John Pecman: the GCR exit interview

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After more than three decades of working at the Competition Bureau of Canada as an economist, John Pecman stepped down last week as the Commissioner of Competition. He spoke with Pallavi Guniganti alongside McMillan partner James Musgrove, who provided the private practitioner perspective, last month.

With the moves toward a more protectionist economic policy in many countries, is Canada's efficiencies defence – which looks beyond consumer welfare to whether a merger will make the Canadian economy more competitive relative to other countries – a way for governments to implement such policy?

Pecman: Some countries may be going through a bit of a protectionist moment. But I'm not aware of another country in the world that's looking to introduce an efficiencies defence. It may be somewhat protectionist in its design but I don't see other countries adopting it. Of course the goal of the efficiencies defence was to allow Canadian firms to compete internationally, and what we see in Canada is a number of merger cases that are being approved on this defence, that may be or are anti-competitive, and these companies are domestic companies and have no international trade whatsoever. The Supreme

Court of Canada in *Tervita*, Chief Justice Rothstein pointed that out, and it wasn't the original intention of the defence. Just from that perspective, I think the defence needs to be looked at here in Canada. And of course we're out of line with the US and other countries regarding cross-border merger reviews. We're prepared to bless anticompetitive mergers just based on this defence.

But what is our rule vis-à-vis foreign acquisitions in Canada? We have an Investment Canada review process and we've recently entered into an administrative MOU with them in terms of how we interact. The Competition Bureau does provide the competition analysis for that process, but that review includes a number of public interest considerations including national security, employment, headquarters location – a number of factors that competition law would not generally consider nor affect our determination of whether a merger is pro- or anti-competitive. But it goes to show that there can be a process that separates the competition analysis from all this public interest considerations. Ultimately it is the minister who makes the call, and he's an elected politician and he's weighing all these factors making a decision on whether or not to approve the deal, or ask for additional conditions. I really think in Canada there has been this separation of church and state. The competition authority is responsible for the competition issue; public interest considerations in this process are ultimately decided upon by the minister of innovation, science and economic development.

With the efficiencies defence, is part of your concern that it seems to be importing those non-competition questions into what the Competition Bureau does?

Pecman: I would argue that it is a public interest consideration and question its first principle. Though the others would argue that it's based on the Chicago School efficiencies-driven approach to competition law and that's the primary purpose, not consumer welfare. There would be a debate on that point. But I truly believe competition laws' primary purpose is to promote consumer welfare, and I'm advocating that Canada move to that model like the US, the EU and other jurisdictions around the world.

Musgrove: The Commissioner knows I don't fully agree with him on this point. But I want to give him credit where it's due. John has made no secret of the fact that he doesn't particularly like the efficiency defence as it's written and interpreted. But it is what it is, and he applies the law as it was written and he permitted mergers to proceed on the basis of the efficiency defence. We've seen people who took a different approach even though the law was what it was. So I give John credit for that.

I have heard John talk about the efficiency defence on a number of occasions. He often makes the point, which I think is a good point, that static allocative efficiencies aren't the big deal – that really what's important is innovation and dynamic efficiency in markets. I agree with him on that point too. But where I disagree, is that I don't think that our efficiency defence necessarily excludes dynamic efficiencies. They're harder to demonstrate, but the efficiency defence is about efficiency and I agree that dynamic efficiencies, where they exist, are very important. Static efficiencies also, however, play a role and frankly the people who put together our Act worried about those issues. That was Canada being a smaller economy, they wanted that ability to achieve both dynamic and static efficiencies.

I guess my point is: the efficiency defence applies to both static and allocative efficiencies, and I think it is an important leg along with consumer welfare in our statute.

I'm interested in what each of you considers to be the historic and current goals of Canada's competition laws – which predate those of the US. The US has been discussing going back to what people see as the original intent of the Sherman Act, which doesn't mention consumer welfare despite Robert Bork's best efforts to wedge it in there. How do you see that for Canada, which unlike the US, also has done a lot more updating of its competition law?

Pecman: Canada does have the oldest competition law in the world. Back then the law pertained primarily to cartel enforcement and it had a competition test in it. It required the government to demonstrate that the cartel unduly prevented or lessened competition. Even back then we never had this philosophy, as the US did, that "big is bad," this trust-busting period. Canada never actually went in that direction. It was always a requirement to show competitive harm as a result of private restraint.

Over time our law has modernised. With the amendments in 1986, we finally introduced effective merger control. But all our current provisions are grounded in economics, for the most part a consumer welfare approach to economics. If conduct is increasing prices or hurting quality or hurting innovation, it's anti-competitive. There's an analysis that's behind it that has been accepted by our courts, our specialised tribunal. It makes our law for the most part predictable and transparent.

Obviously the analysis will vary depending on the input, but at least there's a framework that's not based on these hipster types of considerations that would bring in things such as employment or inequality – how do you weigh that against the benefits of competition? How do you do that trade-off? It just requires someone to make a value judgement about what's more important, blessing a pro-competitive merger or stopping it on the grounds that 20 jobs will be lost. Who makes that call and on what basis? It shouldn't be a competition authority, in my view. And on what basis would they do that? It's just conflating well-established competition law principles and jurisprudence with areas that other social policies should be dealing with.

I'm not trying to minimise the concerns with inequality, privacy and democracy. These are all extremely important issues. But shouldn't wealth transfer be part of tax policy or social policy, not antitrust? Antitrust is dealing with growing your economic pie, ensuring that anti-competitive private restraints are being tackled. Dealing with these larger social issues through your anti-trust and competition law – I think it's going to be difficult to operationalise, and it'll undermine all the good work that's happened.

You really need to go back to first principles: why are these questions being asked, particularly on inequality? It stems from a study or some analysis being done that concentration levels are increasing in the economy and as a result antitrust has been failing. It's not been doing its job to prevent an increase in concentration. Again, the [antitrust] purpose of "big is bad," I think is wrong. You don't want to be punishing successful companies that may not be engaging in bad conduct. It's the conduct that you're concerned about and historically have been.

But I would go back to those studies and take a look at them. There were ones that we used to do in the 1990s based on Statistics Canada data – or in the US, US census data – that has these broad categories that captured, let's say, the level of concentration in the metal sector. But those aren't antitrust markets. That doesn't mean concentration is increasing where companies are competing. It just means that these numbers are potentially becoming more concentrated. It doesn't mean it's harmful to your economy. If you want to go macro, let's go to GDP. Is GDP shrinking in Canada? Is it shrinking in the US? Isn't that

an indicator that maybe concentration isn't so bad and it's not harming consumers? Because what we know from economics is a monopoly market's output is restricted, and therefore your GDP should be going down. So if you want to go macro, let's go a level higher than these US census or Stats Canada data that captures large sectors. I would just question the initial studies that created this discussion about whether or not competition laws work. I haven't been convinced personally.

Musgrove: I hate to agree with the Commissioner, but my view is that the core of what we do in antitrust is hard enough without trying to address these things like equality or low wages, in a direct sense. If we have a more competitive, efficient economy, that will lift all boats. But expressly targeting inequality or allocation of economic power in a broad sense, in my view, is beyond our reasonable competence. If we stretch to that kind of thing, I don't think we'll do anything well. Frankly, we have enough trouble doing a decent job of competition law enforcement when we stick to our knitting, because it is difficult. If we try to cure all of society's ills, we're going to find ourselves in kind of a standard-less swamp and there are real dangers to that.

Firstly, we create expectations about competition law enforcement, which it can't possibly live up to. Secondly, because there are no standards, we give enforcement agencies a big stick to hit business with, with no discipline or guidance as to what to do with it. It can be a random attack on bigness that is both unfair and ultimately going to hurt the economy, so it's going to hurt the very people we are seeking, theoretically, to help. And thirdly – and this may be a minority taste anyway, because there is only a handful of people in the world who actually care about antitrust – but I think it risks destroying the concept of competition law if you make it a "something for everyone" stew. Eventually people are going to realise that it has no genuine doctrine to it at all, and then it will be discredited.

One of the criticisms that's been particularly prominent in the US is that antitrust law has been too dominated by microeconomics; that it's meant to be something that's done by lawyers applying legal standards that aren't quite so dependent on really specific microeconomic analysis. Some people want to go back to a more structuralist standard like the 1968 merger guidelines in the US. You hardly need an economist at all for that sort of work. Even a lawyer who's just capable of doing basic math can more or less come up with those things.

Pecman: I don't know why we think going back in time is progress, first of all – going back to the 1900s or 1960s. Empirical studies and academic thought has advanced well beyond market share as a measure of competition harm. Under this approach, there is a presumptive threshold that if you cross it, you're anticompetitive; and if you're below it you're not. That's kind of simplistic. We've refined economic tools to help us refine the analysis, and move towards challenging truly anticompetitive conduct, as opposed to conduct that may be pro-competitive but crosses some legal presumptive number. I don't know how that's progress, quite frankly. I'm a firm believer that the standards that have been developed more recently around microeconomic thinking, that is the most advanced thinking that we have in this area. The law and the economics go hand in glove. I don't think you can just go back to pure regulation. Otherwise, we're regulating the economy. Is that where we want to be? We're in law enforcement. It's an evolving area. We've got different dynamics; markets change, were tackling the digital disruption issue now. We have big data that we have to think about. How is jurisprudence that creates these boxes that we can't go out of, going to help us progress in making the right calls on mergers or on conduct? It has to be based on something that is a bit more principled like economic

thought. What is the economic theory of harm? If it doesn't start with that, why are we actually doing anything, quite frankly? It has to be grounded in economics in my view, our whole approach.

Musgrove: Again, sadly, yes I agree. I mean we could go back to Von's Grocery or something. In the IP world, we could go back to the nine no-no's of the 1970s. But we do actually have more sophisticated thinking than we used to have on these questions, and we realised that some of these behaviours are in fact pro-competitive. So why not recognise what we have learnt?

Now, economics develops, but it doesn't develop perfectly linearly and so it takes a while. Things are bumpy. The commissioner and I over the last decade have had a debate in one form or another about two-sided markets. This is a developing economic area, the views are still out. Thinking is still developing. We're learning more and more all the time, but we should at least learn and take advantage of the learning. Neither side in our debate is saying "let's pretend this economic learning has not occurred." Going back to pure structuralist rules, I think would be the same thing. It would be damaging to the economy, and just dumb.

Pecman: I was just patting James on the back. I agree with him 100%.

Let me try to get more disagreement by jumping into something that I've seen be quite controversial between agencies and practitioners. You were talking about dynamic efficiencies and innovation. Fostering innovation has been a crucial part of competition policy in Canada during John Pecman's tenure as Commissioner, not just at the Competition Bureau level but as part of a wider government policy. When we're talking about protecting innovation, how far into the future should enforcers be looking? Should it be to the point of preventing the concentration of research and development facilities themselves, as in the European Commission's *Dow/DuPont* decision, or is that going too far?

Pecman: I gave a speech in Vancouver in January that touched on the difference in terms of our approach to the European approach and what we want to look at. Let's start with the fact that I agree with your question that innovation is becoming the most important area of competition law. Our tribunal, our chief justice actually said that in his decision in the *Toronto Real Estate Board* case where he ruled in favour of the commissioner on that matter. The rules by the board restricting the use of data by its members to introduce innovative new products online was found to be anti-competitive, and substantially lessened competition on the grounds that it hurt dynamic competition, which he expressly said was the most important form of competition. There is consensus that innovation drives competition. I don't think there is a lot of debate on that. There is still some academic thinking on that front, but I think among enforcers and competition law practitioners there is a growing consensus that innovation is becoming the heart of competition law objective; to increase that which increases competition.

I'll speak hypothetically about a merger case where our tribunal found that innovation was an important aspect. Under our merger law in Canada, following the *Tervita* decision, the Supreme Court of Canada's decision had a preference that the Commissioner quantify the harm in the economy from the transaction so that a balancing can be undertaken with the claimed efficiencies that will determine whether or not the Tribunal should approve the transaction; and this was the first order requirement for the bureau. Trying to quantify the impact of a merger on future innovation would be be a pretty challenging exercise for us, and we would likely pursue this type of case on qualitative evidence. We would likely pursue a

case where a transaction harms innovation despite the challenges of the efficiencies defence. Now the question is how would the courts deal with it? For example, qualitative evidence that *Dow/DuPont* post merger in theory would stop the development of a pipeline product. In this example if we had evidence to that effect and we would seek to block the deal or require some divestiture.

Our issue is, under the current rules of having to quantify effects, how would we actually do that if challenged? Could we just rely on the fact that there will be this loss of innovation and that would win the day before a tribunal in light of the Supreme Court decision? I think that's a long way of saying we need to have some evidence if we are going to challenge a merger that will impact innovation if there's a particular product that's not going to be developed. Whereas Europe seems a bit more free to challenge transactions based on their law and their approach on more of a theoretical ground that big is bad and the loss of R&D spending in a sector is sufficient to challenge a transaction on an innovation basis. I think that's the difference between the approach that we adopted in Canada on *Dow/DuPont* and in Europe. Again, we're evidence based. We are not a commission, we're an investigative body that must prove its case before an independent court based on evidence not just a theory. It is evident that competition laws are sometimes approached differently in different jurisdictions such as the treatment of innovation. I believe this is an area where there are going to be a lot of future cases. There needs to be more jurisprudence to help us guide us through this area, because right now it's the agencies making the calls because parties want the deals to get through. It would be useful to get some court direction on the whole issue of innovation.

Musgrove: Everyone wants court direction; they just don't want it to be their case, right?

But I don't think, John, that the court in *Tervita* said that if your argument is that you have innovation, if you have dynamic efficiency, it necessarily has to be quantified. I don't think that's what they said and I don't think that would make sense if that's what they said. If it's something that can be quantified, they say quantify it. It seems to me this is not something that can generally be quantified. But I also think I agreed with you earlier, that dynamic efficiency-innovation is a pretty important thing, and in fact on balance between the two it's the more important thing.

To pick up on the question about how far you can look into the future, *Tervita* said really you can look into the future but only as far as you can see, and the view gets hazy reasonably quickly. One of my favourite antitrust scholars, Yogi Berra, said that "predictions are hard, especially about the future" and that's true. But we in antitrust are in the crystal ball business to some degree. We've got to be because the future of the economy is what we're talking about in most competition cases.

On *Dow/DuPont*, I don't think adding up an R&D budget tells you much about innovation. In some industries like pharmaceuticals you can see pipeline products pretty clearly, and in others you can't. That tells you something real where the evidence is available, but just adding up budgets I don't think tells you much.

I'm also going to take this future-looking question to ride a small hobby horse of mine, which is that we systematically underestimate entry in our analysis. We do it because it hasn't happened yet and so we can't see it. We can't really imagine it’s going to happen. This is just the flip side of the same problem that it's hard to see the future. We do our best, but it's hard.

In your speech at the CD Howe institute in April, you mentioned that in mergers, Germany's Federal Cartel Office sticks to strictly competition-based concerns and leaves the public interest safety valve to the Minister of Economy. But the German antitrust enforcer has privacy and other consumer issues as part of its remit now, and its Facebook case seems to be blending those competition and privacy pieces. What do you think about blending these, given a lot of agencies including the Competition Bureau and the US Federal Trade Commission have consumer protection as part of their obligations?

Pecman: There's a lot of questions within that one question. So let's unpack it a little bit.

Musgrove: If you were a politician you'd just answer the one you wanted to.

Pecman: I understand, but I unfortunately work in the legal world where you have to deal with every question and every issue.

With respect to Germany's approach to merger review, which I was talking about in my speech, there's this safety valve. Let's talk about the Facebook case they're taking under the competition laws, under their abuse of dominance provision. They have as an anticompetitive act exploitative abuse, which is pretty much like excessive pricing. I categorise that as "exercise of market power". In Canada, that is not considered an anticompetitive act. The Germans are being very bold and innovative in trying to determine whether the potential reduction in privacy fits under competition laws and specifically in a provision that allows them to look at it. In Canada, we wouldn't look at that as an issue at all because it has to be an anticompetitive act, which has been defined as an act that is exclusionary, disciplinary, predatory, something that harms a rival. In Germany, they're looking at the market power of Facebook and whether Facebook is exploiting that market power. It has nothing to do with Facebook's conduct as it affects the competitive process, and as a result it's a bit like apples and oranges.

They are taking the step of looking at privacy in what I'd like to call a non-price effect, which competition laws can do. They're trying to be innovative but they have a provision that is outside the box, if you will, of traditional antitrust in North America. They're looking at it under their competition laws, under their conduct provision, not the merger ones which I was talking about in my speech.

Musgrove: I think having the same agency look at consumer protection issues as well as antitrust issues, as we do in Canada, as the FTC does, it works fine. You've got to remember what you're doing at one point or another, but it works fine. It can be complementary in a lot of cases.

On the unilateral conduct, the vertical conduct issues that John was talking about, European enforcers really do have a different model than North Americans. They have a different economic history; the differences may also be different legal systems, even different philosophical traditions. The Anglo-American tradition tends to be more modest about what we know and can control about the economy, and what we don't. And in truth, as I've said before, we in this business have much to be modest about. So a degree of modesty is probably appropriate as opposed to ambition to solve all of the ills of the marketplace. I have long proposed an antitrust Hippocratic Oath: first do no harm. Some of these attacks on digital commerce and on business could end up doing some real harm.

Pecman: James, I've actually used that line in some of my speeches about regulatory humility and do no harm. That's my credo on the enforcement beat, to the extent you can minimise errors that will do harm to your economy by taking enforcement action. You have to keep that in mind. And also if you're not taking action where action is required, that's another way of harming your economy. And yes, be careful on both fronts.

James hinted on the fact that at the Competition Bureau, we have consumer protection obligations law under our Act, but they're separate and distinct from antitrust laws. They're different types of offences; deceptive practices have different provisions and there's not a competition test. We have a different group looking at deceptive consumer conduct and it's not commingled with these tough questions of merger review or abuse of dominance.

Musgrove: I want to put in a small plug for the ABA's task force on divergence in dominance standards, which I, for my sins, serve on, because there we are working on trying to articulate the basis and structure of the differences in the approach to monopolisation between Europe and North America, and more broadly around the world. It is a tricky task. We will see how the task force comes out, I'm sure it will do great work but it's challenging. So it's a work in progress.

Switching to cartels, the Commissioner said at the ABA cartel workshop in Paris in February that the number of leniency applications to the Competition Bureau has gone down in the past two years. What do you think is driving this decrease? How do you think the bureau's leniency programme compares to that of other competition authorities? What's the impact of private damages actions, which are becoming more popular in both Canada and Europe?

Pecman: Let's start from first principles. As we know, immunity and leniency programmes are probably the best tool for enforcement agencies to detect, investigate and prosecute cartels. Today that's still the case, although many agencies, including Canada, are looking to other means of detecting and investigating outside immunity and leniency, such as working with procurement agencies and using tiplines and even providing rewards in some jurisdictions to whistle-blowers.

Having said that, leniency is an important tool. The data speaks for itself. The numbers in Canada are going down in terms of how many applications we were receiving. The majority of the decrease is in the international cartels. Why is that happening? I'd like to believe that our enforcement is actually working. The potential jail time and the work that's been done internationally in the US and the EU and abroad elsewhere, with these very significant penalties, are actually having an effect. That's the glass half full. But on international cartels, it's pretty complicated for a cooperating party now having to go into multiple jurisdictions to obtain immunity. Costly: leniency programmes around the world are all a bit different and of course you mentioned private actions. It's increasing the cost for cooperation in the international cartel space. That may have some influence on people's or companies' decision to cooperate and self-report, versus just letting the agencies do their thing and not self-report. It may be a factor. I don't have data. I am an economist; I like to work from facts and data. I am kind of speculating, but like any business cycle, there's waves as well.

Let me talk to you about our immunity and leniency programme. Our incentives and our programme are aligned with international best practice, with the ICN, particularly with regard to providing immunity to the companies and individuals that are first-in to self-report. That programme is pretty standard around

the world and that's what we offer. Our leniency programme is for those that lose the race [to be the first-in immunity applicant], and we have a huge incentive for people to use that programme. Individuals who are second to report are the first-in leniency applicant, again receive immunity from prosecution as they cooperate for our investigation. The programme is still very attractive.

Obviously there are some concerns. We're currently reviewing the programme because of a court decision and some disappointments we've had with cooperating parties in terms of the evidence they ultimately provided. We would like to make obligations a bit more evidence-based as opposed to promise-based, or prosecution-ready as opposed to not tying down witnesses. The programme in Canada has been ratcheted a bit to ensure its efficacy. We've had some disappointments where companies have asked for lenient treatment, seven to eight years ago; have made their applications. They are still in the programme today and still have not pleaded guilty, dragging their feet. We're trying to tighten up the programme to make it work better. We're reissuing our revised draft of the immunity/leniency programme, which will generate, I'm sure, a lot of debate and discussion about the changes that we're contemplating. But for the most part, the incentive of immunity from prosecution continues, which is the big carrot. We're debating with the Bar about information that cooperating parties are concerned that may get out early in the public domain or to plaintiffs, which may or may not be true. It really depends on the case and for the most part the bureau does everything it can to protect confidential information from being released to the public. Ultimately often those decisions are made by the court, which we have no control over.

Musgrove: I'm not an economist, I don't have this evidence bias. I am free to range a bit. Leniency and immunity are getting tougher on the applicant. That is undoubtedly true. The commissioner mentioned applicants going around the world having to coordinate, etc; that's certainly true. In the case of Canada, the commissioner mentioned revisions to the policy. I should note that the Bureau of Competition and the Prosecution Service are taking on board some comments they have received from the bar in Canada and the American Bar Association, which made some quite serious comments and expressed concerns about the proposed revisions.

But frankly I'm heartened by some of that progress, because making sure this programme works effectively is important. It is an effective tool. It's not the only tool, but an effective tool. Making it too discouraging doesn't work to anyone's advantage. Beyond immunity and leniency, it's fair to say that some companies considering their worldwide exposure in cartel matters are asking themselves, "If we don't go into Canada, what's going to happen?" Some people, I think, are reaching the conclusion that maybe nothing will happen. If I were the commissioner, I would look for a good clear case where there's some meaningful Canadian nexus and parties had thought we needed to be in the US or the EU or elsewhere, but not in Canada. I'd consider whether I could win that case, because there may be a message that needs to be sent that you shouldn't bypass Canada.

You've got to have the right case; you've got to have the evidence; you've got to be able to bring that case effectively because it is important to be effective when that case is brought. But there's no doubt that some people at least are taking the bet: let's roll the dice and not go into Canada.

Frankly in Canada we have private enforcement more or less like the US does. It's not treble damages, but beyond that our cases are filed in a couple of days of the US cases being filed. The class certification

standards in Canada are now actually lower than they are in the US, so private enforcement on the cartel side is certainly alive and well in this part of the world.

Pecman: On the private damages side, clearly it augments the deterrence against the cartel behaviour, so the bureau obviously is supportive of that type of activity taking place. It augments our work and sometimes these private cases are matters that we're not actually investigating as well. Generally, they're follow-on cases, following our investigations or following a court proceeding. It's a message to cartels that engaging in this behaviour is high risk, because the costs are quite significant. There's damages, obviously. Also in Canada – for those outside of Canada that choose not to self-report – it should be kept in mind the penalties are probably the most severe in the world. Statutory maximum jail time for an individual is 14 years. When you roll the dice and you don't come into Canada, that's a pretty big gamble.

Musgrove: It is, I'm just saying that I think some people are making that gamble.

Pecman: June 1st there will be a new commissioner, a new sheriff in town. Hopefully we'll able to track down some of these people that are taking those gambles. I don't know if it's worth the cost [to gamble]; the costs will be very high. We'll have to wait and see.

Beyond the literal costs – fines, prison time, private damages liability – there's often a mention from the white-collar defence lawyers that companies are suffering a significant reputational harm when they are accused of competition violations. The Competition Bureau, beyond just the international cartels, has been enforcing against some names that are well known to Canadian consumers, including right now with the investigation of retailers for the alleged bread product cartel. Generally, what do you think is the reputational harm from accusations of competition infringements? Do you actually see it in evidence?

Pecman: James may have more direct evidence on how the companies are affected by our investigation, because we don't actually see it at our end. Clearly, companies spend a lot of money investing in their brand and their reputation. When companies are subject to criminal investigations, just in theory there's going to be some harm. I know in the bread investigation, the public information about our immunity applicant is that there was a survey done on reputational hits or consumers' perception of the company following the public disclosure, the evidence seems to suggest that there was an effect of the investigation on their reputation. This is one of the costs of engaging in anti-competitive behaviour. If there is an investigation, even if there isn't a finding of guilt, there is a cost in addition to all the legal costs and other costs.

Reputation is always in play. It also speaks to the need for companies to be pretty aggressive about introducing corporate compliance programmes, educating their employees about the cost to the company of engaging in anti-competitive behaviour. The Competition Bureau does assist companies by providing guidance. We have a very comprehensive competition corporate compliance bulletin. We provide a lot of outreach on that front, and one of the first agencies in the world to give credit to cooperating parties in our cartel investigations for credible and effective [compliance] programmes. We're prepared to recommend that to the Crown prosecutors, because we feel it is an important way of obtaining compliance with legislation.

Once the genie is out of the bottle – it becomes public that there's an investigation – all bets are off, quite frankly, for these companies. They now have to deal with an investigation and ultimately perhaps charges down the road and having to defend themselves if they're not cooperating with the government to resolve the matter.

Musgrove: From my perspective advising companies, particularly if you are a consumer-facing company, the PR/goodwill kind of impact is a meaningful consideration. As John said, you've got your private class action damages consideration; you've got your criminal liability consideration; and you've got your public relations/ brand consideration. Those are the three big ones that you're thinking about. Frankly these risks are at least as big if not bigger on the misleading advertising cases as they are on cartel cases. The court in one of our misleading advertising cases expressly recognised that the PR brand hit is a meaningful aspect.

The reality is that you can't win a press battle with the "competition watchdog", which is what the first day headline always says; it's always the "competition watchdog" that's doing some darn thing or other. You can't win that fight. That's a bad day and it's going to be a bad day no matter what you do. But in my view you can overreact too. You can make business decisions, which with a cooler head and once the story is out of the headlines you might come to regret. My advice is, you're going to have a bad headline day if you're in that soup. But hold fast, that will pass. If you've got a good product, people are going to tend to keep buying it anyway. Most people are going to keep eating bread.

Pecman: This particular [bread] file is live. But the immunity applicant actually did come out with an enhanced corporate compliance programme, once it had self-identified itself as the immunity applicant, moving to an ISO standard. That action spoke to its reputation, its effect and values. I commend the company for having done that. Clearly the company chose to also provide gift certificates to customers as well, it helps deal with the reputational issues. Again, these are company choices, but it does speak to the issue of reputation and how important it is.

Is there anything that you would like to add? A final word to readers of *GCR*, which has been covering all that you've been doing for quite a long time.

Pecman: There's so much to say. I've been blessed. I'm a lucky man to have actually been appointed Commissioner of Competition. It is an important job for the Canadian economy. The Commissioner's role around the world is important in terms of advancing economic growth through enforcement and advocating for competition. I've been blessed to have that function, in terms of working with my counterparts around the world. But more importantly, to have the support and being able to support my team at home, who have been nothing but supportive of the vision of being more open, transparent and collaborative to try and build trust outside our organisation. It's been very touching. I've loved every minute of my job. I'm going to miss it. Now I will have time to work on my golf swing and on my waistline.