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

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[*] With thanks to Shaniel Lewis and Maxwell Musgrove for proofreading assistance.

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I. Overview – What are we trying to do?

With apologies to Burt Bacharach and Hal David, the title of our note is intended to highlight the importance of clearly understanding the goals of competition law and policy and knowing what is sought to be achieved – particularly when considering statutory amendments to a framework statute that is generally acknowledged to have worked well. We confess that, to us at least, the goals of the potential amendments to the *Competition Act* explored in the Discussion Paper *The Future of Competition Policy in Canada*[1] (the "Discussion Paper") are not clear, or clearly articulated. Indeed, it is not entirely clear that that question has been asked in any disciplined way.

As it is trite to observe, achieving a goal first involves determining what exactly the goal is. The authors of the Discussion Paper know this. They note "The fundamental question may be: what is competition law for?"[2] They go on to say that while some may wish to debate the purpose clause in the *Competition Act*, "for ease of discussion, this paper assumes that the objectives of the *Competition Act* have for the most part not changed, and focuses on how the substantive provisions of the law could be improved to better achieve them."[3] However in fact, a review of the Discussion Paper reveals that it focuses on a host of

[*] With thanks to Shaniel Lewis and Maxwell Musgrove, for comments and proofreading assistance.

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

[2] Ibid.

[3] Discussion Paper, *supra*, note 1, at 12.

possible changes that would fundamentally alter what the competition law is for, without articulating these goals, or why such goals are desirable. Below we explore the types of changes contemplated, and offer some thoughts on the advisability of some of the proposals.

II. Impetus for Change

A. Change is All Around

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

By way of justification for possible changes to the *Competition Act,* the Discussion Paper notes, amongst other things, concerns about affordability and the cost of living, market concentration, the emergence of digital giants, and inequality[7], but it does little to tie these

[4] Discussion Paper, s*upra*, note 1, at 4.
[5] Discussion Paper*, supra*, note 1, at 6.
[6] Joshua Krane, Mark Opashinov and William Wu, "Vigorous enforcement, not studies, are what Canada's competition laws need", *National Post* (13 April 2021, online: <https://nationalpost.com/opinion/opinion-vigorous-enforcement-not-studies-are-what-canadas-competition-laws-need >.) The authors note that studies under the previous statute "led to multi-year investigations into industries perceived to be the giants of the day — most famously the petroleum inquiry — but produced few economically positive outcomes.
[7] Discussion Paper, *supra*, note 1, at 4.

problems, to the extent that they are true problems, with the need for reform to the *Competition Act*. For instance, no thoughtful analysis suggests that the inflationary pressures which Canada, and much of the world, is experiencing are a result of antitrust issues. Nor growing economic inequality – and indeed the evidence (not examined in this paper) suggests that Canada, as opposed to some other societies, is not experiencing meaningfully increased economic inequality. Nor indeed is there conclusive evidence for increased market concentration. There has been a rise in large digital firms, lots of entry, much change, innovation and disruption, but no clear evidence of any antitrust problem if we define antitrust problems as we traditionally have – as related to consumer welfare.

B. *Lose a Case, Amend the Act*

I once proposed a paper with the above slightly impertinent title, but lost my nerve before publishing it. We have now downgraded the joke to a sub-heading, but title or no, there is some truth in the observation that, over the years, the *Competition Act* seems to have been amended from time to time in response to Competition Bureau litigation defeats, and the current amendment efforts may, in part, have similar inspiration.

It is hard to avoid noticing that the Competition Bureau has experienced some losses in litigation over the past few years – particularly in areas of the *Act* on which the Discussion Paper concentrates. Below we explore a small historic sample of litigation-motivated amendments to the *Competition Act*, which have at best a mixed record.

The classic example of litigation-inspired amendment may have been the Bureau's defeat in the *Freight Forwarders* case.[8] That litigation outcome was followed by a paper prepared by a senior bureau official advocating change[9], which ultimately resulted in the 2009/2010

[8] *R v Clarke Transport (1995),* 130 D.L.R. 4th 500, 64 C.P.R. (3d) 289 (Ont. Ct. Gen. Div.) [*Freight Forwarders*]
[9] Harry Chandler and Robert Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act" (remarks before the Roundtable on Competition Act Amendments, May 25, 2000).

amendment to create a *per se* cartel offence.[10] That may be the most significant such example, but there are a number of more discreet, smaller examples as well.

In the case of *R. v Rowe*[11] the defendants moved successfully to quash a bid-rigging charge, on the basis that they agreed to withdraw a bid, which was not a defined offence under Section 47 of the *Act* at that time. Subsequently Section 47 was amended to specifically add, as prohibited conduct, agreeing to withdraw a bid or tender. [12]

In the *Premier Career Management* case[13], the Tribunal in the first instance had determined that misrepresentations made by the respondents were not made "to the public", pursuant to Section 74.01(1)(a) of the *Act*, because they were made in an office which was not open to the public. The Federal Court of Appeal overturned the decision[14], concluding that the representations were made to various members of the public, one at a time. However, between the time of the original decision and the appeal, Section 74.01(1)(a) was amended (as well as the relevant parallel provision in Section 52) to add Section 74.03(4)(c), which provides that in proceedings under Section 74.01 (and 74.02) it is "not necessary to show that the representation was made in a place to which the public has access."[15]

In a somewhat similar situation, a firm was charged with making false or misleading representations to the public by way of "scam" lottery promotions. The representations were all made to persons outside of Canada. The Ontario Superior Court Judge acquitted[16] on the basis that the term "representation to the public" in Section 52(1) meant representation to the public in Canada. The Ontario Court of Appeal found[17] that the "public" was not restricted to the public in Canada. However, again, an amendment was made March 12,

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[10] Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd session, 40th Parl, 2009 (as passed by the House of Commons 12 March 2009) [Bill C-10].
[11] *R. v Rowe*, 2003 CarswellOnt 5961, 29 C.P.R. (4th) 525 [Rowe].
[12] *Competition Act*, RSC 1985, c C-34 s. 47 as amended by *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures.*
[13] *Canada (Commissioner of Competition) v Premier Career Management Group Corp.*, 2008 Comp. Trib. 18.
[14] *Canada (Commissioner of Competition) v Premier Career Management Group Corp.*, 2009 FCA 295.
[15] *Competition Act*, RSC 1985, c C-34, s 74.03(4)(c).
[16] *R. v Stucky*, 2006 CarswellOnt 7827, [2006] O.J. No. 4933 at para 66.
[17] *R. v Stucky*, 2009 ONCA 151.

2009 to add Section 52(1.1) (b)[18] which provides that the persons to whom the representation is made need not be in Canada.

In an early skirmish in the *Petro Canada/Superior Propane* case[19], (which is famous for its consideration, later in the proceedings, of the efficiencies defence) the Bureau sought an injunction to prevent closing of the transaction. The Bureau failed on the basis that the relevant injunction standard in Section 100, as it then existed, required the Commissioner to show that the merger was likely to prevent or lessen competition substantially. After that defeat, the government amended Section 100 to remove the requirement that the Commissioner must demonstrate a likely substantial prevention or lessening of competition, replacing it with a requirement that the Commissioner certify that more time is required to asses the transaction.[20]

More recently, of course, the injunction powers under Section 104 (which applies after a proceeding challenging the transaction has been filed – in contrast to the Section 100 injunction, which is relevant before a Section 92 challenge is commenced), has received attention in the *Secure/Tervita* merger.[21] The Commissioner sought to enjoin closing of the transaction, on an "interim interim" basis, pending the hearing of the full injunction proceeding. The Tribunal concluded it did not have the power under Section 104 to grant such "interim interim" relief. That defeat seems to have provoked the Commissioner to seek additional injunctive power.[22]

On appeal[23] in *Tervita,* the Federal Court of Appeal determined that the Tribunal did in fact have the power to grant interim interim relief.

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[18] *Competition Act*, RSC 1985, c C-34, ss 52(1.1)(b) and 74.03(4)(b).
[19] *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2000 Comp. Trib. 15 reversed in *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2001 FCA 104 [Superior Propane].
[20] *Competition Act*, RSC 1985, c C-34, s 100.
[21] *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4 [Secure/Tervita].
[22] Competition Bureau, "Examining the Canadian Competition Act in the Digital Era", Submission, (2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era>.
[23] *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 FCA 25 [Secure Appeal].

These examples suggest that from time to time, when the Commissioner has experienced a litigation setback, one response has been to seek to amend the *Act*. A litigant which can also amend the law enjoys some real advantages – at least the next time they litigate. That is one reason why it's Good to be the King. However, while the desire to "fix" a problem – and losing a case generally looks to a litigant to be a problem in need of fixing – not every defeat for the Competition Bureau is a problem. If that were so, it would mean that the Bureau only takes uncontroversial cases – or always picks its fights wisely. On the other hand, while every litigation defeat does not necessitate statutory amendment, that does not mean that one should never amend the *Act* when an issue is discovered in litigation – but caution is appropriate, and one should not be too hasty. Even if decisions are wrong – and of course, many are not – court-created problems can rectify themselves – sometimes on appeal in the very case, as we have seen, and sometimes in subsequent cases.

To take a significant example, the finding in *Canada Pipe*[24] that anti-competitive acts have to be aimed at a competitor, was effectively "remedied" in the TREB[25] case, where the Tribunal and Court of Appeal said that it was sufficient if the conduct was aimed at any competitor in the marketplace – effectively reading out substantive meaning from the word "competitor". Arguably, then, the judicially created "problem" was judicially corrected, and the 2022 amendment to add reference to "injury to competition"[26] was unnecessary because of the change to the test effected judicially in TREB.

Those points are not to deny that sometimes cases do illustrate true statutory problems – such as the *Rowe* case[27], which determined that an agreement to withdraw a bid was not caught by the bid-rigging provision. An amendment closed that loophole – appropriately in our view.

[24] *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233 at para 284 [Canada Pipe].
[25] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2013 Comp. Trib. 9 reversed in *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29 [TREB].
[26] Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st session, 44th Parl, 2022 (as passed by the House of Commons 9 June 2022) [Bill C-19].
[27] Rowe, *supra*, note 11.

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

It is understandable that the government does not like to lose a case and indeed quite natural that when the government does lose a case, it (at least the individuals/agency involved) believes that the decision is wrong/unjustified – especially in the short term. That is perfectly natural, but it may not be the best basis for statutory amendment. It is appropriate for the Commissioner of Competition to take cases which may or may not be successful – and appropriate for the Tribunal/Courts to sometimes find for the Commissioner and sometimes find against her. There is nothing about losing a case that suggests that there is anything wrong, in the abstract.

Finally, on a related topic, in June of 2022, less than a year ago, significant amendments were made to a variety of provisions of the *Competition Act*.[28] Some of those amendments have not yet even come into force. Like with taking time for judicial decisions to play out, it may make sense to let those amendments play out, before significant new changes are added.

[28] *Competition Act,* RSC 1985, c C-34, as amended by *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures.*

III. The Nature of the Proposed Amendments

Having turned our attention, briefly, to some of the drivers of the current statutory review, and having suggested that the reasons for change may not be as rigorously articulated or as robust as one might hope, we next note that while the Discussion Paper avoids proposing specific statutory amendments, the thrust of the changes which it discusses are all in one direction – to lower the tests and hurdles for showing a *Competition Act* violation, give the government/Competition Bureau more remedies, to give private plaintiffs more powers; in short, to lower the bar for enforcement action generally. This is the same thrust as the 2022 amendments, just passed.[29] All of this suggests that the authors of the Discussion Paper believe, again in our view without demonstration, that the errors and problems are all of one kind – too little enforcement. And, that "tougher" laws are the answer.

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

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

[29] Bill C-19, *supra*, note 26.

a specific example from a recent case, if the Vancouver Airport Authority (VAA) had lost its Abuse of Dominance case[30], and been prohibited from restricting the number of catering companies operating at the airport, we should not worry, primarily, about the catering market at the Vancouver Airport, or even about the fate of the Airport. That is even though, as the Tribunal found, the challenged policy protected a legitimate business interest in making the Airport more attractive, so a decision against VAA would have been an error that injured both it and the economy. But, what we should really worry about is how such a decision would affect the approach of thousands of other entirely unrelated businesses which would, as a result of that decision, look over their shoulders and worry whether they had the right to decide how many suppliers of a particular service they want to deal with. And would, as a result, make sub-optimal, inefficient, decisions. That is, as you ramp up aggressive enforcement, lower the barriers to finding conduct anti-competitive, and increase the penalties/consequences for firms found to have violated the *Act*, you ramp up the risk of Type One error in the particular case. Much more problematically, you increase the risk of businesses pulling their competitive punches for fear of facing litigation and themselves being the victims of such errors.

IV. Some Specific Comments

Having set the stage, and articulated a basis for some caution in upending settled principles, we turn to specific areas of possible amendment. The Discussion Paper outlines a very significant set of possible changes to the *Competition Act* – of greater or lesser importance, and with respect to which our views as to the wisdom of the proposed changes are more or less significant. All of which is to say – much to the relief of the reader – that we have chosen to comment on some but not all of the proposed changes, and comment to a greater or lesser extent on those to which we do turn our attention. We note that while these

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

changes will affect all kinds of businesses, the amendments may disproportionately impact the technology sector, firms engaged in collaborative or networked industries, firms with a significant market share and firms that find themselves in the political or public opinion cross-hairs from time to time.

A. Mergers – Some Thorny Issues

(i) Nascent Firm Mergers – Lower Review Standard

One of the most difficult issues that the Discussion Paper addresses, and indeed one of the most difficult issues in competition law, is the challenge posed by the acquisition of nascent potential competitors. Those who see this as a problem generally characterize it as a killer acquisition/strangle in the cradle strategy, employed by large firms against those which they think may grow into a threat – particularly the tech sector.[31] It is indeed a difficult issue, as the Discussion Paper recognizes.[32] There are no doubt cases in which an established company does perceive a threat from a new entrant – and consequently buys it up. Sometimes the incumbent firm will have been right – there was a threat, which was eliminated. Sometimes it will have been wrong – there was no real threat. Sometimes (we argue very often) the incumbent firm will be interested in the new entrant not because it is a "threat", but because it has a particular product or technology which is a good fit with the incumbent's offering, and combining them presents an opportunity to improve the offering.[33] Or, again, the incumbent thinks will be a good fit, but the combination fails.

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[31] The Discussion Paper notes that the strategy of strangling threats in the cradle is not unique to the digital economy (Page 21). We agree that it is an age-old strategy (see Exodus 2:1-10; Matthew 2:16-18) but, as explained here, comes with age-old challenges as well. Moses was indeed a threat to Pharaoh; Christ turned out to be in an entirely different market than Herod; and neither Moses nor Christ were successfully identified.

[32] See for instance Antitrust Chronicle, May Spring 2020, Volume 2(2) "Killer Acquisitions". See also Jonathan Jacobson and Christopher Mcfarrige, "Acquisitions of Nascent Competitors", The Antitrust Source, August 2020.

[33] "Nascent Competitor" acquisitions tend to add useful new features to products consumers already, eliminating little or no current competitor, supply the acquired firm's users with far greater support and innovation, and provide a valuable exist ramp for investors, encouraging further investment in innovation", Jacobson and Mcfarrige supra note 32, at 1.

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

Even retrospectively, identifying a competitive threat is difficult. The acquisitions of WhatsApp, Instagram and YouTube by Facebook and Google are often cited as examples of failed antitrust merger policy[34], but even the success those firms have achieved, post acquisition, does not really tell us much from an antitrust perspective. How well would they have done without the capital, expertise and synergies of Facebook and Google? We just do not know. Even if they had done well as stand-alone firms, would they have developed into meaningful rivals to their acquirer, or simply other firms with different offerings? These are very hard questions to understand, even after the fact, and the further after the fact, the harder it is.[35]

In addition, while these transactions and one or two others are regularly mentioned as illustrating the nascent firm problem, hundreds and hundreds of small firms have been acquired by tech giants over the last ten or fifteen years. Based on the kind of precautionary principle articulated in the Discussion Paper – an "appreciable risk"[36] – there would be wholesale intervention, with no justiciable standards. That is because there is always a risk, and when the buyer is big and powerful, the risk can always be said to be "appreciable." The very argument that the target firm is so small/young that it is impossible to know if it will ever offer a competitive threat – so no intervention is justified – gets

[34] See Jacobson and Mcfarrige supra note 32.

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

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

turned on its head. You cannot know whether there is a competitive threat or not, so there is a risk. And if the acquirer is a giant, with an existing strong market position, then it is easy to assert that if the nascent firm were otherwise to develop into a rival, the injury to competition from the merger would be very large. It becomes an allegation which is impossible to disprove. As a result, no doubt some transactions that would otherwise lead to harm would be blocked, but it is likely that many many more which are benign will also be prohibited. And, as the Discussion Paper notes, the ability to sell is often the impetus for start-up firms in the first place, or provides the capital necessary to come effectively to market.[37] So, without that market, the firm might never have existed at all.

In other words, the risks run two ways – and the stakes are not trivial. Our intuition is that lowering the test for intervention in mergers below a likely substantial lessening of competition standard will do more harm than good. It will take away incentives for new firms to form in the first place, and it will prevent many efficiency enhancing, consumer benefiting integrations and product improvements. Few if any problematic mergers will be enjoined.[38] Others may have a different intuition – that such a change will prevent significant competition reducing killer acquisitions. But a decision of this importance – since it has very significant implications for innovation and consumer welfare – should probably not be left to intuition.

The digital revolution, since it is the technology sector in respect of which the issue of *killer acquisitions* is raised most frequently, has been highly economically beneficial to Canadians and indeed the world, and has served to lower barriers to entry in many cases.[39] It could presumably have been marginally more beneficial if antitrust law had been able to

[37] See also Jacobson and Mcfarrige supra note 32, "Such acquisitions provide a valuable exit ramp for investors, encouraging future investment in innovation".
[38] See Jacobson and Mcfarrige supra note 32 "Consumer harm is at best speculative. And most importantly critics have identified no instance in which meaningful competition has been lost or consumers heard", p.1. See also David Emanuelson and Danielle Drory, "The Potential Chilling Effects of Lowering Standards for Tech M&A Enforcement (2020), 34:2 Antitrust 14.

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

distinguish those nascent competitors which should not be acquired, from the many others that should have been. But caution is warranted before we implement changes that could undermine the output of this golden goose. We should avoid changes which put at risk a stunningly successful and beneficial business model. Indeed, if a precautionary principle is relevant at all[40] it is with respect to statutory changes that may undermine a successful pro-competitive model, which has delivered huge consumer benefits. Consequently, given the strength and resiliency of the economy, including its ability to self-correct market power problems[41], we propose the Antitrust Hippocratic Oath: First, Do No Harm.

(ii) Limitation Periods

A second issue explored in the Discussion Paper is whether the one year limitation period to challenge completed mergers should be extended – for transactions generally or for those which have not been subject to notification or pre-closing review. In 2009 the limitation period was decreased from three years to one year, and at the same time a new mechanism to obtain large volumes of information from merging parties through the Supplementary Information Request process was put in place.[42] One was seen as a trade-off against the other.

In cases where there has been notification, mandatory or voluntarily, we see no need to disrupt the one-year limitation period. One year is sufficient time to determine if a transaction merits challenge. Challenges more than a year after closing pose very significant information problems, and create uncertainty and disincentives to investment. The issues

[40] See Joshua Krane and James Musgrove, "The Dangers of Precautionary Principle Challenges to Nascent Mergers", (24 February 2022) C.D. Howe Intelligence Memo.

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

[42] *Competition Act*, RSC 1985, c C-34, s 92 as amended by *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*.

were explored recently by the American Bar Association Antitrust Law Section.[43] There the ABA noted:

> Given the absence of a bar to delayed merger challenges in the United States, the question is how long after consummation should plaintiffs (whether government or private parties) be allowed to challenge a transaction and on what grounds? In addition to questions of fairness (to the parties and other stakeholders, such as employees), there are also questions of efficiency. Never ending uncertainty may deter welfare enhancing transactions from occurring. And post-consummation entities may delay or temper significant and beneficial investment if the threat of a post-consummation challenge looms indefinitely.[44]
>
> Practical difficulties proving competitive harm will increase as time passes. When using a standard of what was foreseeable at the time of the merger, the ability, many years later, to reconstruct from what was known, then, and determine the foreseeability of future events will inevitably be a fraught exercise. Further, there are difficulties in determining whether alleged harm flows from the merger or other exogenous post-consummation market forces. For example, years later, assets acquired in a past merger may be important to a firm's current market power. But it is difficult to determine whether it was the merger, technological developments, competitor exits, or other factors that caused the increase in market power (i.e., the but for world). Only rarely will acquired assets, independent of subsequent events, lead to competitive problems years after consummation. Punishing mergers based on post-consummation changes in the market (like technological developments or competitor exit) imposes no-fault liability on merged entities.

[43] ABA Report, *supra*, note 35.

[44] See Menesh Patel, "Merger Breakups" (2020) Wis L Review 975 at 44-45, cited in ABA Report, *supra*, note 35 at 11.

> Finally, successfully implementing post-consummation remedies can be challenging. Remedies many years later are all the more difficult to implement. The constituent businesses of the merged firm may often be so integrated that practically no divestiture can be made which could survive independently and replace lost competition.[45] It may not even be possible to divest an asset to another operating business which could result in an effective competitive rival. Even if a remedy is possible, its costs may exceed the benefits to be achieved.[46]

This issue has also been canvassed by a number of thoughtful U.S. antitrust scholars.[47]

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

(iii) Notification Thresholds

The Discussion Paper suggests a reduction to the notification thresholds, and particularly the size of the parties threshold. The size of parties threshold has been consistent from

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[45] See Menesh Patel, "Merger Breakups" (2020) Wis L Review 975 at 16, cited in ABA Report, *supra*, note 35 at 11.

[46] *Ibid*.

[47] See, Timothy J. Muris & Jonathan E. Nuechterlein, "First Principles for Review of Long-Consummated Mergers" (2020) 5 Criterion: J. Innovation 29 (arguing that post-consummation developments not foreseeable at the time of the transaction may not be used to challenge consummated mergers), *see also* Donald F. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act", (1965) 78 Har. L. Rev 1313, 1347 & n. 53 (discussing concerns about the relevance of post-acquisition evidence); Robert Pitofsky, "Proposals for Revised United States Merger Enforcement in a Global Economy", (1992) 81 Geo. L.J. 195, 223-24 (discussing problems with post-merger evidence as a basis for illegality), Philip E. Areeda & Herbert Hovenkamp, Antitrust Law 1205 at 267-70 (4th ed. 2014) (discussing the use and interpretation of post-consummation evidence in detail).

1986[48], so has in practice has become very significantly reduced. Especially if non-notifiable mergers return to a three-year limitation period, we see no compelling case for reducing notification thresholds. We further note that the adjustment to the size of transaction threshold in line with GDP growth, which has recently been paused, should resume.

(iv) Interim Relief

As noted above, the Discussion Paper suggests that there may be a need for greater injunctive powers to prevent closing of potentially problematic transactions. We observed above that this suggestion seems to have been inspired by the failure to obtain an "interim interim" injunction in the *Secure/Trevita*[49] transaction. However the Court on appeal confirmed that the Tribunal does have the power to grant such injunctions[50], so the immediate issue may have been overtaken by events.

Leaving aside the case specifics, we do think that a set of mechanisms which appropriately balance the merging parties' need to close transactions in a timely way with the Bureau's need to have the ability to enjoin problematic transactions, and ideally, which also minimize procedural battles, would be advantageous. We are disinclined to favour a more robust injunction power since, as noted, significant injunctive powers exist already, and because injunctive battles will result in time and energy being invested in interlocutory proceedings. The inevitable result of these battles is that both the Bureau and the merging parties are forced to focus their attention on the injunction, rather than the substantive issues. However, we think that the recent *Rogers/Shaw* transaction[51], which moved from case filing to decision in less than eight months, and to appeal in an additional month, may suggest a model. If the Commissioner commits to a hearing (and the Tribunal to a decision) within an

[48] Competition Act supra note 12 at s. 109(1)(a).

[49] Secure Tribunal, *supra*, note 21.

[50] Secure Appeal, *supra,* note 23.

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

eight or nine month timeline, then the trade-off may be an automatic injunction to prevent closing for the nine months. If the Bureau does not commit to that timeline, then the parties should be free to close at their own risk. This approach would have the advantage of getting a resolution to mergers on a timeline that at least many transactions may be able to withstand, while giving the Bureau a fair opportunity to have its case heard on the merits, pre-closing. This approach avoids the significant costs, distraction and delay associated with injunction fights. We will have a bit more to say about timing issues and procedures below.

(v) Efficiencies Defence

Much has been written, by many, about the efficiencies defence and its appropriateness, even a little bit by us.[52] We are unlikely to add much of value, so will be brief. It is certainly true that the drafters of the *Competition Act* sought, as a fundamental goal of the "new" *Competition Act*, to achieve an efficient economy[53], and as recognized in the case law, efficiency was to be a trump factor in merger review when it could be demonstrated.[54] As the drafters of the new *Act* liked to boast, and as detractors of the efficiencies defence now repeat endlessly as a criticism, Canada is unique or largely unique in its mergers efficiencies defence. We are not sure, however, why this uniqueness should be denigrated. It might just as well be seen as a matter for some pride. The underlying logic remains, to us, compelling.

Statistically, the efficiencies defence is not such a big deal. Of the 8,000 or so notifiable mergers since the *Competition Act* was enacted the efficiencies defence has been known to make a difference in only a handful of cases – so in a sense it is largely a symbolic

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[52] James Musgrove and Janine MacNeil, "Section 96 of the *Competition Act*: A Brief history" (Presentation to the Canadian Corporate Council Association National Spring Conference, 27-29 April 2003) [unpublished].

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

[54] Superior Propane, *supra,* note 19.

question.[55] With or without an efficiencies defence, very few mergers will be approved on that basis. But it seems to us to be an important symbol, in that economic efficiency is an important goal of the *Competition Act*. Section 96 is the poster child for the *Act's* concerns about efficiency. If the efficiencies defence is removed, then the importance of economic efficiency within the *Act* generally – and arguably its importance as a government policy – will be undermined. Making efficiencies a "factor" in merger analysis would make it essentially unjusticiable.

Opponents of the defence also raise concerns with its use in respect to purely domestic mergers[56] – but this criticism we think is misguided. One result of making firms more efficient is that they can compete with international rivals, but another much more important result is that the Canadian economy uses its resources more efficiently. The goal was to improve the overall efficiency of the Canadian economy – whether for export or domestic consumption. Only efficiencies achieved in Canada "count" as cognizable efficiencies – so this objection is not well founded in our view.

While we do favour retention of the efficiencies defence, we also think that the requirement to quantify efficiencies, which the court articulated in *Tervita*[57], may go too far. It makes sense as a litigant wishing to advance a strong case to quantify what can be quantified, but failing to quantify matters should not represent an absolute bar to consideration of quantitative evidence.

(vi) Impact on Workers/Labour Markets

Finally, we note that the Discussion Paper raises the question as to whether merger analysis should give special consideration to labour issues. We note, as a first point, that the

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

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

[57] *Tervita Corp. v. Canada (Commissioner of Competition),* 2015 SCC 3 at para 12s 123-126

Bureau's enforcement of the merger provisions has always considered monopsony power in relevant cases[58] – even when there is no output effect. In our view, a wealth transfer without output effects is not a substantial lessening of competition, and so in our view the Bureau's approach in this regard is in error – but the Bureau's current approach to enforcement under the *Act* as it stands does in fact consider monopsony issues and therefore the market for purchase of inputs, including labour. So, that does not necessitate a statutory amendment.

More fundamentally, we think there is considerable danger in seeking to address goals beyond competitive issues in a competition law regime. It is difficult enough to get the competitive issues right, without mixing in unrelated goals. If we seek to protect labour and employment, why not the environment, equity and diversity, health and safety, truth and reconciliation – the possible list is virtually endless. The Commissioner of Competition and Tribunal do not have the expertise[59], and the approach risks – indeed it guarantees – confusing the focus of any analysis. As Lawson Hunter[60] has pointed out, either you have a statute focused on a judicially determinable issue, which requires a tight focus, or you have a broad policy decision – a "net benefit" test for all transactions, not just foreign acquisitions. That is inevitably a political decision, as it is in the *Investment Canada Act*. [61]

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

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

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

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

B. *Unilateral Conduct*

(i) Tech – This Time Its Different

The second big area on which the Discussion Paper focuses is possible amendments to the Unilateral Conduct provisions of the *Act*, inspired by, as the Discussion Paper puts it, "[t]he rise of Big Tech."[62] But the *Act* is one of general application, and applies to tech just like it does to banking, construction, manufacturing, natural resources industries or anything else.[63] As recently as 2017, the Competition Bureau concluded in its "Big Data" discussion paper that Canada's Abuse of Dominance laws were up to the task of tech.[64] Like considerations involving tech, consideration of network effects and two sided markets are not new to the *Act*.[65] Therefore, as a starting point, our view is that the Abuse of Dominance provisions are sufficiently flexible to address conduct by Digital Giants, as they do the conduct of other powerful economic actors. As we explained at some length recently:

> The primary question which this Article asks is whether, given widespread concern about digital platforms and broad reconsideration of approaches to competition law worldwide, are Canada's abuse of dominance provisions able to adequately address anticompetitive market conduct, particularly related to

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

[63] Discussion Paper, *supra*, note 1, at 31.

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

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

> digital platforms and gatekeeping issues? The answer we offer is a largely unqualified "yes".[66]

We gave that answer last year, and we give it again now. In that paper we explored the historical success of the *Competition Act* in addressing such "current" issues as gatekeepers, access to data and self-preferencing, in cases such as *Interac*[67], *Neilsen*[68], *Tele-Direct*[69], *TREB*[70] and *VAA*[71] amongst others. We noted that the *Act* was, as the Competition Bureau itself had recently concluded, "fit for purpose".

(ii) Intent to Injure Competition/Innovation

The Discussion Paper articulates the importance of protecting innovation as an aspect of competition, and notes that the requirement for an intended negative effect on a competitor in order to demonstrate a practice of anti-competitive acts was too narrow a focus. It acknowledges that both the *TREB* case [72], and the 2022 amendments to the *Act*[73] broadened the interpretation of anti-competitive acts defined in the *Canada Pipe*[74] case as those with an intended negative effect on competition. Nevertheless, and despite this significant change, the Discussion Paper asserts that the Abuse of Dominance provision has "very narrow" application and advocates that a broader, less specific test be employed.[75] We do not agree, nor are we persuaded that "this provision may become more problematic

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[66] Musgrove et. al. *supra* note 65 at 52.

[67] *Director of Investigation and Research v Bank of Montreal et al.*, 1995 002 Doc #93a.

[68] *The Director of Investigation and Research v The D&B Companies of Canada Ltd.*, 1994 001 Doc #142a [Nielsen].

[69] *Director of Investigation and Research v Tele-Direct (Publications) Inc.*, 1994 003 Doc #204a.

[70] TREB, *supra,* note 25.

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

[72] TREB, *supra, note 25. .*

[73] Bill C-19, *supra*, note 26.

[74] Canada Pipe, *supra* note 24.

[75] Discussion paper, *supra*, note 1, at 34.

as the economy grows more complex and intertwined."[76] Complexity is not new. Further, as noted above, many of the Abuse of Dominance cases over the years have dealt with complex markets and issues, including data, gatekeepers and two sided markets, amongst others.

Whether particular industries are more complex than others (and as practitioners of competition law know, when you dig into markets, most turn out to have a meaningful level of complexity), that does not change the principles which apply. Further, it is important that the basis upon which conduct may be challenged is clear – particularly as such challenges come with hugely enhanced Administrative Monetary Penalties ("AMPs"), but also because if people don't know the rules it is very hard to abide by them. The vast majority of compliance with competition law, like all law, flows not from enforcement, but from self-regulation. The guidelines for unilateral conduct compliance are already challenging, given the inherent difficulty in distinguishing aggressive competition on the merits from anti-competitive conduct. While we do not favour *per se* rules or presumptions in this area, as they will inevitably stifle pro-competitive aggressive and creative conduct[77] (as discussed further below), nevertheless we favour making the standards as clearly defined as possible. That is a delicate but important balance.

(iii) Preventive Rules/Proactive Enforcement

The Discussion Paper explores the concepts of "preventive" rules[78], and "proactive engagement of competitive alternatives."[79] Whatever those things they are, they are not

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

[77] Bruce Wilson, ""Patent and Know-How License Arrangements: Field of Use, Territorial, Price and Quantity Restrictions" (Speech delivered in Boston, 6 November 1970) [unpublished]. The list of nine potentially offending technology licensing practices was first outlined here. The nine practices were regarded, during the 1970s, as effectively *per se* prohibited, yet as economic thinking developed none are now regarded as deserving of *per se* condemnation, and indeed most are presumptively lawful.

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

[79] Discussion Paper, *supra*, note 1, at 35.

competition law as we have understood it in Canada. Some industries are subject to specific regulatory regimes. That may be appropriate in some cases, but that is an industry specific regulatory regime – not competition law. We have been moving away from regulation where we can for the last 30+ years, given the recognition of the benefits of competitive markets. Likewise with promoting specific firms or industries. The promotion of competitors, as opposed to establishing marketplace rules which allow for competition, has generally not been a successful approach to strengthening the economy or increasing consumer welfare. Promoting new competitors may, sometimes, make sense as industrial policy (although we note a significant lack of success by most governments in this area) but that is not competition law.

There is, or used to be, a consensus that the best outcomes for the economy are likely to flow from the "free market." Establishing general framework rules and then letting the genius of the marketplace operate. If that basic set of assumptions favouring the market and free enterprise is being challenged as a bedrock assumption underlying our approach to competition law, and to the economy more generally (as perhaps in some quarters it is), then the challenge should be articulated directly, rather than trying to hem in the most dynamic parts of our economy with "antitrust" rules, which are in reality disguised government regulation and industrial policy.

(iv) Joint Dominance

The Discussion Paper explores the concept of joint dominance – that is, conduct by a number of firms none of which alone enjoys significant market power. It raises the question as to what degree of "jointness" is necessary for firms to be jointly dominant, absent an express agreement to act together. We agree that the question of what degree of "jointness" is necessary for joint dominance is complex, and would benefit from clarity. [80]

[80] *R v Canada General Electric Co.*, 1976 CarswellOnt 449.

The Discussion Paper, however, does not offer such clarity. The issue is genuinely difficult, so while we agreed that clarity would be beneficial, merely saying this does not much advance the discussion. There is no obvious easy fix.

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

There is also, as we noted, the issue of remedy. Firms without significant market share/market power, acting alone, without agreement with other firms, and particularly firms that do not have knowledge that they are regarded as jointly dominant, may be appropriately subject to cease and desist orders (depending on being able to define conduct from which they should desist) but other remedies, including AMPs, seem inappropriate.

(v) Substantial Lessening of Competition

The Discussion Paper states that "the requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, a substantial lessening or prevention of competition may be unduly strict."[81] Why? If there is no injury to competition (subject to determining what "substantial" is), why on earth would we intervene? The Discussion Paper refers to the European approach to dominance, which is alleged to focus on conduct with less attention to harm. First of all, this is a simplistic view of European competition law[82], which has moved toward a greater focus on harm and potential harm.

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

[82] See Eleanor M. Fox, "Monopolization and Abuse of Dominance: Why Europe is Different" (2014) 59 Antitrust Bull. 1; "Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance

More fundamentally, *per se* prohibition of reviewable practices would entirely upend Canadian competition law, which (along with competition law in Europe, the U.S. and worldwide) has for decades been moving away from *per se* prohibition except for of hard-core conduct. The nine no-nos mentioned above at footnote 77 being an excellent example.

To take a frequently discussed "problem" in the tech sector, self-preferencing, a *per se* prohibition would prevent huge numbers of efficiency enhancing, consumer friendly product offerings. This is of course the key problem with *per se* rules – except in the very clearest, least ambiguous cases they prohibit conduct which is frequently pro-competitive, and as a result tend to injure consumers and the economy. Further, if the *per se* prohibited matters are not defined with great precision – there appears to be no effort to do so in the Discussion Paper, and of course it is very difficult to do in legislation as well – firms will be subject to *per se* prohibition respecting conduct of which they cannot know the precise boundaries, which would not only be inefficient, it would be fundamentally unfair.

This simply cannot be the intended outcome – or if it is, Canadians will end up considerably poorer and with a less innovative economy. It would be a back to the future move, to a time when the economy was significantly less dynamic and innovative.

(vi) Other Restraints of Trade

The Discussion Paper notes that many of the reviewable practices found in sections 75, 76, 77, 80 and 81 are subsets of Abuse of Dominance, although with slightly different tests. We agree, and join the Discussion Paper in asking the question as to whether those specific provisions – some of them rarely or never used – serve a useful purpose. Indeed the provision which has most frequently been the basis of Tribunal proceedings – the Refusal to Deal provision, Section 75 – focuses primarily on injury to competitors rather than to

Standards", report of the ABA Antitrust Law Section, September 2019 (the ABA Report), online: <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf>

competition, and deals with issues more appropriately addressed as a matter of contract. We think that this provision, and indeed all of Sections 75-77, 80 and 81, could be repealed with no loss to economic or enforcement efficiency, and with the additional benefit of considerably less complexity in the legislation.

However, the Discussion Paper also asks whether some of these reviewable practices could be "repositioned" to provide for "fair" competition. We suggest that this idea is fundamentally flawed. "Fairness", like some other hard to define qualities, often lies in the eye of the beholder. It lacks any meaningful, justiciable substance. When fairness is discussed, it tends to refer to the treatment of competitors – a concept which was, rightly in our view, and indeed in the view of the Discussion Paper[83], supplanted in the Abuse of Dominance test.

Competing on the merits can be rough – pretty "unfair" to those who lose the competition. It is conduct that is aggressive, and wins by supplanting – often crushing – less effective, efficient competitors. Indeed especially if competition is very aggressive and delivers consumer benefits, it is likely to drive rivals out – but it is exactly the behaviour we want to encourage if we believe in the benefits of competitive markets.

C. Competitor Collaborations

(i) Need for an Agreement

A fundamental tenet of Canadian competition law has been that for a conspiracy there is a need for an agreement – a meeting of the minds.[84] The economists tell us that in certain

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

[84] *Atlantic Sugar Refineries Co. v Canada (Attorney General)*, [1980] 2 SCR 644, *Pioneer Corp. v Godfrey*, 2019 SCC 42 at para. 190 (Côté J. dissenting, but not on this point). See also *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para 98; *R. v Proulx* 2016, QCCA 1425 at para. 32; *R. v Canada Cement Lafarge* (1973), 12 C.P.R. (2) 12, 1973 CarswellOnt 1031 at para. 5 (Prov. Ct.); *R. v Cominco* (1980), 46 C.P.R. (2d) 154, 1980 CarswellAlta 461 at para.34 (Sup. Ct.). The issue of the legality of conscious parallelism was addressed in the Canadian Competition Bureau's discussion paper "Big Data and Innovations Key Themes for Competition Policy in Canada" (February 19, 2008), online: <https://www.competition bureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html> at 9-10. See also, *Tenser et al v Samsung et al.,* 2021 FC 1185.

oligopoly market situations, injury to competition similar to that which flows from competitor agreements (although generally less certain or prolonged) may result from non-collusive conduct – i.e. from firms observing what their competitors do and drawing conclusions as to what course of action would be best. You observe that the market leader is not seeking market share, but raising prices. So you raise prices too. This conduct is called conscious parallelism, and has never been illegal, even though (and this is why economists tend to call it tacit collusion) the result, at least for a time, can be similar to an express cartel. Conscious parallelism is not illegal at least in part because it is unclear what one could possibly outlaw. Observing the market carefully and accurately? Drawing logical conclusions as to a beneficial course of conduct? Deciding, given the observation and conclusions, on the most profitable way to act? Would the remedy be an order to compete irrationally?

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

What about algorithms that learn on their own? Not to agree with one another, but to observe and make logical moves. We do not really understand if that is possible or not, but let's assume that it is. We do not, for the reasons noted, prohibit conscious parallelism by humans. Why should we for computers? And, if we can and do – if we make a law that says

you must, somehow, prohibit your algorithm from drawing logical conclusions from what it observes – we are back to the same problem we have when people do it.

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

(ii) Scope of Civil Enforcement

The Discussion Paper starts its consideration of Section 90.1 by noting, correctly, that section 45 is reasonably tightly circumscribed, focused on "hard-core" cartels, and that because section 90.1 does not "punish" behaviour, but provides only forward looking cease and desist orders, there may be incentives to conduct oneself in ways contrary to section 90.1 until ordered to stop. That is theoretically correct, but before significant effort is invested in "fixing" section 90.1 – by expanding it to allow for punishment for past behaviours, or expanding it beyond agreements between competitors – it may be appropriate to ask, is it needed at all? Indeed, that was a question we asked in 2009[85], noting that the formerly broader criminal conspiracy provision, despite being applicable to a variety of types of agreements beyond hard-core cartels, had only been employed with respect to the type of hard-core cartels that were captured by the amended section 45 anyway. So, we suggested, there was no practical need for section 90.1. That has proven broadly correct – section 90.1 has had very limited application since its enactment.[86]

More fundamentally, picking up on the Discussion Paper's suggestion to simplify the civil provisions of the *Act* other than Abuse of Dominance, and noting the amendment to the

[85] Esther Rossman and James Musgrove, "Canadian Competition Law: The Next 25 Years", CBA 16th Annual Competition Law Fall Conference (24-25 September 2009).
[86] See *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp. Trib. 14; *Rakuten Kobo Inc. v Canada (Commissioner of Competition)*, 2017 FC 382; *Canada (Commissioner of Competition) v Indigo Books & Music Inc.*, 2015 FC 256, *The Commissioner of Competition v. Air Canada*, 2012 CACT 20.

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

(iii) Patent Settlement Notification

The Discussion Paper suggests a notification system for pharmaceutical patent settlements, presumably modelled on the U.S. system in this regard. Subject to ensuring the mechanisms work in the Canadian context, and subject to ensuring appropriate consultation/dialogue with firms that are active in the marketplace to avoid unintended consequences[87], we do not have material concern with a notification system for pharmaceutical patent settlements.

(iv) Buy-Side "Cartels"

The Discussion Paper's suggestion that buy-side agreements be subject to cartel prosecution strikes us as fundamentally flawed. The amendments of a decade ago were expressly designed to eliminate what was seen as over inclusiveness of the pre-existing Section 45, capturing types of agreements that are not hard-core conduct. To re-capture buy-side agreements, and even worse in a *per se* regime, would be grossly over inclusive. It would potentially criminalize virtually all agreements between competitors – buying or selling – which is especially broad when one recalls that on the buy side, "competitors" can

[87] These settlements are generally between generic and branded firms, and provide for generic entry. The last thing we would wish to do is inadvertently discourage settlements which allow entry.

mean those who compete to buy inputs – a very wide set of firms. The Discussion Paper suggests there may be a need in such circumstances to craft appropriate defences – but we know the difficulty and ambiguity which surrounds the Section 45(4) defence now. This proposal strikes us as, to use a technical legal term – crazy – and crazier still because such agreements would be subject to class action damages claims, as well as prosecution.

As reflected above, agreements other than hard-core cartels involving market power, and which injure competition, can be subject to review, and possibly to harsh penalties, under the Abuse of Dominance provision. Re-criminalizing virtually any competitor agreement, in addition to turning its back on the rationale for amendments of a decade ago, is, in our view, absolutely nonsensical.

(v) Section 49

Finally, an amendment not suggested in the Discussion Paper – but which fits with the theme of simplifying the *Act* – is a suggestion to repeal Section 49. Section 49 applies with respect to certain specific agreements among Federal Financial Institutions. It has its origins as a provision of the *Bank Act*, although it has now been expanded to insurance companies and other financial institutions. But, its prohibitions read quite oddly with respect to non-banks. Also, with the passage of a *per se* Section 45, Section 49 is redundant and it carries with it rigidity, in that there is no Section 45(4) defence available under Section 49. In addition, it is in a practical sense a dead letter – never having been the subject of a prosecution. Finally, it is unfair, treating like entities non-alike, in that it affects financial institutions differently than all other economic actors, and does not apply to virtually identical financial institutions. For no good reason whatsoever (except its peculiar history and constitutional concerns) it does not apply to provincially incorporated financial institutions.

There is no reason to retain Section 49. A diligent gardener would weed it out.

D. Deceptive Marketing Practices

The Discussion Paper starts its consideration of possible changes to the deceptive marketing practices provision by noting the increased ability of businesses to communicate with consumers and sell products as a result of digital commerce, suggesting that the increased ability gives rise to new areas of concern.[88] We do not see it that way. It appears to us that the increased availability of a plethora of product information to customers, and the ability to compare products with minimal effort, all from the comfort of one's home, has made the market more transparent and allowed consumers to make increasingly informed competitive choices.

The specific areas of concern the Discussion Paper notes – native advertising, influencers, online reviews, fine print disclosure, subscription traps, etc.[89], are not new concerns – indeed, we have written about a frightening number of these over the years.[90] All of them are caught by the *Act* now. Oddly, the Discussion Paper expressly acknowledges this: "the *Act's* deceptive marketing provisions have been interpreted broadly, and apply to all manner of business promotions in Canada, and in this sense are seen as a powerful tool in the digital economy."[91] Despite this acknowledgement, the Discussion Paper asks whether additional rules or enforcement tools, including more specific definitions of types of misleading advertising actions, would be useful. In our view, no. They would create rigidity – the recent drip pricing amendment[92] has already created unanticipated challenges. In

[88] Discussion Paper, *supra*, note 1, at 47.
[89] Discussion Paper, *supra*, note 1, at 47-48.
[90] See amongst, others, James Musgrove and Joshua Chad, "Under the Influence: The Canadian Competition Bureau's Stand on Misleading Product Endorsements", McMillan Advertising and Marketing Bulletin (December 2019); James Musgrove, Joshua Chad and M. Niski, "Astroturfing, Flogging, Endorsements and the Evolving Law in Canada", OBA Advertising and Marketing Law: Social Digital, Online Compliance Conference (21 October 2016); James Musgrove, Dan Edmondstone, Dana Doidge and Calie Adamson, "The Complete Canadian Law of Disclaimers" The Canadian Institute's 18th Annual Advertising and Marketing Law Conference (25-26 January 2012); James Musgrove and David Young, "Old Wine on Line: Is There Really Anything New Under the Advertising Sun?", Canadian Institute Special Internet Summit (June 2000); "Marketing Law in a Borderless World – Developments in Canada and Elsewhere Canadian Bar Association Annual Competition Law Conference (18-19 September 1997).
[91] Discussion Paper, *supra*, note 1, at 47.
[92] Bill C-19, *supra*, note 26.

fact, our view is that a movement to simplify the misleading advertising provisions – which now run to some twelve pages in the statute – is in order. A simple prohibition on materially false or misleading representations, with appropriate guidelines as to how the Bureau would enforce the basic rule, would achieve a better, less rigid result.

E. Proposals regarding Administration and Enforcement

(i) Codes of Conduct

The Discussion Paper commences its consideration of administration and enforcement issues by noting that the *Act* does not allow for the imposition of codes of conduct. That is certainly true, and for good reason – it would transform the Commissioner of Competition from an enforcer – a role all Commissioners have zealously guarded over the years and which the Discussion Paper reflects[93] – to a regulator – of all industries! We have discussed, above, the difference between regulation and competition policy, noting the benefit for consumers of competition over regulation whenever possible. We have sufficient examples to know that the two roles – regulator and enforcer – do not sit well together, and that regulating an industry is difficult – we regularly get it wrong even when the regulator has deep knowledge of the specific industry.

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

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

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

(ii) Interim Measures/Pace of Enforcement

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

There is a lot to be unpacked there – so let us try, briefly, to unpack it, although below we will suggest an option to achieve efficiencies in enforcement without major overhaul of the *Act*. First, with respect to the comparison with the European Commission, that is a comparison to an inquisitorial system. The structure of the Canadian system is fundamentally different. We have an adversarial system, including under the *Competition Act*, which involves both an enforcer and an independent decision maker. Indeed, it was to avoid the difficulty surrounding the role of Judge Judy and Executioner[94] that the Restrictive Trade Practices Commission was replaced almost forty years ago.[95] And, as a practical matter, decisions of the European Commission are pretty darn slow, even though they do employ an inquisitorial model.

[94] With apologies to Matt Groening.
[95] *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.*, [1984] 2 SCR 145.

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

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

(iii) Speed of Proceedings

While we do not think any additional injunctive powers are needed – indeed, we think a focus on injunctions may take focus away from reaching decisions on the merits – we do think the speed with which cases are processed can and should be improved. In the discussion of mergers, above, we note the speed with which the *Rogers/Shaw* merger transaction was decided – nine months.[96] The CITT makes use of a statutory timetable to ensure a timely result. In mergers and advertising cases a nine-month timetable seems reasonable, as long as injunctive relief is not sought since an injunction would add significant overall time to proceedings. In Abuse of Dominance cases, double that – eighteen months – seems possible. We went to trial in *Mastercard/Visa* in less than eighteen months.[97]

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

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

[97] We note the Discussion Paper – at footnote 126 – pegs it at three years. That is wrong – it was less than three years. The case was filed on December 15, 2010, the hearing began May 8, 2012 and the Tribunal reserved for over a year before rendering a judgement July 23, 2013, which was, of course, unacceptably long. So two and a half years, net the year and over a year including the deliberation of the Tribunal. *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated et al,* 2013 Comp. Trib. 10,

(iv) Civil Damages for Abuse

The Discussion Paper suggests that a more "robust" framework for enforcement would allow civil damages claims, including presumably class actions, for reviewable conduct – primarily Abuse of Dominance. As we have explored recently and in detail[98] the genius of the *Competition Act* is to differentiate between conduct which is virtually always harmful – hard-core cartels – and more ambiguous things – typically vertical conduct – which may injure competition, but which may be pro-competitive and efficiency enhancing. For the former, we provide criminal penalties and damages – because we are not worried about chilling pro-competitive conduct. For the latter, we examine the conduct on a case-by-case basis, and the primary remedy is a cease and desist order, because we are concerned about chilling aggressive competition.

Conduct defined by the Act as civilly reviewable, which may injure competition but can also be competitively neutral or pro-competitive/efficiency-enhancing, depending on the circumstances, was originally determined by the *Act's* drafters to be appropriate, subject only to challenge by the government. Civilly reviewable conduct was and is subject to the principal remedy of prohibition/cease and desist orders, rather than penalties or damages, although there has been some modification to that approach since the statute was originally enacted. This structure was established because the ambiguous economic impact of such conduct was seen not to merit condemnation without detailed factual examination, and consequently should not attract challenge by private parties motivated by their own interests. Further, the potential consequences of challenges to civilly reviewable conduct should not be designed to deter such conduct prior to an inquiry into its economic impact.

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

[98] James Musgrove and Janine MacNeil, "Blurred Lines: How Dow Chemical and Royal J & M May Confuse Remedies Under the Competition Act" (2022) 35:1 Can Competition L Review 46.

> The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions…Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects…These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal…can order the conduct to cease.[99]

As we pointed out in our recent paper[100], the clarity of that dichotomy has been eroded somewhat, but still remains broadly correct and appropriate.

> The bifurcation of the *Competition Act*, and of the applicable remedies, was a conscious choice by the statute's drafters.[101] Conduct that is always or almost always economically damaging need not be subject to detailed economic analysis before challenge, nor need there be a concern about chilling such conduct. So neither criminal penalties nor damages actions by those allegedly injured are a concern in that regard. Likewise, there is limited concern that private parties may bring actions strategically, since the criminal conduct is relatively clearly defined, and discouraging such conduct does not damage the economy.

[99] *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para 90
[100] Musgrove and MacNeil, *supra* note 98.
[101] House of Commons Debates, 33-1, vol 10 (5 June 1986) at 14026 (Mr. Bill Dom, Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post. See also Dr. Lawrence A. Skeoch & Bruce C. McDonald, Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs (Canada: Department of Consumer and Corporate Affairs, 1976) at 281-283, 316-333.

> Conversely, if the impact of the conduct is economically ambiguous and often efficient, as is the case with civilly reviewable conduct, and determining the line between reviewable conduct which damages competition and that which does not is tricky (which it often is), then there is legitimate concern about chilling potentially pro-competitive conduct. Consequently, the conduct should be subject to detailed economic examination to ensure that it is not condemned out of hand and there are available remedies designed to avoid over-deterrence of such conduct. In those circumstances, a primary cease and desist order remedy makes sense. As noted, however, Parliament added the possibility of AMPs for abuse of dominance in 2009.[102]
>
> Arguably, the bifurcation of the Canadian *Competition Act* is its genius, in that it allows the government to challenge inherently economically ambiguous conduct in circumstances in which it believes that there is an injury to competition, but it does not allow challenges – at least challenges leading to damages actions – by competitors or other persons in the distribution chain seeking to protect their own economic interests. Consequently, firms are more likely to engage in efficiency-enhancing vertical conduct that may injure competitors or others in the distribution chain than they would be in a regime that allowed such firms to seek damages.[103]

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

[102] Bill C-10 *supra* note 10 at s 428.
[103] Blurred Lines, *supra*, note 98, at 50.

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

(v) Market Studies

Finally, we note that the Discussion Paper proposes that the Bureau obtain compulsory powers to require the provision of evidence to conduct market studies. Well, who are we to complain. Where such studies have been established elsewhere, they have resulted in significant work for counsel. But, self-interest aside, that may not be the best use of resources. As we have argued elsewhere[104], historically market studies have been extensive, expensive exercises with limited positive results. They can be punishing to the companies involved, and there is risk that we will simply round-up the usual suspects for such studies.

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

We agree that the Bureau's role as competition advocate can be important for the Canadian economy. But, contrary to a focus on private actors, we think that the big, low hanging fruit

[104] Joshua Krane and James Musgrove, "Competition Act Changes: Proceed with Caution", C.D. Howe Intelligence Memo (10 May 2021).

to be harvested from competition advocacy has to do with regulatory restrictions on competition. Without doubt, government regulation creates the most significant, long lasting monopoly issues in the economy. Competition advocacy with respect to government actions may help improve things, and should not require additional statutory powers, since the government can cooperate with itself. Since that would be a big payoff, we suggest that advocacy efforts focus on government action.

V. Some Concluding Thoughts

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

If we are not told what it is all about, we have to try to figure it out. We have in Canadian competition law the concept of objective intent. We draw the intent from the reasonably foreseeable consequence of the conduct.[105] The reasonably foreseeable consequence of the vast majority of the amendments contemplated in the Discussion Paper would be to make challenge to conduct easier – easier for the Commissioner and easier for private parties. Easier, and with greater consequence. Whether it is easier to challenge mergers; easier to challenge aggressive competition which injures competitors (but may well benefit consumers); easier to challenge competitor collaborations – including on the "buy" side, the inevitable consequences will be less aggressive competition, a less efficient economy, less innovation, less attractive consumer offerings. People will pull their competitive punches.

The evidence on the face of the Discussion Paper, as we have explored, appears to be that these proposals are not inspired by demonstrable problems with the law. The Commissioner has lost some cases, as Commissioners should, but that is not a problem with the law. Nor, indeed, is there demonstrable problem with the economy – which has literally, never been

[105] See for example *Direction of Investigation and Research v The Nutrasweet Company*, 1989 Doc #176a; Canada Pipe, *supra*, note 24; Nielsen, *supra*, note 68.

better. The rise of new technologies – which seems to represent a particular focus for those proposing competition law changes – has made the lives of Canadians obviously and demonstrably better. Indeed, as the Discussion paper observes: "Digital innovation is transforming Canada's economy and improving Canadians' quality of life enhancing productivity, diversifying the consumer experience, connecting people and opening up new markets."[106]

Rather than a demonstrable problem with the law or the economy, this wholesale proposal to transform Canadian competition law appears to be responding to trends, in Canada and elsewhere. We suggest that that is a poor reason to consider fundamental changes to a law which has served Canada well.

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

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