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CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

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BACK TO THE FUTURE: MODERNIZING CANADA'S MONOPOLIZATION LAW

W. Michael G. Osborne MStJ FCIArb[1]

Since 2002, Canada's abuse of dominance law has been moving from the "conduct-effects-remedy" paradigm, established in the 1986 Act, to a "contravention-punishment" paradigm. The conduct-effects-remedy paradigm focuses on finding a remedy where conduct by a firm has anti-competitive effects. By contrast, the contravention-punishment paradigm seeks to punish firms that contravene rules, and thereby deter other firms from contravening those same rules.

The increased administrative monetary penalties enacted in 2022 and proposals to allow damages actions move Canada further down the road to the contravention-punishment paradigm. But this model may not just deter abuse of dominance; it risks also deterring aggressive competition and thus making Canada's economy less, not more, competitive.

This paper argues that we should return to the conduct-effects-remedy model of the 1986 Competition Act. Then, in order to realize the goal of providing a remedy for conduct that harms competition, section 79 should be broadened to include conduct that causes harm because it is widespread in a market, even if no one firm enjoys the requisite degree of market power.

Depuis 2022, le droit canadien sur l'abus de position dominante est passé d'un paradigme « comportement-effet-réparation », établi dans la loi de 1986, à un paradigme « contravention-peine ». Le paradigme « comportement-effet-réparation » s'efforce de trouver une réparation lorsque le comportement d'une entreprise à des effets anticoncurrentiels. En revanche, le paradigme « contravention-peine » cherche à châtier des entreprises qui contreviennent aux règles, donc à dissuader d'autres entreprises de contrevenir à ces mêmes règles.

Les sanctions administratives pécuniaires accrues établies en 2022 et la proposition de permettre des actions en dommages et intérêts font avancer le Canada sur la voie du paradigme « contravention-peine ». Toutefois, il est possible que ce modèle ne fasse pas que dissuader l'abus de position dominante. Il risque aussi de dissuader la concurrence agressive et par le fait même de rendre l'économie canadienne moins concurrentielle, et non le contraire.

L'auteur soutient que nous devrions revenir au modèle « comportement-effet-réparation » de la Loi sur la concurrence de 1986. Ainsi, pour atteindre

l'objectif d'accorder une réparation pour un comportement qui nuit à la concurrence, l'article 79 devrait être élargi pour inclure tout comportement qui cause préjudice, car il s'agit de quelque chose de courant dans un marché, même si aucune entreprise en particulier ne détient le niveau de puissance commerciale requis.

1. Introduction

Canada's 1986 *Competition Act*[2] was hailed as the most economically literate competition law in the world.[3] In the forty years since its enactment, there have been a number of incremental changes to the Act, but the basic framework established in 1986 remains in place today.

That basic framework is relatively simple: price fixing conspiracies are treated as criminal offences, while mergers and other competitive practices are presumptively lawful, and subject to intervention when they harm competition.

That framework is under attack in various proposals made in response to the government's current consultation on reforms to the *Competition Act*, including proposals to allow class actions for damages caused by abuse of dominance made by my colleagues Julie Rosenthal, Adil Abdulla and Arash Rouhi in their article "Optimal Enforcement of Abuse of Dominance: The Case for a Private Cause of Action."

Indeed, since 2002, we have been moving from what I will call a "conduct-effects-remedy" paradigm, established in the 1986 Act, to what might be called a "contravention-punishment" paradigm. The conduct-effects-remedy paradigm focuses on finding a remedy where conduct by a firm has anti-competitive effects. By contrast, the contravention-punishment paradigm seeks to punish firms that contravene rules, and thereby deter other firms from contravening those same rules.

In this paper, I will argue that instead of going further down the road towards the contravention-punishment model, we should return to the insight behind the 1986 Act.

I begin with a history leading up to the 1986 Act and the subsequent shift away from the conduct-effects-remedy paradigm towards a contravention-punishment paradigm. I then discuss the problems associated with this contravention-punishment paradigm and address whether administrative monetary penalties are really needed to control anti-competitive conduct.

I then address the difficulties caused by the current focus on intention. Finally, I offer some thoughts on improvements to the *Competition Act's* abuse of dominance provisions.

2. A short history of abuse of dominance in Canada

A) 1986 and all that

The key feature of the modern *Competition Act* enacted in 1986 was the adoption of markedly different approaches to different competitive practices: conspiracies would continue to be dealt with through criminal prohibitions, while mergers and monopolies would be controlled through civil provisions whose focus was on remediation rather than punishment. The 1986 reforms were the product of over thirty years of discussion and several tentative steps towards reform.

It is worth briefly charting the path that led to this approach.

Before the 1986 reforms, the *Combines Investigation Act* (as the Act was then known),[4] contained a criminal prohibition on mergers and monopolies that operated "to the detriment or against the interest of the public, whether consumer, producers or others".[5]

Prosecutions under the mergers and monopolies offence were rare, and convictions rarer still.[6] The typical finding was that the Crown had not proven the detriment to the public element beyond a reasonable doubt.

The MacQuarrie Committee report, issued in 1952,[7] was perhaps the first attempt to apply modern economic thinking to competition law. This seminal report recognized the problem of single-firm monopolies. Its recommendations were enacted later that same year,[8] resulting in the creation of the post of Director of Investigation and Research (now, the Commissioner of Competition) and the Restrictive Trade Practices Commission. While the Director and the RTPC could now inquire into "monopolistic situations or restraint of trade", the substantive treatment of monopolies was essentially unchanged from the 1923 *Combines Investigation Act*.[9]

It was the Economic Council of Canada's ground-breaking *Interim Report on Competition Policy* that, in 1969, laid down the core principles of what became the 1986 *Competition Act*. Famously, the Economic Council recommended that "Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole".[10] This had nothing to do with creating Canadian champions that could compete on the world market while dominating the home market, as many

suppose today; rather, efficiency is an "economy-wide concept" that "poses the question of how well the economy is doing one of its basic jobs – that of allocating resources between different tasks, and in this way determining what goods and services get produced, how they are produced, and for whom they are produced".[11]

The Economic Council also recommended the structural bifurcation of competition law that is the hallmark of the 1986 Act. It recommended that collusive arrangements between competitors to fix prices, allocate markets, rig bids, and restrict entry or expansion should be subject to "essentially *per se* prohibition under criminal law". It also recommended retaining criminal prohibitions on resale price maintenance and misleading advertising.[12]

Mergers and monopolization, however, should be dealt with through the civil law, the Economic Council urged. It pointed to the "greater flexibility afforded by civil law" as being especially desirable "in those areas of the policy that do not lend themselves well to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices".[13]

The Economic Council said that it was "necessary" that a specialized tribunal should adjudicate mergers and monopolies cases, because these cases would require "difficult balancing judgments founded upon complex economic arguments and analyses".[14] The council expressed the hope that this tribunal's processes would be less formal than those of a court, and "devoid of any strong sense of crime and punishment".[15]

The council also stressed that the "philosophy of approach" to what are termed "restrictive trade practices"[16] in the 1986 Act should be essentially the same as for mergers. They should not be "treated as undesirable *per se*", but rather, "the presumption would be that while the practices could well be harmless or even beneficial to the public in some circumstances, they could be harmful in others". The tribunal would "examine cases where harmful effects were suspected and, upon finding that harm was indeed being done, to impose and/or recommend appropriate remedies".[17]

The council was emphatic on this point, adding that:

> *It should be re-emphasized that none of the above classes of practices would be an offence or be banned as such.* Only where there was reason to suppose that their use in a particular situation might be having a deleterious effect on the public interest would they become the subject of hearings by the tribunal. [Emphasis in original][18]

B) Conduct-effects-remedy paradigm

The 1986 *Competition Act* reflects exactly the philosophy of approach recommended by the Economic Council. Part VIII, entitled "Matters Reviewable by Tribunal" does not prohibit any conduct. To the contrary, all of the practices dealt with by Part VIII are presumptively lawful. A practice caught by this part only becomes unlawful once the Competition Tribunal has issued an order prohibiting it.[19]

This conduct-effects-remedy paradigm can be found in each of the unilateral conduct provisions in Part VIII (exclusive dealing, tied selling, market restriction, refusal to deal, resale price maintenance, and abuse of dominance). That is, in order to obtain a remedy, the Commissioner must show that conduct of the respondent is harming competition (or is likely to do so). Unless and until the Tribunal orders a remedy, the conduct is lawful, and an order from the Tribunal does not involve any declaration that the conduct was unlawful.[20] There are two different standards of harm to competition prescribed in this Part: the "substantial lessening or prevention of competition" standard applies to most of these provisions, while the lower "adverse effect on competition" was introduced in 2002 when the Act was amended to permit private applications for refusal to deal (section 75). This standard is also used in the civil resale price maintenance provision introduced in 2009 (section 76). The abuse of dominance provision (section 79) also has a threshold requirement of showing that the respondent enjoys market power.

The structure can be observed in section 79. Nothing in this provision contains any *ex-ante* prohibition; it provides that *if* the Tribunal finds that three requirements are met, it *may prohibit* the conduct:

> 79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> 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.[21]

This feature of Part VIII remains mostly intact today, despite what might be termed a creeping re-criminalization of monopolization that has been underway in Canada.

C) Creeping re-criminalization of unilateral conduct

The creeping re-criminalization of abuse of dominance began in 2002, when Parliament added "administrative monetary penalties" ("AMPs") to the remedies available under section 79.

The existence of a penalty is logically inconsistent with the idea that the conduct dealt with in section 79 is lawful until the Tribunal prohibits it. Nevertheless, the provisions enacting the AMPs did not change this structural feature.[22] Section 79 still does not contain any language prohibiting any conduct; it permits the Tribunal to prohibit the conduct going forward.

Indeed, the AMPs provisions[23] employ somewhat tortured language to avoid any suggestion that the conduct was unlawful before the Tribunal prohibited it. Thus AMPs are available "if the Tribunal makes an order … under subsection (1) or (2)"—there is no suggestion of a "breach", "violation", "contravention", or "infringement" of section 79. Similarly, a higher AMP, of $15 million, could be imposed "for each subsequent order"—a tortured way of avoiding saying "for each subsequent violation" or similar. Yet more contortions are found in the provision describing the purpose of AMPs; they are "to promote practices by that person that are in conformity with the purposes of this section and not to punish that person". Given that "punish" means "inflict a penalty", and that both words come from the Latin word for "pain" ("*poena*"), this assertion by the legislator defies common sense. It is possible that it was included to ensure that AMPs would not be characterized as having a "true penal consequence" that would trigger constitutional protections afforded a person charged with a criminal offence.. But other federal AMP schemes do not include a similar provision.[24] The best explanation for the linguistic gymnastics found in the AMP provisions is that Parliament wanted to avoid any suggestion that AMPs change section 79's structure to make abuse of dominance unlawful.

In Budget 2022, Parliament amended the AMP provisions to increase the maximum penalty to the greater of $10 million[25] and "three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues".[26]

In parallel with these changes, the Competition Bureau consistently uses language that suggests that conduct covered by section 79 is unlawful *before* the Tribunal has made an order. A recent example is the Bureau's press release announcing its recent settlement with Isologic, where the Bureau states that it "found that Isologic's contractual practices with certain customers *contravened* the abuse of dominance provisions of the Competition Act".[27] In another recent news release, about an inquiry into certain practices by Quebec Professional Association for Real Estate Brokers, the Bureau notes that its "investigation is ongoing and there is no conclusion of *wrongdoing* at this time".[28]

In its online guidance, the Bureau also claims that the *Competition Act* "says that a dominant entity can't abuse its dominance by using its market power in a way that hurts competitors or competition".[29] Of course, the Act says no such thing.

Indeed, this very issue was squarely before the British Columbia Supreme Court in *Novus Entertainment Inc.* Novus pleaded that Shaw engaged in abuse of dominance. In response to Shaw's motion to strike, Novus argued that the addition of AMPs changed the fundamental character of section 79.[30] Because the Tribunal can now impose a penalty for past conduct, that conduct is now unlawful when it occurs, Novus argued. The court disagreed, holding that the conduct is not unlawful until after the Tribunal makes an order:

> While the amendments have the effect of allowing the tribunal to consider a respondent's prior conduct in the determination of any monetary penalty it might impose under the Act, the Tribunal must first make an order under s. 79(1) that a respondent has engaged or is engaging in anti-competitive acts. Section 36 provides a person must fail to comply "with an order of the Tribunal" as a pre-requisite to suing for the recovery of loss or damage. The Tribunal has exclusive jurisdiction under the Act to make a determination whether conduct is anti-competitive. Until such determination is made by the Tribunal, it cannot be said a party's conduct is unlawful.[31]

The Bureau's mischaracterization of the nature of the abuse of dominance provision seem to be aimed at changing it from being purely remedial to one more along the traditional criminal lines of prohibited conduct followed by a penalty—a contravention-punishment paradigm. Of course, no one is proposing full re-criminalization of monopolization (in Canada, at least), presumably because that would re-impose the requirement of proof beyond a reasonable doubt. Instead, we now have the cakeist solution of immense fines imposed on the lower, civil standard of balance of probabilities.

3. Chilling competition

The question must therefore be asked: will moving from a conduct-effects-remedy paradigm to a contravention-punishment one increase competition or chill it?

A) The "puzzle of exclusionary conduct"

Competition authorities and academics have long recognized that over-enforcement of anti-monopolization provisions can have the perverse outcome of reducing competition. Why is that? Because competition is not a genteel game; it's a Darwinian contest among fierce rivals. It involves firms trying to beat their rivals and gain sales and market share at their expense.

This, in turn, makes it hard to distinguish aggressive competition on the merits (which we want) from anti-competitive conduct (which we don't want). Frank Easterbrook, a noted U.S. antitrust scholar and judge, described this as a "puzzle of exclusionary conduct":

> Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike.[32]

This reason this puzzle matters is that whenever a firm is penalized for aggressive competition on the merits, as opposed to truly anti-competitive conduct, then the very activity that competition law wants to promote is instead deterred.

The Bureau explicitly recognizes this in its *Abuse of Dominance Enforcement Guidelines*:

> When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is

> designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.[33]

These concerns may be even greater in digital markets and platforms, where dynamic competition can lead to "winner take all" outcomes, as the Bureau notes:

> The potential for enforcement action to chill dynamic competition in favour of increased static competition is an important consideration for the Bureau in determining whether to pursue an enforcement action, or even what remedy to pursue if enforcement action is warranted. Healthy dynamic competition may result in sequential "winner take all" competition for a market based on product quality or innovation, with the result that the successful firm acquires market power. Often, it is the prospect of market power that provides the incentive for firms to engage in dynamic competition. Focussing enforcement on static outcomes may result in longer term harm as it may undermine the incentives for firms to engage in beneficial dynamic competition, and caution must be exercised when intervening in fast-moving markets.[34]

The Competition Tribunal also expressed similar concerns in *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.*[35] There, the Tribunal was concerned that the lack of an objective test for identifying anti-competitive conduct could chill competition. The Director of Investigation and Research contended that Tele-Direct's response to competitive entry was "overwhelmingly aggressive". But trying to determine whether a response was overwhelmingly intense would be a "highly subjective exercise", and doing so could chill competition:

> What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (*e.g.*, price freezing or cutting, incentives, product improvements, increased advertising).[36]

The United States Department of Justice used to recognize this same principle. In its 2008 report on Section 2 of the Sherman Act, the Antitrust Division wrote: "The problem is not simply one that demands drawing fine lines separating different categories of conduct; often the same conduct can

both generate efficiencies and exclude competitors."[37] The Antitrust Division withdrew the report in 2009. The Federal Trade Commission, however, continues to recognize in its guidance that single-firm conduct can be pro- or anti-competitive depending on the circumstances.[38]

Indeed, nearly every kind of conduct that has given rise to monopolization cases can be pro-competitive in the right circumstances. Exclusive dealing, for example, can exclude rivals. But it can also ensure that the dealer provides good service to customers,[39] or that the dealer carries a full range of products. Tying and bundling can enable a firm to leverage dominance in one market to achieve market power in another market. But bundles, for example the quadruple play of cable TV, internet, phone, and mobile phone, benefit consumers immensely and give rise to competition among providers of bundles.[40]

B) Cloud of unknowing

The difficulties of distinguishing between pro- and anti-competitive conduct have important effects for a firm that is considering how to respond to competitors. It is often impossible for a firm to know for certain whether any proposed business practice could be the subject of an order under abuse of dominance provisions. Quite apart from the unfairness of imposing a punishment on someone for an infraction they could not know they were committing, this will cause some firms to pull their competitive punches—to compete less aggressively.

Indeed, a firm often cannot know for certain whether *any* of the three elements in the provision (dominance, anti-competitive conduct, or substantial lessening or prevention of competition) are met for any given proposed business practice.

First, a firm often cannot know for certain whether it has the "substantial degree of market power" required by paragraph 79(1)(a); "Market power is not an easy concept to handle".[41]

One way to assess market power is to look to high margins as evidence of supra-competitive pricing, and thus market power.[42] But this approach has only worked in two abuse of dominance cases (*Tele-Direct* and *Canada Pipe*), and one merger case (*CWS*).

Another way to determine the existence of market power is to look at market shares. High market shares coupled with barriers to entry can indicate the existence of market power.[43] However, while firms typically have a

general sense of position in the market, relatively few firms know for certain what their market share is. They do not, for obvious reasons, have access to data from their competitors that would enable them to determine this with precision. This difficulty is further compounded by the fact that there are a number of different ways to measure market share. For example, in the recent Rogers-Shaw merger case, there was a live debate among the economists (and the parties) as to whether market share should be measured by share of subscribers or share of gross adds (new subscribers gained over a period of time).[44] Other ways to measure market share include dollar sales, unit sales, capacity, and, for natural resources, reserves.[45]

Paradoxically, the firms best able to identify that they have market power are those that control an essential facility. Firms in that position will be well aware that they have the power to exclude rivals. Yet refusing to share an essential facility is perhaps the least blameworthy sort of anti-competitive conduct—even if we do ultimately force the owner to share it—and forcing the owner of an essential facility to share it involves a serious interference with property rights. The Bureau seems to have recognized this in its case against Vancouver Airport Authority: not only did it not seek an AMP, but in its press release announcing the application, it refrained from using "contravention" language, but instead used the more neutral "restricting competition".[46]

Determining whether a firm enjoys market power or has high market shares also requires definition of the relevant product and geographic markets. While most firms will have a good sense of what those are, it is worth noting that market definition has been hotly contested in many (if not most) of the cases before the Tribunal. Some cases have turned on market definition. For example, in the recent *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited* merger case, the Tribunal rejected outright the product market proposed by the Commissioner.[47] In *CWS*, the Tribunal accepted the Commissioner's contention that landfill sites in Michigan and New York were not a part of the relevant market.[48] In both of these cases, the market definition drove the ultimate result.

The second element, practice of anti-competitive acts (paragraph 79(1)(b)), also poses some difficulties for a firm. As noted above, it is extremely difficult to distinguish aggressive competition on the merits from anti-competitive conduct, since both look much the same. The analytical framework that has developed ostensibly focusses on the *purpose* of the conduct: "an anti-competitive act is identified by reference to its purpose".[49] The requisite purpose is an *intended* predatory, exclusionary, or disciplinary effect on

a competitor or, following the 2022 amendments to section 78, an intended "adverse effect on competition". As I discuss below, intention is a poor screen for determining whether conduct is pro- or anti-competitive. In any event, the focus on intention is somewhat misleading, because evidence of subjective intent is not required. Intention can be assessed objectively: if the predatory, exclusionary, or disciplinary effects are reasonably foreseeable, then the intention element is met (subject to there being a reasonable business justification that rebuts this intention).[50]

Ultimately therefore, the test under paragraph 79(1)(b) as developed by the courts comprises three elements: whether the conduct has a predatory, exclusionary, or disciplinary effect; whether that effect is reasonably foreseeable; and whether a reasonable business justification changes the overall character of the act.

This test was codified in 2022. The chapeau of subsection 78(1) now defines an anti-competitive act as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". It will be interesting to see whether the Tribunal treats this definition as a mere codification of the existing jurisprudence, or as changing the substantive requirements of section 78. It might be argued, for example, that the intention requirement is one of subjective intention, and not merely the current objective test.

There is surprisingly little guidance on when these anti-competitive effects are foreseeable. In *Laidlaw*, the Tribunal simply says that "actions will be presumed to have been intended to have the effects which actually occur in the absence of convincing evidence to the contrary".[51] In *Nielsen*, the "unquestionable effect" of exclusivity provisions in contracts was "to exclude all potential competitors", which "Nielsen can be presume to have intended".[52] In *Tele-Direct*, the Tribunal likened purpose to the "overall character of the act".[53]

However, the Tribunal has also recognized that even dominant firms are entitled to respond to entry, and that any competitive response will negatively impact the new entrant: "Anything short of accommodation is likely to make the post-entry prospects less attractive than the pre-entry benefits enjoyed by the incumbent".[54] So it would seem that some intention to make life less comfortable for competitors is allowed. But the Tribunal has also cautioned that dominant firms do not necessarily have the same freedom as non-dominant firms: "the Tribunal does not apply a safe-harbour for

practices which a non-dominant firm would likely have undertaken in similar circumstances".[55]

As well, certain types of potentially anti-competitive conduct involve factors that cannot be known by the firm. In predatory pricing cases, for example, the Bureau uses as a screen whether the alleged predatory price can be matched by competitors without their incurring losses (this is also known as the equally efficient competitor test). The Bureau uses this screen because of "difficulties inherent in applying a price-cost test to identify predatory pricing".[56] The alleged predator cannot be expected to know whether its competitors can match its prices without incurring losses, however.

It is all but impossible to draw any sort of practical guidance from the cases about how aggressively a dominant competitor can compete. The test for anti-competitive conduct seems to be not unlike the famous test for obscenity: "I know it when I see it".[57] This may be an unavoidable feature of any unilateral conduct provision, since it is the effects on competition that matter, and these depend on factors that are external to the firm whose conduct is under examination.

But the result is that a potentially dominant firm that is considering a competitive response to, say, a new entrant, has to tread very carefully, since any anti-competitive effects caused by its response are likely to determine the overall character of that response.

The third element, substantial lessening or prevention of competition (paragraph 79(1)(c)), is all but impossible for a single firm to assess on its own. As the cases show, it is difficult to determine after the fact whether conduct has caused a substantial lessening or prevention of competition; but it is harder still for a single firm to determine beforehand whether a proposed competitive response is likely to do so. A single firm lacks the ability to gather the necessary evidence from other industry participants (and rightly so!).

C) Inevitable certification and settlement

The difficulties associated with distinguishing pro- from anti-competitive conduct mean that if class actions are permitted in abuse of dominance cases, those class actions will inevitably be certified. This in turn will effectively force defendants to pay large settlements—even in unmeritorious cases.

To understand why this will happen, it is necessary to look at how class actions are managed in Canada.

Before an action can proceed as a class action, it must be certified by the court (authorized, in Quebec). In Canada's common law jurisdictions, and in the Federal Court, a five-part test is applied:

- The pleadings must disclose a cause of action.
- There must be an identifiable class of two or more persons.
- The claims or defences must raise common issues.
- A class proceeding must be the preferable procedure for resolving the common issues.
- There must be a suitable representative plaintiff.

Of these five requirements, only the first (cause of action), third (common issues), and fourth (preferable procedure) are typically in issue.

The first requirement, that the pleadings disclose a cause of action, is assessed using the same test as on a motion to strike. Thus the claim will only fail this requirement if it is "plain and obvious" that it does not disclose a cause of action.[58]

In conducting this analysis, courts assume that the facts pleaded are true "unless they are manifestly incapable of being proven".[59] Pleadings must be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies".[60] Novelty is rarely a handicap, as the court must "err on the side of permitting a novel but arguable claim to proceed to trial".[61]

As a result, even badly drafted claims will typically pass this threshold requirement.

Perhaps the most extreme example of courts allowing novel, but fundamentally unsound, claims to proceed is the saga of waiver of tort as a stand-alone cause of action. In the early 2000s, a number of academics theorized that waiver of tort, hitherto an election of remedies, could be a stand-alone cause of action to force a wrongdoer to disgorge profits even in the absence of any injury to a plaintiff. In 2006, the Ontario Divisional Court adopted this notion and affirmed the certification of a class action based on waiver of tort even though the plaintiffs had no damages.[62] Plaintiffs began

to plead waiver of tort in price-fixing cases to get around difficulties inherent in proving loss on a class-wide basis. The British Columbia Court of Appeal accepted the notion that waiver of tort could be used to circumvent the requirement in the *Competition Act* that the plaintiff have suffered a loss.[63] It was not until 2020 that the Supreme Court of Canada put an end to this experiment, ruling that waiver of tort is not a stand-alone cause of action.[64] But this experiment cost defendants millions.[65]

Courts are also reluctant to rule on the scope of the *Competition Act*'s provisions at a preliminary stage. In *Williams v Audible Inc*, for example, the British Columbia Supreme Court refused to grant summary dismissal of a claim alleging that exclusivity provisions in a distribution agreement between Audible Inc. and Apple constituted a form of unlawful market allocation, contrary to paragraph 45(1)(b).[66] The exclusivity provisions required Apple to source audiobooks exclusively from Audible, and prohibited Audible from integrating its content with any other internet-based distribution service. Audible also sells audiobooks to consumers, making it a competitor as well as a supplier to Apple. It can be difficult to determine whether this type of arrangement, known as a "dual distribution" arrangement, is vertical (and thus lawful) or horizontal (and thus potentially unlawful). Given this difficulty, the court refused to dismiss the claim, although it ultimately denied certification on other grounds.

The abuse of dominance provisions would be an even better playground for creative pleading by plaintiffs. Unlike the criminal provisions in the Act, which tend to be tightly drafted, the abuse of dominance provisions are deliberately broad in scope. They constitute, in a sense, a genus, with many potential species of cases that are left to be developed by the Tribunal. As part of this development, the Tribunal has imposed additional screens in particular types of cases. For example, where a firm is accused of leveraging a dominant position in an upstream market over a downstream market that it does not compete in, by, for example, refusing access to some essential facility, the firm must have a plausible competitive interest in the downstream market.[67] This screen is not found anywhere in the *Competition Act*, yet without this screen, the Act could too easily be used to force firms to supply goods and services to firms that they do not wish to accept as customers. Similarly, the equally efficient competitor screen employed by the Bureau in analyzing predatory pricing cases avoids penalizing firms for *lowering* their prices—an important goal given that lower prices are a desirable outcome of competition. There is, however, no prospect whatsoever that courts will develop screens of this nature at the pleadings stage if abuse of

dominance class actions are allowed. Screens will only be developed after trial, which may never occur.

The common issues requirement will also be relatively easy to meet in putative abuse of dominance class actions. The existence of common issues is at the heart of class action certification; the ability of a class action to deliver a result for a class depends upon the existence of issues that can be determined for the class as a whole.

The plaintiff must show "some basis in fact" to support the proposed common issues. There is some debate in the jurisprudence on this. In Ontario, plaintiffs must show some basis in fact (1) that the common issue actually exists, and (2) that it is common across the entire class.[68] The Federal Court also follows a two-step approach.[69] By contrast, a recent decision from the British Columbia Court of Appeal has been interpreted by some as rejecting this two-step approach in favour of a one-step requirement that the plaintiff show that the issue is common to the class.[70]

Whether the "some basis in fact" test is a two-step or a one-step test, it is clear that it sets a low bar. In *Pro-Sys Consultants Ltd v Microsoft Corp*, the Supreme Court declined an invitation to adopt the more robust analysis conducted at the certification stage by US courts and assess certification requirements on a balance of probabilities.[71] Rather, "certification does not involve an assessment of the merits of the claim"; the court should not resolve conflicting facts and evidence at certification. At the same time, however, certification is meant to be a "meaningful screening device". While the court does not make a determination on the merits, neither does certification "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".[72]

Courts have also repeated warned against getting into the "battle of the experts" and resolving conflicts between experts at certification.[73] The test to be applied to the plaintiff's expert evidence is whether it is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement".[74] For loss issues, it only need "offer a realistic prospect of establishing loss on a class-wide basis".[75]

The Supreme Court's decision in *Godfrey* provides a good example of how this rule leads to an uncritical acceptance at certification of the expert evidence tendered by plaintiffs. One of the issues in that case was whether the methodology proposed by the plaintiff's expert could show that all class members suffered harm. He had admitted that his methodology generated average numbers, which, the defendants argued, meant that some class

members might not have been impacted. But the court accepted his methodology because it was not apparent that the expert had resiled from his opinion that all class members would be impacted.[76] Effectively, so long as the plaintiff's expert does not break down on cross-examination, his or her evidence will be accepted.

In price fixing class actions, economic evidence is usually only relevant to the existence and quantum of loss or damages. Since the enactment of the *per se* conspiracy provisions in section 45, proof of an unlawful conspiracy is relatively simple. The plaintiff need only prove that the parties to the agreement are competitors (which is usually straightforward, but could involve some degree of market definition) and that they entered into an agreement to fix prices, allocate markets, or restrict output. Plaintiffs usually have the benefit of enforcement in other countries to establish some basis in fact that there was a conspiracy.

By contrast, each of the three elements that must be shown in an abuse of dominance case involves expert economic evidence. Expert evidence is required to define product and geographic markets; to determine whether the respondent has market power; to determine whether the respondent's conduct had a disciplinary, exclusionary, or predatory effect on a competitor; and finally, to determine whether or not the conduct has resulted in a substantial lessening or prevention of competition.

In an abuse of dominance class action, then, plaintiffs will presumably commission a report from an economist to establish some basis in fact for each of these elements. It will be all but impossible for defendants successfully to refute this evidence at certification; the judge will be faced with two witnesses, each with a doctorate in economics, contradicting each other on a subject about which the judge will know next to nothing. Courts will follow the injunction in the caselaw not to get into the battle of the experts and instead certify the claim as a class action.

What will happen next is that defendants will settle, rather than face the immense costs of going to trial and the risk of a damages award that threatens the business' very existence. They will, as the Supreme Court recognized in *Babstock*, be "practically compelled to pay a settlement to the plaintiff".[77] These settlements can be very large indeed. By way of example, in two cases alleging quite novel—and highly questionable—theories of breaches of section 45, defendants nevertheless agreed to massive settlements after the certification: defendants in the Visa/Mastercard case paid over $188 million in settlements, while Microsoft agreed to a settlement worth about $500

million. Interestingly, the Microsoft case began life as an attempt to bring a private action for an alleged abuse of dominance by Microsoft. The British Columbia Supreme Court struck those allegations, holding that "in the absence of an order of the Competition Tribunal … conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means".[78] The case was then re-configured as a case alleging a conspiracy contrary to section 45.

Plaintiffs have large incentives to bring cases against Canada's large corporations. Class proceedings legislation establishes what Perell J. described as the "entrepreneurial model for the class action regime".[79] It provides a profit motive for plaintiff firms to bring class actions; it deliberately creates an incentive for firms to launch class actions whenever they sense that they can obtain a settlement that will generate a large fee. In British Columbia, no costs can be awarded against an unsuccessful plaintiff, which removes any incentive against bringing a spurious claim. Thus, unlike the Bureau, which brings cases based on its view about what is best for competition, class action plaintiff firms will bring cases based on what will yield the highest fees, without regard for what is best for competition. The likelihood that courts will certify even dodgy abuse of dominance cases means that plaintiffs will have an incentive to bring them.

D) Staying well back of the yellow line

One important enforcement mechanism is not even in the *Competition Act*: legal advice provided by lawyers to their clients. It is partly through this mechanism that high AMPs and the risk of class actions can chill competition.

Legal advice on unilateral conduct issues is different from advice on cartel issues in two respects. The first is the confidence level with which a lawyer can advise whether or not proposed conduct will create issues under the relevant provisions of the *Competition Act*. The second is the degree of caution that we urge on our clients.

It is usually easy to identify a hard-core cartel and advise clients not to get into it (or to get out if they have entered into a cartel). It is also generally easy to identify with confidence when conduct is unlikely to raise issues under section 45. There are, of course, grey zones. Dual distribution arrangements can be difficult to unravel. But the Bureau's statement in the *Competitor Collaboration Guidelines* that *bona fide* arrangements will be examined under section 90.1 instead of section 45 gives considerable comfort.

Because of the criminal nature of the conspiracy provisions, lawyers typically recommend a cautious approach. For example, although none of these provisions forbid the sharing of competitively sensitive information, there is a risk that a court may infer the existence of a price fixing agreement from information exchanges followed by parallel behaviour. As a result, lawyers typically advise clients not to exchange such information. The analogy I use with clients is that they should "stay well back of the yellow line", just as at a train station. Information exchanges are like standing at the edge of the platform: both are risky.

Advising on unilateral conduct (abuse of dominance, exclusive dealing, refusal to deal, etc) is different in both respects.

We cannot advise a client with high degree of confidence whether proposed business conduct will constitute an abuse of dominance. This is because of the difficulties inherent in distinguishing aggressive competition on the merits from anti-competitive conduct, and the impossibility of knowing for certain whether the elements of section 79 will be met in any given case. The same is true for the other restrictive trade practices in the Act: we cannot know with confidence whether the effects of the conduct will merit intervention by the Tribunal.

We can, of course, retain economists to assist with the analysis. With their help, we may be able to more confidently advise clients. But even a cursory review of the cases shows that economists reach diametrically opposed conclusions on practically every element in every case. There can be no guarantee that the conclusions an economist might reach in advising a client will ultimately be accepted by the Tribunal.

We could, in theory, ask the Bureau for an advisory opinion under section 124. But it seems that even the Bureau is unwilling (or unable) to determine in advance whether proposed conduct will cause a substantial lessening of competition. In its *Fee and Service Standards Handbook for Written Opinions*, the Bureau says that it will not "provide an assessment of the effects on competition of the proposed conduct or practice".[80]

Until now, this has not been a problem. The worst that clients typically face in an abuse of dominance case is to be told to stop whatever the conduct is. The Bureau has, wisely, only sought AMPs in two cases, both of which involved egregious conduct that directly impacted consumers.

However, the further down the road we go toward a contravention-punishment model, the more the advice that lawyers give to clients on unilateral

conduct will resemble the advice they give on criminal matters: stay well back of the yellow line. Clients too, hearing that they could be fined up to three percent of annual worldwide gross (not net!) revenues, as well as large class action settlements, may decide that the risks of aggressive competition on the merits are too high and pull their competitive punches.

The problem with this is that unlike in cartel matters, where we want firms to stay well back of the yellow line, in unilateral conduct, we want them to compete aggressively—that is, compete right up to the platform edge. But sky-high penalties coupled with uncertainty as to where exactly the platform edge is means that firms with a strong position in the market may become competition-shy.

4. Are AMPs really needed to control anti-competitive conduct?

If AMPs have the potential to chill pro-competitive conduct, as I argue above, then it is worth asking whether they are really needed to control anti-competitive conduct.

There have been only four abuse of dominance cases commenced since AMPs were introduced. The Commissioner has only sought AMPs in two of those cases, *Direct Energy* and *Reliance Home Comfort*. Both cases involved some rather nasty practices designed to thwart competition in the water heater rental market. The applications against both companies allege a litany of bad conduct designed to make switching difficult at the end of a water heater rental contract: requiring consumers to complete paperwork to return a water heater; arbitrary restrictions on where and when water heaters can be returned; levying exit fees on consumers in the form of account closure fees, drain, disconnection, and pickup charges, and fees for purported damage to water heaters; and even continuing to charge rental fees after the consumer switches.[81] Direct Energy had agreed to stop similar practices in a 2002 consent order, but had resumed them the day after the consent order expired.[82] As both companies settled, none of these allegations were ever proven. But three things jump out at the reader: first, much of the alleged conduct was against consumers directly; second, it involved dishonest practices; and third, both companies used remarkably similar tactics.

Both companies agreed to pay an AMP as part of their settlements with the Commissioner; Reliance Home Comfort paid $5 million, and Direct Energy, $1 million.

Few would doubt that the allegations against Reliance Home Comfort and Direct Energy would, if proven, have merited a substantial AMP. The same can be said of the *Laidlaw* case:[83] Laidlaw had used evergreen contracts with punitive termination provisions and threatened or actual litigation against customers to prevent switching. That case predated the availability of AMPs, however.

But at the other end of the spectrum lies the Vancouver Airport Authority ("VAA") case.[84] The Commissioner challenged VAA's decision not to allow a third in-flight caterer to operate at the airport. This was a pure "essential facilities" case: the Commissioner was asking the Tribunal to force VAA to rent space on its land to a caterer. VAA believed it had good reasons not to do this (which the Tribunal accepted in dismissing the case). But even supposing that the Commissioner had won, imposing an AMP on VAA would have been outrageous. The Commissioner appears to have recognized this; he did not seek an AMP.

Nor did the Commissioner seek an AMP against the Toronto Real Estate Board ("TREB"). This case was about access to real estate data feed that was structured in such a way as to support a new, and potentially disruptive, real estate agency business model. Here, unlike in VAA, the Tribunal found that TREB's purpose refusing this data feed was to insulate its members from competition.[85] As the Commissioner had not sought an AMP, none was ordered. Would one have been appropriate? While TREB's purpose was anti-competitive, the conduct effectively was that of refusing to help competitors to disrupt the business model of TREB's members. Whatever the merits of competition law requiring a dominant firm to aid a competitor to compete against it, requiring that firm to pay a fine as well would seem a step too far.

Given the paucity of cases since the introduction of AMPs, it is difficult to say whether AMPs truly are needed to deter potentially anti-competitive conduct. In the absence of compelling evidence that they are needed, the fact that they have the potential to chill pro-competitive practices suggests that AMPs should not be retained.

5. The intentionalist fallacy

As discussed above, intention has emerged as the primary distinguishing factor between pro- and anti-competitive conduct: "it is now settled law that the focus of the assessment under paragraph 79(1)(b) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary

negative effect on a competitor".[86] I believe that this is an error that should be corrected.

Until the 2022 amendments, intention was a necessary, but not sufficient, condition for finding that conduct is anti-competitive. The conduct must also have had the requisite predatory, exclusionary, or disciplinary effect. That is not the case in Australia and New Zealand, where an intention to cause a substantial lessening of competition is sufficient.[87] With the 2022 amendments to the *Competition Act*, intention on its own is likely now sufficient, since anti-competitive acts are now defined by reference to intention, not effects: "anti-competitive 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".[88]

There are two problems with using intention as the main determinant of whether conduct is anti-competitive or not.

The first problem is that that businesses compete to win, not to increase competition. Competition is a by-product of businesses trying to beat each other in the market place; to gain sales, revenue, and market share at each other's expense. "Competitors often dislike each other. And competitors almost always want to hurt each other's business" as the Alberta Court of Appeal put it.[89]

The second problem is that if the goal of unilateral conduct provisions is to provide a remedy for conduct that reduces competition, intention is completely irrelevant. Intention does not assist in determining whether conduct has or has not reduced competition.

Intention is, of course, relevant in a contravention-punishment model, since the law is reluctant to punish or award damages in the absence of some fault. But the cases have established that intention can be presumed from the effects of conduct, which essentially wipes it out as a meaningful screen.

Intention seems to matter most where the respondent asserts that it has a reasonable business justification for the conduct. A reasonable business justification can rebut the "deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct".[90]

To date, a reasonable business justification has been found in only one case: *VAA*. VAA said that it decided to limit the number of full-service caterers to two because it was concerned that having a third caterer might

be unsustainable, and lead to there being only one. The Commissioner objected that VAA conducted only a superficial analysis: it made this decision during a one hour meeting and failed to consult airlines. The Tribunal disagreed: the question was not whether VAA was correct, but whether the decision was made in good faith:

> However, the question is not whether VAA's senior management was as correct and as thorough as the Commissioner would have preferred or some observers might expect. Rather, it is whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate.[91]

The Bureau now complains that this approach "would mean that conduct could significantly harm competition but be permitted to continue because the firm convinces the Tribunal it sincerely believes a justification that does not hold up to objective scrutiny".[92] This is true, but if the focus is on intention, as opposed to effects, then the Tribunal's finding makes sense. It is the logical result of the focus on intention.

6. Back to the future

We are, perhaps, at a crossroads. We can continue towards a contravention-punishment model of unilateral conduct; or we can climb into the DeLorean and return to the conduct-effects-remedy model of the 1986 *Competition Act*.

The contravention-punishment model involves high penalties for abuse of dominance, including potentially class actions for damages, in order to deter abuse of dominance. For all the reasons outlined above, the risk is that this model will not just deter abuse of dominance, but will also deter aggressive competition; it will make Canada's economy less, not more, competitive. In order to reduce this risk, the provisions must be tightly drafted, and limiting principles such as intention must be relied on. Without limiting principles, we will be headed for the worst of both paradigms: a broadly worded provision with punitive remedies.

The conduct-effects-remedy model, by contrast, does not chill aggressive competition. As originally envisioned by the architects of the 1986 Act, proceedings can be less contentious, without the stigma of having "contravened" the *Competition Act* or committed "wrongdoing".

In order to return to this model, AMPs would either be repealed, or only be available in cases where the conduct is so egregious as to be outside the

boundaries of acceptable commercial behaviour, for example, where the conduct is independently unlawful, such as breach of contract, fraud, misrepresentations, intimidation, or other tortious behaviour.

But going back to the future does not mean that the abuse of dominance provisions should be returned to their 1986 state without any modernization. I propose three ways to modernize these provisions below.

A) Redefining dominance

The first way that I would modernize section 79 is to simplify and expand the dominance requirement.

First, I would simplify it. Instead of requiring "substantial or complete control" of a "class or species of business", I would reframe this element to reflect the jurisprudence. The requirement should simply be that the firm have a "substantial degree of market power".

Second, I would broaden the joint dominance concept to capture conduct that causes harm because it is widespread in a market, even if no one firm enjoys the requisite degree of market power.

As it stands, conduct that is widespread in a market, but where no one firm is dominant, is difficult to remedy. Section 79 arguably does envision the possibility of an application in these circumstances, since the paragraph 79(1)(a) refers to "one or more persons" controlling a market, and paragraph 79(1)(b) provides that "that person or those persons have engaged" in a practice of anti-competitive acts. But to date no contested case has been brought on a joint dominance theory. As a result it is as yet unknown whether coordinated conduct is required for a finding of joint dominance. The Bureau's guidance on this point is confusing: it says both that similar or parallel conduct is not sufficient, but that evidence of coordinated behaviour is not necessary:

> Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position. Further, evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative insofar as it may explain why members of the allegedly dominant group are not vigorously competing. However, the Bureau does not consider such evidence as necessary to establish that a group is jointly dominant, if there is other evidence that competition among members of the allegedly dominant group is not sufficient to discipline their exercise of a substantial degree of market power.[93]

If a group of firms are engaging in similar or parallel conduct, and they collectively enjoy market power, then the conduct has the potential to cause competitive harm. That should therefore be enough to satisfy the dominance or market power element. There should be no need to show coordination. Remember: the goal is not to stigmatize or punish, but to provide a remedy for competitive responses that harm competition.

One might even consider doing away with the dominance requirement entirely, since if a substantial lessening or prevention of competition is observed, then in principle it can be inferred that the firm involved had sufficient market power to effect this result. In its 2005 report, the Economic Advisory Group for Competition Policy (a group that advises the European Commission on competition policy), pointed this out:

> In terms of procedure, the economic approach implies that there is no need to establish a preliminary and separate assessment of dominance. Rather, the emphasis is on the establishment of a verifiable and consistent account of significant competitive harm, since such an anti-competitive effect is what really matters and is already proof of dominance.[94]

Thus removing the dominance element should in principle have no impact on the application of section 79. This may be a step too far, however, if for no other reason than that the existence of market power can be a useful screen for quickly triaging cases.

B) Streamlining paragraphs 79(1)(b) and (c)

The second way that I would modernize section 79 is to streamline paragraphs 79(1)(b) and (c) into a single test.

In what is perhaps the worst decision decided under the *Competition Act*, the Federal Court of Appeal insisted in *Canada Pipe* that section 79(1)(b) and (c) must each give rise to a distinct legal test. Thus the focus under paragraph (b) is the intended effect of the conduct on competit*ors*, while paragraph (c) looks at the effect on competit*ion*.[95]

This was, and is, a nonsensical approach. The emphasis on "competitors" created a hole that had to be patched up in *TREB*. That case involved a challenge to rules imposed by Toronto Real Estate Board on its members. The Tribunal initially dismissed the case because the rules had no impact on TREB's competitors; TREB was not a participant in the real estate market.[96] The Federal Court of Appeal acknowledged that this result flowed from *Canada Pipe*, but held that "competitor" need not be a competitor of the respondent.[97] Even with the tweak in *TREB*, the focus on competitors is also

inconsistent with the axiom that competition law protects competition, not competitors.

What did the court get wrong in *Canada Pipe*? In its zeal to preserve the purity of principles of statutory interpretation and avoid conflating the tests under each element of abuse of dominance, the Federal Court of Appeal failed to appreciate that these elements are not entirely distinct. Indeed, the anti-competitive nature of conduct comes from its effects on competition. As noted above, it is even possible to infer the existence of market power from observed anti-competitive effects. To some extent, each element of section 79 reflects a single, simple, insight: the focus should be on whether or not conduct by a single firm (or group of firms) is causing a substantial lessening of competition.

Paragraphs 79(1)(b) and (c) could thus be collapsed into a simple test: the firm or firms are engaged in conduct that causes or is likely to cause a substantial lessening or prevention of competition.

The Bureau proposes essentially this in its submission in response to the federal government's discussion paper.[98] Where I part ways with the Bureau, however, is that I would not include intention in a modernized section 79.

C) A new name

My third reform would be to rename the abuse of dominance provision. Apart from its slightly kinky connotations, the term "abuse of dominance" carries a certain stigma of wrongdoing. Given that the same conduct can be either pro- or anti-competitive depending on its effects, it would be better to use a less loaded term.

The US term, "monopolization", may not be much better. Down under, in Australia and New Zealand, the term "misuse of market power" is used. "Misuse" carries less stigma than "abuse", but it is not entirely free of stigma. Another possibility might be simply "conduct having anti-competitive effects". But that it is a mouthful. Perhaps "anti-competitive practices" might be best.

7. Promoting, not chilling, competition

The *Competition Act* is meant to promote competition. Hard core cartels are prohibited *per se* because they are always bad for competition. There is thus no such thing as over-deterrence of hard core cartels.

But that is not the case with conduct dealt with in Part VIII of the *Competition Act*. The same conduct can be pro- or anti-competitive, depending on the circumstances. As a result, it is not obvious what the right approach is. We do know that over-deterrence will deter vigorous competition, leading to less, not more, competition. A contravention-punishment paradigm carries with it a serious risk of over-deterrence. This paradigm, by its very design, will cause large firms to pull their competitive punches. What we want instead is a system that can stop conduct that harms competition without chilling vigorous competition. The conduct-effects-remedy paradigm adopted in 1984 does that. If the provision were simplified and broadened, and if the Bureau is given the resources to challenge unilateral conduct that harms competition, then it can fulfil its objective.

ENDNOTES

[1] Michael Osborne is Chair of Cozen O'Connor's Canadian Competition Practice.

[2] *Competition Act,* RSC 1985, c C-34 [*Competition Act*].

[3] Michael J Trebilcock et al, *The Law And Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 31.

[4] Although the *Competition Act*, *supra* note 2 was in many ways a new act, it was enacted by way of comprehensive amendments to the *Combines Investigation Act*, SC 1923, c 9 [*Combines Investigation Act*], and is thus technically the same statute.

[5] The original *Combines Investigation Act*, *supra* note 4 defined "combines" as including "mergers, trusts or monopolies", as well as various agreements to lessen competition (s 2(1)). The definition only applied where the combine operated (or was likely to operate) "to the detriment of or against the interest of the public, whether consumers, producers, or others". Section 26 made it a criminal offence to be involved "in the formation or operation of a combine". At this time, the *Criminal Code* contained a provision prohibiting conspiracies to lessen competition unduly (see RSC 1927, c 36 s 498). There was considerable overlap between the kinds of agreements listed in this provision and those in the definition of "combine". In 1960, this duplication was eliminated. The *Criminal Code* conspiracy provision was brought into the *Combines Investigation Act* as section 32, and the mergers and monopolies offence became a separate offence, as section 33 *Combines Investigation Act and the Criminal Code, Act to Amend the*, SC 1960, c 45 s 13 [*Combines Investigation Act and the Criminal Code, Act to Amend the*]. Section 32 now prohibited conspiracies that lessened competition "unduly", while the new section 33 prohibited the formation (but not the operation) of mergers or monopolies that operated "to the detriment or against the interest of the public, whether consumer, producers or others".

[6] There are seven reported cases involving charges of merger or monopoly. Of those, six involved mergers and resulted in acquittals. The only one that involved monopoly behaviour also resulted in a conviction: *R v Eddy Match Co* (1951), 104 CCC 39, 13 CR 217 (QCKB). Eddy Match used a number of tactics that would be familiar to a competition lawyer today—rebates, exclusive dealing, fighting brands, etc.

[7] MacQuarrie Committee (Committee to Study Combines Legislation), *Report to the Minister of Justice* (Ottawa, Queen's Printer, 1952).

[8] *Combines Investigation Act*, SC 1949 c 12, renumerated and amended by SC 1952 c 39.

[9] *Combines Investigation Act and the Criminal Code, Act to Amend the*, *supra* note 5 at s 13.

[10] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 9 [*Interim Report on Competition Policy*].

[11] *Ibid* at 8.

[12] *Ibid* at 101-103. The report contains an interesting discussion on the

advisability of retaining the "unduly" requirement—a discussion that continued until 2009!

[13] *Ibid* at 109.

[14] *Ibid* at 110.

[15] *Ibid*.

[16] The Economic Council of Canada used the phrase "trade practices not covered by broad prohibitions" (*ibid* at 120).

[17] *Ibid.*

[18] *Ibid* at 122.

[19] This point is well-established. See *Pro-Sys Consultants Ltd v Microsoft Corp*, 2006 BCSC 1047 at paras 32-46 [*Pro-Sys BCSC*] ("the fact that the Defendants' alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII"); *Procter & Gamble Co v Kimberly-Clark of Canada Ltd* (1991), 40 CPR (3d) 1 at para 148, 1991 CarswellNat 215 (FC) ("abuse of dominant position in the Competition Act is not a criminal or even civil illegality. […] There is no improper conduct until such time as the Competition Tribunal so finds."); *Harbord Insurance Services Ltd v Insurance Corp of British Columbia* (1993), 9 BLR (2d) 81 at para 16, 1993 CarswellBC 526 (BCSC) ("the conduct complained of is per se lawful but may be prohibited under Part VIII because it lessens competition or offends against the policy set by the Tribunal to foster competition in the market: that does not make it unlawful"); *Chadha v Bayer Inc* (1998), 82 CPR (3d) 202 at para 9, 1998 CarswellOnt 5225 (ONCJ) ("before any prohibition is made at the Tribunal, the effect of s.79 is plainly not to make the activity described unlawful"); *ICE Fashionable Accessories Inc v Holt, Renfrew & Co* (2001), OJ No 1527 at para 18, 2001 CarswellOnt 1320 (ONSCJ). There are some outliers. In *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777, the court relied on a 1989 decision to conclude that whether section 76 could support an action was "not settled law". The court ignored all of the other decisions that settle this point. In *Dow Chemicals Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482, the court held that restrictions in a contract would contravene s 90.1 of the *Competition Act*, *supra* note 2. The court was either not referred to, or simply ignored, the authorities listed above.

[20] The merger (s 92) and anti-competitive agreements (s 90.1) provisions share the same basic structure: neither is unlawful until the Tribunal makes an order.

[21] *Competition Act*, *supra* note 2, s 79(1).

[22] *Novus Entertainment Inc v Shaw Cablesystems Ltd*, 2010 BCSC 1030 at para 35 [*Novus Entertainment Inc*].

[23] *Competition Act*, *supra* note 2, ss 79(3.1)-(3.3).

[24] See for example the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40; *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126.

[25] Or $15 million for a "subsequent order," as discussed above.

[26] *Competition Act*, *supra* note 2, s 79(3.1)(b).
[27] Canada, Competition Bureau, *Competition Bureau reaches agreement with Isologic to protect competition in healthcare*, (News Release), (24 March 2023) online: <canada.ca/en/competition-bureau/news/2023/03/competition-bureau-reaches-agreement-with-isologic-to-protect-competition-in-healthcare.html> [emphasis added].
[28] Canada, Competition Bureau, *Competition Bureau obtains court order to advance an investigation of competition in the Quebec real estate services market*, (News Release), (20 February 2023) online: <canada.ca/en/competition-bureau/news/2023/02/competition-bureau-obtains-court-order-to-advance-an-investigation-of-competition-in-the-quebec-real-estate-services-market.html> [emphasis added].
[29] Canada, Competition Bureau, *Abuse of dominance and restrictive trade practices*, (17 June 2023), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/compliance-and-enforcement/corporate-compliance/abuse-dominance-restrictive-trade-practices>.
[30] *Novus Entertainment Inc*, *supra* note 22.
[31] *Ibid* at para 35.
[32] Frank H Easterbrook, "When is it worthwhile to use courts to search for exclusionary conduct?" (2003) 2003:2 Colum Bus L Rev 345 at 345.
[33] Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines*, (Enforcement Guidelines), (7 March 2019), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines> at para ix [*Abuse of Dominance Enforcement Guidelines*].
[34] *Ibid* at para 95.
[35] (1997), 73 CPR (3d) 1, 1997 CarswellNat 3120 (CT) [*Tele-Direct*].
[36] *Ibid* at para 601.
[37] United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (18 March 2022) online: <justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_71_>.
[38] United States Federal Trade Commission, *Guide to Antitrust Laws – Single Firm Conduct*, online: <ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct>.
[39] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 66.
[40] In *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 Comp Trib 1 [*Rogers*], the Tribunal discussed bundled offerings, finding that post-merger there will be at least three firms offering bundled offerings, an increase of one from before the merger.
[41] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at para 52 [*Canada Pipe*].
[42] *Tele-Direct*, *supra* note 35 at paras 285-286; *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 at paras

74-83 [*CWS*]; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2005 Comp Trib 3 at para 161.

[43] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 29.

[44] See *Rogers*, *supra* note 40 at paras 199-222.

[45] Canada, Competition Bureau, *Merger Enforcement Guidelines*, (Enforcement Guidelines), (6 October 2011), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-enforcement-guidelines>.

[46] Canada, Competition Bureau, *Competition Bureau takes action against Vancouver Airport Authority*, (News Release), (29 Sept 2016) online: <canada.ca/en/competition-bureau/news/2016/09/competition-bureau-takes-action-against-vancouver-airport-authority.html>.

[47] 2022 Comp Trib 18.

[48] *CWS*, *supra* note 42.

[49] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 66 [*Canada Pipe FCA*] [emphasis in original].

[50] *Ibid* at para 72; see also *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289, 1992 CarswellNat 1628 (CT) [*Laidlaw*].

[51] *Laidlaw*, *supra* note 50 at para 154.

[52] *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd* (1995), 64 CPR (3d) 216 at para 131, 1995 CarswellNat 2684 (CT) [*Nielson*].

[53] *Tele-Direct*, *supra* note 35 at para 541.

[54] *Ibid* at para 595.

[55] *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 at para 310 [*TREB*].

[56] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 61.

[57] *Jacobellis v Ohio*, 378 US 184 (1964).

[58] *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 56 CPC (6th) 88, 2008 CarswellOnt 1156 (ONSCJ); *Caputo v Imperial Tobacco Ltd* (2004), 236 DLR (4th) 348, 2004 CarswellOnt 423 (ONSCJ); *Hunt v T & N plc*, [1990] 2 SCR 959 at 978-980, 1990 CarswellBC 216 (SCC); *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 27 [*Godfrey*]. In theory, the plaintiff bears the burden of showing that the action discloses a cause of action (*Momi v Canada (Minister of Citizenship & Immigration)*, 2006 FC 738); in practice, however, it is defendants that have to show that the cause of action is not viable.

[59] *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22 [*Imperial Tobacco*].

[60] *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 14, 1985 CarswellNat 151 (SCC).

[61] *Imperial Tobacco*, *supra* note 59 at para 21.

[62] *Serhan Estate v Johnson & Johnson* (2006), 269 DLR (4th) 279, 2006 CarswellOnt 3705 (ONSCJ) [*Serhan*].

[63] *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503 [*Infineon*].

[64] *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [*Babstock*].
[65] Johnson & Johnson paid $4 million to settle the *Serhan* case. Settlements in DRAM totaled over $79 million, but as there were other causes of action asserted, it may not be fair to blame this settlement on the refusal of the BCCA to kill off waiver of tort.
[66] 2022 BCSC 834. Courts have, of course, struck pleadings alleging breaches of the *Competition Act* in other cases. In the credit card interchange case, for example, British Columbia courts held that there was no cause of action under "new" section 45 (*Watson v Bank of America Corp*, 2015 BCCA 362), but the Quebec Court of Appeal refused to rule out the possibility (*9085-4886 Québec inc c Bank of Montreal*, 2019 QCCA 1301).
Courts have also confirmed that section 45 does not apply to buyer side conspiracies in *Mohr v National Hockey League*, 2022 FCA 145 and *Latifi v The TDL Group Corp*, 2021 BCSC 2183.
[67] *TREB*, *supra* note 55 at paras 279–282; *Canada (Commissioner of Competition) v Vancouver Airport Authority*, 2019 Comp Trib 6 at paras 459–466 [*VAA*].
[68] *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para 85; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at para 79; *Simpson v Facebook*, 2021 ONSC 968 at para 43; *Mancinelli v Royal Bank of Canada*, 2020 ONSC 1646 at para 220; *Stenzler v TD Asset Management Inc*, 2020 ONSC 111 at para 41; *Kuiper v Cook (Canada) Inc*, 2018 ONSC 6487, aff'd 2020 ONSC 128 at paras 26-36; *Kaplan v Casino Rama,* 2019 ONSC 2025 at para 54; *Das v George Weston Limited*, 2017 ONSC 4129 at para 623; *Batten v Boehringer Ingelheim (Canada) Ltd*, 2017 ONSC 6098 at paras 14-15; *Dine v Biomet Inc*, 2015 ONSC 7050 at paras 15-19; *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 4529 at paras 34-35.
[69] *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185.
[70] *Nissan Canada Inc v Mueller*, 2022 BCCA 338 at para 133.
[71] 2013 SCC 57 [*Pro-Sys SCC*].
[72] *Ibid* at paras 101-103, 126.
[73] *Ibid* at para 126; *Infineon*, *supra* note 63 at para 68; *Irving Paper Ltd v Atofina Chemicals Inc* (2009), 99 OR (3d) 358, 2009 CarswellOnt 8610 (ONSCJ).
[74] *Pro-Sys SCC*, *supra* note 71 at para 118.
[75] *Ibid.*
[76] *Godfrey*, *supra* note 58 at paras 99-102.
[77] *Babstock*, *supra* note 64 at para 21, quoting JM Martin, "Waiver of Tort: An Historical and Practical Study" (2012), 52 Can Bus LJ 473 at 476
[78] *Pro-Sys BCSC*, *supra* note 19 at para 49.
[79] *Bancroft-Snell v Visa Canada Corp*, 2015 ONSC 7275 at para 80.
[80] Competition Bureau, *Fee and Service Standards Handbook for Written Opinions*, (Bulletin), (7 April 2020) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competition-bureau-fee-and-service-standards-handbook-written-opinions> at Section 3.
[81] *The Commissioner of Competition v Reliance Comfort Limited Partnership* (20 December 2012), CT-2012-002 (notice of application), online: Competition

Tribunal <Reliance - Notice of Application - Competition Tribunal (ct-tc.gc.ca)> [*Reliance*]; *The Commissioner of Competition v Direct Energy Marketing Limited* (20 December 2012), CT-2012-003 (notice of application) at para 18, online: Competition Tribunal <Direct Energy - Notice of Application - Competition Tribunal (ct-tc.gc.ca)> [*Direct Energy*].

[82] *Direct Energy*, *supra* note 81 at para 18.

[83] *Laidlaw*, *supra* note 50.

[84] *VAA*, *supra* note 67.

[85] *Ibid* at para 322.

[86] *TREB*, *supra* note 55 at para 272.

[87] *Competition and Consumer Act 2010*, 1975/51, s 46 (Austl); *Commerce Act*, 1986/5, s 36 (NZ). The Bureau has proposed adopting this in Canada; see Competition Bureau, *The Future of Competition Policy in Canada*, (Submission by the Competition Bureau), (15 March 2023) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-2> at s 2.1 [*Future of Competition Policy*].

[88] *Competition Act*, *supra* note 2, s 78(1).

[89] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, 1996 ABCA 275 at para 56.

[90] *Canada Pipe FCA*, *supra* note 49 at para 73.

[91] *VAA*, *supra* note 67 at para 608.

[92] *Future of Competition Policy*, *supra* note 87 at s 2.2.

[93] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 49.

[94] Economic Advisory Group for Competition Policy, *An economic approach to Article 82*, (July 2005) at 4.

[95] *Canada Pipe FCA*, *supra* note 49 at paras 77-83.

[96] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2013 Comp Trib 9.

[97] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29.

[98] *Future of Competition Policy*, *supra* note 87.

OPTIMAL ENFORCEMENT OF ABUSE OF DOMINANCE: THE CASE FOR A PRIVATE CAUSE OF ACTION

Julie Rosenthal, Adil Abdulla, Arash Rouhi

We argue that there should be a private cause of action to courts, without leave, for abuse of dominance in Canada. We show that abuse of dominance is under-enforced; that this causes serious harm to consumers, competitors, and the economy; that the Competition Bureau cannot close the gap, whereas private parties can; and that private enforcement has been successful abroad. Finally, we suggest that any private cause of action should be modeled on section 36, with recourse to courts for compensatory damages and no leave requirement.

Dans cet article, nous soutenons qu'il y a lieu d'admettre une cause d'action privée au tribunal, sans autorisation, dans les cas d'abus de position dominante au Canada. Nous démontrons que ces cas sont trop peu sanctionnés; que cela cause beaucoup de tort aux parties consommatrices, parties concurrenteset à l'économie; que le Bureau de la concurrence ne parvient pas à combler cette lacune, tandis que les parties privées le peuvent; et que l'application des actions et recours privés en la matière s'est révélée une réussite à l'étranger. Enfin, nous faisons valoir que toute cause d'action devrait prendre modèle sur l'article 36, avec un recours aux tribunaux pour dommages-intérêts compensatoires sans exigence d'autorisation.

Introduction

The Ministry of Innovation, Science and Economic Development has asked for comments on whether private parties should be able to seek compensation for damages suffered from civilly reviewable (non-merger) conduct. This article focuses on a subset of that conduct: abuse of dominance within the scope of sections 75-81 and 84 of the *Competition Act* (the "***Act***").[1] Canada, unlike almost all other developed[2] countries—the United States,[3] the United Kingdom,[4] every member state of the European Union,[5] Australia,[6] New Zealand,[7] Japan,[8] South Korea,[9] and Taiwan[10]—has no private right of action for abuse of dominance.

This article argues that private parties should be able to bring an action in either the Federal Court or in one of the provincial superior courts, seeking compensation for losses suffered as a result of an abuse of dominance, much like they already can for criminally reviewable conduct.[11]

In Part I of this article we discuss evidence indicating that abuse of dominance is currently underenforced, and argue that current enforcement mechanisms provided by the *Act* are inadequate to address the problem. Part II focuses on some of the consequences of underenforcement for consumers, workers, competitors, and the economy at large. In Part III we review the benefits that would ensue from extending enforcement rights beyond the Competition Bureau to private actors. In Part IV we consider the best structure for a private cause of action, including the measure of damages (compensatory, punitive, or both), the forum (Competition Tribunal, courts, or both), and whether the right of action should be subject to a leave requirement.

I. Abuse of Dominance is Under-Enforced

A) Current Enforcement Mechanisms Are Inadequate

Under the *Act* as it currently stands, there are two mechanisms for enforcing abuse of dominance: (1) the Competition Bureau (the "**Bureau**") can apply to the Competition Tribunal (the "**Tribunal**") for a mandatory order and/or an administrative monetary penalty (an "**AMP**"); and (2) as of June 23, 2022, private parties can apply to the Tribunal for leave to bring a proceeding for the same remedies. We discuss each of these enforcement mechanisms in turn.

Since 1986, the Commissioner of Competition (the "**Commissioner**") has had the power to apply to the Tribunal for orders stopping companies from engaging in conduct that contravenes the abuse of dominance provisions.[12] Despite the Commissioner's statutory mandate to enforce the *Act*,[13] such proceedings have been few and far between. The Commissioner has only brought 14 applications,[14] of which only 7 have been litigated to a decision,[15] in almost 40 years.

According to the Bureau, this limited enforcement activity is due to a lack of resources.[16] Limited budgets are problematic because abuse of dominance cases are "unpredictable, lengthy and unnecessarily difficult and resource-intensive to prove".[17] In theory, an increase in funding should enable the Bureau to bring forward a greater number of cases. In late 2021, the government announced that Bureau's annual funding would increase by roughly $25 million per year.[18] That could result in an increase in applications to address abuse of dominance.

However, there is good reason to question whether that budgetary increase will have a measurable—let alone significant—impact on the actual

level of abuse of dominance enforcement. Throughout the history of the *Act*, through times of governmental belt-tightening and times when the spending taps were opened, the flow of cases brought before the Tribunal has remained a slow trickle—only one every 2-3 years.

Rather than pointing the finger solely at perceived under-funding, perhaps the Bureau's reluctance to bring cases forward is more a reflection of an institutional bias against the adversarial process and in favour of other, less coercive means of achieving compliance. Commentators have highlighted this historical bent in favour of prioritizing "voluntary conformity with the Act" through education and market studies,[19] rather than using the big stick of litigation.

Regardless of the reason, most commentators and policy-makers believe that the Bureau has not brought enough cases, and as a result, abuse of dominance is insufficiently enforced.[20] Not all commentators share this view, but we address their views in Part I, Section B below.

Most of that commentary occurred before the 2022 amendments to the *Act* which allow private parties to seek leave to apply to the Tribunal for remedies. Some[21] might say that this new mechanism will increase enforcement. We disagree with that view for the four reasons listed below, and we are not alone in our skepticism.[22]

First, access to section 103.1 is restricted such that the right to seek leave is extended only to competitors of the respondent.[23] Claims cannot be brought by consumers or other parties who might be harmed by the abusive conduct and might accordingly be motivated to seek remedies. Both the Commissioner and at least one commentator have expressed the view that the test for leave under section 103.1, viewed as a whole, is far too onerous.[24]

Second, few litigants have the necessary resources to pursue such a claim. Establishing abuse of dominance almost invariably requires expert evidence from economists and perhaps other experts. Obtaining leave usually requires another round of expert evidence. Indeed, even assessing whether to bring the case may require expert evidence. Few people can afford to pay for all of that expert evidence and legal fees. In civil litigation, a funder or law firm may be enticed to act on contingency. But here, that option is not available because it is impossible to obtain damages and any AMP obtained is paid to the government.

Third, without the prospect of compensatory damages, a putative applicant has little incentive to commence a proceeding.[25] The only possible

monetary recompense is an award of costs, which is customarily less than half of a party's actual legal fees. It is the rare litigant indeed for whom the possibility of a mandatory order, which will only be imposed at the end of a multi-year battle, will prove sufficiently valuable to justify the enormous commitment of management time and money required to see a case through.

Fourth, even in those rare instances where a competitor is willing to undertake the seemingly thankless task of seeking leave and, if leave is granted, pushing a case forward to trial, that litigant will likely face a strong incentive to settle with the respondent and, in particular, to do so in a manner that benefits themselves (and the respondent) at the expense of competition more generally.[26]

In the result, it seems highly unlikely that the expanded section 103.1 will meaningfully increase enforcement of abuse of dominance provisions.

B) Misleading Counterargument That No Abuse of Dominance Escapes Enforcement

Some commentators have asserted that the lack of enforcement activity in Canada is merely reflective of the fact that there is very little abuse of dominance actually occurring in Canada.[27] However, those assertions are unsupported by evidence. Meanwhile, there is evidence to the contrary—namely, that there is abusive conduct occurring in Canada which is not being checked by enforcement proceedings.

First, the Bureau receives hundreds of complaints per year. For example, in 2019-2020, the Bureau received 467 complaints but only opened 11 investigations.[28] While it stands to reason that some—perhaps even most—of the complaints received lack merit, it is more difficult to accept that 97% of the complaints were so wholly without merit that they did not even merit investigation. This is particularly so given that the Bureau provides no reasons for why it chooses not to pursue any given complaint.

Second, leaving aside complaints made by private parties, there are instances where the House of Commons Standing Committee on Agriculture and Agri-Food has raised concerns about conduct that it thought could constitute an abuse of dominance and even went so far as to direct the Bureau to investigate.[29] However, no enforcement proceedings were ever brought.

Third, there is a perceived disparity between the enforcement activities of the Bureau as compared to those of analogous public enforcement agencies in other major jurisdictions, such as the United States, the EU, and South Korea. In several cases, regulatory agencies in other jurisdictions have obtained judicial findings of misconduct and billion-dollar fines, and yet no analogous investigation was opened in Canada.[30]

Finally, given the extraordinarily low levels of enforcement activity in Canada, there would seem to be good reason to suspect that a significant amount of abusive activity is going undeterred and unaddressed.[31] Indeed, even those commentators who are largely predisposed against major changes to the *Competition Act* acknowledge that there are likely anti-competitive practices in Canada that are going unaddressed.[32]

All of this suggests that the lack of abuse of dominance cases in Canada cannot be persuasively explained by a lack of monopolistic behaviour in the Canadian economy.

II. Jurisprudential Problems of Under-Enforcement

The undesirable economic effects of insufficient enforcement activity regarding monopolistic practices—e.g., increased prices, lower quality, reduced innovation, reduced privacy protections and, from a labour perspective, poorer working conditions and reduced wages—are well-known and beyond the scope of our expertise. We instead address the harm that has been done to our understanding of competition law by the paucity of decided cases.

As noted above, Canada has only seven abuse of dominance cases[33] that have been litigated through a trial on the merits—only seven instances where an adjudicator has taken the very broad language of section 79 and applied it to a specific set of facts. In this sense, we would argue that the Bureau's unwillingness or inability to create a robust abuse of dominance docket for the Tribunal has stunted the indispensable—and necessarily incremental—process by which the meaning of a statutory provision is elucidated. While 41 years of *Charter* litigation has yielded thousands of decisions, each of which has worked to gradually shape and elucidate constitutional principles by repeatedly applying those principles to disparate fact patterns, 37 years of abuse of dominance litigation has yielded almost nothing. In contrast to the rich tapestry that comprises Canadian constitutional law, our competition law is threadbare in the extreme.[34]

This lack of a developed jurisprudence is not merely a concern because it leaves scholars and competition law wonks with little to discuss. It also poses a fundamental problem for competition law as a whole and for the economic actors who operate within its sphere. Without clarity—or even meaningful guidance—as to which types of conduct run afoul of the *Act*'s abuse of dominance provisions and which are permitted, economic actors are left guessing as to the legal risk inherent in any given course of conduct.[35]

Few would dispute that this uncertainty is undesirable, both from an economic perspective and from the perspective of the rule of law. Indeed, in advocating in favour of a private right of "access" to enforcing the abuse of dominance provisions, the Commissioner has stated that the "greatest benefit" of such private "access" is that "a broader body of case law would be developed". The Commissioner further noted that "such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses."[36] The C.D. Howe Institute's Competition Policy Council has expressed a similar view, warning of the dilemma facing businesses due to uncertainty "about how the law will be interpreted and enforced".[37] The words of VanDuzer and Paquet from 25 years ago remain just as apt today:

> More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it.[38]

Some have suggested that the problems arising from very thin jurisprudence can be mitigated to some extent by guidance documents issued by the Bureau.[39] However, guidance is a poor substitute for Tribunal decisions in actual cases. First, it cannot provide anything close to the degree of specificity that emerges from an actual case. It is not consider an actual set of facts, with all of the nuance and particularity and inconsistencies that make up real life. Even the illustrative examples provided by the Bureau in its guidance documents are necessarily reductive. At best, they provide a very rough sketch of which conduct is lawful and which is not.

And this leads to the second and more fundamental limitation of the Bureau's guidance documents: they are not binding. They do not bind the Tribunal. Indeed, they do not even bind the Commissioner.[40] At best, they provide some indication as to how the Bureau might view a type of conduct, but without any guarantee that that view might not change over time, and without any indication as to whether the Bureau's (or the Commissioner's) view might change if the specific facts of any given case were slightly different from the necessarily general facts of the illustrative examples. Accordingly,

the guidance documents do not, in fact, provide meaningful guidance—certainly nothing close to the level of guidance that is provided by decided cases—to economic actors or their legal advisors as to whether any given conduct is lawful or not.

III. Private Parties Are Best-Placed to Increase Enforcement

If, as we have argued, there is a need for more abuse of dominance litigation, the question arises how best to fill that need. Should we look chiefly to public enforcers—in this case, the Commissioner—to accomplish the task, or is it time to open the door wider to private enforcers? There are several reasons to believe that private enforcers are more likely to achieve the desired result of increasing the level of enforcement and increasing the volume of jurisprudence.

First, several commentators have noted that the Bureau's lack of resources is a strong argument for allowing private parties to fill the gap.[41] Indeed, even if the Bureau had resources that it considered adequate, it would likely still bring fewer cases than would be brought if private actors enjoyed a right of action. Public enforcers must balance a number of competing priorities in deciding whether to commence litigation before the Tribunal and often struggle with staffing constraints. Some commentators have postulated that there may be an institutional reluctance to litigate cases that are seen as close calls, in favour of pursuing only "sure things".[42]

Second, private parties are frequently better placed to identify abusive conduct,[43] as evidenced by the fact that a large proportion of the cases brought by the Commissioner were initiated by complaints from market participants. Not only are private parties better able to identify wrongdoing, they are often better able to prosecute it, by virtue of their superior knowledge of the relevant markets. As Ducci and Trebilcock explain, "Private enforcers often possess more information than public officials."[44]

Third, empirical evidence from both Canada and other jurisdictions suggest that private parties will energetically exercise the right to bring proceedings for abuse of dominance, if that right is granted. In Canada, there is a significant body of jurisprudence that has developed through private claims for damages arising from breach of the price fixing provisions of the *Act*. The European Commission found that the number of meritorious abuse of dominance prosecutions "significantly increased" after private access to courts was introduced.[45] Within one year of the introduction of a private cause of action, French courts had granted damages in 31 meritorious private cases.[46] In the United States, litigation instituted by private

parties has been described as a "bulwark of antitrust enforcement".[47] Recent statistics indicate that well over 90% of all antitrust claims in the United States are brought by private actors.[48] And in Australia, over the first 20 years in which private actions were permitted under their competition law statute, such cases accounted for over half of all of the competition law proceedings (79 cases, as compared to the 61 commenced by public enforcement agencies).[49]

IV. The Optimal Structure of a Private Cause of Action

If Parliament creates a private cause of action for abuse of dominance, the only remaining question is how it should be structured. We propose that plaintiffs should be able to bring actions for compensatory damages to the courts, with no leave requirement—the model under section 36 of the *Act*. Below, we respond to three objections to that model, namely (1) damages are not necessary; (2) the Tribunal is a better forum; and (3) the absence of a leave requirement will result in over-enforcement.

A) Compensatory Damages Are Necessary and Desirable

As explained above, the purpose of a private cause of action for abuse of dominance would be to increase the number of cases brought, so as to increase enforcement and the body of jurisprudence. To achieve that result, private parties must be incentivized to commit significant resources to the litigation. Prosecuting an abuse of dominance case requires the expenditure of hundreds of thousands, and often millions of dollars, not to mention the commitment of countless hours by personnel to assist and instruct counsel. Thus, to provide an effective incentive, the remedies available to a successful plaintiff must be of sufficient value to offset the cost of the litigation.[50] A broad range of commentators and policy-makers agree that the best form of incentive would be a right to recover compensatory damages.[51]

Such a right would eliminate an unnecessary distinction in the *Act*: compensatory damages are available for conduct that attracts criminal sanction, but not for conduct that is civilly reviewable. We do not see any compelling policy reason to justify this distinction. The corrective justice paradigm that justifies a right to claim damages for losses suffered as a result of criminal conduct should apply with equal force to losses suffered as a result of abuse of dominance.[52]

Some argue that the currently available remedies—mandatory orders and AMPs—offer a sufficient incentive to plaintiffs.[53] However, the exceedingly

small number of proceedings that have been commenced by private parties under sections 75, 76 and 77[54] belies that assertion.

In addition, some have argued that compensatory damages for abuse of dominance are inconsistent with the purpose of the *Act*, which they allege is to protect competition rather than to protect competitors or consumers.[55] This argument is problematic for two reasons.

First, it is inconsistent with the purpose clause of the *Act*, which includes "ensur[ing] that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and "provid[ing] consumers with competitive prices and product choices".[56]

Second, it runs headlong into section 36 and the fact that the *Act* already incorporates the notion of compensation for parties injured by anti-competitive conduct. This right is extended by subsection 36(1)(b) to breaches of an order granted under other sections of the *Act*, including section 79. It seems particularly hard to argue that a right to compensation for injury suffered as a result of a breach of section 79 is inconsistent with the purpose of the *Act*, when the statute already allows a right to compensation for injury suffered as a result of the breach of an order granted to remedy a breach of section 79.

Moreover, even if the current structure of the *Act* does not embrace corrective justice, Parliament can (and should) adjust the *Act* to encompass such a purpose. If Parliament were to amend the *Act* to allow a private right of action for damages to compensate for losses suffered as a result of a breach of section 79, it would be impossible to argue that the purpose of the *Act* does not encompass compensation for parties injured by anti-competitive conduct. In this sense, arguments about current legislative purpose are not particularly compelling when the question relates to proposed legislative reform.

B) Leave Should Not Be Required

We are of the view that there should not be any leave requirement imposed on a private action for damages. Such a requirement would undermine the goal of increasing enforcement and of developing the jurisprudence.

The current leave requirement has been criticized as unduly onerous.[57] And, indeed, of the 26 applications brought under section 103.1 that have resulted in a decision, leave was refused outright in 18 cases, leave was refused without prejudice in 1 case, leave was granted but rescinded in 2

cases, leave was granted in part in 2 cases, and leave was granted in full in only 4 cases.[58] Several other applications were abandoned or settled before a decision was rendered. Assuming a similar approach would be applied to applications for leave to bring an action for damages, one has to assume that the leave requirement would undermine the goal of increasing enforcement. Moreover, in the 26 applications, the Tribunal's decisions have rarely commented on the merits of the case, which further undermines the goal of increasing the amount of jurisprudence.

A number of commentators, arguing in favour of imposing a leave requirement on a right of action for damages, have raised the spectre of a flood of meritless litigation. They assert that private parties will use litigation "strategically", bringing frivolous claims that will act as an inefficient drag on beneficial commercial activity and/or that the threat of such unmeritorious claims will have a "chilling" effect, frightening companies away from desirable behaviour.[59] However, they provide no cogent evidence of these frivolous claims—a failure that has been noted by the Standing Committee on Industry, Science and Technology.[60] We are not aware of any reason to believe that the availability of a private right of action in any of Australia, the European Union, the United States, or any of the other jurisdictions discussed above has had an adverse effect on economic activity in those countries. In the absence of such evidence and in the absence of a compelling explanation as to why Canada's experience would be any different, the argument about the risk of such a "chill" does not seem to be one of substance.

Moreover, other commentators argue that any risk of such over-deterrence can be reduced to an acceptable degree through a well-designed private right of action (e.g. one in which remedies are limited to actual damages and one in which there are meaningful cost consequences to the unsuccessful litigant).[61]

C) The Courts Should Have Concurrent Jurisdiction

The final question to address is whether the Tribunal should retain exclusive jurisdiction for hearing cases asserting a breach of the abuse of dominance provisions. We believe that it should not, and that concurrent jurisdiction should be granted to both the provincial superior courts and to the Federal Court to hear plaintiffs' claims. We have three reasons.

First, the Competition Tribunal has no procedural mechanism by which a class action or representative action could be brought before it. Given that claims for harm done to consumers or workers by an alleged abuse of

dominance are likely to be brought exclusively by means of a class proceeding, if jurisdiction to hear claims for abuse of dominance were extended solely to the Tribunal, claims by consumers or workers would be effectively precluded—a result which does not seem justifiable from a policy perspective.

Second, the Tribunal cannot hear common law or provincial statutory claims. It is likely that claims for abuse of dominance will be brought concurrently with other claims, arising at common law or under provincial statutes (e.g., conspiracy, interference with economic relations, negligent misrepresentation, and breaches of consumer protection legislation). Provincial superior courts could deal with all of those claims in one proceeding. However, if jurisdiction over the abuse of dominance claim is granted exclusively to the Tribunal, a multiplicity of proceedings will necessarily result.

Third, the judges who sit on the Tribunal are few in number, which means that the pool of jurists who are called upon to hear cases brought before it is very small. If one of the purposes of creating a private right of action for abuse of dominance is to foster the growth of a robust body of jurisprudence, then limiting the voices who can contribute to that dialogue to fewer than half a dozen would seem counter-productive.

The most commonly-cited reason for maintaining the Tribunal generally and for maintaining its exclusive jurisdiction over abuse of dominance matters more specifically is that it includes economists whose expertise is particularly valuable in abuse of dominance cases.[62] Some have argued that criminal conduct requires limited economic evidence, whereas everything else—including abuse of dominance—requires significant economic evidence[63] and that, accordingly, the courts' ability to adjudicate conspiracy claims should not be used as a basis for concluding that they would be equally able to adjudicate abuse of dominance claims.

However, the premise for that argument is incorrect. Expert economic evidence is almost always required in price-fixing claims under section 36. Consider for example the following statements made by courts in section 36 cases:

> Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution … [emphasis added][64]

> In preparation for certification, expert materials will have to be prepared to address the economic impacts of the conspiracy, including the economic impact on umbrella purchasers.[65]

> The resolution of these issues will require extensive, expert economic evidence.[66]

Even if it were true that judges hearing price-fixing cases do not need to grapple with complex economic evidence, judges in both the superior courts and the Federal Court are routinely called upon to consider complex expert evidence from a wide range of disciplines, including economics. To suggest that those courts are somehow less capable than the Tribunal of understanding such evidence is without foundation.

Conclusion

Abuse of dominance appears to be plagued by underenforcement in Canada. While more resources have recently been allocated to the Bureau, there is good reason to doubt whether that additional funding will be sufficient to remedy the problem. With a widespread consensus that private litigants need to be part of the solution, the time seems ripe for Canada to join other jurisdictions with sophisticated competition law regimes and introduce a private right of action for damages suffered as a result of abuse of dominance. That right of action should be unshackled from any leave requirement, with jurisdiction over the claim being granted concurrently to the provincial superior courts and the Federal Court. After four decades years of inadequate enforcement, and close to 20 years of commentators and policy-makers advocating in favour of this legislative change, there is no reason to delay any further.

ENDNOTES

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

[2] Private causes of action also exist in developing countries like China (*Anti-Monopoly Law of the People's Republic of China,* Standing Committee of the National People's Congress, Order no 68, 30 August 2007, art 50, online: <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm>); Mexico (see OECD, *Individual and Collective Private Enforcement of Competition Law: Insights for Mexico* (2018), online: <https://www.oecd.org/daf/competition/EN-WEB-private-enforcement-competition-law-mexico-2018.pdf>); Argentina (*Law on the Protection of Competition,* no 27442, 9 May 2018, art 62, online: <https://www.argentina.gob.ar/normativa/nacional/ley-27442-310241/texto>), and even Saudi Arabia (*Competition Law*, Royal Decree no M/75, 7 March 2019, art 62, online: <https://www.wipo.int/wipolex/en/text/566576>.

[3] 15 USC § 15 (1914).

[4] *Competition Act 1998* (UK), s 47A.

[5] The European laws on damages for abuse of dominance are reviewed in Philipp Kirst, "The temporal scope of the damages directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe" (2020) 16:1 Eur Competition J 97. For the European Union overall, see EU, *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance*, [2014] OJ, L 349/1; and EC, "Antitrust Overview" (nd), online: <https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en>. For Austria, see *Federal Cartel Act 2005*, BGBL I, no 61/2005, ss 37(b)-(d), online: <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>. For Belgium, see *Code of Economic Law*, MB, 29 March 2013, art XVII.72, online: <http://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel>. For Bulgaria, see *Law amending and supplementing the Law on Protection of Competition*, Decree No 270, 21 December 2017, s 2, online: <https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=121198> . For Croatia, see *Law on compensation procedures for violations of competition law*, NN, no 69/17, arts 1, 3, online: <https://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_69_1607.html>. For the Czech Republic, see *Act on Compensation for Damages in the Field of Economic Competition*, No 262/2017 Sb, art 4, online: <https://www.zakonyprolidi.cz/cs/2017-262>. For Denmark, see *Act on the processing of compensation cases relating to infringements of competition law*, no 1541, ch 2, online: <https://www.retsinformation.dk/eli/lta/2016/1541>. For Estonia, see *Competition Act*, RT I 2001, no 56 & 332, s 78, online: <https://www.riigiteataja.ee/akt/130122014015>. For Finland, see *Competition Act*, no 2011/948, s 20, online: <https://www.finlex.fi/en/laki/kaannokset/2011/en20110948.pdf>. For France, see *Décret n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles*, JO, 10 March 2017, no 59, online: <https://www.legifrance.

gouv.fr/jorf/id/JORFTEXT000034160256>. For Germany, see *Competition Act*, BGBL I, 2013, no 3245, s 33 & 33(a), online: <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0256>. For Greece, see *Law on the Protection of Free Competition*, no 4529/2018, art 3, online: <https://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/e-antag-pap-apospasma.pdf>. For Hungary, see *Act on the Prohibition of Unfair and Restrictive Market Practices*, no LVII/1996, arts 88/A & 88/C, online: <https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true> . For Ireland, see *Competition Act 2002*, no 14/2002, s 14(1), online: <https://revisedacts.lawreform.ie/eli/2002/act/14/revised/en/html#SEC14>. For Italy, see *Legislative Decree No 3, 19 January 2017, Implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,* GU, 19 January 2017, no 15, art 1, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104> . For Latvia, see *Competition Law*, LV, 23 October 2001, no 151, art 21, online: <https://likumi.lv/ta/en/en/id/54890>. For Lithuania, see *Law of the Republic of Lithuania on Competition,* TAR, 2017 January 18, no 1075, art 43-44, online : <https://www.e-tar.lt/portal/en/legalAct/ad961110dd8911e69ae9f38427b46dd7>. For Luxembourg, see *Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence,* Mémorial A, 2016, no 245, online: <https://legilux.public.lu/eli/etat/leg/loi/2016/12/05/n1/jo>. For Malta, see Competition Act, Cap 379, s 9, online: <https://legislation.mt/eli/cap/379/eng/pdf>; and *Competition Law Infringements (Actions for Damages) Regulations, 2017*, LN 117 of 2017, s 4, online: <https://legislation.mt/eli/ln/2017/117/eng/pdf>. For the Netherlands, see Art 6:193(a)-193(j) Civil Code, online: <http://www.dutchcivillaw.com/civilcodebook066.htm>. For Poland, see *Act of 21 April 2017 on the private enforcement of competition law*, arts 3, 11, online: <http://orka.sejm.gov.pl/proc8.nsf/ustawy/1370_u.htm#_ftn1>. For Portugal, see *Act no 23/2018*, DR, 2018 June 5, no 107/2018, art 3, online: <https://diariodarepublica.pt/dr/detalhe/lei/23-2018-115456103>. For Romania, see *Emergency Ordinance no 170 of October 14, 2020*, MO, 16 October 2020, no 952, arts 2(l), 3, online: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/231241>. For Slovakia see, *Act on Certain Rules for Applying Claims for Compensation for Damage Caused by Violation of Competition Law*, no 350/2016, art 3, online: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/350/20161227.html>. For Slovenia, see *Act on the Prevention of Restriction of Competition*, no 23/17, art 62, online: <http://www.pisrs.si/Pis.web/pregledPredpisa?sop=2017-01-1208>. For Spain, see *Real Decreto-ley 9/2017, de 26 de mayo, por el que se transponen directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores*, BOE, 27 May 2019, no 126, arts 71-81, online: <https://www.boe.es/boe/dias/2017/05/27/pdfs/BOE-A-2017-5855.pdf>. For Sweden, see

Competition Damages Act, no 964/2016, s 2, online: <https://rkrattsbaser.gov.se/sfst?bet=2016:964>.

[6] *Competition and Consumer Act 2010* (Commonwealth), 1974/51, s 82 (Austl).

[7] *Commerce Act 1986*, 1986/5, s 82 (NZ).

[8] Atsushi Yamada, "Private antitrust litigation in Japan: overview", Practical Law (1 April 2019), online: <https://uk.practicallaw.thomsonreuters.com/w-019-8839?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

[9] *Monopoly Regulation and Fair Trade Act*, no 2021/16998, art 56 (South Korea), online: <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61424&lang=ENG>.

[10] *Fair Trade Act*, arts 30-31. (Taiwan), online: <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61424&lang=ENG>.

[11] *Competition Act*, *supra* note 1, s 36(1).

[12] *Ibid*, ss 75(1), 76(2), 77(2), 79(1), 79(2), 79(3.1), 81(1) & 84.

[13] *Ibid,* s 7(1).

[14] David Vaillancourt, "A Private Right of Action for Abuse of Dominance" (26 April 2021), *CD Howe Institute*, online: <https://www.cdhowe.org/intelligence-memos/david-vaillancourt-%E2%80%93-private-right-action-abuse-dominance>.

[15] Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60:2 Can Bus LJ 171 at 197; *The Commissioner of Competition v Vancouver Airport Authority,* 2019 Comp Trib 6.

[16] Matthew Boswell, "Canada Needs More Competition" (delivered at the Canadian Bar Association Competition Law Fall Conference, 20 October 2021), online: <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>; Canada, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (Submission by the Competition Bureau) (8 February 2022), s 3.4, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> [Competition Bureau, *Competition Act in the Digital Era*]. See also Competition Policy Council, *Distilled Wisdom: Top Legal and Economic Experts on the Most Needed Competition Reforms* (9 September 2021), *CD Howe Institute*, online: <https://www.cdhowe.org/council-reports/distilled-wisdom-top-legal-and-economic-experts-most-needed-competition-reforms> [Competition Policy Council, *Distilled Wisdom*].

[17] Canada, Competition Bureau, *The Future of Competition Policy in Canada* (Submission by the Competition Bureau) (15 March 2023), ss 2.1, 3.1.5, 5.4.3 & 5.5.2, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada> [Competition Bureau, *Future of Competition Policy*].

[18] Boswell, *supra* note 16.

[19] George Addy, John Bodrug & Charles Tingley, "Abuse of Dominance in

Canada: Reflections on 25 Years of Section 79 Enforcement" (2012) 25:2 Can Competition L Rev 276 at 281.

[20] See e.g. Vaillancourt, *supra* note 14; Vass Bednar, Ana Qarri & Robin Shaban, *Study of Competition Issues in Data-Driven Markets in Canada* (January 2022), Vivic Research at 15, online: <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1f4b6217f9e441123144e/1674704058295/vivic-research-competition-data-driven-markets-final-report-2022.pdf>; Competition Policy Council, *A New Competition Act for a New Federal Government*, *CD Howe Institute* (April 28, 2016) at 4, online: <https://www.cdhowe.org/cpc-communique/new-competition-act-new-federal-government>; House of Commons, *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (April 2002) at 33, online: <https://publications.gc.ca/site/fra/9.536432/publication.html>; Paul-Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18 Dal J L Studies 1 at 28.

[21] We have been unable to find any commentary expressing this view.

[22] Chris Hersh & Katarina Wasielewski, "Change has come: Significant *Competition Act* amendments enacted; more to follow …", Norton Rose Fulbright (17 August 2022), online: <https://www.nortonrosefulbright.com/en/knowledge/publications/4b0f25f2/change-has-come-significant-competition-act-amendments-enacted> ("As there is no right to damages, there may be limited incentives for private parties to bring private abuse of dominance cases, as these cases are generally a costly, time-consuming undertaking"); Sandy Walker et al, "Proposed amendments to the *Competition Act*—new prohibitions and higher penalties", Dentons (6 May 2022), online: <https://www.dentons.com/en/insights/articles/2022/may/5/proposed-amendments-to-the-competition> ("While the number of abuse of dominance cases may increase, the leave requirement and lack of financial incentives may ultimately curb enthusiasm").

[23] Competition Bureau, *Future of Competition Policy*, *supra* note 17, s 5.5.2.

[24] Competition Bureau, *Competition Act in the Digital Era*, *supra* note 16, s 8 & Recommendation 8.8; Veel, *supra* note 20 at 9-10.

[25] Competition Bureau, *Future of Competition Policy*, *supra* note 17, s 5.5.2; Vaillancourt, *supra* note 14; Subrata Bhattacharjee et al, "Proposed amendments to the Competition Act become law" (18 July 2022), Mondaq, online: <https://www.mondaq.com/article/1214238>; Walker et al, *supra* note 22; Hersh & Wasielewski, *supra* note 22; Elad Gafni & Ian Macdonald, "Significant First-Round Amendments to the Competition Act Come Into Force" (28 June 2022), Gowling WLG, online: <https://gowlingwlg.com/en/insights-resources/articles/2022/significant-amendments-to-competition-act/>.

[26] Competition Bureau, *Future of Competition Policy, supra* note 17, s 3.1.7.

[27] Addy, Bodrug & Tingley, *supra* note 19 at 310; Competition Policy Council, "Damage Control: Abuse of Dominance and the State of Private Remedies in the *Competition Act*" (20 October 2016), *CD Howe Institute*, online: <https://www.cdhowe.org/cpc-communique/

damage-control-abuse-dominance-and-state-private-remedies-competition-act> [Competition Policy Council, *Damage Control*].

[28] Vaillancourt, *supra* note 14.

[29] House of Commons, *Competitiveness of Canadian Agriculture: Report of the Standing Committee on Agriculture and Agri-Food* (May 2010) at 20-23, online: <https://www.ourcommons.ca/Content/Committee/403/AGRI/Reports/RP4494785/agrirp03/agrirp03-e.pdf>.

[30] See e.g. Elvira Pollina & Maria Pia Quaglia, "Italy fines Amazon record $1.3 bln for abuse of market dominance", *Reuters* (9 December 2021), online <https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09/> ; EC, "Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime" (20 December 2022), online: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777>; as a further example, see *Davitashvili v Grubhub Inc* (30 March 2022), 37 in 1:20-cv-03000-LAK (SD NY), online: <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2020cv03000/535674/46/0.pdf?ts=1648740660> (denying motion to dismiss putative class action against Grubhub Inc, Uber Technologies Inc, and Postmates Inc for price fixing).

[31] As one scholar has noted in respect of enforcement generally (i.e., not limited to antitrust law), "One can safely suppose . . . that zero or near-zero levels of enforcement are not optimal. . ." J Maria Glover, "The Structural Role of Private Enforcement Mechanisms in Public Law" (2012) 53:4 Wm & Mary L Rev 1137 at 1146.

[32] Anthony Niblett and Daniel Sokol, *Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech* (November 2021), McDonald Laurier Institute, at 5 & 25, online: <https://macdonaldlaurier.ca/mli-files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf>.

[33] For clarity, the reference here to abuse of dominance cases refers to cases brought under section 79 of the *Competition Act, supra* note 1. It does not include cases brought under, for example, sections 75, 76 or 77.

[34] For commentary on the "sparse" nature of Canadian competition law jurisprudence, see e.g. Kent Roach and Michael J Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:3 Osgoode Hall LJ 461 at 470; Addy, Bodrug & Tingley, *supra* note 19 at 281.

[35] Roach and Trebilcock, *supra* note 34 at 481.

[36] Competition Bureau, *Competition Act in the Digital Era*, *supra* note 16, s 3.4.

[37] Competition Policy Council, *Distilled Wisdom, supra* note 16; see also Addy, Bodrug & Tingley, *supra* note 19 at 276 & 290.

[38] Canada, Competition Bureau, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice,* by J Anthony VanDuzer and Gilles Paquet (Ottawa: Industry Canada, 1999), Part III, online: <http://web.archive.org/web/20130629005037/http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01784.html#3Assess>.

[39] Addy, Bodrug & Tingley, *supra* note 19 at 292-293.

[40] *CCS Corporation v Secure Energy Services Inc*, 2013 ABQB 606 at paras 27-28; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 at para 711; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at para 94.

[41] Veel, *supra* note 20 at 18; Competition Policy Council, *Damage Control, supra* note 27.

[42] See e.g. Robert H Lande & Joshua P Davis, "Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws", 2011 BYUL Rev 315 at 337.

[43] Roach and Trebilcock, *supra* note 34 at 479.

[44] Francesco Ducci & Michael Trebilcock, "The Revival of Fairness Discourse in Competition Policy" (2019) 64:1 Antitrust Bulletin 79 at 101. See also Roach and Trebilcock, *supra* note 34 at 472; and see Niblett and Sokol, *supra* note 32 at 25 and Glover, *supra* note 31 at 1155.

[45] EC, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament*, SWD (2020) 338 (2020) at 3, online: <https://www.astrid-online.it/static/upload/repo/report_on_damages_directive_implementation.pdf>.

[46] Suzanne Carval & Jean-Francois Laborde, "Compensation for Damages Caused by Abuse of Dominance" (2018) 1 *Concurrences* art 84884, online: <https://www.concurrences.com/en/review/issues/no-1-2018/pratiques/compensation-for-damages-caused-by-abuse-of-a-dominant-position>.

[47] *Perma Life Mufflers Inc v International Parts Corp*, 392 US 134 at 139 (1968), cited in Sarah W Corman & Emily M Rix, "The New Landscape for Competition Private Actions" in Todd Archibald & Michael Cochrane, eds, *Annual Review of Civil Litigation 2009* (Toronto: Carswell, 2009) 371 at 371.

[48] Administrative Office of the United States Courts, "Table C-2–U.S. District Courts–Civil Federal Judicial Caseload Statistics" (last updated 31 March 2021), online: <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2021/03/31>.

[49] Roach and Trebilcock, *supra* note 34 at 467.

[50] *Ibid* at 476.

[51] Competition Policy Council, *Distilled Wisdom, supra* note 16 at 7; *Report of the Standing Committee on Industry, Science and Technology*, *supra* note 20 at 48; Vaillancourt, *supra* note 14; Roach and Trebilcock, *supra* note 34 at 496-497.

[52] *Ibid* at 461.

[53] Veel, *supra* note 20 at 24.

[54] Barely 20 over the last 20 years. For cases brought under section from 2002 to 2008, see *ibid.* From 2008 until 2023, only seven cases have been brought under sections 75, 76 and 77.

[55] *Ibid* at 26.

[56] *Competition Act*, *supra* note 1, s 1.1.

[57] Veel, *supra* note 20 at 9-10.

[58] Leave granted in full: *Nadeau Poultry Farm Limited v Groupe Westco Inc*, 2008 Comp Trib 7; *Allan Morgan & Sons Ltd v La-Z-Boy Canada Ltd*, 2004 Comp

Trib 4; *Quinlan's of Huntsville Inc v Fred Deeley Imports Ltd*, 2004 Comp Trib 15; *Robinson Motorcycle Ltd v Fred Deeley Imports Ltd*, 2004 Comp Trib 13. Leave granted in part: *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26; *The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10. Leave granted but rescinded: *Symbol Technologies Canada ULC v Barcode Systems Inc and Price Waterhouse Coopers Inc as Interim Receiver of Barcode Systems Inc*, 2005 Comp Trib 32; *B-Filer Inc et al v The Bank of Nova Scotia*, 2007 Comp Trib 5. Leave refused: *Coretti v Bureau de la Sécurité Privée and Garda World Security Corporation*, 2019 Comp Trib 4; *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28; *Safa Enterprises Inc v Imperial Tobacco Company Limited*, 2013 Comp Trib 19; *Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp Trib 1; *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada et al*, 2008 Comp Trib 29; *Canadian Standard Travel Agent Registry v International Air Transport Association*, 2008 Comp Trib 14; *Annable v Capital Sports and Entertainment Inc*, 2008 Comp Trib 5; *National Capital News Canada v Speaker of the House of Commons*, 2007 Comp Trib 23; *Sono Pro Inc v Sonotechnique PJL Inc*, 2007 Comp Trib 18; *Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd*, 2007 Comp Trib 6; *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp Trib 21; *Paradise Pharmacy Inc and Rymal Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp Trib 21; *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp Trib 22; *Mrs O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24; *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 23; *National Capital News Canada v Milliken*, 2002 Comp Trib 41. Leave refused without prejudice: *Swenson Inc v Trader Corporation*, 2008 Comp Trib 20.

[59] Competition Policy Council, *Damage Control, supra* note 27 at 3; Addy, Bodrug & Tingley, *supra* note 19 at 302, 313.

[60] *Report of the Standing Committee on Industry, Science and Technology*, *supra* note 20 at 28.

[61] Ducci & Trebilcock, *supra* note 44 at 101-102.

[62] Addy, Bodrug & Tingley, *supra* note 19 at 278-279.

[63] Frank Roseman & Jane Graham, "Expert Evidence in Competition Tribunal Proceedings" (1992) 20:3 Can Bus LJ 406 at 407.

[64] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 44.

[65] *Asquith v George Weston Limited*, 2018 BCSC 1557 at para 81.

[66] *Ewert v Nippon Yusen Kabushiki Kaisha*, 2022 BCSC 1908 at para 13. See also *Fanshawe College v LG Philips LCD Co*, 2011 ONSC 2484 at para 51.

INSTITUTIONAL DESIGN AND THE ADMINISTRATION OF CANADIAN COMPETITION LAW: MODERNIZING THE COMPETITION TRIBUNAL

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With the federal government's consultation process to modernize Canadian competition law well underway, the time has come to revisit the structure and function of the Competition Tribunal. In recent years, the Competition Tribunal has faced criticism for lengthy decision-making timelines and an overly formal approach to resolving disputes. This paper examines certain other Canadian tribunals and foreign competition tribunals to gain insight into how other specialized decision-making bodies have been designed in order to fulfill their unique mandates. We then explore calls for reforming the Competition Tribunal championed by professors and practitioners alike before concluding with a list of four priorities to consider for Competition Tribunal reform. In accepting these four proposals, the federal government could ensure that the Competition Tribunal provides Canadians with increased access to justice through the efficient and effective resolution of disputes under the Competition Act.

Le processus de consultation du gouvernement fédéral visant à moderniser le droit de la concurrence au Canada va bon train, et le moment est venu de revoir la structure et le fonctionnement du Tribunal de la concurrence. Ces dernières années, le Tribunal a été la cible de critiques pour ses interminables délais décisionnels et son processus de résolution des litiges jugé trop peu flexible. Les auteurs de cet article jettent un regard sur d'autres tribunaux du droit de la concurrence, au Canada et à l'étranger, pour voir comment les autres instances décisionnelles spécialisées ont été structurées en vue de remplir leur mandat particulier. Vient ensuite un examen des appels à la réforme du Tribunal de la concurrence, mise de l'avant par professeurs, professeures, praticiens et praticiennes et praticiens. Ils concluent cet article par une liste des quatre priorités qui devraient présider à cette réforme. En acceptant ces quatre propositions, Ottawa pourra garantir que le Tribunal assure à la population canadienne un accès amélioré à la justice grâce à un processus efficace de résolution des litiges sous le régime de la Loi sur la concurrence.

Introduction

In February 2022, the Minister of Innovation, Science and Industry announced his intention to undertake a review of the *Competition Act*, beginning with immediate, targeted improvements and followed by further consultations to consider broader changes. The Government of

Canada completed the first stage of targeted amendments in June 2022, and in November 2022 it launched a Consultation on the Future of Competition Policy in Canada (the "**Consultation**").[2] The first stage of the Consultation was completed on March 31, 2023, and the Government is now considering a broad range of proposals for reform, including with respect to the function and role of the Competition Tribunal (the "**Tribunal**"). This process creates an important opportunity to revisit the institutional design of Canadian competition law enforcement agencies, and to ensure that the Tribunal is well-equipped to facilitate access to justice for Canadians.

This paper begins by describing the current structure and certain aspects of the Tribunal's procedure—which has not been significantly altered since the 2002 amendments to the *Competition Act* and *Competition Tribunal Act*.[3] After examining how certain other specialized administrative decision-makers in Canada and around the world are designed to carry out their mandates, we evaluate the merits of various calls for reforming the Tribunal. We conclude that by imposing time limits, altering the composition of members, expanding private access and reworking certain procedural rules, the Tribunal can more effectively and efficiently fulfill its mandate. To ensure that Canadian individuals and businesses are ensured access to justice in competition law matters, the Government of Canada should in particular emphasize reforms tailored to ensure the timeliness of all decisions made by the Tribunal.

Part I: How the Competition Tribunal Currently Works

A) Overview of Canadian Competition Law and the Competition Tribunal's Role

Competition law in Canada is regulated at the federal level by the *Competition Act*, which separates anti-competitive conduct into two types: (i) that which attracts criminal sanctions; and (ii) that which is not illegal, but which is reviewable by the Tribunal and can be subject to civil sanctions in certain circumstances.[4] Matters reviewable by the Tribunal are found at Parts VII.1 and VIII of the *Competition Act* and include certain deceptive marketing practices, restrictive trade practices (*i.e.*, refusals to supply, resale price maintenance, abuse of dominance, exclusive dealing, etc.), certain competitor collaborations and mergers.[5]

The civilly reviewable sections of the *Competition Act* are enforced by three entities: (i) the Competition Bureau (the "**Bureau**") headed by the Commissioner of Competition (the "**Commissioner**"); (ii) the Tribunal; and (iii) the courts. There are three potential stages in the Bureau's

enforcement process: (i) a preliminary examination; (ii) a formal inquiry; and (iii) an application to the Tribunal. At any time during a formal inquiry, the Commissioner may conclude that there are grounds for an order under the *Competition Act* and if such a conclusion is reached, and the parties are unable to negotiate a settlement, the Commissioner will make an application to the Tribunal to litigate the issue. Currently, there are no time limits imposed on the Bureau's investigations, nor on the overall length of Tribunal proceedings.

The Tribunal was established in 1986 by the *Competition Tribunal Act*.[6] The Tribunal has the powers, rights and privileges of a superior court of record. In particular, it has the authority to:

- hear and determine applications relating to the reviewable matters provisions of the *Competition Act* and any related matters;[7]
- hear and determine references of any question of law, mixed law and fact, jurisdiction, practice or procedure in respect of the reviewable matters provisions of the *Competition Act*;
- hear and determine contempt proceedings for breach of a Tribunal order;
- vary or rescind a Tribunal order on request from the Commissioner or a person against whom the order was made;
- grant leave to private parties who wish to bring an application before the Tribunal for remedies in respect of conduct falling under Sections 75 (refusal to supply), 76 (resale price maintenance), 77 (exclusive dealing/tied selling/market restriction) and 79 (abuse of dominance);
- grant leave to intervene to any person affected by a matter before the Tribunal and determine the extent to which the intervener will participate; and
- award costs, including costs against the Commissioner.

Private parties are also able to seek leave from the Tribunal to bring an application for remedies in respect of civilly reviewable conduct falling under Sections 75 (refusal to deal), 76 (price maintenance), 77 (exclusive dealing/tied selling/market restriction) and—since June 2022—78–79 (abuse of dominance) of the *Competition Act*. If granted leave, the private party may negotiate a settlement agreement and have it registered as a consent agreement with the Tribunal that is enforced as if it were an order

of the Tribunal or seek any of the remedies available to the Commissioner under the sections listed above (including the imposition of an administrative monetary penalty, *i.e.*, a fine).

To obtain leave to bring a matter before the Tribunal, private parties must make an application within one year after the practice or conduct that is the subject of the application has ceased. The Tribunal may only grant leave if it has reason to believe that: (i) the applicant's business has been substantially and directly affected (in the case of Sections 75, 77 and 79) or directly affected (in the case of Section 76) by the conduct complained of; and (ii) that the conduct in question could be subject to an order under one of Sections 75, 76, 77 or 79.[8] On an application for leave, the applicant needs to provide "sufficient credible evidence" of what is alleged so that the Tribunal has a "*bona fide* belief" that both required elements for leave are satisfied. In other words, the applicant must establish that their business was directly and substantially affected by the conduct of the respondent and must give evidence that the respondent's practice met all statutory elements of the reviewable practice with respect to which they are seeking leave to apply.[9] If leave to bring a matter before the Tribunal is granted, the notice of application is deemed to be filed as of the date the leave was granted and the respondent must respond within 45 days. The case then proceeds in accordance with the *Competition Tribunal Rules* for contested proceedings.[10] If granted leave, the private party may seek an order prohibiting the anti-competitive conduct at issue and/or ask the Tribunal to issue an administrative monetary penalty (*i.e.*, a fine) against the party engaged in the conduct.[11] Unlike the Commissioner, a private party may not obtain a prescriptive order forcing the respondents to do specific things to restore competition. Private parties cannot recover damages for losses stemming from anti-competitive conduct.[12]

Private applications to the Tribunal are infrequent. In the more than 20 years since private access to the Tribunal has been available in Canada there have only been 28 applications for leave to bring an application under Sections 75, 76 or 77 of the *Competition Act* (and none under Section 79 (abuse of dominance), which has been permitted at the time of writing for one year).[13] Only eight of the 28 applications for leave were granted by the Tribunal and the applications on their merits all either settled before reaching a hearing or were dismissed.[14] Possible reasons for the limited number of private actions in competition cases include private parties facing challenges obtaining leave as well as a lack of incentives due to the fact that they cannot recover damages at the Tribunal for any losses suffered as a result of the practices in question (unless they are alleging a respondent is in breach

of a pre-existing Tribunal order, which breach is a criminal violation and is therefore compensable in damages under section 36 of the *Competition Act*).

The courts are also involved in the enforcement of the civilly reviewable sections of the *Competition Act*—the superior courts of the provinces and the Federal Court share jurisdiction with the Tribunal to adjudicate matters relating to reviewable deceptive marketing practices under the *Competition Act*. In addition, the Federal Court of Appeal (the "**FCA**") hears and determines appeals from decisions of the Tribunal as if they were judgements of the Federal Court.[15]

B) The Composition of the Tribunal

The Tribunal is a specialized adjudicative body intended to combine economic, business and legal expertise for the determination of civil proceedings pursuant to the *Competition Act*. The expertise of the Tribunal was intended to flow from its composition—the Tribunal is made up of no more than six judicial members from the Federal Court and no more than eight lay members appointed by the Governor in Council (both on the recommendation of the Minister of Justice).[16]

Applications before the Tribunal (for matters other than civilly reviewable deceptive marketing cases) are heard by a panel of three to five members, among which there must be at least one judicial member and at least one lay member. Motions and references may be heard by one judicial member.[17] Only judicial members may determine questions of law, while questions of fact or mixed fact and law are to be decided by all members of the panel. The Tribunal also has the power to appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding.[18]

The Tribunal deals with interlocutory or interim matters and also decides cases on their merits in accordance with the civil standard of proof (*i.e.*, on a balance of probabilities). Decisions of the Tribunal may be appealed to the FCA (as of right from all decisions, whether final, interim or interlocutory as if they were decisions of the Federal Court, however pure questions of fact require leave).[19]

C) Expediency of Litigation at the Tribunal

In contrast with some other administrative tribunals in Canada and elsewhere, there are no overall time limits on proceedings or decisions at the

Tribunal. The *Competition Tribunal Act* requires that proceedings before the Tribunal be "dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".[20] However, in practice, the Tribunal functions like a superior court—it has all the same powers as a superior court with respect to the "attendance, swearing and examination of witnesses, the production and inspection of documents [and] the enforcement of its orders" and has a comprehensive set of procedural rules (the *Competition Tribunal Rules*) which are similar to rules of court, including documentary discovery and examinations for discovery as of right.[21] These formalized procedures result in proceedings at the Tribunal being plagued by similar access to justice issues as the courts.

For example, in *Canada (Commissioner of Competition) v Vancouver Airport Authority*, over two years passed from the date the notice of application was filed at the Tribunal (*i.e.*, the case was commenced) to the first date of the hearing.[22] Similarly, in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited* ("Parrish & Heimbecker"), over 12 months passed from the date the notice of application was filed at the Tribunal to the first date of the hearing.[23] There is also no limit on how long the Tribunal can take to make its decision and provide reasons, which can be another cause for lengthy delays. For example, again in *Parrish & Heimbecker,* the Tribunal's decision was not released to the parties until nearly 21 months after the end of the hearings and the reasons were not released to the public until two weeks later.[24] The Tribunal is capable of making faster decisions, as it demonstrated in *Rogers-Shaw*, which decision was released just over two weeks after the end of the hearing.[25]

The procedure for matters brought before the Tribunal is set out in the *Practice Direction Regarding Timelines and Scheduling for Proceedings Before the Tribunal* ("**Normal Proceedings PD**").[26] Under the Normal Proceedings PD, the Tribunal considers a period of 10 to 16 months between the filing of the notice of application and the commencement of the hearing on the merits to be reasonable. This timeline is not fixed and "may be varied and extended depending on the particular context, urgency or circumstances of each case".[27] The Tribunal's own scheduling requirements can also lead to an extension of the timeline.[28] When a case proceeds under the Normal Proceedings PD, the Tribunal takes an active role in case management and will schedule a case management conference after the pleadings stage has ended (*i.e.*, after: (1) the notice of application has been served by the applicant; (2) the response has been served by the respondent; and (3) the applicant has served a reply or the 14 day period for serving a reply has expired)—already some nine weeks into the process.[29] This case management conference will

set timelines for pre-hearing procedures and establish a schedule for the hearing (*i.e.*, when it will be held and its length).[30] The Normal Proceedings PD does not institute a timeline for the issuance of decisions by the Tribunal.

In January 2019, the Tribunal issued an additional practice direction to introduce an expedited process for parties to consider adopting depending on the specific circumstances of their particular matter (the *Practice Direction Regarding An Expedited Proceeding Process Before The Tribunal* ("**Expedited Proceedings PD**")).[31] The Expedited Proceedings PD states that a period of five to six months between the filing of a notice of application and the commencement of the hearing on the merits is a reasonable timeline. Where all parties consent, the Tribunal is likely to adopt the expedited process for a case.[32] The Tribunal may also adopt the expedited process even if only one of the parties requests it, where the requesting party satisfies the Tribunal that the expedited process is reasonable and advisable in light of the circumstances of the matter and considerations of fairness.[33]

The Expedited Proceedings PD notes that case management will be further emphasized under the expedited process. Whenever an application proceeds under the expedited process, the Tribunal will convene an opening case management conference within 14 days after the close of the pleadings to finalize the draft scheduling and confidentiality orders. Discovery plans should also be exchanged between parties within seven days after the close of pleadings and should be aimed towards reducing the number of potential disputes with respect to documentary disclosure and examinations for discovery. The Tribunal will also use the opening case management conference to "actively identify certain issues or sub-issues that, if adjudicated and/or otherwise resolved early on, would lead to a more efficient and effective proceeding." Under the Expedited Proceedings PD, the parties are expected to "reasonably cooperate and agree on expediting discovery and pre-hearing steps, as well as the hearing itself, including with respect to documentary discovery, examinations for discovery, and the presentation of evidence in a manner that could streamline the hearing."[34] The Expedited Proceedings PD also lays out a process for dealing with intervenor applications on an expedited basis. Significantly, the Expedited Proceedings PD states that, although the Tribunal is not legally bound by this timeline, the Tribunal will aim to issue its decision within one month after oral argument.

To date, there has not been a proceeding brought entirely under the Expedited Proceedings PD. Most recently, the contested merger case *Rogers-Shaw* was partially brought under the expedited process.[35] In another

contested merger case, *Parrish & Heimbecker*, the Commissioner made a request to adopt an expedited process without the consent of the respondents. The request was denied by the Tribunal because of the respondent's objection that it would result in procedural fairness issues.[36]

Part II: How do Other Administrative Tribunals Compare?

Before exploring proposals to modernize the Tribunal, it is important first to consider how other Canadian administrative tribunals are designed to carry out their respective mandates. In this section, we examine several specialized decision-making bodies in Canada to assess the following design features: (i) composition of the tribunal; (ii) private rights of access; (iii) time limits; and (iv) rules of procedure.

A) Canadian International Trade Tribunal

The Canadian International Trade Tribunal ("**CITT**") is a quasi-judicial body that conducts trade remedy inquiries, federal government procurement inquiries, and customs duties and excise tax appeals for Canadian and international businesses.[37]

The CITT consists of up to seven permanent members, including a Chairperson and Vice-chairperson, appointed by the Governor in Council (*i.e.*, the federal cabinet).[38] In addition, the Governor in Council may, when "the workload of the Tribunal so requires," appoint up to five temporary members.[39] While permanent members may serve as permanent members for no more than ten years, there is no such term restriction for temporary members.[40] Subject to certain legislative provisions and regulations, three members of the CITT may generally constitute quorum, and there is no minimum number of permanent members required to meet quorum.[41] Members of the CITT are not judges; instead, members have a variety of academic and professional backgrounds, and there are no requirements for qualifications of members prescribed in the legislation or by regulation. The Chairperson of the CITT may assign panels of one or three members of the Tribunal to hear cases.[42]

Canadian and international businesses may bring a variety of cases before the CITT that relate to Canada's international trade obligations. In particular, the CITT conducts inquiries into complaints from private parties involving alleged injuries from dumping and countervailable subsidies, sudden surges of imports and procurement by the federal government alleged to be in breach of Canada's trade agreements.[43] Private parties may also pursue appeals at the CITT, including appeals from decisions of the Canada Border

Services Agency ("**CBSA**") rendered pursuant to the *Customs Act* or the *Special Import Measures Act* ("SIMA"), as well as decisions of the Minister of National Revenue rendered pursuant to the *Excise Tax Act*.[44] Beyond these private rights of access, the CITT may also advise the Government on economic, trade and tariff issues.[45]

The CITT is subject to strict time limits at various stages of the proceedings within its mandate. For instance, with respect to procurement inquiries (involving complaints by suppliers alleging that the federal government has breached its obligations under certain trade agreements), the CITT has five days from the filing of a complaint to decide whether to conduct an inquiry.[46] If the complaint is not accepted for inquiry, the complainant is notified of that decision and reasons are provided, usually, within 15 days.[47] If an inquiry is commenced, the CITT typically has 90 days from the filing of the complaint to complete its inquiry and issue its findings and recommendations to the interested parties.[48] There are two exceptions to the 90 day rule: (i) where the CITT has granted a request for an expedited inquiry ("express option"), it must provide its decision within 45 days after granting this request; and (ii) even where the CITT has granted an extension of time, it must issue its decision within 135 days after the filing of the complaint.[49]

Similar timelines also apply for anti-dumping and countervailable subsidy injury inquiries under the *SIMA*, which proceed in two phases: (i) the preliminary injury inquiry phase; and, if necessary, (ii) the final injury inquiry phase.[50] The first phase begins when the CBSA initiates its investigation into the presence or absence of dumping and/or countervailable subsidies; the CITT then issues a notice of commencement of a preliminary injury inquiry. The CITT then has 60 days to receive submissions and decide whether the record discloses "a reasonable indication of injury or retardation or threat of injury" flowing from the alleged conduct.[51] After making its preliminary finding, the CITT has 15 days to issue its reasons for the decision (*i.e.,* 75 days from the commencement of the first phase). If the CITT makes an affirmative preliminary finding of a "reasonable indication" of injury, retardation or threat of injury on day 60, the CBSA has 30 days to render its preliminary determination of the quantity of dumping and/or subsidizing (*i.e.*, 90 days from the commencement of the first phase).[52] This deadline may be extended to a maximum of 135 days from the commencement of the first phase in complex matters.[53]

The second phase of a CITT injury inquiry begins when a notice of commencement of inquiry is issued the day following the CBSA's affirmative preliminary determination. In the second phase, if the CBSA makes a

non-negligible preliminary determination of dumping and/or subsidizing of imports (after the CITT's positive preliminary injury finding in the first phase), the CITT has 120 days to make a final decision as to whether the alleged dumping and/or subsidizing of imports has caused or is likely to cause injury or retardation under *SIMA*.[54] It has a further 15 days to issue its reasons for the decision (*i.e.*, 135 days from the commencement of the second phase).[55]

From start to finish, therefore, CITT procurement, dumping, and countervailing duty cases (looking at preliminary and final injury inquiries as separate proceedings) can all take a maximum of 135 days from the filing of a complaint to the issuance of reasons.[56]

The CITT's statutory mandate—like that of the Tribunal—states that hearings "shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit".[57] To fulfill this mandate, like the *Competition Tribunal Rules*, the *CITT Rules* allow presiding members to "dispense with, vary or supplement" any procedural rules if it is fair and equitable to do so, or to provide for a more expeditious or informal process.[58] While the CITT, like the Tribunal, has all of the powers, rights and privileges of a superior court of record, the rules and procedures are less formal in nature - with the result, we would argue, that access to justice at the CITT is improved.[59] In support of this position, in the same period of time that the Tribunal has heard 28 cases brought by private litigants (*i.e.*, 20 years), the CITT has heard over 3,300 cases on strictly enforced timelines.[60] With that said, while the speed with which the CITT proceeds through its caseload is commendable, policymakers should exercise caution when prioritizing the timely resolution of disputes through overly strict statutory timelines. The CITT has faced some criticism for its use of strict timelines and its impact on participatory rights in proceedings.[61] The exploration of economic causality by the CITT is also, of necessity in light of the timelines, somewhat more rudimentary than similar inquiries by the Tribunal.

Typically, the CITT decides procurement inquiries on the basis of written submissions.[62] However, the CITT may schedule a public hearing if the information in submissions is insufficient or disputed and the matter cannot be resolved on the basis of the written record alone.[63] More formal procedures may be employed at the discretion of the presiding members.[64] For anti-dumping inquiries under the *SIMA*, it is not the CITT's practice to have an oral hearing during the preliminary injury inquiry phase, but oral hearings are routinely held during the final injury inquiry phase.[65] Here as well, however, formal rules of evidence are not typically enforced, motions

are rare, and discoveries are extremely limited, being limited to one set of requests for information that are vetted by the CITT as to whether they deem the information necessary.[66] All evidence in chief is in written form, and parties are typically provided with hours, not days, within which to conduct cross-examinations of panels of witnesses. Despite the enormous time pressures, it would appear to the authors that the CITT metes out somewhat rough, but ultimately fair and expeditious, justice in the matters before it.

In conclusion, the track record of the CITT demonstrates that deciding complex economic matters involving private litigants with speed and efficiency is an attainable aspiration. The CITT seems to have struck a reasonable balance between expediting cases and ensuring procedural fairness, which has enabled it to successfully fulfill its mandate. Admittedly, in injury and procurement cases the CITT is dealing with backward looking matters most of the time (apart from "threat" cases). This may make those matters more easily amenable of proof than the necessarily forward looking test of a "likely substantial lessening or prevention of competition" that must in most cases be applied by the Tribunal. It could therefore be the case that 135 days (approximately 4.5 months) is not appropriate for Tribunal hearings in most cases. Nonetheless the CITT experience does beg the question as to why it should take the Tribunal more than a year to hear and decide most cases under the *Competition Act*.

B) Trademarks Opposition Board

The Trademarks Opposition Board ("**TMOB**") is a quasi-judicial body that facilitates hearings on certain issues under the *Trademarks Act*, namely trademark opposition proceedings and Section 45 trademark expungement proceedings.[67]

The TMOB consists of a chairperson, members, hearing officers, a manager and clerks.[68] There is no legislatively prescribed minimum or maximum number of positions. Currently there are 18 active members, 1 chairperson and 3 hearing officers at the TMOB.[69] Members of the TMOB are not judges; instead, members are employees of the Treasury Board of Canada, staffed in accordance with Treasury Board Guidelines subject to the approval of the Registrar of Trademarks.[70] While formal legal training is not required, increasing numbers of members of the TMOB hold law degrees and are members of a provincial law society.[71] When sitting to hear a matter, the TMOB is comprised of one hearing officer.

A private party can bring either of the two types of proceedings before the TMOB. According to the *Trademarks Act*, "any person" can file a statement of opposition and "any person who pays the prescribed fee" can file a request to issue a section 45 expungement proceeding notice.[72]

The TMOB is not subject to any time limits. The Canadian Intellectual Property Office has stated that Section 45 and opposition proceedings before the TMOB can take as long as two to four years (or even longer).[73]

The TMOB's powers are restricted to those delegated by the Registrar of Trademarks under the *Trademarks Act*.[74] There is no express statutory wording in the *Trademarks Act* establishing the TMOB, however its adjudicative functions are set out in the relevant sections for each type of proceeding.[75] While the *Federal Courts Rules* guide proceedings at the TMOB, the TMOB is not strictly bound by them, which allows it, in theory, to operate as intended—flexibly and capable of running expeditious proceedings.[76] Evidence at the TMOB is filed in the form of affidavits or statutory declarations, which can be subject to cross-examination.[77] Arguments are made in the form of written representations; however, an oral hearing can be requested by either party.[78] The TMOB has the authority to issue interlocutory rulings and final decisions in all proceedings before it, but it cannot grant injunctions, issue a stay of proceedings or award damages or costs.[79] The TMOB has issued procedural guidance for each type of proceeding over which it presides.[80]

While the TMOB stands as an example for the sufficiency of one administrative decision-maker presiding over certain commercial issues, it also serves as a warning for the types of significant delays that occur in the absence of statutory time limits. Without any meaningful timelines in place, TMOB proceedings have been known to linger on for four years or more to reach a resolution.[81] The commercial uncertainty borne out of such significant delays is an outcome that should be vigorously avoided. Furthermore, without any judicial members, the TMOB may also suffer from a lack of expertise in applying often complex legal principles to the issues brought forth. This lack of legal expertise may in turn be a significant contributor to the long delays.

C) Canada Energy Regulator

The Canada Energy Regulator ("**CER**") reviews and assesses proposed federally-regulated pipelines, power lines and offshore renewable energy projects for potential impacts to people, property and the environment.[82] The CER was previously called the National Energy Board until August 28,

2019.[83] Regulations made under the *National Energy Board Act* (repealed) remain in force under the *Canadian Energy Regulator Act*.[84] The CER Commission (the "**Commission**") is the quasi-judicial, independent decision-making body housed within the CER. It is a court of record and holds all of the powers, rights and privileges vested in a superior court for matters falling within its statutory jurisdiction.[85]

The Commission consists of up to seven full-time commissioners and may also include an unspecified number of part-time commissioners.[86] At least one of the full-time commissioners must be an Indigenous person.[87] Additionally, one of the full-time commissioners must be designated as the Lead Commissioner, which involves being responsible for the Commission's affairs and apportioning the Commission's work amongst its membership.[88] Commissioners may "hold office during good behaviour" for a term of six years and may be reappointed for one or more terms of up to six years each.[89] However, a commissioner can only serve ten years in total.[90] Subject to certain legislative provisions, three commissioners constitutes a quorum of the Commission.[91] Commissioners must be Canadian citizens or permanent residents; members of the CER's Board of Directors are not eligible to be commissioners.[92] Commissioners are not judges; instead, they have a variety of academic and professional backgrounds, often with experience in the energy sector but drawing as well on experience with administrative tribunals and Indigenous relations.

Companies proposing to build pipelines, power lines or offshore renewable energy projects under federal jurisdiction must file a project notification with the CER, identifying members of the public and Indigenous peoples who may be potentially affected.[93] The CER staff then engages the identified members of the public and Indigenous peoples in a consultation, with the assistance of "process advisors" who assist various stakeholders wishing to participate in the application process.[94] The company then files a project application and, again, must notify all potentially affected persons and communities, within 30 days of which any concerned member of the public or Indigenous peoples can file a formal statement of concern.[95] Anyone can then participate in a hearing before the Commission as a commentor or intervenor.[96] Intervenors are entitled to present evidence and ask questions of other parties, while commenters are only entitled to make written submissions.[97] Process advisors are assigned to each hearing and are available to support members of the public, including Indigenous peoples who want to participate.[98]

The Lead Commissioner must prescribe time limits not exceeding the statutory time limits for certain types of applications and has the authority to take "any measure that he or she considers appropriate" to ensure those timelines are met.[99] For example, the Lead Commissioner may increase or decrease the number of commissioners dealing with an application to expedite the process.[100] This power includes the ability to designate a sole commissioner to deal with the application.[101]

For pipeline applications under section 183 of the *Canadian Energy Regulator Act,* the Lead Commissioner must set a time limit for the Commission to deliver its report to the Minister of Natural Resources not exceeding 450 days from the date that the application is deemed complete.[102] Generally, the Commission releases its recommendations, report or decision within 12 weeks after the hearing has concluded.[103] Within 90 days of receiving the Commission's report, the Governor in Council must make the final decision to approve or deny the application.[104]

Other types of applications under the *Canadian Energy Regulator Act* are subject to shorter statutory timelines. For example, the Commission has six months from the date of the application for an import or export license to release its decision (and to issue the license, if applicable).[105] The process for applications for exemption orders for pipelines and for the issuance of a certificate for a federally regulated power line also have prescribed time limits. [106] The final decision for these applications must be issued within 300 days.[107]

On January 9, 2020, the Lead Commissioner issued a letter outlining the time limits for processing applications under sections 183 (pipeline applications), 214 (exemption orders for pipelines) and 262 (certificates for federally regulated power lines) of the *Canadian Energy Regulator Act*.[108] For sections 183 and 262, the Lead Commissioner did not designate shorter time limits that the statute requires.[109] However, for section 214, issues are divided into categories of complexity, each with their own time limit: 130 days for "minor" complexity issues, 210 days for "moderate" complexity issues and 300 days for "major" complexity issues.[110] In addition to the time limits set out in the legislation, the CER has established non-binding service standards for applications, participant funding, land matters complaints and audits. [111]

While the Commission has all of the powers, rights and privileges of a superior court of record, the rules and procedure appear to be somewhat less judicial in nature to improve access to the Commission.[112] Much of this

is due to the fact that the CER is specifically crafted to facilitate a broad public consultation on large-scale energy infrastructure projects. For instance, during public hearings, process advisors employed by the CER may attend to help participants understand how they can effectively participate in the proceedings before the Commission.[113] The Commission also has the power to create its own rules respecting its procedure, and the *Canadian Energy Regulator Act* states that proceedings and applications before the Commission "must be dealt with as expeditiously as the circumstances and procedural fairness and natural justice permit."[114] While these provisions allow for flexibility, the proceedings still resemble a court-like process, and there are significant volumes of filings that project proponents must make in accordance with the CER's Filing Manuals.[115]

Furthermore, the Commission is also empowered to act on its own initiative to conduct inquiries, hear and determine any matter under the *Canadian Energy Regulator Act*.[116] The Commission has jurisdiction to hold a public hearing, however the "process chosen by the CER for a hearing will be adapted based on the project being assessed and those participating".[117] For example, when the Commission issues its "hearing order" at the beginning of the hearing process, it sets out a procedural framework for the hearing with tailored deadlines and timing information.[118] Given the CER's mandate to engage many stakeholders in the decision-making process, it is commendable that the Commission is proving to be quite capable of issuing decisions on reasonably strict timelines. While competition law matters before the Tribunal do not require the same type of consultative engagement with the public at-large, the Commission's ability to adapt its procedures and provide resources to make hearings more accessible to private participants could still be of value when discussing reforms aimed at increasing access to justice at the Tribunal.

D) Trends in Canadian Administrative Tribunals

The composition of the above-noted Canadian tribunals differs rather substantially from the Competition Tribunal in its present form. No sitting judges are part of any of the CITT, TMOB or the Commission. Like the Tribunal, they hear at times complex economic evidence, and make decisions which can have significant commercial implications. Unlike under the *Competition Act*, however, there is no implication of wrongdoing attached to proceedings at these tribunals: either duties will be imposed, or they won't; a trademark will be registered, or it won't; or a pipeline will be built, or it won't. While in theory, civil matters before the Tribunal similarly are matters of dispassionate economic review, some civil cases recently have

opened the door for findings of harm related to civil *Competition Act* "violations", and the Act itself calls for higher penalties (administrative monetary penalties) for repeat "offenders".[119] Perhaps because of this aura of impropriety, as will be discussed in Part III of this paper, it is common practice in other countries for competition law matters to be heard at first instance by judges, regardless of the institutional design within which they are heard.

Expansive private rights of access are commonplace in Canadian tribunals. This flows from the principle that these tribunals are established to provide private parties with efficient and effective resolutions to specific types of issues within their specialized jurisdiction. The legislative schemes empowering the above-noted Canadian tribunals do not have "gatekeepers" for many of the matters falling within their scope. We welcome recent amendments to the *Competition Act* that have now also made private access to the Tribunal possible for a broader range of actions, namely actions under the abuse of dominance provisions; however, in each of the above tribunals studied, there are incentives for the private party that is bringing the case to do so (*e.g.*, a company may be compensated for injuries resulting from dumping goods in Canada, or is able to block the registration of a proposed trademark that is likely to cause confusion with their own brand, or requires the Commission's approval in order to build an energy project).[120] Without the availability of loss-related damages for private litigants in competition law matters, there is little incentive for affected Canadians to bring an expensive case forward to the Tribunal.

The above survey of Canadian tribunals also reveals an interesting trend in establishing time limits for certain, but not all, contexts. In commercial matters involving highly time-sensitive disputes before the CITT or the Commission, strict timelines are imposed on the decision-maker. In contrast, where no such time constraint exists for the TMOB, there are extensive delays for having a matter heard (in some cases exceeding four years), creating significant commercial uncertainty for businesses with respect to the status of their intellectual property rights.[121]

With respect to the rules of procedure in Canadian administrative tribunals, the pattern is clear: to ensure a more expeditious and cost-effective resolution, flexibility is preferable to a rigid application of the rules. Each of the administrative decision-makers described above retains a broad discretion to adapt their process to the circumstances of the case at-bar.

Part III: How do International Competition Tribunals Compare to their Canadian Counterpart?

In addition to surveying the Canadian landscape of administrative tribunals generally, it is also helpful to consider international tribunals specialized in handling competition law matters. Below, we examine two prominent international tribunals to assess the following design features: (i) composition of the tribunal; (ii) private rights of access; (iii) time limits; and (iv) rules of procedure.

A) The United Kingdom Perspective: The Competition Appeal Tribunal

In the United Kingdom, the Competition Appeal Tribunal ("**CAT**") hears a wide range of matters affecting competition. The CAT derives its jurisdiction from Section 12 and Schedule 2 of the *Enterprise Act* and hears matters brought forward under a wide range of economic-focused legislation, including, *inter alia,* the *Competition Act 1988* (United Kingdom), the *Enterprise Act* and the *Consumer Rights Act*.[122]

The CAT is comprised of the president, a panel of "chairmen" (in Canadian parlance, a "chairman" refers to a judicial member of the CAT) and a panel of ordinary members. The President and chairmen roles are judicial appointments, requiring them to be legally qualified and possess appropriate experience and knowledge of competition law or another relevant field.[123] Ordinary members of the CAT are similar to the Tribunal's lay members: they are appointed for time-limited terms as non-judicial members and must have appropriate experience and expertise relating to the subject matter of the CAT.[124] As with the Tribunal, a sitting panel of the CAT is typically composed of three members. The hearing is chaired by either the president or a chair, and the other two members are selected from amongst the chairmen or the ordinary members.[125] There are, however, specific instances outlined in the *Competition Appeals Tribunal Rules* ("CAT Rules") where the President or a chair, sitting alone, may exercise the CAT's powers.[126]

The CAT provides a private right of access for a wide range of matters within its jurisdiction, including actions for damages and injunctive relief under the *Competition Act 1998,* appeals of decisions made under the *Competition Act 1998* by the Competition and Markets Authority and other sector-specific regulators, and appeals under the *Subsidy Control Act 2022* of decisions made by public authorities to issue subsidies.[127] The CAT may

also hear collective claims and applications for approval of collective settlements under the *Competition Act 1998.*[128]

While there are several strict time limits regarding *commencing* proceedings before the CAT, the CAT itself is generally not subject to time limits for competition litigation cases.[129] However, some claims may be subject to the "fast-track procedure" ("**FTP**") defined in Rule 58 of the *CAT Rules*. While the FTP is particularly common in claims for damages under Section 47A of the *Competition Act 1998,* the CAT has the authority to subject any matter to the FTP "on its own initiative or on the application of a party".[130] The intended purpose of the FTP is to allow "less complex claims" to be decided on an expedited basis with "limited risk as to costs".[131] To achieve this end, the substantive hearing of a matter under the FTP is to occur "as soon as practicable and in any event within six months" of the order subjecting the matter to the FTP.[132] There is no explicit time limit on when the CAT must issue its decision or reasons under the FTP or otherwise.

The *CAT Rules* are to be interpreted with regard to a list of governing principles that promote time and cost efficiency. Specifically, Rule 4(5) outlines the concept of "active case management", which the CAT is to employ in all matters to "ensure that the case proceeds in the quickest and most efficient manner possible".[133] While the CAT has the authority to engage in traditional, formal procedures (*e.g.*, oral cross-examination of witnesses), it retains a broad discretion to tailor its process to the specific circumstances of each case.[134]

B) The Australian Perspective: The Australian Competition Tribunal

Competition law matters are heard in Australia by the Australian Competition Tribunal ("**ACT**"). The ACT is an independent statutory tribunal whose primary role is to review decisions of the Australian Competition and Consumer Commission ("**ACCC**"). A review by the ACT is a re-hearing or a re-consideration of a matter initially decided by the ACCC. The ACT may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the original decision.

The ACT is composed of one president, a number of deputy presidents and other members as appointed by the Governor-General of Australia.[135] A president or deputy president must be a judge of the Federal Court of Australia.[136] Other members of the ACT must have "knowledge of, or experience in, industry, commerce, economics, law or public administration."[137]

For the purpose of hearing and determining matters, the ACT is constituted by a presidential member (either the president or a deputy president) and two non-presidential members.[138] All members of the ACT are appointed for a period not exceeding seven years.[139]

The ACT has jurisdiction to undertake reviews of the following determinations made by the ACCC: (i) granting or refusing authorization for company mergers and acquisitions; (ii) granting or revoking authorizations permitting conduct and arrangements that would otherwise be prohibited under the *Competition and Consumer Act, 2010* because of their anti-competitive effect; and (iii) revoking notices for exclusive dealing conduct that would or may otherwise be prohibited under the *Competition and Consumer Act, 2010*. These reviews may be initiated by private parties.

The ACT is not bound by any statutory deadlines when rendering decisions regarding reviews of conduct authorization applications.[140] The ACT is, however, subject to timelines in the context of reviewing merger authorization applications. Applications for reviewing domestic merger authorizations must be decided within 90 days from the date of filing the application.[141] This time limit may be extended in two ways: (i) if the ACT allows new information or evidence, the time limit is 120 days; and (ii) if the ACT determines that the matter is complex or otherwise cannot be dealt with appropriately within the initial period, the time limit is up to 180 days (*i.e.*, 6 months).[142] Importantly, if the ACT does not make its decision within the timeframe, the application—which is by definition an appeal from a matter already decided by the ACCC—is taken to be refused.[143]

The procedure to be used before the ACT is within the discretion of the tribunal itself.[144] Proceedings are to be conducted with "as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the [ACT] permit".[145] If the ACT finds that more formal procedures are appropriate in certain circumstances, however, the *Competition and Consumer Act, 2010* empowers it with a wide range of court-like powers of inquiry. These include summoning individuals to appear before the ACT, compelling the production of specific documents, and requiring the oral hearing of witness evidence.[146]

Part IV: Proposals for Changes to Canada's Competition Tribunal

Proposal 1: Impose Time Limits on Tribunal Proceedings and Deliberations

Currently, there are no time limits imposed on any stage of the Tribunal's process. In some cases where the Tribunal and the parties are highly motivated, for example the *Rogers-Shaw* merger case, proceedings at the Tribunal can proceed quite expeditiously.[147] In *Rogers-Shaw*, the notice of application was filed on May 9, 2022. Just under six months passed from the filing of the notice of application to the first date of the hearing on November 7, 2022. The hearing ran for 34 days, ending on December 14, 2022, and the decision with reasons was released only 18 days later on January 1, 2023. In *Rogers-Shaw*, accordingly, less than eight months passed from the date the notice of application was filed to the date the case was decided. The process in *Rogers-Shaw* was expedient and, in our view, commendable.

However, the speed in the *Rogers-Shaw* case is not the norm at the Tribunal—in some cases the process has been so lengthy that one is reminded of the maxim: "Justice delayed is justice denied". For example, in *Parrish & Heimbecker* the notice of application was filed on December 19, 2019 and the first date of hearing was held over a year after later, on January 6, 2021.[148] The hearing lasted 24 days and then over 21 months passed between the last date of the hearing and the issuance of the decision with reasons on October 31, 2022.[149]

Of course, the merger had already closed in the *Parrish & Heimbecker* case, whereas financing for a $26 billion merger was hanging in the balance for the *Rogers-Shaw* transaction.[150] The motivation of the parties, and the Commissioner, can therefore be assumed to differ in terms of the degree to which they demand speedy resolution. The issues, however, are no more or less complex simply because a transaction has closed or, in the case of abuse of dominance cases, the behaviour is ongoing. If the Tribunal can proceed expeditiously when the parties are anxious for it to do so, and when much public attention is focused on the Tribunal, why should it not proceed, as it is instructed by the *Competition Tribunal Act* "as expeditiously as the circumstances and considerations of fairness permit" in all cases?[151]

The expediency and motivation that propelled the *Rogers-Shaw* should in our view be applied to all cases at the Tribunal. The fact that the *Rogers-Shaw* case was brought partially under the Expedited Proceedings PD could be a contributing factor to the expediency of its resolution. With this in

mind, we believe that modifying the Tribunal's rules of procedure to codify the Expedited Proceedings PD as the default would be in the interest of access to justice. There should be a presumption that all proceedings are to proceed under the Expedited Proceedings PD unless there are compelling reasons not to—and to require full disclosure of the Commissioner's file at the outset, thus obviating the need for the respondents to painfully extract disclosure or seek to examine members of the Bureau.[152]

In addition, the length of time that passed between the last date of the hearing and the release of the decision in the *Parrish & Heimbecker* case should not be precedent-setting. To avoid this, we, along with others, propose imposing a statutory deadline (to be found in the *Competition Tribunal Act*) of six months from the end of a hearing to the release of a decision with reasons to the public which can be extended only upon consent of the parties.[153] This deadline would be consistent with the general unwritten practice of the Federal Court. In some cases, the Tribunal has released decisions with reasons to the public in less than six months from the end of the hearing.[154] However, in many other cases, decisions with reasons have been released to the public much later than six months after the end of the hearing.[155] Implementing a statutory deadline for the issuance of a decision and reasons would provide the parties with certainty and would ensure the Tribunal is operating efficiently on a consistent basis.

Proposal 2: Alter the Composition of the Tribunal

Modifying the structure of the Tribunal could also increase its efficacy while maintaining its expertise. Former chairperson of the Tribunal, Justice Sandra J. Simpson, has previously called for altering the composition of the Tribunal so that it is composed solely of economists and judges with commercial backgrounds. Justice Simpson also suggests establishing priority of assignments between the Federal Court and the Tribunal by amending the *Competition Tribunal Act* and, if necessary, the *Federal Courts Act* so that when the Chair of the Tribunal deems it necessary, Tribunal work takes priority over Federal Court assignments.[156] Competition lawyers, Calvin S. Goldman, K.C. and Charles Layton agree with Justice Simpson's recommendations and further suggest prescribing Tribunal member qualifications directly in the *Competition Act* to bring the Tribunal more in line with the vision of a specialized court that Parliament had intended when it created the Tribunal.[157]

Standing in some contrast with Justice Simpson and Goldman and Layton, leading Canadian competition law academic, Michael J. Trebilcock, has

claimed that the time-consuming court-like process at the Tribunal developed over time as a result of the over-involvement of the judicial members of the Tribunal. Trebilcock and his co-authors claim that lay members should have an increased role at the Tribunal and propose two changes to that effect: (i) the judicial members' monopoly over questions of law should be eliminated (*i.e.*, lay members should be able to decide questions of law); and (ii) every three-member panel should include two lay members and every five-member panel should have three or four lay-members since it is the lay members who are expected to bring economic and business expertise to the Tribunal.[158]

Another possible change would be to eliminate the lay members altogether. The appointment process currently in place for lay people[159] means that they may not have the economic and competition law expertise originally envisaged, and the fact that the positions are part-time can prevent those most qualified from taking the position. Having lay people involved can also further complicate the scheduling of Tribunal matters, as contested cases arise infrequently and hearings need to be scheduled in a way that permits the lay members to take leave of their "day jobs". So long as the judicial members of the Tribunal continue to have access to their own expert economists pursuant to Rule 80 of the *Competition Tribunal Rules*, the loss of lay members ought not to diminish the expertise of the Tribunal. While other Canadian tribunals have been designed to be presided over by lay members alone, Parliament made a clear decision to include judicial members on the Tribunal. Such judicial members of necessity build up considerable expertise over time as they are the ones tasked with hearing *Competition Act* cases. Indeed, several recent appointees to the Federal Court already had significant competition law expertise.[160] The matters heard by the Tribunal often involve complex questions of law, which lay members are not, and we argue should not be, involved in deciding.[161] Questions of this nature are appropriately left in the hands of judicial members alone, and insofar as non-legal expertise would be useful to the Tribunal members to assist in deliberating over questions of fact or mixed fact and law, the judicial members could and should exercise their power to retain experts *ad hoc.* This power to retain "consultants" is also held, and used, by the ACT in Australia.[162] The Tribunal also presently holds this discretionary power, and in the absence of lay members, would be able to retain experts whose subject-matter expertise most closely aligns with the issues at-bar.[163] Moreover, consideration could be given to the permanent retention of expert Tribunal staff, to advise the judicial members, much as the CITT staff who prepare reports which are tabled to the parties in injury cases before the CITT.

If the Tribunal's composition is modified by eliminating lay members, we do not believe this would reduce the Tribunal's specialized expertise because the Tribunal's judicial members themselves have significant expertise. Moreover, the Tribunal has two mechanisms by which it can make use of independent experts, including economic experts, if necessary in particular cases.[164] First, as mentioned above pursuant to Rule 80 of the *Competition Tribunal Rules*, the Tribunal has access to external independent experts.[165] Rule 80 authorizes the Tribunal to appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding.[166] The parties may jointly recommend an expert to the Tribunal.[167] Where an expert report is produced, the report shall be made part of the case record and a copy is served on every party and intervenor.[168] However, "tribunal-appointed experts need not submit a report but can be retained merely to assist the Tribunal in understanding the evidence, most notably economic evidence, proffered to the Tribunal."[169] If an expert report is filed, parties are permitted to file a written response to the expert's report and to examine the expert.[170] The Tribunal may also order the expert to make a further or supplementary report.[171] Second, there is an informal process whereby the Tribunal can appoint an economic advisor.[172] The Tribunal has developed the practice whereby if the economic advisor writes a report the Tribunal will make the report available to the parties and provide them with an opportunity to comment in the interests of procedural fairness.[173]

By eliminating lay members altogether, we see a benefit not only in ensuring that expert assistance is tailored to the case at hand, but also in streamlining Tribunal proceedings, as ad hoc experts can usually be retained on fairly short notice. Another change that would also help to streamline Tribunal proceedings would be to require that all matters be heard by only one judicial member of the Tribunal (as in all other courts of first instance), which would also facilitate timely Tribunal review. Currently, motions and references at the Tribunal may be heard by one judicial member whereas applications must be heard by "at least one" judicial member.[174] There has been at least one instance, *Rogers-Shaw*, where only one judicial member was on the panel hearing the application.[175] However, this is rare. We propose requiring that all matters be heard by one judicial member to aid efficiency—assisted by experts as that judicial member deems useful. The judges of the Federal Court are used to conducting hearings and issuing decisions alone and those with competition expertise can do so in all but the most complex of cases. Appropriately assisted by experts, experienced judges on the Federal Court could more expeditiously deal with matters

such as private applications, and all but the most complex behavioural and merger cases.

Furthermore, on March 2, 2023, a pilot project was launched which created a specialized Intellectual Property and Competition Chambers in the Federal Court to ensure that intellectual property and competition law cases are assigned to judges who have expertise in those areas.[176] Assigning intellectual property and competition law cases to judges who have expertise in those areas has been informally done for several years at the Federal Court; this pilot project formalizes that procedure. In assigning cases, the sub-specialties (*e.g.,* copyright, trademarks, patents and competition) are also considered. While this pilot project is running, we also recommend that judicial members of the Tribunal be selected only from the Intellectual Property and Competition Chambers. As a result of this, only those judges with expertise in competition law would be members of the Tribunal and thereby have the necessary expertise to hear most matters at the Tribunal as a "panel" of one.

Proposal 3: Expand Private Access at the Tribunal

While recent amendments to the *Competition Act* increased the scope of matters in respect of which private parties may seek leave to bring applications to the Tribunal (adding abuse of dominance claims),[177] many commentators recommend expanding private access even further. As mentioned above in Part I of this paper, private applications to the Tribunal are infrequent, in our view partly because potential applicants must overcome a substantial burden to obtain leave to bring an application and partly because, if they are successful, they cannot recover damages at the Tribunal for any losses suffered as a result of anti-competitive acts. As a preface to the discussion below, we echo the caution of others that expanding private rights of action should *not* be used as an excuse to reduce funding to the Bureau—private rights of action should be an additional tool for deterrence and enforcement alongside public enforcement.[178]

The most obvious way to expand private access to the Tribunal is to allow private access for all civilly reviewable matters covered by the *Competition Act*.[179]Another way to incentivize private access at the Tribunal is to allow the Tribunal to award damages for losses suffered as a result of anti-competitive conduct in private action proceedings.[180] Allowing for the possibility of damages at the Tribunal may incentivize private parties to bring actions to the Tribunal and aid in the enforcement and development of Canadian competition law.

Another consideration that should be looked at to increase private access is amending the leave requirement private parties currently face in order to bring a case to the Tribunal. The leave requirement may be unduly high.[181] One recommendation is to lower the test for standing which currently requires that the applicant's business be "directly and substantially affected".[182] A possible alternative would be to require that the applicant's business be "directly and materially" affected.[183] This new standard would still ensure the applicant has a meaningful interest and connection to a case. Some commentators caution against expanding private access at the Tribunal for fear of frivolous litigation being brought. However, even if the standing requirement is lowered applicants still need to satisfy the Tribunal, through evidence, that all statutory elements of the alleged anti-competitive conduct have been met. Therefore, frivolous litigation would continue to not be granted leave were a lower standing requirement to be introduced.

One might even consider eliminating the need for private applicants to obtain leave prior to bringing an application. Frivolous cases could be effectively weeded out by summary motions to dismiss, and cost awards against the applicants. One must question whether the extra costs to applicants imposed by a second rather fulsome hearing on the merits of the case, is really necessary.

Proposal 4: Amend the Tribunal's Rules of Procedure

There has been criticism that the Tribunal has become overly judicialized and the rules of procedure should be simplified to strike a better balance between due process and expediency and timely decision-making.[184] Michael J. Trebilcock and his co-authors have previously called for: (i) eliminating documentary discovery and examinations for discovery at the Tribunal; (ii) prohibiting cross-examination of witnesses by opposing counsel and instead confining questioning of witnesses to members of the Tribunal; (iii) questioning expert witnesses for opposing parties on common issues together; and (iv) the Tribunal to take a more active role in case management by defining and narrowing issues in dispute.[185] Competition practitioners have echoed this call for the Tribunal to take a more active role in case management by imposing substantial limitations on the scope of discovery, limiting the availability of pre-hearing motions and the number of witnesses (both lay and expert) that the parties will be able to call, and to define the issues to be litigated.[186]

We also recommend allowing private parties to state a case to the Tribunal for settlement of a discrete legal or factual dispute with the Commissioner,

during the course of a Bureau inquiry. Section 124.2 of the *Competition Act* currently permits the Commissioner to state a case of his own volition (without consent from the parties who are the object of the inquiry), but private litigants or those whose actions are the subject of an inquiry need the Commissioner's consent to refer a matter to the Tribunal. Given the Commissioner's status as an interested party in any ensuing litigation, it seems odd to appoint the Commissioner as the gatekeeper to justice. Giving private parties the same ability to state a question to the Tribunal could contribute to faster inquiries by the Commissioner, as well as potentially contribute to the settlement of more cases, as questions the parties may have regarding the law could be resolved at an earlier stage in a dispute. Allowing private parties to state questions to the Tribunal would also result in more decisions being made on discrete points of the law, thereby clarifying competition law generally.

Conclusion

The Canadian competition law landscape appears primed for its most significant amendments since the 2009. While substantive changes to the *Competition Act* itself have understandably drawn much of the attention during the ongoing public consultation, the potential impact of modernizing the Tribunal should not be overlooked. Joining the calls of others, we strongly encourage the Government to consider the ways in which the Tribunal can adapt to better provide access to justice for Canadians. As described in the foregoing section, our recommendations revolve around four key changes. First, stricter time limits on the release of Tribunal decisions (with reasons) should be codified to increase commercial certainty and to provide parties with a more timely and cost-effective resolution. The goal of more efficient decision-making is also supported by our second recommendation: altering the composition of the Tribunal by eliminating lay members and creating more scenarios where one member may preside alone. Given the Tribunal's existing ability to appoint its own experts, alongside the specialized knowledge already possessed by appointed judicial members, we believe that the Tribunal can retain its subject-matter expertise while more efficiently advancing matters by removing lay members altogether. Third, expanding private access to the Tribunal and allowing the Tribunal to award damages would help fulfil the goals of competition law while further developing jurisprudence. Lastly, the Government should attempt to reverse the trend towards overly judicializing the Tribunal by simplifying the default rules of procedure and more actively engaging in case management. Sharing the Minister's aspiration for a "more efficient and responsive" approach to administering the *Competition Act,* we hope

to see these four changes reflected in the much-anticipated amendments on the horizon.[187]

ENDNOTES

[1] Laura Rowe and Tessa Martel are associates at Stikeman Elliott LLP and Zach Rudge is at the time of writing a student-at-law. The views expressed in this paper are those of the authors alone and do not necessarily represent those of Stikeman Elliott LLP or its clients.

[2] Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (22 Nov 2022), online (pdf): <https://ised-isde.canada.ca/site/strategic-policysector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf> [Consultation Paper].

[3] In 2002, the Government of Canada passed *An Act to amend the Competition Act and the Competition Tribunal Act*, SC 2002, c 16, bringing significant changes to the administration of Canadian competition law. Significantly, the 2002 amendments marked the beginning of private access to the Competition Tribunal, allowing private litigants to seek leave to bring applications in respect of some types of civilly reviewable conduct (*e.g.*, refusal to deal, exclusive dealing, tied selling and market restriction under sections 75 and 77 of the *Competition Act*). Additionally, the 2002 amendments also included changes to expedite proceedings before the Tribunal, notably by largely removing the Tribunal's role in substantively reviewing consent agreements made between the Commissioner and private parties (agreements now are merely registered with the Tribunal and—provided their terms could have been the terms of an order of the Tribunal—have the force of a Tribunal order).

[4] *Competition Act*, RSC 1985, c C-34.

[5] For clarity, certain "hard core" cartel offences are criminal, as are willfully deceptive marketing practices. The Tribunal hears only civil cases and cannot impose criminal penalties.

[6] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp).

[7] Related matters include allegations of abuse of process (*Canada (Director of Investigation & Research) v Canadian Pacific Ltd*, [1997] CCTD No 7, 1997 CarswellNat 3105 at paras 10-11).

[8] *Competition Act*, *supra* note 4, ss 103.1(7)-103.1(7.1); *National Capital News Canada v Milliken*, 2022 Comp Trib 41 at para 8.

[9] Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18:1 Dal J Leg Stud 1 at 11 [Veel].

[10] *Competition Tribunal Rules*, SOR/2008-141, rr 38 and 124(1).

[11] Kyle Taylor, "Competition Litigation Comparative Guide—Canada" (17 January 2023), online: Mondaq <https://www.mondaq.com/canada/antitrustcompetition-law/1272322/competition-litigation-comparative-guide>.

[12] Veel, *supra* note 9 at 14-15.

[13] Competition Tribunal, "Advanced Search", online: <https://decisions.ct-tc.

gc.ca/ct-tc/en/d/s/index.do?cont=&ref=&d1=&d2=&p=&l=6919&l=6921&col=207&tf1=&tf2=&tf3=&or=> [Competition Tribunal Case Search].

[14] Nikiforos Iatrou, *Litigating Competition Law in Canada* (Toronto: LexisNexis Canada, 2018) at Chapter 7G [*Litigating Competition Law*].

[15] *Competition Tribunal Act, supra* note 6, s 13.

[16] *Ibid*, s 3(2). Subsections 3(3) and 3(4) of the *Competition Tribunal Act* provide for the possibility of Governor in Council forming an advisory committee with whom the Minister must consult before making their recommendations on the appointment of lay people. The advisory panel is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include individuals chosen from business communities, the legal community, consumer groups and labour. No advisory panel has ever been appointed.

[17] *Ibid,* s 3(2).

[18] *Competition Tribunal Rules*, *supra* note 10, r 80(1).

[19] *Competition Tribunal Act*, *supra* note 6, s 13.

[20] *Ibid*, s 9(2).

[21] *Ibid*, s 8(2); *Competition Tribunal Rules*, *supra* note 10, rr 60-64.

[22] Competition Tribunal, "Case Details: Vancouver Airport Authority - CT-2016-015", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462498/index.do>.

[23] Competition Tribunal, "Case Details: Parrish & Heimbecker, Limited - CT-2019-005", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462487/index.do> [*P&H* Docket].

[24] *Ibid;* the decision was released to the parties on October 31, 2022 and the reasons were release publicly on November 17, 2022, 635 and 652 days, respectively, after the close of hearings on February 4, 2021.

[25] Competition Tribunal, "Case Details: Rogers-Shaw - CT-2022-002", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/520930/index.do> [*Rogers-Shaw* Docket].

[26] See Competition Tribunal, "Timelines and Scheduling for Proceedings Before the Tribunal" (January 2019), online: <https://www.ct-tc.gc.ca/en/procedure/practice/timelines-scheduling.html>.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] Competition Tribunal, "Expedited Proceeding Process before the Tribunal" (January 2019), online: <https://www.ct-tc.gc.ca/en/procedure/practice/expedited-proceeding.html>.

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*

[35] In the Scheduling Order dated June 17, 2022 (*Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 06), the Tribunal notes in paragraph 2 that the scheduling

order was made "having regard to certain, but not all, aspects of the Tribunal's *Practice Direction Regarding An Expedited Proceeding Process Before The Tribunal* (January 2019) that have been considered by the Parties and the Tribunal in preparing the schedule in this Order".

[36] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 1 at para 10 [*Parrish & Heimbecker*].

[37] Canadian International Trade Tribunal, "About the Tribunal", online: <www.citt-tcce.gc.ca/en/about-tribunal>.

[38] *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp.), s 3(1) [*CITTA*].

[39] *Ibid,* s 3(5).

[40] *Ibid,* ss 3(5) and 3(6).

[41] *Ibid,* s 13.

[42] *Ibid;* see also Canadian International Trade Tribunal, "Chapter 2—Mandate, Organization and Activities)", online: <www.citt-tcce.gc.ca/en/publications/chapter-2-mandate-organization-and-activities>.

[43] Canadian International Trade Tribunal, "What we do (and don't do)", online: <www.citt-tcce.gc.ca/en/about-tribunal/what-we-do-and-don-t-do>.

[44] *Ibid.*

[45] *Ibid.*

[46] *Canadian International Trade Tribunal Procurement Inquiry Regulations,* Can Reg 93/602, s 7(1) [*CITT Procurement Inquiry Regulations*].

[47] Canadian International Trade Tribunal, "Procurement Inquiries Guide", online: <www.citt-tcce.gc.ca/en/procurement-inquiries/procurement-inquiries-guide> [*Procurement Inquiries Guide*].

[48] *CITT Procurement Inquiry Regulations, supra* note 46, s 12(a).

[49] *Ibid*, ss 12(b)-(c).

[50] Canadian International Trade Tribunal, *Preliminary and Final Injury Inquiry Guidelines,* online: <www.citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/preliminary-and-final-injury-inquiry-guidelines> [*Injury Inquiry Guidelines*].

[51] *Ibid.*

[52] *Special Import Measures Act*, RSC 1985, c S-15, s 38(1) [*SIMA*].

[53] *Ibid,* s 39(1).

[54] *Ibid;* this deadline is statutorily mandated (see *SIMA*, supra note 52, s 43(1)).

[55] *Ibid.*

[56] *Procurement Inquiries Guide,* supra note 47; Canadian International Trade Tribunal, "Anti-dumping and countervailing injury inquiries guide", online: <https://www.citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/anti-dumping-and-countervailing-injury-inquiries-guide>.

[57] *CITTA, supra* note 38, s 35.

[58] *Canadian International Trade Tribunal Rules,* Can Reg 91/499, s 6.

[59] *CITTA, supra* note 38, s 17(2); see also Canadian International Trade Tribunal, "Management of cases before the Tribunal", online: <www.citt-tcce.gc.ca/en/practices-and-procedures/management-cases-tribunal>.

[60] Competition Tribunal Case Search, *supra* note 13; Canadian International

Trade Tribunal, "Advanced Search", online: < https://decisions.citt-tcce.gc.ca/citt-tcce/en/d/s/index.do?cont=&ref=&d1=2002-06-21&d2=&or=>.

[61] For example, some trade law practitioners have argued that strict time limits have impacted the efficacy of witness examinations before the CITT, since "an evasive witness can use up the time potentially leaving many questions unexplored" (See, e.g., Dan Ciuriak, "Trade Defence Practice in Canada" (2012) Ciuriak Consulting Working Paper, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2086602>).

[62] *Procurement Inquiries Guide*, *supra* note 47.

[63] *Ibid.*

[64] *Ibid.*

[65] *Injury Inquiry Guidelines*, *supra* note 50.

[66] *Ibid.*

[67] In Canadian trademarks law, an opposition is a proceeding where a party (the opponent) raises an objection to the registration of an applied-for trademark in Canada. If the opponent is successful, the Registrar of Trademarks is prevented from issuing a registration for the applied-for mark. Section 45 proceedings differ in that they are brought against marks that have already been successfully registered in Canada, but the mark's owner is unable to show use of the mark during the three-year period prior to the date of the Section 45 notice. Section 45 proceedings allow a party to request that a registered mark be removed from the Register of Trademarks for such non-use. The removal of registered trademarks from the Register through this process is known as "expungement" of the mark.

[68] Canadian Intellectual Property Office, "Trademarks Opposition Board" (3 March 2023), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board>.

[69] Canadian Intellectual Property Office, "Trademarks Opposition Board—List of Employees" (2 February 2023), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/trademarks-opposition-board-list-employees>.

[70] Bayo Odutola & Karen Hansen, "Appointment of Members of the Opposition Board" in *Odutola on Canadian Trademark Practice, Release No. 2* (Thomson Reuters, March 2023) at §17:19.

[71] Bayo Odutola & Karen Hansen, "Duties of Opposition Board Members and Hearing Officers" in *Odutola on Canadian Trademark Practice, Release No. 2* (Thomson Reuters, March 2023) at §17:21.

[72] *Trademarks Act*, RSC 1985, c T-13, ss 38(1), 11.13(1) and 45(1). A Section 45 notice is issued by the Registrar of Trademarks upon the filing of a written request by any person, and requires the mark's registered owner to file evidence showing that the mark has been used in Canada at any time during the three-year period preceding the date of the Section 45 notice.

[73] Canadian Intellectual Property Office, "FAQ on Opposition Proceedings—The Opponent" (29 October 2021), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/

opposition-proceedings/faq-opposition-proceedings-opponent> [Opposition Proceeding FAQ]; Canadian Intellectual Property Office, "FAQ on Section 45 Proceedings—The Requesting Party" (15 September 2021), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/section-45-proceedings/faq-section-45-proceedings-requesting-party> [Section 45 Proceeding FAQ].

[74] *Trademarks Act*, *supra* note 72, s 63(3).

[75] *Trademarks Act*, *supra* note 72, ss 11, 38 and 45; *Trademarks Regulations*, SOR/2018-227, s. 42-58, 67-74 and 78-93.

[76] *Tension 10 Inc v Tension Clothing Inc*, 2004 CarswellNat 5775 [TMOB] at para 10.

[77] Canadian Intellectual Property Office, "Practice in Trademark Opposition Proceedings" (28 June 2021), online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/practice-trademark-opposition-proceedings#Section11>.

[78] *Ibid.*

[79] Odutola & Hansen, *supra* note 71 at §17:20 and §17:21.

[80] Canadian Intellectual Property Office, "Trademarks Opposition Board Practice Notices" (21 January 2022), online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/trademarks-opposition-board-practice-notices>.

[81] Opposition Proceeding FAQ, *supra* note 73; Section 45 Proceeding FAQ, *supra* note 73.

[82] Canada Energy Regulator, "Applications and Hearings" (22 June 2021), online: <www.cer-rec.gc.ca/en/applications-hearings/>.

[83] Canada Energy Regulator, "Frequently Asked Questions—Regulations" (12 October 2022), online: <www.cer-rec.gc.ca/en/about/acts-regulations/frequently-asked-questions-regulations.html#s10>.

[84] *Ibid.*

[85] *Canada Energy Regulator Act*, SC 2019, c 28, s 31 [*CERA*].

[86] *Ibid,* s 26(1).

[87] *Ibid*, s 26(2).

[88] *Ibid,* ss 37-38.

[89] *Ibid*, s 28(1) and (2).

[90] *Ibid.*

[91] *Ibid*, s 27.

[92] *Ibid,* s 28(4) and (5).

[93] Canada Energy Regulator, "Hearing Process" (28 June 2022), online: <www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/index.html> [*CER Hearing Process*].

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

[98] Canada Energy Regulator, "Process Advisor Support" (18 January 2022),

online: <https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/process-advisor-support-hearing-participants.html>.

[99] *CERA, supra* note 85, ss 183, 214, 262 and 42(1); Canada Energy Regulator, "CER Time Limits and Service Standards" (12 December 2022), online: <www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/cer-time-limits-and-service-standards.html> [*CER Time Limits*].

[100] *CERA, supra* note 85, s 42(1)(c).

[101] *Ibid,* s 42(2).

[102] *Ibid,* s 183(4).

[103] *CER Hearing Process, supra* note 93.

[104] *Ibid.*

[105] *CER Time Limits*, supra note 99.

[106] *CERA, supra* note 85, s 214.

[107] *Ibid,* ss 214 and 262.

[108] *CER Time Limits*, supra note 99.

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*

[112] *CERA*, *supra* note 85, s 31(2); *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208.

[113] Canada Energy Regulator, "Hearing Room" (5 August 2022), online: < https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/hearing-room.html> [CER Hearing Room].

[114] *CERA*, *supra* note 85, ss 35 and 31(3).

[115] CER Hearing Room, *supra* note 113; Canada Energy Regulator, "Filing Manual" (25 May 2022), online: < https://www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/>.

[116] *CERA*, *supra* note 85, s 33.

[117] *CER Hearing Process*, *supra* note 93.

[118] *Ibid.*

[119] See, e.g., *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777, and *Dow Chemical Canada ULC v Nova Chemical Corporation*, 2020 ABCA 320; see also James Musgrove & Janine MacNeil, "Blurred Lines: How *Dow Chemical* and *Royal J&M* May Confuse Remedies Under the *Competition Act*" (2022) 35:1 Can Competition L Rev 46; e.g., *Competition Act, supra* note 4, s 79(3.2)(e).

[120] *Competition Act, supra* note 4.

[121] Opposition Proceeding FAQ, *supra* note 73; Section 45 Proceeding FAQ, *supra* note 73.

[122] *Enterprise Act 2002* (UK), c 40*; Competition Act 1998* (UK), c 41; *Consumer Rights Act 2015* (UK), c 15.

[123] Competition Appeal Tribunal, "Guide to Proceedings" (2015), online (pdf): <www.catribunal.org.uk/sites/cat/files/2017-12/guide_to_proceedings_2015.pdf>, ss 1.7-1.8 [*CAT Proceedings Guide*].

[124] *Ibid,* s 1.9.

[125] *Ibid,* s 1.11.
[126] *Ibid,* s 1.12; *The Competition Appeal Tribunal Rules 2015,* SI 2015 No 1648 [*CAT Rules*].
[127] Competition Appeal Tribunal, "About the Tribunal", online: <www.catribunal.org.uk/about>.
[128] *Ibid.*
[129] See, e.g., *CAT Proceedings Guide, supra* note 123, ss 4.5-4.14.
[130] *CAT Rules*, *supra* note 126, r 58(1); Note, however, that although the CAT can assign any matter to the FTP, in practice this is typically only done where one or more parties brings an application.
[131] *CAT Proceedings Guide, supra* note 123, s 5.139.
[132] *CAT Rules*, *supra* note 126, r 58(2)(a).
[133] *Ibid,* rr 4(4) and 4(5); See also *CAT Proceedings Guide, supra* note 123, ss 2.2-3.5.
[134] *CAT Rules, supra* note 126, r 4.
[135] *Competition and Consumer Act 2010* (Austl) (Cth), ss 30(2)-30(3) [*CCA*].
[136] *Ibid*, s 31(1).
[137] *Ibid*, s 31(2).
[138] *Ibid*, s 37.
[139] *Ibid*, s 32.
[140] Australian Competition & Consumer Commission, *Guidelines for Authorisation of Conduct (non-merger),* December 2022, online: <https://www.accc.gov.au/system/files/Authorisation%20of%20Conduct%20%28non-merger%29%20guidelines%20-%20December%202022_0.pdf> at para 12.19.
[141] *CCA,* supra note 135, s 102(1AC).
[142] *Ibid*, s 102(1AD).
[143] *Ibid*, s 102(1AB).
[144] *Ibid*, s 103(1)(a).
[145] *Ibid.*
[146] *Ibid,* s 105(2); *Competition and Consumer Regulations 2010* (Austl), SR 1974 No. 170, ss 25, 28M(3).
[147] See, e.g., *Rogers-Shaw* Docket, *supra* note 25.
[148] *P&H* Docket, *supra* note 23.
[149] *Ibid.*
[150] The Canadian Press, "Rogers takeover of Shaw finalized, deal now official" (3 April 2023), online: CBC News <https://www.cbc.ca/news/business/rogers-shaw-merger-official-1.6799566>.
[151] *Competition Tribunal Act, supra* note 6, s 9(2).
[152] We understand that full disclosure of the case file is mandatory for the European Commission. Given the presumption that the Commissioner acts in the public interest, full disclosure is warranted in light of his quasi-prosecutorial role.
[153] See, e.g., Susan M Hutton & Karen Hogan, "Justice Must Be Seen To Be Done: A Look at Canada's Competition Bureau Procedures" (2008) 23:1 Can Competition Rec 116 at 128; Calvin S Goldman, KC & Charles Layton, "Trials and Tribulations: A Quarter-Century of the Competition Tribunal" (2012)

25:2 Can Competition L Rev 522 at 531-532 [Goldman & Layton]; A Neil Campbell, Hudson N Janisch & Michael J Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) 76:3&4 Can Bar Rev 297 at 307 [Trebilcock et al.].

[154] For example, in *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc* (CT-2022-002), a decision with reasons was released to the public 18 days after the end of the hearing and in *Commissioner of Competition v CCS Corporation* (CT-2011-002), a decision with reasons was released to the public roughly 5 months after the end of the hearing.

[155] For example, in *Commissioner of Competition v Secure Energy Services Inc. and Tervita Corporation* (CT-2021-002), it has been almost 12 months since the end of the hearing and no decision has been released and in *Commissioner of Competition v Parrish & Heimbecker, Limited* (CT-2019-005), it took 21 months from the end of the hearing for a decision to be released.

[156] Justice Sandra J Simpson, "The Competition Tribunal 2003-2011 and Beyond" (2011) 24:1 Can Competition L Rev 49 at 49-50.

[157] Goldman & Layton, *supra* note 153 at 532-533.

[158] Trebilcock et al., *supra* note 153 at 305-306.

[159] Pursuant to section 3(2)(b) of the *Competition Tribunal Act*, lay members are appointed to the Tribunal by the Governor in Council on the recommendation of the Minister of Innovation, Science and Economic Development. Given that the optional advisory panel was never used, this process provides no independent oversight over the lay members' appointed, giving rise to the possibility that their appointment may be influenced by partisan considerations of the Government of the day.

[160] Justice Denis Gascon, who is a current judicial member and former chairperson of the Tribunal, practiced competition law for 25 years prior to his appointment to the Federal Court in 2015. Two more recent appointments, Justice Nicholas McHaffie in 2019 and Justice Andrew Little in 2020, also have expertise with competition law. Justice Little is the current chairperson of the Tribunal.

[161] *Competition Tribunal Act, supra* note 6, s 12(1)(a).

[162] *CCA*, *supra* note 135, s 43B.

[163] *Competition Tribunal Rules, supra* note 10, r 80(1).

[164] The Antitrust Source, "Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal" (June 2017), online (pdf): <www.ct-tc.gc.ca/en/tribunal/documents/jun17_gascon_intrvwC.pdf> [*Gascon Interview*].

[165] *Competition Tribunal Rules*, supra note 10, r 80.

[166] *Ibid*, r 80(1).

[167] *Ibid*, r 80(4).

[168] *Ibid*, r 80(5) and (6).

[169] *Litigating Competition Law, supra* note 14 at §8.48.

[170] *Competition Tribunal Rules, supra* note 10, r 80(7). The power given to parties in Rule 80 of the *Competition Tribunal Rules* is much broader than Rule 52 of the *Federal Courts Rules*. There, parties are not permitted to file a written response or examine the expert.

[171] *Competition Tribunal Rules*, *supra* note 10, r 80(8).

[172] *Gascon Interview*, *supra* note 164.
[173] *Competition Tribunal Rules*, *supra* note 10, r 80.
[174] *Competition Tribunal Act, supra* note 6, s 3(2).
[175] For example, in *Rogers-Shaw* the panel was composed of one judicial member (Chief Justice P. Crampton) and two lay members.
[176] Federal Court of Canada, "Notice to the Parties and the Profession—Pilot Project: Chambers of the Court" (2 March 2023), online (pdf): <https://www.fct-cf.gc.ca/Content/assets/pdf/base/2023-03-02-Notice-Specialized-Chambers.pdf>.
[177] Prior to the June amendments, private parties could bring an action to the Tribunal under Sections 75 (refusal to deal), 76 (price maintenance) and 77 (exclusive dealing, tied selling, and market restriction). Following the amendments, private parties can bring an action to the Tribunal under Sections 78 and 79, the abuse of dominance provisions of the *Act*.
[178] Vasiliki Bednar, "Senator Wetston Response re: Examining the Canadian Competition Act in the Digital Era Consultation Paper (15 Dec 2021) at 12, online (pdf): *Senator Colin Deacon* <https://colindeacon.ca/media/50728/bednar.pdf>.
[179] *Ibid*.
[180] John Pecman, "Toughening Canada's Competitiveness" (Nov 2022) at 13, online (pdf): *Canadian Chamber Future of Business Centre* <https://chamber.ca/wp-content/uploads/2022/11/Toughening-Canadas-Competitiveness-EN.pdf>.
[181] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era" (8 Feb 2022) at 8.7, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> [Bureau Submission].
[182] Veel, *supra* note 9 at 21.
[183] *Ibid* at 22; See also Kent Roach and Michael J Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:1 Osgoode Hall LJ 461 at 502.
[184] Goldman & Layton, *supra* note 153 at 527.
[185] Trebilcock et al., *supra* note 153 at 307-308; Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60:2 Can Bus LJ 171 at 198.
[186] Calvin S Goldman, KC, Brian A Facey & Mark Katz, "Mergers, the Information Economy and the New Millennium: A 'Modest Proposal' to Reform the Merger Review Process in Canada" (Paper delivered at the Canadian Bar Association, Competition Law Section, Annual Fall Conference, September 2000) at 10.
[187] Consultation Paper, *supra* note 2 at 55.

A JUSTICE AS FAIRNESS FRAMEWORK FOR A REVISED EFFICIENCIES DEFENCE

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

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

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

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

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

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

Introduction

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

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

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

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

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

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

Part I: The Current State of the Law

(a) What Approach Applies?

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

(i) An illustration to demonstrate the different methodologies

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

Table 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **92 (1)** Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially
>
> **(a)** in a trade, industry or profession,
>
> **(b)** among the sources from which a trade, industry or profession obtains a product,
>
> **(c)** among the outlets through which a trade, industry or profession disposes of a product, ***or***
>
> **(d)** otherwise than as described in paragraphs (a) to (c),[emphasis added][21]

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

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

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

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

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

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

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

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

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

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

If that case gets to the Supreme Court of Canada and that court adopts Chief Justice Crampton's view, then the uncertainty will be put to rest and the order driven approach will prevail. But even in that case, what that actually means will be contingent on the type of order sought, which

leaves discretion in the hands of the Commissioner. As will be discussed below, our proposal would structure that discretion by making it a statutory requirement to implement justice as fairness within a revised efficiencies defence.

(c) Screens for Efficiencies

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

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

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

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

Finally, no screen limits efficiencies to those that would make the company's products or services more competitive in the marketplace. That is strange because section 96(2) says that the Tribunal "shall" consider

whether efficiencies will result in "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products".[41] The Tribunal was confronted with this language in *Parrish*, and held that it could give additional weight if there would be an increase in exports or decrease in imports, but that such evidence was not required.[42]

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

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

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

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

(d) Adverse Effects

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

Interestingly, the Tribunal has noted that adverse effects could include qualitative adverse effects, including "a reduction in service, quality, product choice, incentives to innovate, or other dimensions of competition that

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

(e) Weighing

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

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

(a) Purposes of the Efficiencies Defence

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

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

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

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

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

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

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

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

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

In sum, the efficiencies defence is justified by (1) allocative efficiency, but only if weighed against fairness concerns; and (2) increased competitiveness

of Canadian businesses in global markets, which does not depend on fairness to be a sound policy basis.

(b) Application of those Purposes in the Modern Economy

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

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

In the modern economy, especially in globalized markets, static efficiencies like cost savings may be relatively unimportant to competitiveness, at least to the extent that they are used only to reduce prices. For example, one study on export market shares shows that non-price factors mattered three times more than price factors.[70] This is especially true in digital markets, where many products are priced at $0, companies compete primarily over

quality rather than price, and products derive their value in part from network effects. That being said, this conclusion is not limited to digital markets. Recent evidence suggests that, at least before the latest round of inflation, consumers cared more about quality than price for banking services[71] and groceries.[72]

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

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

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

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

Network Effects: Third, mergers in markets with network effects, or on either side of two-sided markets, can improve the quality of the product for both sides of the market.[80] For example, mergers of software companies can make each of their software more valuable because consumers have access

to a broader network of interoperable software.[81] This arose in the *Thoma Bravo* case, where the Commissioner allowed the acquisition of a competing software company in part because the merged entity would have better features, software updates, and customer service.[82] The implicit rationale was that consumers may prefer the merged company's combined software even if it charges a higher price because the quality matters more than the price.

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

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

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

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

Part III: The Meaning of Fairness

In Part II, we explained why fairness should be considered in the analysis. This part tries to formalize what fairness means in the context of the *Competition Act*. In this Part, we describe two conceptions of fairness: one based

on the text of the *Competition Act*, and one based on Rawlsian fairness. In the next Part, we put these principles into a concrete proposal.

(a) Fairness in the Purpose of the Act

Section 1.1 of the *Competition Act* states:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[87]

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

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

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

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

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

for the retail sale of bulk propane in western Canada, northern Ontario and the Northwest Territories.

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

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

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

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

In summary, the Bureau concluded that no remedy was required in ten local markets, because the efficiency gains resulting from the transaction were likely to clearly and significantly outweigh the likely anti-competitive effects in these markets. In each of the remaining 12 markets, the Bureau concluded that, without a remedy, the efficiency gains resulting from the

transaction would not be likely to clearly and significantly outweigh the anti-competitive effects. To address the Bureau's concerns, Superior agreed to sell retail propane sites and associated assets in these 12 markets.

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

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

(b) Rawlsian Fairness

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

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

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

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

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

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

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

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

Part IV: Our Proposal

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

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

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

a disadvantage, or result in any type of discounting compared to quantified efficiencies.

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

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

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

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

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

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

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

then the order must be made. If (1) and (2) are satisfied, but (3) is not, then the less restrictive order must be made.

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

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

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

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

Part V: Counterarguments

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

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

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

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

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

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

for, and providing training to local suppliers; and targeting all of the above to companies owned by persons from historically disadvantaged groups); and (3) changes to ownership (e.g. an employee share ownership plan; and a program to expand ownership by Black persons).[103]

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

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

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

In a perfect world, the watertight compartment argument is attractive. Hayek's *The Constitution of Liberty*,[107] built a sophisticated watertight compartments approach based on the superiority of the marketplace to predict human wants and needs.[108] We do not live in a perfect world, however. The problem with the direct subsidies approach to achieve

distributional justice is that this takes great effort on the part of governmental regulators and officials. Returning to the Superior Propane and Canwest merger example, the direct subsidies approach would require a government department to identify the various consumers in each of the markets where there was a substantial lessening of competition, and to ensure that those disadvantaged consumers could apply for and receive subsidies that would achieve social justice. The governmental infrastructure that would be required to perform that task would have to be extensive and would have to be able to move quickly as soon as the merger was completed. That governmental infrastructure would also need expertise in a wide range of economic and social areas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The logic in the above paragraph is unassailable. An acquittal on a higher standard of proof such as proof beyond a reasonable doubt, or clear and convincing evidence, does not preclude a finding in another forum of liability on the lower standard of proof on a balance of probabilities. The distinguishing feature between *McDougall* and *Penner* is the fact that the clear and convincing evidence standard was spelled out in the overarching

statute (the *Police Services Act* in that case). In *McDougall,* there was no statutory provision determining the standard of proof. The moral of the story is that the legislation governs with respect to the standard of proof.

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

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

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

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

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

Conclusion

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

ENDNOTES

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

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

[3] Matthew Chiasson & Paul A Johnson, "Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation" (2019) 32:1 Can Competition L Rev 1.

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

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

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

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

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

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

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

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

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

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

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

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

[15] *Ibid* at 464.

[16] *Ibid* at 465.

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

[18] *Ibid* at 6-7.

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

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

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

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

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

[24] *Ibid* at para 502.

[25] *Ibid* at para 504.

[26] *Ibid* at para 500.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[41] *Ibid*, s 96(2).

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

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

[44] *Ibid.*

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

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

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

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

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

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

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

[51] *Ibid* at paras 124-128.

[52] *Ibid* at para 147.

[53] *Ibid* at para 87.

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

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

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

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

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

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

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

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

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

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

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

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

[65] Boswell, *supra* note 63.

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

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

[67] Chiasson & Johnson, *supra* note 3. For a rebuttal see Brian A Facey & David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation" (2019) 32:1 Can Competition L Rev 33.

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

[69] *Ibid* at 4 [emphasis removed].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[92] *Ibid.*

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

[94] *Ibid* at 136-42.

[95] *Ibid* at 302-303.

[96] *Ibid* at 14-15.

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

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

[99] See e.g. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.
[100] See e.g. *R v KRJ*, 2016 SCC 31.
[101] *Competition Act*, No 89 of 1998, s 2(f) (S Afr).
[102] *Ibid*, s 12A(3)(c), as amended by No 18 of 2018 (S Afr).
[103] The public interest powers of the South African Competition Commission were discussed by Betty Mkatshwa, "Incorporating Equity: A Global Perspective" (Panel at the American Bar Association Antitrust Law Spring Meeting, Washington, DC, 30 March 2023) [unpublished]. For a review of the caselaw on public interest conditions in South African merger control, see generally Maryanne Angumuthoo, Derek Lotter & Shakti Wood, "Public Interest in Mergers: South Africa" (2020) 65:2 Antitrust Bull 312 and Prince M Changole & Willem H Boshoff, "Non competition Goals and Their Impact on South African Merger Control: An Empirical Analysis" (2022) 60 Rev Industrial Organization 361. See also Jonathan Klaaren, Karissa Moothoo Padayachie and Olwethu Shedi, "The impact of competition law remedies on public interest", University of Johannesburg, Centre for Competition, Regulation and Economic Development, Working Paper CCRED-IDTT No 2023/04 at 11-16, online: <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/64479b2bc1f2fb059457e3a0/1682414382814/IDTT+2022-2023+WP4_Competition+law+and+public+interest.pdf>. See also, for example, the following South African cases regarding the imposition of public interest conditions on mergers: *Metropolitan Holdings Ltd v Momentum Group Ltd*, [2010] ZACT 87; *Walmart Stores Inc v Massmart Holdings Ltd*, [2011] ZACT 28 (allowing merger subject to conditions), rev'd in part [2012] ZACAC 2 and [2012] ZACAC 6 (varying the conditions); *In re Coca Cola Beverages Africa Limited v Various Coca Cola Bottling and Related Operations*, [2016] ZACT 33, further reasons [2016] ZACT 68; *Re Anheuser-Busch InBev SA/NV and SABMiller plc* (4 August 2016), LM211Jan16 (S Afr Comp Trib), online: <https://www.comptrib.co.za/open-file?FileId=46553>; *Re Simba (Pty) Ltd and Pioneer Food Group Limited* (15 May 2020), LM108Sep19 (S Afr Comp Trib), online: <https://www.comptrib.co.za/case-detail/8953>; and *Re Sunside Acquisitions and NBL Investment Holdings Ltd and Distell Group Holdings Ltd* (8 March 2023), LM136Dec21, online: <https://www.comptrib.co.za/case-detail/19820> (approving with conditions the acquisition of a South African brewery by Heineken).
[104] *Application by Sea Swift Pty Limited*, [2016] ACompT 9.
[105] US, Department of Justice, "Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster" (31 October 2022), online: <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed>.
[106] US, Federal Trade Commission, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (18 January 2022), online: <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

[107] FA Hayek, *The Constitution of Liberty* (London: Routledge, 1960).
[108] See Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace That is Remaking the Modern World* (New York: Simon & Schuster, 1998) at 144. Prime Minister Margaret Thatcher, who instructed Conservative Party staffers that *The Constitution of Liberty* was "what we believe", wanted to replace what she called the "nanny state" of "cradle-to-grave" coddling with an enterprise-based culture: *ibid* at 107-108. See also Douglas Macdonald, "Coerciveness and the Selection of Environmental Policy Instruments" (2001) 44:2 Can Pub Admin 161 at 164, referring to the competing theories of Hayek and Michel Foucault.
[109] See Kathryn Harrison, "Retreat from Regulation: The Evolution of the Canadian Environmental Regulatory Regime", in G Bruce Doern et al, eds, *Changing the Rules: Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) 122 at 124. See generally Todd L Archibald and Kenneth E Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters Canada, 2020), ch 2 at § 2:51.
[110] Kenneth R Ahern & Marco Giacoletti, "Robbing Peter to Pay Paul? The Redistribution of Wealth Caused by Rent Control" (2022) National Bureau of Economic Research, Working Paper No 30083 at 25-35, online: <https://www.nber.org/system/files/working_papers/w30083/w30083.pdf>.
[111] Konstantin A Kholodilin, "Rent Control Effects through the Lens of Empirical Research: An almost Complete Review of the Literature" (2022) DIW Berlin Discussion Paper No 2026, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298178#>.
[112] Mariona Segu, Jordi Jofre-Monseny & Rodrigo Martínez-Mazza, "Effectiveness and Supply Effects of High-Coverage Rent Control Policies" (2022), Institute d'Economia de Barcelona Working Paper 2022/02, online: <https://diposit.ub.edu/dspace/bitstream/2445/183683/1/IEB22-02_Jofre+Martinez+Segu.pdf>.
[113] Duncan Kennedy, "In Defense of Rent Control and Rent Caps" (2023), SSRN, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4371454>.
[114] *Ibid* at 4.
[115] *Secure Energy Services, supra* note 7 at paras 708-709.
[116] See e.g. *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 FCA 16 at para 14: "The burden of proof can matter where there is a gap in the evidence on a key element or where, overall, the case is so close that a make-weight or a tie-breaker is needed. Close this case was not. In fact, considering the force of the evidentiary record before it, the Competition Tribunal concluded (at para. 124) that the result would have been the same even if it accepted the Commissioner's view of the burden of proof."
[117] Todd Archibald & Kenneth Jull, "'Clear and Convincing' Evidence Cannot Reside in the House of Balance of Probabilities: A Scientific Approach" (2021) 51 Advoc Q 315.
[118] 2008 SCC 53 [*McDougall*].
[119] *Ibid* at para 40.
[120] *Ibid* at para 46.

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

SHOULD CANADA OVERHAUL THE SLPC TEST FOR MERGERS?

Andy Baziliauskas and Margaret Sanderson[1]

Governments throughout the world have been questioning whether their competition laws are sufficiently robust to police potentially anti-competitive conduct, including mergers. Of particular concern is whether the tools developed for addressing potentially anti-competitive mergers in traditional markets may fail in digital settings and, as a result, need to be overhauled. As more industries enhance their product offerings with digital innovations, these concerns may eventually cover a greater share of the economy from that which is currently held by so-called 'Big Tech' firms.

Competition laws in respect of mergers have tended to focus on price effects. In digital settings, adverse non-price effects, such as lower product quality and less innovation, may be the greater concern, particularly because digital products and services may have a "zero price" for consumers in that they are "free". In addition, the link between share and concentration measures and competitive effects may be more tenuous in digital markets, particularly in cases involving incumbent firms acquiring nascent (or potential future) competitors with small, or even no, current share in relevant markets.

In response to these concerns, calls have been made to strengthen competition laws to better protect consumers and the competitive process. In Canada, the Competition Bureau ("Bureau") is recommending numerous changes to the competitive effects evaluation of mergers, including adopting a US-style structural presumption, lowering the 'substantiality' threshold, and lessening or reversing the evidentiary burden to establish that a merger is likely to substantially lessen or prevent competition ("SLPC").

A key motivation for the Bureau's proposals is reducing the total resources it devotes under the current system to establishing and quantifying anti-competitive harm in the mergers context. With respect to quantification of harm, the Bureau recommends that the efficiencies defence currently included in section 96 of the Act—and the corresponding trade-off analysis that this defence entails—be repealed and that efficiencies instead be considered as one of several factors under section 93 when the Competition Tribunal ("Tribunal") evaluates whether a merger is likely to result in an SLPC. Should the section 96 trade-off analysis be repealed, the requirement for the Bureau to quantify anti-competitive effects will no longer exist. Our commentary focuses on the proposals to reform the standards used to establish an SLPC.

For the purposes of this commentary, we assume that the Bureau's proposals with respect to the section 96 trade-off are adopted.

Les gouvernements autour du monde sont en réflexion sur la question de savoir si leur cadre de droit de la concurrence est assez solide pour sanctionner les agissements potentiellement anticoncurrentiels, ce qui comprend les fusions. Il est particulièrement intéressant de se demander si les outils créés pour l'encadrement des fusions à risque concurrentiel dans les marchés traditionnels pourraient s'avérer inopérants dans un environnement numérique, et s'ils auraient donc besoin d'être modernisés. Comme un nombre croissant d'industries améliorent leur offre par des innovations numériques, cette question pourrait finir par toucher une part croissante de l'économie et ne plus se limiter aux géants du numérique.

Traditionnellement, les lois sur la concurrence sont plutôt axées sur l'effet de prix en ce qui concerne les fusions. Or, dans l'espace numérique, le principal risque peut provenir d'effets indésirables autres que l'effet de prix, notamment la baisse de qualité et le déclin de l'innovation, d'autant plus que les produits et services numériques ont parfois un coût nul pour les consommateurs puisqu'ils sont « gratuits ». De plus, le lien entre les mesures de centralisation ou de mise en commun et les effets concurrentiels peuvent être moins évidents dans les marchés numériques, surtout quand des sociétés font l'acquisition de concurrentes naissantes ou embryonnaires dont la part de marché est minuscule, voire nulle.

En réponse à ces nouvelles réalités, des voix s'élèvent et réclament qu'on renforce les lois sur la concurrence, afin de mieux protéger les parties consommatrices et le processus concurrentiel. Au Canada, le Bureau de la concurrence (le « bureau ») recommande de nombreux changements dans l'évaluation des fusions quant aux effets de concurrence, notamment l'adoption d'un modèle de présomption structurelle à l'américaine, l'abaissement du critère de substantialité, et l'allègement ou l'inversion du fardeau de démontrer qu'une fusion est susceptible de donner lieu à un empêchement ou une diminution sensible de la concurrence (un « EDSC »).

Les propositions du Bureau sont notamment motivées par la volonté de réduire l'ensemble des ressources qu'il consacre, dans le système actuel, à l'établissement et à la quantification du tort anticoncurrentiel en contexte de fusion. Quant à la quantification du tort causé, le bureau recommande d'abolir la défense fondée sur les gains en efficience aux termes de l'article 96 de la loi dans sa version actuelle— et l'analyse correspondante des facteurs pris en considération—au profit d'une défense qui donnerait l'efficience

comme un facteur parmi plusieurs autres aux termes de l'article 93 quand le Tribunal de la concurrence (le « Tribunal ») devrait déterminer si une fusion risque de donner lieu à un EDSC. Si l'on supprime l'analyse des facteurs prévue à l'article 96, alors le bureau ne sera plus tenu de quantifier les effets anticoncurrentiels. Notre commentaire porte sur les propositions de réformer les normes servant à l'établissement d'un EDSC. Aux fins de ce commentaire, nous présumons que les propositions du bureau concernant l'article 96 seront adoptées.

1. Executive Summary and Recommendations

Governments throughout the world have been questioning whether their competition laws are sufficiently robust to police potentially anti-competitive conduct, including mergers. Of particular concern is whether the tools developed for addressing potentially anti-competitive mergers in traditional markets may fail in digital settings and, as a result, need to be overhauled. As more industries enhance their product offerings with digital innovations,[2] these concerns may eventually cover a greater share of the economy from that which is currently held by so-called 'Big Tech' firms.

Competition laws in respect of mergers have tended to focus on price effects. In digital settings, adverse non-price effects, such as lower product quality and less innovation, may be the greater concern, particularly because digital products and services may have a "zero price" for consumers in that they are "free".[3] In addition, the link between share and concentration measures and competitive effects may be more tenuous in digital markets, particularly in cases involving incumbent firms acquiring nascent (or potential future) competitors with small, or even no, current share in relevant markets.

In response to these concerns, calls have been made to strengthen competition laws to better protect consumers and the competitive process.[4] In Canada, the Competition Bureau ("Bureau") is recommending numerous changes to the competitive effects evaluation of mergers, including adopting a US-style structural presumption, lowering the 'substantiality' threshold, and lessening or reversing the evidentiary burden to establish that a merger is likely to substantially lessen or prevent competition ("SLPC").[5]

A key motivation for the Bureau's proposals is reducing the total resources it devotes under the current system to establishing and quantifying anti-competitive harm in the mergers context. With respect to quantification of harm, the Bureau recommends that the efficiencies defence currently

included in section 96 of the Act—and the corresponding trade-off analysis that this defence entails—be repealed and that efficiencies instead be considered as one of several factors under section 93 when the Competition Tribunal ("Tribunal") evaluates whether a merger is likely to result in an SLPC. Should the section 96 trade-off analysis be repealed, the requirement for the Bureau to quantify anti-competitive effects will no longer exist.[6] Our commentary focuses on the proposals to reform the standards used to establish an SLPC. For the purposes of this commentary, we assume that the Bureau's proposals with respect to the section 96 trade-off are adopted.[7]

Our observations and recommendations follow.

- Courts and enforcers have imperfect information and imperfect foresight. As a result, there is inevitably some risk of false positives (wrongful prohibitions) or false negatives (wrongful approvals) in competition law enforcement. Optimal enforcement aims to minimize the risks of these errors, while also minimizing regulatory costs and maximizing the benefits from enforcement.

- The Bureau's SLPC reform proposals emphasize the harms from false negatives (allowing harmful mergers) and high regulatory and litigation costs to support easing the Bureau's prosecutorial burden. Increased risk of false positives, or potential harm to the economy arising from efficiency-enhancing or innovation-enhancing transactions not being pursued (from a fear of over-enforcement), are ignored. Yet the significant changes proposed by the Bureau to the SLPC test would make harms from false positives a greater concern assuming the 'substantiality' threshold is lowered, and/or the section 96 efficiencies trade-off is eliminated.

- While digital markets and concerns about the effects of mergers on innovation have been cited as motivation for the proposed reforms, any amended provisions will apply to all mergers in all industries. Merger transactions in Canada are predominantly in traditional or resource sectors, with very few involving 'Big Tech'.[8] In addition, the effects of mergers on innovation are seldom primary concerns for the Bureau, in either digital or traditional markets.[9]

- A too-stringent SLPC test is not the reason the Bureau has lost recent litigated merger cases.[10] Instead, in all cases where the Bureau lost the efficiencies trade-off, the Bureau was able to successfully establish an SLPC under section 92. Further, we are not aware of any instances where the Bureau has chosen not to take enforcement action because

it considered the SLPC test too difficult to meet. The Bureau has been clear in communicating it will take enforcement action on any merger that it finds will generate an SLPC even when the merging firms claim offsetting efficiencies under section 96.

- The Tribunal has provided valuable guidance in recent litigated merger cases on its interpretation of the SLPC requirements, including the meaning of 'substantial' and 'material'. The Tribunal's current guidance establishes reasonable thresholds that the Commissioner can, and has, met in litigated mergers.

- The Bureau has successfully argued anti-competitive effects of mergers that include price and non-price factors. Indeed, the Tribunal has found non-price harms when considering an SLPC in several cases where the Bureau did not provide any quantification or direct evidence of non-price effects. Establishing an SLPC under section 92 does not require quantification of price or non-price effects, and proving non-price effects has not historically been a barrier to proving an SLPC. As discussed below, in *Tervita* the Supreme Court of Canada stated that the Act does not bar the finding of a substantial prevention of competition when the Commissioner has failed to quantify deadweight loss[11], and the Commissioner has proven non-price anti-competitive effects in a number of litigated cases, including in the recent *Secure* case.

- While there are no litigated digital 'killer acquisition' cases in Canada, the *Tervita* case involved the acquisition of a prospective new entrant by a large incumbent that the Bureau successfully challenged on prevention of competition grounds. In that case, the Supreme Court of Canada affirmed that the Bureau must demonstrate a 'discernable' timeframe for entry by the acquired firm, as otherwise the timing of entry is merely speculative. This may, in some cases, make it more challenging for the Bureau to meet its burden, if the entry timeframe is highly uncertain or anticipated to be farther into the future.[12] On the other hand, the Federal Court of Appeal established what appears to be a flexible approach that permits the extension of the timing for consideration of entry when it can be demonstrated that entry is 'poised' over the extended timeframe.

- While the Bureau recommends adopting a structural presumption in Canada to 'simplify and expedite' merger review,[13] proving an SLPC for both price and non-price effects has not required especially

'complex economic tests'. Establishing market definition and the extent of competition between the merging firms can also be done without sophisticated economic analysis, whether a structural presumption or the current SLPC threshold is employed. Moreover, the SLPC framework (with some adjustments) is likely a better approach to addressing acquisitions of nascent competitors in digital markets than a structural presumption, precisely because nascent competitors will have small shares such that a structural presumption test may be unlikely to be met.

- In most litigated mergers, the Commissioner has satisfied the Tribunal with 'sufficiently clear and convincing evidence' of an SLPC, beyond the current legal burden of a 'balance of probabilities' standard. Replacing this standard with a 'balance of harms' approach may risk continued emphasis on quantification of harms as well as estimation of probabilities.

- In sum, we find little support for making dramatic changes to the current SLPC test, assuming the Bureau's section 96 efficiencies reforms are adopted. Instead, we recommend more modest revisions to address concerns about possible future underenforcement of digital economy mergers, without risking harms from increased false positive in traditional (and digital) markets. The reforms we support include:

    - As recommended by Professor Iacobucci:[14] (i) broaden the section 93 factors to include consideration of whether an acquisition would entrench or enhance the market position of a leading firm, including firms in the digital sector; and (ii) expand section 93(f) to include consideration of the removal of 'a *potentially* vigorous and effective competitor'.

    - Consider further increased funding for the Bureau to overcome its concerns about the resource costs of challenges related to digital economy mergers. This would reduce underenforcement while limiting the cost of false positives.

    - Consider lower notification thresholds for firms in digital markets if the number of increased notifications will not be overwhelming to Bureau resources.

    - Extend the limitation period under section 97 from one year to the three years recommended by the Bureau, or longer.

- Provide funding and investigative powers to enable more market studies and merger retrospectives, allowing for the refinement of analytical approaches and applying lessons learned. The government may consider making this mandatory, with such a mandate possibly only applying to digital economy mergers and/or mergers of nascent competitors. An impartial third party should conduct the retrospectives.

We elaborate below. Section 2 describes the merger reform proposals that have been advanced by the Bureau and Industry, Science, and Development Canada ("ISED"). Section 3 describes the error costs inherent in enforcement. Section 4 analyzes the Tribunal decisions in merger cases in the context of the proposed SLPC reforms. In Section 5, we comment on the benefits and costs to adopting a structural presumption or a balance of harms standard to replace the current SLPC test, including some statistics on the number of digital transactions reviewed by the Bureau. Section 6 concludes and includes our recommendations.

2. Canadian Merger Reform Proposals

A) Competition Bureau Merger Reform Proposals

The Bureau's response to Professor Iacobucci's consultation paper[15] expresses several concerns, including that the efficiencies defence allows mergers that harm consumers. In respect of the section 92 competitive effects test, the Bureau is concerned that: (i) having it bear the burden to demonstrate an SLPC is not an efficient use of 'judicial, business, or public sector resources'; (ii) the current competitive harm standards are not adequate for assessing acquisitions of nascent competitors; and (iii) the remedy standard, which only requires that a remedy eliminate the "S" from an SLPC, allows firms to accumulate market power. To address its concerns, the Bureau recommends the adoption of a US-style structural presumption to simplify and strengthen merger review. Under the US structural presumption, if the plaintiff shows that a merger significantly enhances concentration, the merger is presumed to substantially lessen competition and the burden shifts to the merging firms to rebut the presumption. It is then up to the merging parties to show that the merger is not likely to harm competition, which they typically attempt to do by demonstrating that: (i) the relevant market is ill-defined; (ii) the merger will generate significant efficiencies that will be passed through to consumers; or (iii) entry or expansion by competitors will mitigate post-merger price increases.

The recommendation to adopt a structural presumption in Canada is reiterated by the Bureau in its submission to the ISED consultation.[16] In that submission, the Bureau claims that the requirement that it must demonstrate that the merged firms will likely be able to exercise materially greater market power "has been further interpreted as requiring proof that the merger is likely to result in materially higher prices or materially lower levels of non-price competition relative to those that would likely exist in the absence of the merger. In turn, this has been interpreted as requiring an assessment of the likely magnitude, duration and scope of these price and non-price effects."[17]

The Bureau further asserts that these economic tests are complex, and that the Bureau is required to prove them on a balance of probabilities, citing the ISED consultation document's assertion that these tests may be highly impractical.[18] Repeal of section 92(2) of the Act, which prohibits the Tribunal from finding an SLPC solely on the basis of evidence of concentration or market share is a minimal initial step towards a structural presumption, according to the Bureau. The Bureau further recommends the structural presumption should be incorporated in legislation, with 'defined thresholds', which could be based on post-merger concentration or market shares and changes in those levels.

The Bureau also recommends revisions to the *Act* to deal with the acquisition of 'emerging competitive threats.' The Bureau claims that jurisprudence in recent cases places too high a burden on the Bureau to prove anti-competitive harm, citing the *Commissioner of Competition v Vancouver Airport Authority* abuse of dominance case. The quote cited in a Bureau submission says that "the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, 'within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market'."[19]

The Bureau claims that its burden to prove these elements on a balance of probabilities may be very difficult or impossible when the acquired firm is still developing its products that would compete with those of other competitors. The Bureau's concern is that "(p)redicting the future is hard at the best of times, but it can be particularly problematic in industries characterized by rapid technological progress,"[20] and contrasts the requirements under Canadian law with case law in the US, citing the DC Circuit Court of Appeals in *United States v Microsoft Corp*[21] and claiming that the *Act* does

not provide the Tribunal with the same powers to protect the competitive process.

Finally, the Bureau notes that the Australian Competition and Consumer Commission ("ACCC"), the UK government, and the US Senate have proposed amendments to ensure that competition laws protect emerging competitors. The Bureau's recommendation 2.3 in its February 2022 submission is: "The standards established from analysis of more traditional industries are not suitable for assessing acquisitions of emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process."[22]

B) ISED Merger Reform Proposals[23]

ISED's main concern for merger review is focused on the adequacy of the current merger provisions to police acquisitions of potential innovators, some of which may not be detected because they do no cross notification thresholds, while others may not be blocked because the competitive harm that may be caused by such mergers "is too difficult to forecast with precision at the time of the acquisition"[24], and then may be too late to remedy once harm becomes apparent.[25] ISED has in mind that digital economy start-ups, often enabled by lower barriers to entry for technology firms, will be acquired by incumbents with the hope that this will 'help them stay on the right side of any disruptive technology' or with the intention of suppressing the acquired firm's innovation. This would reduce competition for the incumbent in overlapping or adjacent markets.

ISED notes that such acquisitions—often referred to as 'killer acquisitions', or acquisitions of 'nascent' competitors—may also provide consumer benefits, since the prospect of an eventual sale to an incumbent creates a financial incentive for the start-up to invest in product development in the first place. Further, the acquisition itself can lead to lower prices and faster product adoption because of the incumbent may have the financial means, distribution networks and other advantages that the start-up lacks.

Identifying and stopping potential 'killer acquisitions' may be challenging if the acquired firm is small with limited assets in Canada, as it may fall below pre-merger notification thresholds. For transactions that are identified and reviewed, ISED notes two substantive challenges. First, the harms from these acquisitions often relate to non-price dimensions of competition such as innovation, which ISED claims may be given less weight by the Tribunal and appeals courts because such non-price effects are difficult to quantify. Second, the Bureau has the burden to demonstrate, on a balance

of probabilities, that any harm to competition from a merger is 'likely' to happen, that such harm will occur within a 'discernable' timeframe, and that such harm will likely be 'substantial'. ISED claims that because of the "complexity, dynamism and pace of change in many markets, especially digital ones, these specific tests may be highly impractical."[26]

One possible remedy to these challenges noted by ISED is *ex post* reliance on the abuse provisions, but for several reasons this is inadequate.[27] ISED notes some proposals made in other countries to better address 'uncertain competitive harm before it happens'. These include:

- the balance of harms approach proposed by the UK Furman panel, which would take into account both the likelihood and magnitude of potential harms and benefits of mergers, rather than just the likelihood of potential harms as is the case under section 92;

- the proposals from Australia's Digital Platforms Inquiry to make certain merger provision requirements more explicit, including the likelihood that a merger would take out a potential competitor, and the nature of the assets being acquired; and

- the proposal from the US Senate to lower the test for harm from a merger to 'an appreciable risk of materially lessening competition.' The US Senate proposal would also shift the burden of proof in some circumstances, such as significant increases in concentration, acquisitions by dominant firms, and mergers with value exceeding $5 billion.

ISED suggests that "(s)imilar measures could be considered in Canada either for transactions or firms of certain sizes, or in particularly concentrated industries. Alternatively, a more stringent competition test, or threshold for notification, could be the state of affairs for designated sensitive sectors."[28]

ISED also questions whether the current efficiencies defence should be retained. As noted above, the Bureau recommends that the current efficiencies defence be repealed and that efficiencies instead be added to the list of factors in section 93 of the *Competition Act*.

3. Error Costs in Law Enforcement

The error-cost framework was first proposed in law and economics scholarship by Richard Posner[29] with an extension made to antitrust by Paul Joskow and Alan Klevorick.[30] Frank Easterbrook also made an important contribution to this literature in 1984.[31]

Under the error-cost framework, optimal legal rules are those that minimize total social costs, which include the costs of 'false positives' (incorrectly condemning conduct that is not harmful), the costs of 'false negatives' (incorrectly allowing conduct that is harmful), and the costs of enforcement. The costs of false positives consist of harms to consumers or the economy when efficiency-enhancing or innovation-enhancing mergers are blocked or not pursued by merging firms. The costs of false negatives consist of consumer harms from higher prices or less innovation when anti-competitive mergers are allowed. Enforcement costs include investigation and litigation costs for governments and private parties.

The Bureau's submissions and the ISED consultation focus primarily on the harms from false negatives driven by perceived underenforcement, while largely ignoring the costs of potential overenforcement if all proposed reforms were to be adopted. This differs from some of the Bureau's past policy statements. For example, in its 'Big Data and Innovation' paper in 2017, the Bureau noted that:

> … an uninformed or overly interventionist enforcement approach risks chilling investment in the accumulation and use of big data through legitimate means, and losing out on significant benefits to competition and innovation. On the other hand, an approach that is too lax risks turning a blind eye to uses of big data that are harmful to competition and consumers. One goal of this discussion paper is to prompt discussion on how the Competition Bureau … should strike a balance in enforcing the *Competition Act* … in cases involving big data.[32]

A stricter merger law, while blocking more harmful mergers than might otherwise have been allowed (reducing harms from false negatives), is also likely to block more mergers that are benign and may have been beneficial if they were allowed (increasing harms from false positives). An error-cost framework attempts to find a balance. Assuming that the section 96 efficiencies trade-off is eliminated, a false positive is most likely to occur when a merger is blocked or not pursued by firms even though consumers would benefit on net, either because anti-competitive effects are overstated and/or efficiencies are understated.

While the economic tools for assessing the effects of mergers on prices are well-developed, those available for estimating a merger's effects on innovation—be they negative or positive—are likely to be less precise, or at the least require much stronger assumptions. The reform proposals neglect the possible incentives created through mergers to innovate, even in cases where market power might exist. Mergers internalize pricing and

investment decisions of the merging firms. In cases where investments have significant spillover effects that benefit rivals, a merger can allow for the capture of a greater share by reducing spillovers of innovation returns, and thereby be expected to enhance the merged firm's incentives to invest in innovations. Therefore, the net effect of a merger is, in general, *a priori* ambiguous.[33] Given the challenges of estimating non-price effects, very strict merger laws are more likely to block some innovation-enhancing mergers. Similarly, mergers in traditional industries can generate significant efficiencies, including from scale economies (for example by reducing fixed costs through the sharing of underutilized common facilities and equipment), and these efficiencies can benefit consumers if producers reduce their prices in response to lower costs. Assuming the efficiencies trade-off is no longer a feature of Canadian merger review, the risk of harms from false positives would be compounded by the significant reforms to the competitive effects test that are proposed by the Bureau.

4. Canadian Merger SLPC Jurisprudence

A) The Meaning of 'Substantial Lessening or Prevention of Competition'

"*Substantial*"

The Tribunal has identified two dimensions to the SLPC analysis. First, is the merged entity likely to have the ability to lessen competition relative to how the market would have evolved 'but for' the merger? Importantly, the Tribunal has found the Commissioner does not have to prove that there will likely be price increases with the merger to meet the SLPC test: it is sufficient that the merged entity has the ability to increase price or reduce quality, service, or product choice.[34]

Second, is the difference between the level of competition with and without the merger substantial? Substantiality is determined by the likely effect on market power. Would competition likely be substantially greater 'but for' the implementation of the merger or proposed merger, through the merged entity's ability to profitably influence price, quality, service, advertising, innovation, or other dimensions of competition?

In its assessment of substantiality, the Tribunal assesses three components.

- The first component is degree or magnitude, which considers whether the merger enable or is it likely to enable the merged entity to exercise materially greater market power. Said differently, post-merger, would

the merged firm have the ability to set prices that are likely to be materially higher, or are non-price dimensions of competition likely to be materially lower?

- The second component is scope, which considers whether the lessening or prevention of competition affects the entire relevant market or a material part of it.

- The third component is duration, which deals with whether the ability to set materially higher prices or reduce non-price dimensions of competition is likely to be maintained for approximately two years.

The Commissioner has the burden of demonstrating the SLPC. In determining whether the Commissioner has discharged this burden, the Tribunal assesses quantitative and qualitative evidence related to both the price and non-price dimensions of competition.[35] The Commissioner is not required to quantify any anti-competitive effects under section 92.[36] Instead, the Commissioner, must "always adduce sufficiently clear and convincing evidence, and he bears the burden to demonstrate, on a balance of probabilities, that the merger lessens or is likely to lessen competition substantially, as well as the basic facts of the "but for" scenario that are required to make that demonstration."[37]

Proof on a 'balance of probabilities' is the standard that must be met, which means the Tribunal must be of the view that it is "more likely than not" that the merger will result in a SLPC: "Mere possibilities are insufficient to meet this standard."[38] The "more likely than not" standard was established by the Supreme Court of Canada in *FH v McDougall*, where it rejected the possibility of a higher standard: "while the concept of '51 percent probability' or 'more likely than not' can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot."[39] In the same case, the Court also said evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."[40]

There are two recent concluded litigated merger cases in which the Commissioner did not meet his burden to establish an SLPC.[41] In *Parrish & Heimbecker*, the Commissioner proved the acquisition would cause 'some' lessening of competition for the purchase of wheat (but not for the purchase of canola),[42] but he did not meet his burden to prove substantiality.

In *Parrish & Heimbecker*, the Tribunal considered both relative and absolute levels of price variations. The Commissioner claimed predicted price variations of between 0.05% and 0.2% of the Cash Price for canola, and

between 0.60% and 1.1% of the Cash Price for wheat, based on a merger simulation model, were material. The Tribunal disagreed, finding that "predicted price variations representing such a small fraction of the pre-Acquisition price for wheat or canola at the Moosomin or Virden Elevators are immaterial, especially in light of the fact that a merger simulation model will always predict a price increase"[43]; for purchases of canola, price variations of "0.2% or less…are *de minimus*" and for the purchase of wheat, "price variations reaching at most 1.1%...are very minor and far from substantial in this market."[44] In its conclusion on relative price variations, the Tribunal concluded that:

> …the Commissioner has not presented any compelling argument nor any clear and convincing evidence regarding the materiality level (in terms of percentage) that should apply to the substantial lessening of competition analysis in this case… Similarly, the Commissioner has submitted no analysis nor any evidence to demonstrate that, in the particular circumstances of this case, the acceptable materiality level for a price decrease could be as low as around 1% or less.[45]

The Tribunal also said it is not aware of any cases in Canada or elsewhere where a court has concluded that a predicted price increase of around 1% met the threshold of substantiality, and noted that since merger simulation models always predict price increases, "absent expert evidence allowing it to conclude differently, relative price variations predicted by a merger simulation model have to be more than 1% in order to have any significance or materiality."[46]

The Commissioner argued that the predicted absolute price increases matter to farmers. The Tribunal, however, did not find "clear and convincing evidence allowing it to conclude, on a balance of probabilities, that a few cents a bushel matter to farmers and to their behaviour in the market. On the contrary, the evidence from farmers is in respect of amounts much higher than… the predicted price increases of Dr. Miller."[47] The parties' expert, Ms. Sanderson, provided evidence that the predicted price variation was significantly lower than within-day daily fluctuations of the price of wheat and canola, and her analysis suggested that a price increase of less than 10 cents per bushel cannot be material.[48] The Tribunal agreed, noting that the absolute value of the price variations of the Commissioner's expert were well under 10 cents. In summary, the Tribunal concluded that the price variations are "rather of a small magnitude and immaterial, consistent with the fact that P&H faces considerable competition from several rival Elevators and Crushers to constrain material price decreases after the Transaction."[49]

Similarly, in *Rogers-Shaw*, the Commissioner did not meet his burden of establishing an SLPC in part because he did not establish that his proposed 'but-for' price was valid.[50] The Commissioner's expert proposed that, but for the merger, Shaw's prices would have remained the same between March 13, 2021 and the present time but for the acquisition, but the Tribunal instead determined that Shaw did demonstrate with 'clear and compelling evidence' that its March 13, 2021 prices were introductory and would have increased independent of the acquisition in the ordinary course of business.[51] The Tribunal concluded that the Commissioner "has not established that the November 2021 increase in some of Shaw Mobile's prices was attributable to the execution of the Arrangement Agreement,"[52] and "Shaw has demonstrated that the price increase it implemented in November 2021 occurred in the ordinary course of business."[53] The Commissioner would therefore have lost this point even if the merging firms had the burden of proof.

B) Substantial Prevention of Competition

In *Tervita*, the Commissioner alleged that Tervita's acquisition of Complete's Babkirk facility would likely result in a substantial prevention of competition ("SPC") because independent entry by Babkirk in competition with Tervita would have reduced Tervita's market power.[54] The 'prevention' and 'lessening' branches are essentially the same because they both focus on whether the merger entity will likely be able to exercise materially greater power than it could without the merger[55], but there are differences because a lessening of competition involves increasing a firm's market power, while prevention involves a firm retaining its existing market power.

In its appeal to the Supreme Court of Canada, Tervita agreed that a SPC analysis is forward looking, but argued projections into the future should consider the parties 'as they are', and the Tribunal made a "fundamental error" by focusing "not on the merger between Tervita and [the target firm], but rather on how competition might have developed looking years into the future."[56] That is, the acquired firm must be "be a competitor based on the assets, plans and businesses of the party at the time of the merger."[57] In reasoning that has important implications for the analysis of future 'killer acquisitions', the Supreme Court disagreed with Tervita and gave the Bureau and Tribunal wide latitude to project the acquired entrant's likely conduct into the future.

The Supreme Court of Canada confirmed the Bureau's approach for assessing whether a firm with market power would use a merger to prevent

competition that would otherwise arise. This involves comparing the likely competition in the market with the merger to competition in the market 'but for' the merger. To understand the "but-for" market involves consideration of: (i) the identity of the potential competitor; (ii) whether the potential competitor would likely enter the market; and (iii) whether the entrant's effect on the market would likely be substantial.

With respect to the identity of the potential competitor, the entrant could be either of the merging firms or a third party entrant.[58] With respect to the second and third elements, Tervita argued that the intention of section 92 is to establish a merger test that "provides certainty to Canadian businesses."[59] The Supreme Court of Canada disagreed, finding that "likely does not require certainty" and there is only one civil standard of proof—on the balance of probabilities—citing the Supreme Court's own decision in *McDougall*. The Supreme Court did not increase the Bureau's burden to prove the likelihood of entry beyond the universal civil standard.

The Supreme Court of Canada's decision sets out factors to be considered when assessing the likelihood of entry. First, any factor that could influence entry should be considered, including plans and assets of the merging party, current and expected market conditions, and other section 93 factors.[60] Second, if the evidence is only that there is a possibility of entry 'at some point in the future', there can be no finding of a substantial prevention of competition.[61] Third, the Supreme Court agreed with the Federal Court of Appeal ("FCA") that the timeframe for entry must be 'discernable'—and while timing need not be a "precisely calibrated determination…there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger."[62] Absent such evidence, "the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met."[63] Fourth, "(e)ven where there is evidence of a timeframe for entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies."[64]

Although Tervita sought to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans, and business at the time of the merger, the Supreme Court of Canada disagreed, finding: "(t)here is no legal basis to restrict the evidence the Tribunal can look at in this way."[65] The FCA found, and the Supreme Court agreed, that when assessing the likelihood of entry, how far into the future the Tribunal can look to assess likelihood of entry should be determined by the lead time

required to enter a market due to barriers to entry,[66] and the 'lead time' is "the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market."[67]

The Supreme Court of Canada further explained that 'lead time' "should not be used to justify predictions about the distant future,"[68] and in some cases lead time will be short—in which case the timeframe may be sufficiently definite to meet the 'likely' test. However, in other cases—for example when the lead time can be 'some years' because of product development or regulatory approval process— "the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative."[69] Finally, "(l)ead time is an important consideration, though this should not support an effort to look further into the future than the evidence supports,"[70] and "(f)actual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances."[71]

In a 2021 submission to the OECD,[72] the Bureau wrote that the substantial prevention of competition analysis by the Tribunal and the FCA "offers support for SPC findings in Canada where the path to effective entry is, to some extent, both winding and protracted."[73] It added that "the Tribunal's Tervita decision shows … that path to viable entry need not be short or direct."[74]

In its response to Professor Iacobucci's discussion paper[75], the Bureau cites to a discussion in the Tribunal's discussion in *Vancouver Airport Authority* that is based on the Supreme Court's *Tervita* conclusions. The Bureau claims that:

> To obtain a remedy, the Commissioner must have sufficient evidence to prove these elements on a balance of probabilities. While this may be possible in a traditional industry, such a task may be particularly difficult—or even impossible—when it involves the acquisition of a firm that is still developing the products that would challenge other competitors. Even when it is uncertain, or where there is only a low probability that an emerging firm would develop a competitive product, any acquisition of that business completely extinguishes this possibility. Predicting the future is hard at the best of times, but it can be particularly problematic in industries characterized by rapid technological progress. [footnote cite to Hemphill and Wu 2020 omitted][76]

The Bureau further claims in its response that "(t)his Canadian case law stands in stark contrast to case law in the U.S."[77], and cites a passage from the D.C. Circuit Court of Appeals in *Microsoft* that says: "it would be inimical to the purpose of [U.S. competition law] to allow monopolists free reign to squash emerging, albeit unproven, competitors at will"[78]. The Bureau seems to believe that Canadian case law *does* allow such squashing of emerging competition—notwithstanding the Supreme Court's ruling in its favour in *Tervita*—and complains that "Canadian courts have no such overarching power or provision in the Act to protect the competitive process. Instead, the Act requires the Commissioner to identify, in the particular context of each case, the "concrete market opportunities" through which the emerging business would bring about greater competition."[79]

It is not obvious that the *Tervita* prevention framework unduly constrains the appropriate enforcement of 'killer acquisitions'. As the Bureau itself noted in its submission to the OECD, the *Tervita* entry framework supports enforcement of acquisitions when the path is both 'winding and protracted'. The FCA establishes a flexible approach to the timing of entry that allows an extension of the timing for consideration of entry beyond the temporal dimension of barriers to entry as long as it can be demonstrated that entry is still 'poised' at a later date.

Furthermore, the Supreme Court of Canada's finding that the likelihood of entry should not be established with 'speculative' evidence is consistent with an error-cost framework. Giving the Bureau the benefit of the doubt in a prevention case is appropriate when evidence or theory establishes that entry is more likely than not (and would erode the acquiror's market power) in similar circumstances, as is the case in 'lessening' cases, where economic evidence points to a likelihood the merged entity will have the ability to exercise market power without needing to prove the merged entity will do so (under section 92).

C) SLPC and Non-Price Effects

ISED cited a concern that harms to non-price dimensions of competition were given less weight and were harder to quantify. Therefore, reform is proposed. However, this misunderstands the law and the jurisprudence. The Tribunal has not required the Commissioner to quantify non-price effects as part of the section 92 competitive effects test. Any quantification of anti-competitive effects that are 'quantifiable' applies only to the section 96 efficiencies trade-off. This is confirmed by the Supreme Court of Canada in *Tervita*:

> … the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. (emphasis added)[80]

In all litigated merger cases, the Tribunal has explicitly and repeatedly stated that the Commissioner can establish an SLPC using evidence of the likely effects of a merger on price or non-price competition. For example, in *Commissioner of Competition v CCS Corp*, the Tribunal stated:

> In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is relative, rather than absolute, in nature. (emphasis added)[81]

The Commissioner has not lost a case before the Tribunal because of a failure to show that a lessening of non-price dimensions of competition was substantial. The Commissioner has alleged non-price effects under section 92 often as a secondary claim to price effects. In *Secure*, while the Tribunal rejected most of the quantified non-price effects alleged by the Commissioner under section 96, the Tribunal accepted the Commissioner's SLPC evidence of anti-competitive harm of both price and non-price effects based on estimated price effects (price increases of at least 5%) and estimated loss of service (increased travel costs), high market shares and margins, along with supporting evidence for the section 93 factors (for example, the merger eliminated Secure's closest competitor in the relevant markets which provided vigorous price and non-price competition to Secure,[82] no acceptable substitutes, and significant barriers to entry or expansion).[83] Although there have been no litigated cases where the Bureau sought to block a merger solely based on non-price effects, there is no reason to believe that the current law or jurisprudence make it too difficult for the Bureau to obtain an order in such circumstances if they were to arise in future.

In summary, there is no case for the competition test in section 92 to be strengthened on the basis that non-price effects are too difficult for the

Tribunal to assess. The Tribunal has clearly stated the Commissioner does not need to quantify non-price effects under section 92, and the Tribunal's decision in *Secure* demonstrates the existence of a substantial lessening of competition on the basis of non-price effects can be inferred from market shares and the section 93 factors, with no requirement that the Commissioner adduce evidence of a causal relationship between market power and non-price effects. At the time of writing, the Tribunal's decision in *Secure* is under appeal.

D) The Bureau's Claim that Establishing an SLPC Requires Complex Economic Tests

The Bureau claims that establishing the likely magnitude, duration, and scope of price and non-price effects for an SLPC requires 'complex' economic tests. The Tribunal's decisions in recent litigated cases suggest that 'complex economic tests', and in particular regression analysis and merger simulation models, were not necessary for the Bureau to establish an SLPC under section 92, although their use was likely influential to the decisions.

Regression analysis and merger simulations are regularly used by economists within enforcement agencies around the globe that are not required to quantify anti-competitive effects for an efficiencies trade-off. Such analyses are used because they are helpful for prosecutorial decisions. The data and information on factors like volume of sales, share of sales, variable margins, and prices required to execute these economic analyses are already collected through the ordinary course of an investigation. Further, even if these "complex" analyses were not used for assessing an SLPC, these same analyses are regularly used to implement the hypothetical monopolist test in market definition. If a structural presumption were adopted, market definition would require similar analysis and resources as those used in the economic analyses related to establishing an SLPC.

It is also the case that significant resources are already devoted by the Commissioner and the parties to market definition and share calculations. Consider, for example, *Superior Propane*, which pre-dates the Supreme Court's *Tervita* decision setting out the current section 96 quantification framework. In *Superior Propane*, the Commissioner argued that "market power can be inferred from various factors such as high market shares and concentration, the high barriers to entry, the removal of ICG as a vigorous competitor, the lack of foreign competition and the fact that there is no effective remaining competition."[84] The Commissioner's market share expert, Professor West, calculated market shares in 74 local markets, and

identified markets where combined shares were within certain bands. Two of the Commissioner's other experts, Professors Schwindt and Globerman, prepared a joint expert report in which they defined product and geographic markets. Their opinion, based on their market definition, changes in concentration, and analysis of barriers to expansion, was that there was sufficient evidence that competition will be reduced in the relevant markets. Neither report undertook an econometric analysis of likely price (or non-price) effects of the merger.

The parties' experts, Professors Carlton and Bamberger, provided a joint expert report critiquing Professor West's market share calculations, as well as the conclusions of Professors Schwindt and Globerman. The Tribunal also considered the Commissioner's expert evidence and other evidence on barriers to entry and the other section 93 factors.

Another Commissioner expert, Professor Ward, provided evidence of likely post-merger prices increases based on a demand estimation and merger simulation model that was the basis of the Commissioner's empirical estimates of deadweight loss in the section 96 trade-off. To reach its conclusion that the merger would likely result in a substantial lessening of competition, the Tribunal "considered the evidence of market shares and concentration provided by Professors West, Schwindt and Globerman and the econometric evidence of Professor Ward on the ability of the merged entity to impose unilateral price increases."[85] It is unclear whether the Tribunal would have reached this conclusion without econometric evidence of price increases.

The Tribunal also concluded that the merger was likely to prevent competition in Atlantic Canada, based on evidence of ICG's plans to expand in Atlantic Canada, as well as evidence of high market shares, the evidence of high barriers to entry and the lack of evidence that entry did occur in the past.[86] Notably, the Tribunal reached this conclusion without any econometric evidence of price effects of the prevention of competition in Atlantic Canada.

In *Tervita*, the Commissioner presented substantial evidence on the boundaries of the relevant product and geographic markets. The Commissioner prevailed on product market definition. The Tribunal did not reach a firm conclusion on the precise boundaries of the geographic market, finding that the geographic market was at least as large as the Contestable Area as identified by Tervita's expert. Ultimately the Tribunal found it would not matter if the geographic scope of the relevant market included additional

customers beyond the Contestable Area, because CCS would remain the sole supplier of Secure Landfill services to any reasonably defined broader group of customers.[87]

The Tribunal then used the analytical framework described above to determine whether the acquisition would likely result in a substantial prevention of competition. The Bureau's expert, Dr. Baye, provided evidence based on a regression model that a decrease in prices of at least 10% was prevented by Tervita's acquisition of the Babkirk facility. The Tribunal did not give "significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger" for a number of reasons, including that his models did not control for costs, and that they were not based on CCS's data.[88] The Tribunal did conclude that the merger likely prevented price reductions of 10%, which was relevant for the section 96 analysis, but this evidence was based on evidence from documents and fact witnesses, not the econometric evidence of Dr. Baye. The Supreme Court concluded that "(w)hile the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in absence of the merger was flawed, there was sufficient other evidence upon which it could find a substantial prevention of competition as a result of the merger."[89]

In addition, in *Rogers-Shaw*, the Commissioner's economic expert, Dr. Miller, provided evidence of price effects based on a merger simulation model, which was disputed by Rogers' expert, Dr. Israel. The Tribunal concluded that "after adapting Dr. Miller's model to address the shortcomings discussed [in the decision], Dr. Israel persuasively demonstrated that the model would not have predicted a material price increase in Alberta or British Columbia. In other words, the Tribunal finds that the Commissioner's quantitative evidence of predicted price effects of the Merger and Divestiture was not reliable and substantially overstated. The Tribunal agrees with Dr. Israel that Dr. Miller's predicted post-Merger price increases are highly doubtful, for the reasons set forth [in the decision]."[90]

The Tribunal's ultimate conclusion that the merger would not likely result in a lessening of competition (let alone a substantial lessening) was not based on the Commissioner's failure to establish price effects through a merger simulation model, although it is possible that establishing price effects may have persuaded the Tribunal to reach a different conclusion. The Tribunal rejected the Commissioner's key claims, including that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor, that Rogers' acquisition of Shaw Mobile would likely

give rise to anti-competitive unilateral effects, and that the merger would likely facilitate the exercise of collective market power.[91] In reaching these conclusions, the Tribunal appeared to rely mainly on qualitative evidence and testimony from fact witnesses.

5. No Need for Specific Reforms

A) Codifying a Structural Presumption in Canada

A core Bureau recommendation for strengthening the merger provisions of the *Act* is to adopt a structural presumption, under which the Bureau would establish that a merger is anti-competitive by demonstrating that it would result in a significant increase in concentration. The merging firms would have the opportunity to rebut this presumption.

As described above, under the US structural presumption, the plaintiff can establish *prima facie* illegality of a merger in US courts by showing that the merger would result in a significant increase in, and high level of, concentration. Once established, the presumption of illegality can be rebutted by the merging firms by showing that market shares do not accurately predict competitive effects, which may be done by undermining the factual foundations of the presumption—for example by proving that the relevant market is not well defined or market shares overstate the potential for competitive effects—or by providing evidence of market conditions that offset the presumed effects of the increase in concentration. Such evidence may be that attempted post-merger price increases would be disciplined by entry, or that the merger would result in offsetting efficiencies that are sufficient to prevent prices from increasing or otherwise offset any anti-competitive effects. If the presumption is undermined, then it 'bursts like a bubble',[92] but if the merging firms simply prove offsetting effects, the presumption remains, although in weakened form.[93]

Assuming the current SLPC test remains the same, adopting a structural presumption would mean that the Bureau no longer has the burden to prove entry or expansion by rivals would not eliminate the SLPC. Therefore, the 'duration' element of the Tribunal's three-part 'substantiality' test would be removed from the Commissioner's burden. However, even with a structural presumption, the Bureau would very likely still advance evidence, including economic analysis, to address the 'magnitude' and 'scope' aspects of the SLPC test detailed by the Tribunal.

The economic basis of the structural presumption is founded on the proposition that the loss of a significant competitor in a concentrated market

is likely to lead to an increase in market power, and concentrated markets often have significant barriers to entry.[94] These are the same foundations the Tribunal uses to determine whether a transaction is likely to enable the merged entity to exercise materially greater market power (the 'materiality' requirement) covering a material part of the relevant market (the 'scope' requirement).

One potential benefit of a structural presumption is saving litigation costs by encouraging some firms to forego a merger that would otherwise be litigated. This is a social benefit in the error-cost framework because it reduces the costs of litigation, especially for mergers where the firms may have a weak case. Canada's current merger framework with the section 96 efficiencies trade-off reduces the likelihood that firms will walk away from or not pursue a highly concentrating transaction as their transaction may prevail on the efficiencies defence even if a structural presumption were to exist. Assuming amendments are made to section 96, firms contemplating a transaction that is likely to meet the Tribunal's SLPC requirements should realize they risk substantial litigation costs without having their merger allowed. This will be the case even without a structural presumption.

The Bureau's recommendation to enact a structural presumption is described as a meaningful way to save enforcement costs the Bureau incurs under section 92. Such perceived savings may not come to pass. Any litigation—or work preparing for possible litigation—requires considerable investigative, legal, and economic work, at meaningful cost to the Bureau and merging firms. The *Parrish & Heimbecker* case is an example of a case where the central dispute related to relevant market definition, including both product market definition and geographic market definition. Most of the economic modelling and analysis undertaken in the *Parrish & Heimbecker* case was used to address market definition and competitive effects. This is not unique.

It is not uncommon for the economic analysis of market definition and competitive effects to be intertwined. For example, merger simulation models are regularly used to implement the hypothetical monopolist test, and also provide an indication of the extent to which the merger provides the parties with the ability to exercise materially greater market power. Such issues are currently vigorously contested, and they are likely to remain so even with a structural presumption. In such circumstances, any savings in litigation costs for the Bureau may be small.

Litigation costs incurred by the Bureau are not the only relevant enforcement costs. In the error-cost framework, the costs to the merging firms are also relevant. These are high but may be reduced if quantification of efficiencies under the section 96 trade-off is no longer required in the future. The other important costs to consider are potential harms resulting from false positives. Replacing current Tribunal jurisprudence with an untested—and to be defined—structural presumption for Canadian merger review will increase uncertainty. Transactions are less likely to be pursued in a more uncertain regulatory environment, making it more likely some beneficial and benign transactions are not pursued.

Finally, a structural presumption is not likely to be applicable for 'killer acquisitions' since the acquired firm, as a nascent competitor, would typically have minimal or even no market share. In other words, the structural presumption would not be relevant for most of the digital economy mergers over which the Bureau expresses the greatest concerns. For example, Facebook's acquisition of WhatsApp and Instagram would not likely have met the market share thresholds under a structural presumption.

B) Balance of Harms Test Risks Continued Emphasis on Quantification

In its discussion paper, ISED described adopting a 'balance of harms' test for digital merger review to replace the current 'balance of probabilities' test. A balance of harms test was recommended by the Furman panel in the UK as a way to take account of the 'likelihood' and 'magnitude' of future harms.[95] In contrast, a 'balance of probabilities' test only considers potential harms—whatever their magnitude—if any harm is shown to be 'more likely than not'. Under a balance of harms test, a merger would be blocked if the expected harm (equal to the likelihood of harm multiplied by the size of the harm if it occurs) is greater than the expected benefit (equal to the likelihood of the benefit multiplied by the size of the benefit). Assuming likelihood and magnitude of harm and benefit can be estimated, the balance of harms test is superior to the 'balance of probabilities' standard because it allow the Tribunal to block mergers that have low probability of very large harm, which would be allowed under the current standard.

An important objection to this standard is that it can be very difficult—and costly—to estimate 'likelihood' and 'effect' with sufficient precision[96] to confidently establish that expected harms exceed expected benefits. Therefore, a 'balance of harms' test is likely to emphasize quantification, which the Commissioner claims is costly for the Bureau and which the Bureau's

proposed amendments seek to avoid. The magnitude of expected benefits and harms can be very sensitive to small changes in the values of the likelihoods and effects, which leads to the potential for significant false positives or false negatives. To illustrate, consider a merger where the Bureau estimates that the probability of harm is 6%, with an estimated consumer harm, if realized, of $100, (an expected harm of 6% x $100 = $6), and an estimated 50% probability of an estimated $10 in consumer benefit (an expected benefit of 50% x $10 = $5), which yields an expected net harm of $1 using a balance of harms approach. If the actual probability of harm is say, 4.9%, instead of 6% , then there would actually be a net expected benefit instead of a net expected harm. Thus, in this example if the expected harm is overstated by just over one percentage point, the balance of harms test will result in a false positive, which would lead to prohibiting a merger than has net benefits. It is unclear how the Bureau, the merging parties and the Tribunal would distinguish instances of 6% versus slightly less than 5% probability without resorting to extensive and costly quantification and "balancing" that the Bureau's section 96 proposed reforms aim to avoid. Although this example was constructed to illustrate a point, the numbers may not be very different from those in real cases, and in particular the likelihood of harm will in often be low, since the test is mainly intended to capture low probability of harm/large magnitude of harm mergers, and the dispute will often be around small differences of low probability events. Such disputes are likely to be costly, time-consuming, and prone to error.

It is worth considering whether the Bureau investigates, or is likely to investigate in the future, a sufficiently large number of potentially problematic mergers in non-traditional industries to justify amendments of general application to deal with future digital mergers. As we discuss below, the Bureau has reviewed very few, if any, high-tech or digital economy mergers over the last several years, and we have seen no evidence that the Bureau has foregone an investigation or challenge of a high-tech merger owing of any challenges to meet the current SLPC jurisprudence standards.

C) The Bureau Reviews Very Few High-Tech Mergers

The merger transactions contested by the Bureau over the last two decades have almost exclusively involved firms in traditional industries. *Superior Propane* involved the sale of propane, *Tervita* involved oilfield waste landfills, *Parrish & Heimbecker* involved grain purchases at prairie elevators, *Secure* involved oilfield waste treatment, disposal and landfill services, and *Rogers-Shaw* involved mainly mobile phone services. None of these merger challenges involved firms in high tech industries.

The Bureau has released approximately 33 backgrounders on mergers since September 2017 (as of April 8, 2023). Very few of these mergers involved firms that could be considered high-tech, and none of the reviewed mergers involved an acquisition of a nascent competitor. The only mergers that appear to involve 'high tech' firms are S&P/IHS, Thoma Bravo/Aucerna, and United Technologies/Rockwell Collins. The other 30 backgrounders discuss mergers of firms in traditional industries, including pulp mills, retail gasoline and grocery stores. This is not surprising given the general make-up of Canadian industry.

In its monthly reports of concluded merger reviews, the Bureau lists 463 mergers between January 2021 and February 2023 that were either pre-notified and/or for which a request was made for an advance ruling certificate.[97] The monthly reports include the 4-digit NAICS code and the resolution of the matter (ARC, Consent Agreement, or No Action Letter). There appear to be very few mergers in any 3 or 4 digit NAICS code that appear to encompass 'high tech' firms. There were eighteen reviews in NAICS 541 'Professional, Scientific, and Technical Services' accounting for 4% of the total. This code also accounted for one out of eleven consent agreements. This involved a proposed merger of S&P Global/IHS, which was a 2021 merger of credit ratings and analytics firms.[98] There were five notifications in NAICS 334 ('Computer and Electronic Product Manufacturing'), including Google/Fitbit (which resulted in an NAL) and Jordan Company/CPI Intermediate Holdings (which resulted in an ARC).

6. Conclusions and Recommendations

Our review of litigated merger cases and recent Bureau reviews provides limited, if any, support for substantial amendments to the *Act* that would lighten the Bureau's burden to prove an SLPC, especially if such amendments are motivated by concerns about underenforcement of the merger provisions in relation to digital economy mergers. The *Act* has proven to be flexible, and with two recent exceptions—which we would argue involve cases the Commissioner would have lost even with a less stringent SLPC test—the Commissioner has met the burden of proving an SLPC, including in the only merger case where the Commissioner alleged a substantial prevention of competition.

We find little evidence that the current *Act* or the jurisprudence in the litigated cases will prevent the Commissioner from obtaining remedial orders for mergers that are likely to substantially lessen or prevent competition if a responsible case is brought. Furthermore, the Commissioner has

consistently proven non-price effects under section 92 based on qualitative evidence, including the section 93 factors, and we find no reason to believe that the current law would not support a responsible application based on non-price effects against a digital economy merger.

The Commissioner has not been burdened by the requirement to adduce complex economic evidence to prove an SLPC based on either non-price or price effects, and when such evidence has been adduced to prove an SLPC, it was mainly in support of meeting the Commissioner's burden to rebut the merging firms' evidence that efficiencies outweigh and offset the efficiencies claimed by the merging firms under the section 96 trade-off. Assuming the Bureau's recommended reforms to the section 96 trade-off are accepted, the current quantification requirements on the Commissioner will be removed, although the Bureau may still find it valuable to use merger simulations and other "complex" economic analyses to persuade the Tribunal of a likely SLPC.

We are unable to point to any harmful 'Big Tech' mergers that the Commissioner has failed to successfully challenge, or harmful mergers that it chose not to challenge, because the current law made it too difficult for the Commissioner to prove an SLPC. The Bureau has reviewed few, if any, 'Big Tech' mergers, and the Bureau has negotiated a consent order in the few mergers where the Bureau had concerns about the effects of the merger on innovation. Of course, the Bureau may need to review more digital economy mergers in the future, including mergers with non-traditional features such as platforms, two-sided markets, zero price goods, non-price effects including innovation, and 'killer acquisitions.'

We note, however, that at this stage there is little information to establish whether acquisitions undertaken by digital firms are designed to 'kill' the target in Canada or elsewhere.[99] Many digital economy mergers that potentially harm Canadians are likely to involve global firms and will be reviewed by the US agencies, the European Commission, and other foreign authorities. The remedies obtained by these larger agencies to resolve their concerns are likely to have positive spillovers for Canadian consumers based on past experience. Most of the recent digital economy mergers that have drawn attention to alleged deficiencies in competition laws in policing non-traditional mergers have similar effects on Canadians as they have on Americans and Europeans, and remedies achieved in the US and Europe have extended beyond these jurisdictions. Given this context, it would not be prudent to amend Canada's competition test for mergers that has worked reasonably well in traditional industries.

There may, however, be some scope for amending the SLPC test, along the lines suggested by Professor Iacobucci, which we include in our list of recommendations below.[100] We offer the following additional recommendations.

A) Recommendations involving changes to Section 93:

- Amendments to section 93. We support the clarifying amendments to section 93 proposed by Professor Iacobucci. He suggests amending section 93 to include a factor that considers whether an acquisition would entrench or enhance the market position of a leading firm, including firms in the digital sector. He also suggests section 93(f) be expanded to include consideration of the removal of 'a *potentially* vigorous and effective competitor', to address concerns about nascent competitors in digital markets. Section 93(f) might also be amended to include a factor that invites the Tribunal to consider whether a merger would result in the degradation of product quality, including for products offered by firms in the digital sector.

B) Other Recommendations:

- Increase Bureau funding. One of the Bureau's main motivations for its recommendations is to limit the cost and complexity of proving cases. Lowering the Bureau's burden will likely reduce enforcement and regulatory costs and reduce false negatives but is also likely to increase false positives. An increase in resources allocated to the Bureau would limit cost concerns and allow for a sharper resolution of cases.

- Enable merger retrospectives. As suggested in the ISED consultation paper, the enabling of more merger retrospectives would allow for the refinement of analytical approaches and applying lessons learned. Retrospectives could even be mandated to be conducted periodically—say every five years—with such a mandate possibly only applying to digital economy mergers and/or mergers of nascent competitors. Consideration could also be given to having an impartial third party—not the Bureau—conduct the retrospectives. There are many highly competent Canadian academics who would be qualified to conduct such reviews.

- Extend limitation period to three years, and possibly longer. The Bureau's February 2022 submission noted that over the past decade, "only five out of the hundreds of acquisitions made by the largest tech firms—Google, Apple, Amazon, Facebook and Microsoft—were notified under the Act."[101] Section 97 prohibits the Commissioner

from challenging a merger more than year after it has been substantially completed. We agree that the limitation period should be extended to at least the three years recommended by the Bureau.[102] This extended period may be particularly relevant for acquisitions of nascent competitors, since the Bureau would be able to monitor whether the acquiror has taken steps to minimize the target's market roll-out or reduce innovation by either firm over a longer time period. This extended timeframe may cause some uncertainty for merging firms and may have the effect of freezing some beneficial investment, but this may be an acceptable economic cost given the possible benefits in terms of reducing the risk of false negatives in digital acquisitions.

ENDNOTES

[1] Andy Baziliauskas, Principal, and Margaret Sanderson, Vice President, are economists specializing in matters of antitrust and competition at Charles River Associates. The opinions and conclusions expressed in this article are solely those of the authors and should not be attributed in any way to any other individual or organization. The authors would like to thank Lisa Stockley, and the referees of the CCLR—Dimitri Dimitropoulos, Ian Cass and Chris Margison—for their valuable comments, as well as Rahim Lila for his assistance in editing draft proofs. Any remaining mistakes are our own.

[2] See "Artificial intelligence is permeating business at last", *The Economist* (6 December 2022), online: <economist.com/business/2022/12/06/artificial-intelligence-is-permeating-business-at-last>.

[3] Some commentators have noted the "price" is not zero because information, or data, about consumers' backgrounds, preferences or choices may be used by the digital network. For a discussion of the economics of 'zero pricing', see Joshua S. Gans, "The Specialness of Zero" (2022) 65:1 JL & Econ 157 at 176.

[4] Special competition measures and regulations for large tech companies have been proposed or put into effect by some governments.

[5] We refer to two Bureau submissions: Canada, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era*, (Submission by the Competition Bureau), (8 February 2022) online: <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html> [Bureau February 2022 Submission]; and Canada, Competition Bureau, *The Future of Competition Policy in Canada*, (Submission by the Competition Bureau), (15 March 2023) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada> [Bureau March 2023 Submission].

[6] As we discuss in this commentary, often predictions of price and non-price effects are adduced by the Bureau and considered by the Tribunal in relation to the section 92 SLPC test in litigated merger cases, but quantification is not necessary for the assessment of the SLPC, as confirmed by the Tribunal and the Supreme Court of Canada (see *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 166 [*Tervita*], and *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at para 476 [*Parrish & Heimbecker*]). Rather, the section 96 efficiencies defence requires quantification of anti-competitive effects which motivates the production of this evidence.

[7] We do not consider the Bureau's recommendation to repeal the efficiencies defence here, and instead focus on the proposed amendments to the competitive effects analysis of mergers. For a discussion of possible reforms to the efficiencies defence, see Andy Baziliauskas and Lisa Stockley, "Towards an Efficiencies Standard That Benefits Canadians" (2023) 36:1 Can Competition L Rev 1.

[8] Where innovation and competition in 'high tech' industries has arisen, the Bureau has negotiated consent agreements (e.g., Dow-Dupont and Thoma

Bravo/Aucerna), or been able to rely at least partly on US and European enforcement agencies to address concerns about the effects of mergers on Canadians (e.g., Dow-Dupont and United Technologies-Rockwell Collins). See Canada, Competition Bureau, "Competition preserved in the supply of oil and gas reserves software in Canada" (20 August 2019), online: <https://www.canada.ca/en/competition-bureau/news/2019/08/competition-preserved-in-the-supply-of-oil-and-gas-reserves-software-in-canada.html>; and Canada, Competition Bureau, *Merger between Dow and DuPont*, (Position Statement), (20 January 2022) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/merger-between-dow-and-dupont#conclusion> [Competition Bureau, *Dow-Dupont Position Statement*].

[9] The Dow-Dupont merger reviewed by the Bureau in 2017 is an exception. The Bureau negotiated a consent agreement with the merging companies to resolve its concerns, which included effects on innovation. See *ibid.*

[10] Of the five most recent litigated merger challenges over the last 20-plus years, the Bureau only lost one (*Parrish & Heimbecker*, *supra* note 6) because it failed to establish that a lessening of competition was substantial. The Bureau established an SLPC in three cases (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15 [*Superior Propane*]; *Tervita*, *supra* note 6; and *Canada (Commissioner of Competition) v Secure Energy Services Inc* 2023 Comp Trib 2 [*Secure*]), but lost two of these (*Superior Propane*, *supra* note 10; and *Tervita*, *supra* note 6) because it failed on the efficiencies trade-off. The Bureau did not establish any lessening of competition in the fifth case (*Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 [*Rogers-Shaw*]); however, *Rogers-Shaw* involved a divestiture remedy proposal such that the competitive effects analysis took account of the proposed divestiture.

[11] *Tervita*, *supra* note 6.

[12] In *Tervita*, the Supreme Court of Canada noted that "the farther into the future predictions are made, the less reliable they will be" (*ibid* at para 68).

[13] Bureau February 2022 Submission, *supra* note 5 at Section 2.2.

[14] Edward M Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (Discussion Paper commissioned by Senator Howard Wetston) (27 September 2021), online: <sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf> [Iacobucci].

[15] Bureau February 2022 Submission, *supra* note 5.

[16] Bureau March 2023 Submission, *supra* note 5.

[17] *Ibid* at Section 1.4.

[18] *Ibid*.

[19] *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 667 [*Vancouver Airport Authority*].

[20] Bureau February 2022 Submission, *supra* note 5 at Section 2.3.

[21] 253 F (3d) 34 (DC Cir 2001) [*Microsoft*].

[22] Bureau February 2022 Submission, *supra* note 5 at Section 2.3.

[23] Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada*, (Ottawa, 2022) online: <ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf> [ISED Consultation].
[24] *Ibid* at 19.
[25] ISED identifies another issue that we do not address in this commentary, which is whether workers should be more adequately protected in merger review under the *Competition Act*, RSC 1985, c C-34 [*Competition Act*].
[26] ISED Consultation, *supra* note 23 at 21.
[27] The ISED Consultation, *supra* note 23 cites that the abuse provisions cannot remedy the consequences of a merger that do not themselves constitute abuse, the criteria for a successful application are complex, costly, the provisions have a three-year time limitation, and structural remedies may be difficult to impose (*ibid* at 22).
[28] *Ibid* at 23.
[29] Richard A Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2:2 J Legal Stud 399.
[30] Paul L Joskow & Alvin K Klevorick, "A Framework for Analyzing Predatory Pricing Policy" (1979) 10:1 J Reprints Antitrust L & Econ 259.
[31] Frank H Easterbrook, "Limits of Antitrust" (1984) 63:1 Tex L Rev 1.
[32] Competition Bureau, *Big Data and Innovation: Implications for Competition Policy in Canada* (Draft Discussion Paper) (Gatineau: Competition Bureau, 2017), online: <ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/Big-Data-e.pdf> at 2.
[33] See, for example, Bruno Jullien & Yassine Lefouili, "Horizontal Mergers and Innovation" (2018) 14:3 J Competition L & Econs 364.
[34] *Parrish & Heimbecker*, *supra* note 6 at para 473.
[35] *Ibid* at para 476.
[36] "In *Tervita SCC*, the SCC held that the Commissioner was not, in law, required to quantify any anti-competitive effects under section 92" (*ibid*).
[37] *Ibid.*
[38] *Tervita*, *supra* note 6 at para 66.
[39] 2008 SCC 53 at para 43 [*McDougall*].
[40] *Ibid* at para 46.
[41] *Secure* is the third recent litigated merger case before the Tribunal. In that case, the Commissioner met his burden to establish an SLPC before the Tribunal, albeit with smaller anti-competitive effects than the Commissioner identified in his application. The Tribunal's findings in *Secure* are under appeal; hence, we do not discuss the Tribunal's findings here (*Secure*, *supra* note 10).
[42] *Parrish & Heimbecker*, *supra* note 6 at para 488: "the joint control of the Virden and Moosomin Elevators by P&H has and will continue to have some limited adverse effects on competition in the purchase of wheat."
[43] *Ibid* at para 516.
[44] *Ibid.*
[45] *Ibid* at para 518.

[46] *Ibid* at para 519.
[47] *Ibid* at para 533.
[48] *Ibid* at para 543.
[49] *Ibid* at para 544.
[50] In *Rogers-Shaw*, the Tribunal also found that the evidence on predicted price effects put forward by the Commissioner's expert's merger simulation model were not reliable and the predicted price increases were substantially overstated (*Rogers-Shaw*, *supra* note 10).
[51] *Ibid* at para 163.
[52] *Ibid* at para 180.
[53] *Ibid* at para 181.
[54] The Bureau also alleged a substantial prevention of competition in *Canada (Director of Investigation & Research) v Southam Inc*, 1991 CanLII 2396, 1991 CarswellNat 1583 (CT); *Superior Propane*, *supra* note 10; and *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3. *Tervita*, *supra* note 6 is the most recent and comprehensive decision in a prevention case.
[55] *Tervita*, *supra* note 6 at para 54.
[56] *Ibid* at para 57.
[57] *Ibid* at para 58.
[58] *Ibid* at paras 62-63.
[59] *Ibid* at para 65.
[60] *Ibid* at para 67.
[61] *Ibid* at para 68.
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid* at para 69.
[66] *Ibid* at para 70.
[67] *Ibid* at para 71. However, the FCA also found that the 'lead time' need not always be determined by the time needed to overcome barriers to entry: "I accept this approach insofar as it serves as a guidepost and not as a fixed temporal rule. There may indeed be rare situations where it may be appropriate to expand the temporal analysis of poised entry beyond the temporal dimension of the barriers to market entry. In such circumstances, the Tribunal will be required to clearly justify why the entry is still "poised" at this later date. However, in most cases the temporal dimension of market entry should serve as an appropriate guidepost." (*Canada (Commissioner of Competition) v CCS Corp*, 2013 FCA 28 at para 91).
[68] *Tervita*, *supra* note 6 at para 74.
[69] *Ibid.*
[70] *Ibid* at para 75.
[71] *Ibid* at para 76.
[72] Canada, Competition Bureau, *The Concept of Potential Competition—Note by Canada*, (Submission to the OECD Competition Committee's roundtable on

"Potential Competition"), (10 June 2021) online: <one.oecd.org/document/DAF/COMP/WD(2021)11/en/pdf>.

[73] *Ibid* at 8.

[74] *Ibid* at 11.

[75] Iacobucci, *supra* note 14.

[76] Bureau February 2022 Submission, *supra* note 5 at Section 2.3.

[77] *Ibid*.

[78] *Microsoft*, *supra* note 21.

[79] Bureau February 2022 Submission, *supra* note 5 at Section 2.3.

[80] *Tervita*, *supra* note 6 at para 166.

[81] 2012 Comp Trib 14 at para 373 [*Tervita CT*].

[82] *Secure*, *supra* note 10.

[83] *Ibid* at para 362.

[84] *Superior Propane*, *supra* note 10 at para 108.

[85] *Ibid* at para 311.

[86] *Ibid* at para 313.

[87] *Tervita CT*, *supra* note 81 at para 118.

[88] *Ibid* at para 229.

[89] *Tervita*, *supra* note 6 at para 82.

[90] *Rogers-Shaw*, *supra* note 10 at para 244.

[91] *Ibid* at para 405.

[92] Steven C Salop, "An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards" (6 November 2017), online: <scholarship.law.georgetown.edu/facpub/2007> at 10 [Salop (2017)].

[93] For economic analyses of the structural presumption, see, for example, Herbert Hovenkamp & Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof" (2018) 127:7 Yale L J 1996 [Hovenkamp & Shapiro (2018)], and Salop (2017), *supra* note 92.

[94] Hovenkamp & Shapiro (2018), *supra* note 93 at 1998.

[95] Digital Competition Expert Panel, *Unlocking Digital Competition* (United Kingdom: Digital Competition Expert Panel, 2015), online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> at 100.

[96] We note the Supreme Court's *McDougall* 'balance of probabilities' standard requires sufficiently clear and convincing evidence (*McDougall*, *supra* note 39).

[97] Canada, Competition Bureau, *Monthly report of concluded merger reviews*, (9 June 2023) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/mergers-and-acquisitions/monthly-report-concluded-merger-reviews>.

[98] Canada, Competition Bureau, *Competition Bureau statement regarding its review of S&P Global's proposed merger with IHS Markit Ltd.*, (Competition Bureau Position Statement), (20 January 2022) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-its-review-sp-globals-proposed-merger-ihs-markit-ltd>.

[99] Oliver Latham, Isabel Tecu & Nitika Bagaria, "Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These be Assessed?" (May 2020) Competition Policy International Antitrust Chronicle, online: <media.crai.com/sites/default/files/publications/CPI%20-%20Latham%20Tecu%20%20Bagaria.pdf>.

[100] Iacobucci, *supra* note 14.

[101] Bureau February 2022 Submission, *supra* note 5 at Section 2.6.

[102] *Ibid*.