ARTICLES

PROPOSALS FOR AMENDING THE *COMPETITION ACT*

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Given the Canadian government's stated intent and the broader public interest that has recently become apparent, it is becoming increasingly likely that there will be an extensive review of Canadian competition policy—in particular the Competition Act—in the coming months. This is a welcome development as many challenges with the current regime have presented themselves in recent years. This paper reviews arguments for and against certain key proposals and offers—from an economist's perspective—a selective set of suggestions for legislative amendments to the Competition Act in the areas of collusion, abuse of dominance, mergers and with respect to market studies.

Vu l'intention exprimée par le gouvernement fédéral et l'intérêt public général récemment manifesté, il est de plus en plus vraisemblable qu'il y aura un examen approfondi des politiques de la concurrence du Canada—en particulier de la Loi sur la concurrence—dans les mois à venir. C'est une bonne nouvelle, car beaucoup de lacunes du système actuel sont ressorties dans les dernières années. L'auteur analyse les arguments pour et contre certaines des propositions principales et présente—du point de vue d'un économiste—un ensemble sélectif de suggestions de modifications à apporter à la Loi sur la concurrence dans les domaines de la collusion, de l'abus de position dominante, des fusions et des études de marché.

I. Introduction

Change is almost certainly coming to Canadian competition policy. Since the last significant amendments to the *Competition Act* made back in 2009,[1] various pressures have been building for a fresh look at many of the substantive provisions of the Act, for a review of the general level of enforcement of existing provisions (and how that enforcement has been limited by a lack of resources provided to the Competition Bureau) and even for a re-thinking of the proper objectives of a modern competition law in the Canadian context.

As a result of these pressures, there has been movement.[2] On February 7, 2022, the Minister of Innovation, Science and Industry announced: "In recognition of the critical role of the *Competition Act* in promoting dynamic and fair markets, the Minister will also carefully evaluate potential ways to

improve its operation."[3] This follows a call several months earlier from the Commissioner of Competition for "a comprehensive review of the *Competition Act*. We need to have a debate in Canada about what our competition law should look like in the 21st century."[4] Even before any specific changes to the *Act* or to enforcement policy had been proposed, the Government of Canada signaled its serious interest in competition policy by making a commitment of significant additional funding for the Competition Bureau: $96 million over the next five years and $27.5 million per year after that, to enhance the Bureau's enforcement capabilities.[5] In its recent release of its Budget 2022, the Federal Government restated its commitment to revising the *Competition Act* and on April 26, 2022 it released the text of the *Budget Implementation Act, 2022* (hereafter "*BIA 2022*") which includes a number of proposed amendments. [6]

To propel discussions on possible changes to Canadian competition policy, Senator Howard Wetston, a former Commissioner of Competition (called "Director of Investigation and Research" at the time), launched a public consultation.[7] To begin, Senator Wetston commissioned a consultation paper by Professor Edward Iacobucci of the Faculty of Law at the University of Toronto, a leading competition law scholar.[8] Invitations went out to other interested parties to provide their own submissions to the consultation—to be posted on the Senator's consultation website.[9] Some of these submissions responded to points made in Professor Iacobucci's paper, while others simply offered their own views about changes to Canadian competition policy that the authors would, or would not, like to see implemented. While the submission deadline for Senator Wetston's consultation has passed, there have been other outlets through which interested parties have been able to contribute to the debates. For example, the C.D. Howe Institute has produced a number of its "Intelligence Memos" devoted to competition policy reform.[10] Also, the public policy periodical *Policy Options* recently invited submissions commenting on the *Competition Act* and will be publishing them over the coming year.[11]

Before considering the broad scope of the various suggestions for reform, it might be appropriate to consider why change seems to be coming now. Significant amendments to Canada's competition laws do not come frequently and are therefore usually powered by strongly felt needs to address important problems or face new challenges.[12]

In the present case, a number of factors are at play. Three suggest themselves immediately. The first is the international attention being paid to the emerging titans of digital and digital-enabled commerce, particularly

those building platforms enjoying powerful network effects such as Google, Facebook (now Meta), Apple and Amazon. Are the traditional tools of competition policy up to the task of controlling anticompetitive behaviour and agreements in the digital space? Detailed investigations in the United States, the United Kingdom and the European Commission have focused on these challenges and recommended specific policy changes.[13] Clearly the concerns raised in these other jurisdictions would apply with some force in Canada as well. The title of Professor Iacobucci's consultation paper, "Examining the Canadian *Competition Act* in the Digital Era" suggests such a motivation.

Second, concerns have been raised in Canada, as in the United States, surrounding evidence of rising levels of concentration in markets throughout the economy that may be contributing to increases in firms' profit margins. This is all controversial: there are strong disagreements about both the evidence of substantial concentration (where we might worry about market power effects) and, whether such increases—if they exist—can be blamed for increasing margins. Perhaps rising profit margins are better explained by changing technologies that feature large development costs but low variable costs. Or higher profits may represent efficient rewards to valuable new products, generating incentives for innovation. Competition policy does not generally challenge profits earned from superior competitive performance. Yet one cannot deny that perceptions of rising levels of concentration and profit margins have led many to put some of the blame on inadequate enforcement of competition laws and/or weaknesses in those laws, thereby inspiring calls for reform.[14]

Third, a number of cases in this country have arguably exposed important gaps in our current statutory framework. Gaps are most apparent in the cartel and abuse of dominance provisions. In addition, cases involving mergers have created uncertainty and altered burdens in ways that may not serve us well.[15]

In addition to reviewing a wide set of suggested amendments to the *Competition Act*, including those included in the government's recent *BIA 2022*, I offer a succinct set of my own. These focus on areas in which the current *Act* may be seen to under-achieve in terms of economic effects. I set aside both process issues and concerns with precise language as these are best left to other experts.

Looking at the Wetston consultation submissions and other significant contributions in recent years provides a long list of amendment ideas.

Not surprisingly, many ideas appear in multiple contributions. A valuable list of the most significant proposals can be assembled from a small set of documents, for example, Professor Iacobucci's consultation paper, the Competition Bureau's submission to the consultation, and a paper written a few years ago by outgoing (at the time) Commissioner of Competition, John Pecman.[16]

In the discussion below, I will focus on just a few key areas, but this is not because other areas are unimportant. I omit some topics because they deserve a more fulsome treatment than can be provided here, and others—for example on process issues—for which I feel less qualified to comment. Important areas not considered here, but attracting interest and worthy of work, include:[17]

a) What are the appropriate goals for the *Act*—should the primary goal be to promote competitive markets, to increase economic efficiency, to serve other socially-valued goals (*e.g.,* equity, sustainability) or some combination? The current (primary) focus of competition policy on efficiency and consumer welfare in modern competition policy jurisdictions is being challenged, most notably in the United States, by members of what has been called the New Brandeis School.[18]

b) Are the competition policy institutions we have created (e.g. the Competition Bureau and Competition Tribunal) properly empowered and structured for the tasks we give them? Would a more administrative (i.e. "commission") structure work better in terms of delivering expert evaluations and judgments more quickly?[19] Alternatively, holding the Bureau to its current role, would it be better to abolish the Tribunal in favour of using regular courts?[20]

c) Should there be special provisions added for digital or platform markets—or, possibly, might a separate regulator for that sector be established?[21]

d) Do the consumer protection provisions of the Act need to be amended as well? There are certainly views that they should be, some deriving from concerns in online markets where sellers now have, and continue to accumulate, greater amounts of information (data) regarding their customers. For example, Section 6 of the Competition Bureau's submission to the consultation is devoted to the deceptive marketing area with recommendations related to "drip pricing" "ordinary selling price", harmonizing the criminal and civil provisions in the area and improving the available set of remedies and penalties.[22]

In the following sections I review some of the challenges that have appeared in each of the three major substantive areas of a modern competition law like Canada's: collusion (Section II), abuse of dominance (Section III) and mergers (Section IV). In each I discuss the problems that have arisen as a result of case decisions or due to compromising language in the drafting of the current statute. I then offer—in no particular order—some focused and limited recommendations for reform. Recognizing the challenges associated with some of my preferred choices, in two cases I offer more limited "Alternate" recommendations that seek to accomplish some of the stated goals and avoid the potential pitfalls of some recommendations made by others. In Section V, I consider an additional question currently being debated: should the Competition Bureau be given a broader authority (with compulsory powers) to conduct market studies? Section VI offers a brief conclusion.

II. Collusion

Statutory prohibitions on collusive conduct go back to Canada's first competition law passed in 1889, "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade".[23] Through some unfortunate drafting and the lack of a proper competition agency, anti-cartel enforcement was limited for many years. Eventually, a permanent enforcement office was created, in 1923[24] but continuing language in the law that made agreements between competitors illegal only if they limited competition "unduly" challenged enforcers.[25] The need to define and then establish undueness meant that Canada lacked the kind of *per se* prohibition for naked collusion familiar across most of the antitrust world. To win a case, the Crown needed to establish, to a criminal standard, that any lessening of competition was undue. This would, in principle, require identifying the affected markets and measuring effects. To be sure, the government won important cases. However, the vagueness of the term "unduly" continued to present challenges, including a temporarily successful court challenge as to the constitutionality of the provision which was ruled void for vagueness.[26]

After the amendments of the 1970s and 1986 modernized the law in the areas of abuse of dominance and mergers, the conspiracy provisions in Section 45 stood out as unfinished business. This was true both because of the challenges surrounding the undueness test, but also due to an evolving international norm viewing *per se* rules for naked price fixing as best-practice. Proposals for changes appeared in the 1990s, many seeking to establish *per se* treatment for at least some kinds of agreements between competitors.[27]

Section 45 was finally amended in 2009.[28] Two key areas of change are particularly noteworthy. First, the amendments created a two-track system for the review of agreements between competitors. Two amendments to Section 45(1) set out the first part of this system. The section, as amended reads:

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> a) to fix, maintain, increase or control the price for the supply of the product;
>
> b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

First, the adverb "unduly" was removed, shifting the policy on price-fixing to essentially a *per se* provision. This change had been widely anticipated. Receiving less attention however, was the fact the new provision clearly does not cover collusion on the buyer-side of the market, focusing as it does on the "production or supply" of a product. Section 45 prior to the 1986 amendments had included among its S.45(1) prohibitions one directed at actions "… (c) to prevent or lessen, unduly, competition in the production, manufacture, *purchase*, barter, sale, storage, rental, transportation or supply of a product …" (emphasis added).[29]

The second track in this new system was introduced *via* an ancillary restraints defence in S. 45(4). If the agreement in question is ancillary to a larger agreement among the same parties, is reasonably necessary for the success of that larger agreement, and if the broader agreement considered alone would not violate S. 45(1), then the agreement in question would not been seen to violate S. 45(1). The larger agreement may, however, be reviewed by the Bureau (and, if challenged, by the Competition Tribunal) under section 90.1—a new civil provision under which the agreement is examined much as a merger might be, with opportunities for the cooperating parties to explain their rationale, and for both sides to study the agreement's current or predicted competitive effects. This is decidedly not a *per se* track, in fact there is an efficiencies exception here (S. 90.1(4)) just as exists for mergers.[30]

II.1 Challenges and Recommendations: Buyer-Side Collusion

It is not entirely clear why the amendments in 2009 removed the buy-side from S. 45(1). One possible explanation, based on some concerns raised during discussions about moving to a *per se* standard, was that a *per se* rule on the buy side might catch many small buyer groups, for example collections of small family grocers banding together to secure better prices from suppliers. If such agreements truly had no effect on competition, they would not have raised issues under the old provisions with its "undueness" test—but under a *per se* test they could be captured. Under the new law, an argument might be made that such a buying group was more like a joint venture seeking purchasing efficiencies through joint action—and therefore eligible for the ancillary restraints defense—but this is theoretical at this point. Otherwise, we would have had to rely on prosecutorial discretion to avoid such inappropriate applications of the *per se* law.

The absence of coverage for buy-side collusion along the *per se* track has nevertheless been exposed as a gap in the current statutory framework. In recent years, in the United States, the EU and Canada, buy-side collusion in labour markets has been alleged in a number of cases. In the U.S., wage-fixing and no-poaching cases arose in a number of sectors including nursing, energy, animation, professional sports and agriculture.[31] A particularly high-profile case in the early 2010s involved high tech companies in Silicon Valley agreeing not to solicit ("poach") each other's workers.[32]

In October 2016, the U.S. Department of Justice and FTC jointly issued "Antitrust Guidance for Human Resource Professionals" in which the agencies clarified that they would treat naked no-poach and wage fixing agreements as *per se* illegal and that the DoJ would proceed criminally in such cases.[33] Unfortunately for the DoJ, its first two attempts to move criminally against such agreements have not gone well so far. On consecutive days in 2022 (April 14/15), defendants in the first two criminal wage fixing/no-poaching cases were acquitted.[34]

Labour market cases have exposed the gap in coverage of the Canadian law. Allegations of no-poaching agreements have emerged, for example, in the fast-food sector[35] and of agreements between major grocery retailers to roll back pandemic-pay bonuses they had been paying workers earlier in the Covid-19 pandemic.[36] With a lot of public attention focused on these situations, the Competition Bureau issued a statement clarifying that the existing criminal price-fixing provisions in S. 45 could not be applied to buyer-side collusion.[37]

While most of the attention paid to this gap has focused on labour markets, there is reason to worry that buyer-side market power can have significantly negative effects in other kinds of input markets as well. The European Commission has, in recent years, moved against buyer cartels in car battery recycling and ethylene and some research in the U.S. has argued for greater attention to be paid to the building of market power on the buyer side through mergers.[38]

Economic models are quite clear that market power on the buyer side of a market can create inefficiencies parallel to those attributable to market power held by sellers. While lower supplier prices might seem to provide benefits downstream to final consumers if cost savings are passed on, there is no guarantee that such pass-through will occur. Indeed, it is the quantity transacted that determines the efficiency of a market and monopsony power by buyers facing elastic supply exerts its downward effect on prices through the inefficient reduction of quantities. When the sellers facing buyers with market power are workers, and the price being reduced is their wage, the implications for their well-being can be considerable and the harms can persist and grow over time. It should not be surprising, then, that there has been substantial support for protecting workers from collusion with respect to their wages.[39] With respect to how other forms of buyer-side collusion should be treated, a greater diversity in views has emerged.[40]

> ***Recommendation 1:*** S. 45 should be amended to cover naked collusion among buyers. That is, such collusion would also represent *per se* criminal conduct.

This is a fairly broad prohibition that would cover more than labour markets, of course, and would run the risk of catching small buyer groups simply trying to accumulate a little countervailing bargaining power with which to face powerful sellers, or to possibly achieve real purchasing efficiencies. While it not controversial to assert that virtually any naked-price fixing by sellers will create market inefficiencies (*e.g.,* deadweight losses) such that an effects test is unnecessary, this is less clear for price-fixing on the buyer side. So, how to deal with the cases of small buying groups? One possibility is to simply rely on enforcement discretion given that such cases would yield no social benefit.[41] Another might be to provide a specific defence for buying groups, perhaps on the condition that their suppliers are made aware of their agreement.[42] Of course, to the extent that there are real efficiencies created by the buying group, for example by collective warehousing and shared transportation, the ancillary restraints defence might be

available to shift the agreement out of S. 45 to S. 90.1 where effects can be evaluated.

In the case that these accommodations are viewed as insufficient to protect small buying groups, a weaker form of this recommendation could be offered.

> ***Recommendation 1 (Alternate):*** Wage-fixing agreements (broadly defined to capture no-poaching) should be brought under S. 45, making them *per se* criminal offenses.

This alternative responds to the current pressures to do something about buyer power in labour markets, but at a cost of losing coverage of buyer collusion in other markets. It might be a useful first step. Importantly, it is a step that has been taken, as it is one of the recommendations in the amendments included in the *BIA 2022*.[43] However, the American experience gives us reason to believe that at least some no-poaching agreements, for example those that are part of larger agreements between franchisors and franchisees, may have access to the ancillary restraints defense and therefore be exempt from the application of S. 45, leaving them to civil review under S. 90.1.[44]

II.2 Challenges and Recommendations: A Per Se Civil Track for Collusion Cases

To offer the clearest expression of the view that naked price-fixing—that is, agreements that are only about restricting competition with no element of efficiency gain—are to be condemned in the harshest possible terms, we have, in S. 45, a *per se* criminal prohibition. That fact that such agreements are treated as *per se* violations is consistent with the approach in most modern competition systems. And while Canada and the U.S. were at one time two of the few countries criminalizing such conduct, that set of countries has been growing rapidly over recent decades.[45]

This said, there is an argument to be made that criminal processes may not be the most appropriate in all collusion cases. Indeed, in a number of jurisdictions including the U.S., Australia, New Zealand, the U.K., Japan, South Korea and Chile the antitrust authority has a choice (in at least some cases) to pursue a cartel case on a civil or criminal basis.[46] A civil version of S. 45, retaining its *per se* character, but putting the cases before the Competition Tribunal, could be useful for cases in which the conduct—though still to be resisted—is less serious, or where the defendant parties were unsophisticated and did not appreciate the illegality of their actions.[47] Possible

remedies provided for in this section could include (as under S. 90.1 cases) structural or behavioural orders and there should be a provision for administrative monetary penalties (which are not provided for under 90.1). There is a precedent for this dual criminal/civil track already in the *Act*: false or misleading representations can be dealt with under criminal Section 52 or civil Section 74.01(1)(a).[48]

The civil track could also be useful when the criminal standard of proof "beyond a reasonable doubt" is difficult to meet. An example could arise when establishing the existence of an agreement to the criminal standard is challenging but an inference of collusion might reasonably be made. For example, elaborate systems of signaling between competitors that evolve without strong evidence of direct communication regarding collusion might prove sufficient to meet a civil standard.[49] This track could also become a "concerted practices" track, allowing the Bureau to investigate market practices that lead to uncompetitive outcomes—in fact, I would suggest the provision explicitly address "concerted practices" along with "agreements". Many modern cartel laws do, in fact, cover concerted practices along with agreements, for example those of the EU, UK, South Africa and Australia.[50]

Another potential benefit of adding a civil *per se* branch follows from challenges associated with the split responsibility for criminal cartel enforcement—shared by the Commissioner and the Public Prosecution Service of Canada (PPSC). Under the current legal structure, if the Director of Public Prosecutions cannot be convinced to pursue a case, either because she cannot be convinced of the likelihood of successful (criminal) prosecution or simply because of other departmental priorities, the case will not proceed and the Commissioner is powerless. A civil *per se* branch would allow the Commissioner to proceed on a non-criminal basis allowing for an expansion in the number of cartel cases prosecuted and development of the case law. [51]

> ***Recommendation 2:*** The Commissioner should be empowered to pursue simple (*i.e.,* naked) price-fixing on a civil track. This could come, for example, via amendments to the current civil provisions on competitor collaborations under Section 90.1. Administrative monetary penalties as well as behavioural and structural remedies should be available in cases on this track.[52]

There is a possible connection between the first two recommendations. If it were determined that Recommendation 1 risked exposing potentially efficient agreements (*e.g.,* small buying groups) to harsh criminal prosecution, buy-side collusion could possibly be restricted to the civil track. This could

be done, for example, by exempting buy-side collusion (or more specifically, buying groups) from the criminal track if their agreements are public and made known to their suppliers.[53]

III. Abuse of Dominance

The *Act's* core provisions on abuse of dominance, new in 1986, are contained in Sections 78 and 79. Section 78 serves to explain the meaning of "anti-competitive acts", not with a general definition but by providing a non-exhaustive list of actions that would constitute such acts. Section 79 then defines the abuse of dominance provision by prohibiting anticompetitive acts: (i) when done by firms in a dominant position; and (ii) when they may harm competition.

> 79 (1) Where, on application by the Commissioner, the Tribunal finds that
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> a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

In addition to these sections on abuse of dominance there are a set of additional, related, reviewable matters, mostly corresponding to various forms of vertical restraints or contracting, for example: refusal to deal (Section 75); price maintenance (Section 76); and exclusive dealing, tied selling and market restriction (Section 77). Each has an "adverse effect on" or "substantial lessening of" competition test before the Tribunal can issue any order.[54]

III.1 Challenges and Recommendations: Refocus on harm to competition

The lack of a more general definition and the unclear relationship between 79(1)(b) and 79(1)(c) (*e.g.*, would one not expect that if an act is "anticompetitive" it must harm competition?) has led to some challenging case law.[55] The result has been a definition of anticompetitive acts that leaves a very big gap in coverage.[56] Briefly, in the *NutraSweet* case the Tribunal, after reviewing the non-exhaustive list in Section 78, noted that all (save one) involved actions with an "intended negative effect on a competitor that is predatory,

exclusionary or disciplinary."[57] As *sufficient* conditions for an act to be potentially anticompetitive this may not be objectionable, but it seems that these sufficient conditions also became *necessary* in the *Canada Pipe* case.[58]

There is a problem created here when the law attacks harm to competitors but not necessarily harm to competition.[59] First, there is the possibility of false positives in that many of a firm's actions may be intended to harm competitors but simply as the product of solid competition on the merits. Good, tough competition harms competitors. But this should not be a problem as such cases would not satisfy the lessening of competition test in 79(1)(c). The greater problem is that the law now fails to cover actions by dominant (or jointly dominant) firms that potentially suppress competition without necessarily harming any existing competitors—by essentially facilitating cooperation between competitors. Winter (2014) has a partial list of the kinds of acts that could operate this way: (i) meeting competition clauses; (ii) price-matching programs; (iii) most-favoured-customer(nation) clauses; (iv) vertical territorial restraints and (v) retail most-favoured-nation clauses.[60]

A second method by which a dominant firm's actions may harm competition without hurting competitors has received a great deal of attention in recent years with the rapid growth of the large players in digital markets. It has been alleged that these large firms are stifling the development of competition by buying up nascent competitors when the targets are too small to trigger a merger review by the competition agencies. It may also be that the potential competitive threat for any one merger is still rather speculative, making for a difficult "prevent" case under Canadian merger review. These kinds of concerns have been raised in many jurisdictions.[61]

The question then naturally arises as to whether, if not a single acquisition, could a series of acquisitions by a dominant firm of very small targets that might potentially have become competitors, be seen as an abuse of a dominant position?[62] In the *Laidlaw* decision, (which followed *NutraSweet*) the Competition Tribunal determined that it could.[63] Unfortunately, the Federal Court in the later *Canada Pipe* case reaffirmed the "harm to a competitor" standard from *NutraSweet,* effectively overturning the Laidlaw precedent that the acquisition of a number of small competitors could be an abuse of dominance.[64]

An amendment to these provisions, to restore their focus on harm to competition as opposed to harms to competitors is certainly in order, and it would not likely be particularly controversial.[65]

> ***Recommendation 3:*** The Abuse of Dominance provisions should be revised to prohibit conduct that harms competition in a market without necessarily harming a specific competitor.

Interestingly, the amendments contained in the *BIA 2022*, address this by putting a definition of anticompetitive act into the text of section 78(1): "anticompetitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts…" (emphasis in original). The focus here on intent rather than effects is notable, and possibly problematic. Establishing intent can be challenging and what should matter, at least in a civil provision, should be the effects or likely effects of the action. There may also be cases in which an action has multiple intents and the provision does not explicitly indicate whether the intent has to be the only or primary intent to satisfy the definition. An alternative that might have been clearer would be to define anticompetitive acts as "any act with the effect or likely effect of …". Intent could still play a role here as it would presumably speak to what the firm expected the likely effect to be.

Abstracting from the intent/effects issue, this *BIA 2022* provision should remove the necessity of showing harm (or intent to harm) to a competitor to establish that an act is anticompetitive but still admits the possibility that an act may be called anticompetitive without it resulting in a substantial prevention or lessening of competition.[66] As noted above, however, S. 79 (1) (c), which requires that the practice of anticompetitive acts to have the effect of preventing or lessening competition substantially before the Tribunal can issue an order, should protect against situations in which harm to competitors is viewed as sufficient to take action.

An additional minor modification would be to add a further example to the list of anticompetitive acts in S. 78, the serial acquisition of nascent competitors. This would make it clear that this activity is covered, something that has become a greater concern with the rise of digital markets.[67]

III.2 Challenges and Recommendations: Private access under the abuse of dominance provisions.

Private antitrust is a growing industry in Canada, one that has been dominated by class actions by customers seeking damages as a result of price-fixing. These are typically follow-on actions that come after the Competition Bureau (and/or foreign competition agencies) has secured guilty pleas or convictions.[68]

In amendments in 2002,[69] private parties were granted the right to apply to the Tribunal for leave to make an application under Sections 75 (refusal to deal) or 77 (exclusive dealing, tied selling and market restriction) and (after further amendments in 2009) Section 76 (price maintenance), but notably not the abuse of dominance sections.[70] Importantly, there was no provision for the private parties to secure damages to compensate them for any harms proven. As remedies to Section 75 and 76 infractions, plaintiffs can essentially only force the defendant to stop the practice. While the market restriction provision in S. 77(1)(3) potentially allows wider scope for Tribunal orders in such cases brought by the Commissioner, S.77(1)(3.1) makes it clear that damages are off the table for private plaintiffs.[71]

As Senator Wetston noted in his Commentary, there was also near consensus on loosening the reins on private enforcement of the *Act*. While there is less consensus on exactly where to add private enforcement, there was considerable support in favour of private rights in the area of abuse of dominance.[72] As the Bureau pointed out in its submission to Senator Wetston's consultation:

> "Private access serves as a complement to public enforcement by the Commissioner. Perhaps the greatest benefit of private access is that, by having a larger number of cases heard by the Tribunal, a broader body of case law would be developed. Such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses who engage in potentially reviewable conduct."[73]

The Bureau goes on to offer two other reasons for expanded private access to the Tribunal: the litigant may be better positioned to bring a case than the Commissioner, and it may be that, in a resource-constrained environment, the Bureau may not be able to take on all meritorious cases.[74]

There are really two questions to answer with respect to this access. First, should the right of access already available to private parties with respect to Section 75, 76 and 77 matters be extended to abuse of dominance matters? That would be the easiest change, but given the effort and costs associated with making such an application, the inability to claim damages and the limited activity to date under current private Tribunal access provisions, it is not likely to be impactful. Second, should the Tribunal be authorized to award damages to victims of the abuse of dominance (and possibly also victims under sections 75, 76 and 77)? Since abusive practices can indeed have very negative consequences for their victims, whether rivals ("predatory, disciplinary, or exclusionary"), or consumers paying higher prices as a result of weaker competition, the case for extending access for abuse cases

to include damages would appear to be strong. [75] Ducci and Trebilcock (2019) argue quite broadly for private access including damages as a way to enhance the "corrective justice" aspects of fairness in competition policy in ways that do not hurt economic efficiency.[76]

> ***Recommendation 4:*** Private parties should be allowed to apply to the Tribunal for leave to make an application under S. 79. Further, the Tribunal should be empowered to make damage awards in private actions brought before it—related to matters covered by Sections 75, 76, 77 or 79.[77]

Notably, the amendments contained in the *BIA 2022* include one that grants private parties the right to apply to the Tribunal to make an application under the Abuse provisions (S. 79) but it does not provide for the awarding of damages. There is one possibly odd aspect of the proposed amendment that derives from the fact, while actions under sections 75, 76 and 77 cannot lead to the imposition of administrative monetary penalties, S. 79(3.1) does provide for such penalties in the case of an abuse of dominance. With this amendment then, private parties (with or without intervention by the Commissioner) may be able to advance cases that lead a defendant to pay a financial penalty to the government but not damages to the applicant, but again only with respect to S.79 matters and not for those related to sections 75, 76 and 77.

Two final points on this recommendation. First, an important question that would need to be considered—given that many damage actions could be class actions—is the Tribunal the right forum to hear class actions? Would there be legal, procedural and even constitutional issues to be resolved to enable class actions for damages to be heard by the Tribunal?[78] Might class actions need to move through the regular court system or might the Tribunal need to set up its own set of rules for class action procedures?

Second, there is a possible connection between this recommendation and Recommendation 2 to create a civil track for collusion cases. There are at least two ways private enforcement of the civil cartel provisions could be supported. One would be to add the new civil *per se* cartel section to the list of sections for which private parties can apply to the Tribunal for leave to make an application. Another would be to amend Section 36, the current provision allowing private litigants to seek damages only for harms suffered as a result of criminal behaviour, (or add an additional section) to permit damage actions as a result of conduct contrary to the new civil *per se* cartel provisions. It may make sense to make both kinds of changes—the first to primarily support private parties in cases the Bureau chose not to pursue,

the second to accommodate follow-on actions of the type we have been seeing in the criminal context

IV. Mergers

The civil merger provisions, currently contained in Sections 91 to 123, were introduced in the 1986 amendments that created the original *Competition Act*. They replaced a woefully inadequate criminal review process—a number of cases had rendered it almost impossible for the Crown to block a merger unless all competition in the market was extinguished— with a civil process largely built on modern competition economics.[79] In Section 92(1), the Tribunal is empowered to issue an order to block or restructure a merger if it finds that the merger is, or is likely to "prevent or lessen competition substantially." Subsequent sections provide some guidance to the Tribunal with respect to how it should or may conduct this review. For example, the Tribunal is instructed not to base a decision solely on the basis of concentration or market shares (S. 92(2)) and Section 93 provides a list of factors that the Tribunal "may" consider when determining whether or not the merger will prevent or lessen competition. These factors include a number items that make great sense given what modern competition economics tells us about what might make for competitive harm, for example, the ability of foreigners to provide competition (S. 93(a)); whether the acquired firm is about to fail (S. 93(b)); whether there are acceptable substitutes available (S. 93(c)); the importance of barriers to entry (S. 93(d)); and the nature and extent of change and innovation in the market (S. 93(g)).

While many jurisdictions struggle with how to incorporate merger-specific efficiencies into a review of a potentially anticompetitive merger, the 1986 *Competition Act* provisions (which went into effect in 1989) positioned Canada as extremely "efficiency friendly" with the addition of the efficiency exception in S. 96(1):[80]

> 96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Understandably, this section presents a number of important questions of interpretation that needed to be addressed in the case law, and two were key. First, how is one to measure "anticompetitive effects" so that we know

efficiencies (which presumably we know how to measure) are smaller or greater? And, second, what is to be made of the phrase "greater than and offset"? Does "greater than" imply "offset" (suggesting some redundancy in language), or does "offset" invoke some additional test beyond efficiencies being greater than anticompetitive harms?

IV.1 Challenges and Recommendations: The Efficiency Defence

In the early years under the new provisions the general view was that the *Act* contemplated a total welfare standard under which a merger would be approved if total welfare were to increase as a result—where total welfare was to be measured as the sum of consumer and producer surpluses.[81] This required comparing the value of efficiencies generated to "harm" measured by the deadweight loss created as a result of the higher prices charged post-merger.[82] The was in contrast to the consumer welfare standard, the approach largely applied in the United States, Europe and many other jurisdictions, which would allow mergers only if consumer (customer) welfare was not reduced.[83]

Importantly, both the total and consumer welfare standards consider the impacts of a merger on the merging firms and their customers and (possibly) suppliers. While they do put different "weights" on the welfare of the different groups—with the total welfare standard putting equal weight on all surpluses and the consumer welfare standard putting almost all weight on consumers alone—neither attaches weight to other social goals such as reducing inequality, addressing climate change, protecting free speech, or expanding economic opportunities for marginalized groups. As noted earlier, there have been calls recently, most notably in the U.S., for the antitrust authorities to consider a wider set of goals and with prominent leaders of this movement now in high positions in the Antitrust Division and the Federal Trade Commission, further serious debate is assured.[84]

Two important merger cases have already moved us away from the total welfare standard in Canada, however. In the process, they introduced greater uncertainty into merger review and added to the Commissioner's burden in challenging a proposed transaction. I will not review these cases in detail, but will focus on the aspects relevant to amendment discussions.

The *Superior Propane* case involved a merger that was expected to raise prices in at least some geographic markets across Canada, but also to generate significant efficiencies.[85] While early calculations suggested that the merger would pass the total welfare test, the Commissioner challenged the

merger arguing that the redistributive effects (less consumer surplus, more firm profits) were an anticompetitive effect on top of the deadweight loss.[86] While the Tribunal did not agree in its first decision, on appeal the Federal Court ordered the Tribunal to reconsider—instructing it that the other "goals" listed in the purpose clause of the Act (S 1.1) allow for a consideration of effects beyond those that are part of the total surplus calculation.

Whatever the relative merits of the total and consumer welfare standards, the result of *Superior Propane* would seem to be a vaguer provision: it leaves us with neither standard. Not only is it not clear what weights should be put on consumer *vs.* producer surpluses, it is not clear whether other factors should be considered as well.[87] Even if we focus simply on the matter of weights on consumer and producer surpluses, we can worry about how decisions by the Tribunal going forward may come to depend on who is sitting on the panel at any point in time, specifically on their (unknown) sense of what appropriate social weights might be.[88]

The *Tervita* case then created new challenges.[89] Evidence of potential anticompetitive effects was put forward, much of it qualitative. While there was evidence that the price effect could be 10% or more, the Commissioner did not estimate deadweight loss. This was likely at least partly because the evidence suggested that any real merger-related efficiencies would be minor so it would seem the transaction could clearly not pass the total surplus test. However, the Supreme Court determined that the Commissioner bears the burden of quantifying any anticompetitive effects than can possibly be quantified.[90] Hence, under this standard it did not accept the evidence of anticompetitive effects and allowed the merger. This placing of such a heavy burden on the Commissioner, even when the threat of anticompetitive harms is clear and the efficiencies seem negligible, has been criticized as has the apparent relegation of qualitative evidence of anticompetitive effects to a sort of second-tier status relative to quantitative evidence.[91] [92]

It is probably safe to say that few are satisfied with respect to how efficiencies are now to be considered in merger review in Canada—this is clear from the submissions to the Consultation. There is widespread dissatisfaction with the results of the *Tervita* decision so there would likely be a lot of support for a clarifying amendment to undo its prioritization of quantitative over qualitative evidence.[93] By itself this change would return us to the (immediately) post-*Superior Propane* world in which it appears the standard is something close to a total surplus standard, but one that is open to consideration of distributional effects in particular cases.[94]

Beyond this, some would like the purpose clause and merger provisions amended to make it completely clear that the *Act* (including the merger provisions) is about, first and above all, economic efficiency (*i.e.,* total surplus maximization).[95] In terms of merger review, this would return us to the total welfare standard many had thought was the original intent.

Another group would argue to move the policy closer to a consumer surplus standard by eliminating the efficiency exception.[96] Many of those arguing for a repeal of the efficiency exemption would nevertheless support a role for efficiencies, perhaps as a factor to be considered by the Tribunal.[97] Not everyone who supports repealing the efficiency defence is doing so because they believe that competition law should prioritize consumers over producers. Even for those who generally support the idea that competition policy should strive to support and increase the total efficiency of markets, there are important arguments in favour of a less prominent role for efficiencies in merger review.

First, an argument by Chiasson and Johnson also lands on a recommendation to repeal the efficiency exemption but with a different justification. They make the point that reduction in competition in a market may lead to higher levels of "X-inefficiency" and lower levels of innovation over time—not only by the merging firms but in the broader market.[98] These kinds of effects, for which there is some empirical support, are nevertheless harder to predict in the context of a particular case. And while defendants can normally be counted on to provide evidence of positive efficiencies in support of their merger, it would not be in their interest to suggest that there could be any less pressure on them to maintain low costs or high levels of innovation post-merger, even if they did have reason to believe this would be the case. Importantly then, Chiasson and Johnson are arguing that removing the efficiency defence could actually raise total efficiency in the longer term—making this a pro-efficiency argument for a consumer welfare standard.[99] The question of whether greater competition promotes increased innovation and efficiency is a complicated one. The relationship is almost certain to be influenced by market and industry specific factors such as the appropriability of the gains from innovation and the contestability of market sales.[100] Some research has famously suggested there might be an inverted U-shaped relationship between competition and innovation with greater competition spurring innovation when competition levels are not high—likely the case in competition policy cases—but then too much competition becoming a drag on innovation at very high levels of competition.[101]

Second, there is a great deal of evidence now that firms, in general, do not achieve the efficiencies that they claim will be available post-merger.[102] This is not just true of efficiencies claimed as part of a merger review by a competition authority—large studies of mergers have shown highly variable rates of success at achieving efficiencies. Rose and Sallet review much of this work.[103] Results reported by strategy consultants, from merger retrospectives and from a great body of work by economists (going back to the 1970s and including work in this century focused on the effects of collections of mergers), point to a relatively poor record for merging firms in achieving significant efficiencies.[104] None of this tells us about the magnitude of efficiencies to expect in any new case in front of us, but it might properly make us skeptical of broad claims for the general importance of mergers for achieving economic efficiency. [105] Importantly, however, much of this research has been conducted on firms in the U.S., leaving open the possibility that efficiencies might be more relevant and important in Canada where the smaller domestic market could mean that many firms are operating at an inefficiently small scale.[106]

Taken together, these first two considerations point to an important distinction to be made with respect to competition policy (and other public policies): the decision rules we instruct enforcers to apply in their decision-making for, *e.g.,* mergers need not directly serve the overall objective of the underlying statute; the best decision rules will be determined, in part, by process considerations. Their contribution to serving the overall objective may then be indirect. This is a point made forcefully by Russell Pitman and by Joseph Farrell and Michael Katz who find examples elsewhere in competition law as well.[107] For example, we have a *per se* rule on naked price fixing even though we recognize that there may be cartels that raise total welfare by building countervailing market power.[108]

One other aspect of the efficiency defence that has been less discussed relates to its implications for the distribution of surplus between domestic and foreign consumers and owners.[109] It is well-known that many companies operating in Canadian markets have sizable ownership shares held by non-Canadians.[110] It is also clear that in many markets within the Bureau's jurisdiction a sizable fraction of consumption will be by non-Canadians—for example if the products are exported or largely sold to tourists. It would seem that attention is not generally paid to the nationality of consumers or sellers in Canadian competition policy—with the notable exception of the "export cartel defence" in S. 45(5)—but it is important to at least understand the implications of different rules for the relative treatment of domestic *vs* foreign interests. The quantities here need detailed study, but imagine for

now that, for the set of markets likely to be subject to merger review in Canada, the following condition is true: the share of foreign ownership of the firms involved significantly exceeds the share of consumption of the products by foreigners. Under this condition, in reviewing a merger that was going to raise prices but also generate efficiencies, the total welfare standard would give equal weight to foreign and domestic surpluses while a consumer welfare standard would be essentially giving more weight to domestic surplus.

Just how important this difference might be requires more study. It will depend on which shares, ownership or consumption, are larger; how much larger they are; and how these relative shares vary across relevant markets. The point is simply that the choice between total *vs* consumer welfare standards in merger review may have implications for the weight given to domestic compared to foreign stakeholders.[111]

This all said, and as explained by its many proponents, the total welfare standard has much to recommend it, and there was, initially, acceptance of it as the correct standard under the *Act*.[112] Properly implemented—if that is possible—it is the standard that best promotes economic efficiency. And it avoids making value judgements about whose surplus is more socially valued than whose in particular cases and considering other ill-defined social objectives. In comparison with standards that allow for undetermined weights to be put on the surpluses of various groups—weights that could depend on the values of the sitting members of the Tribunal—it provides greater certainty and a kind of horizontal equity across cases and Tribunal panels.

This leads to alternative recommendations.

> ***Recommendation 5:*** Amendments should undo the challenges created by the *Superior Propane* and *Tervita* cases—specifically amendments should clarify that the relevant standard is the total welfare standard, and *Tervita's* prioritization of quantitative evidence over qualitative evidence (and insistence that potentially quantifiable anticompetitive effects must be quantified or they cannot be considered) should be cancelled.[113]

This would return us to where many of us thought the law was before *Superior Propane* but with perhaps even more clarity as to how the tradeoff is to be done. Undoing only those described aspects of *Tervita* could be a useful half-step, leaving us with a standard that is probably still close to a total welfare standard but with room for some consideration of distributional effects.

It would also be important to set a very high bar for the acceptance of efficiency arguments, perhaps a requirement of "clear and convincing evidence" before efficiencies can be said to overcome the harms of a loss of competition. If language could be found to incorporate this higher bar in the efficiency exemption, so much the better.

One of the stated benefits of the total welfare standard is that it is a clear standard. Of course, this is also true of the consumer welfare standard. If there is to be a retreat from the total welfare standard, the value of this certainty and the fact that it would not rely on the personal preferences of Tribunal members would recommend a shift to a consumer welfare standard. The alternative recommendation below suggests a path.

> ***Recommendation 5 (Alternate—if a consumer welfare standard is to be adopted):*** Amendments should again undo the challenges created by the *Tervita* case identified above. The efficiency defence should be retained but amended such that it only applies when consumer welfare does not fall.[114] [115]

This alternative Recommendation 5 essentially creates a statutory consumer welfare standard. One strength of Canadian merger law is that it recognizes that anticompetitive effects and efficiencies are two distinct effects that may be produced by a merger. Any particular merger may lead to either, both or neither effects being observed. When they both arise in a case, they are typically of opposite signs in terms of social welfare—the efficiencies a positive consequence, the lessening of competition (and deadweight loss) a negative consequence. Under the total welfare standard we then just add them up to come to a decision.

In jurisdictions that do not have an explicit efficiency defence, to allow mergers that reduce competition (*i.e.,* raise profit margins) but generate such efficiencies that prices do not rise, authorities may need to say that such mergers are not anticompetitive "in law"—even if they were mergers to monopoly and, therefore, anticompetitive in fact. Recommendation 5 (Alternate) provides a path to a consumer welfare standard while retaining a clear distinction between the two kinds of effects.[116]

As a less precise movement from the total welfare standard, suggestions have been advanced to move efficiencies from a "defence" to a "factor" for the Tribunal to consider as it reviews a merger. [117] Two points about this. First, such an approach risks vagueness—what kind of a factor, with what weight and would efficiencies be considered differently in different cases? Arguably, until we have case law on point, the situation could become vaguer than it became after *Superior Propane*.

Second, it will likely matter where in the *Act* this factor is placed. One suggestion has been to add it to the list of factors in S. 93 but this would be problematic. As the section stands now, S. 93 factors are to be considered with reference to how they may affect "whether or not a merger or proposed merger prevents or lessens… competition substantially…" That is, put in this section, the efficiencies would be relevant only to the extent that they affected the degree of competition in a market. Of course, it can be the case that a more efficient firm becomes a more vigorous competitor, as when smaller firms merge to enable them to compete more aggressively against larger players, in which case having efficiencies as a factor in this section could make sense. But most of the time we consider efficiencies as an independent effect, and an offsetting one, from anticompetitive effects. Therefore, putting efficiencies only in S. 93 as a factor risks ignoring them in the majority of contested cases in which they are not actually enhancing competition.[118]

V. Market Studies

As the Organization for Economic Cooperation and Development (OECD) explains,

> "Market studies are a versatile tool for competition authorities to analyse whether there are competition problems in a sector, outside the context of a merger review or antitrust investigation. Nearly all competition authorities in the OECD conduct some types of market study, ranging from short, informal assessments to lengthy, formal processes involving multiple rounds of stakeholder input and empirical analysis."[119]

There are different kinds of market studies conducted in different countries, and even different kinds within countries. For example, the Australian Competition and Consumer Commission (ACCC) can conduct "market studies" or "market inquiries". The former are self-initiated, the latter launched under the direction or approval of the Australian Government.[120]

The powers authorities may exercise should they wish to conduct studies vary by jurisdiction.[121] In some, the authority has no, or very limited, ability to conduct any kind of study outside of an enforcement action. This is essentially the situation in Canada now. As explained in its submission to the Wetston Consultation, the Bureau can conduct studies but only in order to "make representations to and call evidence before" regulators at the federal, provincial and municipal levels".[122] And for provincial and municipal advocacy the Commissioner requires the consent of the regulator prior to making representations or calling evidence."[123] In some other jurisdictions

the authority has the power to conduct a review in most any area, but not to compel participation. A third category includes jurisdictions (*e.g.,* the European Union, the United States and the United Kingdom) that further grant their authorities powers to compel the provision of information relevant to the study.[124] Finally, in some countries, the authority is empowered to take action (*e.g.*, issue orders) directly as a result of information obtained during a market study; that is, without launching a separate enforcement action.[125]

An OECD survey reports that competition authorities use market studies to serve at least four broad goals:[126] (i) advocacy (*e.g.,* to study markets that may have competition problems created by ill-designed laws or regulations); (ii) pre-enforcement (*e.g.,* to study markets that may not be functioning well but in which a specific enforcement issue has not been identified); (iii) information gathering (*e.g.,* to enhance knowledge about a new or rising sector even with no competition challenges currently identified); and (iv) ex-post assessment (*e.g.*, to review the impact of previous authority actions, or actions by other regulators or policy makers).

V.1 Challenges and Recommendations: Expand the Bureau's Market Studies Powers

Canada appears to be a relative outlier with respect to the weakness of its market studies powers and there have been calls for this to change.[127] Interestingly, the old Restrictive Trade Practices Commission (RTPC), working with the Director of Investigation and Research, had greater powers, but those powers did not survive the creation of the *Competition Act* in 1986.[128] This change may well have been a product of negative reaction from the Canadian business community to the extensive "Petroleum Inquiry" conducted by the RTPC which reported in 1986.[129]

Australia's ACCC has been actively conducting both market studies and price inquiries since 2015, conducting 6 of the former and 14 of the latter over this time. According to Naismith and Mullen, "The significant increase in market studies and pricing inquiries reflects the growing recognition in Australia of the significant value of market studies as a tool for understanding how to address difficult and long-standing competition and consumer issues."[130] New Zealand's Commerce Commission received the power to conduct market studies from Parliament in 2018. It has already completed two studies and is into a third.[131]

One of the leaders in this area, the UK's Competition and Market Authority (CMA), can conduct "market studies" to research a particular market that may not be working well and propose remedies; such studies cannot

lead to remedy orders, though they might trigger a "market investigation." A market investigation is a detailed study of a market that, if competitive problems are found, must provide a response which may be orders to remedy adverse effects, the acceptance of undertakings from market participants or recommended actions for other public entities.[132]

In the United States, the Department of Justice Antitrust Division and the FTC conduct market studies and workshops frequently, and for a variety of purposes. These can include: to determine whether changing markets require changes in the law or enforcement policies; to study an evolving industry; and to evaluate the impact on competition of other government regulatory actions. They are also used to conduct retrospective studies of mergers.[133] While the FTC can currently compel the provision of information using powers granted in Section 6(b) of the *FTC Act*, there have been calls to expand studies powers. In a submission to a U.S. House Judiciary Committee, Alison Jones and William Kovacic (the latter a former FTC General Counsel and Acting Chair) recommended expanded powers for the FTC similar to those enjoyed by the CMA in the U.K. for market inquiries: "This would enable the FTC to study sectoral or economy-wide phenomena and to impose remedies regardless of whether the conditions or practices in question violate the antitrust laws."[134] Even more ambitiously, the *Competition and Antitrust Law Enforcement Reform Act*, proposed by Senator Amy Klobuchar would create a new, independent FTC division ("Office of the Competition Advocate") to be tasked with the responsibility to conduct market studies and merger retrospectives.[135]

Beyond the general value attainable from market studies, there are at least a couple of reasons why giving the Bureau stronger market studies powers could be very useful in the current Canadian context.

First, as many writers have pointed out—and as a key motivator for the Wetston Consultation—the digital revolution is creating large new markets and transforming others. There are concerns in Canada, and around the world, that the standard tools in the antitrust toolkit may not be adequate in this new world, that we may need to add new powers to competition authorities, or to create new forms of regulatory oversight.[136] This said, there are others who feel that, while new technology is certainly altering firms and markets, the general purpose tools that modern authorities have currently are generally fit for purpose, and in any case we do not yet know enough to know what actions to take.[137] Given the uncertainty, there is a case to be made to move cautiously and to gather further evidence (including studying best practices elsewhere) before making substantial changes.

In this light, a stronger market study regime in Canada would be a valuable mechanism for the detailed study of individual markets or sectors that could lead to recommendations for enforcement or regulatory action. Similar arguments have been made by the European Commission as it considers market investigations as a "New Competition Tool" to complement its existing authorities. This has been made all the more important by the emergence of the tech titans.[138]

Second, a stronger market study capacity could be a powerful research and advocacy tool for the Bureau, enabling it to study the barriers—many of them government created—to increased efficiency and competitiveness of Canadian industry. When competition problems in a market are the result of a combination of certain firm behaviours and competitive restraints created by regulatory rules or structures, a market study can provide for a more holistic review of the problem and suggest least-cost solutions.

As the OECD repeatedly points out, there are a number of structural problems that are very costly to the Canadian economy including supply management, foreign ownership restrictions and various interprovincial barriers to trade. An ability to shine a light on these problems, measure their costs and suggest solutions could make the Bureau a powerful champion for Canadian competitiveness. The OECD itself has recommended stronger market studies powers for the Canadian Bureau for just this reason.[139]

> ***Recommendation 6:*** The Competition Bureau should be given formal market studies powers including the ability to compel participation and the provision of information. If a particular study results in recommendations to other branches of government or regulators, those branches or regulators should be required to provide a public response within a specified period of time.

At this stage I would not recommend adding remedial powers of the sort the CMA has under market investigations—that would be a much bigger change to our competition policy regime –though this might be something to consider in the future. Best to first develop a model for conducting thorough market studies that is transparent, time-limited, and no costlier than necessary, for the Bureau and others.[140] There are many market study models internationally that could be examined as part of the design process.[141]

VI. Conclusions

As over ten years have passed since the last significant revisions were made to the *Competition Act*, it is certainly time for Canada to review its

competition policy framework. This is especially true given the explosive growth to dominance of firms in the technology and tech-enabled sectors. Indeed, it is not just Canada that is looking to see if its competition policy is still "fit for purpose" in this new world. And there are reasons beyond tech for Canada to take a fresh look at the *Act*—relating to broader concerns regarding (possibly) growing concentration and to gaps in the framework created by past amendments and certain judicial decisions.

In this light it is encouraging to note the current government's interest, not only in addressing a few less controversial issues quickly, but in engaging in a broader consultation on the whole competition policy enterprise in Canada.[142] This is most welcome.

This article has offered some suggestions for amendments. It is not intended to be an exhaustive list of recommendations, indeed there are a number of important areas deserving attention not discussed here at all, including consumer protection and the design of our competition policy institutions. It is a list oriented toward a set of issues of particular importance to economists and to gaps that threaten the greatest economic damage to Canadian markets. This said, I hope that some of the ideas here, most of which have also been put forward by others, will contribute to a constructive consultation and positive outcome for Canadians.

ENDNOTES

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1 The amendments were included as part of the *Budget Implementation Act*, 2009.

2 Thomas W. Ross,"Canada Looks at Revising its *Competition Act*" (3 April 2022), online: *Competition Policy International* <https://www.competitionpolicyinternational.com/canada-looks-at-revising-its-competition-act/>.

3 *Minister Champagne maintains the Competition Act's merger notification threshold to support a dynamic, fair and resilient economy*, (7 February 2022), online: <https://www.canada.ca/en/innovation-science-economic-development/

news/2022/02/minister-champagne-maintains-the-competition-acts-merger-notification-threshold-to-support-a-dynamic-fair-and-resilient-economy.html>. A review had also been suggested in a House of Commons hearing: Can. 43d Parliament, House of Commons 2d Session, Standing Comm. on Industry, Sci. & Tech., "Competitiveness in Canada", online: <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11192572>.

[4] Matthew Boswell, "Canada needs more competition" (Pre-recorded remarks to the Canadian Bar Association Competition Law Fall Conference, delivered on 20 October 2021), online: <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>.

[5] Financial Post Staff, "Competition Bureau Gets a Budget Boost, but Is It Enough to Make Companies Think Twice?", Financial Post (3 May 2021), online: <https://financialpost.com/news/economy/competition-bureau-gets-a-budget-boost-but-is-it-enough-to-make-companies-think-twice>. This represents a very significant increase: the Bureau's budget in 2020-21 was $52.1 million (CDN). Championing competition in uncertain times: 2020-21 Annual Report, 7 December 2021, online (pdf): <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-AnnualReport-2020-2021-Eng.pdf/$file/CB-AnnualReport-2020-2021-Eng.pdf>.

[6] "Budget 2022 announces the government's intention to introduce legislative amendments to the *Competition Act* as a preliminary phase in modernizing the competition regime. This will include fixing loopholes; tackling practices harmful to workers and consumers; modernizing access to justice and penalties; and adapting the law to today's digital reality." Government of Canada, *2022 Budget: A Plan to Grow our Economy and Make Life more Affordable*, at p. 72, online: <https://budget.gc.ca/2022/home-accueil-en.html> ("*BIA 2022*"). The *BIA 2022* can be found at: <https://fin.canada.ca/drleg-apl/2022/nwmm-amvm-0422-bil.pdf>. There is some overlap between amendments proposed in this Act and recommendations presented in this paper—these connections will be recognized. (Note: the amendments in the *Budget Implementation Act* were passed into law without amendment and received Royal Assent on June 23, 2022.)

[7] Competition Consultation, Senator Howard Wetston, online: <https://howardwetston.sencanada.ca/competition-consultation/>. (hereafter "Wetston Consultation")

[8] Edward M. Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (2021), online: <examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf (colindeacon.ca)> ("Iacobucci").

[9] Senator Wetston posted a document ("Commentary") organizing and summarizing the ideas generated through the consultation on April 27, 2022: <senator-wetston-commentary-en.pdf (colindeacon.ca)>.

[10] Available online: <https://www.cdhowe.org/intelligence-memos>. Some of these memos will be cited below.

[11] "Canada's Competition Law is Due for an Overhaul, Policy Options" (February 2022), online: Policy Options Politiques

<https://policyoptions.irpp.org/magazines/february-2022/canadas-competition-law-is-overdue-for-an-overhaul/>.

[12] For background on the legislative history of the Act, see Michael Trebilcock, Ralph A. Winter, Paul Collins & Edward M. Iacobucci (2002), The Law and Economics of Canadian Competition Policy, 3–36 (2002); John Tyhurst, Canadian Competition Law and Policy, chapters 2-3. ("Tyhurst").

[13] See, e.g., Final Report, Stigler Committee on Digital Platforms (2019), online: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E> (for the U.S.); Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, Competition Policy for the Digital Era (2019) (for the E.U.), online: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; and Unlocking Digital Competition: Report of the Digital Competition Expert Panel (2019) (for the U.K.), online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>.

[14] On the U.S. evidence and its antitrust implications—together with references to many of the key papers—see Carl Shapiro (2018), "Antitrust in a Time of Populism", 61 International Journal of Industrial Organization 714-748 ("Carl Shapiro"). Some evidence of increasing concentration in Canadian markets can be found in Ray Bawania and Yelena Larkin, Are Industries becoming More Concentrated? The Canadian Perspective (manuscript at 9) (20 March 2019), online: <https://ssrn.com/abstract=3357041>. An interesting recent contribution suggesting that, after controlling for rising levels of imports, concentration levels in U.S. manufacturing may not be growing is Mary Amiti and Sebastian Heise (2021), "U.S. Market Concentration and Import Competition", Federal Reserve Bank of New York Staff Reports, no. 968 (May). Debates about a need for more vigorous competition policy enforcement have also been aired in popular media. E.g., The Growing Demand for More Vigorous Antitrust Action, Economist (15 January 2022), online: <https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action>.

[15] The cases creating these challenges are discussed below in connection with reform proposals.

[16] Iacobucci, *supra* note 8; Competition Bureau, Examining the Canadian *Competition Act* in the Digital Era: Submission by the Competition Bureau (8 February 2022), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html> ("Bureau Submission"). John Pecman (2018), "Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau", 31 *Canadian Competition Law Review* 5-43.

[17] One suggestion that has received broad support, but seems straightforward and so is not discussed here, is the need to raise the maximum penalties available under the Act. The Bureau Submission, *supra* note 16, argues for higher monetary penalties and shows how low maximums are in Canada relative to our

international comparators (Section 3.3). Steps in this direction are included in the government's *BIA 2022*, *supra* note 6.

[18] Professor Iacobucci addressed suggestions for a wider set of goals in his paper Iacobucci, *supra* note 8. See also Carl Shapiro, *supra* note 14. On the New Brandeis challenge to current antitrust approaches generally, see, for example, Herbert Hovenkamp (2019), "Is Antitrust's Consumer Welfare Principle Imperiled?" 45 Journal of Corporate Law, 101-130.

[19] On design issues with some attention to the Canadian context see, Michael J. Trebilcock and Edward M. Iacobucci (2002), "Designing Competition Law Institutions" 25 *World Competition*, 361-394; and Michael J. Trebilcock and Edward M. Iacobucci (2010), "Designing Competition Law Institutions: Values, Structure, and Mandate", 41 *Loyola University of Chicago Law Journal*, 455-472.

[20] See, Julie Rosenthal & David Rosner (28 March 2022), "Four Reasons to Abolish the Competition Tribunal", *C.D. Howe Institute Intelligence Memo*. Discussions regarding the proper place or role for the Tribunal have been around for some time. See A. Neil Campbell, Hudson N. Janish and Michael J. Trebilcock (1997), "Rethinking the Role of the Competition Tribunal", 76 *Canadian Bar Review*, 297-331. Trebilcock and Ducci are also quite critical of the role the Tribunal: Michael Trebilcock & Francesco Ducci (2018), "The Evolution of Competition Policy: A Retrospective", 60 *Canadian Business Law Journal,* 171-200, at p. 196-199 ("Trebilcock & Ducci"). Related here, as well, are important issues about the independence of the Competition Bureau and whether steps should be taken to protect and enhance that independence. This is a theme of former Commissioner Pecman's, *supra* note 16.

[21] Iacobucci, *supra* note 8, also discusses whether the current Act is fit-for-purpose with respect to dealing with digital markets (concluding, in general, yes). Another submission to the consultation similarly found the current Act largely up to the task of dealing with competitive threats in the digital space: Anthony Niblett and Daniel Sokol, "Up to the Task: Why Canadians Don't Need Sweeping Changes to Competition Policy to Handle Big Tech", (2021), *MacDonald-Laurier Institute*. The American, British and European reports on competition policy in the digital economy cited above, *supra* note 13, provide some support for special provisions for digital markets and even possibly for the creation of a sectoral regulator. And legislators have responded in the EU and UK. The EU is poised to adopt the Digital Markets Act to provide some level of regulation for "big tech" (particularly key platforms identified as "gatekeepers"), see online: <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>. In the U.K. a Digital Markets Unit has been established within the Competition and Markets Authority which is expected to offer enhanced regulatory oversight in digital markets, see online: <https://www.gov.uk/government/collections/digital-markets-unit>.

[22] Bureau Submission, *supra* note 16. The *BIA 2022* includes some proposed new provisions to deal with drip pricing, *supra* note 6.

[23] 52 Vict, c41. The provisions were moved to the Criminal Code in 1892. On those early days see Tyhurst, *supra* note 12 at 18-23.

[24] *Combines Investigation Act*, SC 1923, c. 9.

[25] Prior to the amendments in 2009 described below the key provision read (emphasis added):

> 45. (1) Everyone who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[26] Ultimately ruled not to be void by the *Supreme Court in R. v Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36.

[27] Thomas W. Ross (1991), "Proposals for a New Canadian Competition Law on Conspiracy", *Antitrust Bulletin*, 851-882; Presley L. Warner & Michael J. Trebilcock (1993), "Rethinking Price-Fixing Law", 38 *McGill Law Journal*, 679-723 ("Warner & Trebilcock"); Tim Kennish & Thomas W. Ross (1997), "Toward a New Canadian Approach to Agreements Between Competitors", 28 *Canadian Business Law Journal,* 22-68 ("Kennish & Ross"); and Michael J. Trebilcock (2002-2003), "Reforming Section 45: Defining the Critical Issues", *Canadian Competition Record*, 34-37.

[28] See Trebilcock & Ducci *supra* note 20, at 186-190.

[29] It may be worth noting that the separate prohibitions against bid-rigging in Section 47 would not appear to obviously exclude buy-side bid rigging cartels.

[30] Some describe S. 90.1 as the joint venture or strategic alliance track. One of the goals of this reform was to provide more certainty to legitimate joint venture partners that they would not be subject to per se criminal sanctions because part of their broad agreement may have limited some competition between them. The ideas for a second track of this type were part of the proposals of Kennish and Ross (*supra* note 27) and Warner and Trebilcock (*supra* note 27).

[31] For a discussion and case citations see: Sergei Zaslavsky & Laura Kaufmann, "Buyer Cartel Doctrine: Lessons from Labor Antitrust" (29 June 2021), online: *CPI Antitrust Chronicle* <https://www.competitionpolicyinternational.com/buyer-cartel-doctrine-lessons-from-labor-antitrust/>.

[32] *United States v eBay, Inc*., 968 F. Supp.2d 1030 (N.D.Cal.2013). The suit was resolved by settlement in 2014, see online: <https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements>.

[33] See Federal Trade Commission, "Antitrust Guidance for Human Resource Professionals" (2016), Department of Justice, online: <https://www.justice.gov/atr/file/903511/download>. On this apparent shift in enforcement policy see Lisa M. Phelan, Joseph Charles Folio III & Hannah Elson, "Where have we been, and

where are we going? The criminal prosecution of buyer cartels" (29 June 2021), online: *CPI Antitrust Chronicle* <Where Have We Been, and Where Are We Going? The Criminal Prosecution of Buyer Cartel (mofo.com)>.

[34] National Law Review (20 April 2022), online: <https://www.natlawreview.com/article/doj-faces-two-strikeouts-first-health-care-wage-fixing-and-no-poach-prosecutions>.

[35] Vancouver Courier Staff, "Lawsuit Accuses Tim Hortons Parent Company of Unlawful 'No-Hire' Agreements, Suppressing Wages, *New Westminster Record*" (6 August 2019), online: *New Westminster Record* <https://www.newwestrecord.ca/local-news/lawsuit-accuses-tim-hortons-parent-company-of-unlawful-no-hire-agreements-supressing-wages-3104762>.

[36] See Steven Chase, "Grocery Chain Executives To Be Called to Testify on Pay Cuts for Store Employees" (18 June 2020), online: *Globe and Mail* <https://www.theglobeandmail.com/politics/article-grocery-chain-executives-to-be-called-to-testify-on-pay-cuts-for-store/>.

[37] Competition Bureau Press Release, "Competition Bureau Statement on the Application of the *Competition Act* to No-poaching, Wage-fixing and Other Buy-side Agreements" (27 November 2020), online: *Government of Canada, Competition Bureau Canada* <https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html>. This interpretation was subsequently confirmed by judicial decisions in *Mohr v National Hockey League* 2021 FC 488 and *Latifi v The TDL Group Corp* 2021 BCSC 2183.

[38] See Stepan Svoboda & Brigitta Renner-Loquenz, "Recent EU Developments in Buyer-Side Cartels", *CPI Antitrust Chronicle* (29 June 2021), online: *Competition Policy International* <https://www.competitionpolicyinternational.com/recent-eu-developments-in-buyer-side-cartels/> and C. Scott Hemphill & Nancy L. Rose, "Mergers that Harm Sellers" (2018) 127:2078 *Yale Law Journal*, 2077.

[39] See Peter Glossop, "A New Approach to Wage-Fixing and Anti-Poaching Employer Deals" (9 July 2021), online: *C.D. Howe Institute Intelligence Memo* <https://www.cdhowe.org/intelligence-memos/peter-glossop-%E2%80%93-new-approach-wage-fixing-and-anti-poaching-employer-deals>. However, it would be a mistake to say these views are unanimous, see Chris Margison & Robin Spillette, "No-Poach and Wage-Fixing Agreements in Canada—So What's the Issue?" (29 March 2021), online: *CPI Columns—Cartels* <https://www.competitionpolicyinternational.com/no-poach-and-wage-fixing-agreements-in-canada-so-whats-the-issue/>, who argue for the consideration of effects in such cases.

[40] In the Commentary on his consultation (*supra* note 9 at p. 6) Senator Wetston reports that there was broad agreement on the need to have S. 45 cover at least wage-fixing to make it per se illegal and criminal conduct. He indicates there was less consensus with respect to other buyer-side agreements.

[41] Admittedly, the buying group could in principle still be vulnerable to private actions for damages. Also, while it may be appropriate to use discretion in the

application of a per se rule when the agreement at issue is almost certainly to have negative effects even if they might be *de minimus*, we might be uncomfortable relying on discretion when the agreement might actually have positive effects on total surplus.

[42] This defence could remove them from consideration under S. 45 but not S. 90.1 where effects would be assessed.

[43] *Supra*, note 6.

[44] Note that proposed amendments to S.45(4)—the ancillary restraints defence—will extend the defence to the proposed new wage-fixing offences. On the American experience, see Gregory Asciolla and Jonathan Crevier "'Welcome to McDonald's: May I Take Your Cashier?'—A Review of Recent Franchise No-Poach Class Action Lawsuits"(2022), online: *CPI Antitrust Chronicle* <https://www.competitionpolicyinternational.com/welcome-to-mcdonaldsmay-i-take-your-cashier-a-review-of-recent-franchise-no-poach-class-action-lawsuits/>. With respect to a pair of class actions, the authors report "the courts found that per se treatment was still improper, however, because the agreements were not 'naked' agreements not to hire. Instead the agreements were ancillary to legitimate franchise agreements …"

[45] See Andreas Stephan, "Four Key Challenges to the Successful Criminalization of Cartel Laws" (2014), 2 *Journal of Antirust Enforcement*, 333.

[46] For example, while the U.S. Department of Justice Antitrust Division generally proceeds criminally in cartel cases, it has taken the civil option in some high-profile complicated cases, for example the Airline Tariff Publishing Company (ATPCO) case, finally settled in 1994 (*United States v Airline Tariff Publishing Co*, 836 F. Supp. 9 (D.D.C. 1993) as well as the Apple e-book case: *United States v Apple Inc.* 952 F. Supp 2d 638 (S.D.N.Y. 2013). Before the very recent criminal wage-fixing and non-poaching cases discussed above, the Department would typically take such cases on a civil basis. See the non-poaching case involving tech firms in Silicon Valley United States of America *US Department of Justice Anttrust Division v Adobe Systems, Inc et al* 2010. By contrast, in Australia and New Zealand, the criminal provisions were added relatively recently (2009 and 2019) so most cases have been conducted under the civil provisions. In Australia, criminal sanctions are to be reserved for cases of "Serious Cartel Conduct" as explained in "Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct" (15 August 2014), online: <https://www.cdpp.gov.au/sites/default/files/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.

[47] For example, a group of small merchants or non-profit organizations.

[48] Competition Bureau, "Misleading Representations and Deceptive Marketing Practices" online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04459.html>. The Bureau explains how it chooses between tracks at Competition Bureau "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*" (1999), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html>.

[49] See also the case of retail gasoline pricing in Perth, Australia studied in David P. Byrne & Nicolas De Roos, "Learning to Coordinate: A Study in Retail Gasoline" (2019) 109 *American Economic Review* 591-619. While these are still relatively early days, concerns have been raised about the potential for uncompetitive pricing to result from the adoption of pricing algorithms powered by artificial intelligence. See Emilio Calvano, Giacomo Calzolari & Vincenzo Denicolò *et al*, "Artificial Intelligence, Algorithmic Pricing and Collusion" (2020) 110 *American Economic Review*, 3267-3297. If the pricing software is adopted through unilateral decision-making by sellers, it is not clear it could be called an "agreement".

[50] EU: *Treaty for the Functioning of the European Union* (TFEU), Article 101; UK: *Competition Act*, 1998, Section 2; South Africa: *Competition Act* of 1998, Section 4(1). Under Section 1 of the South African law, it offers the definition: "A 'concerted practice' means co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement". Australia recently amended its *Competition and Consumer Act 2010*, to add concerted practices to its cartel provisions at Section 45(1)(c). An explanatory memorandum to the amendment bill defined a concerted practice to be: "any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition." See Australian Competition and Consumer Commission, "Guidelines on concerted practices" (2018), online: <https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Concerted%20Practices.pdf>.

[51] As Section 36 now stands, agreements challenged by the Bureau under new civil provisions would not provide the same right of follow-on action for private plaintiffs. This could lead defendants to push heavily to have their case moved to the civil track to protect themselves from private actions and in so doing may offer up whatever the Commissioner wants in settlement. This could possibly be addressed with a clear set of guidelines indicating the conditions under which the Bureau would take the civil vs criminal tracks. Rights to press damage claims could be restored to private plaintiffs by granting them access to the Tribunal (and the Tribunal the authority to award damages) along this civil track, as well.

[52] Former Commissioner Pecman has offered a very similar suggestion, see Pecman *supra*, note 16.

[53] This idea borrows from the two-track proposal for all of S. 45 put forward by Warner and Trebilcock (*supra*, note 27) in which any agreement that is public would be exempt from the per se criminal track but would instead move to civil review. In a related way, the prohibition on big rigging in S. 47(1) does not apply if the agreement among bidders is made known to the party calling for the bids.

[54] Some of these practices were criminal under the 1986 Act, but they are all now part of the civil provisions. As these practices are likely to have the negative effects of concern in situations of dominance (including joint dominance) it would probably make sense to consider moving them into the abuse of dominance sections. This has also been suggested by Trebilcock and Ducci, *supra*, note 20.

[55] Iacobucci, *supra*, note 8 also discusses the odd relationship between these two subsections.

[56] The discussion here will be brief as the topic has been well-discussed. See Edward Iacobucci & Ralph A. Winter, "Abuse of Joint Dominance in Canadian Competition Policy" (2010) 60 *University of Toronto Law Journal*, 219-237; Ralph A. Winter, "The Gap in Canadian Competition Law Following Canada Pipe" (2014) 27 *Canadian Competition Law Review*, 293-322; and Michael Trebilcock, "Abuse of Dominance: A Critique of Canada Pipe" (2007) 22 *Canadian Competition Record*, 1-13.

[57] *Canada (Director of Investigation and Research) v NutraSweet Co* No. CT-89/2 (Comp. Trib. Oct. 4, 1990) at para 34.

[58] *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 F.C.R. 233. The author served as an expert witness for the Commissioner in this matter. Interestingly, the decision expresses this view despite the fact that one of the listed examples in Section 78(1)(f) "buying up of products to prevent the erosion of existing price levels"—does not have a negative effect on a competitor, a point made by Iacobucci, *supra* note 8 among others.

[59] Recall that the sections on refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction all require a negative effect on competition.

[60] *Supra*, note 56. The classic reference on such facilitating practices is Steven C. Salop (1986), "Practices that (Credibly) Facilitate Oligopoly Coordination" in Joseph E. Stiglitz & G. Frank Mathewson, eds., *New Developments in the Analysis of Market Structure* 265. While, in principle, it might seem that facilitating practices might be reached as illegal agreements under the criminal provision of Section 45, as Iacobucci and Winter point out, the case law has ruled that out by requiring an explicit agreement.

[61] See *CPI Antitrust Chronicle* (2022) issue which featured a number of columns on nascent competition, online: <https://www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2022/winter-2022-february-volume-1/>. See C. Scott Hemphill and Tim Wu "Nascent Competitors" (2020) *University of Pennsylvania Law Review* 168 1879-1910, online: <https://ssrn.com/abstract=3624058>. Particular concerns have been raised about so-called "killer acquisitions" in which a small firm is acquired by a dominant firm expressly for the purpose of shutting it down. Some evidence in support of the existence of such mergers in non-trivial numbers came in Colleen Cunningham, Florian Ederer & Song Ma, "Killer Acquisitions" (2021) 129 *Journal of Political Economy*, 649–702.

[62] Of course, there may also be ways of amending the merger provisions to make it easier to establish a lessening of competition through a series of mergers.

[63] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, [1992] 40 C.P.R.3d 289 (Comp. Trib.). ("*Laidlaw*")

[64] *Canada Pipe*, *supra* note 58.

[65] Both Professor Iacobucci, *supra* note 8, and the Competition Bureau, *supra* note 16, (at Recommendation 3.1) recommend such a change. Senator Wetston, *supra* note 9, noted this as one of the areas with substantial consensus in his consultation.

[66] A further amendment in the *BIA 2022* adds a new item to the list of examples of anticompetitive acts in S. 78: "(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." Such conduct, targeting effects on competitors, may be pro-efficient competitive responses to entry—something to be encouraged.

[67] With the changes of Recommendation 3 implemented, it might also be possible to reach "concerted practices" through a joint dominance action. We may not have enough case experience, however, to tell us how the Tribunal and courts will view arguments about joint dominance.

[68] These private rights to damages are provided for in Section 36 of the Act. For some of the history here, see J.J. Camp, "A Historical Perspective of a Made-in-Canada Remedy for Anticompetitive Behaviour" (2018) 31 *Canadian Competition Law Review*, 85-99.

[69] *An Act to Amend the Competition Act and the Competition Tribunal Act*, SC 2002, c. 16, s.3.

[70] These rights are now established in Section 103.1(1) of the Act.

[71] "(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7)."

[72] See, for example, Iacobucci, *supra* note 8, and David Vaillancourt, "A Private Right of Action For Abuse of Dominance"(26 April 2021), online: C.D. Howe Intelligence Memo <https://www.cdhowe.org/intelligence-memos/david-vaillancourt-%E2%80%93-private-right-action-abuse-dominance>. There have been voices urging caution against too great an expansion of private rights in the competition domain—particularly if they can be used as competitor weapons, for example by impeding rivals' attempts to merge for efficiency or to forge strategic alliances. See Tim Brennan, "Private Actions in Competition Law: Cautionary Notes from South of the Border" (9 March 2022), online at: C.D. Howe Intelligence Memos <https://www.cdhowe.org/sites/default/files/2022-03/IM_Brennan_2022_0309%20new.pdf>.

[73] Bureau, *supra* note 16, (section 3.4).

[74] Ibid.

[75] A number of submissions supporting access are not clear about whether they would empower the Tribunal to award damages. See, e.g. Bureau, *supra* note 16. For a positive assessment of the experience with private enforcement in the U.S., see, e.g. R. Lande and J. Davis (2008), "Benefits from Private Antitrust Enforcement: An Analysis of 40 Cases", 42 *U of San Francisco Law Review*, 879-918.

[76] "Providing a well-designed right of access to private enforcers to redress the harm they have suffered from past anticompetitive conduct or to restrain ongoing anticompetitive conduct vindicates in our view another legitimate facet of fairness concerns in the enforcement of competition laws." Francesco Ducci & Michael Trebilcock (2019), "The Revival of Fairness Discourse in Competition Policy", 64 *Antitrust Bulletin*, 79-104, at p. 102.

[77] Admittedly, most of the commentary on expanded access and damages has

focused on abuse of dominance. I see no reason not to extend the Tribunal's power to award damages to cover these other sections. Notice, however, that this is not recommending private access (or damage awards) for mergers or competitor collaborations. Trebilcock and Ducci also recommend private access and compensatory relief under Sections 75, 76, 77 and 79, *supra* note 20 at p. 184.

[78] As noted above, *supra* note 20, some have argued that the Tribunal should be eliminated with its functions transferred to the regular court system.

[79] See Thomas W. Ross (1998), "Introduction: The Evolution of Competition Law in Canada", 13 *Review of Industrial Organization*, 1-23.

[80] While technically an "exception," this is often referred to as the "efficiency defence". Canada is often said to be the most efficiency friendly jurisdiction with respect to merger review and that this makes us an unfortunate outlier. See, e.g. Bureau, *supra* note 16 at Sec 2.1. For a somewhat contrary view, that other jurisdictions are taking efficiencies more seriously and are therefore moving at least partially toward the Canadian model, see Lawrence P. Schwartz (2020), "Is the Rest of the World Moving Toward the Canadian Approach to Efficiency in Competition Policy", 33 *Canadian Competition Law Review*, 136-143.

[81] Of course, this is not really total welfare in as much as other parties besides the merging firms and their customers might be affected, for example, suppliers (including workers), competitors and producers of complementary products. Many economists have supported a total welfare standard. See Lawrence P. Schwartz (1992), "The 'Price Standard' or the 'Efficiency Standard'? Comments on the Hillsdown Decision", *Canadian Competition Policy Record*, 42-47, and the submissions by Professors Church <https://colindeacon.ca/media/50733/church.pdf> and Ware <https://colindeacon.ca/media/50747/ware.pdf> to Senator Wetston's consultation, *supra* note 7.

[82] See, for example, Donald G. McFetridge (1998), "Merger Enforcement under the *Competition Act* after Ten Years", 13 *Review of Industrial Organization*, 25-56 (1998). See also Thomas W. Ross and Ralph A. Winter, "Canadian Merger Policy Following *Superior Propane*"(2003) 21 *Canadian Competition Record*, 7-23 ("Ross and Winter") and the many articles cited therein.

[83] While most cases would likely be decided the same way using either standard (merger efficiencies rarely being pivotal) there certainly are cases in which the decisions would differ—the *Superior Propane* and *Tervita* cases (see below), most obviously. In its submission to the Consultation, the Bureau offered another example: "In Superior Plus Corporation's proposed acquisition of Canexus Corporation, the Bureau concluded efficiency gains would be clearly greater than the likely significant anticompetitive effects of the transaction and cleared the transaction. Meanwhile, the U.S. Federal Trade Commission challenged the transaction because of competitive concerns." Bureau, *supra* note 16 at endnote 20.

[84] While there was discussion on the appropriate goals of competition policy in some of the submissions to his consultation, including that by Professor Iacobucci, *supra* note 8, Senator Wetston listed this topic as an area without

consensus: "There was no consensus on the basic question of what the Act should strive to achieve." Wetston, *supra* note 9 at 7.

[85] *Canada v Superior Propane Inc*, 2003 FCA 53, [2003] 3 FC 52. See also Ross and Winter, *supra* note 82, and Thomas W. Ross and Ralph A. Winter (2005), "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments", 72 *Antitrust Law Journal* 471–503.

[86] Somewhat ironically, the deadweight loss was mis-measured and, had it been properly measured, the merger might have been blocked without any need to consider negative redistribution effects. See G. Frank Mathewson and Ralph A. Winter (2000), "The Analysis of Efficiencies in *Superior Propane*: Correct Criterion Incorrectly Applied", 20 *Canadian Competition Record*, 88-97.

[87] For example, s. 1.1 also mentions expanding "opportunities for Canadian participation in world markets"—could this mean the Tribunal needs to listen with sympathy to arguments about building Canadian monopolies to be "national champions"? The purpose clause also mentions ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy"—could this mean that the Tribunal should block mergers that might create a large efficient firm that less efficient SMEs would have trouble competing against?

[88] This is a major concern discussed in, for example, Iacobucci, *supra* note 8. To the credit of the Tribunal in *Superior Propane*, when instructed to consider distributional issues it looked to other social policies like taxation rates to attempt to infer social preferences rather than impose their own. See, Competition Tribunal (2002), "Reasons and Order Following the Reasons for Judgement of the Federal Court of Appeal" (4 April 2001), <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/464511/1/document.do> at paragraphs 110-113.

[89] *Tervita Corp v Canada*, 2015 SCC 3.

[90] Importantly, the Commissioner bears this burden before the parties have to prove any efficiency gains.

[91] See, e.g., Ralph A. Winter (2015), "*Tervita* and the Efficiency Defence in Canadian Merger Law", 28 *Canadian Competition Law Review*, 133-159 (offering "three general criticisms" of the *Tervita* standard) and Thomas W. Ross (2016), "Competitive Effects and Efficiencies: The Canadian Supreme Court's Decision in *Tervita*", 2 *Competition Law & Policy Debate*, 54-63. Importantly, however, *Tervita* did reinforce two aspects of the *Superior Propane* decision that were important. It recognized that it is ultimately the welfare of market agents (in this case buyers and sellers) that matters in merger review and that distributional issues would not be a concern in mergers upstream of final consumers (i.e. in which the buyers were themselves firms and not final consumers). If *Superior Propane* can be said to have left us close to a total surplus standard with occasional exceptions when facing strong distributional concerns, *Tervita* further confirmed this.

[92] It is worth noting, though perhaps obvious, that essentially all qualitative effects could in principle be quantified in the sense that a number could be put to them by an expert. But the important point is the resulting numbers may be little better than wild guesses deserving of little weight. Insisting on numbers when the

numbers are mere noise is not helpful. However, none of this is to suggest that the Commissioner should not attempt to provide quantitative evidence when such evidence can be produced at reliable quality.

[93] This is a suggestion of Iacobucci, *supra* note 8 at 33, for example. But it would be wrong to say that views are unanimous on this point. For example, the submission by the Blakes law firm to Senator Wetston's Consultation provides support for the efficiency exemption as it is and, specifically rejects an amendment to remove a requirement for the Commissioner to quantify quantifiable effects. Blakes, "Blakes Comments on the Examination of the Canadian *Competition Act* in the Digital Era" at <https://colindeacon.ca/media/50756/blakes-submission-re-examining-the-canadian-competition-act-in-the-digital-era.pdf>.

[94] Ross and Winter, *supra* note 82.

[95] This would appear to be, for example, the view of the Montreal Economic Institute in its submission to the Wetston Consultation: <https://colindeacon.ca/media/50744/rancourt.pdf>.

[96] For example, this is the view expressed in the submission to the Wetston Consultation by the Public Interest Advocacy Centre: <https://colindeacon.ca/media/50742/piac-comments-examining-the-canadian-competition-act-in-the-digital-era-final.pdf>. See also Peter Glossop, "Efficiency Defence: Let's Lose It", C.D. Howe Intelligence Memo (17 February 2022), <https://www.cdhowe.org/intelligence-memos/peter-glossop-efficiency-defence-lets-lose-it>.

[97] This is the view expressed by the Bureau in its submission to the Wetston Consultation, *supra* note 16. (Recommendation 2.1).

[98] Matthew Chiasson and Paul A. Johnson (2019), "Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation", 32 *Canadian Competition Law Review*, 1-32. The Bureau's merger enforcement guidelines define X-inefficiency in footnote 69: "'X-inefficiency' typically refers to the difference between the maximum (or theoretical) productive efficiency achievable by a firm and actual productive efficiency attained." The theory, reviewed by Chiasson and Johnson and originated by Leibenstein, is that firms that face less intense competition will, over time, tend to become less efficient than they would have been were they facing intense competition. See Harvey Leibenstein (1966), "Allocative Efficiency vs. 'X-Efficiency'", 56 *American Economic Review*, 392–415. On how this can work in a merger context see, e.g., Jean-Etienne de Bettignies and Thomas W. Ross (2013), "Mergers, Agency Costs, and Social Welfare", 30 *Journal of Law, Economics and Organization*, 401–436.

[99] For a response to Chiasson and Johnson expressing a contrary view about the efficiency defence, see Brian A. Facey and David Dueck (2019), "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm than Good for Economic Efficiency and Innovation", 32 *Canadian Competition Law Review*, 33-62.

[100] See Carl Shapiro, "Competition and Innovation: Did Arrow hit the Bull's Eye?" (2012) Chapter 7 in J. Lerner and S. Stern (eds), *The Rate and Direction of Inventive Activity Revisited*, U. of Chicago Press, 361-410.

[101] For a discussion of the different results appearing in the literature, see Richard J. Gilbert, "Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate." (2006) in A. Jaffe, J. Lerner and S. Stern (eds), *Innovation Policy and the Economy*, vol. 6, Chicago: University of Chicago Press, 159-215. Also, Richard J. Gilbert, "Competition and Innovation" (2006) 1 *Journal of Industrial Organization Education*, article 8.

[102] Related is research showing significant price increases following reviewed mergers, in some cases even after remedies were imposed. See the sources cited below.

[103] Nancy L. Rose and Jonathan Sallett (2020), "The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right", 168 *University of Pennsylvania Law Review*, 1941-1984. See particularly 1961-1967.

[104] See McKinsey & Co, "Most mergers are doomed from the beginning. Anyone who has researched merger success rates knows that roughly 70 percent of mergers fail." McKinsey & Co. *Perspectives on Merger Integration* (2010) at 11, online: <https://perma.cc/TC7U-VJ7U>. In the merger retrospective studies, a result the prices increased post-merger is at least an indication that the efficiencies were not sufficient to overcome the anticompetitive effects. John Kwoka has performed a meta-analysis of horizontal merger retrospectives, reviewing more than 200 studies. He finds evidence of higher post-merger prices in a large fraction of cases. John Kwoka (2015), *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*. An important example of work in the 1970s was Dennis Mueller's use of the FTC's 1974-77 manufacturing Line of Business database to study the performance of firms post-merger: Dennis C. Mueller, "Mergers and Market Share" (1985) 67 *Review of Economics and Statistics*, 259-267. More recent work has taken a "production function" approach to assess the efficiency gains post-merger. Some of this work, e.g., by Blonigen and Pierce find evidence of higher markups post-merger but no evidence of productivity gains. Bruce A. Blonigen and Justin R. Pierce, "Evidence for the Effects of Mergers on Market Power and Efficiency" (2016) *National Bureau of Economic Research Working Paper 2750*, online: <https://www.nber.org/papers/w22750>. See also the extensive discussion, and numerous references, in Herbert Hovenkamp, "Appraising Merger Efficiencies" (2017) 24 George Mason Law Review, 703–741

[105] A similar view has recently been expressed by the Chief Economist of the European Commission's DG Competition: "Interview with Pierre Regibeau, Chief Economist, Directorate-General for Competition, European Commission, Brussels" 36 *Antitrust*, Fall 2021, p. 45.

[106] As noted by many others, one of the original motivations for the inclusion of the efficiency exemption derived from the view, in the 1980s, that Canadian firms had to get bigger to compete internationally. The Bureau speaks to this in Bureau, *supra* note 16 at section 2.1. It is also important to recognize that the large studies of largely unchallenged mergers (and their apparent lack of success at achieving efficiencies) may not speak so directly to the likelihood that efficiencies argued and tested in an actual case before the Tribunal will be realized.

[107] Joseph Farrell & Michael L. Katz, "The Economics of Welfare Standards

in Antitrust", 2 *Competition Policy International* (Autumn) (2006) 3-28; and Russell Pittman, "Consumer Surplus as the Appropriate Standard for Antitrust Enforcement" (2007) 3 *Competition Policy International* (Autumn) 205-224. Both papers also discuss related research suggesting that the welfare standard adopted for merger review will influence the types of mergers firms propose, with the implication that a consumer welfare standard may result in more total welfare enhancing mergers being proposed. These two papers take different views as to the appropriate overarching welfare standard with Farrell and Shapiro supporting a total surplus standard (though not necessarily for a merger decision rule) and Pittman more sympathetic to income distribution effects and more completely embracing a consumer surplus standard at least for merger review.

[108] Pittman, *supra* note 106 at 210.

[109] Though the issue was highlighted many years ago in Stephen F. Ross, "Afterward: Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So the World Can Be More Efficient" (1997) 65 *Antitrust Law Journal*, 641-652. There has also been some judicial discussion of the point, see Director of Investigation and *Research v Hillsdown Holdings (Canada) Ltd*, 1992 41 C.P.R. 3rd 289 (in Section VI); *Commissioner of Competition v Superior Propane Inc*, 2002 Comp. Trib. 16 (paras 192-198) and *Commissioner of Competition v CCS Corporation et al*, 2012 Comp. Trib. 14 (at para 262).

[110] Statistics Canada reports on the share of assets under Canadian control vs under foreign control by sector. These are not exactly ownership shares but they tell us something. For example, the share of assets was under 10% in insurance, education, utilities, agriculture, forestry, fishing and hunting industries. This can be compared to the value of share of assets between 40-60% in oil and gas, manufacturing, wholesale trade and non-depository credit intermediation (Statistics Canada, "Foreign-controlled enterprises in Canada, by financial characteristics and industry" Table 33-10-0033-01, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3310003301>.)

[111] To be clear, none of this is to recommend a system in which we weight domestic and foreign surpluses differently in a case-by-case way—even if one wanted to, the practical challenges associated with determining the "residence" of consumer and/or producer surpluses would likely be overwhelming. Such an approach may also violate Canadian "national treatment" obligations under various international trade agreements.

[112] See, e.g. Michael Trebilcock and Ralph A. Winter, "The State of Efficiencies in Canadian Merger Policy" (2000) 19 *Canadian Competition Record*, 106-11. Also, Trebilcock, Winter, Collins and Iacobucci, *supra* note 12 at 40: "Competition policy is appropriately viewed as an instrument to maximize efficiency or 'total surplus' gained by market participants." The history of the efficiency provisions is detailed in a "Subsequent Submission" to the Wetston Consultation by Calvin Goldman, Richard Taylor, Nicholas Cartel and Larry Schwartz (2022) available at: <https://colindeacon.ca/media/50914/proposed-revision-of-the-efficiency-defenceoverviewsgoldmantaylorschwartzcartelapril62022as-submitted.pdf>, with appendices at <https://colindeacon.ca/media/50915/

appendices-to-submission-for-senator-wetstonapril62022as-submitted-7-1.pdf>. As they explain (Appendix I, p. 5), the Bureau embraced the total surplus standard in its first Merger Enforcement Guidelines in 1991. Another recent contribution is. Brian A. Facey, Navin Joneja and David Dueck, "Efficiencies Exception: Let's Keep It", C.D. Howe Intelligence Memo (17 February 2022) <https://www.cdhowe.org/intelligence-memos/facey-joneja-dueck-efficiencies-exception-lets-keep-it>.

[113] Again, to the extent that reliable estimates can be provided, the Commissioner should be encouraged to quantify effects in an efficiency defense case in order to facilitate the necessary trade-off analysis. The objection here is to the placing of zero weight on qualitive evidence if the Tribunal comes to the view that quantitative evidence could have been provided.

[114] To be clear, because there has been some confusion about the term, by "consumer welfare" here I am referring essentially to consumer surplus. In most cases this test can be viewed as a "price standard", i.e. if price is expected to rise the merger would not be allowed. In some cases, however, there may be non-price dimensions that affect consumer well-being—for example if a retail merger reduced the number of stores, inconvenienced consumers may be harmed—and their consumer surplus lowered—even with no price effect. In such a case the merger would fail the consumer welfare test and be blocked.

[115] In light of concerns about mergers adding to market power on the buying side of the market (e.g. See Hemphill and Rose, *supra* note 38), "consumer welfare" in this could be broadened to capture harms to sellers, e.g. perhaps replacing "consumer welfare" with "trading parties' welfare".

[116] The result would then be like the European system which allows the Commission to approve an anticompetitive merger if there are efficiencies such that consumers are not harmed. See, "Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings", *Official Journal of the European Union* (2004/C 31/03) at Section VII, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN>. It appears that the European guidelines still muddy the distinction between anticompetitive effects and efficiencies.

[117] This is the Bureau's suggestion in its submission. Bureau, *supra* note 16 at Recommendation 2.1.

[118] Of course, we could adapt the way other jurisdictions have -- when faced with mergers that hurt competition but yield such efficiencies that prices do not rise -- by applying the efficiency factor to say that competition was not reduced in law (even if margins went up and even if it was a merger to monopoly). As explained, this muddies the distinction between efficiencies and anticompetitive effects.

[119] A footnote adds that market studies go by other terms in some jurisdictions, such as market inquiries, sector inquiries, fact-finding inquiries or general studies (OECD, "*Market Studies Guide for Competition Authorities*" (2018), online: <www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm>.)("OECD").

[120] Francesco Naismith & Baethan Mullen, "Market Studies: Making all

the Difference?" (2022) CPI Columns, Oceania, online: <https://www.competitionpolicyinternational.com/market-studies-making-all-the-difference/>.

[121] See, e.g. OECD, "The Role of Market Studies as a Tool to Promote Competition: Background Note by the Secretariat" (2016), DAF/COMP/GF(2016)4, available at: <https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf>. A great deal of information on market studies can be found on the OECD's "Market Studies and Competition" website at: <https://www.oecd.org/daf/competition/market-studies-and-competition.htm>. For example, the OECD has produced a booklet: OECD, "*Market Studies Guide for Competition Authorities*", available at: <https://www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm>.

[122] Pecman, *supra* note 16 (endnote 6) lists a number of studies conducted by the Bureau, into, e.g., the generic drug sector, certain professions, a follow-on study of dentistry, ride-sharing and fintech.

[123] Bureau Submission, *supra* note 16 at Section 7.

[124] Ibid.

[125] The Competition and Markets Authority ("CMA") in the UK, for example. Competition and Markets Authority, "*Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach*" (2017), online at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf>.

[126] OECD, "Market Studies: The Results of an OECD Survey: Note by the Secretariat" (20 November 2015) online: <https://one.oecd.org/document/DAF/COMP(2015)7/en/pdf>.

[127] Former Commissioner Pecman: "Formal market study powers backed by the ability to compel information would allow the Bureau to study issues that currently cause substantial harm to Canadian consumers." *supra* note 16 at p. 39. In its submission to the Wetston Consultation, the Bureau discusses some market study successes in other jurisdictions as well as its own fintech study. It goes on to make two amendment recommendations: (i) the Bureau should have the power to compel the production of information relevant to market studies; and (ii) when implicated by a market study, regulators and other government officials should be required to respond to Bureau recommendations within a certain period of time. *Supra* note 16 Recommendations 7.1 and 7.2 in section 7. In its final report commissioned by the Government of Canada, the Competition Policy Review Panel also noted the "gap" created by not having a research body to conduct market studies, though it preferred the powers to conduct such studies be vested in a new specialized institution. Competition Policy Review Panel, "*Compete to Win, Final Report June 2008*" (2008) at 60, online: <https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008-1E.pdf>.

[128] On the activities of the Restrictive Trade Practices Commission, see J. J. Quinlan, "The Restrictive Trade Practices Commission: Its Functions and Duties" (1975) 44 *Antitrust Law Journal*, 492-507.

[129] See, e.g., J. Wm. Morrow, "The Petroleum Inquiry Report: Its Current Implications" (1986) 7 *Canadian Competition Policy Record*, 48-58.

[130] Naismith and Mullen, *supra* note 118 at 5. Of note is that the ACCC does not have access to compulsory information-gathering powers where it has self-initiated a market study, but it does have those powers for price inquiries (p.3).
[131] Commerce Commission New Zealand, "Market Studies", online: <https://comcom.govt.nz/about-us/our-role/competition-studies>. See also, Mark Berry, "Market Studies Arrive in New Zealand: First Learnings from the Retail Fuel Sector Study" (2020) CPI Oceana Column, online: <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/02/Oceania-Column-February-2020-Full.pdf>.
[132] OECD, *supra* note 119 at 18-19, and CMA, *supra* note 125.
[133] OECD, "Using Market Studies to Tackle Emerging Competition Issues: Contribution from the United States" (2020), DAF/COMP/GF/WD(2020)37, online: <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/market_studies_us.pdf>.
[134] Alison Jones & William F. Kovacic, "The Institutions of Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms" (29 June 2020) 30 online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3619095>. For a contrary view, see Christine S. Wilson and Pallavi Guniganti, "FTC Fit to Its Purpose: Responding to Kovacic's Market Investigation Proposal" (27 October 2020) *CPI Antitrust Chronicle* at 3. <https://www.competitionpolicyinternational.com/ftc-fit-to-its-purpose-responding-to-kovacics-market-investigation-proposal/>.
[135] For a general discussion of Senator Klobuchar's proposal see: <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>. The draft bill can be found here: <https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf>.
[136] See *supra*, note 13.
[137] This was Professor Iacobucci's general view, for example, though he did recommend some relatively minor changes to accommodate tech-related challenges. Iacobucci, *supra* note 8. See also Anthony Niblett and Daniel Sokol (2021), *supra* note 21.
[138] See, for example, Massimo Motta, Martin Peitz and Heike Schweitzer, "Market Investigations in the EU: A Road Map" (2022) Chapter 1 in M. Motta, M. Peitz and H. Schweitzer (2022) (eds), *Market Investigations: A New Competition Tool for Europe?* 1–15, as well as Gregory S. Crawford, Patrick Rey & Monika Schnitzer, "An Economic Evaluation of the EC's Proposed 'New Competition Tool'"(16 October 2020), Publications Office of the European Union, online: <Letter (europa.eu)>.
[139] OECD, "Economic Surveys: Canada Overview" (2021), online: <https://www.oecd.org/economy/surveys/Canada-2021-OECD-economic-survey-overview.pdf>.
[140] Another discussion of the potential benefits and challenges associated with a

market studies regime is found in Amelia Fletcher, "Market Investigations for Digital Platforms: Panacea or Complement?" (2022), Chapter 8 in M. Motta, M. Peitz and H. Schweitzer (2022) (eds), *Market Investigations: A New Competition Tool for Europe?*, 352-380. Gregory S. Crawford, Patrick Rey & Monika Schnitzer (2022), *supra* note 136, also consider important design issues for a market studies regime, in particular at their Recommendation 7.

[141] South Africa is another jurisdiction with positive experience conducting market studies, particularly since 2013. The country has also recently revised, and strengthened, the market studies provisions in its *Competition Act*. See, e.g. Tembinkosi Bonakele, Reena Das Nair & Simon Roberts, "Market Inquiries in South Africa: Meeting Big Expectations?" (2022) Chapter 6 in M. Motta, M. Peitz & H. Schweitzer (2022) (eds), *Market Investigations: A New Competition Tool for Europe?*, 291–319.

[142] While the inclusion of those few amendments contained in the *BIA 2022* (*supra* note 6) has probably served as a positive signal of government's seriousness with respect to competition policy reform—a case could be made that these changes (which were not completely non-controversial) should have waited to be part of the fuller discussion.