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TABLE OF CONTENTS/TABLE DES MATIÈRES

CCLR VOLUME 35, NUMBER 2

ARTICLES

The Competition Bureau’s Rejection of Efficiency as the Key Criterion in Competition Policy: A Critique
 Edward Iacobucci 1

When Should We Look Out For The Little Guy? An Examination of the Inconsistencies in Antitrust Enforcement of Monopsony Power in Canada and the United States
 Susan M. Hutton, Naime Isaj,
 Laura Rowe and D. Daniel Sokol 32

**2022 JAMES H. BOCKING MEMORIAL AWARD WINNER/
 LAURÉATE DU PRIX COMMÉMORATIF JAMES-H.-BOCKING
 2022**

Algorithmic Collusion: From Smokerroom to Code Lines? How Collusion Can Evolve & Are We Prepared
 Laura Hamdan 54

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

Edward Iacobucci

*Professor and TSE Chair in Capital Markets
Faculty of Law, University of Toronto
June 8, 2022¹*

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

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

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

1. Introduction

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

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

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

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

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

2. The Objectives of Competition Policy

a) Efficiency as the Objective

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

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

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

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

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

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

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

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

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

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

The consultation paper examines other flaws in s. 1.1.¹⁴ For example, it is reasonable to conclude, as the Federal Court of Appeal did in *Superior Propane*, that concern for competitive prices reflects some kind of distributive concern for consumers relative to producers. But if distribution of economic resources is an objective, why are consumers singled out and not, say, workers?¹⁵ On the one hand, s. 1.1 is overinclusive in that it includes objectives that may conflict; on the other, it may be underinclusive by singling out some objects of distributive concern (consumers, possibly SME's) but not others (e.g., workers).

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

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

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

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

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

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

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

Citing the consultation paper specifically, the Competition Bureau “strongly opposes” any change to s. 1.1.²⁰ While there are reasonable arguments to be made in defence of the *status quo*, as I have noted, the Bureau instead offers arguments that are largely unconvincing. This section reviews and evaluates the Bureau's reasons.

i) Efficiency and Indifference to Consumers, SME's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii) Efficiency and Flexibility

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

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

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

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

iii) Non-efficiency Harms

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

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

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

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

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

iv) Comparative Argument

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

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

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

v) Under- and Overinclusivity

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

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

c) Conclusion on the Goals of the Act

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

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

3. The Efficiencies Defence

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

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

a) Section 96 Allows Mergers that are Harmful to Canadians

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) The Efficiencies Defence is an International Outlier

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

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

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

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

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

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

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

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

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

d) The Efficiencies Defence is Difficult to Implement Properly

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

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

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

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

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

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

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

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

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

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

An alternative approach to the enforcement difficulties at present is to abolish the defence as the Bureau suggests.⁶² In my view, enforcement difficulties ought not to decide the matter. First, enforcement challenges caused by *Tervita* can be and ought to be addressed by a statutory amendment. Second, mergers analysis is very challenging in virtually all cases and on many dimensions, yet this is not a basis to abolish mergers review altogether. The existence of future efficiency gains rests on identifiable organizational strategies that are in many cases more straightforward to evaluate than what lies behind an evaluation of competitive effects. Determining whether there has been a substantial lessening of competition requires the Bureau to predict the future impact of a merger by evaluating demand for the merging parties' products, demand for the strength of competitive products, the competitive response of rivals to the merging parties, the existence and significance of barriers to entry, the impact of possible innovation, and more besides. This is not a straightforward enforcement environment. Yet as far as I know, while there have been calls to simplify enforcement⁶³, there have not been calls to abandon mergers policy because it is complicated.

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

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

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

Having evaluated the Bureau's questionable arguments for diminishing the efficiencies defence, I turn now to the Bureau's proposal. The Bureau concludes that the *Act* should repeal s. 96 and instead relegate efficiencies to be simply a factor to consider when assessing a merger. In a footnote, the Bureau suggests that efficiencies could be treated as a factor to consider just as other factors in assessing mergers are outlined in s. 93.⁶⁴ As I will explain, it is difficult to know exactly how such an amendment would operate, how the Bureau would plan to implement it, and how it eliminates the problems that the Bureau sees with s. 96 at present. To foreshadow the final point, the Bureau objects to the efficiencies defence because it is an "exception" to the usual overarching objective of promoting competition. Yet treating efficiencies as a "factor," if this is to be meaningful, would continue to create an "exception" to the standard emphasis on competition. If competition exceptionalism is the mischief, considering efficiencies as a factor will not cure the mischief, as I will explain.

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

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

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

The Bureau suggests that inclusion of cost efficiencies as a factor to consider in s. 93 would align Canada's approach with that of international best practices. Setting aside the question of whether harmonization ought to be taken as desirable in and of itself, something considered above, the Bureau's suggestion is potentially helpful in assessing what it has in mind by suggesting that efficiencies be treated as another factor in assessing a merger. The EU and US both in theory⁶⁵ consider efficiencies as potentially justifying a merger if and only if the cost savings are sufficiently large that consumers would benefit from the merger, for example, prices fall, even if the merger lessens competition. There are a number of observations that follow from the Bureau's apparent endorsement of this approach.

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

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

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

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

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

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

3. Conclusion

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

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

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

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

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

ENDNOTES

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

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

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

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

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

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

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

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

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

⁸ *Supra* note 2.

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

¹⁰ I discuss this alignment further below in reviewing the Bureau’s arguments.

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

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

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

¹⁴ Iacobucci, “Examining the *Competition Act*”, *supra* note 2.

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

World in Fourteen Stories (The Netherlands: Kluwer Law International, 2012) 63 [Iacobucci, “The Superior Propane Saga”].

¹⁶ Iacobucci, “Examining the *Competition Act*”, *supra* note 2 at 54-55.

¹⁷ Ross & Winter, *supra* note 13.

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

¹⁹ Iacobucci, “Examining the *Competition Act*”, *supra* note 2.

²⁰ Competition Bureau Canada, *supra* note 5.

²¹ *Ibid* at s 1.

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

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

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

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

²⁶ *Supra* note 5 at n 8.

²⁷ See, e.g., Edward Iacobucci, “The Superior Propane Saga”, *supra* note 15.

²⁸ *Supra* note 5 at s 1,1.

²⁹ *Ibid*.

³⁰ *Ibid*.

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

³² *Ibid*, s 4.

³³ *Supra* note 5 at s 1.1.

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

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

³⁶ See Iacobucci, “The Superior Propane Saga”, *supra* note 15.

³⁷ *Supra* note 12.

³⁸ *Supra* note 12.

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

are found in Thomas Ross, “Proposals for Amending the *Competition Act*” (2022) 35:1 Can Competition L Rev 1; Brian A Facey & David Dueck, “Canada’s Efficiency Defence: Why Ignoring Section 96 Does More Harm than Good for Economic Efficiency and Innovation” (2019) 32:1 Can Competition L Rev 33; Matthew Chiasson & Paul A Johnson, “Canada’s (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation” (2019) 32:1 Can Competition L Rev 1.

⁴⁰ *Supra* note 5.

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

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

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

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

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

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

⁴⁷ *Supra* note 5 at s 2.1.

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

⁴⁹ *Supra* note 3.

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

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

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

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

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

⁵⁵ I am a member of the Council.

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

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

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

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

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

⁶¹ Iacobucci, “Examining the *Competition Act*”, *supra* note 2. See also Goldman et al, *supra* note 4.

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

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

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

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

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

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

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

WHEN SHOULD WE LOOK OUT FOR THE LITTLE GUY?

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

Susan M. Hutton, Naime Isaj, Laura Rowe and D. Daniel Sokol

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

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

Introduction

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

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

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

Monopsony power has been defined by economists as the mirror image of monopoly or oligopoly power in that it enables the transfer of wealth in the form of economic rents from one side of the market to the other.¹ Economists have based their objection to the exercise of monopsony power on grounds similar to those underlying the rejection of monopoly power. Both contribute to social welfare losses² and a reduction of allocative or economic efficiencies.³ Although theoretical underpinnings of antitrust law have focused on maintaining competitive markets as a means of inhibiting potential downstream consumer harm in the context of monopolies, case law in the United States illustrates that monopsony power has in some cases been condemned,⁴ however, in other cases has been tolerated if there was no resulting harm to consumers.⁵ The analytical approach that warrants such a distinction is not clear. Similar analytical difficulties have also presented themselves in Canadian competition law jurisprudence and enforcement decisions.⁶

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

Inconsistent Evaluations of Downstream and Upstream Market Power

The exercise of downstream market power to the detriment of customers has been historically viewed as unambiguously bad due to the deleterious effects such power exerts through the ability to artificially constrain price and non-price effects, regardless of the size of the customer or the benefits to small- and medium-sized suppliers. Alternatively, the exercise of upstream market power by firms has received more ambiguous treatment by antitrust enforcement agencies. When observing labour markets, for example, the anti-competitive exercise of buyer power is viewed as bad. No-poach and wage fixing agreements are viewed as *per se* illegal in the United States⁷ and are soon to be criminalized once again in Canada.⁸

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

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

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

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

Competition Framework

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

Legislation and Guidelines

Canada

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

Competitor Collaboration

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

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

The 2009 amendments to Section 45 of the *Competition Act*, which came into effect in 2010, reformulated the conspiracy provision to remove the requirement that the Crown establish an “undue” prevention or lessening of competition and—importantly—removed buy-side agreements from the scope of Section 45.¹⁶ It effectively narrowed the categories of *per se* criminal agreements to those between firms in respect of their downstream competition as sellers. Specifically, Section 45 applies a *per se* illegal prohibition against a party who, along with a competitor, agrees to allocate sales, territories, customers or markets for the production or supply of the product, or fixes prices, maintains, controls, prevents, lessens, or eliminates the production or supply of the product.¹⁷ In response, the Competition Bureau (“the **Bureau**”) amended the *Competitor Collaboration Guidelines* to clarify that they do not apply to joint purchasing agreements on the basis that joint purchasing agreements can have pro-competitive effects, and do not have unambiguously negative impacts when compared to hard core cartels in certain product markets.¹⁸ While buy-side agreements can still be reviewed by the Bureau (and the subject of remedies by the Tribunal) if they are in fact found to be anti-competitive, no criminal liabilities or fines or damages as a result of follow-on civil suits can result. The Competition Tribunal is equipped with power under the non-criminal Section 90.1 of the *Competition Act* to identify agreements or arrangements that create, maintain or enhance a parties’ market power when looking at buying groups, for example, and their ability through an agreement or arrangement to exert monopsony or oligopsony power over their suppliers to depress sale prices in a relevant market.¹⁹ Since 2010, even naked group boycotts have been actionable only upon proof to the civil standard of a substantial lessening or prevention of competition.

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

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

Accordingly, in 2022 as part of a package of other significant amendments to the statute, wage-fixing and no-poach agreements between employers were criminalized under Section 45.²¹ This amendment will align Canada with the United States Department of Justice's decision to prosecute no-poach and wage-fixing agreements as *per se* offences under the *Sherman Act*.²² No-poach and wage-fixing agreements in respect of employees will be considered under the criminal provisions of the *Competition Act* as of June 24, 2023. Other buy-side cartels, however, remain subject only to "rule of reason" civil enforcement in Canada.

Mergers & Acquisitions

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

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

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

Unilateral Conduct

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

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

United States

In the United States, the antitrust landscape is primarily governed by the *Sherman Act*, the *Federal Trade Commission Act* and the *Clayton Act*.³² Although there is no explicit reference to monopsony, Section 1 of the *Sherman Act* outlaws “every contract, combination or conspiracy in restraint of trade”³³ that is unreasonable,³⁴ and Section 2 outlaws any “monopolization, attempted monopolization, or conspiracy or combination to monopolize”.³⁵ The *Federal Trade Commission Act* similarly bans unfair methods of competition, and deceptive acts or practices,³⁶ while the *Clayton Act* prohibits anti-competitive tying arrangements and exclusive dealing,³⁷ price discrimination³⁸ and mergers.³⁹

Competitor Collaborations

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

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

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

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

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

Mergers & Acquisitions

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

Unilateral Conduct

In the United States, the approach to abuse of dominance in the context of monopsony power is not explicitly addressed or referred to under the governing provision, Section 2 of the *Sherman Act*. This statutory provision primarily applies to the exercise of monopoly power; however, it may be possible to appeal to Section 5 of the *Federal Trade Commission Act*, which outlines a prohibition against “unfair methods of competition” that encompasses a broader scope of actions that may implicate a firm beyond the exercise of monopoly power.⁵³ However, there are practical issues facing Section 5 of the *Federal Trade Commission Act*. Two main issues have been identified that make it difficult for the Federal Trade Commission (“FTC”) to use Section 5 as an enforcement provision against upstream unilateral exclusionary conduct. First, only the FTC can enforce it, therefore if the FTC lacks relevant industry expertise or is distracted by other priorities, there may be no remedial action.⁵⁴ Neither private parties nor the Department of Justice can address exclusionary conduct under Section 5.⁵⁵ Secondly,

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

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

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

Loblaw Companies Limited (2014)

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

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

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

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

its theories of anti-competitive harm (raising rivals' costs or reduced rivalry as a result of facilitating conduct). It is interesting to note that while the Loblaw Policies were aimed at suppliers, and may have harmed suppliers, the Bureau's two theories of harm were still primarily focused on impacts to downstream competition (*i.e.*, other retailers). The Bureau seems to have disregarded potential adverse consequences of the Loblaw Policies on suppliers, which calls into question why suppliers that tend to be larger, corporate entities⁵⁸ do not receive protection against monopsonistic pressure.

West Fraser Logging (2004)

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

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

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

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

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

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

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

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

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

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

In Re Electronic Books Antitrust Litigation (2011)

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

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

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

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

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

Uber Technologies Inc

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

ENDNOTES

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

² *Ibid.*

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

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

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

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

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

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

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

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

¹⁰ Noll, *supra* note 1 at 607.

¹¹ Blair & Harrison, *supra* note 1.

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

¹³ *Ibid.*

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

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

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

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

¹⁸ *Ibid.*

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

²⁰ Eric Tucker, “Competition and Labour Law in Canada: Patrolling the

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

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

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

²⁴ *Ibid* at s 93.

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

²⁶ *Ibid* at para 9.1.

²⁷ *Ibid* at para 9.3.

²⁸ *Ibid* at para 9.4.

²⁹ *Ibid*.

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

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

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

³³ *Sherman Act*, 15 USC § 1 (1890).

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

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

³⁶ Tucker, *supra* note 20.

³⁷ 15 USC § 14 (2006) [“US Code”].

³⁸ *Ibid* at § 13.

³⁹ *Ibid* at § 18.

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

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

⁶² Gregory J Werden, “Monopsony and the Sherman Act: Consumer Welfare in a New Light” (31 March 2007), online (pdf): SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975992>.

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⁶⁴ *US v Cargill Inc and Continental Grain Co* (8 July 1999), 99-1875, online: US Antitrust Division <<https://www.justice.gov/atr/case-document/complaint-53>>.

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⁶⁶ *US v Cargill Inc and Continental Grain Co* (30 June 2000), 99-1875, online: *US Antitrust Division* <<https://www.justice.gov/atr/case-document/final-judgment-37>>.

⁶⁷ *Ibid.*

⁶⁸ Rosenfelt, *supra* note 3.

⁶⁹ *Ibid.*

⁷⁰ *In re Electronic Books Antitrust Litigation*, 859 F Supp (2d) 671 (2012).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *United States of America v Apple Inc. et. al.*, 952 F. Supp (2d) 638 (2013); *US v Apple Inc*, 952 F Supp (2d) 638 (2013); “Apple to Pay \$450M Settlement Over US E-book Price Fixing” (7 March 2016), online: *The Guardian* <<https://www.theguardian.com/technology/2016/mar/07/apple-450-million-settlement-e-book-price-fixing-supreme-court>>; Pinar Akman & D Daniel Sokol, “Online RPM and MFN Under Antitrust Law and Economics,” (2016) 50:2 *Rev Indus Org* 133.

⁷⁴ *US v Bertelsmann SE & Co KGaA et al.*, case 1:21-cv-02886-FYP, Document 194, Filed 11/07/22, online: <<https://www.justice.gov/atr/case-document/file/1549941/download>>.

⁷⁵ Matthew Perlman, “Court Blocks Penguin’s \$2.2B Simon & Schuster Deal”, *Law360* (31 October 2022), online: <<https://www.law360.com/articles/1537250>>.

⁷⁶ See *Meyer v Kalanick*, 174 F Supp (3d) 817 (2016); “*Swink v Uber Technologies, Inc* (4:16-cv-01092)” (22 April 2016), online: *Court Listener* <<https://www.courtlistener.com/docket/4395686/parties/swink-v-uber-technologies-inc/>>.

⁷⁷ Nick Passaro, “Uber Has an Antitrust Litigation Problem, Not an Antitrust Problem” (15 May 2018), online: *Competition Policy International* <<https://www.competitionpolicyinternational.com/uber-has-an-antitrust-litigation-problem-not-an-antitrust-problem/>>.

⁷⁸ Marshall Steinbaum, “Monopsony and the Business Model of Gig Economy Platforms” (Paper delivered at the Roundtable on Competition Issues in Labour Markets, 131st Meeting of the Competition Committee, 5 June 2019) [unpublished], online (pdf): *OECD* <[https://one.oecd.org/document/DAF/COMP/WD\(2019\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf)>.

⁷⁹ *Ibid.*

⁸⁰ Maureen Ohlhausen, “Letter to Senator Cory Booker,” December 1, 2017; C

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

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

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

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

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

JAMES H. BOCKING MEMORIAL AWARD ESSAY

ALGORITHMIC COLLUSION: FROM SMOKEROOM TO CODE LINES? HOW COLLUSION CAN EVOLVE & ARE WE PREPARED

Laura Hamdan*

This paper explores whether the current Canadian legal framework is adapted to the challenges that algorithmic pricing may pose. It concludes that creative legal solutions should be envisioned to curtail upcoming challenges, although the most appropriate solutions may come from regulating the design of algorithms.

It first provides an overview of the artificial intelligence at hand, and rationales that draw businesses to use them. Secondly, this paper asks whether there is a real threat that pricing algorithms may enable collusion. Through a review of experimental and empirical evidence, it answers that the calls to caution are not unwarranted, although the threats may not yet be at the forefront. Thirdly, after a review of the legal landscape in Canada, this analysis reveals that some actions are needed for regulators to be proactive in the face of upcoming challenges, through a study of the different ways in which algorithmic collusion may occur.

Cet article s'interroge sur l'adaptation de l'actuel cadre juridique canadien aux défis que les algorithmes de prix peuvent poser. Il y est conclu qu'on fera bien d'envisager des solutions juridiques astucieuses pour parer aux problèmes qui s'annoncent, mais que le mieux sera sans doute de régler la conception des algorithmes.

L'article commence par une vue d'ensemble de l'intelligence artificielle aujourd'hui et des raisons qui poussent les entreprises à y recourir. Ensuite est posée la question de savoir si les algorithmes de tarification posent un risque réel d'ouvrir la porte à la collusion. Après examen de l'évidence expérimentale et empirique, il est établi que les mises en garde ne sont pas sans fondement, quoique les risques ne soient possiblement pas encore des plus préoccupants. Enfin, après examen du secteur juridique canadien, l'analyse révèle que les autorités de réglementation doivent adopter certaines mesures proactives pour éviter les problèmes qui s'annoncent, par une étude sur les différentes manières dont la collusion algorithmique peut se produire.

1. Introduction: Setting the Scene

Picture this. You take an Uber ride to attend a concert, and the ride costs a certain price. At the end of the show, just like hundreds of showgoers, you open the Uber app only to see that the cost for the *same* trip back home has now tripled: this is Uber's surge pricing, or *dynamic pricing*, in action. Uber uses the practice of surge pricing when the demand is higher than the supply of riders, reportedly in the hopes of attracting more drivers.¹ Uber's artificial intelligence, its pricing algorithm, detects situations of high demands and low supply, and then automatically hikes the price of rides according to the shortage.² While the ethicality and effectiveness of the practice is a separate discussion,³ it illustrates the growing resort to dynamic pricing by businesses and sellers.

Dynamic pricing became principally known in the 1990s, when airlines started to change their prices constantly, depending for instance on the number of seats available per flight or competitors' prices, in order to maximize their revenue. This practice of yield management⁴ soon expanded to other industries, such as hotels and sporting events, as it is extremely valuable.⁵ For example, American Airlines, the forerunner of dynamic pricing, reportedly gain an additional \$500 million per year this way.⁶ Dynamic pricing, which is a type of price discrimination, refers to a set of pricing strategies implemented to increase profits and is facilitated by algorithms.⁷ Whereas price discrimination focuses on varying prices based on consumers' individual characteristics and data, dynamic pricing is more focused on market data to influence the prices: factors such as stock, competitors' offerings and prices, expiration dates, demand, etc.⁸ Yet, both practices are defined by their volatility in prices; indeed, sellers using these practices may change prices multiple times a day.⁹

Today, with the boom of e-commerce, dynamic pricing has become more widespread and more easily implemented thanks to the availability of information and the development of artificial intelligence, specifically *pricing algorithms*.¹⁰ Much like the Uber example, an increasing number of businesses rely on pricing algorithms, but use ones that focus on reacting to other competitors' pricing. Platforms such as Amazon's facilitated this expansion.¹¹ A study found that out of the merchants selling any of the 1,641 best-seller products, 500 of them used algorithmic pricing.¹² As well, the study showed that 60% of the third-party sellers on Amazon that use algorithmic pricing charged more than other sellers.¹³ The European Commission also found that two-thirds of online retailers use pricing tools.¹⁴

In 2016, it was noted that two competing sellers on Amazon were selling the same book for \$23.7 million.¹⁵ No, it was not a first edition of a Shakespeare¹⁶—but merely a widely available scientific book, *The Making of a Fly* by Peter Lawrence. The jaw-dropping prices were the result of both sellers using algorithmic pricing making the prices fly.

The Kafkaesque price tags shed light on a problem: pricing algorithms that react on competitors' prices, if left unfettered, can interact, and produce unexpected outcomes.¹⁷ As the use of pricing algorithms becomes more prevalent in everyday lives,¹⁸ it is important to pause and consider the implications concerning competition law.

Competition law, in Canada, has four stated goals: to promote the efficiency and adaptability of the economy; to expand the opportunities of Canadians to participate in world markets; to ensure equitable opportunities to smaller businesses; and, to provide consumers with competitive prices and product choices.¹⁹ Parliament stated that this later goal “is the ultimate objective” of competition law.²⁰ All of these objectives—and the fourth one in particular—are fundamentally undermined by collusion. Collusion occurs when two or more competitors decide to collaborate in order to ultimately suppress rivalry in their market. Generally, they collaborate through price-fixing, market allocation, limiting production, or bid-rigging.²¹ Collusion is condemned by economists and lawmakers alike.²² On the one hand, it hurts consumers as it would lead to higher prices. On the other, it results in hurting innovation in the market and disincentivizing new entrants by acting as a barrier to entry.²³

With the evolution of self-learning algorithms, once these are given a goal (e.g., to maximize profits for the company), they are able to autonomously implement strategies to reach it—even in the absence of explicit instructions.²⁴ The advent of these technologies and the rise of e-commerce and *Big Data* creates new concerns for competition law. Together, these developments will test the regulatory side: is the law well equipped to address the potential complications?

With that background in my mind, this paper will explore whether the current legal framework is adapted to the possible challenges that algorithmic pricing can pose, in light of competition law. Specifically, this paper will focus on pricing algorithms that respond to competitors' actions.²⁵ After an overview of the artificial intelligence at hand and its uses, this paper will ask if we are not *crying wolf*: that is, is there a real threat that pricing algorithms may enable collusion? Based on both experimental and recent empirical

evidence, it will answer that yes, although the threats may not yet be at the forefront, the calls to caution are not unwarranted as pricing algorithms can independently learn to not compete, and therefore reach collusive outcomes. The third part will examine the legal considerations. After a review of the legal landscape in Canada, this analysis will reveal that some actions are needed for regulators to be proactive in the face of upcoming challenges, through a study of the different ways in which algorithmic collusion may occur in light of Canadian law. Finally, this paper will conclude that creative legal solutions should be envisioned to curtail the upcoming challenges while admitting that the most appropriate solutions may come from regulating the design of algorithms themselves.

The Competition Bureau (“Bureau”), the agency invested to enforce the *Competition Act*,²⁶ already recognizes different levels and types of cartel behaviours, finding some more egregious than others.²⁷ This paper therefore argues that, in the advent of digitalization of pricing, the difficulty with which collusions are uncovered can only be reinforced.²⁸ It is then opportune to revise legal and policy *approaches* to prevent proactively the development of more opaque forms of collusion, i.e. the sheltering of unlawful behaviour and liability from consequences, behind an algorithm.

The present study draws on cases and literature from everywhere, notably from the United States and Europe, but focuses on the Canadian perspective and Canadian laws. The goal is to discuss legal implications and as such, only a cursory discussion of the computer science and economic aspects are presented. That is, this paper does not aim to criticize nor comment on the economics methods of studies presented. Rather, it hopes to use these robust studies as catalysts for a legal discussion.

2. Artificial Intelligence: the What and the Why

Today, artificial intelligence (“AI”) is widely used and deep-seated in our societies.²⁹ But what do we actually mean by AI and how does it relate with algorithms?

2.1 The Nomenclature: Defining the Terms

AI is a branch of computer science that refers to the study and design of intelligent systems, for the execution of complex, intelligent tasks.³⁰ Machine learning is then a subfield of AI that “designs intelligent machines [using] algorithms that iteratively learn from data and experience.”³¹

Machine learning uses algorithms which, in a nutshell, are logical and sequential rules that generate certain outputs, based on a given input. More precisely, they are defined as follows:

An algorithm is an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects (e.g., configurations of chess pieces, numbers, cake ingredients, etc.). The initial state of the tokens is the input; the final state is the output.³²

Machine learning algorithms can be grouped into three categories. First, there are supervised learning algorithms. These algorithms use a sample of labelled data to learn the general rules that map out inputs and outputs. Simply put, these algorithms will be able to predict the output once confronted with a new set of inputs.³³ Second, unsupervised learning algorithms detect structures and patterns in unlabelled sample data, without the associated outputs.³⁴ Third, reinforcement learning algorithms perform tasks in dynamic, complex environments and learn from experience.³⁵

Deep learning is then a subfield of machine learning that is close to reinforcement learning algorithms. It is a complex software that tries to replicate human neuronal activity through artificial networks. Ultimately, it is a complex way for computers to learn faster and more effectively.³⁶ Both deep learning and reinforcement learning algorithms are systems that learn autonomously; however, the former learns from a training set and applies it to a new dataset, and the latter dynamically learns by adjusting its actions thanks to feedback.³⁷

2.2 Algorithmic Business

A phenomenon coined and described extensively by Stucke & Eyrachi,³⁸ algorithmic business refers to the “industrialized use of complex mathematical algorithms pivotal to driving improved business decisions or process automation for competitive differentiation.”³⁹ The use of algorithms for business can be grouped into two practices: predictive analytics and business processes optimization.⁴⁰ Additionally, different types of existing algorithms may be said to either cater to consumers or, more inwards, to the business operations.

2.2.1 Predictive Analytics & Business Processes Optimization

Predictive analytics seeks to exploit patterns in past transactions for optimized outcomes for the business. It can “estimate demand, forecast price

changes, forecast market shocks, and predict consumer behaviour and preferences to improve management decision making.⁴¹

On the other hand, algorithms may be used for business processes optimization. In that role, algorithms' automation and computational power allow for the processing of large datasets and to react fast—and at a lower cost than through labour. Businesses then utilize this ability to reduce production and transaction costs or set optimal prices for instance.⁴²

2.2.2 Algorithms Catered Towards Consumers & Algorithms Catered Towards Businesses

Banicevic et al offer a list of examples of specific uses of algorithms in a business context.⁴³ That list allows to discern two broad uses: algorithms catered towards consumers and algorithms catered towards the businesses themselves.

The former category regroups algorithms such as: ranking and matching algorithms, which recommend a product or match buyer and seller based on the consumer's preferences; cross-merchandizing algorithms promote another product to a consumer based on history; personalized pricing algorithms optimize the price of a product according to the consumer's interests; and risk assessment algorithms that analyze a consumer data to assess the likelihood of their actions.

The second category englobes the following algorithms: dynamic pricing algorithms that automatically adjust selling prices according to competitors' prices and market changes; unilateral pricing algorithms that are made to take unilateral pricing steps, relative to competitors' prices; and financial trading algorithms that analyze financial markets to execute transactions.

2.2.3 The Appeal of Algorithmic Business

Evidently, algorithmic business has developed because AI has much to offer for businesses. The variety of types and uses of algorithms create unparalleled opportunities for businesses to optimize their processes and revenue. Not only this, but it can also improve consumers' experiences thanks to algorithms catered towards them.

The OECD underlines how algorithms can have pro-competitive effects, both on the supply and demand side.⁴⁴

On the supply side, algorithms allow to gain efficiencies, which in return promote lower production costs. It can also promote the quality of the

products and services offered, and the overall consumer experience. The OECD also notes that dynamic pricing algorithms have been recognized to improve market efficiency, specifically because it enables businesses to react instantaneously to changes.⁴⁵ Algorithms also facilitate “perfect price discrimination;” that is, they allow businesses to price directly according to consumers’ personal information. While it may raise some actual discriminatory and ethical issues,⁴⁶ it is also admitted that it improves economic efficiency.⁴⁷

On the demand side, algorithms are poised to help consumers in their choices. “Algorithmic consumers” is even used to refer to this shift in who bears the weight of decision-making. Algorithms use their “predetermined decision tree which assigns weights to decision parameters in order to suggest the optimal decision given in a particular set of data and circumstances.”⁴⁸ This allows for optimized decision-making and reduces search and transaction costs for consumers. Additionally, the ease with which consumers can compare offerings incentivizes businesses to innovate and promote competition.⁴⁹

3. Too Good to Be True? A Looming Threat that Should Be Heeded

In Part 2, this paper presented the numerous advantages that algorithmic business offers for the market as a whole. But the picture is tainted. This Part will discuss the concerns that the use of pricing algorithms catered towards businesses pose. While some argue that these worries are unfounded or premature, evidence will be examined to balance the debate.

3.1 Debates on the Anti-Competitive Effects of Pricing Algorithms

Authors have raised concerns that the use of algorithms will favour some form of collusion and make it harder to detect by regulators. As technology evolves, gets refined, and becomes more widely available, “the possibilities for both chaos and mischief” are endless.⁵⁰

It is feared that algorithms may learn to cooperate autonomously—and thus to independently achieve collusive outcomes or to be used to implement a collusion agreement.⁵¹

Independently, a reinforcement algorithm that is given the goal to maximize profits may learn that avoiding price wars⁵² with competitors is the

best way to reach that goal.⁵³ Competitors' algorithms may thus reach collusive price levels, even without communicating with one another.

One appeal of collusion is that competitors do not compete on price points. That way, they are able to charge more for their products and services.⁵⁴ But, following the scenario outlined above, if algorithms learn to not engage in price wars with their competitors, these businesses will stop offering discounted prices.⁵⁵ Even further, many raise concerns that algorithmic pricing tends to reach supra-competitive prices, which refers to prices that are above what can be sustained in a competitive market and is usually indicative of anti-competitive behaviour.⁵⁶ While businesses will gain higher profits, these will result in higher costs for consumers and less economic efficiency.⁵⁷

Additionally, algorithms render less important the number of players involved, in order to effectively implement collusion. Given the incentive to defect or deviate from the agreement, collusions fare better when a smaller number of players is involved.⁵⁸ Algorithms, however, allow for better coordination and monitoring irrespectively of the number of players.⁵⁹

These AI tools also reinforce market transparency and the frequency of interactions, which are elements that favour collusive behaviour.⁶⁰ On this point, the French and German competition regulators are insightful:

Even though market transparency as a facilitating factor for collusion has been debated for several decades now, it gains new relevance due to technical developments such as sophisticated computer algorithms. For example, by processing all available information and thus monitoring and analyzing or anticipating their competitors' responses to current and future prices, competitors may easier be able to find a sustainable supra-competitive price equilibrium which they can agree on.⁶¹

In response to these concerns, many believe that the assumptions underlying the fears for competition are either not supported by empirical evidence or too premature: these are unproven theories—for now.⁶²

The critics argue that while algorithms are increasingly intelligent, real-world markets are too complex for the experimental designs' conclusions to hold true.⁶³ In the same vein, experimental studies assume unchanging market environments, which are variables that have important implications for collusion.⁶⁴ Another critique is that these studies focus on duopolies, which is not the case for most markets.⁶⁵ In fact, the more players there are in a market, the more difficult collusion becomes.

At the same time, critics insist that the type of algorithms capable of autonomously cooperating with competitors simply do not yet exist.⁶⁶ Even more so, to achieve collusive consequences, algorithms, it is argued, must learn to communicate with each other and to react to these communications.⁶⁷

In line with these criticisms, the Canadian Competition Bureau also concluded that, at the moment, there was no evidence of algorithmic collusion, therefore preventing them from issuing guidance on the issue. Yet, it was recognized that technology and business practices evolve rapidly—which may warrant a change of position in the future.⁶⁸

3.2 Recent Robust Experimental Studies

Three experimental studies from 2020 and 2021 come to renew the concerns about the use of algorithmic pricing.

The first study was conducted by Calvano et al, a group of European economists.⁶⁹ The experimental study demonstrates that algorithms can implement autonomous collusion in synthetic environments. The study is designed in a repeated oligopolistic competition setting, where firms compete with differentiated products.⁷⁰ In this setting, the businesses delegate pricing processes to their Q-learning pricing algorithms, a new generation of reinforcement learning algorithms,⁷¹ with the given goal to maximize the business's profits.⁷² Assad et al, who discuss the study findings, summarize the experiment as follows:

In each period, the algorithm observes and thus reacts to prices effectively charged in previous periods by all market participants. After making its choice, it observes the resulting profits realized in that period. The idea of the experimental approach is to study the behaviour that these AI-powered pricing algorithms learn over time by observing them repeatedly interacting in this virtual market.⁷³

The study found that the algorithms consistently learned to collude.⁷⁴ This came first apparent through the finding that businesses in the experiment would obtain higher profits.⁷⁵ Interestingly, when a competing algorithm lowers its prices—that is, when it would deviate from the rest—, it is met with punishment from the other algorithms until it realigns itself. Such “reward” and “forgiveness” patterns are an attribute of collusion.⁷⁶ The algorithms in the study are self-learning and have learned these behaviours or strategies through experience. What did they learn here? The lesson was “that undercutting the other firm's prices brings forth a war with low profits which ultimately makes any attempt to deviate from the spontaneous cartel

price unprofitable.”⁷⁷ More importantly: these algorithms have not been designed to collude, nor do they talk among each other.⁷⁸

In a related study from 2021, Calvano et al add to the literature by finding that, if given enough learning time, Q-learning algorithms are able to learn to not compete *even* in environments with imperfect information, imperfect monitoring, and in the absence of communication and instructions.⁷⁹ This study presents two variations. In the imperfect information variation, the algorithms are informed of their own business’s prices but not of their competitors’. In the imperfect monitoring variation, the algorithms cannot perfectly observe the prices chosen by competitors due to imperfect signals.⁸⁰

When a competitor deviates in price or after a demand shock, the algorithms enter into a price war for a brief period after which cooperation picks up again.⁸¹ A change in the hyperparameters also yields similar outcomes, which validates the findings of Calvano et al that collusive outcomes are common and not dependent on a select few points.⁸²

In a study similar to the 2021 experiment of Calvano et al, Hansen et al also seek to contribute to the literature of algorithmic collusion by identifying a new mechanism through which supra-competitive pricing can occur.⁸³ In their experiment setting, the algorithms do not observe the prices of their competitors. Just like Calvano et al, they also find that in such a setting, collusion can materialize just as well. Their experiments also reveal the importance of having high informational value. When this is present, independent algorithms inadvertently correlate their prices, therefore creating a collusion-like environment in the market.⁸⁴

These recent economic studies provide essential answers to some of the critics discussed above. They show, in an experimental setting, that communication between algorithms is not needed for these AI to reach collusive outcomes. They also reveal that novel algorithms may fare better than expected in complex environments.

3.3 Empirical Evidence from the Case of the German Retail Gasoline Market

Where experimental evidence of the negative impacts of algorithmic pricing is abundant, the same cannot be said for empirical evidence. This paper discussed in Part 1 the study by Chen et al, which found a prevalence of use of pricing algorithms among top sellers on Amazon, and that 60% of the third-party sellers on the platform using algorithmic pricing were charging more than other sellers.⁸⁵ Other regulators inquiries found evidence of

growing use of pricing algorithms: the European Commission reported that two-third of online retailers use pricing tools,⁸⁶ and the Portuguese competition regulator reported that about 8% of the businesses surveyed used them.⁸⁷

Nonetheless, these do not bring much evidence of concrete threats to competition or of collusive behaviours. In 2020, Assad et al bridged the gap in the literature by conducting a study of the German retail gasoline market.⁸⁸ This is the first empirical evidence of widespread algorithmic adoption raising margins and prices, putting the theoretical and experimental findings to the test.

The authors decided to focus on the German retail gasoline market because high-frequency retail gasoline price data is available and because, according to publications, this market started to widely adopt the use of pricing algorithms in 2017.⁸⁹ In line with previous studies that use margins to evaluate competition,⁹⁰ this study compares the retail margins of adopting gasoline stations and of non-adopting gasoline stations.

The algorithms used in this market, for any given gasoline station, are trained with historical data. They then mix in real-time information to these inputs in order to set prices that maximize the station's profits. The ensuing transactions are then fed back into the algorithm, to be used as new inputs, etc.⁹¹

As the lines get blurred, it is not certain what type of algorithm is being used. However, it is inferred that the type of machine learning being used is a reinforcement learning algorithm, similar to the one described in Calvano et al's 2020⁹² study.⁹³ It is however noted that regardless of the type of algorithms used in the German retail gasoline market, a widespread use could still lead to collusive behaviour.⁹⁴

The near-perfect transparency of prices in the market studied, in part due to price disclosure regulations, make deviations from collusive behaviour easily detectable and punishable—thus, favouring an environment that will sustain the supra-competitive prices obtained.⁹⁵ This setting so far coincides with experimental designs' environments and creates a perfect empirical study to test the conclusions.

The research finds that the mean margins at the station level increased by 0.7 euro per litre, after the adoption of pricing algorithms, which represents a 9% increase.⁹⁶ The mean prices rose by 0.5 euro per litre. Extrapolated, these findings estimate a €500 million per year increase in consumer

expenditures for gasoline, because of price increases since adopting pricing algorithms.⁹⁷

With regards to the effects on competition, the research results indicate that a “market-wide algorithmic-pricing adoption raises margins and prices, suggesting that algorithms reduce competition.”⁹⁸ Even more compellingly, the margin increases found here are consistent with estimates of other researchers on the effects of coordination in the retail gasoline market.⁹⁹

Lastly, the research tests two hypotheses: are these outcomes due to the algorithms’ inability to learn effective competition? Or are they actively learning how *not* to compete? Just like Calvano et al, they conclude that the latter question must be answered in the affirmative. Indeed, there is evidence that the margins only start increasing a year into the adoption of pricing algorithms in the market, which indicates that the algorithms are effectively learning tacit collusive strategies.¹⁰⁰

Could the results of this study just prove that there is an ongoing, undiscovered collusion in the German retail gasoline market? There is no direct evidence of such anti-competitive behaviour, neither from the firms providing the algorithms to that market nor from the gasoline companies.¹⁰¹ Interestingly, this raises a concern addressed under Part 4.2: with the rise of pricing algorithms, it may be easier to hide *actual* collusive endeavours, as it will be *prima facie* difficult to discern autonomous algorithmic action from algorithmic execution of illicit ventures.

What the study does suggest is that the experimental evidence available so far has not been far-fetched. It provides solid evidential grounds for the concerns raised against the use of algorithmic pricing. A2i systems, one of the software companies providing pricing algorithms in the German retail gasoline market,¹⁰² is a Danish AI company specializing in supplying pricing algorithms in the fuel industry.¹⁰³ They boast that they provide solutions in at least twelve countries and have advertised working with six brands, all leaders in the industry.¹⁰⁴

This signals that regulators should study more closely this industry. But not just that: this study suggests that the concerns raised by academics and economists may not be so distant and theoretical after all.

4. A Canadian Legal Landscape ... In Need of Landscaping?

Having established the nature of the problem and the extent to which algorithmic pricing may pose problems to markets, are regulators well

equipped to respond to the challenge? To answer this question, the various legal tools available in Canada will be discussed before applying them to three situations in which algorithmic pricing challenges may arise: (i) pricing algorithms may be used to execute pre-existing explicit collusion; (ii) the use of pricing algorithms from a common intermediary can create hub-and-spoke scenarios; and (iii) pricing algorithms can autonomously collude.

4.1 Overview of the Legal Framework

4.1.1 The Criminal Avenue: Sections 45 of the Competition Act

Section 45 of the *Competition Act* was enacted to address “hardcore” cartels.¹⁰⁵ The provision focuses on horizontal agreements by prohibiting agreements between competitors¹⁰⁶ to fix prices, allocate market shares, and fix production or supply.¹⁰⁷ In 2010, the *Competition Act* was amended and created Section 90.1.¹⁰⁸ Since, the Competition Bureau has signalled that it means to tackle the “most egregious forms of cartel agreement” under Section 45 and address the others under Section 90.1.¹⁰⁹ Any agreement that relates to a subject not outlined under Subsection 45(1) should be analyzed under Section 90.1.¹¹⁰ Additionally, the *Competition Act* confers a private right of action for persons that suffered damages from a breach of the criminal provisions of the Act, notably of Section 45.¹¹¹

Under Section 45, there is no need to demonstrate that the object of the conspiracy was carried out or that the agreement had any effect on competition.¹¹² Importantly, however, there must be an actual agreement for there to be a conspiracy, which requires “genuine intention” to enter into the agreement and knowledge of the terms of the agreement.^{113,114} In other words, for there to be an agreement, there must be a “meeting of the minds.”¹¹⁵ While evidence of this agreement must be proven beyond a reasonable doubt, it may be inferred from circumstantial evidence.¹¹⁶ In that vein, conscious parallelism does not meet the threshold to constitute an agreement impugned under Section 45, unless there is evidence of communication in that regard.¹¹⁷ Conscious parallelism can be understood as,

[...] pricing that emerges out of an oligopolistic market setting without communication or agreement among the sellers. The crux of the theory of conscious parallelism is briefly that the oligopolists are interdependent in their pricing: they base their pricing decision in part on anticipated reactions to them. Put differently, the oligopolist is behaving in exactly the same way as is a rational seller in a competitively structured market; he is simply taking into account the reactions of his rivals to any price cut or increase

which he has to take into account because of the situation in which he finds himself.¹¹⁸

Exceptions and defences may also rebut a charge. Subsection 45(4) establishes a defence where the impugned agreement is ancillary to and necessary for another, lawful agreement.¹¹⁹ Subsection 45(5) provides for a defence in cases of products exports,¹²⁰ and Subsection 45(6) creates an exception for agreements among affiliates.¹²¹ Finally, Subsection 45(7) adopts the common law regulated conduct defence.¹²²

Lastly, to promote uncovering of conspiracies, the Competition Bureau has an immunity and leniency program exclusively for persons charged under Section 45.¹²³

4.1.2 The Civil Avenue: Section 90.1 of the Competition Act

Introduced above, Section 90.1 is a recent provision of the *Competition Act* that was meant to address the legislative gap between the criminal cartel provision (Section 45) and the mergers review provision (Section 92). It specifically provides a mechanism for arrangements that are “neither structural nor egregiously illegal” and aims to punish agreements that result in a substantial lessening or prevention of competition (“SLPC”).¹²⁴ Six elements must be met for a successful Section 90.1 claim:¹²⁵ (i) the challenged conduct is an arrangement or agreement; (ii) the agreement or arrangement is existing or proposed; (iii) there are two or more parties to the agreement or arrangement; (iv) the above parties are competitors; (v) the agreement or agreement results in an SLPC; (vi) the effects occur or are likely to occur in a Canadian market.

Similar to Section 45, Section 90.1 requires a consensus between the parties and does not apply to conscientious parallelism.¹²⁶ However, this new test is “effects-based.” In that sense, an otherwise reviewable collaboration will be saved under Subsection 90.1(4) if it creates efficiencies.¹²⁷ Just as is allowed in merger reviews,¹²⁸ an agreement or arrangement is saved if it results in efficiency gains that offset its anti-competitive effects.¹²⁹

The section may apply to a variety of agreements that are usually considered to be pro-competitive.¹³⁰ The Competition Bureau has issued guidelines, freshly updated, on its approach to Section 45 and 90.1, and especially in their applications in light of other provisions in the act.¹³¹

Overall, the tests presented above under the *Competition Act* underline that the regulators are trying to strike the right balance because, as much as

joint ventures may hurt competition, these “are often the catalysts of innovation and efficiency.”¹³²

4.1.3 The Tort Avenue: The Tort of Civil Conspiracy

A tort avenue for conspiracies also exists. For a successful claim under the tort of civil conspiracy, (a) two or more persons must have concluded an agreement and (b.i) the predominant purpose of the agreement was to cause injury to the plaintiff, regardless of the lawfulness of the conduct undertaken, or (b.ii) “where the conduct contemplated by the agreement [was] unlawful, that conduct [was] directed towards the plaintiff [who suffered damages] and the defendants should [have known] in the circumstances that damage to the plaintiff [was] likely to result.”¹³³

However, the tort is not well developed, in terms of scope and utility.¹³⁴ It is also a private action and not under the competence of competition regulators.¹³⁵

4.2 Putting the Law to the Test

Canadian competition law is therefore rich in avenues to address issues of illicit arrangement between competitors. Let’s now see how these hold, considering the issues identified in Part 3.

4.2.1 Competition Law & Pricing Algorithms as Tools to Execute Pre-Existing Explicit Collusion

With pricing data being more readily available, the use of pricing algorithms can facilitate explicit coordination. There have already been cases before courts on this specific offence.

The 2015 *United States of America v Topkins*¹³⁶ case was the first anti-trust criminal prosecution involving e-commerce in the United States. The defendants were charged with using pricing algorithms to execute a conspiracy to fix prices of certain posters sold on Amazon Marketplace.¹³⁷

In 2016, a similar case was brought forward by the Competition and Markets Authority (“CMA”), the United Kingdom regulator for competition.¹³⁸ Two competitors selling posters and frames on Amazon had agreed to not undercut each other’s prices. Their agreement was executed using pricing algorithms that were specifically programmed to implement this cartel.¹³⁹

Other investigations mirroring these scenarios are currently pending.¹⁴⁰

These cases reinforce the statement from the Canadian Competition Bureau reported in Part 3: in such factual frameworks, the existing analytical principles are sufficient to address the legal problems.¹⁴¹ Indeed, these scenarios all rely on AI to put into effect a previously agreed upon collusive pact. There, AI merely becomes *a vector* of their collusive intent. A Section 45 charge will only worry about the intent of the conspirators, while a Section 90.1 claim would add an analysis of the effects to the competition environment.

The only “novelty” that pricing algorithms pose in these instances, is the ease with which conspirators may implement their collusion.

4.2.2 Competition Law & Algorithmic Hub-and-Spoke Scenarios

Another possible scenario arises where competitors (the spokes) use the same or a common, third-party algorithm (the hub) in their pricing processes,¹⁴² creating a like hub-and-spoke environment.¹⁴³ Such arrangements are not necessarily unlawful—but can be.

In 2016, the Court of Justice of the European Union (“CJEU”) addressed this scenario.¹⁴⁴ E-turas, a Lithuanian online booking system, had sent a message to its travel agents users informing them to cap the discount rates. The CJEU ultimately ruled that in order to conclude that a collusion occurred between the agents, their knowledge was an instrumental factor. Despite the caution of the CJEU, it signalled that businesses who independently acquire a pricing algorithm, knowing that their competitors use it too, may be subjected to a collusion inference and therefore need to exercise caution.¹⁴⁵

Similarly, in *Meyer v Kalanick*,¹⁴⁶ an ingenious argument was brought forth. It was alleged that Uber facilitated a hub-and-spoke-structured collusion, whereby Uber conspired with the drivers—whom Uber has always argued are independent contractors—¹⁴⁷to use the company’s pricing algorithm to set the prices charged to the users.¹⁴⁸ Albeit structurally complex, it would be interesting to see if the argument of *Meyer v Kalanick* is raised again in another jurisdiction or with other parties.¹⁴⁹

These instances reveal the dynamics that a pricing algorithm may create, which competition regulators and courts may—or rather, *will*—have to grapple with.

A2i systems, discussed in Part 3.3, sketches out this hub-and-spoke structure, whereby A2i systems' software is the hub supplying its clients, the spokes, with a common pricing algorithm.

In Canada, the updated Competitor Collaboration guidelines ("Guidelines") open the door for such structures to be addressed under Section 45.¹⁵⁰ The Guidelines offer the example of a hub-and-spoke conspiracy, specifically with a price-fixing agreement. In this structure, the Bureau notes that there would be a "meeting of the minds" especially if "spoke A" agrees to implement a certain price policy if "spoke B" does it too.

Applying this logic to the context of the hub being a pricing algorithm, how would it work? The E-turas case is insightful: the CJEU stresses the importance of the spokes' knowledge of the concerted practice.¹⁵¹ Therefore, it could be argued that a business resorting to a common pricing algorithm with a third party, undertakes the responsibility of *possibly* being involved in collusion. Indeed, that algorithm will apply the same logical rules to all the *spokes* involved, therefore attaining concerted prices to all businesses involved. As long as businesses are aware of this possible outcome, the "meetings of the mind" should be inferred. Drawing upon the doctrine of willful blindness, it could be said that, in these circumstances, an intent to enter into an agreement can be inferred from the adoption of these pricing algorithms. The Supreme Court of Canada states that willful blindness can impute knowledge to people "whose suspicion is aroused to the point where [they should have inquired further] but deliberately [chose] not to."¹⁵² The goal of this doctrine is to signal that self-imposed ignorance should not be rewarded. The same logic should be extended in this context.

This ultimately leads to conclude that, in all aspects, Canadian competition law seems equipped to handle such situations. The lack of jurisprudence on these hub-and-spoke scenarios—even more so scenarios where the hub is an algorithm—could either open the door to courts and regulators to address them under existing legislation or could let them shy of taking this jurisprudential leap. Going back to the A2i systems example, competitors using such a common algorithm supplier may face more risks without proper due diligence, should regulators take that leap.

4.2.3 Competition Law & Pricing Algorithms Autonomously Colluding

As it has been discussed, especially through the studies by Calvano et al,¹⁵³ it is possible for pricing algorithms to autonomously learn to collude.¹⁵⁴ In

those scenarios, no command to do so is given to the algorithm: so how can there be collusion *legally*?

Sections 45 and 90.1¹⁵⁵ both require an intent, a “meeting of the minds” to form an agreement or arrangement.¹⁵⁶ Evidently, it cannot be said that those elements exist in the context of autonomous, independently colluding algorithms.

As the law stands, there would not seem to be any legal sanctions.

In that regard, it could be argued that businesses that implement these pricing algorithms as part of their processes, knowingly assume the anti-competitive effects, namely the reaching of supra-competitive prices. Undoubtedly, these same points that raise concerns in the literature and to regulators are the same points that draw these businesses to adopt the AI tools. Similar to the point raised in Part 4.2.2, the doctrine of willful blindness may inspire the legal analysis to be undertaken here. At the same time, Subsection 45(3) allows to infer the existence of a conspiracy from circumstantial evidence or facilitating practices. These practices can be viewed as indicators of the existence of an agreement among competitors.¹⁵⁷ The Competition Bureau even notes that algorithms may extend the arrays of activities that constitute facilitating practices.¹⁵⁸ This is a great avenue to explore a solution, but with a caveat: this still presupposes that underneath, there *is* an agreement.

Ultimately, on the one hand, competition law seems to stress that it cares a lot about the *effects* that behaviours will have on competition. This can be seen with the addition of Section 90.1 in 2010.¹⁵⁹ This provision not only includes an SLPC analysis under Subsection 90.1(1) but also creates an efficiency defence under Subsection 90.1(4), thus reinforcing the understanding that *effects* are the key. On the other hand, there is a wariness by the regulators to be overzealous as they recognize that collaboration can be—and is—good for competition.¹⁶⁰ Wariness is even more so warranted as sanctioning intent-less collusion would amount to condemn conscious parallelism.

And yet, unfettered pricing algorithms can be harmful for competition and consumers, given the anti-competitive outcomes that they can reach.¹⁶¹ Regulators must then strike the right balance between rectifying and preventing anti-competitive effects, and not unduly punishing businesses.

5. Conclusion: The Path Forward

There is a clearly identified and pressing novel challenge that is dawning upon competition regulators. Pricing algorithms have proven to make a mark and to be attractive to businesses even more.

For years now, academics and economists have nudged regulators to warn them of potential issues. Many experimental studies reveal the core of the problem: what makes AI and pricing algorithms so attractive is also their downfall. They allow for real-time price adjustments: this allows for real-time monitoring for deviations from the collusive agreement. They also allow for better profits for their users: studies show these better profits do not necessarily reflect market prices. Ultimately, a growing number of studies reach similar conclusions: smart algorithms without being taught nor instructed to, end up reaching a collusive outcome.

These reinforcement learning algorithms are self-taught. Their programmers give them wings, and they fly to their destinations, their pre-assigned goals, on their own. Maybe this should prompt us to think philosophically about collusion: what makes it so that all, including AI, mere *lines of binary codes*, have this tendency? A Plato or Descartes may say that it is nature that makes these tendencies so inevitable.¹⁶² Or, maybe the answer will be found in John Locke's postulate: our ideas are not innate; our mind is a *tabula rasa*, a blank sheet that gets filled as we experience.¹⁶³ Maybe the experience that drives this tendency is the clearly stated and present goal of profits for businesses and AI alike.

Echoing Locke's theory, the most appropriate answers to go forward may lie in understanding the controllable elements that affect the algorithms' reasoning. Indeed, considering how algorithms process their experiences and the inputs they are allowed to take into consideration, allow to point rather into the direction of regulating algorithms themselves. Maybe certain properties of pricing algorithms should be prohibited,¹⁶⁴ changing the design to reward algorithms that cut process for instances,¹⁶⁵ or making software designers liable for their algorithms' designs are all paths forward to address algorithmic collusion more efficiently.¹⁶⁶

The legal path, however, is delicate. The current legal principles can hold the fort for now. Yet, there are circumstances where the legal avenues get murkier. While we should be cautious of developing legal principles too broad that may result in impeding competition, we should also be cautious of not creating legal blind spots where colluders may hide, shielded from

liability. This paper has proposed to creatively read-in intent to bypass the lack of actual agreement for instance.

Absent legislative reforms, only time and the bringing forth of the first algorithmic collusive case to courts will be able to confirm the robustness and adequacy of Canadian laws for these challenges.

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ENDNOTES

* Laura Hamdan is a recent graduate of the Faculty of Law at McGill University and is currently articling at McMillan. Prior to studying law, she completed a Bachelor of Arts with Honours in International Development Studies at McGill University and obtained a Master in International Relations from Université Paris 1 Panthéon-Sorbonne. Her interests include the study of the intersection of competition law and technology, which led her to participate in the Adam F. Fanaki Competition Law Moot.

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⁵ Ariel Ezrachi, *Virtual Competition: the Promise and Perils of the Algorithm-Driven Economy* (Cambridge, MA: Harvard University Press, 2017) at 87.

⁶ *Ibid.* See also McAfee & Te Verde, *supra* note 4 at 1.

⁷ See McAfee & Te Verde, *supra* note 4 at 1

⁸ See Ezrachi, *supra* note 5 at 87: however, note the increasing blur between price discrimination and dynamic pricing given the more complex strategies implemented.

⁹ *Ibid.*

¹⁰ See Le Chen et al, “An Empirical Analysis of Algorithmic Pricing on Amazon Marketplace” (Paper delivered in the *Proceedings of the 25th International Conference on World Wide Web*, Montréal, Canada, 11–15 April 2016), at 1339, DOI: <[10.1145/2872427.2883089](https://doi.org/10.1145/2872427.2883089)>.

¹¹ See Lane Burns, “What Is the Difference Between Amazon and Amazon Marketplace?” (23 February 2021), online: *Your Marketing People* <yourmarketingpeople.com/blog/what-is-the-difference-between-amazon-and-amazon-marketplace/>. Amazon.com and Amazon Marketplace are platforms both owned by Amazon, essentially differentiated by the identity of the seller and

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²⁰ See *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 at para 109 [*Superior Propane*].

²¹ See generally Robert C Marshall & Leslie M Marx, *The Economics of Collusion: Cartels and Bidding Rings* (Cambridge, MA: MIT Press, 2012). Cf. *Competition Act*, *supra* note 19 at ss 45, 47.

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²⁴ See Tobias Werner, “Algorithmic and Human Collusion” (10 November 2021), online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3960738>.

²⁵ The distinction of types of algorithms and their uses is the subject of Part II.

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³⁰ *Ibid* at 9.

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³² *Ibid* at 8 citing Robert A Wilson & Frank C Keil, eds, *The MIT Encyclopedia of the Cognitive Sciences* (Cambridge, MA: MIT Press, 1999) at 11.

³³ OECD 2017, *supra* note 29 at 9.

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid* at 11.

³⁷ See Bernard Marr, “Artificial Intelligence: What’s The Difference Between Deep Learning And Reinforcement Learning?” (22 October 2018), online: *Forbes* <www.forbes.com/sites/bernardmarr/2018/10/22/artificial-intelligence-whats-the-difference-between-deep-learning-and-reinforcement-learning/?sh=6de4368d271e>.

³⁸ See Ezrachi, *supra* note 5 at 20–21.

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⁴⁰ See OECD 2017, *supra* note 29 at 11.

⁴¹ Anita Banicevic et al, “Algorithms Challenges and Opportunities for Antitrust Compliance” (Fall 2018) Compliance and Ethics Spotlight American Bar Association at 5.

⁴² *Ibid*. See also OECD 2017, *supra* note 29 at 11.

⁴³ Banicevic et al, *supra* note 41 at 5–7: Banicevic et al offer more details on each of these types of algorithms as well as examples.

⁴⁴ OECD 2017, *supra* note 29 at 14–17.

⁴⁵ *Ibid* at 16, Box 5, citing Robert M Weiss & Ajay K Mehrotra, “Online Dynamic Pricing: Efficiency, Equity, and the Future of E-Commerce” (2001) 6:2 Va JL & Tech 1.

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⁴⁷ See OECD 2017, *supra* note 29 at 16, Box 5.

⁴⁸ Michal Gal & Niva Elkin-Koren, “Algorithmic Consumers” (2017) 30 Harv JL & Tech at 5.

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- ⁵⁴ See Chen, *supra* note 23.
- ⁵⁵ See Banicevic et al, *supra* note 41 at 9.
- ⁵⁶ See Zach Y Brown & Alexander MacKay, “Competition in Pricing Algorithms” (2021) National Bureau of Economic Research Working Paper No. 28860.
- ⁵⁷ See Calvano et al, *VoxEU*, *supra* note 53.
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- ⁶¹ *Ibid* at 22 citing Autorité de la concurrence & Bundeskartellamt, “Competition Law and Data” (10 May 2016), online: *Bundeskartellamt* <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?__blob=publ>.
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- ⁶⁴ *Ibid.*
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- ⁶⁸ See Competition Bureau Canada, “Big and innovation: key themes for competition policy in Canada” (2018), at 10–11 online: *Competition Bureau Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>.
- ⁶⁹ Emilio Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion” (2020) 110:10 *American Economic Rev* 3267 [Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion”].
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- ⁷² See Assad et al 2021, *supra* note 51 at 463.
- ⁷³ *Ibid.*
- ⁷⁴ See Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion”, *supra* note 69 at 3295. See also Assad et al 2021, *supra* note 51 at 467: Assad et al refer also to a study by Timo Klein which confirms the Calvano et al study results,

in different environments (Timo Klein, “Autonomous algorithmic collusion: Q-learning under sequential pricing” (2021) 52:3 *The RAND J of Economics*).

⁷⁵ See Assad et al 2021, *supra* note 51 at 465.

⁷⁶ *Ibid* at 466.

⁷⁷ *Ibid*.

⁷⁸ See Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion”, *supra* note 69 at 3295.

⁷⁹ See Emilio Calvano et al, “Algorithmic collusion with imperfect monitoring” (2021) 79 *Intl J of Industrial Organization* [Calvano et al, “Algorithmic collusion with imperfect monitoring”].

⁸⁰ See Assad et al 2021, *supra* note 51 at 467, who discuss the study and its findings.

⁸¹ See Calvano et al, “Algorithmic collusion with imperfect monitoring”, *supra* note 79 at 11.

⁸² *Ibid* at 9.

⁸³ See Karsten T Hansen et al, “Frontiers: Algorithmic Collusion: Supra-competitive Prices via Independent Algorithms” (2021) 40:1 *Marketing Science* at 2.

⁸⁴ *Ibid* at 9.

⁸⁵ See Chen et al, *supra* note 10 at 1345. See also Singer, *supra* note 13.

⁸⁶ See European Commission, *supra* note 14 at para 13.

⁸⁷ See Autoridade da Concorrência, “Digital Ecosystems, Big Data and Algorithms” (July 2019), online (pdf); *Autoridade da Concorrência* <www.concorrencia.pt/sites/default/files/processos/epr/Digital%20Ecosystems%2C%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf>.

⁸⁸ See Stephanie Assad et al, “Algorithmic Pricing and Competition: Empirical Evidence from the German Retail Gasoline Market” (2020) CESifo Working Paper No. 8521 [Assad et al 2020].

⁸⁹ *Ibid* at 2. See also Assad et al 2021, *supra* note 51 at 469–470.

⁹⁰ See Assad et al 2020, *supra* note 88 at 4.

⁹¹ See Assad et al 2020, *supra* note 88 at 7–8.

⁹² Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion”, *supra* note 69.

⁹³ See Assad et al 2021, *supra* note 51 at 469.

⁹⁴ See Assad et al 2021, *supra* note 51 at 469.

⁹⁵ *Ibid*.

⁹⁶ See Assad et al 2020, *supra* note 88 at 4–5.

⁹⁷ See Assad et al 2021, *supra* note 51 at 471.

⁹⁸ See Assad et al 2020, *supra* note 88 at 5.

⁹⁹ See Assad et al 2020, *supra* note 88 at 5.

¹⁰⁰ *Ibid*.

¹⁰¹ See Assad et al 2020, *supra* note 88 at 2, Footnote 1.

¹⁰² See Assad et al 2021, *supra* note 51 at 468.

¹⁰³ Cf “A2i systems”, online: *A2i systems* <www.a2isystems.com>.

¹⁰⁴ See “Customers”, online: *A2i systems* <www.a2isystems.com/customers/>.

¹⁰⁵ See Wakil, *supra* note 27 at 107. See also Canada Competition Bureau, *supra* note 68 at 10.

¹⁰⁶ Subsection 45(8) defines competitors as including “a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to” in Subsection 45(1).

¹⁰⁷ *Competition Act*, *supra* note 19, subs 45(1). Subsection 45(8) defines price as including “any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.” See also Brian A Facey & Cassandra Brown, *Competition and antitrust laws in Canada: mergers, joint ventures and competitor collaborations*, 3rd ed (Markham, ON: LexisNexis Canada Inc, 2020) at 477.

¹⁰⁸ Section 90.1 was introduced in the amendment of 2010: *Budget Implementation Act*, 2009, SC 2009 c 2. Section 90.1 is discussed below in Part 4.1.3.

¹⁰⁹ See Wakil, *supra* note 27 at 107.

¹¹⁰ *Ibid.*

¹¹¹ *Competition Act*, *supra* note 19, s 36.

¹¹² See Musgrove, *supra* note 26 at 57–58.

¹¹³ See *R c Déry*, 2006 SCC 53 at para 35 [Déry]. See also *Canada v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606 at para 119, 1992 CarswellNS 15 [Pharmaceutical Society].

¹¹⁴ Since the amendment of the section in 2010, no case has been brought forth. The old text provided that the agreement “unduly prevented or lessened competition.” In that regard, there was a need to establish an objective and subjective element for the *mens rea* (see *Pharmaceutical Society*, *supra* note 113 at paras 117–120). Currently, it is unclear what elements of the *mens rea* survived the amendments and how the old standards would apply: Musgrove, *supra* note 26 at 53.

¹¹⁵ Competition Bureau Canada, *supra* note 68 at 10.

¹¹⁶ See *Competition Act*, *supra* note 19, subs 54(3). See also Musgrove, *supra* note 26 at 59.

¹¹⁷ See *R v Canadian General Electric Co*, 1976 CarswellOnt 449 at para 124, 15 OR (2d) 360 [Canadian General Electric Co]. See also *Atlantic Sugar Refineries Co v Canada (Attorney General)*, [1980] 2 SCR 644 at para 10, 1980 CarswellQue 50.

¹¹⁸ *Canadian General Electric Co*, *supra* note 117 at para 35.

¹¹⁹ See Wakil, *supra* note 27 at 110. See also Musgrove, *supra* note 26 at 63–64.

¹²⁰ See Wakil, *supra* note 27 at 110. See also Musgrove, *supra* note 26 at 64.

¹²¹ See Wakil, *supra* note 27 at 110–111. See also Musgrove, *supra* note 26 at 64–65.

¹²² See Wakil, *supra* note 27 at 111–112. See also Musgrove, *supra* note 26 at 65.

¹²³ See Facey & Brown, *supra* note 107 at 478: for the criteria to meet to obtain immunity. See also “Immunity and Leniency Programs”, *supra* note 28.

¹²⁴ See *Competition Act*, *supra* note 19, subs 90.1(1). See Competition Bureau Canada, “Merger Enforcement Guidelines” (6 October 2011), online: *Competition Bureau Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.

[html](#)> on an explanation of the SLPC threshold. See also Facey & Brown, *supra* note 107 at 462–463.

¹²⁵ *Rakuten Kobo Inc v Commissioner of Competition*, 2016 Competition Trib 11, at para 56, 2016 CarswellNat 2171.

¹²⁶ See Facey & Brown, *supra* note 107 at 461.

¹²⁷ See *Competition Act*, *supra* note 19, subss 90.1(3)—(6).

¹²⁸ See *Competition Act*, *supra* note 19, s 96.

¹²⁹ See Wakil, *supra* note 27 at 274–277. See also on the efficiency defense: *Superior Propane*, *supra* note 20; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3.

¹³⁰ See Facey & Brown, *supra* note 107 at 471–477: for detailed discussion of each type of arrangement.

¹³¹ See Competition Bureau Canada, “Competitor Collaboration Guidelines” (6 May 2021), online (pdf): *Competition Bureau Canada* <[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-BC-CCGs-Eng.pdf/\\$file/CB-BC-CCGs-Eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-BC-CCGs-Eng.pdf/$file/CB-BC-CCGs-Eng.pdf)> [Competitor Collaboration Guidelines]

¹³² Facey & Brown, *supra* note 107 at 480.

¹³³ Halsbury’s Laws of Canada (online), *Competition and Foreign Investment*, “Competition Law: Non-Statutory Aspects of Competition Law: Conspiracy: Elements of the tort” (I.2.(2)) at HCT-12. See especially *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452 at para 33, 1983 CarswellBC 812.

¹³⁴ *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57 at para 72.

¹³⁵ For these reasons, this paper will not develop more the analysis of this tort. It is however important to know that some private actions exist, either under Section 36 of the *Competition Act* or under the tort of civil conspiracy.

¹³⁶ No 15-CR-00201 (ND Cal 2015) [*Topkins*].

¹³⁷ *Ibid* at para 6.

¹³⁸ See Competition and Market Authority, “Online seller admits breaking competition law” (21 July 2016), online: *Competition and Market Authority* <www.gov.uk/government/news/online-seller-admits-breaking-competition-law>.

¹³⁹ *Ibid*.

¹⁴⁰ See e.g., CNMC, News Release, “The CNMC opens antitrust proceedings against seven firms for suspected price coordination in the real estate intermediation market” (19 February 2019), online (pdf): *CNMC* <www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/2020219%20NP%20Intermediation%20Market%20EN.pdf>.

¹⁴¹ See Banicevic et al, *supra* note 41 at 13.

¹⁴² See e.g. Ezrachi & Stucke, *supra* note 50 at 1787.

¹⁴³ Hub-and-spoke refers to a model in which a centralized hub send information, products, etc. to the spokes: see e.g. Cathy Habas, “Hub & Spoke Model: Definition, Benefits & Examples” (9 September 2019), online: *Bizfluent* <bizfluent.com/13721308/hub-spoke-model-definition-benefits-examples>.

¹⁴⁴ See *E-turas et al v Republic of Lithuania et al*, C-74/14 [2016] ECJ ECLI:EU:C:2016:42 [*E-turas*]

¹⁴⁵ See AZB & Partners, “Pricing Algorithms, CCI’s First Major Encounter with Assessing New-Age Collusions” (15 March 2021), online: *Lexology* <www.lexology.com/library/detail.aspx?g=2a5a5714-3752-4864-b0b6-a4cd6fc9ef90>. See also *E-turas*, *supra* note 144.

¹⁴⁶ 174 F Supp 3d 817 (SDNY 2016). The case was adjudicated in a private arbitration; thus, no legal opinion is known on this theory.

¹⁴⁷ See “A court bashes Uber into compliance—again” (11 December 2021), online: *The Economist* <www.economist.com/britain/2021/12/11/a-court-bashes-uber-into-compliance-again>.

¹⁴⁸ See *Topkins*, *supra* note 136 at 820—821. See also Sanjukta M Paul, “Uber as for-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications” (2017) 38:2 *BJELL* 233 at 242—244.

¹⁴⁹ This is especially true because Uber’s argument of its structure prevents it from raising any common defence. For instance, by insisting that drivers are not employees, Uber may not invoke the affiliate exception under Paragraph 45(6)(a) of the *Competition Act*.

¹⁵⁰ See Competitor Collaboration Guidelines, *supra* note 131 at 53. Notably too, Section 76, on price maintenance, does not apply to downward influence: see *Wakil*, *supra* note 27 at 217.

¹⁵¹ See *E-turas*, *supra* note 144 at para 41.

¹⁵² *R v Briscoe*, 2010 SCC 13 at para 21.

¹⁵³ See Calvano et al, “Artificial Intelligence, Algorithmic Pricing, and Collusion”, *supra* note 69; Calvano et al, “Algorithmic collusion with imperfect monitoring”, *supra* note 79.

¹⁵⁴ See Assad et al 2021, *supra* note 51.

¹⁵⁵ *Competition Act*, *supra* note 19.

¹⁵⁶ See Part 4.1.1 and Part 4.1.2, above.

¹⁵⁷ See also Competitor Collaboration Guidelines, *supra* note 131 at 11.

¹⁵⁸ *Ibid.*

¹⁵⁹ Adopted through *Budget Implementation Act*, 2009, SC 2009 c 2.

¹⁶⁰ See Facey & Brown, *supra* note 107 at 480—481. See also Competitor Collaboration Guidelines, *supra* note 131 at 6.

¹⁶¹ See Part 3, especially Part 3.3, above.

¹⁶² See Gary Hatfield, “René Descartes” (Summer 2018), online: *The Sandford Encyclopedia of Philosophy* <plato.stanford.edu/entries/descartes/>.

¹⁶³ See William Uzgalis, “John Locke” (Spring 2020), online: *The Sandford Encyclopedia of Philosophy* <plato.stanford.edu/entries/locke/>.

¹⁶⁴ See MIT podcast, *supra* note 46.

¹⁶⁵ See Assad et al 2021, *supra* note 51 at 463, 472—476.

¹⁶⁶ See Calvano et al, “Protecting consumers,” *supra* note 22 at 1041—1042.