THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-56 — Affordable Housing and Groceries Act

CANADIAN BAR ASSOCIATION
COMMODITY TAX, CUSTOMS AND TRADE SECTION, COMPETITION LAW AND FOREIGN INVESTMENT REVIEW SECTION AND CONSTRUCTION AND INFRASTRUCTURE LAW SECTION

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PREFACE

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

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

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I. INTRODUCTION

We are writing on behalf of the Canadian Bar Association's Commodity Tax, Customs and Trade Section, Construction and Infrastructure Law Section and Competition Law and Foreign Investment Review Sections to comment on Bill C-56, the *Affordable Housing and Groceries Act*.

The CBA is a national association of 37,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice.

The Commodity Tax, Customs and Trade Section deals with law and practice related to commodity tax, customs and trade remedy matters. The Construction and Infrastructure Law Section examines the law and practice relating to problems arising in the construction industry. These CBA Sections comment on Part 1 of Bill C-56, amendments to the *Excise Tax Act* to implement a temporary enhancement to the GST New Residential Rental Property Rebate in respect of new purpose-built rental housing.

The Competition Law and Foreign Investment Review Section promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment. This CBA Section comments on Part 2 of Bill C-56, amendments to the *Competition Act.*

II. EXCISE TAX ACT AMENDMENTS FOR GST NEW RESIDENTIAL RENTAL PROPERTY REBATE (ENHANCED REBATE)

A. Overview of proposed Enhanced Rebate

The Enhanced Rebate seeks to encourage construction of new rental housing by providing a 100% rebate of the GST self-assessed by builders. Under the *Excise Tax Act (ETA)*, builders who construct or substantially renovate rental housing are required to self-assess GST/HST on the fair market value of rental property.[1] For a multi-unit apartment building, the builder could be required to self-assess on the value of the entire apartment building upon occupancy of the first unit, even if the other units have not been rented yet.

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1 Self-assessment is required upon the later of substantial completion and first residential occupancy of a unit in the complex.

Currently, rental units are eligible for up to a 36% rebate of the self-assessed GST (Current Rental Rebate). However, the rebate amount is phased out for units valued between $350,000 and $450,000 and is eliminated entirely once the value equals or exceeds $450,000.[2] These thresholds have not been increased since the rebate was introduced 23 years ago.

The net GST/HST imposed on rental housing and the immediate cash-flow required to pay the self-assessed GST/HST, represent a significant tax burden on new rental units. This burden is particularly acute at a time when rising interest rates have in some cases doubled the cost of financing, and supply chain disruptions and inflationary pressures have significantly increased labour and material costs.

The Department of Finance Backgrounder on Bill C-56 (Backgrounder) states that qualifying residential units would be those that qualify for the Current Rental Rebate and are in buildings with at least:

- Four private apartment units (i.e., a unit with a private kitchen, bathroom and living areas), or at least 10 private rooms or suites (e.g., a 10-unit residence for students, seniors or people with disabilities); and
- Ninety per cent of residential units designated for long-term rental. In contrast to the Current Rental Rebate, the Enhanced Rebate would not be phased-out or capped by the value of the unit.

The Backgrounder states that individually-owned condominium units, single-unit housing, duplexes, triplexes, housing co-ops, and owned houses situated on leased land and sites in residential trailer parks would not qualify for the Enhanced Rebate. Further, the Enhanced Rebate would not apply to substantial renovation of existing residential complexes. The Enhanced Rebate would only be available for qualifying properties that begin construction after September 13, 2023, but before 2030, and are substantially complete by 2036.

While the Enhanced Rebate is a significant and positive development, we believe it could be improved to further increase rental housing supply.

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[2] In Ontario, a 75% rebate of the HST is also available, up to a maximum of $24,000 for units valued at $450,000 and above. In the November 2, 2023 Economic Outlook and Fiscal Review, Ontario announced that it is "taking steps to enhance the rebate so that it is equal to 100 per cent of the provincial portion of the HST paid, with no maximum rebate amount, for qualifying new purpose-built rental housing. This would mirror the proposed enhancements to the federal [Current Rental Rebate] of the 5 per cent federal portion of the HST, and together would remove the full 13 per cent HST on qualifying new purpose-built rental housing in Ontario."

B. Concerns with implementation and eligibility

The proposed "all-or-nothing" implementation of the Enhanced Rebate is tied exclusively to when construction "begins." This approach appears to be unnecessarily blunt and arbitrary.

Take the example of two rental properties developed on the same street. One builder applies for approvals earlier and starts construction before the other builder, seeking to bring units to the market as soon as possible. The property that began earlier qualifies for the Current Rental Rebate (or may not qualify for any rebate, if the units equal or exceed $450,000 in value) if construction started on September 13, 2023. The other property would be entitled to a full 100% Enhanced Rebate simply because construction started after September 13, 2023.

While the intention is to incentivize construction, the arbitrariness of the proposed implementation could inadvertently discourage the supply of rental housing.

For example, if a property intended for rental began construction before September 14, 2023, it would not qualify for the Enhanced Rebate. Without this benefit, builder A has a competitive disadvantage vis-à-vis rental housing builders who begin construction after September 13, 2023 and could bring their rental units to market without any GST embedded in their capital costs. Builder A may decide it has become more economically attractive to sell the units as condominiums, particularly if construction is still in early stages.

Rental housing builders have indicated that the Enhanced Rebate has the potential to encourage the creation of additional housing units in other projects if it were available to projects already under construction. The cost savings from the Enhance Rebates could make capital available which the builder could deploy toward additional projects.

RECOMMENDATION

1. **We recommend more equitable approaches to level the playing field for construction already commenced before September 14, 2023. For example, the Enhanced Rebate could be prorated based on the degree of construction after September 13, 2023, for projects that have not already been subject to GST/HST self-assessment. In addition, the Enhanced Rebate could be made available in full to projects under construction before September 14, 2023 where the builder satisfies a condition to build additional rental housing.**

C. Uncertainty on when construction "begins"

RECOMMENDATION

2. We recommend that the effective date of the Enhanced Rebate be based on the date self-assessment is required for GST/HST purposes, rather than when construction is considered to "begin."

Proposed section 256.2(3.1) is too vague and does not give the construction industry sufficient clarity and confidence to pursue this initiative. Proposed section 256.2(3.1) reads as follows:

> **(3.1) The amount of a rebate under subsection (3) in respect of a taxable supply of purpose-built rental housing — being prescribed property — is determined in accordance with subsection (3.2) if prescribed conditions are met and if**
>
> > **(a) the taxable supply is a supply by way of sale of a residential complex or an interest in a residential complex to a person that is not a builder of the residential complex, or of a residential complex or an addition to a residential complex to a person that is, otherwise than by reason of subsection 190(1), a builder of the residential complex or addition, as the case may be, and the *construction or last substantial renovation of the residential complex or addition*, as the case may be, *begins* after September 13, 2023 but before 2031 and is substantially completed before 2036; or**
> >
> > **(b) the taxable supply is a supply by way of sale of a residential complex that is deemed to be made to a person that has converted real property for use as the residential complex and is, as a result, deemed under subsection 190(1) to be a builder of the residential complex and the *construction or alteration necessary to effect the conversion begins* after September 13, 2023 but before 2031 and is substantially completed before 2036. [emphasis added]**

"Construction" is not defined in the *ETA* or in Bill C-56. Several points along the development process could potentially be considered the "beginning" of construction. This uncertainty has caused current projects to be delayed while the issue is resolved.

In contrast, the date of self-assessment under section 191 of the *ETA* is much clearer: the later of substantial completion and first residential occupancy of a unit in the building. This rule is longstanding and benefits from years of administrative practice. It is also subject to certain anti-avoidance rules (section 191(9)).

RECOMMENDATION

3. **We recommend that the new Enhanced Rebate be available to some degree to any project for which the date of self-assessment under section 191 of the *ETA* is on or after September 14, 2023. If construction had not started as of that date, the Enhanced Rebate would be available in full. It would also be available in full if construction started and the builder begins construction on additional housing units within an appropriate time period. Otherwise, where construction has started, the Enhanced Rebate would be prorated based on the degree of construction after September 13, 2023.**

The combination of certainty and prorating removes the arbitrariness and unfairness of including or excluding certain builders and projects in their entirety and incentivizes the completion of residential rental unit construction to the extent reasonably appropriate in different circumstances.

D. Flexibility with "substantial completion" date

Under Bill C-56, construction would have to be "substantially complete" before 2036 to qualify for the Enhanced Rebate. If substantial completion occurs on January 1, 2036, for example, the rental property no longer qualifies.

Construction can be fraught with delays. Labour availability, supply chain disruptions, inspections, weather, site conditions, and changes to municipal land use regulations are only a few reasons that can delay construction – and these factors are largely outside a builder's control.

RECOMMENDATIONS

4. **We recommend removing the proposed deadline for substantial completion. Bill C-56 already includes requirements for when construction must begin. Builders generally will not have an incentive to delay construction. To the contrary, they are financially motivated to complete construction as soon as possible. Alternatively, we recommend that the legislation give administrative flexibility to allow the Enhanced Rebate for projects that are substantially completed after 2036, in recognition of the delays inherent in construction.**

E. Rental apartments and townhouses registered as condominiums

The Backgrounder states that "individually-owned" condominium units would not qualify for the Enhanced Rebate. We assume this refers to individuals (i.e., natural persons) who purchase condominiums units for rental.

In some jurisdictions, the units in a multi-unit apartment building or townhouse row may be registered legally as condominium or strata units, for municipal tax or other reasons. These apartment buildings and townhouses are nonetheless built for and operated as rental properties and should qualify for the Enhanced Rebate.

RECOMMENDATION

5. **We recommend clarifying that condominium units in these buildings would qualify for the Enhanced Rebate,[3] subject to other eligibility conditions.**

Proposed conditions already include a requirement that at least 90% of the residential units in the building are designated for long-term rental. (We look forward to clarification on the designation requirement and on the definition of "long-term").

For the townhouse example, we also suggest clarifying that the "building" to contain the requisite number units is the townhouse row.

F. Alignment with initiatives encouraging diverse housing options

The proposed eligibility criteria for the Enhanced Rebate may unintentionally favour larger-scale new construction, neglecting other forms of housing encouraged by municipal "gentle density" or "missing middle" initiatives. Municipalities across Canada have implemented or are considering these initiatives to increase housing supply by adding units through smaller multiplexes, secondary suites, and laneway houses in existing neighbourhoods.

Based on the Backgrounder, the Enhanced Rebate would only be available where a building contains at least four private apartments or 10 private rooms or suites. This may not be feasible

[3] Definition "B(i)" of the rebate calculation provision, proposed section 256.2(3.2), appears to contemplate that a residential condominium unit could qualify for the Enhanced Rebate.

on many lots in municipalities seeking to encourage "missing middle" housing supply, as those municipalities have not done away entirely with lot restrictions.[4]

The Backgrounder refers to a minimum number of units, private rooms or suites "in" a building. This restriction could unintentionally exclude rental properties with the requisite number of units where the units cannot be contained in a single building. For example, a rental complex could comprise a single lot with a triplex and a detached laneway suite (four units in total).

RECOMMENDATION

6. **We recommend that the Enhanced Rebate align with municipal policies to address housing shortage through a diversity of housing options, and not favour "tall and sprawl" developments.[5]**

G. Substantially renovated rental properties should not be excluded

The Backgrounder categorically excludes substantially renovated properties from the Enhanced Rebate. [6] This exclusion would favour new construction and fail to recognize that valuable housing supply can be created through substantial renovation. Internal conversion of existing single-family residences into multiplexes are recognized as affordable housing solution.[7]

For example, consider a charity that takes under-utilized residential properties, such as single-family bungalows, and substantially renovates them into multiple unit properties to provide stable, long-term housing for persons experiencing homelessness. Since they are substantially renovated, these properties would be subject to GST/HST self-assessment.[8] However, the Backgrounder indicates that they would not be eligible for the Enhanced Rebate simply because the properties are substantially renovated and not new construction. This anomalous result would not be equitable and should be reconsidered.

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4 For example, rental properties with four or more units may not be permitted due to lot coverage constraints, set back requirements, and height restrictions.

5 Ryerson University, Ryerson City Building Institute, Density Done Right (2020).

6 However, proposed subparagraph 256.2(3.1)(a) refers to "and the construction or last substantial renovation of the residential complex […]"

7 City of Halifax, Factsheet Gentle Density & Missing Middle Housing, Proposed Centre Plan August 2021.

8 If the builder is a public service body, such as a charity, they may be eligible for a partial rebate under section 259. Where a public service body is also eligible for the Enhanced Rebate, proposed subsection 256.2(9.1) stipulates that only the Enhanced Rebate is available.

The concern about "renovictions" in the Backgrounder does not seem to justify excluding substantial renovations.

This concern is not isolated to substantial renovations. New construction properties, particularly in built-up centres where vacant lots are scarce, may be constructed on land assemblies comprising existing residential properties. Those properties would be taken off the market and demolished.

Similarly, additions to existing residential properties (which appear to qualify for the Enhanced Rebate[9]) may require removal of units to accommodate construction of the addition.

Also, tenant protection laws in most provinces and territories aim to strike the appropriate balance between landlord and tenant rights. These laws may already have rules specifically protecting tenants from "renovictions."

We encourage the government to consider solutions that do not categorically exclude housing created through substantial renovation. For example, the Enhanced Rebate could be designed with appropriate criteria to ensure that any temporary removal of units due to substantial renovation is offset by the creation of additional units.

III. COMPETITON ACT AMENDMENTS

The Competition Law and Foreign Investment Review Section (CBA Section) believes the amendments to the *Competition Ac*t could have the opposite effect of what is desired - a more competitive, dynamic and innovative economy.

Given the November 20 2023 motion in the House of Commons expanding the scope of Bill C-56 and compressing timelines for its study by the Finance Committee, our comments focus on improvements to the legislation to ensure that the needs of all Canadians are put first, including the needs of Canadian innovators and businesses which fuel the economy.

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9 Proposed subparagraph 256.2(3.1)(a) refers to "taxable supply…of a residential complex or an addition to a residential complex […] "

A. Market or Industry Inquiries

Amendments required to balance benefits and costs of market studies

The CBA Section recognizes that formal market study powers can potentially generate recommendations for policy changes and future enforcement actions benefiting the Canadian economy.

Our comments aim to ensure that market study benefits are likely to exceed the substantial costs of conducting the study, to both government and the private sector, and to ensure fairness and due process for Canadian businesses subject to a market or industry inquiry.

Give due consideration to Commissioner's input before ordering an inquiry

Proposed section 10.1(1) vests the inquiry commencement power with the Minister. While it may be implicit that the Commissioner could propose a specific market or industry inquiry to the Minister, it would be useful to amend Bill C-56 to explicitly confirm the Commissioner's ability to do so.

We support the revision proposed in the November 20 motion granting the Finance Committee the power to expand the Bill to "allow the Competition Bureau to conduct market study inquiries if it is either directed by the Minister responsible for the Act or recommended by the Commissioner of Competition and require consultation between the two officials prior to the study being commenced".

RECOMMENDATION

7. We recommend amending section 10.1(1) as follows:

Market or industry inquiry

10.1(1) The Minister, if he or she is of the opinion that it is in the public interest to do so, may, <u>whether acting on recommendation of the Commissioner or on his or her own accord,</u> direct the Commissioner to <u>conduct</u> an inquiry into the state of competition in a market or industry.

We support the requirement in proposed section 10.1(2) that the Minister consult with the Commissioner on the feasibility and cost of an inquiry. Given the time-intensive and costly nature of these investigations for industry participants subject to the inquiry, expected private and public sector costs should be considered. In addition, this consultation should include consideration of the expected benefits of conducting an inquiry.

RECOMMENDATION

8. We recommend that proposed section 10.1(2) be amended as follows:

> **Consultation with Commissioner**
>
> **(2) Before making the direction, the Minister must consult the Commissioner to determine whether the inquiry would be feasible and beneficial, including with regard to its cost to the government of Canada and to market or industry participants.**

RECOMMENDATION

9. To guard against the risk that an inquiry diverts Bureau resources away from the Commissioner's primary law enforcement responsibilities, the CBA Section recommends that the Minister's power to order an inquiry be conditional on the availability of adequate resources. For example, this could be ensured by adding the following to Bill C-56:

> **Availability of Resources**
>
> **10.1(2.1) The Minister shall not direct the commencement of an inquiry unless he or she has ensured that the Commissioner has, or will have, sufficient resources to conduct the inquiry without adversely impacting the Commissioner's ability to effectively administer and enforce Parts VI through IX of the Act.**

Give due consideration to input from responsible regulatory authorities

In practice, markets and industries with competition issues considered to be candidates for a market study are often regulated sectors. For example, the Commissioner has previously conducted market studies related to financial services, telecommunications, pharmaceuticals and health care.

While market studies may identify business practices of market participants that could lead to enforcement actions by the Commissioner, they often lead to recommendations to responsible government departments and agencies to make changes to regulations that create barriers to competition.

RECOMMENDATION

10. The CBA Section recommends adding a requirement that the Minister also consult in advance with any regulatory authorities expected to be

responsible for addressing recommendations that may emerge from an inquiry into a particular market or industry:

Consultation with Regulatory Authorities

10.1(2.2) Before making the direction, the Minister shall consult with federal or provincial departments or agencies responsible for regulation of the market or industry regarding the feasibility, benefits and costs of the inquiry.

Market inquiries should have a clear end date to minimize cost and burden

Imposing a reasonable deadline for completion of a market study is important to ensure that inquiries are focused and conducted expeditiously, so the uncertainty arising from an inquiry is resolved in a timely manner, and the costs of an inquiry (for government and industry participants) do not increase uncontrollably.

While the CBA Section recognizes the need for flexibility during an inquiry, proposed section 10.1(6) would allow the Minister to extend an inquiry indefinitely in three-month increments and without reasons.

RECOMMENDATION

11. The CBA Section recommends that the time extension power be amended to give market participants certainty on the maximum duration of the inquiry:

Extension

(6) The Minister may extend the specified period for a maximum of two periods of up to three months upon receipt of a request from the Commissioner setting out the reasons why additional time is necessary to complete the inquiry.

Treatment of confidential information

We agree that persons required to provide information under section 11(1) in relation to a market or industry inquiry should have an opportunity to review the Commissioner's draft report before it is published to address any factual inaccuracies and confidentiality issues related to that person's information.

However, proposed section 10.1(7) is unworkable from a timing perspective. Given the potential length of the reports and potentially large amounts of data and other information that may need to be reviewed, three working days is insufficient. Proposed section 10.1(7) also leaves open the

meaning of confidential information, creating significant uncertainty and imposing no obligation on the Commissioner to give due consideration to concerns expressed.

RECOMMENDATION

12. The CBA Section recommends the following changes to proposed section 10.1(7):

> **Sending draft to certain persons**
>
> **(7) Before the report is published, the Commissioner must send to every person who was required to do anything under an order made under subsection 11(1) a complete or partial draft of the report and inform the person that they may, within ~~three~~ fifteen working days after the day on which it was sent, provide the Commissioner with the person's concerns regarding factual inaccuracies or confidential information that should not be disclosed in the final report. For these purposes, confidential information includes personal information and third party information within the meaning of sections 19 and 20 of the Access to Information Act. The Commissioner must give due consideration to concerns expressed regarding factual inaccuracies and confidential information before finalizing the report.**

To prevent significant commercial harm to market participants, the proposed amendments should also include clear statutory protections for the confidentiality of commercially sensitive information throughout a market or industry inquiry.

RECOMMENDATION

13. The protection currently applicable to enforcement inquiries in section 10(3) of the *Competition Act* – namely that they be conducted in private – should be explicitly extended to market or industry inquiries by revising 10(3):

> **Inquiries to be in private**
>
> **10(3) All inquiries under this section and section 10.1 shall be conducted in private, except for the terms of reference in subsection 10.1(3) and the publication of the report referenced in subsection 10.1(5).**

Accountability for market studies decisions

We believe that the Minister's power to commence market or industry inquiries should be accompanied by an accountability mechanism that ensures the Commissioner's published report and recommendations are given appropriate consideration.

RECOMMENDATION

14. The CBA Section recommends adding a requirement for a public response by the Minister.

Minister's Response

(8) Within 60 days after publication of the Commissioner's final report, the Minister shall publish a response to the report.

Compulsory investigation powers should not be available on an ex parte basis

Market inquiries are neither enforcement inquiries nor potential precursors to enforcement proceedings by the Commissioner making them fundamentally different from an enforcement inquiry that the Commissioner may commence under section 10 of the *Competition Act*.

Given this important distinction, we recommend that use of the compulsory powers in section 11 be adjusted to reflect the different nature and purpose of a market inquiry.

The *ex parte* application process when section 11 orders are sought in enforcement inquiries is not appropriate for a market study because the recipients of the order are not under investigation for potentially contravening the *Competition Act*. There is no basis to remove basic due process rights ordinarily afforded to parties affected by a court order of having formal notice of and standing to make submissions in response to the application.

Market participants will be aware that the inquiry is occurring since proposed section 10.1(3) requires that the terms of reference of the inquiry be published. Giving responding parties the opportunity to make the Commissioner and the court aware of salient issues (like whether parts of the requested court order may be irrelevant to, or beyond the scope of the inquiry terms of reference and whether certain information requests would be excessive, disproportionate or unnecessarily burdensome[10]) will allow the court to make better determinations of these issues and reduce the possibility of post-issuance challenges to the scope of section 11 orders.

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10 In the current section 11 review process for enforcement matters, the extent to which the respondent(s) would be subject to specifications that are excessive, disproportionate or unnecessarily burdensome is considered: *Canada (Commissioner of Competition) v. Saskatchewan Telecommunications*, 2015 FC 990 at para. 49.

RECOMMENDATION

15. The CBA Section recommends a new section 11(1.1) that would apply to orders sought in relation to a market or industry inquiry. The new version mirrors the current version of section 11(1) except for the removal of the *ex parte* nature of the application (differences highlighted below) and the explicit requirement that notice be given to the persons against whom the section 11 order is sought (see the proposed addition of section 11(6)).

> **Order for examination, production or written <u>return in a market or industry inquiry</u>**
>
> **11<u>(1.1)</u> If, on the ~~*ex parte*~~ application of the Commissioner or his or her authorized representative <u>upon notice in accordance with subsection (6)</u>, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to**
>
> **(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;**
>
> **(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or**
>
> **(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required. […]**
>
> **<u>Notice of Application</u>**
>
> **<u>(6) At least 14 days' notice of an application under subsection (1.1) shall be given by or on behalf of the Commissioner or his or her authorized representative, as the case may be, to each person against whom the order is sought.</u>**

The self-incrimination provisions in section 11(3) should be equally applicable to market or industry inquiries, as should related section 11 provisions (sections 12-14) that pertain to competent and compellable witnesses, fees, representation by counsel, attendance, administration of oaths and orders of the presiding officer.

This can be achieved by adding the following cross-references:

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (1.1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a) or (1.1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c) or (1.1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

12 (1) Any person summoned to attend pursuant to paragraph 11(1)(a) or (1.1)(a) is competent and may be compelled to give evidence.

(2) Every person summoned to attend pursuant to paragraph 11(1)(a) or (1.1)(a) is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which the person is summoned to attend.

(3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(a) or (1.1)(a) and any person whose conduct is being inquired into to be represented by counsel.

(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(a) or (1.1)(a) and that person's counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would

(a) be prejudicial to the effective conduct of the examination or the inquiry; or

(b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.

[…]

14 (1) The presiding officer may administer oaths and take and receive solemn affirmations for the purposes of examinations pursuant to paragraph 11(1)(a) or (1.1)(a).

(2) A presiding officer may make such orders as he considers to be proper for the conduct of an examination pursuant to paragraph 11(1)(a) or (1.1)(a).

(3) A judge of a superior or county court may, on application by a presiding officer, order any person to comply with an order made by the presiding officer under subsection (2).

(4) No order may be made under subsection (3) unless the presiding officer has given to the person in respect of whom the order is sought and the Commissioner twenty-four hours notice of the hearing of the

application for the order or such shorter notice as the judge to whom the application is made considers reasonable.

B. Section 90.1 of the Competition Act

Proposed section 90.1(1.1) is extremely broad and would apply to any vertical agreement, including exclusive supply, license, franchise, distribution and joint venture agreements where the Tribunal finds that *a significant purpose* of the agreement, *or any part of it,* is to substantially prevent or lessen competition in any market (SPLC).

Various types of vertical agreements include, for legitimate business reasons, certain restrictions designed to prevent or lessen competition. For example, restrictive covenants that prevent competition are included in franchise agreements and license agreements to protect investments made by one party, or to incentivize new product development or entry into a market, or to encourage innovation.

Amendments to minimize marketplace uncertainty

We understand that the intent of the proposed amendments to section 90.1(1.1) is to capture agreements (or parts of agreements) between non-competitors that unjustifiably seek to and are likely to prevent or lessen competition substantially in a market. The government has identified one example: "particularly in situations where large grocers prevent smaller competitors from establishing operations nearby".[11]

Although well intentioned, relying solely on the enforcement discretion of the Commissioner and the discretion of the Tribunal to consider the factors for an SPLC assessment enumerated in section 90.1(2), creates significant uncertainty. It also leads to compliance issues that could chill pro-competitive restraints as businesses of different sizes in different sectors navigate the new provisions. This uncertainty would be compounded if section 90.1 were opened up to fines or private litigation in the future.

It may well be that, when evaluating "a significant purpose of an agreement or arrangement, or any part of it" under proposed section 90.1 (1.1), the Bureau and the Tribunal will consider both subjective evidence of intent (e.g. business documents describing the purpose of an act) as well as objective evidence (in the form of the reasonably foreseeable consequences of an act) to

11 Press Release, Deputy Prime Minister of Canada Chrystia Freeland, Government introduces legislation to build more rental homes and stabilize grocery prices (September 21, 2023).

assess whether a significant purpose was to prevent or lessen competition in any market as opposed to efficiency-enhancing or pro-competitive. However, this is uncertain from the current wording of the proposed section.

The marketplace uncertainty cannot be addressed by pointing to the "rule of reason approach" adopted in the United States to consider all forms of horizontal and vertical agreements that are not *per se* illegal. Under the rule of reason approach, if anti-competitive effects are established, the burden shifts to the defendant to show an objective, pro-competitive justification for the agreement. However, this rule has developed through years of judicial interpretation in the US. It is not a feature of Canada's competition laws, which are statute based. If the intent is to adopt a rule of reason approach, this should be reflected in the legislation. The CBA Section recommends minor amendments to new section 90.1(1.1) to minimize marketplace uncertainty.

Clarify the requirement for a SLPC and adopt an ancillary restraints defense

Since the CBA Section understands that the new section 90.1(1.1) is intended to capture restraints that have the objective of lessening or preventing competition substantially without justification, this should be confirmed in the legislative drafting and a provision that clearly provides for consideration of legitimate business justifications – such as the ancillary restraints defense, which is already used in section 45 of the *Competition Act* and is well understood – should be incorporated.

RECOMMENDATION

16. We recommend the following additions to section 90.1(1.1):

> **Exception — non competitors**
>
> **90.1(1.1) If the Tribunal finds that a significant purpose of an agreement or arrangement, or any part of it, is to prevent or lessen competition in any market it may make an order under subsection (1) even if none of the persons who are party to the agreement or arrangement are competitors, <u>provided that the other elements of subsection 90.1(1) are met.</u>**
>
> **<u>Ancillary restraints</u>**

90.1(1.2) The Tribunal shall not make an order under subsection 90.1(1) in respect of an agreement or arrangement described in subsection (1.1), or any part of it, if:

(a) the persons who are party to the agreement or arrangement establish that:

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not have as a significant purpose to prevent or lessen competition.

C. Efficiencies

Section 10 of Bill C-56 will repeal section 96 of the *Competition Act.* The government proposes to remove the existing efficiencies defence to ensure that mergers cannot proceed "when Canadian consumers would pay higher prices and have fewer choices."[12]

While the objective of the proposed amendment appears to be a switch from the current "total economic welfare" approach (which focuses on impact on the Canadian economy as a whole), to a "consumer welfare" approach (which prioritizes the interests of consumers), Bill C-56 may not fully implement that change.

Amendment required to fully implement a consumer welfare approach

Bill C-56 could result in mergers being blocked or otherwise challenged even when economies of scale, productivity gains or other efficiencies arising from the merger would likely lead to consumers paying lower prices or benefiting from more innovation, quality improvements or other non-price advantages. This unintended outcome could arise from the existing interpretation of section 92 under the current merger review framework.

If section 96 is simply eliminated from the *Competition Act*, with no other amendments to the merger provisions, there would be no explicit mechanism to take into account the potential benefits to consumers on prices, innovation, product quality or other non-price dimensions of competition that may arise from cost savings or other efficiencies.

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12 Prime Minister Justin Trudeau, Fighting for the middle class (September 14, 2023).

The Minister of Innovation, Science and Industry remarked in his speech to the House of Commons that "if a proposed merger creates efficiencies that strengthen competition in a sector, the Tribunal would be able to consider them in its deliberations".[13] Although section 93(h) of the Act allows "any other factor that is relevant to competition in a market" to be taken into account under section 92, it is uncertain whether the Commissioner and the Tribunal would do so.

The current legislative framework and existing case law separates the assessment of the impact of a merger on competition (under section 92) from the assessment of efficiencies (under section 96):

- The substantial lessening or prevention of competition test under section 92 focuses on whether a merger will give the merging parties increased market power, which is defined as the "ability" to raise prices (or adversely affect innovation, quality or other dimensions of competition).[14]
- While efficiencies can generate strong incentives for merging parties to lower prices or improve innovation, product quality or other dimensions of competition,[15] they may not be regarded as removing the "ability" of a firm with market power to raise prices.[16]

Incorporation of efficiencies as a factor in competitive effects analysis

While the repeal of section 96 may be sufficient for a court to reconsider the analytical framework set out in existing case law, we recommend that Bill C-56 be amended to more fully implement the intended consumer welfare approach by incorporating efficiencies as a factor to be considered when determining if a merger is likely to prevent or lessen competition substantially

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13 Debates (Hansard) No. 223 - September 25, 2023 (44-1), online.

14 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 44-45. See also *Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15 at para 258 ("There is no requirement under the Act to find that the merged entity will likely raise the price (or reduce quality or service). The only requirement under section 92 is for the Tribunal to decide whether the merged entity has the ability to do so."); and *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp. Trib. 18 at para 179 ("It is not disputed that, under section 92, the Commissioner bears the burden of proving that the merger will create, maintain, or enhance market power through the merged entity's ability to profitably influence price, quality, service, or other dimensions of competition. However, there is no requirement for the Commissioner to prove that the merged entity will, in fact, exercise these powers.")

15 See Competition Bureau, Merger Enforcement Guidelines, at paras 11.2 and 12.14-12.18.

16 For example, see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at paras 136-137 ("It is plainly Parliament's intent that, in merger review, efficiencies are to be considered only under section 96 and not under section 92. As a result, the consideration of efficiency gains is not to be tied into the analysis of competitive effects of the merger."); and *Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14 at paras 387-389 ("[…] efficiencies would only be considered on the "efficiencies" side of the balancing process contemplated by section 96 […] Moreover, at the section 92 stage of the analysis, [efficiencies] typically would not be found to be a source of any new, increased or maintained market power that must be identified in order to conclude that the merger is likely to prevent or lessen competition substantially.")

for purposes of section 92 of the Act. Giving clear direction to the Tribunal and the Bureau that positive benefits of efficiencies on consumer prices, innovation, product quality or other non-price dimensions of competition may be considered when assessing mergers would benefit both consumers and Canadian businesses.

This approach would generally be consistent with major trading partners such as the US, UK and EU, each allowing mergers to proceed "where efficiencies can be shown to directly benefit competition and consumers."[17] This approach would also be consistent with the Bureau's recommended amendments to the *Competition Act*, which propose that efficiency claims be "considered as a factor in determining *whether* a merger is anti-competitive."[18]

RECOMMENDATION

17. The CBA Section recommends that efficiencies be incorporated as a factor to be considered when determining if a merger is likely to prevent or lessen competition substantially for purposes of section 92 of the Act. Efficiencies could be included in the otherwise comprehensive list of factors in section 93 by striking out "and" at the end of paragraph g.3, and adding the following after that paragraph:

(g.4) the extent to which efficiencies are likely to benefit competition; and

Additional situations that should be covered by transitional provision

The transitional provision in section 12 of Bill C-56 applies to transactions that have either been completed or have been notified under section 114 of the *Competition Act*, before the amendments come into force. However, merging parties can and often do choose to submit a request for an advance ruling certificate under section 102 without submitting notifications under section 114 of the *Act*.[19]

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17 See Competition Bureau, Examining the Canadian Competition Act in the Digital Era (February 8, 2022), at s. 2.1. See also U.S. Department of Justice and U.S. Federal Trade Commission, Horizontal Merger Guidelines (August 19, 2010), at s. 6.1; and European Commission (2004), *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004/C 31/03, O.J. C 31/5 (5.2.2004) at Part VII.

18 Competition Bureau, Examining the Canadian Competition Act in the Digital Era (February 8, 2022), at s. 2.1 and The Future of Competition Policy in Canada (March 15, 2023), at s. 1.8.

19 See Competition Bureau, Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters (June 23, 2022), at s. 3.3.1.

RECOMMENDATION

18. The CBA Section recommends amending the transitional provision in section 12 to include transactions for which an advance ruling certificate has been requested. This can be achieved by amending section 12 of Bill C-56 as follows:

> **Sections 92 and 96 of the Competition Act, as they read before the day on which sections 9 and 10 come into force, continue to apply after that day to a proposed transaction notified under section 114 of that Act before that day, a proposed transaction for which a certificate under section 102 of the Act has been requested before that day, or to a merger that has been substantially completed before that day.**

D. Expanded Scope of Bill C-56

The Finance Committee has also been granted the power to expand the scope of Bill C-56 to:

- increase the maximum fixed penalty amounts for abuse of dominance to $25 million in the first instance, and $35 million for subsequent orders, for situations where this amount is higher than three times the value of the benefit derived (or the alternative variable maximum),

- revise the legal test for abuse of a dominant position prohibition order to be sufficiently met if the Tribunal finds that a dominant player has engaged in either a practice of anti-competitive acts or conduct other than superior competitive performance that had, is having or is likely to have the effect of preventing or lessening competition substantially in a relevant market.

The CBA Section is concerned with the haste at which the government is proposing to revise the legal test for abuse of dominance. The Finance Committee is being tasked with drafting a new standard for abuse of dominant position where amendments made by this government approximately 18 months ago have not yet been used by the Bureau or interpreted by the courts. As the Bureau itself recognizes, these were important amendments to the *Competition Act* that became law on June 23, 2022, strengthening the Bureau's ability to protect Canadian consumers, businesses and workers from anti-competitive conduct.[20]

It is important that amendments to section 79 do not make *any* action by a firm that has a dominant position open to enforcement activity. Such an outcome could have serious chilling effects on aggressive pro-competitive conduct that is highly beneficial to the Canadian economy

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20 See G7 2023 Hiroshima Summit, Compendium of approaches to improving competition in digital markets at p. 54

and to Canadians. This chilling effect is especially real considering the AMPs for abuse of dominance, as high as 3% of a party's annual worldwide gross revenues, or $25 million dollars if the current proposal is adopted, whichever is higher, and the fact that private parties can now also bring applications before the Tribunal.

To ensure that Canada's competition legislation is not viewed around the world as simply an affront on business and our laws remain consistent with our major trading partners, we believe it is important that the legal test for abuse of a dominant position remain broad enough to address a full range of anticompetitive conduct while ensuring that businesses can distinguish between robust competitive behaviour and anticompetitive behaviour when they make business decisions. This can be accomplished by retaining the substantial prevention or lessening of competition standard in section 79(1)(c) of the Act and providing for intent or business justifications or a defense of competition on the merits in section 79(1)(b).

The CBA Section submits that removing the effects test, which some are calling for to refocus on protecting fair competition[21] would be a simplistic approach with significant error costs. As the American Bar Association Antitrust Law and International Law Sections correctly identifies, "when it comes to scrutinizing the independent decisions and actions of a single firm, the line between aggressive competition and conduct that tends to destroy competition may be delicate to draw. And how and where that line is drawn is vitally important because the law should not chill or diminish the competitive process that it is seeking to protect, nor should it fall short of capturing truly anticompetitive conduct."[22]

Indeed, certain "anti-competitive acts" enumerated in section 78(1) of the Act can be either anti-competitive or represent vigorous competition depending on the circumstances. For example, the use of fighting brands introduced selectively on a temporary basis to discipline a competitor (see 78(1)(d)) can be pro-competitive as can a selective or discriminatory response to an actual competitor for the purpose of impeding or preventing the competitor's expansion in a market (see 78(1)(j)).

We recognize that proving a substantial lessening or prevention of competition on a balance of probabilities can be challenging. However, this is not a deficiency in our laws. The standard for

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21 See CAMP's submission to The Future of Competition Policy in Canada.

22 See Comments of the American Bar Association's Antitrust Law Section and International Law Section on the Government of Canada's Consultation on the Future of Competition Policy in Canada (May 25, 2023).

intervention in private, commercial activity should be a rigorous one. The Competition Tribunal itself recognizes that "Competition, even 'tough' competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task".[23]

That is why an element of intent exists in section 79(1)(b). Only a practice of "anti-competitive" acts are enjoined. As stated by ISED in the Future of Competition Policy in Canada: "Following the BIA Amendments, an "anti-competitive act" that could form part of the practice in the second part of the test is now explicitly defined as an "act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". This drew from, and broadened, prior case law, while continuing to list illustrative examples in s. 78. Both subjective intent and reasonably foreseeable consequences are relevant, and distinguish truly anti-competitive behaviour from justifiable business decisions that nevertheless may prejudice a competitor." [24]

The proposed addition of "conduct other than superior competitive performance" to section 79(1)(b) may be overly broad if it could capture conduct that is not anti-competitive in its purpose - this could also chill pro-competitive business conduct that benefits Canadians.

RECOMMENDATION:

19. **The CBA Section recommends that any further amendment to the abuse test (i) retains, in all circumstances, the substantial prevention or lessening of competition standard in 79(1)(c) of the Act, and (ii) provides, in all circumstances, for intent or business justifications or a defense of competition on the merits in section 79(1)(b).**

IV. CONCLUSION

Thank you for the opportunity to comment on Bill C-56. We trust our comments are helpful and would be pleased to offer further clarification.

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23 See Canada (Dir. of Investigation & Research) v. Tele-Direct (Publications) Inc., 1994 Comp. Trib. (CT-1994-003), at 263.

24 See Innovation, Science and Economic Development Canada, The Future of Competition Policy in Canada (2022) at p. 33.

V. SUMMARY OF RECOMMENDATIONS

A. GST New Residential Rental Property Rebate (Enhanced Rebate)

1. We recommend more equitable approaches to level the playing field for construction already commenced before September 14, 2023. For example, the Enhanced Rebate could be prorated based on the degree of construction after September 13, 2023, for projects that have not already been subject to GST/HST self-assessment. In addition, the Enhanced Rebate could be made available in full to projects under construction before September 14, 2023 where the builder satisfies a condition to build additional rental housing.

2. We recommend that the effective date of the Enhanced Rebate be based on the date self-assessment is required for GST/HST purposes, rather than when construction is considered to "begin."

3. We recommend that the new Enhanced Rebate be available to some degree to any project for which the date of self-assessment under section 191 of the *ETA* is on or after September 14, 2023. If construction had not started as of that date, the Enhanced Rebate would be available in full. It would also be available in full if construction started and the builder begins construction on additional housing units within an appropriate time period. Otherwise, where construction has started, the Enhanced Rebate would be prorated based on the degree of construction after September 13, 2023.

4. We recommend removing the proposed deadline for substantial completion. Bill C-56 already includes requirements for when construction must begin. Builders generally will not have an incentive to delay construction. To the contrary, they are financially motivated to complete construction as soon as possible. Alternatively, we recommend that the legislation give administrative flexibility to allow the Enhanced Rebate for projects that are substantially completed after 2036, in recognition of the delays inherent in construction.

5. We recommend clarifying which types of condominium units would qualify for the Enhanced Rebate.

6. We recommend that the Enhanced Rebate align with municipal policies to address housing shortage through a diversity of housing options, and not favour "tall and sprawl" developments.

B. Competition Act Amendments

7. We agree with the motion to expand Bill-56 to "allow the Competition Bureau to conduct market study inquiries if it is either directed by the Minister responsible for the Act or recommended by the Commissioner of Competition and require consultation between the two officials prior to the study being commenced".

8. We recommend that proposed section 10.1(2) be amended to add consideration of the expected benefits of conducting a market or industry inquiry.

9. We recommend that the Minister's power to order an inquiry be conditional on the availability of adequate resources to guard against the risk that an inquiry diverts Bureau resources away from the Commissioner's primary law enforcement responsibilities.

10. We recommend adding a requirement that the Minister also consult in advance with any regulatory authorities expected to be responsible for addressing recommendations that may emerge from an inquiry into a particular market or industry.

11. We recommend that the time extension power to complete an inquiry be amended to give market participants certainty on the maximum duration of the inquiry.

12. We recommend changes to the sending of the draft report proposed in section 10.1(7).

13. We recommend the extension of section10(3) to industry inquiries to provide clear statutory protections for the confidentiality of commercially sensitive information throughout a market or industry inquiry.

14. We recommend adding a requirement for a public response by the Minister.

15. We recommend a new section 11(1.1) that would apply to orders sought in relation to a market or industry inquiry. The new version mirrors the current version of section 11(1) except for the removal of the *ex parte* nature of the application and the explicit requirement that notice be given to the persons against whom the section 11 order is sought.

16. We recommend amendments to new section 90.1(1.1) to minimize marketplace uncertainty by clarifying the requirement for a SLPC and adopt an ancillary restraints defense.

17. We recommend that Bill C-56 be amended to more fully implement the intended consumer welfare approach by incorporating efficiencies as a factor to be considered when determining if a merger is likely to prevent or lessen competition substantially for purposes of section 92 of the Act.

18. We recommend amending the transitional provision in section 12 to include transactions for which an advance ruling certificate has been requested.

19. We recommend that any further amendment to the abuse test (i) retains, in all circumstances, the substantial prevention or lessening of competition standard in 79(1)(c) of the Act, and (ii) provides, in all circumstances, for intent or business justifications or a defense of competition on the merits in section 79(1)(b).