [Sullivan, *Statutory Interpretation*]).
[195] *Interpretation Act*, RSC 1985, c I-2, s 12 ("[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at paras 23–24 [*CISSS*]; *Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 46 [*Piekut*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 25; *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 22 (SCC). The effect of this legislation and the interpretive rules that arise from it is to "[abolish] the distinction between strict and liberal construction" (Ruth Sullivan, *Construction of Statutes*, 7th ed, (Toronto: LexisNexis Canada Inc, 2022), s 15.02 [Sullivan, *Construction of Statutes*]). See also Sullivan, *Construction of Statutes*, s 9.04.
[196] *Cineplex*, *supra* note 1 at para 355.
[197] See generally Sullivan, *Statutory Interpretation*, *supra* note 194 at 173–79; Sullivan, *Construction of Statutes*, *supra* note 195, s 13.02(4). See also *CISSS*, *supra* note 195 at para 24; *Piekut*, *supra* note 194 at paras 42–45.
[198] *Lin*, *supra* note 21 at para 37.
[199] *Competition Act*, *supra* note 2, s 74.05(1); Tyhurst, *supra* note 19 at 511.
[200] Tyhurst, *supra* note 19 at 512, citing *R v Steinberg's Ltd*, [1977] Carswell Ont 1213, 17 OR (2d) 559.
[201] Tyhurst, *supra* note 19 at 511; Competition Bureau, *Deceptive Marketing Digest Volume 1*, *supra* note 104 at 4; *Lin, supra* note 21 at para 37.
[202] For a full description of this kind of argumentation, see Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 73–75.
[203] Sullivan, *Construction of Statutes*, *supra* note 195 at 325–27.
[204] See e.g., *Thibodeau v Air Canada*, 2014 SCC 67 at para 92 [*Thibodeau*]; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 37, 41.
[205] *Thibodeau, supra* note 204 at para 186.
[206] *Ibid* at para 92.
[207] *Ibid* at para 94, citing *Daniels v White*, 1968 CanLII 67 (SCC).
[208] Competition Bureau, *Examining the Competition*, *supra* note 121, s 6.1.
[209] *Bill C-19 Senate Debates*, *supra* note 147 at 1520.
[210] *Reference re Securities Act*, 2011 SCC 66 at para 64; *Rizzo*, *supra* note 195 at para 35, citing *R v Morgentaler*, [1993] 3 SCR 463 at 484, 1993 CanLII 74 (SCC).
[211] The text must take primacy. See *CISSS*, *supra* note 195 at para 24. See also Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919 at 927, 930–31.
[212] Drip pricing is also enumerated under the electronic marketing provisions in s

74.011, specifically s 74.011(3.1). This is further evidence that Parliament intended drip pricing to be applicable in multiple contexts.
[213] As permitted by *Competition Act*, *supra* note 2, s 36.
[214] See Banicevic, *supra* note 12; *Kenitex*, *supra* note 26.
[215] *Competition Act*, *supra* note 2, s 52(1).
[216] *Ibid*, ss 52(1.3), 74.01(1.1).
[217] *Sears*, *supra* note 13 at paras 93, 333–37 (finding the purposes of the criminal and civil provisions identical; using the criminal provisions to inform the consumer perspective in the civil context).
[218] The *Fall Economic Statement Implementation Act*, *supra* note 178 amended the private access provision of the *Competition Act, supra* note 2 (s 103.1) to allow for private parties to bring actions for deceptive marketing, including drip pricing. Section 254(1) amends the leave provision to state that "[a]ny person may apply to the Tribunal for leave to make an application under section 74.1[…]". Section 254(6) prescribes the standard, requiring that such an action be "in the public interest". Note that this is different to the test historically applied in private actions for other anti-competitive conduct (see *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 8 at paras 12, 34–40; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 at paras 42, 54). It remains to be seen how permissive this test will be and thus whether private actions at the Tribunal will be a significant force. Also note that these amendments come into force on June 20, 2025 (see *Fall Economic Statement Implementation Act*, *supra* note 178, s 272).
[219] *Cineplex*, *supra* note 1 at paras 488–89.
[220] *Ibid* at paras 440–57.
[221] *Ibid* at para 445.
[222] *Ibid* at paras 450–51.
[223] *Ibid* at para 545.
[224] *Ibid* at para 453.
[225] *Ibid* at para 455.
[226] *Ibid* at para 456.
[227] *Cineplex*, *supra* note 1 at para 456 ("[i]n both circumstances, an order under paragraph 74.1(1)(d) that refunds some consumers but not all affected consumers, for conduct that is presumably continuing, suggests unfairness to more recent consumers and Scene+ members").
[228] *Ibid* at para 446.
[229] *Ibid.*
[230] *Ibid* at paras 445, 447.
[231] *Ibid* at paras 450–55.
[232] *Ibid* at para 455 [emphasis added].
[233] *Ibid* at paras 477–78; Competition Bureau Canada, "Competition Bureau wins deceptive marketing case against Cineplex" (23 September 2024), online (news release): <canada.ca/en/competition-bureau/news/2024/09/competition-bureau-wins-deceptive-marketing-case-against-cineplex.html>.

# PREVENTING THE PERILS OF PERSONALIZED PRICING: A PROPOSED REGULATORY CODE FOR PERSONALIZED PRICING ALGORITHMS

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*Due to the expanding digital marketplace, more consumers have been, and continue to be, subject to price discrimination, whereby consumers are charged different prices for a similar item sold by the same vendor. To perform price discrimination, sellers implement personalized pricing algorithms ("PPAs"), which use artificial intelligence ("AI") to analyze consumer data to set prices that achieve the maximum amount of profit. The fact that PPAs are benefitting sellers in the digital marketplace suggests that a market failure exists that warrants attention and regulation. Moreover, price discrimination can significantly harm consumer welfare and competition in the digital marketplace, especially when PPAs operate on biased data. However, Canada currently has no regulations against PPAs or price discrimination. This paper provides an overview of PPAs and suggests the implementation of an ex-ante, rules-based regulatory code inspired by the frameworks of the United States and the European Union. By prohibiting the collection and use of personal data, mandating disclosure and consumer consent and requiring ongoing PPA assessments, the Code aims to prevent the perils of personalized pricing in the digital marketplace.*

*En raison de la croissance du marché numérique, un plus grand nombre de consommateurs sont—et continuent d'être—exposés à des pratiques de discrimination par les prix, selon les-quelles un même vendeur facture des prix différents pour des produits similaires. Pour mettre en œuvre cette forme de discrimination, les commerçants recourent à des algorithmes de tarification personnalisée (« ATP »), qui s'appuient sur l'intelligence artificielle (« IA ») pour analyser les données des consommateurs et fixer des prix visant à maximiser les profits. Le fait que ces ATP profitent principalement aux vendeurs dans le contexte numérique laisse entrevoir une défail-lance de marché nécessitant une attention particulière, voire une intervention réglementaire. En outre, la discrimination par les prix peut nuire de manière significative au bien-être des consom-mateurs ainsi qu'à la concurrence, notamment lorsque les ATP reposent sur des données biai-sées. Or, à l'heure actuelle, aucune réglementation canadienne n'encadre spécifiquement l'utilisation des ATP ou la discrimination par les prix. L'auteur propose un survol des ATP et recommande la mise en place d'un code de réglementation ex ante, fondé sur des règles claires et inspiré des cadres juridiques en vigueur aux États-Unis et dans l'Union européenne. Ce code viserait notamment à interdire la collecte*

*et l'utilisation de données personnelles à des fins de ta-rification personnalisée, à imposer des obligations en matière de transparence et de consente-ment éclairé des consommateurs, ainsi qu'à exiger une évaluation continue des ATP. L'objectif est de prévenir les périls liés à la tarification personnalisée dans le marché numérique.*

In light of the expanding digital marketplace, more and more consumers are being subjected to price discrimination, whereby consumers are charged different prices for a similar item sold by the same vendor, without their knowledge. To perform price discrimination, sellers (often large companies) implement personalized pricing algorithms ("PPAs"), which use artificial intelligence ("AI") to analyze consumer data to set prices that achieve the maximum amount of profit. PPAs have generated profit for numerous companies; therefore, their popularity and widespread use will likely grow.

The fact that PPAs are benefitting sellers in the digital marketplace suggests that a market failure exists that warrants attention and regulation. Specifically, the extent to which companies can effectively use PPAs is *prima facie* evidence of market power. Without market power, competition amongst sellers would result in consumers diverting their business when the PPA user attempts to charge a high price. Such diversion would defeat any profitability arising from PPA use. Furthermore, companies can use PPAs to facilitate various anti-competitive acts to maintain market power.

While price discrimination can significantly harm consumer welfare and influence market competition, Canada currently has minimal regulations against AI, PPAs and price discrimination. This paper provides an overview of PPAs and suggests the implementation of an *ex-ante*, rules-based regulatory code inspired by international frameworks to prevent the perils of personalized pricing in the digital marketplace.

## 1. Personalized Pricing Algorithms

The personalized pricing process begins with the collection of "Big Data" - extremely large and diverse data sets that continue to grow at accelerating rates as new information arises.[1] PPAs gather details about the personal characteristics (e.g., age, gender, religion) and shopping behaviour of consumers. PPAs compile information from online browsing and purchase history across various devices (e.g., computers, phones, tablets, smart watches), as well as offline choices via credit card transactions.[2] PPAs then use the collected data to calculate and set prices based on consumers' maximum willingness to pay ("WTP").[3] The result is effectively first-degree

price personalization - a type of price discrimination by which each individual consumer is charged a different price for the same product sold by the same vendor.[4] Since first-degree price personalization requires substantial information about each consumer, it was almost impossible prior to the widespread availability of AI algorithms and broad database of online information.[5] Now, several major retailers use PPAs to set their prices based on consumers' WTP.[6]

## 2. Potential Harms of Personalized Pricing Algorithms

PPAs pose many risks for consumers in the digital marketplace, especially those belonging to minority groups. Companies and competition may also be adversely affected. Consumers tend to have a negative attitude towards price personalization, which is partially attributed to the secrecy around PPA use.[7] Moreover, consumers often view personalized pricing as unfair, especially if they become aware of price discrepancies that cause them to pay more for a product.[8] In turn, an "unraveling of markets" may occur – if consumers lose confidence that they are receiving a fair price, they may withdraw their demand, leading to fewer sales and lower profits for the company.[9]

### 2.1 Consumer Welfare and Competition

PPAs may harm consumer welfare since the opacity of pricing algorithms and the broad database of online consumers increase the risk of PPAs producing unfair and supracompetitive prices. One difficulty with AI is the "black box" problem – the inability to comprehend and explain how AI systems arrive at decisions.[10] In the context of PPAs, we know that consumer data is collected and analyzed, but details of the *exact* process by which the data is analyzed remain unclear. Consequently, preventing the generation of unfair prices can be challenging if algorithms function without human intervention.

Additionally, companies rarely, if at all, disclose their collection and use of personal data, so consumers cannot provide consent or prepare for various privacy-related consequences (e.g., data breaches, malware, cybercrimes). PPAs also hinder consumers' ability to make informed purchases by managing their perception of price.[11] In the digital marketplace, consumers cannot see, and are often unaware of, the alternative prices for products offered to other consumers. Sellers can exploit consumers by imposing excessive prices if consumers believe the prices are on-par with the market value of the good or service.[12] Therefore, the use of personal data

in a non-transparent manner strips away the rights of consumers to consent to the use of their data, protect their privacy and make informed decisions.

Companies may also have incentives to implement PPAs in a way that adversely impacts marketplace competition. Global online retailers have been alleged to engage in anti-competitive behaviour and predatory pricing. Such retailers have been said to undercut competitors by using algorithms to track and automatically match or beat their prices, while calculating and pricing items based on consumers' WTP.[13] Some may argue that pricing algorithms maximize competition, by offering lower prices to consumers than they are offered elsewhere. However, certain retailers may use pricing algorithms to extend their monopolies from one market (the online retailing) to a connected market (the online superstore market) by excluding competitors and thereby harming competition.

Companies, such as Postmates, may facilitate joint price-setting by bringing together numerous businesses, which otherwise operate independently. Postmates may allow companies to delegate pricing to a proprietary algorithm, which could set the same excessive prices for similar menu items across different competing restaurants, thus facilitating (either explicit or tacit) collusion. Further, if the algorithm can calculate consumers' WTP, first-degree price personalization can occur.[14]

Additional competition concerns with PPAs include strong network effects, which companies may exploit to maintain dominant positions in the digital marketplace,[15] and the creation of stable cartels from concurrent price discrimination and algorithmic collusion.[16] Given the popularity and effectiveness of PPAs in the digital marketplace, regulation is a reasonable next step to manage market power and prevent the use of PPAs in an anti-competitive manner.

## 2.2 Bias

One misconception of algorithmic pricing is that a consumer's WTP is derived solely from their preferences.[17] However, AI algorithms are not 100% accurate since they are influenced by bias in the data sets. Bias can be introduced purposefully or inadvertently into AI systems,[18] or implicitly emerge as algorithms operate on data.[19] Therefore, statistical, algorithmic and human cognitive and perceptual biases, such as racism and other forms of discrimination, can influence outputs.[20]

### 2.2.1 Gender

PPA-generated prices often reflect consumer demographics and may disfavour minorities and disadvantaged groups.[21] In particular, PPAs disproportionately impact women by effectively including a "pink tax" in WTP calculations. A "pink tax" refers to the extra costs women pay for products and services marketed specifically towards them.[22] Although pink taxes typically are found to apply to feminine care products, there is a price discrepancy between sexes in everyday essentials, such as clothes and toiletries. Studies have found that, on average, products that are marketed for women are 13% more expensive than the same products marketed for men.[23] Through their reliance on demographic information, implicit algorithmic bias may emerge - PPAs may assume women have a higher WTP and set their prices at higher rates than men. In light of the pre-existing wage gap, increased prices on products will further disadvantage female consumers.

Gender bias in algorithms can also negatively influences female business owners and employees. A 2016 study found that female vendors on eBay received fewer bids and lower offers than their male counterparts selling the same product.[24] Additionally, the study found that female employees of a ride-sharing company were negatively impacted by the company's algorithm that allocates work and determines compensation rates. Female employees received an average per-hour income of two thirds of male employees, even though they worked more hours.[25] Overall, the use of biased algorithms in the digital marketplace disproportionately harms women by contributing to less compensation, but greater consumer costs.

### 2.2.2 Race

Similar to gender, data about a consumer's race can influence their calculated WTP since algorithmic bias tends to set higher prices for racial minority groups. For instance, a study performed in 2015 found that the algorithm used by the Princeton Review, a company that provides test preparation, tutoring, and college admissions services for students, was twice as likely to charge higher prices in zip codes with predominantly Asian American populations, irrespective of income.[26] More recently, in 2021, a study analyzing various ride-sharing services found that fares were higher for trips beginning or ending in neighbourhoods with mainly non-white populations.[27] Therefore, while the use of demographic statistics may seem harmless, the inclusion of race in data sets inserts social bias into the analysis and contributes to discriminatory PPA outputs. For individuals with

intersecting minority identities, such as women of colour, the harm is even greater.

#### 2.2.3 Age

A consumer's age can influence their calculated WTP, albeit to a less predictable degree than gender or race. Age is a key characteristic that has historically been used in various marketplaces for third-degree price discrimination, where consumers are charged "differently, for similar products, according to the group they belong to, inferred by attributes of the group."[28] Movie theatres and public transportation, for example, engage in third-degree price discrimination by charging lower prices for youth and seniors. While age discounts benefit these groups of consumers, those whose ages do not fall within the range allocated to youth or seniors will pay higher relative prices. Thus, by using data solely about a consumer's age, rather than their purchase history, PPAs may tend to set higher prices based on inaccurate assumptions about consumers' WTP. Such assumptions can be harmful – considering a person's earnings are not directly correlated with their age, a consumer may be subjected to higher prices without having the proportional economic means to afford them.

## 3. Current Regulations

### 3.1 AI Legislation

Despite being at the forefront of AI,[29] Canada currently has no regulatory framework specific to PPAs or price discrimination. In June of 2022, the *Artificial Intelligence and Data Act* (the "*AIDA*") was introduced in Parliament as part of Bill C-27 to address the adverse impacts of AI on individuals and in the commercial context.[30] The *AIDA* established regulatory standards for "high-impact" AI systems around safety and human rights and creates new criminal law provisions to prohibit harmful uses of AI.[31] Regulatory requirements included human oversight and monitoring, transparency in data collection and use, and the proactive assessment of high-impact AI systems to identify likely harms, accountability and consistency in outputs. Violations of the *AIDA* would result in administrative monetary penalties ("AMPs"), regulatory offences and criminal offences.[32] However, Bill C-27, and thus the *AIDA,* was terminated due to the prorogation of Parliament on January 6, 2025.

AI use in the private sector is mainly regulated by the Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems. The Code provides Canadian companies with

common standards regarding safety, fairness, transparency, etc., and allows them to demonstrate that they are developing and using generative AI systems in a responsible manner.[33] For instance, the Code requires developers to assess training data sets to manage data quality and potential biases, as well as perform various testing to assess and mitigate the risk of biased output prior to release.[34] So far, major firms have signed the Code, such as Cohere, Ada, Coveo, BlackBerry, TELUS, OpenText, and IBM.[35]

### 3.2 The *Competition Act*

Without AI-specific legislation, Canada's *Competition Act*[36] may be used to address the harms associated with PPAs. While no provision specifically prohibits price personalization or price discrimination generally,[37] subsection 78(1)(k) lists the imposition of excessive and unfair selling prices as one of the definitions of "anti-competitive acts" for the purposes of section 79, which concerns abuse of dominance.[38] PPA use may be considered anti-competitive under subsection 78(1)(k) or under section 78(1) more generally if framed as predatory, exclusionary or disciplinary when used to target competitors.[39] However, subsection 78(1) states that "anti-competitive acts" must be intended to negatively affect a competitor or market competition, or substantially harm competition in effect. In light of the black box nature of AI, malicious intent and anti-competitive effects may be difficult to establish. Users may argue that they were unaware of the potential for their PPAs to influence competition, and tracing specific anti-competitive effects to a single algorithm is, at present, almost impossible. As a result, there is currently a lack of evidence that PPAs cause substantial harm to competition, which is also problematic for subsection 79(1)(b)(i), which prohibits conduct that had, is having, or is likely to have the effect of preventing or lessening competition. Furthermore, the Competition Bureau expects that claims of excessive and unfair pricing will be rare as investigations require a credible reason to suspect the occurrence of anti-competitive acts or substantial competition harm.[40]

The *Competition Act* also includes provisions which address misleading representations and deceptive marketing practices. Section 52 and subsection 74.01(1)(a) prohibit companies from making materially false or misleading representations to promote a product, service or business interest.[41] While these provisions only explicitly refer to positive representations, omissions may be captured by the "general impression test" used by courts when deciding whether a representation is false or misleading. The general impression test requires courts to consider the general impression conveyed by the representation as well as its literal meaning.[42] Since companies rarely,

if ever, disclose their use of PPAs, these provisions will likely not capture such acts. There is also no guarantee that a court will find that failure to disclose a PPA constitutes a false or misleading representation under the general impression test. In turn, a possible amendment to section 52 and subsection 74.01(1)(a) to enhance their effectiveness at regulating PPAs is to explicitly prohibit omissions.

Additionally, sections 45 or 90.1 may be applicable if an agreement or arrangement exists amongst competitors to use PPAs to lessen competition in the digital marketplace.[43] Nevertheless, since algorithmic tacit collusion is more common than explicit collusion and with the minimal explainability of PPAs, demonstrating that pricing algorithms coordinated their actions and engaged in collusive behaviours to produce supracompetitive pricing or reduce competition is no easy feat and not adequately regulated with *ex-post* measures.[44]

Considering the difficulty with tracing harm to competitors and market competition to a particular pricing algorithm, no statutes or cases currently address the legality of PPAs. In fact, a case law search on the Competition Bureau website produces no results. Therefore, other than industry-specific regulations and consumer protection statutory provisions, prices are largely unregulated and left to the contracting parties.[45]

## 3.3 The United States

### 3.3.1 AI Legislation

Currently, the United States does not have any comprehensive federal legislation to regulate AI. However, the *Algorithmic Accountability Act of 2023* (the "*AAA*") was proposed in Senate to regulate AI in "high-impact" scenarios, such as housing, finance, employment and education,[46] where algorithms decide loan approvals, medical needs, hiring outcomes of new employees, school admissions, etc. The *AAA* aims to promote greater transparency about the impact of algorithms by requiring users to conduct impact assessments for effectiveness, bias and other factors, as well as perform ongoing testing to ensure outputs are accurate and do not amplify bias based on personal characteristics.[47] In addition, the *AAA* proposes that the Federal Trade Commission (the "FTC") establish a Bureau of Technology to monitor the enforcement and implementation of the Act. At the state level, Colorado, Utah, Illinois, Massachusetts, Ohio and California have all proposed or enacted legislation to regulate AI development and use in the private sector.[48] Most state legislation focuses on similar high-impact situations as the *AAA* and the safe development of AI models. Unfortunately,

PPAs are rarely, if at all, used in these high-impact scenarios, and thus fall outside the ambits of the *AAA* and state legislation.

### 3.3.2 Privacy Laws

In the US, data privacy laws are the primary form of pricing algorithm regulation. US privacy laws comprise an *ex-post*, sector-based framework that aims to protect the welfare of online consumers.[49] The *Federal Trade Commission Act* (the "*FTC Act*") regulates algorithmic pricing to prohibit deceptive or unfair behaviour or practices. Under section 5 of the *FTC Act,* FTC authority can pursue legal action against someone if their use of an algorithm is deceptive or unfair and causes substantial harm that a) consumers cannot reasonably avoid, and b) is not outweighed by countervailing benefits to consumers or competition.[50] Deceptive use includes a failure to disclose how prices are determined, whereas unfair use involves discriminatory pricing that could harm consumers. For instance, if an online retailer employs a pricing algorithm that discriminates against a consumer by charging them higher prices based on their zip code without disclosing the fact, the retailer will violate the *FTC Act.*

In the context of PPAs, US privacy laws do not effectively mitigate the harms of personalized pricing. First, requiring algorithms to cause substantial consumer harm poses a challenge for PPAs. Given their opacity and use of a plethora of personal information, quantifying and directly attributing consumer harm to a PPA's use of specific data is quite difficult.[51] Consequently, the *FTC Act* may fail to capture many instances of excessive personalized pricing. Second, the decentralized approach to privacy laws allows each state to fill any regulatory voids with their own legislation. For instance, California's *Consumer Privacy Act* and Virginia's *Consumer Data Protection Act* regulate the processing and control of personal data.[52] While state legislation attempts to supplement the *FTC Act* to create comprehensive regulation across the country, the fragmented framework provides uneven protections for consumers - regardless of which state a seller is located in, consumers are only protected by the laws of the state in which they reside. In addition, increased operational complexity and costs arise for businesses that operate in various states since they must comply with the legislative requirements specific to each state. Considering companies in the digital marketplace, such as eBay, span across numerous states and countries, the US privacy law framework does not sufficiently address the harms of PPAs.

## 3.4 The European Union

To protect consumers from price discrimination created by PPAs, the European Union uses an omnibus approach that involves AI regulation, anti-discrimination laws and data protection legislation.

### 3.4.1 AI Regulation

In 2024, the EU approved the first risk-based framework for AI – the *Artificial Intelligence Act* (the "*AI Act*").[53] The *AI Act* introduces unique regulations for certain uses of online algorithmic pricing, so AI users in different sectors have varying transparency, data governance and human oversight obligations.[54] Regarding price discrimination, Article 5(1)(c) prohibits the use of AI scoring techniques based on personal characteristics in circumstances where 1) the information is used outside of the context for which it was generated, and/or 2) the detrimental effects are disproportionate to the behaviour.[55] Article 5(1)(c) may capture PPAs since the algorithms analyze personal data provided by consumers in other instances or obtained without consumer knowledge. Furthermore, excessive prices may harm consumers at a rate disproportionate to any consumer or seller benefits. Nonetheless, PPAs may benefit consumers by offering more equitable pricing based on characteristics, such as zip codes, so establishing disproportionate detrimental effects of PPAs is difficult.

### 3.4.2 Anti-Discrimination Laws

In principle, personalized pricing is legal in the EU, as long as sellers do not use the personal information of consumers in a manner that breaches anti-discrimination laws.[56] Article 21 of the Charter of Fundamental Rights prohibits "discrimination on such grounds as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation."[57] Under Directive 2000/43/EC, discrimination based on grounds of racial or ethnic origin in relation to the supply of goods and services is prohibited.[58] Additionally, Directive 2004/113/EC disallows discrimination on the grounds of sex, such that men and women must receive equal treatment in accessing and supplying goods and services.[59] EU anti-discrimination laws apply to PPAs and prohibit direct and indirect discrimination. A pricing decision based on one of the prohibited grounds is considered directly discriminatory, whereas indirect discrimination occurs if the pricing "has a disproportionate impact on certain groups defined by a prohibited ground without an objective and appropriate justification."[60] If a PPA solely analyzes information about the sex of consumers, pricing

outcomes would differ directly based on sex, one of the prohibited grounds, and thus violate Directive 2004/113/EC. However, since PPAs often use a vast array of personal data to arrive at pricing decisions, indirect discrimination is more likely. If PPAs consider women to have a higher WTP by including "pink tax" in their calculations, the criteria for indirect discrimination can be met.

### 3.4.3 Data Protection Legislation

#### 3.4.3.1 General Data Protection Regulation

The General Data Protection Regulation (the "GDPR") regulates the treatment of personal data, pseudonymous data and anonymous data originating in the EU,[61] and applies to operations within and outside the EU, including Canada.[62] The GDPR defines personal data as data that directly or indirectly identifies a person, "in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the[ir] physical, physiological, genetic, mental, economic, cultural or social identity."[63] PPAs collect and analyze data about age, sex, religious beliefs, location, etc., which fall under the "personal data" definition. Therefore, users must abide by the GDPR's *ex-ante* and *ex-post* regulations.

*Ex-ante* measures aim to ensure transparency, accountability and fairness in the use of personal data. For PPAs, relevant requirements include obtaining consumer consent before including their personal data in an algorithmic data set and conducting mandatory Data Protection Impact Assessments ("DPIAs"). Article 9(1) requires consent for the processing of "sensitive" data, such as "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership."[64] Article 35 mandates DPIAs for various operations, including complex algorithmic pricing schemes.[65] DPIAs require companies to describe how the personal data will be processed and the risks to the rights and freedoms of the individuals, as well as identify measures to address any potential privacy risks.[66] A company must examine how their PPA uses personal characteristics and past purchasing behavioural data to determine pricing, and whether these practices could result in discrimination or unfair treatment.[67] However, given the lack of explainability of AI, companies may struggle to meet the requirement.

Articles 14, 15, 21 and 22 of the GDPR outline the *ex-post* measures applicable to PPAs. Once personal data is collected, Article 14 requires users to explain their algorithms and AI methods to increase transparency[68] – again,

such an explanation may be difficult, if not impossible. Article 15 allows consumers to review the data being analyzed by the PPA,[69] after which they can decide if they want to proceed as a customer of the company. Article 21 provides consumers with the right to object to the processing of their personal data, including profiling.[70] Finally, under Article 22, consumers have the right to challenge decisions solely based on automated processing "which produces legal effects concerning [the consumer] or similarly significantly affects [them]."[71] However, sellers can bypass the provision by involving humans in a minor way, so decisions are not made by "solely automated processing" systems.[72] Furthermore, what constitutes a significant impact on consumers is unclear, so whether the effects of PPAs would fall under the provision remains uncertain.

#### 3.4.3.2 Additional Measures

To supplement the GDPR, the EU implemented the *Digital Services Act* (the "*DSA*") and *Digital Market Act* (the "*DMA*"), which focus on risk and crisis management and fostering a competitive market, respectively. Under the *DSA*, companies who use digital services, including pricing algorithms, must manage online risks and crises effectively to prevent harming consumer rights or public safety.[73] The *DMA* provides objective criteria to qualify large online platforms as "gatekeepers" and establishes clear obligations that gatekeepers must follow to protect consumers from exploitative pricing algorithms. So far, companies such as Amazon, Apple and Microsoft have been designated as gatekeepers.[74]

The Consumer Rights Directive (the "CRD") addressed personalized pricing for the first time in EU legislation. Article 6(1)(ea) of the CRD requires traders to inform consumers if prices are personalized based on automated decision-making.[75] However, the provision does not require disclosure of how prices are calculated (e.g., with an algorithm, based on personal characteristics, etc.), so many instances of personal pricing escape regulation. To overcome the CRD's limited scope, Article 7(1) of the Unfair Commercial Practices Directive imposes a positive obligation on traders to provide all the information necessary for the average consumer to make an informed purchasing decision.[76] For PPAs, "necessary" information could include PPA use and the characteristics being analyzed.

### 3.5 Learning From the US and EU

When comparing the US and EU approaches to algorithmic pricing, the EU framework provides greater consumer protection.[77] The state-specific and sector-based legislation in the US leads to inconsistent, and often

inadequate, regulation of algorithmic pricing that complicates compliance efforts for companies involved in numerous industries. In comparison, the GDPR provides comprehensive guidelines to promote transparency around PPA use across the EU in various sectors. Additionally, the scope of the language used in each framework has important implications for PPA regulation. The GDPR broadly defines "personal data" to encompass any organization that processes personal data.[78] Such a wide definition creates uncertainty and compliance difficulties for businesses, enforcement issues for regulators and struggles to exercise data rights for individuals.[79] By using the GDPR's definition of personal data, the *DSA* and *DMA* suffer from the same semantic uncertainty. Consequently, future algorithmic pricing legislation should apply a narrower definition that explicitly references the types of prohibited data and uses. Overall, the US and EU frameworks highlight how PPAs require comprehensive regulation that applies to all sectors, contains precisely defined terms, incorporates *ex-ante* disclosure and consumer consent requirements and mandates ongoing monitoring to ensure compliance as AI algorithms evolve.

## 4. Proposed Reform

Canada should implement a licensing regime for e-commerce sellers based on a code (the "Code") that includes *ex-ante*, rules-based requirements, ongoing measures and AMPs for violations. With the growing availability of online personal data and the development of more intricate algorithms, personalized pricing will be increasingly easy to perform.[80] Considering the limitations of current *ex-post* regimes, namely the *Competition Act,* PPAs should be regulated in an *ex-ante* manner to prevent certain personal data from entering algorithms, generating implicit data bias and producing unfair, excessive prices, especially for consumers belonging to minority groups who face societal and financial disadvantages. While some individuals advocate for a blanket ban on personalized pricing, experts warn that a full prohibition could harm disadvantaged consumers who may benefit from fair and responsible personalized pricing.[81] For instance, if a PPA detects a consumer is located in a lower-income neighbourhood, the algorithm may generate a lower price.

### 4.1 Regulatory Framework

**Purpose**

**(1)** This Code aims to reduce the potential and actual harms to consumers and market functioning associated with first-degree price personalization

arising from the use of personalized pricing algorithms in the digital marketplace.

## Definitions

**(2)** In this Code,

***"First-degree price personalization"*** means the practice of pricing the same product or service from the same seller at a different rate for each individual consumer.

***"Personal data"*** means information that directly or indirectly refers to an individual's physical, physiological, genetic, mental, economic, cultural or social identity. Such information includes sex, gender, age, religion, race, national or ethnic origin, name, occupation, social security number, phone number, email address, credit card information and transactions, zip code, IP address, device ID, MAC address, cookies and browser fingerprints.

***"Personalized pricing algorithms ('PPAs')"*** means algorithms that use artificial intelligence to generate the price of a product or service for a consumer according to calculations of that consumer's willingness to pay based on their personal data.

***"Seller"*** means any individual person or company that uses a PPA to sell, or coordinate the sale of, a good or service in the digital marketplace.

***"Willingness to pay ('WTP')"*** means the maximum amount a consumer is willing to spend to purchase a good or service.

### Application

**(3)** This Code applies to PPAs developed and used for all e-commerce transactions, across all industries and sectors, where the seller and/or consumer is located in Canada.

### Licence Issuance

**(4)** A regulatory authority may issue a licence to a seller to use a PPA to price online goods and services if the algorithm and seller act in accordance with the rules and requirements provided in sections 5 and 6 of this Code, respectively.

### Prohibited Activities

**(5)** A seller shall not implement a PPA to generate the price of goods and services based on any characteristic(s) considered "personal data" under section 2 of this Code. Some rules include:

a) PPAs shall not price men's products and women's products sold by the same seller, of the same nature, quality and material, at a higher rate than the other. Product labels including the words "girl," "boy," "female," "male," "women," and/or "men" must be excluded from the PPA data sets.

b) PPAs shall not charge a consumer with an IP address associated with a higher-income neighbourhood (annual household income of over $150,000) a higher price for goods and services than a consumer with an IP address associated with a middle-income (annual household income between $65,000 to 150,000) or lower-income area (annual household income under $65,000).

c) PPAs shall not analyze information about a consumer's sex or gender, obtained from direct or indirect identifiers, to calculate that consumer's WTP. Identifiers of sex and gender include the consumer's name, pronouns and gender labels on previously purchased products.

**Disclosure and Consent Requirements**

**(6)** Sellers must disclose their use of PPAs to consumers at the first instance that consumers access the seller's e-commerce platform. Sellers must disclose that the prices on the platform are personalized and calculated with a PPA using the personal data of each individual consumer. This disclosure must include an option for consumers to consent to the terms of disclosure and proceed to the platform or withhold consent and be redirected off the platform.

**Ongoing Measures**

**(7)** After receiving a licence, a seller must:

a) Outline a schedule for performing four (4) internal audits per year to assess for bias and any personal characteristics outlined in section 2 of this Code in the algorithmic data sets;

b) Perform a risk assessment and prepare a report detailing their incident response plan to any risks identified in the assessment; and

c) Establish a specific team and/or individual (e.g., a Model Risk Officer) to oversee the routine audits and data management.

**Violations**

**(8)** Failure to abide by any measure(s) in sections 5, 6 and/or 7 constitutes a violation of this Code. A seller who commits a violation shall have their licence revoked by the authority and is liable

a) in the case of an individual seller, to a maximum administrative monetary penalty of $50,000; or

b) in the case of a company, to a maximum administrative monetary penalty of $5,000,000.

**Criteria for Penalty**

**(8.1) The amount of the penalty is to be determined by considering factors such as:**

a) the nature and extent of the violation;

b) any benefit obtained by the seller from committing the violation;

c) the seller's ability to pay the penalty; and

d) any other factor considered relevant by the seller or authority.[82]

## 4.2 Rationale for a Rules-Based Approach

Rules clearly outline what conduct is prohibited, thus reducing subjectivity and increasing the efficiency of the licensing process.[83] A rules-based system is arguably better suited for actions that are "simple, stable and do not involve huge economic interests."[84] Nevertheless, while AI algorithms are complex, dynamic and may generate prices for substantial e-commerce purchases, a rules-based code with explicit instructions can effectively regulate unfair price personalization. Although AI is rapidly evolving, the information targeted by the Code is often simple and stable since personal characteristics (e.g., gender, race, religion) are unlikely to change significantly over time.

A rules-based code also increases the efficiency of the licensing process. *Ex-ante* regulations are critiqued as being inefficient since regulators must review each product.[85] However, rules contribute to a more efficient approval process by requiring objective determinations, rather than

subjective assessments under principles-based legislation - whether an algorithm uses prohibited data can be better determined than whether an algorithm generates "unfair" prices. Rules also reduce the likelihood of interpretation issues. A principles-based code prohibiting "unfair" pricing is unclear - one seller might consider charging consumers in a wealthy neighbourhood a higher price as fair, while another may not. The former seller may be denied a licence if the regulator decides their algorithm generates unfair prices, creating a delay as the seller must amend their algorithm and reapply. Additionally, rules promote consistency. What one regulator considers "unfair" differs from the next, so empowering regulators to determine what constitutes "unfair" pricing results in inconsistent approvals and an unjust advantage for sellers who have their PPAs assessed by a more lenient regulator. Clear and objective rules limit discretion and ensure that decisions align with the Code's purpose.

### 4.3 Rationale for an *Ex-Ante* Framework

*Ex-ante* measures require the proactive integration of safeguards to protect consumers, rather than a reaction to harm that has already occurred. According to the Ontario Court of Appeal, "there is good reason to favour *ex-ante* rules where … there is scientific uncertainty as to the precise nature or magnitude of the possible harms."[86] Given the automatic functioning of PPAs and lack of, or minimal, human involvement, uncertainty exists around the precise magnitude of harmful pricing that occurs. Furthermore, *ex-ante* regulation may be beneficial in circumstances that involve "invisible harms" - harms that go unreported because they are difficult or impossible to identify by design or due to a lack of will or mechanism to report.[87] Considering the opacity of PPAs, bias from past discrimination based on personal characteristics may enter the algorithm and contribute to perilous price personalization without being detected and/or reported. Consequently, PPAs create invisible harms that could be prevented with *ex-ante* regulation. Finally, an *ex-ante* code would complement the *Competition Act* and enhance its efficacy in regulating PPAs. Since section 6 of the Code requires disclosure of PPA use, failure to provide accurate and adequate information may trigger section 52 and subsection 74.01(1)(a), the false and misleading representation provisions, and reduce reliance on the general impression test.

#### 4.3.1 Response to Potential Objections

According to Archibald & Jull, *ex-ante* regulation should be reserved for situations where health and safety are at risk, but do not have to be

life-threatening.[88] While PPAs do not directly influence consumer health and safety, the downstream effects of harmful personalized pricing may be exceptionally harmful to consumer welfare. A consumer may rely on a product and become accustomed to a certain price. If a PPA calculates a higher WTP for that consumer, the price may increase and force the consumer to choose to access the product or pay an excessively high price.[89] Furthermore, health and personal care is the second fastest growing e-commerce industry,[90] contributing over $4.9 billion CAD in revenue in 2024. Consumers purchase health-related products online; therefore, restricted access because of extreme prices could harm consumer health. Moreover, the privacy and security of personal data has implications for consumer safety. As Peter Seele et al. explain, "online and offline tracking, profiling, and personalizing is becoming ubiquitous, leaving less and less room for consumers' privacy."[91] Since sellers often mask their use of personal data with extensive privacy disclaimers, many consumers are unaware of such processes and thus unable to take the necessary measures to protect their data against situations like data breaches.

An indirect connection to health and safety may be rejected as a valid basis for *ex-ante* regulation. However, *ex-ante* legislation should not be dismissed as one could argue the Archibald & Jull model is too restrictive. As discussed, principled reasons exist for *ex-ante* PPA regulation, such as the fact that initially preventing bias and personal characteristics from entering data sets will most effectively prevent unfair prices. As a result, there ought to be a role for *ex-ante* frameworks even where health and safety are not directly impacted. The biggest obstacle to acceptance is that *ex-ante* systems are inflexible and considered inappropriate for situations where technology is rapidly developing since "prior approval may lag behind the technological progress."[92] In such circumstances, *ex-post* regulation, such as the *Competition Act* provisions concerning excessive pricing[93] and consumer protection,[94] are traditionally viewed as more fitting, if anti-competitive effects can be demonstrated. With AI quickly evolving, PPA users often update their pricing algorithm models to enhance data learning and predictive capabilities over time. However, the Code does not target these developments, but rather focuses on the *type* of data being analyzed by outlining rules that algorithms must follow, regardless of their model. Since each PPA version analyzes the same data and approval depends on the type of data being analyzed (e.g., personal characteristics), technological advancements in their algorithm's efficiency at collecting and analyzing data will not impact prior approval.

Considering the Code's novelty and stringency, resistance is expected. First, the government will be hesitant to implement the *ex-ante* Code since the licensing process requires significant monetary and temporal resources. A tradeoff exists – while it is more time efficient to conduct *ex-post* reviews of evidence of anti-competitive conduct and address it accordingly, significant harm may go undetected and unaddressed due to the lack of algorithmic explainability. Reviewing individual algorithms will certainly take time since sellers may not use the exact same algorithms as one another; nonetheless, pricing algorithms use similar foundations, variables, weighting and decision rules.[95] Therefore, the review process may be less time consuming than initially believed and sellers may obtain licences in a timely fashion. Second, e-commerce sellers will likely oppose the Code because the approval of their algorithms lies in the hands of government officials with whom they may disagree and there may be a discrepancy in the quality and attentiveness of regulators. However, the Code's objective rules may ease some concerns by reducing the subjectivity of the decision-making process and promoting consistency across licencing decisions.

Overall, the Code provides sufficient safeguards against the inflexibility and potential objections to warrant an *ex-ante* regulatory framework for PPAs. At the end of the day, the victims of unfair price personalization are the consumers. With over 75% of the Canadian population being e-commerce users,[96] the likelihood of biased price discrimination is not insignificant, and may cause detrimental harm over time if consumers, especially those belonging to minority groups, are charged supracompetitive prices for goods and services.

### 4.4 Ongoing Measures

Ongoing measures are crucial to promote compliance and identify prices based on bias or personal data, as well as address the evolving nature of PPAs. Quarterly audits are an effective accountability, bias and general risk mitigation mechanism.[97] Given the rapid development of AI, audits allow users to identify and remove any bias or prohibited information that may have entered the data sets to mitigate unfair pricing outputs. Furthermore, risk assessments allow for proactively planning to address anti-competitive risks that may materialize during PPA use, enabling companies to complete their due diligence. Finally, having a delegated team or officer aids in monitoring compliance and reporting potential violations.[98]

### 4.5 Penalties

AMPs will encourage compliance and prevent violations of the licensing requirements. The penalty scheme takes inspiration from other *ex-ante* legislation in Canada,[99] accounting for the severity of the violation and the resulting harm. When administering AMPs, there is a risk that the penalties will be considered a true penal consequence and trigger *Charter* rights. In *Guindon v Canada,* the Supreme Court of Canada (the "SCC") found that a monetary penalty will be a true penal consequence "when it is, in purpose or effect, punitive."[100] To determine whether an AMP is punitive and thus inappropriate in a regulatory context, the SCC outlined four factors that should be balanced – "the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty."[101]

Based on the *Guindon* factors, the Code's penalty scheme does not produce true penal consequences. While $50,000 and $5,000,000 may seem significantly high and punitive in nature, the size of most PPA users (e.g., eBay) and the reach of the algorithms (one PPA can target every consumer and impact millions of people) is substantial and warrants a high penalty. It should also be noted that these values represent the maximum AMP amounts under the scheme and, therefore, will not necessarily be administered for each violation. Moreover, the amounts are directly tied to the objective of deterring non-compliance with the Code and account for the reality that many consumers purchase most of their daily necessities online, so excessive prices can be detrimental to their livelihoods. An authority must also consider various factors in determining the magnitude of the AMP (such as the violator's personal gain), which are relevant to deterring such misconduct. Finally, the stigma arising from the imposition of an AMP under the Code is not comparable to that attached to a criminal conviction, but rather is similar to the penalties for other regulatory offences, such as violations of the *Occupational Health and Safety Act.*[102]

## 5. Conclusion

With the rapid expansion of the digital marketplace, the use of PPAs is bound to increase and influence a greater number of consumers. Despite *prima facie* evidence of market power of effective PPA users, as well as the significant risks of excessive prices, especially for minority groups, and anti-competitive behaviour, Canada currently lacks an adequate regulatory scheme for PPAs. Taking inspiration from the US and EU regulatory

frameworks, Canada should implement a licensing regime based on an *ex-ante,* rules-based code with ongoing measures and AMPs to reduce the perils of personalized pricing in the digital marketplace.

## ENDNOTES

* Tristan Montag is a JD candidate at University of Toronto Faculty of Law. I would like to thank Kenneth Jull for his invaluable guidance, Suzana Popovic-Montag for her unwavering support, and the editors at the CCLR who provided feedback on the article.

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# PARLIAMENT GOT IT RIGHT: WHY REBUTTABLE STRUCTURAL PRESUMPTIONS MAKE SENSE IN MERGER REVIEW

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*In 2024, rebuttable structural presumptions were incorporated into the merger provisions of the Competition Act. This means that a merger is now presumptively anti-competitive if the Competition Bureau can show that it would likely result in a significant increase in concentration or market share above prescribed levels. Merging parties can rebut such a presumption by showing that, contrary to the structural inference, the merger is unlikely to harm competition substantially. Failing that, however, the Competition Tribunal has discretion to prohibit or remedy the transaction to safeguard competition.*

*This new burden-shifting framework is consistent with the longstanding approach to mergers under U.S. antitrust law. It provides a clear and simple guidepost for merger analysis, while still allowing all relevant evidence bearing on a merger's likely competitive effects to be considered. Nevertheless, the change has been met with significant opposition by many in the business and practitioner community who view it as retrograde.*

*This paper provides historical context for this recent reform, arguing that it was part of a necessary set of corrections for a regime that had become unworkably complex. It then explains why rebuttable structural presumptions make sense for merger review, from both an economic and a practical perspective.*

*En 2024, des présomptions structurelles réfutables ont été intégrées aux dispositions relatives aux fu-sions dans la Loi sur la concurrence. Cela signifie qu'une fusion est désormais présumée anticoncur-rentielle si le Bureau de la concurrence peut démontrer qu'elle entraînerait vraisemblablement une augmentation importante de l'indice de concentration ou de la part de marché au-delà des seuils prévus. Les parties à une fusion peuvent toutefois tenter de réfuter cette présomption, mais il leur in-combe de démontrer que, contrairement à l'inférence structurelle, la fusion ne devrait pas nuire sen-siblement à la concurrence. À défaut, le Tribunal de la concurrence dispose d'un pouvoir discrétion-naire d'interdire l'opération ou d'imposer des mesures correctives afin de préserver la concurrence.*

*Ce nouveau cadre de déplacement du fardeau s'inscrit dans la lignée de l'approche de longue date en matière de fusions adoptée par la loi antitrust*

*américaine. Il fournit un point de repère clair et simple pour l'analyse des fusions, tout en permettant de tenir compte de tous les éléments de preuve pertinents relatifs aux effets concurrentiels probables de l'opération. Néanmoins, cette réforme a sus-cité une opposition marquée au sein du milieu des affaires et parmi les praticiens du droit, plusieurs la considérant comme un retour en arrière.*

*L'auteur fournit un contexte historique a cette réforme récente, soutenant qu'elle s'inscrit dans un ensemble nécessaire de mesures correctives visant un régime devenu excessivement complexe et diffi-cile à appliquer. Il explique ensuite les raisons pour lesquelles les présomptions structurelles réfu-tables sont justifiées dans l'examen des fusions, tant du point de vue économique que pratique.*

## 1. The Preventative Goal of Merger Review and the Need for Workable Tests

The purpose of the *Competition Act* is to maintain and encourage competition in Canada in support of a broad range of economic aims.[1] Among the available tools, merger control serves as a key line of defence, with a distinctly preventative focus.[2] Other forms of anti-competitive conduct—such as abuse of dominance—typically involve firms that already hold substantial market power. Likewise, collusion is generally thought to be easier to sustain in tight oligopolies with a smaller number of competitors, and wasteful rent-seeking behaviours are more apt to occur when firms already have market power to protect or entrench.[3]

While the concentration of market power and its attendant economic risks can arise for many reasons other than mergers, preventing anti-competitive mergers is a critical safeguard. It helps ensure that markets evolve as much as possible through the dynamic process of competition on the merits—that is, based on individual firms striving to gain share by offering what people want in better, more efficient ways.[4] This dynamism is essential for economic growth and innovation and, therefore, "[c]ountries must jealously guard and actively nurture the conditions that promote it."[5]

Indeed, the economic risks posed by anti-competitive mergers are considered so great and so much better to stave off *ex ante*, that the largest mergers in Canada are subject to mandatory pre-merger notification requirements and waiting periods.[6] This helps ensure that the Competition Bureau has an opportunity to review the most economically-significant transactions *before they close* and, if necessary, challenge them or secure consensual remedies to prevent anti-competitive harm.[7]

In recent years, less than 4% of notified mergers were found by the Bureau to raise substantive competition issues in Canada.[8] While mergers not raising issues are generally triaged and cleared quickly, the fact that Canada's merger control system is comfortable subjecting some twenty-five mergers to pre-merger screening for every one that is ultimately revealed to be anti-competitive, demonstrates the strong policy preference for *ex ante* review. At the same time, however, it underscores the need for efficient heuristics to ensure timely and predictable merger review decisions. Upwards of 200 mergers are notified each year in Canada and thousands of others are reviewable in principle.[9] Incomplete information, finite resources, and commercial realities dictate that these forward-looking reviews will never be perfect and cannot drag on forever. In order to be workable, the decision framework needs to be risk-based.

Historically, however, Canadian competition policy has struggled to produce workable, risk-based tests for identifying problematic mergers. From 1910 to 1986, anti-competitive mergers in Canada could only be prosecuted criminally, under a vague public interest test.[10] Unsurprisingly, there was not a single successful conviction in a contested merger case over this entire 76-year timespan. The indeterminacy of the test, coupled with the strict criminal law burden of proof, rendered enforcement against anti-competitive mergers virtually impossible, even in the extreme case of merger to monopoly.[11]

The search for a more workable, civil law-based alternative was a prolonged affair, beginning with the Economic Council of Canada's 1969 Interim Report on Competition Policy and culminating with the modern *Competition Act* adopted in 1986.[12] While there was general agreement that mergers demanded a case-by-case economic assessment, it was not obvious how best to operationalize such an assessment in a law enforcement framework. Should merger cases be decided by a specialized tribunal or by general courts? Should the competition test be relative or absolute? And what about Canada's relatively small, sparsely-populated and increasingly-open economy—should that require a more tolerant approach to anti-competitive mergers in the interest of scaling up large national champions that could succeed on the world stage? These and other considerations confounded policymakers in their search for an optimal merger policy.

The Canadian business community played an outsized role over this period of time, defeating and delaying various reform proposals, and shaping the ultimate law that would emerge.[13] In 1981, for instance, after several failed attempts at reform, the then Minister of Consumer and

Corporate Affairs released a discussion paper setting out a "new and simplified approach" for merger review that he hoped would appease stakeholders seeking clarity and predictability from the merger control system.[14] Among other things, the proposal dispensed with the "heavily criticized" approach taken in previous bills of having an "expert tribunal…weigh the expected efficiency gains from a merger against any damage to the competitive environment which might be expected."[15] Efficiency tests, the discussion paper noted, were "fine in theory but arguably impracticable" and "gave rise to great uncertainty as to when mergers would come under the law" because "neither the costs nor benefits were intuitively obvious."[16] Therefore, under the new proposal, merger cases would be decided by the regular courts, who would apply a basic significant lessening of competition test. To further increase predictability, the law would stipulate "that any merger which would result in the new enterprise accounting for more than a given per cent of any market in Canada would lessen competition significantly."[17] On this aspect, the discussion paper explained:

> "If a firm grows through acquisition of competitors to account for more than that percentage of the market, it would be inhibited from further acquisition in that market and would have to grow in the future by competing for a larger market share. It could also grow via diversification or entry into export markets. The advantage of this proposal is that it avoids the creation of uncertainty as to the application of the law in this area and leaves significant scope for firms to utilize the merger route in the process of growing and seeking to become more competitive while at the same time catching those mergers which are most destructive of competition."[18]

This bore some resemblance to the structural presumption framework that applied (and still applies) to horizontal mergers under U.S. antitrust law. Specifically, in *Philadelphia National Bank*, the U.S. Supreme Court held that a merger which "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[19] The court adopted this simplifying rule "in the interest of sound and practical judicial administration" and so that businesses could "assess the legal consequences of a merger with some confidence."[20] While the court declined to specify the smallest post-merger market share that would trigger the presumption, it was "clear that 30% presents that threat."[21] Importantly, however, this presumption was rebuttable, whereas the Minister's 1981 discussion paper seemed to be proposing something closer to a bright-line rule.

Regardless, this 'new and simplified' approach provoked strenuous opposition within the Canadian business community who subsequently organized and lobbied for an alternative. Journalist and business historian, Peter Newman, wrote that "[d]uring the next three years", the Business Council on National Issues (now known as the Business Council of Canada) "spent $1 million on the project", "hired its own team of twenty-five lawyers" and "produced a 236-page master plan" that would eventually become the *Competition Act*.[22] Newman mused, dramatically perhaps, that it "was the only time in the history of capitalism that any country allowed its antimonopoly legislation to be written by the very people it was meant to restrain."[23]

In stark contrast to the 1981 proposals, under the new *Competition Act*, merger cases would be decided by a specialized Competition Tribunal after all, subject to a standalone efficiency defence (previously dismissed as impractical). Additionally, there would be a new provision—eventually found in subsection 92(2)—expressly providing that the Tribunal "shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share." This stipulation, the government noted, was "designed to ensure that the Tribunal's consideration is more than a mere mechanistic process and focusses on both the qualitative and quantitive [sic] aspects of competition, thereby avoiding an overly structuralist approach to the law."[24] It added that, "[c]ompetition is a dynamic process, and merely adding up market share, after the merger, in some circumstances may tell little about the effect of a merger on competition."[25] It is unclear whether U.S.-style *rebuttable* presumptions were ever seriously considered by policymakers as a less "overly structuralist" alternative to the 1981 proposals.

Nevertheless, the 1986 reforms clearly represented a significant improvement over the inoperative criminal law system that existed before. Whereas the prior system had produced no convictions for anti-competitive mergers in the previous 76 years, there were at least three partially successful merger challenges in half that amount of time between 1986 and 2024, and many other anti-competitive mergers remedied consensually outside of contested proceedings.[26]

## 2. The Increasing Complexity of Merger Tests Under the *Competition Act*

Notwithstanding the guardrails against mechanistic decision-making noted above, in the early years of litigation under the *Competition Act*, the Competition Tribunal embraced basic structural rules of thumb to guide its analysis.

That pragmatism can be seen in early cases, such as the consent order proceedings in *Imperial Oil*, where the Tribunal accepted a divestiture rule preventing Imperial from acquiring more than 30% market share in various retail gasoline markets.[27] In *Laidlaw*, an early abuse of dominance case, the Tribunal found that high market share constituted a *prima facie* indication of market power.[28] In *Hillsdown*, the first decision in a contested merger case, the Tribunal suggested that market share data combined with "some evidence regarding barriers to entry" was sufficient to establish that a merger was *prima facie* anti-competitive.[29] In that case, the Tribunal cited evidence from the Bureau's expert on the post-merger level and change in concentration measured by the Herfindahl-Hirschman Index (HHI),[30] as well as the expert's view that a post-merger HHI of more than 1,800 coupled with an increase of more than 100 should be sufficient to establish that a merger is *prima facie* anticompetitive.[31] Regarding price tests, the Tribunal noted that it did "not find it useful to apply rigid numerical criteria" to determine whether a lessening of competition was substantial.[32] Likewise, in *Tele-Direct*, another early abuse case, the Tribunal found that a large market share could support an initial determination of market power "absent other extenuating circumstances, in general, ease of entry."[33] That decision further endorsed a sliding scale approach, whereby smaller impacts on competition would be deemed substantial, the less competitive the market was to begin with.[34] Notably, the Tribunal pointed to the consistency of that approach with the then U.S. merger guidelines insofar as "any numerical increase in concentration [is treated] more severely the higher the initial market share of the acquiring firm."[35]

While there are nuances in the various characterizations above, it is apparent from a review of these early decisions that structural evidence served as a useful guidepost in the Tribunal's analysis without detracting from the overall analytical rigour of its decisions. At a minimum, the Tribunal seemed prepared to apply a skeptical eye to mergers that would significantly increase market share or concentration, particularly in an already concentrated market.

Over time, however, this pragmatism gave way to a more complex mode of analysis. In *Superior Propane*, for instance, the Tribunal found that the merger would result in a monopoly or near-monopoly in numerous retail propane markets across Canada.[36] However, in considering the relevant anti-competitive effects applicable under the efficiency defence, it pointed to the aforementioned stipulation in subsection 92(2) barring it from finding a merger anti-competitive based solely on market share and concentration evidence. The Tribunal posited that this provision was "a reaction to the incipiency doctrine adopted by the [US] Supreme Court in *Brown Shoe* and to the structuralist presumption arising from *Philadelphia National Bank*."[37] It noted, albeit without citation, that the drafters of the *Competition Act* "sought to take advantage of the more recent scholarship and research literature that placed the market power-market share relationship in considerable doubt."[38] This meant that even an "extreme case [involving] a merger to monopoly cannot automatically be found to lessen competition substantially" in Canada.[39] While literally true, in the sense that market share and concentration evidence could not be determinative by itself, the Tribunal went further, concluding "that the creation of monopoly is *irrelevant* to its task under the merger provisions of the Act."[40] More important in its view, given the statutory scheme, was the effect of such a merger on resource allocation and welfare, which would be taken into account as part of the statutory efficiency defence with no special allowance for the creation or preservation of monopoly *per se*. Indeed, this was consistent with the position advanced in the Bureau's own merger guidelines at the time the merger was challenged.[41] Ultimately, the Tribunal found that the proven efficiencies brought about by the merger outweighed the proven anti-competitive effects. Unfortunately, economic experts would later point out that the Bureau had under-estimated the anti-competitive effects of the merger by failing to take into account pre-merger market power in its deadweight loss calculations, and this mistake had been decisive.[42] Put differently, a miscalculation had led to the authorization of a propane monopoly under the *Competition Act*.

Over time, quantitative evidence took on greater prominence in Tribunal decision-making in merger cases. While case law had long equated a substantial lessening or prevention of competition with an enhanced ability to exercise market power, decisions began to emphasize the need to forecast and quantify the adverse effects of that enhanced market power with particularized evidence to prove that it was *substantial*. This explicit metering of anti-competitive harm was arguably required by the Supreme Court of Canada's decision in *Southam*, which held that "the appropriate remedy for

a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[43] In principle, this minimally intrusive remedial standard required the Tribunal to identify the specific threshold level of anti-competitive effects that would be tolerable in any particular case, a complexity that did not exist in other jurisdictions.[44]

In *CCS*, another merger to monopoly case, the Tribunal adopted what might be termed a 'volumetric' approach.[45] Under this approach, the substantiality of any lessening or prevention of competition would be assessed with reference to the "magnitude", "duration" and "scope" of adverse effects on price or non-price indicators of competition stemming from enhanced post-merger market power.[46] In this particular case, the Tribunal found that the estimated average price effect of the merger was approximately 10%, that it would likely extend throughout a material part of the relevant market, that there would be no possibility of new entry for at least 30 months and that there would be minimal cognizable efficiencies from the merger.[47] However, on appeal, the Supreme Court of Canada held that the efficiency defence required that the forecasted market power effects of the merger be further translated into economic welfare and efficiency losses so that they could be compared on a like-to-like basis against the (negligible) estimated resource savings brought about by the merger.[48] Indeed, to minimize subjective judgement in the analysis, all quantifiable anti-competitive effects had to be quantified by the Bureau in this manner or else they could not be considered, and remaining effects that could only be assessed qualitatively would generally assume "lesser importance" in the trade-off.[49] Justice Karakatsanis dissented on these points, seeing no justification for such a categorical prioritization of quantitative over qualitative evidence.[50] Leading competition policy scholars also questioned this new "hierarchical superiority" of quantitative evidence.[51] Nevertheless, this became the second merger to monopoly authorized under the *Competition Act*, again based on insufficiently quantified anti-competitive effects.[52]

As if peering deeper into a fractal, cases became even more complex as the Bureau and merging parties wrestled with the practicalities of a full-blown, forward-looking, quantification-driven, welfare analysis for mergers. Instead of focusing on the proximate effects of a merger on competition and the potential enhancement of market power, the analysis required a detailed assessment of the likely effects-of-those-effects (on prices or other indicators), and then an assessment of the likely effects-of-the-effects-of-those-effects (on measures of economic welfare). Efficiency claims had to be assessed through a series of complex cognizability screens.[53] Time

differences in the realization of efficiencies and anti-competitive effects had to be taken into account by projecting out a time series and then discounting to present value at some to-be-determined discount rate. Effects inuring to the benefit or detriment of foreign shareholders were to be scrubbed out, where possible, to permit a Canadian welfare analysis. Wealth transfers could be neutral in the trade-off or could count against a merger depending on whether they were "socially adverse."[54] These were just some of the complexities.

Moreover, as demonstrated in *P&H*, even where all of the practical difficulties could be overcome, and the proven anti-competitive effects outweighed the proven efficiencies, it was no guarantee that there would be a remedial order, because the merger might not meet the predicate criterion of lessening or preventing competition *substantially*.[55] In other words, even where all of the economic debits and credits supposedly meant to be given primacy in the analysis were tallied up, and favoured intervention, intervention was not assured. Notably, that case involved a single relevant market and took over 20 months of deliberation and 800 paragraphs of legal and economic analysis to decide, illustrating just how complex merger analysis had become.

As a final example, in *Secure Energy Services,* the Bureau challenged a merger of two rival suppliers of oilfield waste services and sought an interim injunction to prevent it from closing pending a decision on the merits.[56] Although the Tribunal accepted the Bureau's evidence that the transaction would be a merger to monopoly for thousands of customers (and a 3-to-2 for tens of thousands of others) and that irreparable harm in the form of adverse price and non-price effects would occur,[57] it declined to order injunctive relief because of the lack of "deadweight loss" estimates from the Bureau to weigh against the financial harm that would be suffered by the acquiror if closing were delayed.[58] In its eventual decision on the merits, the Tribunal found that the transaction had in fact substantially lessened competition in 136 of the 143 markets alleged by the Bureau, noting that it was "difficult to conceive of a more anti-competitive merger."[59] It ordered post-closing divestitures, but only after confirming, through roughly 230 paragraphs of analysis, that the efficiency defence did not apply.[60]

While merger review under the *Competition Act* had been a significant improvement over the prior criminal legislation, and had humble beginnings, it had evidently morphed into something inordinately complex, confirming many of the fears set out in the 1981 discussion paper described above. As illustrated in Table 1 below, merger cases took longer to decide

and decisions themselves became longer. Moreover, despite all the trappings of the pre-merger notification system, cases like *Secure Energy Services* called into question whether the Bureau could actually prevent an anti-competitive merger from closing in practice if it had failed to prevent one of the most anti-competitive mergers conceivable for lack of sufficient quantitative evidence.

**Table 1: Fully-contested Merger Cases Under the *Competition Act*[61]**

| Case | File No. | # Hearing Days | # Days from End of Hearing to Decision | Approx. Length of Decision (# Words) |
|---|---|---|---|---|
| Southam | CT-1990-001 | 40 | 130 | 60,000 |
| Hillsdown | CT-1991-001 | 12 | 81 | 24,000 |
| Superior Propane I | CT-1998-002 | 48 | 203 | 51,000 |
| Canadian Waste | CT-2000-002 | 12 | 124 | 22,000 |
| CCS | CT-2011-002 | 13 | 167 | 38,000 |
| P&H | CT-2019-005 | 13 | 634 | 87,000 |
| Secure Energy Services | CT-2021-002 | 19 | 274 | 84,000 |
| Rogers/Shaw | CT-2022-002 | 20 | 17 | 36,000 |
| **Average first four cases** | | **28** | **135** | **39,250** |
| **Average last four cases** | | **16** | **273** | **61,250** |
| **% change** | | **-42%** | **+103%** | **+56%** |

In the author's view, it strains credulity to think that this system was comprehensible to a business contemplating a merger in Canada. A merger to monopoly was not *prima facie* anti-competitive under a law whose nominal purpose was to maintain and encourage competition. And even if it was proven to be anti-competitive, it could still be saved by an efficiencies defence if, after a convoluted jumble of error-prone calculations, the numbers were favourable. This is not to suggest that merger control should be devoid of analytical rigour and expert analysis—it absolutely requires those things—however, like any regulatory system, it also has to be administrable at scale and generate reasonably intuitive results consistent with its objectives. Moreover, the undue emphasis on quantification likely did more to *undermine* the interests of economic efficiency in Canada (assuming that was the overriding goal) by downplaying the less quantifiable but more important harms arising from reduced dynamic competition.[62]

Two additional clarifying points are worth making here. First, the discussion above is not meant to assign blame for the way that the system evolved. Policymakers adopted a merger control system that was prone to complexity, but likely did so out of necessity to appease influential stakeholders. The Tribunal adopted increasingly complex tests, but ones that at least partly reflected Supreme Court jurisprudence and the Bureau's own enforcement guidelines. The Bureau, for its part, lost some cases that it probably could have won, albeit with the benefit of hindsight. And merging parties forced litigation in some extreme cases, as is their right, and those extreme cases likely made for bad law.

Second, the system evidently *did* function in spite of these complexities. As noted above, the vast majority of transactions do not raise substantive issues under the *Competition Act* and are cleared quickly, while the ones that do raise issues tend to be resolved consensually, outside of fully-contested proceedings.[63] It may be tempting to conclude from that that the stringent standards developed through case law do not matter that much or only impact a small number of mergers.[64] However, this ignores the fact that in Canada's prosecutorial system merger decisions are made in the shadow of litigation. This necessarily impacts how the Bureau triages and prioritizes cases, the amount and type of information it gathers, and the remedies it accepts. If standards are such that it is unlikely for a merger to monopoly to be prevented or blocked in the event that it is challenged, that likely impact the types of mergers that get proposed in the first place. It also presumably impacts the willingness of complainants to come forward and cooperate with Bureau reviews, at least at the margin. In other words, one should expect that the legal framework affects the distribution of merger cases, their outcomes, as well as the review process itself.

## 3. Recent Amendments to Strengthen and Simplify Merger Review

Over the past four years, policymakers took note of the infirmities above, and enacted a series of reforms that significantly improve the merger control framework in Canada, along with other parts of the *Competition Act*.[65]

These reforms were introduced incrementally following a consultation led by former Senator Howard Wetston, a comprehensive review carried out by the department of Innovation, Science and Economic Development, and various Parliamentary committee studies.[66] Among other things, pre-merger notification rules were tightened, new rebuttable structural presumptions were adopted, the remedial standard for anti-competitive

mergers was strengthened so that remedies preserve or restore the level of competition that would have existed without the merger, and the standalone efficiencies defence was repealed.

In the author's view, all of these changes reinforce the preventative goal of merger review in service of maintaining and encouraging competition in Canada. They also simplify administration and enforcement of the law. The repeal of the standalone efficiencies defence notably addresses the welfare quantification-related complexities described above. The new remedial standard will mean less hairsplitting over where the substantiality threshold lies in a particular case. While each of these changes is significant in its own right, the balance of this paper will focus on the new rebuttable structural presumption framework. For ease of reference, the relevant new provisions spanning subsections 92(2) to 92(5) of the *Competition Act* are copied below.

> **Evidence**
>
> **(2)** For the purpose of this section, if the Tribunal finds, on a balance of probabilities, that a merger or proposed merger results or is likely to result in a significant increase in concentration or market share, the Tribunal shall also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, unless the contrary is proved on a balance of probabilities by the parties to the merger or proposed merger.
>
> **Significant increase in concentration or market share**
>
> **(3)** A merger or proposed merger results or is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger or proposed merger,
>
> **(a)** the concentration index increases or is likely to increase by more than 100; and
>
> **(b)** either
>
> **(i)** the concentration index is or is likely to be more than 1,800, or
>
> **(ii)** the market share of the parties to the merger or proposed merger is or is likely to be more than 30%.
>
> **Definition of concentration index**
>
> (4) In subsection (3), **concentration index** means, in any relevant market, the sum of the squares of the market shares of the suppliers or customers.
>
> **Regulations—different values**

> (**5**) The Governor in Council may by regulation prescribe different values than those provided in subsection (3).

Effectively, these changes replaced the previous bar on the Tribunal finding a merger anti-competitive based solely on market share or concentration with a rebuttable presumption that a merger is anti-competitive if it significantly increases market share or concentration (ss.92(2)). That presumption is deemed to be triggered if the Bureau can show that a merger would increase the level of concentration as measured by the HHI by more than 100 and either: 1) the merging parties would hold a combined share greater than 30%; or, 2) the post-merger HHI would exceed 1,800 (ss.92(4)). These thresholds mirror the ones currently set out in the U.S. merger guidelines, and can be updated by regulation (ss.92(5)).[67] Incidentally, they also align with the benchmarks cited in *Imperial Oil* and *Hillsdown* above.[68]

A useful mental shortcut can be derived by recognizing that the change in HHI of a merger involving two firms A and B is simply twice the product of their respective market shares.[69] A change in HHI exceeding 100 therefore requires the product of A and B's market shares to exceed 50. In addition, any market with 5 or fewer competitors necessarily has an HHI of at least 2,000.[70] Therefore, while there are other combinations that could trigger the presumption, any merger that reduces the number of competitors from 6-to-5 or worse, where the product of the merging firms' shares is greater than 50, is presumptively anti-competitive. Likewise any acquisition by a firm with more than 28% share of a competing firm with more than 2% share is presumptively anti-competitive. As discussed further below, this means that disputes over whether or not the presumption applies will tend to be limited to cases where a market is quite fragmented or where one or both of the merging parties are small players. In the author's experience, these would not normally be cases that a competition authority would challenge.[71]

The Bureau specifically advocated for these new presumptions, arguing that:

> "Structural presumptions make sense for a risk-based analysis like merger review. They provide a guidepost for the analysis and more efficiently allocate burdens of proof while still allowing for a full assessment of relevant factors. They can also provide a useful signal to firms and their advisors about transactions that are likely to raise significant concerns and may not be worth pursuing, saving time and resources for everyone."[72]

Other stakeholders advocated for structural presumptions during the reform process as well, including public interest advocacy groups,[73] consumer groups,[74] and farmers associations.[75] The House standing committee on Agriculture and Agri-Food also recommended enacting structural presumptions consistent with the Bureau's recommendations.[76] A private members bill, C-352, unanimously supported by opposition parties at second reading would have codified a stricter set of market share presumptions (including a total prescription against mergers that would lead to a combined market share exceeding 60%), but was eventually voted down after the above system of rebuttable structural presumptions was incorporated into the government's bill C-59.[77]

Notably, the government's bill had initially only proposed repealing subsection 92(2), but not replacing it with a structural presumption framework or specifying particular presumptive thresholds. This would have left the door open for some type of burden-shifting framework to potentially emerge through case law, as it had in the United States.[78] Assuming things would have unfolded in that manner, there would have been advantages to such a framework from a flexibility standpoint. However, given that fully-litigated merger cases are rare (there have been just 8 cases in the past 40 years), it may have taken years or perhaps decades for such a framework to crystallize, and there would have been considerable uncertainty for the Bureau and business community in the interim, including over basic issues like what level and change in market share or concentration thresholds would be sufficient to trigger a presumption.

Moreover, there is reason to doubt that such a framework would have actually emerged at all in the absence of clear legislative direction. Had Parliament intended the Tribunal to adopt structural presumptions, so the argument would go, they could have codified a framework as the Commissioner had recommended and as the above-noted private members bill would have done. At best the mere repeal of subsection 92(2) would have been a legislative nudge, and could have been ignored. Arguably stronger legislative directions went unheeded in the past. For example, when the competitive effects test was removed from section 100 to make it less onerous for the Bureau to obtain an extension of time to complete a merger inquiry, the Tribunal found that there was still "some vestige of SLC considerations" under a different prong of the test, and that because the time period for merger reviews had been ratcheted up from 21 to 42 days, there was "a heightened expectation that 42 days should be sufficient to complete a merger review."[79] Analogously, the Tribunal may have viewed the other amendments strengthening the merger provisions as reason to impose a

*heightened* evidentiary standard on the Bureau under section 92, rather than adopt structural presumptions.

Regardless, this was evidently a reform that had garnered wide popular and political support, and Parliament opted to put in place a definitive framework. However, this reform was not supported by all. The Canadian Bar Association,[80] the Canadian Chamber of Commerce[81] and various think tanks and academics pushed back to varying degrees.[82] The next section explains why this reform made sense and responds to some of the concerns raised by critics.

## 4. Why Rebuttable Structural Presumptions for Mergers Make Sense

### 4.1 Economic rationale

Market share and concentration are economic indicators of market power in properly defined markets, and changes in these metrics brought about by a merger are a gauge on the risk that a merger will enhance market power. This is precisely why competition agencies define relevant markets using the hypothetical monopolist test, to determine the relevant products and areas over which market power could be exercised.[83] This does not mean that market share and concentration metrics provide *conclusive* evidence of anti-competitive harm from a merger. But that is not the goal of *rebuttable* presumptions. The goal is to identify mergers that raise *prima facie* risk of such harm, while keeping an open mind to other countervailing evidence that disproves or rebuts the presumption, like ease of entry.[84] Some commentators seemed to mistakenly conflate recent reforms with the adoption of a bright-line rule, or a complete disavowal of effects-based analysis.[85]

Leading antitrust scholars and economists support the use of structural presumptions. In 2018, Herbert Hovenkamp, one of the most cited antitrust scholars in the world, co-authored a paper with Carl Shapiro, a leading antitrust economist, affirming the use of structural presumptions in contemporary merger analysis, concluding that presumptions are "strongly supported by economic theory and evidence, as well as the experience gained in merger enforcement over the past fifty years."[86] In 2022, a group of 26 economic experts wrote, "as economists, we support the established legal presumption that a merger that significantly increases market concentration in an already concentrated market is likely to result in adverse competitive effects."[87] Another paper, in 2023, co-authored by 12 economists and lawyers with substantial experience in antitrust enforcement, supported rebuttable presumptions, writing that the "general approach of

employing presumptions while allowing rebuttal on a sliding scale can reasonably be expected to strengthen merger enforcement while preserving a focus on market power."[88]

Critics of structural presumptions sometimes point to the economic consensus that developed in the 1970s and 1980s that market structure does not determine performance.[89] However, this critique is not particularly relevant to the use of presumptions in merger review. It is true that markets can become concentrated due to economies of scale and the normal process of competition on the merits, yielding lower prices and greater efficiency. An important insight from that work is that blind efforts to deconcentrate markets by breaking-up firms can be economically counterproductive, and that competition law should seek to promote competition not competitors.[90] However, this does not say anything about the effect of increased concentration *induced by mergers*. Mergers are a particular way in which markets can become more concentrated and can be studied as a distinct phenomena.

Indeed, a large number of merger retrospective studies find anti-competitive effects from mergers that significantly increase concentration.[91] One recent study found that a merger-induced increase in the HHI of more than 100 is, by itself, a good predictor of anti-competitive effects (i.e. irrespective of the baseline).[92] Professor Hovenkamp has suggested that the available evidence may justify an even lower set of presumptive thresholds than the ones set out in the current U.S. merger guidelines (which mirror the ones set out in the *Competition Act*).[93]

Of course, many of these merger retrospective studies are based on U.S. markets. One potentially legitimate critique of the new presumptions under the *Competition Act* is that the U.S. thresholds may not be suitable for the Canadian context. However, this would only be the case under certain conditions. For one, it could be the case that a given level and change in market share or concentration induced by a merger produces less market power in Canada than it does in the United States, all else being equal. That might be plausible if markets in Canada were generally characterized by lower barriers to entry or other constraints on market power, however, that seems hard to argue (if anything, the opposite could be true, which would militate in favour of *lower* thresholds). Another possibility is that the thresholds are accurate predictors of merger-induced market power in Canada but we should simply *tolerate* more market power in Canada for social or economic reasons, like fostering 'efficient' national champions. However, that was the logic underpinning the prior efficiency defence for anti-competitive mergers under the *Competition Act*, which was severely repudiated in the context

of recent reforms. There is no evidence that anti-competitive mergers in Canada have made our economy more productive or have produced internationally competitive firms. Another possibility is that the *composition* of mergers in Canada differs on average from the composition of mergers in the U.S. (or from the mergers that have been studied). However, again, it is not obvious *a priori* whether that would militate in favour of higher or lower thresholds in Canada. Moreover, there is evidence to suggest that the new presumptions are consistent with the Bureau's enforcement practices in in-depth merger reviews, suggesting that they are reasonably calibrated.[94]

In any event, there certainly should be more independent merger retrospective studies in Canada. Notably, if emerging evidence shows that the Canadian thresholds are inapt, the thresholds can be updated through regulation. And, of course, in all cases, the new presumptions are rebuttable, meaning that context-specific factors can always enter the analysis through that route.

### 4.2 Practical rationale

The introductory sections of this paper explained at length the impracticalities of the previous system and the need for more workable, risk-based tests for identifying potentially problematic mergers in Canada. The preceding subsection explained why merger-induced changes in market share and concentration are useful (if imperfect) predictors of anti-competitive harm. But are they practical?

One critique about presumptions is that they rely on market definition and defining relevant markets is not always straightforward. However, it is important to recognize that defining markets was already a *de facto* required step in contested merger cases.[95] Not a single litigated merger case has been decided in Canada without defining markets. There are well-established methodologies for defining markets and calculating market shares, and sometimes the Tribunal has preferred the merging parties' evidence, demonstrating that the Bureau has no unique advantage. While the new structural presumption framework arguably increases the stakes on market definition in litigation, it is hard to imagine this aspect of the analysis being more contentious than it already has been.[96] In other words, while there are bound to be cases where market definition is complex, presumptions do not make merger analysis more complex, and in many cases they will make it simpler.

As explained above, the thresholds are set at levels that make it unlikely that disputes over the precise boundaries of the relevant market will matter

for purposes of establishing whether the presumption applies. And in cases where other more direct evidence is more probative of a merger's competitive effects, there is nothing to prevent the Bureau and parties from focusing on that evidence instead, inside or outside contested proceedings, since it will inevitably be relevant. For mergers that would clearly exceed the threshold under any plausible market definition, and where there are no obvious mitigating factors like low entry barriers, the risk analysis should be much simpler for all involved. Some of the most egregiously anti-competitive transactions may not get proposed in the first place, saving time and redirecting business energy to other, more productive avenues for growth.

Another reason to believe that structural presumptions will be more practical than the prior system is the fact that they have been used in the U.S. for over 60 years, in a regime where merger cases are decided by general courts. As noted above, burden-shifting presumptions were adopted by the U.S. Supreme Court in *Philadelphia National Bank* for the precise purpose of simplifying decision-making - it seems unlikely that they would have persisted for as long as they have if they were unhelpful or impractical. In 2024 alone, there were at least four contested merger cases in which three different U.S. district courts relied on structural presumptions, applying the 30% threshold from *Philadelphia National Bank* and/or the HHI thresholds set out in the 2023 U.S. merger guidelines.[97] Moreover, it is the author's understanding that merging parties can and do rebut the presumption in practice, and U.S. antitrust agencies do not challenge every merger that exceeds the thresholds. There is no reason why it should be any different in Canada. Indeed, the same is true in Germany where rebuttable presumptions are written directly into their law and "play an important role in accelerating and facilitating proceedings without removing the authority's duty to investigate or the party's rights to supply evidence."[98] Likewise, the European Commission is currently consulting on whether to adopt rebuttable presumptions "to identify more easily mergers that are likely to result in a significant impediment to effective competition" while allowing merging parties to provide "evidence showing that the transaction in question does not lead to anticompetitive effects."[99]

## Conclusion

In the author's view, the incorporation of rebuttable structural presumptions into the merger provisions of the *Competition Act* was a positive development. It was a necessary correction for a regime that had become unworkably complex. Properly implemented, these new presumptions should simplify and streamline merger decisions and provide greater clarity

to all involved, without unduly compromising analytical rigour. All of this should better serve the goal of maintaining and encouraging competition in Canada.

## ENDNOTES

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

[2] Innovation, Science and Economic Development Canada, *Future of Canada's Competition Policy Consultation – What We Heard Report* (20 September 2023) at s IV (describing merger review as "the first line of defence against market concentration"); International Competition Network, *Recommended Practices for Merger Analysis* at 3 ("Merger analysis requires an agency to predict a merger's competitive impact to prevent any competitive problems before they materialize.").

[3] Jonathan B Baker & Joseph Farrell, "Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement" 2020) 168 *U Pa L Rev* 1985 at 1991; Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft" in *40 Years of Research on Rent Seeking*, vol 1 (Springer, 2008) 45.

[4] See *CCS*, *infra* note 45 at para 372 ("Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy." [emphasis in original]).

[5] Mark Carney, *Value(s): Building a Better World for All* (Signal, 2021) at 504–06 (adding "[i]t is a gentle slope towards cosy oligopolies. The costs of this quiet life are not immediately apparent, but they grow with time through lost innovation, stilted ideas and growing rent seeking. Eternal vigilance in the name of competition is essential.").

[6] *Competition Act, supra* note 1, Part IX.

[7] The Bureau can also review and challenge mergers that do not meet the notification thresholds, or that have already been consummated, subject to a limitation period. See *Competition Act, supra* note 1, s 97.

[8] Competition Bureau, *Performance Measurement and Statistics Report 2023-2024* at s 3. From 2018-2019 to 2023-24 there were reportedly 1,234 merger filings and 42 reviews concluded with issues (i.e., abandoned, remedied or challenged on the basis of competition concerns).

[9] *Ibid*; IMAA Institute, "Canada – M&A Statistics" (accessed 13 April 2024).

[10] John S Tyhurst, *Canadian Competition Law and Policy, Updated First Edition* (Irwin UTP, 2025) (Essentials of Canadian Law) at 191–96.
[11] *Ibid*; See also GB Reschenthaler & WT Stanbury, "Benign Monopoly: Canadian Merger Policy and the KC Irving Case" (1977) 2:2 *Can Bus LJ* 135.
[12] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969). For a historical overview see Tyhurst, *supra* note 10 at ch 2.
[13] WT Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971-1975* (Toronto: 1977); Roy Vogt, "Corporate Power and the Development of New Competition Policies in Canada" (1985) 19:2 *J Econ Issues* 551-558; and Peter C Newman, *Mavericks: Canadian Rebels, Renegades and Anti-Heroes* (Toronto: 2010) at 259–60.
[14] Minister of Consumer and Corporate Affairs, *Proposals for Amending the Combines Investigation Act, A Framework for Discussion* (Ottawa: April 1981) at 6.
[15] *Ibid.*
[16] *Ibid*; Although not cited in the 1981 discussion paper, this view on the impracticality of case-by-case efficiency tests for mergers aligned with the view of leading U.S. scholars at the time, including those otherwise sympathetic to economic efficiency as a goal of antitrust enforcement. See e.g. Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (8 February 2022) at s 2.1.
[17] The discussion paper did not specify the threshold, but indicated that it "would have to be set reasonably high." It also noted that an above-threshold merger need not be prohibited entirely, it could still be allowed if a "conditional order were feasible which would ensure that the merger did not result in a dominant position in any particular market." *Ibid.*
[18] A speech by the Minister previewing the 1981 discussion paper noted that "Inevitably, some will find [the eventual threshold] too high, others too low. It seems to us that we must specify an exact share of the market that will allow businesses considerable expansion through acquisitions, and that will eliminate the few cases where competition is most seriously threatened." Speech by the Honourable André Ouellet to the Montreal Chamber of Commerce (31 March 1981). *Ibid* at 7.
[19] *United States v Philadelphia National Bank*, 374 U.S. 321 (1963) [*Philadelphia National Bank*].
[20] *Ibid.*
[21] *Ibid.*
[22] Newman, *supra* note 13 at 260.
[23] *Ibid.*
[24] Department of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide*, (Ottawa: December 1985) at 17.
[25] *Ibid.*
[26] See remedial orders made in *Southam* (CT-1990-001), *Canadian Waste* (CT-2000-002) and *Secure Energy Services* (CT-2021-002). In addition, there are at least 96 merger cases involving registered consent agreements listed on the

Competition Tribunal website as of the time of writing. This does not include additional cases resolved by way of undertakings, or cases that were abandoned on the basis of competition concerns, of which there would likely be dozens.

[27] *Canada (Director of Investigation and Research) v Imperial Oil Ltd, (26 January 1990)*, CT8903/390 at 26–27 [*Imperial Oil*]. At 16, the Tribunal embraced a sliding scale approach, whereby it would show less tolerance for anti-competitive harm from a merger if the pre-merger situation was already highly uncompetitive.

[28] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd,* 1992 CanLII 15378 (CT) at 325 and 330 [*Laidlaw*]. At 345, the Tribunal also opined that an acquisition practice that leads to a monopoly "by itself constitutes at least a prima facie lessening of competition which is substantial.

[29] *Canada (Director of Investigation and Research) v Hillsdown Holdings Ltd*, 1992 CanLII 2092 (CT) at 46 [*Hillsdown*].

[30] The HHI is a standard measure of market concentration deriving from oligopoly theory. It is calculated by summing the squares of the market shares of all the firms competing in the market. See George J Stigler, "A Theory of Oligopoly" (1964) 72:1 *Journal of Political Economy* 44–61.

[31] While not expressly embracing such a presumption, the Tribunal suggested at footnote 47 that this was a higher test than the one that applied in the United States and thus "an approach that will likely be more appropriate for Canadian industries which will often already be highly concentrated." *Ibid* at 47–48.

[32] *Ibid* at 71.

[33] *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc,* CCTD No 8 at para 227 [*Tele-Direct*].

[34] *Ibid* at para 758. See also *Imperial Oil*, *supra* note 27.

[35] *Ibid*, n 291.

[36] *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 CACT 16 (CanLII) [*Superior Propane*].

[37] *Ibid* at para 121.

[38] *Ibid* at para 133.

[39] *Ibid* at para 133.

[40] *Ibid* at para 272 [emphasis added].

[41] Competition Bureau, *Merger Enforcement Guidelines* (March 1991). Those guidelines noted that "[n]o inferences regarding the likely effects of a merger on competition are drawn from evidence that relates solely to market share or concentration." It also noted that under the efficiency defence, the relevant anti-competitive effects of the merger were limited to deadweight loss to the Canadian economy.

[42] Frank Mathewson & Ralph Winter, "The analysis of efficiencies in Superior Propane: Correct Criterion Incorrectly Applied" (2000) 20:2 *Canadian Competition Record* 88–97.

[43] *Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385 (SCC), 1 SCR 748 at paras 83–85 [*Southam*]. The author thanks an anonymous reviewer of this paper for suggesting this point.

[44] See discussion of international remedial standards in Competition Bureau (2022), supra note 16 at s 2.4.
[45] *Canada (Commissioner of Competition) v CCS Corporation et al,* 2012 CACT 14 (CanLII).
[46] *Ibid* at paras 375–86.
[47] *Ibid* at paras 2, 4, 222 and 289–90.
[48] *Tervita Corp v Canada (Commissioner of Competition),* 2015 SCC 3 (CanLII), 1 SCR 161 [*Tervita*].
[49] *Ibid* at paras 100, 137–39, 151, 164, and 166.
[50] *Ibid* at para 181–200.
[51] Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2017) 60 *Can Bus LJ 171* at 195. See also Ralph Winter, "Tervita and the Efficiency Defense in Canadian Merger Law" (2015) 28 *Can Competition L Rev* 133.
[52] As an aside, it is possible that this decision was a purely idiosyncratic result. Justice Rothstein wrote the decision for the majority in *Tervita* in his final months on the court. In a tribute article, one set of observers noted that *Tervita* represented a "keystone of his legacy" and the "culmination of a lifetime of work committed to promoting economic efficiency as a virtue that benefits all Canadians." Notably, Justice Rothstein "insisted on Parliament's intention to put economic efficiency at the heart of Canadian competition law even at the expense of other stated purposes of the Competition Act, including consumer protection and providing opportunities for small and medium enterprises." He was able to do so, apparently, by relying on a "textualist leaning", given the express wording of the efficiencies defence, and ignoring the policy considerations that Parliament had in mind in creating the defence. Joshua Krane et al, "Marshalling the Efficiencies Defence" (2016) 74 *SCLR* (2d) 451 at paras 1, 3 and n 52.
[53] CCS, supra note 45 at paras 261–65.
[54] *Superior Propane*, supra note 36 at para 333.
[55] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Ltd*, 2022 Comp Trib 18, CanLII 106878 (CT) at paras 638, 698–702, and 762–63 [*P&H*]. In particular, the Tribunal noted at paras 700–01 that the consumer surplus loss was $540,000 per crop year in wheat, that the deadweight loss was at least $30,000, and that the cognizable efficiencies were $0. The Tribunal also noted at para 540 that it did not have sufficient evidence to determine whether a loss of $2000 per farm "could be material or not to farmers."
[56] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7, CanLII 76988 (CT) [*Secure Energy Services*].
[57] *Ibid* at paras 23–24 and 107.
[58] *Ibid* at paras 108–25.
[59] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02, CanLII 27447 (CT) at para 5.
[60] *Ibid* at paras 484–716.
[61] Author's calculations using case data from Competition Tribunal website.

Note that *Superior Propane I* only counts the first decision in that case, not the subsequent hearing and redetermination decision.

[62] Matthew Chiasson & Paul Johnson, "Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation" (2019) 32 *Can Competition L Rev* 1. This could be particularly relevant in industries where dynamic competition is important. See Carney, *supra* note 5 at 504–05 ("In technology … a series of acquisitions have been waved through because there is no discernible price impact. But there is a detrimental impact on experimentation and another one on the concentration of economic power. And with them, on dynamism.").

[63] *Supra* notes 8 and 26.

[64] See e.g. Michael Kilby & Lawson Hunter, "In Getting Mergers Done, the Infamous Efficiencies Defence is Way Overrated" *The Globe and Mail* (21 December 2022).

[65] For a general overview of the changes and what led to them, see Matthew Chiasson & Matthew Boswell, "From Fiction and Fantasy to Reality: How a New Era of Competition Law in Canada Came to Be" (2025) 24:4 *The Antitrust Source*.

[66] *Ibid.*

[67] U.S. Department of Justice and Federal Trade Commission, *2023 Merger Guidelines* (18 December 2023) at 6. Footnote 15 of the guidelines explains that these thresholds are consistent with ones used in previous iterations of the guidelines and routinely relied upon by the courts from 1982 to 2010. The agencies raised the thresholds in the 2010 guidelines to better reflect enforcement practices, but decided to revert back to the historical levels in 2023 based on experience and evidence that had developed. Courts have found this explanation persuasive and are citing the current thresholds, see cases *infra* note 97.

[68] *Imperial Oil*, *supra* note 27, and *Hillsdown*, *supra* note 31.

[69] DHHI = (A + B)2 - (A2 + B2) = 2*A*B. This holds regardless of the number of other firms in the market.

[70] Since the smallest HHI in a five-firm market would occur if each firm held 20% share and 202 + 202 + 202 + 202 + 202 = 2,000.

[71] An exception might be a merger involving particularly close competitors in a highly differentiated industry where relevant markets could potentially be drawn narrowly or widely. However, even those situations would be readily apparent to the merging parties as raising potential competition risks as firms generally know who their closest competitors are.

[72] Competition Bureau, *Submission to the House of Commons Standing Committee on Finance and Senate Standing Committee on National Finance in Respect of Bill C-59* (1 March 2024), online: <https://www.ourcommons.ca/Content/Committee/441/FINA/Brief/BR12944851/br-external/CompetitionBureauCanada-e.pdf>.

[73] See e.g. Public Interest Advocacy Centre, "Submission re: Consultation on the Future of Competition Policy in Canada" (31 March 2023) at paras 61–62; Canadian Anti-Monopoly Project, "Written Submission for the Study of Bill C-59" (March 2024) at 4–5.

[74] See e.g. Consumers Council of Canada, "Submission re: Consultation on the Future of Competition Policy in Canada" (February 2023); Consumers Union des consommateur, "Brief to the Standing Committee on Finance re: Bill C-59", (20 March 2024) at 5; Option consommateurs, "Comments to the Finance Committee re: Bill C-59" (5 April 2024) at 8–9.

[75] See e.g. National Farmers Union, "Submission re: Consultation on the Future of Competition Policy in Canada" (March 2023) at 4; L'Union des producteurs agricoles, "Mémoire re: Consultations Sur L'avenir de la Politique de la Concurrence au Canada" (29 March 2023) at 16.

[76] Standing Committee on Agriculture and Agri-Food, *A Call to Action: How Government and Industry Can Fight Back Against Food Price Volatility* (May 2024), 1st session, 44th Parliament, at Recommendation 9.

[77] C-352, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st session, 44th Parliament, 2023.

[78] Officials explained that the repeal of section 92(2) would allow the Tribunal to "make intuitive presumptions if market share has become very high" while at the same time "allowing the courts and jurisprudence to evolve." See testimony of Martin Simard, Senior Director, Corporate, Insolvency and Competition Directorate, Department of Industry to the House of Commons Standing Committee on Finance in respect of Bill C-59 (19 March 2024), online: <https://www.ourcommons.ca/documentviewer/en/44-1/FINA/meeting-132/evidence>.

[79] *The Commissioner of Competition v Labatt Brewing Co. Ltd. et al,* 2007 CACT 9 (CanLII) at paras 24–28.

[80] See e.g. Submissions of the Competition Law and Foreign Investment Review section of the Canadian Bar Association re: Bill C-59, dated April 29, 2024 and June 5, 2024.

[81] See e.g. Canadian Chamber of Commerce, "Written submission for the study of Bill C-59" (February 2024) at 8.

[82] See e.g. CD Howe Institute Competition Policy Council, "A Step Too Far: Enshrining Structural Presumptions Governing Mergers in the Competition Act is Not Good for Canada's Competitiveness" (5 March 2024); Macdonald Laurier Institute, "Proposed changes to Canada's Competition Act could kneecap our already faltering economy" (9 May 2024); Information Technology & Innovation Foundation, "Comments to the Parliament of Canada Regarding Proposed Amendments to Canadian Competition Law" (23 February 2024); International Centre for Law & Economics, "Bill C-59 and the Use of Structural Merger Presumptions in Canada" (15 March 2024).

[83] ICN Recommended Practices, *supra* note 2 at 5.

[84] Herbert Hovenkamp & Carl Shapiro, "Horizontal mergers, market structure, and burdens of proof" (2018) 127 *Yale LJ* 1996-2025; Steven Salop, "The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach" (2015) *Georgetown Law Faculty Publications and Other Works* 1304.

[85] Chamber of Commerce, *supra* note 81 ("Judging a merger solely based on its effects on market share is misguided…" and "…while concentration may generally be associated with a lack of competition in a market, this is not

universally the case."); ITIF, *supra* note 82 ("… Under U.S. law, mergers that result in certain levels of market concentration or a high combined market share can under certain circumstances be treated as presumptively anticompetitive. However, this presumption is rebuttable…").

[86] Hovenkamp & Shapiro, *supra* note 84.

[87] Nathan Miller et al, "On the misuse of regressions of price on the HHI in merger review" (2022) 10:*2 Journal of Antitrust Enforcement* 248–59. The paper, however, cautioned against using HHI in more sophisticated regression analyses.

[88] Jonathan B Baker et al, "Comments of Economists and Lawyers on the Draft Merger Guidelines" (18 September 2023), *U of Penn, Inst for Law & Econ Research Paper* No. 23-45. The paper, however, cautioned against *irrebuttable* presumptions or presumptions de-coupled from market power that would treat increased concentration as intrinsically harmful.

[89] Michael Kades, Deputy Assistant Attorney General, US DOJ Antitrust Division, "Remarks at GCR Live: Law Leaders Global 2024" (1 February 2024). It appears this was the critique the Tribunal had in mind in its commentary on subsection 92(2) in *Superior Propane*, *supra* note 38.

[90] Hovenkamp & Shapiro, *supra* note 84 at 2005-2006.

[91] Hovenkamp & Shapiro, *supra* note 84 at 2007 ("evidence from merger retrospectives strongly supports the structural presumption by finding links between concentration and post-merger price increases"); Kades, *supra* note 89 at n 20 (citing a large number of merger retrospective studies).

[92] Volker Nocke & Michael D Whinston, "Concentration thresholds for horizontal mergers" (2022) 112:6 *American Economic Review* 1915–48.

[93] Herbert Hovenkamp, "The 2023 Merger Guidelines: Law, Fact, and Method" (2024) 65:1 *Review of Industrial Organization* 39–77 at 52–53.

[94] Nikiforos Iatrou et al, "Contagious Presumptions: Will U.S. Antitrust Transform Canadian Merger Review?" (3 September 2024) (examining previous mergers and finding that "being over or under the structural presumption is a reasonable indicator for the risk that a deal may require a remedy").

[95] *Southam*, *supra* note 43 at para 79 ("Definition of the relevant market is indeed a necessary step in the inquiry…").

[96] See e.g. *P&H, supra* note 55. That decision devoted some 270 paragraphs to market definition with the acronym SSNIP (small but significant non-transitory increase in price) being used over 100 times.

[97] See *Federal Trade Commission v IQVIA Holdings Inc*, 1:23-cv-06188v, (SDNY 8 January 2024); *Federal Trade Commission v Novant Health, Inc et al*, 5:2024cv00028 (WDNC 5 June 2024); *Federal Trade Commission v Tapestry, Inc*, 1:24-cv-03109, (SDNY 24 October 2024); and *Federal Trade Commission v Kroger Company*, 3:24-cv-00347, (D. Or., 10 December 2024).

[98] Germany, *Submission to OECD Roundtable on The Use of Structural Presumptions in Antitrust* (4 December 2024).

[99] European Commission, "Topic B: Assessing Market Power Using Structural Features and Other Market Indicators" *Review of the EU Merger Guidelines* (8 May 2025).

# 2025 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2025

## The Problem

This year's Adam F. Fanaki Competition Law Moot problem required participants to grapple with the competitive effects of an exclusive supply agreement between a distributor of films to independent cinemas and a chain of independent movie theatres. The Commissioner of Competition filed an application under section 79 of the Competition Act, seeking to terminate Kingsland Inc.'s exclusive supply agreement with Lion House Cinemas, alleging it results in substantial lessening or prevention of competition (SLPC).

Kingsland Inc. is a joint venture co-owned by Dragonrider Pictures and Tallturret Studios, two of Canada's major film studios. These studios produce films for distribution to all types of cinemas. The joint venture acts as a distributor of Dragonrider and Tallturret's films to independent theatres. Lion House Cinemas operates a significant chain of independent movie theatres across Canada. The agreement, signed on December 16, 2023, grants Kingsland exclusive rights to distribute movies within Lion House theatres. Wolf House Films, an independent studio, filed a complaint against the agreement, leading to an inquiry by the Commissioner.

The Commissioner argued that Kingsland controls the market for film distribution to independent theatres and is engaging in anti-competitive practices by excluding other studios from Lion House theatres, resulting in higher prices and reduced choice for consumers. Alternatively, the Commissioner contended that Tallturret and Dragonrider are jointly dominant in the market for film distribution across all theatres in Canada.

The Tribunal found the relevant market to be the distribution of films to all theatres in Canada, excluding streaming services. It found that Kingsland is not dominant in this market, but Dragonrider and Tallturret are jointly dominant. The Tribunal concluded that the agreement constitutes a practice of anti-competitive acts but does not result in an SLPC due to effective competition from other distributors and streaming services.

## Detailed Analysis

### Market Definition

The Tribunal found the relevant market to be the distribution of films to all movie theatres in Canada, excluding streaming services. It found that independent theatres are an important channel, but consumers can switch between independent and larger chain theatres with minimal costs.

### Joint Dominance

Tallturret and Dragonrider were found to be jointly dominant in the market for film distribution to all theatres. Their combined market share is 63%, and it is expected to rise further. The Tribunal considered other factors indicating joint dominance, such as the ability to exclude competitors and significant commercial leverage.

### Anti-Competitive Acts

The Tribunal agreed with the Commissioner that the agreement is a practice of anti-competitive acts, excluding Wolf House and other studios from the independent theatre channel. The Tribunal found that, despite arguments to the contrary by the Respondents, the agreement is not pro-competitive or efficiency-enhancing.

### Substantial Lessening or Prevention of Competition

The Commissioner failed to prove that the agreement results in a substantial lessening or prevention of competition in the relevant market. The independent theatre channel is a small portion of the market, and the effects are not substantial.

The Tribunal ordered the prohibition of Kingsland's implementation of the exclusivity provisions in the agreement but did not require the dissolution of the agreement.

The parties (Kingsland, Inc., Dragonrider Pictures, and Tallturret Studios) appealed the Tribunal's decision, and the moot participants acted for either the appellants (the parties) or the respondent (the Commissioner) before the (hypothetical) Federal Court of Appeal.

## Appellants' Argument

In their winning factum for the Appellants, Daniel Kim and Tyler Li of the University of Ottawa, Faculty of Law (Common Law Section), argued

that the relevant market includes both theatres and streaming services due to substitutability and industry behaviour. Within this broader market, Kingsland holds no dominant position, and the combined market share of Dragonrider and Tallturret is well below the 65% threshold for joint dominance. The Appellants further argued that the Tribunal erred in finding a "practice of anti-competitive acts," asserting that the exclusivity agreement was a single, rational business decision—not a sustained or exclusionary practice. There was no intent, objectively or subjectively, to harm competition. Even if a violation occurred, the Appellants argued that the nationwide prohibition is too broad. Any remedy should be localized to areas lacking alternative theatres to reflect actual competitive harm.

## Respondent's Arguments

In their winning factum for the Respondent, Jubilee Lambie and Rhiannon Szewczyk of the University of Ottawa, Faculty of Law (Common Law Section), argued that the Tribunal correctly found Kingsland's exclusivity agreement with Lion House Cinemas to be anticompetitive and constituted a practice of abuse of dominance. The Respondent maintained that the relevant market is the distribution of films to all movie theatres in Canada—excluding streaming services, which serve as complementary rather than substitutable film distribution channels. Within this market, Dragonrider and Tallturret were properly found to be jointly dominant. The Respondent further argued that the exclusivity agreement constituted a "practice of anti-competitive acts," as it had clear and foreseeable exclusionary effects, and the Tribunal rightly concluded that there was no credible business justification that outweighed these effects. The Respondents urged the Appeal Tribunal to uphold the prohibition on the exclusivity provisions and to impose an administrative monetary penalty (AMP) to deter future anti-competitive conduct.

## Le concours de plaidoirie

Le Concours de plaidoirie Adam F. Fanaki en droit de la concurrence de cette année exigeait des participants et participantes qu'ils saisissent les effets concurrentiels d'un accord d'approvisionnement exclusif entre un distributeur de films à des cinémas indépendants et une chaîne de salles de cinéma indépendante. Le commissaire de la concurrence a déposé une demande en vertu de l'article 79 de la *Loi sur la concurrence* pour mettre fin à l'accord d'approvisionnement exclusif conclu par Kingsland Inc. et Lion House Cinemas, faisant valoir qu'il entraîne l'empêchement ou la diminution sensible de la concurrence (EDSC).

Kingsland Inc. est une coentreprise dont Dragonrider Pictures et Tallturret Studios, deux des principaux studios de cinéma du Canada, sont copropriétaires. Ces studios produisent des films en vue de leur distribution à tous les types de cinéma. La coentreprise agit comme distributeur des films de Dragonrider et Tallturret à des cinémas indépendants. Lion House Cinemas exploite une importante chaîne de salles de cinéma indépendantes partout au Canada. L'accord, signé le 16 décembre 2023, donne à Kingsland les droits exclusifs de distribuer des films dans les cinémas de Lion House. Wolf House Films, un studio indépendant, a déposé une plainte au sujet de l'accord, laquelle a mené à une enquête du commissaire.

Le commissaire a fait valoir que Kingsland contrôle le marché de la distribution de films à des cinémas indépendants et qu'elle s'adonne à des pratiques anticoncurrentielles en excluant les autres studios des cinémas de Lion House, ce qui entraîne l'augmentation des prix et la diminution des choix pour les consommateurs. Subsidiairement, le commissaire a soutenu que Tallturret et Dragonrider exercent une dominance conjointe dans le marché de la distribution de films à tous les cinémas du Canada.

Le Tribunal a conclu que le marché pertinent est la distribution de films à tous les cinémas du Canada, à l'exclusion des services de diffusion en continu. Selon lui, Kingsland n'exerce pas une dominance dans ce marché, mais Dragonrider et Tallturret exercent une dominance conjointe. Le Tribunal a aussi conclu que l'accord constitue une pratique d'agissements anticoncurrentiels, mais n'entraîne pas l'EDSC en raison d'une concurrence efficace d'autres distributeurs et des fournisseurs de services de diffusion en continu.

## Analyse détaillée

**Définition du marché**

Le Tribunal a conclu que le marché pertinent est la distribution de films à toutes les salles de cinéma au Canada, à l'exclusion des services de diffusion en continu. Selon lui, les cinémas indépendants constituent un canal important, mais les consommateurs peuvent passer des cinémas indépendants à des chaînes de cinéma importantes à coût moindre.

**Dominance conjointe**

Le Tribunal a conclu que Tallturret et Dragonrider exerçaient une dominance conjointe dans le marché de la distribution de films à tous les cinémas. Leur part de marché combinée s'élève à 63 % et elle augmentera vraisemblablement. Le Tribunal a pris en compte d'autres facteurs indiquant la dominance conjointe, comme la possibilité d'exclure des concurrents et un levier commercial important.

**Agissements anticoncurrentiels**

Le Tribunal a souscrit à l'avis du commissaire selon lequel l'accord est une pratique d'agissements anticoncurrentiels, parce qu'il excluait Wolf House et d'autres studios du canal des cinémas indépendants. Le Tribunal a conclu que malgré les arguments au contraire des défenderesses, l'accord n'a pas pour but d'accroître l'efficience ou de favoriser la concurrence.

**Empêchement ou diminution sensible de la concurrence**

Le commissaire n'a pas prouvé que l'accord entraîne l'empêchement ou la diminution sensible de la concurrence dans le marché pertinent. Le canal des cinémas indépendants représente une petite partie du marché et les effets ne sont pas considérables.

Le Tribunal a interdit à Kingsland de mettre en œuvre les dispositions d'exclusivité dans l'accord, mais n'a pas exigé l'annulation de ce dernier.

Les parties (Kingsland, Inc., Dragonrider Pictures et Tallturret Studios) ont interjeté appel de la décision du Tribunal, et les participants au concours ont représenté les appelantes (les parties) ou l'intimé (le commissaire) devant la Cour d'appel fédérale (fictive).

## Argument des appelantes

Dans leur mémoire gagnant pour les appelantes, Daniel Kim et Tyler Li de la faculté de droit, Section de common law, de l'Université d'Ottawa, ont soutenu que le marché pertinent comprend à la fois les cinémas et les services de diffusion en continu en raison de la substituabilité et du comportement de l'industrie. Dans ce marché élargi, Kingsland n'exerce aucune position dominante, et la part de marché combinée de Dragonrider et de Tallturret se situe bien en deçà du seuil de 65 % pour la dominance conjointe. Les appelantes soutiennent aussi que le Tribunal a commis une erreur lorsqu'il a conclu à l'existence d'une « pratique d'agissements anticoncurrentiels », affirmant que l'accord d'exclusivité était une décision d'affaire rationnelle et unique, non une pratique durable ou d'exclusion. Les appelantes n'avaient pas pour but, objectivement ou subjectivement, de nuire à la concurrence. Même s'il y a eu violation, elles ont fait valoir que l'interdiction à l'échelle nationale est trop générale. Toute mesure corrective devrait être localisée à des régions où il n'y a pas d'autres cinémas afin de tenir compte du préjudice réel causé à la concurrence.

## Arguments de l'intimé

Dans leur mémoire gagnant pour l'intimé, Jubilee Lambie et Rhiannon Szewczyk de la faculté de droit, Section de common law, de l'Université d'Ottawa, ont soutenu que le Tribunal avait conclu à juste titre que l'accord d'exclusivité de Kingsland avec Lion House Cinemas était anticoncurrentiel et qu'il constituait une pratique d'abus de position dominante. L'intimé a soutenu que le marché pertinent est la distribution de films à toutes les salles de cinéma au Canada, à l'exclusion des services de diffusion en continu, lesquels complètent les canaux de distribution de films sans s'y substituer. Le Tribunal a eu raison de conclure que dans ce marché, Dragonrider et Tallturret exerçaient une dominance conjointe. L'intimé a également fait valoir que l'accord d'exclusivité constituait une « pratique d'agissements anticoncurrentiels », puisqu'il avait des effets d'exclusion clairs et prévisibles, et que le Tribunal a conclu à juste titre qu'aucune justification opérationnelle crédible ne l'emportait sur ces effets. L'intimé a exhorté la Cour d'appel à confirmer l'interdiction des dispositions d'exclusivité et à imposer une sanction administrative pécuniaire (SAP) afin de dissuader tout comportement anticoncurrentiel futur.

# 2025 ADAM F. FANAKI COMPETITION LAW MOOT PROBLEM

## *COMMISSIONER OF COMPETITION V KINGSLAND INC., DRAGONRIDER PICTURES & TALLTURRET STUDIOS*

## I. Executive Summary

1) The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking an order requiring Kingsland Inc. ("**Kingsland**") to terminate its exclusive supply agreement with Lion House Cinemas ("**Lion House**") (the "**Agreement**"). The Commissioner asserts that the implementation of the Agreement is a practice of anti-competitive acts that is resulting in a substantial lessening or prevention of competition ("**SLPC**").

2) Kingsland is a film distribution joint venture co-owned by Dragonrider Pictures ("**Dragonrider**") and Tallturret Studios ("**Tallturret**"), two of the three major movie studios in Canada's production industry.

3) Lion House operates a major chain of independent movie theatres across Canada.

4) On December 16, 2023, Kingsland and Lion House entered into the Agreement, which, *inter alia,* provides Kingsland exclusive rights to distribute movies within Lion House theatres. On December 29, 2023, the CEO of Wolf House Films ("**Wolf House**"), an independent movie studio, filed a complaint with the Competition Bureau criticizing the agreement as anti-competitive and against consumer interests. On January 5, 2024, the Commissioner commenced an inquiry under section 10 of the Act.

5) The Commissioner's application alleges that the Agreement contravenes section 79 of the Act. Specifically, the Commissioner alleges that each of the three elements of section 79 is satisfied:

    a. Kingsland substantially or completely controls the market for the distribution of movies to independent theatres in Canada;

    b. Kingsland is engaged in a practice of anti-competitive acts by excluding other studios from showing their films in Lion House theatres; and

c. Kingsland has engaged in conduct that is having the effect of substantially lessening or preventing competition for the distribution of films through independent theatres, resulting in higher prices and reduced choice for independent theatres and consumers.

6) In the alternative, the Commissioner alleges that:

a) Tallturret and Dragonrider are jointly dominant in the market for film distribution across all theatres in Canada;

b) Tallturret and Dragonrider are, through the implementation of Kingsland's exclusive distribution agreement with Lion House, engaging in a practice of anti-competitive acts by excluding other studios from showing their films in Lion House theatres; and

c) Tallturret and Dragonrider are, through the implementation of Kingsland's exclusive distribution agreement with Lion House, engaging in conduct that is having the effect of substantially lessening or preventing competition for the distribution of films through independent theatres, resulting in higher prices and reduced choice for independent theatres and consumers.

7) For the reasons set out below, the Tribunal finds that the relevant market is the distribution of films to all theatres in Canada, and that Kingsland is not dominant in that market. However, the Tribunal finds that Dragonrider and Tallturret are jointly dominant in the relevant market.

8) The Tribunal finds that the implementation of the Agreement constitutes a practice of anti-competitive acts by Dragonrider and Tallturret. However, it is not likely to result in an SPLC in the market for film distribution to all theatres in Canada, given the small percentage of total films distributed through the channels affected by the Agreement, and effective remaining competition from other film distributors, as well as the competitive constraint represented by streaming services.

9) The Commissioner's application is granted. The Tribunal prohibits Kingsland from implementing the exclusivity provisions in the Agreement, but does not require the dissolution of the Agreement as sought by the Commissioner.

## I. The Parties

10) 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.

11) Lion House is headquartered in Brampton, Ontario and operates one of Canada's largest independent theatre chains under the Lion House brand. Lion House operates 30 Lion House locations with 270 movie screens across Canada. This represents just over 10% of the total movie theatre screens in Canada and 50% of independent theatre screens. However, Lion House is expanding aggressively and is one of the fastest-growing chains of independent theatres. Accordingly, their market share is expected to grow in the future.

12) Kingsland is a film distributor to independent theatres, and is a joint venture which is 50/50 owned by Dragonrider and Tallturret (all together, the "**Respondents**"). Kingsland distributes exclusively Dragonrider and Tallturret films.

13) Dragonrider and Tallturret are two of the three major film studios in Canada. Prior to the Agreement, they made 60% of all films shown in Canadian theatres.

## II. Factual Background

14) Canada's movie industry is dominated by the three major studios, Dragonrider, Tallturret, and Saltwater Serpent Pictures ("**Saltwater Serpent**"). 80% of films distributed in Canada originate from these three studios. Dragonrider and Saltwater Serpent's production stages are located on adjacent lots in Vancouver, with Tallturret producing films in Toronto.

15) The Canadian film industry utilizes three primary channels to supply movies to end consumers: large "multi-plex" theatres with at least 15 screens per theatre, smaller independent theatres and streaming platforms. Since the introduction of online streaming in 2005, consumers have increasingly utilized streaming platforms to access movies, with over 90% of Canadians reporting usage of streaming services.

16) Canada has two major theatre chains, ValePlex and StreamVision that, combined, represent 75% of total movie theatre screens in Canada. The remaining movie theatre screens are operated by numerous national and regional independent movie theatre chains, including Lion House. However, the evidence before the Tribunal indicates that Canadians' preferences are skewing towards independent movie theatres because

of the decline in reputation of major theatre chains. Part of that decline can be attributed to a perception that the major chains are not as "consumer-friendly" and are sometimes misleading moviegoers into paying higher prices for tickets. As a result, more independent movie theatres have been opening—or reopening—in Canada.

17) The most popular streaming platform, HealerFlix, carries movies made by all Canadian studios and many foreign studios. Each of the three major Canadian studios also operates a streaming platform. They are named Dragonrider Plus, TallturretTV, and Max (formerly Saltwater Serpent Max).

18) While streaming viewership has grown in recent years, theatre distribution still forms an important part of the industry. Research has shown that movies that undergo a theatrical release perform much better over their lifetime than movies released directly to streaming services because theatrical releases drive awareness and publicity around the movie, which in turn leads to subscriptions and viewership for the studio's respective streaming services once the films are released on streaming platforms following their run in theatres.

19) In 2019, Dragonrider and Tallturret established Kingsland, a joint venture created to distribute their films to independent movie theatres and reduce the costs of distribution of films produced by their studios.

20) On December 16, 2023, Lion House and Kingsland announced that they had entered into an agreement pursuant to which Kingsland would be the exclusive supplier of movies shown in Lion House theatres. This would involve Lion House immediately ending any contracts in place with other movie studios, including Wolf House.

21) On December 29, 2023, the CEO of Wolf House filed a complaint with the Competition Bureau criticizing the Agreement as anti-competitive and against consumer interests. The company is known for the originality and artistic style of films it produces, and positions itself as a disruptive and artistic studio in contrast to Canada's three major studios. Wolf House operates its own distribution company, which relies heavily on distribution through independent cinemas. The Agreement would

have the effect of excluding Wolf House from Lion House theatres, as well as any other competing studios.

22) On January 5, 2024, the Commissioner commenced an inquiry into the alleged anti-competitive conduct.

23) On April 1, 2024, the Commissioner commenced an application under section 79 of the Act. This application seeks a finding that the implementation of the Agreement constitutes a practice of anti-competitive acts that is resulting in a SLPC and an order requiring that the Agreement be dissolved.

## III. Position of the Parties

*Section 79 Positions*

24) The Commissioner and the Respondents take opposing positions with respect to each element of section 79 of the Act. The parties' positions with respect to each element are set out below.

*Paragraph 79(1)—Substantial or Complete Control of a Class or Species of Business*

25) The Commissioner alleges that distribution of films to independent movie theatres constitutes a "class or species of business" within the meaning of paragraph 79(1) of the Act, over which Kingsland has substantial or complete control.

26) The Commissioner submits that, because independent movie theatres provide an important channel for smaller movie studios to supply their films to the public, and section 1.1 of the Act sets out the encouragement of equitable opportunities for small and medium-sized enterprises as a purpose of competition law, distribution to independent movie theatres must be considered as a class or species of business separate and distinct from the distribution of films to the larger movie theatre market.

27) The Commissioner submits that Kingsland is dominant in the market for the distribution of films to independent theatres. Kingsland distributes the majority of films shown in independent movie theatres. Prior to the Agreement, Kingsland supplied 65% of films shown in independent movie theatres. After the Agreement was implemented, this rose to 80% of all films shown in independent movie theatres in Canada. The Commissioner submits that these market shares are clearly above the

indicators set out in the Abuse of Dominance—Enforcement Guidelines published by the Competition Bureau ("**Guidelines**").

28) In the alternative, the Commissioner submits that the distribution of films to the broader movie theatre market, including major multi-screen movie theatres, constitutes a "class or species of business" within the meaning of paragraph 79(1) of the Act, over which Dragonrider and Tallturret are jointly dominant due to their significant combined market share of distributed films. As noted above, prior to the Agreement, Tallturret and Dragonrider together supplied 60% of all films shown in all movie theatres in Canada. After the implementation of the Agreement, their joint market share rose to 63% of all films, and is expected to rise further.

29) The Commissioner argues that streaming services do not constitute a part of any properly defined relevant market in this matter. The Commissioner submits that the vast majority of consumers do not consider watching a movie in the cinema or at home using a streaming service as entirely substitutable because, in part, of the additional services and options offered at movie theatres. These include food service, a higher quality audio-visual experience, VIP seating and experiences and the ability to watch movies at or closer to the time of release. However, the Commissioner acknowledges that streaming services may exert a certain competitive pressure on independent and major multi-screen movie theatres.

30) The Respondents reject the Commissioner's assertion that the distribution of films to independent theatres constitutes a "class or species of business". The Respondents assert that the Commissioner's position is too narrow as theatres of all sizes show both films produced by major and small studios, and that large and independent theatres compete for the same movie-viewing customers on price and quality of experience, and also against streaming services, whose share of movie distribution is rapidly growing.

31) The Respondents submit that the relevant market should be defined as the distribution of films to all types of movie theatres and to streaming services. Each time that a consumer decides that they want to watch a movie, they must decide whether they want to go to a theatre (and if so, which) or watch in the comfort of their own home. At its core, this is where competition occurs, with consumers taking into account pricing, convenience and variety of each of these methods of movie

consumption. The vast majority of consumers have access to smart televisions in their homes that have the ability to download the myriad streaming services available on the market as a substitute for going to a theatre, and, when streaming, consumers have ultimate control over when they can watch their desired film.

32) Streaming services have advanced tremendously in recent years, with many new releases being available immediately or within weeks of a theatrical release. The vast majority of movie-watchers are not cinephiles demanding opening night tickets, but rather are everyday people looking for enjoyable entertainment at their leisure. Watching movies in the comfort of home also allows consumers to choose their own snacks, pause the movie for bathroom breaks and split movies into portions for convenience.

33) Alternatively, the Respondents submit that the relevant market should not be narrower than the distribution of films to all theatres. The product offerings at all theatres are substantially the same, the experience is substantially the same, and consumers decide which theatre to attend based primarily on location and show times.

34) Kingsland submits that it is not anywhere close to dominant in the distribution of films to all theatres in Canada, as its share is below 10%. This share approaches 1-2% when streaming services are taken into account. Further, the exclusivity agreement is restricted to Lion House theatres, which constitute only a portion of independent movies theatres and a small percentage of total movie theatre screens in Canada.

35) Further, Tallturret and Dragonrider submit that they are not jointly dominant for the distribution of films to all theatres because their combined share is, at most, 63%. They also submit that their combined market share is approximately 35% if the market is deemed to include streaming services. Both numbers are below the indicators for joint dominance outlined in the Guidelines. Furthermore, Tallturret and Dragonrider compete aggressively for the distribution of their films in all theatres and across streaming platforms, with the exception of their Kingsland joint venture. They assert that they cannot possibly be considered to be jointly dominant in any market other than for the distribution of independent films, as they are not acting in concert or collaborating in any way.

*Paragraph 79(1)(a) and (b)—Practice of Anti-Competitive Acts or Conduct resulting or likely to result in an SLPC*

36) The Commissioner alleges that the implementation of the Agreement is an abuse of dominance by Kingsland in the distribution of films to independent theatres, or alternatively an abuse of joint dominance by Dragonrider and Tallturret in the market for the distribution of films to all theatres.

37) The amendments in Bill C-56 to the Act have changed the substantive test for abuse of dominance, allowing an abuse of dominance to be found when a firm engages in the practice of anti-competitive acts or engages in conduct having or likely to have the effect of preventing or lessening competition substantially. The Commissioner submits that the Agreement meets both of these standards.

38) The Commissioner submits that the implementation of the Agreement is an anti-competitive act under subsection 78(j) of the Act as 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.

39) Independent movie studios, such as Wolf House, have grown in popularity through the expansion of streaming and a societal push against the blockbuster studios that have dominated the market in recent years. These studios work to reinvigorate the art of cinema and pose a distinct threat to the three major studios and others.

40) The Commissioner submits that the Agreement is a response to this trend and has as its purpose a goal of limiting the distribution of movies from independent studios in independent theatres, thereby protecting Kingsland's dominant position in the distribution of independent films.

41) The reasonably foreseeable consequences of the Agreement are (i) Kingsland and its owner studios will increase their market share in the independent movie theatre market and (ii) independent movie studios will be inhibited from getting their movies in front of consumers, thereby reducing the economic benefit to independent movie studios and forcing them to reduce the number of films produced or leave film production entirely.

42) The Commissioner submits that the implementation of the Agreement is conduct having the effect of preventing or lessening competition substantially. Further, the Commissioner submits that, even if no

anti-competitive intent exists, it is reasonably foreseeable that the Agreement would exclude competitors from the market.

43) The Commissioner asserts that, "but for" Kingsland's practice of anti-competitive acts in the form of the Agreement, the market for the distribution of films to independent movie theatres would be more competitive, leading to lower prices and greater choice for consumers and lower barriers to entry for smaller studios.

44) Finally, the Commissioner asserts that, should the Tribunal find that Kingsland is not dominant unilaterally in the market for the distribution of films to independent theatres but that Tallturret and Dragonrider are jointly dominant in the market for the distribution of films to all theatres, their arguments in relation to the practice of anti-competitive acts and to the harm resulting therefrom apply *mutatis mutandis* to the Tribunal's analysis under paragraphs 79(1)(a) and (b).

45) The Respondents reject the Commissioner's assertions that the implementation of the Agreement is a practice of anti-competitive acts, and that the Agreement is conduct having or likely to result in an SLPC.

46) The Respondents reject the Commissioner's proposed "but for" world and asserts that, in any event, the Agreement is not and will not be the cause of an SLPC.

47) The Respondents argue that the Agreement represents a justifiable business decision in the normal course of its relations with movie theatres such as the Lion House chain. Kingsland asserts that the Agreement is pro-competitive, as it guarantees distribution for artistic, independent films, thus encouraging their development and production.

48) Kingsland further argues that the Agreement is efficiency-enhancing because it will allow for films to be distributed at greater scale, which will reduce marginal costs.

49) Finally, Tallturret and Dragonrider assert that, if the Tribunal finds that they are jointly dominant in the relevant market, the business justifications put forth are applicable *mutatis mutandis* in the Tribunal's analysis of any alleged practice of anti-competitive acts.

*Paragraph 79(1) and (3.1)—Remedy*

50) The Commissioner submits that, as Kingsland is engaging in a practice of anti-competitive acts that is resulting in an SLPC, or that, in the

alternative, Dragonrider and Tallturret are jointly engaging in a practice of anti-competitive acts that is resulting in an SLPC, the Tribunal should impose an order under section 79(1) directing Kingsland to dissolve the Agreement with Lion House.

51) The Respondents submit that the elements of section 79 have not been made out, including any practice of anti-competitive acts, let alone conduct that is resulting in an SLPC, and, accordingly, the Tribunal should not impose any remedy.

## IV. The Issues

52) As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:

a) What is the proper market definition with respect to the distribution of films in Canada?

b) In the market identified above, is Kingsland dominant or, alternatively, are Tallturret and Dragonrider jointly dominant?

c) Has the Commissioner established the existence of a practice of anti-competitive acts, or conduct that is resulting or is likely to result in an SPLC?

d) If the elements of section 79 are met, what is the proper remedy?

## V. Tribunal's Analysis

53) The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence before it. For the reasons below, the Tribunal has concluded that:

a) The relevant market is the distribution of films to all movie theatres in Canada, not just independent movie theatres, and does not include streaming services. However, streaming services may exert a certain competitive pressure on competitors in the relevant market.

b) Kingsland is not dominant in the "all-theatre" distribution market due to its small share of overall film distribution.

c) The Guidelines sets out an appropriate analytical framework and market share indicators for unilateral or joint dominance. Having regard to those indicators and the totality of the evidence,

Dragonrider and Tallturret are jointly dominant in the "all-theatre" distribution market. In the properly defined relevant market, Dragonrider and Tallturret's combined market share is slightly below the indicators in the Guidelines for joint dominance, but it is growing in an expanding channel within the market, and other factors suggest that they can jointly exercise a substantial degree of market power.

d) The implementation of the Agreement represents a practice of anti-competitive acts by Dragonrider and Tallturret as they are the sole owners of Kingsland and the Agreement relates directly to the exclusive distribution of their films in Lion House theatres.

e) However, the practice of anti-competitive acts is not having, nor is it likely to have, the effect of substantially lessening or preventing competition in the relevant market.

f) As the Commissioner has made out joint dominance and a practice of anti-competitive acts but has not proven that the conduct is resulting or likely to result in an SLPC in the relevant market, the implementation of the exclusivity provisions contained in the Agreement should be prohibited.

*Relevant Market*

54) Paragraph 79(1) of the Act requires that a firm "substantially or completely control, throughout Canada or any area thereof, a class or species of business." In the present case, whether the first element of section 79 of the Act is made out turns on the question of how to define the "class or species of business", i.e. relevant market.

### i) Analytical Framework

55) The Tribunal has consistently interpreted the words "class or species of business" to refer to the relevant product market in which the respondent is alleged to have substantial or complete control.

56) The Tribunal's approach to market definition, as set out in *Commissioner of Competition v Toronto Real Estate Board,* 2016 Comp Trib 7 ("**TREB**") focuses upon whether there are close substitutes for the products at issue.

57) In TREB, the Tribunal supported the use of the hypothetical monopolist

test, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines*, reading:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("**SSNIP**") above levels that would likely exist in the absence of the merger.

58) The Tribunal has typically defined the SSNIP as a 5% price increase lasting one year. As the Tribunal explained in TREB:

> If sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power.

### ii) Application of the Hypothetical Monopolist Test

59) The Commissioner has asked the Tribunal to apply the hypothetical monopolist test here, and contends that under this test, the distribution of films to independent movie theatres constitutes the relevant product market for purposes of the Tribunal's analysis.

60) Having reviewed the evidence and such factors as switching costs and the behaviour of buyers, the Tribunal finds that the Commissioner has defined the relevant market too narrowly and that the proper relevant market to consider is the distribution of films to all movie theatres.

61) The Tribunal agrees with the Commissioner that independent movie theatres constitute an important channel through which movie studios supply their films to the public; however, they have not demonstrated why consumers would be unable to attend another theatre if their desired movie was unavailable at an independent theatre. The switching costs between independent and larger chain theatres are *de minimis* and so the relevant market must be expanded to a point where the hypothetical monopolist would have sufficient market power to impose a SSNIP.

62) The Tribunal finds that there are similarities in the films shown in

independent theatres and multi-plex theatres, such that certain customers would be able to view many films in either form of venue, or would switch venues in response to a price increase. While the Commissioner has led evidence of certain independent films that are available only in independent theatres, they have not established that patrons of these films would not be willing to switch to another form of theatre or see other films in response to a price increase.

63) The Tribunal agrees with the Commissioner that streaming services should not constitute part of the relevant market. However, while outside of the relevant market, streaming services can and do exert a certain competitive pressure on distribution in theatres because there may be some consumers at the margins who may consider switching from viewing a movie in a theatre to streaming it at home in response to a SSNIP imposed by a hypothetical monopolist.

64) Given the market is properly defined as "all-theatres", Kingsland is clearly not dominant given that its market share is less than 10%.

*Joint Dominance*

65) Should the Tribunal not find Kingsland to be dominant, the Commissioner has asked the Tribunal to find, in the alternative, that Tallturret and Dragonrider are jointly dominant in the distribution of films to all theatres.

66) The Tribunal recognizes that Canada's film distribution sector is relatively concentrated with three major players and a number of smaller studios producing content for distribution. As noted in the Guidelines, the existence of high market share is usually a necessary, but not sufficient, condition to establish the existence of a substantial degree of market power. In the case of joint dominance, the Commissioner has expressed in the Guidelines that a 65% market share (or greater) between a group of firms is an indication of joint dominance in a market.

67) The Tribunal agrees with the analytical approach set out in the Guidelines, including the indicative value of the thresholds therein. The Tribunal has identified the relevant market as the distribution of films to all movie theatres as opposed to just the independent theatre channel. As a result, the combined market share of Tallturret and Dragonrider

was 60% prior to the implementation of the Agreement, and is now 63% and is expected to rise.

68) The Tribunal finds that, while the current combined market share of Tallturret and Dragonrider is below the 65% indicative threshold set out in the Guidelines, there are other factors that indicate that these two firms are jointly dominant.

69) The Guidelines contemplate that, in exceptional cases, firms with lower market share may be found to possess a substantial degree of market power where other evidence establishes its existence. Evidence that may indicate market power includes the ability to impose supra-competitive pricing, exercise significant commercial leverage, influence a relevant dimension of competition or to restrict the output of other actual or potential market participants and thereby profitably influence prices.

70) First, the evidence before the Tribunal indicates that the current market share is expected to rise. Indeed, it has increased by 3% in a few short months since the implementation of the Agreement. With more independent movie theatres opening in Canada, it is reasonable to expect shares to continue to increase beyond the 65% indicator in the Guidelines. Second, the Agreement on its face appears to be a demonstration of the ability of Tallturret and Dragonrider to exclude. In this case, the Agreement has served to exclude an existing competitor in the form of Wolf House. This is also linked to the two firms' significant commercial leverage, since they able to exclude Wolf House by implementing an agreement that affects Wolf House's dealings with a major customer, namely Lion House.

71) Tallturret and Dragonrider point out that the Commissioner has failed to lead any evidence that these parties have engaged in any joint conduct or collaboration outside of the Agreement, and Tallturret and Dragonrider have introduced significant evidence of the competition between the two studios for the distribution of their films in all other channels.

72) The Tribunal acknowledges the evidence adduced by Tallturret and Dragonrider in respect of rivalry between them, but finds that, on a balance of probabilities, the expected growth in the number of independent movie theatres will increase the ability and incentive of the two firms to engage in an exercise of joint dominance over time. In other words, the sufficiency of competition among the two firms is likely to

erode to the point where it may not discipline their joint exercise of a substantial degree of market power.

73) As a result, the Tribunal finds that Tallturret and Dragonrider are jointly dominant in the market for the distribution of films to all theatres in Canada.

*Paragraph 79(1)(a)—Practice of Anti-competitive Acts*

74) Having found that Tallturret and Dragonrider are jointly dominant in the properly defined relevant market, the Tribunal now turns its attention to the assessment of the practice of anti-competitive acts alleged by the Commissioner, namely the implementation of the Agreement.

75) This is the first time that the Tribunal has been called upon to opine on paragraph 79(1)(a) of the Act, as amended by Bill C-56. However, the term "practice of anti-competitive acts" used in paragraph 79(1)(a), read in the context of the rest of section 79, should be interpreted in the same way as it was when that term was used in the former paragraph 79(1)(b) of the Act. The wording of the term remains the same—it is merely its positioning within section 79 that has changed.

76) The Tribunal's assessment of paragraph 79(1)(b) of the Act was addressed in detail in TREB CT. That approach was affirmed by the Federal Court of Appeal in *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("**TREB FCA**") and most recently applied in *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("**VAA**"). The framework does not need to be repeated here and can be applied *mutatis mutandis* to paragraph 79(1)(a) of the current Act.

77) The Commissioner has alleged that the Agreement is a practice of anti-competitive acts because it is 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. In addition, the Commissioner asserts that the Agreement is reasonably foreseeable to exclude competitors from the market. The Respondents have refuted these assertions and alleges that the Agreement is pro-competitive and efficiency-enhancing.

78) The Tribunal agrees with the Commissioner that the implementation of the Agreement is a practice of anti-competitive acts. The Agreement effectively excludes Wolf House and any other studios from competing for distribution of films to the independent theatre channel within the

relevant market. As noted previously, this is significant as that channel grows to the detriment of the major movie theatre chains.

79) The Tribunal accepts the evidence that Wolf House provides a differentiated product. Accordingly, the Tribunal disagrees with the argument put forward by Tallturret and Dragonrider that the Agreement would be pro-competitive by guaranteeing the distribution of independent, artistic films. It is demonstrably not the case that this is the type of film produced by these two firms, and the Agreement is specifically designed to exclude such films, as Lion House would be required to screen only films made by Tallturret and Dragonrider.

80) The Tribunal in VAA noted that the jurisprudence establishes that a business justification must contain a rationale that is linked to the respondent—in this case, Dragonrider and Tallturret. Further, the legitimate business justifications must outweigh any exclusionary negative effect of the conduct on a competitor and/or the subjective intent of the act, such that the overall character or overriding purpose of the impugned conduct was not anti-competitive in nature The Tribunal acknowledges that the Agreement may have marginal benefits in terms of cost reductions and efficiencies that accrue to Dragonrider and Tallturret and that may be passed on to customers or end consumers. However, on a balance of probabilities, the Tribunal finds that Dragonrider and Tallturret have not demonstrated that any enhancements to efficiency would outweigh any exclusionary negative effect of the Agreement on Wolf House, or indeed on any other competitor. Accordingly, they have not established to the requisite degree that the overall character or overriding purpose of the Agreement was not anti-competitive in nature.

81) Having found no legitimate business justification that outweighs the anti-competitive nature of the Agreement, the Tribunal finds that the implementation of the Agreement constitutes a practice of anti-competitive acts for the purposes of paragraph 79(1)(a) of the Act.

*Paragraph 79(1)(b)—Conduct resulting or likely to result in an SLPC*

82) The Tribunal now turns its attention to the assessment of the harm resulting or likely to result from the practice of anti-competitive acts by Dragonrider and Tallturret.

83) For the same reasons as noted above with respect to the interpretation of the term "practice of anti-competitive acts", the analysis of the substantial

lessening or prevention of competition should follow the framework established in the jurisprudence, as summarized in paragraphs 632 to 644 of the Tribunal's decision in VAA. While the framework does not need to be reproduced here, two elements bear noting in particular.

84) First, the analytical framework focuses on a two-stage assessment of competition in the relevant market in the presence of the impugned practice and in a "but for" world where the impugned practice is absent (*Tervita Corp v Canada (Commissioner of Competition), 2015 SCC 3* ("**Tervita SCC**")).

85) Second, the Commissioner bears the burden of establishing the substantiality of the harm on a balance of probabilities by adducing sufficiently clear and convincing evidence to this effect (Tervita SCC at para 65; TREB FCA at para 87; *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 at para 46).

86) The Tribunal finds that the Commissioner has not discharged their burden of proof with respect to paragraph 79(1)(b) of the Act. While it is possible that the Commissioner's portrayal of the "but for" world has some basis in fact, it cannot be argued that the effects of the Agreement could be felt outside of the independent theatre channel within the relevant market. The Commissioner has led no other sufficiently clear and convincing evidence to demonstrate that any effects are substantial.

87) Having regard to the fact that the independent theatre channel is a small albeit growing portion of the relevant market, the Tribunal finds that the Commissioner has not proven on a balance of probabilities that any effects would be substantial.

88) As a result, the Tribunal finds that the practice of anti-competitive acts is not resulting in a substantial lessening or prevention of competition in the relevant market, nor is it likely to do so.

*Remedy*

89) The Commissioner seeks an order requiring that the Agreement be dissolved. This is the first time the Tribunal has been called upon to consider a remedy under section 79 following the amendments that provided it with the discretion to make an order without a finding of an SLPC.

90) In determining an appropriate remedy, the Tribunal considers that it must still be guided by relevant jurisprudence. Accordingly, any order

must only go as far as the Tribunal considers necessary in order to restore competition in the relevant market (*Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp. Trib.)

91) Accordingly, the Tribunal finds that the appropriate remedy is not to require that the Agreement be dissolved. Rather, the appropriate remedy is to prohibit the implementation of the exclusivity provisions in the Agreement. The Commissioner has not led any evidence to support the ending of the entire commercial relationship between Kingsland and Lion House.

92) The Tribunal pauses to note that, as Kingsland is a wholly-owned joint venture by Tallturret and Dragonrider, the remedy being ordered will have the requisite effect of restoring competition in the relevant market, as the Agreement is the contractual mechanism through which Tallturret and Dragonrider are abusing their jointly dominant position in the relevant market.

## VI. Order

93) For these reasons, the application brought by the Commissioner is granted.

94) Kingsland shall not implement the exclusivity provisions contained in the Agreement.

DATED at Ottawa, this 31st day of October 2024.

SIGNED on behalf of the Tribunal by the Panel Members.

# 2025 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2025

## COMPETITION APPEAL TRIBUNAL [ON APPEAL FROM THE COMPETITION TRIBUNAL]

Between:

**KINGSLAND INC., DRAGONRIDER PICTURES AND TALLTURRET STUDIOS**

Appellants

**AND**

**COMMISSIONER OF COMPETITION**

Respondent

## FACTUM OF THE APPELLANTS

Counsel for the Appellants
Team No. 25110

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## Overview

[1] The modern age of film consumption places the power of choice in the hands of consumers. Each time someone decides to watch a movie, that power allows them to choose between attending a theatre or enjoying the convenience and comfort of streaming from home. For most Canadians, they have chosen streaming as their preferred option. At the same time, independent theatres are seeing increased interest as major theatre chains face reputational challenges.

[2] The shift in consumer behavior has compelled both movie studios and movie theatres to adapt or risk obsolescence. In response to this evolving landscape, Kingsland Inc. ("**Kingsland**"), a film distributor to independent theatres, and Lion House Cinemas ("**Lion House**"), an independent movie theatre chain entered into an exclusive supply agreement (the "**Agreement**"). Under this arrangement, Lion House theatres play movies supplied by Kingsland. It ensures a steady stream for it to attract customers and compete with the major movie theatre chains.

[3] The Competition Tribunal (the "**Tribunal**") improperly characterized this arrangement as an abuse of dominance. Its order prohibiting Kingsland from implementing the exclusivity provisions should be overturned by the Competition Appeal Tribunal (the "**CAT**")

[4] The *Competition Act*'s (the "**Act**") abuse of dominance provision intends to prevent dominant firms from using their market power to suppress competition in a relevant market, not to penalize those that can efficiently supply goods and services to consumers and take steps to adapt to changing demands in the marketplace.

> *Competition Act,* RSC 1985, c C-34, s 79(1) [*Act*].

## Part I: Statement of Facts

### Dragonrider, Tallturret, and Kingsland's Partnership with Lion House

[5] Dragonrider Pictures ("**Dragonrider**") and Tallturret Studios ("**Tallturret**") are Canadian movie studios that compete against each other for

viewers of their movies. Their movies can be watched in major and independent theatres as well as on their respective streaming platforms or on HealerFlix, a popular streaming platform that carries movies made by all Canadian studios and many foreign studios.

[6] Dragonrider and Tallturret established Kingsland in 2019, a 50/50 joint venture, to efficiently distribute their films to independent theatres and reduce the costs of distribution of films produced by their studios.

[7] Lion House Cinemas ("**Lion House**") is an operator of independent movie theatre chains in Canada. On December 16, 2023, Lion House and Kingsland announced their agreement (the "**Agreement**"). Under the Agreement, Lion House theatres would feature movies supplied by Kingsland, guaranteeing a reliable and cost-efficient stream of content for its audiences to choose from.

[8] Despite the Agreement between Kingsland and Lion House, Dragonrider and Tallturret continue to compete to attract moviegoers to watch their respective films within Lion House. They also remain competitors in distributing their films to all theatres and streaming platforms, except within the scope of their Kingsland joint venture.

[9] Dragonrider and Tallturret's combined share for the distribution of films to all theatres is at most 63% and approximately 35% when including streaming services. Each of these combined shares is below the 65% threshold set out in the Abuse of Dominance – Enforcement Guidelines published by the Competition Bureau ("**Guidelines**").

**Canada's Movie Industry**

[10] Canada's movie industry consists of major studios, such as Saltwater Serpent Pictures, as well as independent studios like Wolf House Films ("**Wolf House**"). They distribute their movies to end consumers through three primary channels for viewing: large "multi-plex" theatres with at least 15 screens per theatre, smaller independent theatres, and streaming platforms.

[11] In terms of movie theatres, ValePlex and StreamVision are major chains, representing a combined 75% of total movie theatre screens in Canada. The remaining screens are operated by numerous national and regional independent theatre chains, including Lion House, which represents just over 10% of the total movie theatre screens in Canada.

[12] In terms of online streaming, HealerFlix is the most popular streaming platform and carries movies made by all Canadian studios and many foreign studios. Additionally, major studios operate their own streaming platforms. Since the introduction of online streaming, consumers have increasingly chosen to utilize streaming platforms to access movies, with over 90% of Canadians reporting usage of streaming services.

[13] On October 31, 2024, the Tribunal granted the Commissioner's ("the **Commissioner**") section 79 application and ordered Kingsland not to implement the exclusivity provisions contained in its Agreement with Lion House (the "**Decision**").

## Part II: Statement of Points In Issue

[14] The Appellants' position on the issues raised in this appeal is as follows:

1) The proper market definition is distribution of films to theatres and streaming services in Canada.

2) In this market, Kingsland is not dominant and Dragonrider and Tallturret are not jointly dominant.

3) The Tribunal incorrectly found the Agreement constituted a "practice of anti- competitive acts" and correctly found no substantial lessening or prevention of competition.

4) If all elements had been met, then the appropriate remedy would have been to prohibit the exclusivity provisions only where there is an adverse local impact.

### The Standard of Review

[15] The Tribunal's decisions are subject to a statutory right of appeal (*Vavilov; Competition Tribunal Act*). Accordingly, where an issue on appeal concerns a question of law, the appropriate standard of review is correctness; where an issue on appeal concerns a matter of fact or mixed fact and law, the applicable standard of review will be palpable and overriding error. Where a question of mixed fact and law contains an extricable issue of law, then the standard of review is correctness (Housen).

> *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 39.
> *Competition Tribunal Act,* RSC 1985, c 19 (2nd Supp), s 13(1).
> *Housen v Nikolaisen,* 2002 SCC 33 at para 36 [*Housen*].

## Part III: Statement of Submissions

### ISSUE 1. The proper market definition is the distribution of films to all theatres and streaming services in Canada

[16] The Tribunal failed to consider substitutability factors critical for determining the relevant market. Ignoring evidence is an error of law (*Southam*) and a correctness standard applies. The relevant market is the distribution of films to all theatres and streaming services in Canada because of product end-use, industry behaviour, the constraining power of streaming services, and that movie studios compete on a national scale to distribute movies.

> *Canada (Director of Investigation and Research) v Southam Inc.,* 1997 CanLII 385 (SCC) at paras 38– 39 [*Southam SCC*].

[17] The first step in defining the market is to determine the relevant product and geographic market. The chapeau language of section 79 of the Act requires "one or more persons who substantially or completely control" a relevant market. A relevant market consists of (i) "a class or species of business" (ii) "throughout Canada or any thereof", which are the product and geographic markets respectively (*Tele-Direct*).

> *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.,* 1997 CarswellNat 3120 at para 71, [1997] CCTD No 8.

[18] When determining both the relevant product and geographic market, the Tribunal considers substitutability: whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes (*Southam*). Products will be close substitutes if buyers are willing to switch from one product to another in response to a relative change in price (*Southam*). Substitutability can be proven either by direct evidence or by indirect evidence. Indirect evidence includes factors such as buyers and industry behaviour, functional interchangeability in end-use, switching costs, and the constraining power of an alleged substitute (*TREB CT; Canada Pipe CT*).

> *Canada (Director of Investigation and Research) v Southam Inc.,* 1995 CarswellNat 1312 at 79, [1995] 3 FC 557 (CA) [*Southam FCA*].
> *Commissioner of Competition v Toronto Real Estate Board* (28 April 2016), CT-2011-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do> at para 130 [*TREB CT*]. *Canada (Commissioner of Competition) v Canada Pipe Co.* (3 February 2005),

CT-2002-006, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464214/index.do> at para 70 [*Canada Pipe CT*].

a) The Tribunal incorrectly assessed the product market by ignoring critical evidence of substitutability and correctly found that films are distributed nationally, not locally

[19] The Tribunal ignored evidence that the three channels are functionally interchangeable in end use, that industry views streaming as critical to their distribution, and that exerting competitive pressure on a market is an indicator of substitutability. Instead, it focused on indirect indicators such as "switching costs and buyer behaviour" (*Tribunal Decision*). Had the Tribunal done a correct analysis, they would have found that the relevant market is the distribution of films to all theatres and streaming services in Canada.

*Commissioner of Competition v Kingsland Inc., Dragonrider Pictures & Tallturret Studios* (31 October 2024) at para 60 [*Tribunal Decision*].

[20] Functional interchangeability in end-use, is a "critical element of the [substitutability] analysis" (*Canada Pipe CT*). End-use is critical because it speaks to the underlying "relevant purpose" that justifies grouping products into the same relevant product market (*Southam SCC*). It is about what you use the products for.

*Canada Pipe CT, supra* para 18 at para 84.
*Southam SCC, supra* para 16 at para 72.

[21] Here, the end-use of all independent and multi-plex theatres and streaming is film consumption. The Tribunal did not ever discuss *any* end-use.

*TREB CT, supra* para 18 at paras 144–145.

[22] As such, the Tribunal makes no distinction in end-use between theatres and streaming to explain why they are, or are not, functionally interchangeable. All three channels have the same end-use: film consumption. This conclusion is reflected in the Tribunal's reasoning; the Tribunal cited film choice and switching costs as reasons not to differentiate between independent and multi-plex theatres (*Tribunal Decision*). This reasoning applies equally to streaming services because switching costs are minimal and the same films are available on streaming services (*Tribunal Decision*).

*Tribunal Decision, supra* para 19 at paras 61, 18.

[23] The Tribunal ignored industry behaviour—evidence that the film industry behaves as if streaming is a critical part of their distribution strategy. All major movie producers in Canada have their own streaming platform to compete in the highly competitive streaming distribution channel (*Tribunal Decision*). This is a clear pattern of uniform industry behaviour, indicating a widely held belief that streaming is a vital part of the film distribution market.

> *Tribunal Decision, supra* para 19 at para 17.

[24] The above industry view can explain why the Tribunal found streaming services to exert a "competitive pressure" on the film distribution market (*Tribunal Decision*). In *Canada Pipe CT* whether one product constrains the price movements of another (i.e., exerts competitive pressure) was an indicator that they belong in the same relevant market (*Canada Pipe CT*). This is precisely what the Tribunal found to be happening here, strongly suggesting that streaming is in the same relevant market as theatres.

> *Tribunal Decision, supra* para 19 at para 63.
> *Canada Pipe CT, supra* para 18 at paras 94–95.

[25] The Tribunal correctly found that the geographic dimension of competition for the distribution of films is national. In *Laidlaw*, the geographic market analysis defined the boundaries of the geographic area within which competitors must operate to be effective competitors. The Tribunal correctly concluded that film distributors, regardless of their location in Canada, provide effective competition for film consumption nationwide. It follows then, that streaming services, which provide effective competition for film consumption nationally and compete to meet the same consumer demand for film content, should also be included in the market definition.

> *Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd,* 1992 CarswellNat 1628 at para 66, [1992] CCTD No 1 [*Laidlaw*].
> *Tribunal Decision, supra* para 19 at para 7.

[26] For the reasons set out above, the correctly defined relevant market is the distribution of films to all theatres and streaming services in Canada.

## ISSUE 2. The market for the distribution of films to theatres and streaming services in Canada is neither dominated by Kingsland nor jointly by Dragonrider and Tallturret

[27] The Tribunal correctly found that Kingsland is not dominant in the "all-theatres" market but erred when finding Dragonrider and Tallturret are jointly dominant. This error applies regardless of whether an all-theatre or theatre-and-streaming relevant market is used.

[28] Market power is a required element in abuse of dominance. It arises from the word "control" in section 79(1) of the Act which requires "one or more persons who *control or substantially control*" a relevant market. In *TREB CT* "control" was defined as requiring a "substantial degree of market power" which means a "degree of market power that confers...considerable latitude to...determine price or non-price dimensions of competition in a market". Market shares is a primary measure of market power; more than a 50% market share will be a *prima facie* finding of a substantial degree of market power (*TREB*).

*TREB CT, supra* para 18 at paras 174, 193–194.

a) The Tribunal appropriately recognized Kingsland's lack of market power

[29] The Tribunal appropriately recognized that Kingsland's 10% share (*Tribunal Decision*) in the "all-theatre" market does not constitute a substantial degree of market power, given that it does not meet the 50% threshold. Where the relevant market includes streaming services, Kingsland's market share would be even lower, at 1–2%. (*Tribunal Decision*). The Tribunal appropriately identified and applied the dominance test to the facts of the case. There is no palpable and overriding error that would justify disturbing the Tribunal's finding.

*Tribunal Decision, supra* para 19 at paras 64, 34.

b) The Tribunal incorrectly found Dragonrider and Tallturret are jointly dominant in the relevant market

[30] The Tribunal endorsed and applied the Guidelines on joint dominance (*Tribunal Decision*). The Guidelines provide a threshold combined market share of 65% as indicative of joint dominance (*Guidelines*). It also sets out other indicators of joint dominance: the level of competition (or lack

thereof) both inside and outside the allegedly dominant group, innovation, and barriers to entry (*Guidelines*).

> *Tribunal Decision, supra* para 19 at paras 67, 53.
> Canada, Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: CBC, 2024) online: <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines> at paras 45, 47–49 [*Guidelines*].

[31] However, the Tribunal misapplied the joint dominance Guidelines as applying to a hypothetical state of events. While the Guidelines are not binding, the Tribunal must apply the correct test if it explicitly endorses that test (*Tribunal Decision*). Applying the wrong legal standard is an error of law (*Housen*). As an error of law, a correctness standard applies (*Housen*).

> *Tribunal Decision, supra* para 19 at paras 53, 67.
> *Housen, supra* para 15 at para 36.

i. The legal standard for joint dominance is present evidence of dominance, not hypotheticals

[32] The Tribunal used the wrong legal standard to find Dragonrider and Tallturret jointly dominant. The Tribunal found Dragonrider and Tallturret to be jointly dominant by speculating that they would *eventually* meet the joint dominance indicators. The Tribunal speculated a world that has never existed: Dragonrider and Tallturret have never met the 65% threshold of combined market share (*Tribunal Decision*)—whether the relevant market is all-theatres or includes streaming. Additionally ignored, were the indicators that Dragonrider and Tallturret are in vigorous competition. Had the Tribunal applied the Guidelines correctly, they would not have been able to make a finding of joint dominance.

> *Tribunal Decision, supra* para 19 at paras 70, 72.
> *Housen, supra* para 15 at para 36.

[33] The Tribunal's finding of joint "control" over the relevant market based on future anticipated events contradicts the meaning and intent of 79(1). In *Direct Energy*, the Tribunal found the words "one or more persons substantially or completely control" in section 79(1)(a) of the Act (as it read in 2015) to mean that the allegedly dominant firm(s) must be in a position of dominance "*at the time of the alleged anti-competitive practice*". The Tribunal rejected Direct Energy's argument that section 79(1) was forward-looking and found that it applies in the present tense.

> *Commissioner of Competition v Direct Energy Marketing Limited* (26 March 2015), CT-2012-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463127/index.do> at para 40.

[34] The Tribunal incorrectly adopted a "forward-looking" definition of "control" in the chapeau language of section 79 and found that Dragonrider and Tallturret were jointly dominant based on speculation that Dragonrider and Tallturret's market share will eventually reach the 65% threshold set out in the Guidelines (Tribunal Decision).

> *Tribunal Decision, supra* para 19 at para 70.

[35] This prediction has no basis in reality. At this present time, within the narrowly defined "all-theatres" market, Dragonrider and Tallturret do not meet the 65% threshold in the Guidelines. This is doubly more so when the relevant market appropriately includes streaming—Dragonrider and Tallturret's combined market share of film distribution would be 35% (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at para 35.

[36] The Tribunal's speculative "forward-looking" approach led to overlooking two additional indicators—innovation and competition within the allegedly dominant group—which demonstrate Dragonrider and Tallturret's vigorously competitive relationship.

[37] Innovation continues in the film distribution market, which has been transformed by streaming services. Competition is fierce between Dragonrider and Tallturret because both parties attempt to use streaming services to leapfrog past each other, establishing their own respective streaming platforms. They attempt to solicit each other's customers in all channels—through Healerflix and even within Lion House theatres—to watch their respective films (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at para 17.

[38] Had the Tribunal considered the Guideline's indicators in the present tense, they could not have found Dragonrider and Tallturret to have "control" in any relevant market, be it all-theatres or theatres-and-streaming.

## ISSUE 3. The Tribunal incorrectly found the Agreement constituted a "practice of anti- competitive acts" and correctly found no SLPC

[39] The Tribunal made a palpable and overriding error by finding that the agreement was a "practice of anti-competitive acts" under section 79(1) of the *Act* because it improperly applied the legal test to assess anti-competitive "purpose." However, the Tribunal committed no reviewable error when it correctly applied the legal test to assess substantial lessening or prevention of competition ("**SLPC**").

a) The Tribunal misapplied the legal test to find the Agreement constituted a "practice of anti- competitive acts" in the relevant market

[40] The legal test for a "practice of anti-competitive acts" contemplated by section 79(1) was outlined in *Canada Pipe FCA* and *TREB CT*. For conduct to be found "anti-competitive," it must satisfy two different and distinct elements in the relevant market: (i) it must be a "practice" and (ii) it must have been done for the *purpose of achieving an intended negative effect* on a competitor that is predatory, exclusionary, or disciplinary.

> *TREB CT, supra* para 18 at paras 272–273.
> *Canada (Commissioner of Competition) v Canada Pipe Co.,* 2006 FCA 233 at paras 67–72, 77 [*Canada Pipe FCA*].

[41] The Tribunal committed two errors to reach its finding that the Agreement constituted a "practice of anti-competitive acts." First, the Tribunal incorrectly found the Agreement constitutes a "practice." Second, the Tribunal also made a palpable and overriding error when it focused its analysis of the Agreement's effects on a distribution channel rather than the relevant market.

b) The Tribunal incorrectly found the Agreement constituted a "practice"

[42] The Tribunal incorrectly found that the Agreement constituted a "practice" because the Agreement's effects were isolated to the independent theatre channel. The Tribunal concluded the Agreement constituted a practice when it reasoned that "Dragonrider and Tallturret…are the sole owners of Kingsland and the Agreement relates directly to the exclusive distribution of their films in Lion House theatres." The Tribunal's reasoning does not accord with the jurisprudence because a "practice" cannot be found when an act is isolated from the relevant market.

*Tribunal Decision, supra* para 19 at paras 86, 53.

[43] For an act to constitute a "practice," it must be more than an isolated act. A single occurrence must be "sustained and systemic," or have a "lasting impact on competition" on the relevant market (*Canada Pipe FCA*). *TREB FCA* and *TREB CT* together established that analyses into conduct contemplated by sections 78(1) and 79(1) must be conducted in relation to the relevant market and not an isolated channel within it.

*Canada Pipe FCA, supra* para 40 at para 60.
*Canada (Commissioner of Competition) v Toronto Real Estate Board,* 2014 FCA 29 at paras 17–20 [*TREB FCA*].
*TREB CT, supra* para 18 at para 277.

[44] Canada Pipe FCA applied this approach when it found the Stocking Distributor Program ("**SDP**") constituted a practice because "[t]he various components of the [SDP] *add up to a practice.*" This demonstrates that the SDP's various components—rebates, discounts, purchase requirements, and renewal conditions—did not individually constitute a "practice" because they were isolated acts. However, the SDP was found to be "sustained and systemic" and had a "lasting effect on competition" once its components were *added together* to form the SDP, at which point they were found to constitute a "practice."

*Canada Pipe FCA, supra* para 40 at para 60.

[45] The exclusivity agreement before the Tribunal was entirely different from the facts of *Canada Pipe FCA*. Both cases involved an agreement structure designed to facilitate a preferential relationship with another party. However, the SDP was found to constitute a practice because it contained numerous provisions that applied across the entire relevant market. The present case involved a single exclusivity agreement arranged with a single distributor and did not apply to 98–99% of the relevant market that includes streaming services (*Tribunal Decision*). The same can be said if the relevant market consists only of all theatres in Canada as the Agreement would not apply to 90% of the market (*Tribunal Decision*).

*Canada Pipe FCA, supra* para 40 at para 60.
*Tribunal Decision, supra* para 19 at paras 34, 11.

c) The Tribunal did not properly weigh evidence of intent to assess the Agreement's "purpose"

[46] For conduct to have an "anti-competitive purpose," it must have been to create an "intended negative effect on a competitor" *(Canada Pipe FCA*). *TREB CT* clarifies that the word "competitor" contemplated by this analysis, is "a person who competes … in the relevant market."

> *Canada Pipe FCA, supra* para 40 at para 64.
> *TREB CT, supra* para 18 at para 277.

[47] For a "negative effect(s)" to be considered "intended," the Tribunal must evaluate whether the effects were objectively intended (reasonably foreseeable) and, where evidence is available, whether those effects were subjectively intended (*TREB CT*). Read together with the previous paragraph, "objectively intended" and "subjectively intended" effects must be on a person's ability to compete in the *relevant market*—not solely on a channel within it.

> *TREB CT, supra* para 18 at paras 274–275.

[48] The Tribunal did not properly consider evidence showing no objectively intended negative effects from the Agreement. The Tribunal incorrectly found that "the Agreement is reasonably foreseeable to exclude competitors from the market" from its reasoning that "[the Agreement] effectively excludes Wolf House and any other studios from competing for distribution of films to the independent theatre channel within the relevant market."

> *Tribunal Decision, supra* para 19 at para 78.

[49] The Tribunal's reasoning departs significantly from *TREB CT*. In *TREB CT*, the finding that it was reasonably foreseeable that the anti-competitive act would negatively affect a competitor was *contingent* on its conclusion that the act *severely restricted* the competitor's ability to participate in the relevant market.

> *TREB CT, supra* para 18 at para 445.

[50] There was no evidence before the Tribunal that the Agreement would exclude a competitor from the relevant market. The extent of the Agreement's reasonably foreseeable "restrictions" would be limited to 1–2% of the relevant market that includes streaming services, with 98–99% remaining *entirely unrestricted* for a competitor to participate (*Tribunal Decision*). The same can be said if the relevant market consists only of all theatres in Canada as the Agreement would not apply to 90% of the market (*Tribunal Decision*).

*Tribunal Decision, supra* para 19 at paras 34, 11.

[51] The Tribunal acknowledged this when it determined that "it cannot be argued that the effects of the Agreement could be felt outside of the *independent theatre channel within the relevant market*" (*Tribunal Decision*). Accordingly, the Tribunal misapplied the legal test to find the Agreement was objectively intended to create negative effects on a competitor(s).

*Tribunal Decision, supra* para 19 at para 86.

[52] The Tribunal did not properly consider evidence showing no subjectively intended negative effects from the Agreement. In *TREB CT*, subjective intent was found because: (i) there was explicit evidence found in internal documents about an apprehended and emerging threat to traditional brokers; and (ii) a direct alignment between the apprehended threat and the impugned act. Here, there was no evidence before the Tribunal of any internal documents demonstrating either of these.

*TREB CT, supra* para 18 at paras 198, 253, 331.

[53] The Tribunal did not properly consider evidence that "independent movie studios, such as Wolf House, have grown in popularity through the expansion of streaming." There was no evidence before the Tribunal that Kingsland, in the four years since its establishment, had attempted to disrupt this critical channel of growth for independent films, despite the "distinct threat" they allegedly pose to Dragonrider and Tallturret (*Tribunal Decision*).

*Tribunal Decision, supra* para 19 at para 39.

[54] The Tribunal correctly observed that the Agreement was a response to a growing trend of viewing films in independent theatres. However, the Tribunal incorrectly *relies* on this observation to conclude that the Agreement was "specifically designed" with the *intention* to exclude independent films, rather than to make a rational business decision aimed at meeting their audiences' needs. For the reasons above, the Agreement was not "specifically designed" to exclude independent films, and at most, it incidentally affected Wolf House.

*Tribunal Decision, supra* para 19 at para 79.

[55] For the reasons above, the Tribunal incorrectly found that the Agreement was objectively and subjectively intended to create negative effects on a competitor.

d) The Tribunal improperly weighed evidence required to evaluate legitimate business justifications

[56] For the reasons above, the Tribunal incorrectly found that Dragonrider and Tallturret's legitimate business justifications did not outweigh the Agreement's objectively and subjectively intended negative effects—or lack thereof. *VAA CT* explicitly establishes "[t]he mere fact that a practice may be exclusionary is not a sufficient basis upon which to conclude that the practice has an overriding anti-competitive purpose or character." As such, the Tribunal's palpable and overriding error in assessing the Agreement's intent led to its conclusion that the Agreement's overall purpose was anti-competitive.

> *Commissioner of Competition v Vancouver Airport Authority* (17 October 2019), CT-2016-015, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465215/index.do>, at paras 621-622 [*VAA CT*].

[57] The Agreement at issue enables Kingsland, Dragonrider, and Tallturret to compete more effectively with streaming services by reducing marginal costs, distribution costs, and ticket prices (*Tribunal Decision*). The Agreement also provides Lion House with a consistent supply of high- quality films to compete with larger multiplexes and streaming services. Overall, the Agreement supports the distribution of films to independent theatres to enhance their competitiveness and long-term viability, with any exclusion of competitors being an incidental effect rather than its primary purpose.

> *Tribunal Decision, supra* para 19 at paras 19, 48, 47, 80.

[58] Dragonrider and Tallturret's efficiency-enhancing and pro-competitive business justifications mirror those held to be valid in *VAA CT*, which are to: (i) improve end-consumer experience, (ii) improve the ability for numerous parties to compete in the relevant market, and (iii) improve the competitiveness of the party(ies) at issue.

> *VAA CT, supra* para 56 at para 621.

[59] Therefore, Dragonrider and Tallturret's efficiency-enhancing and pro-competitive business justifications surpass the weighing threshold set out in *VAA CT*. Unlike *VAA CT*, where competitors were excluded from 100% of the relevant market, the Agreement leaves 98–99% of the relevant market open for competition (*Tribunal Decision*). Unlike in *VAA CT*, where VAA explicitly admitted an intent to exclude competitors, there was no evidence

that the Agreement was subjectively intended to exclude competitors (*Tribunal Decision*). Despite this, the Tribunal in *VAA CT* still found that VAA's efficiency-enhancing and pro-competitive business justifications were sufficient to establish that there was no anti-competitive purpose; the same conclusion must follow the far less restrictive and similarly pro-competitive Agreement here.

> *VAA CT, supra* para 56 at paras 1, 626-628.
> *Tribunal Decision, supra* para 19 at para 34.

e) The Tribunal did not commit a reviewable error when it correctly applied the legal test to find no SLPC

[60] The Tribunal's finding that the Agreement does not lead to an SLPC should stand because it correctly applied all available evidence required by the legal test. Under section 79(1)(b) of the Act, determining SLPC involves applying a legal standard to factual findings, which are afforded significant deference and can only be overturned in cases of palpable and overriding error (*Housen*).

> *Housen, supra* para 15 at para 36.

[61] The Tribunal's reasoning applied both branches of section 79(1)(b) to all relevant facts. It assessed "the Commissioner's portrayal of the impugned conduct's effects in the 'but for' world," specifically whether the conduct facilitated previously unheld market power or preserved existing power by preventing competition that would have otherwise emerged (*Tribunal Decision*). The Tribunal sufficiently considered the trajectory and potential future state of competition in the market, noting the independent theatre channel as a "small albeit growing portion of the relevant market." It concluded that the Commissioner had not provided "sufficiently clear and convincing evidence to demonstrate that any effects are substantial" (*Tribunal Decision*). This demonstrates that the Tribunal assessed all evidence, including persistence and duration of effects. As such, its finding demonstrates no reviewable error and should be given deference. (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at paras 86-87.
> *Housen, supra* para 15.

[62] For the reasons above, the elements of the abuse of dominance test under section 79(1) have not been satisfied. Neither Kingsland nor Dragonrider and Tallturret have: (i) "control" over the relevant market; (ii) engaged

in a practice of anti-competitive acts; or (iii) engaged in conduct likely to result in, or that has resulted in, an SLPC.

## ISSUE 4. The proper remedy is to prohibit exclusivity only where there is an adverse effect on local competition

[63] For the reasons above, the Appellants' position is that no remedy is required.

[64] If the elements for demonstrating an abuse of dominance on a balance of probabilities was established by the Commissioner, then a proper remedy should prohibit exclusivity only in areas where there are no geographical substitutes for a Lion House theatre.

[65] The Tribunal did not consider local dimensions of competition to be important for the relevant product market. While the appellants agree with the Tribunal's conclusion that Canada is the relevant geographic market, the remedy should be appropriately tailored to where there is a local adverse effect to film distribution and theatre-goers.

[66] This remedy accords with the jurisprudence which states a remedy should only "go as far as necessary [to] restore competition in the relevant markets" (*Laidlaw*). The exclusivity agreement does not affect competition in areas where consumers have an abundance of choice because the theatre-going experience is inherently localized. Accordingly, the nation-wide prohibition ordered by the Tribunal goes significantly further than necessary because it includes areas where it is not "necessary [to] restore competition" to begin with. It should be localized.[1]

> *Laidlaw, supra* para 25 at para 116.

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[1] This accords with the remedy recently taken by the Bureau, where it only removed an exclusive property leasing provision in a specific location (Crowsnest Pass, Alberta) rather than a prohibition on all-theatres in Canada as seen in the present case. This exclusivity provision was a business arrangement between a major player in the grocery industry and a commercial real estate owner. Similar to movie-going, the Bureau recognized that grocery shopping is an inherently localized experience. Accordingly, this remedy allows grocery stores to lease property and compete in an area where it was "necessary to restore competition" while respecting arrangements between private business in areas where it was not "necessary to restore competition." Canada, Competition Bureau Canada, *Competition Bureau takes action to protect competition in the grocery industry in an Alberta community (Ottawa: CBA, 2025), online: <canada.ca/en/competition-bureau/news>*.

[67] The present Agreement's exclusivity provision can be used in specific conditions without creating the need for remedy. A downtown Toronto theatre-goer is not traveling to Newmarket because a Lion House theatre lacks "differentiated movies"; they will simply choose another theatre nearby. In contrast, a theatre-goer in Crowsnest Pass, Alberta may have no choice but to travel long distances for alternative theatre-going experiences. A prohibition on all theatres in Canada does not reflect the diversity of choice in theatre markets nation-wide.

[68] For the above reasons, the Appellants submit that the appropriate remedy, if any, would be to prohibit the exclusivity clause in communities where "necessary to restore competition."

## Part IV: Remedy Sought

[69] The appellants request that the Tribunal's order prohibiting Kingsland from implementing the exclusivity provisions be overturned.

## APPENDIX A: TABLE OF AUTHORITIES

### A. Legislation

*Competition Act*, RSC 1985, c C-34.

*Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp).

### B. Jurisprudence

*Canada (Commissioner of Competition) v Canada Pipe Co.* (3 February 2005), CT-2002-006, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464214/index.do>.

*Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233.

*Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29.

*Canada (Director of Investigation & Research) v D&B Co. of Canada Ltd.* 1995 CarswellNat 2684, [1995] CCTD No 20 (Comp Trib).

*Canada (Director of Investigation & Research) v NutraSweet Co.*, [1990] CLD 1078, 1990 CarswellNat 1368 (Comp Trib).

*Canada (Director of Investigation and Research) v Southam Inc.,* 1995 CanLII 3523 (FCA).

*Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385 (SCC)

*Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.*, 1997 CarswellNat 3120, [1997] CCTD No 8 (Comp Trib).

*Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd.,* 1992 CarswellNat 1628, [1992] CCTD No 1, 40 CPR (3d) 289 (Comp Trib).

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

*Commissioner of Competition v Direct Energy Marketing Limited* (26 March 2015), CT-2012-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463127/index.do>.

*Commissioner of Competition v Kingsland Inc., Dragonrider Pictures & Tallturret Studios* (31 October 2024).

*Commissioner of Competition v Toronto Real Estate Board* (28 April 2016), CT-2011-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do>.

*Commissioner of Competition v Vancouver Airport Authority* (17 October 2019), CT-2016-015, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465215/index.do>.

*Housen v Nikolaisen*, 2002 SCC 33.

## C. Government Documents

Canada, Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: CBC, 2024), online: <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines>.

## D. Secondary Sources

Canada, Competition Bureau Canada, Competition Bureau takes action to protect competition in the grocery industry in an Alberta community (Ottawa: CBA, 2025), online: <canada.ca/en/competition-bureau/news>.

# 2025 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2025

## IN THE COMPETITION APPEAL TRIBUNAL (ON APPEAL FROM THE COMPETITION TRIBUNAL)

Between:

**KINGSLAND INC., DRAGONRIDER PICTURES AND TALLTURRET STUDIOS**

Appellants

**AND**

**COMMISSIONER OF COMPETITION**

Respondent

## FACTUM OF THE RESPONDENT

Team No. 25110

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## Overview

[1] In the dynamic movie industry in Canada, theatre viewing is a distinct and important way studios share their films with consumers. This case is about consumer choice and an exclusionary agreement that effectively foreclosed all but two movie studios from showing their films in one of the largest and fastest growing independent theatre chains.

[2] The Tribunal made no errors in finding: the relevant market to be the distribution of films to all movie theatres in Canada, that Dragonrider Pictures ("**Dragonrider**") and Tallturret Studios ("**Tallturret**") are jointly dominant in this market, and that the Agreement ("**Agreement**") constitutes a practice of anti-competitive act. The Tribunal also made no error in rejecting the Appellants' business justification argument.

[3] The Tribunal's remedy furthers the objectives of the *Competition Act* (the "*Act*") which include providing small and medium-sized enterprises with equitable opportunities to participate and to provide consumers with more choices. The remedy does this by allowing all studios to access a major distribution channel in the market.

> *Competition Act,* RSC 1985, c C-34, s 1.1.

[4] This is the first time the Tribunal has been called upon to apply the recent amendments to the *Act*, making this case of critical importance to the future of competition law in Canada. The Tribunal correctly understood the new test, which allows abuse of dominance to be found where there is an anti-competitive practice or a substantial lessening or prevention of competition ("**SLPC**"). The remedy to prohibit a clearly exclusionary agreement is consistent with Parliament's purpose of promoting competition and making it possible to find an abuse of dominance where a dominant firm acts in an exclusionary fashion, even in the absence of a SLPC.

[5] The Respondent submits that the Tribunal made a reviewable error in not finding the anti-competitive act also to be conduct likely to result in a significant lessening or prevention of competition.

## Part I—Statement of Facts

### Canada's Movie Industry

[6] The movie industry is dominated by three major movie studios which control 80% of all films distributed in Canada: Dragonrider, Tallturret, and Saltwater Serpent Pictures (*Tribunal Decision*). Films are distributed through

large "multi-plex" theatres, smaller independent theatres, and streaming platforms (*Tribunal Decision*). While streaming is a popular option, theatres remain an important and distinct way in which Canadians view films. Even within the movie theatre market evidence indicates that Canadians' preferences are skewing towards independent movie theatres due to the declining reputation of large multiplex theatres, which are viewed as unfriendly to consumers due to hidden fees being imposed (*Tribunal Decision*). Businesses are taking advantage of this demand by opening more independent theatres in Canada (*Tribunal Decision*).

> *Commissioner of Competition v Kingsland Inc, Dragonrider Pictures & Tallturret Studios* at paras 14-16 (CACT) [*Tribunal Decision*].

[7] Kingsland is a joint venture between Dragonrider and Tallturret created to distribute Dragonrider and Tallturret films exclusively to independent theatres, including Lion House. Lion House is one of Canada's largest and fastest-growing independent theatre chains, accounting for 50% of Canada's independent theatre screens. Lion House is expanding aggressively and its market share is expected to grow even further (*Tribunal Decision*).

> *Tribunal Decision, supra* para 6 at para 11.

**The Anti-Competitive Agreement**

[8] On December 16, 2023, Kingsland and Lion House entered into an Agreement, pursuant to which Kingsland is the exclusive supplier of movies to Lion House theatres. As a direct result, Lion House immediately terminated existing contracts in place with all other movie studios (*Tribunal Decision*).

> *Tribunal Decision, supra* para 6 at para 20.

[9] The Agreement has the effect of foreclosing all other competing studios from half of Canada's independent theatre screens. Following the implementation of the Agreement, Dragonrider and Tallturret's joint market share increased from 60% to 63% of all films in Canada, and is expected to rise further as long as the Agreement remains in effect (*Tribunal Decision*). As a result, consumer choice is and will continue to be limited by limiting films available for viewing at independent theatres and lessening competition in film distribution.

> *Tribunal Decision, supra* para 6 at para 28.

## Part II—Statement of Points in Issue

[10] The central issue to this appeal is whether the Tribunal made any reviewable errors that warrant the Competition Appeal Tribunal ("**CAT**") to interfere with the Tribunal's decision to prohibit the exclusivity provisions of the Agreement. It is submitted on the issues before the CAT:

1) The Tribunal made no reviewable error in defining the relevant market as the distribution of films to all movie theatres in Canada.

2) The Tribunal made no reviewable error in finding that Dragonrider and Tallturret are jointly dominant in the market for film distribution to all movie theatres in Canada.

3) The Tribunal did not err in finding that the implementation of the Agreement constitutes a practice of anti-competitive acts by Dragonrider and Tallturret. However, the Tribunal committed a palpable and overriding error in its SLPC analysis.

4) The Tribunal erred by not ordering an administrative monetary penalty (AMP) pursuant to section 79(3.1) of the *Act*, in addition to a prohibition on the exclusionary provisions of the Agreement.

## Part III—Statement of Submissions

**Standard of Review**

[11] The standard of review for issues on appeal to the CAT is (i) correctness for questions of law, and (ii) palpable and overriding error for questions of mixed fact and law (*Fanaki Moot Rules*). A palpable and overriding error is an error in law that is obvious and significant enough to affect the outcome of the decision (*Vavilov*). This is a deferential standard (*Vavilov*; *Southam*). The correctness standard operates without deference. Instead, where an issue of law is raised, the CAT must make its own determination of the correct outcome (*Vavilov*).

> *Adam F Fanaki Competition Law Moot Rules, Academic Year 2024-25* at 7, online <fanakimoot.org/officialrules> [*Moot Rules*].
>
> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
>
> *Canada (Director of Investigation & Research) v Southam Inc*, 1997 CanLII 385 (SCC) [*Southam*].

## ISSUE 1—Defining the Relevant Market

[12] The first step to establishing abuse of dominance is to define the relevant market (*TREB*). The relevant market must be defined in two dimensions, by product and geography (*Competition Act*; *D&B*). The relevant market need not and typically cannot be determined with exact precision, but rather is an exercise in judgement (*TREB*).

> *The Commissioner of Competition v The Toronto Real Estate Board,* 2016 CACT 7 at paras 11, 132 [*TREB*].
>
> *Competition Act, supra* para 3, s 79(1).
>
> *Canada (Director of Investigation and Research) v D&B Companies of Canada Ltd*, 1995 CanLII 8 at para 39 (CACT) [*D&B*].

[13] In interpreting the chapeau of section 79(1) of the *Competition Act*, the Tribunal has established that a "class or species of business" is synonymous with a product market (*NutraSweet*). The Tribunal held that the distribution of films to the broader movie theatre market, including major multi-screen movie theatres within Canada, constitutes a "class or species of business (*Tribunal Decision*)." Through this finding, the Tribunal defined the product market as "the distribution of films to movie theatres" and defined the geographic market as "within Canada."

> *Competition Act, supra* para 3 at s 79(1).
>
> *Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 at 32, 1990 CanLII 13729 (CACT) [*NutraSweet*].
>
> *Tribunal Decision*, *supra* para 6 at para 7.

### (1) The Tribunal Made No Reviewable Error in Defining the Relevant Market.

[14] The Tribunal did not err in law when it found the relevant market to be the distribution of films to all theatres in Canada (*Tribunal Decision*). The Tribunal properly weighed relevant factors for determining the product market and analyzed the practical indicia including switching costs and the behaviours of buyers (*Tribunal Decision*). It engaged in a fact-dependent assessment which is subject to deference (*Southam*).

> *Tribunal Decision*, *supra* para 6 at paras 7, 60.

*TREB*, *supra* para 12 at para 11.

*Southam*, *supra* para 11.

**(a) Product Market**

[15] To identify the product market, one must begin by analyzing the product at issue and whether close substitutes exist for that product. This analysis must focus on the demand responses of consumers within that given market (*TREB*).

*TREB*, *supra* para 12 at para 124.

[16] The relevant product market can be determined by direct or indirect evidence of substitutability (*Southam*). Direct evidence of substitutability includes statistical evidence of buyer price sensitivity and anecdotal evidence. Indirect evidence of substitutability focuses on practical indicia such as switching costs and buyer behaviour (*Southam*). Direct evidence of substitutability is often difficult to obtain, making practical indicia an important part of assessing substitutability to build an accurate market definition.

*Southam*, *supra* para 11 at para 16.

[17] In the absence of direct evidence on substitutability the Tribunal properly examined practical indicia of switching costs and buyer behaviour (*Southam*; *ADEGs*).

*Southam*, *supra* para 11 at para 16.

Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (7 March 2019) at paras 6, 7, 12, online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines> [*ADEGs*].

[18] The Tribunal determined that independent theatres and larger-chain theatres form part of the same product market by assessing the switching costs between independent theatres and larger-chain Theatres (*Tribunal Decision*).

*Tribunal Decision*, *supra* para 6 at para 61.

[19] The Tribunal found the switching costs between independent theatres and larger movie theatre chains to be *de minimis* (*Tribunal Decision*). *De*

*minimis* switching costs indicate that consumers view two products as alternatives for each other (*Tele-Direct*). When consumers consider products as alternatives for each other that serves as an indicator that the products are substitutable and therefore form part of the same product market (*TREB*).

> *Tribunal Decision*, *supra* para 6 at para 61.
>
> *Director of Investigation and Research v Tele-Direct Inc,* 1997 CanLII 11 at para 130 (CACT) [*Tele-Direct*].
>
> *TREB*, *supra* para 12 at paras 117-118.

**(i) Streaming Services**

[20] The Tribunal made no reviewable error in finding streaming services are not part of the product market.

[21] The Tribunal correctly analyzed buyer behaviour to conclude that streaming services are complementary to movie theatres and therefore exist outside of the relevant market.

[22] In analyzing the buyer behaviour of streaming services the Tribunal held that outside of the relevant market, streaming services can and do exert a certain competitive pressure on distribution in theatres because there may be some consumers at the margins who consider switching from viewing a movie in a theatre to streaming it at home in response to a SSNIP imposed by a hypothetical monopolist (*Tribunal Decision*). However, it properly concluded this did not elevate streaming services to being in the same product market as theatres given the other factors showing the distinct nature of the latter.

> *Tribunal Decision*, *supra* para 6 at para 63.

[23] The evidence before the Tribunal showed that films released in theatres perform much better over their lifetime and drive up subscriptions to the studio's streaming platforms, where the films are released following their run in theatres (*Tribunal Decision; Amazon MGM*). This shows the distinct character of these products.

> *Tribunal Decision*, *supra* para 6 at para 15.
>
> EU, Directorate-General for Competition, *Case M.10349—Amazon/MGM*, [2022] OJ, C 1723 at paras 95, 88, online: <ec.europa.eu/

competition/mergers/cases1/202250/M_10349_8691929_626_3.pdf> [*Amazon MGM*].

[24] The ability of streaming services to exercise competitive pressure on distribution of movies in theatres indicates that consumers view streaming services and theatres as complements rather than alternatives (*Clarke*). Products consumers view as complements to the product at issue must be classified as a separate relevant market (*Clarke*).

*R v Clarke Transport Canada Inc,* 1995 CanLII 7327 at para 130 (ONSC).

[25] In summary, by properly analyzing the practical indicia of switching costs and buyer behaviours, the Tribunal was able to identify a relevant product market without committing a palpable or overriding error.

**(b) Geographic Market**

[26] Notably, the geographic market is not at issue in this appeal. The Tribunal identified the relevant market as the distribution of films to movie theatres within Canada (*Tribunal Decision*). The movie theatre industry comprises different levels: upstream, intermediate, and downstream (*Amazon MGM*). Distribution of films from movie studios and distributors to movie theatres is part of the downstream level (*Amazon MGM*). The focus on the distribution aspect means that as long as a firm distributes films to movie theatres throughout Canada their products (films) can be included as part of the relevant market (*ADEGs)*.

*Amazon MGM*, *supra* para 23 at paras 7-9.

*Tribunal Decision*, *supra* para 6 at para 7.

*ADEGs*, *supra* para 17 at para 13.

## ISSUE 2—The Tribunal made no reviewable error in finding that Dragonrider and Tallturret are jointly dominant in the market for film distribution to all movie theatres in Canada.

[27] The Tribunal did not err in mixed fact and law when it found Dragonrider and Tallturret are jointly dominant in the relevant market of film distribution to all movie theatres in Canada.

[28] The Tribunal did not err in finding that Dragonrider and Tallturret are jointly dominant because it properly analyzed the factors of joint dominance

and evaluated the relevant indicia for determining their collective market power.

**(1) Factors of Joint Dominance**

[29] Establishing a finding of joint dominance requires a twofold legal analysis. First it must be established that the firms in question jointly control a class or species of business. Second it needs to be established that the firms in question collectively hold a substantial degree of market power (*ADEGs*). Indicia of market power includes a high market share, a small number of competitors, ability to impose commercial leverage, and high barriers to entry.

*ADEGs*, *supra* para 17 at para 46.

[30] The tribunal found the Agreement to be a part of a business strategy on behalf of these firms to utilize their market power to foreclose competitors from participating in a growing portion of the theatre market.

[31] As two of the three largest film studios in Canada, Dragonrider and Tallturret have a substantial degree of market power within the broader theatre market. The tribunal discussed how recent consumer trends away from larger movie theatres have led to a growth in the independent movie theatre market (*Tribunal Decision*). Therefore, the growth of this subset of the market brings with it the prospect of increased profits for any firms that are already engaged in the broader movie theatre market.

[32] Kingsland is a joint venture between Dragonrider and Tallturret that was created to distribute Dragonrider and Tallturret films to independent movie theatres across Canada. The Agreement is linked to the two firms' significant commercial leverage and illustrates the ability of Tallturret and Dragonrider to exclude competitors from displaying their films through a growing part of the relevant market.

[33] The Tribunal determined that expected growth in independent theatres would increase their ability to exercise joint dominance over time (*Tribunal Decision*).

*Tribunal Decision*, *supra* para 6 at para 72.

**(2) Indicia of Market Power**

[34] The Agreement is a demonstration of the ability of Tallturret and Dragonrider to exclude competitors in an industry with high barriers to entry (*Tribunal Decision)*.

*Tribunal Decision*, *supra* para 6 at para 70.

[35] Entry into the movie theatre studio industry has high barriers to entry. New entrants into the market must seek and acquire the rights to produce films that are projected to make a profitable return on their investment when displayed in theatres. Which films will perform well is unpredictable and therefore newer film studios will likely suffer sunk financial costs within their first few years of entering the market.

## ISSUE 3—Practice of Anti-Competitive Acts and SLPC

[36] Pursuant to the recent amendments to the *Act,* abuse of dominance can be established by a finding either of a practice of anti-competitive acts or conduct that results or is likely to result in a SLPC (*Competition Act*). This amendment reflects Parliament's intention to make it easier to establish abuse of dominance by only requiring one of the tests under section 79(1) to be met.

*Competition Act, supra* para 3, s 79.

### (1) Practice of Anti-Competitive Acts

[37] The Tribunal made no reviewable error in finding that the Agreement constitutes a practice of anti-competitive act by Dragonrider and Tallturret. The Tribunal correctly interpreted and applied the test for anti-competitive acts under section 79(1)(a) of the *Act.*

[38] Under section 79 of the *Act,* abuse of dominance can be established by finding that the dominant player engaged either in a practice of anti-competitive acts, or in conduct resulting in or likely to result in a SLPC. An anti-competitive act, in addition to the examples listed in subsections 78(1)(a)-(k) of the *Act*, is defined as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition" (*Competition Act*).

*Competition Act, supra* para 3, ss 78-79.

[39] In assessing a practice of anti-competitive acts, the Tribunal must determine the overall character of the conduct by weighing all relevant factors

(*TREB*). These factors include the reasonably foreseeable or expected objective effects of the conduct, with the party being deemed to have intended the effects of its actions (*Canada Pipe*).

> *TREB*, *supra* para 12 at para 274.
>
> *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at paras 67-70 [*Canada Pipe*].

[40] Here, the Tribunal made no error in finding that the overall character of the Agreement is anti-competitive, in light of the clear and direct evidence of exclusionary effects on competitors. The Tribunal explicitly found that the Agreement is exclusionary (*Tribunal Decision*). The Agreement has clear exclusionary effects, with Lion House immediately ending its contracts with all other studios following the Agreement coming into effect (*Tribunal Decision*). As a result, competing studios were cut off from distributing their films to 50% of the independent movie theatre screens in Canada (*Tribunal Decision*). The effects of the Agreement on competitors were reasonably foreseeable and obvious given the nature of the exclusive supply Agreement (*Tribunal Decision*). Therefore Kingsland, Dragonrider, and Tallturret are deemed to have intended the exclusionary effects of the Agreement (*Canada Pipe*).

> *Tribunal Decision*, *supra* para 6 at paras 78, 20, 11, 21, 20.
>
> *Canada Pipe*, *supra* para 39 at paras 67–70.

[41] The Tribunal also made no error in holding the Agreement to be a "practice" of anti-competitive acts. A "practice" of anti-competitive acts includes conduct that is ongoing, sustained and systemic, or conduct that has a lasting impact on competition (*TREB*).

> *TREB*, *supra* para 12 at para 273.

[42] The Agreement featured sustained, systemic, and exclusionary conduct. The Agreement has a sustained impact on competition, completely excluding all other studios from the main theatre chain in the popular and fast growing independent theatre stream. The Agreement also extends across the entire country. This means that every single competitor across the national market for film studios is excluded from distributing to Lion House except Dragonrider and Tallturret through Kingsland.

[43] The effects of the Agreement have already begun to affect competition with Dragonrider and Tallturret's market share of all films increasing from 60% to 63% after the Agreement went into effect (*Tribunal Decision*). There is also likely to be a lasting impact on competition overtime from the Agreement. There was no evidence before the Tribunal that the Agreement had any end date suggesting the Agreement could have a significant impact on competition in the long term (*Tribunal Decision*). This further supports the Tribunal's finding that the Agreement is a practice for the purpose of 79(1)(a).

*Tribunal Decision*, *supra* para 6 at paras 28, 20.

**(2) Business Justification**

[44] The Tribunal made no reviewable error in finding that the Appellant had not established a valid business justification because it properly weighed the evidence of the alleged business justification against the overall exclusionary effects of the Agreement.

[45] A business justification is an alternative explanation for the purpose of conduct that is alleged to be anti-competitive (*Canada Pipe*). The justification must go beyond proof of some legitimate business purpose that is self-serving. It must provide a credible efficiency or pro-competitive rationale for the conduct that relates to and counterbalances the anti-competitive effects of the acts (*Canada Pipe*). Any business justification raised must be weighed against the predatory, exclusionary, or disciplinary effect the conduct has on competition (*D&B*). This is a holistic balancing exercise, with all known factors being taken into account (*D&B*). The burden of establishing the business justification rests solely on the alleged dominant party (*TREB*).

*Canada Pipe*, *supra* para 39 at para 73.

*D&B*, *supra* para 12 at paras 262, 265.

*TREB*, *supra* para 12 at para 144.

[46] At the Tribunal, the Appellants claimed that the Agreement is within the normal course of the studios' relations with movie theatres, such as Lion House, and that it would lead to efficiencies (*Tribunal Decision*). The Appellants even went as far as to claim that the Agreement was pro-competitive in guaranteeing distribution for independent films (*Tribunal Decision*). Despite these claims, the Appellants did not raise any tangible evidence of any pro-competitive or efficiency related justifications for the Agreement.

Specifically, the reasons from the Tribunal state, "they (Dragonrider and Tallturret) have not established to the requisite degree that the overall character or overriding purpose of the Agreement was not anti-competitive in nature (*Tribunal Decision*)."

> *Tribunal Decision*, *supra* para 6 at paras 47-48, 80.

[47] The Tribunal properly balanced the evidence that was before it of the anti-competitive and exclusionary effects of the Agreement to find that no valid business justification was made out.

[48] The balancing of available evidence is a matter that is subject to deference from the CAT. The Appellants have shown no palpable or overriding error by the Tribunal in determining that the business justification raised by the Appellants did not outweigh the anti-competitive character of the Agreement.

**(3) Parliamentary Intention Behind the Amendments to Section 79(1) of the Act**

[49] The Tribunal made no reviewable error in finding an abuse of dominance under section 79(1)(a), even though it did not find a SLPC, because the amendments to the *Act* allow this. The Tribunal's decision is consistent with the Parliamentary intention behind the 2023 amendments to the *Act*.

[50] Following Bills C-59, C-19, and C-56, the *Act* has recently undergone its most comprehensive amendments since coming into effect in 1985 (Ross).

> Thomas Ross, "The Dust Has Settled (For Now): Reviewing the Recent Amendments to the Canadian Competition Act" (19 November 2024), online: <pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act> [Ross].

[51] Notably, Bill C-56 amended section 79 of the *Act* to provide that a SLPC is no longer required to make an order prohibiting anti-competitive conduct.

> *An Act to amend the Excise Tax Act and the Competition Act*, SC 2024, c C-56, s 5 [Bill C-56].

[52] The Tribunal, like all judicial bodies, must interpret and apply the law as set by Parliament. This includes the *Act*. Courts must first look to the plain meaning of the law, and where there is discrepancy or further interpretation

is needed, courts must take a purposive interpretation, considering the entire concept of the law and the mischief behind it (Sullivan). The Tribunal's application of the new test is consistent with the plain language of the amendments and the larger mischief behind the amendments.

> Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1999) 30:2 Ottawa L Rev 175 at 187, 216 [Sullivan].

[53] By a plain language analysis there is an obvious and intentional change in the wording of section 79(1) from "and" to "or". This change opens the door for the Tribunal to find an abuse of dominance either where a person or persons is engaged in a practice of anti-competitive acts or conduct that is likely to result in a SLPC.

[54] The Tribunal's decision is also consistent with the larger context and mischief behind the amendments, further supporting the Commissioner's submission that no error in law was made in interpreting the amended Act. The amendments recognize that even where there is no finding of SLPC, there may still be substantial impacts on competition (FINA Committee). Parliament recognized that under the previous version of the Act, abuse of dominance was one of the more challenging provisions to enforce (FINA Committee). It was the intention of Parliament to create a lower threshold for the Tribunal to remedy anti-competitive conduct.

Canada, House of Commons, Standing Committee on Finance, *Evidence*, 44th Parl, 1st Sess (20 November 2023) at 18:42, 18:44 (Mark Schaan) [FINA Committee].

[55] The Tribunal's decision was aligned with the intention of Parliament. The Agreement restricted consumer choice and foreclosed all but two studios from distributing their movies to Lion House theatres (*Tribunal Decision*). This entrenched Dragonrider and Tallturret's dominant and controlling position in the Canadian film industry. It is clear that there were immediate anti-competitive effects from the Agreement on the supply for movies that needed to be addressed, even if they did not rise to an SLPC.

> *Tribunal Decision, supra* para 6 at para 21.

[56] The Tribunal's decision is aligned with both the plain language and purposive intention behind the 2023 amendments. There is no reviewable error in the Tribunal's interpretation of the new amendments.

**(4) Substantial Lessening or Prevention of Competition (SLPC)**

[57] While it is open to the Tribunal to find an abuse of dominance without a finding of SLPC, the Tribunal erred in its analysis of SLPC. The Tribunal made an overriding and palpable error in mixed fact and law because it did not consider independent theatres as a material part of the market in its SLPC analysis.

**(a) The Test for SLPC**

[58] The second way to find an abuse of dominance is through conduct that had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market that the person has a plausible competitive interest in (*Competition Act*). The effect of this conduct must not be a result of superior competitive performance (*Competition Act*). The jurisprudence is clear that where a prevention or lessening of competition does not extend throughout the entire relevant market, the Tribunal must also assess its scope and whether the impact extends through a material part of the market (*VAA; CCS; Parrish*). The term "material part of the market" refers to the scope of the adverse effect on price or non-price levels of competition arising from the conduct and asks whether these adverse effects touch a significant portion of the relevant market or in respect of a material volume of sales (*CCS*).

> *Competition Act*, *supra* para 3, ss 79(1)(b)(i), 79(1)(b)(ii).
>
> *The Commissioner of Competition v Vancouver Airport Authority,* 2019 CACT 6 at para 640 [*VAA*].
>
> *The Commissioner of Competition v CCS Corporation et al*, 2012 CACT 14 at paras 375, 378 [*CCS*].
>
> *Canada (Commissioner of Competition) v Parrish & Heimbecker Ltd*, 2022 CanLII 106878 at para 474 (CACT) [*Parrish*].

**(b) The Tribunal's Error**

[59] The Tribunal erred in mixed fact and law by not considering independent theatres as a material part of the relevant market. The Tribunal conducted its analysis of SLPC in the market for all movie theatres and found that because independent movie theatres were a small channel of this market, the lessening and prevention in this channel was not significant to the overall market (*Tribunal Decision*). However, the test for SLPC requires the Tribunal to consider a material part of the relevant market where a

lessening or prevention of competition does not transcend the entire market (*VAA*).

*Tribunal Decision, supra* para 6 at para 86.

*VAA, supra* para 58 at para 640.

[60] Independent theatres are a material and rapidly-growing part of the relevant market. The evidence before the Tribunal shows the prominent and growing role independent theatres play. The preferences of consumers are skewing towards independent theatres because of the decline in reputation of major theatre chains (*Tribunal Decision*). In response to this increased demand, independent theatres are expanding across Canada (*Tribunal Decision*). Further, LionHouse, the theatre that all but two studios in the market are foreclosed from, is one of the fastest growing independent theatre chains in the country, already holding 50% of all independent theatre screens (*Tribunal Decision*). Independent theatres currently account for a quarter of the all theatre market and there is clear evidence that this part of the market is significantly growing (*Tribunal Decision*).

*Tribunal Decision*, *supra* para 6 at paras 16, 11.

[61] The materiality of independent theatres is bolstered by the forward looking approach to a SLPC analysis and jurisprudence such as *TREB*. It is therefore open to the Tribunal to consider evidence of independent theatre's likely growth in the market to support an argument that this sector of the market is material.

[62] Further, this case is analogous to *TREB* in dealing with a smaller but growing section of the market. In *TREB*, the lessening and prevention of competition arising from the data sharing restrictions disproportionately impacted new innovative brokers who operated virtual office websites ("VOWs") (*TREB*). While the effects of the conduct impacted the VOW brokers significantly more than traditional brokers, the Tribunal nonetheless held these effects to be substantial, pointing in part to the projected growth in the VOW sector (*TREB*). This is analogous to the current case. The Tribunal found that the effects of the Agreement are not likely to be felt beyond independent theatres. However, this does not mean that these effects are not substantial. The evidence before the Tribunal is that this sector is expected to grow rapidly, increasing its significance in the market and making it a material part of the market.

*TREB*, *supra* para 12 at paras 445, 665-673.

[63] The Tribunal's error of not considering independent theatres as a material part of the market is overriding, palpable, and on its face obvious. The Tribunal did not fully apply the SLPC test, skipping the analysis of a material part of the market. The jurisprudence is clear that where the effects of conduct may not transcend the entire market, the Tribunal's analysis must turn and ask if the scope of the effects impact a material part of the market (*VAA)*. Skipping this step is a palpable error and is overriding because it led the Tribunal to not make a finding of an SLPC, despite the substantiality of the effects under the "material part of the market" test.

*VAA*, *supra* para 58 at para 640.

## Part IV—Remedy Sought

[64] The Tribunal erred in mixed fact and law on its analysis of SLPC, and thus did not impose an appropriate remedy under the *Act* as amended. The Tribunal erroneously found no SLPC, and therefore did not consider AMPs.

[65] The Commissioner requests that the CAT make the order that the Tribunal should have made, had it not erred in its analysis of SLPC. The proper remedy is a prohibition on the exclusivity provisions of the Agreement, and an AMP pursuant to section 79(3.1) of the *Act*.

[66] Section 79(3.1) of the *Act* provides that the Tribunal "may" impose additional AMPs where a finding of anti-competitive conduct is anchored in section 79(1)(b)(ii), and an SLPC has been established. The Commissioner submits that the CAT should exercise this judicial discretion and impose an AMP in this case.

[67] It is appropriate for the CAT to make this order under section 79(3.1)(a) of the *Act*, which provides for an AMP not exceeding $25,000,000. Section 79(3.1)(b) of the *Act* cannot easily be ordered by the CAT in this case because the value of the benefit derived from the Agreement is not before the CAT.

[68] Furthermore, ordering an AMP under section 79(3.1)(a) would provide general deterrence for future anti-competitive acts, and further animate Parliament's intention of creating an abuse of dominance framework that can better respond to modern competition issues.

[69] In the alternative, should the CAT not find a SLPC to be established, the correct remedy is to maintain the prohibition on the exclusivity provisions made by the Tribunal. In which case, the Tribunal made no reviewable

error in holding that the appropriate remedy was to prohibit Kingsland from implementing the exclusivity provisions in the Agreement.

[70] In ordering a remedy, the Tribunal is to only go as far as necessary to restore competition in the relevant market (*Laidlaw*).

> *Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 at 351, 1992 CanLII 15378 (CACT) [*Laidlaw*].

[71] By prohibiting the exclusivity provisions in the Agreement, the Tribunal's remedy goes only as far as is necessary to accomplish the goal of ending the exclusionary anti-competitive practice by the Appellants. The remainder of the Agreement may still be allowed to stand. The Tribunal's remedy only addresses the provisions that were causing the exclusionary and anti-competitive effect. This is consistent with the jurisprudence on acceptable remedies.

## APPENDIX A—TABLE OF AUTHORITIES

### Legislation

*An Act to amend the Excise Tax Act and the Competition Act*, SC 2024, c C-56.

*Competition Act,* RSC 1985, c C-34.

### Jurisprudence

*Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233.

*Canada (Commissioner of Competition) v Parrish & Heimbecker Ltd*, 2022 CanLII 106878 at para 474 (CACT).

*Canada (Director of Investigation & Research) v Southam Inc*, 1997 CanLII 385 (SCC).

*Canada (Director of Investigation and Research) v D&B Companies of Canada Ltd*, 1995 CanLII 8 (CACT).

*Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1, 1990 CanLII 13729 (CACT).

*Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289, 1992 CanLII 15378 (CACT).

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

*Commissioner of Competition v Kingsland Inc, Dragonrider Pictures & Tallturret Studios* (CACT).

*Director of Investigation and Research v Tele-Direct Inc,* 1997 CanLII 11 (CACT).

EU, Directorate-General for Competition, *Case M.10349 – Amazon / MGM*, [2022] OJ, C 1723 at paras 95, 88, online: <ec.europa.eu/competition/mergers/cases1/202250/M_10349_8691929_626_3.pdf>.

*R v Clarke Transport Canada Inc.,* 1995 CanLII 7327 (ONSC).

*The Commissioner of Competition v CCS Corporation et al*, 2012 CACT 14.

*The Commissioner of Competition v The Toronto Real Estate Board,* 2016 CACT 7.

*The Commissioner of Competition v Vancouver Airport Authority,* 2019 CACT 6.

## Government Documents

Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (7 March 2019), online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines>.

## Secondary Material

*Adam F Fanaki Competition Law Moot Rules*, *Academic Year 2024-25*, online <fanakimoot.org/officialrules>.

Canada, House of Commons, Standing Committee on Finance, *Evidence*, 44th Parl, 1st Sess.

Thomas Ross, "The Dust Has Settled (For Now): Reviewing the Recent Amendments to the Canadian Competition Act" (19 November 2024), online: <pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act>.