THE COMPETITION BUREAU'S REJECTION OF EFFICIENCY AS THE KEY CRITERION IN COMPETITION POLICY: A CRITIQUE*

Edward Iacobucci

Professor and TSE Chair in Capital Markets
Faculty of Law, University of Toronto
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The Competition Bureau's submission to a consultation initiated by The Hon. Howard Wetston is wide-ranging in its recommendations for the future direction of the Canadian Competition Act. This article focuses on two critical issues in the submission: the appropriate goals of the Act; and the future of the efficiencies defence to mergers. The article concludes that the Bureau is unpersuasive on both issues. On the question of the goals of the Act, the Bureau's support for the status quo rather than a clearer emphasis on efficiency overlooks a number of considerations, including the ways in which efficiency has been dominant to date in practice, which explains why there have not been many significant conflicts between goals in practice (though there have been some, which have led to indeterminacy in the law). On the efficiencies defence, the Bureau offers assertions without elaborating their justification, and offers an amendment—efficiencies ought to be merely one factor to consider in assessing a merger, rather than a defence—without explaining its operation in practice, or its advantages, which are not apparent.

Dans son mémoire faisant suite à une consultation demandée par l'honorable Howard Wetston, le Bureau de la concurrence formule des recommandations générales sur l'orientation future de la Loi sur la concurrence du Canada. Cet article porte sur deux questions essentielles qui y sont soulevées : l'adéquation des objectifs de la Loi, et l'avenir du critère d'efficience comme défense d'un fusionnement. L'auteur conclut que le Bureau n'est persuasif sur ni l'une ni l'autre question. À propos des objectifs de la Loi, le Bureau appuie le statu quo de préférence à cibler clairement l'efficience. Il laisse ainsi dans l'ombre plusieurs points à considérer, notamment la dominance du critère d'efficience dans la pratique à ce jour, chose qui explique la paucité des conflits importants entre les objectifs dans la pratique (mais il y en a eu, et cela a produit des flous dans la loi). Quant à l'efficience comme défense, le Bureau fait des affirmations sans développer d'arguments à l'appui, puis recommande une modification—les gains en efficience devraient constituer simplement un facteur parmi d'autres dans l'évaluation d'un fusionnement, et non un motif

de défense—sans en expliquer l'application pratique ni les avantages, fort peu visibles au demeurant.

1. Introduction

Senator Howard Wetston initiated a consultation process on possible reforms to the *Competition Act* in the latter half of 2020. At Senator Wetston's request, I authored a paper to form a basis for consultations. The paper reviewed the impact of digital markets on competition and asked whether reforms were necessary as a consequence of that impact.[2] The paper canvassed the economics of digital markets, concluding that while there are reasons to be concerned about market power in digital markets, the *Competition Act* remains fundamentally suitable because of its flexibility and reliance on general standards. The paper also made several suggestions for targeted changes to the *Act* that would make sense regardless of the digitization of the economy but are more urgent with it. Included in the paper was discussion of two related matters of longstanding controversy in Canadian competition policy: should competition policy focus on efficiency exclusively as its objective, or should it be more pluralistic?; and, should the efficiencies defence to mergers stand as it is, be amended, or be abolished?

The paper observed that the existing list of disparate objectives in s. 1.1 of the *Competition Act* creates various concerns, including indeterminacy when those objectives point in different directions, and, while recognizing counter-arguments, tended to favour a sharper focus on efficiency. The paper also supported retaining the efficiencies defence to mergers in s. 96 of the *Competition Act*, which allows mergers with anticompetitive effects to proceed if efficiencies from the merger offset those effects, though recommended amendments to reject certain implications of the Supreme Court's decision in *Tervita*,[3] which unfortunately put a burden on the Bureau to quantify "quantifiable" anticompetitive effects before the parties would have to prove any efficiency gains from a merger.[4]

In response to Senator Wetston's call for responses to the paper as part of a consultative process, the Competition Bureau made an extensive, wide-ranging submission that touched on some of the matters that the consultation paper raises, and many that the paper does not, including several process issues.[5] The focus of this article is the Bureau's arguments on the goals of competition policy, and on the efficiency defence to mergers. The Bureau disagrees with the consultation paper on both issues. The Bureau strongly advocates for retention of the *status quo* in the statement of objectives in s. 1.1 of the *Competition Act*. The Bureau also recommends that the

efficiencies defence be demoted from a defence to a factor to be considered among many in merger review.

Rather than debating the optimal approach to each of these issues, I focus instead in this article on the Bureau's stated reasons for its positions. The Competition Bureau is the most important competition law authority in Canada, and its views are critical to understanding the enforcement of competition law in Canada. While the Competition Tribunal is in principle available to hear any disputes with private parties about the Bureau's approach to a matter, in practice almost all matters are settled with the Bureau.[6] The opinions of the Bureau, while not formally taking on legal significance, are highly influential in all cases, and dispositive in the vast majority. It follows that the Bureau's views about the fundamental questions on which this article focuses matter a great deal to Canadian competition law. Unfortunately, as this article will discuss, the Bureau's analysis comes up short on several dimensions. Section 2 considers the Bureau's arguments about the objectives of competition policy, and Section 3 considers the arguments about the efficiencies defence. While defensible arguments for the Bureau's positions are available,[7] the Bureau instead relies on a number of unpersuasive arguments.

2. The Objectives of Competition Policy

a) Efficiency as the Objective

The consultation paper outlined several concerns with the *status quo* list of objectives in s. 1.1 of the *Competition Act*. Section 1.1 provides:

> 1.1 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.

Promoting competition has several purposes according to s. 1.1. It promotes efficiency, improves the competitiveness of Canadian business in international markets, ensures that small and medium-sized enterprises ("SME's") have an "equitable" opportunity to compete, and tends to provide competitive prices and product choices.

In *Examining the Competition Act in the Digital Era*,[8] I questioned whether s.1.1 was an appropriate statement of objectives for the *Act*, or whether its

purposes should be expanded or narrowed. I concluded that there were several problems with the status quo. Most importantly, the purpose section fails to guide adjudication when it is most needed to do so. There are, to be sure, many situations where the various purported benefits of competition identified in s. 1.1 could be understood to point in the same direction.[9] For example, preventing anticompetitive exclusion better allows the participation of SME's in Canadian markets, and better promotes efficiency. Preventing price-fixing promotes competitive prices and efficiency.[10]

But what should the authorities do in circumstances where the objectives are in tension? It may be efficient, for example, for a dominant upstream firm to allocate an exclusive territory to a downstream firm, such as a franchise, in order to allow the downstream firm better to internalize its private benefits from investing in the brand.[11] But this may exclude other SME's from the market downstream that would like also to sell the brand. Is this a problematic restriction of competition that may be efficient, but inequitable to SME's? Conversely, ought a price-fixing conspiracy that increases prices in a market to be regarded as acceptable because higher market prices allow higher-cost SME's to participate in the market?

While, as I discuss below, conflicts have been largely minimized in Canada to date by an emphasis in practice on the efficiency goal, the tensions between objectives are not merely a theoretical problem. In one of the few litigated mergers cases, *Superior Propane*,[12] the Tribunal and Federal Court of Appeal wrestled with the meaning of the efficiencies defence in s. 96 of the *Act*, which permits mergers with anticompetitive effects if the efficiency gains from the merger are greater than and offset the anticompetitive effects. Section 96 fails to define "anticompetitive effects," and *Superior Propane* was litigated over the question of what ought to be included in these effects. If efficiency is the objective, the negative effects from an anticompetitive merger result from some customers getting priced out of the market as prices increase; this is the so-called deadweight loss. On the other hand, if significant weight is placed on the objective of ensuring that consumers pay competitive prices regardless of efficiency, then it may be that price increases are harmful from a societal perspective even in respect of consumers that continue to purchase the product; that is, the transfer from consumers to producers from higher prices is not socially neutral, as efficiency would have it, but socially harmful.

While the Tribunal initially held that efficiency considerations dominate the analysis of s. 96, the Federal Court of Appeal, largely resting its analysis on s. 1.1, overturned. The Court of Appeal held that the Tribunal ought to

weigh positive efficiency effects of a merger *and* negative effects from higher prices. It did not provide much guidance in how the Tribunal ought to do this, however, going so far as to suggest that the weighting across effects could vary case by case.

Superior Propane illustrates a critical problem with s. 1.1 as written: it is indeterminate. This puts adjudicators in the difficult position of making policy choices about competing values with little guidance from the statute. The Federal Court of Appeal decision essentially leaves the matter to the personal preferences of adjudicators.[13]

The consultation paper examines other flaws in s. 1.1.[14] For example, it is reasonable to conclude, as the Federal Court of Appeal did in *Superior Propane*, that concern for competitive prices reflects some kind of distributive concern for consumers relative to producers. But if distribution of economic resources is an objective, why are consumers singled out and not, say, workers?[15] On the one hand, s. 1.1 is overinclusive in that it includes objectives that may conflict; on the other, it may be underinclusive by singling out some objects of distributive concern (consumers, possibly SME's) but not others (e.g., workers).

Without definitively resolving the question, the consultation paper offers a number of reasons to prefer an efficiency objective for the *Act*. It is important to begin by noting that adopting such an objective would *not* imply that efficiency is more socially desirable than economic equity, or other social values such as privacy. The consultation paper states:

> Privacy, freedom of expression, editorial diversity, the equitable distribution of economic resources for consumers and workers, and concentrations of political power are only some of the values at stake when companies compete, or protect themselves against competition, especially in digital markets. Such values are critical to democratic polities, and it would be absurd to make the case that they ought not to count in Canadian competition law because the only policy value that matters is economic efficiency.[16]

The argument in favour of efficiency is that economic efficiency tends to promote the average well-being of Canadians, and there are other instruments for other objectives: competition policy may focus on economic efficiency, while other, better-tailored instruments, such as progressive income tax and expenditure, seek to achieve other goals, such as more equitable distribution of resources.

In the consultation paper, I elaborate on the advantages of efficiency as an objective relative to others. First, it avoids the indeterminacy of s. 1.1 as presently written, and as manifest in *Superior Propane*. Second, while efficiency provides a consistent guide to competition policy, other social values will lead to inconsistent implications. For example, following the logic of Ross and Winter, if distribution is given central importance, competition policy ought to *encourage* anticompetitive mergers in cases where shareholders are less wealthy on average than consumers.[17] Or, following Johnson's logic, a merger of oil producers that would result in higher prices ought to be encouraged from an environmental perspective.[18] Third, competition policy is a highly unreliable instrument to promote non-efficiency values. While efficiency is always at stake in competition policy matters, other objectives may only occasionally assume importance. Consider economic distribution. Occasionally stopping an efficient merger that would lower costs and raise prices is a terribly capricious policy instrument to promote economic equality, in contrast with systematically redistributive instruments such as progressive taxation and expenditures. Fourth, adopting a wide range of goals for competition policy would require the Competition Bureau and Tribunal to become conversant if not expert in a range of social policy objectives, rather than building institutional expertise in efficiency analysis. Fifth, a focus on efficiency often will promote other values in s. 1.1. Stopping price-fixing promotes lower prices and efficiency, for example.

There are competing considerations, as I observe in the consultation paper. As I stress, it is uncontroversial that a variety of social objectives are implicated by the kinds of conduct that competition policy governs, and it may be that having several policy instruments that are sensitive to these objectives is desirable. Altering a number of policies at the margins to account for economic redistribution, for example, may be preferable to relying on tax and expenditures as the sole policy instrument promoting economic equity. Moreover, given the democratic legitimacy of a host of values, the law writ large must contend with trade-offs between the values at some juncture; the question is whether it is better to do so within a single instrument, or across instruments.

Examining the Competition Act in the Digital Era has more to say about these issues, but this summarizes the central arguments.[19] I turn now to the Bureau's rejection of efficiency as the objective of competition policy, and its reasons for its defence of the *status quo*.

b) The Bureau's Defence of the *Status Quo*

Citing the consultation paper specifically, the Competition Bureau "strongly opposes" any change to s. 1.1.[20] While there are reasonable arguments to be made in defence of the *status quo*, as I have noted, the Bureau instead offers arguments that are largely unconvincing. This section reviews and evaluates the Bureau's reasons.

i) Efficiency and Indifference to Consumers, SME's

First, the Bureau claims that, "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."[21] This is incorrect and reflects a misunderstanding of the merits of efficiency as a goal. Efficiency is a laudable social goal not because of some peculiar, abstract devotion of some economically-oriented policy commentators, but rather because it makes Canadians on average better off economically. That is, an outcome is efficient if it makes Canadians better off. It follows that efficiency is emphatically *not* indifferent to the effect of anticompetitive conduct on vulnerable groups such as consumers. To the contrary, concerns about reductions in consumer welfare from anti-competitive behaviour and high prices that exclude consumers from the market lie at the heart of the efficiency analysis of competition. Efficiency concerns are concerns about people's well-being and to suggest otherwise is simply wrong.

Oddly, at the same time that it says that efficiency risks indifference to vulnerable groups' well-being, the Bureau implicitly accepts that promoting efficiency generally makes people better off. To explain, the Bureau states that, "when provisions of the Act are viewed through the lens of *maintaining and encouraging competition*, the objectives set out in the purpose clause rarely come into conflict."[22] This is reasonable as a descriptor of Canadian competition policy in practice, but with a very important caveat that I will explore shortly. But to say, as the Bureau does, that the objectives rarely conflict in practice is to say that *promoting competition to promote efficiency also promotes the welfare of consumers and SME's*.[23] Promoting efficiency typically calls for competitive prices and product choices, and prevents anticompetitive exclusion of SME's. But the conclusion that the objectives typically align in practice is not an argument against efficiency as an objective; rather, it concedes that efficiency typically makes consumers and SME's better off. It follows that adopting efficiency as the sole criterion for promoting competition would, on the Bureau's analysis, have little practical

effect on competition law's capacity to make citizens better off. This is not obviously a persuasive argument against adopting efficiency as the objective.

Given the Bureau's reasonable assertion that the goals do not often conflict in practice, one might mistakenly conclude that the question of the goals of the *Act* is not especially important. Setting aside the important fact that the goals do conflict in some cases, which is problematic in itself, to say that there has been little conflict between the goals in practice is contingent on the way that competition policy has been administered in Canada. There are *potential* conflicts between the different goals everywhere, especially between efficiency and fostering competition from SME's, but the law has marginalized these potential conflicts by largely hewing to an efficiency-oriented analysis.

As an example, if one were to elevate the prominence of the goal of protecting competition by SME's, abuse of dominance law in Canada could simply focus on whether a dominant firm has hindered access to the market by a smaller rival, and if it has, the law could conclude that there was a substantial lessening of competition. That is, elevating the importance of SME's could have the *Competition Act* strive to protect competitors and call that protecting competition. But that is not the way the case law has evolved. Consider *Nielsen*, for example, in which a dominant firm prevented entry by a potential entrant by signing exclusive contracts with suppliers of a key input and buyers of the output.[24] There was no controversy at all whether Nielsen excluded a smaller rival; the contracts did so on their face. But that was insufficient to establish abuse of dominance. Instead, the Bureau provided a coherent and compelling theory of why the contracts *inefficiently* excluded competition and that gave rise to a successful abuse of dominance case.[25]

To take another example, one might take an aggressive approach to predatory pricing, perhaps contending that prices that are low enough to disadvantage SME participation in the market are harmful to SME competitors, and thus to competition, and therefore predatory. There are debates about the correct approach to predatory pricing, but at the very least, the Bureau has not attempted to describe above-cost prices that harm higher-cost SME's as predatory, nor would one expect it to: the premise of predatory pricing law is that there is an inefficiency associated with the low prices and consequential exclusion; low prices themselves are not problematic.

The list of potential examples of how the law could have departed from efficiency based on s. 1.1, but has not because of an implicit emphasis

on efficiency, is very long. This has two implications for a critique of the Bureau's position. First, enforcement of the *Act* to date has largely focused on efficiency analysis, which suggests that maintaining the *status quo* would continue to emphasize efficiency. Second, clarifying s. 1.1 would have the benefit of avoiding indeterminacy that arises on occasion under the *status quo*, as in *Superior Propane*, and perhaps more importantly, would avoid alternative interpretations of s. 1.1 in the future that would emphasize the protection of inefficient competitors.

A final point on the dominant role of efficiency in the *status quo*. Modifications to the *Act* over the years have consistently moved in the direction of efficiency at the expense of other possible values. Refusal to deal provides an excellent example. Previous versions of the *Competition Act* enjoined refusals to deal where a supplier's or suppliers' refusal substantially affected a buyer's business, and did not include a requirement of an adverse effect on competition, something required by the current version of s. 75. If the welfare of SME's were understood generally to be a valuable goal of the *Act* in its own right, and not simply as an element of efficiency analysis, this statutory evolution would have been a mistake: why allow SME's to be excluded from competing in a market by a refusal to supply them with a critical input? But given that efficiency has generally been understood to be the goal, the evolution makes sense: refusals to deal that do not have a negative impact on competition do not have negative implications for efficiency and competition policy should not intervene, even if such refusals have negative implications for SME's and their ability to compete in a market.

There are other examples of the statute's trending to efficiency, such as the abolition of price discrimination as an offence. Price discrimination involves lower prices to some consumers, and higher prices to others, and thus engages concerns about consumer welfare in complicated ways, but tends not to be systematically inefficient. Given this, it makes sense that the price discrimination provision, formerly a criminal provision, was deleted from the *Act*.

To summarize the point about the conventional emphasis on efficiency, competition policy in Canada has largely avoided conflicts between the objectives in s. 1.1 because the emphasis in the case law and in statutory evolution has been on inefficient impediments to competition, not on protecting SME's or other objectives. While there are occasional conflicts between objectives in s. 1.1 that have led to indeterminacy in specific contexts, the Bureau and I agree that the conventional pursuit of efficiency tends to promote the other objectives in s. 1.1. This provides a reason to focus on

efficiency: it eliminates the indeterminacy that arose in *Superior Propane*; and, just as or more importantly, fends off future interpretations of the *Act* that would expand the role of non-efficiency objectives at the expense of the statute's coherence and determinacy.

In a footnote, the Bureau contends that conflicts within s. 1.1 (only?) arise when the *Act* creates an exception to its general focus on fostering competition, such as the s. 96 efficiencies defence.[26] This is inaccurate. The confusion in s. 96 arose because the statute requires the Tribunal to weigh the efficiency gains against the "anticompetitive effects" of a merger, yet fails to define "anticompetitive effects." Section 96 therefore requires an answer to the question of why we care about competition, but consideration of what "anticompetitive effects" means must arise in every competition case whether or not this is explicit.[27] For example, how could one determine whether the obvious exclusion of a rival, as in *Nielsen*, substantially lessens competition for the purposes of the *Act* without an understanding of why we care about competition? Because enforcement and interpretation of the *Act* have focused on efficiency, most cases, including *Nielsen*, unselfconsciously consider anticompetitive effects to be efficiency effects and are not reflective about alternative understandings, such as promoting competition through the protection of SME's. Section 96 simply compels decision-makers to be self-conscious about a matter, the goals of competition policy, that surely underlies every competition policy outcome.

This analysis addresses another internally inconsistent assertion of the Bureau. On the one hand, as noted, the Bureau contends that the objectives within s. 1.1 typically align in practice. As noted above, this implies that pursuit of efficiency would not generally change the way the law has been interpreted, given that there has been relatively little conflict between the goals in practice to date. Yet, on the other hand, the Bureau also asserts that, "Changing the purpose clause [to efficiency] risks fundamentally altering the Act, upending decades of established case law, and threatening the Bureau's ability to protect consumers and businesses from anti-competitive conduct."[28] My view is that the Bureau was right the first time: because efficiency has generally implicitly provided the basis for competition policy decisions and amendments to the statute, there have not been frequent conflicts between the objectives in s. 1.1 in practice; and amending the statute to clarify the focus on efficiency would therefore not have the revolutionary impact that the Bureau fears. Amending the purpose clause would simply eliminate the moments of indeterminacy that have arisen in the case law because of conflicting objectives, and perhaps more importantly, would eliminate the potential for future decisions that might on occasion elevate

certain objectives (especially the encouragement of SME's) over efficiency and create indeterminacy.

ii) Efficiency and Flexibility

The Bureau argues that s. 1.1's broad scope enhances flexibility in the application of the *Act*. This is also unpersuasive. For one, the flexibility of the multiple objectives in s. 1.1 may lead to the wrong kind of "flexibility": indeterminacy and consequential reliance on the policy preferences of adjudicators to determine case outcomes. For another, the Bureau fails to explain how s. 1.1's flexibility would be superior to the flexibility associated with an efficiency-oriented objective. The Bureau provides a list of outcomes that it implies would not have arisen without a broad version of s. 1.1. It states:

> The purpose clause benefits from its flexibility. Its objectives provide examples of the types of economic benefits that competition brings, and thus guide the interpretation of various provisions of the Act. Importantly, the purpose clause has not prevented the Tribunal or the courts from recognizing other benefits that are consistent with those objectives. For instance, the word "innovation" does not appear anywhere in the purpose clause, yet the Tribunal has referred to it as "the most important type of competition." Likewise, even though competitive prices and product choices are specifically mentioned in the purpose clause, the Supreme Court has recognized a broader range of competitive harms stemming from market power, namely "the ability to profitably influence … quality, variety, service, advertising, innovation or other dimensions of competition." Finally, while only "consumers" are mentioned in the purpose clause, the Tribunal has recognized that suppliers can also be deprived of competitive prices and choices when buyers obtain market power through anti-competitive means. (Footnotes omitted.)[29]

This paragraph does little to support the Bureau's contention that s. 1.1 as written is valuable because of its flexibility, unlike, by implication (since this is the foil in the Bureau's analysis), an efficiency objective. The efficiency objective would also allow, indeed would *require*, a broad consideration of competitive effects. All the examples that the Bureau provides, from considering competition in innovation, to the importance of quality competition, to taking account of harms to suppliers, all fit naturally, and indeed are necessary to consider, within an efficiency framework. Efficiency is a flexible concept that would account for all these factors, and more besides. To focus on one example, to imply that product quality is not something that efficiency accounts for is obviously incorrect. Economists would account for quality in determining the welfare outcomes in a particular market; a degradation in quality is akin to an increase in price. The difference between

the flexibility that efficiency affords and that of s. 1.1 as written is that the efficiency objective avoids incoherence: it provides decision-makers with a policy goal, and gives them wide latitude to achieve it; section 1.1 as written provides a list of potentially incompatible goals.

iii) Non-efficiency Harms

The Bureau also invokes some broad conception of non-efficiency yet economic harms to support the status quo in s. 1.1, stating that:

> It makes sense for the Act's purpose clause to be cast broadly. This is because competition law embodies a broader range of economic values than just efficiency. For instance, cartels are prohibited not just because of their tendency to reduce efficiency, but also because they directly victimize individuals and businesses and harm their economic well-being. (Footnote omitted.)[30]

Economic agents make decisions that harm others' economic well-being all the time. A seller that raises domestic prices because of increased demand from foreign nationals harms a Canadian buyer's economic well-being. An efficient seller that cuts prices may hurt an inefficient seller that cannot match the price. An innovative seller that provides a product that consumers want may hurt other sellers that continue to provide less desirable products. Despite the economic harms that these actions cause, we do not condemn them because they tend to make society better off on the whole; that is, they are efficient.

Perhaps the Bureau has in mind some kind of moral principle that underlies competition policy enforcement, at least in certain contexts, which is why some economic harms result in "victims" worthy of protection, while others do not. It would have been helpful to hear more on this; it is not enough merely to assert that something is simply wrong and therefore worthy of competition policy condemnation independent of efficiency. I am sceptical that powerful arguments about the inherent immorality of certain anticompetitive behaviour exists independent of efficiency. Moreover, if this were the case, Canadian law is flawed in a number of dimensions. For example, the area that might be most likely to attract moral arguments is collusion: perhaps one might argue that cartelizing is intrinsically immoral and therefore worthy of criminal sanction, unlike the civil treatment of almost all other competition matters. But cartels are permitted in a number of contexts under the law. Export cartels, for example, are permissible in Canada, unlike other criminal acts—such as corruption—that have a negative impact on foreign countries.[31] Supply management in Canada involves government-sponsored cartels of agricultural products. And collusion among otherwise

competitive labourers or employers is explicitly exempted from the Act if it involves collective bargaining.[32] If collusion is intrinsically immoral, it would be interesting to hear more about why these exceptions exist.

iv) Comparative Argument

The Bureau makes two additional points when it states that, "the Bureau is not aware of any jurisdiction in the world that orients its competition law around economic efficiency alone, and excludes other important touchstones like consumer welfare."[33] It is inaccurate and misleading to say that efficiency excludes consumer welfare. Consumer welfare is by far the dominant consideration in the efficiency analysis of competition. This makes the contrast with international regimes much less stark. While an emphasis on efficiency alone would account for welfare effects beyond that on consumers on the theory that the welfare of all individuals ought to count, in practice maximizing consumer welfare typically maximizes efficiency. This is why the Bureau and I agree that the objectives in s. 1.1 typically align in practice, at least in how the *Act* has been applied historically.[34]

The broader point that the Bureau makes is fair: most competition regimes account for concerns other than efficiency. But that, while noteworthy and cause for reflection, is not a substantive argument in itself to cause our law to take a different tack. There are many contrasts with other regimes with the existing s. 1.1. Indeed, as Fox and Trebilcock observe, there is an enormous range of stated objectives around the world in competition policy.[35] Canada has self-consciously chosen a different path historically in a variety of ways in its statute, adopting the efficiencies defence in s. 96, for example, when no other competition regime had done so.

Given all the contrasts across nations, in my view, the correct question is not whether we are mimicking other countries, but rather whether there are lessons from other countries that suggest that Canada is on the wrong path if it were to adopt efficiency as the touchstone. It is possible that such evidence is available, but mere observations that we would not be doing what they are doing if we pursue efficiency are not persuasive in themselves.

v) Under- and Overinclusivity

As a final point on the goals of Canadian competition policy, the Bureau argues that s. 1.1 ought to be retained as it appropriately accounts for a range of *economic* objectives. This is also problematic in that s. 1.1 is both under- and overinclusive. The Bureau does not explain why, for example, the economic welfare of consumers ought to be singled out as an objective,

while other constituencies that may also attract distributive economic concern, such as workers, are excluded.[36] Moreover, why does the Bureau support the inclusion only of *economic* values in s. 1.1? There may be concerns, for example, about the political influence of digital firms with market power—why are these concerns excluded from consideration? Once the objectives stray from a focus on economic efficiency towards a broader conception of fairness, it is arbitrary to draw the line where s. 1.1 does.

c) Conclusion on the Goals of the *Act*

To conclude, section 1.1 as written is indeterminate because it sets out objectives that may point in opposite directions. Fortunately, case law and statutory developments have, to date, largely avoided indeterminacy by implicitly focusing on efficiency. The Bureau's argument that amending s. 1.1 would upend decades of case law is contradicted by its own observations that the objectives in s. 1.1 only rarely conflict in practice.

On the other hand, because more adventurous readings of s. 1.1 have not been adopted, a fair objection to adopting an efficiency goal in place of s. 1.1 is that it would not make much of a difference in practice. The objection comes up short, however, in two respects. First, there have been interpretive questions in practice that turn on the goals of competition policy in s. 1.1, and the case law has left the answers to the individual preferences of adjudicators; see *Superior Propane,* for example.[37] Second, a focus on efficiency would deter future developments in Canadian competition policy that would replace efficiency with other objectives in s. 1.1, such as encouraging competition from SME's even if inefficient. This would be undesirable for a host of reasons, including creating conflicts between objectives, and indeterminacy.

3. The Efficiencies Defence

Section 96 allows anticompetitive mergers as long as the efficiency gains from the merger outweigh the anticompetitive effects from the merger. *Superior Propane* makes it clear that "anticompetitive effects" could include, depending on the views of the Tribunal, both deadweight losses from consumers priced out of the market, and the effects of higher prices on consumers that continue to purchase.[38] There have been many debates about how best to apply the defence,[39] but the Bureau calls for the abolition of the efficiencies defence, and for the treatment of efficiency gains as simply another factor to consider in reviewing a merger.[40] It advances four reasons for its position: s. 96 allows mergers that are harmful to Canadians; it is inconsistent with international best practice; it suffers from a misguided

policy intent; and it is difficult or impossible to implement. I will review each argument in turn.

a) Section 96 Allows Mergers that are Harmful to Canadians

Before considering the Bureau's argument, it is helpful to revisit briefly the central policy justification of a focus on efficiency: gains in efficiency are good for Canadians. An efficient economy increases its citizens' economic well-being on average. It is not the only value that matters in a democracy, of course, and may be an unsuitable criterion in some contexts.[41] But making people on average better off economically is desirable in many contexts, including competition policy.

The Bureau treats economic efficiency dismissively in its critique of s. 96. The Bureau notes that s. 96 is only invoked after it has been established that a merger will substantially lessen competition. It continues:

> Regardless of the size or scope of the private benefits brought about by the merger, a wide swath of Canadian consumers and businesses are harmed *in every case* where the efficiencies exception applies. These consumers and businesses now bear the burden of higher prices, fewer choices, and less innovation, with no requirement that they will receive any actual benefit from the merger. (Emphasis in original.)[42]

Part of this critique is accurate, but the Bureau relies on a questionable assertion in making its point.

The accurate part is that an application of the efficiencies defence will predictably make at least some consumers and businesses worse off in that it would allow a merger that increases prices, reduces quality, or reduces innovation; the defence only arises if a merger has been shown to be likely to prevent or lessen competition substantially. Of course, if the parties are successful under s. 96, it will also be the case that there are gains to others, shareholders typically, that exceed the losses to consumers; the economic benefits of the merger exceed the costs.[43]

The questionable assertion made by the Bureau is that the losses apparently count as losses to "Canadian consumers and businesses" in the Bureau's analysis, while any gains from efficiency, whatever their size, are merely "private benefits." This is unpersuasive for a number of reasons.

As a matter of principle, efficiency analysis declines to judge who is a more worthy recipient of a dollar, a consumer or producer, but rather focuses on the creation of that dollar and its distribution to someone. This may

be controversial. As was well-rehearsed in *Superior Propane*, there may be legitimate concerns about economic distribution if a dollar is transferred to a relatively wealthy producer (shareholder) from a less wealthy consumer.[44] But the Bureau does not advance these concerns in its submission. Rather, it seemingly regards gains to shareholders from efficiencies as less important or even irrelevant as a matter of principle given that they are merely "private benefits."

The Bureau fails to offer any reason why we should view the gains as "private." Why characterize gains to shareholders as "private" in contrast to losses to consumers and businesses, which are apparently not "private" but losses to "Canadians"? A consumer who is priced out of the market following a merger and a price increase realizes a loss. A shareholder of a firm that merges, realizes efficiency gains, and sells at a higher price realizes a gain. What makes the latter private and the former not private?

Even more puzzling, why do losses to buyers that are "Canadian businesses" count as non-private losses, while gains to merging businesses count as private gains? It is peculiar to say that gains to shareholders of the suppliers are private and therefore matter less or not at all, while losses to shareholders of purchasing businesses are "harms to Canadian businesses" that do matter. The Bureau fails to explain its thinking and instead offers conclusory assertions.

Perhaps the reason for its conclusions about "private benefits" lies in the Bureau's reference to a "wide swath" of Canadians who are always harmed by a merger permitted by s. 96: since many consumers and business are harmed by higher post-merger prices, and only a few shareholders benefit, the argument might run, it is appropriate to refer to profits as "private benefits" in contrast to consumer and business losses, which have more of a "public" aspect because of numbers. This too is unpersuasive. Each consumer realizes a private benefit, that is, a benefit to themself alone, from consumption, each shareholder of a buying firm realizes a private benefit from buying an input, and each shareholder of the selling firm realizes a private benefit from a owning a share. This is true if there are a thousand consumers or one consumer, or a thousand shareholders or one shareholder.

Moreover, as an empirical matter, even if one were to emphasize numbers, the error of dismissing gains to producers as merely "private" is easily illustrated by prosaic examples. Suppose, as is highly plausible, that the Canada Pension Plan Investment Board is a shareholder in a firm that proposes a merger that will rely on s. 96 for its approval. Suppose further that the firm

manufactures big and tall men's clothing. Almost every Canadian benefits from the CPPIB's shareholdings (at least in expectation), while only a subset of Canadians buy the clothing. Are the gains to almost every Canadian from the efficiency benefits to be dismissed as merely private, while the losses to big and tall men public?

This response to the Bureau's characterization/dismissal of efficiency benefits as "private" is not to say that there are not good questions that could be (and have been) asked about the distributional properties of the efficiencies defence.[45] But the Bureau does not raise these questions, and instead makes the unsatisfactory assertion that benefits to some Canadians are categorically "private" and harms to other Canadians are not.[46] Moreover, this unsatisfactory assertion appears to be the basis for the Bureau's conclusion that s. 96 allows mergers that are harmful to Canadians: the losses fall upon "Canadians consumers and businesses", while the gains, even if they exceed the losses, are merely "private benefits" that presumably do not count for much in the assessment. Arbitrary characterizations of the nature of the gains or losses are not helpful, and the Bureau is unpersuasive in making this argument.

b) The Efficiencies Defence is an International Outlier

The Competition Bureau observes that other countries have not adopted an efficiencies defence similar to that in s. 96, and that we should abolish it as a consequence. It reviews other jurisdictions—the US, EU, UK and Australia—and notes that they require any efficiency savings to be passed on to consumers before considering approving a merger on the basis of efficiencies. The Bureau appears to make two points following on this observation. First, the fact that other jurisdictions have not followed our lead on s. 96 should cause us to change our position. Second, the differences in the approaches have led to disagreements between Canada and other jurisdictions over particular case outcomes, which is (implicitly) undesirable.

I address the second point first. The Bureau observes that, "This contrasting treatment of efficiencies in Canada and the U.S. has resulted in situations where the Bureau allowed a merger to proceed because of the efficiencies exception, while the counterpart U.S. competition authority successfully challenged the merger."[47] It is not clear why the Bureau makes this observation, whether it is just to illustrate that the efficiencies defence may matter in individual cases from time to time, which is unsurprising, or whether there is something possibly problematic about departing from our trading partners over a decision in a merger.

Disagreements over principle or facts with trading partners are commonplace in competition policy and are not a reason for either party to abandon what it believes to be the best approach for it.[48] Moreover, given that the efficiencies defence leaves Canada's law more permissive on this dimension, Canadian law will not impact its partners: any decision by other jurisdictions to stop the merger is entirely unaffected by Canada's decision to permit it. Canada may have cause to complain that its decision to permit a merger will be undermined by its partners' decisions to stop it, but not the other way around. It would not be a good argument to call for the abolition of the efficiencies defence because its invocation by Canada may occasionally be undermined by decisions of trading partners.

On the first point about the failure of other countries to adopt the efficiencies defence, as observed above in a related context, if there are lessons from other countries about the perils of the Canadian efficiencies defence, we ought to take them seriously. It is not obvious what those specific lessons are. Observations that Canada is an outlier ought to encourage reflection, but ought not to determine outcomes. Indeed, when the efficiencies defence was adopted in s. 96, it was well-known that neither the US nor the EU had adopted such an approach. Canada self-consciously made several choices tailored to our own circumstances in crafting the *Competition Act* then, and it is not obvious why Canada should stop doing so now.

c) The Efficiencies Defence's Original Policy Intent is Misguided

Before turning to the one argument that the Bureau makes against the efficiencies defence that has some purchase, consider the Bureau's argument that the original policy intent for the efficiencies defence was misguided. Quoting a recent case, *Tervita*, the original intention, according to the Bureau, was that Canada, a medium-sized economy, required the efficiencies defence better to ensure that Canadian firms would be able to achieve scale and therefore compete in international markets.[49] Yet, the Bureau observes, the defence applies in all markets, including solely domestic markets, not just those that cross borders. The Bureau notes that the two cases that were litigated to completion over the efficiencies defence involved domestic markets.[50]

One may dispute the Bureau's conclusion that the original intent in fact was only or primarily to promote the capacity of firms to compete in international markets. But a searching examination of the record for the actual policy intent at the time of the passage of the *Competition Act* would not

add much to a contemporary policy discussion. The Bureau is not calling for a specific legal interpretation of s. 96 as written in the statute, something that might (or might not) be informed by legislative intent, but is calling for the abolition of the efficiencies defence for policy reasons. Rather than examining the original intent of the drafters, or the Supreme Court's understanding of that intent in *Tervita*, it is better in making a policy decision to evaluate the policy arguments on their own terms.

The argument that the efficiencies defence is desirable in promoting exports by enhancing the efficiency of domestic firms participating in international markets is not an especially compelling argument. The challenges that firms in small- and medium-sized countries face in achieving scale are often *more* acute in local markets, not international markets. If a market is international in scope, there is *less* reason for domestic firms to be unable to achieve efficient scale: while domestic sales may not allow a Canadian firm to reach minimum efficient scale, the possibility of selling internationally presents an opportunity to achieve scale. In contrast, if a firm is confined to Canada, or more local markets, it may be difficult to achieve scale in a highly competitive market. This is why Trebilcock and others have described freer trade as vitally important to promoting competition.[51] The argument that the efficiencies defence is misguided because it applies in domestic markets, not just international markets, has it backwards: the defence may be especially important in local markets relative to international markets.[52]

d) The Efficiencies Defence is Difficult to Implement Properly

The most persuasive argument that the Bureau makes against the efficiencies defence is that it is difficult to implement properly. The Bureau makes less and more compelling arguments on this subject. I will begin with discussion of the less persuasive, and close with the better arguments.

The fundamental problem with the Bureau's invocation of the enforcement challenges is its failure to tease out the effects of *Tervita* from the defence *per se*. As I and other commentators have pointed out, the requirement in *Tervita* that the Bureau quantify any anticompetitive effects of a merger if the merging parties claim the efficiencies defence was misguided, as illustrated by the result of that case itself: the merger in question was proven likely to lead to significant price increases; the parties failed to prove any meaningful offsetting efficiencies; yet the Supreme Court allowed the merger given the failure of the Bureau to prove the negative effects of the merger quantitatively.[53] There are a number of reasons why this is

misguided, but perhaps near the top of the list is the enforcement challenge that this presents to the Bureau. Why should the Bureau be compelled to quantify the harms of a merger when the parties are unable to demonstrate efficiencies from the merger? It would be fair to say that if the Bureau does not quantify the negative impact of the merger, it may assume some risk that the merging parties will get the benefit of the doubt in any weighing of proven, quantified efficiencies against qualitative negative effects. But that is a strategic choice that the Bureau ought to be able to make without losing the case every time.

The problems with *Tervita* have attracted much commentary, including from the Competition Policy Council at the C.D. Howe Institute that the Bureau quotes,[54] but quotes in an unfortunately misleading way.[55] In support of its contention that the efficiencies defence is too difficult to implement properly, the Bureau quotes the Council as having stated the following:

> [T]he efficiencies [exception] for mergers has become difficult for the Bureau and merging parties to deal with as a result of the formalistic requirements.[56]

The full quotation, however, makes it clear that the object of discussion was not the efficiencies defence in the abstract, but the *Tervita* decision specifically. The Council stated:

> Most Council members believe that the efficiencies defence for mergers has become difficult for the Bureau and merging parties to deal with as a result of the formalistic requirements imposed in the *Tervita* decision. However, there was no consensus on whether the government should seek to address the issues through amendments or leave matters for further development through jurisprudence. [Underlining added.][57]

It is clear from the underlined words that the target of the Council's comments was the *Tervita* decision, not the efficiencies defence itself. It would not be difficult to amend the *Act* to undo the unfortunate effect of the *Tervita* decision on enforcement, while retaining the efficiencies defence.[58] It is disappointing that the Bureau did not provide the full context, especially when it quotes the Council's communiqué for support of the Bureau's assertion that, "Despite significant improvements in economic methods, commentators continue to note the difficulties of efficiencies analysis today..."[59] This is not an appropriate citation: the communiqué was not saying that the efficiencies defence is intrinsically difficult or impossible to implement despite improvements in statistical methods, but rather that *Tervita* increased the difficulty unnecessarily. The Council's focus was whether amendments or

further jurisprudence would be better to clarify or abolish the quantification requirement in *Tervita*, not the abolition of the defence.

That said, the Bureau's basic point that applying the efficiencies defence is challenging in practice, and especially so under *Tervita*, is well-taken. It ought not to be the case that the mere invocation of the efficiencies defence by the merging parties, even where no efficiencies are ultimately proven, puts a burden on the Bureau to quantify all "quantifiable"[60] anticompetitive effects from a merger. I have recommended a statutory amendment that would clarify that while the Bureau has the initial burden of proving a substantial lessening of competition, once they have done that, the parties have the burden of showing that efficiencies are greater than and offset the anticompetitive effects.[61] The trade-off may rely on competing quantitative analyses, qualitative analyses and the exercise of judgement, or a combination of the two. The efficiencies defence ought not to allow the outcome in *Tervita*, in which a merger was approved under the efficiencies defence without any analysis of competitive harms because of a failure to quantify them.

An alternative approach to the enforcement difficulties at present is to abolish the defence as the Bureau suggests.[62] In my view, enforcement difficulties ought not to decide the matter. First, enforcement challenges caused by *Tervita* can be and ought to be addressed by a statutory amendment. Second, mergers analysis is very challenging in virtually all cases and on many dimensions, yet this is not a basis to abolish mergers review altogether. The existence of future efficiency gains rests on identifiable organizational strategies that are in many cases more straightforward to evaluate than what lies behind an evaluation of competitive effects. Determining whether there has been a substantial lessening of competition requires the Bureau to predict the future impact of a merger by evaluating demand for the merging parties' products, demand for the strength of competitive products, the competitive response of rivals to the merging parties, the existence and significance of barriers to entry, the impact of possible innovation, and more besides. This is not a straightforward enforcement environment. Yet as far as I know, while there have been calls to simplify enforcement[63], there have not been calls to abandon mergers policy because it is complicated.

In conclusion, there are significant empirical questions that underlie the decision whether to retain or abolish the efficiencies defence; what are its costs, including enforcement costs, and what are its benefits? There are no definitive answers to these questions. Contingent on efficiency being a central goal of the *Competition Act*, there is clear theoretical support for the

efficiencies defence, and on balance I would advocate for its retention. But I recognize that the goals of antitrust are contestable, and the evidence of the net benefits of the efficiencies defence is hardly definitive either way. The shortcomings of the Bureau's submissions rest on its reasoning rather than its conclusions.

e) The Bureau's Proposal: Efficiencies as a Factor

Having evaluated the Bureau's questionable arguments for diminishing the efficiencies defence, I turn now to the Bureau's proposal. The Bureau concludes that the *Act* should repeal s. 96 and instead relegate efficiencies to be simply a factor to consider when assessing a merger. In a footnote, the Bureau suggests that efficiencies could be treated as a factor to consider just as other factors in assessing mergers are outlined in s. 93.[64] As I will explain, it is difficult to know exactly how such an amendment would operate, how the Bureau would plan to implement it, and how it eliminates the problems that the Bureau sees with s. 96 at present. To foreshadow the final point, the Bureau objects to the efficiencies defence because it is an "exception" to the usual overarching objective of promoting competition. Yet treating efficiencies as a "factor," if this is to be meaningful, would continue to create an "exception" to the standard emphasis on competition. If competition exceptionalism is the mischief, considering efficiencies as a factor will not cure the mischief, as I will explain.

In speculating what it might mean for efficiencies to be a "factor" in mergers analysis analogous to other factors in s. 93, it is helpful to begin with an examination of existing s. 93 factors: the extent of foreign competition; whether a firm is failing; the existence of substitutes for the merged firm's products; barriers to entry; the extent of effective competition remaining; the likelihood that the merger would remove a vigorous and effective competitor; and the nature and extent of innovation in the market. The common thread through these factors is that they all relate to the question of whether the merger is likely to threaten competition. The existence of foreign competition, substitutes, effective competitors, and potential competitors (either because of low barriers to entry or innovation) all would point in the direction of a conclusion that the merger is not likely to have competitive effects. The failing firm factor takes a slightly different path to the same destination: even if there is little competition post-merger, the imminent failure of one of the merging firms suggests that the counterfactual to the merger would also see a reduction in competition, so the merger itself does not lessen competition substantially.

It is clear that the cost savings presently relevant to s. 96 differ in kind from the kinds of factors considered in evaluating the competitive effects of a merger, such as those found in s. 93. Whether a merger results in productive efficiencies does not shed light on the question of whether the merger is likely to lessen competition substantially. Indeed, the efficiencies defence in s. 96 only makes sense because it is possible that merging parties may anticipate *both* efficiencies and market power in proposing to merge. It is far from clear what the point would be in treating efficiencies as a factor analogous to those found in s. 93: in contrast to the usual factors considered in mergers analysis, consideration of future cost savings would shed little light on whether the merger is likely to lessen competition substantially.

If efficiencies are not a factor that sheds light on the competitive effects of the merger, giving them legal significance implies that there is some kind of trade-off with competitive analysis that is relevant to a conclusion on the merger. But this is inconsistent with the Bureau's conclusion that there ought not to be exceptions to promoting competition.

The Bureau suggests that inclusion of cost efficiencies as a factor to consider in s. 93 would align Canada's approach with that of international best practices. Setting aside the question of whether harmonization ought to be taken as desirable in and of itself, something considered above, the Bureau's suggestion is potentially helpful in assessing what it has in mind by suggesting that efficiencies be treated as another factor in assessing a merger. The EU and US both in theory[65] consider efficiencies as potentially justifying a merger if and only if the cost savings are sufficiently large that consumers would benefit from the merger, for example, prices fall, even if the merger lessens competition. There are a number of observations that follow from the Bureau's apparent endorsement of this approach.

First, the EU and US each treat efficiencies as a defence to an anticompetitive merger, or, as the Bureau puts it, as an "exception" to the general rejection of anticompetitive mergers. If the issue is that the existing defence in s. 96 is an inappropriate "exception" because *all* mergers that lessen competition should be disallowed, then the EU/US approach ought not to be adopted either. A merger that lessens competition but lowers prices because costs fall still lessens competition.[66]

Put differently, there is a similarity between the EU and US approach, and the *status quo* in Canada. *Superior Propane* invited the Tribunal to decide how much weight to assign to the resulting transfer in wealth from consumers to shareholders in the event of a likely price increase post-merger.

The US/EU approach takes discretion away, but applies similar logic: it *a priori* assigns infinitely negative weight to any transfer between consumers and producers. That is, if the total transfer of wealth from consumers to producers is $1 million, then even if the cost savings were orders of magnitude larger, say $1 billion, the merger cannot go ahead. On the other hand, as long as prices fall post-merger, then no matter how anticompetitive the merger, the merger can go ahead. If the Bureau is in principle adamant that promoting competition is an immutable objective, and is opposed to trade-offs between competition and other considerations, the EU/US approach ought to be rejected.

Moreover, there is an important practical implication that follows from the observation that the US/EU approach is in some ways structurally similar to s. 96 at present: *Tervita* may remain problematic. Under *Tervita*, once the parties claim the efficiencies defence, the Bureau must quantify the quantifiable anticompetitive effects of the merger. Suppose Canada opts to follow the US approach to efficiencies. Parties to a merger claim that there will be sufficiently large efficiencies that prices will fall post-merger. Following *Tervita*, making such a claim would presumably require the Bureau to quantify the expected price increases post-merger, which requires verifiable information about demand and costs.[67] Only after such quantification has taken place would the parties be compelled to show that efficiencies will result in lower prices. The Bureau's proposal does not avoid the need to address *Tervita*; treating efficiencies as requiring prices to fall post-merger risks all the enforcement challenges to which the Bureau rightly objects under *Tervita*.

There is a different line of argument that also casts doubt on the treatment of efficiencies as a factor that requires prices to fall post-merger. Efficiencies as a factor that justifies a merger in the EU and US is a theoretical possibility, but not a practical one. Perhaps because of the difficulty for parties to prove that prices will fall despite a reduction in competition, both jurisdictions do not in practice approve anticompetitive mergers on the basis of an efficiencies defence that requires lower post-merger prices. This is a defensible choice. But to call for Canada both to follow the international approach *and* to consider *meaningfully* efficiencies as a factor is potentially misleading. Canada can either consider efficiencies meaningfully, which it does in s. 96, or it can follow the international approach. It cannot do both. The Bureau's call for efficiencies to be treated similarly to international partners such as the US and EU is essentially a call for the abolition of efficiencies as a significant consideration in mergers policy. While this position is not

unreasonable, the Bureau has failed to provide persuasive arguments in support of such a position.

3. Conclusion

I have considered two of the recommendations that the Bureau makes in response to calls to reform Canadian competition law: maintain the purpose clause, s. 1.1, as is; and rather than relying on an efficiencies defence in s. 96, treat efficiencies as merely a factor to consider in assessing a merger. I oppose both recommendations, but focus in this article on the reasoning of the Bureau rather than the actual conclusions. There are reasonable arguments in favour of including fairness considerations in the purpose clause, and there are reasonable arguments for abolishing the efficiencies defence. The Bureau's arguments, however, are unpersuasive on each matter.

On the question of the goals of the *Competition Act*, the most significant shortcomings of the Bureau's reasoning are the following. First, the Bureau incorrectly describes efficiency as potentially indifferent to harms to consumers. Consumer harm lies at the heart of efficiency analysis. Second, the Bureau inconsistently concludes that in practice the existing goals in s. 1.1 rarely conflict, and that promoting efficiency would risk indifference to consumer harm. If the goals do not conflict in practice, then pursuing efficiency also promotes consumer well-being. Third, the Bureau's reasonable assertion that there are relatively small numbers of cases where conflicts between goals played a critical role in a decision is contingent on the historical emphasis on efficiency that enforcers and adjudicators have taken. If priorities were to shift, perhaps away from promoting efficiency toward protecting SME's, there are conflicts between goals everywhere. Protecting competitors rather than competition would take Canadian competition law in the wrong direction. Fourth, the Bureau unpersuasively praises s. 1.1, as opposed to an efficiency goal, because of s. 1.1's flexibility. A focus on efficiency has a clear normative goal while remaining flexible: it requires flexible, context-specific analyses and appropriately accounts for a range of considerations in assessing conduct, including price, quality, innovation etc. On the other hand, the *normative* flexibility that s. 1.1 establishes inappropriately creates indeterminacy in the law: how much weight to assign the various normative goals in s. 1.1 will affect case outcomes, and this critical question is up to individuals on the Tribunal to decide.

The Bureau makes a number of problematic arguments about the efficiencies defence as well. First, the Bureau makes conclusory assertions that gains to some parties, such as the merging business, are "private" and presumably

worthy of lesser consideration, while losses to other parties, such as businesses that pay higher prices post-merger, are losses to Canadians that presumably do matter. While economic distribution questions are clearly relevant to an analysis of s. 96, the Bureau's labels are not helpful. Second, the Bureau observes that Canada has a more robust efficiencies defence than our trading partners. This is taken to indicate an error in Canada. Competition law values and goals vary around the world, however, and being an outlier ought to encourage reflection but is not in itself an argument against any given approach. Moreover, our greater permissiveness toward a merger because of s. 96 does not prevent our partners from taking a stricter approach. Third, the fact that *Tervita* described the purpose of the efficiencies defence as allowing Canadian companies to achieve scale to compete internationally, while the only two litigated cases involved purely domestic markets, is not, contrary to the Bureau's analysis, problematic. Canadian firms are more likely to be able to achieve efficient scale in international markets given the prospect of selling to non-Canadians, and the defence is therefore more likely to be more important in domestic markets. Fourth, the Bureau is persuasive that *Tervita*, by requiring quantification of quantifiable effects whenever the efficiencies defence is invoked, imposes unfortunate and inappropriate burdens on the Bureau, but this is a fault of *Tervita*, not the efficiencies defence *per se*. Fifth, the Bureau's recommendation that efficiencies be treated as merely one factor among others to consider in mergers analysis is not helpful. Efficiencies are not like other factors that are relied upon to assess a merger in that it does not shed light on the competitive effects of the merger. It is therefore unclear what precisely the Bureau has in mind, but any inclusion of consideration of efficiency gains in an assessment of a merger is very likely to result in a kind of efficiency-competition trade-off, which is essentially the structure in place under the *status quo*.

In conclusion, while there are reasonable arguments in favour of abolishing the efficiencies defence and maintaining a wide purpose clause, the Bureau has failed to make its case.

ENDNOTES

[*] This article was completed before the publication of, and therefore does not refer to, Innovation, Science and Economic Development Canada's consultation document, "The Future of Competition Policy in Canada."

[1] Thanks to Andy Baziliauskas, Gordon Kaiser, Anthony Niblett, Tom Ross, Michael Trebilcock and Ralph Winter for comments on an earlier draft.

[2] Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021), online (pdf): *Senate of Canada* <sencanada.ca/

media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf> [perma.cc/C7R9-ESWC] [Iacobucci, "Examining the *Competition Act*"].

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

[4] For a similar view on revising the provision, see: Memorandum from Calvin Goldman et al to the Honourable Francois-Philippe Champagne (4 May 2022), "Proposed Revision of the Efficiency Defence for Mergers in Canada's *Competition Act*", online (pdf): *C.D. Howe Institute* <www.cdhowe.org/sites/default/files/2022-05/IM_Gol-ayl-Car-Sch_2022_0504.pdf> [perma.cc/652Y-RWRH].

[5] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era" (8 February 2022), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html> [perma.cc/7JWR-KFJN].

[6] See, e.g., C.D. Howe Institute Competition Policy Council, "Watching the Watchmen: The Need for Greater Oversight of the Competition Bureau" (5 November 2015), online (pdf): *C.D. Howe Institute* <www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_Nov_5_2015_CPC.pdf> [perma.cc/3Z39-ZSL7].

[7] Iacobucci, "Examining the *Competition Act*", *supra* note 2 (and many other writings) canvass arguments that would support the Bureau's positions, but the Bureau did not mention them, much less emphasize them in its submission.

[8] *Supra* note 2.

[9] There is room for debate whether at least one of the purported benefits ought to be considered a benefit: it is not clear why the "equitable" participation of SME's in Canadian markets, whatever that may exactly mean, is necessarily a benefit independent of efficiency. It is not obvious, for example, why it would be normatively preferable if a market were served by two SME's instead of a single larger enterprise if all other features of the market, such as quality, prices etc., were identical.

[10] I discuss this alignment further below in reviewing the Bureau's arguments.

[11] See, e.g., GF Mathewson & RA Winter, "An Economic Theory of Vertical Restraints" (1984) 15:1 RAND J Economics 27.

[12] *Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15, rev'd in part 2001 FCA 104; *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 Comp Trib 16, aff'd 2003 FCA 53.

[13] Ross and Winter review the application of the Federal Court of Appeal's decision *Superior Propane* at the Tribunal, and conclude that the deviation from the total surplus standard was relatively small (Thomas W Ross & Ralph A Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments", (2005) 72 Antitrust LJ 471). This conclusion is contingent on the approach of the Tribunal, which could, according to the Federal Court of Appeal in *Superior Propane*, vary case to case.

[14] Iacobucci, "Examining the *Competition Act*", *supra* note 2.

[15] I made this observation about the statutory neglect of worker welfare in s. 1.1 in, Edward Iacobucci, "The *Superior Propane* Saga: The Efficiencies Defence in Canada" in Barry Rodger, ed, *Landmark Cases in Competition Law: Around the*

World in Fourteen Stories (The Netherlands: Kluwer Law International, 2012) 63 [Iaccobucci, "The *Superior Propane* Saga"].

[16] Iacobucci, "Examining the *Competition Act*", *supra* note 2 at 54-55.

[17] Ross & Winter, *supra* note 13.

[18] Paul Johnson, "Let's Keep Competition the Focus of Canada's Competition Act" (3 August 2021), online: *C.D. Howe Institute* <www.cdhowe.org/intelligence-memos/paul-johnson-%E2%80%93-lets-keep-competition-focus-canadas-competition-act> [perma.cc/3PA4-NNG2].

[19] Iacobucci, "Examining the *Competition Act*", *supra* note 2.

[20] Competition Bureau Canada, *supra* note 5.

[21] *Ibid* at s 1.

[22] *Ibid* at s 1.1. The Bureau states that conflicts only arise when there are exceptions to promoting competition, as in s. 96. I discuss this below.

[23] The converse is not necessarily true; that is, promoting the welfare of inefficient SME's will not promote efficiency. But the Bureau's statement about the absence of conflict in practice holds because, in practice, the Bureau has historically focused on efficiency in applying competition law.

[24] *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1996), 64 CPR (3d) 216 (Comp Trib), 24 BLR (2d) 20 [*Nielsen*].

[25] The Tribunal accepted the argument of an economic expert, Ralph Winter, about the inefficiency of the exclusive contracts. For an outline of the argument and further elaboration, see: Ran Jing & Ralph A Winter, "Exclusionary Contracts" (2014) 30:4 JL, Econ & Org 833.

[26] *Supra* note 5 at n 8.

[27] See, e.g., Edward Iacobucci, "The *Superior Propane* Saga", *supra* note 15.

[28] *Supra* note 5 at s 1,1.

[29] *Ibid*.

[30] *Ibid*.

[31] *Competition Act*, RSC 1985, c C-34, s 45(5).

[32] *Ibid,* s 4.

[33] *Supra* note 5 at s 1.1.

[34] It is a different argument whether competition policy accomplishes the conventional goal of promoting efficiency by protecting and fostering competition. There is an argument that even on an efficiency analysis, competition policy must evolve to address the challenges associated with innovation, technology, increasing concentration, and perhaps other factors that have changed markets over time. That important discussion is outside the scope of this article; I discuss more in Iacobucci, "Examining the *Competition Act*", *supra* note 2.

[35] Eleanor Fox & Michael Trebilcock, eds, *The Design of Competition Law Institutions: Global Norms, Local Choices* (New York: Oxford University Press, 2013).

[36] See Iacobucci, "The *Superior Propane* Saga", *supra* note 15.

[37] *Supra* note 12.

[38] *Supra* note 12.

[39] There is an extensive literature on the efficiencies defence. Recent discussions

are found in Thomas Ross, "Proposals for Amending the *Competition Act*" (2022) 35:1 Can Competition L Rev 1; 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; 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.

[40] *Supra* note 5.

[41] For a discussion of other the role of other various values in influencing contract law, and the relationship between other values and efficiency, see Michael J Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass: Harvard University Press, 1997).

[42] Competition Bureau Canada, *supra* note 5 at s 2.1.

[43] An argument that is often leveled against the efficiency defence is that studies of consummated mergers reveal that proposed efficiencies often do not materialize: see, e.g., evidence reviewed in, Nancy L Rose & Jonathan Sallett, "The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right" (2020) 168:7 U Pa L Rev 1941, cited in Ross, *supra* note 39. The problem with relying on these studies for considering the Canadian efficiencies defence is that they typically involve American companies, not Canadian ones, and in any event they examine the full population of mergers, rather than those at play in the efficiencies defence: for the efficiencies defence to be successful, the parties must prove on a balance of probabilities in a legal proceeding (or in the shadow of a legal proceeding) that they will realize the efficiency gains. This is almost never required for run-of-the-mill mergers.

[44] There are at least two responses, as noted. First, other, much more suitable policy instruments are available to redistribute wealth, such as taxation and expenditures. Second, a focus on redistribution in contexts where consumers are wealthier than producers calls for the encouragement of anticompetitive mergers, which is a peculiar result.

[45] See Ross & Winter, *supra* note 13 for an excellent discussion of distribution and the efficiencies defence.

[46] There are arguments about the role of international competition and the efficiencies defence. As with many other competition policy considerations, the fact that shareholders and consumers may be unevenly distributed across jurisdictions will affect the welfare analysis of the efficiencies defence. See, e.g., Thomas Ross, "Proposed Amendments to the *Competition Act*" (2022) 35:1 Can Competition L Rev 1.

[47] *Supra* note 5 at s 2.1.

[48] See, e.g., Edward M Iacobucci & Michael J Trebilcock, "National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy" in Richard A Epstein & Michael S Greve, eds, *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington, DC: AEI Press, 2004).

[49] *Supra* note 3.

[50] *Superior Propane*, *supra* note 12 and *Tervita, supra* note 3.

[51] See discussion of the relationship between freer trade and competition in Michael J Trebilcock, "Competition Policy and Trade Policy: Mediating the Interface" (1996) 30:4 J World Trade 71.

[52] To be sure, there may have been some sense when the *Competition Act* was adopted in 1986 that trade liberalization was coming (and indeed did with the Free Trade Agreement in 1988), which may have given rise to a kind of infant industry argument that the efficiency defence would assist Canadian firms seeking to prepare for greater import competition. Whatever the coherence of that argument, it fails to have much purchase in the current era of liberal trade.

[53] See, e.g., Edward M Iacobucci, "The Lessons of *Tervita*" (2015) 57:2 Can Bus LJ 217; Ralph A Winter, "*Tervita* and the Efficiency Defence in Canadian Merger Law" (2015) 28:2 Can Competition L Rev 133; Ross, *supra* note 39.

[54] C.D. Howe Institute Competition Policy Council, "Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government" (9 September 2021), online (pdf): *C.D. Howe Institute* <www.cdhowe.org/sites/default/files/attachments/communiques/mixed/Communique_2021_0909_CPC.pdf> [perma.cc/XZE8-VQAU].

[55] I am a member of the Council.

[56] Competition Bureau Canada, *supra* note 5 at s 2.1.

[57] C.D. Howe Competition Policy Council, *supra* note 54 at 8-9.

[58] See, e.g., Iacobucci, "Examining the *Competition Act*", *supra* note 2; Goldman et al, *supra* note 4.

[59] Competition Bureau Canada, *supra* note 5 at s 2.1.

[60] Whatever that means: in principle all economic effects are quantifiable. See, e.g., Iacobucci, *supra* note 2.

[61] Iacobucci, "Examining the *Competition Act*", *supra* note 2. See also Goldman et al, *supra* note 4.

[62] While ultimately concluding on balance that the defence should be retained, Iacobucci, "Examining the *Competition Act*", *supra* note 2 concludes that its retention is not an obvious decision, stating at page 32:

> [T]here is a question whether the efficiencies defence ought to be retained at all, even from an economic perspective, perhaps especially in the digital era. There is some evidence in the US that market power is increasing, which is consistent with what one would predict given the rise in digital markets and their vulnerability to uncompetitive conditions. Given the rise in market power generally, and the difficulties of identifying efficiency gains that will truly materialize *ex post,* especially in dynamic and innovative markets, it would not be unreasonable to recommend the abolition of the efficiencies defence altogether on the basis of economics, let alone political considerations.

[63] The Bureau calls for more emphasis on market shares in challenging mergers, for example. See, e.g., *supra* note 5.

[64] Competition Bureau Canada, *supra* note 5 at n 39.

[65] As I note below, while theoretically cost savings that lower prices may justify an anticompetitive merger, this is not a successful defence in practice.

[66] Even so-called merger to monopoly might result in lower post-merger prices if the cost savings from the merger are sufficiently great than the profit-maximizing monopoly price is lower than pre-merger, more competitive prices.

[67] This may be especially true if efficiencies are now considered as a factor in s 93, given that the Bureau is presumably responsible for proving anticompetitive effects based on the factors outlined in s 93.