A JUSTICE AS FAIRNESS FRAMEWORK FOR A REVISED EFFICIENCIES DEFENCE

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The efficiencies defence is at a crossroads. There is uncertainty about how it works. There is uncertainty about whether it will continue to exist after the next round of legislative amendments. Now is a good time to take stock and assess whether it is still necessary, and how to make it work in the modern economy and for all Canadians.

This article argues that there is still value in enabling Canadian companies to reach scale. The efficiencies defence should not be jettisoned. However, to make it work in the modern economy, the focus needs to be changed from static efficiencies to dynamic efficiencies. Equally importantly, to make it fair to all Canadians, the defence should expressly incorporate Rawlsian fairness.

Ultimately, this article presents a concrete proposal that would achieve both of those goals.

Le critère d'efficience comme motif de défense se trouve à la croisée des chemins. Son fonctionnement reste entouré de mystère, et l'on ignore s'il va survivre à la prochaine ronde de modifications législatives. Le moment est venu de l'évaluer et de voir s'il reste pertinent, et par quels moyens on pourrait en faire bénéficier l'économie moderne et l'ensemble des Canadiens.

Selon les auteurs de cet article, il demeure avantageux de donner aux entreprises canadiennes les moyens de grandir, et l'on devrait se garder de saborder le critère d'efficience. Toutefois, afin d'adapter ce critère à l'économie d'aujourd'hui, on aura intérêt à délaisser l'efficience statique pour privilégier l'efficience dynamique. Et par souci de justice pour toute la population canadienne, il importera tout autant d'intégrer expressément un modèle d'équité rawlsienne à ce motif de défense.

Au bout du compte, il s'agit de proposer une solution concrète qui permettrait de réaliser ces deux objectifs.

Introduction

Section 96 of the *Competition Act*,[1] known as the "**efficiencies defence**", is an aspect of merger review that is unique to Canada. It applies after the Competition Tribunal ("**Tribunal**") has been convinced that a merger would be anti-competitive, allowing that merger to proceed anyways as long as there are "gains in efficiency" that "outweigh the effects of any prevention or lessening of competition".

In recent years, many have argued for abolishing the efficiencies defence including former Commissioner of Competition ("**Commissioner**") John Pecman,[2] some economists,[3] and legal practitioners.[4] Others have issued rebuttals.[5] The Competition Bureau ("**Bureau**") has advocated that the efficiencies defence be reduced to be just one factor to be considered when assessing a merger.[6] Lots of ink has already been spilled on this subject.

This article argues that before any legislative change is made, we first need to take a step back and figure out what the test actually is under the present section. There remains uncertainty about whether the test is (1) a national aggregate test; or (2) an order driven test. The decision in *Secure Energy Services*[7] is a step towards the order driven approach. This decision was affirmed by the Federal Court of Appeal, but the text of this article was finalized before the deadline for seeking leave to appeal to the Supreme Court of Canada.[8] There is also uncertainty about the onus of proof in light of the reference in *Secure* to "a balance of probabilities, and with clear and convincing evidence". We argue that the test remains a balance of probabilities standard which equals 50.1%. But either way, the fact that there is uncertainty about the test leads to the first part of our thesis: the new regime should make it crystal clear what approach to apply.

The second part of our thesis is based on the legislative purpose of the efficiencies defence. The Supreme Court of Canada explained the original purpose of the efficiencies defence was to permit Canadian companies to exploit the benefits of scale to remain globally competitive. We argue that the efficiencies defence should not be abolished because, in at least some industries, scale remains critical to competitiveness. However, the most important efficiencies in the modern economy are dynamic efficiencies, which are arguably undervalued in the analysis. If we are serious about achieving the original purpose of the efficiencies defence, then the analysis should be refocused on those efficiencies, in recognition of the evolving Canadian economy including the new digital world.

The third part of our thesis is based on a philosophical perspective. We argue that the efficiencies defence should be reformed and re-written to promote justice as fairness. We apply the philosophy of John Rawls who articulated the principle that social and economic inequalities are to be arranged so that they are both to the greatest benefit of the least advantaged, consistent with the just savings principle.

Finally, we present a concrete proposal to reform the efficiencies defence that satisfies all three parts of our thesis. Our proposed framework clearly adopts a methodology derived from justice as fairness that recognizes the importance of dynamic efficiencies without sacrificing the needs of the least advantaged.

Part I: The Current State of the Law

(a) What Approach Applies?

As explained in more depth below, *Secure Energy Services* squarely asked whether the Tribunal should be applying a national aggregate test or an order driven test, concluding that it was the latter. Below, first, we describe the difference between those tests. Second, we show that the law is not entirely settled on that point. Third, we show that, even if the order driven approach applies, this leaves a significant amount of discretion in the hands of the Commissioner who is seeking that remedial order.

(i) An illustration to demonstrate the different methodologies

Suppose that a merger affects 3 markets (A, B and C) and that all of the efficiencies and anticompetitive effects can be quantified and compared in similar units. It is also assumed that there are no qualitative anticompetitive impacts or any distributional or equity issues arising. The anticompetitive effects in each market are also assumed to be substantial.[9] The following chart illustrates a hypothetical trade off in three different markets and then in total.

Table 1

Market	Efficiencies	Anticompetitive Effects	Difference
A	100	20	80
B	10	50	-40
C	10	40	-30
TOTAL	120	110	10

In this example, all three markets affected by the merger experience a substantial lessening of competition (SLC). In these circumstances, the Commissioner has several options. One option is to attempt to block the merger in its entirety. The other option is to seek an order requiring divestitures only in markets B and C. Yet, under the section 96 tradeoff, considering the national aggregate effect of 120 units of efficiency gains versus 110 units of anticompetitive effects would preclude the Tribunal from granting a divestiture order under section 92.

However, in this example, markets B and C viewed on a stand-alone basis have anticompetitive effects that outweigh the efficiencies. In order to put a human face on these type of trade-offs, imagine that the product in the above chart is propane. In markets B and C it can be predicted that the price of propane will rise significantly. People living in markets B and C who heat their homes with propane and who may be close to or below the poverty line may have to tell their children to put on sweaters at home during the winter.

In contrast to the national aggregate approach, under an order driven approach, then, the Tribunal would weigh the anticompetitive effects prevented by the order against the efficiencies not achieved because of the order. A partial divestiture order in markets B and C would arguably be granted under section 96 because the "lost" efficiency gains that would not be attained if the order were granted (10 units in each of B and C) are less than the total anticompetitive effects resulting from the merger (50 units in B and 40 units in C).

This hypothetical example illustrates why the methodological test makes a very real difference in the result.

(ii) The national aggregate approach versus an order driven approach

Some commentators have advocated a 'total efficiencies' approach to the section 96 trade-off which compares the efficiencies likely to be generated by the proposed transaction against the anti-competitive effects likely to result from the proposed transaction. Facey and Krane argue that "the Bureau should not seek (and the Tribunal should not issue) orders that reduce total merger efficiencies".[10] Those who argue for the total merger efficiencies approach point to the decision of the Tribunal in *The Commissioner of Competition v Superior Propane Inc*, ("**Superior Propane III**") and specifically paragraph 140 which states:[11]

> By contrast, section 96 of the Act applies to the transaction in its entirety. There is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area. Rather, the tests of "greater than" and "offset" in section 96 require a comparison of the aggregate gains in efficiency with the aggregate of the effects of lessening or prevention of competition across all markets and areas. Accordingly, the Act clearly contemplates that some markets or areas may experience gains in efficiency that exceed the effects therein, while others may not.

As will be discussed below in more detail, in the decision in *Secure Energy Services,*[12] the Tribunal explicitly stated that Superior Propane III endorsed an order driven approach.

By way of contrast to the total merger efficiencies approach, the "order-specific" approach to the section 96 trade-off compares the efficiencies that would be lost from a hypothetical order made by the Tribunal to the anti-competitive effects remedied by that order.

Under a total efficiencies approach, there is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area. Rather, the tests of "greater than" and "offset" in section 96 required a comparison of the total gains in efficiency with the aggregate total of the effects of lessening or prevention of competition across all markets and areas.

The decision of the Supreme Court of Canada in *Tervita Corp*.[13] has been cited to support a total efficiencies approach. Yet, it can also be argued that the decision in *Tervita* could also allow for an Order driven approach. The debate unfolds as follows.

Krane, Brown and Robson (2016) challenge the order driven approach in their article entitled "Marshalling the Efficiencies Defence"[14] Krane, Brown and Robson (2016) argue that the underlying force of the *Tervita* decision would reject the order driven approach had that issue been before the Court, (which it was not as the decision was based on a technical issue):

> If Justice Rothstein were tasked with interpreting the second clause of subsection 96(1) today, we believe he would be unlikely to adopt the Order-Driven Approach. Given his focus on Parliamentary intent and maximizing efficiencies as he noted in *Tervita*, we believe Justice Rothstein would likely interpret the provision to require that no order should be made if that order would have the effect of reducing the efficiencies that would likely be obtained (the "Efficiency-Maximizing Approach").[15]

Krane, Brown and Robson argue that specifically, the words in the provision were carefully chosen over many iterations of the efficiencies defence. Parliament used the same term ("gains in efficiency") to refer both to the efficiencies likely to be brought about by the merger and the efficiencies that would not likely be attained if the Tribunal made an order.[16]

Facey and Krane (2017) have argued that the Tribunal ought not to engage in an order-driven "slice and dice" approach to craft an order which has the effect of re-engineering the transaction contemplated by the parties:[17]

> The second issue relates to the position in the guidelines on whether the Bureau should count efficiencies that would not likely be attained if the Tribunal were to make an order remedying all or part of the merger. The Bureau bases this position on its interpretation of the second clause of Section 96(1), which states that "The Tribunal shall not make an order under Section 92 if it finds that ... the gains in efficiency would not likely be attained if the order were made." The Bureau takes the position that in applying the second clause of subsection 96(1), it must weigh the efficiencies lost as a result of a Tribunal order against the anti-competitive effects remedied by the order and thus it can still make orders that reduce merger efficiencies provided that order also remedies anti-competitive effects. Not only is such an approach inconsistent with the plain language of Section 96, it has two major downsides: It creates uncertainty for merger planning because parties cannot predict how their merger will be theoretically restructured, and any process that allows for divestitures or other remedies necessarily means that all merger efficiencies will not be attained. Instead, the Bureau should not seek (and the Tribunal should not issue) orders that reduce total merger efficiencies.[18]

We argue that the structure of the *Competition Act* leaves room for an order driven approach. The following passage from *Tervita* recognizes the principle that the Tribunal has the discretion to choose the appropriate method in view of the particular circumstances of each merger:[19]

> The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition ***<u>in the relevant geographic and product market.</u>*** As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other".[20] [emphasis added]

The concept of the relevant geographic market can be linked to the structure of section 92 of the Act:

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, ***or***

(d) otherwise than as described in paragraphs (a) to (c),[emphasis added][21]

It is submitted that the subsections in section 92 modify the main clause because of the use of the disjunctive test "or" in the subsections. In other words, the insertion of the word "or" allows the Tribunal to treat each of these categories on a separate stand alone basis. Where the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially **(c)** ***among the outlets through which a trade, industry or profession disposes of a product***, the Tribunal may order a remedy specific to those outlets.

Chief Justice Paul Crampton has described a range of potential approaches including the "Order-Driven Approach".[22] He notes that the main benefit of the approach is that it allows the Tribunal more flexibility to consider remedies and allows the Tribunal to disregard those efficiencies that would likely occur even if the order were made. The order driven approach, he concludes, maximizes both competition and efficiency.

In *Secure Energy Services*, Secure argued that the proper test is that "all efficiencies likely to be brought about by the merger are cognizable under section 96".[23] In the *Secure Energy Services* decision, Chief Justice Crampton disagreed with Secure's interpretation, holding that the legislature did not use the word "total":

> For greater certainty, there is nothing in the context of the merger provisions—or, indeed, the Act as a whole—that would support the interpretation that Secure advances. Had Parliament intended subsection 96(1) to operate in the manner advocated by Secure, it could easily have inserted the word total, to make it clear that the relevant comparison is between the total efficiency gains likely to be brought about by a merger and the effects of any prevention or lessening of competition likely to result from the merger. The fact that Parliament did not include the word total in the provision suggests that this is not the test it intended to create.[24]

Chief Justice Crampton also noted that focusing on what happens but for the order "puts the focus on the true cost of making the order in question—namely, the loss of the various efficiencies that would not likely be attained if the order in question were made".[25]

Moreover, in *Secure Energy Services* the Tribunal explicitly stated that Superior Propane III endorsed an order driven approach, and also cites several other cases that affirm this approach:

> The Tribunal disagrees with Secure's position regarding the fifth screen. In brief, the "order driven" interpretation of section 96 that underlies this screen was explicitly endorsed in both *Tervita CT*, at paragraph 262 and **in *Superior Propane III*, at paragraphs 148–149** (aff'd *Superior Propane IV* (see also *P&H*, at para 657). This interpretation was also implicitly endorsed in *Tervita FCA*, at paragraph 172.[26] [emphasis added]

In the appeal before the Federal Court, Secure.[27] Secure has made two arguments in relation to the order driven approach on appeal.

First, Secure argues that the Tribunal erred by suggesting that the efficiencies defence was designed to balance "enhancing efficiency" with "maintaining competition". The existence of the efficiencies defence shows that the legislature intended to give primacy to the former, and based on *Mohr*,[28] it is inappropriate to consider countervailing policy considerations.[29] Indeed, the Supreme Court of Canada said in *Tervita* that "Section 96 does give primacy to economic efficiency".[30] The Commissioner responds that the Tribunal in *Tervita* endorsed the order driven approach by excluding efficiencies that "would likely be achieved even if the order … is made".[31] The Commissioner argues that the Tribunal has consistently applied the order driven interpretation and the Tribunal recently reaffirmed the requirement in *P&H*.[32] It is too early to tell whether Supreme Court *obiter* or Tribunal *ratio* will prevail.

Second, if the order-driven approach is the appropriate test, Secure argues that the order-driven approach was incorrectly applied. The Tribunal compared the efficiencies that would be lost due to the order with *all* adverse effects.[33] The Commissioner says that this is the proper interpretation of the order driven approach.[34]

If that case gets to the Supreme Court of Canada and that court adopts Chief Justice Crampton's view, then the uncertainty will be put to rest and the order driven approach will prevail. But even in that case, what that actually means will be contingent on the type of order sought, which leaves discretion in the hands of the Commissioner. As will be discussed below, our proposal would structure that discretion by making it a statutory requirement to implement justice as fairness within a revised efficiencies defence.

(c) Screens for Efficiencies

Once we have clarity on the approach that applies, the rest of the analysis is clearer. First, the merging parties must show that there are efficiencies. The Tribunal assesses these claimed efficiencies using five screens in three categories: type, location, and causation.

Type of Efficiency: Two screens deal with the type of efficiency that is considered. First, screen 1 limits efficiencies to effects on "productive or dynamic efficiency" or "allocative efficiency".[35] To the extent that courts have ventured definitions for these terms, those definitions have been broad.[36] Economic theory would also suggest that they could be quite broad, covering not only cost savings but also expanded distribution networks, better access to credit, improved ability to spend on innovation, conglomerate effects, network effects, data aggregation, and so on.

However, in practice, "gains in efficiency" has effectively meant static efficiencies, and in particular cost savings. As far as we can tell, with the exception of the *Thoma Bravo* case discussed below, the only gains in efficiency that have been directly factored into the section 96 analysis have been cost savings.[37] One plausible explanation for this is *Tervita*, where the Supreme Court of Canada held that "qualitative effects will be of lesser importance".[38] Dynamic efficiencies are difficult if not impossible to quantify at the hearing, especially when the anticipated benefits are expected to occur years or even decades in the future. Knowing that unquantified dynamic efficiencies will be discounted, lawyers have an incentive to recast them as short-term cost savings which can be quantified at the hearing.

Second, screen 3 excludes efficiencies "brought about by reason only of a redistribution of income",[39] as expressly required by section 96(3).[40] The classic example of a cost saving excluded under this screen is an increase in bargaining power, allowing the merged company to purchase inputs from suppliers at a lower price. Those cost savings are purely a redistribution of income from suppliers to the merged company.

Finally, no screen limits efficiencies to those that would make the company's products or services more competitive in the marketplace. That is strange because section 96(2) says that the Tribunal "shall" consider whether efficiencies will result in "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products".[41] The Tribunal was confronted with this language in *Parrish*, and held that it could give additional weight if there would be an increase in exports or decrease in imports, but that such evidence was not required.[42]

We argue that this was an impermissible rejection of clear statutory language. The statute says that the Tribunal "shall" consider these factors, not that it may do so if the parties choose to present such evidence. As we explain in Part II, this evidence was the primary purpose behind the original adoption of the efficiencies defence.

Location of Effects: Screen 4 excludes efficiency gains that "would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders".[43]

Causation: Finally, two screens deal with causation. First, screen 2 requires merging parties to show that the effects are "likely" to be caused by the merger.[44] We will pick up on the importance of this screen in Part V, Section (b).

Second, screen 5 requires that the effects would not be attained through other means even if the order sought by the Commissioner was made.[45] This goes back to the discussion in Part I, Section (a), on which approach applies.

(d) Adverse Effects

To identify what counts as an adverse effect, on two occasions, the Federal Court of Appeal endorsed the "balancing weights" approach.[46] Under this approach, the court included (1) the deadweight loss; and (2) wealth transfers from low-income consumers to the corporation, which was called the "socially adverse portion of the wealth transfer".[47] The parties can agree to omit (2).[48] Given that these decisions were made on a reasonableness standard, the Tribunal could decide to apply a standard without (2) in the absence of consent. For our purposes, the key point is that the Tribunal is already allowed to consider (2), which is a distributional effect. We will return to this point in Part V, Section (a), as a response to the counterargument that distributional effects have no place in merger review.

Interestingly, the Tribunal has noted that adverse effects could include qualitative adverse effects, including "a reduction in service, quality, product choice, incentives to innovate, or other dimensions of competition that consumers value".[49] The Supreme Court of Canada has similarly acknowledged the possibility of qualitative adverse effects including worse service and lower quality.[50] However, in practice, the Commissioner almost never argues that there are qualitative adverse effects. This is in part because of the Supreme Court of Canada's holding in *Tervita* that, where an effect is measurable, it must be quantified; otherwise, the effect cannot be considered at all.[51] But it is also in part because such qualitative adverse effects are given less weight, as discussed in the following section.

(e) Weighing

Once the Tribunal has identified the efficiencies and the adverse effects, it has to weigh them. In *Tervita*, the Supreme Court of Canada explained that this weighing should occur in two steps: first you weigh the quantitative efficiencies against the quantitative adverse effects, and then you weigh the qualitative efficiencies against the qualitative adverse effects.[52] In light of that, the Commissioner knows that the only way to directly counter a quantitative efficiency is to raise a quantitative adverse effect. Similarly, the merging parties know that the only way to directly counter a quantitative adverse effect is to raise a quantitative efficiency. In practice, the result is that neither side bothers to address qualitative efficiencies or adverse effects.

Part II: Making the Efficiencies Defence Work in the Modern Economy

(a) Purposes of the Efficiencies Defence

Broadly speaking, legislators, courts, and commentators have described the purposes of the efficiencies defence in two ways. The first purpose is to improve Canada's position in international trade. The underlying theory is that Canada is a small market, so if Canadian companies want to remain internationally competitive, they need to consolidate and benefit from economies of scale. The Supreme Court of Canada explained it well:

> "A stand-alone statutory efficiencies defence was considered 'particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally'."[53]

The focus on international trade is the only purpose that is clearly referenced in Hansard by the person who proposed the bill,[54] the only other representative of the government who spoke to the issue,[55] the Leader of the

Opposition,[56] and another opposition MP.[57] It was also the only purpose described in early academic commentary.[58]

It is also supported by the text of the provision. As explained above, the only guidance in the text of the *Competition Act* about what constitutes a gain in efficiency is that the Tribunal "shall" consider whether the claimed efficiencies will increase exports or decrease imports.[59]

The second purpose of the efficiencies defence is to increase the size of the economic pie. Cutting costs improves allocative efficiency, which *can* allow the company improve quality, increase quantity, or increase profits without harming consumers. Similarly, an acquiring company *can* discard pieces of an acquired company that are unprofitable, or simply less-than-optimally profitable.[60] All these effects yield benefits to society greater than the harms to society, growing the total size of the economic pie (a "**Kaldor-Hicks improvement**").[61]

However, as shown in the example of propane in a small town, Kaldor-Hicks improvements can make some people much worse off, shrinking the smallest pieces. In theory, the government could tax the merged company just enough to compensate those harmed, such that everyone is better off (a "**Pareto improvement**"). But in the real world, governments do not tax merging companies to address all the adverse effects, and even if they wanted to, it would be essentially impossible to perfectly calibrate the tax to ensure everyone is better off. Thus, in practice, allocative efficiencies result in a Kaldor-Hicks improvement, but not a Pareto improvement. This is what raises concerns about fairness.

We assume that everyone agrees that there is a point at which a Kaldor-Hicks improvement diverges so far from a Pareto improvement that allowing it would be unconscionable.[62] Thus, we argue that allocative efficiency (i.e. whether the merger is a Kaldor-Hicks improvement), without any consideration of fairness (i.e. how far it diverges from a Pareto improvement), is an unsound policy basis for the efficiencies defence.

In other words, when assessing the benefit of increased allocative efficiency, distributional effects are inherently relevant. Considering distributional effects on the efficiencies side also creates symmetry with the fact that distributional effects are already considered when identifying adverse effects, as described above in part I, section (d).

In sum, the efficiencies defence is justified by (1) allocative efficiency, but only if weighed against fairness concerns; and (2) increased competitiveness of Canadian businesses in global markets, which does not depend on fairness to be a sound policy basis.

(b) Application of those Purposes in the Modern Economy

In remarks delivered on May 16, 2023, Mathew Boswell, the Commissioner of Competition, cited a report published in November 2022 by Deslauriers, Gagné and Paréat at the Centre for Productivity and Prosperity at HEC Montreal entitled "Canada's Lagging Productivity: Could the Problem Be Insufficient Competition?"[63] This report found that since the early 2000s Canada's economy has been gradually declining.[64] Their prescription: "put competition back at the heart of Canada's economic strategy".[65] As a country, we need to analyse the factors that are contributing to decline. The popular press has coined the phrase the "Canadian Curse" referring to the crash of Nortel Networks Inc., the failure of Research In Motion Ltd. (now BlackBerry Ltd.) and the roller coaster ride of Shopify shares.[66] We cannot simply assume that the present state of the Canadian economy has evolved to the point where companies no longer need the efficiencies defence to compete on the world stage. We need empirical study of that question.[67] There are many different variables to consider in the complex analysis of our economy that require further thought and study before any conclusions can be drawn in relation to the efficiencies defence.

A different issue, but nonetheless very important issue, relates to foreign investment. Baziliauskas and Stockley deal with this issue in their article "Towards an Efficiencies Standard that Benefits Canadians."[68] Baziliauskas and Stockley argue that if some of the agents who benefit from the efficiency defence are not Canadians (e.g., if some are foreign shareholders of the merging firms), it is not immediately apparent that the enhanced efficiency of the Canadian economy does support the welfare of Canadians. In fact, quite the opposite may be true. "The harms of the SLPC are likely to accrue primarily to Canadians, while many of the benefits of the efficiency may be accruing to non-Canadians, even if they enhance the efficiency of the Canadian economy. Maximizing the size of the Canadian economic pie doesn't necessarily maximize how much pie Canadians get to eat."[69]

In the modern economy, especially in globalized markets, static efficiencies like cost savings may be relatively unimportant to competitiveness, at least to the extent that they are used only to reduce prices. For example, one study on export market shares shows that non-price factors mattered three times more than price factors.[70] This is especially true in digital markets, where many products are priced at $0, companies compete primarily over quality rather than price, and products derive their value in part from network effects. That being said, this conclusion is not limited to digital markets. Recent evidence suggests that, at least before the latest round of inflation, consumers cared more about quality than price for banking services[71] and groceries.[72]

On the other hand, dynamic efficiencies are more important than ever. In particular, four critical dynamic efficiencies are a function of the size of the company, making consolidation crucial for competitiveness.

Research & Development: First, the importance of research and development ("**R&D**") has only increased over time. In some industries, even multi-billion dollar investments can become obsolete in a few years, such that only companies with enormous scale can survive.[73] Mergers can eliminate wasteful duplication in R&D, substantially increase investment in R&D, and generate spillovers between R&D projects.[74] Even if the merged company spends exactly as much as before the merger on R&D, the internal spillovers and elimination of duplication can make that R&D more effective and so make the company more competitive.

Admittedly, there are other important reasons why Canada's investment in innovation lags. For example, companies like Nortel and BlackBerry missed major trends and then focused too heavily on incremental rather than revolutionary R&D.[75] But if they had been a single company, they might have invested in more revolutionary R&D projects. At least one study suggests that Nortel's failure was partially caused by a lack of economies of scale in R&D.[76]

Conglomerate Effects: Second, mergers of companies with complementary products increase cross-selling, and thus profit margins. A broader range of products can also improve brand awareness, as consumers of both types of product become aware of the company and perceive it as a more comprehensive solution to their needs. These effects are well-established in economic literature,[77] and real-world examples abound. For example, when TD acquired Canada Trust in 2000, cross-selling was a major feature, helping it increase its productivity.[78] In part because of that merger, TD was able to expand rapidly in the United States. It is now the 10th biggest bank in the United States.[79]

Network Effects: Third, mergers in markets with network effects, or on either side of two-sided markets, can improve the quality of the product for both sides of the market.[80] For example, mergers of software companies can make each of their software more valuable because consumers have access to a broader network of interoperable software.[81] This arose in the *Thoma Bravo* case, where the Commissioner allowed the acquisition of a competing software company in part because the merged entity would have better features, software updates, and customer service.[82] The implicit rationale was that consumers may prefer the merged company's combined software even if it charges a higher price because the quality matters more than the price.

Similarly, a merger of two newspapers makes the advertising space in the new paper more valuable because it reaches the audiences of both old papers.[83] The combined newspaper would also have access to more data, which is described next.

Big Data: Fourth, the value of some digital products is a function of the data they have. Consider the evolution of GPT. Its accuracy has increased with the number of parameters in its training data.[84] Only the most recent versions—those relying on the most training data—have reached the level of accuracy needed to have widespread practical applications. In other words, if Microsoft had not acquired GitHub and worked with Open AI to build the largest-ever dataset, we would never have gotten ChatGPT, DALL-E, or Copilot. Other examples abound.[85]

For all of these reasons, Canada still needs a defence that allows mergers that increase competitiveness through scale, especially in digital industries. But as Chief Justice Crampton argued 20 years ago,[86] more focus should be placed on dynamic efficiencies like the ones described above, rather than on static efficiencies like cost savings.

This is also consistent with the two purposes of the efficiencies defence described above. Dynamic efficiencies increase competitiveness in global markets in the long run. They satisfy the first purpose of the efficiencies defence. Static efficiencies may be increasingly unlikely to increase competitiveness in global markets. Instead, they typically satisfy the second purpose of the efficiencies defence: demonstrating allocative efficiency. But that purpose is only sound to the extent that it is reconciled with considerations of fairness. Thus, to the extent that static efficiencies continue to be considered, we argue that they must be weighed against fairness.

Part III: The Meaning of Fairness

In Part II, we explained why fairness should be considered in the analysis. This part tries to formalize what fairness means in the context of the *Competition Act*. In this Part, we describe two conceptions of fairness: one based on the text of the *Competition Act*, and one based on Rawlsian fairness. In the next Part, we put these principles into a concrete proposal.

(a) Fairness in the Purpose of the Act

Section 1.1 of the *Competition Act* 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.[87]

The key point to realize about this purpose is that it is not singularly focused on economic efficiency, but rather considers that to be one factor, on par with the interests of "small and medium-sized enterprises" and "consumers", which are both distributional concerns.

The Bureau appears to share that conception of fairness, but has extended it a bit further. In response to commentators arguing that it should focus exclusively on economic efficiency, the Bureau said:

"The Bureau strongly opposes such a change … a singular focus on economic efficiency risks making the Act indifferent to the welfare of consumers, small and medium-sized enterprises, and other groups that are most vulnerable to anti-competitive conduct. It would remove the flexibility granted by the existing purpose clause and, therefore, risk upending decades of case law."[88]

Note the reference to "other groups that are most vulnerable to anti-competitive conduct". Given that the *Competition Act* was just amended to add a prohibition on wage fixing,[89] it stands to reason that this might include employees. In sum, the text of the *Competition Act* suggests that fairness means being fair to small businesses, consumers, and possibly employees.

In support of a fairness approach, we cite the negotiated consent agreement reached in the Superior/Canwest merger in 2017.[90] The Competition Bureau announcement on September 27, 2017 that it had reached a Consent Agreement with Superior Plus LP ("Superior") regarding its proposed acquisition of Canwest Propane ("Canwest") from Gibson Energy ULC ("Gibsons"). This agreement protects Canadians by preserving competition for the retail sale of bulk propane in western Canada, northern Ontario and the Northwest Territories.

Following a detailed review, the Bureau determined that a remedy was required to resolve competition concerns in 12 local markets where the merger would have otherwise been likely to substantially lessen competition and where claimed efficiencies did not clearly and significantly outweigh the merger's anti-competitive effects. Superior agreed to sell retail propane sites and associated assets in those 12 markets.[91] The Bureau concluded that no remedy was required in ten local markets, because the efficiency gains resulting from the transaction were likely to clearly and significantly outweigh the likely anti-competitive effects in these markets.

The Bureau determined that the relevant geographic markets for retail bulk propane distribution are local in nature. Bulk propane is delivered by truck directly to a customer's location, where a large tank on the customer's property is filled. These trucks generally do not travel great distances to deliver propane, as the costs associated with trucking over long distances can become prohibitive.

In order to determine the scope of an appropriate remedy, the Bureau engaged in a trade-off analysis for each of the local geographic markets where a substantial lessening of competition was found to be likely in order to determine which of the local markets had gains in efficiency arising from the proposed transaction that clearly and significantly outweighed the anti-competitive effects of the proposed transaction.[92] In a footnote to the position statement, the Bureau noted that in this case, the majority of both the anti-competitive effects and efficiencies were highly divisible due to the nature of the assets and geographic markets, making a local market specific trade-off analysis possible. In cases such as this one, where the appropriate remedy is something other than a full block of the merger, specific considerations such as this may apply.

The local market specific approach used by the Bureau helped to craft a remedy that addressed competition concerns while allowing efficiencies to be realized in markets where they were likely to clearly and significantly outweigh the anti-competitive effects of the proposed transaction.

In summary, the Bureau concluded that no remedy was required in ten local markets, because the efficiency gains resulting from the transaction were likely to clearly and significantly outweigh the likely anti-competitive effects in these markets. In each of the remaining 12 markets, the Bureau concluded that, without a remedy, the efficiency gains resulting from the transaction would not be likely to clearly and significantly outweigh the anti-competitive effects. To address the Bureau's concerns, Superior agreed to sell retail propane sites and associated assets in these 12 markets.

This is an example of ensuring that overall efficiencies are not at the expense of the least advantaged in select markets. This type of analysis is consistent with a justice as fairness approach articulated later in this paper.

The case of Superior re Canwest was a consent agreement, and does not constitute a legal precedent for the interpretation of the "efficiencies defence" which has been the source of debate. An important consideration is the way in which an application is framed, in terms of the lessening of competition substantially in a trade, industry or profession, or among the sources or outlets from which a trade, industry or profession obtains a product. The framing of the markets may allow for some flexibility in terms of the efficiency analysis.

(b) Rawlsian Fairness

The analysis above describes whom we should be fair to, but not what it means to be fair. For the latter, we turn to Rawls' conception of justice as fairness. We choose this conception because it is relatively easy to apply to merger review. We express no opinion on whether this is the best model of fairness. Philosophers have written reams on that question, and we do not have the time or the space to do that debate justice here.

Rawls imagined a society created by an original agreement where "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like".[93] Hence, the principles of justice are chosen behind a "veil of ignorance".[94]

He argued that the agreement reached behind the veil of ignorance would include the following rule, among many others:

"Social and economic inequalities are to be arranged so that they are … to the greatest benefit of the least advantaged".[95] Such inequalities "are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society".[96]

Rewritten in the language set out above, a Kaldor-Hicks improvement that is not a Pareto improvement is philosophically justified as long as those worse off after the change are not the least advantaged members of society. A Rawlsian framework would not support the total efficiencies approach.

The rules developed by Rawls could provide guidance for the order driven approach approved in *Secure Energy Services.* As outlined below we recommend that these rules be codified in a reformed legislative efficiencies defence.

In two ways, Rawlsian fairness is fairly extreme. First, it would prevent a change in which a least advantaged person loses $1 but someone else gains $1 billion. Our solution to that problem is to require a degree of proportionality between harms to the least advantaged and benefits to society at large in order to block the change. Once that proportionality threshold is reached, harm to the least advantaged should be determinative.

Second, Rawlsian fairness would prevent a change that helps millions of people, but hurts 1 least advantaged person. Our solution to that problem is to group the stakeholders into larger categories of disadvantage. The question would not be whether *a* least advantaged consumer is harmed, but rather whether *the class* of consumers in a least advantaged category (e.g. low-income consumers, or consumers in a particularly hard-hit region) are harmed. Similarly, the fact that *one* employee loses their job is not determinative, but if *the class* of all employees, or all workers in a particular industry, are adversely affected, that would be determinative. Note that these categories of least advantaged are taken from the categories of people to whom we have to be fair, as per the text of the *Competition Act*.

Part IV: Our Proposal

Below, we describe our proposed methodology for a revised efficiencies defence that would be established with legislative reform.[97] Recall that by the time we get to this analysis, the Commissioner has already proven that there will be a substantial prevention or lessening of competition. The Commissioner would not need to prove that again at this stage.

Step 1—Identify Efficiencies: First, the merging companies should continue to have the burden of showing that (1) the merger will yield efficiencies; and (2) those efficiencies would not be achieved if the order was made.

The Tribunal should consider both static and dynamic efficiencies, and should not discount qualitative efficiencies. To the contrary, if the merging parties show that (1) a dynamic efficiency is likely to occur; and (2) in their industry, that dynamic efficiency matters to consumers, then the Tribunal should give those efficiencies extra weight. The fact that the magnitude of a dynamic efficiency is not known at the time of the hearing should not be a disadvantage, or result in any type of discounting compared to quantified efficiencies.

The Tribunal should also consider any evidence that these efficiencies would increase exports or decrease imports, as required by section 96(2). That evidence does not have to be quantitative—for example, it could be an expert report saying that a dynamic efficiency will likely increase exports, but the magnitude of the effect cannot be estimated at this time. If the merging parties fail to adduce any such evidence, that should weigh against the merging parties.

Step 2—Identify Deadweight Losses: Second, the Commissioner can show that (1) the merger will result in deadweight losses; and (2) the order would avoid or limit those deadweight losses. The inclusion of (2) is consistent with an order driven approach. Most of this analysis would have already been done at the substantial prevention or lessening of competition stage.

Step 3—Identify Harms to Disadvantaged: Third, the Commissioner can show that (1) the merger will have adverse effects on disadvantaged groups, over and above the harms to competition nationwide; and (2) the order would avoid or limit those adverse effects.

The Tribunal should consider harms described in non-monetary terms, including reductions in quality of life if disadvantaged groups must forego the company's products or services. These qualitative adverse effects should not be discounted relative to quantitative effects.

The Tribunal should only consider harms at a group level. The relevant groups should be limited to (1) small businesses; (2) low-income consumers; (3) consumers in especially affected or rural regions; (4) consumers in captive market segments (ones with low price elasticities of demand); (5) employees of either company; and (6) workers in a defined industry. The Tribunal should assess whether these are truly disadvantaged groups.

Step 4—Identify Less Restrictive Orders: Fourth, the merging companies can attempt to show that there is a less restrictive order that would avoid or limit those adverse effects.

Step 5—Apply Rawlsian Fairness: If (1) there are harms to any one of the disadvantaged groups that are *material*; (2) the order would avoid or limit those harms to the point where they would no longer be *material*; and (3) there is not a less restrictive order that would avoid or limit those harms, then the order must be made. If (1) and (2) are satisfied, but (3) is not, then the less restrictive order must be made.

We understand that "material" is imprecise, and will cause some uncertainty. Eventually, jurisprudence would refine that concept to provide adequate guidance, but we understand that is cold comfort for the parties forced to litigate in the interim. Still, the uncertainty is manageable. In many other areas of law, judges routinely determine whether effects are "material" or "not *de minimis*"—this is not meaningfully different.

Step 6—Weighing: If the order is not made at step 4, then the Tribunal should consider all of the efficiencies, the deadweight losses, and the harms to disadvantaged groups and determine whether the first of those outweighs the latter two. As explained above, this step would be similar to the balancing weights approach, except that it would be weigh (usually qualitative) dynamic efficiencies no less than (usually quantitative) static efficiencies, and weigh qualitative adverse effects no less than quantitative adverse effects.

We understand that it is complicated to weigh factors with incommensurate bases. One might reasonably ask how one could compare the value of data aggregation against the inability of a low-income consumer to purchase a product. But once again, this is not unprecedented. For example, the final step of the *Oakes* test—proportionality—raises the same concerns.[987] It is no easier for courts to weigh freedom of religion against access to the legal profession,[99] or to weigh constitutional sentencing rights against preventing sexual violence,[100] but they manage.

It might be asked, what is the difference between our proposal and the current standard? This depends on whether the order driven approach in *Secure Energy Services* is upheld on appeal. But assuming that it is, our proposal adds an explicit focus on the least advantaged persons. You can see that in step 5, which makes effects on disadvantaged groups determinative—not merely a factor to weigh. For example, in the hypothetical example that we cited, markets B and C have high anti-competitive effects. But we do not know within those markets whether the population is poor or disadvantaged in some respect. Our proposal requires an analysis of that demographic. You can also see that in steps 3 and 6, which stop devaluing qualitative adverse effects on disadvantaged groups. But the effect is symmetric, as step 1 also stops devaluing qualitative efficiencies, like the dynamic efficiencies so important in the modern economy.

Part V: Counterarguments

(a) Should Fairness Be Considered at All Within Merger Analysis?

We anticipate the counterargument that distributional effects have no place within competition law.

At several points above, we have pre-empted the counterargument that distributional effects have no place within competition law. In Part I, Section (b), we explained that distributional effects are already considered in the "balancing weights" approach to adverse effects. In Part III, Section (a), we explained that the explicit purposes of the *Competition Act* include distributional effects on small businesses, consumers, and possibly workers. These points clearly establish that distributional effects *are* among the purposes of competition law.

We also argued that distributional effects *should be* among the purposes of competition law. In Part III, Section (b), we explained how consideration of distributional effects is necessary to making the defence comply with Rawlsian fairness.

In this section, we add that Canada would be an outlier globally if it removed consideration of distributional effects. Almost every other country's competition statutes reference effects on consumers and/or small businesses. Some countries go much further.

South Africa's regime expressly incorporates equity. For example, one of the purposes of its statute is "to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons".[101] In particular, a merger can be blocked if it adversely affects the ability of "firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market".[102] The South African Competition Commission has exercised these powers to push merging companies to agree to orders with distributional effects; or approve mergers notwithstanding lessening of competition due to distributional effects. The distributional effects have included (1) protections for workers (e.g. prohibiting layoffs; requiring the company to rehire workers; requiring the company to pay fair wages; requiring the company to improve working conditions; providing counselling; and providing career advice); (2) supports for suppliers and potential suppliers (e.g. local procurement policies; technology transfers to local suppliers; creating a fund to increase the capacity of local suppliers; producing reports on, hosting conferences for, and providing training to local suppliers; and targeting all of the above to companies owned by persons from historically disadvantaged groups); and (3) changes to ownership (e.g. an employee share ownership plan; and a program to expand ownership by Black persons).[103]

The Australian Competition and Consumer Commission can authorize mergers if public benefits outweigh public detriments. Public benefits are interpreted broadly. For example, in *Sea Swift*, two shipping/ferry companies wanted to merge. The Tribunal found that the merger could impose disproportionate harms on particular Torres Strait Islander communities, so it imposed conditions to protect those communities: the merged company had to maintain the same routes with the same frequency and fares could not be increased by more than inflation.[104]

In the United States, the Department of Justice successfully blocked a merger of publishing houses on the basis that it would harm authors,[105] who are the "workers" in that industry. All of these are distributional effects. They all confirm that impacts on disadvantaged communities and workers are integral to the concept of competition law. In 2022 the Federal Trade Commission (FTC) and the Justice Department's Antitrust Division launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the United States' economy are becoming more concentrated and less competitive—imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses.[106]

We also anticipate another counterargument which is that fairness concerns are within the bailiwick and jurisdiction of other government departments, and should not be considered within the context of merger analysis. There is a significant academic and policy debate about the best vehicle of government to ensure fairness and distributional justice. A watertight compartments approach would be that merger review ought to promote competition in the market, but that it ought not to attempt to implement any other social goals in relation to justice for the least advantaged, as this can arguably be better done by direct subsidies or other social programmes delivered by other ministries of the government.

In a perfect world, the watertight compartment argument is attractive. Hayek's *The Constitution of Liberty*,[107] built a sophisticated watertight compartments approach based on the superiority of the marketplace to predict human wants and needs.[108] We do not live in a perfect world, however. The problem with the direct subsidies approach to achieve distributional justice is that this takes great effort on the part of governmental regulators and officials. Returning to the Superior Propane and Canwest merger example, the direct subsidies approach would require a government department to identify the various consumers in each of the markets where there was a substantial lessening of competition, and to ensure that those disadvantaged consumers could apply for and receive subsidies that would achieve social justice. The governmental infrastructure that would be required to perform that task would have to be extensive and would have to be able to move quickly as soon as the merger was completed. That governmental infrastructure would also need expertise in a wide range of economic and social areas.

Moreover, there are significant flaws in the watertight compartments analysis which relate to timing and political lag. On a simple level, public opinion will be a prime motivator in the formulation of regulations in accordance with democratic accountability. As the democratic process is staged into electoral periods (of usually four to five years), there tends to be a "lag" period between public opinion and the enactment of regulations on any given issue.[109] In the interim lag periods the subsidy programs will be either non-existent or slow to catch up. This has very real impact on the least advantaged. Returning to the hypothetical, in this period your business may not survive and you will have to put sweaters on your children at home.

The merits of a watertight compartments approach is illustrated by a debate in another area, which is the battle between rent control versus rent subsidy programmes. A recent study found that the introduction of rent control in an American City caused statistically significant and economically large declines in property values. The costs the law imposed on owners were substantial, but with respect to benefits the study showed that they were poorly targeted. Though the intention of the law is to benefit lower income renters, the authors found that transfers to renters were largest in the neighborhoods of the city in which renters had higher incomes, were less likely to be minorities, and had more education.[110] This study would support a watertight compartments test that separates control of competitive markets from social justice goals that might be better served by direct subsidies to lower income people and other disadvantaged folks who need assistance with rent. Comparative analysis shows that although rent control appears to be very effective in achieving its main goal—lower rents—it also results in a number of undesired effects, for example, lower mobility and residential construction. These unintended effects counteract the desired effect and, thus, diminish the net benefit of rent control. Therefore, the overall impact of rent control policy on the welfare of society is not clear.[111]

Other studies contradicted these results and have shown that rent control may effectively reduce rents without shrinking rental markets.[112]

The illustration of the rent control debate would on first impression appear to support the counterargument that merger review should stick to enhancing competition and not invade other social compartments. But the stubborn fact is that the alternative model of direct subsidies may be a worse remedy that is cumbersome, expensive, and not very effective.

Professor Duncan Kennedy has written "In Defence of Rent Control and Rent Caps"[113] that direct subsidies are expensive and fail to address local markets. He advocates rent control as a mechanism that allows for more local, tailor-made solutions that are specific to each region:

> To reverse the crisis, even just to stabilize the current disastrous situation, would require subsidies, section 8s and affordable construction, to the tune of hundreds of millions or even billions of tax-payer dollars directed at the middle and no longer just the lower end of the chain. Rent control, either caps or a full regulatory program, allows localities to defend themselves against these market forces. They can tailor their response to their local market conditions and in many situations turn them to their advantage. No new taxes required. The innovative legislation being considered in Massachusetts permits them to increase the supply of affordable housing targeted to their local conditions without calling for massive new subsidies from the state.[114]

The same arguments support our argument for a competition law approach towards mergers that permits the court or Tribunal to require divestiture in local geographic markets to ensure that the interests of the least advantaged are advanced.

(b) Does the "Clear and Convincing Test" Offer Comfort?

From a legal perspective concerning the burden of proof, the decision in *Secure Energy Services* demonstrates that it is incumbent on parties invoking the efficiencies defence to ensure that evidence adduced is "clear and convincing" to avoid the risk that critical claimed efficiencies are dismissed. The Tribunal summarized the burden of proof in the following paragraphs in relation to the burden of proof. We quote the full paragraph to emphasize how this burden issue applies for both the proponent and the Commissioner

> For the reasons summarized at paragraph 628 above, the final amount of Foregone Efficiencies that Secure has established on a balance of

> probabilities, and with clear and convincing evidence, is $32,205,813 on an NPV basis. The annualized equivalent of this is $4,618,433.
>
> For the reasons summarized at paragraphs 701–707 above, the final amount of anticompetitive effects that the Commissioner has established on a balance of probabilities, and with clear and convincing evidence, is between $30,219,522 and at least $39,354,443, on an NPV basis. The annual equivalent of this is $4,333,591 to at least $5,643,572 for the years 2023–2033.[115]

If the "clear and convincing" test is a higher standard than balance of probabilities, there are policy implications of this higher burden.

First, assuming that the Commissioner must meet the higher test to show anti-competitive effects, some could argue that this alone will ensure that more mergers will be approved. The burden of proof can make a difference where the case is so close that a tie-breaker is needed.[116] If indeed the Commissioner must meet a higher test, so the logic follows that more mergers will likely be approved and we do not need the efficiencies defence to assist industry.

Conversely, assuming that industry proponents must meet the higher burden of proving on clear and convincing evidence that efficiencies are real and quantified, it might be argued that we should keep the efficiencies defence because this high standard ensures that it will not be a mere pass for industry.

We argue that neither of the above contrary policy conditions are valid because as the law is presently structured, the clear and convincing test does not create a higher standard. We cannot take comfort from this higher test because it is only a balance of probabilities standard.

In the following section we demonstrate that the standard of "clear and convincing" only creates a higher standard of proof if the governing legislation makes explicit reference to it. The *Competition Act* does not make explicit reference to the clear and convincing standard and therefore the only applicable standard is balance of probabilities which equals 50.1%.[117] This requires a short digression as to the history of the "clear and convincing" standard in Canadian law.

In *H (F) v McDougall*[118] Justice Rothstein for the Supreme Court of Canada stated definitively that there was only one standard of proof in civil cases:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is

> proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.[119]

The court in *McDougall* appeared to close the door on any argument that the clear, convincing and compelling standard was a higher standard, by treating this standard as a subset within the balance of probabilities:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence *was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.*[120] [Emphasis added.]

A higher standard of proof was recognized by the Supreme Court of Canada in *Penner v Niagara (Regional Police Services Board)*.[121] The Supreme Court of Canada refused to apply issue estoppel, given the *higher* standard of proof of clear and convincing and cogent evidence in the police disciplinary proceedings:

> It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where **the balance of probabilities—a lower standard of proof**—would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted.[122] [Emphasis added.]

The logic in the above paragraph is unassailable. An acquittal on a higher standard of proof such as proof beyond a reasonable doubt, or clear and convincing evidence, does not preclude a finding in another forum of liability on the lower standard of proof on a balance of probabilities. The distinguishing feature between *McDougall* and *Penner* is the fact that the clear and convincing evidence standard was spelled out in the overarching statute (the *Police Services Act* in that case). In *McDougall,* there was no statutory provision determining the standard of proof. The moral of the story is that the legislation governs with respect to the standard of proof.

Applying this logic to the *Competition Act,* neither sections 92 nor section 96 specifies the burden of proof that shall be applied and there is certainly no reference to "clear and convincing evidence". Accordingly, the standard that applies is the lower standard of balance of probabilities.

Underlying the decision in *McDougall* is a reluctance to apply a mathematical model to the burdens of proof issue. The distrust of a mathematical formula and its alleged imprecision can be seen in *McDougall* from the following passage:

> An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466–67:
>
> > As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.[123]

We part company with authors Rothstein, Centa and Adams where they posit that the concept of 60% or 70% probability likely cannot be understood by decision makers. While we agree that civil juries might struggle with complex and layered instructions,[124] this does not mean that administrative tribunal members or trial judges could not master the mathematical concepts. In the modern world of risk management, the concept of 60 or 70 percent probability can be understood, and *must be* understood by decision makers. Moreover, administrative proceedings are different from civil jury trials as they are presided over by subject matter experts who have had experience in applying standards of proof. This is particularly the case with the Competition Tribunal.

In summary, we cannot be lulled into the false sense of security that the clear and convincing test in the competition law context is a higher test. It is not. In the absence of legislative change, the test is a balance of probabilities standard which equals 50.1%.

Conclusion

This paper has demonstrated that the efficiencies defence ought not to be jettisoned too quickly on the assumption that consolidation is no longer needed in Canada. Scale remains important, but for reasons other than static efficiencies. It also needs to be balanced with distributional considerations. The proposal described above can address the new realities of economic growth in the digital economy while also incorporating Rawlsian fairness. Justice as fairness can lead the way.

ENDNOTES

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[1] RSC 1985, c C-34, s 96 [*Competition Act*].

[2] Julius Melnitzer, "'Vestige of the past': Competition Bureau mulls scrapping 'efficiencies' defence in merger law" *Financial Post* (30 April 2019), online: <https://financialpost.com/legal-post/vestige-of-the-past-competition-bureau-mulls-scrapping-efficiencies-defence-in-merger-laws>.

[3] 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.

[4] Paul Glossop, "Efficiency Defence: Let's Lose It" *CD Howe Institute* (17 February 2022), online: <https://www.cdhowe.org/intelligence-memos/peter-glossop-efficiency-defence-lets-lose-it>.

[5] Edward Iacobucci, "The Competition Bureau's Approach to the Efficiencies Defence" *CD Howe Institute* (2 May 2022), online: <https://www.cdhowe.org/intelligence-memos/edward-iacobucci-competition-bureaus-approach-efficiencies-defence>; Calvin Goldman et al, "Proposed Revision of the Efficiency Defense for Mergers in Canada's Competition Act" (22 June 2022), online: <https://www.competitionpolicyinternational.com/proposed-revision-of-the-efficiency-defense-for-mergers-in-canadas-competition-act/>; Michael Caldecott & Erin Keogh, "Much Ado About Nothing? An Examination of Canada's Efficiencies Defence" (16 April 2023), online: <https://www.competitionpolicyinternational.com/much-ado-about-nothing-an-examination-of-canadas-efficiencies-defense/>.

[6] Canada, Competition Bureau, *The Future of Competition Policy in Canada* (Submission by the Competition Bureau), (15 March 2023) at ch 1.8, online: <https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf>; Canada, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (Submission by the Competition Bureau), (8 February 2022) at ch 2.1, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> [Competition Bureau, *Competition Act in the Digital Era*].

[7] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2 [*Secure Energy Services*].

[8] This decision was affirmed by the Federal Court of Appeal: *Secure Energy Services Inc v Canada (Commissioner of Competition)*, 2023 FCA 172. Leave may be sought to appeal it to the Supreme Court of Canada.

[9] For an interesting article about the complexities in this balancing, see Darwin

V Neher, David M Russo, & J Douglas Zona, "Lessons from the Superior-ICG Merger" (2003) 12:2 Geo Mason L Rev 289.

[10] Brian Facey & Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (2 March 2017), *CD Howe Institute*, at 7, online: <https://www.cdhowe.org/public-policy-research/promoting-innovation-and-efficiency-streamlining-competition-reviews>.

[11] 2002 Comp Trib 16 [*Superior Propane III*].

[12] *Secure Energy Services, supra* note 7.

[13] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita* SCC].

[14] Joshua A Krane, Cassandra Brown & Jim Robson, "Marshalling the Efficiencies Defence" (2016) 74 SCLR (2d) 451.

[15] *Ibid* at 464.

[16] *Ibid* at 465.

[17] Brian Facey & Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (2 March 2017), *CD Howe Institute,* online, < https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/e-brief_254_0.pdf>.

[18] *Ibid* at 6-7.

[19] We recognise that these passages were discussing total welfare vs. balancing weights. The 'flexibility' discussed is not directly related to aggregate vs. order driven approaches.

[20] *Tervita* SCC*, supra* note 13 at para 90.

[21] *Competition Act*, *supra* note 1, s 92(1).

[22] Paul S Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 540-47, cited in Krane, Brown and Robson, *supra* note 14 at 463.

[23] *Secure Energy Services, supra* note 7 at para 499.

[24] *Ibid* at para 502.

[25] *Ibid* at para 504.

[26] *Ibid* at para 500.

[27] Secure Energy Services Inc, "Secure Energy to Appeal Competition Tribunal Decision on its Merger with Tervita", *Newswire.ca* (4 March 2023), online: <https://www.newswire.ca/news-releases/secure-energy-to-appeal-competition-tribunal-decision-on-its-merger-with-tervita-821169939.html>. In addition to the questions of law appealed as of right, leave to appeal has been granted on two questions of fact: *Secure Energy Services Inc v The Commissioner of Competition* (21 April 2023), Ottawa, FCA 23-A-25 (granting leave to appeal).

[28] *Mohr v National Hockey League*, 2022 FCA 145.

[29] *Secure Energy Services Inc v The Commissioner of Competition* (30 March 2023), Ottawa, FCA 23-A-25 (Memorandum of fact and law, Appellant) at paras 26-29.

[30] *Tervita* SCC*, supra* note 13 at para 111.

[31] *Secure Energy Services Inc v The Commissioner of Competition* (6 April 2023), Ottawa, FCA 23-A-25 (Memorandum of fact and law, Respondent) at para 34, citing *Commissioner of Competition v CCS Corp*, 2012 Comp Trib 14 at paras

265, 268, 272, 275 & 277 [*Tervita* CT]. Note that CCS changed its name to Tervita during the litigation: See *Tervita Corp v Canada (Commissioner of Competition)*, 2013 FCA 28 at para 15 [*Tervita* FCA].

32 *Secure Energy Services* (Memorandum of fact and law, Respondent), *supra* note 31 at para 35.

33 *Secure Energy Services* (Memorandum of fact and law, Appellant), *supra* note 29 at paras 24 & 30-38.

34 *Secure Energy Services* (Memorandum of fact and law, Respondent), *supra* note 31 at para 40.

35 *Tervita* CT, *supra* note 31 at para 262.

36 In *Tervita* SCC, *supra* note 13 at para 102, the court held that *economists would define efficiency* as including (1) "production efficiency", where "output is produced using the most cost-effective combination of productive resources"; (2) "dynamic efficiency", which involves "invention, development and diffusion of new products and production processes"; and (3) "allocative efficiency", where "resources available to society are allocated to their most valuable use". The court does not clearly endorse this as the legal definition of efficiencies. In *Commissioner of Competition v Superior Propane Inc*, 2000 Comp Trib 15 [*Superior Propane I*], rev'd on other grounds, 2001 FCA 104 [*Superior Propane II*], the court suggested that "productive efficiency" included "industry output fall[ing] and economic resources [being] diverted to the production of more costly substitute goods", while "allocative efficiency" included consumers "acquir[ing] less of the product and switch[ing] to lower-valued substitutes". However, this does not define the boundaries of the terms, so it is not a definition.

37 See *Canada (Director of Investigation and Research) v Hillsdown Holdings Ltd*, 1992 CanLII 2092, 41 CPR (3d) 289 (CT) (referencing only "administrative cost savings", "savings on transportation costs", and "savings in manufacturing costs"); *Superior Propane I, supra* note 36 at Table 1, rev'd on other grounds, *Superior Propane II*, *supra* note 36; *Tervita* CT, *supra* note 31 at paras 250-255; *Tervita* FCA, *supra* note 31 at para 32, rev'd on other grounds, *Tervita* SCC, *supra* note 13; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited,* 2022 Comp Trib 18 at paras 703-760 [*Parrish*]. Admittedly, in *Tervita* CT, *supra* note 31, at para 252, the merging parties mentioned the possibility of expanding markets. However, this was fundamentally a point about the cost of a new service falling to a level where it would be viable. In that sense, it was essentially still an argument about cost reductions.

38 *Tervita* SCC, *supra* note 13 at para 146.

39 *Tervita* CT, *supra* note 31 at para 262.

40 *Competition Act*, *supra* note 1, s 96(3).

41 *Ibid*, s 96(2).

42 *Parrish*, *supra* note 37 at para 693.

43 *Tervita* CT, *supra* note 31 at para 262.

44 *Ibid.*

45 *Ibid*; *Secure Energy Services, supra* note 7 at para 497.

46 *Superior Propane II, supra* note 37 at para 161; *Canada (Commissioner of*

Competition) v Superior Propane Inc, 2003 FCA 53 at para 33 [*Superior Propane IV*].

47 *Ibid* at paras 24, 28, 31 & 33.

48 *Secure Energy Services, supra* note 7 at para 489.

49 *Parrish, supra* note 37 at para 650.

50 *Tervita* SCC, *supra* note 13 at para 100.

51 *Ibid* at paras 124-128.

52 *Ibid* at para 147.

53 *Ibid* at para 87.

54 *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 Apr 1986) at 11927-11928 (Hon Michel Côté): "Our prosperity as a nation depends on the quality of our economic participation in both domestic and international markets … Canada is first and foremost a trading nation … The importance of international competition is also emphasized in the proposals concerning mergers … Today, many of our industries are directly exposed to international competition both on our domestic and foreign markets. Thanks to these amendments, Mr. Speaker, when the time comes to rule on the legality of a merger or take-over, the Tribunal will be bound to take into account the extent of foreign involvement in our domestic market".

55 *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 Apr 1986) at 11962 (Pierre Blais): "Canada is a trading nation. One job out of three depends on international trade. This is why when a merger would greatly improve efficiency, thereby increasing exports or substitutions to imports, the Tribunal will have to authorize it."

56 *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (9 Apr 1986) at 12051-12052 (Rt Hon John Turner): "[T]he Government claims that we Canadians need big multinationals in Canada to compete with the big foreign multinationals. There may be some validity to this argument. We must have companies that are powerful enough and vigorous enough to respond to initiatives here on the Canadian market and on international markets, but in my view, recent takeovers do not support this argument. … There is another phenomenon, the concentration of economic power in a few large cities in Canada, and … this is to the detriment of other regions in Canada. Such concentration will have repercussions on regional development policies, and management of these large corporations will drift farther and farther away from the small communities of this country."

57 *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 Apr 1986) at 11969 (Aideen Nicholson): "There probably do exist cases in which concentration will assist in efficiency and economies of scale. It has traditionally been said that in Canada, because our population is relatively small and our country immense, there is a case for greater concentration of power than that which is found in the United States. However, when looking for evidence that concentration does in fact enhance R and D and marketing ability, it is very hard to find."

58 Kamil Gérard Ahmed, "The Efficiency Defence and Its Interpretation in

Superior Propane: Reversed Robinhoodism at Its Worst" (2006) 40:3 RJT 595 at 633-634.

[59] *Competition Act*, *supra* note 1, s 96(2).

[60] Michael Caldecott & Erin Keogh, "Much Ado About Nothing? An Examination of Canada's Efficiencies Defence", *Competition Policy International* (16 April 2023), online: <https://www.competitionpolicyinternational.com/much-ado-about-nothing-an-examination-of-canadas-efficiencies-defense> ("Supporters of the efficiencies defense tie its continuing existence to the Act's purpose clause … the 'efficiency and adaptability' of the Canadian economy … Their general hypothesis is that transactions are part of a beneficial process of creative destruction in the marketplace. The acquired firm is cannibalized by the acquiring firm, which can then discard inefficient components"); Michael Kilby & Lawson AW Hunter, "The Role of the Efficiencies Defence in Canadian Competition Law: A Closer Look", Stikeman Elliott LLP (22 December 2022), online: <https://www.stikeman.com/en-ca/kh/canadian-ma-law/the-role-of-the-efficiencies-defence-in-canadian-competition-law-a-closer-look> (mergers are allowed to proceed if "anti-competitive effects would be outweighed by economic efficiency gains").

[61] Note that, if merger analysis were to use this as its touchstone, it would be similar to using the total surplus model discussed in part I, section (a).

[62] To take an obviously extreme example, if wealthy shareholders made an extra $10 million from a merger that increased baby food prices on reserves, but as a result 100 First Nations families would face such higher prices that their babies would become malnourished, the Tribunal could find that the monetary benefit to the shareholders exceeded the wealth transfer from the First Nations babies. This is especially possible under the current regime which discounts effects that are not easily quantifiable in monetary terms, such as "increased malnourishment". We trust that everyone would agree that this should not be allowed.

[63] Matthew Boswell, "Why Canada needs an urgent competition upgrade" (Address delivered at Annual Conference of the Canadian Chapter of the International Institute of Communications, Ottawa, 16 May 2023), online: <https://www.canada.ca/en/competition-bureau/news/2023/05/why-canada-needs-an-urgent-competition-upgrade.html>; citing Jonathan Deslauriers, Robert Gagné & Jonathan Paré, "Canada's "Lagging Productivity: Could the Problem Be Insufficient Competition?", Centre for Productivity and Prosperity, HEC Montréal (16 November 2022), online: <https://cpp.hec.ca/en/canadas-lagging-productivity-could-the-problem-be-insufficient-competition/>.

[64] In the opinion of the authors for the Centre for Productivity and Prosperity this decline is due essentially to the inaction of federal administrations since the early 1990s. Canada, unable to shake off its protectionist past, has been unable to prepare its enterprises to meet the challenges of integrated world markets. The concept of protectionism obviously goes beyond competition law issues to encompass foreign investment restrictions.

[65] Boswell, *supra* note 63.

[66] David Berman, "Shopify's decline contributes to the quirky 'Canadian

curse' of the TSX", *The Globe and Mail*, (8 January 2022), online: <https://www.theglobeandmail.com/investing/markets/inside-the-market/article-shopifys-decline-contributes-to-the-quirky-canadian-curse-of-the-tsx/>.

67 Chiasson & Johnson, *supra* note 3. For a rebuttal see 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.

68 Andy Baziliauskas and Lisa Stockley, "Towards an Efficiencies Standard that Benefits Canadians" (2023) 36:1 Can Competition L Rev 1.

69 *Ibid* at 4 [emphasis removed].

70 Konstantins Benkovskis & Julia Wörz, "What drives the market share changes? Price versus non-price factors" (2014) European Central Bank, Working Paper No 1640 at 25-27, online: <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1640.pdf>.

71 VD Smitnov, "Influence of Non-Price Factors of Banks' Activities on their Financial Results" (2020) 24:5 Fin Theory & Prac 62 at 63.

72 Daniel Läubli & Nora Ottnik, "In fresh-food retailing, quality matters more than price", *McKinsey & Company* (11 April 2018), online: <https://www.mckinsey.com/industries/retail/our-insights/in-fresh-food-retailing-quality-matters-more-than-price>.

73 See e.g. Robyn Mak, "TSMC foots the bill for global chip supremacy", Reuters (12 January 2023), online: <https://www.reuters.com/breakingviews/tsmc-foots-bill-global-chip-supremacy-2023-01-12/> (suggesting that record research and development expenses threaten the profitability of the Taiwanese semiconductor manufacturer TSMC).

74 Facey & Dueck, *supra* note 67 at 37–39.

75 See Jeffrey Dale, "No one wants to talk about it, but Canada's R&D programs are failing" (16 March 2016), *The Globe and Mail*, online: <https://www.theglobeandmail.com/report-on-business/rob-commentary/no-one-wants-to-talk-about-it-but-canadas-rd-programs-are-failing/article29248703/>.

76 Jonathan Calof et al, "An Overview of the Demise of Nortel Networks and Key Lessons Learned: Systemic effects in environment, resilience and black-cloud formation" (17 March 2014), Telfer School of Management, University of Ottawa at 11, online: <https://sites.telfer.uottawa.ca/nortelstudy/files/2014/02/nortel-summary-report-and-executive-summary.pdf>.

77 See Craig Minerva, Loren K Smith & Peter Herrick, "The Other Side of the Coin: Complementarity in Mergers of Multiproduct Firms" (October 2021), *Antitrust Magazine Online,* online: <https://www.brattle.com/wp-content/uploads/2021/11/The-Other-Side-of-the-Coin-Complementarity-in-Mergers-of-Multiproduct-Firms.pdf>; OECD, *Roundtable on Conglomerate Effects of Mergers—Background Note,* Doc No DAF/COMP(2020)2 (30 April 2020) at paras 67-73, online: <https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf>.

78 Sarah Kim, *Merger-Related Productivity Gains in the Canadian Banking Industry* (MAS Thesis, University of Toronto Department of Mechanical

and Industrial Engineering, 2004) at 21, 65 & 85-89, online: <https://central.bac-lac.gc.ca/.item?id=MQ91504&op=pdf&app=Library&is_thesis=1&oclc_number=58828807>; Ed Clark, Address (delivered at RBC Capital Markets Canadian CEO Conference, Toronto, 21 January 2004), online: <https://www.td.com/ca/en/about-td/for-investors/investor-relations/presentation-and-events/archived-events-jan-21-2004>; Ed Clark, Address (delivered at Citigroup Financial Services Conference, Las Vegas, 17 January 2007, at 5, online: <https://www.td.com/document/PDF/investor/td-investor-2007-citigroup-c-m-transcript.pdf>.

[79] US, Federal Reserve System, "Insured U.S.-Chartered Commercial Banks That Have Consolidated Assets of $300 Million or More, Ranked by Consolidated Assets" (updated 31 March 2023), online: <https://www.federalreserve.gov/releases/lbr/current/default.htm>.

[80] See Edmond Baranes, Thomas Cortade & Andreea Cosnita-Langlais, "Merger control on two-sided markets: is there need for an efficiency defense?" (2014) Networks, Electronic Commerce, and Telecommunications Institute, Working Paper No 14-12, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506359#>.

[81] Pierre-Majorique Léger & Louis Quach, "Post-merger performance in the software industry: The impact of characteristics of the software product portfolio" (2009) 29:10 Technovation 704.

[82] Canada, Competition Bureau, "Competition Bureau statement regarding Thoma Bravo's acquisition of Aucerna" (30 August 2019), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-thoma-bravos-acquisition-aucerna>.

[83] See Ambarash Chandra & Allan Collard-Wexler, "Mergers in Two-Sided Markets: An Application to the Canadian Newspaper Industry" (2009) 18:4 J Economics & Management Strategy 1045; Patrick Van Cayseele & Stijn Vanormelingen, "Prices and Network Effects in Two-Sided Markets: the Belgian Newspaper Industry" (29 May 2009) at 16, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404392>.

[84] Alec Radford et al, "Language Models are Unsupervised Multitask Learners" (24 February 2019), *OpenAI Blog*, at 4-5, online: <https://insightcivic.s3.us-east-1.amazonaws.com/language-models.pdf>; Tom B Brown et al, "Language Models are Few-Shot Learners", in Hugo Larochelle et al, eds, *Advances in Neural Information Processing Systems 33* (2020) at 5, 8, 12, 14, 16, 19-22, 24-25 & 27, online: <https://proceedings.neurips.cc/paper_files/paper/2020/hash/1457c0d6bfcb4967418bfb8ac142f64a-Abstract.html>. You can see that data is the primary driver because the number of parameters has a bigger effect on accuracy than the umber of shots.

[85] Netflix relies on big data to recommend new shows, and decide what shows to produce (see Enrique Dans, "Netflix: Big Data And Playing A Long Game Is Proving A Winning Strategy" (15 January 2020), *Forbes*, online: <https://www.forbes.com/sites/enriquedans/2020/01/15/netflix-big-data-and-playing-a-long-game-is-proving-a-winningstrategy/?sh=219f5023766e>). Amazon

relies on big data to identify fast-selling products by third party sellers that they can manufacture in-house and sell more profitably (see Martin Dickson et al, "A Prime example of the issue with Big Data?—European Commission issues Statement of Objections in Amazon probe," *Freshfields Bruckhaus Deringer* (17 November 2020), online: <https://technologyquotient.freshfields.com/post/102gkbz/a-prime-example-of-the-issue-with-big-data-european-commission-issues-statemen>). Starbucks uses big data to decide where to open stores, and to optimize their menus and prices at each location (see Bernard Marr, "Starbucks: Using Big Data, Analytics And Artificial Intelligence To Boost Performance" (28 May 2018), *Forbes,* online: <https://www.forbes.com/sites/bernardmarr/2018/05/28/starbucks-using-big-data-analytics-and-artificial-intelligence-to-boost-performance/?sh=3d4a179a65cd>). Credit card companies use big data to identify fraud (see Rob Matheson, "Reducing false positives in credit card fraud detection" (20 September 2018), *MIT News*, online: <https://news.mit.edu/2018/machine-learning-financial-credit-card-fraud-0920>). Many large companies rely on big data to target ads more effectively, and to set prices dynamically to maximize revenues.

86 Paul S Crampton, "Beyond Bill C-23: A Competition Law for the New Millennium" (2002) 36:2 Can Bus LJ 161 at 189.

87 *Competition Act*, *supra* note 1, s 1.1.

88 Competition Bureau, *Competition Act in the Digital Era*, *supra* note 6 at ch 1.1.

89 *Competition Act*, *supra* note 1, s 45(1.1), as amended by SC 2022, c 10, s 257(1).

90 One of the authors of this paper, Kenneth Jull, was involved in this case as General Counsel with the Competition Bureau Legal Services branch on an interchange. The views in this paper do not represent the views of the Competition Bureau.

91 Canada, Competition Bureau, "Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC" (24 April 2017 & 27 September 2017), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/superior-plus-lps-proposed-acquisition-canwest-propane-gibson-energy-ulc>.

92 *Ibid.*

93 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 12.

94 *Ibid* at 136-42.

95 *Ibid* at 302-303.

96 *Ibid* at 14-15.

97 See Ahmed, *supra* note 58. This article makes an interesting proposal for an *ex ante* price maintenance standard for the efficiency defence where Canadian firms can benefit from cost savings but generally not from higher prices; consumer protection will thus be significantly furthered.

98 See generally Kerry Sun, "The Notion of a Proportionate Balance: A Book Review" of Francisco J Urbina, *A Critique of Proportionality and Balancing* (2019) 77:1 UT Fac L Rev 44.

99 See e.g. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

100 See e.g. *R v KRJ*, 2016 SCC 31.

101 *Competition Act*, No 89 of 1998, s 2(f) (S Afr).

102 *Ibid*, s 12A(3)(c), as amended by No 18 of 2018 (S Afr).

103 The public interest powers of the South African Competition Commission were discussed by Betty Mkatshwa, "Incorporating Equity: A Global Perspective" (Panel at the American Bar Association Antitrust Law Spring Meeting, Washington, DC, 30 March 2023) [unpublished]. For a review of the caselaw on public interest conditions in South African merger control, see generally Maryanne Angumuthoo, Derek Lotter & Shakti Wood, "Public Interest in Mergers: South Africa" (2020) 65:2 Antitrust Bull 312 and Prince M Changole & Willem H Boshoff, "Non competition Goals and Their Impact on South African Merger Control: An Empirical Analysis" (2022) 60 Rev Industrial Organization 361. See also Jonathan Klaaren, Karissa Moothoo Padayachie and Olwethu Shedi, "The impact of competition law remedies on public interest", University of Johannesburg, Centre for Competition, Regulation and Economic Development, Working Paper CCRED-IDTT No 2023/04 at 11-16, online: <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/64479b2bc1f2fb059457e3a0/1682414382814/IDTT+2022-2023+WP4_Competition+law+and+public+interest.pdf>. See also, for example, the following South African cases regarding the imposition of public interest conditions on mergers: *Metropolitan Holdings Ltd v Momentum Group Ltd*, [2010] ZACT 87; *Walmart Stores Inc v Massmart Holdings Ltd*, [2011] ZACT 28 (allowing merger subject to conditions), rev'd in part [2012] ZACAC 2 and [2012] ZACAC 6 (varying the conditions); *In re Coca Cola Beverages Africa Limited v Various Coca Cola Bottling and Related Operations*, [2016] ZACT 33, further reasons [2016] ZACT 68; *Re Anheuser-Busch InBev SA/NV and SABMiller plc* (4 August 2016), LM211Jan16 (S Afr Comp Trib), online: <https://www.comptrib.co.za/open-file?FileId=46553>; *Re Simba (Pty) Ltd and Pioneer Food Group Limited* (15 May 2020), LM108Sep19 (S Afr Comp Trib), online: <https://www.comptrib.co.za/case-detail/8953>; and *Re Sunside Acquisitions and NBL Investment Holdings Ltd and Distell Group Holdings Ltd* (8 March 2023), LM136Dec21, online: <https://www.comptrib.co.za/case-detail/19820> (approving with conditions the acquisition of a South African brewery by Heineken).

104 *Application by Sea Swift Pty Limited*, [2016] ACompT 9.

105 US, Department of Justice, "Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster" (31 October 2022), online: <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed>.

106 US, Federal Trade Commission, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (18 January 2022), online: <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

[107] FA Hayek, *The Constitution of Liberty* (London: Routledge, 1960).

[108] See Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace That is Remaking the Modern World* (New York: Simon & Schuster, 1998) at 144. Prime Minister Margaret Thatcher, who instructed Conservative Party staffers that *The Constitution of Liberty* was "what we believe", wanted to replace what she called the "nanny state" of "cradle-to-grave" coddling with an enterprise-based culture: *ibid* at 107-108. See also Douglas Macdonald, "Coerciveness and the Selection of Environmental Policy Instruments" (2001) 44:2 Can Pub Admin 161 at 164, referring to the competing theories of Hayek and Michel Foucault.

[109] See Kathryn Harrison, "Retreat from Regulation: The Evolution of the Canadian Environmental Regulatory Regime", in G Bruce Doern et al, eds, *Changing the Rules: Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) 122 at 124. See generally Todd L Archibald and Kenneth E Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters Canada, 2020), ch 2 at § 2:51.

[110] Kenneth R Ahern & Marco Giacoletti, "Robbing Peter to Pay Paul? The Redistribution of Wealth Caused by Rent Control" (2022) National Bureau of Economic Research, Working Paper No 30083 at 25-35, online: <https://www.nber.org/system/files/working_papers/w30083/w30083.pdf>.

[111] Konstantin A Kholodilin, "Rent Control Effects through the Lens of Empirical Research: An almost Complete Review of the Literature" (2022) DIW Berlin Discussion Paper No 2026, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298178#>.

[112] Mariona Segu, Jordi Jofre-Monseny & Rodrigo Martínez-Mazza, "Effectiveness and Supply Effects of High-Coverage Rent Control Policies" (2022), Institute d'Economia de Barcelona Working Paper 2022/02, online: <https://diposit.ub.edu/dspace/bitstream/2445/183683/1/IEB22-02_Jofre+Martinez+Segu.pdf>.

[113] Duncan Kennedy, "In Defense of Rent Control and Rent Caps" (2023), SSRN, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4371454>.

[114] *Ibid* at 4.

[115] *Secure Energy Services, supra* note 7 at paras 708-709.

[116] See e.g. *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 FCA 16 at para 14: "The burden of proof can matter where there is a gap in the evidence on a key element or where, overall, the case is so close that a make-weight or a tie-breaker is needed. Close this case was not. In fact, considering the force of the evidentiary record before it, the Competition Tribunal concluded (at para. 124) that the result would have been the same even if it accepted the Commissioner's view of the burden of proof."

[117] Todd Archibald & Kenneth Jull, "'Clear and Convincing' Evidence Cannot Reside in the House of Balance of Probabilities: A Scientific Approach" (2021) 51 Advoc Q 315.

[118] 2008 SCC 53 [*McDougall*].

[119] *Ibid* at para 40.

[120] *Ibid* at para 46.

[121] 2013 SCC 19 [*Penner*].
[122] *Ibid* at para 60.
[123] *McDougall*, *supra* note 119 at para 43.
[124] Archibald & Jull, *supra* note 117.