File No.

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the "***Competition Act***");

AND IN THE MATTER OF an application by the Consumers Council of Canada ("**CCC**") for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under sections 77 and 79 of the *Competition Act*;

AND IN THE MATTER OF an application by the CCC for an order pursuant to sections 77 and 79 of the *Competition Act*;

B E T W E E N:

CONSUMERS COUNCIL OF CANADA

Applicant

and

LIVE NATION ENTERTAINMENT, INC. and TICKETMASTER LLC

Respondents

AFFIDAVIT OF DON MERCER
(sworn on December 15, 2025)

I, Don Mercer, of the Town of Ladysmith, in the Province of British Columbia, MAKE OATH AND SAY:

1. I am the President of the Consumers Council of Canada ("**CCC**"), and as such, have personal knowledge of the matters set out herein except where stated to be based on information and belief, in which case I believe such information to be true.

2. I have been a long-time member of the Board of Directors of the CCC, including as President of the CCC and also as a volunteer Vice President of Outreach from 2015 to 2017.

3. Prior to my work at the CCC, I retired in April 2007 after a long career with the Competition Bureau of Canada. I thus have extensive experience with the competition statutes that are intended by Parliament to foster healthy competition and trust in the Canadian marketplace, including by prohibiting anti-competitive conduct such as price-fixing and abuse of dominance, and by addressing misleading advertising, misrepresentations, fraud, and deception.

4. Through this work, I gained extensive experience with the administration and enforcement of federal competition and consumer-protection laws and with issues affecting consumers, competition, and marketplace integrity in Canada.

5. CCC seeks leave to make an application on the basis of public interest pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34.

A. The CCC

6. CCC was founded in 1994. It is a non-profit, voluntary organization, working towards an improved marketplace for consumers in Canada. CCC is governed by a board of directors and funded from a variety of sources, including federal funding programs, social enterprise projects and membership fees.

7. It seeks an efficient, equitable, effective and safe marketplace in which consumers are able to exercise their rights and responsibilities. CCC is a member of the Canadian Consumer Initiative, a group of leading organizations serving consumers in Canada.

8. CCC has been active for many years as a research organization. It has produced and published publicly- and privately-funded consumer perspective research. CCC also delivers information to consumers and engages in consumer education through traditional publishing, as well as over the Internet and social media.

9. CCC works on common initiatives with other consumer groups in Canada and abroad. In particular, CCC advocates for the following rights:

(a) The right to safety;

(b) The right to choose;

(c) The right to be heard;

(d) The right to be informed;

(e) The right to consumer education;

(f) The right to consumer redress;

(g) The right to a healthy environment;

(h) The right to basic needs; and

(i) The right to privacy.

10. In recent years, CCC has been active in consumer representation initiatives in a diverse range of industries, including advertising, broadcasting and telecommunications, ecommerce, financial services, food and consumer products, and housing.

11. CCC maintains a website aimed at policy-maker and consumer education at: https://consumerscouncil.com/.

B. CCC's Interest in the Live Music Industry and the Impugned Conduct

12. This application concerns alleged conduct in the live music industry that may have significant implications for consumers in Canada. The live music and ticketing marketplace affects a large and diverse group of Canadian consumers, including individuals and families who purchase event tickets for personal, family, or household purposes. The issues raised by this application therefore fall squarely within CCC's mandate to promote fairness, transparency, and consumer choice in Canadian markets.

13. CCC's mandate extends to representing the interests of all Canadian consumers, including those who engage with complex and evolving digital marketplaces. The live event ticketing industry is one such marketplace, where consumers often face information asymmetries, limited choice, and limited ability to assess pricing and availability.

14. CCC's mandate also includes identifying and addressing systemic marketplace practices that harm consumers, including those that limit choice, increase prices, or otherwise undermine fair competition. The live music industry is a significant area of concern for CCC because consumers, otherwise referred to in this proceeding as "fans", bear the ultimate economic and social consequences of anti-competitive conduct by dominant market participants.

15. CCC's research and advocacy over the past three decades have included examination of markets in which consumer outcomes are influenced by concentration, vertical integration, or limited competition. CCC has contributed to public policy consultations and legal proceedings involving sectors with similar characteristics, including telecommunications, financial services, and electronic commerce.

16. In fact, in February 2023, CCC responded to the Minister of Innovation, Science and Industry in Canada's invitation for submissions from the public as part of a review of Canada's *Competition Act*. In its submission, CCC pointed out that competition law had eroded consumer welfare during a period of lacklustre growth in household incomes. It advised the Ministry that failure to protect consumers in the marketplace contributed to economic inequality. Attached as Exhibit "**A**" is a copy of these submissions.

17. While CCC does not purport to have direct knowledge of the conduct at issue, we believe that the questions raised by this application have implications extending well beyond the parties, and that the outcome may materially affect consumers across Canada who participate in the live entertainment marketplace.

18. CCC's participation in this proceeding is therefore consistent with its objective of promoting an efficient, equitable, and transparent marketplace for Canadian consumers, and ensuring that the public interest in competitive markets is adequately represented in matters of national importance.

C. CCC Judicial Interventions in Competition Cases

19. CCC has been granted leave to intervene in proceedings involving various consumer issues before different levels of court, including but not limited to:

(a) *Pioneer Corporation v. Godfrey*, 2019 SCC 42, which involved the interpretation and application of the *Competition Act*, including the availability of civil damages under section 36, the scope of discoverability and fraudulent concealment, and the recognition of umbrella purchaser claims;

(b) *Telus Communications Inc. v. Wellman*, 2019 SCC 19, which concerned the interpretation of the *Arbitration Act, 1991* and the *Class Proceedings Act, 1992*, and the ability of consumers to access collective redress mechanisms; and

(c) *Uber Technologies Inc. v. Heller*, 2020 SCC 16, which addressed the enforceability of mandatory arbitration clauses in consumer and employment contracts, and the doctrine of unconscionability in the context of access to justice.

20. In each of these interventions, CCC sought to assist the court by providing a broad public interest perspective on how the issues before the court affect Canadian consumers.

D. Government Consultations and Consumer Advocacy

21. In addition to the submissions alluded to above, CCC is actively involved in government consultations and other policy-level engagements on behalf of Canadian consumers. CCC regularly participates in consultation with a variety of governmental and regulatory bodies, including the Competition Bureau in respect of the new green-washing provisions, the Office of Consumer Affairs (OCA), Innovation, Science and Economic Development Canada (ISED), the Department of Finance in respect of strengthening the financial sector, the Canadian Radio-television and Telecommunications Commission in respect of both telecom and broadcasting proceedings, and before the House of Commons Standing Committee on Industry and Technology.

22. CCC's work in these areas is carried out largely by unpaid volunteers who contribute their professional expertise to represent and advance the interests of Canadian consumers. CCC is also Canada's only civil-society member of Consumers International, the membership organisation for consumer groups around the world, including over 200 organisations in more than 100 countries.

23. These activities are further described in CCC's Annual Report of Activities, 2024-25, which is attached as Exhibit "**B**".

E. CCC's Capacity to Bring this Application

24. CCC possesses both the organizational capacity and the institutional commitment required to bring and pursue this application in the public interest. Over its thirty-year history, CCC has consistently demonstrated independence, diligence, and perseverance in advancing consumer interests before courts, regulators, and policy-making bodies.

25. CCC's Board of Directors has authorized the commencement of this application and is prepared to support it through to its conclusion. The Board recognizes the significance of this matter for Canadian consumers and understands that Tribunal proceedings under section 103.1 of the Competition Act may involve extended timelines and complex evidentiary and procedural requirements. CCC is committed to meeting those demands.

26. CCC's experience participating in long-term public consultations, judicial interventions, and policy reform initiatives reflects its willingness and ability to remain engaged in sustained advocacy. Its track record demonstrates fortitude in advancing positions grounded in the consumer interest.

27. CCC is not aligned with any commercial or industry actor and approaches this application solely from the perspective of the broader public interest. Its governance structure and funding model are designed to safeguard that independence and ensure that its decisions are made on principled, policy-driven grounds.

28. CCC has retained experienced counsel and understands the procedural and evidentiary obligations that may accompany an application of this nature. It is fully prepared to comply with

all procedural directions of the Tribunal and to devote the necessary time and effort to ensure that the consumer perspective is properly and responsibly presented.

29. Accordingly, CCC has the institutional capacity, commitment, and fortitude necessary to bring and sustain this application under section 103.1 of the *Competition Act* in the public interest, and its participation will assist the Tribunal in the discharge of its statutory mandate.

SWORN by Don Mercer of the Town of Ladysmith, in Province of British Columbia, before me at the City of Toronto, in the Province of Ontario, on December 15, 2025 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

Signed by:
1EC4544521C1463...

Commissioner for Taking Affidavits
(or as may be)

Patricia Kim Son, a Commissioner, etc.,
Province of Ontario, for
Sotos LLP, Barristers and Solicitors.
Expires September 3, 2027.

Signed by:
93E5E6EA6030413...

DON MERCER

This is Exhibit "A" referred to in the Affidavit of Don Mercer of the Town of Ladysmith, in the Province of British Columbia, sworn before me on December 15, 2025, at the City of Toronto, in the Province of Ontario in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Signed by:
1EC4544521C1463...

Commissioner for Taking Affidavits (or as may be)

Patricia Kim Son, a Commissioner, etc.,
Province of Ontario, for
Sotos LLP, Barristers and Solicitors.
Expires September 3, 2027.

The Future of Competition Policy in Canada

A Consumer Interest Perspective for the Minister of Innovation, Science and Industry

CONSULTATION SUBMISSION

February 2023

Contents

The Future of Competition Policy in Canada

Abstract
The Minister of Innovation, Science and Industry in Canada invited submissions from the public as part of a review of Canada's *Competition Act*, with a February 27, 2023 deadline. This document contains Consumers Council of Canada's submission, which points out that current competition law has eroded consumer welfare during a period of lacklustre growth in household incomes. It advises that failure to protect consumers in the marketplace is contributing to economic inequality. The submission recommends a series of remedies to better protect the interests of consumers within the Canadian economy.
Keywords: competition, mergers, consumer protection

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Executive Summary

Canadian consumers cannot afford policy that fails to bring them internationally competitive prices, quality of goods and services, or choice.

In their competition legislation and policies, most advanced industrial economies such as the United States, United Kingdom, European Union, Japan and Australia place a significant emphasis on the concept that consumers should benefit from competition policy and legislation with outcomes that promote lower prices, a wider selection of goods, services and vendors, and higher-quality and more innovative goods and services. Canadian consumers, in contrast, have not been the beneficiaries of such a focus, but rather have suffered from a regime that has given priority to efficiency considerations that have benefitted primarily specific companies and their shareholders.

The reduction in consumer welfare that such an approach has supported, now more than ever, points to the need for a reformed approach to the *Competition Act* that promotes value for money and responsive choice in the marketplace for consumers and other purchasers. This is particularly important given that Canadian consumers have experienced lacklustre growth in their incomes over the last several decades, which have not kept pace either with inflation or productivity growth,[1] except for the wealthiest households, increasing the level of income inequality in the country. Consumers' household debt has also grown exponentially in the past three decades, and many consumer households are essentially living paycheque to paycheque. All these trends are being exacerbated by the recent significant growth in inflationary pressures in the economy.

Consumers can no longer afford to pay for a competition policy that favours and is 'efficient' for shareholders and companies, but not competitive internationally in terms of its impact on the price and quality of goods and services and the range of choices available to Canadian consumers.

Recommendations in this submission focus on the following three key themes.

1. **Making the benefits to consumers and consumer well-being a central principle of the reformed *Competition Act*.**

- Making Canadian consumer welfare and well-being a central principle of a reformed *Act* would put Canada back in the mainstream on how competition policy is interpreted by our OECD trading partners, rather than an outlier focused on efficiency gains to the exclusion of other competition considerations and benefits.
- Introduce the concept of measurable benefits to consumers as a principal outcome from the implementation and enforcement of the competition statute.
- The Council is fully supportive, with certain conditions, of most of the recommendations for amendments in the department's consultation paper. However it wishes to state unequivocally that it concludes that efficiencies should no longer be given primacy in merger review. The efficiencies defence should be fully removed from the *Competition Act*, and efficiencies and potential innovation effects should be considered with and in the context of other competitive effects and considerations. A properly reformed Act would apply to and be effective in all areas of the economy, including within what some refer to as the 'digital economy'.
- In light of the emergence of digital platforms and digitally networked service providers, it is imperative to more fully and effectively address the harm caused to consumers from their market dominance, their control of markets for free goods and services, and their ability through algorithmic tools and access to personalized data to manipulate and control consumer

preferences, choice and decision making.

2. **Strengthening the role of the *Competition Act* in protecting consumers from fraud, deceptive practices, and misleading advertising, especially in the digital marketplace.**

   - Addressing all forms of deceptive practices in the digital era and the need for new approaches, priorities, and enforcement capabilities, as described in more detail in the rest of this submission.
   - Dealing with protecting consumers from trade in personal data and the use of malware and other tools to defraud and manipulate consumers.

3. **Re-establishing and strengthening the Competition Bureau's and the *Competition Act's* role in enforcing a competitive marketplace for consumers.**

   - Revive the *Competition Act's* consumer protection provisions as described in section 4 in this submission on how in recent years the Bureau has given very low priority to consumer protection legislation, despite research findings on the high monetary and other costs resulting from the non-enforcement of (and violations of) these consumer protection statutes and the consumer protection provisions in the *Competition Act*.
   - As emphasized above and throughout this submission, expand the consumer focus of the *Competition Act* and the Act's administration and enforcement of those provisions.
   - Develop a greater understanding on – and consider implementing – the recent emergence and success of combined competition and consumer agencies elsewhere in the global economy, and the opportunities they provide for an enhanced institutional representation of the consumer interest in Canada (see section 4).
   - Consider whether additional fundamental changes are needed in the institutional infrastructure on competition, consumer protection, privacy and related laws and regulations at the federal level, including the whole of government approach to competition and consumer policy such as the Canadian Consumer Advocate discussed in section 4 of this submission, and a greater recognition of the dual responsibility the Competition Bureau has for both competition and consumer policy.

Introduction and Background

This submission responds to specific questions raised by the Minister of Innovation, Science and Industry and makes recommendations to revise the *Competition Act* and better serve the interests of consumers.

Consumers Council of Canada is pleased to present the following submission in response to the request by the Minister of Innovation, Science and Industry for comments from stakeholders and the general public on the proposal to revise the current *Competition Act,* which came into force in 1986.

Consumers Council of Canada is a national, non-profit, voluntary organization, founded in 1994, that works towards an improved marketplace for consumers in Canada. It seeks an efficient, equitable, effective and safe marketplace in which consumers are able to fully exercise their rights and responsibilities.

In making this submission, the Council understands that the text may be posted on the website of the Department of Innovation, Science and Economic Development and, therefore, that its contents may be made publicly available.

Our submission is organized to respond to the specific questions/issues raised in the department's request for comments and also contains, at its end, some recommendations about the overall approach the government should take to revising a new *Competition Act* and to implementing its competition policies.

Consumers and the Competition Act: The Current Context

A revised *Competition Act* could have an important role in improving the circumstances of consumers in the Canadian marketplace.

Before providing its specific comments, the Council would like to provide some brief introductory comments, which it hopes will help explain, in part, the reasons behind its specific comments on the 21 issues the department has raised in its consultation paper on reforming the *Competition Act* and will provide its overall recommendations with respect to revising the legislation. These introductory comments deal with:

- the current state of the implementation of the *Competition Act*'s provisions and its impact on consumers;
- the challenges facing consumers in the current macro-economic context; and
- the interplay between technological change and industrial structure in Canada, which are having significant implications for the economic well-being and circumstances of consumers.

A revised Act could have an important role in improving the circumstances of consumers in the Canadian marketplace, and, for this reason, the Council makes this submission.

In the Council's view, since the last major legislative restructuring of the *Competition Act* in 1986, the consumer interest has been largely ignored in the manner in which the Act has been interpreted, implemented and enforced. This is not an accident, but rather the result of a changed direction to the Act in 1986, when the principal concern in the restructuring of the legislation was to ensure that Canadian firms were as efficient as possible, and had sufficient economies of scale to be able to address competition in Canada from global firms and to better support firms who were expanding abroad and required the efficiencies and economies of scale needed to succeed in global markets.

Subsequent interpretations of the new Act by the Competition Tribunal and the courts, have cemented this new approach to competition policy outlined in the Act and has resulted in decisions which have allowed efficiency considerations to dominate decision-making both about competition policy, and when considering issues such as restructurings and mergers. These decisions have permitted corporate actions that potentially reduce competition and present consumers with less choice, variety and access, and higher prices. **This key issue is recognized in the government's own discussion paper on the revision of the *Competition Act*, released this past autumn.**

It is important to underline that the high priority attached to efficiency considerations in the Act, and in competition policy more generally in Canada, has not been copied by most advanced industrial countries such as the United States, the United Kingdom, the European Union, Japan and Australia. In fact, Canada is an outlier in this regard. Most countries are basing their legislation on principles designed to promote: price competition, competitive entry into markets, and reduced concentration in sectors.

In their competition legislation and policies, Canada's international competitors place a significant emphasis on the concept that consumers should benefit from competition policy and legislation with

outcomes that promote lower prices, a wider selection of goods, services and vendors, and higher-quality and more innovative goods and services. Canadian consumers, in contrast, have not been the beneficiaries of such a focus, but rather have suffered from a regime that has given priority to efficiency considerations that have benefitted primarily specific companies and their shareholders.

The reduction in consumer welfare that such an approach has supported, now more than ever, points to the need for a reformed approach to the *Competition Act* that promotes value for money and responsive choice in the marketplace for consumers and other purchasers. This is particularly important given that Canadian consumers have experienced lacklustre growth in their incomes over the last several decades, which have not kept pace either with inflation or productivity growth,[1] except for the wealthiest households, increasing the level of income inequality in the country.[2] Consumers' household debt has also grown exponentially in the past three decades, and many consumer households are essentially living paycheque to paycheque.[3] All of these trends are being exacerbated by the recent significant growth in inflationary pressures in the economy.[4]

Consumers can no longer afford to pay for a competition policy that favours – and is 'efficient' for – shareholders and companies, but not competitive internationally in terms of its impact on the price and quality of goods and services and the range of choices available in the Canadian consumer marketplace to the modern Canadian consumer.

These longer-term problems with the nature of our legislative regime for managing competition policy have been put into stark relief due to the new challenges facing consumers, presented by the emergence of digital technologies in the creation and marketing of consumer goods and services. New technologies are now providing greater opportunities for industries and markets to become even more concentrated and companies to become vertically integrated through network economies of scale and scope and related network effects, especially in many digitally delivered goods and services (telecoms and financial services are just two prominent examples). New levels of concentration give these huge global companies (e.g. Amazon, Google, Apple, Microsoft, Facebook) significant abilities to control prices and the access offered to consumers to goods and services – and on what terms – and make it very difficult for new and potentially more efficient and innovative entrants to establish themselves in the marketplace.

This enhanced ability of digitally networked firms, especially digital platforms, to limit competition is being combined with their vastly expanded capability to manipulate consumer choice through questionable privacy practices, misuse of big data, and algorithmic tools designed to exploit behavioural biases and mine vast quantities of personalized data now in the hands of digital service providers and platform owners. These methods include effective and sophisticated ways of disclosing prices and product and service information, and the use of choice architecture to steer consumers to purchase high margin products and services. Using personalized data on their consumers, these companies are also able to target and structure their product and service offerings in ways that can effectively influence consumer decision-making and expand their ability to further dominate their various market segments.

These new capacities have radically changed the power relationship between consumers and businesses, placing consumers at a significant disadvantage and increasing the already substantial market power businesses consequently exercise in the consumer marketplace.

The current *Competition Act* also has significant provisions that deal with criminal fraud, deceptive marketing practices, product misrepresentations, and misleading advertising. While these provisions are often enforced as much to protect legitimate businesses against criminal and other illegal activity as to protect consumers, the growth of the digital economy has vastly expanded the scope and scale of fraudulent and misleading advertising and other harmful activities online, such as phishing, spoofing and other misrepresentations designed to mislead and defraud consumers. The growth of this activity will place increasing focus on these aspects of the Act's provisions. This is primarily for two reasons.

First, the internet has dramatically transformed the economics of fraud. The costs of sending fraudulent messages and offers to consumers through the internet is essentially costless compared to older technologies (the mail, using telephone calling centres, and direct selling at the door). Even assuming that only a very few people respond to such appeals, the low costs of distribution of digital fraud essentially ensure that the large numbers of messages distributed will generate significant revenue streams and profits from illegal and very harmful conduct.

Further, on-line delivery of fraudulent marketing and scams can be quickly tailored to specific recipients or segments of the population. Indeed, with the growth of hacking of commercial and government websites and data bases, sophisticated fraudsters can be very effectively equipped with personalized information on the people they are seeking to defraud, making their scams and frauds better targeted and more effective. As well, the ability to impersonate commercial entities in terms of the design and presentation of online messages and emails – which, indeed, links them to websites that duplicate down to the smallest details the look and feel of the online presence of legitimate players in the digital marketplace – allow fraudsters to trick consumers into purchasing non-existent goods and services and to divulge sensitive information such as passwords, payment card information and access to their financial accounts.

Linking such activity with the distribution of malware, which allows criminals to destroy content or information on consumers' electronic devices or to hold it hostage to such destruction, or to gain access to sensitive information that can be used to exploit consumers, further expands the risks consumers face in this area and further lessens fair competition in the affected digital markets, platforms and spaces. The emergence of the 'Internet of Things' also greatly increases the risks of financial loss and damage to devices and property that consumers may face from illegitimate online activity and consequent reductions in fair competition, which can especially harm more vulnerable and disadvantaged consumers, smaller enterprises, and other market participants.

Recent research on the digital economy and the consumer[5] has emphasized that the consumer perspective and the relatively new and under analyzed consumer protection, privacy, access and related competition challenges posed by the internet and digital markets, platforms, and economies, have to date received limited attention from competition and other relevant practitioners, authorities and policy ministries. These same studies found that many digital consumers and users have limited confidence and trust in the ability of government to find and implement the 'right solutions' to these and other digital consumer and competition challenges.

The Council appreciates that the Bureau's February 2022 submission and the ISED November 2022 consultation document (Government of Canada 2022a and 2022c) recognize that these and other digital consumer and competition challenges represent new subject areas and challenges, which the Act and Competition Bureau (the Bureau) will need to address when: (i) reforming and revising the Act, and (ii) expanding the scope of the investigative, enforcement and deterrence activities required by the Bureau to effectively address the relatively new and constantly evolving consumer and competition issues posed by the digital economy and age now and in the future. Further discussion of these new digital and related issues is included in the rest of this submission.

Nonetheless, for the reasons described under question 7 in the next section and elsewhere in this document, the Council does not support the application of different, distinctive, special and more restrictive and punitive competition and other rules being applied to only one sector of the economy, such as the digital economy, under competition law and other regulatory regimes.

This introductory section results in a number of key conclusions and proposals for a three-pronged approach that resonate throughout this submission:

1. **Make the benefits to consumers and consumer well-being a central principle of the reformed *Competition Act*.**

- This is not a radical proposition. Making Canadian consumer welfare and well-being a central principle of a reformed Act would put Canada back in the mainstream on how competition policy is interpreted by our OECD trading partners, rather than an outlier focused on efficiency gains to the exclusion of other competition considerations and benefits.
- Introduce the concept of measurable benefits to consumers as a principle outcome from the implementation and enforcement of the competition statute.
- In light of the emergence of digital platforms and digitally networked service providers, the imperative is to more fully and effectively address the harm caused to consumers from their market dominance, their control of markets for free goods and services, and their ability through algorithmic tools and access to personalized date to manipulate and control consumer preferences, choice and decision making.

2. **Strengthen the role of the *Competition Act* in protecting consumers from fraud, deceptive practices and misleading advertising, especially in the digital marketplace, through:**

- Addressing all forms of deceptive practices in the digital era and the need for new approaches, priorities and enforcement capabilities, as described in more detail in the rest of this submission.
- Dealing with protecting consumers from trade in personal data and the use of malware and other tools to defraud and manipulate consumers.

3. **Re-establish and strengthen the Competition Bureau's and the *Competition Act's* role in enforcing a competitive marketplace for consumers:**

- Revive the *Competition Act's* consumer protection provisions as described in section 4 in this submission about how in recent years the Bureau has given very low priority to consumer protection law, despite research findings on the high monetary and other costs resulting from the non-enforcement of (and violations of) these consumer protection statutes and the consumer protection provisions in the *Competition Act*.
- As emphasized above and throughout this submission, expand the consumer focus of the *Competition Act* and its administration and enforcement.
- Develop a greater understanding on, and consider implementing, the recent emergence and success of combined competition and consumer agencies elsewhere in the global economy, and the opportunities they provide for an enhanced institutional representation of the consumer interest in Canada (see section 4).
- And consider whether additional fundamental changes are needed in the institutional infrastructure on competition, consumer protection, privacy and related laws and regulations at the federal level, including the whole of government approach to competition and consumer policy such as the Canadian Consumer Advocate discussed in section 4 of this submission, and a greater recognition of the dual responsibility the Competition Bureau has for both competition and consumer policy.

Answers to the "Guiding Questions" in the ISED Consultation Document "The Future of Competition Policy in Canada"

Consumers Council of Canada responses, recommendations and perspectives.

The objective of this section is to provide the responses, perspectives and contributions of the Consumers Council of Canada to the more specific 20 guiding questions under five headings in the ISED consultation document "The Future of Competition Policy in Canada" of November 2022 (called the ISED November consultation document in this submission), and the related issues discussed in the earlier February submission of the Competition Bureau "Examining the Canadian *Competition Act* in the Digital Era: Submission by the Competition Bureau."

Merger Review

1. The revision of pre-merger notification rules to better capture mergers of interest.

The Council fully supports revising the pre-merger notification rules and closing the loopholes in pre-merger notification described in the Bureau's February submission, including:

1. Digital and other transactions that are below the merger thresholds, including the so-called killer acquisitions,[1] which eliminate emerging competitive threats, and therefore would substantially impede future competition and innovation, significantly reduce consumer choice, variety and access to higher quality and more innovative goods and services, and prevent dynamic competition in the longer-term future, through removing from the market a promising nascent digital or other competitor.
2. Mergers of interest that involve foreign businesses that can have negative effects on competition and consumers in Canada – in order to reduce the risk that the Bureau would not be able to assess sales into Canada, which are made by the target firm but are not generated from Canadian assets. Removing this loophole would be particularly important to consumers by better ensuring that potentially anticompetitive cross-border mergers, including digital mergers, are reviewed by the Bureau from a Canadian competition, consumer and marketplace perspective.
3. Revising the pre-merger notification rules to capture what the literature calls serial mergers of interest. These revisions would encompass the accumulated effects of two or more *killer acquisitions,* as described above, as well as other acquisitions by the same powerful conventional or digital firms and platforms. The revisions could also address other examples of the more general problem of serial and creeping acquisitions, when larger firms with market power make several acquisitions of small firms. For these serial mergers, each acquisition falls below merger review size thresholds; but nonetheless these smaller acquisitions have the aggregated effect of substantially lessening current competition, decreasing consumer welfare and choice, and most importantly preventing future competition and innovation. These serial mergers essentially generate market concentration and dominance through creep and stealth.[2]

2. **The extension of the limitation period for non-notifiable mergers (e.g., three years), or tying it to a voluntary notification.**

The Council fully agrees with extending the limitation period and tying the period to voluntary notification for the reasons described very well in the ISED November consultation document and in the earlier Bureau February submission. These reasons include convergence with trading partners, and the ongoing costs and challenges of continuously monitoring industry developments, and of identifying, collecting and assessing the required information on problematic individual and serial mergers of interest in rapidly evolving digital and other markets.

3. **The easing of the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction.**

The Council agrees that easing the conditions for interim relief is needed given the expanding size, complexity, and information requirements of transactions, and the simultaneous need to protect competition and negatively affected consumers and smaller businesses on an interim basis. This proposed reform is particularly important in the digital space and for cross-border transactions in both digital and conventional markets – as described on page 24 of the ISED November consultation document. The international competition policy community has been arguing for some time that earlier interventions are needed by competition authorities before the 'dead small business bodies' accumulate in affected digital and other markets because of the long duration of many competition cases, and the many years before permanent remedies can be imposed and become effective in protecting smaller enterprises as well as competition and consumers.[3]

This proposed reform, as well as the first two merger review reforms discussed earlier, could be especially relevant to identifying and securing information on potentially problematic domestic and cross-border vertical and conglomerate mergers, with which Canada and many other often smaller competition law jurisdictions and authorities have limited experience to date. Expanding attention is now being given in the competition literature, conferences and webinars to vertical and conglomerate mergers and their potentially harmful effects on competition and consumer welfare.

For example, two cartel experts, Levenstein and Suslow (2022: Abstract) argue persuasively in their article on vertical mergers and coordinated effects that: "Vertical mergers can expand the scope for monitoring, coordination, punishment, and exclusion on the part of horizontally colluding firms. The very high horizontal concentration levels observed in markets with explicit collusion also suggests that the merger guidelines address such patterns of market dominance." Coordination effects can be especially important for vertical and conglomerate mergers in digital markets.[4]

The Council also agrees with the references to vertical mergers in the ISED November consultation document; and in Beck and Scott Morton (2022) on the imperative to:

- more fully evaluate the evidence on vertical mergers, which, for example;
- would lead to common ownership at different stages of national, multi-country region and global supply chains;
- and why their pro-competitive nature should not be presumed;
- and instead vertical transactions that previously were seen as benign should be examined individually and in detail on their merits and potential negative effects on market competition and consumer welfare and well-being.

4. **Changes to the efficiencies defence, e.g. restricting its application to circumstances where consumers or suppliers would not be harmed by the merger.**

Among the many possible changes to the efficiencies defence described in the Bureau and ISED documents and other merger review studies in the bibliography, the Council strongly believes that: (i) efficiencies should no longer be given primacy in merger review; (ii) the efficiencies defence should in

fact be fully removed from the Act; and (iii) instead, efficiencies and potential innovation effects should be considered with other competitive effects and considerations under the *Competition Act*.

The consideration of potential efficiencies and innovation benefits by the Bureau should be based on strong quantitative and qualitative evidence from the merger proponents regarding how and why:

- the claimed and predicted efficiencies, synergies, and innovation effects will be achieved;
- and how and why the benefits from these efficiencies, synergies, related cost-savings, and innovation benefits would be shared with consumers and other purchasers and market participants in a manner that;
- results in lower product prices, higher quality and more innovative products, lower quality adjusted prices, and/or better consumer choice, access, and product and vendor variety.

Treating efficiencies and innovation benefits as only a factor, rather than a stand-alone defence, will especially improve the evaluation of mergers and acquisitions in the digital space where experience in Canada and many other jurisdictions is often limited and too often negative (see as well Ross 2022a:6-7 and 2022b:16-23). The Council would also argue that eliminating the efficiencies exception from the Act would need support from consumer-oriented changes to the purpose clause and other provisions of the *Competition Act* including the merger provisions, along the lines discussed later in this submission.[5]

Shifting efficiencies from an exception to a factor in competitive effects analysis is also more consistent with the merger review literature over the past three plus decades. Most of these studies have determined that: (i) the probability of competition authorities making a Type II false negative under-enforcement error of approving an anticompetitive merger that enjoys greater market power, higher prices and an easier competitive life after the transaction is completed is much greater than: (ii) the probability that the merged entity will actually achieve its promised and predicted efficiency, cost-savings, innovation, and synergy claims; (iii) which their proponents argue would lead in the long term to more competitively priced and higher quality and more socially and environmentally responsible goods and services for consumers and other purchasers. In short, predicted efficiencies are often not achieved; and when some efficiencies are achieved, they are often not sufficient to compensate for higher prices and other competition and consumer harms.[6]

One major theme across this merger literature is that the merging parties greatly under-estimate the post-merger integration problems, challenges and mistakes when attempting to bring two different firms together into a single well-functioning corporate entity. The excellent analysis in the Bureau's February Submission and the ISED November consultation document (pp 25-27) describes very well the problems with the efficiencies exception, and indicates that the Bureau's staff and advisors are very familiar with the same post-merger integration literature.[7]

The approach to merger efficiencies favoured by the Council is consistent with the broader structural presumption and reverse onus approach, which the Council prefers for merger review, abuse of dominance and other competition matters that involve the risk of highly concentrated markets, market dominance and tipping-to-monopoly in digital as well as more conventional markets.[8]

For example, structural and related rebuttable presumptions should be employed to simplify merger cases by shifting the burden of evidence and proof onto the merging parties to prove why a concentrative merger would not substantially lessen or prevent competition in a manner that significantly harms consumers, other market actors, as well as the competitive process.[9] *You show us how your transactions will not harm competition, consumers and workers and how your predicted efficiencies and innovation benefits will be achieved and shared with final consumers, other purchasers, your employees, and other market participants – and not just benefit your senior executives and shareholders.*

This merger review approach would have the advantage of adopting the U.S analytical approach.

interactions with our American colleagues over the years have indicated that convergence on this issue would be helpful to competition policymakers and agencies on both sides of the border. Furthermore, this approach would employ the structural presumption of upward pressure on post-merger prices once a merger is completed, due to an even more concentrated market. Therefore, as noted earlier, in response to that presumption, proponents would have to provide solid quantitative and qualitative evidence that cost savings, efficiencies, synergies and innovation benefits will greatly reduce the risk of material post-merger price increases and lower quantities supplied, and/or would be offset by higher quality and more innovative goods and services after the merger is completed.

Furthermore, for essential goods and services, the merger proponents should be asked to demonstrate that fewer firms, and a more concentrated market after the merger is completed, will not compromise consumer access, choice, and product and shopping experience variety, and harm the resilience and ability of the industry to respond to external shocks – as described in the following footnote.[10] Consumer access could be added to the new consumer privacy provisions. Limited consumer access, choice and variety greatly reduce consumer and other purchaser sovereignty, control, well-being, welfare, and power in markets. These consumer issues also raise questions regarding gender, ethnic and other forms of equity and discrimination; and are relevant in similar ways and for similar reasons to abuse of dominance and competitor collaborations.[11]

Applying the structural and related rebuttable presumptions, such as the cellophane fallacy, to concentrated markets, dominant firms, price and other predation by dominant firms, platform gatekeepers, and tipping to monopoly in digital and some conventional markets, is based on the premise that while big is not always bad, larger, more powerful and dominant firms operating in concentrated markets are often the major sources of competition, consumer protection, product safety, privacy, environmental, and other legal and regulatory misconduct, violations and harms (see as well Shapiro 2021, Baker and Shapiro 2008, Hovenkamp and Shapiro 1996, and Hemphill and Weiser 2018).

5. **Revisiting the standard for a merger remedy, e.g. to better protect against prospective competitive harm, or to better account for effects on labour markets.**

The Council fully concurs with both aspects of this proposed reform, and believes that the anticompetitive effects of a merger on labour markets should be considered in merger review, for the reasons described later in this submission on the interactions between consumer and worker harm as a consequence of: (i) anticompetitive mergers leading to more concentrated product, labour and other input markets, which (ii) can harm consumers through reduced quantities, higher prices and lower quality products, as well as through job losses from lower quantities produced as well as reduced wages, incomes and consumer purchasing power.[12]

Unilateral Conduct and the Abuse of Dominance and Related Provisions

6. **Better defining dominance or joint dominance to address situations of de facto dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market.**

The Council fully supports this and the other proposed reforms on unilateral conduct and abuse of dominance. The Council also proposes that the structural presumption and reverse onus, discussed above under question 4 for merger review, should be applied consistently to abuse of dominance and joint dominance cases and other forms of unilateral anti-competitive conduct. These two approaches are needed to better ensure that the unilateral conduct reform proposals become functional and effective, and better protect consumers, smaller businesses, and the competitive process.

The Council fully recognizes that, under the abuse of dominance concept in the *Competition Act*, firms and other regulated entities[13] are allowed to obtain market power and a dominant market position

within relevant product, labour and other markets through superior competitive performance, the exit of a strong competitor, pro-competitive mergers as well as collaborations with competitors (see below), and/or good fortune. Nonetheless, regardless of how dominance is achieved, the Council believes that the emphasis in these investigations should be on the negative outcomes of market dominance for competition, consumers and other market participants. Therefore:

- once market power and dominance have been achieved and the economies of scale and scope, network effects, other externalities and other benefits of size and power are being enjoyed by the corporate entity;
- the firm or other regulated entity has a special responsibility to *not abuse and exploit* its dominance at the expense of: consumers, smaller businesses, farmers, other less powerful market participants, the competitive process, trust and confidence in democracy and the free market system, the common good and social welfare; and therefore;
- should be held fully accountable for any anticompetitive conduct and significant harms that are associated with their dominant market positions regardless of intent or circumstances such as "we are simply imitating and 'meeting' the anticompetitive competition and doing what all of our competitors are doing."

In sum, the reformed *Competition Act* should send a clear signal to the business community including digital firms and platforms, digital and conventional consumers, smaller businesses, other market participants and the general public that:

1. abuse and exploitation of less powerful actors, and related corruption and white-collar crime by the powerful represent taboo, unethical, and anti-social behaviour; and,
2. powerful regulated entities are fully responsible for their anticompetitive behaviour and resulting anticompetitive outcomes and harm associated with their power and dominance.[14]

This interpretation of the abuse of dominance concept is fully consistent with and supportive of the structural presumption concept discussed earlier, and with other competition related presumptions in the competition economics literature such as the cellophane fallacy, which require for further study from a Canadian marketplace perspective.[15]

The structural presumption will be particularly helpful to addressing the 'unpleasant and at times unintentional anticompetitive surprises' including tipping-to-monopoly and excessive consumer and user dependence on certain digital platforms, which are associated with the rise of the digital economy and big tech over the past three decades; but should also be applied to market dominance and power in more conventional markets. This is because the traditional distinction between digital and conventional markets and firms is now eroding in many ways because of the global COVID-19 pandemic for example: 'What are Costco, Staples, and Walmart in 2023, conventional, digital or some novel mix and hybrid of the two?'

The structural presumption is equally relevant to the other questions discussed below on unilateral conduct, competitor collaborations and deceptive marketing practices and, therefore, will not be repeated under future questions on these issues except in passing.

7. Crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects.

Crafting a simpler test for a remedial order is supported by the Council based on the reasons described in the Bureau's February submission and the ISED November consultation document, such as greater consistency with international best practices and our major trading partners, better ensuring that merger, abuse of dominance, and other remedies more fully achieve their desired purpose, and better addressing the remedy challenges posed by:

- dynamic competition, innovation and the growth of digital markets and big data, when for example establishing firm intentions is very challenging when anticompetitive and other conduct is algorithmic or automated (how to address the 'algorithm made me do it' excuse);[16]
- remedying anticompetitive conduct that is widespread in a relevant market without a single 'easy to identify' party being responsible for the misconduct and harm,
- the need to address all forms of anticompetitive conduct (both horizontal and vertical) including past misconduct and potential misconduct in the future so that 'gaps' in the remedial order cannot encourage and incentivize anticompetitive behaviour and other non-compliance,[17]
- and other challenges posed by the digital economy and the rise of big tech and the increasingly interconnected and networked global economy of the post-COVID era as discussed in the Bureau's February submission, the ISED consultation document and many studies in the bibliography.

One example would be the anticipated growth in cross-border unilateral conduct and abuses of dominance by digital and more conventional firms, which harm competition, consumers and potential competitors in multi-country regions and the global economy and will at times involve privacy, personal information security and big data challenges that are unfamiliar to many competition agencies – see e.g. Wynne et al (2020), Marsden and Podszun (2020), and Bourreau and de Streel (2019) on envelopment, tipping-to-monopoly, and other digital competition challenges.

The Council especially places major importance on greater consistency with Canada's major trading partners in order to address the weaknesses on enforcement mechanisms described very well on pages 51-53 of the ISED November consultation document. The previous experience and research of Council members underlines that better alignment with our major trading partners, starting with the European Union, the United States and Australia, on remedial measures, information collection, and other enforcement mechanisms, is essential for information sharing and enforcement cooperation on such competition matters as cross-border cartels, mergers, abuse of dominance, other unilateral conduct, competitor collaboration, and other enforcement cases.

When feasible, functional and effective, simpler is always better than highly technical and complex remedial orders. Simpler remedial orders significantly increase the understanding and acceptance of proposed remedies by the affected businesses, the business community more generally, civil society groups and the general public. The 'make it simpler' criterion is likely relevant to and provides a useful benchmark, reference point and standard for many of the other proposed reforms that will emerge from this consultation process on the *Competition Act*.

As well, the Council fully supports revisiting and applying broader and more flexible interpretations to corporate intentions and competitive effects when dealing with dominance and related competition matters involving unilateral conduct as discussed on pages 30-39 of the ISED November consultation document. These reforms may be especially needed for the market power and dominance situations associated with digital firms, platforms and markets. However, as noted previously in this submission, so-called conventional firms, regulated entities and markets should also be covered since so many conventional firms have been going digital since the start of the COVID pandemic in 2020.

For this and other reasons, the Council is leery of different, distinctive, special and more restrictive and punitive competition rules being applied only to the digital economy (however defined). It is sufficient that the same dominance and related rules are applied more frequently and rigorously when required to the digital space. This economy-wide approach is the perspective of many competition lawyers and economists in the competition policy and law community particularly in North America,[18] and is fully consistent with the important role of the *Competition Act* as one of many federal economic framework laws of general application (see ISED November consultation document page 8).

8. Creating bright line rules or presumptions for dominant firms or platforms, with respect to

behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction.

As noted earlier, the Council fully supports this proposed reform starting with the structural presumption and cellophane fallacy (see earlier footnotes); and looks forward to the opportunity to review in detail the bright line rules and presumptions for dominant firms *and* dominant platforms that are proposed in the future by the Bureau and ISED, such as on:

- questionable gatekeeping and self-preferencing practices and facilitating practices;
- envelopment strategies to eliminate smaller potential rivals often in adjacent markets;
- excessive product and brand proliferation and diversification to e.g. confuse consumers and other purchasers;
- new forms of predation and refusals to deal and below merger threshold serial mergers involving 'killer' and other acquisitions; and,
- misuse of big data and related privacy violations.

These and related violations by dominant platforms as well as by dominant conventional firms and regulated entities are now being addressed by the *Digital Markets Acts* and Digital Markets Units of the European Union and United Kingdom.[19]

9. **Condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision. Alternatively, the unilateral conduct provisions outside of abuse of dominance could be repositioned for different objectives of the *Competition Act*, such as fairness in the marketplace.**

Consistent with the 'simpler when feasible' premise described earlier, the Council strongly supports condensing the various unilateral content provisions now under section 75-77, 79, and 81 of the *Competition Act* under a single abuse of dominance or market power provision, with fairness in the marketplace and fair and efficient competition as two of the major guiding principles within the provision.

The Council also believes that this provision, as well as similar provisions in the merger and competitor collaboration sections of the Act, could encompass and be applied to the following circumstances:

- Deceptive marketing practices, the 'phishing for phools' strategies described by two Nobel Laureate Economists Akerlof and Schiller (2015 and 2016), and privacy violations should be given much greater recognition, prominence, consideration and weight as significant abuses of dominance and market power. These abuses could be especially prominent in certain digital markets, but are also important and consequential in some more conventional markets and for dominant regulated entities now moving into the digital space.
- And the excellent additions to the merger, abuse of dominance and competitor collaboration provisions under the June 23, 2022 amendments to the *Competition Act*[20] should be expanded to more explicitly encompass a wider range of consumer concerns and interests including: consumer access to essential goods and services; and consumer preferences for high quality, innovative and safe goods and services, and for greater choice and variety of goods, services, vendors, service providers, and shopping experiences.

Consideration should also be given to capturing the concept of fair competition in these provisions as discussed elsewhere in this submission, including references to vulnerable and disadvantaged consumers and other market participants, addressing objectionable conduct as described in the consumer law of Australia, and the fair and equitable treatment of consumers[21] in their consumer purchases, transactions, and other interactions including complaint handling and resolution, with

producers, vendors and service providers in both conventional and digital markets. Consumer research has indicated that fairness and equity concerns can be in many ways as important to the modern Canadian consumer as competitive prices and quantities.

Accordingly, the Council believes that the three new consumer privacy provisions added to the *Competition Act* in June 2022 represent a good starting point; but consideration should be given to expanding these provisions to include other consumer issues and concerns important to consumers and other purchasers, and their satisfaction, well-being and welfare. These measures should be supported as well through including additional consumer welfare and interest references and provisions elsewhere in the Act in order to counteract the impression of many that total efficiency is the only, and will continue to be the only 'functional' purpose of the Act.

Other possible locations for additional consumer references would be the new provision in the merger section where efficiencies are treated as a competitive factor rather than a defence (see question 4 above); and the reforms that result from responses to question 11 under competitor collaborations on broadening and/or strengthening these provisions. In addition, a more detailed discussion of this more general Council concern is provided in the final sub-section of section 4 of this submission.

After the consultation process and the reforms are completed, the Bureau should prepare and distribute widely a guidance document on how consumer privacy and these other consumer interest factors are and will be considered and interpreted in merger, abuse of dominance, other unilateral conduct, and competitor collaboration and conduct cases, and other Bureau functions, activities and strategies such as in its corporate compliance guidance documents.

The Council's understanding is that the single dominance and market power provisions would encompass five sections of the current Act. As listed on page 38 of the ISED November consultation document, these five sections are on refusal to deal (section 75 of the current Act), price maintenance (76), exclusive dealing, tied selling or market restriction (77), abuse of dominance (79),[22] and delivered pricing (section 80).

Furthermore, page 79 of the ISED consultation document notes that, in light of the "multi-faceted purpose clause, including the participation of small and medium enterprises in the economy, the Government believes it would be worth exploring whether these (or potentially other) provisions may be repositioned as 'fair competition' provisions with less focus on competitive effects, in the interests of maintaining a level playing field and checking gatekeepers with monopolistic or monopsonistic power … while some foreign competition authorities administer 'unfair competition' provisions, such as with respect to unconscionable conduct in Australia [noted above], or abuse of superior bargaining position in several jurisdictions."

The Council would be supportive of additional reform proposals along these lines, and looks forward to reviewing such proposals in the future.[23] A common theme across the Council's responses to the ISED document's 20 questions is that the interests and concerns of consumers, workers, and small businesses should be reflected in and resonate throughout the reformed Act. Being mentioned in the purposes clause and a few other provisions is not sufficient. The merger, abuse of dominance, competitor collaboration, and other guidelines prepared and distributed by the Bureau should adopt a similar approach and philosophy.

Competitor Collaborations

10. Deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity, especially given the difficulty of applying concepts like agreement and intent in the age of AI (artificial intelligence/machine learning).

The Council supports this reform proposal, but with the important qualification that:

- further research and attention is needed on defining and expanding on the negative effects of

algorithmic activity on the health of markets and negative competition and consumer outcomes in the Canadian marketplace;

- the potential for algorithm-driven consumer frauds, malware threats, privacy violations, and deceptive marketing practices under the *Competition Act*;
- the implications for violations of other federal privacy, financial consumer, product safety, air passenger, and other federal consumer protection laws;
- as well as violations of provincial consumer protection, unfair trading, product misrepresentation, and product safety laws.

This qualification is consistent with the whole of government approach to algorithm-driven misbehaviour and resulting competition, consumer, small business, privacy and other harms in Canada; and could be the subject of a Bureau-led or joint-ministerial, even federal-provincial, market study. Market studies and investigations and the whole of government approach are further discussed later in this submission.

This qualification and perspective also results from the Council's broader concern that the reform proposals under competitor collaborations are fine, but are too technical and narrow in scope, and only touch the surface of the competition challenges, and in particular the consumer challenges and issues, which are now emerging and will emerge in the AI/ML, Internet of Things, and regulation-by-robot world we are now entering.[24]

11. Broadening and/or strengthening the *Competition Act's* civil competitor collaboration provisions to discourage more intentional forms of anti-competitive conduct, including through examining past conduct and introducing monetary penalties.

The Council fully supports this reform proposal; and believes, as well, that broadening and strengthening the civil provisions on competitor collaborations should take account of how governments and their various ministries are now encouraging what would hopefully be pro-social competitor collaborations in order to allow the private sector to make greater contributions to addressing for example:

- climate change, sustainable development, biodiversity, alternative energy sources, and other environmental crises and challenges;
- supply chain and other disruptions resulting from pandemic, public health and other healthcare policy priorities, and other crises and shocks including national and global financial crises, and other public policy issues and wicked problems; and,
- public policies, programs and objectives and what could be called private/public partnerships (PPPs) that are intended and designed to support and accelerate innovation and technological change and development on disruptive and transformative and other technologies in Canada and our major trading partners.

The Council believes that, in many cases, these collaborations can make contributions to solving these and other public policy objectives, problems, crises and external shocks. Nonetheless, as discussed under question 9, such collaborations can carry significant short-term and longer-term risks for competition and consumer interests when, for example:

- pro-social collaboration is transformed into anti-social collusion and corruption during the crisis; and/or,
- after the crisis has come to an end, collaboration is no longer needed to serve the public interest, but collusion among competitors continues and can become a bad habit;
- with imitation and contagion effects for entire markets and industries and for even multiple product and geographic markets where the same competitors are prominent – see Bernheim and

Whinston (1990) on multi-market contact and collusive behaviour and Wynne (2020).

Furthermore, there is growing evidence that both the civil and criminal provisions and the Bureau's enforcement of these provisions should go beyond the conventional cartel focus on uncompetitive prices and reduced quantities produced and supplied; and take account of how competitor collaborations can also be used and misused in a manner that results in poorer quality and less innovative products, and less innovation among cartel members and across a market and industry that would be consistent with the 'damaged and degraded good' concept of Deneckere and McAfee (1995).

In 2021, the Directorate General for Competition of the European Commission (called EU DG Comp in the literature) had their first successful cartel case that did not involve higher prices but instead poorer product quality and less innovative products. This cartel case involved five German motor vehicle firms: Daimler, Audi, Porsche, VW and BMW that colluded in order to limit the technology they use to control car emissions.

The collusion, therefore, held back the full potential of this technology, leading to less effective emissions reductions and pollution cleaning performance, and significantly reduced competition based on product quality. Daimler received full immunity for disclosing the cartel, while the other four were fined and benefitted from the settlement procedure. The European Commission has indicated that they will continue to address and sanction cartels and other forms of anticompetitive conduct that reduce product quality competition and innovation, and therefore essentially involve the production and marketing of intentionally damaged and degraded goods and services to increase corporate profits.[25]

To summarize, collaboration agreements between competitors became a major issue during the global pandemic from 2020 to 2022, and in recent years are becoming a major mechanism for addressing sustainability, climate change, other environmental issues, and technology and innovation challenges. The EU, Canadian and Dutch competition authorities prepared and distributed guidelines on these agreements during the pandemic.[26] The major competition concern is that competitor collaborations to address a financial, public health, environmental, innovation, or other crisis and/or public policy objective, will remain in place and cause substantial anticompetitive and consumer harm after the crisis is over or the objective has been achieved. A related challenge is the potential for the number of businesses planning to establish such agreements in Canada and elsewhere to increase greatly in the years ahead, in response to the corporate sector and/or public policy challenges of the post-COVID period.

Strengthening and broadening the still relatively new 2009 civil provisions on competitor collaborations, based on experience to date in Canada and other jurisdictions particularly during the global pandemic of 2020-2022, is clearly a priority for the Bureau and very important for competition, consumers, smaller businesses and other market participants in Canada.[27] In the increasingly interconnected and networked post COVID-world, these competitor collaboration agreements will often cross national borders, and some may even be global in scope and/or outcomes, requiring further improvements in the information sharing and enforcement cooperation agreements between competition law jurisdictions.

12. Making collaborations that harm competition civilly reviewable even if not made between direct competitors.

The Council fully supports this proposed reform, and believes more generally that, in the emerging digital age, the ISED consultation process and subsequent *Competition Act* reforms and amendments should focus on negative outcomes, and the risk of negative outcomes and harms, which are measurable and, where feasible, quantifiable, for competition, consumers, smaller businesses, other market participants, and the health of the marketplace.

Therefore, the Council strongly believes that, in the emerging digital age, the reformed Act, the Bureau and its enforcement and other functions should give priority to negative outcomes, not to the

stated, apparent and predicted intentions of firms and not whether their relationships with other firms are horizontal, vertical or conglomerate in nature. Recent competition policy and industrial organization research has illustrated for example that vertical relationships established with good intentions by both firms can still lead to unanticipated and unintended consequences, which can substantially lessen competition and cause substantial harm for consumers, workers, smaller enterprises, other market participants and the economy. As described on page 41 of the ISED November consultation document: "As ways of doing business continue to evolve rapidly, so too must all forms of competition analysis, as some suggest that traditional approaches may need to be reconsidered or refocused on outcomes."

Accordingly, the competitor collaboration and other provisions should be functional, enforceable, and effective regardless of whether the relationships between firms are horizontal, vertical, close and long-standing, incidental, personal or digital (a few emails), and whether the collusion or joint dominance is explicit, tacit, incidental, unplanned or involves other less obvious forms of "working and cooperating together" such as facilitating practices.[28]

13. Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement.

The Council supports this form of mandatory notification and looks forward to reviewing from a consumer-interest and well-being perspective the potentially problematic type agreements that are identified for mandatory notification by ISED and the Bureau.

14. Reintroducing buy-side collusion – beyond only labour coordination – into the *Competition Act's* criminal conspiracy provision, or considering a civil per se approach to it.

As emphasized earlier, the Council fully supports reintroducing buy-side collusion that goes beyond labour market coordination, and believes that both criminal and civil per se approaches are needed to ensure that no buy-side collusion agreement falls between the cracks. The civil per se type approaches could also be supported by structural and related presumptions and bright lines as well as perhaps carefully crafted exemptions,[29] so that, for example, pro-social buy-side agreements of small retailers and other businesses and farm groups to better compete with the larger more powerful retailers, agribusinesses, and other players would not be subject to either the criminal or civil per se provisions.

This and the previous reform proposals under the competitor collaboration heading underline that, after the consultation and amendment processes are completed, the Bureau will need to prepare and distribute a revised and updated competitor collaboration guidance document designed to assist the business community as well as consumers, small business, farmer cooperative and other associations and other civil society groups. The guidance document would of course take full account of other reforms and amendments proposed in this submission, which take greater account of the consumer interest and harm and related issues as described throughout this document.

Deceptive Marketing

15. Adopting additional enforcement tools suited for modern forms of commerce, given the nature and ubiquity of digital advertising. For example, further amendments to better define false or misleading conduct, such as the 2022 drip pricing amendments, could be considered.

The Council fully supports this proposed reform; and, as emphasized throughout this submission, among the highest priorities of the Council in this submission are the following:

- Expanding and strengthening the deceptive marketing provisions of the *Competition Act* that go beyond drip pricing (a very good June amendment) to cover additional forms of potentially deceptive conduct in both digital and conventional markets.
- As described on pages 47-48 of the ISED November consultation document and developed in greater detail in the earlier Bureau February submission, the development of proposals for reform

in such areas as (i) sellers bearing the full burden of proving that discounts are genuine, which is consistent with the reverse onus approach discussed earlier; (ii) the need for greater flexibility when the Bureau is conducting deceptive marketing investigations; and (iii) the requirement for the Act to contain better remedies to address deceptive conduct both in digital and conventional markets, including increases in monetary penalties and strengthening other remedies.[30]

- More fully integrating these provisions and the other three consumer protection acts administered and enforced by the Bureau and Commissioner into the day-to-day functioning and decision making of the Bureau – see the discussion below in section 4 on the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.
- Based on these reforms and amendments, update and revise the Bureau's existing (and often highly dated) guidelines on deceptive marketing practices, and as required prepare and distribute new enforcement guidelines on the new forms of digital and other deceptive marketing practices that would be covered in the Act and given higher priority by the Bureau in the future once the consultation and amendment processes are completed.[31]

These initiatives are needed in order to take greater account of and give greater attention to the full range of consumer interests, concerns and harms in the 'globalized digital age' across all provisions of the Act and all functions of the Bureau.

The Council also agrees that the Act and Bureau would benefit greatly from competition and consumer protection research which: (i) identifies more fully the additional forms of deceptive conduct discussed in the ISED document; and as well (ii) identifies and assesses newer tools or conceptions of deceptive conduct altogether associated with the digital economy and the rise of the 'big tech titans'. The Council would appreciate the opportunity to participate in the required market studies and investigations.

As noted previously, the deceptive marketing practices and 'phishing for phools' strategies of digital, conventional, and 'hybrid' (both digital and conventional) businesses and other regulated entities can be expected to be more frequent and consequential for competition, consumer welfare and smaller businesses. As well, these deceptive practices will be increasingly relevant to merger, dominance, competitor collaboration and other competition matters of the Bureau and other competition authorities as national and global economies enter the increasingly interconnected, networked, complex, turbulent, chaotic and unpredictable post-COVID period.[32]

Administration and Enforcement

16. The Government is considering reforms in administration and enforcement, and would welcome input on making the administration of the law, and enforcement before the Competition Tribunal or courts, more efficient and responsive whether public or private, without unreasonably compromising procedural fairness.

In this regard, the Council proposes that the Bureau, ISED and government should carefully review all reform and amendment proposals from the perspective of their implications for the promotion of and possible impediments to:

- fair competition, interfirm rivalry, and consumer welfare, interests, empowerment, and sovereignty in all sectors of the Canadian economy (see Siciliani, Riefa and Gamper 2019);
- the Bureau's enforcement, deterrence, sanctioning, and corporate compliance functions, its competition policy and law outreach, education and advocacy programs to all interested parties, and other functions, activities, and strategies of the Bureau;
- with particular attention to ensuring that monetary penalties and other remedies are consistent across the Act's provisions and Bureau functions, are sufficient to demonstrably deter

anticompetitive conduct and subsequent consumer, competition and other harms, and are proportionate to the resulting negative outcomes and harm – 'the punishment fits the crime' approach;

- the ability of the proposed reforms and amendments to be 'fit to purpose' for promoting fair competition and remedying competition, consumer, small business and related harms in the digital world (see for example Riefa and Clausen 2019);
- better protecting and promoting the interests of more vulnerable and disadvantaged consumers, other purchasers and other market participants including smaller businesses, micro-enterprises and farmers (see for example Riefa 2020b);[33] and,
- enhanced international competition policy and law enforcement cooperation and information sharing in order to: address cross-border mergers, acquisitions and other transactions and anticompetitive and deceptive conduct; mitigate the potential harms from multi-market contact in different product, geographic, digital, financial and other markets;[34] and provide best practices and models for other jurisdictions including developing and emerging market economies – the Council's proposal to fully eliminate the efficiencies defence meets this criterion (Ireland 2015).

Based on the previous research of the Council and its members, special attention should be given to how and why the reforms and amendments would make it much more costly and less profitable to *not comply* with the *Competition Act* and its standards and provisions, and much easier and more profitable to comply and contribute to the public good of fair and efficient competition and marketplaces in Canada.[35]

Furthermore, as noted in many parts of the ISED November consultation document (see e.g. pages 33-35 and 43-44), the Council fully concurs that every effort should be made to remove gaps and inconsistencies within the *Competition Act* that can incentivize anticompetitive behaviour. It is essential that violations of the Act, which cause similar negative outcomes and harm for competition, consumers, other purchasers, small businesses, and other market participants, should be treated, investigated, enforced and sanctioned in a similar manner, regardless of the section of the Act that explicitly addresses the misconduct and violation. Otherwise, wrongdoers will likely search *Competition Act* sections in order to identify and exploit gaps, inconsistencies, and loopholes.

Gap filling and greater consistency across sections and violations strengthen the arguments for higher monetary penalties and other more effective remedies in the reformed deceptive marketing section of the Act. Greater consistency across sections and violations would particularly increase consumer, political and public trust and confidence in the *Competition Act* and Bureau. The Council and many of its members have extensive personal experience with how well-intentioned reforms and amendments to competition, consumer protection, and other legal, policy, and regulatory frameworks, regimes and systems can have highly negative unanticipated and unintended consequences for competition, consumers and other market participants because of gaps, inconsistencies, and poor wording.

Furthermore, the institutional, cultural, and human resource challenges of administering and enforcing significantly modified and reformed competition and related statutes should not be discounted and ignored by the government, ISED and Bureau. Members of the Council also have personal experience with these challenges soon after the 1986 *Competition Act* began to be implemented, and somewhat later when Corporate and Consumer Affairs Canada was merged into Industry Canada (now ISED) in 1993.[36]

The Council also offers for consideration some administration and enforcement issues and concerns that are more specific to the deceptive marketing sections of the Act. The Council's view is that, with some exceptions, the *Competition Act* provisions on deceptive marketing are mainly concerned with regulatory or public welfare offences and not 'real' criminal offences; and Bureau enforcement actions, in particular with regard to the deceptive marketing practices provisions, have favoured more

regulatory compliance approaches such as consent agreements, and issuance of Administrative Monetary Penalties as opposed to protracted and expensive criminal or civil prosecutions.

ISED and the Bureau may wish to give consideration to expanding section 24(1) to allow the Governor in Council to make regulations under the relevant prohibitions in section 52 and 74.01, in order to provide the Bureau with greater flexibility and agility to take more decisive action and to align with the regulatory powers already available to the Bureau with the other three regulatory statutes administered and enforced by the Competition Bureau.

The following offers the Council's input and perspectives on the four more specific questions on administration and enforcement in the ISED November consultation document.

17. Giving the Bureau more leeway to act as a decision-maker, e.g. through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct.

The Council is broadly supportive of this reform proposal which would better align the Bureau's information collection and enforcement functions with those of Canada's major trading partners and other competition jurisdictions. However, as always, the devil will be in the 'information collection and enforcement' details and therefore we look forward to reviewing and commenting on these details from the consumer perspective when they become available during the enforcement process.

18. Introducing new forms of civil enforcement as alternatives to criminal prosecution for certain actions.

The Council has already indicated its support for this proposal, but, similar to the previous question, more detail and specifics on what, why, when and how are needed; and the Council looks forward to the opportunity to participate in this process.

One issue, with which Council members have personal experience, is the role that voluntary or mandatory codes of conduct can play in supporting civil enforcement of the Act. Codes of conduct are now among what other jurisdictions are calling the 'new competition tools' now being considered and/or employed by the EU, UK, Australian, and some other competition authorities to support and complement competition law enforcement.[37] It should be noted in this regard that these are not new tools for the Competition Bureau. In the late 1990s and early 2000s, the Bureau successfully collaborated with selected sectors such as diamond mining and retailing, retail grocery, and pet food manufacturing, and environmental products manufacturers to introduce guidelines and voluntary codes of conduct that are still in effect today.[38]

19. Allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the *Competition Act*.

The Council is in full agreement with this proposal, and as discussed later believes that the potential for expanding private and collective non-government enforcement and compensation for damages before the Tribunal, including by non-business civil society groups, should be considered in greater detail during this consultation and reform process, as well as if and when needed in the future.

The ISED November consultation document provides an excellent discussion of private enforcement in its enforcement mechanisms section on pages 52 and 53;[39] and the earlier Bureau February submission has even more references and discussion relevant to private access and enforcement, such as expanding private access including private enforcement/litigation for abuse of dominance and competitor collaborations.

The references to private access and enforcement in both documents could provide the foundation for additional reform proposals along these lines, which the Council would be pleased to review and comment on from the consumer and civil society perspective later in the consultation and amendment process. When reviewing these proposals, the Council will want to ensure that greater opportunities for private litigation and enforcement will not be used and misused by the government, ISED and the Bureau as a rationale and excuse for reducing the Bureau's budget and other resources, and thereby diminishing its enforcement and other functions, activities and responsibilities under the *Competition*

Act.

20. And as well pursuing a reasonable path with respect to the collection of information outside of the enforcement context, such as for the purpose of market studies, taking both public value and private burden into account.

As noted elsewhere in this submission, the Council is a major supporter of increasing the Bureau's information collection/gathering and related powers to better facilitate conducting and completing market studies and other broader non-enforcement investigations including merger retrospectives/ex post merger reviews (see PIAC 2021:22-23).

In selecting the subjects for future market studies and non-enforcement investigations, special emphasis could be placed on the distinctive issues and challenges posed by globalization, and more specifically the globalization of the digital economy, for the Canadian economy, marketplace and society. As discussed in the following footnote, these issues and challenges can be very different from those in other countries and competition jurisdictions, where previous research and policy analysis, as cited in the ISED November consultation document, has been conducted.[40]

Enhanced information gathering and monitoring of market and industry developments and more frequent market studies and other non-enforcement investigations would as well be aligned with the expanding behavioural and competition literature on how strong and continual monitoring, surveillance and scrutiny can improve behaviour – which can be called the *we are watching you* concept. These literatures can support greater Bureau investigative resources for enhanced monitoring, surveillance and scrutiny of specific firms, and relevant digital and conventional markets, industries and supply chains as well as expanded resources and powers for market studies.

For example, in his study on the digital economy, tech dominance, and policemen at the elbow, Wu (2019) argues persuasively that monitoring, investigation and the threat of sanctions, such as restructuring and related structural remedies even when not applied, can alter the behaviour of big tech companies. This is because of their fear (even anticipated, perceived, imagined, or irrational fear) of drawing too much attention to themselves and their business activities, leading to greater scrutiny by competition and other authorities, civil society groups, the media, and subsequently politicians.

Comments and Suggestions of a More General Nature

Canada needs a 'whole of government' approach to achieve a modern, outcomes-based, competition and consumer policy for the 21st Century.

Consumers Council of Canada greatly appreciates the opportunity provided by the ISED consultation document to address issues of a more general nature that are important to the future of competition policy in Canada. These more general issues in our case are associated with the integral role that consumer interests, perspectives and concerns can, should and will play in the design, administration and enforcement of competition policy and law in Canada in the coming years.

Utilize the Commissioner's Full Powers Against Anti-competitive Activity

After the integration of the Department of Consumer and Corporate Affairs into Industry Canada in 1993, three federal statutes that prescribe minimum standards of conduct and care for general merchandise and prohibit false and misleading representations: *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, and the *Precious Metals Marking Act*, were transferred, with funding for administration and enforcement, to the Competition Commissioner's delegated authority. These three statutes became important additions to the Commissioner's legal arsenal to assist in efforts to combat anti-competitive activity and protect Canadian consumers. Subsection 7(1) of the *Competition Act* clearly states that the Commissioner of Competition is responsible for the administration and enforcement of these three Acts, in addition to the *Competition Act*.

These consumer protection statutes and their regulations prescribe minimum quality and marking standards for precious metal articles: jewellery and other articles containing gold, silver, platinum, and palladium; consumer textile articles: apparel and other consumer textile goods; and standards and procedures for verifying the accuracy of weights and measures and label representations for all non-food consumer prepackaged products sold in Canada. Similar legislation is administered and enforced by all of Canada's major trading partners in the G7, G20 and beyond.

At the time they were transferred, it was believed that these statutes would enhance the Commissioner's ability to address fairness and integrity in the Canadian marketplace. They give the Commissioner authority to carry out warrantless entry inspections and take immediate enforcement action on products in violation of the statutes, without engaging in protracted legal proceedings. Before and during the transfer period, data indicated low rates of compliance and a high number of incidents of fraud and misrepresentation in businesses that were subject to the legislation. These violations represented a cumulative annual social loss to consumers in the billions of dollars.

Unfortunately, successive Commissioners have chosen not to apply an adequate standard of care for these statutes, thereby effectively repealing them by means of non-enforcement and the failure to modernize the legislation and regulations as required by government regulatory policy and practiced by all other Canadian federal regulatory authorities.

As the centre of competition policy for Canada, ISED should decide on whether these statutes indeed have an impact on mitigating anti-competitive activity such as misrepresentation and fraud, and whether they should be enforced and modernized accordingly. ISED has also been encouraged by the Consumers Council of Canada to consider transferring responsibility for the administration and enforcement of these statutes to a regulatory authority such as Measurement Canada, which is housed within ISED and has the infrastructure (active inspectorate, technical expertise, regional and district offices across Canada) and a refined understanding and knowledge of how to administer and enforce regulatory standards and standards of identity found in consumer protection regulatory statutes.

The Bureau's attempts to effectively repeal these statutes through non-enforcement and lack of modernization: (i) invites fraud and misrepresentation, (ii) encourages foreign manufacturers and distributors to exploit weak to non-existent surveillance, thereby placing affected domestic industries at a competitive disadvantage, (iii) is counter to the objective of promoting the integrity of a competitive marketplace and consumer protection, (iv) is inconsistent with ISED's stated policy and commitment in this current review exercise to make "… changes that will help the Competition Bureau better protect consumers and the integrity of the marketplace" and to better address the challenges of big data and digital markets; and, (v) as noted above, ignores the high costs of violations to consumers and other purchasers, and how non-enforcement harms the Bureau's reputation.

The protections provided by these three acts as well as by the deceptive marketing provisions of the *Competition Act* are especially important to women who are responsible for doing the majority of day-to-day shopping in Canadian households and in most other countries. As a consequence, these protections support the current efforts of the Competition Bureau, the OECD and other countries to make competition statutes and the functions, activities and strategies of competition authorities more gender inclusive, as explored in some detail by Ireland (2022d) in his recent research paper on more gender inclusive competition, consumer protection, product safety, privacy and other policy, legal and regulatory regimes.

Improve Transparency Through Detailed Performance Measurement and Reporting

Apart from the Canadian Bar Association, academics, politicians, and those who administer and enforce the *Competition Act*, Canadians are unfamiliar with competition policy and its contribution to a fair, competitive marketplace. By design or unintentionally, the Competition Bureau has distanced itself from ordinary Canadians and civil society and has failed to provide, on a regular basis, adequate value for money analysis and reporting to the public.

By contrast, the Bureau's American counterpart, the Federal Trade Commission, provides public reporting in a publication that gives detailed annual performance plans with strategic goals, performance targets, and performance metrics, and a detailed annual performance report with quantitative and qualitative metrics.[1] Many of these metrics relate to the FTC's quite extensive consumer protection responsibilities, including one metric that measures the "rate of customer satisfaction with the FTC's customer response center".

Successive Competition Commissioners typically lament the lack of funding, yet fail to provide detailed evidence to the public that the existing funds they are allocated from ISED are used efficiently and how consumer welfare has been advanced through stronger competition and inter-firm rivalry in conventional and digital markets that are both efficient and fair. Rather than expending resources on marketing, public relations, and multi-media campaigns as is the case currently, the Commissioner needs to provide clearer evidence to the public of value for money through reporting on the measurable and meaningful deliverables for consumers and other market participants, using the FTC strategic planning and reporting model.

In addition to providing meaningful performance reporting, greater efforts should be made to

establish relationships, coordination and collaboration with consumer organizations and other civil society groups as practiced in other advanced economies with competition and consumer protection agencies. This can only be done through experimentation and risk taking.[2] Some recommendations can be found in the free publication from the Consumers Council of Canada "Supercomplainers: Greater Public Inclusiveness in Government Consumer Complaint Handling."[3]

ISED may also wish to consider experimenting with establishing more formal methods to seek input on important competition policy and consumer protection matters and issues by carrying out hearings, and implementing an intervenor type model similar to CRTC hearings where balanced representation is encouraged and civil society groups including consumer organizations are invited to participate.

'Whole of Government' Approach to Develop and Implement Competition Policy

The Competition Bureau is the competition law enforcement agency which is, of course, a key element in implementing competition policy. The Bureau and its officials are influencers of competition policy in part through the design and implementation of the investigative, enforcement, deterrence, compliance promotion, outreach, education, and related policies needed to administer and enforce the *Competition Act*.[4] However, the *Competition Act* does not have the ultimate decision-making powers to change and reform competition policy.

The Department of Industry, Science and Economic Development (ISED) allocates resources for the Competition Bureau's operations but has very limited capacity to address competition policy as part of its Departmental responsibilities to set industrial and marketplace strategic policy. Nonetheless, any amendments to the *Competition Act* must ultimately be presented to Cabinet via the Minister of ISED.

Free advice, research and analysis is to be found in abundance from the Canadian Bar Association, large legal firms that concentrate on competition law cases, former high-profile Competition Commissioners, academics, and the business media. Yet, competition policy is exercised by the federal and provincial governments to an extent that well exceeds the limited capacities of the *Competition Act*, Competition Bureau, ISED, and private sector influencers. Multiple departments, crown corporations and agencies influence the conditions of competition through their exercise of regulatory authority or through the procurement process. An excellent overview and example of the extent of the 'whole of government' influence on competition policy in a modern democracy can be found in the July 2021 U.S. Presidential executive order on promoting competition in the American economy.[5]

The development of modern, outcomes-based, competition and consumer policy is essential to move Canada into a 21st century economy and the digital era. This is so vital that the opportunity offered by this review should not be wasted by focusing solely on granular amendments to the *Competition Act* and machinery of government matters, without taking the opportunity to address the much greater impact a whole of government approach to competition policy can have for the Canadian marketplace, economy, consumers and other market participants.[6]

After the reform process is completed, the government and Bureau should support research on whether, why and how the administration and enforcement of the new *Competition Act* would benefit from allowing private litigation for certain provisions of the Act, in light of the expanding interest in and use of private antitrust litigation in the United States, European Union, and some other competition law jurisdictions. This research should carefully consider the potential risks, costs and benefits of private antitrust enforcement for competition, consumers and smaller enterprises, based on experience elsewhere appropriately modified for the Canadian marketplace and competition environment.[7]

A Canadian Consumer Advocate to Support a Competitive Marketplace

In most advanced economies, competition policy and consumer policy are seen as complementary to each other. This dual approach is espoused by the OECD and in practice by regulatory authorities such as the Australian Competition and Consumer Commission, the US Federal Trade Commission, and the UK's Competition and Market's Authority. It is not inconsequential that consumer and public confidence in competition and consumer regulators is much stronger where this is the case. Competition authorities that view the public and consumers as simply the recipients and potential beneficiaries of their actions, as opposed to being key stakeholders and collaborators, miss important opportunities to improve the effectiveness of their policies and improve the public's trust in their competition policy regimes and the fairness and effectiveness of the outcomes of competition in their marketplaces.

In 2019, the Ministers of Industry, Seniors, and Middle-Class Prosperity were mandated by the Prime Minster to create a Canadian Consumer Advocate to provide a single point of contact for consumers needing help with their complaints about federally regulated banking, telecom, or transportation-related sectors. This marked an important inflection point where the federal government acknowledged federal regulators may be losing touch with consumers and the public in carrying out their mandates to provide a fair, competitive marketplace, and would benefit from oversight by an independent agency with powers to ensure consumer and competition interests and expectations are being met.

An extended form of this mandate for improved consumer protection frameworks for all sectors of the economy was proposed by the Consumers Council of Canada and supported by Canadians from every province and territory of Canada in the form of a certified House of Commons petition (e-3150) just prior to the dissolution of Parliament in August 2021.[8] Correspondence obtained through an Access to Information request confirmed that ISED officials were active in following this extended mandate approach by creating an advisory panel of Assistant Deputy Ministers from a wide variety of federal Departments that administer and enforce consumer-facing legislation.

The mandate to create a Canadian Consumer Advocate did not appear in mandate letters following the 2021 election. During a follow up enquiry to ISED on next steps for the Canadian Consumer Advocate initiative, the Council was informed by a senior ISED official that the initiative had been dropped and that "consumer protection and consumer interests are not an ISED priority".

Canadians and Canadian consumer organizations continue to believe that federal government attention to protecting consumers has eroded over the past several decades and consumers' voices are absent when important policy, regulatory and legislative decisions are made.[9] The current patchwork approach to consumer protection is a failing strategy as Canadians navigate increasingly complex markets dominated by international factors, corporate players, and powerful special interests in both conventional and digital markets.

In addition, corporate capture of the regulatory process is evident in policies and strategies currently being pursued by the Treasury Board Secretariat. This scenario is not isolated to Canada. The United States Congress is currently reviewing legislation that would create an Office of the Public Advocate, which would become the voice of the public in the rule-making process and have the core mission to "reduce corporate capture by increasing the influence of the public".[10]

The Council continues to advocate that Canada's progress in meeting future economic and social challenges lies in the establishment of an independent federal advocate[11] with a sole function to argue for consumers, support their voice through civil society, and stress the relationship of their needs to the decision-making processes within agencies of government – including ISED and the Competition Bureau.

Furthermore, as indicated at the end of section 2, the Council believes that the government, ISED and the Bureau should develop a greater understanding of, and consider implementing, the recent emergence and success of combined competition and consumer agencies elsewhere in the global economy, and the opportunities they provide for an enhanced institutional representation of the

consumer interest in Canada.

These models from other countries have significantly enhanced the competition and consumer protection investigative, enforcement and decision-making powers of such agencies as the Federal Trade Commission in the United States, the Australian Competition and Consumer Commission, the Competition and Markets Authority of the United Kingdom and, most recently, the Competition and Consumer Commission of Singapore, as well as the European Commission, which is very active on both competition and consumer issues albeit from separate directorates – see e.g. Jenkin and Ireland (2018), cited in the ISED November consultation document.

Council's Comments on the Role, Functioning and Purpose of the Competition Act

As described in the consultation scene setter (Government of Canada 2022c), the current purpose clause of the *Competition Act* seeks to: promote and preserve competition in order to foster economic dynamism and efficiency; support success of Canadian businesses in world markets; ensure a level playing field for small and medium-sized enterprises (SMEs); and provide consumers with competitive prices and product choices. The purpose clause of the Act has received considerable debate, discourse and contestation over the past nearly four decades and this debate will likely be amplified and become even more contentious during the consultation process. This final section will provide the Council's perspectives on this important question.

The February Bureau submission and the November ISED consultation document on page 12 contend that the Act's purpose clause should maintain its broad multi-objective outlook. The Council recognizes that statutes with multiple objectives can be more challenging to administer and enforce. Nonetheless, we also recognize that simple abstract objectives focused on 'total efficiency' and 'promoting the competitive process' may satisfy competition law economists and lawyers, but do not capture the complexity of the modern Canadian marketplace and the interests and concerns of Canadian consumers now and especially in the future.

In particular, focusing solely on efficiency is a non-starter for the Council. For example, a total efficiency and/or total welfare standard places too much weight on what are often dubious and spurious efficiency and innovation claims in mergers, horizontal collaboration agreements, unilateral conduct, abuse of dominant positions, and vertical matters, when there is strong evidence of higher prices, less quantity, lower quality products, more limited access, and other consumer, worker and small business harm.

Instead, the Council's concern is that total efficiency and the international competitiveness of Canadian firms and industries have been given too much emphasis in the administration and enforcement of the Act up to the present day, to the detriment of the other objectives in the purpose clause, especially those concerning the consumer interest and SMEs. As described in some detail in the Council's responses to questions 4, 9 and 11, and elsewhere in the previous section, these objectives should be given much greater attention throughout the major sections of the Act, as well as in the enforcement, deterrence, compliance promotion, education, outreach and other functions, activities and strategies of the Bureau. As well, the purpose clause and Bureau's interventions and other efforts to protect the consumer and enhance consumer welfare should better capture the many needs, interests and complexities of the modern Canadian consumer (Ireland 2021).

Consumer welfare and the consumer interest should therefore be more central to the Act's overall provisions rather than a passing reference in the purpose clause. Further, it should illustrate that consumer welfare and the consumer interest go well beyond more quantity and lower, more competitive, prices, to include high quality, innovative, safer, ethical and environmentally responsible goods and services, and related transactional and contractual matters consistent with the concept of competition that is both fair and efficient. The *Competition Act* had only one reference to the consumer,

in the purpose clause, up to the June 2022 amendments when, as noted earlier, consumer privacy was added to three sections of the Act.

In this regard, it is important to underline that promoting the consumer interest is not some sop to a special interest group. All Canadians are consumers in the marketplace and ensuring their interests are met is a powerful tool to use to ensure that competition and innovation happens in the Canadian marketplace. Put simply, the interests of consumers are competition and innovation enhancing.

The three new consumer privacy provisions, which increase the consumer references within the Act from 1 to 4, represent a good starting point and building block for the future, but consideration needs to be given to adding other consumer welfare and interest references elsewhere in the Act in order to counteract the impression of many that total efficiency is the only 'functional' purpose of the Act now and in the future.

As noted in the previous section, these additional sections and provisions would include:

- the efficiencies provision, especially if efficiencies become a competitive factor rather than a defence;
- bringing the consumer interest into the competitor collaboration provisions when these are widened and strengthened, as discussed under question 11; and
- making deceptive marketing practices and related deceptions, misleading advertising, production misrepresentation, and consumer frauds an explicit abuse of dominance and market power;
- such as in the new provision which condenses the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision – as in question 9, which in the new Act would perhaps correspond to some degree with provision 78(1) on definition of anticompetitive acts in the current Act.

The Council also believes that protections for small businesses should remain in the purpose clause, protections for workers should be added, and additional references should be provided throughout the Act regarding how small business, worker and privacy issues should be addressed under different sections of the Act.[12]

Furthermore, as noted previously, the purpose clause, as well as other sections of the Act, should more fully recognize that stronger competition and inter-firm rivalry, and greater product and vendor choice, are essential for making Canadian markets more efficient as well as fairer and more equitable for all market participants.[13] The imperative for the Competition Bureau and the federal government more generally to promote fair and efficient markets has a long history in Canada.

The concept of fair competition is being discussed greatly in the international competition policy community; and the promotion of markets that are both efficient and fair was in the CCAC mission statement, and at the outset in the *Department of Industry Act* of 1995. It was regrettably removed in subsequent revisions to the Act and its successors for reasons that are less than clear.[14]

Without product and vendor variety, choice and access, and especially fair and equitable access to essential goods, services, vendors and service providers as well as to competition policy and law agencies and policy makers, consumer sovereignty and empowerment in the marketplace are highly limited and essentially an empty vessel. It is essential therefore that the Act and its administration and enforcement fully recognize the essential role of the well-informed, proactive and empowered consumer, with significant voice and exit opportunities, in promoting fair competition, efficient markets, innovation, and a stronger and more competitive and productive Canadian economy.[15]

The 'whole of government' approach described in the previous section requires multi-disciplinary research including market studies and non-enforcement investigations by the Bureau from a distinctive Canadian competition, consumer and marketplace perspective on: (i) the inter-relationships and interactions between the different components of the purpose clause of the amended *Competition Act*

and other policy issues raised in the ISED consultation process; and (ii) the discourse in the international policy community on fair competition and fair and efficient digital and conventional markets. Some of the Council's suggestions regarding the issues and subject areas that require further study include the following.

Our first priority is discussed in the Council's response to question 20 including footnote 45. Based on previous research of the Council and its members – see for example Jackson and Ireland (2021) on the on-demand economy and consumer, we would give greatest priority to research on the distinctive issues and challenges posed by globalization, and more specifically the globalization of digital firms, platforms and markets, for the Canadian economy, marketplace, fair competition, innovation, and consumer well-being. As noted earlier, research on the interactions between competition, innovation and the digital markets from a Canadian perspective is very limited, and rarely focuses on the modern Canadian consumer.

Depending on research from other countries and jurisdictions when developing Canadian competition and innovation strategies, including the investigation, enforcement and deterrence strategies of the Bureau and other authorities in this country, is highly problematic. Research of the Council and from other sources have illustrated that Canadian consumers can be very different from consumers in our major trading partners and other countries; and the Canadian marketplace is also very different because of our federal system, very different economic, and social and political structures, environments and cultures, and Canada's 'incomplete' common market because of interprovincial trade and other barriers.

New Canadian research and studies should particularly focus on the essential role of the final consumer for promoting fair competition, innovation and a stronger and more competitive Canadian economy in a manner that provides significant and measurable benefits to final consumers, other purchasers, small businesses, workers, farmers, and other participants in conventional and digital markets.

The Council also believes that the government should adopt a forward agenda of multi-disciplinary research regarding how and why fair competition and consumer well-being in Canada would benefit from:

- How a more level playing field for small and medium sized enterprises provides final consumers and other purchasers with enhanced product and vendor variety, choice, access, control, empowerment, and consumer sovereignty.
- Greater understanding of the interactions in the Canadian marketplace between product, geographic, financial, digital, labour and other input markets, with emphasis on their implications for market definition, competitive effects, consumer and worker welfare/well-being, business entry, and other issues addressed in competition and consumer analysis including enforcement cases (Ireland 2018).
- And in-depth analysis on how the lack of competition in what the literature calls political markets, the excessive political influence of the more powerful and dominant corporate players, and regulatory capture, combined with the limited voice and influence of consumers and other civil society groups in policy making processes, can be translated into more concentrated markets and corporate power and dominance in product, geographic, financial, digital, labour and other economic markets in this country.[16]

The major lesson from recent research of Council members is that fair competition in product markets requires fair competition in all other markets including what the literature calls political markets where various corporations, civil society groups and other non-government actors compete for favourable and their preferred policies, laws, regulations and programs from government.[17]

The core issue for competition policy and law and the whole of government approach in Canada is to

more fully recognize that the people and groups – which are disadvantaged by market concentration, corporate power and dominance, and anticompetitive and non-compliant conduct within product, financial, labour, and other markets – are the same less powerful people and groups acting in their different roles and in different contexts as consumers, workers, small business people, farmers, small retail investors, voters, and/or citizens.

The reform of the *Competition Act* should take full account of these hard realities on the interactive and cumulative negative effects of corporate power and dominance in different market contexts, as described in this submission as well as in many sections of the Bureau's February 2022 submission and the ISED November consultation document. Two other common themes throughout this submission based on the research of the Council and its members should also be taken into account.

On the one hand, *Competition Act* reform should fully recognize that the final consumer is the major victim of the misconduct of large Canadian corporations and other firms as well as the poorly designed and enforced policies, laws, and regulations of government. On the other, *Competition Act* reform should also fully recognize that the well-informed, demanding, empowered and 'sovereign' final consumer is the major driver of competition, innovation and competitive and socially responsible firms in Canadian conventional and digital markets.

In this regard, as discussed throughout this submission, the government, ISED, the Bureau, the business community and other stakeholders should take full account of the interactions between fair competition, fair, equitable, and efficient markets, and the priority of the Canadian and many other governments to promote enhanced gender, ethnic minority and other forms of inclusion by means of their competition, consumer protection, and other policy, legal and other regulatory regimes. In many ways, competition policies, laws and authorities, especially those that also have consumer protection and privacy responsibilities, are better positioned than other framework laws and policy, legal and regulatory regimes to foster fairer and more equitable markets and gender and related forms of inclusion.[18]

To conclude, the Council is highly supportive of this ISED consultation process to reform the *Competition Act*. Our support is based in part because of growing concerns that current high government spending and increases in fiscal deficits and national and provincial debt are unsustainable. As a consequence, the well-being of consumers and other market participants will need to depend more in the future on major improvements and reforms to Canada's economic framework laws and related legal and regulatory instruments, as well as enhanced public understanding of and support for these laws and regulations, as well as compliance with and enforcement of them.

The ability of taxpayers' dollars to solve competition, consumer, worker, small business, inequality and related social problems is becoming increasingly constrained as we enter the post-COVID period. Nonetheless, as proposed by the Council throughout this submission, it is essential, as well, to provide the responsible agencies and authorities with the required financial and other resources, powers and capabilities to administer and enforce laws and regulations in a proactive, aggressive, effective, fair and transparent manner.

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Notes

Executive Summary

1. Canadian consumers are also facing the risk of stagflation, which for less prosperous consumers would represent high probability of unemployment and limited incomes and inevitable price increases in the coming years.

Consumers and the Competition Act: The Current Context

1. Canadian consumers are also facing the risk of stagflation, which for less prosperous consumers would represent high probability of unemployment and limited incomes and inevitable price increases in the coming years.

2. See for example, Conference Board of Canada, *Canadian Income Inequality, Is Canada Becoming More Unequal?* Available at: https://www.conferenceboard.ca/hcp/hot-topics/canInequality.aspx; D. Dodge, R. Dion and M. Horgan, *Growth in Real Household Income in Canada 1984-24,* Bennett Jones, June 2015, available at: https://www.bennettjones.com/Publications-Section/Updates/Growth-in-Real-Household-Income-in-Canada-1984-2024; D.A. Green, W.C. Riddell and F. St-Hilaire, *Income Inequality in Canada: Driving Forces, Outcomes and Policy*. (Montreal: Institute for Research on Public Policy, February 2017), available at: https://irpp.org/research-studies/income-inequality-in-canada/; Claire Brownell, "Canadian Median Income Growth Sluggish over Last 10 Years, Statscan Figures Show" *The Financial Post*, September, 13, 2017, available at: https://financialpost.com/news/economy/canadian-median-income-growth-sluggish-over-past-10-years-statscan-figures-show; Statistics Canada, *The Daily: Canadian Income Survey 2020*, released March 23, 2022, available at https://www150.statcan.gc.ca/n1/daily-quotidien/220323/dq220323a-eng.htm and Lars Osberg *The Age of Increasing Inequality: The Astonishing Rise of Canada's 1%,* James Lorimer Publishers, Toronto, 2018

3. Financial Consumer Agency of Canada, *Canadians and their Money: Key Findings from the 2019 Canadian Financial Capability Survey* available at: https://www.canada.ca/en/financial-consumer-agency/programs/research/canadian-financial-capability-survey-2019.html

See as well McDonald (2023) on CEO pay in Canada in 2021 hits a new high, which is partially explained by higher inflation in 2022; but a longer term factor is increasing market concentration in many product, labour, digital, financial and other markets, which also increase corporate revenues and profits leading to higher CEO bonuses, stock options and shares, and compensation packages and higher inequality.

CEOs and other senior managers in large powerful corporations are the major beneficiaries of anticompetitive mergers and other business practices that are not detected, investigated and sanctioned – as well as when the financial and other penalties of detected anticompetitive arrangements and practices are only a hand slap/small cost of doing business. Therefore, compared with the rest of us, corporate CEOs benefit greatly from both inflation and higher market concentration, which also adds to inflation.

4. Claire Fan, Nathan Janzen, Naomi Powell, "Low Income Canadians to feel sharpest sting from inflation, rate hikes" *RBC Economics*, April 22, 2022, available at: https://thoughtleadership.rbc.com/proof-point-low-income-canadians-to-feel-sharpest-sting-from-inflation-rate-hikes/ and Matt

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5. Including Jackson and Ireland (2021), Akman (2021), and Etro (2022).

Answers to the "Guiding Questions" in the ISED Consultation Document "The Future of Competition Policy in Canada"

1. See for example, in the bibliography, Cunningham et al (2020) "Killer Acquisitions"; Massolo (2022) and Bary and Lecole (2022) on mergers and other antitrust cases in big tech and a review of EU and national case law; and Bester (2022) on a merger policy for a dynamic and digital Canadian economy, which was published in September 2022, covers many of the same merger issues as the Bureau's February 8 submission, and is referenced in the Bureau submission eight times.

2. See Denise Hearn and Robin Shaban "The Hidden Trend Reshaping and Hurting the Economy: Serial Acquisitions. Mega-mergers get the ink, but Canada needs to evaluate its legislative and regulatory ability to deal with big companies swallowing small competitors," IRPP *Policy Options*, November 30, 2022 at https://policyoptions.irpp.org/magazines/november-2022/the-hidden-trend-reshaping-and-hurting-the-economy-serial-acquisitions/?utm_source=Policy+Options+Newsletter&utm_campaign=c68c5fd322-EMAIL_CAMPAIGN_2022_02_14_05_26_COPY_01&utm_medium=email&utm_term=0_26f66e24ce-c68c5fd322-104317983&mc_cid=c68c5fd322&mc_eid=9f5eb54878

3. This has been a recurring theme in the studies, webinars and conferences over the past five years on competition law reform and the potential need for ex-ante regulation in the EU, UK, US and other jurisdictions – see for example Marsden and Podszun (2020) on restoring balance to digital competition, sensible rules, and effective enforcement.

4. See for example Bourreau and de Streel (2019) on digital conglomerates, bundling and other strategies of envelopment that allow big tech platforms to envelop their smaller and often more efficient and innovative competitors in adjacent markets, raise entry barriers for innovating entrants, or soften competition by increasing product differentiation in an excessive manner.

5. The Council's perspectives are taking into account, as well, the arguments of pro-efficiencies defence proponents that in getting mergers done, the infamous efficiencies defence is way overrated. The Council concurs that the defence is badly overrated but for different reasons.

Counter arguments are that, yes, there are relatively few cases, but these cases are contested and provide weak precedents, case law and guidance to the Bureau, merger proponents, and other interested parties, and appeared to give the Tribunal major difficulties, such as for Superior Propane where the welfare analysis was questionable. The efficiencies defence is also out of line with virtually all other jurisdictions leading to potential inter-jurisdictional problems and conflicts regarding cross-border mergers where Canada would be the outlier and likely loser in these conflicts.

One implication from this research is that removing the defence will likely not involve throwing out good case law, learning and guidance from previous cases. And finally a competition law, which can benefit powerful companies and rich shareholders at the expense of less prosperous consumers, small businesses and other purchasers, is a hard sell to the general public and is clearly inconsistent with the *Act*'s current purpose clause. Therefore, removing the efficiencies defence would be expected to increase public interest, understanding, approval and support for the reformed *Competition Act*.

Finally, in his article on antitrust balancing, the highly esteemed antitrust scholar Hovenkamp (2018) contends as follows. "In the rare event that balancing is necessary, courts should be aware that unless

they have specific, quantifiable amounts to attach to competitive threats and offsetting gains, they are in hazardous territory. For that reason the courts should get out of the business of "balancing" abstractions, such as the impact on competition against the rights conferred by the patent system. Values such as these are impossible to balance, except when they are so lopsided that little more than a casual observation is needed to determine that one is more significant than the other.…

"Balancing requires values that can be cardinally measured and weighed against each other. The factors that are supposedly balanced in *Sherman Act* cases almost never fit this description. Even if the things requiring balancing did come in cardinal units, most times the courts would not have the tools necessary to make and apply the measurements. Instead, balancing approaches are usually binary rather than cardinal. They are more like off and on switches that go in one direction or the other" (Hovenkamp 2016).

These balancing challenges could be one reason why the efficiencies defence was not adopted by other jurisdictions; and other studies have suggested that the Tribunal faced similar problems when attempting to "balance" negative competitive effects against the efficiency, synergy, and innovation claims of merger proponents when the efficiencies defence was employed.

6. Council members have personal experience with the merger integration challenge after the merger is completed. Two of many sources on the post-merger integration challenge and problem are Johannes Gerds, Freddy Strottmann and Pakshalika Jayaprakash (2010) "Post Merger Integration: Hard Data Hard Truths, Deloitte Review Issue 6; and Melissa E. Graebner, Koen H. Heimeriks, Quy Nguyen Huy and Eero Vaara (2017) "The Process of Postmerger Integration: A Review and Agenda for Future Research" *Academy Of Management Annals*, 2017, Vol. 11, No. 1, 1–32 at https://eprints.lancs.ac.uk/id/eprint/82813/1/Process_of_post_merger_integration_annals_2014.pdf

Furthermore, in the very recent CIGI study on merger policy for a dynamic and digital Canadian economy, Bester (2022) describes "a recent retrospective study of merger policy in the European Union from 1990 to 2018 … [which found that] the required efficiencies to offset estimated consumer harms from price increases were likely too large to be achievable through mergers (Affeldt et al. 2021)." These findings are fully consistent with previous US, EU etc. studies on the same subject.

7. See as well Ross (2022a:3-4) who has a footnote on the following key source on this question: Ralph A. Winter "Tervita and the Efficiency Defence in Canadian Merger Law", 28 *Canadian Competition Law Review* 133 (2015) (offering "three general criticisms" of the *Tervita* standard) at http://blogs.ubc.ca/rawinter/files/2019/06/Tervita-CanCompLR_28-2_2015_02_Winter.pdf

And Chiasson and Johnson (2018) on the efficiencies and inefficiencies defence, and the potential for the economies of scale and scope and related efficiencies and innovation effects associated with large corporate size to become the X-inefficiencies of large and powerful firms of Leibenstein (1966).

8. There are many excellent references to the structural and related presumptions in the Bureau February submission and the ISED November consultation document such as on how structural presumptions, applying the American approach to rebuttable structural presumptions, and shifting the burden of proof to merger proponents and other defendants, would simplify and expedite merger review (the Bureau submission). Furthermore, the later ISED document describes how "legislators are turning to the possibility of preventive rules or presumptions applied to dominant firms or platforms, with respect to both acquisitions and business practices such as self-preferencing and data use, rather than conducting extensive economic analyses in each case" (ISED document page 35 and Wolfe and Mhlanga 2022:18-19).

9. The Bureau's adventures with the Rogers-Shaw merger, which was approved by both the Competition Tribunal and most recently the Federal Court of Appeal, can be expected to strengthen the rationale and arguments in favour of employing the structural presumption and making other reforms discussed above to the merger review provisions of the *Competition Act*.

issues raised by this merger relevant to merger review reform under the Act are that: (i) the merger would decrease the number of major national competitors in the Canadian telecom market from four to three; (ii) Canadian cellphone bills and wireless mobile prices are very high compared with most other more advanced OECD economies including Australia, which faces similar geographic and low population density challenges; and (iii) whether economies of scale and scope and related efficiencies and innovation benefits that may result from the merger will be shared with merged entity's customers in the form of lower prices, higher quality services, better and more reliable access, enhanced privacy protection, and so on, and better and more accessible service delivery to more vulnerable and disadvantaged consumers, customers and users including in rural areas and smaller communities.

These and other issues suggest that the cellophane fallacy discussed earlier in this sub-section of the submission could be relevant to this and other mergers and acquisitions in Canada's often highly concentrated goods and services markets. See:

Pete Evans' "Court rejects Competition Bureau's appeal to block Rogers' takeover of Shaw – Only thing standing in way of deal now is ministerial approval" *CBC News* January 24, 2023 at https://www.cbc.ca/news/business/rogers-shaw-appeal-court-1.6724045

Government of Canada "Statement from the Commissioner of Competition on the Federal Court of Appeal's decision regarding the Rogers-Shaw merger" From Competition Bureau Canada, January 24, 2023 at https://www.canada.ca/en/competition-bureau/news/2023/01/statement-from-the-commissioner-of-competition-on-the-federal-court-of-appeals-decision-regarding-the-rogers-shaw-merger.html which provides access to earlier associated Bureau links

Jennifer Quaid "Rogers-Shaw decision sets a worrying precedent for future takeovers" Special to *The Globe and Mail*, January 4, 2023 at https://www.theglobeandmail.com/business/commentary/article-rogers-shaw-decision-important/

Katie Pederson, Virginia Smart and David Common "Why are Canadians' cellphone bills higher than other countries?" *CBC News Marketplace* January 13, 2023 at https://www.cbc.ca/news/business/marketplace-high-cell-phone-bills-1.6711205

And the Andrew Coyne article on the same subjects reviewed in some detail in footnotes in section 4 of this submission on the "whole of government" approach to competition policy and law reform.

10. See Samanth Subramanian "A Bad Formula: America's addiction to monopolies caused the baby food shortage" *Quartz* and *Competition Policy International*, May 18, 2020 at https://qz.com/2167097/americas-addiction-to-monopolies-caused-the-baby-food-shortage/

"The US' vast shortage in infant formula has one immediate cause: the suspension of operations in an Abbott Laboratories plant in Michigan earlier this year, after samples of a lethal bacteria were found in it. But beyond that lies a bigger structural problem plaguing the American economy: a tendency for many sectors to be controlled by a few companies, or even just one."

The Council anticipates that merger review in the US and elsewhere will give greater attention to industry resilience and consumer access to essential goods and services in the future. Canada should be ready to do the same. Other essential goods and services based on recent pandemic experience would include children medicines, and protective equipment for healthcare workers as well as for families.

11. See for example Averitt and Lande (2007) on the "consumer choice" approach to antitrust law that goes beyond price and efficiency to encompass choice, variety, innovation, product quality, limited information and search costs, and other forms of non-price competition – which would require identification of specific industries and markets for which lower market concentration and greater choice and variety are especially important to consumers (page 191).

Moreover, the recent very strong expansion in the on-demand economy and other digital markets suggests that the consumer choice approach would also encompass convenience, immediacy, time

savings, privacy and personal security, and greater consumer, independence, control and empowerment (Jackson and Ireland 2021). See as well Leotti et al (2010) on the interactions between choice and control, which illustrates how greater choice can increase consumer satisfaction, sovereignty, empowerment, and well-being.

12. See Ireland (2018) especially Appendix C, and the many excellent references to labour market competition and anticompetitive activity in the ISED November consultation document. Council members also noted with interest the Bureau consultation process on seeking new guidance regarding the June 2022 amendments on wage fixing and non-poaching agreements, and are looking forward to the opportunity to review the findings from the process from the perspective of their implications for the well-being of consumers and workers, who as noted in the main text are typically the same person.

See Government of Canada "Competition Bureau seeks feedback on new guidance related to wage fixing and no-poaching agreements," Competition Bureau of Canada, January 18, 2023 at https://www.canada.ca/en/competition-bureau/news/2023/01/competition-bureau-seeks-feedback-on-new-guidance-related-to-wage-fixing-and-no-poaching-agreements.html

13. In this submission, the term *regulated entities* is defined broadly to encompass firms of all sizes and types: incorporated and unincorporated firms and smaller firms/micro-enterprises including firms in the informal sector; as well as industry, trade, professional and other associations; business and enterprise groups and networks including production networks, supply and value chains, and digital platforms and eco-systems; and for some regulatory regimes individuals acting on their own as final consumers, voters, taxpayers, workers, and so on.

14. See for example Munyai (2019) on competition law and corporate social responsibility, and a review of the special responsibility of dominant firms in competition law – "with great power comes great responsibility." Social psychology research on power and the powerful illustrates that many powerful leaders and their organizations understand and accept this greater responsibility while many others do not – see Keltner (2017) on the power paradox and Ireland (2022b).

15. See for example Church and Ware (2000:617-618) on antitrust markets, monopolization cases, and the cellophane fallacy also known as the cellophane fallacy or trap. This competition issue emerged from an American antitrust case of the 1950s regarding cellophane, a Dupont product, and other wrapping materials. The major lesson from the this Dupont case and subsequent economic studies on the cellophane fallacy, criticizing the court's decision in favour of Dupont, is that, for dominance, monopoly and merger cases, competition agencies, tribunals and courts should use competitive prices as the reference point for their analysis, not prevailing prices that can reflect the market power of one or more firms in the relevant market and their coordinated and other anticompetitive conduct.

As market concentration increases in digital and more conventional markets in Canada and elsewhere, the cellophane fallacy may become increasingly relevant to enforcement cases under competition laws and other regimes with competition responsibilities and effects. See as Philip Nelson (2007) "Monopoly Power, Market Definition and the Cellophane Fallacy," Economists Incorporated at https://www.justice.gov/sites/default/files/atr/legacy/2007/03/27/222008.pdf – "Avoiding the Cellophane Fallacy: Market definition must be based on substitution at competitive prices, not monopoly prices."

16. See page 33, 37 and 42, as well as footnote 86 on page 35, in the ISED November consultation document, and Ireland (2019) on the increasingly crowded, complex and dynamic digital marketplace, which has become even more crowded, complex, and dynamic during the COVID pandemic period.

17. See ISED November consultation document pages 43-44 on the scope of civil enforcement. This section also addresses the challenges of detecting other forms of anticompetitive collaborations:

"One notable area that the Bureau has highlighted for a number of years is that of patent litigation settlement agreements in the pharmaceutical industry, or so-called "pay for delay" arrangements between patent-holders and generic manufacturers." Reforms that address and remedy this and related forms of anticompetitive collaborations would also be supported by the Council and its members.

18. Studies, conferences and webinars over the past three years have illustrated that North American competition policy and law practitioners are less enthusiastic about separate ex-ante/anticipatory and more prescriptive rules and regulations for digital platforms, firms and markets compared with their European counterparts (see for example Competition Policy Council 2021).

19. For the EU's DMA proposal and legislation see https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

And for a more recent primer on the Act and discussion of the enforcement challenges, see https://www.csis.org/analysis/european-unions-digital-markets-act-primer and https://www.bruegel.org/blog-post/insights-successful-enforcement-europes-digital-markets-act

Regarding the United Kingdom's competition regulatory regime for digital markets and the work of the UK's new Digital Markets Unit (DMU), an overview is provided by Aniko Adam and Shruti Hiremath at Clifford Chance on July 26 2022 in their article for *Thomson Reuters Practical Law* at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/07/uk_competition_regulatory_regime_digital_markets.pdf

See as well the draft consultation paper of the Competition Bureau of Canada (2017) on big data and innovation, and the implications for competition policy in Canada.

20. See: Factors to be considered 4(b) page 110 under abuse of dominance "the effect of the practice on price or non-price competition, including quality, choice or consumer privacy" (b) Factors to be considered (g.3) page 119 under agreements or arrangements that prevent or lessen competition substantially "any effect of the agreement or arrangement on price or non-price competition, including quality, choice or consumer privacy" and (c) Factors to be considered for mergers (g.3) on page 124 which now reads "any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy."

21. Including fair contracts and effective consumer complaint handling and consumer redress – see Consumers Council of Canada (2022) on a renewed more consumer-centred approach to telecommunications policy.

22. The abuse of dominance section of the current *Competition Act* encompasses any anti-competitive act that is: "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." The Council anticipates that, for most enforcement cases that involve these anti-competitive acts, the structural presumption would likely be highly relevant and helpful to the Bureau.

This perspective could be particularly true for price and other forms of predation where recoupment would be more likely and easier for dominant firms in an oligopoly market, which for example have already developed a strong reputation for price-cutting, winning price wars, and successful price predation in the past -- see Hemphill and Weiser (2018) on the competition law challenges of predatory pricing.

23. See as well Kovacic (2007) on competition policy, consumer protection, economic disadvantage, poverty reduction and the larger human dimension of competition policy and law.

24. See Ireland (2019) for a very preliminary and now out-of-date pre-pandemic review of the literature on what the increasingly crowded, complex and dynamic digital marketplace means for competition, consumers, and policy, legal and regulatory frameworks.

25. See Kramer Levin "Car Emissions Case: First Sanction of an Anti-competitive Agreement on Technical Development by the European Commission." December 6, 2021 at https://www.jdsupra.-com/legalnews/car-emissions-case-first-sanction-of-an-9421384/#:~:text=12%2C%202021%2C%20the%20European%20Commission,clean%20exhaust%20-gases%20generated%20by

26. See the EU Horizontal Cooperation Guidelines at https://eur-lex.europa.eu/legal-con-tent/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN and https://ec.europa.eu/info/law/bet-ter-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation

The Dutch competition authority (ACM) produced a guidance document on sustainability, competition law, and sustainability agreements at https://www.acm.nl/sites/default/files/docu-ments/2020-07/sustainability-agreements%5B1%5D.pdf

And the Competition Bureau's Competitor Collaboration Enforcement Guidelines of May 6, 2021 during the pandemic at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04582.html

See as well Jones (2020) on cartels in the time of COVID; and Holmes (2022) on sustainability, competition policy and an overview of EU and national case law

27. See Fasken *Competition Chronicle* Dec. 6, 2022 on "Competitor Collaborations – The Way Forward" at https://www.competitionchronicle.com/2022/12/competitor-collaborations-the-path-for-ward/

28. See ISED November consultation document pages 34, 36, and 43.

29. See ISED November consultation document page 46.

30. The Council fully supported these proposed deceptive conduct reforms that were described in detail in the earlier Bureau February 2022 submission; and has questions about why these proposals were not incorporated explicitly into the ISED November consultation document. More generally, section six on deceptive marketing in the earlier Bureau submission has a more detailed and fulsome discussion of the competition and consumer harms from deceptive conduct compared with the much briefer two-page section on deceptive marketing in the later ISED consultation document.

The Council's expectation is that these earlier proposals, including on higher monetary penalties and other stronger remedies to address and mitigate deceptive conduct violations, will be incorporated into future research and policy analysis as the consultation and reform processes proceed to the amendment stage. As deceptive marketing practices go global in the digital age, weak remedies that represent a hand slap and a minor cost of doing business for large digital and conventional firms, platforms and other regulated entities, are clearly not sufficient. The Council will be pleased to contribute to further research and policy analysis on these deceptive marketing issues, based in part on the digital consumer insights offered by the Council's recent study, funded by the Office of Consumer Affairs in ISED, on the on-demand consumer and economy (Jackson and Ireland 2021).

31. Information on the Bureau's website indicates that the following guidelines have been published and are now being applied by the Bureau with the date of publication in parentheses: *Precious Metals Marking Act* and Regulation (2006), Accuracy Requirements for Net Quantity Declarations (1999), Labelling of Textiles for Businesses (2007), Textile Labelling and Advertising (2003), Labelling of Stuffed etc. (2019), Telemarketing (2009), and Environmental Claims 2008 – information taken from

https://ised-isde.canada.ca/site/competition-bureau-canada/en/publications#wb-auto-4

The Council's major concern is that dated and no guidelines provide too much latitude to Bureau staff and legal interpretations regarding what constitutes deceptive practices when certain new deceptive

marketing practices emerge, while the business community and other interested parties such as consumers associations are not being provided with sufficient information and guidance on these new 'red lines' on deceptive marketing practices.

32. See Wynne (2020) and Ireland (2022a, 2022b, 2022c, and 2022e).

33. For example, there is growing political and public interest in the United States regarding how competition/antitrust law can be deployed to better protect the interests and well-being of the American family farms and farmers. See the Carstensen references in the bibliography on buyer power, the problems that American farmers and ranchers are facing when marketing their products, and why monopsony is not simply the mirror image of monopoly, and buyer power is often more consequential and harmful.

See as well Max M. Miller (2020) "America Needs Farmers and Farmers Need Better Antitrust Law," *CPI Antitrust Chronicle*, Competition Policy International (CPI); Assistant Attorney General Office of the Iowa Attorney General, January 2020 at https://www.competitionpolicyinternational.com/wp-content/uploads/2020/01/CPI-Miller.pdf

34. See Bernstein and Whinston (1990) on multi-market contact and collusive behaviour; Matsushima (2001) on multi-market contact, imperfect monitoring, and sustaining implicit collusion; and Klein et al (2019) on coopetition, multi-market contact, market entry, and how cooperation affects competitive dynamics between rivals in the airline industry.

One might expect that multi-market contact, coopetition/the mix of competitive and cooperative behaviour, and implicit, tacit, and more explicit collusion, joint dominance, and other forms of cooperative anticompetitive conduct, would be quite prominent and profitable in digital markets and economies. However, Google Scholar searches did not identify any academic and policy studies that explicitly assess multi-market contact and the risk of collusion in the digital space.

35. See Ireland (2020) on the true and full opportunity costs of non-compliance for regulated entities.

36. See as well Jones and Kovacic (2020) on American experience with similar competition policy and law regime institutional challenges, including; (i) judicial resistance to change and preferences for the status quo, (ii) designing effective remedies under a new enforcement strategy, (iii) political and public backlash and how opposition to legislative reforms can continue from some special interest groups even after the reformed and amended statute has been approved by the legislature and implementation has begun, and (iv) government failures to provide competition and other authorities with adequate additional human, financial, technical, and statutory responsibilities and powers – see as well pages 5, 51 and 54 of the ISED November consultation document, with similar references in the earlier Bureau February submission.

37. See pages 49 and 51 of the ISED November consultation document and Webb (2004 and 2005).

38. See for example https://www.canadiandiamondcodeofconduct.ca/EN-consumer-information.php

https://www.retailcouncil.org/scanner-price-accuracy-code/

https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-labelling-and-advertising-pet-foods

https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/environmental-claims-guide-industry-and-advertisers

39. The potential benefits and challenges from private enforcement are captured very well in a paragraph on page 53 of the ISED consultation document. "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.… It may also lessen the effect of any strategic litigation on public resources. At the

same time, changes in this regard would have to be designed to avoid unmeritorious or strategic litigation, or an unmanageable number of actions for the Competition Tribunal or courts to process."

40. See Jackson and Ireland (2021), footnote 21 on page 11 of the ISED document, and page 53 of the same document which states that "the absence of public information on the conduct of digital platforms and the functioning of digital markets is a challenge for effective advocacy as much as enforcement, where grounds for an inquiry may not easily arise in the absence of critical information voluntarily provided by a source in possession of it."

More generally, the Canadian academic and policy communities have conducted many impressive studies and research programs on innovation and technological development in Canada, but limited research and policy analysis has been done from a Canadian perspective on the interactions between competition and innovation and the links between competition and innovation policies and other legal regimes such as intellectual property rights in this country.

An important exception from the distant past is the 1998 book edited by Robert Anderson and Nancy Gallini on competition policy and intellectual property rights in the knowledge-based economy. While more recent contributions from a Google search are provided by the Bureau's draft discussion paper for pubic consultation of 2017 on big data, innovation and the implications for competition policy in Canada; and Denise Hearn "Lack of competition blunts Canadian innovation" IRPP *Policy Options* February 24, 2022 at https://policyoptions.irpp.org/fr/magazines/february-2022/competition-hurts-innovation-canada/

For the most part, Canadian governments, the Competition Bureau, and the Canadian competition policy and law community have depended on the extensive research conducted elsewhere especially in the US and EU. See for example Shapiro (2012) on competition and innovation. Kenneth Arrow hit the bulls-eye about how competition policy can best promote innovation, comparing American studies on the apparently very different Arrow and Schumpeter perspectives on competition, market and monopoly power and innovation, which according to this article are not as different as generally believed – see as well Katz 2021, and Katz and Shelanski (2005 and 2007) which was cited quite often in the Shapiro (2012) paper.

Canadian authors are, therefore, often forced to tailor these insights from other jurisdictions to the realities of the Canadian marketplace, federal system, very different economic, social and political structures and environments, and 'incomplete' common market. Stronger information collection and market studies powers under the *Competition Act* would help the Bureau and the country's competition policy and law and innovation communities to fill this research and policy gap regarding competition and innovation in Canada in the digital age as we enter the increasingly interconnected and networked post-COVID period (Wynne 2020).

The expectation of the Council and its members is that the interactions between competition, innovation, and intellectual property rights, and the implications for consumers, smaller business and other market participants, are very different in Canada compared with for example much larger competition jurisdictions such as the US and EU.

Comments and Suggestions of a More General Nature

1. Federal Trade Commission Annual Performance Report for Fiscal Year 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023 at https://www.ftc.gov/system/files/ftc_gov/pdf/21apr_22-23app.pdf

2. Recent media reports suggest that the current Commission of Competition in Canada is aware of the transparency and related concerns raised by the Council in this section and elsewhere in this submission.

See Joe Castaldo "Competition commissioner says reform needed to shake up Canada's 'concentrated economy,' oligopolies" *The Globe and Mail*, Published December 22, 2022 at https://www.theglobe-andmail.com/business/article-competition-bureau-commissioner-matthew-boswell/

3. See https://cccshop.consumerscouncil.com/ca/Consumer-Representation/c/3214/Super-Complainers-Greater-Public-Inclusiveness-in-Government-Consumer-Complaint-Handling-[EPUB]/p/139702

4. See for example Competition Bureau of Canada "Bulletin Corporate Compliance Programs" June 3, 2015 at https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/corporate-compliance-programs and https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/cb-bulletin-corp-compliance-e.pdf for the PDF version.

5. See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

Carrier (2023) on the right to repair, competition, and intellectual property, which was an important issue in the Presidential executive order of 2021.

Andrew Coyne "Corporate Canada has been protected from competition for too long. It's time to put consumers first," *The Globe and Mail*, January 20, 2023 at https://www.theglobeandmail.com/opinion/article-corporate-canada-has-been-protected-from-competition-for-too-long-its/

This article implicitly adopts a whole of government approach through emphasizing how public policies at the federal and provincial levels have impeded and continue to impede competition, innovation and consumer welfare in Canada. The article also discusses the role of inter-provincial trade barriers, which has often been addressed by the Bureau over the past nearly 40 years.

Previous research conducted by Council members illustrated how Canada has a much weaker and more incomplete common market than the European Union comprised of sovereign states. The article concludes by reminding readers that consumption is, as Adam Smith put it, "the sole end and purpose of all production," and that therefore "the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."

6. It should be noted that the Cartels and Deceptive Marketing Practices Branch and its predecessors within the Bureau have a long history of using a whole of government approach including for cross-border consumer frauds and scams.

See for example: Federal Trade Commission "U.S. and Canadian Authorities Strengthen Partnership To Combat Cross-Border Scams During National Consumer Protection Week" February 3, 2006 at https://www.ftc.gov/news-events/news/press-releases/2006/02/us-canadian-authorities-strengthen-partnership-combat-cross-border-scams-during-national-consumer for which the partners were the Federal Trade Commission , the United States Postal Inspection Service, and the Postal Service's Consumer Advocate, the Royal Canadian Mounted Police, PhoneBusters and Canada's Competition Bureau.

And Royal Canadian Mounted Police "Fraud Prevention Month raises awareness after a historic year for reported losses," February 28, 2022 at https://www.rcmp-grc.gc.ca/en/news/2022/fraud-prevention-month-raises-awareness-a-historic-year-reported-losses for which the partners are the Canadian Anti-Fraud Centre (CAFC), the RCMP and the Competition Bureau.

7. See for example Crane (2019) on a realistic comparative assessment of private antitrust enforcement; and Lande and Davis (2017) on restoring the legitimacy of private antitrust enforcement.

8. See https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-3150

9. See for example Ireland and Webb (2007) and Jackson and Ireland (2021).

10. See Mathew Kent and Amit Narang "How to end corporate capture of the regulatory process," *The Hill*, February 9, 2022 at https://thehill.com/blogs/congress-blog/politics/593594-how-to-end-corporate-capture-of-the-regulatory-process/

11. See the Council document "Time for a Real Federal Consumer Advocate" at https://cccshop.consumerscouncil.com/ca/Consumer-Representation/c/3214/Time-For-A-Real-Federal-Consumer-Advocate-[PDF]/p/156609

12. Similar arguments are made in PIAC (2021).

13. See for example Huck et al (2012) and Flammer (2013) on how and why competition can foster trust and corporate social responsibility; and the expanding literature on the importance of consumer and purchaser trust to business success in digital markets.

14. The departmental legislation for ISED continues to be the *Department of Industry Act* of 1995 which was last amended on June 17 2019. In the amended version, there are no references to fair and efficient markets, fair competition and fairness, and references to the consumer within the now ISED Act are limited largely to the transfers of powers, duties, functions and authorities from the previous Department of Consumer and Corporate Affairs, with one important exception: (i) "promote the interests and protection of consumers", which is the last objective under the Objectives section of the Act – see as well Ireland and Webb (2007) on consumer protection through free markets, small government and individual responsibility.

15. See Averitt and Lande (2007); Inesi et al (2011 and 2012) who make very strong behaviorally informed arguments that, without choice and highly valued alternatives, individuals have no control and power in their market relationships, transactions and other interactions. No or limited consumer choice means the vendor or producer has essentially all the power. The importance of market fairness is recognized to some degree in the ISED November consultation document, which has one reference to fair competition and 18 references to fair or fairness.

See as well Hirschman (1970) on exit, voice, loyalty and how people respond to declining performance by firms, other organizations and nation states. Without opportunities for both exit and voice, consumers and other less powerful actors and groups have limited control, power and sovereignty.

16. Research of Council members and other policy analysts underline the need for more open, inclusive, polycentric, shared accountability and sustainable competition and other policy, legal and regulatory regimes in Canada, which provide much stronger participation, influence, voice and empowerment for consumers associations and other non-business civil society groups – see the Coyne article earlier in this section and Ireland (2022a, 2022b and 2022e)

17. See Ireland (2022b Appendix G); and the footnote reference earlier in this section to the very recent Andrew Coyne article on how government policies are major impediments to fair competition and consumer welfare in Canada. This article and many other sources suggest that the whole of government approach to promoting competition in Canada needs to include the negative and positive effects of other government policies at the federal, provincial and municipal levels, as discussed throughout this section.

18. See for example PIAC (2021:12-13), which argues persuasively that prioritizing efficiency over other objectives within the purpose clause, design and enforcement of the *Competition Act*, and deferring, relying on, and in a sense out-sourcing other economic and social objectives to other policy, legal and regulatory instruments is totally unworkable and inconsistent with broader trends within the international competition policy and law community.

While as noted earlier in this submission, the OECD with significant support from the Competition Bureau and other competition authorities, are placing increasing emphasis on gender inclusion as well as related forms of inclusion and discrimination and gender-based analysis, when designing, administering and enforcing their competition and related policies, laws, regulation and rules.

See for example Ireland (2022d) which reviews the OECD and other research and related insights on gender inclusive competition, consumer protection, product safety, privacy and other policy, legal and

regulatory regimes.

And the excellent OECD website on its gender inclusive competition policy project at https://www.oecd.org/competition/gender-inclusive-competition-policy.htm downloaded on January 12, 2023, which: (i) indicates that this "project has been launched with the support of the Canadian Government and in particular the Canadian Competition Bureau to develop guidance for competition agencies in this area"; (ii) indicates that a key activity from Q3 2021 onward is the development "of a toolkit or guidance for Canadian and any other interested competition authorities;" and (iii) provides easy access to the many state-of-the-art research studies and other deliverables from this very important international project.

References

1. This is one paper in the excellent online *Policy Options* series/edition on "Recalibrating Canada's Consumer Rights Regime" of June 2018 at http://policyoptions.irpp.org/magazines/june-2018/recalibrating-canadas-consumer-rights-regime/

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The e-periodical serving
Canada's consumer protection and empowerment sector.

This is Exhibit "B" referred to in the Affidavit of Don Mercer of the Town of Ladysmith, in the Province of British Columbia, sworn before me on December 15, 2025, at the City of Toronto, in the Province of Ontario in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

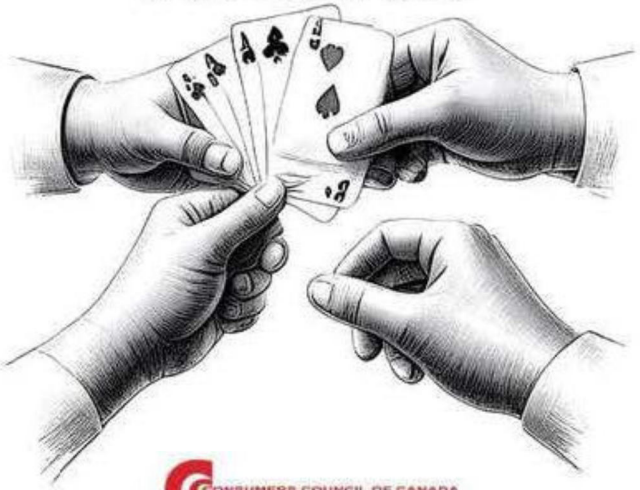
Commissioner for Taking Affidavits (or as may be)

Patricia Kim Son, a Commissioner, etc.,
Province of Ontario, for
Sotos LLP, Barristers and Solicitors.
Expires September 3, 2027.

ANNUAL REPORT OF ACTIVITIES

2024-25

PLAYING THE HAND AS DEALT

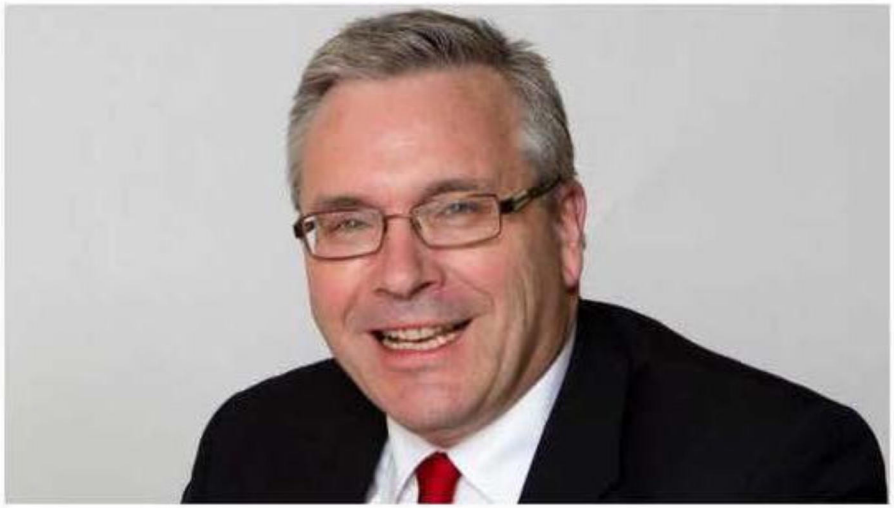


CONSUMERS COUNCIL OF CANADA

Contents of This Report

President's Report

It's Time for Consumers to Play Their Strong Suit



Chris Ballard, President, Consumers Council of Canada

With grocery store prices, rents, housing prices, and cost of credit and insurance up sharply during 2024, many Canadian consumers felt this year they were dealt a very weak hand of cards to play.

During the year gone by, more consumers in Canada felt their sense of safety and security in the marketplace decline, observed their privacy eroding, received mixed signals about businesses' and their own responsibility to protect the environment, and worried about or struggled to meet their basic needs.

For example, with their anxiety heightened by price inflation in most categories of the household budget, thousands of people from every corner of the country joined the Council's Public Interest Network to share their views with us about what's going right and wrong for them at the grocery store.

The Council has not witnessed such an instant surge of grassroots participation in a decade.

Reports in news media were no cause for cheer, either.

Sad accounts of online- and telephone-instigated frauds, large-scale privacy violations and tepid responses to them by authorities, rampant misinformation, home maintenance misconduct, vehicle odometer fixing, tow truck industry violence, medical services extra-billing, lack of public transit supply and reliable service, and so on, did not add happy news to the bad news of rising prices. And then came the conduct of what many Canadians see as the duplicitous, deal-breaking United States, which turned "tariff" into a widely loathed word.

As our reporting year ended, the news from south of the border only worsened, as the value of reciprocal agreements with the United States for each others' consumer protection began circling down the drain.

As Canada's member of Consumers International, we can report consumer activists around the world – including the United States – are going to red alert.

Canada, itself, sized up the threat, and led with a King.

If there has ever been a time when those active in representing the public or trying to do so need to stand shoulder to shoulder with advocates for consumer protection and empowerment, then this ought to be it. But, so far, it is not.

It's not that no interest exists to make the marketplace fairer for Canadians; but so far governments have shown low interest in consumer protection and business leaders seem firmly focused on sandbagging against the gathering storm. Enabling consumers to defend or stand up for themselves gets more lip service than action, even where the largest line items in most household budgets are involved. It's hard to say how the idea "the consumer is mostly wrong" will work out as a builder of consumer confidence or the economy.

Everyone seems distracted from the work that needs to be done to assess the consumer impacts of existing or proposed public policy and marketplace stewardship and to fix well-known problems.

So what have been some of the consequences?

- Low preparedness for a major pandemic, experts warned could happen, and low evidence of a focus on lessons-learned
- Sharply higher retail prices, especially for groceries and other life essentials
- Massive risks to homes and property due to widely predicted climate events
- New forms of predatory lending or problematic lending practices
- Housing shortages, soaring prices for shelter, and a major miss on building homes that meet contemporary needs
- Financing risk for highly leveraged home owners
- Lack of automobile ownership affordability, masked by problematic financing offers
- Widespread worries about the fairness of energy prices and reliable supply from the monopolies that deliver us natural gas and electricity, whether private or public sector
- Food safety incidents, leading to death and injury
- Higher incidents of impaired driving, with related deaths, as distribution of 'controlled substances' has been liberalized
- Hallway medicine
- Overwhelmed modes of transportation

- Missing, declining and badly organized public services
- Broken and altogether missing paths to timely consumer redress and restitution

And that's just to name a few,

Major foreign threats exist, too, but these can be said to be 'Made in Canada'.

As an advocacy organization, research organization and public educator, the Council and its expert and engaged members have always devoted their time to working constructively to help governments and business listen, to bridge divides and to help search for paths to consumer confidence. However, our organization observes that more and more, business and government are fading as subscribers to key principles of consumer protection.

And, sure, governments will write laws, but do they give them teeth?

Have business and governments enabled speedy restitution for cash-strapped consumers when they are wronged? Not really.

Consumers have told the Council they are short of holding a deuce, much less a full house, when it comes to being able to lodge a consumer complaint that will receive a timely response, much less restitution.

As this report demonstrates, Council members volunteer countless hours to the very hard work of representing consumers. Some successes are achieved for consumers, as a result, but even that can trigger swift action by dominant special interests to then unravel those reforms.

Sadly and too often, business and government "innovation" agendas seem to manipulate or 'game' consumers rather than serving them better.

Consumers in Canada urgently need to recognize that for at least the immediate future they must invest in protecting themselves, by preparing financially as individuals and through public engagement via organizations like the Council, ready to work for them collectively.

Consumers Council of Canada is appreciative of the effort thousands of Canadians have made recently to join its Public Interest Network or share their experiences through its website.

The Council is even more appreciative of those who will support its fact-finding and idea generation by purchasing and subscribing to its publications and by making a free-will payment for publications offered for no charge.

And something Canadians could do, which they have not done traditionally, is to make a simple direct donation. Due to past efforts by some to exercise control over free speech by charities, the Council is not organized as a charity. But as a not-for-profit, its independence can be assisted by small donations.

Our organization survives due to its social enterprise and the goodwill of Canadians.

The Council urges Canadians to join in supporting us in any ways they can, including:

- Read our free news blog and Apple News™ Channel.
- Join our Public Interest Network for free.
- Find out what the PIN thinks – subscribe to our questionnaire results.
- Make a small financial contribution.
- If you have expertise to lend, apply and become a member-volunteer.
- If you are an academic researcher, register and report your consumer interest research to us.
- If you are a professional committed to consumer protection and empowerment and a better marketplace for consumers, subscribe to our e-periodical written with you in mind, *Think Consumers*.

Our point is simple, if you want a fairer, better marketplace, then supporting and engaging with Consumers Council of Canada is a choice to make.

Play the cards on the table.

This year's report is a record of challenges faced and achievements, many by our committed, capable and knowledgeable members and network of consultants who do much with so little.

Give them a hand.

Chris Ballard
President

Current Research

Consumers Council of Canada actively promotes and conducts research into consumer protection and empowerment.

Homeowner awareness and willingness to address climate change risk

The Council's researchers have been exploring homeowner attitudes and understanding of climate change, the potential risks to their homes from weather extremes, and solutions they recognize. The resulting report, accessible to the public for free through the Council's online content store and to members and subscribing stakeholders through their logins, catalogues weather-related home damage and document measures homeowners can adopt to increase the resiliency of their homes and manage their risks. Importantly it consulted home owners to learn their views about factors influencing them to work on the climate resiliency of their homes. The report and its executive summary is available in both English and French.

The On-Demand Consumer Update

The Council successfully published the OCA-funded research project *The On-Demand Consumer Update* in the late Spring of 2024. This research duplicated the national web panel survey portion of the previous research post-pandemic marketplace, to provide an opportunity to compare and contrast current post-pandemic consumer views with those measured previously. This report is also available online to the public and to members and subscribing stakeholders through their logins.

Consumer Perspectives on the Effectiveness of Regulatory 'Name and Shame'

This research will lead to a report later in 2025 on 'name and shame' as an enforcement tool, by conducting a literature review studying its history, current practices and implementations by selected federal and provincially-designated regulatory bodies, as well as a 2,000n web panel survey to determine consumer awareness, attitudes and experiences concerning 'name and shame' enforcement.

Significant Capacity Development Initiative

Mobilizing Consumer Protection and Empowerment at the Grocery Store

In 2023-24, Consumers Council of Canada responded to a public call by Office of Consumer Affairs (OCA), Innovation, Science and Economic Development Canada (ISED), for proposals aimed at gathering consumer perceptions about opportunities to improve the marketplace for groceries in Canada.

The household budgets of Canada's consumers have been hit hard by price inflation of every major life necessity.

One area of rising concern for Canadians has been finding best value when shopping for groceries. Common trading practices of grocery retailers are generating rising concern among Canadian consumers.

Inflationary pressures in general are reportedly driving rising numbers of people to turn to food banks.

Then Minister of Innovation, Science and Industry François-Philippe Champagne has announced the formation of a "grocery task force" within OCA and ISED. A Council member is serving independently on that task force.

The Council answered OCA's call with a proposal aimed at capacity development of itself and of Canada's consumer movement as a whole, animated by shoppers' present high level of concern about their treatment when grocery shopping. The Council's proposal was selected for funding through ISED's Contributions Program for Non-Profit Consumer and Voluntary Organizations.

Progress of the Initiative

In late 2023 and early 2024, the Council began the foundation work necessary to convene and then facilitate an independent Consumer Interest Advisory Panel of consumer organizations and other experts to work on defining the consumer interest of Canadians in the grocery shopping experience.

The Council also has conducted questionnaires with its Public Interest Network, and undertaken a 4,500-participant national web panel survey administered by Environics, which is publicly available online and to members and stakeholders through their logins.

Two *Think Consumers* special reports on grocery sector consumer issues were published, available to subscribers but also the general public.

Modern, Multi-platform Methodology

In addition to the work to better understand the grocery marketplace and collaborate with experts and other consumer groups on ideas and recommendations for its improvement, this project has included other important capacity-building features and leveraged a moment of high consumer concern to build relationships with the expert community, the public and the international consumer movement, which has likewise been engaging in a worldwide instance of rising food prices and consumer concerns.

Through the use of a modern, online, asynchronous consultation facilitation platform the Council has offered convenient participation across Canada's time zones and geography.

More Direct Public Participation

At year end, the project and its budget for social media promotion had already helped multiply participation in the Council's Public Interest Network by a factor of nine. And another similar effort will be mounted later in 2025. Thousands of Canadians have made a connection to the consumer movement through the Council's Public Interest Network to share their concerns about grocery shopping. And these newly registered participants have already significantly boosted the number of Canadians providing their input to the Council on other consumer interest topics.

Enhances Role as a Consumer Interest Publisher

The initiative is also helping the Council to strengthen its role as a news provider to the public through its news blog, free public Apple News™ Channel and *Think Consumers* subscription e-periodical serving the consumer protection and empowerment professional community.

Globally Aware Consumer Representation

Importantly, the Council, as Canada's only civil-society member of Consumers International, has linked together consumer organizations internationally with this initiative. This has added to its understanding of the global groceries supply and retail businesses and the commonalities and differences of consumer experience among consumers in some other major industrialized countries, in particular Australia and New Zealand.

Key Subjects Considered

Some key subjects elucidated and discussed so far have been:

- Grocery Industry Practices, including:
  - Unit Pricing
  - Shrinkflation
  - Skimpflation
  - Food Fraud
- Checkout & Payment
- Complaints & Redress
- Theft

- Shopping Tools for Empowerment of Consumers

The Council will issue an interim report on the work to-date this summer before proceeding with a final segment of work looking into consumer perspectives of grocery shopping at alternatives to the major grocers.

While Consumers Council of Canada has received funding from Innovation, Science and Economic Development Canada's Contributions Program for Non-profit Consumer and Voluntary Organizations, views gathered or expressed in the course of this work will not necessarily be those of Innovation, Science and Economic Development Canada or of the Government of Canada.

Policy Development & Representation

The Council's Consumer Policy Committee provides policy recommendations, guidance and advice to the Council's President, Executive Committee and Board of Directors on issues of importance to consumers that align with and advance the Council's Strategic Objectives. Submissions to federal and provincial consultations are drafted and/or vetted by the committee or its working groups before release to the public.

Policy Submissions 2024-25

- **September 2024. Response to the Department of Finance's consultation paper, "Proposals to Strengthen Canada's Financial Sector."** The submission addresses key issues that impact Canadian consumers and emphasizes the need for a robust, competitive, and consumer-centric financial sector.
- **September 2024. Response to the public consultation on the Competition Act's new anti-greenwashing provisions.** The Council's submission supported the new law but encouraged the Bureau to follow the lead of competition authorities in other advanced economies to develop comprehensive guidelines for business and consumers and take a 'whole of government' approach.
- **November 2024. Credit Cards and Their Impact on Consumers.** The Council made submission to the House of Commons Standing Committee on Industry and Technology in support of the Committee's current study investigating the impact of credit cards on consumers in the current Canadian marketplace.

Consumer Representation

Members of the Consumers Council of Canada represent consumers across the Canadian economy and internationally.

Council members are active representing consumers in a wide range of roles and forums. Much of this work is unpaid volunteer work. The Council is recognized as an experienced contributor to many important public processes that enable consumer protection. Where possible, it participates in international forums, in recognition of the impact globalization has on consumer protection and empowerment everywhere.

With limited resources, the Council unfortunately declines many important requests to consult, but nonetheless maintains an ambitious agenda of working for a better marketplace for Canada's consumers.

Standards

Consumer Representatives in Standards Committee

The Consumer Representatives in Standards Committee (CRISC) was revived in August/September of 2017. Committee members are Council members who are highly experienced professionals and active as consumer representatives on national and international standards committees such as:

- International Organization for Standardization (ISO)
- International Consumer Product Health and Safety Organization (ICPHSO)
- Canadian Standards Association (CSA)
- Canadian General Standards Board (CGSB)
- Underwriters Laboratories of Canada (ULC)
- Consumers International
- National and Ontario Building Codes

CRISC endeavours to assist in promoting the Canadian consumer interest in the creation of technical standards, especially those developed to support the implementation of Canadian laws and public policies developed at all levels of government. Members also engage in policy forums on the application of standards, including to market surveillance and enforcement and accreditation and conformity assessment schemes. It seeks to influence the development or revision of Canadian legislation related to products and services that are likely to affect the consumer, including where reference is made to standards.

CRISC supports Council's objectives by:

- Identifying, reviewing, and describing, needs for consumer interest advocacy in standards development;
- Providing an institutional interface with standards organizations;
- Providing a forum for the Council's members engaged with standards development and developing best practices and training for consumer representatives in standards;
- Working toward the improvement of relationships between the Council and organizations involved with the development of standards;
- Helping to developing the financial and human resources necessary for the Council to participate effectively in standards development and operate the committee;
- Supporting Council priority identification for engaging with the development of standards and for development of its relationships with standards organizations;
- Advocating for meaningful engagement of independent role players for the consumer perspective and interest in the development of standards; and
- Making known the Council's involvement in standards development.

Activities Overview

CRISC members continue to hold leadership and member roles on some of the most timely and influential national and international standards committees including, but not limited to, the following:

- Chair and Vice-Chair of SCC's Mirror Committee to ISO's Consumer Policy Committee and member of all four of COPOLCO's working groups and Chairs Advisory Group.
- Vice-Chair and member of several CSA technical committees on residential heating and cooling systems, residential housing depressurization, and residential ventilation requirements.
- Leadership roles on several ISO standards under development to address privacy, the circular economy, sharing economy, graphical symbols, food waste, ethical labelling, environmental labelling (anti-greenwashing), aging societies, vulnerable consumers, security and resilience, trade in second-hand goods, and consumer product safety.[1]
- Member of CGSB standards committees on organic food, genetically engineered food, and responsible business conduct for Canadian companies operating abroad.
- A CRISC member continues as the Council-appointed consumer representative to the National Research Council's Advisory Council to the Harmonized Code Development System under the Canadian Board for Harmonized Construction Codes.[2]
- CRISC members have been active 'bringing home' ISO standards on

accessibility and privacy by design with the objective of influencing domestic accessibility and privacy policies and is a member of Office of the Privacy Commissioner's Civil Society Roundtable.[3]

- A CRISC member was appointed to convene the ISO committee to revise ISO 14021 which addresses the accuracy of self declared environmental claims and is a key reference standard for the Competition Bureau and regulators in other countries enforcing anti-greenwashing laws. The same member is active contributing to standards under development by the international Responsible Jewellery Council, ISO standards on food safety and food loss and waste and was appointed by iSO Secretariat to attend training pilot training sessions in South America as a mentor to trainers wishing to groom new consumer representatives to participate in standards development.

Financial Services

Ombudsman for Banking Services and Investments

The Council recently joined the informal consumer group that provides feedback to the Ombudsman for Banking Service and Investments on its strategic directions and operations. A meeting was held November 28, 2024 via videoconference.

The meeting was significant as it was the first one of its kind since the OBSI formally took over responsibility as the **sole** External Complaints Body for consumers of federally regulated banking services. The Council has advocated for nearly a decade towards the objective of a single consumer complaint taker for banking, now achieved.

Previously banks were able to use private sector, for profit, complaint handling companies to deal with complaints that could not be resolved internally, and a number of major Canadian banks used such private companies. As a result, the volumes of complaints that will be handled by OBSI will dramatically increase from November 2024 onwards. OBSI also handles complaints from consumers of investor services.

In 2024, OBSI opened more than 3,200 cases, an all-time high, reflecting both more banking complaints and a surge in the numbers of investor complaints. Despite the rise in cases OBSI reduced the time it took to close cases, and while it doubled its budget dealing with complaints over the previous year, in anticipation of increased complaint volumes, the number of cases it handled grew by 400%.

Enquiries from consumers in 2024 were 16,420 and are expected to rise to 20,000 by the end of this year. Of the enquiries, 12,124 concerned banking issues and 2,112 concerned investments. Of the just more than 3,200 actual complaint cases opened in 2024, up somewhat from the previous year, over 2,500 concerned banking issues and 650 concerned investment issues. While the investment cases were quite diverse in nature, the banking issues were worrisome in that the leading complaint issue by far involved fraud, at close to 1,000 cases, followed by service issues (554), chargeback issues (167), financial product disclosure/misrepresentation (142), and interest rate charges (112).

Clearly, 2025 will be an important transition year for OBSI as its role in handling consumer banking complaints will clearly grow due to the expansion of its mandate. Its role in handling investment complaints will likely also change depending on the outcome of consultations by the Canadian Securities Administrators to provide OBSI with binding authority to resolve most investment cases. As with telecommunications services, it will be interesting to see over the coming years what the nature of the complaints data that OBSI reports on will reveal about the systemic problems for consumers in the use of banking and investment services.

High-Interest Lending

The Council, through repeated submissions to federal legislative and regulatory reviews, has successfully sought curbs on marketplace conduct by high-interest lenders, where combinations of rates and add-on fees have led to extraordinarily high borrowing costs for some borrowers.

The government has passed legislation to lower the criminal rate of interest, and set a new national limit on payday loan charges.

The Council now awaits action to make sure the new law is effective and for provinces to adapt their laws and regulations to its provisions.

Institutional Representation

Financial Consumer Agency of Canada

Consumers Council of Canada sought to rejoin the Financial Consumer Agency of Canada's Consumer Protection Advisory Committee after an absence from it. Council Vice President Michael Jenkin has since been selected to join the membership of the committee when it next meets.

A long-standing concern of Canada's consumer and investor rights organizations has been the lack of funding necessary to provide for the thoroughness of preparation required to make opportunities like the CPAC meaningful ones.

While representatives involved with the Council have assumed responsibilities like this one as volunteers, those volunteers can add much more value to the process when backed by professional, independently organized support, to assist them with their work. This should be one of the benefits of having committee members associated with consumer organizations.

Payments Canada

Payments Canada (formerly Payments Canada Association) operates the core of the Canadian payments system connecting financial institutions, other payment service providers, merchants and consumers together throughout Canada and as well to the international payments system. It is a public purpose corporation authorized by legislation developed and administered, following Parliamentary enactment in 1980, by Finance Canada. The Payments Canada enabling legislation requires two bone fide consumer representatives be members of the legally mandated Stakeholder Advisory Council.

The Council's representation of a strong consumer perspective at the Payments Canada Stakeholder Advisory Council is now resulting in important changes to the payments system to move in the next year to a centralized recourse system for payment errors whether made by consumers or financial institutions and other

payments service providers. It is meant to cover, also, circumstances in which financial institutions and/or payment service providers ought to have known a consumer was dealing with a fraudulent actor in the marketplace and failed to alert consumers in a timely fashion, so that a payment could not be fraudulently taken.

This is especially important as Canada moves towards 'open banking' (also referred to as 'consumer led banking') in which consumers will come under pressure to disclose their financial account information to merchants in order to have a more seamless payment experience, and also to gain access to the 'real time rail,' which will enable instantaneous and irrevocable payments.

While this real time rail and open banking will be marketed by various financial institutions in different ways, it will be important that trust in the payments system be protected by having a robust recourse system when something goes wrong.

There is now a recognition in Canada that payor and payee financial institutions as well as payment service providers must share responsibility to make retail consumers – all Canadians, Canadian residents and immigrants – whole should they be harmed by payment errors (not encompassing buyer remorse) or by fraud.

Along with this responsibility comes a need for a centralized recourse system with one ultimate payments ombudsman and a set of rules that all financial institutions and payment service providers must follow in recognition that a payment is a payment is a payment and that the method for resolution needs to be known and consistent across all payments systems, providers and consumer circumstances.

An important achievement of the past two years has been the institution of twice annual joint meetings between Payments Canada members (that is financial institutions) in the Payments Canada Member Advisory Council and the members of the Stakeholder Advisory Council.

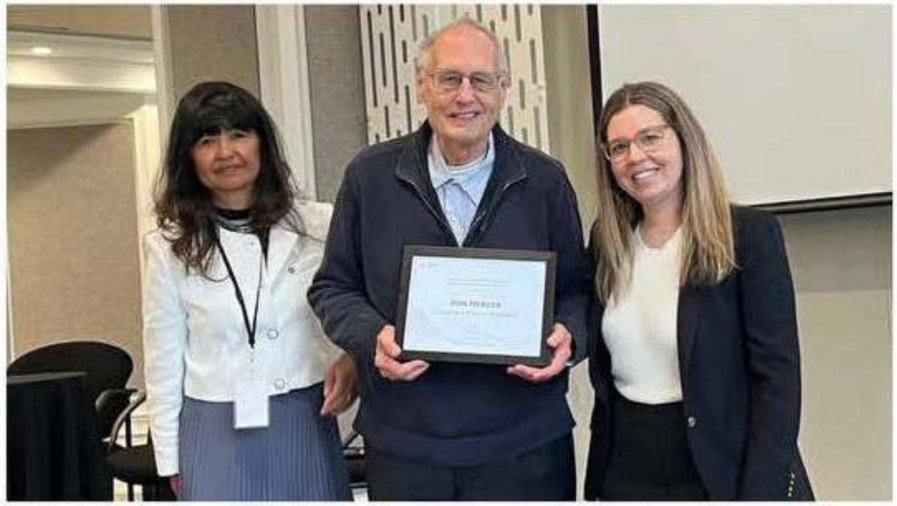
These meetings are designed to ensure stakeholders, including those offering consumer perspectives, are brought directly to member institutions. Consumers Council of Canada has pushed for these joint sessions for some time. They have brought awareness of need for centralized recourse system for fraud and payments errors to the fore and not as afterthoughts.

Fortunately, some steps can be taken without further legislative change, which can take time. However, to bring all needed changes to full fruition, some legislation to enhance necessary authority may be required. This issue is certainly now in the focus of federal and provincial policy makers to resolve. The issues surrounding payments involve federal, provincial and territorial jurisdictions, so it has been important that the necessary discussions and related work take place in a timely fashion.

The Department of Finance wisely instituted FinPay – the Finance Canada Payments Consultative Committee –several years ago, to keep updated about the needs of a modern payments system and the means to supervise it. This Committee enables the department to stay abreast of developments and emerging legislative requirements as the payments system is modernized in stages that started in 2014/15.

Don Mercer, Past President of Consumers Council of Canada, has continued to represent the Consumers Council of Canada on both the Payments Canada Stakeholder Advisory Council and at FinPay.

Payments Canada recognized the long service of Don Mercer as representative of Consumers Council of Canada at the Stakeholder Advisory Council (SAC) in a surprise presentation to him on May 5 2025. Don will leave SAC at the end of October 2025. The Council has nominated Council Vice President Michael Jenkin as his replacement.



Don Mercer being recognized at Payments Canada

The following are issues emerging from the FinPay and Advisory Council forums and subjects of the Payments Canada annual Payments Summit:

- **AI agents making purchases on behalf of consumers.** At present, human intervention is needed to initiate payment once an AI agent chooses products or services. However, much work is being done by well-known high-tech companies to enable purchases without human intervention. The building of this AI agent infrastructure is already being deployed within various sandboxes – regulatory 'carve-outs' created to permit experimentation and testing. The possible consequences for personal privacy are enormous, not only because personal data is gathered for the necessary machine learning without people's knowledge, but also because biases can be introduced into AI-driven systems, which could harm consumers.
- **Data privacy is at risk.** Data is being stored outside Canada and therefore outside Canada's jurisdiction to protect it. This could make consumers' ability to control their own data more problematic. With the emergence of the Trump administration in the United States, concerns have risen. A solution is localization of data: that is, ensuring data is stored in Canada or relocated to Canada. Bringing this about is challenging globally not only for Canada. As well, the Canadian Privacy Commissioner has a legal framework to provide some protection but has no legal penalty framework except for failure to cooperate in its investigative work. This negatively impacts potential collaboration with international authorities.
- **Risks to trust in the payments system arising from privacy breaches and**

fraud, when Canada moves to consumer-led banking. The risks of fraud grow exponentially if robust protections are not enabled in a timely fashion. The adoption of the U.K.'s approach, in which both the payor and payee financial institutions must make consumers 100% whole in the event of fraud, could play a significant role in maintaining trust in the payments system.

- **Efforts to reduce fraud and abuse in international payments will require coordination and cooperation among national governments.** This is an upcoming area where focus will be needed to ensure protection and redress for consumers in dealing with payment errors and fraud in these transactions. Eventually a new set of treaty arrangements will be required and the Council will need to consider how it can be at the forefront of the related issues going forward.

Finance Canada Payments Consultative Committee

Don Mercer, immediate past-president of Consumers Council of Canada, has served as a member of FinPay, Finance Canada's Payments Consultative Committee.

FinPay advises Finance Canada on public policy, including legislation needed to ensure payment safety, innovation, consumer protection, meeting user needs as well as ongoing challenges and opportunities.

Open banking is much discussed at FinPay, because of the potential impacts of innovation in this area on public trust in the system of payments.

Financial Services Regulatory Authority of Ontario

Council member Harvey Naglie has served as vice chair of the Financial Services Regulatory Authority of Ontario's (FSRAO) Consumer Advisory Panel (CAP). More recently Council Vice President Michael Jenkin has participated in an open session hosted by the panel via video conference, also.

In Ontario, FSRAO regulates:

- Property and casualty insurance
- Life and health insurance
- Credit unions and caisses populaires
- Loan and trust companies
- Mortgage brokers
- Health services providers (related to auto insurance)
- Pension plan administrators
- Financial planners and advisors

The CAP has continued to serve as a vital advisory body to FSRAO in 2024–25, offering a consumer perspective on regulatory and policy initiatives. The panel's activities focused on amplifying consumer voices, influencing FSRAO's strategic direction, and addressing emerging challenges in Ontario's financial services landscape.

Key Activities and Engagements

- The panel held five official meetings with FSRAO staff and two Policy Lab sessions, where consumer-focused feedback was solicited on early-stage policy ideas.
- CAP maintained six topic-specific working groups, targeting areas such as vulnerable consumer protection, outreach partnerships, unclaimed deposits, financial professional title protection, mortgage product suitability, and insurance sales practices.
- The panel hosted a Consumer Advocate Meetup, bringing together advocacy organizations and regulators to foster collaboration and discuss consumer protection challenges.
- CAP submitted seven responses to FSRAO's public consultations, including a detailed submission on FSRA's Proposed 2024–25 Statement of Priorities.

Impact and Recommendations

- The panel's recommendations led to enhancements in FSRAO's consumer awareness campaigns, with a particular focus on reaching underserved populations, including those without digital access. The Panel encouraged FSRAO to partner with MPP offices and use non-digital media, such as radio and public television, to broaden outreach.
- CAP raised concerns about the use of artificial intelligence and data by regulated sectors, urging FSRAO to address technological risks and ensure robust consumer protections in this evolving area.
- The panel influenced FSRAO's approach to enforcement under principles-based regulation, advocating for clearer rules and guidance to ensure both consumer and industry understanding of regulatory expectations.
- CAP's input resulted in tangible improvements, such as clarifying mortgage product suitability guidance, enhancing the Financial Planner/Advisor Check Credentials Tool, and refining FSRA's public warning notice strategies.

Reflections on Service

Harvey Naglie reports that serving as Vice-Chair of the CAP during 2024–25 has been both challenging and rewarding. The Panel's collaborative work with FSRAO management and staff has helped promote the principle that consumer interests must remain central to Ontario's financial regulatory framework. Through active engagement, evidence-based recommendations, and a commitment to outreach, the Panel has advocated for a more responsive and inclusive approach to consumer protection. Looking ahead, CAP remains dedicated to supporting FSRAO's mandate and strengthening consumer confidence in Ontario's financial services sector.

Competition & Trading Practices

The revisions to the *Competition Act,* proposed in Bill C-59 last year, passed.

The revisions reflect many of the opinions received in the call for public comment dating back to 2022, including those offered the government by the Council, which urged legislation more similar to that of other nations.

The Competition Bureau received much of what it sought to strengthen enforcement powers. Already the Bureau has announced a series of market studies and launched

some actions to address drip pricing and some dubious land covenants restricting the use of real estate by retail stores.

The changes are intended to make more mergers subject to review, mergers easier to challenge, and allow the Bureau to halt mergers while interim injunctions are in play. Higher market shares (market concentration) can be used to oppose mergers. Merger reviews will also be able to consider the impact on competition in labour markets.

Following 2022 changes that allowed private access for abuse of dominance applications, the new bill expands the ability of private litigants to bring claims under deceptive marketing and anti-competitive agreements. The net effect is that private parties will be able to pursue claims under every major enforcement area of the Act, apart from merger review.

Penalties and sanctions are higher as well. Businesses may need to divest assets, and pay penalties up to 3 per cent of gross revenues as part of the new remedies. Private actions can result in penalties as well.

A greenwashing provision allows statements about a product's benefits to the environment to be challenged similar to other misleading advertising claims.

The 'right to repair' provision will expand to allow either the Commissioner or a harmed person to ask the Competition Tribunal to order a supplier to provide the means to diagnose or repair a product.

The changes would also limit the cost awards against the Commissioner unless certain circumstances apply.

The revisions also extend 'whistleblower' protections and add a ban on 'reprisal actions' to stop organizations from punishing those who communicate with the Commissioner or assist investigations.

The Council's successful submissions and representation has been led by members Derek Ireland, Jay Jackson, Michael Jenkin and Don Mercer.

Food & Groceries

Consumer anxiety over rising grocery prices and grocery industry trading practices came to a head in 2023-24. The House of Commons Standing Committee on Agriculture and Agri-Food conducted extensive hearings concerning grocery price inflation. And the Competition Bureau issued a major market study of the grocery industry.

At that time, the Standing Committee embraced the Council's position and recommended the government pursue implementation of unit pricing at retail, which was the subject of a 2019 report by the Council, *Unit Pricing: Time for a National Approach*.

Since then, the Quebec government moved to tighten up its already existing regulation of unit price presentations, and it increased compensation to consumers who encounter higher prices at checkout than advertised in-store.

So far, other provinces have not followed suit. The Retail Council of Canada has yet to modify the national voluntary code it administers in the rest of Canada to match Quebec's stronger terms and conditions. This despite evidence the Council has collected demonstrating that, by a wide margin, Canadian consumers favour mandatory unit pricing standards and find the present RCC's voluntary code is poorly understood and implemented.[4]

Energy

Ontario Energy Board Representation

The Council regularly participates as an intervenor in Ontario Energy Board (OEB) natural gas and electricity utility rate applications representing the interests of residential consumers. In addition, the Council participates in the OEB's consultation processes and policy reviews that deal with a wide range of issues relevant to electricity and natural gas regulation.

The Council's principal representatives at the OEB are Julie Girvan and Lawrie Gluck. The Council's supervising committee is its Energy Committee, consisting of Rae Dulmage, Michael Jenkin and Don Mercer.

The following sets out the major applications and policy reviews that the Council was involved in over the last year.

Electricity

Natural Gas

Enbridge Gas Inc. – Rates 2024-2028 (Phase 2):

On April 26, 2024, Enbridge Gas Inc. (EGI) applied to the OEB for approval related to certain proposals that were not addressed in Phase 1 of its 2024-2028 Rates proceeding. These proposals related to certain performance metrics, the energy transition technology fund, the treatment of certain storage costs, the manner in which rates would be updated each year from 2025 to 2028, and the procurement of renewable natural gas (RNG) supplies. A portion of the case was the subject of a Settlement Agreement in which the parties agreed on a number of key issues. This process was followed by a lengthy oral hearing to consider all of the unsettled issues.

The Council participated in the hearing and made a number of submissions for the OEB's consideration:

- The OEB should not change EGI's performance metrics with respect to meter reading
- The OEB should not allow EGI to true-up cost variances resulting from changes in customer count
- The OEB should approve a significantly smaller RNG program than proposed, which better balances the costs of the program with the benefits.

The OEB's decision on Phase 2 of EGI's 2024-2028 Rates proceeding is still pending.

Enbridge Gas Inc. – 2024 Gas Supply Plan Consultation

On March 26, 2024, Enbridge Gas Inc. (EGI) filed its 2024 Gas Supply Plan (GSP) Update for the OEB's consideration. EGI's GSP is updated annually and the annual update filing provides information about material changes to the procurement of natural gas and related transportation contracts year-over-year. The Council

participated in the consultation and generally had no concerns with the updated plan. However, the Council provided recommendations regarding the provision of additional cost information at the time of the 2025 Five-Year GSP filing to allow for a more in-depth review of EGI's decision to continue contracting on the Vector Pipeline in the future.

In its comments on the 2024 GSP Update, the OEB decided that the 2025 Five-Year GSP will be addressed by way of an adjudicative process (whereas previously all GSP reviews were addressed through consultations). The OEB also agreed that additional cost information associated with Vector Pipeline contracting is to be provided in EGI's 2025 Five-Year GSP as was requested by the Council.

Enbridge Gas Inc. – 2023 Deferral and Variance Account Disposition

On March 31, 2024, Enbridge Gas Inc. (EGI) filed an application seeking approval to dispose of its 2023 deferral and variance account balances. Full settlement was reached between intervenors and EGI on all issues in the proceeding. The most significant change resulting from the settlement was an $7 million reduction ($32 million reduced to $25 million) to the balance to be collected from ratepayers in a deferral account that records costs associated with incremental pipeline locate costs.

The OEB's decision on the settlement proposal is still pending.

EPCOR Natural Gas Limited Partnership – Aylmer Service Area – 2025 Rates

On July 18, 2024, EPCOR Natural Gas Limited Partnership (ENGLP) filed an application for approval of its 2025 rates, which were proposed on a cost-of-service basis. Full settlement was reached between intervenors and ENGLP on all issues in the proceeding. The result of the settlement was a decrease in the bill increase as proposed from $78/year (or 6%) to $51/year (or 4%) for residential customers. The OEB accepted the settlement proposal in its entirety.

Other Proceedings:

Ontario Energy Board – Generic Hearing on Cost of Capital

On March 6, 2024, the Ontario Energy Board (OEB) initiated a generic proceeding on its own motion to consider the cost of capital parameters and deemed capital structure to be used to set rates for electricity transmitters, electricity distributors, natural gas utilities, and rate-regulated electricity generators (Cost of Capital proceeding). Prior to this review, the OEB last reviewed the methodology for calculating the cost of capital parameters in 2009. The cost of capital has a very significant impact on rates. As an example, a change of 100 basis points (across all Ontario regulated utilities) to the return on equity component is valued at more than $400 million.

The proceeding dealt with all aspects of the cost of capital (i.e., cost of debt and return on equity). The Council recommended only small changes to the manner that the cost of debt is calculated. The Council's arguments largely focused on the return on equity. The 2025 return on equity using the existing methodology established in 2009 was approved on an interim basis at 9.25% and we argued that this should be reduced to 7.1% on a final basis. The utilities, through their various associations, argued for an increase ranging from 10%-11.08%. In its Decision and Order, the OEB determined that a small reduction to the 2025 return on equity from 9.25% to 9.00% was appropriate. The ROE will be updated each year on the basis of a formula that is essentially unchanged from the formula used since 2009. The OEB also made very limited changes to the manner in which the deemed cost of debt is to be calculated.

Non-Quick Start Generation Group – Market Rule Amendment Review Application

On November 7, 2024, the Non-Quick Start (NQS) Generation Group (which represented a number of natural gas-fired generators owned by various companies) filed an application requesting that the OEB revoke a number of amendments made to the market rules by the Independent Electricity System Operator (IESO). The amendments made by the IESO were required to operationalize the Market Renewal Program (MRP) to evolve Ontario's electricity market. The Council made the argument that supported the amendments to the market rules as these amendments were designed to provide benefits to consumers through a more efficient and cost-effective IESO-administered market. The IESO estimated that the MRP benefits will amount to $975 million over 10 years at an estimated cost of $233 million. In its Decision and Order, the OEB denied the NQS Generation Group's application and maintained the market rule amendments made by the IESO.

Other Initiatives:

Adjudication Modernization Committee

Julie Girvan serves on the OEB's Adjudicative Modernization Committee which was established in June 2021. The AMC is called upon to provide early advice to senior management and the Chief Commissioner, and serve as a forum for informal discussions with industry stakeholders on matters related to adjudication process and policy. The committee meets typically three times a year.

Housing

Climate Adaptation

The Council engaged in research considering the consumer interest in options and measures to adapt new and existing homes to be more resilient in the face of the impacts of climate change.

Over the years, the Council has issued a series of research reports touching on opportunities to protect consumers as they adapt to climate change and public policy and marketplace changes attendant climate change responses.

As indicated earlier in this report, Council members have been engaged in standards development. But issues touching on adaptation to climate change emerge in many areas of the institutional consumer representation in which Council members are involved.

Marketplace Problems

The Council seeks to address marketplace issues related to housing through the engagement of its members in the governance, consumer representation and provision of research and information to regulatory authorities such as Home Construction Regulatory Authority, Technical Standards and Safety Authority, Electrical Safety Authority, and Condominium Management Regulatory Authority in Ontario. The

Council has also made representation to Consumer Protection B.C. and the Real Estate Council of Alberta from time-to-time about housing market issues.

The Council has maintained a persistent research publishing initiative related to housing issues in the marketplace.

Telecommunications & Media Services

With telecommunications and media services evolving quickly, Consumers Council has focused on two important measures: establishing fair cost recovery and participation for consumer interests in proceedings of the Canadian Radio-television and Telecommunications Commission and addressing the rising tide of complaints by consumers against telecommunications and media services providers. Two ways it has done this have been through participation in advisory roles related to governance processes of the Commission for Complaints in Telecom-Television Services (CCTS) and of the Broadcast Participation Fund (BPF).

Commission for Complaints in Telecom-television Services

Consumers Council of Canada is represented on the Consumer Advisory Panel (CAP) of the Commission on Complaints for Telecommunications-Television Services by Michael Jenkin our Vice-President. The Council is one of several consumer organizations represented on the CCTS' Consumer Advisory Panel, which meets twice a year, usually just before the CCTS issues its mid-year and Annual reports on complaints. The CCTS receives complaints from consumers of landline telephone services, mobile telecommunications services, internet services and subscription television services.

Most of the CAP's work focuses on consumer organizations' reactions to the semi-annual and annual reports and reviews of the CCTS' complaint handling performance. Major concerns over the years have been:

- ensuring consumer awareness of the CCTS and their ability to lodge complaints with it;
- the efficiency of the CCTS's complaint handling system; and
- the overall level of consumer complaints and the evolving nature of those complaints.

Over the past several years public awareness of the CCTS has been improving, in part due to its own public awareness initiatives and not surprisingly as seen in the numbers of complaints it receives on an annual basis, which have been growing. By far the largest source of complaints is mobile telecommunications services (over 50% of complaints) followed by internet services. The most complained about providers are the big three and their various "flanker" brands of Rogers, Bell and Telus.

For 2024-25 the main focus of the CAP was to review and make comments on CCTS' strategies for public outreach to increase consumers' awareness of its services and their ability to seek redress when they feel they have been treated unfairly by telecommunications, internet and television service providers. Generally, the increased spending on awareness initiatives has ben appreciated, but they will need to be maintained and expanded if CCTS is to be well known.

In terms of reviewing the nature of the complaints that were received, according to the CCTS' most recent *Annual Report*, the most common issue by far were billing issues, which the CCTS defines as:

- *incorrect charge for the monthly price plan*
- unexpected *price increases to the monthly price plan*
- promised *credits or refunds that are not received*
- disputes about other charges such as *roaming, data usage, cancellation or equipment charges.*

A detailed analysis of billing issues across all service types seems to indicate a **major disjuncture** between what customers thought they were to receive, and how much it would cost, as a result of marketing and other advertising efforts by service providers.

This, would appear to represent one of the major weaknesses of the current complaints system. Marketing efforts such as aggressive and/or misleading advertising, be they in marketing materials, advertisements, commercials in legacy media and online, or as a result of interactions between customers and staff in retail locations, on line, or via telephone, are out of scope for the CCTS to review. It does not help that the various Codes of Conduct approved by the CRTC for mobile, internet, television and land line services also do a poor job of setting out standards for transparent and clear marketing practices.

Until advertising and marketing more generally is more effectively regulated, customers will continue to be dissatisfied and will complain about how they are treated by mobile phone, internet, television and landline service providers.

One other disturbing trend in the complaints data for this year has been the growth in complaints about service delivery, especially in internet and mobile services. Canada's service providers have claimed for many years that Canadians receive by international standards a very high level of service quality. That service quality is now becoming a growing issue for consumers is troubling and deserves close monitoring given that mobile and internet services are now an essential service for most consumers and that Canada remains a high cost country for these consumer services.

Broadcasting Participation Fund

The Council has participated on the consumer and stakeholder advisory committee of the Broadcasting Participation Fund, which was created to provide intervenor funding for participation in consultations and applications hearing concerning broadcasting licensees before the Canadian Radio-television and Telecommunications Commission (CRTC).

The BPF has been on a shaky footing since inception. New powers given to the CRTC could lead to significant reforms to intervenor cost recovery policy and procedures concerning media services matters, as the CRTC also expands its scope to include certain internet-accessible services.

The Council has participated as a BPF stakeholder to support the existing and widening access to intervenor cost recovery in this sector.

The problematic polices of the CRTC around intervenor cost-recovery in both broadcasting and telecommunications have introduced risks to participation which has led to the Council to participate in its processes with caution.

The Council continues to advocate for reforms on its own and more commonly in conjunction with others to gain consumer intervenors access to the fair levels of funding necessary for meaningful consumer representation in the CRTC's proceedings.

The Council's engagement with the BPF has represented an effort to maintain the toe-hold it represents for consumer intervenors having cost-recovery in broadcasting proceedings at all.

Consumers International

Consumers Council of Canada members participated in World Consumer Rights Day events hosted by Consumers International (CI) in March. The focus for 2024 was "Fair and Responsible AI for Consumers."

CI led a debate among experts about core consumer concerns as AI proliferates. It explored the scale of the emergence of AI 'deepfakes', scams and misinformation. It highlighted the need for strong policy regarding the data used to build AI models. New insights were offered about the consumer experience of generative AI chatbots, reporting the results of global effort of 35 CI member organizations. The Council actively promotes the week of online public events scheduled around World Consumer Rights Day, each year on March 15.

The Council has been contributing to CI's Coalition to Stop Scams. Fraud and scams online and over the telephone have been highlighted by the Council's Public Interest Network participants as a top consumer protection concern. It has participated also in Ci's Inclusive Digital Finance study.

The Council has participated in CI's Global Advocacy Leadership Group, which helps set the direction of international consumer advocacy.

Ongoing Consumer Representation

Consumers Council of Canada members serve in a wide spectrum of formal, ongoing roles – directly representing the Council sometimes and other times independently appointed – as participants able to deliver consumer representation according to the Council's principles.

Council members serve on consumer advisory councils and committees of several Ontario delegated administrative authorities, including the: Technical Standards and Safety Authority, Financial Services Regulatory Authority, Ontario Motor Vehicle Industry Council, Bereavement Authority of Ontario, and the Home Construction Regulatory Authority.

Council members who are currently or have been active in standards and legislation development are particularly well suited to work with the DAAs in promoting consumer interests and protections. Council has been an important source for DAAs when recruiting qualified consumer representatives for their advisory committees, and many of our members are asked to take on leadership roles to chair committees or participate on subcommittees.

Organization	Role	Sector
Consumers International	Member	Global Consumer Advocacy
ICANN	North American Regional At-Large Organisation	Internet
Ontario Motor Vehicle Industry Council	Consumer Advisory Committee	Automotive Vehicle Dealers and Sellers
Competition Bureau	Fraud Prevention Forum	Fraud Avoidance
Pharmaceutical Advertising Advisory Board	Board of Directors	Health
Condominium Management Regulatory Authority of Ontario	Member serves as Chair, Board of Directors	Builders and Sellers of New Homes
Standards Council of Canada	Canadian delegation to ISO Consumer Policy Committee	Consumer-oriented international standards
Technical Standards and Safety Authority	Consumer Advisory Council	Fuels, Elevating devices, and Pressure vessels
Home Construction Regulatory Authority	Consumer Advisory Committee	Housing
Bereavement Authority of Ontario	Funeral & Transfer Services Advisory Committee	Bereavement Services
Commissioner for Complaints in Telecom-television Services	Consumer Representatives Working Group - consumer and public interest board member nomination	Telecom
Broadcast Participation Fund	Stakeholder and participant in board selection process	Broadcasting
Canadian Standards Association	Standards committee participation	Building
Canadian General Standards Board	StandardsTechnical Committee Members	Organic foods, Responsible business conduct for Canadian companies operating abroad, Canadian flag
Finance Canada	Payments Consultative Committee (FinPay)	Payments
Canadian Payments Association	Stakeholder Advisory Council	Payments
Financial Consumer Agency of Canada	Consumer Protection Advisory Committee	Financial Services
Ombudsman for Banking Services and Investments	Bi-Annual Consumer Groups Meeting	Financial Services
Financial Services Regulatory Authority of Ontario	Consumer Advisory Panel	Financial Services
Ontario Energy Board	Intervenor	Energy

About the Council

2024-25 Board of Directors

Chris Ballard, President

Chris Ballard is Chief Executive Officer of Passive House Canada, a national non-profit professional association advocating for the Passive House high-performance building standard. He is a former member of the Ontario Legislature and Ontario cabinet, serving as Minister of Housing, Minister of Environment and Climate Change, and Minister Responsible for the Poverty Reduction Strategy. Chris is an experienced communications and public affairs executive with a background that also includes strategic planning, business development and project management. Chris has been president of CSB Communications Inc., a small consulting firm, since 1989. He has worked with a wide variety of clients, including associations, small and medium-sized businesses, governments and multi-national corporations. Chris has extensive expertise in facilitation, project management, quantitative and qualitative research and has conducted surveys, focus groups and workshops on behalf of a variety of corporate, government and not-for-profit organizations. Chris has a background in consumer advocacy and consumer affairs. He was a founding board member of the Consumers Council of Canada, a past executive director of the Consumer's Association of Canada (Ontario), (and managed its transition into the Council), a member of the provincial Retail Sector Strategy. Chris is an honourary lifetime member of the Public Affairs Association of Canada and served in various capacities, including president. During the past 15 years, Chris has worked closely with numerous First Nation communities across Canada's far north, in business development, governance and sustainability. He is active in his community of Aurora, Ontario, where he served as a Town Councillor.

Residence: Aurora, Ontario.

Michael Jenkin, Vice President

Michael Jenkin is a former federal public servant with more than 36 years' experience in public policy research and management. He last served as Director General of the Office of Consumer Affairs (OCA) at Industry Canada, a position he held from 1999 to 2014. During his time at OCA, Michael also served as the Federal Co-Chair of the Consumer Measures Committee, a group charged with harmonizing federal, provincial and territorial consumer protection measures, and, from 2008 to 2014, as the Chair of the OECD Committee on Consumer Policy.

Michael has held a number of other senior positions in the industry department including: Director General of Strategic Planning and Corporate Development in the Operations Sector; Director General, Strategic Policy and Consultations; Director General, Industrial Competitiveness and Director of Economic Development Policy in the Industry and Science Policy Sector. He has worked for several other federal departments and agencies, including: the Ministry of State for Economic and Regional Development and the Federal-Provincial Relations Office and has served as a Science Adviser with the Science Council of Canada.

Michael obtained his Bachelor's degree (Honours) in politics, history and economics from Trent University in 1972. He also pursued graduate studies at the University of Manchester (UK) on a Commonwealth Scholarship where he received an MA (Econ.), and PhD in government. He has written a number of articles and books on federal-provincial relations and on industrial, science and technology, and consumer policy.

Michael has received a number of awards, including: City of Ottawa Whitton Award for community service in 2002, the Queen Elizabeth II Diamond Jubilee Medal for community and public service in 2012, and the Public Service Award of Excellence for Outstanding Career in 2014 which was awarded by the Clerk of the Privy Council and presented by the Governor General. In 2014 the City of Ottawa also named the main community hall in the Ottawa South Community Centre after Michael in honour of his contribution to community in Old Ottawa South. In addition to his long involvement with his community association, Michael recently served on the Board of the Public Interest Advocacy Centre as its Vice- Chair (2016-2019). Michael is married with two adult sons.

Residence: Ottawa.

Ashish Sharma, Secretary

Ashish Sharma is a community organizer and U.S.-licensed attorney with experience with large-scale litigation involving information governance, consumer protections, and electronic discovery. A Toronto native, Ashish has lived and worked around Canada and the United States including Windsor, Detroit, Seattle, and Los Angeles organizing at all levels from small city council elections, mayoral races, and national campaigns. His legal experience includes financial regulations, data breach, information protection, international law, and he has worked with the ABA's American Immigration Council providing pro bono legal defense to detainees in ICE Detention Centers. Ashish holds a BA from the University of Windsor and a JD from University of Detroit Mercy School of Law.

Residence: Pickering, Ontario.

Trevor Shaw, Treasurer

Trevor Shaw is a professional auditor and accountant with designations of Chartered Professional Accountant (CPA), Chartered Accountant (CA), Certified Management Consultant (CMC), and Certified Quality Auditor (CQA). He is a member of various professional bodies including CPA Institute, the Institute of Internal Auditors (IIA),

the Canadian Evaluation Society (CES), the Institute of Certified Management Consultants, and the American Society for Quality. Trevor has more than 40 years of diverse audit experience in both public and private sectors. In approaching his work he is innovative and integrative and values both people and results. He is familiar with accounting, audit and evaluation standards, guidance, and functions as pronounced by various professional bodies. For 30 years (1984 to 2014) Trevor was a Director and then Principal (senior management) with the Office of the Auditor General of Canada. He conducted many performance audits to evaluate a wide range of government departments, agencies and Crown corporations at both the federal and provincial levels in Canada.

Residence: Ottawa.

Max Goodman-Coop

Currently a Product Analyst with CMiC, a construction management software company, Max Goodman-Coop was previously Product and Business Development Manager EnviroApps Inc, Senior Quality Associate Thornhill Medical. Product/system management, and regulatory coordinator for Veresen Inc. He has a Master's degree in sustainability management from University of Toronto, and a Product Management Certificate from the Product School, San Francisco, California. He graduated from the University of Ontario Institute of Technology with a BSc in physics, with an energy and environment specialization.

Residence: Toronto.

Jay Jackson, Director

As a member-volunteer, Jay Jackson has served as Consumers Council of Canada's Director of Policy and Strategy, co-chair of its Policy Committee and chair of the Council's Consumer Representatives in Standards Committee. He has a BA from the University of Toronto and a diploma from the Ridgetown College of Agricultural Technology. Jackson has 36 years of experience as a federal government policy analyst dedicated to promoting consumer interests. He has led or directed several in-house consumer policy research projects (e.g. labelling of genetically modified foods, food irradiation, values-based consumption, vulnerable consumers, e-commerce, compliance policy, the sharing economy, and others) at the Competition Bureau, Agriculture and Agri-Food Canada and the Office of Consumer Affairs, Innovation, Science and Economic Development Canada.

Residence: Kanata, Ontario.

Tracy MacCharles, Director

Tracy MacCharles is a former politician in Ontario, Canada. She was a Liberal member of the Legislative Assembly of Ontario from 2011 to 2018 who represented the riding of Pickering–Scarborough East. She was a member of cabinet in the government of Kathleen Wynne. MacCharles was born and raised in Scarborough, Ontario. She went to Brock University where she obtained a degree in Business and Public Administration. She worked in human resources management in various roles including Vice President of Human Resources at Manulife Financial. She was chair of the Ontario Accessibility Standards Advisory Council and was a member of the Durham Board of Education's Special Education Advisory Committee. MacCharles ran successfully in the 2011 provincial election as the Liberal candidate in the riding of Pickering–Scarborough East. She was re-elected in 2014.

While a member of the legislature, MacCharles served as Parliamentary Assistant to the Minister of Children and Youth Services, Minister of Consumer Services, Minister of Children and Youth Services, Minister responsible for Women's Issues and Minister of Government and Consumer Services.

MacCharles retired from provincial politics in April 2018.

Residence: Pickering, Ontario.

Agni Shah, Director

Agni Shah is a former professor who taught package development, pharmaceuticals quality assurance and quality fundamentals at Seneca and Sheridan Colleges. He worked for more than 23 years in the pharmaceuticals industry in quality assurance, systems administration and regulatory affairs after similar positions in the food industry in the UK and Africa. He has served as Vice Chair with Consumer and Public Interest Panel of the Standards Council of Canada, been a Chair and member of various working groups, Reviews and Mirror Committees. He has volunteered with United Way in Citizen Review Process, Canada Revenue Agency in the Community Volunteer Income Tax Program and a number of Social Agencies as a Mentor / Trainer. He has held Board level positions with Halton-Peel District Health Council (Order in Council Appointment), Community Care Access Center, Pharmaceutical Advertising Advisory Board and Leadership Peel. He has been on Consumer/Community Advisory Committees with Travel Industry Council of Ontario, Trillium Health Center and Peel Newcomer Strategy Group. He has mentored immigrants through STEM and HOST programs, students and those starting economic life in Canada.

Residence: Mount Hope, Ontario.

Ken Whitehurst, Executive Director

Ken Whitehurst has served as Director of Research and Communications and then Executive Director of the Consumers Council of Canada since 2008. He has 30 years of senior-level general and project management experience in consumer representation and research; news media; sales, marketing and regulated disclosure communications; business information systems; management consulting; and financial services.

He has served as manager for Canada of news agency United Press International, vice president and general manager of broadcast news network Standard Broadcast News, director of media services for Global Strategy Financial Inc., and editor-in-chief of Metroland North Media.

Residence: Aurora, Ontario.

Major Subscribers

- Bereavement Authority of Ontario
- Electrical Safety Authority
- Home Construction Regulatory Authority
- Ontario Ministry of Public and Business Service Delivery and Procurement
- Ontario Motor Vehicle Industry Council
- Payments Canada
- Tarion
- Technical Standards & Safety Authority

Principles

Consumers Council of Canada works towards an improved marketplace for consumers in Canada, seeking an efficient, equitable, effective and safe marketplace for consumers by informing and advocating concerning the following consumer rights and responsibilities. The Council strives to take positions based on evidence derived from current research and analysis and what it believes represents the best interests of Canadian consumers consistent with the objectives and principles found in the 2015 *United Nations Guidelines for Consumer Protection*.

Basic Needs – *The right* to basic goods and services that guarantee survival. *The responsibility* to use these goods and services appropriately. To take action to ensure that basic needs are available.

Safety – *The right* to be protected against goods or services that are hazardous to health and life. *The responsibility* to read instructions and take precautions. To take action to choose safety equipment, use products as instructed and teach safety to children.

Information – *The right* to be given the facts needed to make an informed choice, to be protected against misleading advertising or labelling. *The responsibility* to search out and use available information. To take action to read and follow labels and research before purchase.

Choice – *The right* to choose products and services at competitive prices with an assurance of satisfactory quality. *The responsibility* to make informed and responsible choices. To take action to resist high-pressure sales and to comparison shop.

Representation – *The right* to express consumer interests in the making of decisions. *The responsibility* to make opinions known, to take action to join an association such as the Consumers Council, to make your voice heard and to encourage others to participate.

Redress – *The right* to be compensated for misrepresentation, shoddy goods or unsatisfactory services. *The responsibility* to fight for the quality that should be provided, to take action by complaining effectively, and to refuse to accept shoddy workmanship.

Consumer Education – *The right* to acquire the knowledge and skills necessary to be an informed consumer. *The responsibility* to take advantage of consumer opportunities, to take action by attending seminars and workshops, and to work to ensure consumer education takes place in schools.

Healthy Environment – *The right* to live and work in an environment that is neither threatening nor dangerous and which permits a life of dignity and well-being. *The responsibility* to minimize environmental damage through careful choice and use of consumer goods and services, to take action to reduce waste, to reuse products whenever possible, and to recycle whenever possible.

Privacy – *The right* to privacy particularly as it applies to personal information. *The responsibility* to know how information will be used and to divulge personal information only when appropriate.

The Council is committed to:

- Being a voice for consumers
- Listening to consumers
- Consumer empowerment
- Integrity
- Stakeholder involvement
- Excellence in stakeholder and member services
- Financial sustainability

Notes

Consumer Representation

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