BLAKES COMMENTS ON THE EXAMINATION OF THE CANADIAN COMPETITION ACT IN THE DIGITAL ERA

1. INTRODUCTION

We appreciate the opportunity to comment on the consultation paper entitled "Examining the Canadian Competition Act in the Digital Era" by Edward Iacobucci (the "**Consultation Paper**"). The Consultation Paper discusses a number of important aspects of the *Competition Act*, and we commend the authors for providing thoughtful contributions to a number of longstanding academic debates in this complex area of framework legislation.

Set out below are comments on the Consultation Paper for your consideration that provide additional perspective and nuance on the recommendations. These comments relate to: i) the suitability of the *Competition Act*; ii) efficiencies; iii) abuse of dominance; iv) references by private parties to the Competition Tribunal; v) the digital economy and privacy; and vi) buy-side agreements.

Executive Summary

1. *Suitability of the Competition Act*. We agree that the *Competition Act* is well suited to promote the competitiveness and efficiency of the Canadian economy in its current form without the need for significant reforms.

2. *Efficiencies.* It would be a serious mistake to amend the efficiencies provisions of the *Competition Act* so as to remove the requirement for the Commissioner to quantify anticompetitive effects.

3. *Abuse of Dominance*. We question whether there is a need for any material amendments to the abuse of dominance provisions in section 79. A proper interpretation of section 79 recognizing the need to show the "effects" of a substantial prevention or lessening of competition would avoid the need for an amendment to the abuse of dominance provisions.

4. *References to the Competition Tribunal*. Private parties (and not only the Commissioner) should have the ability to refer questions of law to the Competition Tribunal, particularly with respect to mergers given their time sensitivity. In addition, the Competition Bureau

has been criticized for issuing overly extensive supplementary information requests under section 114(2) during merger reviews, and the Competition Tribunal could exercise an important oversight function in this regard.

5. *The Digital Economy and Privacy*. Issues relating to the digital economy and privacy are highly complex and raise unique issues. Oversight over the digital economy and privacy issues should be analyzed separately and concerns about privacy are best dealt with through specific laws and regulations separate from the *Competition Act* framework. Recent experiences in the US illustrate some of the tensions that can arise when these issues are intermingled.

6. *Buy-Side Agreements*. Buy-side agreements should remain decriminalized. Buy-side agreements can be pro-competitive and/or efficiency enhancing in a number of circumstances, and criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the "hardcore" cartel category.

Each of these comments is discussed in further detail below, and we would be pleased to discuss any of these important issues with you further at your convenience.[1]

2. SUITABILITY OF THE COMPETITION ACT

We agree with the Consultation Paper that the Canadian *Competition Act* is well suited to promote the competitiveness and efficiency of the Canadian economy and address issues raised by digital markets.[2] For this reason, caution should be exercised before making significant reforms to the Canadian *Competition Act*. As the Competition Bureau recently concluded after carrying out a detailed reported titled *Big data and innovation: key themes for competition policy in Canada*:

> There is little evidence that a new approach to competition policy is needed…The fundamental aspects of the analytical framework (e.g., market definition, market power, competitive effects) should continue to guide enforcement…The key principles of competition law enforcement remain valid in big data investigations…The Bureau's enforcement framework remains intact when examining matters that involve big data.[3]

Similarly, in a recent publication for the MacDonald-Laurier Institute, Anthony Niblett and Daniel Sokol reviewed a number of proposed legislative changes to address the growth of tech platforms and concluded that significant amendments or an overhaul of the Canadian competition policy framework "*would be counterproductive. Canada's competition law framework is capable of adequately discouraging anti-competitive behaviour by digital platforms. The Competition Act is*

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1 In addition, to the extent competition policy reforms are being considered, it would likely make sense to also review the notification provisions of the *Competition Act*, which have not been significantly reviewed or amended in a number of years. Since these are not specifically addressed in the Consultation Paper, we do not provide detailed comments regarding this topic in this submission.

2 Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (September 27, 2021), at 15-20 [Consultation Paper].

3 Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (February 19, 2018) at 4-5, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

sufficiently flexible to deal with anti-competitive conduct."[4] In addition, changes that fail to take into account the way digital platforms compete and innovate risk chilling innovation and ultimately harming consumers.[5]

Canadian competition policy must also be tailored to the unique facets of the Canadian economy, rather than simply following the lead of antitrust reform abroad.[6] For example, many Canadian industries face a smaller economic base and operate over wider geographic areas compared to many businesses in the U.S. and Europe. These industries need to remain efficient to remain competitive internationally while also adapting to longer term economic trends.[7]

As a result, the *Competition Act* has been carefully drafted as a statute of general application that aligns with Canada's broader economic policy objectives, seeking to balance the interests of a number of stakeholders, including consumers and small businesses, while also seeking to promote the efficiency and adaptability of the Canadian economy and its stakeholders.[8] It is also important to keep in mind that the application of competition laws often involves an interference with the freedom of contract and property rights of private parties. While infringements on contractual freedom and property rights may be justified from the perspective of overall social welfare in many circumstances, it is important not to forget the cumulative costs of such infringements, which should not be taken lightly.

Moreover, many aspects of Canadian competition law are highly complex, and any revision that does not take into account the unique aspects of the Canadian economy risks creating business uncertainty and unintended consequences for decades to come. Unsound competition policy or overly broad legislation can chill pro-competitive and efficiency-enhancing business conduct or increase regulatory burdens for Canadian businesses, and any potential reforms to the Canadian *Competition Act* should be carefully considered with this in mind.

3. EFFICIENCIES

We believe that the efficiencies provisions in sections 86, 90.1, and 96 of the *Competition Act* are important albeit underutilized tools to promote productivity and innovation in the Canadian economy and to help Canadian industries streamline and adapt to changing economic

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4 Anthony Niblett and Daniel Sokol, "Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech," *A MacDonald-Laurier Institute Publication* (November 2021), at 4 - 5.

5 *Ibid*., at 28.

6 Navin Joneja and Matthew Prior, "Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement," *Competition Policy International* (December 2021), online: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/North-America-Column-December-2021-Full.pdf. See also Anthony Niblett and Daniel Sokol, "UP TO THE TASK: Why Canadians don't need sweeping changes to competition policy to handle Big Tech," *A MacDonald-Laurier Institute Publication* (November 2021).

7 Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," *Canadian Competition Law Review*, Vol. 32, No. 1 (May 2019) at 52-54, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

8 *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1.

conditions.[9] As a result, we strongly recommend against any proposed changes to the *Competition Act* that would allow the Commissioner of Competition to challenge or otherwise discourage efficiency-enhancing mergers on the basis of evidence that is not objective and concrete.

a. Relevant Context for Discussions of the Efficiencies Provisions

The Canadian *Competition Act* has been described as one of the most economically sophisticated competition laws in the world largely due to its efficiencies provisions.[10] These provisions ensure that the positive impacts of mergers and other competitor collaborations on the Canadian economy are appropriately taken into account when reviewing transactions. Recently, Christine Wilson, a Commissioner at the U.S. Federal Trade Commission, suggested that the U.S. adopt a total surplus standard that would in many ways emulate Canada's efficiencies provisions, noting that Canada's "experience could be instructive" for the U.S.[11]

However, the key issue with the efficiencies provisions is not that they exist but that they are either ignored, subjected to long delays,[12] or subjected to a systematic bias from the Competition Bureau.[13] After losing the *Superior Propane* series of cases in the early 2000s, the Competition Bureau also supported a bill in Parliament to repeal the efficiencies provision in section 96.[14] However, this bill was not enacted, and subsequently the *Report of the Advisory Panel on Efficiencies* in 2005 and the *Compete to Win* report in 2008 both recommended retaining the efficiencies provisions in Canada. Indeed, the amendments to the *Competition Act* in 2009 – after extensive consultations with stakeholders including the Competition Bureau – not only retained the efficiencies provisions in sections 86 and 96 but *expanded* their scope to include joint ventures and other forms of competitor collaborations under section 90.1.

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9 See Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," *Canadian Competition Law Review*, Vol. 32, No. 1 (May 2019) at 52-54, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx; and Brian A. Facey and Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (March 2, 2017), *C.D. Howe Institute Newsletter*.

10 Michael Trebilcock & Ralph A. Winter, "The State of Efficiencies in Canadian Merger Policy," (Winter 1999-2000) Canadian Competition Record 106 at 106.

11 Christine S. Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get" (Luncheon Keynote Address delivered at the George Mason Law Review 22nd Annual Antitrust Symposium, Arlington, VA, February 15, 2019), online: https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

12 Brian A. Facey and Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (March 2, 2017), *C.D. Howe Institute Newsletter* at 3.

13 Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," *Canadian Competition Law Review*, Vol. 32, No. 1 (May 2019) at 46-52, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

14 Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 37-2, No 32 (November 6, 2003).

b. Requirement to Quantify Anticompetitive Effects

We believe it would be a serious mistake to amend the efficiencies provisions to remove a requirement for the Commissioner to quantify anticompetitive effects.

First, such a change is not necessary to ensure that qualitative effects are taken into account. The Supreme Court of Canada left significant latitude in *Tervita* for the Competition Tribunal to take into account qualitative evidence, where appropriate. The Supreme Court of Canada's decision in *Tervita* requires that "*qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue*."[15] This gives the Competition Tribunal a significant degree of discretion to take qualitative evidence into account.[16]

Moreover, the Commissioner has significant powers to gather evidence through Supplementary Information Requests under section 114(2) and judicial orders under section 11 of the *Competition Act*. Using such powers, the Commissioner has the ability to uncover evidence of effects from both a qualitative and quantitative perspective.

In addition, concerns about a bias resulting from any discounting of qualitative anti-competitive effects is misplaced. Mergers, joint ventures, and other competitor collaborations promote innovation and productivity improvements through dynamic efficiencies, increased economies of scale, and greater incentives to develop new products and services.[17] However, many of the beneficial impacts of a merger on innovation and productivity are also very challenging for merging parties to quantify because the exact nature and timing of new or better products and processes – and the extent to which they will benefit consumers and/or result in cost savings – may not be known or quantifiable in advance. One should not assume that any qualitative anticompetitive effects will necessarily be larger than the qualitative efficiencies, which are often quite significant.[18]

Finally, as stated by the Supreme Court of Canada, the assessment of the efficiencies trade-off should be as objective as possible.[19] As a matter of procedural fairness, merging parties must know the case they have to meet.[20] Requiring the Commissioner to quantify the anticompetitive effects that are quantifiable merely provides an objective basis to compare the positive and negative impacts of any merger. Any decision seeking to block a merger (let alone one generating

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15 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 147.

16 In *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7 at para. 121, the Competition Tribunal also noted that in the context of a section 104 proceeding, the Commissioner need only provide "rough estimates", including a "ballpark" estimate of the deadweight loss.

17 See e.g., Gary L. Roberts & Steven C. Salop, "Efficiencies in Dynamic Merger Analysis: A Summary," (1995) 19:4 World Competition 5 at 8.

18 Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation, Canadian Competition Law Review, Vol. 32, No. 1, May 2019, at 46-47, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

19 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 146.

20 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 125

significant efficiencies for the benefit of the Canadian economy) should be based on objective and concrete evidence to the fullest extent possible, not merely speculative and subjective claims from the Commissioner. As Justice Rothstein explained following the *Tervita* decision:

> In my view, the efficiencies defence should look mostly to the net change in economic efficiency as a result of a merger, without making value judgments about whether the particular economic gains at issue are more socially desirable than the losses. Qualitative factors must be taken into account, but a great deal of subjectivity is involved in their consideration. It seemed to me that such subjective judgment on the part of the Tribunal should be limited as much as possible.[21] [Emphasis added]

Such objectivity is important for determining the net impact of a merger on economic welfare and is consistent with section 92(2) of the Competition Act, which prevents the Competition Tribunal from relying on presumptions based on market shares when reviewing mergers.[22] Competition policy has long moved away from such presumptions to considering actual market effects, and, in our view, it should not backslide.

c. Benefits of Retaining Canada's Efficiencies Provisions

The vast majority of transactions and agreements reviewed under the *Competition Act* do not engage the efficiency provisions. That said, the efficiencies analysis involves a highly sophisticated balancing of the net economic effects to the Canadian economy of a transaction, and any legislative amendment risks creating business uncertainty and unintended consequences. In particular, the efficiencies provisions help incentivize efficiency-enhancing transactions (the majority of which are never litigated before the Competition Tribunal) and an attempt to limit or repeal the scope of the efficiencies provisions would also discourage and disincentivize many efficiency-enhancing transactions that would otherwise have taken place.

There remain strong policy reasons to keep Canada's efficiencies provisions in place. First, the efficiencies provisions effectively function as a "cost-benefit" analysis for mergers. They provide an important mechanism to assess each transaction on its own merits and determine if the proven benefits of a transaction on productivity and innovation – qualities that are clearly economically desirable -- outweigh any potential negative effects. The importance of the supply-side of the economy, which drives productivity and innovation, should not be lost through a myopic perspective that would only be focused on spending in the demand-side of the economy.[23] Mergers and other collaborations can be an especially effective mechanism for fostering

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[21] The Honourable Marshall Rothstein, Q.C., "Afterward" in Brian Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures, and Competitor Collaborations*, LexisNexis Canada Inc. 2017 (Second Edition), at 413.

[22] *Competition Act*, R.S.C. 1985, c. C-34, s. 92(2).

[23] David Weinberger, "The Classical Economists Were Smarter than You Think," *FFE Stories* (December 27, 2021), online: https://fee.org/articles/the-classical-economists-were-smarter-than-you-think.

productivity improvements through efficiencies.[24] It would be a mistake to ignore or discount the importance of these significant benefits to the Canadian economy.[25]

Second, many Canadian industries need to operate with economies of scale to maximize productivity, remain competitive internationally, adapt to changing economic conditions, and invest in innovative and environmentally sustainable technology. For this reason, the Canadian government has made achieving economies of scale, efficiency, and adaptability a key policy goal. One recent example of this is the *Innovation Superclusters Initiative* to help industry superclusters operate at scale, attract foreign talent, and develop intellectual property.

This goal is consistent with a key purpose behind Canada's efficiencies provisions recognized by the Supreme Court of Canada. In the *Tervita* decision, the Supreme Court of Canada noted that the efficiencies provisions were introduced in part because a small domestic market in Canada often precludes more than a few firms from operating at efficient levels of production and that Canadian firms need to be able to exploit economies of scale to remain competitive internationally.[26] As the Supreme Court of Canada stated, "*In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition*."[27]

Canada's efficiencies provisions do this by creating greater opportunities to scale-up and adapt for key Canadian industries that are the bedrock of the Canadian economy, including aerospace manufacturing and AI technology in Quebec, advanced manufacturing in Ontario, oil & gas in Alberta, and shipbuilding in Atlantic Canada. These industries may find themselves with a need to enter into mergers or other collaborations in order to achieve the scale necessary to innovate, improve productivity, compete internationally, and adapt to changing economic conditions.[28]

Third, the efficiencies provisions provide a flexible mechanism to take into account a variety of ways in which mergers can impact social welfare and the Canadian economy as a whole, including impacts on the environment and the quality of healthcare. For example, mergers and other collaborations may lead to environment improvements and facilitate greater investments in environmentally sustainable technology. These environmental benefits may represent real resource savings to the Canadian economy (and therefore a cognizable efficiency under section 96 of the Canadian *Competition Act*) that may offset any potential harm to competition from a transaction.

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[24] See e.g., Gary L. Roberts & Steven C. Salop, "Efficiencies in Dynamic Merger Analysis: A Summary," (1995) 19:4 World Competition 5 at 8.

[25] Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation, Canadian Competition Law Review, Vol. 32, No. 1, May 2019, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

[26] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 87.

[27] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 87.

[28] Navin Joneja and Matthew Prior, "Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement," *Competition Policy International* (December 2021), online: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/North-America-Column-December-2021-Full.pdf.

Without the efficiencies provisions, Canadian competition law would have no mechanism to factor these benefits to the Canadian economy into account. The efficiencies provisions have only become more relevant to the Canadian economy with the passage of time, and any attempt to limit or repeal the efficiencies provisions in sections 86, 90.1, and 96 of the *Competition Act* would be a serious mistake.

4. ABUSE OF DOMINANCE

a. Importance of demonstrating effects

In our view, a proper interpretation of section 79(1)(c) that recognizes the need to demonstrate the "effects" of a substantial prevention or lessening of competition would avoid the need for any substantial amendments to the abuse of dominance provisions in sections 78 and 79.

The Consultation Paper points out that "*a net result of Canada Pipe is that there can be a practice of 'anticompetitive acts' that not only do not harm competition, but benefit consumers… Section 79 should be amended to avoid confusion*."[29] We agree that such an outcome would be absurd and undesirable. However, a proper interpretation of section 79 would avoid the need for an amendment to the abuse of dominance provisions to address this issue.

In particular, section 79(1)(c) requires that "*the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,*"[30] similar to the language in section 96 requiring the Commissioner to quantify any quantifiable "effects" of any prevention or lessening of competition.[31] Requiring the Commissioner to prove not only that conduct is preventing or lessening competition in some abstract way but that there is a clear anticompetitive "effect" of this conduct (e.g., a reduction social welfare from a deadweight loss) would ensure conduct that does not harm competition and benefits consumers is not inadvertently captured by the abuse of dominance provisions. In addition, such an approach should require no amendment to the *Competition Act*, as, in our view, this is already contemplated by the clear wording of section 79(1)(c).

b. Private Rights of Action

It is very important to carefully consider the potential consequences of suggestions to create a private right of action for the abuse of dominance provisions in the *Competition Act*. Extending a private right of action to these provisions would risk promoting unmeritorious litigation between competitors.[32] Private litigation could also have a chilling effect on otherwise pro-competitive conduct as companies would be incentivized to commence or threaten to commence meritless lawsuits against competitors in response to aggressive competition that actually benefits

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29 Consultation Paper, *supra* note 2, at 37.

30 *Competition Act*, R.S.C. 1985, c. C-34, s. 79(1)(c). This specific point was not argued before the Federal Court of Appeal in *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, [2018] 3 FCR 563, and the Supreme Court of Canada denied leave to appeal this decision in *Toronto Real Estate Board v. Commissioner of Competition*, 2018 CanLII 78753 (SCC).

31 See *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 146. Notably, unlike section 96 (and section 79), section 92 does not include references to anticompetitive "effects" and does not require the Commissioner to prove or quantify any such effects.

32 Competition Policy Review Panel, *Compete to Win* (June 2008) at 59.

consumers.[33] Such additional litigation would not enhance the competitiveness of Canadian industry or markets, and these costs need to be weighed against any perceived benefits.

Moreover, the Competition Bureau was recently given significantly greater resources that will facilitate enhanced enforcement of the *Competition Act*. This will further increase the Competition Bureau's ability to bring legitimate actions challenging anti-competitive conduct in response to complaints from private parties.[34] In particular, the Competition Bureau will receive an additional $96 million dollars over the next 5 years and $27.5 million per year on an ongoing basis, which will be used to create a new Digital Enforcement and Intelligence branch and to grow the Competition Bureau's enforcement teams.[35]

5. REFERENCES TO THE COMPETITION TRIBUNAL

Section 124.2(2) of the *Competition Act* allows the Commissioner to refer questions of law to the Competition Tribunal at any time.[36] However, private parties currently have no such right. If amendments are made to the *Competition Act*, consideration should be given to also granting private parties a right to refer questions of law to the Competition Tribunal, particularly with respect to mergers given their time sensitivity. We leave open whether the same ability should apply to other provisions of the *Competition Act* as well.

The Competition Bureau often engages with parties in the shadow of the law, and relatively few cases are ultimately litigated before the Competition Tribunal. For example, business people often prefer certainty and want to close mergers quickly in order to begin achieving synergies, which drives them to settle with the Competition Bureau even when they might have had a strong case in litigation. In addition, the Commissioner is also currently the only gatekeeper for applications to the Competition Tribunal relating to the merger provisions of the *Competition Act*. Only the Commissioner can bring an application to the Competition Tribunal relating to a merger under section 92 of the *Competition Act*, and only the Commissioner can refer questions of law relating to mergers (and other matters) to the Competition Tribunal under section 124.2(2).

Allowing private parties to bring applications to the Competition Tribunal on questions of law relating would help address this imbalance. It would provide private parties a way to obtain greater legal certainty without the risk of delaying the achievement of synergies or other important business objectives, and it would bring important legal questions before the Competition Tribunal that may never otherwise be considered.

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[33] C.D. Howe Institute Competition Policy Council, "Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act", Twelfth Report (October 20, 2016) at 3.

[34] Anthony Niblett and Daniel Sokol, "Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech," *A MacDonald-Laurier Institute Publication* (November 2021), at 5 and 28.

[35] Matthew Boswell, Commissioner of Competition, "Canada needs more competition", Canadian Bar Association Competition Law Fall Conference (October 20, 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html.

[36] *Competition Act*, R.S.C. 1985, c. C-34, s. 124.2(2) ("*The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX*.")

In addition, the Competition Bureau has been criticized for issuing overly extensive supplementary information requests under section 114(2) during merger reviews.[37] Disproportionate and unnecessary demands for information place onerous obligations on businesses and on the Canadian economy as a whole, costing significant time, money, and other resources. Courts have provided an important oversight function with respect to production orders sought by the Commissioner under section 11 of the Competition Act,[38] and amendments could enable the Competition Tribunal to exercise a similarly important oversight function with respect to supplementary information requests issued under section 114(2) of the Competition Act.

6. THE DIGITAL ECONOMY AND PRIVACY

Issues relating to the digital economy and privacy are highly complex and raise unique issues. As a result, we believe the digital economy and privacy issues need to be analyzed separately before being addressed together in the competition law context.

Recent experiences in the US illustrate the tensions that can arise when privacy and competition policy issues are intermingled. For example, in *Epic Games Inc. v Apple Inc*, the United States District Court for the Northern District of California ultimately agreed with Apple that its privacy and security protections justified the fees and restrictions on third-party app stores that Epic argued were anticompetitive in their effect.[39]

Given this tension, we believe that concerns about privacy are best dealt with through specific laws and regulations separate from the *Competition Act* framework. For example, in November 2020, the Canadian government proposed two bills dealing with privacy law and social media companies. Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* was introduced to broaden the scope of broadcasting legislation to require digital media broadcasters to contribute to Canada's broadcasting system, supporting Canadian content producers and creators. Bill C-11, the *Digital Charter Implementation Act, 2020* was introduced to address concerns about the collection, use and dissemination of personal information and data by large technology companies. In particular, it would enact the Personal Information and Data Protection Tribunal Act, establish an administrative tribunal to hear appeals of certain decisions made by the Privacy Commissioner of Canada, and impose penalties for contravention of certain of its provisions.

It is quite possible that similar bills will be introduced in the new Parliament in the coming months, and these may very well address many of the issues at play. Using the *Competition Act* to address these issues in parallel risks acting at cross-purposes and likely producing counter-productive results.

7. BUY-SIDE AGREEMENTS

The Consultation Paper raises legitimate questions about the use of wage-fixing agreements,[40] but any attempts to criminalize buy-side agreements could have unintended chilling effects on

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37 See e.g., *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp. Trib. 4 at para. 59.

38 See e.g., *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59.

39 See e.g., *Epic Games Inc. v. Apple,* F 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021).

40 Consultation Paper, *supra* note 2, at 26-28.

legitimate competitive conduct. Buy-side agreements can be pro-competitive or efficiency enhancing in a number of circumstances. For example, they may be especially pro-competitive for smaller or medium size enterprises who, through combined purchases, achieve greater discounts from suppliers and share the delivery and distribution costs.[41]

Criminal penalties are too blunt an instrument to deal with agreements or arrangements between competitors that do not fall into the "hardcore" cartel category.[42] The *Competition Act* should only criminalize such agreements or arrangements where they clearly and unambiguously always harm competition, which is not the case with buy-side agreements.

Moreover, under section 90.1, the Competition Tribunal can make an order prohibiting buy-side agreements that are likely to substantially lessen or prevent competition in a market. In our view, this approach works well and does not risk discouraging legitimate forms of collaboration, such as buy-side agreements among smaller competitors that benefit from increased scale to counteract market power from large sellers in order to obtain goods and services at lower prices.

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41 James B. Musgrove, *Fundamentals of Canadian Competition Law*, 3rd Edition (2015), at 102.

42 Competition Policy Review Panel, *Compete to Win* (June 2008) at 59.

ABOUT BLAKES

Blake, Cassels & Graydon LLP is one of Canada's leading business law firms. Serving a diverse domestic and international client base, our five offices in Canada and 7 offices worldwide assist companies in virtually every area of business law, including competition law.

The Blakes Competition, Antitrust & Foreign Investment Group has been involved in many of the largest and most complex mergers in Canadian history, and has led the Canadian aspects of some of the largest global transactions, including internationally recognized innovative matters. Blakes is frequently retained by major domestic and international companies, and recommended by international and domestic law firms, to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters and other competition issues.

Blakes' lawyers have worked on many of the leading efficiencies cases in Canada, including the ongoing *Secure / Tervita* litigation, the *Superior Propane* series of cases[43] and both the *Superior / Canexus*[44] and *Superior / Canwest*[45] transactions, which were cleared by the Competition Bureau on efficiencies grounds. Treatises by members of Blakes Competition & Antitrust group have been cited by the Supreme Court of Canada on the application of the efficiencies provisions,[46] and Blakes' lawyers have authored many of the leading articles on efficiencies in Canada.[47]

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[43] *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 F.C.A. 104; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16; and *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 F.C.A. 53.

[44] See Competition Bureau, "Competition Bureau statement regarding Superior's proposed acquisition of Canexus" (June 28, 2016), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

[45] See Competition Bureau, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC" (September 28, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

[46] See *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 S.C.C. 3 at paras. 85-86, 91-95, and 102, which references Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham, Ont.: LexisNexis, 2013) and Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 4th ed. (Markham, Ont.: LexisNexis, 2014).

[47] See e.g., Navin Joneja and Matthew Prior, "Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement," *Competition Policy International* (December 2021), online: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/North-America-Column-December-2021-Full.pdf; Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation," *Canadian Competition Law Review*, Vol. 32, No. 1 (May 2019) at 52-54, online: https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx; Brian Facey, Navin Joneja et al., "Mind the Gap: Merger Efficiencies in the United States and Canada," *Antitrust Magazine*, Spring 2018, Issue 32:2; and Brian A. Facey and Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (March 2, 2017), *C.D. Howe Institute Newsletter*.

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