"50 YEARS ON: THE INFLUENCE OF THE ECONOMIC COUNCIL OF CANADA'S *INTERIM REPORT ON COMPETITION POLICY*"

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2019 marks the 50-year anniversary of the release of the Economic Council of Canada's Interim Report on Competition Policy in 1969. The transformation of Canadian competition legislation since 1969 can be directly traced to recommendations in the Economic Council's Report. This article focuses on two of those recommendations: to move those matters requiring a detailed economic assessment to adjudication by an expert civil tribunal (and away from the criminal courts), and to focus on economic efficiency as the legislation's main objective. This vision for change has largely been implemented. The Report marked a watershed for Canadian competition policy—an important turning point which began the process of moving the law from being in many respects ineffective, to occupying a leading place among modern competition law regimes.

L'année 2019 marque le cinquantenaire de la publication du Rapport provisoire sur la politique de concurrence publié par le Conseil économique du Canada en 1969. La transformation de la législation depuis 1096 découle directement des recommandations faites dans le Rapport du Conseil. Le présent article est axé sur deux d'entre elles, à savoir : faire en sorte que les questions nécessitant une évaluation économique détaillée soient tranchées par un tribunal civil spécialisé (et non plus par les cours criminelles), et faire de l'efficience économique le principal objectif de la législation. Cette vision du changement a largement été mise en œuvre. Le Rapport a été un tournant dans la politique canadienne en matière de concurrence; un virage qui a lancé le processus du passage de lois inefficaces à plusieurs égards vers un régime juridique qui fait figure de proue en matière de droit de la concurrence moderne.

Introduction

In the course of examining the efficiency defence in the merger provisions of the *Competition Act* in *Tervita v Commissioner of Competition*, Justice Rothstein noted that "[t]he process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report 'identified economic efficiency as the overriding policy objective' of legislative reform."[1] As a result of the amendments made since receipt of the resulting *Interim Report on Competition Policy* in 1969, the legislation was

largely transformed. This transformation can be directly traced to recommendations in the Economic Council's Report.

The 50-year anniversary of the release of the *Interim Report* is an opportunity to celebrate, and take stock of, its major contribution to the modernization of the law. This article focuses on two central recommendations of the *Report*: to move those matters requiring a detailed economic assessment to adjudication by an expert civil tribunal (and away from the criminal courts), and to focus on economic efficiency as the legislation's main objective. This vision for change has largely been implemented. While it took decades for this to happen, the *Interim Report* marked a watershed for Canadian competition policy—an important turning point which began the process of moving the law from being in many respects ineffective, to occupying a leading place among modern competition law regimes.

The 1960's: Mad Men, Mergers and Criminal Competition Laws

In 1960, there had never been a successful challenge to an anti-competitive merger in Canada, although the applicable law had been on the books for 50 years. That year, two criminal merger cases, dealing with beer and sugar, were decided at trial by the Chief Justices of two different provinces. At the time, the only way to challenge a merger (or monopoly) was by criminal prosecution. The criminal prohibition stated in stark terms:

> 33. Every person who is party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years.[2]

A "merger" was in turn defined as an acquisition "whereby competition … is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others."[3] This standard provided no legislative guidance to the courts on the meaning of "public detriment" or the "public interest". Thus, "[t]he issue of 'detriment' ... involved the courts in a … subjective decisional role, one which they found very difficult."[4] This led to an understandable reluctance by the criminal courts to convict business people of conduct which could in many circumstances be benign or even beneficial.

R v Canadian Breweries Ltd was "the first case based solely on the operations of the accused as a merger to come before any Court in Canada".[5] The accused corporation was the leading manufacturer of beer in Ontario, with a 1958 market share of 60.9%. Its market share had increased from

11.2% in 1931 through numerous acquisitions of competing brewers and growth. During that period, 23 plants were acquired, 6 of which were closed "very shortly after their acquisition".[6] The Crown argued at trial that the acquisitions and other conduct justified criminal conviction on the basis, *inter alia,* that "the purpose of acquiring competing plants was to destroy the competition that arose from price-cutting activities of some of the plants acquired."[7] The trial judge, Ontario Chief Justice McRuer, rejected this argument, finding that "I do not think it is an offence against the Act for one corporation to acquire the business of another merely because it wishes to extinguish a competitor."[8] He held further that "under the *Act* it must be demonstrated beyond a reasonable doubt that the merging of competitive corporations is likely to put it within the power of the merger to so extinguish competition as to affect prices by monopolistic control."[9] This was an extremely high threshold for the Crown to satisfy—essentially merger to monopoly. Because other competitors remained in the beer market, it could not be met. Other factors were at play, such as provincial regulation of beer prices. The Court acquitted the accused. There was no appeal.

R v British Columbia Sugar Refining Co. dealt with a series of mergers in the 1950's whereby the accused became the sole sugar refiner in Western Canada. The Crown argued that the transactions gave the company the power "to exercise a complete monopoly of the sugar business in Western Canada [and that] detriment to the public ... therefore resulted or was likely to result from this merger."[10] The trial judge, Manitoba Chief Justice Williams, held that the Crown needed to show not only a "virtual monopoly", but also "excessive or exorbitant profits or prices."[11] He held that the Crown had not shown this, noting the possibility of competition from sugar refineries based in Eastern Canada. Another acquittal was entered; again, the Crown did not appeal.

Reviewing these and other competition law decisions in 1965, a leading member of the Bar questioned the institutional competence of the criminal courts to decide competition cases:

> The demands of 1889 are not the demands of the 1960's, and the combines cases illustrate contortions through which the courts have been going in their attempts to accommodate the change absent any fundamental overhaul of the statute. The object of the statute has changed, and increasingly the control of combines is recognized as a sophisticated problem requiring analysis of economic data. The Canadian courts, aware of their deficiencies in the training need for such evaluations, resist as much as possible any debate over or inquiry into economic data or theory.[12]

The Chairman of the Economics Faculty at McGill had a similarly harsh assessment of the effect of the *Canadian Breweries* and *B.C. Sugar* decisions: "an unsophisticated judiciary, overwhelmed by strict criminal law tests, had come very close to rendering the merger offence meaningless."[13]

The criminal monopoly provision was also subject to the requirement of operating "to the detriment or against the interests of the public" and therefore to the high thresholds applied by the courts in *Canadian Breweries* and *B.C. Sugar*. There was only one conviction for the offence of monopoly throughout its lifespan[14] and as a result of the test applied by the courts, it "was widely perceived as ineffective in dealing with anti-competitive conduct by dominant firms."[15]

Two previous attempts by Parliament in 1921[16] and 1936[17] to move to a non-criminal regime had been struck down on division of powers grounds. The law retained its criminal foundation. By the 1960's, it had become clear that this state of affairs was rendering the law largely ineffective in areas such as merger and monopoly review, which require a case-by-case assessment of economic effect.

The Economic Council of Canada

The Economic Council was created by an Act of Parliament in 1963 as an agent corporation available to provide advice to the government on various economic policy-related matters. It was composed of "a chairman, two directors and not more than twenty-five other members, to be appointed by the Governor in Council".[18] The members were drawn from a broad cross-section of society—from business and agriculture to academe. In addition to a broad mandate to advise on economic matters, the Council could be tasked with conducting "such studies, inquiries and other undertakings as may be necessary" if so directed by the responsible Minister.[19] The Council had a 30-year life span, being dissolved in 1993.

The 1966 Terms of Reference

In 1966, the Liberal government asked the Economic Council "to look at the field of consumer affairs … with a view to providing advice as to the courses of action which seem best to meeting the needs of the Canadian people and the Canadian economy in the consumer field."[20] The government had decided to refer "the whole question of combines, mergers, monopolies and restraint to trade" to the Council along with other issues such as intellectual property. It stated that it did not want to make "piece-meal" changes to the *Combines Investigation Act*. Changes would only be

undertaken "in the context of the whole review and any revisions that may take place in light of the findings of the Economic Council."[21]

The government thus saw competition policy as an element of broader economic policy. This, itself, represented an enlightened view and an evolution of thinking. The first "combines" legislation in 1889 had not been part of any unified or planned framework of economic policies. Rather, it was reactive legislation, put in place to counter the excesses of private combines (or "trusts" as they were called in the United States[22]). Limited and ineffective legislation was passed in response to public, and political, concern over the "combines problem" and the unintended side-effects of a protectionist high tariff policy.[23]

This reactive character continued in changes which were made over the following decades. For example, the Great Depression led to a policy agenda in the 1930's favouring the protection of competitors and individual businesses. In 1935, Parliament introduced criminal prohibitions of predatory pricing and price discrimination, provisions which were in many respects hard to square with the advancement of competition.[24] For example, the predatory pricing provision made it an offence merely to intend to eliminate a competitor, regardless of competitive effect; price discrimination was an offence founded on making distinctions in the prices charged by a supplier to competing firms, even though volume or other discounts are often justified on efficiency grounds and may lower prices to consumers. It was observed with respect to the former that the section "can be construed as protecting competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation."[25]

In 1951, a criminal prohibition of resale price maintenance was added. Resale price maintenance is a practice which economists came to regard over time as neutral or even beneficial, because it may stimulate greater competition by, for example, encouraging enhanced service and interbrand competition.[26]

Given this history, combines legislation was, by the 1960's, an awkward jumble of sometimes conflicting prohibitions, all uneasily enforced under the banner of the criminal law. For example, even though the Supreme Court's in reference to the legislation's central conspiracy prohibition had held "[t]he enactment before us ... was passed for the protection of the specific public interest in free competition,"[27] provisions such as predatory pricing were directed, as noted above, as much at protecting competitors as

promoting competition. The tide was turning however; circumstances and economic learning informed the Council's 1966 terms of reference. Competition policy was finally being viewed as having a central place among other economic and regulatory policies. The Economic Council's work, and a greater economic focus on competition policy arising from the work of the "Chicago" and "Harvard" schools of antitrust in the United States,[28] would assist in advancing that thinking.

The relevant language of the terms of reference announced in 1966 by the government asked the Council "[i]n light of the government's long term objectives, to study and advise on … combines, mergers, monopolies and restraint to trade."[29] This mandate gave the Council considerable latitude for its review.[30]

The Council's *Report*

The Council began its work by soliciting comments from the public. Forty submissions were received. The Council also carried out research into competition policy as applied in Europe and the United States. It reviewed the economic data available on the structure and performance of the Canadian economy. It examined particular sectors of the economy, such as services, and specific issues such as government regulation. [31]

The composition of the Council at the time of the *Interim Report on Competition Policy* was described by the *Report's* "principal author"[32], Dr. David McQueen (then Professor of Economics at Glendon College, York University), as a "mixed membership of large and small businessmen, farm and labour leaders, consumer advocates, academics, etc." According to Dr. McQueen, this diversity of backgrounds "posed divisive possibilities for a body which hitherto had managed to operate by consensus rather than majority vote, and which believed this important for its ability to influence public opinion and economic events."[33] As reflected by Dr. McQueen's central place in writing the report, while the Council members may have played a guiding role, the Report's substance was evidently crafted with the aid of considerable economic expertise.

The *"Interim Report"* was released in July, 1969. In spite of its title, there was no further, or *"final"*, report.[34] The chairman of the Council described the *Report* (despite the tensions identified by Dr. McQueen) as "a consensus among twenty-eight people reflecting a very broad cross-section of views and interests in different parts of the country and different sectors of the economy." [35]

The *Report* began by noting how much the country had changed, in terms of industrialization and urbanization, in the preceding years. It noted that the government had requested a fundamental re-examination of the role of competition policy in the economy in light of these changes.[36]

The Council's assessment was that competition legislation had historically had little more than a "modest" or "uneven" impact on the economy. In the area of corporate mergers, for example, the Report concluded bluntly that "the Act has been all but inoperative."[37] It stated that "it has proved impossible, within the confines of the criminal court procedure, to provide the sort of examination of complex economic phenomena that would adequately satisfy the protection of the public interest."[38]

The Report contained two powerful, and as it turned out, persuasive, ideas.

The first was in the Report's second chapter, "Philosophy and Problems", which laid out the Council's vision for a future competition policy. It proposed that "the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy."[39] The Report explained that historically, "popular thinking about competition policy" had emphasized the "income distribution" objective—the transfer of income which occurs, for example, when a monopoly seller raises prices to the consumer. Such concerns, it stated, were "no doubt uppermost in the minds of the farm interests who were among the strongest supporters or early anticombines and antitrust legislation".[40] The Report explained however that other policies, such as taxation and direct subsidies would be more effective in achieving distributive goals; that elevating efficiency as the main objective was likely to lead to a more consistent application of competition policy.[41] The Report's emphasis was on pursuing "the most efficient performance from the economy" in terms of optimal resource use (i.e. allocative efficiency)[42] as well as "the recognition of the importance of research, invention and innovation" (i.e. dynamic efficiency).[43]

The second powerful suggestion was "A New Approach to Competition Policy in Canada"—as the Report boldly titled Chapter 6. The Council opined that conduct which could be prohibited outright, such as bid rigging, price fixing, market allocation, resale price maintenance and misleading advertising, should be dealt with under the criminal law.[44] However, other practices requiring an assessment of their economic effects based on the facts of a particular case, such as mergers and monopoly, should be adjudicated

by a new, independent, expert, "Competitive Practices Tribunal". [45] The rationale was explained as follows:

> The basic reason for seeking to place some of the federal government's competition policy on a civil law basis would be to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public. The greater flexibility afforded by the civil law is especially to be desired in those areas of the policy that do not lend themselves to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices.[46]

An expert civil tribunal, the Council believed, would be able to distil the complex data and other evidence required to assess competition law issues, while retaining "some of the characteristics of a court", such as affording the parties before it the right to be heard and other aspects of procedural fairness.[47] It would also permit a range of remedies suited to practices such as mergers.[48] At the same time, the tribunal would have the flexible procedures and expertise permitting it to analyse and to decide technical economic questions:

> … the tribunal's proceedings would be less formal than those of a court and, it might be hoped, devoid of any strong sense of crime and punishment. ... The prevailing atmosphere would ideally be one of a collective search for understanding of business practice and its economic effects, and for the progressively clearer discernment of the nature of the public interest in particular cases.[49]

The *Report* noted that its recommendations for reliance on civil law remedies and adjudication for federal competition law assumed their constitutionality on division of powers grounds, although it accepted that there was "no certainty" in this respect until the issue was pronounced upon by the courts.[50] The *Report* did provide factual support for federal authority, however, in Appendix IV, entitled "The Interdependency of the Canadian Economy", which concluded that "an effective competition policy in Canada must be organized, at least in part, on a national basis."[51]

One commentator noted several "firsts" found in the Council's *Report*:

> … the earliest displacement of the term "anti-combines policy" by a positive-sounding "competition policy"; the first government attempt at in-depth analysis of its economic roots; the first real effort to explore the implications of competition policy for efficiency in government regulation and ownership.[52]

The Process of Amendment: Taking up the Council's Mantle

Over a period of almost two decades after the Economic Council's *Report,* there were numerous initiatives to amend the law. Success was finally achieved in two main stages: the amendments of 1976 and those of 1986. These amendments shifted Canadian competition law toward a more consistent focus on the economic and efficiency-related effects of anti-competitive practices, and toward the use of civil remedies adjudicated before an expert tribunal, as the Council had recommended. More recently, amendments in 2002 adding a requirement for an "adverse effect on competition" to the refusal to supply provision and a right of private access to the Tribunal for certain provisions, and those of 2009 addressing conspiracy and other anti-competitive agreements and pricing practices, carried on the process of de-criminalization and increased the consistency of the economic focus for the law.

The initial effort to achieve reform in one package was Bill C-256, tabled in June 1971. It was described by one commentator as "the most significant pro-competition, pro-consumer legislation in Canadian history." [53] The Council's chairman noted that the proposals "follow … closely the Economic Council's general approach."[54] Indeed, the responsible Minister had instructed officials that he wanted the draft legislation to reflect the Council's recommendations.[55] The proposed "Competitive Practices Tribunal" contained in the Bill would have had an inquisitorial role and broad powers to restructure Canadian industry.

The Bill encountered a strong adverse reaction from the business community;[56] "[i]n the eyes of some, the proposals … went far beyond the Council's recommendations in the extent of its advocacy for consumer interests."[57] To move matters forward, the reform proposals were split into "Stage I" and "Stage II", with the more controversial matters, such as merger and monopoly law reform, and the Council's central recommendation of the creation of a new tribunal, deferred to Stage II.[58]

1976 Amendments: Civil Reviewable Practices and the R.T.P.C.

The Stage I proposals were first introduced in November, 1973. They were finally passed into law in late 1975 and came into effect in January, 1976.[59] One significant amendment was giving the existing Restrictive Trade Practices Commission (R.T.P.C.) the authority to make final decisions, and issue binding orders, in respect of a number of new "civilly reviewable matters". These were mainly "vertical" practices (i.e. seller to buyer, as opposed to

"horizontal", competitor to competitor, conduct) such as refusal to supply and exclusive dealing. The R.T.P.C. had hitherto been tasked with making policy recommendations and carrying out "research inquiries", rather than conducting trial-like proceedings. Its mandate was extended to implement the Council's recommendion that a specialized tribunal be used for cases which involved a case-by-case assessment of economic effects.

More Legal Setbacks; Continued Resistance to Change

The pressing need for further reform of Canadian competition law was underlined in 1976 with the Supreme Court of Canada's decision in *R v K.C. Irving*. One observer wrote that the case "hammered the last nail into the coffin of Canadian merger policy";[60] another that it represented "[t]he final straw for Canadian merger and monopolization law."[61] K.C. Irving Ltd and affiliates were convicted at trial before the New Brunswick Supreme Court on charges of merger and monopoly under section 33 of the *Combines Investigation Act*.[62] The companies had acquired control of all five English-language newspapers in New Brunswick over the period 1944 to 1968. The Crown argued, successfully at trial, that these acquisitions gave rise to a presumption of public detriment "upon proof of control of a business that excluded the possibility of any competition".[63] However, the trial decision was overturned by the New Brunswick Court of Appeal[64] and the Crown appealed to the Supreme Court. Chief Justice Bora Laskin, for the unanimous Court, rejected the Crown's contention that any presumption of public detriment arose from the acquisition of complete control and the absence of competition and dismissed the appeal.[65]

In 1976, the government commissioned and received a report from an advisory committee led by Dr. Lawrence Skeoch (an economist) and Bruce MacDonald (a lawyer).[66] The *Skeoch-MacDonald Report* continued to recommend the creation of a new expert civil tribunal and a shift away from criminal law for merger and monopoly review, as the Economic Council had done. There was also a subtle shift in the approach. It placed an emphasis on ensuring that too-vigorous enforcement using structural tests did not stymie critical dynamic forces, such as innovation. The authors viewed such forces as a key driver of competitive markets. On adjudicative matters, it recommended that the new tribunal be subject to the "supervisory jurisdiction of the Federal Court of Canada"[67] and that Cabinet should have the ability to rescind or vary any order of the new civil tribunal because "[t]he Canadian economy is not as uniformly vigorous as some other economies and there is a greater need at times to compromise between public policy objectives."[68] The suggested need to reign in the authority of the proposed

tribunal on substance and procedure gave ammunition to critics of subsequent proposals for a civil tribunal.[69] Thus, the Report had a mixed effect in terms of advancing the urgently-needed legislative changes.

Bill C-42, introduced in March 1977, represented a blend of the recommendations of the Economic Council's *Report*, the *Skeoch-MacDonald Report* and other proposals. It continued to propose that merger and monopoly law be shifted to a new civil tribunal. It also introduced controversial proposals for class actions to recover damages from anti-competitive practices.[70] The Bill died after Second Reading.

Its successor, Bill C-13, was introduced in November, 1977. It contained substantial revisions to the language and tests in the earlier Bill. Completely new was a Cabinet power to override decisions of a new civil tribunal on merger, monopoly and other matters (as recommended in *Skeoch-MacDonald Report*). In spite of such changes designed to deal with many of the criticisms that had emerged, Bill C-13 was never given second reading or referred to Committee.

In May 1981, the government released a "discussion paper" proposing, yet again, new civil-law based provisions dealing with merger and monopoly, but this time to be adjudicated by the civil courts. No draft legislation flowed from these proposals, but it initiated a slow process of further consultation between government officials and interested groups.[71] Eventually this led to Bill C-29, introduced in 1984. However, the Bill was not enacted before the general election in the fall of that year.

1986 Amendments: Civil Merger and Monopoly Law

The new (Conservative) government took up the legislative torch where the previous (Liberal) government had left off. Proposals for reform of competition law were introduced as Bill C-91 in December, 1985. The Bill was passed as the *Competition Act* in June, 1986. Finally, the main pillars of the Council's recommended approach were law.

The *Guide* to the 1986 amendments gave credit to the important role played by the Council's work. It stated that the 1969 *Interim Report* had fostered a 16 year long "debate on the substance and form of amendments necessary to strengthen and modernize the law". It noted that given the increasing competitiveness of the world economy since the 1960's, "the need for a comprehensive reform of Canada's outmoded competition law has become even more pressing."[72]

The 1986 amendments added a purpose clause for the first time in the history of the legislation. This provision reflects the *Act's* increased economic emphasis. It states:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[73]

The Supreme Court of Canada in its 1997 *Southam* decision considered the purpose clause and concluded that "[t]he aims of this Act are more 'economic' than they are strictly 'legal' ". The Court noted that "the Tribunal is especially well-suited to the task of overseeing a complex statutory scheme whose objectives are particularly economic."[74]

As the Economic Council had suggested, competition was framed in the purpose clause as a means to other, ultimate, objectives, including efficiency. Sexton J.A. in *Premier Career Management*, a case dealing with the misleading marketing provisions of the *Act*, captured this point:

> As this purpose clause makes clear, the goal of the Act is not to foster competition for its own sake, but rather to promote derivative economic objectives, such as efficiency, global participation, high quality products, and competitive prices.[75]

The influence of the Economic Council's recommended orientation toward efficiency can be seen in several substantive provisions in the 1986 *Act*, such as those governing mergers and dominant firm behaviour, which require the assessment of their economic effect using a "substantial lessening of competition" standard.[76] This test has been interpreted to require conduct which creates, preserves or adds to "market power", a concept anchored in the ability to raise prices above competitive levels and hence the potential for creating allocative inefficiency, which was a focus of the Council's policy concerns.[77] In *Tervita,* the Supreme Court confirmed that the test for substantial prevention or lessening is whether a merger is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms."[78] Assessing market power often requires a detailed assessment of factors such as market definition, market concentration, barriers to entry and other market conditions which influence the competitive impact of the conduct under

review. As recommended by the Council, the provisions containing this test are subject to adjudication before the Competition Tribunal.

The Competition Tribunal

The Competition Tribunal is a specialized civil tribunal with the expertise and tools enabling it to conduct a weighing and analysis of economic factors. The *Competition Tribunal Act* lays out the structure of the Tribunal. It is composed of not more than six judges of the Federal Court and not more than eight lay members. Both groups are appointed by the Governor in Council.[79] No particular background is specified for the lay members, although the Tribunal website notes that current members "provide expertise based on their individual backgrounds in economics, business, finance, accounting or marketing."[80]

The Chairman of the Tribunal is designated by the Governor in Council from among the judicial members. Only judicial members may make determinations of questions of law in proceedings before the Tribunal. On the other hand, questions of fact and mixed fact and law shall be determined by all members.[81] The scheme ensures judicial expertise is brought to the law-making aspect of the Tribunal's function. On the other hand, lay members are involved in those matters for which their expertise qualifies them most strongly: fact-related determinations, which may involve an appreciation of economic evidence, statistics, and particular analytical approaches.

Hearings are presided over by judicial members. Hearing panels are composed of from three to five members, with at least one lay member.[82] Reflecting a Parliamentary desire that the Tribunal's rules of evidence be more flexible than those of the criminal courts which were perceived to have created such great problems for proof and enforcement of the law, the *Competition Tribunal Act* states in subsection 9(2):

> All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.[83]

Hearings before the Competition Tribunal have in general more closely resembled those of a civil trial than a hearing before an administrative tribunal such as the Canadian Radio-television and Telecommunications Commission (C.R.T.C.). The Competition Tribunal is likely a more court-like body than the one envisaged by the Council. For example, while suggesting that the tribunal retain some resemblance to a court, the Council recommended a tribunal possessing a "small expert staff of its own … to provide factual information and analysis … which was not forthcoming

from any other source".[84] It was also to have a role in "education and persuasion" through such means as "issuing general guidelines ... in respect of certain types of merger or trade practices"[85] These functions have more in common with a regulatory agency (such as the C.R.T.C.) or an inquisitorial body (such as the European Commission Directorate-General for Competition) than a court.

The Competition Tribunal seeks to marry the benefits of greater certainty, known procedures and judicial decision-making found in the Federal Court with those of a specialized body with lay members chosen for their expertise. The government's *Guide* accompanying the 1986 amendments explained the rationale for a judicialized tribunal:

> The Economic Council of Canada's 1969 Interim Report on Competition Policy stated that any shift of competition policy legislation out of the criminal law should be accompanied by the formation of a specialized tribunal to adjudicate these matters. ...
>
> The issue of adjudication of competition matters has been the subject of much discussion over the long history of competition law reform. Many interested parties have proposed reliance on the ordinary courts to adjudicate competition matters. One factor often cited in support of the courts is their ability to produce consistent results with clear and full rights of appeal. Others have expressed a preference for the use of a specialized tribunal because it would provide greater potential for expertise in economics and business, and would permit more scope for response by the decision maker to social and economic change. In particular, lay experts are better able to reflect the reality of the business world.
>
> On balance, the Government believes it is more appropriate that these matters be adjudicated by a highly judicialized tribunal. This hybrid will allow the use of expert lay persons as well as judges in the decision-making process. Nevertheless, the Government agrees that it is very important to have in the law an adjudication system that ensures the impartiality, due process and certainty which is associated with the courts.[86]

The Competition Tribunal's court-like structure and processes have led to concerns about the cost and delay required to obtain a final ruling.[87] Delay or uncertainty can lead businesses to abandon transactions when challenged by the Commissioner, regardless of the merits of a challenge under the *Act*.[88] Conversely, if the authority to approve conduct was given to a body capable of dispensing speedy summary justice, but without the procedural safeguards, evidentiary rules and appeal rights available through the Tribunal,[89] other concerns, such as arbitrariness or lack of procedural fairness, would

probably be raised.[90] Furthermore, giving the Tribunal a more pro-active role to issue guidelines and to carry out its own factual collection, as the Council suggested, may impact its perceived independence and impartiality. Thus, it may be hard to improve on the careful compromise reflected in the structure of the Competition Tribunal, even though it is a more judicialized body than the Council appears to have envisioned.

Constitutionality of Civil Competition Law

The federal constitutional juridsdiction to enact civil competition law, referenced by the Council in the *Report*, was finally confirmed by the Supreme Court of Canada in 1989 in *City National Leasing*.[91] The Court cited the *Report* to the effect that recourse to civil remedies was necessary to increase the flexibility, effectiveness and acceptability of competition law to the general public, in support for the Court's conclusion that the civil damages provision (added to the legislation in 1976) fell within federal authority over trade and commerce.[92] The Court noted that the Council had "recommended expanding civil enforcement mechanisms generally to increase flexibility needed to combat business practices reducing competition".[93] Dickson C.J. for the Court concluded "I see no reason why remedies available for violations of the Act should be frozen in time. There is no constitutional impediment to amending the remedies provisions of the *Combines Investigation Act* to conform with changing economic realities."[94]

The Efficiency Defence

The merger provisions introduced in 1986 contain an "efficiency defence", applicable to those transactions where the merger-specific gains in efficiency are "greater than, and will offset" the anti-competitive effects.[95] The anti-competitive impact of a merger, such as a price increase, may lead consumers to purchase less desirable substitutes that cost society more to produce (creating allocative inefficiency); the merger may also lead to higher production costs flowing from a reduction in competitive pressure (productive inefficiency). Price increases may lead to income transfers between producers and consumers. On the other hand, the merger may bring about benefis such as lower costs from rationalization of plant or personnel (productive efficiencies) and/or promote innovation (dynamic efficiencies). The defence provides for a balancing of these factors.

The defence has been interpreted as not excluding the consideration of distributive factors (i.e. income transfers) in the weighing of anti-competitive effects of a merger against efficiencies. The Federal Court of Appeal ruled that it was an error of law for the Tribunal to exclude such considerations

entirely.[96] On reconsideration, the Tribunal included some distributive effects as part of its assessment of the defence.[97]

The Economic Council's *Report* did not recommended a separate "defence" based upon efficiency; resource savings from a merger were merely listed among the "matters" to be considered as part of assessing a merger's competitive effect.[98] The Council did envisage that the new tribunal would be tasked with "a balancing assessment between possible detrimental effects on competition and possible beneficial effects in the form of social savings."[99] However, it did not express any views on what should be included in the category of anti-competitive effects.[100] The central task of the tribunal was described as follows:

> It would be primarily concerned with whether the merger was likely to lessen competition to the detriment of final consumers, and whether there were likely to be any offsetting public benefits.[101]

In terms of the income distribution and other effects of a merger, while the Council had recommended that "obtaining the most efficient possible performance of the Canadian economy" should be "the main objective" of competition policy, it did not view this as excluding room for concurrently serving other objectives where consistent with efficiency. For example, the Council noted that "[m]ost of the time, action to promote efficiency would also result in some progress toward the other goals" such as "the diffusion of economic power", "more equal income distribution" and eliminating "barriers to entry of new enterprises".[102]

The Council noted, consistent with more contemporary economic thinking which has focused on the importance of innovation and dynamic efficiency:[103]

> —the efficiency of resources must, however, be seen in dynamic as well as static terms, which implies among other things the recognition of the importance of research, invention and innovation;[104]

The *Report* also stated:

> To the greatest extent possible, competition policy should be administered in such a way that due account is taken of the competitive impact of, and the desire for, new products and new methods of production.[105]

These statements reflect a view that effects of anti-competitive conduct on such matters as research and innovation should be given close consideration and considerable weight because of their potential importance to the

competitive process. An important question arising in the context of the merger efficiency defence is how this factor should be integrated into the analysis. Impacts on innovation and dynamic competition are usually challenging to quantify,[106] but the Supreme Court majority in *Tervita* accepted that there was room for such factors in the balancing analysis. While the majority expressed a clear preference for the perceived objectivity of "quantified" effects, they noted that "qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable" and may be weighed in assessing the defence.[107] The work of the Economic Council supports giving dynamic efficiency considerations appropriate weight in the framework of the efficiency defence as set out by the Supreme Court in *Tervita*.

2002 Amendments: Private Access to the Tribunal

The *Report* had, in brief terms, recommended that applications before the new tribunal it recommended could be initiated both by a Crown official (the "Director of Legal Proceedings") and by "private parties deeming themselves affected by the practice." The latter would be subject to a screening process before the tribunal to determine whether "there appeared to be public interest grounds for subjecting the practice to a full hearing."[108] In 2002, Parliament went part of the way in this direction, passing amendments which, *inter alia,* permit private parties to apply to the Competition Tribunal for leave to bring an application under the refusal to supply, exclusive dealing, market restriction and tied selling provisions.[109] (The most active provision for such applications has been refusal to supply.[110]) The Commissioner, however, remains the gatekeeper to the Tribunal in applications for relief arising from the merger and abuse of dominant position provisions.

2009 Amendments: "*Per se*" Conspiracy and De-Criminalized Predatory Pricing

The Council's 1969 recommendations included the creation of *per se* criminal prohibitions of price fixing and market allocation.[111] In 2009, the *Act* was amended to substantially alter the existing conspiracy offence by creating a "*per se*" criminal prohibition of certain kinds of agreements (price fixing, market sharing and output restriction) without the need for an economic assessment of their effects.[112]

These changes reflected a building international consensus over previous decades, found in the work of such bodies as the OECD, that "hard-core" cartels (defined by the OECD as agreements among competitors "to fix prices, make rigged bids (collusive tenders), establish output restrictions or

quotas, or share or divide markets"[113]) are so inherently harmful to public welfare that they should be prohibited outright, while other types of potentially legitimate competitor collaboration may have positive or negative effects which require case-by-case consideration.

Consistent with the recommendations of the Economic Council, in the 2009 amendments, Parliament again moved away from economic assessment in the criminal law provisions in the *Act,* eliminating the "undueness" test in the conspiracy provision, which had previously required a determination of whether market power existed among the co-conspirators. While the Council was equivocal on the need to eliminate that standard in view of the evolving jurisprudence at the time of its *Report,*[114] it would likely have agreed with this change in light of the intervening jurisprudence. The market power assessment mandated by the Supreme Court of Canada in 1992 in *R v Nova Scotia Pharmacies* for "undueness" required that the Crown show that the agreement in question involved both "moderate market power" and "some behaviour likely to injure competition."[115] This was precisely the kind of economic effects assessment to which the criminal courts had proven themselves unsuited in the 1960's and 70's cases cited above.[116]

The Competition Tribunal's jurisdiction was also enlarged by a new provision dealing with anti-competitive agreements (other than mergers).[117] Such agreements, like mergers and abuse of dominance, now may be subjected to a case-by-case economic analysis by the Tribunal to determine whether there has been a "substantial lessening of competition." An efficiency defence, employing the same standard as that applicable to mergers, also applies to such agreements.[118]

In the case of predatory pricing, the criminal prohibition prior to 2009 made it an offence, for example, to intend to eliminate a competitor by a policy of low pricing.[119] The Council noted that attacking such conduct created a potential "conflict of goals" within the legislation. The Council's view was that where "the squeezing of a competitor appears to be part of a process likely to increase efficiency and lower costs and prices", "the efficiency goal might well suggest letting the process work itself out", because "no individual competitor, corporate or otherwise, has an inherent right to stay in business".[120] Under the 2009 amendments, the criminal predatory pricing provision was repealed and left to consideration under the existing abuse of dominance provision on a "substantial lessening of competition" standard.[121]

Resale price maintenance was also de-criminalized and made reviewable by the Tribunal where it is "likely to have an adverse effect on competition in a market", the same test applicable to the refusal to supply provision since 2002.[122]

The 2009 amendments therefore carried on the trend, consistent with the recommendations in the 1969 Economic Council's *Interim Report*, of having those provisions which require a case-by-case economic analysis addressed before an expert tribunal, and removing or simplifying criminal provisions so that they do not require such an analysis.

Conclusion

The *Interim Report on Competition Policy* has had a major influence on the development of Canadian competition policy over the past 50 years. The current *Competition Act* largely reflects the Council's vision of a competition law regime where the criminal law is reserved for those matters susceptible to outright prohibition without a detailed economic analysis, while conduct such as mergers, abuse of dominance and pricing and distribution practices that warrant a weighing of economic effects, are adjudicated before a specialized tribunal. The move toward this state of affairs has been incremental; it encountered significant resistance in the early decades after the *Report*, but the wisdom of the Council's recommended approach gradually gained acceptance, to the point where it is fair to say that it has now been largely implemented. These changes represent a substantial improvement to the law, which now reflects a more cohesive and consistent regime in which the institutional abilities of the bodies adjudicating it are more closely and realistically matched to the subject matter under consideration.

Another of the Council's central recommendations, that economic efficiency become the focus of Canadian competition policy, is also reflected in the changes which have occurred over the intervening decades. The *Report's* persuasive impact on policy-making was rooted in its well-reasoned exposition of preferred purposes and objectives, which "provided a unique foundation on which to build deeper understanding of competition policy".[123] While the legislation has shifted toward a greater efficiency-related focus as the Council recommended, other historical objectives remain in the purpose clause and continue to inform interpretation of such provisions as the efficiency defence. We may expect, consistent with developments in the United States,[124] that debate will continue on whether to move competition legislation away from objectives unrelated to economic efficiency, or whether to increase the emphasis on non-efficiency related factors such as income distribution or the abuse of economic power.

The Council's contribution to the modernization of Canadian competition policy is readily apparent in comparing the *Report's* recommendations to the adjudicative structure and substantive tests in the current legislation. The views expressed in the *Report* on such matters as the importance of innovation and dynamic efficiency also remain relevant to the application and interpretation of Canadian competition legislation in the future.

ENDNOTES

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[1] *Tervita Corporation v Commissioner of Competition*, 2015 SCC 3 at para 85 [*Tervita*], citing AN Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (1997) at 21.

[2] *Combines Investigation Act*, RSC 1970, c C-23, s 33.

[3] *Ibid*, s 2.

[4] *Canada (Director of Investigation and Research) v Air Canada*, [1988] CCTD No 2 at 9.

[5] *R v British Columbia Sugar Refining Co*, [1960] MJ No 2, 129 CCC 7 at para 3. Four cases were brought between 1910 and 1960 alleging a merger was an illegal "combine" in conjunction with other allegations such as monopoly. All four were unsuccessful: I Brecher, *Canada's Competition Policy Revisited: Some New Thoughts on an Old Story* (Montreal: IRPP, 1982) at 5.

[6] *Regina v Can Breweries Ltd*, [1960] OR 601 at 620.

[7] *Ibid* at 620–21.

[8] *Ibid* at 621.

[9] *Ibid* at 624.

[10] *R v British Columbia Sugar Refining Co*, [1960] MJ No 2, 129 CCC 7 at para 253.

[11] *Ibid* at para 252.

[12] B McDonald, "Criminality and the Canadian Anti-combines Laws" (1965) 4 Alb L Rev 67 at p 92

[13] Brecher, *supra* note 5 at 13.

[14] *R v Eddy Match Co Ltd*, [1953] QJ No 8 (CA).

[15] D Jeffrey Brown, ed, *Competition Act and Commentary* (Markham: LexisNexis, 2016) at 123.

[16] *Reference Re Board of Commerce Act, 1919 (Can)*, [1921] JCJ No 4, [1922] 1 AC 191, 60 DLR 513.

[17] *Reference Re Dominion Trade & Industry Commission Act (Canada)*, [1936] SCR 379.

[18] 12 Elizabeth II, c 11, s 3.

[19] *Ibid*, s 10.

[20] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 199.

[21] *Ibid* at 200.
[22] It is noteworthy that that U.S. *Sherman Antitrust Act* 26 Stat 209 (1890) was passed a year after the first Canadian anti-combines legislation.
[23] See C Baggaley, "Tariffs, Combines and Politics: the Beginning of Canadian Competition Policy, 1888-1900", in Khemani & Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: IRPP, 1991) at 22; Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47:2 Business History Review 177 at 180; Lloyd G Reynolds, *The Control of Competition in Canada* (Cambridge, Mass: Harvard University Press, 1940) at 134; Charles Paul Hoffman, "A Reappraisal of the Canadian Anti-Combines Act of 1889" (2013) 39:1 Queen's LJ 127.
[24] In response to JO Patenaude, *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935), Parliament enacted section 489A of the *Criminal Code* in SC 1935, c 56, s 9; SC 1952, c 39, s 11. The provision became s 412 in SC 1953-54, c 51. It was transferred to the *Combines Investigation Act* as s 33A (SC 1960, c 45, s 13). See also LA Skeoch & BC McDonald, *Dynamic Change and Accountability in the Canadian Economy* (Ottawa: Consumer and Corporate Affairs, 1976) at 204–05.
[25] *Ibid* at 223.
[26] See e.g. JA Van Duzer, "Assessing The Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance" (2000-2001) 32:2 Ottawa Law Rev 179 at 220–24.
[27] *Container Materials Ltd et al v The King,* [1942] SCR 147 at 152.
[28] For an overview, see WE Kovacic, "The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix" (2007), 1 Colum Bus L Rev 1 at 14.
[29] Economic Council of Canada, *supra* note 20 at 199.
[30] *Ibid* at 201. See also D McQueen, "Revising Competition Law: Overview by a Participant" in JRS Prichard & WT Stanbury, TA Wilson, *Canadian Competition Law, Essays in Law and Economics* (Toronto: Butterworths, 1979). The government's announcement also referred to Restrictive Trade Practices Commission's *Report on the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries and Accessories and Related Products* (Ottawa: Queen's Printer, 1962)—the so-called *TBA Report.* That report had recommended adding criminal prohibitions dealing with exclusive dealing and tying arrangements. The Council was asked to consider this specific recommendation as part of its mandate to advise on amendments to combines legislation.
[31] *Ibid* at 4.
[32] See Editor's Note in McQueen, *supra* note 30 at 4, n 5, which states: "Dr. McQueen was the principal author" of the *TBA Report.*
[33] *Ibid* at 6.
[34] The Council released two other "interim" reports (also final); its first, released in 1967, resulted in legislation to create the Department of Consumer and Corporate Affairs, transferring supervision of the Director of Investigation and Research, the

predecessor to the Commissioner of Competition, to that Department from the Registrar General. See WT Stanbury, *Business Interests and Reform of Canadian Competition Policy*, 1971-1975 (Toronto: Carswell/Methuen, 1977) at 61.

[35] *Ibid* at 63.

[36] Economic Council of Canada, *supra* note 20 at 1–4.

[37] *Ibid* at 64.

[38] *Ibid* at 70.

[39] *Ibid* at 19.

[40] *Ibid* at 6-7.

[41] *Ibid* at 20

[42] *Ibid* at 19.

[43] *Ibid* at 12–15, 19.

[44] *Ibid* at 101–102.

[45] *Ibid* at 88, referring to the "crucial requirement of independence".

[46] *Ibid* at 109.

[47] *Ibid* at 110.

[48] *Ibid* at 114–15.

[49] *Ibid* at 110.

[50] *Ibid* at 107.

[51] *Ibid* at 232.

[52] Brecher, *supra* note 5 at 13.

[53] Stanbury, *supra* note 34 at 95.

[54] *Ibid* at 98.

[55] *Ibid* at 70.

[56] For a detailed discussion, see *ibid*, Chapter 8.

[57] I Clark, "Legislative Reform and the Policy Process: The Case of the Competition Act" in Khemani & Stanbury, ed, *Historical Perspectives on Canadian Competition Policy* (Halifax: IRPP, 1991) at 228.

[58] *Ibid* at 133.

[59] SC 1974-75-76, c 76.

[60] C Green, *Canadian Industrial Organization and Policy* (Toronto: McGraw-Hill, 1980) at 188.

[61] MJ Trebilcock, "The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy" (2001) 80 Can Bar Rev 542 at 587.

[62] (1974), 7 NBR (2d) 360 (SC).

[63] *R v KC Irving Ltd*, [1978] 1 SCR 408 at 421 [*KC Irving*].

[64] (1975) 11 NBR (2d) 181 (CA).

[65] *R v KC Irving*, *supra* note 63 at 424-25.

[66] LA Skeoch & BC McDonald, *supra* note 24.

[67] *Ibid* at 309.

[68] *Ibid* at 314-15.

[69] Brecher, *supra* note 5 at 31.

[70] *Ibid* at 31-36.

[71] I Clark, "Legislative Reform and the Policy Process: The Case of the

Competition Act" in Khemani & Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: IRPP, 1991) at 232.

[72] Consumer and Corporate Affairs, *Competition Law Amendment: A Guide* (Ottawa: Consumer and Corporate Affairs, 1985) at 2-3.

[73] *Competition Act,* RS 1985, c C-34 [*Competition Act*], s 1.1.

[74] *Canada v Southam Inc,* [1997] 1 SCR 748 at para 48.

[75] *Commissioner of Competition v Premier Career Management Group Corp,* 2009 FCA 295 at para 60.

[76] *Competition Act,* ss 79, 92.

[77] See e.g. *Canada v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289, [1992] CCTD No 4; see also *Commissioner of Competition v Superior Propane Inc* (2000), 7 CPR (4th) 385, 2000 CCTD No 15 at para 56; *Canada (Commissioner of Competition) v Canada Pipe,* [2005] CCTD No 3 at para 140, rev'd on other grounds 2006 FCA 236, leave to appeal to SCC refused, 31637 (10 May 2005).

[78] *Tervita, supra* note 1 at para 44.

[79] See *Competition Tribunal Act,* RSC, 1985, c 19 (2nd Supp), s 3(2) [*Competition Tribunal Act*].

[80] Competition Tribunal Website, online: <https://www.ct-tc.gc.ca/Tribunal/Members-eng.asp#lay>. The *Competition Tribunal Act,* s 3(3), provides for an "advisory council to advise the Minister with respect to appointment of lay members" which council is to be "knowledgeable in economics, industry or public affairs". However, the appointment of the council is discretionary and based upon a review of Orders in Council, online: <https://orders-in-council.canada.ca/> (accessed 29 October 2019), no such council has been appointed to date.

[81] *Competition Tribunal Act,* s 12.

[82] *Ibid,* s 10.

[83] The Tribunal has made *Rules* by regulation pursuant to the *Act: Competition Tribunal Rules,* SOR/2008-141.

[84] Economic Council of Canada, *supra* note 20 at 111.

[85] *Ibid* at 192.

[86] Consumer and Corporate Affairs, *supra* note 72 at 10-11.

[87] See N Campbell & H Janisch, M Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997), 76 CBR 297.

[88] See e.g. WT Stanbury, "The Merger Review Process in Canada: Information and the Structure of Incentives" (1995) 16 *Canadian Competition Record* (no. 3) 73.

[89] An appeal may be brought on questions of law to the Federal Court of Appeal on a correctness standard of review (see *Tervita, supra* note 1 at paras 34-39). Appeals on questions of fact and mixed fact and law require leave; reasonableness is the standard of review in such appeals (*Tervita, supra* note 1 at paras 34-39). *Competition Tribunal Act,* s 13.

[90] See e.g. the kind of challenge made, and rejected, in *Canada (Commissioner of Competition) v Canada Pipe Company Ltd,* [2003] CCTD No 24, 2003 Comp Trib 15.

[91] Although the Court dealt with the civil damages action in the *Competition Act*

and not the substantive civil provisions or the Tribunal, it provided strong support for the constitutionality of those provisions, which have been upheld in challenges to date before the tribunal and courts: See *Alex Couture v Canada* (1990), 41 QAC 1; leave to appeal denied; [1992] 2 SCR v; *Director v Xerox* (1990), 33 CPR (3d) 83 (Competition Tribunal); see also *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co*, [1990] CCTD No 17, 32 CPR (3d) 1.

[92] *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at para 73.

[93] *Ibid* at para 75.

[94] *Ibid* at para 76.

[95] *Competition Act*, s 96.

[96] *Commissioner of Competition v Superior Propane Inc* (2000), 7 CPR (4th) 385, 2000 CCTD No 15; rev'd [2001] FCJ 455 (CA); leave refused 202 DLR (4th) vi (SCC).

[97] (2002), 18 CPR (4th) 417 (Competition Tribunal), aff'd 2003 FCA 53.

[98] Economic Council of Canada, *supra* note 20 at 115-16.

[99] *Ibid* at 117.

[100] *Contra*, see Nadon J in the *Superior Propane (Reconsideration)* decision (*Canada (Commissioner of Competition) v Superior Propane Inc*, [2002] CCTD No 10 at paras 42-46.) The Council did not express a view on whether distributive effects should be excluded from the "detrimental effects" of a merger in the balancing exercise it envisaged. The efficiency objective was emphasized throughout the Economic Council of Canada *Report*, but the Council stated that it was "a recurrent theme of this Report that Canadian competition policy should aim *primarily* at bringing about more efficient performance by the economy as a whole" at 9; it also referred to efficiency as the "*main* objective" at 19.

[101] Economic Council of Canada, *supra* note 20 at 117.

[102] *Ibid* at 20.

[103] See e.g. the research cited in Jonathan B Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation", (2007) 74 Antitrust LJ 575 at n 8-9 and following.

[104] Economic Council of Canada *supra* note 20 at 19.

[105] *Ibid* at 15.

[106] A recent article in this journal opined that, in the kind of balancing test in the efficiencies defence, "less weight is given to the less immediate and harder-to-quantify, dynamic effects of competition on innovation and efficiency": Matthew Chiasson & Paul A Johnson, "Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation" (2019) 32:1 Can Competition L Rev 1 at 19. A responding article questioned, *inter alia*, the foundational concern for impacts on innovation as well as the perceived bias in the defence against evidence of dynamic anti-competitive effects: Brian A Facey & David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm than Good for Economic Efficiency and Innovation" (2019) 32:1 Can Competition L Rev 33.

[107] *Tervita, supra* note 1 at para 100.

[108] Economic Council of Canada, *supra* note 20 at 121.
[109] *An Act to amend the Competition Act and the Competition Tribunal Act,* SC 2002, c 19, s 12.
[110] Brown, *supra* note 15 at 96, which indicates that, to that year, 20 refusal to supply applications for leave were filed and seven were successful.
[111] Economic Council of Canada, *supra* note 20 at 102.
[112] Bill C-10; passed as SC 2009, c 2.
[113] OECD, *Recommendation of the Council concerning effective action against hard core cartels* (1998), online: <http://www.oecd.org/daf/competition/2350130.pdf>.
[114] Economic Council of Canada, *supra* note 20 at 103. The Council was not definitive on whether deletion of the word "unduly" would be needed to accomplish the *per se* ban it recommended.
[115] *Nova Scotia Pharmaceutical Society et al v The Queen,* [1992] 2 SCR 606 at paras 102, 109 [*Pharmaceutical Society*].
[116] See the cases cited in *Pharmaceutical Society, ibid,* n 5-11, 14, 63. This is also supported by the diminished record of convictions in contested cases, many of which could be linked to the undueness requirement. See H Chandler & R Jackson, *Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act* (Paper presented at the Roundtable on Competition Act Amendments, Insight Conferences, Toronto, Ontario, 25 May 2000).
[117] *Competition Act,* s 90.1.
[118] *Ibid,* s 90.1(4).
[119] *Ibid,* s 50(1)(c).
[120] Economic Council of Canada, *supra* note 20 at 20.
[121] See Competition Bureau, "Abuse of Dominance Enforcement Guidelines" (7 March 2019) at paras 59-61.
[122] *Competition Act,* s 76. The Council did not recommend any significant change in the area of resale price maintenance; see Economic Council of Canada, *supra* note 20 at 104. The *Report* did not contain any detailed discussion of the pros and cons of this practice, however.
[123] Brecher, *supra* note 5 at 15.
[124] See e.g. Lina M Khan, "The Ideological Roots of America's Market Power Problem" (2018) 127 Yale LJF 960; C Shapiro, "Antitrust in a Time of Populism" (2018) 61 International Journal of Industrial Organization 714.