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Trends to Watch

2024 Competition/Antitrust & Foreign Investment Outlook

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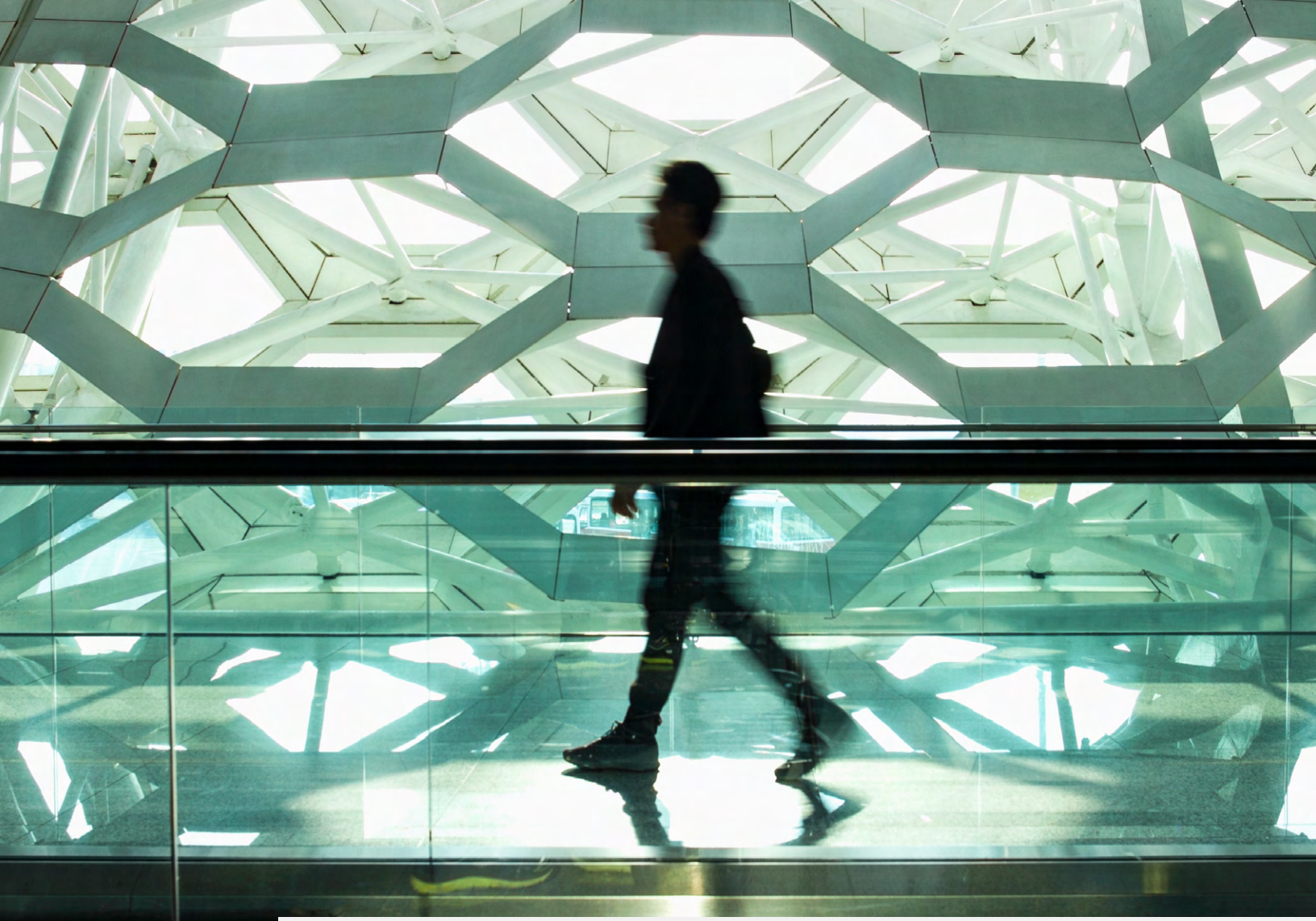
This publication reviews key developments in Canada during 2023, and reflects on their potential significance for 2024 and beyond.

Prepared by the Competition/Antitrust & Foreign Investment Group at McCarthy Tétrault



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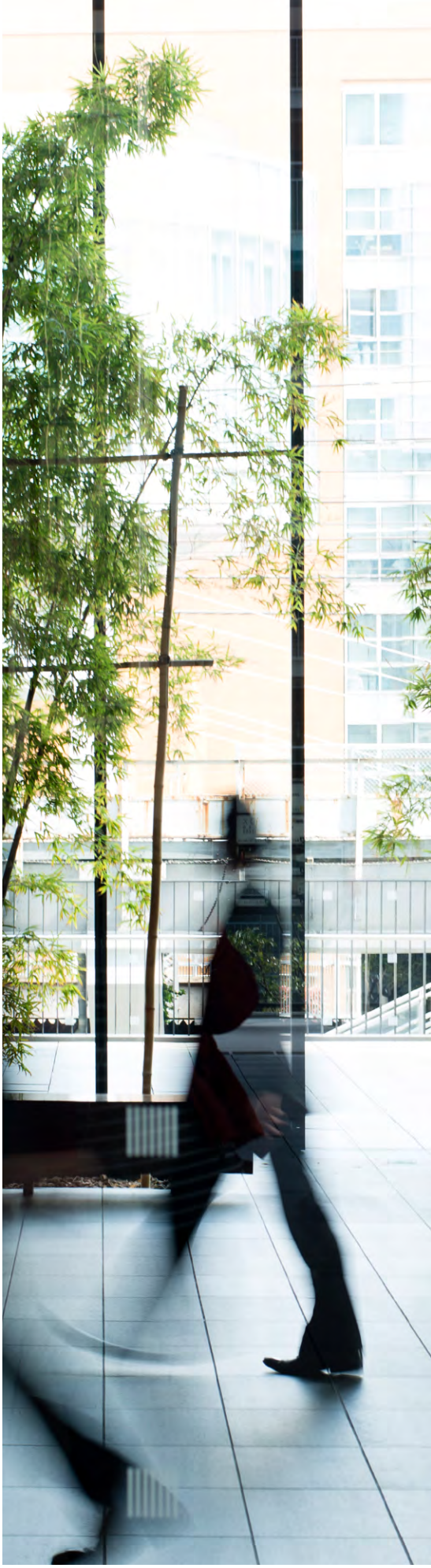
INTRODUCTION

Legislative reform of both the *Competition Act* and the *Investment Canada Act* has continued to dominate the policy agenda in 2023, with one set of amendments to the *Competition Act* enacted in December 2023 and concrete proposals for substantial further reform pending before Parliament as we enter 2024. The Commissioner of Competition (the "**Commissioner**") has long advocated for substantial reform to the *Competition Act*; and following a relatively modest set of amendments being enacted in 2022, the past year has seen additional steps towards legislative overhaul. The federal government has proposed – and in some cases already enacted – sweeping amendments notably removing Canada's statutory merger efficiencies defence, enabling the Competition Bureau ("**Bureau**") to pursue conduct that could harm competition in sectors of the economy important to consumers, broadening private rights of access before the Competition Tribunal ("**Tribunal**"), allowing private parties to claim damages and expanding the substantive scope of several civil provisions. Rarely before in Canada – if ever – has competition law policy captured such political attention.

Reform to the *Investment Canada Act's* national security regime has also progressed through Parliament in 2023; the current expectation is that amendments designed to enable earlier detection of, and enforcement against, threats to Canadian national security will be enacted in late 2023 or early 2024. Notably, the amendments include the introduction of mandatory pre-closing filings for certain categories of investments in sensitive sectors such as dual use technology and critical minerals where the investor obtains certain prescribed rights that will allow it to influence the activities of a Canadian entity. Consistent with prior years, enforcement activity in 2023 has continued to focus on investors with connections to countries that are considered to be not allied with Canada, a sign of the overarching geo-political climate.

In parallel with the evolving policy landscape, enforcement of the existing competition law regime has been – in some areas – more assertive than in prior years. The Commissioner, for the first time, prevailed in contested merger litigation involving the efficiencies defence (against Secure/Tervita), while also experiencing defeat in the high-profile Rogers/Shaw litigation. Outside of the Tribunal, the Bureau has settled a half-decade high of merger cases with divestiture remedies, and transactions proceeding to in-depth review may continue to face a greater risk of remedies than in prior years.

While the Bureau has not yet undertaken any public cases using the new criminal provisions relating to wage fixing and no-poach agreements that came into force in June 2023, there are signs that cartel enforcement activity may be on the uptick. The Bureau has made no tangible progress on its open abuse of dominance investigations into digital market participants in 2023, although October 2023 saw the first private settlement of an abuse of dominance complaint pursuant to the private right of access for such cases introduced in the 2022 amendments. While hurdles remain for successfully bringing a case before the Tribunal (until at least potential further amendments), further



applications, designed to bring the respondent to the negotiating table, may follow. The Bureau's deceptive marketing activity continues to focus on drip pricing, "scarcity cues" and greenwashing cases, in the latter case supported by the growing sophistication of environmental pressure groups making complaints to the Bureau. Finally, the competition class action landscape continues to produce important jurisprudence, with Canadian courts scrutinizing plaintiffs' arguments carefully, particularly in the case of actions brought as a corollary to U.S. proceedings.

Competition Act Reform – Substantial Change on the Horizon

With the ink barely dry on the 2022 *Competition Act* amendments, 2023 saw a continued push for even greater Canadian competition law reform. While this past year was largely consumed by further study and debate, it is coming to a close with the most substantial changes to the *Competition Act* in over a decade. Bill C-56 was enacted in December 2023, including the repeal of the merger efficiencies defence and expanding the scope of the *Competition Act*'s civil enforcement provisions. Further, even more substantial reforms are pending before Parliament. By the end of 2024, Canada's competition law regime is likely to be dramatically reformed, with expanded private litigation, stronger civil conduct provisions, and a more expansive merger notification regime.

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AN AMBITIOUS REVIEW OF THE *COMPETITION ACT*

After enacting initial *Competition Act* amendments in June 2022, the government launched an expansive consultation on the future of competition policy in Canada in November 2022.

To initiate the consultation, Innovation Science and Economic Development Canada (ISED) published a discussion paper on potential reforms to the *Competition Act*'s merger review, unilateral conduct, competitor collaboration and deceptive marketing provisions, as well as to its administration and enforcement more broadly. In contrast to the 2022 amendments, which the government described as a targeted first step towards modernizing the *Competition Act*, the government set its current objective as more fundamental improvement to the the *Competition Act*'s framework.

The government highlighted the absence of consensus on the path forward for Canadian competition policy.

The consultation ran through March 2023, receiving over 130 submissions from identified stakeholders and more than 400 responses from the general public, which collectively raised over 100 potential reform proposals. In a September 2023 report summarizing the feedback received, the government highlighted the absence of consensus on the path forward for Canadian competition policy, writing that:

— ISED was informed both that the Act and its enforcement regime were toothless and outdated, but also that any attempts at modernization threatened to chill investment and innovation. The Act was, to some, glaringly inadequate when held up for international

comparison, yet others insisted that it was exemplary and top-of-the-line when measured against Canada's foreign partners. Some groups explained that their members were suffering under the status quo, while others foretold negative economic consequences in the event that the status quo were abandoned.

The government concluded that the "task at hand is to consider how best to rebalance the regime to better limit concentration and deter anticompetitive practices, while avoiding overcorrection and preserving certainty in compliance."

AN ENFORCER EAGER FOR CHANGE

While Canada at large appears undecided on the future direction of the *Competition Act*, the Bureau suffers from no such uncertainty, enthusiastically participating in the government's consultation by submitting over 50 recommendations for reform.

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The Bureau's recommendations cover merger review, unilateral conduct, competitor collaborations, deceptive marketing and administration and enforcement, and collectively call for far-reaching and substantial reform. In particular, the Bureau's recommendations call for new standards for the enforcement of a wide range of *Competition Act* provisions, including new tests for finding competitive harm and for assessing the adequacy of remedies to such harm. For example:

- In the context of merger review, abuse of dominance and competitor collaboration, the Bureau called for the assessment of competitive harm to focus more on "the competitive process", which could be achieved, for example, by allowing competitive harm to be inferred where an impugned merger or course of conduct "appears reasonably capable of making a significant contribution to the creation, maintenance, or enhancement of the ability to exercise market power."
- For mergers, the Bureau suggested that the remedial standard should require that competition be restored to pre-merger levels (rather than the current requirement that it be remedied to the point where the competitive harm is no longer "substantial").
- For the civil competitor collaboration provisions, the Bureau called for the availability of both prescriptive remedies aimed at restoring competition and administrative monetary penalties (currently the only available remedy is an order requiring the conduct to be discontinued).

Both before and since submitting its recommendations to the government's consultation, the Bureau has been vocal in its view that Canada needs stronger competition laws and that it is working to enforce Canada's existing laws more effectively. In October 2023, the Bureau hosted a summit where it called for a whole-of-government approach to fostering competition while also releasing a report asserting that Canada's competitive intensity decreased in the two decades from 2000 to 2020. In a speech later that month, the Commissioner reiterated the Bureau's commitment to vigorously enforcing the *Competition Act*, emphasising that the Bureau is "continuing to build our investigation and litigation capacity to take timely and evidence-based enforcement action—including seeking injunctions—in both the traditional marketplace and the digital one."

PRELIMINARY STEPS TOWARDS SUBSTANTIAL REFORM

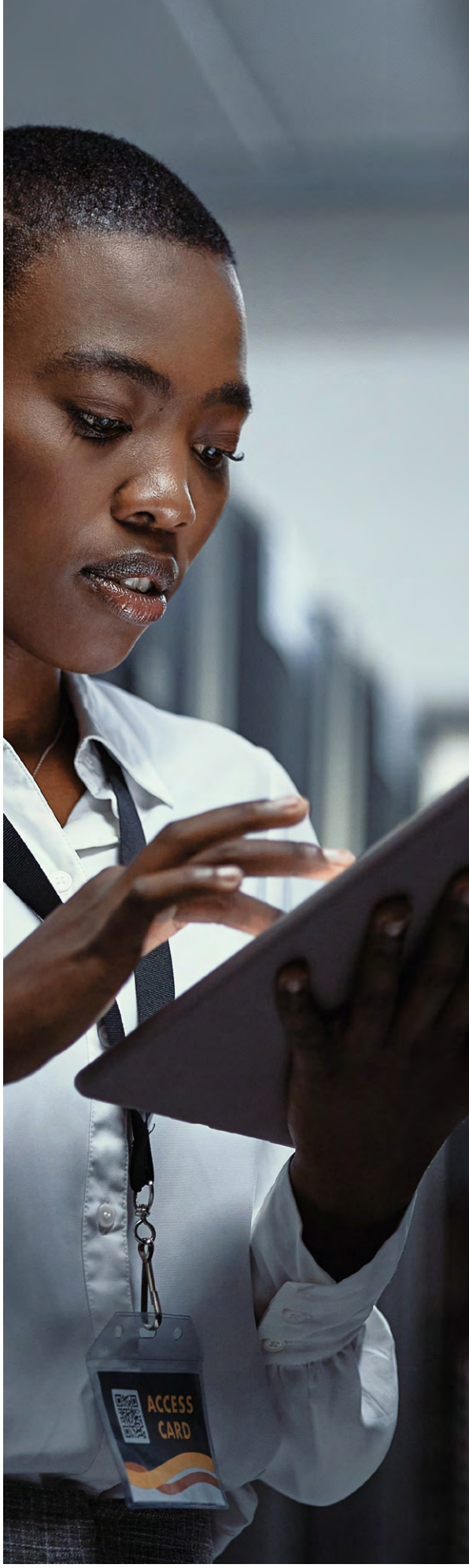
As 2023 comes to a close, the ambitious scope of the government's consultation and the Bureau's emphatic call for substantial change is beginning to translate into material concrete reform.

In September, the government took initial steps with the introduction of Bill C-56: the *Affordable Housing and Groceries Act*.

Positioned by the government as part of its efforts to address cost of living concerns, in particular, in the grocery sector, Bill C-56 experienced swift passage through Parliament, receiving royal assent on December 15, 2023. This legislation provides for only a limited number of changes to the *Competition Act*, including, most significantly:

— **Repeal of the Efficiencies Defence for Mergers:** Bill C-56 has brought an end to the "efficiencies defence" in merger review, which prohibits the Tribunal from issuing an order against a merger that is likely to bring about efficiency gains that are greater than, and would offset, the merger's anti-competitive effects and where those efficiencies would be lost if the Tribunal were to issue an order (e.g. prohibiting the merger). The Bureau has campaigned stridently against the efficiencies defence and it was widely anticipated to be a target of the government's efforts at reform. However, while the Bureau, and certain other stakeholders, had called for efficiency gains to remain explicitly enumerated in the *Competition Act*, but only as a factor that the Tribunal could consider in determining whether a merger substantially lessens or prevents competition rather than as a defence, Bill C-56 makes no such allowance (though the Tribunal will still be entitled to consider efficiencies since the list of factors that the Tribunal can consider when assessing a merger are expressed in the *Competition Act* on a non-exhaustive basis). As an aside, it is not evident on its face how the elimination of the efficiencies defence addresses the government's grocery sector related concerns given that not a single previous grocery sector merger in Canada relied upon the efficiencies defence, and, further, the defence applies only to mergers rather than to ongoing, day-to-day commercial activity.

— **Formal Market Study Powers:** Bill C-56 introduces formal market study powers into the *Competition Act*. While the Bureau has an established track record of episodically undertaking market studies, the *Competition Act* had previously not provided a formal process for such studies and, in particular, does not provide the Bureau with any information gathering powers. Bill C-56 allows the Bureau to seek a court order to compel the production of relevant information for its studies. The power to initiate a market study lies with both the Commissioner and the Minister of Innovation, Science and Industry (with consultation required between the two before either can exercise its power).



While Bill C-56 seeks to impose a number of checks and balances on the market study process, Bureau production demands can often be burdensome. Assuming the new market study powers are allocated sufficient Bureau resources, there is a risk that firms active in industries subject to future studies will face onerous compliance costs under the new regime.

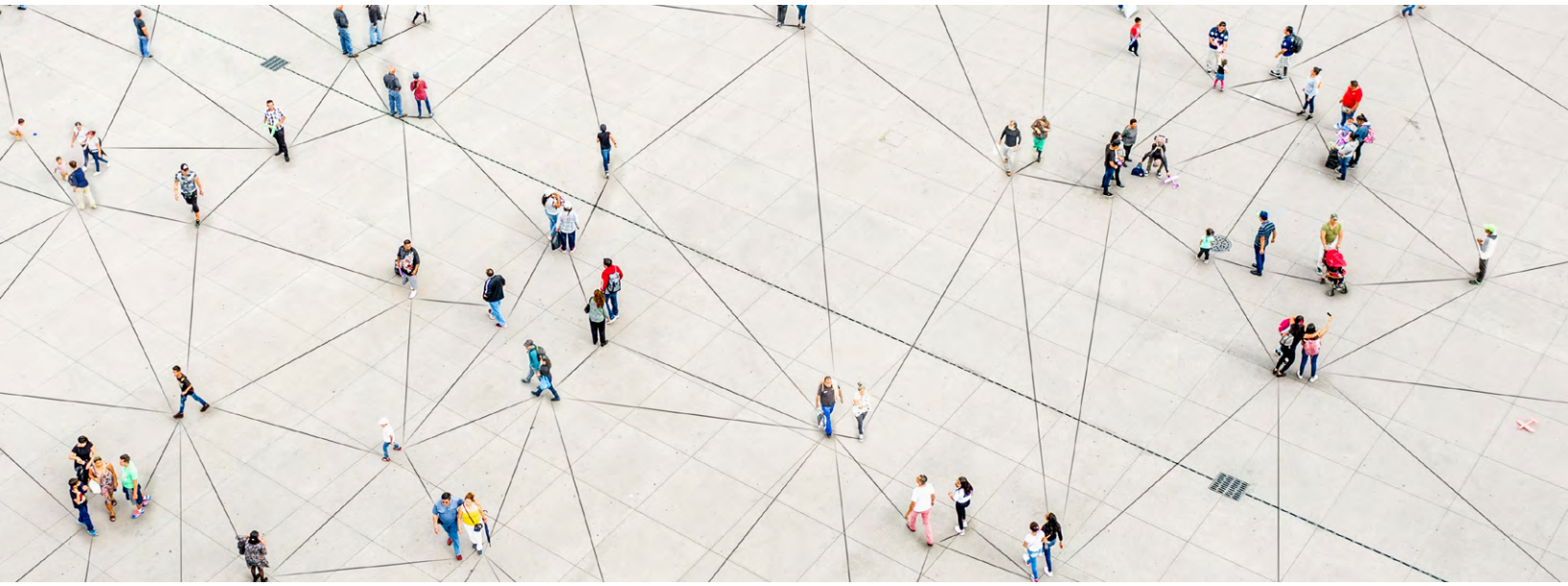
— **Competitor Collaborations:** To address anti-competitive collaborations within and beyond the grocery sector, Bill C-56 expands the Tribunal's power to issue orders in respect of anti-competitive agreements or arrangements between competitors that substantially prevent or lessen competition to include arrangements between non-competitors where a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market.

— **Lower Abuse Standard:** Prior to the enactment of Bill C-56, both intent (to engage in an anti-competitive act) and effect (substantial prevention or lessening of competition) were required to establish abuse of dominance under the Act; Bill C-56 has lowered this threshold. Under Bill C-56, in order for the Tribunal to make a prohibition order, it is now sufficient for the Tribunal to find that a dominant firm has (i) engaged in a practice of anti-competitive acts or (ii) engaged in conduct that substantially lessens or prevents competition. The Tribunal's ability to order a party to (i) take any action, including a divestiture and/or (ii) pay an administrative monetary penalty will remain limited to cases where both anti-competitive intent and effect are established.

In late November, with Bill C-56 still making its way through Parliament, the government unveiled significantly broader plans for *Competition Act* reform as part of an omnibus bill implementing a range of measures announced in the government's Fall Economic Statement (Bill C-59). Bill C-59 seeks to dramatically alter Canada's competition law regime, providing for, among many other changes, a substantial expansion of private *Competition Act* litigation, a broad range of material remedies for anti-competitive civil collaborations and modifications to the merger review regime that will both increase the number of notifiable transactions and facilitate the Bureau's ability to challenge transactions. A more detailed overview of the key changes being proposed under Bill C-59 is available **here**.

Given the dual track amendment process underway through Bills C-56 and C-59, the *Competition Act* can be expected to evolve somewhat gradually. As noted, Bill C-56 received royal assent on December 15, 2023, whereas debate over the more substantial reforms set out in Bill C-59 are likely to continue into the new year. However, the government has demonstrated an ability to quickly usher legislation through Parliament in the past, and the full suite of reforms may be enacted swiftly.

As 2023 comes to a close, the speed with which Bill C-56 was enacted in the space of just a few months shows that the government is intent on implementing meaningful reform to the *Competition Act* and that the Canadian competition law landscape will likely be reshaped even further over the coming year.



Investment Canada Act: Brace Yourselves, Amendments Are (Still) Coming

CHANGE REMAINS ON THE HORIZON

Set in motion at the end of 2022, the move toward a more robust national security enforcement regime has been on hold through much of 2023.

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In November, 2022, following three high profile divestiture orders involving Chinese investors in the lithium mining sector, the government tabled *Bill C-34: An Act to amend the Investment Canada Act* ("**Bill C-34**"), which – once enacted – will mark the first significant legislative changes to the *Investment Canada Act* since the introduction of the national security regime in 2009. The pending changes are largely designed to render the national security review process more effective in detecting national security risks and more efficient in enforcing against them. Notably, the amendments will expand the categories of investments subject to pre-implementation notification to include any investment in an entity carrying on a "prescribed business activity", a concept still undefined but expected to align with the enumerated national security factors in the Investment Review Directorate's (IRD) national security guidelines, where the investor would acquire certain decision-making powers and receive sensitive, non-public information or access to "material assets" as a result of the investment. The hope is that pre-implementation notification in these instances will allow the government to more effectively screen potentially injurious acquisitions prior to closing, the harms of which could be realizable immediately upon implementation. By contrast, most national security enforcement action under the present regime operates on a post-closing, non-suspensory basis, arguably frustrating some remedial outcomes.

Pre-implementation notification in these instances will allow the government to more effectively screen potentially injurious acquisitions.

Other pending amendments include simplifying the process for the government to claim national security privilege during judicial review cases, empowering the Minister to impose interim measures where an investment has been completed and the government initiates the national security review process, and codifying Ministerial jurisdiction to approve investments with mitigation, without referring the decision to Cabinet (as the *Investment Canada Act* currently stipulates).

In addition, on September 28, 2023, the House of Commons Standing Committee on Industry and Technology proposed additional *Investment Canada Act* amendments that have since been incorporated into Bill C-34. These amendments include:

- enabling the Federal Cabinet to order a net benefit review of a notifiable investment where the investor is a state-owned or influenced enterprise from a country without a trade agreement with Canada;
- requiring the Minister to consider an investment's impact on intellectual property developed or funded by the Canadian government and Canadians' personal data during the net benefit review process;
- requiring (not merely allowing) the Minister to impose interim measures during the national security review process where such measures are necessary to prevent injury to national security and would not themselves introduce new risks of harm;
- codifying that the national security regime applies to the acquisition of assets of an entity carrying on all or part of its operations in Canada; and
- making prior corruption convictions a basis for the Minister to conclude that reasonable grounds exist to believe that an investment by a non-Canadian could be injurious to national security, though the Minister still retains the discretion whether to initiate the national security review process.

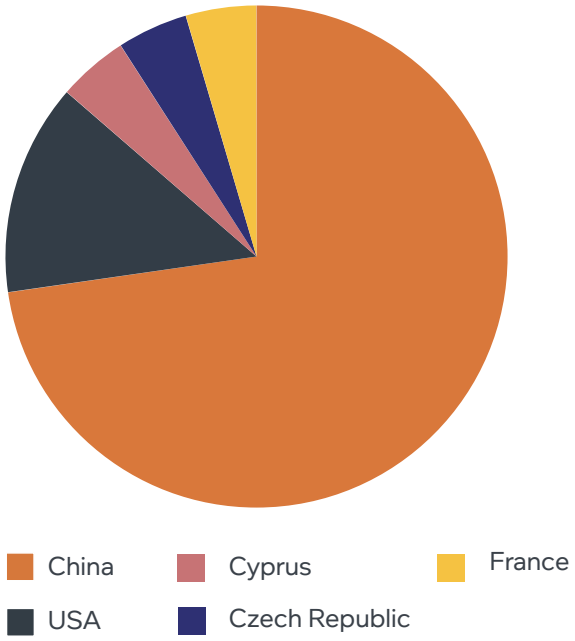
As of writing, the amendments remain under review before Senate committee and, after which, must be sent to the Senate for approval before the bill can receive royal assent. It is therefore possible, though not certain, that at least some of the amendments will come into force early in the New Year. Others – like the introduction of mandatory pre-closing notifications for prescribed business activities – will not come into effect until parallel changes are made to the *Investment Canada Regulations*, drafts of which have not been released. Once enacted, however, both the filing requirements and voluntary strategies associated with national security review in Canada will change significantly.

ENFORCEMENT RAMPS UP

Despite the slow progression of legislative amendments, IRD has continued to strengthen its national security enforcement posture in 2023, reflecting recent policy announcements that focus on certain categories of investors (state owned enterprises, SOEs) and target industries (critical minerals and infrastructure).

The overall number of applications and notifications received from investors was down to 1,010 in the government's fiscal year ended March 31, 2023, following an all-time high of 1,255 applications and notifications in fiscal year 2021-2022. Instead, the number of filings received in 2022-2023 was consistent with the most recent five year average. Investors from the United States, the United Kingdom and the European Union accounted for the significant majority (approximately 80%), with the United States alone accounting for approximately 55% of notified investments. The next largest investors were China (43 investments), India (29 investments), Australia (15 investments) and Japan (15 investments).

Extended National Security Reviews by Investor Origin



This chart compares the number of extended national security reviews by investor country of origin.

Despite the decline in the total number of notified investments, IRD's national security enforcement activity increased significantly**.** A record 32 investments were subject to extended reviews under Part IV.1 in 2022-2023, compared to 24 and 23 in 2021-2022 and 2020-2021, respectively. Of those 32 extended reviews, 22 received an order for full review pursuant to section 25.3, which was 10 more than the year prior. Of those 22 full reviews, eight investors withdrew their application and terminated their investments, three were ordered to divest their investments and 10 reviews were discontinued by the government. However, it is likely that some – if not

most – discontinuances were conditional upon negotiated undertakings between the Minister and the investor (a process not currently prescribed by the *Investment Canada Act* but to be codified via Bill C-34).

Detailed information about the reviewed investments and the concerns they raise is unknown. Despite the government's promise to enhance transparency where full reviews are ordered, no public statements have been made regarding specific reviews since November 2022. However, certain trends and assumptions can be gleaned from IRD's Annual Report. In particular, consistent with IRD's national security guidelines, full reviews appeared to be reserved for investments in industries raising one or more of the guidelines' enumerated national security factors. For example:

- Investments involving sensitive and critical technology and know-how were closely scrutinized, with the Minister reviewing seven investments in computer systems design businesses, two investments in scientific research and development businesses and one investment in a communications equipment manufacturing business.
- Critical mineral supply remained front of mind, with six reviews launched for investments in mining (though the minerals were unspecified, one review involved metal ore mining and five involved non-metallic mineral mining and quarrying).
- One review was ordered for an investment in an investigation and security services business, which may have raised several national security factors, including the potential for foreign surveillance and espionage, the potential impact on Canada's intelligence or law enforcement and/or the investor's potential collection and use of sensitive personal data through the investment.

The origin of the investor continues to be a key national security consideration. As in recent years, investments by Chinese investors made up a disproportionate number of investigations. Of the 22 full reviews ordered, 16 related to Chinese investments. However, it is critical to note that despite Chinese investors accounting for the majority of reviewed investments, 27 Chinese investments were allowed to proceed without review and five of those reviewed on an extended basis were allowed to proceed. Accordingly, while Chinese investors are likely to attract increased scrutiny, Canada is not closed to all investment from China.

INVESTMENT CANADA ACT: A DEAL FACTOR

This *Investment Canada Act* is increasingly considered in deal documentation when negotiating the acquisition of a Canadian business.

Our annual review of the 30 largest deals involving Canadian publicly-listed entities between January and December 1, 2023 indicates that the *Investment Canada Act* is increasingly considered when negotiating the acquisition of a Canadian business. Of the 22 deals involving a foreign-controlled buyer, 68% included a representation regarding the buyer's status as either a World Trade Organization or trade agreement investor (designations which dictate the applicable *Investment Canada Act* review threshold).

This is a 28% increase over the top 30 deals of 2022. In addition, 27% included a representation that the investor is not a state-owned enterprise, compared to 23% and 13% in 2022 and 2021, respectively.

However, the *Investment Canada Act* is not only impacting representations and warranties in transaction agreements – it is increasingly pertinent to deal timing.

Of the 22 deals with a foreign-controlled buyer, 27% included national security clearance under Part IV.1 of the Investment Canada Act as a closing condition, compared to 5% and 17% in the previous two years, respectively.

More prescriptive conditions regarding filing timelines, cooperation covenants and remedies and break fees with respect to national security remain unusual but are likely to become more commonplace as the national security landscape continues to shift.

Competition Act Merger Review: The Bureau's Litigation Strategy Finally Prevails

2023 was yet another active year for the Bureau's mergers branch, marked by the Bureau's setback in Rogers/Shaw and its success in challenging Secure/Tervita, notably refuting the merging parties' use of the efficiencies defence. Alongside an increasing number of negotiated merger remedies, final judgments from the Tribunal and the Federal Court of Appeal in those two major merger disputes were issued in 2023, with significance for merging parties both from a legal and practical standpoint. However, their long-term impact is uncertain in the context of ongoing legislative reform in Canada, a focal point of which has been the anticipated repeal of the efficiencies defence (as described on page 4 under ***Competition Act* Reform – Substantial Change on the Horizon – Preliminary Steps Towards Substantial Reform**).

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ROGERS/SHAW: COMPETITION BUREAU'S LOST BATTLE

On the eve of 2023, the Tribunal released its decision refusing to grant the Bureau's application to block the proposed amalgamation of Rogers Communications Inc. and Shaw Communications Inc., essentially concluding that Shaw's agreement to sell its subsidiary Freedom Mobile Inc. to Vidéotron Ltd. – in direct response to the Bureau's announced concerns of the initially proposed transaction – constituted an appropriate remedy to ensure that competition would not be substantially lessened post-closing. The Bureau's litigation strategy almost immediately suffered a further setback as the Federal Court of Appeal dismissed the Bureau's appeal of the Tribunal's decision in January 2023.

The Tribunal's decision – which followed the *Parrish & Heimbecker* case, in which the Bureau had also failed to substantiate the anti-competitive effects required to block a transaction – highlights the strategic merits of advancing a proactive remedy package: the decision confirms that the Tribunal will evaluate transactions not as they stand when the Bureau commences its challenge, but rather as they stand at the time of the hearing. In fact, the Tribunal expressly criticized the Bureau's alternative position, refusing to "spend scarce public resources assessing something that will never happen" and, in a subsequent decision, the Tribunal ordered the Bureau to pay $13 million in costs to the merging parties, in light of the Bureau's "unreasonable behavior". As such, the decision puts pressure on the Bureau to carefully evaluate remedy proposals in the future before making a decision to challenge before the Tribunal.

Rogers/Shaw confirms that the Tribunal will evaluate transactions not as they stand when the Bureau commences its challenge, but rather as they stand at the time of the hearing.

SECURE/TERVITA: EFFICIENCIES NOT A SILVER BULLET DEFENCE

In March 2023, the Tribunal, in a decision upheld by the Federal Court of Appeal, largely granted the Bureau's application challenging SECURE Energy Services Inc.'s acquisition of Tervita Corporation, two suppliers of oilfield waste services, ordering Secure to sell 29 facilities to resolve the substantial lessening of competition found in 136 relevant markets.

Not only was the Bureau successful in substantiating the anti-competitive effects of the transaction, but it also prevailed in challenging the merging parties' attempt to "save" the transaction using the statutory efficiencies defence, which prohibits the Tribunal from issuing an order against a merger that is likely to bring about efficiency gains that are greater than, and offset, the anti-competitive effects that are likely to result from a merger where those efficiencies would be lost if the Tribunal were to issue an order. While Rogers/Shaw had left questions unanswered as to the application of the efficiencies defence – since the Commissioner did not meet his burden of showing that the transaction would result in a substantial lessening of competition, and in light of the compressed timeline in this case, the Tribunal did not consider the efficiencies defence – the Secure/Tervita challenge provided helpful guidance in this regard and confirmed that the Tribunal will very carefully consider the efficiencies evidence adduced by merging parties

and dismiss any purported efficiencies where the evidence is not clear and convincing. The decision may also encourage the Bureau to increasingly rely on non-price anti-competitive effects – formally codified through the 2022 amendments to the *Competition Act* – including quality, choice, service, innovation, to challenge transactions in the future.

PROPOSAL TO REPEAL THE EFFICIENCIES DEFENCE: WHAT IMPACT ON FUTURE MERGER REVIEW?

As described on page 4 under ***Competition Act* Reform – Substantial Change on the Horizon – Preliminary Steps Towards Substantial Reform**, Bill C-56's introduction by the federal government in September 2023 and enactment in December 2023 has resulted in the repeal of the efficiencies defence in its entirety in merger review, an approach which diverges from the Bureau's recommendation that the defence be repealed but made an assessment factor that the Tribunal can consider in determining whether a merger substantially lessens or prevents competition. It remains possible that this will be the subject of future amendments.

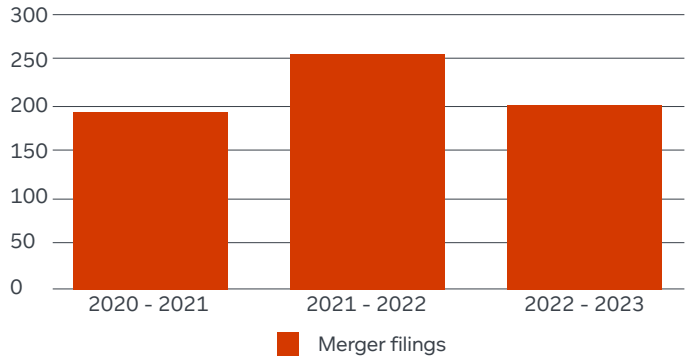
Bill C-56's introduction by the federal government in September 2023 and enactment in December 2023 has resulted in the repeal of the efficiencies defence in its entirety in merger review, an approach which diverges from the Bureau's recommendation that the defence be repealed but made an assessment factor.

The impact of the repeal of the efficiencies defence on merger review is unclear, and arguably should not be overestimated. Indeed, not only are litigated cases rather rare – even taking into account the Bureau's more litigation-ready posture of recent years – but merging parties have invoked the defence in only a sub-set of those cases. Moreover, the defence is rarely determinative outside of the Tribunal, rendering its repeal irrelevant to the vast majority of merger cases reviewed by the Bureau. Finally, the Secure/Tervita Tribunal decision discussed above (which was affirmed by the Federal Court of Appeal, but, as of writing, is subject to an application for leave to the Supreme Court of Canada) further restricts the application of the efficiencies defence.

Overall, whether its repeal will achieve the government's and Bureau's objective to swiftly improve competition throughout the Canadian economy remains uncertain.

BUREAU REMAINS ACTIVE IN MERGER ENFORCEMENT

Merger Filings by Year



This chart compares the number of merger filings received by the Bureau per year since 2020.

The Bureau continues to demonstrate its openness to resolving merger concerns on a consensual basis, entering into a half-decade high of seven consent agreements in fiscal year 2023, which represents a sharp increase over recent years, with two and four consent agreements being registered in fiscal years 2021 and 2022, respectively.

Merger review activity at the Bureau has remained active over the past year – with 208 reviews completed over the period – though a lower number of merger filings were received by the Bureau in the year ended March 31, 2023 (202, as compared to 256 in 2021-2022 and 193 in 2020-2021, a year that was marked by a sharp decline due to the COVID-19 pandemic). Similarly, there was a lower number of reviews of non-notifiable mergers, with the Bureau initiating only eight such reviews – the lowest number for the past five years.

For approximately 70% of the 13 transactions that received a SIR, a remedy was required or the transaction was abandoned.

Despite fewer filings, the Bureau issued 13 Supplementary Information Requests (SIRs, the equivalent of a Second Request in the U.S. or Phase 2 in Europe) that is 6.2% of concluded reviews over the period; registered seven consent agreements (a record figure for the past five years); and identified two transactions as being abandoned due to competition concerns. Proportionally, this means that for approximately 70% of the 13 transactions that received a SIR, a remedy was required or the transaction was abandoned, which reveals a material increase in the level of enforcement activity when compared to the previous five years, during which time the Bureau issued SIRs in respect of approximately 4.7% of merger filings on average, and negotiated a remedy or had the transaction abandoned in approximately 24% of SIR cases.

In calendar year 2023, four transactions have been subject to a remedy through registered consent agreements, all of which involved structural divestitures. In Sika AG/MBCC Group, both global admixture systems suppliers, Sika AG agreed to sell certain MBCC Group assets, including admixture production plants in Canada, 10 admixture production plants and a research and development centre in the United States, and a global research and development centre in Germany. Of note, the Bureau – along with other competition authorities whose approval was needed for the transaction to close – approved Cinven, a private-equity firm, as divestiture buyer, thereby confirming that PE firms can be considered qualified, vigorous competitors even in a remedy context. In Superior Plus Corp./Certarus Ltd, the Bureau concluded that the proposed transaction raised competition concerns for the retail supply of portable heating fuels for industrial customers in Northern Ontario, and as a result thereof, Superior agreed to sell eight propane distribution hubs in Northern Ontario, including customer contracts and associated operating assets at each hub. In Shell Canada Limited/Sobeys Capital Incorporated, involving the acquisition of all of Sobeys' retail fuel stations and related convenience stores in western Canada, Shell agreed to divest three stations in Alberta and British-Columbia. To resolve the Commissioner's concerns related to another transaction in the retail fuel supply business, Global Fuels' proposed acquisition of Greenergy's Canadian retail fuel business, Global Fuels agreed to assign motor fuel supply agreements in two regions in Ontario. It has been an active year for the Bureau on merger remedies, perhaps highlighting a slight tightening of enforcement practice for more complex transactions.

ANALYSIS OF M&A INVOLVING PUBLICLY LISTED CANADIAN ENTITIES

Our annual review of the largest 30 negotiated M&A transactions announced between January 1 and December 1, 2023 that involved a publicly-listed Canadian entity demonstrates that a significant proportion (43%) included a *Competition Act* closing condition.

— Of those 13 agreements with a *Competition Act* condition, 92% required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter, rather than being satisfied on the expiry of the applicable waiting period. This confirms that merging parties are well aware of the risk attached to closing a transaction prior to receiving formal Bureau clearance rather than the mere expiry of the waiting period.

— 9 out of 13 agreements that had a *Competition Act* closing condition also incorporated covenants relating to remedies, with 3 agreements (31%) requiring the purchaser to give some remedies if required, and 6 agreements (46%) providing that the purchaser was not required to give any remedy to obtain *Competition Act* clearance. This high incidence of remedy consideration in merger agreements may be an acknowledgement of the Bureau's more assertive enforcement stance.

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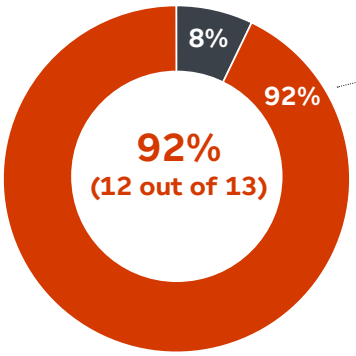
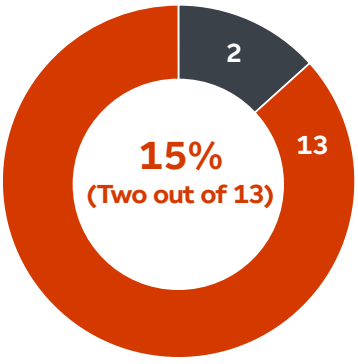
— Only 3 agreements included covenants relating to which party had carriage of regulatory strategy; in all 3 cases, the buyer had final authority. Only two agreements imposed a reverse break fee on the purchaser if the *Competition Act* closing condition was not satisfied.

Analysis of M&A Involving Publicly Listed Canadian Targets

More than two thirds (9 out of 13) of agreements that had a *Competition Act* closing conditions also incorporated (positive or negative) covenants relating to remedies.



92% (12 out of 13) with a *Competition Act* condition required substantive comfort in the form of an Advance Ruling Certificate or No Action Letter



A smaller number imposed a reverse break fee on the purchaser if the *Competition Act* closing condition was not satisfied **(two out of 13)**

This graphic reviews the largest 30 negotiated M&A transactions announced between January 1, 2023 and December 1, 2023 that involved a publicly-listed Canadian entity.

Taking Aim at Concentration and Affordability – Sector Specific Developments

In the context of the federal government's drive to identify and remedy the causes of the rising cost of living, the Bureau has been active across a number of key, consumer-facing sectors of the Canadian economy in 2023, completing big ticket merger reviews in the telecommunications and financial services sectors and publishing its highly anticipated retail grocery market study.

Allied to its enforcement activity, the Bureau has undertaken a study on Canada's competitive intensity, designed to test the government's intuitive assumption that competitive intensity in Canada has declined in the last two decades. In its report published in October 2023, the Bureau concluded that, between 2000 and 2020, concentration has risen in Canada's most concentrated industries, top firms are maintaining their position for longer periods of time and overall entry has declined, resulting in rising profits and markups. While other statistics in the report show that many industries have not experienced rising concentration, the tenor of the Bureau's conclusions suggests that highly concentrated industries can expect to receive enhanced scrutiny from an enforcement perspective moving forward. In 2023, the Bureau has already devoted significant resources to three such industries: telecommunications, grocery and financial services, with mixed outcomes.

TELECOMMUNICATIONS – THE ROGERS/SHAW SAGA FINALLY COMES TO AN END

As summarized on page 9 under ***Competition Act* Merger Review: The Bureau's Litigation Strategy Finally Prevails**, over two years after the deal was first announced, Rogers/Shaw was completed in April 2023 after the Tribunal and Court of Appeal sided with the merging parties against the Bureau, in particular by insisting on an evaluation of the transaction as amended by the divestiture of Shaw's Freedom Mobile business to Vidéotron. There are several key takeaways from Rogers/Shaw of relevance to the Bureau's hardening enforcement stance on sector-specific issues:

— The Rogers/Shaw decision reinforces the Tribunal's presence as an impartial adjudicator - merging parties who are confident in their case and have the time and resources to litigate can be assured that the Tribunal will not side with the Bureau simply because it elects to bring a challenge in a market which is perceived to be unduly concentrated. In Rogers/Shaw, a remedy was required to address a genuine competition issue, but the Tribunal focused on the evidence put before it, rather than the political noise that accompanied the case as it went to trial.

— In addition, parties facing a Bureau challenge can benefit from the negotiation of effective remedy proposals; once the Bureau has laid out its case in the administrative review stage, the parties can craft an acceptable remedy to rectify such concerns before the case reaches litigation. The Rogers/Shaw decision is likely to cause the Bureau to more carefully evaluate such remedy proposals going forward, particularly since it is now clear that if the Bureau is unwilling to entertain them, the Tribunal most likely will.

— The Rogers/Shaw transaction was also subject to a separate review and approval by the Canadian Radio-television and Telecommunications Commission (CRTC), pursuant to the *Broadcasting Act*, with respect to the transfer of Shaw's broadcasting assets. While the Bureau commonly consults with other regulatory agencies that have a vested interest in transactions under its review, the extent to which the Bureau and CRTC reviews overlapped, or even engaged with one another, is unclear with respect to Rogers/Shaw, perhaps as a result of the Bureau's review focusing on the telecommunications (rather than broadcasting) aspect of Shaw's business.

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On the telecommunications front more broadly, the Bureau also made submissions in June 2023 to the CRTC's consultation on reform to its wholesale high-speed access framework, which governs the way internet service providers (ISPs) access the underlying infrastructure and services necessary to provide internet services to Canadians. On the central question of mandating aggregated access for ISPs to fiber technology, the Bureau's advocated for (but did not recommend) disaggregated access to fiber technology, noting that it would better facilitate competition in the industry while acknowledging the real world challenges of a workable configuration for disaggregated access. The Bureau's submission also provided recommendations on improving affordability of internet services for retail customers, including the reduction in switching costs by providing customers the right to use their own modems and routers rather than requiring these be rented from ISPs (as is common practice in Canada today). It remains to be seen how this intervention will shape CRTC and wider government policy in this important industry moving forward.

RETAIL GROCERY – COMPETITION POLICY HAS BECOME A KITCHEN-TABLE ISSUE

With prices rising at the shelves, the Canadian government has turned to competition policy to combat food inflation. Government, the media, academic commentators, the Bureau and even ordinary Canadians have all weighed in on whether the *Competition Act* is an appropriate mechanism to combat food inflation and how equipped or ill-equipped it is for that purpose. From the Bureau and the federal government's perspective at least, competition law appears to be the right tool to tackle this pressing, politically-charged issue.

In June 2023, the Bureau released the highly anticipated final report summarizing its market study on competition in Canada's retail grocery sector. Entitled Canada Needs More Grocery Competition, the report draws on information volunteered by grocers, consumers, governments and agencies in Canada and around the world and sets out four recommendations for the federal and provincial / territorial governments to improve competition in this sector:

- Create a **Grocery Innovation Strategy** to support the emergence of new types of grocery businesses (e.g., independent online grocers) and expand consumer choice. Among other things, the strategy should provide financial support to entrepreneurs and simplify regulatory requirements.
- Encourage the **growth of independent grocers and the entry of international grocers** into the Canadian market.
- Introduce **accessible and harmonized unit pricing requirements** that enable customers to compare prices between different products, package sizes, and grocery stores and facilitate consumer choice.
- Take measures to **limit property controls in the grocery industry**, including, if warranted, to ban their use. Property controls, also referred to as restrictive covenants, limit how real estate can be used by competing grocers (for example, retailers asking landlords to restrict the sale of similar products in nearby stores) making it harder for new grocery stores to open, since only a finite amount of real estate exists to accommodate a grocery store in a given community.

While certain of these recommendations require regulatory and policy tools beyond the remit of the *Competition Act*, just two months after the publication of this report, the federal government introduced Bill C-56, the *Affordable Housing and Groceries Act*, which was designed to introduce measures to enhance competition and drive down grocery prices for Canadians, and which swiftly moved through the legislative process and received royal assent in December 2023. As described on page 5 under ***Competition Act* Reform – Substantial Change on the Horizon – Competitor Collaborations**, Bill C-56 would expand the *Competition Act*'s competitor collaboration prohibition to include arrangements between non-competitors where a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market. This amendment appears to be motivated to enable the Bureau to pursue property controls between landlords and retailers that it claims are inhibiting new entry in the retail grocery sector, but the scope of the proposed amendment is not limited only to the grocery sector and, if adopted, this change would considerably expand the current s. 90.1 civil regime.

Perhaps the biggest win for the Bureau is the introduction of more formalized market study powers in Bill C-56. The authority to initiate a market study would lie with both the Minister of Innovation, Science and Industry (the "**Minister**") and the Bureau itself, although the Minister

and Commissioner must consult with each other to initiate a study. A recurring theme in the Bureau's grocery sector report is the limitations its analysis faced as a result of the quality and completeness of voluntary responses provided by market participants. While Bill C-56 does not give the Bureau the authority itself to compel the production of information from market participants, it does expand the Bureau's existing right to obtain a court order to compel the production of information to apply in the course of a market study. Given the substantial cost and effort associated with responding to market studies, this judicial oversight will be critical to ensure that market studies are not unnecessarily burdensome for market participants and other key stakeholders.

These developments have put the grocery sector on notice that they are in the Bureau's crosshairs. It remains to be seen how effective these new powers (and competition law more generally) will be at combating food inflation in Canada and which sectors the Bureau and the federal government will target next with the formal market study powers now available.

FINANCIAL SERVICES – BUREAU GREEN-LIGHTS RBC'S ACQUISITION OF HSBC

The Bureau has also been active in Canada's banking and financial services sector. In late 2022, Canada's largest bank, the Royal Bank of Canada (RBC), announced its proposed acquisition of HSBC Bank Canada (HSBC), Canada's seventh largest bank. Since it was announced, the deal has been subject to much political and media scrutiny, with members of the opposition and the House of Commons Finance Committee calling on the Minister of Finance, who has the ultimate jurisdiction over transactions in the financial services sector, to block the transaction.

In contrast to these voices, the Bureau concluded in its September 2023 report to the Minister of Finance that, as a result of HSBC's limited competitive impact in the relevant markets in Canada and the effectiveness of remaining competition from the other four "Big Five" banks and, to a limited extent, credit unions and other non-bank financial institutions, the transaction was not likely to result in a substantial lessening or prevention of competition in any relevant market in Canada. The Bureau reached this conclusion despite finding that the relevant markets (capital market services, credit card services, personal financial services and business financial services) remain highly concentrated, and there are high financial, reputational and regulatory barriers to entry and expansion in these markets.

While the Bureau acknowledged the role of fintech enterprises, branchless competitors and other non-traditional banking alternatives in driving competition, it concluded that relevant geographic market for personal and business banking services remained local as a result of physical bank branches being the primary mode of banking for many Canadians.

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Echoing the limited role that online grocers play in driving competition in the retail grocery sector, these conclusions show that, despite significant advancements in digital markets more generally, digital alternatives have yet to penetrate more traditional sectors in a manner meaningful enough to impact competition. However, the outcome in RBC/HSBC also shows that the Bureau continues to take an orthodox approach to its assessment of competitive effects, even in cases with significant political and other policy consequences. The close look given to the transaction by the Bureau was ultimately grounded in the evidence relating to competitive effects, reflecting the proper jurisdictional division of responsibility between Bureau and Minister of Finance in the legislation.

Cartel Activity: False Dawn or New Age?

The Canadian cartel enforcement landscape saw significant developments in 2023. New criminal prohibitions on specified agreements between employers came into force in June, and Parliament is considering further enforcement tools in the form of revisions to the civil collaboration provisions of the *Competition Act*. In addition to receiving new tools, the Bureau's investigators have been busy. In its 2022-2023 fiscal year, the Bureau commenced more than double the investigations it did in each of the two preceding years. Finally, in the courts, helpful judicial consideration in one contested criminal matter has clarified the intersection between the law of privilege and the Bureau's immunity and leniency processes.

In addition to receiving new cartel tools, the Bureau's investigators have been busy. In its 2022-2023 fiscal year, the Bureau commenced more than double the investigations it did in each of the two preceding years.

FINALIZED BUREAU GUIDELINES ON BUY-SIDE AGREEMENTS

New amendments to the conspiracy provisions of the *Competition Act* came into force in June 2023. This amendment at section 45(1.1) criminalizes agreements to: (1) fix salaries, wages or other terms and conditions of employment; or (2) refrain from soliciting or hiring each other's employees.

The new section 45(1.1) employer offences represent, in our view, the most stringent wage-fixing and no-poach antitrust enforcement regime in the world. The potential liabilities under these offences are substantial — prison sentences of up to 14 years for involved individuals, significant corporate fines with no statutory limit (but instead "in the discretion of the court"), civil damages claims (including by way of class actions), reputational harm, and potential debarment or disqualification for public contracts. Moreover, these offences are codified in legislation rather than part of an enforcement posture, as is in the case in some comparable jurisdictions such as the United States.

In June 2023, just before the new provisions were set to come into force, the Bureau finalized stand-alone guidance on no-poach and wage-fixing agreements, which provides some welcome safe harbours:

— **No-poach agreements must be mutual (two-way).** The guidelines helpfully state that a one-sided non-solicitation arrangement is not an agreement to not hire "each other's" employees within the meaning of the statute, and, therefore, potential criminal liability is only possible where employers mutually agree to refrain from solicitation. This should provide comfort to parties who engage outside consultants or staffing agencies and agree not to solicit or hire those third parties' employees.

The Bureau finalized stand-alone guidance on no-poach and wage-fixing agreements.

— **Some comfort for parties to merger, temporary staffing, and IT services agreements.** As non-solicitation clauses commonly play an important role in agreements to purchase a business, as a matter of enforcement discretion, the Bureau "will generally not assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal track". The Bureau's finalized guidance also recognizes "the pro-competitive role these types of restraints can play in certain business arrangements, for example in franchise agreements and certain service provider-client relationships, such as staffing or IT service contracts". That said, the Bureau reserves the right to commence a criminal investigation "where those clauses are clearly broader than necessary in terms of duration or affected employees, or where the business agreement or arrangement is a sham".

However, there also remain certain points of uncertainty for employers:

— **Limited guidance on the ancillary restraints defence.** One possible response to an alleged offence is the ancillary restraints defence, which allows the accused to avoid liability where one establishes, on a balance of probabilities, that: (i) the impugned agreement is ancillary to a broader or separate legitimate agreement between the parties; and (ii) the wage-fixing or no-poach provision is related to and reasonably necessary to give effect to the broader legitimate agreement. Yet, despite the fact that the ancillary restraints defence is anticipated

to play an important role in justifying non-solicitation agreements, the Bureau's guidance provides limited practical guidance in respect of likely scenarios where the defence may be available, leaving parties to interpret its application themselves.

— **Limited guidance for immunity or leniency applicants.** Any individual or company that becomes aware of agreements or conduct contrary to the new criminal offence could benefit, in exchange of full cooperation, from the Bureau's immunity and leniency programs. Yet the Bureau's existing immunity and leniency guidance is not well-suited to potential wage fixing or no-poach cases. Guidance on what applicants can expect in exchange for their cooperation in such cases is eagerly anticipated.

With the new offences being in place for only six months, new developments are expected as cases (both criminal and parasitic class actions alike) are brought and litigated. This will be a space to watch in 2024.

BILL C-56: FURTHER ADDITIONS TO THE BUREAU'S COLLABORATIONS TOOLKIT

As discussed on page 5 under ***Competition Act* Reform – Substantial Change on the Horizon – Competitor Collaborations**, the enactment of Bill C-56 in Parliament in December 2023 included an amendment to broaden the reach of the *Competition Act*'s civil provisions governing competitor collaborations (section 90.1). Previously, the Tribunal could only grant relief under this provision where an agreement or arrangement between competitors was likely to result in a substantial lessening or prevention of competition in a market. The effect of the proposed amendment is, where "a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market", then the Tribunal can remedy agreements or arrangements that result in a substantial prevention or lessening of competition even where the parties involved are not competitors.

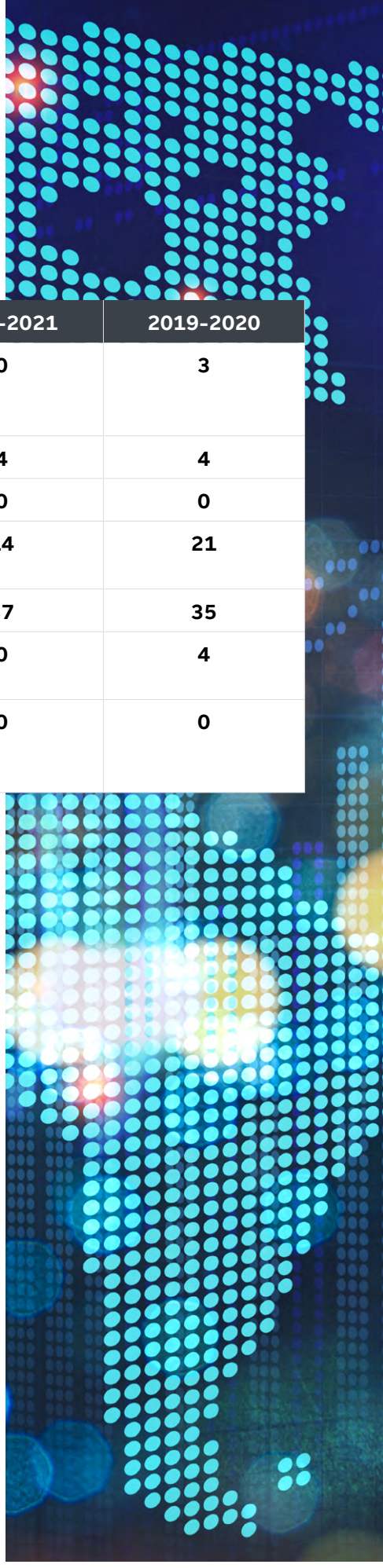
While not a "cartel" provision in the traditional, criminal sense, the expansion of the existing civil provision, which was developed to address restrictive covenants in the grocery sector, could see the Bureau investigating a broader array of allegedly anti-competitive collaborations, even where the parties are not competitors.

> **The effect of the amendments to the civil collaboration provisions is, where "a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market", then the Tribunal can remedy agreements or arrangements that result in a substantial prevention or lessening of competition even where the parties involved are not competitors.**

STATISTICAL UPDATE FOR BUREAU'S 2022-2023 FISCAL YEAR

The table below includes key cartel enforcement statistics published by the Bureau for its fiscal year ending in March 2023:

Enforcement Metric	2022-2023	2021-2022	2020-2021	2019-2020
Search warrants issued, including multiple orders for a single investigation	**0**	**1**	**0**	**3**
Immunity markers granted	**1**	**2**	**4**	**4**
Leniency markers granted	**0**	**0**	**0**	**0**
New cartel investigations commenced	**30**	**14**	**14**	**21**
Ongoing cartel investigations	**47**	**39**	**37**	**35**
Investigations referred to the PPSC	**0**	**2**	**0**	**4**
Investigations where criminal charges were laid following a PPSC decision	**1**	**1**	**0**	**0**



The Bureau's cartel directorate had a busy 2022-2023 year. The opening of 30 new investigations more than doubles the Bureau's new file count as compared with each of the prior two years. Notably, however, the Bureau's total ongoing cartel case count only ticked up by eight, with the Bureau closing 21 investigations and laying charges in just one matter.

The statistics are consistent with the observable trend in publicly-announced enforcement activity: the Bureau is taking steps to resolve old cases, clearing its plate to take on new ones. This year, settlements were announced in cases relating to the price of bread and bidding for municipal infrastructure in Quebec, with some of the underlying events in both cases being over a decade old.

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Notably, however, the full effect of the new criminal employer-related offences (which came into force in June 2023) is likely not captured by the statistics above (which end as of March 2023). Looking forward, it will be important to watch to see if the new provisions permanently increase the Bureau's investigative caseload, as well as whether they have an impact on the number of immunity and leniency markers granted.

PRIVILEGE UNDER THE BUREAU'S IMMUNITY AND LENIENCY PROCESSES SUBJECT TO FURTHER JUDICIAL CONSIDERATION

Near the end of 2023, the Ontario Superior Court of Justice provided welcome judicial consideration on a key point of cartel practice: solicitor-client privilege where clients agree to cooperate with law enforcement. On September 22, 2023, Justice Bawden of the Ontario Superior Court of Justice released his decision on an application for disclosure in *R. v. Tri-Can Contract Inc.* This is the second decision to consider in detail how legal privilege applies during the Bureau's immunity and leniency regimes for criminal offences. The decision confirms that, where lawyers communicate and conduct interviews with clients to obtain information to be proffered to the Bureau in connection with immunity or leniency applications, solicitor-client privilege appropriately applies to those communications.

Privilege under the Bureau's immunity and leniency regimes was previously considered in *R. v. Nestlé Canada Inc*. There, Justice Nordheimer considered whether information collected by counsel in an internal investigation, and subsequently provided to the Crown, was protected by privilege. Justice Nordheimer held that where an immunity/leniency applicant provides copies of solicitor-client communications to the Crown, the privilege is waived with respect to those communications.

Where lawyers communicate and conduct interviews with clients to obtain information to be proffered to the Bureau in connection with immunity or leniency applications, solicitor-client privilege appropriately applies to those communications.

Justice Bawden described *Tri-Can* as the "predictable sequel" to *Nestlé*. In *Nestlé*, the Court presumed that solicitor-client privilege applied to the lawyers' interview notes but held that this privilege was lost when the notes were intentionally disclosed to the Bureau. The defendants in *Tri-Can* challenged that first presumption. They argued that the lawyers for the immunity/leniency applicants in *Tri-Can* became agents of the state when they agreed to question witnesses on specific topics at the direction of the Bureau, and thus the factual information they collected (as opposed to legal advice that was given) was under the control of the state and subject to disclosure in accordance with *R. v. Stinchcombe*.

The Court rejected this argument, and held that "solicitor-client privilege applies to information obtained by counsel from an immunity or leniency applicant" for the purposes of approaching the Bureau to obtain immunity. The Court explicitly noted that this includes interviews with "employees and officers of the company to determine the facts." The Court's clear analysis of how the law of privilege applies in this context is sure to assist future applicants in navigating the Bureau's immunity and leniency programs.

Unilateral Conduct and Deceptive Marketing: Moved to the Back Burner?

In 2023, there were a number of key developments in the unilateral conduct and deceptive marketing space, including the first ever private application under the abuse of dominance provisions as well the first drip pricing proceeding since the 2022 amendments came into force. However, there has been little tangible enforcement activity on the digital and greenwashing front—a notable shift from 2022. With the ongoing consultation into the Bureau's Bulletin on the 2022 abuse of dominance amendments and the enactment of Bill C-56 adjusting the framework for establishing abuse of dominance, 2024 promises to be an active year from a policy perspective.

KEY DEVELOPMENTS IN 2023: THE YEAR OF MANY FIRSTS

There have been a number of important developments across the unilateral conduct and deceptive marketing space in 2023.

— **The first private application before the Tribunal asserting an abuse of dominance infringement was brought** by Apotex Inc. ("**Apotex**") in September 2023. Apotex, a generic drug manufacturer, alleged that Takeda Pharmaceuticals U.S.A. Inc. and Paladin Labs Inc. (the "**Respondents**") deployed a number of tactics to prevent Apotex from launching a competing generic drug. Apotex alleged that the Respondents' conduct constituted an abuse of dominance and sought leave to bring an application under the *Competition Act*. To obtain leave to do so, the applicant must satisfy the Tribunal that its business would have been affected directly and substantially, and that the alleged conduct could be subject to an order under the abuse of dominance provisions. The case, however, never got this far. Apotex issued a notice of discontinuance just over two weeks after filing its application, suggesting that the parties settled their dispute shortly thereafter. The high bar applicants must satisfy to obtain leave may inhibit the successful bringing of private abuse of dominance cases. Private cases may nevertheless be an appealing strategy to bring respondents to the negotiating table and to encourage the settlement of commercial disputes, as appears to have happened in this case.

— In October 2023, the Bureau released a *Bulletin on Amendments to the Abuse of Dominance Provisions* (the "**Bulletin**"), designed to act as an addendum to its existing guidelines, focused on the amendments to these provisions enacted in 2022. While the Bulletin is under consultation until the end of 2023, in draft form it illustrates the expansive interpretation to abuse of dominance perceived to be captured by the Bureau in the amended definition of anti-competitive act, which goes beyond anti-competitive behaviour targeted at a particular competitor, and now includes acts intended to have "an adverse effect on competition." The Bulletin provides that conduct intended to harm competition includes "any form of conduct that has the purpose of negatively affecting the competitive process" and "conduct that softens competition, benefitting one or more competitors", such as agreements between competitors, the sharing of competitively sensitive information, contracts that reference rivals (for example, most favoured nation clauses) and serial acquisitions. Given most of these forms of conduct have hitherto been examined under other sections of the *Competition Act*, the Bulletin in its draft form has the potential to introduce further uncertainty in how certain types of conduct will be categorized and investigated by the Bureau. This uncertainty is particularly noteworthy given infringements of the abuse of dominance provisions now carry larger administrative monetary penalties (whereas unlawful competitor collaborations do not currently attract any financial penalty). We can expect further guidance and clarity on the Bureau's approach to the amended abuse of dominance regime in 2024.

We can expect further guidance and clarity on the Bureau's approach to the amended abuse of dominance regime in 2024.

— In March 2023, the Bureau entered into a consent agreement with Isologic Innovative Radiopharmaceuticals Ltd. ("**Isologic**") to address competition concerns arising from the company's contractual practices. In particular, the Bureau concluded that, in requiring customers to purchase some products exclusively from Isologic, the company contravened the abuse of dominance provisions of the *Competition Act*. Under the terms of the consent agreement, Isologic agreed to cease using legal exclusivity clauses in its contracts with customers and to include terms that allow customers to terminate

multi-year contracts prior to expiration. This represents the Bureau's first successful public resolution of an abuse matter since the Softvoyage consent agreement in 2018. Prior to that, the Bureau's most recent abuse case leading to public resolution was commenced in 2016 against the Vancouver Airport Authority, which was ultimately dismissed by the Tribunal.

— **As expected, the Bureau's enforcement efforts in deceptive marketing continue to focus on drip pricing.** Earlier this year, the Bureau commenced a suit before the Tribunal against Cineplex, alleging that Cineplex engaged in drip pricing contrary to the *Competition Act*. In common with historic drip pricing cases, the Bureau claims that Cineplex advertised movie tickets at a price that is lower than what customers were ultimately required to pay owing to fixed, obligatory booking fees surfaced later in the payment process. The case continues at the time of publication, with Cineplex claiming that the online booking fee is clearly shown on the very first page of its website and mobile app.

As expected, the Bureau's enforcement efforts in deceptive marketing continue to focus on drip pricing.

— While the Cineplex litigation is the first ever to proceed under the newly codified prohibition on drip pricing, this activity has been an enforcement priority of the Bureau for many years. Since 2018, the Bureau has successfully brought enforcement action against several car rental companies, online ticketing resale platforms, and online travel agency platforms. The codified prohibition on drip pricing only bolsters the Bureau's ability to pursue such cases by no longer requiring that it prove the deceptive nature of drip pricing. As a result, we expect that Bureau's enforcement efforts will continue to focus on this practice.

— In November 2023, the Bureau also entered into a consent agreement with TicketNetwork to address concerns over the company's pricing claims. A Bureau investigation concluded that TicketNetwork engaged drip pricing by advertising tickets at unattainable prices and unattainable discounts. The Bureau also found that TicketNetwork used misleading digital content, including search engine ads and website URLs, that gave the impression to consumers that they were buying directly from the venue, artist or sports team when they were in fact purchasing resale tickets. Pursuant to the consent agreement, TicketNetwork agreed to pay a $825,000 penalty.

— **The Bureau also focuses on "scarcity cues".** In September 2023, the Bureau announced that it had entered into a consent agreement with The Dufresne Group Inc. ("**Dufresne**") under the stringent "ordinary selling price" provisions. The Bureau investigation concluded that Dufresne offered products at inflated regular prices and then advertised them at big discounts, suggesting significant savings to consumers. The Bureau also found that Dufresne used urgency or "scarcity cues" that gave the false or misleading impression that deals on certain products would no longer be available after a certain time, when this was not the case. Pursuant to the consent agreement, Dufresne agreed to pay a $3.25 million penalty. The Bureau also made it clear in its *Deceptive Marketing Practices Digest* that misleading scarcity cues, such as "limited time offer" claims, countdown timers, and pop-ups or claims as to how many other people are currently viewing the same product, will continue to be an enforcement priority for Bureau in the coming years.

The Bureau also focuses on "scarcity cues".

SLOW PROGRESS IN BIG TECH INVESTIGATIONS

Despite renewed attention on the digital economy and significant reforms to the *Competition Act,* 2023 did not witness any material developments in Canada in respect of enforcement action against big tech.

For example, the Bureau began an investigation into Amazon in 2020. Three years later, the Bureau has yet to announce when it expects to complete its investigation or any commentary on its preliminary findings. In contrast, agencies in the United States and in Europe have launched lawsuits and reached settlements with Amazon in the last 12 months, all focused on the extent to which Amazon has

engaged in practices that inflate prices, degrade market and product quality and stifle innovation. It is possible that the Bureau is seeking to ride in the slipstream of peer agencies given the global nature of these cases' implications, a practice that is used routinely in complex global transactions under review in multiple jurisdictions.

Similarly, the Bureau does not appear to have made any meaningful progress in its investigation into Google since it obtained a court order requiring Google to produce relevant records in late 2021. The absence of any tangible evidence of progress in this case contrasts markedly with the continued efforts of agencies in other jurisdictions, especially the United States and the EU, to enforce against Google in several different areas of its business.

If 2023 is an accurate predictor of what portends for 2024 in Canadian big tech enforcement, we should not expect investigations into this sector of the economy to dominate either the Bureau's resources or the headlines.

THE BUREAU REMAINS SILENT AMID RISING GREENWASHING COMPLAINTS

In 2022, "greenwashing", or misleading environmental claims, rose to the forefront of the Bureau's agenda, with Commissioner Boswell hosting a Green Growth Summit and successfully forcing a settlement in respect of recyclability claims made by Keurig regarding its single-use coffee pods. In addition, the Bureau initiated a raft of other greenwashing inquiries, in part buoyed by external complaints from environmental pressure groups.

While third-party complaints have continued in 2023, and the Bureau remains statutorily required to initiate an inquiry where the complaint is made by six or more Canadian residents, active enforcement against firms for greenwashing activities have been more muted. That said, there remain a growing number of private greenwashing complaints and open investigations, which include:

- **Greenpeace's Complaint Against The Pathway Alliance:** In March of 2023, Greenpeace submitted a complaint, alleging that an advertisement by the Pathways Alliance, a group of oil & gas producers, were false and misleading. In particular, Greenpeace took issue with claims made by the Pathways Alliance that they are actively reducing emissions and helping Canada achieve its climate targets. The Bureau has opened an inquiry into the marketing practices of the group, which remains ongoing.
- **Ecojustice Complaint Against the Sustainable Forest Initiative:** In December 2022, Ecojustice filed a complaint alleging that the Sustainable Forest Initiative's certification standard was false and misleading. The Bureau has yet to comment on the complaint.
- **Ecojustice Complaint Against Royal Bank of Canada (RBC):** In June 2022, Ecojustice alleged that—in claiming that it was committed to achieving "net-zero emissions in its lending by 2050" and to advancing the objectives of the Paris Agreement — RBC made false and misleading representations because the bank continued to finance fossil fuel development. The Bureau's inquiry into RBC's messaging on climate action began in September 2022, and remains ongoing.
- **The Centre Québécois du Droit de L'Environnement (CQDE) Complaint against Gazoduq Inc.:** In a complaint filed in June 2021, the CQDE alleged that Gazoduq Inc. falsely represented that their pipeline project would be carbon neutral and reduce greenhouse gas emissions. The Bureau has yet to publicly respond to the matter.

These open cases may have been privately discontinued by the Bureau during the course of 2023; or they could translate into enforcement action over the course of 2024 and beyond.

Competition Class Actions: A Deepening Line in the Sand

In last year's Outlook, we reported on several decisions where Canadian courts were not shy to engage meaningfully with the *Competition Act*. In 2023, Canadian courts continued to build on that 'line in the sand', scrutinizing actions that failed to adequately plead proper anticompetitive conduct under the *Competition Act*. However, one case stands to change this pattern, calling into question what 2024 will hold for competition class actions.

KEY CASES DENYING PLAINTIFF'S CLAIMS

This year produced several notable cases that continued to scrutinize plaintiffs' pleadings, providing precedent-setting interpretations of the *Competition Act*'s key provisions. Canadian courts provided helpful insight into the demands a court will place on a plaintiff's expert at certification and the methodology proposed to assess damages.

Emphasizing the Canadian Market

In *Lilleyman v. Bumblebee Foods LLC*, the plaintiff brought two parallel proposed class actions. Together, they alleged that the defendants breached the conspiracy provisions of the *Competition Act* (and related causes of action including unlawful means conspiracy, conspiracy to injure, unjust enrichment, and breach of section 46 of the *Competition Act*) with damages accruing to direct, indirect, and umbrella purchasers of packaged tuna products in Canada between 2004 to the present day.

The actions were fundamentally a "copycat" class action based on US proceedings. However, none of the active defendants in the Canadian action actually sold packaged tuna in Canada.

The motion judge concluded that the plaintiff's claim did not disclose a cause of action, that the claim lacked some basis in fact for the existence of the conspiracy in Canada, and that a class action was not the preferable procedure. In coming to his decision he made the following significant findings, among others:

— **Conspiracy claims can fail where differently-situated entities are "grouped together" in a Statement of Claim in a manner that results in improper pleadings.** Throughout the Statement of Claim, the plaintiff "grouped together" differently-situated defendants. This resulted in a number of deficient pleadings, including assertions incapable of proof and assertions that failed to respect the separateness of corporate personalities
(material facts were not pleaded to support piercing the corporate veil).

— **Expert evidence untethered to the Canadian market cannot provide some basis in fact for conspiracy claims.** The defendants responded to the plaintiff's expert evidence by advancing a fact witness who detailed the ways in which the plaintiff's expert misconstrued the structure of the Canadian tuna market (including which defendants were actually present in

Canada and whether the structure of the Canadian market could facilitate the formation of a cartel). The motion judge made a number of criticisms of the plaintiff's expert in this regard, ultimately concluding that the expert's opinion "does not provide some basis in fact for a conspiracy to fix canned tuna prices in Canada. Indeed, the mistakes in the expert's opinion rather suggest that the marketplace in Canada was not conducive to a price-fixing conspiracy."

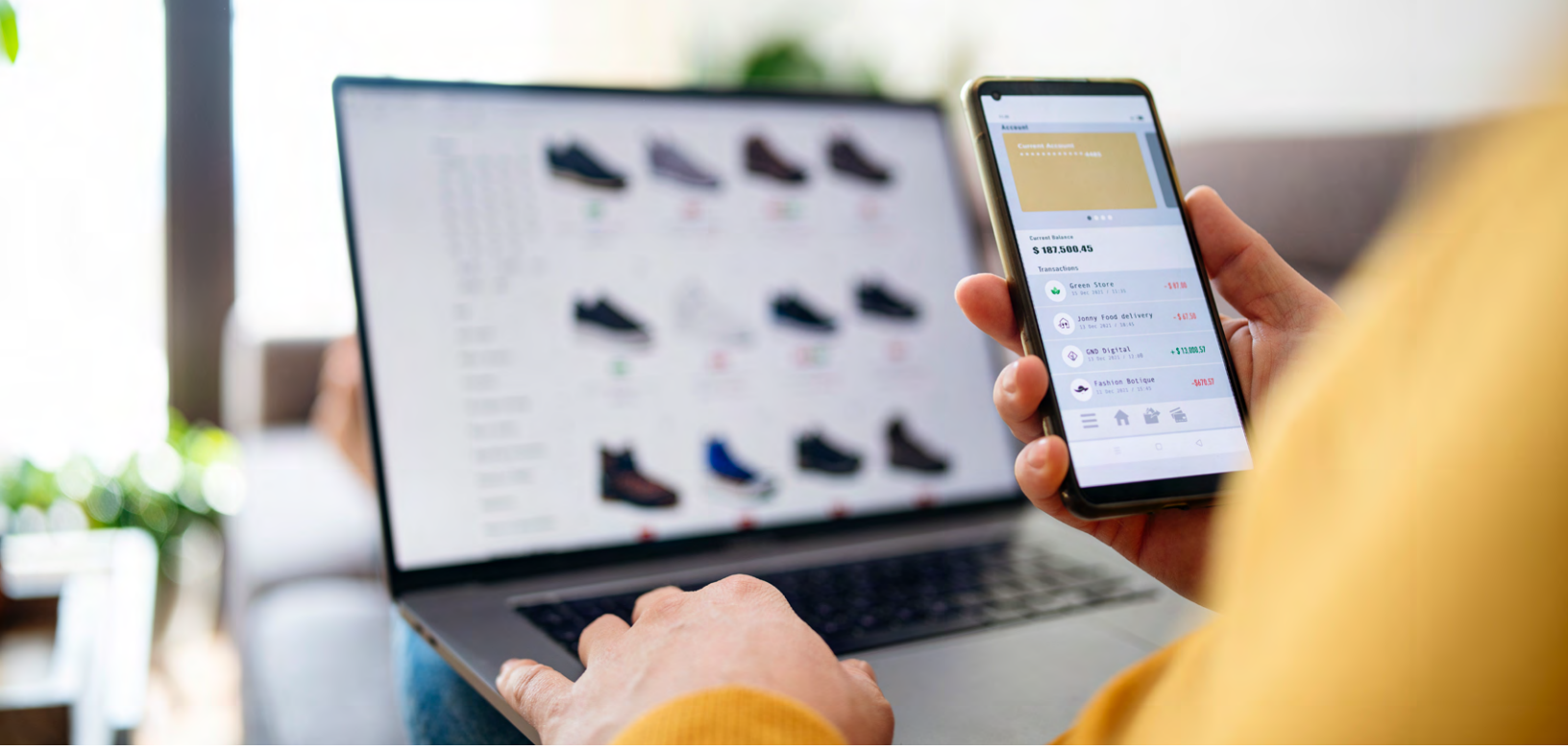
— **Merely asserting that an economic model exists to assess damages without 'actualizing' that methodology is insufficient in cases involving indirect and umbrella purchasers.** The Plaintiff's expert failed to establish a methodology upon which a common issue about the harm caused by the alleged conspiracy could be based. The methodology insufficiently particularized the structure of the packaged tuna industry (e.g., it did not acknowledge the many separate types of indirect purchasers of packaged tuna and how this would be dealt with). This improper specification had knock-on effects for the expert's opinion on the availability of data. Namely, because the expert "did not actualize" a methodology "by describing it other than in theoretical terms", the expert "was not in a position to say whether there would be the data available for the methodology to be applied".

Merely asserting that an economic model exists to assess damages without 'actualizing' that methodology is insufficient in cases involving indirect and umbrella purchasers.

This case continues the trend of courts carefully scrutinizing improperly pleaded claims, and identifies the expectations of experts at certification.

$12 Billion Class Action Dismissed Against Amazon

In *Difiderico v. Amazon.com Inc.*, the plaintiffs alleged that Amazon's agreements with third parties who sold products on its platform breached sections 45 and 46 of the *Competition Act*. In particular, they took issue with Amazon's Business Solutions Agreement (BSA) and its Fair Pricing Policy. From June 1, 2010 to March 2019, the BSA required third-party sellers to ensure that the prices of the products they sold on Amazon's platform were at least as favourable as the selling prices of those same products on any other e-commerce website. The Fair Pricing Policy allegedly allowed Amazon to penalize third-party sellers where they had engaged in harmful pricing practices, including pricing a product significantly higher than recent prices offered on or off Amazon.



The Federal Court dismissed the motion. Chief Justice Crampton found that the plaintiffs' claim failed to disclose a cause of action, such that it had no reasonable prospect of success for two reasons. First, the plaintiffs did not plead sufficient material facts with respect to all of the constituent elements of section 45. Second, neither the BSA nor the Fair Pricing Policy fall within the narrow scope of section 45 (the section 46 derivative claim, criminalizing foreign directives, was likewise dismissed). Specifically, Chief Justice Crampton found that no material facts supported an alleged agreement between the third-party sellers, making the pleadings insufficient to establish the wheel of a hub-and-spoke conspiracy. The court was satisfied that Amazon was an actual competitor of some third-party sellers, where it supplied products that certain third-party sellers also supplied, but it rejected unsupported allegations that Amazon and third-party sellers agreed to carry out activities prohibited under section 45.

In particular, the plaintiffs failed to provide the material facts required to demonstrate that Amazon and third-party sellers agreed to engage in the type of conduct sanctioned by section 45. The court noted that the plaintiffs did not plead any particulars with respect to the price or range of prices that Amazon and third-party sellers allegedly agreed to fix, maintain or increase. Further, the pleadings contained insufficient material facts to support a finding that the parties had the requisite intent to form the kind of agreement described in section 45; they merely made assertions to this effect.

The decision provides some helpful key takeaways:

— Plaintiffs must plead sufficient material facts with respect to all constituent elements of section 45. Bald assertions that simply track the language of the allegedly breached legislative provisions will not assist plaintiffs in filling the gaps in their theory of the case.

— Section 45 is concerned with the objects of the impugned agreement, rather than with its effects. An agreement that does not have one of the topics described in section 45 as its object will not be criminalized just because it may have an adverse impact on prices.

— Section 45 is confined to unambiguously harmful types of agreements between competitors. This kind of conduct must fulfill both the *actus reus* and the requisite objective *mens rea* requirement for conspiracy. Agreements that fall short of this high bar should instead be reviewed under section 90.1 of the *Competition Act*.

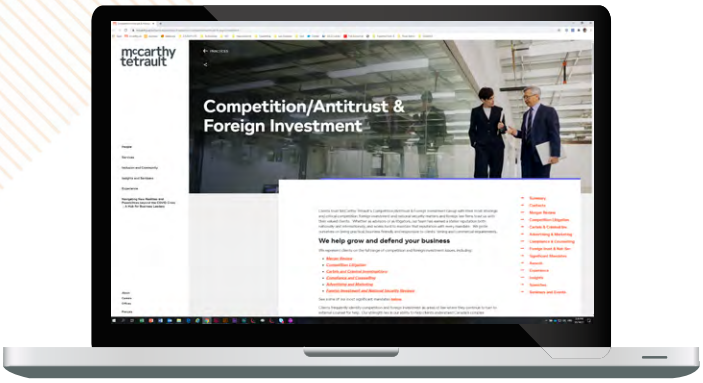
THE OUTLIER: BRITISH COLUMBIA COURT SHOEHORNS ABUSE OF DOMINANCE CLAIM IN CIVIL CLASS PROCEEDING

In *Barroqueiro v. Qualcomm Incorporated*, the British Columbia Supreme Court certified a class proceeding against the defendants, who are in the business of developing, implementing and licensing cellular technology and modem chips, used in cellular devices and tablets. The plaintiffs pleaded breaches of section 45 (both former and current versions), 46, and 61 (as it existed prior to March 11, 2009) of the *Competition Act*, along with civil conspiracy, unlawful interference with economic relations, and unjust enrichment. The thrust of the plaintiffs' claim is that the defendants abused their alleged dominant position in modem chips to charge supra-competitive price or otherwise impose unfair terms when selling its modem chips and licensing its products.

Among other reasons, the defendants took the position that the business practices the plaintiffs alleged are anticompetitive are not civilly actionable in Canada. They argued that, at most, the plaintiffs' claims could amount to an allegation that the defendants abused its dominant position or otherwise engaged in conduct that is reviewable under sections 78-79 (abuse of dominance) and section 77 (exclusive dealing) in Part VII of the *Competition Act*. These sections constitute non-criminal trade practices that can be reviewed by the Bureau (and be the subject of an application to the Tribunal). The argued that the allegations cannot be the subject of a civil action pursuant to section 36, nor can it constitute "unlawful means" for any tort. Notably, similar global proceedings against the same defendants outside of Canada focused on abuse of dominance allegations. The defendants asserted that the plaintiffs shoehorned in those claims into a series of vague pleadings designed to fit statutory and common law causes of action in Canada.

The motion judge ultimately found that the plaintiff's allegations were not vague enough to preclude the claim from certification, noting that any deficiency could be resolved by amending the pleading at a later stage. The motion judge's approach represents a stark contrast from the approach Canadian courts have adopted in the past two years, closely scrutinizing class actions that involve atypical cartel conduct which doesn't conform with the prohibitions in the *Competition Act*. This decision is presently under appeal at the British Columbia Court of Appeal. We will be watching closely this coming year to see how this case is applied across Canadian courts.

FOR MORE INFORMATION, PLEASE CONTACT THE COMPETITION/ANTITRUST & FOREIGN INVESTMENT GROUP AT McCARTHY TÉTRAULT



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