RECONSIDERING WELFARE

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Recent amendments to Canada's Competition Act expanded the list of potential factors to determine an impact on competition for mergers, competitor collaborations and abuse of dominance. Though a part of a non-exhaustive list of factors the Competition Bureau and Competition Tribunal can consider, the additional factors are a signal from the government of a desire for a broader conception of the dimensions of competition. That desire is likely to be frustrated however by a competition law framework, and in particular a merger enforcement framework, guided by estimating welfare tradeoffs. Building on the policy conversation surrounding the consumer welfare standard in the United States, the more general welfare frame for antitrust analysis is limited because of its outdated and incomplete conception of welfare, its tendency to narrow analysis to quantitative and short-term factors, and its contribution to an increasingly unwieldy and inequitable body of law. The federal government's 2022-23 consultation and review of the Competition Act presents an opportunity for Canada to reconsider the welfare frame as the foundation for the future of its competition law. To begin that process of reconsideration, two potential paths diverting from the welfare frame, Wu's competitive process standard and Posner's market power north star, are put forward to inform a post-welfare competition policy in Canada.

Les récentes modifications à la Loi sur la concurrence canadienne ont élargi la liste des facteurs pouvant servir à mesurer les éventuelles conséquences pour la concurrence d'une fusion, d'une collaboration entre concurrents ou d'un abus de position dominante. L'emploi de cette liste, qui ne se veut pas exhaustive, est laissé à la considération du Bureau de la concurrence et du Tribunal de la concurrence, mais il reste que sa bonification est un signal du désir du gouvernement d'élargir sa conception de la concurrence et de ses différentes facettes. Ce désir risque toutefois d'être frustré par le régime du droit de la concurrence, et plus particulièrement son encadrement des fusions, guidé comme il l'est par des considérations de bien-être. Comme l'illustrent les discussions stratégiques concernant le niveau de vie des consommateurs aux États-Unis, cette notion-phare assez floue de « bien-être » est limitante pour orienter l'analyse antitrust vu la conception dépassée et incomplète qu'on a du bien-être, et vu sa tendance à restreindre les analyses à des facteurs quantitatifs et à court terme ainsi qu'à contribuer à rendre la masse de droit toujours plus lourde et inéquitable. L'occasion est toutefois là en 2022–2023, dans le cadre des consultations du gouvernement fédéral et de son réexamen de la Loi sur la concurrence, de remettre en question le principe du bien-être

comme fondement des prochaines moutures du régime de droit de la concurrence au Canada. Pour entamer cette remise en question, deux autres voies potentielles sont proposées comme substitution au principe du bien-être : la norme du processus concurrentiel, par Wu, et le principe-guide du pouvoir de marché, par Posner.

1. Introduction

> "[A] merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence"
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> -Justice Brennan, United States v Philadelphia Nat'l Bank, 374 U.S. 321 (1963)

In 2022 the *Competition Act* received its first material amendments since 2009. Though only a preview of the government's declared interest in a more wide-ranging review of the act, the amendments made a number of important changes, among them an increased focus on anticompetitive behaviour in labour markets including wage-fixing and non-compete agreements. Beyond these headline-grabbing changes however, the amendments also attempted to broaden the scope of factors for considering impacts on competition for mergers, competitor collaborations and abuse of dominance.[1]

These additional factors signal the government's desire for a broader lens when assessing the consequences of potentially anticompetitive conduct, especially in digital markets. The amendments introduce language related to the potential consequences of network effects, the position of existing incumbents, and non-price dimensions of competition such as innovation, choice and privacy. While the changes are a step in the right direction toward a broader appreciation of the benefits of competition, these additional factors are unlikely to generate meaningful changes or expansion in enforcement. So long as Canada's competition law framework, and particularly its assessment of mergers, rests on a foundation of welfare analysis, whether under a total surplus, balancing weights or consumer standard, the policy goal of a deeper appreciation of the benefits of competition will be frustrated.

In the merger context the goal of welfare analysis is to attempt to quantify as best as possible the likely outcomes of a merger and use the net effect to guide for judicial decision-making. A noble goal in theory, but the

practicalities of this approach have serious consequences for the scope and prioritization of factors of analysis, further frustrated by the limitations of the litigation context. In the United States debate and reconsideration of the primacy of the so-called consumer welfare standard in antitrust enforcement and its consequences over the past half century of the law is ongoing. Though its law lacks a consumer welfare standard, Canada's approach to merger analysis is not immune to the criticisms that have fallen on American enforcement. The parallels between the frameworks of the two countries and their close relationship mean the ongoing debate is an opportunity for Canada to assess the analytic frame that makes up the foundation of merger analysis in Canada.

If policy makers wish to expand the scope of Canada's competition policy, having welfare analysis as its foundation should be a target for reform. Arising from the economic assumptions driving the development of the *Competition Act,* the provisions that flowed from those assumptions, and recent jurisprudence intensifying its role, welfare analysis has taken a prominent and growing place in Canadian competition policy. Although attractive for its perceived ability to simplify complex analysis, that simplicity masks distortions that will continue to shape the development of Canada's competition law. With an understanding of those potential distortions, international scholarship wrestling with the effects of the primacy of welfare analysis in other contexts is useful in charting a path forward that moves away from the attempt to maximize welfare and towards preserving the competitive process as a cornerstone of Canada's economic policy.

2. Where we are today

Today the predominance of the economic discipline in the area of antitrust and competition policy is clear, a role that has only grown in the past half century. Providing a concise summary of the status of this process in Canada, economists Boyer, Ross and Winter detail the rise of the economic frame of analysis across the primary areas of *Competition Act* enforcement, highlighting Canada's "trailblazing" role in introducing economic analysis, with an emphasis on merger enforcement.[2] But there is reason to believe that supposed economic sophistication has not translated into an effective framework for maintaining and encouraging competition.

Remaining focused on merger enforcement, Boyer Ross and Winter argue that the primacy of the economic frame is beginning to have harmful effects on the adjudication of the law.[3] In the reform efforts of the 70s and 80s, the status of Canada's merger provisions as effectively dead letter law

were a motivation for the development and introduction of a completely new Act. Illustrating the point, the primer published alongside the proposed 1986 legislation pointed to the lack of a single successful merger challenge in the lifetime of the *Combines Investigation Act*.[4] Unfortunately the track record since those reforms has not been much better. In the four decades since the law's introduction there have been only two successful litigated challenges of a merger, with the recent win in *Secure Energy Services Inc*, barring successful appeal in front of the Supreme Court, occurring more than two decades after the first, and both taking place in the waste management space. Recent misses by the Competition Bureau such as the price increases following acquisitions by legal software provider Dye and Durham and the collapse of the Bell-MTS merger remedy raise questions about the Bureau's ability to detect and review harmful transactions and the power of negotiated settlements to truly protect competition.[5]

The perspective from inside the house is not particularly optimistic. Breaking with its usual silence on the competition policy file, the Competition Bureau has highlighted a number of challenges it sees interfering with its ability to police anticompetitive conduct in the Canadian economy.[6] Canada's abuse of dominance framework has been effectively dormant over the past six years, despite 2020 and 2021 announcements of ongoing investigations into Amazon and Google, respectively.[7] Amid the growth of the cost of groceries for Canadians, analysis by the Bureau pointed to decades of consolidation that occurred under its watch as a driver of the pricing power allowing retail chains to maintain strong profit margins and pass the cost of inflation onto customers.[8] Canada is not alone however in wrestling with a competition law framework that shows signs it is not delivering the desired results for their citizens, as peers like the United States ramp up enforcement of existing laws and the European Union develops new regulatory tools to address the power of dominant firms in digital markets.

Academics and practitioners in the United States in particular are grappling with what has become the dominant frame of analysis in their antitrust framework, the so-called consumer welfare standard. Though the definition of the standard has proven malleable, for the purpose of this discussion the consumer welfare standard will be defined as an enforcement framework that only intervenes when anticompetitive conduct is considered to generate a negative impact against the welfare of a group of consumers, however defined, often with higher prices as the north star.[9] Canadian competition law does not operate under a consumer welfare standard, but instead an analytic framework predating the consumer welfare standard that similarly

relies on an accounting of the net effects on consumers and producers arising from anticompetitive conduct, most explicitly in the case of mergers.

Though the definition of the consumer welfare standard is contested, the nature of Canada's approach to welfare analysis is contested between approaches: a total welfare standard and a balancing weights standard. Under the former, the lens of the analysis is not limited to the aforementioned consumers, but also extended to producers. As an illustrative example, under a total welfare standard, the magnitude and scope of the price increases associated with a reduction in competition flowing from a merger would first be estimated, and then, using a demand elasticity, a reduction in consumer surplus is estimated. This would then be compared to the benefits arising from the merger flowing to the parties to the transaction and its shareholders, which are represented as an increase in producer surplus, possibly arising from cost savings and increased profits resulting from price increases, with both harms to consumers and benefits to producers weighted equally. The balancing weights approach is similar, with the key difference being an attempt by enforcers and adjudicators to determine the relative value of the wealth transfers from consumers to producers. This approach was applied most notably in *Superior Propane*, the case that introduced the test, with the argument by the Bureau that harms from price increases to relatively poorer Canadians should be weighted more heavily than benefits flowing to the on average wealthier shareholders of the merged firm. Both the total surplus and balancing weights approaches to merger analysis seek to quantify the harms and benefits of a given merger and use the results of that analysis to compare the harms arising from a substantial lessening or prevention of competition to the corresponding and offsetting efficiencies that might allow the transaction to proceed anyway.

Which of these approaches is appropriate under the *Competition Act* is contested, with respondents often arguing for a total welfare standard that is more generous to the arguments of merging parties. But beyond the relative merits of the two approaches to welfare analysis, this discussion argues that all welfare rooted approaches, consumer welfare, total welfare and balancing weights, suffer from a common set of deficiencies that interfere with the operation of a competition law framework that recognizes and protects the many benefits of competition

As the United States reconsiders its focus on consumer welfare, energy for reform is present in Canada, signaled by the federal government's incremental 2022 amendments to the *Competition Act* and the ensuing public consultation on broader reform to Canada's competition law. Though not

driven by a single perceived shortcoming of the law, the government has shown an interest in a competition law with a notably broader scope than the current framework offers. The additional factors added to merger, competitor collaboration and abuse of dominance analysis are emblematic of this desire for a wider-ranging framework of analysis. Though likely not front of mind for policy makers at the time of the amendments, that desire will need to contend with the shaping power of the welfare frame in Canada's competition law, and its presence in Canada's merger law in particular. The welfare frame shapes what factors Canada's competition framework prioritizes and diminishes in attempting to achieve the multiple goals set out in the purpose clause of the *Competition Act*. Though versions of the welfare frame exist in peer jurisdictions, the development of Canada's approach to welfare analysis is distinct. Canada's welfare frame is the product of predominant economic thinking in Canada at the time of drafting, enshrined in the *Competition Act*, and more recently retrenched by jurisprudence that has raised the ire of even members of Canada's economist community. Before discussion of the potential limitations of the framework, it is worthwhile understanding the roots of this framework and its expression in law and recent jurisprudence.

A) Canada's Embrace of Williamsonian Welfare

In response to a request from his colleagues at the Department of Justice, in a 1968 paper Oliver Williamson laid out a possible test on which the agency could judge mergers centered on a trade-off between the deadweight loss associated with a merger and the efficiencies that could be expected to arise from the transaction.[10] Effectively the first iteration of the total welfare standard, under Williamson's cost-benefit test framework a merger is considered to substantially lessen competition if the total surplus is reduced as a result of the transaction, treating both consumer and producer surplus as equal in value. Though in the United States this test would evolve to eventually become the consumer welfare standard, placing increasing consumer surplus above that of the producer, Canada would go on to embrace a more straightforward Williamsonian approach to merger analysis.[11] Somewhat ironically, the total welfare standard embraced in Canada is more akin to Bork's originally proposed consumer welfare standard which despite the title more closely resembled Williamson's cost-benefit test given the loose definition of consumer that has been the subject of criticism.[12]

Williamson's approach would grow in popularity among the academic antitrust community in the coming decade, but the preference for this total welfare approach was already clear in the Economic Council of Canada's *Interim Report on Competition Policy* released the following year. Placing

the achievement of efficiency as the suggested primary goal of Canada's competition law, the interim report took seriously the foundation of Williamson's analysis that straightforward increases in total welfare should be considered beneficial and that exchanges between producers and consumers should be treated neutrally.[13] That view would survive the over 15 year process that would lead to the introduction of the *Competition Act* in 1986 though the efficiency goal would end up as only one of the multiple stated goals of the legislation.[14]

The purpose clause of Canada's *Competition Act* would include goals beyond optimizing the supposed efficient use of resources in the Canadian economy, but the legislation's approach to consolidation is more ambivalent than American counterparts.[15] Unlike the *Sherman Act's* monopolization language and the *Clayton Act*'s focus on addressing monopoly in its incipiency, the Act's focus on maintaining and encouraging competition is relatively less focused on decrying its inverse. Canada's law has included a shifting set of per se provisions towards targeted conduct, but the Williamsonian conception of welfare balancing has been clearly present in Canada's merger law from its enactment. The stated goal of the law is to maintain and encourage competition, but the law begins from a neutral standpoint on the likely consequences of concentration. Discussion among policy makers along the road to the introduction of the Act would reflect the presence of Williamson's analysis but also the initial intention of the government to reflect a more consumer welfare standard-oriented approach to mergers. Introductory documents for the failed Bill C-256 discuss the need for the benefits from combinations to "be transmitted in substantial part and within a reasonable time to the public," and in response to reproach from the business community, Minister of Consumer and Corporate Affairs Ron Basford clarified that this would apply only to mergers "shown to have a restrictive effect on competition."[16] That intention however would not survive the rocky reform battle that resulted in the total welfare standard foundation and the most explicit commitment to the total welfare frame in Canada's competition law, section 96's efficiency exemption.

B) Section 96—Canada's Efficiency Exemption

The subject of much public debate, section 96 of the *Competition Act* is the clearest reflection of the long shadow of Williamson on Canada's competition law framework.[17] The exemption prohibits the Competition Tribunal from issuing an order enjoining a merger that would otherwise generate efficiencies greater than and offsetting the harms of any substantial lessening or prevention of competition. Based on the views reflected

in the Economic Council of Canada's interim report, the assumption was that Canada's economy needed to accept degrees of lower competition through consolidation in exchange for a nebulous concept of offsetting efficiencies that would in some way benefit the Canadian economy as a whole. While peer jurisdictions accept efficiency arguments in judging whether a transaction is anticompetitive or not, Canada is alone in its commitment to preventing its competition law framework from intervening when an effective total welfare standard argument can be made in favour of an acquisition. Additionally, unlike jurisdictions such as the United States or the European Union, in Canada there is no requirement for the benefits of that efficiency to accrue to a particular group.[18] Though the language of offsetting could be read to imply a requirement to demonstrate benefit to the groups potentially harmed by a given transaction, consumers or otherwise, the exemption has not been interpreted as a departure from the supposed neutrality of the Williamsonian cost-benefit test.

Setting aside the debate on the fitness of the exemption as a part of an effective competition law framework, the exemption explicitly invites a surplus welfare-driven approach to the analysis of mergers, assessing the trade-offs under the presumption that offsetting efficiencies can excuse an otherwise harmful transaction. Though the concept leaves room for judicial interpretation of the hurdle to be met, the requirement for Canada's competition law to engage in some form of trade-off analysis points to a predominantly quantitative approach to assessing the consequences of a given transaction. Though qualitative aspects of efficiencies are considered, in particular attempting to import some consideration of the longer term notion of dynamic efficiencies, a clear preference for static quantitative welfare analysis is reinforced by the presence of the efficiency exemption in Canada's competition law.

However, the prominence of that quantitative analysis and the openness to efficiency arguments has not been static in the recent history of the competition law framework. Present in the *Competition Act* since its 1986 introduction, the role of the efficiency defense in Canada's merger framework has expanded in two important milestones in Canadian competition law. First, then Commissioner of Competition Sheridan Scott's 2003 decision to begin formally considering efficiency arguments put forward by parties following *Superior Propane* marked a shift in the openness of the enforcer to arguments for transactions it would otherwise attempt to challenge in court. More recently, and potentially more impactful to the role of the cost-benefit test was the Supreme Court's 2015 decision in *Tervita*.[19] Given the rarity of not only competition cases in general but those that reach

the Supreme Court, it is not surprising that Tervita represents a landmark in Canadian competition law. Though the outcome of Tervita had a number of important consequences for merger law in Canada including a restrictive standard for prevention of competition arguments, its most controversial outcome for the purpose of this discussion is its impact on the welfare analysis framework. In his decision, Justice Rothstein elevated the already quantitative-oriented welfare trade off analysis and created an explicit hierarchy of quantitative over qualitative evidence in the consideration of harms and offsetting efficiency claims by merging parties. In her dissent, Justice Karakatsanis called out the improper hierarchy of quantitative over qualitative evidence, highlighting that "the statutory language of the Act does not distinguish between quantitative and qualitative efficiencies."[20]

In elevating the role of quantitative evidence, Rothstein's decision not only cemented the role of quantitative welfare trade-off analysis but also marked an important shift in the weighting of the relevant factors for merger enforcement decisions and a narrowing of the time scale relevant to that analysis. Regardless of their importance to the competitive process, static, easier to quantify factors in merger analysis now rise above factors that, while still important, depend on qualitative elements to guide decision-making. Looking at the additional factors added to merger analysis in the 2022 amendments, distance between the goals of policy makers and the decision of the Supreme Court begins to emerge. The role of network effects, entrenchment of a leading incumbent's position and non-price dimensions of competition like quality, choice and consumer privacy now pose a quandary for the Bureau. Either the Bureau can strain to force these often truly qualitative factors into a quantitative mold for a static welfare trade-off analysis, or risk the Tribunal diminishing their importance relative to more easily quantifiable efficiencies, regardless of their importance to the competitive process.

Though recently proposed legislation may strike the efficiencies exemption from Canada's competition law, today Williamson's brand of surplus welfare trade off analysis is alive and well in Canadian competition law.[21] The system is perpetuated not only by the structure of the law, but also the courts and the enforcers that operate within its framework. It has grown out of commonly-held economic beliefs in the latter half of the 20th century and the simplifications seen as necessary to the realities of Canada's adversarial competition law system. But any framework that attempts to simplify the messy complexity of reality must contend with the trade-offs resulting from that simplification.

3. The limits of welfare

In committing to a welfare trade-off based standard, whether under a total welfare or balancing weights approach, Canada's competition law imports shortcomings that have a material impact on the effectiveness of the law in maintaining and encouraging competition. This discussion will focus on three dimensions of the limits of a welfarist approach to Canadian competition law. First, in adopting the Williamsonian frame of welfare analysis, Canada's competition law ignores not only the modern field of welfare economics but also the original concerns that Williamson included as caveats to his proposed model. Second, by taking an already quantitative-leaning frame of analysis and further narrowing its analytic scope the welfarist frame discounts important qualitative aspects of competition and elevates an increasingly empirically suspect view of efficiencies. Finally, the practical realities of adversarial merger litigation not only erode the foundation of welfare trade-off analysis but result in an increasingly unwieldy system tilted in favour of large litigants at the expense of public enforcers and private plaintiffs.

A) An outdated and incomplete conception of welfare

The rhetorical draw of welfare standards in merger enforcement is clear. Through rigorous analysis, enforcers and adjudicators can determine the consequences of a merger and limit enforcement only to those that result in net harm to the economy and society. But looking beyond the level of rhetoric reveals issues with the application of the welfare frame in competition and antitrust analysis. The first hurdle to overcome is that what is being measured in the typical antitrust case is nowhere near a measure of welfare in the modern field of welfare economics. What is most frequently quantified in merger analysis are the price and non-price effects of competition. In the recent *Secure Energy Services* the Bureau put forward arguments related to non-price harms in the form of transportation costs, waiting times, capacity constraints, lower service quality and a reduced role of reputation in the market. These are traded off against what are referred to as efficiencies, frequently primarily cost savings resulting from the reduction of redundant assets and workforces. In *Secure*, labour and non-labour cost savings arising from the closure of waste management facilities were the primary components of the claimed efficiencies.

In order to create a social welfare function, a common component of modern welfare economics, analysts need to not only identify all individuals with standing, create a process for the aggregation of measures of individual

wellbeing, and establish a utility function to convert those measures of wellbeing into a welfare figure.[22] Though the balancing weights approach attempts to remedy the situation, there is functionally no concept of utility in Canada's approach to welfare in antitrust analysis. Introduced in *Superior Propane*, the balancing weights approach takes a step towards a more modern understanding of welfare and seeks to apply a form of income distribution on which different transfers, such as those from poorer individuals to wealthier ones, might be judged. Instead of modern welfare economics, Canada's competition law framework remains squarely in the field of surplus theory of welfare, popular in the time of Williamson and taken further by Bork's proposed consumer welfare standard in the late 70s.[23] Despite the surplus theory of welfare losing favour with welfare economists, the approach has maintained a foothold in industrial organization economics.[24] But as Glick, Lozada, Govindan and Bush show, this approach to welfare has material issues that have led to the decline of its use elsewhere in the field of economics. First, surplus analysis that focuses only on output markets ignore the potential consequences on input markets, including labour markets, of the transaction. Particularly relevant to Canada's efficiency focus, cost savings that are the result of depressed wages or layoffs are not truly efficiencies but transfers, often assumed away in merger cases. Second, the view of the surplus theory is a partial analysis because surplus is only one dimension of welfare, something that the founding fathers of welfare economics Marshall and Pigou understood.[25] Third, discussed briefly in relation to the balancing weights approach, welfare analysis requires some form of distribution on which to base individual utility and its required aggregation, which the surplus theory of welfare ignores.

In arguing for a total welfare standard in opposition to a balancing weights standard, practitioners argue that there is no objective way to weigh the transfer of surplus from one party to another, no matter their economic circumstance. Accordingly, the transfers should be weighed equally. Litigation resources continue to be dedicated to reversing this introduced consideration for the differential value of transfers among individuals, most recently on display in *Rogers*.[26] Though the field of welfare economics disagrees, this equalization is seen as a necessary concession to the realities of antitrust enforcement. But this equalization is simply weighting by another name. To assign two values equal weight is to still assign them values, with even less thought than the balancing weights approach, which itself still falls short of modern welfare analysis. By assuming a constant marginal utility of money, the total welfare standard encodes the flaws of an outdated approach to welfare measurement into Canadian antitrust policy.[27] Though

the balancing weights test attempts to create a framework for considering relative utility values of a given transfer between differentiated producers and consumers, it does not overcome the remaining flaws that dog the outdated welfare theory that antitrust analysis maintains.

Though practitioners may understand the limitations of the welfare approach used in antitrust analysis, it may still be seen as a necessary shortcut for the administrability of the law. A full social welfare analysis may be appropriate for discerning the true societal outcomes of a merger, but is effectively impossible given the data limitations and adversarial nature of the merger litigation process. But beyond its reliance on welfare measures that are unlikely to correspond to reality, the welfare frame also distorts the focus of the law away from important dimensions of competition and towards spurious but more easily measurable factors of analysis.

B) An incorrect devaluation of qualitative dimensions of competition

Through its growing focus on the quantifiable consequences of mergers, the welfare focus of Canada's competition law has steadily devalued important elements of competition that do not fit neatly into the framework. Canada's welfare frame has been shown to be capable of disregarding the value of competition entirely, an extreme situation relative to international peers. Though discussed in other jurisdictions as primarily a theoretical concern, Canada's competition law has allowed for a literal merger to monopoly in the case of *Superior Propane*, and no change in Canada's law since would suggest this outcome is no longer a possibility. Further, when paired with the improper elevation of quantitative above qualitative evidence, the Williamsonian trade-off approach shifts the focus away from qualitative elements of the competitive process and towards a definition of efficiency that appears increasingly narrow and spurious.

Hints at this distortion are present in Williamson's ambivalence in his original paper proposing the welfare trade-off approach. While Williamson noted that ignoring the potential welfare trade-off required a strong presumption on the consequences of mergers, he had serious concerns about the flattening effect of his proposed "naive model" on antitrust analysis. Not only did the model fail to examine the relationship of a given market to the rest of the economy, but considerations such as "enforcement expense, timing, incipiency, weighting, income distribution, extra-economic political objectives, technological progress, and the effects of the monopoly power on managerial discretion" were excluded from the analysis.[28] These

considerations read as a list of the benefits of competition and reflect important aspects of an effective competition law enforcement framework. Rather than write them off, Williamson understood these considerations as important consequences of a merger. Reflecting the greater skepticism of concentration present in U.S. history, Williamson understood that mergers passing under this analysis could still generate social harms. Despite his own misgivings about the analysis, Williamson's original approach still looms large in Canadian competition law, with reference in the expert testimony of the recent *Rogers* merger litigation.[29]

The recently concluded *Secure Energy Services* case provides a window into the focus of the welfare frame in Canadian merger analysis today. It is not a coincidence that the two successfully litigated transactions for the Bureau have taken place in the waste management market, the other being Canadian Waste completed in 2001.[30] The characteristics of the market fit well into an analytic frame searching for clean, quantitative reasons to guide its decision making rather than one that places value on protecting the competitive process and the range of benefits that competition offers. The market has high barriers to entry, often including regulatory permit requirements. Relevant markets are tightly geographically constrained, with transportation cost contributing materially to the decision making of market participants. Output for facilities in question is relatively easy to quantify compared to more dynamic and quick-moving markets. The Bureau is drawn to these cases not because they are the most important markets in Canada but because they fit into the analytic frame the *Competition Act* has set out, the Tribunal has interpreted, and the Bureau is attempting to solve for when it chooses to pursue litigation it believes will be successful. Contrast this example with the digital markets that have captured the attention of competition and antitrust policy over the past decade in which consumers trade off privacy for prices, geographic boundaries are irrelevant and new entrants are counted on to unseat incumbents.

The third in a series of contested waste management consolidations, counting the aforementioned *Tervita* among them, *Secure* is an example of how the welfare balancing approach diminishes the role of preserving qualitative aspects of the competitive process. The Tribunal's opening assessment of the transaction is uniquely stark, remarking that "it is difficult to conceive of a more anti-competitive merger."[31] Clear competitive harms were identified from the beginning of the proceeding, but throughout the process Canada's total welfare standard threatened to allow those harms to occur if the Williamsonian trade-off could be argued in favour of the transaction. While the Tribunal recognized the Commissioner's

arguments related to the qualitative evidence of the competitive harms of the transaction, they are clearly secondary to the Tribunal's final analysis of the transaction which largely hinges on the weighing of the predicted deadweight loss and Secure's corresponding efficiency arguments. The Tribunal finds that the $32 million of efficiencies argued by Secure are not sufficient to outweigh the $30 - $39 million of deadweight loss argued by the Bureau. In its own assessment, the Tribunal highlights the difficulty in quantifying non-price effects associated with the merger, rejecting attempts to quantify increased wait times, capacity constraints, reduced quality of service, and reputational factors, leaving only increased transportation costs accounted for. With the ultimate decision in mind, the Tribunal was not unanimous in its final accounting of the correct total of non-price effects that could be counted towards the Commissioner's argued deadweight loss estimates.[32]

Stemming from Williamson's critique, with their focus on the quantifiable, welfare standards will inherently discount the range of qualitative benefits that the competitive process can generate and harms which consolidation can generate. Commentary to this effect has come from members of the Canadian competition economics community, with Boyer, Ross and Winter (2017) noting that post-Tervita, "in terms of reliance on quantitative economic analysis, within the area of Canadian law on mergers the pendulum has, ironically, swung too far."[33] This growing predominance of the quantifiable effects of mergers and anticompetitive conduct in general is increasingly at odds with the aims of policy makers as review of the *Competition Act* is ongoing. This is clearest in the additional factors for consideration in merger analysis added in the 2022 amendments that include quality, a non-price factor recognized as difficult to quantify but still rejected by the Tribunal in *Secure*, but also in the language of the government's discussion paper related to the diminishment of qualitative evidence following the decision in *Tervita*.[34]

The situation is made worse by the element of welfare trade-off analysis that has become increasingly prominent in Canada, efficiencies. Canada's approach to efficiency makes nods to concepts such as productive, allocative and even dynamic efficiency, but what predominates is a "businessman's definition of efficiency" most often concerned with cost savings.[35] Canadian competition law analysis does not incorporate the concept of Pareto efficiency, whereby gains are only considered when no party is made worse off, inappropriate for the often zero-sum nature of merger assessment trade-offs.[36] Canada's focus on efficiency also rests on an increasingly fragile bed of motivated evidence, as studies reveal the overpromise and underdeliver nature of efficiency claims, and the corresponding material price increases

they must theoretically offset. Quantitative study of claimed merger efficiencies frequently demonstrate that those claims are often overstated, misrepresented or paling in comparison to the harms resulting from a lax merger policy that has dogged peer jurisdictions.[37]

Though much has been made of the supposedly narrow application of the efficiency defense in public cases, the link between the efficiency defense and the stringency of Canada's merger law can be seen in commentary following the decision by then Commissioner Sheridan Scott to recognize efficiency arguments presented by merging parties.[38] Emblematic of the anticipated post *Superior Propane* merger environment, Mathewson and Winter note that "Prior to *Superior Propane*, competition lawyers would have properly advised clients not to pursue mergers that involved an obvious and substantial lessening of competition. After *Superior Propane*, such advice is too conservative for mergers involving significant efficiencies."[39]

Providing an example of the distorting effect of this efficiency focus at the heart of Canada's welfare frame of analysis, Chiasson and Johnson show how the efficiency exemption shifts the frame of merger analysis away from important but difficult to quantity benefits of competition. Instead of valuing the innovation that flows from the competitive process, Canada's law gravitates towards valuing short term static cost savings that are a better analytic fit regardless of their actual impact on the future of competition in Canada. They find the ironic conclusion that by devaluing innovation the efficiency defense may in fact represent a cost rather than a benefit to the long term efficiency of the Canadian economy.[40]

An analytic framework that seeks to address ambiguity with quantification will trend towards the devaluing of qualitative factors in its analysis. An issue present from the introduction of the welfare trade-off approach, Canada's framework has accelerated that trend through its unique commitment to using merger policy as a route to a kind of efficiency and the elevation of quantitative evidence above qualitative factors.

C) An unwieldy and inequitable body of law

Beyond the flaws of an outdated conception of welfare and the narrowing of analysis to the exclusion of important qualitative dimensions of competition, the welfare frame also affects the administrability and equity of Canada's competition law. Since its 1986 introduction, the complexity and level of legal and economic resources associated with a Canadian competition case has continued to increase, a trend not unique to Canada but most recently exemplified in the *Rogers* merger with the merging parties claiming

fees north of $22 million, millions more than the Bureau's entire merger filing fee revenue for fiscal 2021-2022.[41]

Before the exemption was introduced, there was skepticism of the operability of welfare trade-off analysis. A 1981 consultation document on proposals for amending the *Combines Investigation Act* prepared by the federal government shows concern for the administrability of efficiency exemptions core to the welfare trade-off analysis that would eventually be incorporated into the law. While highlighting their theoretical attractiveness, the proposal noted that such tests are "very difficult to apply in practical terms," creating "uncertainty as to the application of the law and rais[ing] the prospect of very uneven enforcement."[42] This concern was echoed by Williamson himself in a follow up to his 1968 paper in which he cautioned against the introduction of a "full-blown trade-off assessment" into a merger enforcement framework.[43] Reporting on its experience as Canada's sole antitrust enforcer, the Bureau describes the efficiency trade-off analysis as a "incredibly complicated and expensive undertaking" and requiring a "large number of assumptions to implement."[44] Focusing on the consequences of *Tervita* on the administrability of Canada's competition law, Ross points out that "[w]hile surely positive for the employment of economists, it may lead to a merger review process that is slower, costlier and no more capable of selecting out the right transactions."[45]

Stepping outside the welfare frame briefly, beyond relying on a crude and outdated definition of welfare, this shortcut definition of welfare is weakened further by the attempts to place a truth-seeking exercise within an inherently adversarial process. Either party to the litigation is attempting to model a version of reality that best adheres to the case they are trying to make, with the clearest financial interest present for the merging parties and their representatives. Analysis proffered by either party will never run counter to their position in the litigation, and the task of the judge, though specialized in the case of the Canadian framework, is to wade through which of these motivated models appears a more plausible representation of the past, present and future of a market. The adversarial nature of the process has implications for the practical process of economic modeling as well. The quality of an economic model is dependent on the quality of data available to the modeler, both to generate simulations and to check their performance against reality. Though merging parties have the incentive to cooperate with the enforcer to a point, the incentive will remain to frustrate the analysis of the enforcer by withholding information that would be detrimental to the case of the merging parties. This limitation is made worse by the lack of retrospective evaluation in Canadian competition law. Today there is

practically zero retrospective analysis of the accuracy of arguments accepted in merger litigation, or the consequences of merger enforcement decision or indecision. This is the case because the Bureau's limited information gathering powers do not permit analysis of the actual outcomes following a challenged or permitted merger. The sole public evidence of an attempt at this is the Bureau's 2011 Merger Remedies Study in which the Bureau conducted 135 interviews with parties related to 23 merger cases that painted a mixed picture of the perceived effectiveness of the remedy process but no firm conclusions.[46]

The focus on quantification inherent in the welfare frame, intensified in the case of efficiency arguments, also raises equity implications in its ability to address disputes between disparately resourced parties. Parties are increasingly reliant on a fleet of legal and economic resources to conduct the trade-off analysis on which merger decisions hinge. In the case of the government versus large defendants, the primary mode of litigation given the narrow private access to the *Competition Act,* the enforcer's budget is highly constrained compared to the resources available to large defendants, of which there could be many in a time of high merger activity. In fiscal 2021-22 the Bureau's total budget was $59.5 million, of which $18.4 million was generated by the user fees intended to support the merger review program.[47] This is compared to the $33 million in costs claimed by the respondents in Rogers-Shaw, of which approximately $13 million was comprised of expert fees.[48] By taking a benign position in its analysis of mergers and lacking structural presumptions against mergers in concentrated industries, the resource constraint is likely to dampen the assertiveness of the enforcer. As Woodcock explains, by adopting a relatively neutral view, a competition law framework can create a bias against enforcement by increasing the cost of investigation and litigation against the budget constraint of enforcers.[49] But as private access to the *Competition Act* begins to open and become more relevant to the evolution of the Canadian competition law landscape, the requirement to commit vast resources to mount an argument against anticompetitive conduct will exacerbate existing inequalities between smaller plaintiffs and their opponents, likely dominant in their respective markets.

4. Potential paths forward for Canada

With energy for reform building, Canada has the opportunity to turn away from its commitment to a flawed welfare frame of analysis and re-center the value of preserving competition and the competitive process as the goal of its competition law. As the global rethink of antitrust policy shows

at an international level, and the 2022 amendments to the *Competition Act* show at the domestic level, there is appetite for a competition law that considers a broader conception of the benefits of competition. By forging a different path forward, Canada can leave behind the outdated conception of welfare, the distortions that diminish the important qualitative dimensions of competition and the complexity foreseen prior to the introduction of the *Competition Act*.

As an incremental improvement, Canada should do away with the *Tervita* jurisprudence that has created an undesirable preference for quantitative over qualitative evidence. There is an understanding even in the economic community that while the intention of the decision may have been noble, it is ill-suited to the reality that important qualitative factors comprise the benefits of competition.[50] But undoing *Tervita* would leave in place the efficiency exemption that lies at the heart of Williamson's surplus welfare analysis, keeping Canada's competition law framework rooted in an analysis that was held with appropriate skepticism nearly a half century ago, and whose base of support is eroding under empirical study. To remedy the situation the Bureau has suggested repealing the efficiencies exemption while keeping it a factor in the assessment of mergers. However, this would ignore the building evidence that narrowly defined efficiencies are largely illusory and that by prioritizing short term benefits they may cause long term harm to the Canadian economy. It would also invite a return to form for the legal, economic and financial institutions that have grown up around the adjudication of Canada's competition law framework and have expanded the consideration of efficiencies to other areas of the Act. There should remain a place for arguments about the procompetitive possibilities of select mergers, but the idea that competitive harms should be traded off for what are essentially short term cost savings at the expense of output should be discarded. Adopting this clean break approach, the federal government's recently proposed Bill C-56, framed as a response to affordability concerns in the housing and grocery, aims to strike the efficiencies exemption from Canadian competition law.[51]

Though these changes would contribute to invigorating Canada's competition law framework, they would be unlikely to truly diverge from the welfare frame that has characterized the country's approach since 1986. Looking to a peer jurisdiction wrestling with the consequences of its own brand of the Williamsonian-Borkian welfare frame, alternatives proposed in the United States are useful for motivating consideration of potential directions for Canada's law in the future. Two potential paths emerging from the post-consumer welfare discussion south of the border are driven

by professors Tim Wu and Eric Posner. Both see the consumer welfare standard as neutering a once assertive body of law with interlocking economic and political goals at its heart. To remedy the situation, both put forward alternatives that may better capture the full range of benefits of maintaining and encouraging competition in their execution.

A) Wu's Competitive Process Standard

The first potential path forward is what Wu refers to as the preservation of competition or the protection of the competitive process standard.[52] Finding the consumer welfare standard "too tainted," Wu proposes a model that takes the focus of antitrust back to the role of referee in markets, setting and enforcing the rules on which the game of competition is played.[53] Through the metaphor of sport, Wu notes that the purpose of rules is not to maximize output, but to create the conditions for the benefits of healthy competition to arise. Wu distinguishes a law that intends to maximize some value, in Canada's case total welfare, from one that is designed to protect a process. Highlighting issues noted earlier in this discussion, the limitations inherent in measuring a concept as abstract as welfare place judges in a position that even their specialized colleagues will struggle to execute properly. For the consumer welfare standard Wu sees the primary challenge as the restrictiveness of the approach in comparison to wide-ranging goals of antitrust in the United States.

Wu's criticism of the consumer welfare standard rings true to Canada's implementation of the total welfare standard, with a bias towards quantifiable and static harms, often limited to effects on prices. This is to the detriment of more qualitative and dynamic harms to the competitive process such as blocking potential competition, slowing the process of innovation, and reduction in product or service quality. , Even though these may be more important to the long term flourishing of an economy, especially compared to static cost savings, their role in analysis under the consumer welfare standard is diminished. Wu's commentary on the indeterminacy of the consumer welfare standard in U.S. antitrust law despite claims to the opposite also has applications for its northern neighbour. Despite the Tribunal's commentary on the severity of the anticompetitive nature of *Secure* it could have been excused had the Tribunal's acceptance of harms and efficiencies differed. This remains the case despite the Tribunal going out of its way to explain that the trade-off in *Secure* would have been found in favour of the Bureau if the analysis had been "close."[54] Canada's total welfare standard generates its own indeterminacy through the ad hoc comparison and equal weighting, which still constitute value judgments, of disparate factors

of competition shoved into attempts at quantification under the headings of deadweight loss and efficiency. Wu's critique of the consumer welfare standard extends to the political goals of the American antitrust framework, but while an important recognition of the political dimension of antitrust and competition policy the criticism is less relevant to Canada's more ambivalent approach to consolidation and monopoly taken in its competition law.

In place of consumer welfare Wu argues for "preservation of competition" or "protection of the competitive process" to be recognized as the end goal of antitrust policy. Wu's key distinction is the shift away from the maximizing of some value towards the protection of a process, namely through a focus on preventing conduct meant to "suppress or even destroy competition," relying on language from 1918's *Chicago Board of Trade*.[55] Rather than threats to a nebulous definition of consumer welfare, the standard would focus on addressing subversions of competition on the merits such as sabotage, exclusionary deals, or predation. Returning briefly to Woodcock's analysis of the consequences of the rule of reason approach that has coincided with the rise of the consumer welfare standard, Wu's standard implies a return to a greater use of per se rules around conduct understood to be harmful to competition instead of fishing for a potentially efficiency-motivated explanation to excuse them.[56]

Wu's analytic framework guides enforcers to ask a series of questions to determine whether the conduct in question is the beneficial competition on the merits that enforcers seek to protect, or an attempt to subvert that process. The framework makes explicit the consideration of the relative position of the parties to the conduct, asking whether the alleged violator or victim is a long-standing incumbent or a challenger attempting to disrupt a stagnant status quo. Of the conduct itself the question remains a familiar one, whether the conduct represents competition on the merits or an attempt to subvert that process through illegitimate methods, allowing for arguments that the nature of the conduct is in fact procompetitive. Wu's framework then seeks out evidence of the distortion or suppression of the competitive process, which he defines as competition on the basis of price and quality. Here Wu allows for consideration of harm to consumer welfare to enter the analysis, but it remains subordinate to the concern over suppression of competition, and does not invite a welfare balancing exercise. Finally, reflecting the ongoing conversation in the United States considering a return to the political goals of antitrust law, enforcers consider implications for non-economic values which could include policy goals like the preservation of the marketplace of ideas.

B) Posner's Market Power Test

In a similar vein, Posner takes his critique of the consumer welfare standard with a familiar foundation to a different endpoint.[57] Like Wu, Posner laments the narrowing focus that the consumer welfare standard has had on American antitrust to the detriment of important benefits of competition such as innovation and contrary to the stated goals of policy makers and jurisprudence prior to the 1970s. Posner's starkest critique of the focus on price and efficiencies in the current American framework is that it opens the door to excusing literal mergers to monopoly, as discussed previously something that has already been allowed to occur in Canada. Charting the evolution from the Williamson-Bork cost-benefit test that lives on in Canada towards the price test that underpins the current iterations of the consumer welfare standard in the United States, Posner identifies a unifying critique that both tests focus their analysis on a narrow band of participants, namely those that interact with the merger participants. In doing so, important social costs such as the increased political clout and ability of firms to abuse and shape regulations are ignored, a critique even Williamson raised in relation to elevating private efficiency claims above social costs. To illustrate this point, Posner notes that the growth in predominance of the consumer welfare standard tracks with a progressive decline in confidence in big business in the United States from 1975 to 2020.[58]

Posner offers that contrary to the consumer welfare standard, these social costs of excessive concentration should be taken seriously. Expanding the frame of analysis, the social costs of mergers can include rising social discontent, disadvantaged small and medium sized businesses, increased ability for monopolists to shape political outcomes, and inequity in market outcomes. Each of these potential costs exist outside the frame of the deadweight loss triangle of traditional cost-benefit analysis but have important implications for the political goals of antitrust and competition law, echoing elements of the *Competition Act*'s purpose clause such as preserving equitable opportunity for small and medium-sized businesses and competitive choice for consumers.

Responding indirectly to discussion in Canada about the supposed creep of other important policy goals into competition laws, Posner does not believe that mergers should be evaluated on their social costs on a case by case basis, but rather the standard or test for evaluating mergers should incorporate measures that can internalize these costs. To do so, Posner suggests that market power rather than the price test, or cost-benefit test for that matter, is a better north star for regulators to aim for in constructing

a merger enforcement framework. In doing so, Posner hopes to move the focus of American antitrust law away from price and back towards competition, recognizing the attraction of the alleged simplicity that the consumer welfare standard's price test offered. Market power is offered as a useful representation of the rivalry that comprises competition, with its presence signaling a failure of competition that regulators should focus their attention on. Offering more precision than the more nebulous concept of competition, market power is seen as a useful guide for merger analysis while still requiring a determination of substantiality to guide intervention. Under such a standard a merger that increases industry-wide average market power would be understood to lessen competition substantially, reflecting the consequences of depressed competitive intensity.

The test Posner proposes to operationalize this market power "north star" does not rely on introducing new tools to the merger analysis toolkit but rather refocusing the core of that analysis. Whether a merger is anticompetitive or procompetitive is determined by assessing its impact on industry-wide margins. If industry-wide margins increase beyond a given threshold the merger is blocked, but if margins are decreased by the creation of a more efficient competitor that exerts pressure on other industry players the merger is allowed to proceed. In this way efficiency arguments can be introduced without them becoming an excuse for an otherwise anticompetitive merger. An important departure from the price test of the consumer welfare standard, a situation where prices decline but margins increase would be blocked under the margin test by using the increase in market power to reflect the broader social costs not captured by the short term price effects of the merger. Understanding the analytic limitations of incorporating individual social costs into merger analysis, the broader lens of market power is an attempt to reflect the potential harms of a merger beyond price without wading into the trade-off analysis that Williamson cautioned against decades ago.

Posner recognizes that measuring a true reflection of marginal cost needed to calculate margins is no easy task but notes that approaches taken by academics such as De Loecker and his coauthors show promise and that margin calculation often already occurs in merger analysis.[59] Recognizing the data limitations inherent to the adversarial process of antitrust enforcement, Posner places margin data as the ideal guiding quantitative factor for the determination of market power but notes that a cruder version of the test based on HHI thresholds as an indicator of competition or other qualitative measures will have an important role to play when data limitations are present. Returning to Posner's "north star" language, the core point is

of the market power focus is a movement away from the measure of prices as the core dimension of competition and the corresponding welfare effects towards direct measures of the intensity of competition, in this case market power and its various indicators.

5. Conclusion

The energy for reform of Canada's competition law provides an opportunity to review the nearly four decade performance of the existing framework and the assumptions that guided its creation and evolution over that time period. While consideration of the appropriate powers and provisions is important, even more important are the underlying assumptions and analytic tools that guide the exercise of those powers. An assumption ripe for this kind of consideration is the welfare trade-off analysis at the heart of Canada's approach to merger enforcement. Though concerns about the efficacy and administrability of the framework were present at its outset, the decades since the introduction of the *Competition Act* provides the grounds on which to assess its performance at home and internationally.

The aim of allegedly maximizing welfare rather than valuing and protecting the competitive process is increasingly suspect as a goal for competition policy. Rooted in a long-outdated conception of welfare, the total welfare standard aims to quantify and weigh disparate consequences to achieve the appearance of objectivity in its analysis. In the process, important dimensions of competition, both the benefits from its presence and the harm of its absence, are diminished in favour of short-term factors that fit neatly into the analytic framework. This is made worse by the continued commitment to a narrow definition of efficiencies, the evidence base for which has been steadily eroded by empirical study. Finally, the elevation of quantitative over qualitative evidence has increased the burden on parties to merger litigation at the expense of public enforcers with constrained budgets and future private plaintiffs seeking relief from anticompetitive conduct.

To overcome the flaws baked into the welfare analysis frame and invigorate its competition law, Canada should instead focus its efforts on creating a framework that values the protection of competition over attempts to maximize an outdated and limited definition of welfare. Looking to lessons from the consumer welfare debate in the United States, Wu and Posner provide two potential paths forward that recenter competition as the goal of competition policy rather than the flattening goals of prices and abstract notions of welfare. Though Canada's answer to this provocation will necessarily reflect its own peculiarities, both proposals provide inspiration for

frameworks that appreciate a broader sense of the benefits of competition, rather than prioritizing the dimensions that best fit the flawed analytic tools used to date.

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[16] Gorecki & Stanbury, supra note 14.

[17] "Exception where gains in efficiency
[96] (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made." Competition Act, R.S., 1985, c. 19 (2nd Supp.), s. 45.

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