THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: competition-consultation-concurrence@ised-isde.gc.ca

Samir Chhabra
Director General, Marketplace Framework Branch
Innovation, Science and Economic Development Canada
235 Queen Street
Ottawa ON K1A 0H5

Dear Mr. Chhabra:

Re: Consultation on the Future of Competition Policy in Canada

The Canadian Bar Association's Competition Law and Foreign Investment Review Section (CBA Section) is writing to follow up on its CBA Section March 2023 Submission to ISED in response to Innovation, Science and Economic Development' s consultation on the future of competition policy in Canada.

We reviewed the Competition Bureau's submission and felt it was necessary to comment on some of the Bureau's recommendations. Please see our comments in the attached table.

The CBA Section appreciates the opportunity to share our perspectives on the modernization of the Competition Act and we would be pleased to expand upon our views.

Yours truly,

(original letter signed by Marc-André O'Rourke for Sandra Lee Walker)

Sandra Lee Walker
Chair, CBA Competition Law and Foreign Investment Review Section

ISED CONSULTATION ON THE FUTURE OF COMPETITION POLICY IN CANADA

CANADIAN BAR ASSOCIATION COMMENTS ON COMPETION BUREAU'S RECOMMENDATIONS

1. MERGER REVIEW

Competition Bureau Recommendation	CBA Section Comments
Recommendation 1.1.1 (Notification rules) Pre-merger notification rules should be revised to better capture mergers of interest.	The CBA Section agrees that pre-merger notification rules should be revised to better capture mergers of interest. However, the rules should not simply be expanded to capture more transactions. After nearly 40 years of experience with merger notification, it is clear that most notifiable transactions are non-problematic. The rules should therefore be tailored to avoid notification for categories of mergers that can reasonably be expected not to raise substantive competition issues. The Competition Bureau proposals would simply expand burdens on businesses, without attempting to address the deficiencies of the current regime. We encourage ISED to look at the current regime with fresh eyes and ask whether longstanding provisions are fit for purpose simply because they are in the legislation. We have frequently advocated for the inclusion of more exemptions. Another example is the notification of minority interest acquisitions. These are acquisitions where there is no change in control between two economic actors. The Bureau has never challenged a minority interest acquisition. These transactions do not require notification in the vast majority of the world's merger control regimes. (Most of them require a change of control on a non-temporary basis as a basic jurisdictional requirement.) Yet thousands of these mergers have been notified in Canada. Why? We recognise that minority interest acquisitions can raise theoretical competition concerns in rare situations. However, the merger control regime should not be designed to require all transactions to be notified to the government to address a theoretical – and to date never materialised – risk. The notification regime should be selective and focus on transactions most likely to cause harm. Simplified procedures or fast reviews of non-

Competition Bureau Recommendation	CBA Section Comments
	problematic transactions is at best a partial solution but not a complete answer to overbroad notification rules. Any unnecessary review imposes unnecessary burdens on merger parties in terms of time and cost (including legal fees and filing fees). It would also be inappropriate to ignore the cumulative effect on the Bureau and private parties (even beyond the merging parties) of the resources required to review thousands of mergers with no corresponding benefit. We expect to agree with the Bureau on numerous aspects of reform to pre-merger notification. However, implementation of these reforms is likely to be complex and potentially contentious. It would be helpful to establish a working group of experts from the private sector and Bureau to discuss potential reforms separate from this consultation.
There are a number of technical pre-merger notification issues that should be addressed. These are described more fully in the Bureau's 2022 Submission and include: Creeping acquisitions – such as those which occur amongst the same or affiliated parties and are separately not notifiable – should be aggregated for notification purposes;	We are uncertain about this specific proposal. "Creeping" acquisitions, in the sense of acquisitions of small parts of businesses over time, are caught by the current thresholds. Parties who alone or with affiliates acquire shares or interests in a target must notify once the 20% or 35% thresholds are exceeded. It does not matter whether these acquisitions occur in a single transaction or as multiple separate acquisitions. With one potential exception, the current rules already require notification for "creeping" acquisitions where relevant thresholds are exceeded. The one potential exception is asset acquisitions. Currently, asset acquisitions are subject to notification if the value of the assets acquired (or revenues generated from those assets) exceed certain thresholds. In theory, a buyer could buy parts of a business through multiple separate asset acquisitions, each of which is under the relevant thresholds. In practice, this does not happen. (A vendor/target is highly unlikely to cannibalise its business by selling off parts of it in asset transactions.) Moreover, the new anti-avoidance provision in section 113.1 would operate to prohibit parties from purposefully structuring transactions to avoid notification. We therefore see this as a theoretical and not practical concern. As a practical matter, there would also be complexities to introducing a regime requiring notification where multiple unconnected small asset acquisitions in the aggregate exceed the relevant notification thresholds. For example, if a buyer acquired

Competition Bureau Recommendation	CBA Section Comments
	assets over a period of years it would be hard for businesses to monitor compliance and to assess notification obligations based on fluctuating asset or revenue measurements over time. In other words, we understand the Bureau is proposing a potentially complex and difficult-to-implement regime to capture what are infrequent and inadvertent or unplanned "creeping" asset acquisitions. If there is a desire to proceed with such an amendment, one option to address Bureau "gap" concerns and Bar "compliance" concerns may be to amend subsection 110(2) to the effect that notification would be required for any proposed acquisition of all or substantially of the assets of a business or operating segment of a business, with a proviso that such acquisitions include acquisitions that occur as a result of more than one transaction or event, provided that all such transactions or events are completed within one year (the one-year limitation to avoid compliance and calculation burdens and complexities outlined above). The CBA Section would be pleased to discuss this further with ISED and the Bureau in any technical roundtable or working group on notification issues. More generally, the Bureau has the resources and authority to identify and review non-notifiable transactions, including creeping acquisitions, in the rare circumstances where they are problematic.
The acquisition of a target entity's components, including shares or interests and assets, as well as amalgamations, should be aggregated for notification purposes;	The CBA Section supports this recommendation. That is, if an acquiror is acquiring all or substantially all of a business through the acquisition of a combination of shares (or interests) and assets, notification should be required if the "target-size" test is satisfied based on aggregating both the share (or interest) and asset acquisition. In other words, aggregation within the same transaction is appropriate.
Non-corporate joint ventures should be made notifiable under the Act;	Non-corporate joint ventures are in fact notifiable under section 110 of the Act. Only certain types of non-corporate JVs meeting very specific technical requirements are exempt. That said, the CBA Section agrees that there is no obvious reason why corporate and non-corporate JVs should be treated differently. We believe the intention of the JV exemption in section 112 was to exclude transactions that are temporary in nature.

Competition Bureau Recommendation	CBA Section Comments
	This is consistent with merger regimes in other jurisdictions, which require any change of control to happen on a lasting basis. Parliament should (a) expand the scope of the section 112 exemption to apply to corporate JVs but also (b) specifically limit its scope to JVs that are temporary in nature (e.g., intended to have a duration of three years or less). Contractual JVs (that do not involve the acquisition of assets) are not subject to notification at all. Parties must simply ensure compliance with sections 45 and 90.1. There is no reason in concept why a short-term structural JV should require notification when a short-term contractual JV does not. Our proposed amendment to section 112 would therefore bring Part IX in closer alignment with the rest of the Act. The foregoing notwithstanding, we are unaware of any data or experience to suggest that the current exemption creates practical problems. We are not aware of substantively problematic transactions regularly being exempt from notification pursuit to section 112.
The definition of "voting share" should be amended to include: (i) any class of voting shares; and (ii) any share to which votes may attach in the ordinary course of business;	The CBA Section disagrees. For the purposes of Part IX of the Act, voting shares should be defined by reference to the rights to elect directors attached to the shares. That is consistent with (a) control concepts in section 2 of the Act and (b) the notion that the government should not be apprised of transactions where an ability to control is being conferred. In the corporate context, this happens through an ability to elect directors. There is no reason why a party that acquires shares that do not elect directors should be subject to a notification requirement. The Bureau proposal could also have unusual results, for example, there could be multiple notifications for buyers exceeding the 20% or 50% thresholds of numerous different share classes. The CBA Section strongly believes that the notification rules out to be "right sized" to capture transactions likely to be of substantive concern. Creating a regime, for example, that could result in numerous notifications for transactions that do not confer control would merely add to the regulatory burden on business already imposed by the Competition Act.

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Acquisitions of an interest in a combination that "*controls an entity that carries on an operating business*" should be captured by the Act;	The CBA Section does not oppose this recommendation. That said, we are unaware of any data or experience to suggest that the current construct in the Act is a practical problem. In our experience, the value of subsidiary entities is usually reflected in the financial statements of the entity the interests of which are being acquired. There are few cases where there is a gap such that notification would or would not be required based on consideration or non-consideration of entities controlled by the combination.
The notifiable structure of "*combinations*" should be expanded to include assets contributed by affiliates of the partners in a joint venture; and	We interpret this proposal as a technical one relating to the introductory language to subsection 110(5) of the Act. It references inclusion of the value of any assets (and revenues) contributed to a combination by parties and their controlled subsidiaries, but not their parents. In other words, a combination could be created without notification being required where parent entities contribute (significant) assets to the combination. The CBA Section does not see this issue arise in practice but agrees that there is a technical gap and has no objection to the Bureau approach (assuming we are interpreting it correctly).
The definition of "*operating business*" should be amended to include those which are outside of Canada.	On balance the CBA Section believes the "operating business" requirement should be maintained. Notification requirements should be based on merger parties' revenue in Canada, not assets. (See CBA Section March 2023 Submission to ISED, page 7.) A logical consequence of this is that it should not be necessary to have an operating business in Canada (which, as defined, requires assets in Canada.) However, some members of the CBA Section are of the view that there should be some de minimis physical nexus to Canada for basic jurisdictional reasons. The operating business requirement is minimal – a simple sales office would suffice, for example – and will not operate to exclude any transaction with a material connection to Canada. It will, however, ensure that Canadian courts, including the Tribunal, have clear and adequate jurisdiction over the parties to a merger transaction (i.e., an ability to ensure that respondents will attorn to the jurisdiction and that a judgment could be enforced.)
Recommendation 1.1.2 (Transaction-size information): The Act should be amended to require parties to proposed notifiable transactions to submit their transaction-size information.	The CBA Section supports this recommendation in concept. (See CBA Section March 2023 Submission to ISED, page 11.) However, merger parties often do not collect this information with any degree of precision. Often notification obligations are clear. In many cases it will be time

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	consuming and difficult to calculate specific values to a level of accuracy to which parties are willing to swear or certify under oath. The CBA Section is concerned about this burden particularly when merger parties will be required to swear or affirm the accuracy of the information as part of the filing. We recommend that parties only be required to certify ranges of values. (E.g., between $100 million and $1 billion, etc.). We understand and agree that this information would be helpful in setting notification thresholds or filing fee amounts. If that is the case, general and not specific information should be adequate.
Recommendation 1.1.3 (Solicitor-client privilege and confidentiality logs): The Act should be amended to require the production of "privilege and confidentiality logs" for merger notification filings and SIR responses.	The CBA Section has serious concerns about this proposal. We understand from US antitrust lawyers that the preparation of these logs (which are part of the US HSR process) takes considerable time and expense. Given the volume of productions on modern SIR responses, preparing privilege and confidentiality logs would be unduly burdensome on parties, and so voluminous it would be unclear on whether and how the Bureau or a court would be able to evaluate the parties' privilege claims in a reasonable time. The current system already has an appropriate system of checks and balances, in that merger parties must swear or affirm under oath that privilege claims are reasonable. Merger parties do not take this obligation lightly as swearing a false certificate is a serious offence. We are concerned that the Bureau wants to impose on merger parties a burdensome solution to address a problem that does not exist. The CBA Section strongly believes that the current system of merger review should be streamlined. Wherever possible the regulatory "red-tape" burden on merger parties should be reduced, not expanded.
Recommendation 1.1.4 (Oral examinations under oath or solemn affirmation): The Commissioner's SIR information gathering powers are currently limited to the receiving of records and written information and should be expanded to include oral examinations under oath or solemn	The CBA Section has serious concerns about this proposal. The current SIR process is extremely costly and burdensome for merger parties. There are no checks and balances on the scope of the Bureau's information gathering ability. The cost and complexity of merger control has already increased geometrically over the past decade. We believe that a re-balancing is necessary. We have serious concerns about amendment proposals that simply continue to add to the burden of merger

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affirmation together with appropriate extensions to statutory timeframes.	review without also trying to find ways of alleviating burdens that impose unnecessary cost, expense and delay. Serious reform should consider ways to give the Bureau essential data it reasonably needs in a manner that is different from the current process. For example, the Bureau now routinely asks for records and data for the last four years. It is not clear why old data, which is the most burdensome to produce, is relevant to a forward-looking merger review. The Act should impose limits on the scope of what can be requested in SIRs, such as proviso that SIRs cannot require records or data more than one or two years old. This streamlined system will result in faster and more efficient reviews for both the parties and the Bureau. This approach also seems consistent with the views of the Competition Tribunal, which observed in the Secure/Tervita case that "Another part of the solution [to the complexity of reviewing a SIR production] could be to reduce the amount of information that is sought in a SIR and that then needs to be assessed within a very short period of time." In practice the Bureau has not reduced SIR burdens since that decision; as a result, we think a legislative solution is appropriate. (See also CBA Section March 2023 Submission to ISED, page 14.) In unusual cases where more data is required, the Bureau can seek section 11 orders. That approach would have the benefit of ensuring some degree of judicial oversight – even if only on an *ex parte* basis – of the Bureau's exercise of its data collection powers. We encourage ISED and the Bureau to think creatively about systems and processes that are balanced and fair, and that aim to give the Bureau what is essential, to avoid the situation where inordinately burdensome demands are placed on merging parties for no valid reason. We encourage ISED to consider ways to streamline the merger review systems. This should include making merger reviews – including litigation – shorter and less expensive. Accordingly, the CBA Section believes allowing for oral examinations as a routine part of SIRs is unwarranted. It will add to the time and complexity of reviews. In rare and unusual cases where oral examinations are important, they can be sought pursuant to section 11 of the Act. The Bureau has done so in the context of merger reviews before

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	(see review of Kraft Heinz Canada/Parmalat). The requirement to seek a judicial order under paragraph 11(1)(a) of the Act to compel oral testimony offers an important procedural protection for parties.
Recommendation 1.1.5 (Gun jumping): "Gun jumping" is currently a criminal offence under the Act and the application of civil remedies are unclear in certain instances. Changes are required to decriminalize the conduct and expand both the scope and available remedies of the existing civil provisions.	
The criminal offence under subsection 65(2) ["*Failure to supply information*"] should be repealed;	The CBA Section supports this recommendation.
The Act should be amended to clarify that sections 123 ["*Time when transaction may not proceed*"] and 123.1 ["*Failure to comply*"] are applicable to situations where a waiting period has not yet started due to a failure to notify;	The CBA Section supports this recommendation.
Section 123.1 should be expanded to allow the court to make an order remedying partial implementation and preventing further implementation or completion. The modification could read as follows: "If, on application by the Commissioner, the court determines that a person, without good and sufficient cause, the proof of which lies on the person, has completed or implemented, or is likely to complete or implement, all or part of a proposed transaction before the end of the applicable period referred to in section 123, the court may ...."; and	The CBA Section does not oppose this recommendation conceptually. The CBA Section suggests the words "or part of a proposed transaction" be deleted. We are concerned that the ordinary course integration planning and preparation that takes place in the interim period between signing and closing could be viewed as "partial" implementation of a transaction. This activity is not gun-jumping in the sense of purposefully (or inadvertently) not notifying a merger and should not be caught by any amendments to the Competition Act.
Similarly, paragraph 123.1(1)(c) and (d) should be amended to read, "in the case of a completed or implemented transaction or part of a transaction".	The CBA Section does not oppose this recommendation conceptually. We suggest removing the words "or part of a transaction" for the reasons previously articulated.

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Recommendation 1.1.6 (Notification waivers): The period of time in which a notification requirement waiver is valid should be expressly limited to one year. [similar to the time period for an ARC]	The CBA Section does not oppose this recommendation.
Recommendation 1.1.7 (Significant interest): The Act's definition of "*merger*" references "*significant interest*", a phrase which the Act leaves undefined. The Act should be revised to include a definition that adopts the principles-based guidance provided in the MEGs.	The CBA Section opposes this suggestion. We do not believe there is a gap that needs to be addressed. Moreover, the "significant interest" concept in the MEGs is multi-faceted and subjective. Importing it into the Act would not achieve clarity or certainty. The interpretation of words and phrases like these should be left to courts. The CBA Section would support a bright line definition of what is or is not a merger. For example, a merger could be defined to exclude acquisitions of less than 20% of an entity.
Recommendation 1.2 (Limitation period): The Act provides the Commissioner with only a short time to challenge a consummated merger. The limitation period in section 97 should be extended to three years.	With respect to notifiable mergers that have been reviewed by the Competition Bureau, the CBA Section believes that a one-year limitation period is appropriate, as it is consistent with international norms and provides certainty for the business community and international investors. With respect to non-notifiable mergers, we believe that a one-year limitation period strikes an appropriate balance between the certainty the business community desires, and the risk that harmful mergers go undetected. (See CBA March 2023 Submission to ISED, page 11.) If there is any change to the limitation period, the extended period should only apply to non-notified mergers. Specifically, if merger parties voluntarily notify these non-notifiable transactions, the one-year period should apply to them too. Voluntary notification should not be subject to filing fees and should be streamlined in terms of informational demands by the Bureau. (See CBA March 2023 Submission to ISED, page 12.)
Recommendation 1.3 (Injunctions): The Act should provide more workable standards to temporarily pause the completion of a merger pending the outcome of proceedings before the Tribunal.	We believe that a proposal to ease the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction is inappropriate. As recently confirmed by the Federal Court of Appeal in *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, the Tribunal has broad jurisdiction under

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In cases where the Bureau is seeking an injunction to prevent closing (whether under section 100 ["*Interim order where no application under section 92*"] or section 104 ["*Interim order*"]), the law should provide automatic short-term relief until the injunction application can be heard and decided; For an injunction under section 104, where the Commissioner is simultaneously challenging the transaction under section 92, the test should not require the quantification demanded by current case law. It also should not require a case-specific "balance of convenience" assessment that considers whether the harm to competition is outweighed by the harm to parties from delaying the transaction (e.g., in terms of delayed realization of efficiencies); Accordingly, to obtain an injunction pending a full hearing on the merits under section 92, it should be sufficient for the Bureau to show that there is a serious issue to be tried and that the transaction would likely cause irreparable harm if it was allowed to proceed.	section 104 of the Act to grant any interim order it considers appropriate, including an "interim" injunction pending a decision on whether to grant interlocutory relief. The well-defined injunction standard in the Act is consistent with the standard used in a wide variety of other legal contexts and has long been available to the Bureau for merger cases, including the lower bar for balance of convenience with respect to government action when it is able to demonstrate the likelihood of potential harm. Any significant lessening or removal of the current standard risks effectively making the Bureau the investigator, prosecutor, judge and jury, if it is unaccountable to independent judicial oversight with respect to interim relief. As for the Bureau's suggestion that "quantification" not be required, the Tribunal has made it clear that it is merely seeking some "rough or initial sense of the irreparable harm" in the context of having concerns where the Bureau made "no effort to provide the Tribunal with even a very preliminary or rough sense of how all of that evidence comes together." This does not seem like a burdensome obligation in the context of a merger that the Bureau has decided to challenge as anti-competitive. Presumably this work would already have been completed. It is a question of synthesizing the existing information in a "very preliminary or rough" way for the Tribunal. Any proposal to deviate from the current, well-established standards should not be taken lightly. These standards have been created or endorsed by courts of appeal or the Supreme Court as striking the right balance between the rights or applicants and respondents in all cases, including competition cases. Change should only be considered if there were a consistent record of anti-competitive transactions being approved for which interim relief was unavailable following a properly argued application. (See CBA March 2023 Submission to ISED, page 13.)
Recommendation 1.4 (Structural presumption): Structural presumptions should be enacted to simplify merger cases by shifting the burden onto the merging parties to prove why a merger that significantly increases concentration would not substantially lessen or prevent competition.	Mergers in Canada are presumptively legal. Experience demonstrates that the vast majority of mergers are competitively benign or pro-competitive. The Section is concerned that this proposal seeks to reverse that presumption and ignore that experience. If the government wants to stop a legitimate, ordinary-course business activity, the burden of doing so should be on the government.

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A minimum initial step toward a structural presumption would be the repeal of subsection 92(2) ["*Evidence*"] of the Act, which expressly prohibits the Tribunal from concluding that a merger is likely to harm competition "*solely on the basis of evidence of concentration or market share*"; and The Bureau believes there is a need for a more definitive reform in this area and that policymakers should actually legislate a structural presumption with defined thresholds (elaborated in the Act or in follow-on regulation). Those thresholds could be based on the levels of post-merger concentration or market share, and the changes in those levels brought about by the merger, taking inspiration from thresholds outlined in the US Horizontal Merger Guidelines or US case law.	The idea that a merger should be presumptively illegal based on market shares is flawed for numerous reasons. First, market shares are a simplistic and often inaccurate reflection of market power. That is why the Act is drafted as it is and why they are currently used merely as preliminary screens. Section 93 lists many qualitative factors that can and should be taken into consideration in assessing competitive effects. The substantive analysis of the Bureau and Tribunal should not rely on a purely quantitative metric such as market shares. Second, US experience has shown that structural presumptions simply shift the focus of argument to other aspects of a review, such as market definition (i.e., parties simply dispute the market share data rather than accept the presumption). Subsection 92(2) of the Act reflects best in class economic science with respect to how mergers should be assessed; it should not simply be abandoned because the Bureau finds it challenging. In this regard we would also encourage ISED to consider regimes in other parts of the world, and not simply the US or other single jurisdiction, if there is a desire to compare to international standards.
Recommendation 1.5 (Competition tests): Standards for evaluating a substantial lessening or prevention of competition should be recalibrated to focus on harm to the competition process. One suggestion would be to specify in section 92 ["*Mergers"*] that an SLPC may be inferred from a merger that appears reasonably capable of having anti-competitive effect or of making a significant contribution to the creation, maintenance, or enhancement of the ability to exercise market power.	The CBA Section opposes this suggestion. We have numerous concerns about proposals to "recalibrate" the substantial lessening or prevention of competition test, as outlined in detail below. An overarching concern is that any change will simply result in extensive litigation as parties will inevitably dispute the scope and meaning of any new test. Although some stakeholders tout the idea of increased litigation being beneficial to clarify the law, the CBA Section does not believe that more litigation is a desirable outcome. Ideally there is compliance with the Act or consensual settlements when disputes arise. Litigation is complex, costly, disruptive and gives rise to unpredictable outcomes. The current legal standard for merger intervention – a substantial lessening or prevention of competition – is a well-known, international standard with which enforcers, practitioners, parties and judiciaries have decades of experience. Courts have developed jurisprudence giving meaning to competition terminology and

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	concepts, which has guided and enabled strong merger enforcement and given merger parties clarity and business certainty. A shift in this standard, particularly as proposed by the Bureau, would make merger review more subjective and uncertain. Many mergers could create conditions where anticompetitive effects are "reasonably capable" of occurring but that are also highly unlikely to occur. Such a change would make up-front compliance assessments difficult or impossible. The Bureau proposal is thus likely to result in pro-competitive or competitively benign mergers not proceeding. The CBA Section is alarmed at the proposal that the Bureau wishes to stop transactions that may " significant[ly] contribute" to the "creation" or "maintenance" of market power. In other words, the Bureau seems to be saying it wants to stop mergers that will not result in the creation or maintenance of market power, but that could merely contribute to such outcomes. It is alarming that a government agency suggests wanting, in effect, broad power to intervene in the economy to stop potential risks from materialising where there is no evidence that they are actually ever likely to materialise. Merger review is a predictive and therefore inherently uncertain exercise. To give the Bureau broader powers to stop hypothetical future outcomes would curb healthy business activity and make Canada an international enforcement outlier. We strongly believe that merger reviews should be streamlined to ensure that transactions that are clearly problematic are addressed efficiently. Introducing vague and arbitrary new standards will not help. It would allow the Bureau to challenge mergers as "anticompetitive" based on speculative theoretical harm rather than based on objective evidence of likely real-world effects. This shift would create substantial uncertainty in the business community on what transactions will be approved. This uncertainty would have a chilling effect on legitimate, pro-competitive and pro-consumer merger activity. (See CBA March 2023 Submission to ISED, page 16.)
Recommendation 1.6 (Remedial standard): The remedy standard established in the case law does not restore competition to pre-merger levels, allowing merging parties to accumulate market power and	The CBA Section sees no reason why well-established Supreme Court jurisprudence (the Southam case) should be repealed by legislation. To the contrary, it would be inconsistent and unprincipled to treat mergers requiring a remedy to *de facto* be evaluated on a standard (i.e., does not result in any change to competition) that differs

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harm the economy. The Act should be amended to provide that the Tribunal's remedial order should restore competition to the level that would have prevailed but for the merger.	from those that do not require a remedy (i.e., does not, or is not likely to, result in a SLPC). We note the important Southam qualification that: "If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former must be preferred. At the very least, the remedy must be effective." There is no evidence that the current remedial standard is not effective in addressing anti-competitive mergers. For example, the Tribunal applied the Southam principles in the recent Secure/Tervita case to achieve an outcome in favour of the Competition Bureau.
Commissioner should have sufficient time and information to evaluate merger remedy proposals prior to closing;	Moreover, in the case of a consent agreement, the Bureau has a separate review process to evaluate a merger remedy proposal, with respect to which timing may be extended at the Bureau's discretion. [Note: A separate but related issue is the current consent agreement process. It gives the Bureau significant advantages – with numerous standard form "one-sided" Bureau-favourable terms – presented to the parties on a "take it or leave it" basis. The Bureau rarely departs from these terms even where circumstances warrant. The CBA Section favours a more flexible approach. We would be open to discussing with ISED and the Bureau how that could be achieved.]
The Tribunal's jurisdiction should be limited to analyzing the competitive effects of the transaction as it existed when it was challenged by the Commissioner with parties bearing the burden of proving the effectiveness of any subsequent remedies or transaction modifications; and	The Bureau and Tribunal should evaluate the transaction that is before them, even if it has changed in some important way, rather than be constrained to evaluating a transaction that is no longer pursued by the parties. If additional time is required to assess the impact of the change, that can be addressed by the Tribunal. Limiting the Tribunal as proposed by the Bureau would ignore commercial realities and waste limited Tribunal, Bureau and parties' resources. This amendment seems designed to prioritise administrative enforcement convenience without any regard to marketplace reality. The CBA Section has grave concerns about a proposal that was specifically rejected by the Federal Court of Appeal in the recent Rogers/Shaw case as being "without merit." The Court of Appeal said in that case that "the Competition Act aims to address truth

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	and reality, not fiction and fantasy. Examining the merger alone – a merger that by itself, will not and cannot happen without the divestiture – would be a foray into fiction and fantasy." It would be similarly bizarre if the Bureau, parties or Tribunal were forced to ignore other facts that changed from the date of a Bureau challenge. What if relevant trade barriers were repealed or a major competitor exited the market, for example? It is unrealistic to force the Tribunal to ignore those facts in assessing competitive effects. Such an approach is not "pro-defence:" sometimes changed circumstances favour the parties, sometimes the Bureau. The current Canadian approach is consistent with US case law. Maintaining the status quo approach would be consistent with the Bureau's desire to ensure Canada is not an international outlier. More generally, from a procedural perspective, it is clear that the Competition Act and courts will operate in a way that will ensure procedural fairness. We cannot envision a situation where a change in circumstances occurs in such a way that the Bureau would not have adequate time to consider the change and factor it into its assessment. Placing the burden of proof on parties on the effectiveness of any subsequent remedies or transaction modifications would create a presumption that any such remedies or modifications are anti-competitive – when the original transaction itself has not yet been determined by the Tribunal to be anti-competitive. Parties to a transaction that has been restructured to eliminate competitive harm should not be treated differently than parties that structure a transaction from the outset to eliminate competitive harm. In all cases, the burden should be on the Bureau to establish whether there has been a lessening of competition. Requiring the government to establish harm before enforcement action can be taken should not be viewed as an unusual or burdensome requirement.
Behavioural commitments offered by parties should not be relied upon by the Tribunal to conclude that a remedy is effective absent the Commissioner's consent.	The Tribunal and courts are well-equipped to decide what remedies they think will or will not be effective. For completeness, the Bureau's proposal may be based on a misapprehension of the recent Rogers/Shaw case. There is a difference between a behavioural remedy and a

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	change in circumstance. In Rogers/Shaw, the Tribunal found that behaviour on the part of Videotron was unlikely to create a lessening of competition. The behaviour of Videotron was in other words part of the factual background against which the Tribunal assessed the merger. That is not the same as the Tribunal accepting a behavioural remedy as a solution to a competitive problem.
Recommendation 1.8 (Efficiencies exception): The efficiencies defence should be repealed, and efficiency gains should instead be incorporated into the list of factors that the Tribunal can consider in determining whether a merger substantially lessens or prevents competition.	The CBA Section has long supported the efficiencies defence and does not believe it should be reduced to one of several factors the Tribunal can consider in determining whether a merger substantially lessens or prevents competition. (See CBA March 2023 Submission to ISED.) The CBA Section has proposed alternatives should ISED nevertheless wish to explore amendments. One is to limit efficiencies to a factor in merger review with a clear and predictable consumer welfare standard. Another is to limit the Bureau burden of proof under section 96. (See CBA March 2023 Submission to ISED, Appendix A, page 54.)

2. UNILATERAL CONDUCT

Competition Bureau Recommendation	CBA Section Comments
Recommendation 2.1 (Streamlining the three-part test): The test for establishing an abuse dominance should be simplified, including a more appropriate allocation of the burden of proof.	
The abuse of dominance provisions could be satisfied by a two-part test where the Commissioner could obtain an order by establishing that: (i) a firm is dominant (or a group of firms are jointly dominant); and (ii) they engaged in a practice with *either* anti-competitive intent or effect;	The CBA Section does not agree that it would be appropriate to eliminate any of the three elements required to establish an abuse of dominance. With respect to removing the element of intent, there are a wide range of circumstances in which a dominant firm may, for example, legitimately decide to take action to focus on new business areas or reorganize its business or relationships (e.g. discontinue a business line or reorganize its supply chain) where participants in an

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	affected market will not benefit. In addition, an assessment of the likely impact of a course of action cannot reliably be undertaken prospectively. A firm should be entitled to undertake a course of action for a legitimate business purpose unrelated to harming competition without fear of facing penalties for market consequences that the firm did not intend. With respect to eliminating the requirement to show an anti-competitive effect, it would be inappropriately prescriptive and to the detriment of competition and consumers if a dominant firm were prohibited from engaging in any conduct at all that could be considered an "anti-competitive act", a concept that is not clear in its scope. It is appropriate and reasonable to permit firms to engage in market activity including vigorous competition to the extent that competition is not substantially prevented or lessened as a result.
A second option would be to retain the current three-part test but introduce an element of burden-shifting. For example, if the Commissioner proved that a dominant firm engaged in a practice with anti-competitive intent the burden then could shift to the dominant firm to prove that the conduct was not capable of substantially harming competition;	The CBA Section does not support this proposal. Since a firm usually will not have access to market data required to demonstrate the absence of market impact, this proposal will significantly increase compliance burdens and chilling effects on Canadian businesses. The Competition Act gives the Commissioner tools and powers to gather market data from market participants needed to assess and demonstrate the impact of a course of conduct on the market, including sensitive commercial data regarding revenues and profits, strategies, customers, pricing and forward-looking plans, and imposes on the Commissioner the obligation to treat this information as confidential. Independent firms in the marketplace have no ability, understandably, to compel commercially sensitive information of competitors and other market participants that would be necessary to demonstrate the absence of market impact of their actions.
Similarly, where a SLPC is shown it may be appropriate to presume conduct has an anti-competitive purpose (or, alternatively, if a SLPC is established there would be no need to also show an anti-competitive purpose for the abuse of dominance provisions to be engaged); and	Intent must be retained as a core element of an abuse of dominance.

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Other models could also be explored. Regardless of the model adopted, the Bureau is not seeking to discourage aggressive competition on the merits. For example, the Bureau would support an ancillary amendment to section 79(4) ["*Superior Competitive performance*"] to make it more clear that simply being more effective competitor is not an abuse of dominance.	An approach that would permit a firm to justify its conduct based on superior competitive performance or other enumerated justifications is not appropriate. It is not practically possible to enumerate an exhaustive list of the justifications for conduct that will not be considered "anti-competitive." Expressly limiting the justifications for conduct is unnecessary to ensure a sufficiently broad scope of conduct is captured, especially since the definition of an "anti-competitive act" has been broadened to include an act intended to "have an adverse effect on competition."
Recommendation 2.2 (Business justifications): For a business justification to be cognizable under the abuse of dominance provisions, the dominant firm must also prove that it was objectively valid.	We believe it is reasonable to include a concept of objectivity in the assessment of the business justification for conduct. Further assessment would be required on how this would be defined and determined (for example, "objectively valid" is an unclear expression; "objectively reasonable" may be a more useful approach to explore).
Recommendation 2.3 (Competition tests): Standards for evaluating a substantial lessening or prevention of competition should be recalibrated to focus on harm to the competition process.	
A more appropriate analysis should focus on the principles of competition law and the protection of the competitive process. In this light, the necessary questions posed should be: does the conduct create barriers to entry or expansion: Does it lessen incentives to compete? And does it preserve the position of a dominant firm? Where there is evidence of adverse effects on price or non-price dimensions of competition that evidence could be taken into account, and may be dispositive when it exists, but it should not be necessary to find an SLPC. This would be consistent	The CBA Section considers that competitive process considerations mentioned by the Bureau can already be taken into account, where relevant, under the existing statutory framework and jurisprudence. In addition, the BIA amendments have increased the ability of the abuse of dominance provisions to focus on harm to the competition process by (i) including in the definition of an "anti-competitive act" an act intended to "have an adverse effect on competition" and (ii) confirming that non-price competition can be considered wherever relevant.

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with the recent amendments to the Act in June 2022 which clarify that "*the effect of the practice on price or non-price competition, including quality, choice or consumer privacy*" is a discretionary factor that the Tribunal "may" consider as part of the SLPC test for abuse of dominance, mergers and competitor collaborations;	
The Bureau therefore endorses the suggestion in the Discussion Paper that the showing of a SLPC can be accomplished by showing conduct is "*capable of having anti-competitive effects*"; and	The CBA Section does not support this proposal as it would import a loose and uncertain test for establishing an abuse of dominance, particularly considering the very significant penalties and remedies that can be ordered (e.g. conduct "capable of having anti-competitive effects" would capture conduct that only has a remote possibility of having anticompetitive effects.) The SLPC concept is widely used in competition law and has been interpreted in case law in Canada over many years. Further, the current requirement is not onerous as an SLPC is only required to be demonstrated as "likely", i.e. on a balance of probabilities.
One option would be an interpretative provision that provides that a SLPC may be inferred from conduct that appears reasonably capable of making a significant contribution to the creation, maintenance, or enhancement of the ability to exercise market power.	The CBA Section does not support a proposal to adopt a loose and uncertain standard for "inferring" an SLPC (or the "capability" concept, for the reasons discussed above). The existing provision already permits considering the impact on prospective competition. The Commissioner has extensive information gathering powers and should be required to demonstrate on a balance of probabilities that market outcomes worthy of concern are likely to occur.
Recommendation 2.4 (Dominance test): Certain features of the dominance test are critical to the effectiveness of the Act's abuse of dominance provisions and should remain unchanged. These include the possibility of joint dominance, the case law establishing that firms with gatekeeping power can be dominant, and the principle that dominance can be	The CBA Section agrees that no amendment is necessary.

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attained through the impugned practice of anti-competitive acts and need not be a pre-existing status.	
Recommendation 2.5 (Interim relief): The process for seeking interim relief should be simplified and the duration of interim orders should be extended.	Existing tools are not insufficient as evidenced by the fact that the Commissioner does not use the tools currently available. Further, the standard for interim relief should be high, taking into account that such relief is sought at a point where no case has yet been made out and the business disruption to firms (and their customers and suppliers) resulting from an order may be impossible to reverse.
One potential solution is to amend the provision to afford the Tribunal the discretion to determine the appropriate order duration, either by making the process one that may be contestable by the parties at the outset or by adopting a two-pronged approach that retains an initial *ex parte* process, followed by a contested one with greater discretion.	The CBA Section could support giving the Tribunal the discretion to determine the appropriate duration and scope of an interim order if the process is contestable by the parties rather than initiated by the Commissioner *ex parte*.
Recommendation 2.6 (Other restrictive trade practices provisions): Any removal or repositioning of any of the restrictive trade practices provisions should avoid reducing the scope of the Act by ensuring the abuse of dominance provisions are properly calibrated to apply to all cases would previously have been covered by the restrictive trade practices provisions	As described in the earlier CBA Section March 2023 Submission to ISED, we could support repositioning the restrictive trade practices provisions, provided that required elements of the abuse of dominance provisions are not relaxed when other restrictive trade practices are integrated into the abuse of dominance framework.
Recommendation 2.7 (Commencing proceedings under multiple provisions): The Commissioner should be permitted to apply for relief under any combination of civil provisions simultaneously.	The Commissioner is already permitted to apply for relief under certain civil provisions simultaneously (e.g., sections 77 and 79). The Section would not support allowing the Commissioner to challenge conduct under all civil provisions without consideration of the potential ramifications. For example, permitting a merger to be challenged under both sections 79 and 92 would represent an important shift from the current merger enforcement framework and result in significant uncertainty for merging parties:

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	• merger could be challenged under section 79 which provides for a three-year limitation period, as compared to a one year limitation period following substantial completion of a transaction for a section 92 challenge; and • merging parties could be exposed to administrative monetary penalties under section 79, in addition to a merger remedy under section 92.
The Tribunal would retain its jurisdiction to consolidate or bifurcate proceedings as appropriate and its discretion to ensure its remedial orders are not overbroad or unnecessarily duplicate.	

3. COMPETITOR COLLABORATIONS

Competition Bureau Recommendation	CBA Section Comments
Recommendation 3.1.1 (Remedies): The remedies provided for competitor collaborations are insufficient. Prescriptive remedies aimed at restoring competition and administrative monetary penalties should be available in appropriate cases.	**Orders to Restore Competition**: The CBA Section agrees that the Tribunal should have the ability to make orders that are necessary to restore competition when a prohibition order under section 90.1 would be insufficient to remedy a likely SLPC. This would be analogous to the ability to issue these orders to remedy an abuse of a dominant position or the effects of exclusive dealing / tied selling / market restriction, as well as to issue divestiture or dissolution orders to remedy a completed merger that is found to be anti-competitive. **Administrative Monetary Penalties**: The CBA Section believes that the Bureau has not established any basis for the addition of AMPs as a remedy. Section 90.1 treats competitor agreements in a similar manner to mergers: the focus is on proper identification of competitive effects and the remedying of such effects. The Bureau has only identified a few cases in 13 years that warranted any enforcement action under this provision (e.g., Air Canada / United joint venture and the e-books case). The existing remedial powers under section 90.1 were appropriate and sufficient for

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	dealing with those cases. AMPs are not needed for mergers and they do not appear needed for the competitor agreements reviewable practice.
Recommendation 3.1.2 (Past agreements and past harm): Only current or proposed agreements between competitors, and only current or future harm to competition, are addressable under the competitor collaboration provision. Section 90.1 should be expanded to address both past agreements that are no longer in effect, and past harm to competition that has since ceased.	The Bureau should not have the ability to challenge or seek penalties for past agreements that are no longer in effect. This would be a waste of time and resources for the Bureau, the parties to the agreement, and the Tribunal. Like the merger provisions, the competitor agreements reviewable practice is designed to focus on remedying situations that are currently having, or are likely to have, negative effects on competition. It is not designed to deal with past harm or to deter and punish agreements between competitors – those that merit such treatment are prohibited as criminal offences. (See CBA Section March 2023 Submission to ISED, page 30.)
In addressing these gaps, the Bureau would support a limitation period within which the Commissioner must bring an application in respect of a past agreement, similar to that which applies to abuse of dominance applications where a practice has ceased [i.e. "*more than three years after the practice has ceased*" (s. 79(6)].	If (i) agreements where the conduct has ceased are made subject to challenge, and (ii) AMPs are introduced, notwithstanding the concerns expressed above, the one-year limitation period for challenging completed merger transactions would be more appropriate than the three-year limitation period used for abuses of a dominant position. No useful purpose would be served by creating a three-year period of uncertainty for Canadian businesses in legal investigations and proceedings related to prior agreements that are not having any effects on competition.
Recommendation 3.1.3 (Competition tests): Standards for evaluating a substantial lessening or preventive of competition should be recalibrated to focus on harm to the competitive process.	See the CBA Section's comments on Bureau Recommendations #1.5 and #2.3 in the discussions of Merger Review and Unilateral Conduct issues.
Recommendation 3.1.4 (Efficiencies exception): The competitor collaborations provision contains an efficiencies exception, similar to the merger provisions, that is equally unsuitable for maintaining and	See the CBA Section's comments on Bureau Recommendation #1.8 in the discussion of Merger Review issues.

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encouraging competition. The defence should be repealed, and efficiency gains should instead be incorporated into the list of factors that the Tribunal can consider in determining whether an agreement substantially lessens or prevents competition.	
Recommendation 3.1.5 (Private access): Private access to the Tribunal is currently not available for competitor collaboration cases. The Act should allow such access.	The CBA Section believes that the Bureau has not established any basis for the addition of private access as an enforcement mechanism for competitor agreements. Unlike cartel conduct, which is regarded as unequivocally problematic and is subject to both criminal penalties and private damages actions, section 90.1 treats non-cartel competitor agreements in a similar manner to mergers: the focus is on proper identification of the competitive effects and the remedying of such effects. Despite its view that mergers and competitor collaboration are high enforcement priorities, the Bureau has, as noted above, identified hardly any competitor agreements that warranted applications to the Tribunal. The Bureau is best-placed to make the assessments on the competitive effects of these practices, which are often complex and have market-wide impacts, without targeting specific market participants that is the primary rationale for private access to the Tribunal for the unilateral conduct reviewable practices (i.e. sections 75-79: refusal to deal, price maintenance, tied-selling, exclusive dealing, market restriction and abuse of a dominant position).
As discussed elsewhere in the Bureau's submissions, this extension should be coupled with amendments easing the test for leave.	The CBA Section believes that any private right of access to the Tribunal that may be established for the competitor agreements reviewable practice should be subject to the same safeguards, including the test for leave, that are applicable for other reviewable practices. (See also the CBA Section's comments on Bureau Recommendation #5.5.2 on changes to the leave test in the discussion of Administration and Enforcement issues.)

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Recommendation 3.1.6 (Notification for pharmaceutical patent litigation settlement agreements): Pharmaceutical patent litigation settlement agreements have the potential to harm competition, but can be difficult for the Bureau to detect. The Act should be amended to include a mechanism to make the Bureau aware of and receive such agreements.	The CBA Section does not believe that this proposed change is necessary or desirable. It would impose extra burdens on all companies dealing with patent litigation disputes, consume Bureau resources, and introduce sector-specific elements into a general economic framework law, instead of addressing them in a sector-specific regulatory framework related to intellectual property and pharmaceutical products. Patent litigation and settlements can be observed by monitoring Federal Court dockets, allowing the Bureau to investigate and challenge settlements if there are competition concerns. The CBA Section suggests that the Bureau make use of this available pathway before proposing to burden Canadian pharmaceutical businesses with a bureaucratic notification regime. (See CBA Section March 2023 Submission to ISED, Part IV.D, page 33)
Recommendation 3.1.7 (Private access settlement agreements): Litigation settlement agreements between parties to a private access case under Part VIII of the Act should be notified to the Commissioner in all cases [not just when the parties file a consent agreement, as currently required under s.106.1(2)].	This proposed change addresses a hypothetical scenario that is unlikely to arise often in practice. The CBA Section would be concerned if a significant amount of scarce Bureau resources were allocated to re-assessing private settlements. That said, the CBA Section recognizes that private litigation can be used for strategic or anti-competitive purposes. If additional resources are available, this information could reinforce the Commissioner's follow-up rights under section 106.1(6) to intervene if the Commissioner believes that a settlement is anti-competitive.
Recommendation 3.2.1 (Buy-side cartels): Consistent with international practice, policymakers should consider defining and treating hard core buyer cartels the same way as hard core supplier cartels under the Act. Barring such reform, it is even more important to strengthen the civil competitor collaboration provision in line with the recommendations set out in section 3.1 above.	The criminal law is not an appropriate instrument to deal with buy-side competitor agreements. The CBA Section is not aware of the Bureau ever (i) prosecuting a buy-side agreement under the conspiracy offence prior to it being amended to remove any applicability to buy-side agreements in 2010, or (ii) challenging any type of buy-side agreements as anti-competitive since section 90.1 was enacted. Buy-side agreements are often pro-competitive or competitively neutral and lack the inherent harmfulness that would make a criminal prohibition appropriate. The Bureau has provided no evidence that the current competitor agreements reviewable practice

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	is inadequate to deal with any buy-side agreements that may raise competition concerns. The CBA Section expects that the main consequence of this amendment would be to force Canadian businesses that participate in buying groups (mainly small and medium-sized businesses seeking to obtain lower prices through volume purchasing, compete with larger rivals) to terminate these arrangements or risk criminal prosecutions and penalties. Historically, the Bureau has recognized that legitimate buying groups were not problematic under the conspiracy or price discrimination offences. (See CBA March 2023 Submission to ISED, Part IV.E, pages 33-36)
However , as outlined in the Bureau's *Competitor Collaboration Guidelines*, the cartel provisions of the Act generally avoid sanctioning these types of agreements by targeting naked restraints on competition that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture. For example, parties to a joint venture agreement can rely on the ancillary restraints defence and parties to a joint-bidding arrangement can avoid criminal liability by making their arrangement known to the person calling for bids or tenders (see discussion 3.2.3 below). Other jurisdictions apply similar concepts to distinguish hard core buyer cartels that merit per se treatment from other types of buy-side agreements that should be examined under a civil effects-based standard. The distinction can be further clarified by enforcement guidelines to provide greater certainty.	While the Bureau's *Competitor Collaboration Guidelines* were an essential step to address the uncertainty and overreach of the bluntly drafted amendments to the conspiracy offence in 2010 (which were tabled and enacted without meaningful stakeholder consultation), using enforcement guidelines to offset the risks (and chilling effects) created by overbroad legislation is a sub-optimal way to establish and administer criminal laws that carry massive potential fines and 14-year terms of imprisonment. The ancillary restraints defence in the Act is an imperfect counterbalancing mechanism because it is drafted and interpreted by the Bureau restrictively, and it places the burden of proof on the defendant(s). This often leads Canadian businesses to err on the side of caution and avoid activities that would likely be lawful.
Recommendation 3.2.2 (Criminal proceedings): The Act prohibits the commencement of a criminal conspiracy proceeding if applications were made	The CBA Section agrees that the protections against criminal and civil double jeopardy should apply to all the criminal offences in the Act. In addition to the wage-fixing and no-poaching offences in section 45(1.1), the foreign-directed conspiracies offence in

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under certain other of the Act's provisions [i.e. s. 45.1, which prohibits prosecutions under s. 45(1) when there are proceedings under any of ss. 76, 79, 90.1 or 92]. The rule should be expanded to include proceedings pertaining to wage-fixing and no-poaching agreements.	section 46 and the bid-rigging offence in section 47 should be covered by the double jeopardy provisions. This change could be achieved by changing s. 45.1 to read: "No proceedings maybe commenced under subsections 45(1), 45(1.1), 46(1) or 47(2) ….
Recommendation 3.2.3 (Bid-rigging "made known" element): The "made-known" element of the Act's bid-rigging provision does not sufficiently protect competition. The Act should establish "made known" as a defence that may be asserted only when the conduct is directly related to the submission of a single joint bid.	
[…,] the "made known" element is unduly broad for two reasons. It may apply to circumstances in which multiple bidders submit multiple agreed-upon bids, which harms competition; and	The CBA Section disagrees with the Bureau's assertions that (i) the "made known" element of the bid-rigging offence was only intended to apply, and should only apply, when there is a single joint bid, and (ii) other types of agreements covered by the bid-rigging offence are always harmful and should not be subject to the "made known" element. For example, a manufacturer and its authorized distributor, or two firms that are participants in a legitimate strategic alliance or joint venture, may both receive a call for bids and tenders, decide whether one or the other, or both of them, will handle the response, and advise the person calling for the bids or tenders accordingly. An agreement that is made known to the person calling for bids or tenders generally will lack the quality of a "naked restraint" or "hard-core cartel conduct" that would merit criminal prosecution. The "made known" element appropriately provides bidders with an incentive to disclose any types of collaboration to the person calling for bids and tenders. The recipient can take into account the disclosure it has received in its subsequent decision-making regarding the tender process. It can also determine whether to make

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	a complaint to the Bureau regarding a possible contravention of the competitor agreements reviewable practice or, in an egregious case, the conspiracy offence.
Because it is an element of the offence, the Crown has the extraordinary burden of proving that the agreement was *not* made known by the parties to the person requesting the bids or tenders.	The CBA Section expects that it would be a rare case in which a Bureau investigation of bid-rigging was unable to determine whether or not an agreement between bidders was made known to the person calling for the bids or tenders. If such disclosure was made, the bidders will be incentivized to provide the supporting evidence to the Bureau in order to conclude the investigation without a prosecution. The Bureau will also be able to confirm with the recipient what disclosure was provided. That said, if the Act is amended, the CBA Section agrees that the "made known" element of the offence (without changes to its current scope) could be converted into a defence that the parties to the agreement would need to prove.
Recommendation 3.2.4 (Conspiracies relating to professional sport): Section 48, the provision of the Act dealing with conspiracies relating to professional sport is no longer needed and should be repealed. The provision is no longer needed as the conduct is likely to be subsumed within the more general wage-fixing and no-poaching provision that comes into force in June 2023. Indeed, retaining section 48 in this context may generate confusion and/or unnecessarily limit the general application of the new provision. Competition law generally favours rules of general application over sector-specific prohibitions. To date, section 48 has not generated any enforcement utility, and judicial consideration is extremely limited. Since its introduction in 1975, no cases have been	The CBA Section agrees with the Bureau's conclusion that the criminal offence of conspiracy relating to professional sport should be repealed, and with the three rationales provided by the Bureau in support of this recommendation (i.e. that it is largely subsumed by other general provisions, there is no history of enforcement utility, and it contains ambiguous terms that undermine use of a criminal law instrument).

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referred to the Public Prosecution Service of Canada (PPSC) under section 48. The provision lacks definitions for ambiguous terms such as "unreasonably" and "desirability", which presents significant challenges to its enforcement in the criminal context.	
Recommendation 3.2.5 (Cartels involving federal financial institutions): Sanctions for section 49 offences should be consistent with other criminal cartel offices.	The CBA Section strongly disagrees with the Bureau's recommendation to increase penalties for the offence of "agreements or arrangements" (not "cartels") between federal financial institutions. Instead, this provision should be repealed, for similar reasons as identified by the Bureau on the recommendation to repeal section 48: • The provision is no longer needed, since the conduct is likely to be subsumed within the more general conspiracy offence in section 45 (which no longer has the "undue lessening of competition" requirement that was a catalyst for the prior separate treatment of agreements between federal financial institutions). • There is no rationale for treating federal financial institutions more restrictively than provincial financial institutions and the many other firms with which they compete in rapidly evolving financial services markets. Competition law strongly favours rules of general application over sector-specific prohibitions. A criminal prohibition applying only to a subset of competitors in a market is even more problematic. (The Bureau's own 2017 market study on "Technology-Led Innovation in the Canadian Financial Services Sector" suggested that regulation should be based on the function that an entity carries out, so all entities that perform the same function carry the same regulatory burden and consumers have the same protections when dealing with competing service providers.) • To date, section 49 has not generated any enforcement utility, and judicial consideration is extremely limited. Since its migration from the Bank Act to the *Competition Act* in 1986, the CBA Section is not aware of any prosecutions under section 49.

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	• The provision lacks definitions for ambiguous terms such as "any kind" of charge or service or loan, and there are a complex set of exceptions, both of which present significant challenges to criminal enforcement while at the same time imposing significant compliance burdens on federal financial institutions. (See CBA March 2023 Submission to ISED, Part IV.F, pages 37-38)

4. DECEPTIVE MARKETING

Competition Bureau Recommendation	CBA Section Comments
Recommendation 4.1 (Consumer standard): The Act should clarify the consumer standard for deceptive marketing practices.	As explained below, the CBA Section does not agree that the *Time* test is the appropriate consumer standard under the Act. In addition, we do not see the need to clarify in the Act the consumer standard in relation to the general impression test. The consumer standard is also left to judicial interpretation in the U.S.
The Act should therefore be amended to prescribe the appropriate consumer standard for deceptive marketing practices and adopt that set by the SCC in *Time* namely, the "credulous and inexperienced consumer". Such an inclusion will clarify the obligations of businesses and encourage compliance with the Act, both of which will serve to maintain fair competition.	The *Chatr* decision rightly distinguishes the goals and purposes of Part VII.1 of the Act from those of provincial consumer protection legislation, and rightly held that the SCC approach in *Time* needs to be modified in order to consider the context in which the representations at issue are made and the targeted audience. The *Chatr* decision, which has been followed in civil class actions, confirms the approach taken in earlier competition law cases; the general impression test under the Act needs to be assessed from the perspective of the average consumer of the intended target audience. Incorporating the *Time* test in the Act would be contrary to the legislative history and relevant jurisprudences, that support a general impression test from the perspective of an average consumer of the relevant product or services. In addition, incorporating the *Time* test as the consumer standard in the Act would set Canada apart from the US "reasonable consumer" standard. As online and digital claims are more accessible than ever to consumers in both Canada and the US, mandating a different standard in the Act would raise the compliance burdens for marketers doing business in both countries.

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Recommendation 4.2 (Ordinary selling price): The Commissioner bears a significant burden, under the OSP provisions, of proving that advertised discounts are not genuine. The burden of proof for OSP matters should be reversed, with appropriate consequential amendments, so that advertisers bear the burden of proving that advertised discounts are, in fact, truthful.	The Bureau has been successful in bringing OSP cases and combatting "fake discounts", including in contested matters, and therefore questions the need to consider reversing the burden of proof. The Act's highly technical OSP regime is unique, and there are no similar stringent provisions in other major jurisdictions, including the US. In light of the recently revised maximum AMPs that can be imposed under the OSP regime, up to 3% of the corporation's annual worldwide gross revenues, reversing the burden for the technical OSP rules would increase compliance burdens and add uncertainty for Canadian businesses.
Further, the OSP provisions include a presumption that does not reflect current marketing practices. They should be amended to remove the presumption that savings claims are references to competitors' prices rather than discounts off of the advertiser's 'regular' prices. The Act presumes that an advertiser's savings claims are comparisons to competitors' prices unless the advertisement *clearly specifies* that the savings claim is referring to a discount off of the advertiser's own regular price (subsection 74.01(3)). As a remedy, the Act should be amended to eliminate the reference to "*clearly specified*" in subsection 74.01(3) as this change would remove the presumption and modernize the provisions. It would also harmonize the English and French versions of the Act – interestingly, the "*clearly specified*" requirement is present in only the English version of the Act's subsection, which generates confusion as to whether the presumption is actually intended to operate.	The CBA Section agrees with the Bureau's proposal to remove the presumption that savings claims refer to competitors' prices, rather than discounts off the advertiser's 'regular' prices.

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Recommendation 4.3 (Harmonizing criminal and civil provisions): The deceptive marketing provisions are inconsistent in how they provide civil remedies and criminal penalties. The Act should provide both criminal and civil tracks in order to allow the seriousness of deceptive conduct to dictate how it gets addressed.	The dual criminal and civil misleading advertising tracks were introduced as part of the 1999 amendments and described as "a watershed in the treatment and approach to misleading advertising" (*Benlolo*, cited in *Stucky*). With these amendments, Parliament intended to create a clear distinction between, on the one hand, egregious cases that have the hallmarks of fraud and should therefore be treated as criminal matters, and, on the other hand, cases that are more akin to "sharp practice" and should therefore be assessed under a civil regime. The current broad criminal track under section 52(1) gives sufficient flexibility to the Bureau to protect Canadian consumers in egregious cases. The more technical provisions (e.g., proper and adequate testing, and OSP) are closer to regulation and do not have the required egregious stigma to warrant criminal prosecution and associated jail sentences for individuals. Proving all elements of these technical provisions beyond a reasonable doubt would impose a very high burden on the Bureau and Crown counsel. These specific types of representations are therefore better left for the civil regime only.
A choice amongst the two tracks should be feasible in all instances as a particular violation may warrant only criminal but not civil sanction (vice versa). Further, the disparities can result in the nonsensical bifurcation of matters where both a criminal and civil provision were engaged.	The CBA Section is not aware of bifurcation being a significant concern.
Recommendation 4.4 (Remedies): The Act should provide a wider range of remedies to counteract deceptive practices, including the addition of a contract annulment provision and the expanded application of restitution.	
Section 74.1 of the Act affords the courts certain remedial tools, including the authority to order AMPs	The proposal to add a contract annulment provision raises constitutional and division of powers questions. Any proposal should therefore be more carefully considered,

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and restitution (in limited circumstances), and to require the publication of a notice advising of a particular violation. The remedies available are largely deterrent in nature and do not permit the undoing of market distortions and competitor harm through the rescinding of deceptive contracts.	including the interaction of such new power under the Act with similar powers under provincial consumer protection legislation.
Lastly and in respect of restitution, paragraph 74.1(1)(d) of the Act limits its application to conduct that is reviewable under paragraph 74.01(1)(a), or the making of misleading representations to the public. Restitution should be made available to all other deceptive marketing practices (which would include, for instance, the provision that prohibits making unsubstantiated performance claims about a product).	The Bureau is not using the existing restitution powers, which may be explained by the sufficiency of the current remedial powers and the recently increased maximum administrative monetary penalties. Given the technical nature of the provisions outside section 74.01(1)(a), it is not necessary or desirable to simply apply all the broader elements of the current remedial framework for general representations that are false or misleading in a material respect to the other more regulatory provisions.
Recommendation 4.5 (Temporary orders): The Act [section 74.11(1)] should be amended to allow the court to temporarily enjoin conduct from re-occurring in situations where it has stopped, and enjoin substantially similar reviewable conduct from occurring.	The CBA Section strongly opposes this proposal. Seeking temporary orders for past representations that are no longer in effect would not be a proper allocation of the Bureau's and the courts' scarce resources. There is also a question on whether these applications would meet the injunctive relief test. The current remedial powers, including consent agreements, allows the Bureau to redress past representations and prevent similar representations to be made in the future.
Recommendation 4.6 (Facilitating reviewable conduct): The courts' ability to enjoin persons from facilitating the commission of civilly reviewable conduct is limited to temporary orders [section 74.11(1.1)]. The Act should permit the issuance of permanent orders in these circumstances.	The Bureau is not seeking temporary orders under section 74.11(1.1), and section 74.11 already allows the Bureau to obtain extensions subject to proper checks and balances from the Courts. Under section 74.11(6), this temporary order regime is exceptional. The Bureau has not explained why there is currently an enforcement gap and why there would be a need to obtain permanent orders.

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Recommendation 4.7 (Freezing assets): The courts have limited jurisdiction to issue interim orders to freeze assets [section 74.111]. The Act should be expanded to broaden these powers.	
The Act should be amended to allow the court to temporarily prevent the disposition of articles where it finds that there is a strong prima facie case that a person is engaging or has engaged in deceptive marketing practices of any reviewable kind; the person is or is likely to dispose of the articles; and that such disposal would substantially impair the effectiveness of a remedial order.	Again, the Bureau is not currently seeking freezing orders. Given the lack of precedent, the Bureau should explain what the perceived gaps are and the rationale for this proposal.
Recommendation 4.8 (Charges or fees that are entirely government imposed): Charges and fees that are typically imposed on a business may be dripped on to a consumer. The Act should be amended to close this loophole. Further, the Act's electronic messaging provisions should explicitly address drip pricing.	
The exemption [added in the 2022 amendments], as it currently stands, has created a loophole allowing advertisers to drip their own costs for complying with various laws onto Canadian consumers in a way that consumers would not expect. Notwithstanding its recent introduction, the provisions therefore require further refinement to indicate that the exemption to the drip pricing law only applies to obligatory charges	The CBA Section supports this proposal to clarify the drip pricing provisions.

Competition Bureau Recommendation	CBA Section Comments
or fees that represent federal, provincial or territorial sales taxes.	
Second, there is no explicit mention of drip pricing in the Act's electronic messaging provisions, and it is unclear whether the recent drip pricing provisions would apply absent a specific reference. This could be resolved by clarifying that the drip pricing provisions apply to all false or misleading representation provisions of the Act.	The CBA Section has no comment on this proposal.
Recommendation 4.9.1 (Subsequent order): The Act should be amended to expand the administrative remedies that are available for false or misleading representations by electronic message.	The CBA Section supports addressing this drafting oversight.
Section 74.1 of the Act provides an assortment of administrative remedies, and subsection 74.1(6) lists the scenarios in which an order is considered a "subsequent order" for certain prescribed reviewable conduct. However, the conduct governed by section 74.011 - that is, the provision of false or misleading representations in electronic messages - is not currently caught by subsection 74.1(6). The omission is merely a drafting oversight that occurred at the time the Act was updated to reflect CASL and should be corrected.	

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Recommendation 4.9.2 (Proof of deception not required): Unlike the criminal provision for false or misleading electronic messages [section 52.01]; the civil equivalent [section 74.011] does not state that proof of deception is not required. The Act should be amended to include this clarification.	The CBA Section supports this proposed amendment, which would provide that proof of deception is not required for the civil misleading electronic messages provisions, as section 74.03(4)(a) already provides that proof of deception is not required for representations reviewable under sections 74.01 and 74.02.

5. ADMINISTRATION AND ENFORCEMENT

Competition Bureau Recommendation	CBA Section Comments
5.1: Reforms should seek to preserve the Commissioner's independence The Bureau currently enjoys a high degree of independence as a law enforcement body while remaining accountable through public reporting obligations, service standards, and general financial and administrative oversight. In the past, various commentators have pressed for new Ministerial vetoes or public interest overrides over the Bureau's work, or new governance frameworks that would provide external direction over Bureau enforcement priorities and use of formal powers. Policymakers should resist such suggestions and ensure that the Bureau's independence is preserved as part of any reform.	The CBA Section supports the recommendation that reforms should seek to preserve the Commissioner's independence. The CBA Section does not agree that assigning decision-making to elected officials with mandates to consider competition along with other elements of the public interest are "vetoes" or "overrides over the Bureau's work" and does not agree that they threaten the Commissioner's independence to administer and enforce the Act. The Act already contemplates the possibility of Ministers exempting certain agreements and mergers in certain regulated industries (transportation and banking) on public interest grounds. We recommended introducing a public interest override for protection of the environment in the civil provisions of the Act. (See CBA March 2023 Submission to ISED, page 3 and Part IV.F, pages 38-42)

Competition Bureau Recommendation	CBA Section Comments
Recommendation 5.2 (Market studies) A formal market study regime with information-gathering powers should be added to the Act, consistent with international best practice. Wherever possible, regulators and other implicated government bodies should be required to respond to Bureau recommendations within a reasonable time period.	The CBA Section has concerns about giving the Bureau increased powers to study markets. In particular, we are concerned that market studies create significant burdens on parties that have not contravened the Act (e.g., responding to mandatory information requests) and process issues (e.g., treatment of confidential information). As such, any new power to order market studies should be constrained as described below.
Independent authority to commence a market study: The regime should expressly authorize the Commissioner to launch a study. Studies would be carried out, and findings and recommendations developed independently by the Commissioner, as is the case with the Bureau's enforcement work.	If the Government decides to add a formal market study regime to the Act, the Section does not agree that the regime should authorize the Commissioner to launch a market study unilaterally. Given the burden that a market study would impose on market participants, and given the risks of recommendations not being acted upon by the responsible government officials after a study has been completed, the Minister of Innovation, Science and Industry (and the Minister(s) responsible for the industry to be examined, if any) should sign off on any proposed market study and its terms of reference. In some markets where policy considerations other than private actor conduct may be relevant to competitive outcomes, it may be more productive for the Commissioner to carry out a market study in conjunction with relevant industry experts in government (including provincial government departments involved in the regulation of relevant industries), business organizations and academia, or to defer to policy-makers with sector-specific expertise and responsibilities.

Competition Bureau Recommendation	CBA Section Comments
Requirement to publish terms of reference: The regime should require the Commissioner to publish a notice setting out terms of reference for the study, including the products and services to which the study relates, the scope of competition issues to be examined, and the timeframe for the study. This would promote transparency and address stakeholder concerns that market studies would be used as general "fishing expeditions". While the Bureau anticipates that studies would not ordinarily take longer than 18 months to complete, there should be flexibility for the Bureau to specify shorter or longer timeframes based on the scope of the study. There should also be a process to update the public terms of reference, including timeframes, as necessary.	If the Government decides to add a formal market study regime to the Act, the Section agrees with this recommendation.
Information-gathering powers: The regime should allow the Bureau to compel information or seek production orders consistent with the process for enforcement inquiries, and subject to the same due-process protections. This would address stakeholder concerns surrounding burden and proportionality of the Bureau's information requests. Consistent with the Bureau's current practice, if information disclosed to the Bureau through a market study revealed a potential contravention of the Act, the Bureau would be able to use that information for enforcement purposes, although such enforcement would of course be separate from any market study.	If the Government decides to add a formal market study regime to the Act, the CBA Section agrees with this recommendation. However, see the CBA Section's comments on Recommendation 5.3.2 (Civil information gathering) below. (See also CBA March 2023 Submission to ISED, page 3 and Part VI.B, pages 52-53)

Competition Bureau Recommendation	CBA Section Comments
Confidentiality safeguards: The regime should subject information gathered to the same confidentiality protections that apply to other information obtained under the Act.	If the Government decides to add a formal market study regime to the Act, the CBA Section agrees with this recommendation.
Authority to publish a report: For greater certainty, the regime should expressly allow the Bureau to publish a market study report summarizing its findings as well as its recommendations, if any, subject to the confidentiality safeguards noted above.	If the Government decides to add a formal market study regime to the Act, the CBA Section agrees with this recommendation.
Response requirements for government entities subject to recommendations: While any Bureau recommendations flowing from market studies would be non-binding, the regime should require government entities subject to the Bureau's recommendations to provide a public response within a reasonable timeframe after the report is published. Such a requirement could, if necessary, be limited to recommendations directed at federal government entities.	The CBA Section does not take a view on the practice and procedure of government entities other than the entities responsible for the administration and enforcement of the Act.
As part of any such reform, the Bureau would commit to publishing guidance in consultation with stakeholders on its approach to market studies, to provide further predictability and transparency.	If the Government decides to add a formal market study regime to the Act, the CBA Section agrees with this recommendation.

Competition Bureau Recommendation	CBA Section Comments
Recommendation 5.3.1 (Definition of record): The Act's definition of "record" should be modernized.	The CBA Section agrees with this recommendation.
In the revised Access to Information Act (ATIA), "record" means "any documentary material, regardless of medium or form". Bill C-27 currently proposes to amend the Consumer Privacy Protection Act to adopt this same definition.	
Having regard for the ATIA's approach but being cognizant of the differing word choices between it and the Act (such as "*documentary material*" versus "*information*"), it is recommended that the Act's definition of "*record*" be changed to, "*any information registered or marked on a medium regardless of form*".	
Recommendation 5.3.2 (Civil information gathering): Procedural requirements relating to the Commissioner's current information gathering powers under the Act have become disproportionate, and risk unduly delaying investigations into anti-competitive conduct. The Commissioner should have access to streamlined information gathering powers in civilly reviewable matters, to ensure that the Bureau can access relevant evidence in a timely, effective, and simple way.	The CBA Section does not support this recommendation. Ensuring the Bureau can effectively gather evidence is critical to its ability to fulfil its enforcement mandate. That said, the Bureau's evidence-gathering powers – namely any enhancement of these powers – must be balanced against the due process rights of persons from whom evidence is compelled, particularly since complying with Bureau production orders is frequently time-intensive and costly. This is particularly so when information is required from third-party market participants who are not the subject of an investigation. This balance is best achieved through the existing requirement that evidence-gathering powers be subject to prior judicial authorization. (See CBA Section March 2023 Submission to ISED, pages 47-49 for more detail.)

Competition Bureau Recommendation	CBA Section Comments
Recommendation 5.3.3 (Presiding officer): New rates of remuneration should be fixed for presiding officers and an indexation mechanism should be put in place to adjust these rates for inflation.	The Section agrees with this recommendation.
Recommendation 5.3.4 (Attendance at examinations): Targets of an investigation are currently allowed to attend examinations of persons who are providing information to a Bureau investigation [sections 11(1)(a) and 12(4)]. This provision should be removed from the Act.	The CBA Section does not support this recommendation. Section 12(4) of the Act establishes a procedure whereby the Bureau can satisfy the presiding officer that the presence of the person whose conduct is being inquired into would: (a) be prejudicial to the effective conduct of the examination or the inquiry; or (b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer. This section allows for appropriate case-specific balancing of the interests of the parties involved in an examination and the targets of an investigation.
Recommendation 5.3.5. (Solicitor-client privilege): The Act should be amended to clarify that the Commissioner will not be granted access to records that are said to be protected by solicitor-client privilege unless a judge has determined the privilege claim is invalid (i.e repeal section 19(5)).	The CBA Section agrees with this recommendation. The Supreme Court of Canada has stated that: "The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole…. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. […] It is therefore in the public interest to protect solicitor-client privilege." (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 at para. 26, 34).

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	The CBA Section has expressed concern in the past about the procedure for claiming privilege under the Act including, section 19(5).
Recommendation 5.3.6 (International compliance): International cooperation between competition authorities is currently limited by a number of factors. Such cooperation should be deepened to account for the fact that businesses operate on a global scale, and actions in one country can have meaningful effects in others. The Bureau's cooperation with its international competition authority counterparts is critical to the fulfillment of its mandate and may be improved by:	The CBA Section has growing concerns about the scope of information-sharing activities by the Bureau and preserving the confidentiality of sensitive business information. Section 29 of the Act prohibits the Competition Bureau from disclosing information other than to a Canadian law enforcement agency or "for the purposes of the administration or enforcement of "the Competition Act. The Bureau takes the position that the phrase "administration or enforcement" of the Act permits disclosure to a foreign agency where the communication is for the purpose of receiving the assistance or cooperation of the foreign agency in respect of the Canadian investigation. The CBA Section is on the record as disagreeing with this interpretation of section 29, and notes that it is inconsistent with the rules applicable to enforcement agencies in most other jurisdictions. For example, US agencies are bound by the confidentiality restrictions of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq., the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 et seq., the Antitrust Civil Process Act, and other applicable laws, regulations, and rules and must obtain waivers from the parties in order to share certain confidential information with the Bureau. The CBA Section believes that amendments are required to clarify that information protected by section 29 may only be provided to foreign agencies pursuant to MLAT's entered into pursuant to the detailed framework set out in Part III of the Act.
Developing tools to facilitate timely information sharing amongst competition authorities;	
Establishing multilateral legal assistance treaties; and	The process for entering into MLATs already exists in Part III of the Act. MLATs have been used in the criminal context, but Canada has not entered into an MLAT for civilly reviewable conduct. Under these legally binding treaties, foreign authorities can request information or assistance from the Bureau, and vice-versa. As stated above,

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	the CBA Section has concerns with the Bureau's self-serving interpretation of section 29 of the Act and believes that the Bureau should be making use of Part III of the Act to develop proper inter-governmental agreements that include appropriate confidentiality protections for the information of Canadian companies and individuals if it wants to exchange information with foreign antitrust agencies.
Enabling heightened compatibility amongst privacy laws.	This is not a proposal related to legislative amendments to the Act, but rather appears to be a call to align Canada's privacy laws with international standards. The CBA Section may have comments on any proposed legislation that provides for the exchange of information between the Commissioner of Competition and the Privacy Commissioner, and with any foreign counterparts, to ensure that the rights of targets to an investigation or market study or proceeding are protected.
Recommendation 5.4.1 (Six-resident process): The "six-resident" application process should be repealed or revised to clarify the Commissioner's discretion.	The CBA Section agrees with this recommendation.
While some six-resident complaints are useful and meritorious, they should be triaged like the thousands of other complaints and investigative leads the Bureau receives each year, and should no longer be given special treatment simply due to their form. An amendment repealing the six-resident process, or clarifying the Commissioner's discretion to open an inquiry in response to a six-resident application, would better enable the Bureau to prioritize its work.	
Recommendation 5.4.2 (Inquiry conducted in private): Amend the Act to clarify that all inquiries shall be conducted pursuant to Act's confidentiality provision.	The Bureau is a law enforcement agency. It is supposed to conduct its inquiries with the objective of determining the facts. Unless and until a finding of wrongdoing has been made, it is appropriate for the inquiry to be conducted in private. Inquiries conducted in public can result in significant damage to a company's reputation and impose unnecessary costs.

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Recommendation 5.4.3 (Speed of litigation): Competition litigation in Canada can be a time-consuming and resource-intensive process that can take several years. Litigation should be simplified and accelerated wherever possible, while maintaining procedural fairness and due process, so that both the Commissioner and private businesses can quickly obtain the certainty necessary to operate in a rapidly changing world.	The CBA Section acknowledges that competition litigation in Canada can be a time-consuming and resource-intensive process. However, we cannot comment on the merits of this recommendation without reviewing the specific proposals for how litigation should be simplified and accelerated, while maintaining procedural fairness and due process.
Recommendation of 5.4.4 (Consent agreement compliance): Non-compliance with consent agreements can presently be addressed only on a criminal standard. There should be a more accessible mechanism to allow the Commissioner to apply to the Tribunal, under the civil standard of proof, for orders requiring compliance and, where appropriate, administrative monetary penalties.	The CBA Section agrees with this recommendation.
Recommendation 5.4.5 (Preliminary inquiry): To allow more timely criminal prosecutions, persons charged with an offence under the Act and prosecuted on indictment should not be afforded the right to elect a preliminary inquiry.	The CBA Section strongly opposes this recommendation. Parliament removed an accused's statutory right to a preliminary inquiry for offences that have a maximum penalty of less than 14 years, allowing for more timely criminal prosecutions. However, most criminal offences under the Act, carry a maximum penalty of 14 years. Accordingly, an accused charged with an offence under the Act should be entitled to the same rights as an accused charged with any other offence under the Criminal Code that carries a similar penalty. To allow more timely criminal prosecutions, the penalty associated with competition law offences could be reduced to less than 14 years.
In 2019, Parliament removed an accused's statutory right to a preliminary inquiry for offences that have a	

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maximum penalty of less than 14 years, allowing for more timely criminal prosecutions. This change did not affect most criminal offences under the Act, which carry a maximum penalty of 14 years. To ensure timely prosecutions, in light of the complexity and volume of information that must be considered in the course of Bureau investigations, section 67 of the Act should be amended so that anyone charged with an offence and prosecuted on indictment cannot elect to have a preliminary inquiry. The updated provisions could follow language in section 536 of the *Criminal Code.*	
Recommendation 5.4.6 (Corporations and jury trials): The Act permits the bifurcation of proceedings for some related criminal matters, and it should be amended to limit this outcome.	The CBA Section agrees with this recommendation.
In an attempt to curb future bifurcation issues, subsection 67(4) of the Act should be revised to provide that,	
67(4) Notwithstanding anything in the Criminal Code or in any other statute or law, except as provided in this section, a corporation charged with an offence under this Act shall be tried without a jury.	

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(4.1) Where one or more individuals and one or more corporations are charged in the same indictment, unless the court is satisfied that the ends of justice require otherwise, • *if the individuals elect or re-elect to be tried without a jury, the corporations shall be tried without a jury;* • *if the individuals elect or re-elect to be tried with a jury, the corporations shall be tried with a jury; and* • *if one or more but not all individuals elect or re-elect to be tried without a jury, notwithstanding section 567 of the Criminal Code the Attorney General shall in his discretion determine the manner in which each corporation is tried.*	
Recommendation 5.5.1 (Cost awards): The Commissioner, who acts in the public interest, faces the same cost risks as a private litigant. The Act should explicitly immunize the Commissioner against cost awards.	The CBA Section disagrees with the recommendation that there should be an asymmetric costs regime for the Commissioner and parties that are subject to proceedings initiated by the Commissioner. Cost awards are an important way of holding the Commissioner accountable for enforcement decisions, just as they provide incentives for private parties to carefully consider whether to invest in litigating proceedings.
Recommendation 5.5.2 (Private enforcement): The test to obtain leave for private access to the Tribunal is unduly restrictive and should be eased to ensure that applicants can appropriately obtain leave. Further, a damages regime should be considered so that persons injured by anti-competitive conduct can seek compensation.	

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When applying for leave to make an application under sections 75 [refusal to deal], 77 [exclusive dealing, tied selling and market restrictions] or 79 [abuse of dominant position] of the Act, the applicant must demonstrate that they are "*directly and substantially affected in the applicant's business*" by the conduct. This means that only businesses can seek leave to bring a case to the Tribunal, not other groups that can be directly harmed by anti-competitive conduct like consumers or workers. Moreover, the test has been interpreted to require an examination of whether the business as a whole has been substantially affected rather than simply examining whether a particular product or product line of that business has been materially affected. This stands in contrast to the leave test for applications under section 76 of the Act, which only requires applicants to establish that they are "*directly*" affected by the conduct.	The CBA Section does not have a view on whether and how the test for leave should be modified. We agree that it can be difficult for multi-product firms to obtain leave under the current standard since the "substantially affected" requirement "has been interpreted to require an examination of whether the business as a whole has been substantially affected rather than simply examining whether a particular product or product line of that business has been materially affected".
In addition to the restrictive leave tests, there is no possibility for injured parties to seek compensation for damages suffered from civil contraventions of the Act. This further disincentivizes private enforcement and stands in contrast to the US and many other regimes. The Bureau agrees with the Discussion Paper that a "more robust framework for private enforcement, encompassing both 'private access' to the Competition Tribunal and 'private action' to provincial and federal courts for damages, would complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and lead to quicker case resolutions."	The views of CBA Section members vary considerably on the question of introducing a more robust framework for private enforcement of the non-cartel reviewable practices, including private rights of action for damage suffered. If the Government decides to further privatize competition law enforcement by providing damages to incentivize private litigation of conduct covered by the civil provisions of the Act, we submit that effective judicial and procedural safeguards (e.g., the existing leave requirement for private actions under Part VIII of the Act) will be important to mitigate against the potential for unmeritorious and abusive private litigation.

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The Bureau also agrees that any such change should be designed to avoid unmeritorious or strategic litigation - the courts have traditionally played an important gatekeeping role in this respect, and the Bureau anticipates that this would continue.	
Recommendation 5.6 (Gender neutrality): The Act should be amended to include gender-neutral language.	The CBA Section agrees with this recommendation.
The list of the Act's use of gender-specific words is relatively long. While a complete inventory has been compiled, it has not been included in this submission owing to its length and the consultation portal's character limits. Nevertheless, the list will be made available. An overview of the desired changes are as follows: • Replace references to "his" or "her" with "their"; • Replace references to "him" or "her" with "them"; and • Replace references to "he" or "she" with "they".	