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March 31, 2023

This submission is filed on behalf of the law firms[1] listed below in response to the Government of Canada's consultation and discussion paper on the Future of Competition Policy in Canada ("Discussion Paper"):

- Belleau Lapointe (Montreal)
- Camp Fiorante Matthews Mogerman (Vancouver)
- Foreman & Company (London)
- Siskinds LLP (London and Toronto)
- Sotos LLP (Toronto)

[1] This submission reflects the views of the undersigned law firms and is not meant to represent the views of our clients.

These firms are among the leading Canadian class action firms, specializing in competition law class actions. Together these firms have collected well over a billion dollars in settlements from foreign companies alleged to have engaged in price fixing that affected Canadian consumers and businesses. The affected products are used by virtually every Canadian business and consumer. Examples include a wide variety of products, ranging from DRAM (a type of semiconductor memory), lithium ion batteries, LCD panels, optical disc drives, automotive parts, commodity chemicals, manufacturing inputs, and chocolate bars. Distribution of these funds to Canadians is ongoing, and millions of Canadians have and will continue to benefit from these efforts. In many of these cases, there has been no related Competition Bureau action. Total fines collected by the Competition Bureau in related investigations are less than $200 million.

This track record of successful private actions on behalf of Canadians for breaches of s. 45 of the *Competition Act* indicates that Canadians are eager to and able to take advantage of private rights of action. This experience informs our recommendations throughout these submissions that private rights of action for damages should be expanded.

It is now a long-standing convention that private enforcement constitutes a critical means of ensuring the effectiveness of the *Competition Act*. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, the Supreme Court of Canada affirmed the constitutionality of s. 36, holding that its purpose is to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance," which "enhances the deterrent effect of the legislation and enables compensation to the plaintiff for [] injury." Similarly, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, the Supreme Court of Canada held that "while under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification, the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives."

Canada has lagged behind other developed countries in terms of addressing anticompetitive conduct - particularly in respect of abuse of dominance claims. We welcome modernizing Canada's competition regime to bring it more in line with other developed countries. We agree with the statement from Minister Champagne that changes need to be made to help ensure that the Competition Bureau (and, in our view, the *Competition Act* more generally) "better protects consumers and the integrity of the marketplace." We also agree with the need to "ensure that our competition law remains fit for purpose in a modern economy that continues to evolve quickly." This evolution includes the reality of an increasing globalized Canadian economy, in which actions taken by foreign companies in foreign jurisdictions can have important consequences for competition and consumers in Canada.

In addition to these principles, our submissions emphasize that any amendments to the *Competition Act* should recognize the importance of compensation for victims of anticompetitive conduct, and the centrality of private rights of action in enforcement and deterrence.

This submission is organized by the topic areas identified in the Discussion Paper. While we have largely focused on the topic areas identified in the Discussion Paper, we have also included additional reform suggestions.

MERGER REVIEW

We support the submissions of the Competition Bureau on this point, particularly Recommendation 1.8.

UNILATERAL CONDUCT

Create a Private Right of Action

We adopt the submission of Sotos LLP regarding the need for a private right of action to address unilateral conduct. As set out in that submission, the current private right of access is under-utilized and does not provide for compensation. Creating a private right of action with the prospect of damages would incentivize lawyers to take the case on contingency, so that individual harms can be vindicated and companies can be held financially responsible.

Test for Unilateral Conduct

The Current Framework

Under the current framework, to make an order under the abuse of dominance regime, the Commissioner must satisfy the following test on a balance of probabilities:

1. A person or group of persons substantially or completely control a class or series of business;
2. That person or those persons have engaged in or are engaging in anti-competitive acts (as defined in s. 78); and
3. The anti-competitive acts have caused or are likely to cause a substantial lessening or prevention of competition in a market.[2]

The Competition Bureau will consider four factors when assessing a firm's dominance in a given market:

1. A firm's product market;
2. A firm's geographic market;
3. Whether a firm controls a substantial degree of market power; and
4. Whether a finding of joint dominance with another firm is appropriate.[3]

Amendments to the Act by Bill C-19 clarified that an anti-competitive act can have an intent to inflict an adverse effect on either a competitor or on competition generally.[4] An anti-competitive act can therefore be found when a dominant firm's competitor or the competitive process is the object of its conduct.

Bill C-19 made positive progress in adapting the abuse of dominance regime; it expanded the definition of "anti-competitive acts," made unlawful conduct that harms competition generally, created private access to the Tribunal, and increased penalties on offenders that are commensurate with international best practices.[5] These changes all respond to the Competition

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[2] *Competition Act*, RSC, 1985, c C-34, s 79(1).
[3] Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (March 7, 2019).
[4] *Competition Act*, RSC, 1985, c C-34, s 78, 79(1)(b).
[5] Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2021-2011 (assented to June 23, 2022), cl 261(1), 262(1)-262(2).

Bureau's calls for a regime that covered all forms of anti-competitive conduct and more effectively addressed conduct aimed at emerging competitive threats.[6]

Despite the progress made by the recent amendments, we agree with the Ministry's position that the three-part test in subsection 79(1) of the Act remains "ripe for re-examination."[7] The Bill C-19 amendments failed to address the fundamental deficiency with the Act's abuse of dominance regime – the onerous three-part test which is unique among various comparator jurisdictions and the equally onerous case law that has developed around it.

We echo the Competition Bureau's observation that the existing three-part test is unusual in the context of modern antitrust laws. Jurisdictions that impose a lower standard for abuse of dominance include the United States,[8] the European Union,[9] Australia,[10] and the United Kingdom.[11] Canada's requirement to prove both anti-competitive intent *and* impact is unique and distinct from these jurisdictions, and it is a significant barrier to enforcing the Act and protecting Canadian competition.

Revising the Test for Abuse of Dominance

Evidence from the Competition Bureau and academic commentary supports a conclusion that Canada's abuse of dominance regime fails to facilitate necessary action by the Commissioner to tackle the seminal anti-competitive conduct of the modern economy.

Commentators, even those who are opposed to extensive changes to the Act as a result of this consultation,[12] have called for amending Canada's abuse of dominance test. Approaches have included eliminating the requirement for competitor harm in s. 78 altogether in favour of a test that focuses on harm to the competitive process,[13] while others have recommended a test under s. 79 which simply requires the Commissioner to prove that a dominant firm is engaging in a practice that prevents or substantially lessens competition.[14]

A third method, proposed by Dr. Bednar et al. calls for revisiting the policy considerations that underpinned the original conception of the test. Dr. Bednar argues that Canada currently uses a "consequentialist" approach, which requires the Commissioner to show that an anti-competitive act has generated specific anticompetitive effects in the market. The EU, a far more active regulator of abuse of dominance, employs a "deontological" approach, which requires proof of certain behaviours that threaten harm to the competitive process, rather than proof of actual competitive effects.[15]

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[6] Competition Bureau, "Examining the Canadian *Competition Act* in the Digital Era" (8 February 2022).
[7] Information, Science and Economic Development Canada, "*The Future of Competition Policy in Canada*" (2022), Part V.
[8] Section 2 of the *Sherman Act* prohibits a person from monopolizing, attempting to monopolize, or conspiring with any other person(s) to monopolize any trade or commerce. The Unites States is currently undergoing drastic reforms of its antitrust laws, in order to adapt them to the economic realities of modern economies – See Vass Bednar, Ana Qarri, Robin Shaban, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022), pg 17.
[9] Article 102 of the Treaty on the Functioning of the European Union prohibits abuse of a dominant position by "one or more undertakings… in so far as it may affect trade between Member States."
[10] See *Competition and Consumer Protection Act 2010* (Cth) s 46.
[11] See *Competition Act 1998*, 1998 c 41, s 18.
[12] Edward Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021), pp. 15, 33-38.
[13] CD Howe Institute Competition Policy Council, "Undo Haste: Rushed *Competition Act* Reforms Warrant Further Examination" (7 June 2022), pg 3.
[14] Edward Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (27 September 2021), pg 37-38.
[15] Vass Bednar, Ana Qarri, Robin Shaban, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022), p. 31.

Dr. Bednar finds that Canada's consequentialist approach is susceptible to a failure to capture anti-competitive acts within the scope of its regime, whereas the EU's deontological approach risks preventing behaviours that would be benign or, in some cases, procompetitive.[16] Their finding was ultimately that the decision must be left to policy makers regarding which approach is better for Canada, but proposed that a more deontologically oriented substantive test under s. 79 "may be better suited to proactively address competition concerns."[17]

The Competition Bureau has outlined two options for revising the abuse of dominance provisions:

1. 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; and

2. 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.

While we favour the first approach and believe it will more effectively achieve the goals of the Act, either approach would be an improvement over the existing framework.

COMPETITOR COLLABORATIONS

Algorithmic Collusion

Retail e-commerce increased substantially during the COVID-19 pandemic. From February 2020 to July 2022, retail e-commerce increased by 67.9%. Retail e-commerce sales have remained above pre-pandemic levels, indicating that the switch to e-commerce may reflect a long-term change in consumer spending habits.[18] E-commerce is not immune to price fixing and other anti-competitive conduct, including through algorithmic collusion.

For example, in 2015 the United States Department of Justice prosecuted e-commerce retailers who agreed to fix the prices of certain posters sold through Amazon Marketplace. To implement their agreements, the co-conspirators adopted specific pricing algorithms for the sale of certain posters with the goal of coordinating changes to their respective prices and wrote computer code that instructed algorithm-based software to set prices in conformity with this agreement.[19]

This example falls within the scope of s 45. However, the conspiracy was made easier through the use of technology because it was largely self-implementing and there was less risk of cheating. The human element of the "prisoner's dilemma" was removed. As explained in an article by The New Yorker:

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[16] Vass Bednar, Ana Qarri, Robin Shaban, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022).
[17] Vass Bednar, Ana Qarri, Robin Shaban, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022).
[18] Statistics Canada "Retail e-commerce and COVID-19: How online sales evolved as in-person shopping resumed" (February 2023).
[19]

> Economists typically assert that cartels dissolve naturally after members cheat or become irrational. When computers are the actors, though, detection is faster and not prone to human errors or failings, making defection less likely. Automated participants can identify price changes more quickly, allowing defectors who lower prices at the expense of the group to be sifted out earlier. Given this dynamic, participants have little incentive to either "cheat" the group or to leave it. Put another way, computers are likely to handle the classic prisoner's dilemma better than humans.[20]

The more interesting topic is how pricing algorithms behave in the absence of human intervention. In many cases, these algorithms monitor various indicia of demand, and then set prices to maximize their short-term revenues given that demand. They are purely reactive, and not designed to affect competitors' prices. Such algorithms can increase total welfare and be pro-competitive.

But some algorithms may behave in an anticompetitive manner and/or have an anticompetitive effect. For example, some pricing algorithms are designed to increase competitors' prices through a punishment mechanism. These algorithms punish price decreases, even though doing so reduces the company's short-term profit. Such punishments are finite in duration, with a gradual return to pre-deviation prices. In a recent study by Calvano et al, the authors constructed AI pricing agents and let them interact with each other in computer-simulated markets. They found as follows:

> The results indicate that, indeed, relatively simple pricing algorithms systematically learn to play collusive strategies. The algorithms typically coordinate on prices that are somewhat below the monopoly level but substantially above the static Bertrand equilibrium. The strategies that generate these outcomes crucially involve punishments of defections. Such punishments are finite in duration, with a gradual return to the predeviation prices. The algorithms learn these strategies purely by trial and error. They are not designed or instructed to collude, they do not communicate with one another, and they have no prior knowledge of the environment in which they operate.[21]

Professors Ariel Ezrachi of Oxford University Centre for Competition Law and Policy and Maurice E. Stucke of the University of Tennessee College of Law explain that the speed of retaliation is unique to the algorithmic environment:

> Computers can rapidly detect deviations, and calculate the profit implications of a myriad of moves and counter-moves to punish deviations. The speed of calculated responses effectively deprives discounting rivals of any significant sales. The speed also means that the tacit collusion can be signalled in seconds. The greater the improbability that the first-mover will benefit from its discounting, the greater the likelihood of tacit collusion. Thus, if each algorithm can swiftly match a rival's discount and eliminate its incentive to discount in the first place, the threat of future retaliation keeps the coordination sustainable.[22]

For example, suppose A and B set their price at $10, to make a supra-competitive $5 profit. If A reduces its price below $10 – even to $9.99 – B immediately reduces its price further, potentially

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[20] Jill Priluck, "When Bots Collude", The New Yorker (25 April 2015).
[21] *Emilio Calvano et al, "Artificial Intelligence, Algorithmic Pricing, and Collusion" (2020) 11:10 American Economic Review 3267 at 3268.*
[22] Ariel Ezrachi & Maurice E Stucke, "Sustainable and Unchallenged Algorithmic Tacit Collusion" (2020) 17:2 Northwestern J Tech & IP 217 at 227 [citations omitted]

taking a loss on each sale until A goes back to charging $10. B uses the same algorithm. Thus, A and B each continue charging $10 in the longer term.

This algorithm just engaged in tacit collusion, and threatens predatory pricing, but it may not be illegal under current Canadian law. Since A and B never expressly communicated, it is unclear whether the conduct would be covered by the conspiracy provisions. Likewise, since the predatory pricing is only in effect for a short period of time, it is also unclear whether it would be covered by sections 78-79. Nevertheless, the effect of the algorithm is to force prices to remain at artificially-high levels through programming used to create the algorithm.

Algorithms can also predict how other algorithms will behave and effectively cooperate with each other to advance their own profit-maximizing interest. As Professors Ezrachi and Stucke explain:

> Computers may limit competition not only through agreement or concerted practice, but also through more subtle means. For example, this may be the case when similar computer algorithms reduce or remove the degree of strategic uncertainty in the marketplace and promote a stable market environment in which they predict each other's reaction and dominant strategy. Such a digitalized environment may be more predictable and controllable. Furthermore, it does not suffer from behavioral biases and is less susceptive to possible deterrent effects generated through antitrust enforcement.[23]

Some software vendors promote their pricing algorithms as means of avoiding price wars and increasing prices and margins. For example, Boomerang promotes how its price optimization software can "put an end to price wars before they even begin."[24]

In the United States, § 5 of the *Federal Trade Commission Act* does not require an agreement, but only an "unfair practice".[25] There is no equivalent provision in the Act. In our view, a provision should be enacted prohibiting the use of pricing algorithms that have anticompetitive effects and providing a remedy to persons affected by such conduct. We appreciate that this provision would need to be carefully constructed to avoid capturing potentially pro-competitive conduct.

There is a wealth of support for implementing such a provision. Academics have raised concerns about such algorithms[26] and have suggested that certain algorithms "should be interpreted as strong evidence of anticompetitive intent".[27] The EU has suggested that certain algorithms would be illegal under EU law.[28] Finally, the DOJ has indicated its commitment to prosecute cartel behaviour, including cartels implemented through algorithms: "We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms. American consumers have the right to a free and fair marketplace online, as well as

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[23] Ariel Ezrachi & Maurice E Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition" (8 April 2015), University of Illinois Law Review, Vol. 2017, 2017 p 1782.

[24] Ariel Ezrachi & Maurice E Stucke, "Sustainable and Unchallenged Algorithmic Tacit Collusion" (2020) 17:2 Northwestern J Tech & IP 217 at 230 [citations omitted].

[25] *Ibid* at p 1794. See also: Aneesa Masumdar, "Algorithmic Collusion: Reviving Section 5 of the FTC Act" (Mar 2022), Columbia Law Review, Vol. 122, No. 2.

[26] See generally: Salil K Mehra, "Price Discrimination-Driven Algorithmic Collusion: Platforms for Durable Cartels" (2021) 26 Stanford J L Bus & Fin 171; Ariel Ezrachi & Maurice E Stucke, "Sustainable and Unchallenged Algorithmic Tacit Collusion" (2020) 17:2 Northwestern J Tech & IP 217; Emilio Calvano et al, "Artificial Intelligence, Algorithmic Pricing, and Collusion" (2020) 11:10 American Economic Review 3267.

[27] Florian E Dorner, "Algorithmic collusion: A critical review" (2021) at 27-28.

[28] Organisation for Economic Co-operation and Development, "Algorithms and Collusion – Note from the European Union" (14 June 2017) at paras 15, 23-34.

in brick and mortar businesses."[29] The DOJ has enhanced its capability of detecting such conduct – hiring technologists and data scientists. [30] The Bureau should be given similar resources.

Create a Private Right of Action for Violations of s. 90.1

The Bureau identifies several proposed revisions to s. 90.1. We agree with those revisions. The Bureau also recommends creating a right of private access to the Tribunal. For the reasons discussed in the Sotos submission, a right of private access to the Tribunal is ineffective. There should be a private right of action, with the potential for damages.

Reintroduce Buy-Side Conspiracies

As part of the 2009 amendments to the Act, the word "purchase" was removed from s. 45. As a result, buy-side conspiracies are no longer included in the criminal conspiracy provisions. This gap in the legislation has been partially addressed by the recent addition of wage and poaching agreements into s. 45. However, other forms of buy-side agreements are still excluded from s. 45.

Currently, buy-side agreements are reviewable under section 90.1 of the Act. In its current form, section 90.1 is of limited assistance:

- Section 90.1 only applies to "existing or proposed" agreements, meaning that there is no recourse for acts that were committed in the past.
- Private access to the Competition Tribunal is not available for breach of this provision.
- There is no private right of action for damages under s. 36 of the Act.
- There are no monetary penalties for breach of section 90.1—the Tribunal may only order that the conduct cease.

We adopt the Bureau's position that buy-side cartels should be treated the same way as supply-side cartels under the Act, and that workers are not unique in requiring protection from buy-side conspiracies. As the Bureau notes, there are "myriad other industries and groups whose livelihood depends on there being competitive downstream markets in which to offer their goods and services – from farmers, fishers, and loggers, to authors, musicians, and artists, and a multitude of small and medium-size producers." We agree.[31] The current remedy under s. 90.1 is insufficient to deter anticompetitive buy-side behaviour, and also provides no compensation to victims. These issues could be remedied by treating buy-side conspiracies akin to other horizontal conspiracies in s. 45.

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[29] Department of Justice, Press Release: "Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution" (6 April 2015)

[30] Department of Justice, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy" (2 March 2023).

[31] By way of example, litigation is currently underway in the United States on behalf of cattle farmers who allege that the largest beef packers in the United States engaged in a conspiracy to depress the price of fed cattle in order to inflate their own margins. *In Re Cattle Antitrust Litigation* (formerly *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America et al v. Tyson Foods, Inc. et al*). While the potential impact of such a conspiracy on the market and cattle farmers is clear, a similar action in Canada is not currently possible under the Act.

DECEPTIVE MARKETING

We agree with the Bureau that prescribing a consumer standard for deceptive marketing conduct would be beneficial. As the Bureau identifies, the case law is not consistent in this regard. We agree that an appropriate standard is the "credulous and inexperienced consumer".

Further, the scope of deceptive marketing conduct should be expanded. Ontario courts have held that a "failure to disclose a material fact which can amount to a false or misleading representation under provincial consumer protection law […] is not a breach of s. 52(1) of the *Competition Act*."[32] We do not agree with this finding.

ADMINISTRATION AND ENFORCEMENT

Enhanced Whistleblower Protection

We recognize that there are currently provisions codified in the Act that broadly address whistleblowers. Section 66.1 of the Act provides that any person with "reasonable grounds" to believe that a person has committed (or intends to commit) an offence under the Act may notify the Commissioner and request their identity be kept confidential. Section 66.2 purports to protect whistleblowers by prohibiting employers from retaliation. Although these whistleblower provisions are codified, they generally do not receive much attention due to the focus of the Bureau on the Immunity and Leniency programs that they have developed, which are not codified in law.

Significantly, the whistleblower provisions and the Immunity and Leniency programs do not cover the same demographic. Under the Immunity and Leniency programs, eligible applicants are those who are implicated in the illegal activity being reported. In contrast, sections 66.1 and 66.2 apply to *any person* who has reasonable grounds to believe that an offence has been or will be committed, which includes employees and other third parties to the illegal conduct observed.

There is significant potential for the Bureau to benefit from a valuable source of information by addressing the underutilization of the statutory tools already codified in the Act by introducing mechanisms of enforcement, transparency, and possibly incentivization into the Act.

First, although section 66.2 attempts to provide protections for employees against reprisals, there is a lack of both a formal complaint mechanism and a private right of action for employees. A more robust enforcement mechanism would provide more certainty for potential whistleblowers.

For example, in the United States, the legislation provides that an individual may seek relief by filing a complaint with the Secretary of Labor, and if no decision has been made within 180 days, the complainant may bring an action against their employer for "all relief necessary to make the covered individual whole" including damages.[33] Similarly in Canada, the Ontario Securities Commission (OSC) provides employees facing reprisals with civil access to the courts in response to any improper reprisal.[34]

Second, whistleblower statistics are not reported in the Bureau's annual reports and the Bureau's approach to evaluating complaints or reports from individuals is generally unclear. Although the issue of confidentiality is important on an individual basis, the public would benefit from more transparency from the Bureau with respect to information such as the number of whistleblower

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[32] *Rebuck v. Ford Motor Company*, 2022 ONSC 2396.
[33] *Criminal Antitrust Anti-Retaliation Act*, 15 U.S.C. § 7a-3 (2021).
[34] *Whistleblower Program*, OSC Policy 15-601, s. 13.

complaints and whether those complaints led to any significant information about potential competition law violations or investigations.

Another means of increased transparency would be to have a formal notification from the Bureau when investigations commence, similar to Statements of Objections which are issued by the European Commission when beginning investigations into suspected violations of EU antitrust rules.

The Bureau may benefit from a dedicated whistleblower program or office similar to the OSC Office of the Whistleblower, which administers and manages the program.[35] Using this office, the OSC has been able to measure its whistleblower program's effectiveness.[36]

Further, a dedicated office would allow the Bureau to provide more transparency in other aspects. For example, the European Union's Whistleblower Directive specifically requires that competent authorities develop a feedback process to provide complainants with explanations as to the outcome of the specific information they provide.[37] A similar feedback mechanism can help the Bureau communicate to the public what kind of information it needs and what thresholds need to be met.

Lastly, the Bureau has confirmed that the Immunity and Leniency Programs are the best resource for them to uncover information about the illicit conduct of companies. It can be easily understood how these programs' ability to provide leniency and immunity are incentives in and of themselves. In contrast, no such incentive is available to individuals who are not eligible to participate.

The consideration of financial incentives for whistleblowers is still a very controversial question. However, such financial incentives have become available for whistleblowers in various regulatory contexts in recent years.[38] Most significantly, such incentives are available under the OSC's Whistleblower Program.[39] In its five-year update on the progress of the program, the OSC noted that it had received approximately 650 tips from whistleblowers and awarded more than $8.6 million to whistleblowers. It also claims that tips provided are "specific, credible and timely, on complex, novel and hard-to-detect matters."[40]

The proliferation of these financial incentive programs has made it more difficult to attract whistleblowers where there are no financial incentives. Given the Bureau's ongoing focus on criminal enforcement and the value of insider information, carefully developed financial incentives for whistleblowers would provide the Bureau with an important enforcement tool moving forward.

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[35] Ontario Securities Commission, News Release, "OSC launches Office of the Whistleblower" (14 July 2016), online: www.osc.ca/en/news-events/news/osc-launches-office-whistleblower.

[36] Ontario Securities Commission, News Release, "OSC Whistleblower Program marks five-year milestone, praises contributions of whistleblowers" (14 July 2021), online: https://www.osc.ca/en/news-events/news/osc-whistleblower-program-marks-five-year-milestone-praises-contributions-whistleblowers.

[37] *Directive (EU) 2019/1937*, ss. 64-67.

[38] Financial incentives are available in various regulatory areas in the United States including procurement fraud, tax evasion, securities fraud, ocean pollution, and money laundering. See Theo Nyreröd & Giancarlo Spagnolo, "A fresh look at whistleblower rewards" (Stockholm School of Economics, 2021) SITE Working Paper, No. 56.

[39] To combat the counterarguments against financial incentives such as the potential for fraudulent claims and the undermining of internal compliance programs, the OSC developed robust eligibility requirements for awards. See *Whistleblower Program*, OSC Policy 15-601, ss. 14-15, 20, 25(3).

[40] Ontario Securities Commission, News Release, "OSC Whistleblower Program marks five-year milestone, praises contributions of whistleblowers" (14 July 2021).

Sections 66.1 and 66.2 of the Act have been codified for decades and a renewed focus on enforcement, transparency and possibly incentivization in relation to these whistleblower provisions is long overdue.

Enhanced Private Enforcement of *Competition Act* Provisions

We agree with the Bureau and 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."

Private rights of action facilitate compensation to victims and serve as a deterrent to would-be wrongdoers. The remedies in the Act should be optimized to fully realize these objectives. We propose several solutions.

First, as noted above, there ought to be a civil right of action under s. 36 for all forms of horizonal conspiracy (including buy-side agreements and agreements to lessen competition) and for abuse of dominance.

Second, to the extent there is no right of action under s. 36 for abuse of dominance, the private right of access to the Tribunal should be reconsidered. We agree with the Bureau that the leave requirements for private access to the Tribunal should be lessened and a damages regime should be considered. The current regime disincentivizes private actions and undermines any potential deterrent effect.

Third, the scope of recovery available to private litigants under the Act should be reconsidered. One approach would be to increase the quantum of damages available to victims of hard-core conspiracies. In the United States, treble damages are available to plaintiffs. It is often explained that a multiplier on damages is appropriate because not all violations are detected and proven: "From the perspective of optimal deterrence, if damages and fines only total actual damages, firms would be undeterred from committing violations."[41] A similar multiplier approach could be implemented in Canada.

In the alternative, s. 36 could be amended to provide for punitive damages, such that the most outrageous conduct pursued under s. 36 could be adequately addressed and deterred. Notably, in Quebec, punitive damages are not available unless provided for in a statute. Similarly, punitive damages are not available where a conspiracy claim is pursued in Federal Court.

CONCLUSION

In summary, the *Competition Act* needs to be updated to reflect the modern economy and better ensure that victims of anticompetitive conduct have effective recourse.

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[41] Robert H. Lande, "Why Antitrust Damage Levels Should be Raised" (2004) 16 Loy. Consumer L. Rev. 329 at 335. See also: "Multiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully. Indeed, some multiplication is necessary even when most of the liability-creating acts are open and notorious. The defendants may be able to conceal facts that are essential to liability." Frank Easterbrook, "Detrebling Antitrust Damages" (1985) 28 J.L. ECON. 445, 455.

We welcome the opportunity to discuss this submission or address any questions.

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