WHEN SHOULD WE LOOK OUT FOR THE LITTLE GUY?

AN EXAMINATION OF THE INCONSISTENCIES IN ANTITRUST ENFORCEMENT OF MONOPSONY POWER IN CANADA AND THE UNITED STATES

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Enforcement of competition/antitrust laws regarding the exercise of market power in respect of upstream markets (monopsony/oligopsony power) has been inconsistent in both Canada and the United States. This paper provides an overview of the competition/antitrust laws in Canada and the United States and how they have addressed (or not addressed) monopsony power both in legislation and in case law, and seeks to identify the interests that are protected by various enforcement rationales. An apparent pattern is that large suppliers seem not to be afforded the same degree of protection against monopsony as small suppliers—a pattern that is at odds with monopoly enforcement in Canada and the United States. However, this pattern is not consistently articulated or applied. The authors call for clarification by law-makers and enforcers as to what interests they are seeking to protect from the exercise of monopsony power, and when they will intervene to do so.

Les lois antitrust et lois sur la concurrence relativement à l'exercice du pouvoir de marché pour les marchés en amont (monopsone ou oligopsone) ne sont pas appliquées uniformément au Canada et aux États-Unis. Les auteurs de cet article font l'exposé de la situation des lois antitrust et lois sur la concurrence dans ces deux pays, et des façons dont cette législation agit (ou non) sur le pouvoir de monopsone, dans la loi comme la jurisprudence. Ils tâchent de voir quels intérêts sont protégés par différents arguments d'application de la loi. Selon une tendance qui se dessine, les gros fournisseurs ne semblent pas jouir du même degré de protection contre le pouvoir de monopsone que les petits fournisseurs – un phénomène contraire à l'application de la loi contre les monopoles au Canada et aux États-Unis. Toutefois, ce degré de protection n'est pas interprété ou accordé de façon uniforme. Les auteurs demandent aux législateurs et aux autorités d'application de la loi de définir plus clairement les intérêts qu'ils souhaitent protéger de l'exercice du pouvoir de monopsone, et les cas où ils interviendront pour ce faire.

Introduction

Competition agencies have historically focused their inquiries on the exercise of market power in respect of downstream markets (monopoly/oligopoly power) but have taken a piecemeal approach

to constraining the exercise of market power in respect of upstream markets (monopsony/oligopsony power). In a contest between downstream customers and upstream suppliers with market power, the law is clear that downstream customers should experience no ill effects as a result of anti-competitive behaviour. Agencies and courts have been inconsistent, however, with their protection of upstream suppliers from customers with market power; sometimes consumers still win—even at the expense of suppliers—sometimes not. In this paper, we identify the somewhat idiosyncratic approach to buyer power exhibited by competition laws, courts and enforcement agencies in the United States and Canada. We seek to identify the interests being protected in prior cases involving buyer power, as well as the value judgements and trade offs they implicitly entail. We argue that explicitly identifying such value judgements will increase the transparency and predictability of antitrust/competition law enforcement. Further, this framework could be expanded in the modern political context to recognize economic externalities beyond the impact on those who are parties to the transaction. In clearly identifying and articulating these trade-offs and value judgements, lawmakers and competition law enforcement agencies will be better equipped to create robust policies and procedures to better regulate buyer power and improve the consistency and transparency of law in this area.

Part I—Historical Treatment of Buyer Power in American and Canadian Antitrust Law

Monopsony power has been defined by economists as the mirror image of monopoly or oligopoly power in that it enables the transfer of wealth in the form of economic rents from one side of the market to the other.[1] Economists have based their objection to the exercise of monopsony power on grounds similar to those underlying the rejection of monopoly power. Both contribute to social welfare losses[2] and a reduction of allocative or economic efficiencies.[3] Although theoretical underpinnings of antitrust law have focused on maintaining competitive markets as a means of inhibiting potential downstream consumer harm in the context of monopolies, case law in the United States illustrates that monopsony power has in some cases been condemned,[4] however, in other cases has been tolerated if there was no resulting harm to consumers.[5] The analytical approach that warrants such a distinction is not clear. Similar analytical difficulties have also presented themselves in Canadian competition law jurisprudence and enforcement decisions.[6]

The approach to traditional antitrust and competition law analysis conducted by enforcement agencies and courts is worth dissecting to understand the historically inconsistent approaches to antitrust enforcement in the United States and Canada.

Inconsistent Evaluations of Downstream and Upstream Market Power

The exercise of downstream market power to the detriment of customers has been historically viewed as unambiguously bad due to the deleterious effects such power exerts through the ability to artificially constrain price and non-price effects, regardless of the size of the customer or the benefits to small- and medium-sized suppliers. Alternatively, the exercise of upstream market power by firms has received more ambiguous treatment by antitrust enforcement agencies. When observing labour markets, for example, the anti-competitive exercise of buyer power is viewed as bad. No-poach and wage fixing agreements are viewed as *per se* illegal in the United States[7] and are soon to be criminalized once again in Canada.[8]

When compared to the obvious harm experienced by customers in the context of a firm exercising monopoly power, such as wealth moving from the customer to the seller, the harms resulting from an exercise of buyer power are more elusive. For example, the transfer of wealth from one supplier to another reduces a firm's costs, and if that firm sells into a competitive market, the cost savings might be expected to be passed on to the customers of the firm exercising buyer power—thus ultimately benefiting its customers. However, this may not always be the case. If a monopsonist also has monopoly power over downstream sales and can profitably reduce the prices paid for an input while also producing less output, then suppliers of the input are injured and there is a welfare loss in the input market.[9] Further, since output decreases, consumer welfare falls as prices rise in the output market. This impact may be small if the downstream market is more competitive, but the impact exists.

Looking beyond this long-term traditional economic approach, the exercise of monopsony power and consequent lower prices for the monopsonist's customers could also result in positive externalities such as increased product availability, faster adoption of new products, and benefits in areas such as health and the environment.[10] If one were to judge the merits of the exercise of buyer power on its impact on ultimate consumers, let alone on the basis of all externalities arising from the lower prices, one might not condemn the exercise of buyer power as harmful, even though a traditional

economic analysis looking at the distortions in upstream markets alone might have done so.[11]

Historically, however, there is no such explicit weighing of pros and cons in the event prices are lowered as a result of the exercise of buyer power in antitrust and competition laws and enforcement. There have been various investigations and enforcement actions initiated in response to buy-side activity in Canada and the United States. Enforcement decisions regarding allegations of anti-competitive buyer power in Canada and the United States have resulted in a pendulum of dispositions that have swayed to either protect the downstream customer or upstream supplier in the absence of a clear analytical approach. A review of seminal enforcement decisions below will illustrate this disjointed approach to enforcement agency analyses in order to better identify the interests being protected in such cases, and the value judgements and trade offs they entail.

Competition Framework

The evolution of American antitrust law has created fundamental approaches to the legal analysis of anti-competitive behaviour in both the United States and Canada, which have distinguished between practices that are illegal *per se* and practices that are subject to a "rule of reason" analysis.[12] Practices that are illegal *per se* are deemed to be inherently contrary to antitrust legislation, whereas the "rule of reason" entails more of an analysis in hopes of identifying practices that are subject to an unreasonable restraint rather than an axiomatic condemnation under the *per se* rule regardless of the competitive effects.[13]

Legislation and Guidelines

Canada

The primary legislation responsible for maintaining and encouraging competition in Canada is the *Competition Act,* which includes both civil and criminal provisions that are aimed at preventing anti-competitive practices by firms in the marketplace.[14]

Competitor Collaboration

Since 2009, Canada has had a two-track system for the assessment of competitor collaborations under the *Competition Act*: (i) "hard core" cartels involving agreements between competitors to fix prices, allocate markets or restrict output are criminal under the conspiracy provision in Section 45 of the *Competition Act*; while (ii) other forms of competitor collaborations

may be subject to review under the civil provision in Section 90.1 of the *Competition Act*. Section 90.1 permits the Tribunal to issue remedies in respect of existing or proposed agreements between competitors or potential competitors that are likely to substantially lessen or prevent competition in any relevant market.[15]

The 2009 amendments to Section 45 of the *Competition Act,* which came into effect in 2010, reformulated the conspiracy provision to remove the requirement that the Crown establish an "undue" prevention or lessening of competition and—importantly—removed buy-side agreements from the scope of Section 45.[16] It effectively narrowed the categories of *per se* criminal agreements to those between firms in respect of their downstream competition as sellers. Specifically, Section 45 applies a *per se* illegal prohibition against a party who, along with a competitor, agrees to allocate sales, territories, customers or markets for the production or supply of the product, or fixes prices, maintains, controls, prevents, lessens, or eliminates the production or supply of the product.[17] In response, the Competition Bureau ("the "**Bureau**") amended the *Competitor Collaboration Guidelines* to clarify that they do not apply to joint purchasing agreements on the basis that joint purchasing agreements can have pro-competitive effects, and do not have unambiguously negative impacts when compared to hard core cartels in certain product markets.[18] While buy-side agreements can still be reviewed by the Bureau (and the subject of remedies by the Tribunal) if they are in fact found to be anti-competitive, no criminal liabilities or fines or damages as a result of follow-on civil suits can result. The Competition Tribunal is equipped with power under the non-criminal Section 90.1 of the *Competition Act* to identify agreements or arrangements that create, maintain or enhance a parties' market power when looking at buying groups, for example, and their ability through an agreement or arrangement to exert monopsony or oligopsony power over their suppliers to depress sale prices in a relevant market.[19] Since 2010, even naked group boycotts have been actionable only upon proof to the civil standard of a substantial lessening or prevention of competition.

While buying groups or group boycotts in Canada can be said to be judged based on the "rule of reason" (to use American parlance), the exercise of buyer power against wage-earners as a result of collusion between employers has come to be seen as egregious and worthy of *per se* condemnation. However, in response to allegations in 2020 that grocery chains had colluded in the simultaneous removal of COVID-19 bonus pay to their front-line workers, the Bureau had to explain publicly that buy-side agreements such

as no-poaching or wage fixing agreements between employers did not violate the criminal provisions of the *Competition Act*.[20]

Accordingly, in 2022 as part of a package of other significant amendments to the statute, wage-fixing and no-poach agreements between employers were criminalized under Section 45.[21] This amendment will align Canada with the United States Department of Justice's decision to prosecute no-poach and wage-fixing agreements as *per se* offences under the *Sherman Act*.[22] No-poach and wage-fixing agreements in respect of employees will be considered under the criminal provisions of the *Competition Act* as of June 24, 2023. Other buy-side cartels, however, remain subject only to "rule of reason" civil enforcement in Canada.

Mergers & Acquisitions

The Competition Tribunal is empowered by Section 92(1) of the *Competition Act* to make orders where it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially."[23] Section 93 of the *Competition Act* provides a non-exhaustive list of factors for the Tribunal to consider when determining whether or not a proposed merger presents or lessens, or is likely to prevent or lessen, competition substantially.[24] While none of these factors refer explicitly to buyer power, the Bureau has issued *Merger Enforcement Guidelines* ("**MEGs**") which provide general direction on its analytical approach to merger review, including for monopsony power concerns.[25] When reviewing a merger between competing buyers, the Bureau is generally concerned "when a buyer holds market power in the relevant purchasing market, such that it has the ability to decrease the price of a relevant product below competitive levels with a corresponding reduction in the overall quantity of the input produced or supplied in a relevant market, or a corresponding reduction in any other dimension of competition."[26] The Commissioner will generally not challenge a merger where the combined share of the purchasing market held by the merging parties is below 35%. A merger is more likely to be challenged, however, where the merging parties account for a significant portion of purchases of the relevant product and exceed a 35% share of the purchasing market.[27]

The Bureau will also consider barriers to purchaser entry that may limit or negate the ability of a new buyer to purchase the product, or of an existing buyer to expand its purchases.[28] This analytical framework is essentially the mirror-image of the way downstream market power is assessed. Similarly, upstream product markets are defined using the "hypothetical monopsonist" test, where the Bureau will define a relevant product market to

determine whether suppliers, in response to a decrease in the price of an input, would switch to alternative buyers or reposition the product they sell in sufficient quantity to render price decrease by the hypothetical monopsonist unprofitable.[29] Although the MEGs indicate that buyer power will be dealt with in exactly the same manner as is downstream power, as we shall see in our review of case law below, this is not always in fact the case.

Unilateral Conduct

The anti-competitive exercise of unilateral market power, or "abuse of dominance", is one of the key provisions of the *Competition Act*. Sections 78 and 79 of the *Competition Act* prohibit anti-competitive acts that are intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition.[30] The Bureau has also issued *Abuse of Dominance Enforcement Guidelines*, which describe the Bureau's general approach to enforcing the abuse of dominance provisions.[31]

With respect to buyer power and abuse of dominance, Section 78 of the *Competition Act* provides a definition of "anti-competitive act" and sets out a non-exhaustive list of such acts. Most of the anti-competitive acts enumerated in Section 78 are primarily focused on regulating the exercise of downstream market power. However, paragraphs 78(1)(f) ("buying up of products to prevent the erosion of existing price levels"), 78(1)(h) ("requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market") and 78(1)(j) ("a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market") would apply to buy side behaviour.

United States

In the United States, the antitrust landscape is primarily governed by the *Sherman Act,* the *Federal Trade Commission Act* and the *Clayton Act*.[32] Although there is no explicit reference to monopsony, Section 1 of the *Sherman Act* outlaws "every contract, combination or conspiracy in restraint of trade"[33] that is unreasonable,[34] and Section 2 outlaws any "monopolization, attempted monopolization, or conspiracy or combination to monopolize".[35] The *Federal Trade Commission Act* similarly bans unfair methods of competition, and deceptive acts or practices,[36] while the *Clayton Act* prohibits anti-competitive tying arrangements and exclusive dealing,[37] price discrimination[38] and mergers.[39]

Competitor Collaborations

The *Sherman Act* governs combinations in the United States that create an unreasonable restraint of trade, with two main approaches applied depending on the context. The *per se* rule applies to any restraints that are inherently anti-competitive and damaging to the market, resulting in immediate condemnation without further inquiry as to their market effects. Horizontal agreements between competitors to fix prices or output, rig bids or divide markets by allocating customers, suppliers, territories or lines of commerce have all been placed into this category—as have group boycotts.[40]

Where a collaboration is not clearly a cartel, in the case of a joint purchasing collaboration for example, courts and agencies will often analyze the agreement using the rule of reason.[41] In the context of product markets, however, the distinction between a group boycott and a buying group is not clear. The flexibility that enables buying groups to create a legitimate organization can create difficulty in distinguishing buying groups from cartels, which then empowers the buying group to impose restraints on its suppliers, such as requiring more favourable terms than those made available to other buyers.[42] Group boycotts arise when there is agreement among competitors not to do business with targeted individuals or businesses, which ultimately raises antitrust concerns.[43] The United States Supreme Court had initially determined that group boycotts were *per se* violations of the *Sherman Act,* however this was later qualified by a federal district court that required the exertion of coercive economic pressure in order to trigger a *per* se violation of the *Sherman Act.*[44]

The difficulty in delineating between buying groups and group boycotts is illustrated by assessing Toys "R" Us' conduct when it imposed a restraint on its suppliers by requiring that they not provide popular toys to discount retailers that competed with Toys "R" Us.[45] Although the Federal Trade Commission identified that boycotts targeting "price cutters" are likely to draw antitrust concerns where they are achieved with the assistance of a common supplier, exclusionary conduct similarly executed by a legitimate buying group can take the form of exclusive dealing or other arrangements that prevent the sale of key inputs to competitors of the buyers in question.[46] This places significant importance on the characterization of the relationship between the collaborators and the motivation behind their actions.

Similar to its *per se* treatment of group boycotts, the United States Department of Justice has recently articulated that no-poach agreements between employers should be analyzed under the *per se* rule, a proposition flowing

from the determination that employee-allocation agreements should be treated the same as customer-allocation agreements and deemed *per se* illegal.[47] In asserting that no-poach agreements are *per se* violations of the Section 1 of the *Sherman Act*, the Department of Justice emphasized that like other suppliers, employees supply an input—labour—and courts have consistently recognized claims against employers who have engaged in anti-competitive behaviour.[48] This approach has limited the availability of defences that are grounded in pro-competitive effects, consistent with decisions by courts that rejected the notion that naked restraints of trade should be tolerated because they are well intended or bolster competition, for example.[49]

Mergers & Acquisitions

Section 7 of the *Clayton Act* governs horizontal mergers in the United States. This provision forbids a merger that may substantially reduce competition or that tends to create a monopoly in the respective line of commerce across the country.[50] The focus of the *Horizontal Merger Guidelines* in the United States is on the increase of market power amongst merging firms.[51] The guidelines are explicit in identifying that the exercise of market power by buyers (*i.e.*, monopsony power) results in similar negative consequences as does the exercise of monopoly power, and therefore identifies that the analytical framework outlined in the guidelines will also be applied against the exercise of monopsony power. [52]

Unilateral Conduct

In the United States, the approach to abuse of dominance in the context of monopsony power is not explicitly addressed or referred to under the governing provision, Section 2 of the *Sherman Act.* This statutory provision primarily applies to the exercise of monopoly power; however, it may be possible to appeal to Section 5 of the *Federal Trade Commission Act*, which outlines a prohibition against "unfair methods of competition" that encompasses a broader scope of actions that may implicate a firm beyond the exercise of monopoly power.[53] However, there are practical issues facing Section 5 of the *Federal Trade Commission Act.* Two main issues have been identified that make it difficult for the Federal Trade Commission ("**FTC**") to use Section 5 as an enforcement provision against upstream unilateral exclusionary conduct. First, only the FTC can enforce it, therefore if the FTC lacks relevant industry expertise or is distracted by other priorities, there may be no remedial action.[54] Neither private parties nor the Department of Justice can address exclusionary conduct under Section 5.[55] Secondly,

where the FTC is amenable to investigating and challenging conduct, it may not prevail.

Part II—Analysis of Select Competition and Antitrust Enforcement Actions Related to Buyer Power

Despite the fact that the relevant legislation has (with the exception of Canada's approach to upstream cartels after 2010) dealt with monopoly and monopsony power symmetrically, competition law and antitrust enforcement agencies and courts have been inconsistent with their analysis of buyer power in relation to competitor collaboration, mergers and abuse of dominance matters. In this section we provide an overview of a selection of matters in both countries in which buyer power played a central role.

Loblaw Companies Limited (2014)

In 2014, the Bureau commenced an inquiry into Loblaw, Canada's largest grocer, regarding allegations that Loblaw implemented and enforced several anti-competitive policies against its suppliers.[56] The Bureau's inquiry focused on nine policies implemented and enforced by Loblaw (the "**Loblaw Policies**"), pursuant to which Loblaw sought compensation from its suppliers when its profitability was negatively impacted by the competitive activity of other retailers.[57]

The Bureau's primary concern was that the Loblaw Policies may have caused suppliers to implement strategies to minimize the potential financial impact of the Loblaw Policies, including offering less favourable trade terms to other retailers. Ultimately, the Bureau concluded that there was insufficient evidence to conclude that the Loblaw Policies had lessened or prevented competition substantially in any relevant market, despite suggestions from a number of suppliers that the Loblaw Policies had caused them to engage in such strategies.

The Bureau also provided some guidance in its position statement about how it would assess future cases involving upstream buying markets. The Bureau stated that market share was less relevant than other factors, such as limited existing or potential distribution channels, the relative impact on revenue of a supplier vs. their customer if they were to stop doing business and private label competition in the grocery sector.

While the Bureau did find evidence that Loblaw had market power and determined that at least some of the Loblaw Policies may have been introduced for anti-competitive purposes, it was unable to substantiate either of

its theories of anti-competitive harm (raising rivals' costs or reduced rivalry as a result of facilitating conduct). It is interesting to note that while the Loblaw Policies were aimed at suppliers, and may have harmed suppliers, the Bureau's two theories of harm were still primarily focused on impacts to downstream competition (*i.e.*, other retailers). The Bureau seems to have disregarded potential adverse consequences of the Loblaw Policies on suppliers, which calls into question why suppliers that tend to be larger, corporate entities[58] do not receive protection against monopsonistic pressure.

West Fraser Logging (2004)

In comparison to Loblaw, the Bureau had buyer power-related competition concerns about the 2004 merger of West Fraser Timber Co. Ltd ("West Fraser") and Weldwood of Canada Ltd. ("Weldwood"). The parties signed a consent agreement with the Bureau to resolve those concerns.

This consent agreement required that West Fraser and Weldwood sell their sawmill interests in various associated forest tenures as a means of removing significant barriers to competition for the purchase of logs by allowing new players to enter the market, or to allow existing ones to expand capacity.[59] This enabled the forestry companies to merge and to realize cost savings while ensuring that suppliers of timber, such as independent timber harvesters, wood re-manufacturers and log sellers in the northern and southern areas of British Columbia, still had a choice of to whom to sell.[60] These suppliers, unlike the grocery suppliers in *Loblaw*, were characterized as "independent" operations. It is interesting to note that the Bureau required remedies in this case despite the fact that West Fraser and Weldwood had been selling into highly competitive downstream markets.

Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co (2007)

Moving to the United States, in a Section 2 claim under the *Sherman Act* filed by Ross-Simmons, a lumber company, it was alleged that Ross-Simmons was driven out of the market by Weyerhaeuser due to a predatory buying scheme aimed at purchasing a quantity of raw materials that would drive up the price, therefore raising rivals' costs and inhibiting their profitability.[61] In this instance, the US Supreme Court required proof of downstream consequences—an analytical approach likely to be a result of the court's affirmation that predatory pricing and predatory bidding claims are analytically similar. Finding none, it overturned the lower court and found no Section 2 violation. This approach ultimately implied that the same legal standard should apply between claims of monopolization and

monopsonization,[62] thus keeping in line with the jurisprudential inclination to focus on consumer welfare rather than welfare in the aggregate. We note that treating predatory pricing and predatory buying the same way meant that the Supreme Court created a standard which was underinclusive for purposes of a total welfare analysis.[63] While *Weyerhaeuser* involved monopsonizing conduct rather than monopsony power concerns arising in the context of a merger (as was the case in West Fraser), the difference in the result between the two cases is notable. Both the US Supreme Court and the Bureau started from the same premise (the exercise of upstream power is just as bad as the exercise of downstream power) and were both considering circumstances involving no impact on downstream consumers, but the Bureau's ability to obtain remedies contrasts with the US Supreme Court finding no violation of the *Sherman Act*.

United States v Cargill Inc and Continental Grain Co (1999)

Looking further back, the U.S. Department of Justice challenged the proposed merger between Cargill Incorporated ("Cargill") and Continental Grain Company ("Continental") on the basis that it would substantially lessen competition for grain purchasing services to farmers in a number of areas in the United States in violation of Section 7 of the *Clayton Act*.[64] The Complaint was based solely on monopsony concerns and made no mention of harm to downstream consumers, likely reflecting that grain prices to consumers are determined in global markets.[65] While this case did not go to trial and the court did not make any findings, Cargill and Continental agreed to a number of divestitures in order to remedy the alleged loss of upstream competition.[66] Speaking about the case at a conference, the Economics Director of Enforcement at the Department of Justice noted that while downstream consumers would not have been harmed, "the loss to grain suppliers due to lower prices paid by Cargill post merger (absent the divestiture) would have exceeded the gain to Cargill, because depressing input prices through monopsony power typically induces quantity distortions and thereby reduces overall welfare" (for example through causing farmers to sell in distant markets or change the crops they grow, causing inefficiencies).[67]

Mandeville Island Farms, Inc v American Crystal Sugar Co (1948)

Some 50 years prior to the decision in *United States v Cargill Inc. and Continental Grain Co.,* the U.S. Supreme Court, along with various federal courts, established the foundation for prioritizing the prevention of injury to sellers in the context of buyer cartels where there is alleged price-fixing taking

place.[68] In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, the Supreme Court held that price-fixing conducted by purchasers that specifically injured sellers was a *per se* violation of Sections 1 and 2 of the *Sherman Act*. This decision was in response to an agreement between a group of California sugar farmers to pay a uniform price in their purchase of sugar beets. Importantly, this case was later referenced by the United States in its *amicus curiae* brief in the aforementioned *Weyerhaeuser* decision, which asserted that the *Sherman Act* should not be confined to only protecting consumers, but that it should instead protect all who fall victim to anti-competitive practices.[69] Despite this assertion, the U.S Supreme Court in *Weyerhaeuser* maintained a strict position that proof of downstream consumer harm is required to find a Section 2 claim of anti-competitive harm as a result of the exercise of buyer power.

In Re Electronic Books Antitrust Litigation (2011)

The Apple e-books antitrust matter involving Amazon primarily arose from the decision made by multiple competitors in the publishing industry to sign on to e-book distribution agreements with Apple which private plaintiffs, in cooperation with the U.S. Department of Justice and the Attorneys General of 33 states and territories, alleged amounted to a conspiracy to raise e-book prices.[70] This antitrust litigation was in response to Apple's collaboration with executives from each of the largest publishing organizations in the United States that was aimed at formulating a method that would force Amazon to abandon its discount pricing model for e-books. This pricing model had perturbed publishers because of potential consequences resulting from the lower pricing, such as decreased sales in their hardcover books, and as a result, impacts to the viability of brick-and-mortar stores containing these hardcover copies.[71] The vertical agreements entered into between Apple and each of the publishers included attractive incentives that, importantly, did not threaten the sale of hard copy books at various retail locations.

After agreeing to work with publishers to help increase the prices charged for their e-books, Apple had its sights on diminishing Amazon's 90 percent market share in e-books by timing its entry into the e-books market with its launch of the first iPad. Apple succeeded in obtaining the publishers' sign-off on agency agreements that ultimately initiated an increase in e-book pricing from $9.99 USD (the prevailing price on Amazon's website) to $14.99 USD on the Apple iBookstore.[72] After the publishers approached Amazon to sign similar agency agreements, the standard price for e-books rose overnight. The Supreme Court of the United States declined to hear Apple's appeal of

a lower court decision finding that it had conspired to e-book price fixing using a "hub and spoke" model of collusion, forcing Apple to pay a $450 million settlement.[73]

US v Bertelsmann SE & Co KGaA et al. (2022)

In a recent government victory, the Department of Justice sued to enjoin the merger of Penguin and Simon & Schuster. The landscape of publishing houses in the United States is comprised of what is known as the "Big Five" publishers, which include Penguin Random House, Simon & Schuster, HarperCollins Publishers, Hachette Book Group and Macmillan Publishing Group, LLC.[74] As Judge Pan's decision described, Penguin Random House's closest competitor, Simon & Schuster competed in relation to author's advances and royalties, as well as for the provision of services to authors such as editorial work, design, marketing, and publicity. The U.S. Department of Justice argued that eliminating competition between the two largest publishers would likely result in reduced author compensation, which will likely lead to fewer and less diverse books being published. Competition would also be diminished from smaller publishers as well, as they often lack distribution capacity and depend upon Penguin Random House and Simon & Schuster for distribution services that may involve selling books to retailers, warehousing and shipping. On October 31, 2022, the deal was blocked by a U.S. district court judge, finding that the merger would likely hurt competition in the market for the rights to anticipated top selling books.[75] The critical focus of the decision was the exclusive focus on upstream harm to the authors rather than downstream consumer harm.

Uber Technologies Inc

While not related to any enforcement action brought by antitrust authorities, Uber's history with antitrust law includes allegations of price fixing, predatory pricing and avoiding regulations under Section 2 of the *Sherman Act.* This history primarily implicated labour law issues that centred on Uber drivers being categorized as independent contractors rather than employees. Following this logic, Uber results in thousands of independent sole proprietorships operating in the same market and seeking the same consumers, who are all charging the exact same prices. This has led to price fixing allegations by consumers and competitors, as illustrated by the claim in *Meyer v Uber*, which framed Uber as a hub and spoke conspiracy.[76] While a lower court initially upheld this claim against a motion to dismiss, a subsequent appeal was not decided on the merits but on the basis of an arbitration issue.[77]

The prevalence of contemporary ride sharing services has had notable implications on labour markets in the context of buyer power. This has manifested in an expansion of an unhindered, "gig economy" business model due to the lack of jurisprudence regarding vertical restraints, along with the assertion in both Canadian and American jurisdictions that Uber drivers are not employees and therefore cannot be protected under a collective bargaining regime.[78] However, some scholars argue that the lack of enforcement in this area is more reflective of resource constraints impacting enforcement priorities, rather than a gap in underlying antitrust principles (although query why the current antitrust agencies, despite being more pro-labour than any in at least a generation, have not prioritized bringing such a case).[79] Importantly, the empirical literature addressing labour monopsonies has consistently found enforcement agencies believe that strong buyers or cartels of buyers are just as liable as strong sellers or cartels of sellers, and that consumer price effects are not required to establish harm to competition.[80]

Part III—Inconsistencies in the Analysis of Buyer Power in Canadian and American Competition and Antitrust Enforcement Actions

As demonstrated by the cases explored above, there are inconsistencies in the analytical approaches that Canadian and American competition law and antitrust enforcers and courts take when it comes to buyer power. In some cases, such as *Loblaw* and *Weyerhauser*, enforcement agencies have not acted to protect suppliers, while in other cases including *West Fraser*, *Cargill* and *Mandeville Farms*, they have. An apparent difference in these cases is the identity of the suppliers who are harmed—in the set of cases where enforcement action was not taken the suppliers were (or appear to have been) large corporate entities, while in the cases where enforcement action was taken, and remedies were obtained, the suppliers were independent operators, individual farms and other small enterprises. This suggests that one of the value judgments being made, at least implicitly, is who should be protected, and the answer has been that small businesses and individuals need protection, while large corporations do not. This is inconsistent with Canadian and American enforcers' approaches to downstream harm—both jurisdictions' agencies regularly act to protect large corporations from downstream competitive harm.[81]

This question about who competition and antitrust law should protect is an important part of the current debate on the purpose of competition and antitrust laws. For example, the recent amendment to Canada's criminal

cartel provision (Section 45 of the *Competition Act*) to criminalize wage-fixing and no poach agreements is limited to protecting employees. Thus, a decision seems to have been made that employees deserve protection from these types of agreements, but that independent contractors (who are often self-employed) require no such protection.

In addition to the question of who should be protected, the weighing of externalities in the context of buyer power enforcement decisions has been shallow to date. Canadian and American enforcement authorities focus their analyses on the economic impacts of the transaction on competition, rather than considering impacts on parties not privy to the transaction. This contrasts with the European Commission's July 2020 statement that it supported the Dutch Competition Authority's interpretation of Article 101(3) of the Treaty of the Functioning of the European Union, which enables it to balance negative effects of anti-competitive behaviour on consumers against benefits incurred by the resulting reductions of greenhouse gas emissions.[82]

Recent proposed amendments in the United States under the *Competition and Antitrust Law Enforcement Reform Act*, a bill introduced by Amy Klobuchar (D-MN), seek to set revised legal standards for assessing anti-competitive mergers under Section 7 and reflect a focus on the total welfare standard. Among the proposed amendments are an increased focus on expanding liability for exclusionary conduct while also prohibiting acquisitions which materially lessen competition and that create a monopsony beyond a *de minimis* standard.[83] These suggested amendments illustrate a shift in normative underpinnings to a pursuit of policies that strengthen total welfare (at least in some settings when they focus on economic concerns), instead of focusing on consumer welfare alone, with respect to the exercise of downstream market power.

It has been argued that the analytical inconsistencies and approaches to controlling the exercise of buyer power is a result of the inadequately developed case law and the somewhat piecemeal approach that legislators have taken in identifying the unique vulnerabilities facing small sellers such as farmers, ranchers, fishermen and loggers, along with professionals such as doctors, nurses and independent contractors.[84] The relevant market to focus on in monopsony matters is based on the alternative buyers available to a seller, rather than on alternative sellers of products or services available to consumers (as commonly seen in the assessment of anti-competitive effects in relation to downstream market power). It is crucial to recognize that the impact of these policy decisions falls on those who may have less bargaining power and who may succumb to monopsonistic behaviour due

to the sunk costs involved in producing the good or service in question, for example, which may leave suppliers unable to effectively resist or avoid a price squeeze from buyers.

Conclusion

Value judgements are inherent in the creation of antitrust laws. Such laws favour consumers over suppliers when examining the downstream exercise of market power, as the results (higher prices; poorer quality; a reduction in choice and innovation) are all negative compared with the exercise of buyer power, which typically results in lower prices and may, arguably, fuel an increase in downstream product quality, choice and innovation. Externalities related to buyer power may be positive or negative and warrant deeper analysis than that which exists in current decision making by the courts and enforcement agencies in the United States and Canada.

One pattern which seems to exist is that small suppliers are worthy of protection against the exercise of monopsony power, while larger suppliers do not warrant such protection. However, this is inconsistent with the analysis of monopoly power, which is agnostic to the size of the purchasers who may be harmed.

The inconsistencies in how enforcement agencies and courts analyze monopsony power illustrate the need for both to be more explicit in their prioritizing of interests and values to address the uncertainty in the analytical framework they use to address monopsony. A clear articulation of how monopsony will be addressed is critical to a coherent antitrust and competition law landscape. In particular, as monopsony can be examined under both criminal and civil law enforcement mechanisms, there needs to be certainty in the law and in government policy so that citizens and companies can abide by the law.

ENDNOTES

[1] See Roger G Noll, "'Buyer Power' and Economic Policy" (2005) 72:2 Antitrust LJ 589; Roger D Blair & Jeffrey L Harrison, "Antitrust Policy and Monopsony" (1991) 76 Cornell L Rev 297; and Roger D Blair & Jeffrey L Harrison, "The Measurement of Monopsony Power" (1992) 37:1 Antitrust Bull 133 at 140 ("The social welfare effects of monopsony are analogous to those of monopoly—too few resources will be employed.").

[2] *Ibid.*

[3] Natalie Rosenfelt, "The Verdict on Monopsony" (2008) 20:4 Loy Con L Rev 402.

[4] *Ibid.* See also *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*, 127

S Ct 1069 (2007); *Reid Bros Logging Co v Ketchikan Pulp Co*, 699 F (2d) 1292 (9th Cir 1983); *National Macaroni Manufacturers Association et al v Federal Trade Commission*, 345 F (2d) 421 (7th Cir 1965); *Mandeville Island Farms Inc v American Crystal Sugar Co*, 334 US 219 (1948).

[5] See *Balmoral Cinema Inc v Allied Artists Pictures Corp*, 885 F (2d) 313 (6th Cir 1989); *Kartell v Blue Shield of Mass Inc*, 749 F (2d) 922 (1st Cir 1984).

[6] See Competition Bureau Canada, Position Statement, "Alleged Anti-Competitive Conduct by Loblaw Companies Limited" (2017), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04310.html>; Government of Canada, News Release, "Competition Bureau Reaches Agreement to Preserve Competition in Two B.C. Forestry Markets" (2004), online: <https://www.canada.ca/en/news/archive/2004/12/competition-bureau-reaches-agreement-preserve-competition-two-bc-forestry-markets.html>.

[7] "Statement of Interest of the United States: *Curtis Markson et al v CRST International et al*" (5 August 2022), online: *US Department of Justice, Antitrust Division* <https://www.justice.gov/atr/case-document/file/1520056/download>.

[8] See Competition Bureau Canada, "Guide to the 2022 Amendments to the Competition Act," (24 June 2022), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04671.html#sec03>. The amendments will make no-poach and wage fixing agreements *per se* illegal beginning in June 2023.

[9] John F Clifford & Sorcha O'Carroll, "Monopsony and Predatory Buying: The Canadian Landscape is Wide Open" (Paper delivered at the Canadian Bar Association Competition Law Section Annual Conference, Gatineau, 11–12 October 2007) [unpublished].

[10] Noll, *supra* note 1 at 607.

[11] Blair & Harrison, *supra n*ote 1.

[12] Richard Janda & Daniel M Bellemare, "Canada's Prohibition Against Anti-Competitive Collusion: The New Rapprochement with U.S. Law" (1993) 38 McGill LJ 620.

[13] *Ibid.*

[14] Competition Bureau Canada, "Our Mandate" online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00020.html>.

[15] Competition Bureau Canada, "Competitor Collaboration Guidelines" (6 May 2021), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04582.html>.

[16] Sandra Walker & Michael Kilby, "Institutional Overview and Statutory History" in James B Musgrove, ed, *Fundamentals of Canadian Competition Law*, 4th ed (Toronto: Thomson Reuters, 2022) 13 at 30.

[17] Neil Campbell, Jun Chao Meng & Francois Tougas, "Monopsony Power and the Relevance of the Sell-Side Market" (2013) 26:2 Can Competition L Rev 201.

[18] *Ibid.*

[19] Brian A Facey & Cassandra Brown, *Competition Act: Commentary and Annotation* (Toronto: LexisNexis Canada, 2022) at 248.

[20] Eric Tucker, "Competition and Labour Law in Canada: Patrolling the

Boundaries" (1 June 2021), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3970972>.

[21] Competition Bureau Canada, "Guide to the 2022 Amendments to the *Competition Act*" (24 June 2022), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04671.html>.

[22] United States Department of Justice, News Release, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation" (20 October 2016), online: <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>.

[23] *Competition Act*, RSC 1985, c C-34, s 92(1).

[24] *Ibid* at s 93.

[25] Competition Bureau Canada, "Merger Enforcement Guidelines" (6 October 2011), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html> ["Merger Enforcement Guidelines"].

[26] *Ibid* at para 9.1.

[27] *Ibid* at para 9.3.

[28] *Ibid* at para 9.4.

[29] *Ibid.*

[30] *Competition Act*, *supra* note 23 at ss 78-79.

[31] Competition Bureau Canada, "Abuse of Dominance Enforcement Guidelines" (7 March 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html>.

[32] Federal Trade Commission, "The Antitrust Laws" online: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

[33] *Sherman Act,* 15 USC § 1 (1890).

[34] See *Standard Oil Company of New Jersey v US,* 221 US 1 (1911), where the majority of the Court came to the conclusion that section 1 of the *Sherman Act* aims to only regulate "undue restraint of interstate or foreign commerce", following the language already explicit in Canadian legislation at the time. The Court determined that this was the appropriate analysis of section 1, despite section 1 forbidding "every" conspiracy in restraint of trade, of interstate or foreign commerce; see also Janda & Bellemare, *supra* note 12.

[35] *Sherman Act, supra* note 33 at § 2.

[36] Tucker, *supra n*ote 20.

[37] 15 USC § 14 (2006) ["US Code"].

[38] *Ibid at* § 13.

[39] *Ibid at* § 18.

[40] Federal Trade Commission & US Department of Justice, "Antitrust Guidelines for Collaborations Among Competitors" (April 2000), online (pdf): <https://www.ftc.gov/sites/default/files/attachments/dealings-competitors/ftcdojguidelines.pdf>.

[41] Debbie Feinstein & Albert Teng, "United States: Buyer Power: Is Monopsony the New Monopoly?" (1 May 2019), online (blog): *Mondaq* <https://www.mondaq.com/unitedstates/cartels-monopolies/802794/buyer-power-is-monopsony-the-new-monopoly>.

[42] Peter C Carstensen, "Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy" (2010) 1:1 Wm & Mary Bus L Rev 1.
[43] Federal Trade Commission, "Group Boycotts" online: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/group-boycotts>.
[44] *United States v Insurance Board of Cleveland,* 188 F Supp 949 (ND Ohio 1960).
[45] *Klor's v Broadway-Hale Stores,* 359 US 207 (1959).
[46] Feinstein & Teng, *supra* note 41.
[47] "Statement of Interest," *supra* note 7.
[48] *Ibid.*
[49] *United States v Topco Associates Inc*, 405 US 596 (1972).
[50] *Clayton Act*, 15 USC §§ 12-27, as amended at s 7.
[51] US Department of Justice & Federal Trade Commission, "Horizontal Merger Guidelines" (8 April 1997), online (pdf): <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/hmg.pdf\>.
[52] *Ibid. But see* Ioana Marinescu & Herbert J Hovenkamp, (2019) "Anticompetitive Mergers in Labor Markets," 94:3 Indiana LJ 1039 (identifying limits to current merger policy on monopsony).
[53] Patrick Bock & Kenneth Reinker, *Dominance 2020* (London: Law Business Research Ltd, 2020), online (pdf): Lexology <https://www.clearygottlieb.com/-/media/files/getting-the-deal-through/getting-the-deal-throughs-2020-guide--dominance--united-states-pdf.pdf>.
[54] John B Kirkwood, "Buyer Power and Healthcare Prices" (2016) 91:1 Wash L Rev 253.
[55] *Ibid.*
[56] Competition Bureau Canada, Position Statement, "Alleged Anti-Competitive Conduct by Loblaw Companies Limited" (21 November 2017), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04310.html>.
[57] *Ibid.* Pursuant to the Loblaw Policies, Loblaw would request or obtain compensation from suppliers when: (i) another retailer's price for one of the supplier's products was lower than or equivalent to Loblaw's price; (ii) it determined that another retailer's wholesale cost for a product was lower than its wholesale cost; it was not offered a product or format that was offered to another retailer; or (iv) its margin or profitability on one or more of a supplier's products fell below a specified threshold.
[58] While some grocery suppliers are large multinationals, such as Kraft Heinz, others might be quite local such as bakeries. It is not clear from the Bureau's position statement in *Loblaw* whether they investigated the impact on all manner of suppliers, or just large ones.
[59] See Government of Canada, News Release, "Competition Bureau Reaches Agreements to Preserve Competition in Two BC Forestry Markets" (7 December 2004), online: <https://www.canada.ca/en/news/archive/2004/12/competition-bureau-reaches-agreement-preserve-competition-two-bc-forestry-markets.html>.
[60] *Ibid.*
[61] *Weyerhaeuser Co*, *supra* note 4 at para 39.

[62] Gregory J Werden, "Monopsony and the Sherman Act: Consumer Welfare in a New Light" (31 March 2007), online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975992>.
[63] Roger D Blair & Jeffrey L Harrison, *Monopsony in Law and Economics* (Cambridge: Cambridge University Press, 2010).
[64] *US v Cargill Inc and Continental Grain Co* (8 July 1999), 99-1875, online: US Antitrust Division <https://www.justice.gov/atr/case-document/complaint-53>.
[65] Marius Schwartz, "Buyer Power Concerns and the Aetna-Prudential Merger" (Address delivered at the 5th Annual Health Care Antitrust Forum, Chicago, 20 October 1999) [unpublished], online: *Justice News* <https://www.justice.gov/atr/speech/buyer-power-concerns-and-aetna-prudential-merger>.
[66] *US v Cargill Inc and Continental Grain Co* (30 June 2000), 99-1875, online: *US Antitrust Division* <https://www.justice.gov/atr/case-document/final-judgment-37>.
[67] *Ibid.*
[68] Rosenfelt, *supra* note 3.
[69] *Ibid.*
[70] *In re Electronic Books Antitrust Litigation*, 859 F Supp (2d) 671 (2012).
[71] *Ibid.*
[72] *Ibid.*
[73] *United States of America v Apple Inc. et. al.*, 952 F. Supp (2d) 638 (2013); *US v Apple Inc*, 952 F Supp (2d) 638 (2013); "Apple to Pay $450M Settlement Over US E-book Price Fixing" (7 March 2016), online: *The Guardian* <https://www.theguardian.com/technology/2016/mar/07/apple-450-million-settlement-e-book-price-fixing-supreme-court>; Pinar Akman & D Daniel Sokol, "Online RPM and MFN Under Antitrust Law and Economics," (2016) 50:2 Rev Indus Org 133.
[74] *US v Bertelsmann SE & Co KGaA et al.*, case 1:21-cv-02886-FYP, Document 194, Filed 11/07/22, online: <https://www.justice.gov/atr/case-document/file/1549941/download>.
[75] Matthew Perlman, "Court Blocks Penguin's $2.2B Simon & Schuster Deal", *Law360* (31 October 2022), online: <https://www.law360.com/articles/1537250>.
[76] See *Meyer v Kalanick*, 174 F Supp (3d) 817 (2016); "*Swink v Uber Technologies, Inc* (4:16-cv-01092)" (22 April 2016), online: *Court Listener* <https://www.courtlistener.com/docket/4395686/parties/swink-v-uber-technologies-inc/>.
[77] Nick Passaro, "Uber Has an Antitrust Litigation Problem, Not an Antitrust Problem" (15 May 2018), online: *Competition Policy International* <https://www.competitionpolicyinternational.com/uber-has-an-antitrust-litigation-problem-not-an-antitrust-problem/>.
[78] Marshall Steinbaum, "Monopsony and the Business Model of Gig Economy Platforms" (Paper delivered at the Roundtable on Competition Issues in Labour Markets, 131st Meeting of the Competition Committee, 5 June 2019) [unpublished], online (pdf): *OECD* <https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf;>.
[79] *Ibid.*
[80] Maureen Ohlhausen, "Letter to Senator Cory Booker," December 1, 2017; C

Scott Hemphill & Nancy L Rose, "Mergers That Harm Sellers," (2018) 127:7 Yale LJ 2078.

[81] For a recent example see "Complaint: US v Aon plc and Willis Towers Watson plc" (16 June 2021), online: *US Department of Justice, Antitrust Division* <https://www.justice.gov/atr/case-document/file/1425181/download>, in which case two of the five markets in which competition would allegedly be lessened were specifically defined with reference to "large" customers. See also *Commissioner of Competition v GFL Environmental Inc* (30 November 2021), CT-2021-006, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/516939/1/document.do> (Notice of Application), in which the parties' customers were industrial and manufacturing businesses, as well as certain municipalities.

[82] "Competition Policy: Statements" (9 July 2020), online: *European Commission* <https://competition-policy.ec.europa.eu/european-competition-network/documents_en#statements>.

[83] "Sen Klobuchar Introduces Bill to Significantly Alter Federal Antitrust Law" (11 February 2021), online (blog): *Paul, Weiss* <https://www.paulweiss.com/practices/litigation/antitrust/publications/sen-klobuchar-introduces-bill-to-significantly-alter-federal-antitrust-law?id=39403>.

[84] Warren S Grimes, "Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller" (2005) 72:2 Antitrust LJ 563.