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HEARING ON OLIGOPOLY MARKETS

-- Note by Canada --

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CANADA

Introduction

1. Canada's Competition Bureau (the "**Bureau**") is pleased to provide this submission to the OECD Competition Committee hearing on "Approaches to issues in Oligopoly Markets". The Bureau, headed by the Commissioner of Competition (the "**Commissioner**"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "**Act**")¹ and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

2. The Act is a federal law governing most business conduct in Canada. Its purpose is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy; expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; ensure that small and medium-sized enterprises have an equal opportunity to participate in the Canadian economy; and provide consumers with competitive prices and product choices.

3. Competition enforcement in oligopoly markets is of particular importance in Canada given that a number of Canadian markets are characterized by both high levels of concentration and significant barriers to entry. That said, enforcement in such markets poses unique challenges: it is often difficult to determine whether firms in such markets are engaging in anti-competitive conduct, or instead acting as profit-maximizing firms by rationally taking into account their rivals' anticipated behavior when setting prices and other competitive variables.

4. The Bureau has a number of tools at its disposal to investigate and, where appropriate, initiate targeted enforcement in respect of oligopoly markets, as follows: (1) criminal provisions that prohibit agreements between competitors concerning price, output or territorial division;² (2) civil provisions that prohibit agreements between competitors, abuse of dominance (including abuse of joint dominance) and price maintenance likely to have a negative effect on competition; and (3) merger provisions, which permit the Bureau to challenge mergers that are likely to have a negative effect on competition.

5. As part of its mandate, the Bureau also participates in a range of activities to promote and advocate for the benefits of a competitive market. To the extent that competitive concerns arise in an oligopoly market that is regulated, the Bureau may choose to address concerns through the use of advocacy instruments (*e.g.*, advice to regulators or regulatory intervention).

6. This submission focuses on the latter two areas of enforcement set out above (*i.e.*, enforcement of the civil and merger provisions of the Act), and highlights key challenges faced by the Bureau in respect of oligopoly markets. The first section considers four broad challenges under the civil provisions of the Act. This is followed by an overview of certain challenges under the merger provisions of the Act.

¹ R.S.C. 1985, c. C-34.

² For more detail regarding the Bureau's enforcement of the criminal provisions of the Act, see: (1) the *Competitor Collaboration Guidelines*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>; and (2) the Bid-Rigging Pamphlet: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03152.html>.

2 Civil Provisions and Oligopoly Markets

7. Part VIII of the Act contains a number of provisions that prohibit different types of conduct that are likely to have a negative effect on competition (including harm arising from coordinated effects). Three of these provisions are particularly relevant to oligopoly markets: (1) section 90.1, which prohibits existing or proposed civil agreements between competitors that are likely to negatively impact competition in a market; (2) sections 78 and 79, which together prohibit anti-competitive conduct by a dominant firm (or dominant firms acting jointly) that is likely to negatively impact competition in a market; and (3) section 76, which prohibits certain vertical restraints, such as minimum pricing policies and minimum advertised pricing policies, that negatively impact competition.³

8. The section that follows provides a brief overview of the substantive elements of, and remedies available pursuant to, each of these provisions.

2.1 Overview of Sections 90.1, 78, 79 and 76 of the Act

2.1.1 Section 90.1

9. Section 90.1 was introduced as part of significant amendments to the Act in 2009. In many respects, section 90.1 works in tandem with section 45 of the Act, which is a *per se* criminal offence that prohibits collusive agreements between competitors related to pricing, output or territorial restriction. Section 90.1, conversely, is intended to capture other types of agreements between competitors that may not be *per se* offences but that still have a significant negative effect on competition. At present, there is no jurisprudence under this provision.

10. As is clear from the text of the provision,⁴ section 90.1 contains two substantive elements that must be proved in order to obtain a remedy: (1) an agreement or arrangement between persons two or more of whom are competitors; (2) that prevents or lessens or is likely to prevent or lessen competition substantially in a market. The Bureau's analytical framework for both of these elements is set out in detail in the Bureau's *Competitor Collaboration Guidelines*.⁵

11. If both of these elements are proved, the Competition Tribunal (the "**Tribunal**"), which is an independent adjudicative body with jurisdiction to hear and dispose of all applications under Part VIII of the Act, has the discretion to grant a remedy. The remedy can be prohibitive (*i.e.*, prohibiting a party from engaging in conduct contemplated by the agreement) or positive (*i.e.*, requiring a party to take specified action, whether or not that action is contemplated by the agreement). However, a remedy that is positive in nature can only be granted upon consent of both the Commissioner and the target of the order.

2.1.2 Sections 78 and 79

12. On application by the Commissioner, section 79 of the Act permits the Tribunal to issue a remedial order in respect of an abuse of a dominant market position. Under the Act, abuse of dominance occurs when: (1) a dominant firm (or a dominant group of firms) in a market; (2) engages in a practice of anti-competitive acts; (3) that has had, is having or is likely to have the effect of

³ Another provision that is potentially relevant to oligopoly markets is section 77 of the Act, which prohibits, among other things, tied selling and exclusive dealing by a major supplier in a market, or that is widespread in a market, that is likely to have a negative impact on competition. For more information, see the Bureau's Exclusive Dealing, Tied Selling and Market Restrictions overview: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00111.html.

⁴ See Appendix A for the text of section 90.1.

⁵ See the *Competitor Collaboration Guidelines* referred to in note 1, above, at pages 19-22.

preventing or lessening competition substantially in a market.⁶ The Bureau's analytical framework for each of these elements is set out in detail in the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "**Abuse Guidelines**").⁷

13. Section 78 provides a non-exhaustive list of types of conduct that are deemed to be "anti-competitive acts" for the purposes of section 79. These include: predatory pricing; pre-empting scarce facilities or resources; margin squeezing of a downstream competitor by a vertically-integrated supplier; and the use of temporary fighting brands to discipline or eliminate a competitor. Since this list is non-exhaustive, other practices, such as exclusive dealing or tied selling, can also be considered as "anti-competitive acts" under section 79.

14. The remedies available under section 79 of the Act are considerably broader than under section 90.1. Specifically, the Tribunal has the discretion to grant any of the following remedies upon a demonstration that the elements of section 79 have been proved: (1) an order prohibiting the practice of anti-competitive acts; (2) an order directing the respondent(s) to take actions that are reasonable and necessary to overcome the anti-competitive effects of the practice, including divestiture of assets or shares; and/or (3) an order requiring the respondent(s) to pay an administrative monetary penalty of up to CAD\$10 million on a first order, and up to CAD\$15 million for each subsequent order.

2.1.3 Section 76

15. Section 76 of the Act permits the Tribunal to make a remedial order in respect of three types of price maintenance conduct where the conduct has had, is having or is likely to have an adverse effect on competition in a market:

- First, subparagraph 76(1)(a)(i) applies where a person influences upward or discourages the reduction of the price at which another person supplies, offers to supply or advertises a product within Canada.
- Second, subparagraph 76(1)(a)(ii) applies when a person refuses to supply or otherwise discriminates against another person because of the low pricing policy of that person.
- Third, subsection 76(8) applies when a person induces a supplier to refuse to supply a product to another person because of the low pricing policy of that person.⁸

16. The Bureau's analytical framework for each of these types of prohibited conduct is set out in detail in the Bureau's *Price Maintenance Enforcement Guidelines* (the "**Price Maintenance Guidelines**").⁹

17. Similar to section 90.1, the remedies available under section 76 of the Act are fairly limited, as follows: (1) in respect of conduct that falls under either of the first two classes of conduct above, the Tribunal may make an order prohibiting a person from engaging in the conduct or requiring the person to accept another person as a customer within a specified time on usual trade terms; and (2) in respect of conduct that falls under the third class of conduct above, the Tribunal may make an order prohibiting a person from engaging in the conduct or requiring the person to do business with another person on usual trade terms.

⁶ See Appendix A for the text of sections 78 and 79.

⁷ The Abuse Guidelines were updated on 20 September 2012, and are available on the Bureau's website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>.

⁸ See Appendix A for the text of section 76.

⁹ The Price Maintenance Guidelines were updated on 15 September 2014, and are available on the Bureau's Website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03787.html>.

2.2 *Challenges under the Civil Provisions of the Act*

18. The sections that follow highlight four areas under the civil provisions of the Act, which relate to oligopoly markets, that are in need of further clarity, as follows: (1) at present, there is a lack of Canadian jurisprudence with respect to the test for joint dominance under paragraph 79(1)(a); (2) certain types of conduct that harm competition may not fit within the definition of “anti-competitive acts” under paragraph 79(1)(b), as that term has been defined in Canadian jurisprudence; (3) remedial considerations may, in some cases, inhibit the Bureau’s ability to effectively remedy conduct that is likely to have a negative effect on competition; and (4) there is debate with respect to the application of section 76 in cases where more than one party in a market implements vertical pricing restrictions, such as a minimum pricing policy or minimum advertised price policy.

2.2.1 *Joint Dominance*

19. While paragraph 79(1)(a) of the Act expressly contemplates that applications may be brought against multiple entities for an alleged joint abuse of dominance, the existing jurisprudence is limited to cases involving allegations of unilateral dominance (*i.e.*, dominance by a single firm). Given the absence of jurisprudence, there is significant debate surrounding how to properly assess whether firms are jointly dominant in the context of paragraph 79(1)(a).¹⁰

20. Members of the private bar have suggested that joint dominance ought to be assessed by considering the level of interaction or coordination between the firms alleged to be jointly dominant.¹¹ Generally, the private bar has taken the position that joint dominance cannot be established absent evidence of something more than conscious parallel behavior.¹² For instance, the National Competition Law Section of the Canadian Bar Association (“CBA”) has submitted that “at least coordination or tacit agreement should be required for a finding of joint dominance”.¹³

¹⁰ At present, the Bureau has yet to file an application before the Tribunal that alleges an abuse of joint dominance. Indeed, joint dominance has only been raised before the Tribunal in the context of negotiated consent agreements. For instance, in *The Commissioner of Competition v. Waste Services (CA) Inc. and Waste Management of Canada Corporation*, the Commissioner negotiated a consent agreement with two companies that collectively held a market share exceeding 80%. The Commissioner concluded that these companies were jointly dominant in the market for commercial, front-end, non-hazardous, solid waste haulage and disposal services in certain rural areas of the province of British Columbia: http://www.ct-tc.gc.ca/CMFiles/CT-2009-003_Registered%20Consent%20Agreement_001_61_6-16-2009_7583.pdf.

¹¹ The level of coordination between parties can range from overt collusion to independent behaviour, as follows: (1) overt collusion, which captures explicit coordination between parties through an actual agreement, written or otherwise; (2) tacit collusion, which unlike overt collusion, does not involve any explicit agreement or communication, but still permits firms to adopt a less vigorous mode of competition; (3) conscious parallelism, which captures behaviour between firms in oligopoly markets pursuant to which firms make decisions on issues such as pricing and output in part based on the anticipated reactions of their competitors; and (4) independent behavior, which describes competitive behaviour amongst firms without any coordination or conscious parallel behavior. For more information on these classes of coordination, see Jason Gudofsky, Evangelia Litsa Kriaris & Lucian Vital, “Abuse of Joint Dominance – Is the Cure Worse than the Disease?” (2010) Canadian Bar Association, 2010 Annual Competition Law Conference. Available at: http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf.

¹² For instance, see: *ibid*; and Anita Banicevic & Mark Katz, “Collective Dominance in Canada: A New Direction” (2009) GCP: The Antitrust Chronicle 1. Available at: <https://www.competitionpolicyinternational.com/file/view/6198>.

¹³ See the Canadian Bar Association’s National Competition Law Section submission on the Enforcement Guidelines: Abuse of Dominance (Competition Act sections 78 and 79), May 2012 at page 11. Available at: <https://www.cba.org/cba/submissions/pdf/12-34-eng.pdf>.

21. The Bureau has opted for a more practical and holistic approach to assess whether firms are jointly dominant. As with single-firm dominance, the Bureau will assess whether jointly dominant firms have market power; however, the Bureau does not consider it necessary to show that market power is a result of coordination. In assessing whether firms jointly hold market power, the Bureau considers the extent to which firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another. Factors relevant to this assessment may include: (1) whether prices appear to be at or near the competitive level; (2) price-matching competition among competitors; and (3) frequent customer switching.¹⁴ The Bureau has also taken the position that evidence of coordinated behaviour is probative, but not strictly necessary to establish that firms are not competing vigorously with one another.¹⁵

22. The Bureau expects that continued enforcement in oligopoly markets will ultimately provide greater clarity with respect to the test for joint dominance.

2.2.2 “Anti-Competitive Acts” May Not Capture Facilitating Practices

23. The Federal Court of Appeal’s decision in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (“**Canada Pipe**”) stands as the seminal case on the interpretation of the phrase “anti-competitive acts”, as that phrase is used in paragraph 79(1)(b) of the abuse of dominance provisions. In that case, the court held that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.¹⁶ While the Federal Court of Appeal’s decision in *Commissioner of Competition v. Toronto Real Estate Board* has, in some respects, broadened the scope of this test, it must still be satisfied in order for the Tribunal to conclude that an act is anti-competitive. In that case, the court overruled the decision of the Tribunal, holding that the intended negative impact can be directed at a competitor in any market. As such, it appears that the scope of this test has been broadened to potentially capture anti-competitive conduct by a dominant entity that affects a market in which it does not compete.¹⁷

24. An unanticipated consequence of the test developed in *Canada Pipe* is that certain conduct which harms competition, but not competitors, might escape the application of the abuse of dominance provisions.¹⁸ Such conduct, which is most common in markets with high concentration (*i.e.*, oligopoly markets), is often referred to as a facilitating practice. As emphasized by Ralph Winter, facilitating practices “raise prices in the market by suppressing the competitive mechanism, softening competition to the benefit of all firms in the market not just the firms adopting the practice” (emphasis added).¹⁹

25. In the Bureau’s experience, facilitating practices fall into two classes: (1) exclusionary facilitating practices, which not only raise prices to the benefit of certain firms in the market, but also have exclusionary dimensions; and (2) non-exclusionary facilitating practices, which reduce vigorous

¹⁴ See the Abuse Guidelines, *supra* note 7 at pages 9-10.

¹⁵ *Ibid.*

¹⁶ *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at paras 63-73.

¹⁷ *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29 at paras 16-22. Conversely, the Tribunal had held that the intended negative impact must be directed at a competitor of the party that is the target of the Commissioner’s application. For more detail, see the Tribunal’s decision in *The Commissioner of Competition v. The Toronto Real Estate Board*, 2013 Comp. Trib. 9. Both of these decisions are available on CanLii: <https://www.canlii.org/en/>.

¹⁸ Edward M. Iacobucci & Ralph A. Winter, “Abuse of Joint Dominance in Canadian Competition Policy” (2010) *University of Toronto Law Journal* 219.

¹⁹ Ralph A. Winter, “The Gap in Canadian Competition Law Following *Canada Pipe*” (2014) *Canadian Competition Law Review* 293 (“**Winter**”).

competition to the benefit of all firms in the market. While the first class of conduct clearly meets the definition of “anti-competitive acts” for the purposes of paragraph 79(1)(b), it is less clear with respect to the second class of conduct.

26. Examples of conduct that can, in certain circumstances, constitute facilitating practices include:

- **Meeting-competition Clause:** this type of contractual commitment compels a seller to match any price offered to a customer by a rival firm.
- **Price Matching:** this is similar to a meeting-competition clause, but is not a contractual commitment. Rather, price matching is a strategy implemented by retail firms pursuant to which they announce to customers that they will match the price of any seller on an identical item.
- **Most Favoured Nation Clause (“MFN”):** this type of contractual commitment compels a seller to always offer its best price or terms to a customer.
- **Retail MFNs:** there are two main forms of retail MFNs: (1) a pair of suppliers that provide products to consumers through the same retailers each impose “a restraint on the retailer requiring that the supplier’s product not be sold at a higher price than the price that the retailer charges for the products sold by the other supplier”; and (2) retailers selling products of more than one supplier prohibit each supplier from providing its products to the retailer at a price that exceeds the price offered to other retailers.²⁰

27. While such conduct can be pro-competitive, it can also, in some circumstances, undermine the incentives of firms to engage in vigorous competition. In these circumstances, the conduct harms competition (by facilitating supra-competitive pricing), but not competitors (since competitors benefit from supra-competitive margins). As a consequence, the conduct may not fall within the scope of paragraph 79(1)(b) of the Act.

28. The recent decision of the Tribunal in *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated* (“**Credit Cards**”) illustrates certain challenges associated with enforcement in oligopoly markets.²¹ Credit Cards involved allegations by the Commissioner that certain rules implemented by Visa and MasterCard, the two largest operators of credit card networks in Canada, were having a negative impact on competition. The rules included:

- **No Surcharge Rules:** these rules prohibited merchants from adding any fee to a transaction amount when a customer used a Visa or MasterCard-branded credit card for payment.²²
- **Honour all Cards Rules:** these rules required merchants that accepted any Visa or MasterCard-branded credit cards to accept all of that brand’s credit cards, regardless of the type of card.

²⁰ For more detail regarding each of these facilitating practices, see Winter, *ibid*, at pages 307 to 310.

²¹ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10. Available at: http://www.ct-tc.gc.ca/CMFiles/CT-2010-010_Reasons%20for%20Order%20and%20Order%20Dismissing%20the%20Commissioner%27s%20Application%20337%2038%207-23-2013%207109.pdf (“**Credit Cards**”).

²² The no surcharge rules operate much like the first type of retail MFN summarized above: the no surcharge rules prohibit merchants from charging customers that pay with credit cards more than customers that pay with lower-cost forms of payment (for instance, debit or cash). This is discussed in greater detail in Winter, *supra* note 19 at pages 313 to 318.

- **No Discrimination Rule:** this rule, specific to MasterCard, prohibited merchant's from offering incentives, giving preferences or steering customers away from one brand or type of credit card.

29. The evidence collected by the Commissioner suggested that these rules benefitted both Visa and MasterCard. In other words, it did not appear that the rules were intended to negatively affect a competitor.

30. Consequently, the Commissioner elected to file an application pursuant to the civil price maintenance provision rather than the abuse of dominance provision. The Commissioner's application was ultimately unsuccessful, with the Tribunal suggesting that it might have been more appropriate to hear the case under the abuse of dominance provision, while also noting the challenge that this would have presented given the decision in *Canada Pipe*.²³

2.2.3 Remedial Issues

31. Three broad remedial issues can, in some cases, inhibit the Bureau's ability to effectively enforce conduct that is likely to have a negative impact on competition in oligopoly markets.

32. The first issue relates to the scope of available remedies under sections 90.1 and 79 of the Act. As noted above, the remedies available under section 90.1 are quite circumscribed, in that the Tribunal only has the discretion to grant an order: (1) prohibiting a party from engaging in conduct that is contemplated under the agreement; or (2) compelling a party to take some positive action, which can only be awarded with the consent of both the party and the Commissioner.

33. Of course, it may not be practical to expect that a party will consent to the issuance of a positive order in the context of litigated proceedings. As a consequence, where the Commissioner believes that it is necessary to obtain a positive remedy – or some other type of remedy – in order to overcome the alleged anti-competitive effect of the agreement, the Commissioner might decide to proceed under section 79, which offers broader remedies. Ultimately, in pursuit of the goal to remedy anti-competitive conduct, the Commissioner's decision will be informed by both the facts of the case, as well as the remedies available under each potentially applicable provision.

34. A second remedial issue arises from the Tribunal's decision in *Credit Cards*. In that case, the Tribunal commented that, even if the Commissioner had successfully established that the alleged conduct contravened section 76 of the Act, it would not have exercised its discretion to award a remedy, noting that the proper solution to the concerns raised by the Commissioner's application would be a regulatory framework.²⁴ This is the first case in which the Tribunal has made such a statement.

35. A final remedial issue in respect of oligopoly markets is one that is common to many competition authorities: namely, parallel pricing among firms in oligopoly markets can survive even in the absence of anti-competitive conduct that could be remedied by an order of the Tribunal. Consequently, it may not be possible, in some cases, to achieve a competitive outcome in oligopoly markets through the remedies available under the civil provisions of the Act.

2.2.4 Multi-Party Price Maintenance

36. Following the decriminalization of the price maintenance provision in 2009, there has been a reported proliferation in the use of vertical pricing restrictions, such as minimum pricing policies or minimum advertised pricing policies, by firms supplying products in Canada. Of particular concern is

²³ *Credit Cards*, *supra* note 21 at paras 137 to 139.

²⁴ *Credit Cards*, *supra* note 21 at paras 394 to 401.

that, in some cases, firms within the same market have adopted vertical pricing restrictions, causing prices to rise.

37. At present, there is no jurisprudence with respect to the application of section 76 of the Act in such circumstances (*i.e.*, where more than one competitor in a market implements vertical pricing restrictions), given that no such case has been heard by the Tribunal.

38. The private bar has taken the position that section 76 can apply in such circumstances, but only in limited cases. For instance, the National Competition Law Section of the CBA has stated as follows:

*“While the CBA Section does not have an issue in principle with bringing a case under section 76 against multiple firms in the context of a single proceeding, we are firmly of the view that each element of section 76 would nonetheless need to be established for each participant, independently of any other participants, to satisfy the requirement of an adverse effect on competition”.*²⁵

39. The Bureau, however, has taken a more expansive approach to the application of section 76. As set out in greater detail in the Price Maintenance Guidelines, the Bureau believes that section 76 of the Act can apply where more than one firm in a market implements vertical pricing restrictions, provided that the cumulative effect of the vertical pricing restrictions is a negative impact on competition.²⁶

40. The Bureau expects that continued enforcement in oligopoly markets will provide greater clarity with respect to the application of section 76 in cases of multi-party price maintenance.

3. Merger Provisions and Oligopoly Markets

3.1 Overview of Coordinated Effects Enforcement under Section 92 of the Act

41. In addition to the civil sections described above, the merger provisions in Part VIII of the Act serve as important tools for addressing competition concerns relating to oligopoly markets. More specifically, section 92 of the Act permits the Tribunal to take action where it finds that a transaction, or proposed transaction, “prevents or lessens, or is likely to prevent or lessen, competition substantially”.²⁷ Where it makes such a finding, the Tribunal may, under section 92: (1) order the dissolution of a completed merger; (2) order any party to the merger to dispose of assets or shares; (3) block a proposed merger, or any part of a proposed merger; (4) in the case of a proposed merger, prohibit a person from doing any act or thing the prohibition of which is necessary to ensure that competition is not lessened or prevented; and (5) order a person to take any other action, only with the consent of such person.

42. Section 92 provides a means for addressing anticipated competitive harm resulting from structural changes in oligopoly markets. A merger may prevent or lessen competition substantially, as is contemplated under section 92, when it is likely to create, maintain or enhance the ability of the merged entity to exercise market power either unilaterally or in coordination with other firms.

²⁵ See the Canadian Bar Association’s National Competition Law Section submission on the Competition Bureau’s Draft Price Maintenance Guidelines, June 2014 at pages 1-2. Available at: <http://www.cba.org/CBA/submissions/pdf/14-36-eng.pdf>.

²⁶ For more detail, see the Price Maintenance Guidelines, *supra* note 9 at pages 3-4.

²⁷ See Appendix A for the text of section 92.

Mergers which facilitate or encourage coordinated behaviour among firms are most likely to occur in oligopolistic markets and, as a result, are the focus of this section.²⁸

43. The Bureau’s analytical framework with regard to potential coordinated effects resulting from merger transactions is described in detail in the Bureau’s *Merger Enforcement Guidelines* (the “MEGs”),²⁹ and generally mirrors international approaches common across numerous jurisdictions.

44. As is noted in the MEGs, the Bureau evaluates the impact of mergers on the likelihood or effectiveness of coordination involving both express agreements among competing firms, and “tacit understandings that are not explicitly negotiated or communicated”.³⁰ The Bureau considers that such coordination is likely sustainable where certain conditions are satisfied, including:

- firms are able to recognize mutually beneficial terms of coordination;
- firms are able to detect deviation from such terms;
- firms are able to respond to deviations with credible punishments; and
- coordination would not be deterred by external factors, such as reactions by competitors, entrants or buyers.

45. In practice, the Bureau generally considers that significant market concentration is a necessary but not sufficient condition for a merger to prevent or lessen competition through coordinated effects. The Bureau also examines barriers to entry, as coordinated behaviour would unlikely be sustainable if an exercise of market power were to lead to significant effective entry. Beyond these basic structural conditions, however, the MEGs identify a number of “facilitating factors” relevant to evaluating the sustainability of coordination post-transaction. The Bureau thus considers, for example, homogeneity in products and cost structures when assessing the potential for recognition of profitable terms of coordination; the size and frequency of transactions when evaluating incentives to deviate; the degree of market transparency when gauging the potential for effective monitoring; and the amount of multi-market exposure when considering the effectiveness of punishments. The Bureau also considers whether there has been a history of collusion or coordination in the market, as previous and sustained collusive or coordinated behaviour indicates that firms have successfully overcome the hurdles to effective coordinated behaviour in the past.

46. The MEGs also posit several potential mechanisms through which a merger may impact the likelihood of coordinated behaviour, including by: (1) reducing the number of rivals in the market; (2) reducing or eliminating asymmetries between the merged firm and its rivals; and (3) removing a maverick from the market, or inhibiting a maverick’s ability to expand or enter. Ultimately, the

²⁸ It should be noted, of course, that merger-specific unilateral effects are also relevant in oligopolistic markets, and that mergers in such markets may give rise to concerns of both unilateral and coordinated effects. However, given the more robust literature already available regarding unilateral effects, this submission considers only concerns of coordination.

²⁹ The MEGs were updated on 6 October 2011, and are available on the Bureau’s website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

³⁰ See the MEGs, *ibid*, at page 24. As such, the Bureau does not explicitly address the issue of “conscious parallelism” (see civil discussion above) in its merger guidelines. However, it is likely inevitable that merger enforcement will, in some cases, address changes in market conditions, which ultimately result in consciously parallel behaviour, for example when preventing coordination among market leaders that would be rationally paralleled by likely “followers”. Conscious parallelism has only been minimally acknowledged in Canadian merger jurisprudence, for example, in the context of the Commissioner’s allegations in *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15. The decision in that case is available at: http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_192b_45QNO-4232004-3036.pdf (“Propane”).

Bureau's analysis seeks to determine whether the merger is likely to substantially prevent or lessen competition by changing the competitive dynamic in the market, or reducing or eliminating constraints on coordinated behaviour, such that coordination is substantially more likely or effective than it would likely be absent the transaction.

3.2 *Canadian Jurisprudence Regarding Coordinated Effects*

47. Canadian jurisprudence offers little guidance on the application of section 92 to theories of coordinated effects. Indeed, the Tribunal has only provided a conclusion on allegations relating to coordinated effects in one notable merger case through its decision in *Commissioner of Competition v. Superior Propane Inc.*³¹

48. In that case, the Commissioner alleged that conditions in the propane industry were “conducive to the likelihood of interdependent behaviour”, as evidenced by existing interdependence and the presence of several facilitating factors, including the stability of demand, homogeneity of products, pricing transparency and multi-market exposure.³² The Commissioner also alleged that the transaction would result in a significant concentration in various local propane markets. The Tribunal ultimately concluded that the transaction was likely to lessen competition substantially by enhancing interdependence in numerous markets, noting the substantial market share of the acquired firm. In its decision, the Tribunal also explained that evidence of concentration, while not sufficient for a finding of a lessening of competition, is “particularly useful in identifying mergers that are likely to result in greater interdependence among the remaining firms in the market”.³³ However, the remainder of the proceedings focused primarily on the likely unilateral effects of the transaction, and the Tribunal thus provided little guidance in its reasons regarding coordinated effects beyond a structural analysis.

49. The Bureau has also expressed concerns regarding coordinated effects in a limited number of merger matters resolved on consent before the Tribunal.³⁴ While previous Bureau investigations have involved analysis of a variety of substantive issues relating to the sustainability and likelihood of coordination, including, for example, the effect of the removal of a vigorous competitor,³⁵ the impact of vertical integration and joint ventures on monitoring and transparency,³⁶ and the influence of

³¹ Ibid.

³² See the Notice of Application dated 22 December 1998 in Propane, supra note 30, which is available at: http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_020_45QNF-4222004-3120.pdf

³³ Propane, supra note 30 at para 305.

³⁴ For example, on 5 May 2015, the Commissioner reached a Consent Agreement with BCE Inc. and Rogers Communications Inc. in order to preserve competition in the wireless sector. More specifically, the agreement resolved the Bureau's concerns that the two parties' acquisition of wireless retailer GLENTEL Inc. would likely result in a substantial lessening of competition through coordinated behaviour. The Bureau's review of the transaction had revealed that the joint ownership of GLENTEL could facilitate Rogers and BCE's access to each other's competitively sensitive information, as well as that of competing carriers serviced by GLENTEL, likely giving the parties the ability to substantially lessen competition. See the Bureau's position statement available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03924.html>.

³⁵ See, for example, *Commissioner of Competition v. Abitibi-Consolidated*, in which the Commissioner alleged that the acquired party was a low cost producer that occasionally refrained from implementing price increases and capacity reductions in coordination with its competitors. Available at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=169>.

³⁶ See, for example, the Commissioner's Statement of Ground and Material Facts in *Commissioner of Competition v. Bayer AG, Aventis Crop Science Holdings S.A.* (available at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=171>); and the Commissioner's Notice of Application in *Director of Investigation and Research v. Imperial Oil Limited* (available at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=214>).

certain contractual facilitating practices,³⁷ they have generally not included Tribunal evaluation of the Bureau's substantive allegations, nor significant discussion of their merits.

50. As a result, while the Bureau has performed coordinated effects analyses in the context of numerous merger investigations, Canadian jurisprudence currently offers little guidance on these issues.

51. On 30 April 2015, however, the Commissioner filed an application under section 92 of the Act in respect of a merger between gasoline retailers, which alleges that the transaction will permit an exercise of enhanced market power, either unilaterally or through coordinated behaviour, in various local markets in Canada.³⁸ The application notably argues, with respect to coordinated behaviour, that gasoline retailers may be currently coordinating in certain concentrated markets, given existing barriers to entry and the presence of certain facilitating factors. Specific factors noted as relevant in this respect include:

- the limited differentiation in the retailing of gasoline, and common raw material prices for retailers, which make it easier to recognize mutually-profitable terms of coordination;
- the fact that retail purchases of gasoline are small and frequent, which makes deviation from coordinated behaviour less profitable, and coordinated behaviour more likely;
- the fact that retail gasoline prices are visibly posted by retailers, making it easier for rivals to monitor one another's behaviour; and
- firms' ability to change prices³⁹ quickly, in order to respond to deviations from terms of coordination.

52. The application further alleges that the transaction will result in a significant increase in concentration in the relevant markets, and will thus amplify the extent, likelihood, frequency and duration of coordination among some or all gasoline suppliers.

53. Given the relative lack of jurisprudence relating to coordinated effects in Canada, the Bureau expects that these proceedings may provide useful guidance on the courts' treatment of coordinated theories of harm. Further, the Commissioner's application in this matter demonstrates that the Bureau will not hesitate to bring merger cases relating to coordinated behaviour in oligopoly markets, where such an application is necessary to preserve competition.

3.3 Challenges under the Merger Provisions of the Act

54. While any form of *ex ante* merger review is by nature predictive, analysis of coordinated effects theories has frequently been described as particularly uncertain.³⁹ Given the relative absence of

³⁷ For instance, MFNs or other facilitating contractual commitments discussed above in this submission. Such practices may be taken into account during merger analysis without encountering the challenges associated with addressing their effects under section 79. That said, there is no specific Canadian jurisprudence regarding their impact in a merger context.

³⁸ See the Commissioner's Notice of Application in *The Commissioner of Competition v. Parkland Industries Ltd., Parkland Fuel Corporation, Pioneer Petroleum Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleum Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleum Holding Inc., Pioneer Energy Management Inc., 668086 N.B.Limited, 3269344 Nova Scotia Limited and 1796745 Ontario Ltd.*. Available at: http://www.ct-tc.gc.ca/CMFiles/CT-2015-003_Notice%20of%20Application_1_38_4-30-2015_1761.pdf ("Retail Gas").

³⁹ Internationally, both academics and antitrust regulators have previously characterized coordinated effects analysis as lacking the empirical tools and theoretical and practical certainty of unilateral effects analyses.

Canadian jurisprudence on the subject, the Bureau lacks the guidance afforded to regulators in certain other jurisdictions when addressing challenges inherent to analysis in this domain. Two broad areas in which further clarity may be provided by future enforcement are noted below.

3.3.1 *Demonstrating Merger-Specific Effects on Coordination*

55. Isolating a proposed merger's specific effect on coordination remains arguably the most challenging aspect of coordinated effects enforcement. In both international jurisprudence and academic literature, there has been a clear trend towards an increased emphasis on demonstrating a specific mechanism by which coordination is likely to occur post-merger, and the effect of the merger on such a mechanism.

56. While the MEGs describe an effects-based approach, the Bureau lacks jurisprudential guidance on the specific standard of proof for demonstrating that a merger will affect the likelihood or effectiveness of coordination. Uncertainty remains, for example, regarding the types of evidence required to demonstrate the likely mechanism of coordination, or to prove that a party to the merger has acted as a constraint on coordination and will no longer do so (*e.g.*, as a "maverick"). This particular challenge may be further exacerbated by the increased focus on quantitative analysis implied by recent Canadian jurisprudence (see section ii, below).

57. Given Canadian courts' emphasis on the specific demonstration of competitive effects in cases regarding unilateral theories, further guidance on the precise evidence required in coordinated effects cases, beyond structural measures of concentration, will be particularly valuable to future enforcement.

3.3.2 *Quantifying Anti-Competitive Effects*

58. In its recent landmark decision in *Tervita Corp. v. Canada (Commissioner of Competition)* ("**Tervita**"),⁴⁰ the Supreme Court of Canada (the "**Supreme Court**") provided further guidance on the analysis of merger-specific efficiencies under section 96 of the Act. Section 96 provides a defence for mergers that are "likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition".⁴¹ In short, this provision requires the courts to compare efficiency gains associated with a merger, which are to be proven by the parties, to the merger's likely competitive effects as demonstrated by the Commissioner.

59. In its decision in *Tervita*, the Supreme Court established that the Bureau must quantify all reasonably quantifiable anti-competitive effects, in order for them to be considered in this analysis under section 96:

*The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger ... However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable").*⁴²

⁴⁰ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do>.

⁴¹ See Appendix A for the text of section 96.

⁴² *Tervita*, *supra* note 40 at para 125.

60. In the absence of such quantification, the Supreme Court held that measurable competitive effects could not be considered qualitatively, and must be assigned a weight of zero when comparing them with merger-specific efficiencies. The Supreme Court also established a two-step framework for assessing efficiency gains, in which quantitative efficiencies and quantitative competitive effects are first compared, prior to incorporating qualitative measures. While the implications of this framework are somewhat unclear, it may reinforce the current emphasis on quantification in Canadian antitrust enforcement.⁴³

61. In short, the Supreme Court's decision has placed a significant burden on the Commissioner to quantify the likely deadweight loss attributable to a merger, or risk that even marginal efficiency gains may render an application under section 92 unsuccessful due to their subsequent consideration under section 96. There is currently no widely-accepted empirical methodology available to competition authorities in predicting price effects and deadweight loss in cases involving coordinated effects, although recent academic research has proposed certain empirical tools applicable to such analyses.⁴⁴

62. Further clarification from the courts will have profound implications for the evidentiary burden imposed on the Commissioner when demonstrating likely coordinated effects, and, ultimately, on the feasibility of merger enforcement in oligopoly markets.

4. Conclusion

63. This submission highlights certain issues under the civil and merger provisions of the Act where there is a lack of clarity in the jurisprudence. The Bureau anticipates that, in many cases, greater clarity will be achieved through continued enforcement. As Credit Cards and Retail Gas demonstrate, the Bureau will not hesitate to bring responsible cases before the Tribunal where it believes such action is necessary to preserve and enhance competition in oligopoly markets.⁴⁵

⁴³ Although a detailed discussion of the two-step framework is beyond the scope of this submission, the Supreme Court's decision does propose that in the majority of cases, the initial quantitative assessment will likely be dispositive where quantitative effects outweigh quantitative efficiencies (para 147) – this may raise the question of the likelihood of the inverse situation. The decision also notes that the goal of maximizing objectivity in section 96 analysis supports “the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations” (para 147).

⁴⁴ See, for example, the OECD's Policy Roundtable on the subject of “Economic Evidence in Merger Analysis”, available at: <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>.

⁴⁵ The Bureau will heed the advice of the Tribunal in Credit Cards by continuing to bring cases that promote the public interest:

The Commissioner advanced a case which should be brought; even if she was not entirely successful. Competition law in Canada will not advance if a Commissioner is afraid to lose cases which ought to be brought. The courage to advance these cases is in the public interest. Gaps in our laws and policy will not be identified or remedied. Canadian competition law will develop more opaquely behind the scenes.

There is a broad public interest in bringing this case. It is even so for the Respondents as it may add some certainty to their position. The public debate on the issues in this case and more broadly are enhanced by this proceeding. (paras 406 to 407)

APPENDIX A

Section 90.1 – Civil agreements between competitors

The text of section 90.1 reads, in relevant part, as follows:

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen competition substantially in a market, the Tribunal may make an order

- (a) prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement; or
- (b) requiring any person – whether or not a party to the agreement or arrangement – with the consent of that person and the Commissioner, to take any other action.⁴⁶

Sections 78 and 79 – Abuse of dominance

The text of section 79 reads, in relevant part, as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding \$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000.⁴⁷

⁴⁶ *Competition Act*, RSC 1985, c. C-34, s. 90.1.

⁴⁷ *Competition Act*, RSC 1985, c. C-34, s. 79.

The text of section 78 reads as follows:

- 78.** (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:
- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;
 - (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
 - (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
 - (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
 - (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
 - (f) buying up of products to prevent the erosion of existing price levels;
 - (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
 - (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market; and
 - (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.⁴⁸

Section 76 – Price Maintenance

The text of section 76 reads, in relevant part, as follows:

- 76.** (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
- (a) a person referred to in subsection (3) directly or indirectly
 - (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person’s customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
 - (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
 - (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

⁴⁸ *Competition Act*, RSC 1985, c. C-34, s. 78.

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

(3) An order may be made under subsection (2) against a person who

- (a) is engaged in the business of producing or supplying a product;
- (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or
- (c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

...

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.⁴⁹

Section 92 – Substantive Merger Provision

The text of section 92 reads, in relevant part, as follows:

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

- (a) in a trade, industry or profession,
 - (b) among the sources from which a trade, industry or profession obtains a product,
 - (c) among the outlets through which a trade, industry or profession disposes of a product, or
 - (d) otherwise than as described in paragraphs (a) to (c),
- the Tribunal may, subject to sections 94 to 96,
- (e) in the case of a completed merger, order any party to the merger or any other person
 - (i) to dissolve the merger in such manner as the Tribunal directs,
 - (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
 - (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or
 - (f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person
 - (i) ordering the person against whom the order is directed not to proceed with the merger,

⁴⁹

Competition Act, RSC 1985, c. C-34, s. 76.

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.⁵⁰

Section 96 – Efficiencies Defense

The text of section 96 reads as follows:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.⁵¹

⁵⁰ *Competition Act*, RSC 1985, c. C-34, s. 92.

⁵¹ *Competition Act*, RSC 1985, c. C-34, s. 96.