THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Competition Bureau Bulletin on Amendments to Abuse of Dominance Provisions

CANADIAN BAR ASSOCIATION
COMPETITION LAW AND FOREIGN INVESTMENT REVIEW SECTION

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66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1
tel/tél. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Competition Law and Foreign Investment Review Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Competition Law and Foreign Investment Review Section.

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I. INTRODUCTION

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to submit preliminary comments on the *Draft Bulletin on Amendments to the Abuse of Dominance Provisions* (Draft Bulletin) issued for consultation on October 25, 2023 as a supplement to the *Abuse of Dominance Enforcement Guidelines*.[1]

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform and offer expertise on how the law touches the lives of Canadians every day. The CBA Section comprises approximately 1,000 lawyers and promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

With the enactment of significant amendments to the abuse of dominance provisions in the *Competition Act* in Bill C-56, the *Affordable Housing and Groceries Act* on December 15, 2023, we offer provisional commentary on the Draft Bulletin with the expectation that the Bureau will need to consult on further guidance to address amendments in Bill C-56 and any future amendments resulting from Bill C-59, the *Fall Economic Statement Implementation Act, 2023*.

The CBA Section looks forward to offering comments on future draft guidance.

The CBA Section commends the Bureau's continuing efforts to engage with stakeholders through public consultation and to give meaningful guidance to members of the bar and market participants. This guidance is especially important for abuse of dominance, given the difficulty in distinguishing between aggressive, but pro-competitive conduct, and conduct that may be anti-competitive. In particular, detailed examples in the Draft Bulletin are useful for Canadian businesses.

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1 Competition Bureau, Abuse of Dominance Enforcement Guidelines (March 7, 2019), online.

II. EXPANDED DEFINITION OF "ANTI-COMPETITIVE ACT"

The 2022 budget implementation legislation extended the abuse of dominance provisions to conduct that is intended to harm competition, not just conduct that is intended to harm a competitor.[2]

The Draft Bulletin gives guidance on four types of conduct that may be intended to harm competition:

- agreements between competitors
- information sharing
- contracts referencing rivals
- serial acquisitions (and stand-alone acquisitions)

A. Agreements between competitors

Paragraph 23 of the Draft Bulletin states "[i]f an agreement gives rise to a criminal offence under section 45, we will refer the matter for criminal prosecution rather than bring an application under the abuse of dominance provisions or section 90.1."

In our view, this categorical statement unnecessarily limits the Commissioner of Competition's enforcement discretion with respect to agreements that may violate section 45.

In practice, a number of factors may be weighed in the exercise of enforcement discretion on whether to proceed under section 45 or a civil provision including: (i) whether the parties can credibly rely on the ancillary restraints defence; (ii) the uncertainty of proving a case beyond a reasonable doubt; and (iii) the ability under the Act's reviewable practice provisions to obtain orders to restore competition, rather than just a financial penalty or incarceration.

The rigid language in the Draft Bulletin contrasts with the *Competitor Collaboration Guidelines*,[3] which state that the Bureau will "determine, based on evidence in its possession or to be gathered, whether the criminal provision in section 45 or the civil agreements provision in section 90.1 is applicable".[4] There is no reason to adopt a different approach in the context of the abuse of dominance provisions.

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2 *Competition Act*, s. 78(1), as amended by S.C. 2022, c. 10, s. 261.

3 Competition Bureau, Competitor Collaboration Guidelines (May 6, 2021), online.

4 Competitor Collaboration Guidelines, section 1.3.

RECOMMENDATIONS

1. **The CBA Section recommends revising the Draft Bulletin to include language similar to the Competitor Collaboration Guidelines on when and how the Bureau will determine under which provision an agreement between competitors would be assessed.**

2. **The CBA Section recommends that the Draft Bulletin explain: (i) the criteria used to decide if an agreement that will not be referred under section 45 will be reviewed under section 79 or section 90.1; and (ii) the Bureau's view on how the ancillary restraints defence would apply to decisions on the choice of enforcement track.**

B. Information sharing

Paragraph 26 of the Draft Bulletin states "[i]nformation sharing may facilitate conscious parallelism, a form of coordination, between competitors. Therefore, information sharing may be an anti-competitive act intended to harm competition."

Information sharing is addressed in the *Competitor Collaboration Guidelines:* "[p]arallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, may be sufficient to prove that an agreement was concluded between the parties."[5]

The Draft Bulletin suggests that information sharing may also be an abuse of dominance.

This is a new approach under Canadian law that requires more elaboration and consideration.

For example, the Bureau should explicitly recognize that conduct that facilitates conscious parallelism is not inherently anti-competitive – indeed it may be pro-competitive or beneficial to customers (e.g. publicly posting gas prices at gas stations reduces search costs for consumers).

The CBA Section notes:

- The *Competitor Collaboration Guidelines* state that "the Bureau does not consider that the mere act of adopting a common course of conduct with awareness of the likely response of competitors, commonly referred to as 'conscious parallelism', is sufficient to establish an agreement for the purpose of section 90.1.";[6]

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5 Competitor Collaboration Guidelines, section 1.3.

6 Competitor Collaboration Guidelines, section 3.2

- The *Abuse of Dominance Enforcement Guidelines* state that "[s]imilar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position";[7] and
- The Draft Bulletin states at paragraph 28 that "[i]n and of itself, conscious parallelism does not raise issues under the abuse of dominance provisions."

RECOMMENDATION

3. To clarify and better align the Draft Bulletin with other guidance, the CBA Section recommends that the Draft Bulletin state that the facilitating practice (such as intentional sharing of competitively sensitive information) is the anti-competitive act, not any conscious parallelism that may exist after a facilitating practices is undertaken by jointly dominant firms.

Paragraph 32 of the Draft Bulletin states "[i]nformation sharing can also be indirect. For example, an industry participant may provide commercially sensitive information to a third-party algorithm developer that provides pricing recommendations to industry participants. If the developer's algorithm considers commercially sensitive information provided to the developer by other firms, this could result in coordinated outcomes despite no direct information sharing between industry participants."

In March 2023, the CBA Section commented on the use of algorithms in its submission to ISED's consultation on the Future of Competition Policy in Canada:

> Mere "conscious parallelism" is ubiquitous and cannot be usefully or effectively addressed by competition law enforcement. The same principle should apply where the parallelism arises from algorithms. It is a well-established principle that the mere act of adopting a common course of conduct with awareness of the likely response of competitors (including the interaction of algorithms) is not sufficient to establish an agreement under the civil competitor collaboration provisions.[8]

RECOMMENDATION

4. The CBA Section recommends that the Bureau develop properly calibrated guidance on any application of the abuse of dominance regime to algorithmic conduct while avoiding unintended negative consequences

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7 Abuse of Dominance Enforcement Guidelines, at para 49.

8 See CBA Section, Submission on Future of Competition Policy in Canada (March 2023), online at p. 2; see also section IV(A)(1) at pp. 26-29.

such as reduced incentives for investment and innovation or interfering with conduct that would have pro-competitive effects.

C. Contracts that reference rivals

Paragraph 39 of the Draft Bulletin states "[f]or example, a dominant retailer that implements a policy to match any lower price offered by a competitor (similar to a meet-or-release clause) may soften competition. In this example, a competitor may have less incentive to lower its price if it anticipates the dominant firm will match the lower price. A dynamic pricing algorithm that automatically monitors and matches the prices of competitors could also have this effect."

The example suggests that actions by a dominant competitor that benefit consumers may be viewed by the Bureau as anti-competitive, on the theory that they might disincentivize other competitors to reduce prices. The example implies that the Bureau's position is that dominant retailers should deliberately keep prices above competitive levels to avoid engaging in an anti-competitive act, or that price matching in general could be anti-competitive (rather than pro-competitive, as is usually understood).

The CBA Section questions the guidance that lowering prices to compete on price, even if done by a dominant competitor, would constitute an anti-competitive act. Arguably, if the pricing were below cost, there could be a concern. However, even in this situation, the mere act of meeting a competitor's pricing should not be regarded as predatory or anti-competitive.

RECOMMENDATION

5. **The CBA Section recommends that the Bureau either remove the price matching example or give additional explanation on the circumstances where price matching could be an anti-competitive act.**

D. Serial acquisitions (and stand-alone acquisitions)

Paragraph 44 of the Draft Bulletin states that "[w]hile individual acquisitions are *generally reviewed* under the merger provisions of the Act, a series of acquisitions may engage the abuse of dominance provisions in certain circumstances. Serial acquisitions may also be coupled with other anti-competitive conduct to form a broader practice of anti-competitive acts."

In footnote 17, the Draft Bulletin cites the Tribunal's *Laidlaw*[9] decision as precedent for the application of section 79 to a series of acquisition transactions. However, it is important to recognize that the basis of this decision was that the repeated acquisitions constituted a practice that excluded competitors/entrants.

In our view, the phrase "generally reviewed" is inconsistent with the Bureau's guidance and practice on merger reviews. It would also create uncertainty for market participants.

Individual acquisitions are reviewed under the Act's merger provisions and have been since the merger review provisions were introduced. We believe that potential anti-competitive effects that may flow from individual mergers should continue to be considered only under the Act's merger provisions and that the abuse of dominance provisions as amended do not alter the regime for merger reviews established by Parliament.

RECOMMENDATION

6. The CBA Section recommends amending the Draft Bulletin to clarify that merger review continues to be the primary method of addressing concerns related to an individual transaction. While there can be scope to address serial acquisitions as an abuse of dominance in certain circumstances, this would only apply to a narrow category of transactions, and it would be desirable to provide illustrative examples if this is envisioned to extend beyond the *Laidlaw* precedent.

Paragraph 46 of the Draft Bulletin states, "[w]hen assessing serial acquisitions under the abuse of dominance provisions, we examine the collective impact and purpose of the acquisitions. When examined individually, each acquisition may have limited competitive effects. However, when examined collectively, the series of acquisitions may have substantial competitive effects. As such, serial acquisitions can raise similar competition risks as individual transactions that we review under the merger provisions." This part of the Bulletin offers minimal guidance on when and how the exceptional step of an abuse of dominance inquiry would be undertaken.

RECOMMENDATION

7. The CBA Section recommends the Bureau give further guidance on its approach to identifying when serial acquisitions constitute abusive

9 *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*. (1992), 40 CPR (3d) 289.

conduct. This could include examples of circumstances when the Bureau would conduct an abuse of dominance investigation into two or more acquisitions, how it applies the three-year limitation period, and the criteria that distinguish multiple, unrelated, ordinary course transactions from serial acquisitions.

Paragraph 48 of the Draft Bulletin states, "[t]here may be circumstances where an individual transaction is considered under the abuse of dominance provisions. In some cases, a transaction may be anti-competitive because it increases the ability or incentive of the merged firms to engage in anti-competitive conduct, like foreclosing access to inputs or markets. Where we are able to remedy or prevent this type of anti-competitive transaction prior to its completion under the merger provisions, this will generally be preferable to pursuing a post-merger remedy under the abuse of dominance provisions. However, it may be that we determine a transaction facilitated other anti-competitive conduct after it is completed. A single transaction could also be otherwise coupled with other anti-competitive conduct that collectively harms competition. In such cases we may consider the transaction under the abuse of dominance provisions, alongside the other anti-competitive conduct."

For the reasons above, we believe that a stand-alone transaction in and of itself would not constitute an abuse of dominance and should be assessed under the merger provisions.

Moreover, the fact that a transaction, if not otherwise anti-competitive, may enhance market power or increase the ability of a firm to engage in future anti-competitive conduct is not in and of itself a contravention of section 79.

Paragraph 49 of the Draft Bulletin states, "[w]e may simultaneously investigate a transaction under both the merger provisions and the abuse of dominance provisions where it appears that the transaction may be a part of a practice of anti-competitive acts. We may also investigate acquisitions that we have previously reviewed under the merger provisions as part of a practice of anti-competitive serial acquisitions under the abuse of dominance provisions."

RECOMMENDATION

8. The CBA Section recommends revising the Draft Bulletin to:

a) clearly explain that section 98(b) of the Act prevents an application being made to the Tribunal on substantially the same facts under both sections 79 and 92, and provide further guidance on how the Bureau's investigative approach will align with the Act;

b) give specific guidance on the factors that the Bureau will consider when deciding whether to challenge acquisitions under the merger control or abuse of dominance provisions of the Act (as has been done in the Competitor Collaboration Guidelines for agreements that might be examined under sections 45 and 90.1); and

c) delete the reference to challenging a merger after reviewing and deciding not to challenge a transaction (since reneging on a merger clearance is unlikely to lead to a successful enforcement outcome and would undermine the predictability and credibility of the merger review process).

III. JOINT CONDUCT

The CBA Section has offered extensive commentary on the need for a coherent and principled approach to joint dominance. Most recently, our submission on the Future of Competition Policy stated:

> In our view, an overly expansive approach to joint dominance risks chilling legitimate and procompetitive or competitively neutral behaviour. […]
>
> The scope of "joint dominance" has been the subject of extensive commentary and debate, including when the Bureau updates draft guidelines on the abuse of dominance provisions. Each time, after much debate and discussion, it was determined that caution is warranted in this area to avoid chilling legitimate and often pro-competitive parallel marketplace conduct.[10]

In October 2020, we recommended that "joint abuse of dominance be considered only in circumstances where a competitor collaboration is exclusionary, disciplinary, predatory or otherwise targeted at a competitor or competitors."[11]

While recognizing that the 2022 amendments expanded the definition of an *anti-competitive act* to include "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition", the CBA Section continues to doubt that joint dominance would be found by the Tribunal or the courts under section 79 in the absence of some coordinated conduct that affects competition between the alleged jointly dominant firms.

Part E of the Draft Bulletin expands the description of the Bureau's interpretation of potentially abusive conduct in a market characterized by jointly dominant participants from that which is

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10 See CBA Section, Future of Competition Policy Submission, at p. 19; see also section III(A) at pp. 18-23.

11 See CBA Section, Submission on Competitor Collaboration Guidelines (October 2020) online at p. 3; see also section II(A) at pp. 2-3.

currently in the *Abuse of Dominance Enforcement Guidelines*. However, this discussion is vague and overbroad. In particular, it does not explain the concept of a "business group" (which is referenced in paragraph 50 and then ignored) and suggests that individual firms may be jointly dominant while behaving independently.

The Draft Bulletin effectively signals that any conduct undertaken by a participant in a concentrated market could potentially be considered an abuse of dominance. Such conduct would not need to be coordinated with other jointly dominant firms, might not even be parallel in nature, and could involve as few as two of the firms in a market which has other significant competitors.

This approach is not supported by the case law or legislative history. The requirement in paragraph 79(1)(a) that two or more persons "control" a market must require something more than independent parallel conduct.

Paragraph 51 of the Draft Bulletin states "[s]imply being jointly dominant does not engage the abuse of dominance provisions. Similar to individually dominant firms, jointly dominant firms must also engage in a practice of anti-competitive acts that harms competition substantially. Since anti-competitive acts may strengthen joint dominance, conduct that has the purpose of harming competition may be particularly relevant because it can soften competition among the jointly dominant firms. For example, conduct that facilitates conscious parallelism may allow jointly dominant firms in a concentrated market to increase their prices."

RECOMMENDATION

9. The CBA Section recommends revising the Draft Bulletin to clarify that mere conscious parallelism, without something more – such as communication or coordination between firms – would not in itself constitute an anti-competitive act or a joint abuse of dominance. In addition, as noted in our comments on paragraph 26, the Bulletin should indicate that it is only the facilitating practice(s) that may be considered anti-competitive acts and give rise to a joint abuse of dominance.

Paragraph 53 of the Draft Bulletin states "[i]n many cases, joint conduct involves several jointly dominant firms adopting similar or identical practices that collectively harm competition. However, jointly dominant firms engaging in different, but complementary, practices may also contravene the abuse of dominance provisions. Additionally, we do not consider it necessary that all jointly dominant firms engage in anti-competitive conduct to contravene the abuse of dominance

provisions. For example, if two of three jointly dominant firms were engaging in conduct with an anti-competitive purpose that harmed, or was likely to harm, competition substantially, we may take action under the abuse of dominance provisions."

Paragraph 53 is vague, does not explain how different practices could constitute joint dominance, and could potentially capture any conduct by a participant in a concentrated market.

RECOMMENDATION

10. The CBA Section recommends that the Draft Bulletin delete or clarify the reference to "complementary" practices. If the Bureau continues to identify complementary practices as a potential form of joint dominance, the Draft Bulletin should give a detailed example of when and how different "complementary practices" would constitute a potential abuse of dominance.

Paragraph 53 of the Draft Bulletin further states that "we do not consider it necessary that all jointly dominant firms engage in anti-competitive conduct to contravene the abuse of dominance provisions". For example, paragraph 53, indicates that, in a concentrated market with three participants, two participants engaging in "complementary" anti-competitive conduct and one abstaining completely could constitute an exercise of joint abuse of dominance.

It is unclear how market participants refraining from engaging in an anti-competitive act could be considered as jointly abusing a dominant position.

The Bureau should also address the many practical difficulties that would be faced by a competitor in a concentrated industry who would have to assess whether proposed conduct might expose it to a section 79 joint dominance proceeding based on what its competitors might be doing independently, irrespective of its own conduct. Were the Bureau to bring a joint abuse of dominance case in these circumstances, what could the remedial order require or prohibit? How could it be issued and enforced?

RECOMMENDATION

11. The CBA Section recommends that the Bureau reconsider its enforcement policy where a firm that is allegedly part of a jointly dominant group is not engaging in anti-competitive acts.

IV. ADMINISTRATIVE MONETARY PENALTIES

The amendments significantly increased the maximum AMPs available under section 79. Paragraph 61 of the Draft Bulletin states "we may seek higher AMPs than were possible prior to the amendments."

The Bureau's ability to seek higher AMPs than were possible prior to the amendments increases the risk of overstepping its statutory purpose – the promotion of conduct that is in compliance with the abuse of dominance provisions[12] – and straying into punitive measures. This is especially the case for the possibility of seeking a penalty of up to 3% of a firm's worldwide revenues.

RECOMMENDATION

12. The CBA Section recommends that the Bureau clarify that AMPs will not be sought for conduct not affecting Canada and that the revenues considered in applying this provision will be limited to those related to conduct that constituted the abuse of dominance in Canada.

V. PRIVATE ACCESS

Paragraph 64 of the Draft Bulletin confirms that "[Bureau] investigate all credible allegations of abuse of dominance to the extent we deem appropriate. However, in some cases, a private party may choose to pursue private access if they believe they are better positioned than us to bring an application or if they disagree with a decision by us not to proceed with a matter."

The CBA Section encourages the Bureau to elaborate on its observation that private parties could be better positioned than the Bureau to bring an abuse of dominance complaint before the Tribunal and include a hypothetical example. Private parties would benefit from a clearer direction on when it would make sense for them to invest resources in pursuing an action, rather than bringing the issue to the Bureau's attention.

VI. HYPOTHETICAL EXAMPLES

Examples involving agreements between competitors and information sharing, contracts referencing rivals and serial acquisitions are useful elements of the guidance for market

12 *Competition Act*, s. 79(3.3).

participants. It would also be helpful to add hypotheticals addressing joint dominance issues (i.e., in addition to the joint venture concept in Hypothetical A).

A. Agreements between competitors and information sharing

In Hypothetical Example A, the Draft Bulletin states, at paragraph 71(c), "[f]or simplicity, please assume… SEMAPHORE and HELIOGRAPH are jointly dominant in that market [for the sale and service of COMMS]". Footnote 23 states that "[t]he existence of the Venture itself would be a factor we would consider when assessing whether SEMAPHORE and HELIOGRAPH are jointly dominant."

The example gives no basis for the assumption of joint dominance other than the existence of the installation/service joint venture, which the footnote says is only "a factor" in the joint dominance assessment. It also raises some of the issues identified in our earlier comments on joint dominance generally.

The example does not give any indications of coordination – or of conduct generally – other than entering into the joint venture. It is not evident, based on the facts provided, that the parties are doing anything to control the COMMS market. The Draft Bulletin states at paragraph 51 that "[s]imply being jointly dominant does not engage the abuse of dominance provisions."

As noted in the *Abuse of Dominance Enforcement Guidelines*, "it is still necessary to establish that these firms' conduct constitutes a practice of anti-competitive acts that is preventing or lessening competition substantially" to raise an issue under the abuse of dominance provisions.[13]

If the Bureau believes the installation/service joint venture is sufficient to control the COMMS market, it would be informative to state that point more explicitly and with supporting explanation.

In addition, the assessment of information sharing in paragraph 73 is confusing. Paragraph 68 suggests that the terms of the joint venture are limited to installation and servicing of equipment and do not address joint selling or pricing. Paragraph 70 references "significant transparency" regarding prices, but does not provide any helpful insight into what information pricing and other information was exchanged.

If the Bureau intends to adopt the position that, by providing each party with information on the other's cost of installation and servicing (the explicit purpose of the joint venture), the parties were in fact providing greater transparency on COMMS pricing more generally, it would be helpful for that point to be made more explicitly.

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13 Abuse of Dominance Enforcement Guidelines, at para 50.

In addition, if the Bureau intends to communicate that the parties misled (or attempted to mislead) the Bureau by stating that the parties "maintain that the terms of the Venture are limited to installing and servicing COMMS and do not address joint selling or pricing", and then stating that the parties shared pricing and other information (potentially outside the scope of the joint venture), that point should also be incorporated more explicitly into the facts and analysis.

The CBA Section welcomes the clear statements at paragraph 71(d) and footnote 24 that information sharing, absent an agreement of the type referenced in section 45, would not constitute a criminal offence.

B. Contracts that reference rivals

In Hypothetical Example B, the Draft Bulletin discusses multiple scenarios related to contracts by a dominant firm that reference rivals.

Paragraph 86 of the Draft Bulletin states "[e]vidence of subjective intent may include business documents related to COUNTRYLOVE's concern that a competitor that offers lower prices could become a more effective competitor."

It is not clear how concern that a competitor offers lower prices could be evidence of an anti-competitive purpose for a company – dominant or not. Competition on price is not only ordinary course activity for all companies, it is often pro-competitive, is an indicator of competitive rivalry, and is beneficial for consumers.[14]

RECOMMENDATION

13. The CBA Section recommends amending paragraph 86 of the Draft Bulletin to identify forms of subjective intent that could give rise to an anti-competitive act, or delete the sentence that currently focuses on a competitor's lower prices.

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14 See, for example, the Competition Bureau's position statement on the acquisition of Terrapure by GFL (May 24, 2022), online.

> This rivalry [between GFL and Terrapure], which included close competition on price, service quality, and service bundles, significantly benefitted customers. Evidence collected by the Bureau demonstrates that the Parties routinely evaluated one another's competitiveness when competing for major customers in the markets at issue, and reduced prices as a direct response to the other. With the closing of the Acquisition in August 2021, this rivalry and its benefits to the Canadian economy were lost.