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CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

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BAR ASSOCIATION

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ARTICLES

PROPOSALS FOR AMENDING THE *COMPETITION ACT*

Thomas W Ross*

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

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Collusion

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

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

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

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

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

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

II.1 Challenges and Recommendations: Buyer-Side Collusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Abuse of Dominance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Mergers

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

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

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

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

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

IV.1 Challenges and Recommendations: The Efficiency Defence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This leads to alternative recommendations.

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

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

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

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

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

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

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

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

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

V. Market Studies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusions

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

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

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

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

ENDNOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[43] *Supra*, note 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[66] A further amendment in the *BIA 2022* adds a new item to the list of examples of anticompetitive acts in S. 78: "(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market." Such conduct, targeting effects on competitors, may be pro-efficient competitive responses to entry—something to be encouraged.

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

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

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

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

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

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

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

[74] Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[124] Ibid.

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

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

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

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

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

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

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

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

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

BLURRED LINES: HOW *DOW CHEMICAL* AND *ROYAL J&M* MAY CONFUSE REMEDIES UNDER THE *COMPETITION ACT*

James Musgrove and Janine MacNeil,
with assistance from Madeline Klimek

The authors explore the issue of whether conduct alleged to be contrary to the civilly reviewable provisions of the Competition Act can found a cause of action for conspiracy to injure or under the unlawful means tort. The paper reviews the legislative history of the bifurcation of the Canadian Competition Act and contains a comprehensive summary of relevant jurisprudence, which makes it clear that civilly reviewable conduct under the Competition Act can only be sanctioned by the Competition Tribunal, that such conduct is lawful until or unless the Competition Tribunal finds otherwise, and that it cannot be the basis for damages actions. However, two recent cases from the Ontario Superior Court (Royal J & M Distributing Inc v Kimpex Inc) and the Alberta Court of Appeal (Dow Chemicals Canada ULC v NOVA Chemicals Corporation) create some uncertainty for this settled law. The authors conclude that this development represents a potentially serious challenge to the structure and logical operation of the Competition Act.

Dans cet article, les auteurs se demandent si un comportement prétendument contraire aux dispositions de la Loi sur la concurrence susceptibles d'examen au civil peut être un motif d'action pour complot en vue de nuire ou pour délit d'atteinte par un moyen illégal. Ils y présentent le contexte législatif du changement de cap de la Loi sur la concurrence du Canada ainsi qu'un résumé complet de la jurisprudence applicable, démontrant ainsi clairement qu'un tel comportement ne peut être puni que par le Tribunal de la concurrence, qu'il est légal à moins que le Tribunal en décide autrement et qu'il ne peut donner lieu à une action en dommages-intérêts. Or, deux affaires récentes—de la Cour supérieure de justice de l'Ontario (Royal J&M Distributing Inc. v. Kimpex Inc.) et de la Cour d'appel de l'Alberta (Dow Chemicals Canada ULC v. NOVA Chemicals Corporation)—ont ébranlé ce principe juridique établi. Les auteurs estiment que cela pourrait sérieusement remettre en question la structure et l'application logique de la Loi sur la concurrence.

One of the key features of Canada's *Competition Act*[1] (the "*Act*") is its bifurcation between criminal conduct and civilly reviewable conduct. Conduct defined as criminal (such as price fixing and bid rigging) is regarded by the statute as unambiguously harmful. Criminal conduct can be prosecuted and can found damages actions for those injured

under section 36 of the *Act*, without the need to demonstrate competitive harm. Such conduct can also represent the "unlawful conduct" predicate for a conspiracy to injure damages action, under the second branch of the *Canada Cement LaFarge*[2] test.

By contrast, conduct defined by the *Act* as civilly reviewable[3], which may injure competition—but can also be competitively neutral or pro-competitive/efficiency-enhancing, depending on the circumstances[4]—was originally determined by the *Act*'s drafters to be appropriately subject only to challenge by the government rather than private parties. Civilly reviewable conduct was and is subject to the principal remedy of prohibition/cease and desist orders, rather than penalties or damages, although there has been some modification to that approach. The ambiguous economic impact of such conduct was seen not to merit condemnation without detailed factual examination, and consequently should not attract challenge by private parties motivated by their own interests. Further, the potential consequences of challenges to civilly reviewable conduct should not be designed to deter such conduct prior to an inquiry into its economic impact.[5]

This bifurcated structure of the *Act* was recently re-confirmed by the Federal Court of Canada:

> The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions … Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects…. These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal … can order the conduct to cease.[6]

Section 36 of the *Act* confers a right of private action to any person who has suffered loss or damage as a result of conduct in breach of one of the criminal provisions of the *Act*, or as a result of a failure to comply with an order of the Competition Tribunal ("Tribunal") or another court under the *Act*. Conversely, non-criminal anti-competitive conduct, even one having serious anti-competitive effects, does not give rise to a recourse in damages by private plaintiffs.[7] While the original bifurcation of the *Act* has been subject to some legislative tinkering since then, including the very recent amendment to allow private Tribunal challenges under the abuse of

dominant market position provisions of the *Act*, the structure has stayed broadly the same. However, two recent cases have thrown this balance contained within the *Competition Act* into question.

This paper proceeds as follows. First, it discusses the structure of the *Competition Act*, focusing on the division between criminal and civilly reviewable conduct. Second, it illustrates the implication of this division when there is a claim for damages under a tort theory of harm requiring, as an element of the tort, unlawful conduct. Third, there is an extensive review of the jurisprudence dealing with the issue of the Tribunal's exclusive jurisdiction with respect to reviewable conduct under Part VIII of the *Act*, and such tort challenges followed by a brief summation of the law. Finally, this paper discusses two recent cases that challenge the settled law relating to the bifurcation of the *Act*.

1. Structure of the *Act*

The original structure of the *Competition Act* established a clear division between criminal conduct (challengeable by the government, and by those injured via damages actions); and civilly reviewable conduct (challengeable only by the government and attracting primarily cease and desist remedies). These civil reviewable provisions include the general abuse of dominance/monopolization provision, as well as a number of more specific provisions, such as exclusive dealing, tied selling and market restriction. As noted, the logic of the bifurcation was that only "hard core" agreements between competitors, to fix prices and the like, are to be condemned outright as virtually certain to cause injury. By contrast, reviewable conduct, which is often efficiency enhancing and positive for consumers—such as bundling products together to lower prices (tied selling) or allowing effective distribution systems (exclusive dealing)—is subject to condemnation only after detailed inquiry into its economic effects. In 2002 the structure was adjusted to allow those "directly and substantially affected" by certain types of civilly reviewable conduct to seek leave of the Tribunal to bring an application for an order under section 75 or 77 of the *Act*.[8] Very recently, the government has extended this right of private access to the abuse of dominance provisions as found in sections 78 and 79 of the *Act*. The substantive provisions were also amended to make clear that the available remedies did not include damages.[9]

In 2009, when the *Act* was amended to decriminalize price maintenance and make it a reviewable practice pursuant to section 76, affected persons were given the right to seek leave of the Tribunal to bring a proceeding for a

cease and desist order under section 76.[10] Further, the key civilly reviewable practice—abuse of dominance—was amended to provide for an award of administrative monetary penalties ("AMPs") (but not damages remedies) in appropriate cases, and only at the behest of the government.[11]

The result of these amendments was that the original dichotomy between criminal conduct (which required limited, or no, assessment of the economic implications of the conduct) on the one hand, and civilly reviewable conduct (which required a detailed factual/economic examination to determine the impact of the conduct), on the other, was reduced to some degree. Furthermore, the reviewable conduct provisions which may now be the subject of challenge, with leave of the Tribunal, by those who are affected (sections 75, 76 and 77—and now sections 78 and 79), do not give rise to possible damages awards or payments to those injured—and were adjusted where necessary to make that clear.[12]

Consequently, the *Act* retains a broad statutory bifurcation between criminal matters (such as cartels and bid rigging), which can give rise to criminal penalties and civil damages actions, and civilly reviewable matters, which give rise to a variety of remedies, excluding damages, and in most cases, financial penalties. The primary remedy was, and remains, cease and desist or prohibition orders for civilly reviewable conduct.

Mirroring the bifurcation in the *Act*, jurisdiction over the two types of conduct is divided within Canada's legal system. Criminal conduct is dealt with in the provincial/territorial courts (or the Federal Court). Damages under section 36 of the *Act* can also be sought in the provincial superior courts or in the Federal Court. By contrast, reviewable conduct, is challengeable before the Tribunal—a specialized economic tribunal, consisting of judges of the Federal Court (with considerable expertise in competition law matters) as well as lay members appointed for their expertise in economics and business.[13]

Misleading advertising, also captured by the *Competition Act*, is a special case. It can be challenged criminally, before the provincial/territorial courts or the Federal Court, if the misleading advertising is engaged in "knowingly or recklessly".[14] Like other criminal conduct under the *Act*, it can also be the basis for potential damages actions. However, if the conduct is not undertaken knowingly or recklessly it can be challenged civilly by the Commissioner of Competition. The Commissioner can challenge reviewable

misleading advertising conduct either before the provincial superior court, the Federal Court, or before the Tribunal.[15]

Remedies for civil misleading advertising are varied. They include cease and desist orders, but also AMPs, and, in some cases a requirement to publish corrective notices and/or pay restitution. If a respondent in a civilly reviewable misleading advertising case can show that it used due diligence to avoid the misleading advertising (even though the duly diligent efforts were not successful in preventing the misleading advertising), then, while the advertising is still subject to a cease and desist order, it is not subject to the other remedies (AMPs/restitution orders/corrective notices).[16]

The bifurcation of the *Competition Act*, and of the applicable remedies, was a conscious choice by the statute's drafters.[17] Conduct that is always or almost always economically damaging need not be subject to detailed economic analysis before challenge, nor need there be a concern about chilling such conduct. So neither criminal penalties nor damages actions by those allegedly injured are a concern in that regard. Likewise, there is limited concern that private parties may bring actions strategically, since the criminal conduct is relatively clearly defined, and discouraging such conduct does not damage the economy.

Conversely, if the impact of the conduct is economically ambiguous, and often efficient, as is the case with civilly reviewable conduct, and determining the line between reviewable conduct which damages competition and that which does not is tricky (which it often is), then there is legitimate concern about chilling potentially pro-competitive conduct. Consequently, the conduct should be subject to detailed economic examination to ensure that it is not condemned out of hand and the available remedies designed to avoid over-deterrence of such conduct. In those circumstances, a primary cease and desist order remedy makes sense. As noted, however, Parliament added the possibility of AMPs for abuse of dominance in 2009.[18]

Similarly, if reviewable conduct could give rise to civil damages that would allow challenge by non-government actors the risk of damages actions, perhaps by way of class proceedings, would add a considerable chilling effect. Section 36 of the *Competition Act*[19] provides for damages related to defined criminal conduct—and for breaching a Tribunal order—but not for reviewable conduct unless or until a Tribunal order has been made and breached.

> 36 (1) Any person who has suffered loss or damage as a result of
>
> conduct that is contrary to any provision of Part VI, or
>
> the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

As such, the structure of the *Act* does not provide for damages with respect to reviewable conduct—except after an order of the Tribunal is breached. And as noted, in 2002, when those injured were given the statutory right to seek leave of the Tribunal to bring cases before the Tribunal respecting some of the civilly reviewable matters, the *Act* was amended to make clear that damages were not an available remedy.

Arguably, the bifurcation of the Canadian *Competition Act* is its genius, in that it allows the government to challenge inherently economically ambiguous conduct in circumstances in which it believes that there is an injury to competition, but it does not allow challenges—at least challenges leading to damages actions—by competitors or other persons in the distribution chain seeking to protect their own economic interests. Consequently, firms are more likely to engage in efficiency-enhancing vertical conduct that may injure competitors or others in the distribution chain than they would be in a regime that allowed such firms to seek damages.

2. A twist—Conspiracy to Injure Damages Actions

As noted above, one of the remedies provided for under the *Competition Act* is a right to civil damages actions (generally brought as class actions) for breach of the criminal provisions of the *Act*. However, an action under section 36 of the *Act* is not the only way to sue for damages. If the conduct involves an agreement between two or more persons, a damages action can also be brought for conspiracy to injure, relying on breach of the *Act*'s criminal provisions in order to satisfy the "unlawful conduct" branch of the *Canada Cement LaFarge* test.[20] Actions can also be brought for damages pursuant to the "unlawful means" tort. In the *Canada Cement Lafarge* case the Supreme Court of Canada determined that there were two branches of actionable civil conspiracy. One is a conspiracy with the principal objective

of injuring a person. The second is a conspiracy which injures a person and is effected by unlawful means. An agreement which violates the price fixing provisions of the *Competition Act* meets the second branch of the test. Likewise, as noted, actions can be brought for unlawful interference with economic relations, otherwise known as the "unlawful means" tort, which requires some unlawful conduct to satisfy an element of the tort.[21] Again, the unlawful means could be a breach of the conspiracy provisions of the *Competition Act.* However, insofar as the unlawful conduct element of either tort could be fulfilled by alleging breach of the civilly reviewable provisions of the *Act* (that is, if civilly reviewable conduct could constitute the necessary "unlawful conduct" to found a damages action for conspiracy under the second branch of the *Canada Cement LaFarge* test, or for the unlawful means tort), then the structure of the *Act*, which does not impose damages for reviewable conduct, would be undermined.

For three decades, the courts have found—although not unanimously—that there is nothing improper or unlawful about conduct defined as civilly reviewable in the *Competition Act* unless or until the Tribunal finds there to be a problem. Consequently, without a Tribunal finding such conduct unlawful, it cannot be the basis of a damages action for conspiracy to injure under the second branch of the *Canada Cement LaFarge* test or with respect to the unlawful means tort.

3. A Review of the Cases

This section provides a comprehensive, largely chronological, review of the cases exploring the issue of the Tribunal's exclusive jurisdiction with respect to reviewable conduct under the *Competition Act* (Part VIII), as well as attempts to base damages claims on a 'breach' of those provisions. A brief summation of the cases explored in detail in this section can be found in Section 4.

A) *Pindoff Record Sales Ltd v CBS Music Products Inc* ("*Pindoff*")

The first case to take up the question of whether conduct contrary to the reviewable practices provisions of the *Competition Act* could found a cause of action for damages determined that, at least as a preliminary matter on a motion to strike, such an action should not be struck out. In *Pindoff*,[22] Mr. Justice Montgomery of the Ontario High Court of Justice declined to strike a claim of civil conspiracy which relied, for the tort's 'unlawful means' element, on conduct contrary to the reviewable conduct provisions of the

Act. In this case, CBS refused to sell its audio products to Pindoff, as Pindoff would not agree that such products would not be exported from Canada.

In rendering its decision, the Court relied on two UK cases[23] under the *Restrictive Trade Practices Act* which found that conduct under that Act's reviewable provisions could constitute illegal means to ground civil proceedings. Mr. Justice Montgomery stated that "[i]t should not be the function of the Motions Court Judge at this preliminary stage to make a determination which might restrict this head of the plaintiff's claim, when there are other triable issues to be dealt with."[24]

As will be seen, the initial case did not set a trend.

B) *Travailleurs et Travailleuses Unis De L'Alimentation et DuCommerce Local 500 et al v Corporation D'Acquistion Socanav-Caisse Inc et al* (« *Travailleurs* »)

In this case,[25] private parties, including the relevant union, sought to enjoin a merger involving the Steinberg grocery chain. The court declined to exercise jurisdiction to do so, noting that, under the (then) new *Competition Act*, the power to challenge mergers had been assigned to the Director (now the Commissioner), with a right to apply to the Tribunal. The court concluded:

> The undersigned is persuaded in all of these circumstances, that it ought to refrain from intervention in a matter which, clearly … falls within the purview of Section 92 of the Competition Act …. Where Parliament has decreed that violation of its laws in the area of restriction or elimination of competition in the market place be dealt with by a specialized Tribunal … a Common Law Court of original jurisdiction ought to refrain from intervention….[26]

C) *Procter & Gamble Co v Kimberley-Clark of Canada Ltd* ("*Procter & Gamble*")

In this Federal Court patent case,[27] Procter & Gamble alleged that Kimberly-Clark violated a patent relating to material used in disposable diapers. In addition to denying infringement and validity of the patent, Kimberly-Clark argued Procter & Gamble was estopped from obtaining relief because it had engaged in abuse of dominant position (contrary to section 79 of the *Act*) in the disposable diaper market. Mr. Justice Teitelbaum, who was also a member of the Tribunal, rejected Kimberly-Clark's argument, ruling that the alleged section 79 conduct was neither criminal nor civilly actionable:

> In the case before me, abuse of dominant position in the *Competition Act* is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the *Act* and any proceedings relating to the practice are conducted before a civil administrative tribunal. There is no improper conduct until such time as the Competition Tribunal so finds.[28]

D) *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* ("*RD Belanger*")

This case[29] involved an action by the catering licensee for the Skydome, alleging breach of the *Competition Act*, tort, and breach of contract in relation to the requirement that the licensee buy all food for the Skydome from Skydome's exclusive supplier. The plaintiff alleged a variety of causes of action, including civil conspiracy to injure. The unlawful means necessary to support such a conspiracy were supposedly contraventions of section 77 (exclusive dealing) and section 79 (abuse of dominant position) of the *Competition Act*. The defendants brought a motion to strike the claim, which the court of first instance granted as follows:

> Alleged contraventions of ss. 77 and 79 of the *Competition Act* may not in the circumstances of the instant motion be the bases for founding a cause of action inasmuch as ss. 77 and 79 do not, prima facie, create a cause of action. Those two sections catalogue conduct which upon application by the "Director" may be reviewed by the "Tribunal". The Tribunal, upon review, may make one of the orders it is authorized to make under the *Competition Act*. It is the failure of a party to comply with such an order made that would bring the impugned conduct within the purview of section 36 of the Act. … The point should be made that under the *Competition Act* reviewable conduct is, *prima facie*, legal until the Tribunal, following a review, determines otherwise. That is in contrast to the British counterpart to the *Competition Act*; *The Restrictive Trade Practices Act*, 1956; which under s. 21 of the Act, deems certain kind of conduct "contrary to the public interest" unless the court is satisfied in respect to any one of a number of circumstances enumerated.[30]

The Court of Appeal ultimately overturned this decision without specifically addressing the plaintiff's reliance on sections 77 and 79 to support its conspiracy claim. However, the Court did cast doubt on that claim's validity, noting that defence counsel had questioned whether section 36 of the *Act* could found a civil cause of action on the facts as pleaded. It then stated:

> All this may well be true. The Statement of Claim does reveal a 'scatter gun' approach to the issues. Portions of the Statement of Claim could well be struck out under Rule 25.11 as frivolous and vexatious, but we are not

> concerned here with niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate.[31]

E) *Chrysler Canada v Canada (Competition Tribunal)* ("*Chrysler*")

In this case,[32] the Tribunal attempted to hold Chrysler in contempt for breach of an order against it pursuant to the *Act*'s refusal to deal provision (section 75). In determining whether the Tribunal had the power to hold entities in contempt for breach of its orders, the Supreme Court of Canada explored the structure of the *Competition Act*, the *Competition Tribunal Act*[33] and the Tribunal's role:

> The *1986 Act* completed the broad division of the *CA* into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its *Interim Report on Competition Policy*. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 *CA*). As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) *CTA* confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the *CA* therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the *CA* and the *CTA* that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII *CA*, since it involves complex issues of competition law, such as abuses of dominant position and mergers.[34]

F) *Harbord Insurance Services Ltd v Insurance Corp of British Columbia* ("*Harbord Insurance*")

This British Columbia case[35] further affirmed that reviewable conduct is not illegal. On its facts, a competitor of the Insurance Corporation of British Columbia ("ICBC") brought an action to attempt to prevent ICBC from offering incentives to agents to place as much coverage as possible with ICBC. ICBC typically paid a fixed commission, but announced a plan to implement a sliding commission scale giving a higher commission to an agent dependent on the quantum of ICBC optional insurance placed by that agent. The plaintiff sought an injunction to prevent this sliding commission scale from being introduced, alleging it would drive agents to sell ICBC optional insurance at the expense of its competitors. It was alleged that the proposed scheme by ICBC violated section 77 of the *Competition Act*. This argument was put forth to support a pleading of unlawful interference with

economic relations. The B.C. Supreme Court rejected the claim. Mr. Justice Hutchinson stated:

> The practices of "exclusive dealing", "market restriction" and "tied selling", in the absence of legislation prohibiting them, are legitimate, are lawful and prima facie not contrary to public policy. Were they offences under Part VI and punishable by imprisonment or a fine, then they would be unlawful. However, as they do not attract such sanctions, those practices are not unlawful, and in the absence of some other culpability cannot be the foundation for a finding of unlawful means.[36]

He went on to state:

> The sections under Part VIII of the *Competition Act* deal with matters that are only reviewable by the Tribunal constituted under the *Act* and not by an ordinary court. The complainant, under Part VIII, may file a complaint with the Director of Investigation and Research. The Director then considers the complaint, and if he or she decides to do so, may place the allegations before the Tribunal. It is only the Director who can initiate applications before the Tribunal, not the complainant. If the Tribunal finds the application is well-founded, it may prohibit the practice complained of or make a similar order to attain the objectives specified in the relevant section. The policy set by the Tribunal is dictated by economic and philosophic principles, and is flexible enough to cater to changing circumstances. The Tribunal is a statutory board of people appointed by the Minister to encourage competition in ways defined by the *Act* but according to its own principles.[37]

The Court ultimately concluded that the conduct complained of was "… per se lawful but may be prohibited under Part VIII because it lessens competition or offends against the policy set by the Tribunal to foster competition in the market: that does not make it unlawful."[38]

G) *Polaroid Canada Inc v Continent-Wide Enterprises Ltd* ("*Polaroid*")

The decision in *Polaroid Canada Inc v Continent-Wide Enterprises Ltd*[39] was delivered after a trial, rather than on an interlocutory basis. Polaroid Canada established a mechanism to discourage its dealers from exporting Polaroid's film products out of Canada. The mechanism was a "two-price" policy, whereby purchases for consumption within Canada would be at one price, and purchases for export would be at a higher price. The export price was so high that it effectively prohibited exports that were purchased at the higher price.

Polaroid sued the defendant, Continent-Wide, for the difference between the domestic and export price with respect to purchases made at the domestic price that were actually exported. Continent-Wide counterclaimed for damages for termination of the dealership arrangement, alleging that Polaroid's two-price policy was contrary to public policy. Continent-Wide also sued for damages under the conspiracy and price maintenance provisions of the *Competition Act* pursuant to section 36 of the *Act*, although it ultimately did not argue the conspiracy issue.

The Court found, based on *Tank Lining Corp v Dunlop Industrial Ltd*,[40] that parties seeking to enforce a restraint of trade must demonstrate that the restraint is reasonable in the interests of the parties. That is, the restraint must be intended to protect some legitimate interest of the party seeking to enforce it, and must not go beyond what is adequate to accomplish that end. The Court found that Polaroid's goal was to eliminate or reduce interruptions to and disruption of supply to Canadian customers, and to prevent gray marketing in foreign markets from disrupting prices and distribution in those markets. Consequently, Polaroid had a proper commercial interest in avoiding price increases in Canada, and in defending the viability of its international distribution and pricing policy. Thus, the restraint was reasonable in the interest of the parties.

In response, Continent-Wide argued that the two-price policy was not reasonable in respect of the public interest and in particular, that the two-price policy constituted a 'market restriction' within the definition of that term in subsection 77(1) of the *Act*. The Court accepted this potential characterization, but noted that market restriction was not an offence under the *Act*—rather, it was reviewable conduct. The Court pointed out that unless or until there is an application by the Director to the Tribunal, and an order by the Tribunal, no action may be taken under the *Act* in respect of market restriction.

Continent-Wide also argued that the two-price policy constituted a refusal to deal within the meaning of section 75 of the *Act*, and for that reason, the policy should be found to be unreasonable in respect of the interest of the public. The Court also rejected this argument, noting that for section 75 to apply there must be a finding by the Tribunal with respect to a number of things, including the availability of supply in a market and the lack of sufficient competition in the market. The Court stated that it was not satisfied that it should make a determination on such points in the absence of a finding by the Tribunal: "[t]o do so might be improperly pre-emptive of the jurisdiction of the Tribunal to make such a determination".[41]

The Court also pointed out that in a situation where no Tribunal order has been granted, or no application has been made to the Tribunal, the mere possibility of those outcomes in the future cannot justify a determination that the conduct is contrary to the public interest. The Court noted that the scheme of the *Act* contemplates that the Tribunal may properly decide to make no order. In taking that decision, the Tribunal would be obliged to direct its attention to the purposes section of the *Act*.

H) *Cellular Rental Systems Inc v Bell Mobility Cellular Inc* ("*Cellular Rental*")

This case[42] involved a cell phone agent, Cellular Rental Systems Inc, which brought an action against Bell Mobility. In 1990, the parties entered into a three-year contract renewable upon terms and conditions to be agreed upon by the parties. Bell decided not to continue the agreement, except for a few months past the end of the initial term. Cellular Rental brought an action against Bell, arguing that the agreement had been extended for another three years. In addition to its contract action Cellular Rental also applied, by way of a 'six person' complaint, to the Director of Investigation and Research for an inquiry into Bell, and for the Director to seek an order under section 75 of the *Act* compelling Bell to continue to supply products to Cellular Rental. A mandatory injunction was sought in the civil action to compel Bell to continue to deal with Cellular Rental until the Director determined whether it would bring an Application or until the Tribunal made its ruling.

Before the court of first instance, Cellular Rental pleaded unlawful interference with economic relations. While granting the requested injunction, Mr. Justice Montgomery was only prepared to say that such a pleading might have some bearing on the outcome, noting "[i]f the Tribunal concludes that the conduct of Bell Mobility was in restraint of trade that might constitute the unlawful means of interference."[43]

In allowing Bell's subsequent appeal, the Divisional Court noted with approval the following statement of Mr. Justice White:

> In my opinion, the order of Montgomery J. conflicts with the principle of law stated by Phelan J. in [*Travailleurs*]. That principle is that an allegation pertaining to Part VIII of the *Competition Act*, is within the sole purview of the Director and the Competition Tribunal under the Act, and cannot be the basis of injunction proceedings in a superior court of record.
>
> …

> Parliament has bestowed on the Director and the Competition Tribunal under the *Competition Act* full jurisdiction to deal with alleged violation [*sic*] of the *Act*, including the jurisdiction of the Competition Tribunal to entertain and grant applications for interim orders, if sought by the Director, 'having regard to the principles ordinarily considered by superior courts—when granting interlocutory or injunctive relief'. (See s. 104(2) of the Act). It would appear that Montgomery J. has granted the type of relief which Parliament intended should be granted by the Competition Tribunal at the request of the Director.[44]

The Divisional Court further noted that subsection 75(1) of the *Competition Act* did not confer any cause of action which Cellular Rental could enforce against Bell in a court of common law or equity.[45] It stated:

> The effect of the order [granting an injunction] was to provide [Cellular Rental] with the benefit of an order which it hoped would be forthcoming pursuant to s. 75(1), *if* the director saw fit, after completing the inquiry under s. 10, to bring an application to the tribunal under s. 75(1), *and* the Tribunal granted an order favourable to [Cellular Rental]. In my view, in granting the order Montgomery J. misconceived the meaning and purpose s. 75(1) and exceeded the jurisdiction of the Ontario Court of Justice (General Division) by granting an order which, if appropriate, could be granted only by the Tribunal under s. 104 on the application of the director.
>
> Montgomery J. was no doubt led astray by the request of [Cellular Rental] for an injunction to restrain Bell 'from violating the provisions of s. 75(1) of the *Act*', because s. 75(1) does not proscribe any conduct and, therefore, can neither be 'breached' nor 'violated'. Nor does s. 75(1) confer a civil right of action. There is a right of action which is derived from non-compliance with an order made under s. 75(1); but that is not this case: s. 36(l)(*b*) …. Section 75(1) does not require the tribunal to determine retrospectively whether the conduct of any supplier has been 'in restraint of trade', as Montgomery J. stated, and, thus 'unlawful'. Rather, its focus is prospective, in that the tribunal must determine whether a person who has been unable to obtain a supply of a product because of insufficient competition in a market should be put on a footing equal to those who are able to obtain the product. The tribunal's discretion to issue such an order is based upon the policy objectives of the Act and the balance of interests of those potentially affected by such an order. Indeed, the individuals who make a request to the director under s. 9(1)(*b*) for an inquiry are not parties to a s. 75(1) application before the Tribunal; the parties are the director and the company in respect of which a complaint was made. Only the director may bring a matter before the Tribunal ….

> Even if the facts and s. 75(1) justified the granting of an order in the terms of the order under appeal, it is my view that, pursuant to s. 104, the tribunal has been given exclusive jurisdiction to grant the order. This follows from the reasons for judgment of Gonthier J., on behalf of a majority of the Supreme Court of Canada, in [*Chrysler*].[46]

Concluding that Justice Montgomery had been without jurisdiction to compel Bell to continue dealing with Cellular Rental, the Divisional Court set the injunction aside on this basis.

I) *Ceminchuk v IBM Canada Ltd* ("*Ceminchuk*")

The *Ceminchuk*[47] case involved a claim against IBM alleging the use of "mainframe software pricing to reduce the price of IBM compatible mainframe hardware."[48] The plaintiff's claim alleged that IBM had engaged in tied selling under section 77 of the *Competition Act*, albeit without specifying any underlying cause of action in tort. IBM brought a motion to strike the claim, which the court granted. It noted, relying on *Procter & Gamble*, *Harbord Insurance*, and *Cellular Rental*, that "… reliance on section 77 of the *Competition Act* as a civil cause of action under which to claim damages is bad at law and cannot succeed."[49]

J) *Visx Inc v Nidex Co* ("*Visx*")

Visx[50] involved a dispute over portions of a statement of defence and counterclaim in a patent infringement suit that alleged the plaintiff was engaging in abuse of dominance. The defendant argued that such conduct, amongst other actions, disentitled the plaintiff to equitable relief because it lacked 'clean hands.' The pleading was rejected on the basis of the *Procter & Gamble* case, noted above.

K) *Eli Lilly & Co v Novapharm Ltd* ("*Eli Lilly*")

In *Eli Lilly*[51] the name brand trademark owner, Lilly, sued Novapharm for passing off, selling generic fluoxetine hydrochloride in a design and get-up that, according to Lilly, infringed its trademarks with respect to Prozac.

Novapharm sought to defend and counterclaim on the basis, amongst others, that the license Lilly gave to Pharmascience to use its trademark was improper because it allowed Pharmascience to launch a 'fighting brand,' contrary to subsection 78(d) of the *Competition Act*. In rejecting the claim the court noted that:

> … the anti-competitive act of fighting brands is a reviewable practice under Part VIII of the *Competition Act*, to be determined by the Competition Tribunal. An application to the Competition Tribunal may only be brought by the Director under the Act … There is no private right of action or defence known as 'use of fighting brands.'[52]

L) *Canada (Director of Investigation and Research) v Southam Inc* ("*Southam*")

Southam[53] involved the appeal of a Tribunal order requiring Southam, pursuant to the merger provisions of the *Competition Act* (which are among the civilly reviewable practices provisions included in Part VIII), to divest one of the community newspapers it had acquired in the Vancouver region. In considering the deference due to the Tribunal's decisions on appeal, the Supreme Court of Canada articulated the statutory logic of the Tribunal's exclusive jurisdiction with respect to Part VIII matters:

> The aims of the Act are more "economic" than they are strictly "legal". The "efficiency and adaptability of the Canadian economy" and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the *Competition Act*.
>
> …
>
> Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the *Competition Act* than is the Tribunal, the natural inference is that the purpose of the Act is better served by appellate deference to the Tribunal's decisions.
>
> …
>
> As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court—Trial Division, and not more than eight lay members, who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See *Competition Tribunal Act*, s. 3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the *Competition Act*, economic or commercial expertise is more desirable and important than legal acumen.[54]

M) *Chadha v Bayer Inc* ("*Chadha*")

Chadha[55] is well known in competition law as a foundational case in regard to class actions and indirect purchaser issues. It involved a claim by a class of homeowners with respect to an alleged conspiracy overcharge for brick pigment. In an interlocutory proceeding, *Chadha* also contributed to the jurisprudence of reviewable conduct liability. One of the causes of action proposed by the plaintiff was civil conspiracy, with the unlawful conduct element alleged to be conduct contrary to section 79 of the *Competition Act* (abuse of dominance). The defendant brought a Rule 21 motion to strike that pleading, amongst others. On that point Mr. Justice Sharpe ruled:

> Section 79 confers jurisdiction on the Competition Tribunal to make an order prohibiting certain activity, after which that prohibited activity is unlawful. However, before any prohibition is made at the Tribunal, the effect of s. 79 is plainly not to make the activity described unlawful.[56]

N) *Belsat Video Marketing Inc v Astral Communications Inc* ("*Belsat*")

In *Belsat*[57] a "rack jobber" (Belsat) that distributed Walt Disney video cassettes pursuant to a contract with Astral (which itself held distribution rights from the relevant Disney affiliate) brought various claims against Astral, Disney, and other defendants when its rack-jobbing contract ended—including an alleged breach of the refusal to deal provision under section 75 of the *Act*. The court rejected the claim:

> An alleged breach of section 75 of the *Competition Act* is a reviewable practice within the jurisdiction of the Tribunal. An alleged breach of the *Competition Act* requires the Tribunal to make an order. An alleged breach of Section 75 of the *Competition Act* does not sustain a civil cause of action.[58]

O) *Carrefour Langelier v Cineplex Odeon Corp* ("*Carrefour*")

Carrefour[59] involved a dispute between a shopping center landlord and Cineplex, together with a company to whom Cineplex had assigned their lease. The assignee agreed to take over Cineplex's obligations under the lease, including taking on Cineplex's booking agreement. The landlord, in seeking to terminate the lease and take enforcement action, argued that the assignment of the booking agreement was contrary to the abuse of dominance provision of the *Competition Act*, and therefore illegal. The court rejected this argument as follows:

> It is settled jurisprudence that the Competition Tribunal, created especially by virtue of the Competition Tribunal Act to hear and determine all applications made under Part VIII of the Competition Act, is a specialized tribunal with exclusive jurisdiction over all civil parts of that statute. The questions [the assignee] now asks the Court to rule upon are therefore within the exclusive province of the Director of Competition, who if he believes there are reasonable grounds to make an order under Part VIII, must cause an inquiry to be made with the view of determining the facts before applying to the Competition Tribunal for an order under section 79. Only the Competition Tribunalis [*sic*] competent to make such an order. Even though the Court is not asked to do that here, it is nonetheless asked by [the assignee] to make findings of illegal behavior (having nothing to do with Carrefour in any case) that would necessarily involve an exercise of jurisdiction that belongs to the Tribunal.[60]

P) *Manos Foods International Inc v Coca-Cola Ltd*[61] ("*Manos Foods*")

Manos Foods International Inc brought proceedings seeking to require Coca-Cola to supply it with product, and Coca-Cola sought to strike out aspects of the claim based on conduct allegedly contrary to the *Competition Act*. The motions judge struck the part of the claim based on breach of the reviewable conduct provisions of the *Act*:

> Section 36 of the Act does not create a civil cause of action based on Reviewable Practices in Part VIII. They cannot form the basis of a civil claim. They cannot be used as a defence. Nor can they form the basis of an "unlawfulness" requirement of a civil tort. Prior to a ruling from the Competition Tribunal, these provisions have no application in a civil proceeding. There is no jurisdiction in the General Division of the Ontario Court of Justice to make any ruling touching upon matters falling within Part VIII.[62]

On appeal, the Ontario Court of Appeal, addressing the issues from a slightly different angle, ruled as follows:

> Although the remedy sought in paragraph 1(b) does not exist in common law, there are statutory remedies in the *Competition Act* available in certain circumstances which may require a supplier of product to sell that product to persons whose businesses would be substantially affected if the supplier did not do so and also which may prevent a supplier of product from limiting the sale of product by its customer (See s. 75 and s. 77 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended). These remedies are within the exclusive jurisdiction of the Competition Tribunal. The respondent has not pursued the relief available under the *Competition Act*.[63]

Q) *Ice Fashionable Accessories v Holt Renfrew & Co* ("*Ice Fashionable Accessories*")

Ice Fashionable Accessories[64] involved a motion by the defendants to strike parts of a statement of claim pleading unlawful interference with economic relations based on an alleged breach of the abuse of dominance provision under the *Act*. The court granted the motion, noting that the *Ceminchuk*, *Chadha* and *Eli Lilly* cases were "consistent in holding that reviewable practices under the *Competition Act* do not constitute criminal offences and therefore any attempt to rely on them as a basis for civil liability must fail."[65]

R) *Tremblay c Acier Leroux inc* (« *Tremblay* »)

This case[66] involved a corporate law oppression claim under the *Canada Business Corporations Act* ("CBCA")[67] by a shareholder who relied, in part, on allegations the respondent company engaged in conduct amounting to market restriction and abuse of dominance under Part VIII of the *Competition Act*. The shareholder (Tremblay) did not allege a right to damages or a remedy for breach of the *Competition Act* itself, but did seek CBCA remedies that relied on the Part VIII allegations.

The respondent apparently did not raise the exclusive jurisdiction of the Tribunal to determine such matters in its written submissions, but did raise the issue in oral argument. In respect of that matter the court stated:

> … the provisions of the *Competition Act* to which Mr. Tremblay has referred in his proceeding are part of the Competition Tribunal's jurisdiction as they are found within Part VIII of that Act. But is that enough to hold that the Superior Court lacks jurisdiction? I do not believe that Parliament could have so intended.
>
> First, the language used in section 8(1) [of the *Competition Tribunal Act*] to grant jurisdiction, which is the only provision in either statute dealing with jurisdiction, is not cast in terms that would suggest that the jurisdiction is an exclusive one. Moreover, the functions of the Competition Tribunal have over time been more regulatory than civil in nature as only the Commissioner had the authority to bring any matter before the Tribunal. Thus, whatever civil recourses that did exist were unavailable to private parties.
>
> …
>
> In any event, even if the amendment [i.e., the then-recent amendment to allow private parties to seek injunctive remedies from the Competition Tribunal with respect to some of the reviewable conduct provisions] had been in force at the relevant time, I am of the opinion that the history of the

> Competition Tribunal as a regulatory tribunal means that it makes sense to understand this recent grant of jurisdiction as one that does not exclude that of provincial superior courts to entertain an oppression remedy that alleges unfair competition, especially where Parliament has provided for a clear grant of jurisdiction to the Superior Court in section 2 defining « court » and in section 241 of the *CBCA*. To hold otherwise would also violate the rule of statutory interpretation to the effect that it is « presumed that the legislature does not intend to alter existing jurisdictions, and particularly to transfer jurisdiction out of superior courts ».
>
> I am also mindful that the Competition Tribunal is composed of both judges of the Trial Division of the Federal Court of Canada as well as members named by the federal Minister of Industry, that they hold office as members of the Tribunal for a seven year mandate which is renewable, and that for the most part, they sit in panels of three or five members, with only Federal Court judges who are members of a panel being able to decide questions of law while the other members who are not judges are able to decide questions of fact as well as mixed questions of fact and law. In my opinion, the composition of the Tribunal with its adjudicative methodology tend to emphasize its essentially regulatory role despite the recent grant of a limited jurisdiction to entertain certain non-regulatory applications. In such circumstances, I do not believe that Parliament intended to have a proceeding that contains allegations and conclusions such as those of Mr. Tremblay decided by the Competition Tribunal.
>
> Accordingly, this argument of Acier Leroux also fails, with the result that I am of the opinion that Mr. Tremblay's proceeding was properly initiated in the Superior Court. [68]

This case is therefore an outlier, although close in some respects to *Dow Chemical*, discussed later. *Tremblay* did not give rise to a damages claim based on "breach" of the civil provisions of the *Competition Act*, but it did, wrongly in our view, allow a claim under another statute based in part on reviewable conduct under the *Competition Act*.

S) *Unilever Canada Inc v Crosslee Trading Co* ("*Unilever*")

In this case[69] the defendant in a trademark infringement action sought leave to amend its pleading to allege that the plaintiff had engaged in anti-competitive conduct contrary to sections 77 and 79 of the *Competition Act*. The prothonotary declined to allow the amendment:

> The plea cannot possibly succeed … based on the reasoning of Justice Marshall Rothstein (as he then was) at page 259 of [*Eli Lilly*]. The anti-competitive acts identified in section 77 of the *Competition Act* confer exclusive

> jurisdiction on the Competition Tribunal to review and determine whether impugned activities are illegal and to impose a remedy. Further, the reviewable practice provisions under Part VIII of the *Competition Act* do not apply, nor do they purport to apply, in private actions. … [L]eave to amend to include allegations of anti competitive conduct contrary to sections 77 and 79 of the *Competition Act* is dismissed.[70]

T) *Pro-Sys Consultants Ltd v Microsoft Corp* ("*Pro-Sys*")

This case[71] involved a long-running, high-profile dispute between Microsoft and a proposed class of direct and indirect purchasers of Microsoft's products in which the purchasers challenged a wide variety of allegedly anti-competitive business practices by Microsoft. The case eventually reached the Supreme Court of Canada on a number of issues, including the availability of claims by indirect purchasers under Canadian competition law. However, the issue of whether reviewable conduct could found a cause of action in tort had been resolved, in favour of the defendants, before the case reached the Supreme Court.

The plaintiffs alleged that Microsoft's conduct constituted unlawful interference with economic relations and that the unlawful means employed included, amongst other things, conduct contrary to the reviewable conduct provisions of the *Competition Act*. The defendant challenged this aspect of the claim, on the basis that reviewable conduct is not illegal and cannot found a cause of action. It relied on the logic of the dichotomy of the *Competition Act*.

The plaintiffs responded by referring to the *Pindoff* and *RD Belanger* decisions. The court then addressed the issue:

> I do not regard either *Pindoff* or *R.D. Belanger* to be contrary to the authorities relied upon by the Defendants. Both of the decisions turned on the fact that the statement of claim disclosed other triable issues, and the Courts held that it was therefore inappropriate to decide the issue of whether conduct of the nature described in Part VIII of the *Competition Act* can be considered unlawful or constitute illegal means for the purposes of the torts of interference with economic relations and conspiracy.
>
> …
>
> The Plaintiffs next say that contrary authority is found in the decisions of *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62 (B.C. C.A.) and *Reach M.D. Inc. v Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30

(Ont. C.A.). The Plaintiffs rely on the following passage from the dissenting judgment of Lambert J.A. in *No. 1 Collision*:

> Lord Denning has defined [in *Torquay Hotel*] the unlawful act for the purposes of the tort [of interference with economic relations] as an act which a person is not at liberty to commit. By that, I understand that what is meant is that the act is one which the law will recognize as being wrong in the sense that the law is capable of granting a remedy of some kind in relation to that wrong, whether the remedy would be granted or not in a particular case. (¶118)

In the case of conduct of the nature described in Part VIII of the Competition Act, however, Parliament decided in s. 36 of the Act that a remedy is available in a court of competent jurisdiction only when the Competition Tribunal has made an order prohibiting the conduct and there has been non-compliance with the order.

The comments of Lambert J.A. cannot properly be interpreted to mean within the context of this action that the second element of the tort is satisfied if the court concludes that the conduct of the defendant is of the nature described in Part VIII. In order to do so, the court would have to trespass upon the exclusive jurisdiction of the Competition Tribunal, which is something it is not entitled to do.

…

Microsoft was at liberty to engage in [conduct described in Part VIII of the *Competition Act*] unless the Competition Tribunal had made an order prohibiting it. This is not affected by the fact that the Commissioner of Competition may have decided to defer to the U.S. authorities and did not make an application to the Competition Tribunal.

I conclude that the fact that the Defendants' alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII.

…

My ruling at this stage is that it is plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. I order that the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.[72]

The British Columbia Court of Appeal subsequently noted that no appeal was taken from this aspect of Mr. Justice Tysoe's decision.[73]

Finally, in the Supreme Court of Canada's decision in the matter, Mr. Justice Rothstein, writing for the Court, touched briefly on the issue of the Tribunal's exclusive jurisdiction over reviewable conduct matters:

> Microsoft made other brief arguments objecting to the cause of action under s. 36. Before Tysoe J., it argued that the Competition Tribunal should have jurisdiction over the enforcement of the competition law. I agree that a number of provisions of the *Competition Act* assign jurisdiction to the Competition Tribunal rather than the courts. However, that is not the case with s. 36, which expressly provides that any person who suffered loss by virtue of a breach of Part VI of the Act may seek to recover that loss. The section expressly confers jurisdiction on the court to entertain such claims.[74]

U) *Novus Entertainment Inc v Shaw Cablesystems Ltd* ("*Novus*")

In *Novus*,[75] Novus sued Shaw with respect to promotions offered by Shaw for various communications services. Novus alleged that Shaw had engaged in abuse of dominance under section 79 of the *Act* by selling at less than acquisition cost (as defined in subsection 78(1)(i)). Shaw brought a motion to strike out aspects of the claim as disclosing no cause of action because the conduct fell within the exclusive jurisdiction of the Tribunal.

The court noted that in the B.C. Supreme Court's initial decision in *Pro-Sys*, Mr. Justice Tysoe found that absent an order of the Tribunal, conduct contrary to the reviewable practices provisions is not unlawful for the purpose of the tort of interference with economic relations.

The plaintiff in *Novus* acknowledged this, but submitted that the addition of the possibility of AMPs to section 79 in 2009 was a "clear indication" Parliament intended to recognize that past conduct under that provision could be unlawful.[76] The court disagreed: "[t]he Tribunal has exclusive jurisdiction under the *Act* to make a determination whether conduct is anti-competitive. Until such determination is made by the Tribunal, it cannot be said a party's conduct is unlawful."[77]

V) *Metropolitan Toronto Apartment Builders' Assn. and Universal Workers Union, Local 183 (Jurisdiction), Re* ("*Metropolitan Toronto*")

This case[78] involved an application for judicial review by the union with respect to an arbitration decision of the Ontario Labour Relations Board in which the arbitrator declined to consider allegations that provisions of a collective agreement constituted breaches of both the civilly reviewable and the criminal provisions of the *Competition Act*. In affirming the arbitrator's decision the Divisional Court concluded as follows:

> The arbitrator's decision to defer these issues for consideration by the Tribunal or the courts was also reasonable. First, only the Competition Tribunal had the economic expertise and the jurisdiction to determine the legality of conduct covered by Part VIII of the *Competition Act*. Second, a decision applying s. 45 of the *Act* would have ramifications beyond the parties to the arbitration. Third, if the applicants want a consideration of the legality of the disputed provisions in the context of the entire *Competition Act*, as apparently they do, it was reasonable to expect them to employ the procedures available through the *Competition Act* and to seek a determination before the one body that can determine all the issues. Fourth, the arbitrator was appointed to determine the terms of new collective agreements and to do so in an expedited process. The issues raised by the applicants would have greatly complicated and prolonged the process of reaching a collective agreement, which this application amply demonstrates, and this would not be fair to the employees nor in the interests of good labour relations.[79]

W) *Maddock v Law Society of British Columbia* ("*Maddock*")

This case[80] involved proceedings by the Law Society seeking to prevent contravention of the *Law Society Act* by a legal consultant (Maddock) who, in response, alleged that the Law Society was acting in breach of section 79 of the *Competition Act*. The Law Society argued that deciding whether conduct falls within section 79 of the *Competition Act* was within the exclusive jurisdiction of the Tribunal, and that conduct is only unlawful under section 79 if and once the Tribunal makes such a finding. In considering the issue the court explored the structure of the *Competition Act*.

> In *Chrysler Canada Ltd. v Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.), the Court described how the *Competition Act* divides jurisdiction between the provincial Superior Courts, the Federal Court, and the Tribunal:
>
> …

> [The Court quoted the portions of the *Chrysler* decision discussed above, and then noted]
>
> The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers. [Emphasis in original]

This court has confirmed the exclusive jurisdiction of the Competition Tribunal relating to orders under s. 79; *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2006 BCSC 1047 (B.C.S.C.) at paras. 20 and 49, rev'd on other grounds 2011 BCCA 186 (B.C. C.A.), rev'd on other grounds 2013 SCC 57 (S.C.C.) ("*Pro-Sys Consultants Ltd.*"); and *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030 (B.C.S.C.) ("*Novus*") at paras. 27 and 35.

Relying on *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) at 331, Mr. Maddock argues that this court can decide matters under the *Competition Act* that are within the exclusive jurisdiction of the Competition Tribunal if "a remedy could be granted as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions."

In this case, Mr. Maddock is asking this Court to make a determination that the injunction sought by the Law Society violates s. 79 of the *Competition Act* and amounts to an abuse of a dominant position in the market, so that he can avoid a statutory injunction being pronounced against him. Mr. Maddock is asking this Court to make a substantive pronouncement of federal competition law as a defence to the unauthorized practice of law. In my view, such an order is not ancillary to the court's principal determination of some other matter; rather, it addresses the central question of whether the injunctive relief should be granted.

The authorities make clear that this Court does not have the jurisdiction to make a s. 79 order in the first instance. Jurisdiction would only arise if the Competition Tribunal ordered that the Law Society's conduct was prohibited, which it has not.

…

Even if Mr. Maddock were to establish that this Court has the jurisdiction to decide the substantive *Competition Act* issue, the remedy he seeks cannot be granted. Section 79(1) provides a means for the Competition Tribunal to make an order prohibiting an abuse of a dominant position. The prohibition order can only be granted once the Tribunal has made its initial determination that the Law Society has abused a dominant position contrary to

subsections 79(1)(a) to (c) of the *Competition Act*: *Pro-Sys Consultants Ltd.* at paras. 33-36, 41, 45-46, and 49; and *Novus* at paras. 27-28, 35-37. No such finding has been made.[81]

4. Summary of the Historical Jurisprudence

The jurisprudence leading up to the two recent decisions which are the impetus for this paper may be fairly summarized as follows:

- Two early cases, *Pindoff* and *RD Belanger*, declined to strike allegations of conspiracy to injure based on breach of the civilly reviewable provisions of the *Act* at an early stage and when there were other triable issues to be heard (although the Court of Appeal in *RD Belanger* expressed doubt about such a cause of action). Mr. Justice Tysoe, in *Pro-Sys*, explicitly distinguished these two cases.

- The overwhelming weight of the cases, and all of those for the last 30 years (*Procter & Gamble*, *Harbord Insurance*, *Polaroid*, *Cellular Rental*, *Ceminchuk*, *Eli Lilly*, *Chadha*, *Belsat*, *Shaw*, *Carrefour*, *Ice Fashionable Accessories*, *Maddock*, *Manos Foods*, *Unilever, Pro-Sys*) have rejected the argument that a claim for conspiracy to injure or other civil torts that require unlawful conduct as an element[82] can be founded (with respect to the necessary "unlawful conduct") on breach of the civilly reviewable provisions of the *Act*, unless and until the Tribunal has made such a finding. When asked to do so, courts have consistently struck such claims. Further, the Federal Court, as recently as late 2021, explicitly articulated and restated the fundamentally bifurcated structure of the *Competition Act*, with the criminal provisions giving rise to potential damages claims by private parties from their breach and the reviewable conduct provisions giving rise to civil review and potential forward-looking prohibitions if they are established to cause anti-competitive effects, but not to a recourse in damages.[83]

- The courts—including the Supreme Court of Canada on two occasions—have also been clear (with the exception of the outlier *Tremblay* case) that the Tribunal has exclusive jurisdiction with respect to the reviewable conduct provisions of the *Competition Act* (*Travailleurs*, *Harbord Insurance*, *Polaroid*, *Cellular Rental*, *Eli Lilly*, *Chadha*, *Belsat*, *Pro-Sys*, *Chrysler, Carrefour, Maddock, Manos Foods, Unilever*). In a third Supreme Court case (*Southam*), the Court explored the logic of this exclusive jurisdiction, given the primarily economic nature of the issues dealt with in the civil provisions of the *Act* and the Tribunal's economic expertise.

In summary, while there were two early outliers refusing to strike pleadings at a preliminary stage, the overwhelming weight of the case law, unanimously for the last 30 years, has been that reviewable conduct under the *Competition Act* cannot be the basis for a civil cause of action. The courts have also been broadly consistent, although not unanimous, that the Tribunal has exclusive jurisdiction to determine the question of reviewable conduct under the *Act*.

5. Two Recent Surprises

Despite this fairly consistent series of cases over more than three decades which made clear that reviewable conduct can only be challenged before the Tribunal, and that such conduct is perfectly lawful until or unless the Tribunal finds otherwise, and that it cannot be the basis for damages actions, either directly or as the requisite "unlawful means" for tort claims, two recent cases have potentially thrown a wrench into the works.

A) *Royal J&M Distributing Inc v Kimpex Inc* ("*Royal J&M*")

Royal J&M[84] was decided, in the first instance, in the spring of 2021. It involved a motion under Ontario Rule 21.01(1)(b)[85] to strike out a claim in tort for conspiracy damages. The essence of the challenged claim was that Kimpex was alleged to have conspired with some of its principals/executives to refuse supply of a product to Royal because Royal refused to abide by Kimpex's Minimum Advertised Price (MAP) policy, allegedly contrary to section 76 of the *Competition Act*—the price maintenance provision. Since 2009, price maintenance, previously criminal conduct under the *Act*, has been a civilly reviewable practice. Section 76 provides, in relevant part:

> 76 (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> a) a person referred to in subsection (3) directly or indirectly
>
> i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
>
> ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

> c) the conduct has had, is having or is likely to have an adverse effect on competition in a market.
>
> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.[86]

The defendant brought a motion challenging this aspect of the claim by noting that principals of a corporation cannot conspire with the corporation, and argued that reviewable conduct cannot constitute the unlawful conduct upon which a conspiracy to injure action may be founded. It cited the *Chadha* and *Novus* cases, noted above, as well as, apparently, *Pro-Sys*. However, it appears that much of the other jurisprudence discussed above was not cited to the motions judge.

The motions judge refused to strike the claim. He referred to the *Pindoff* case, and noted:

> I am of the view on authorities cited to me by the parties that the issue is not settled law. A trial judge should be allowed to determine whether the Plaintiff's claim for conspiracy to violate s. 76 without a [*sic*] an order having first been made by the Tribunal is precluded by s. 36, which on its face appears not to apply to an action for civil conspiracy such as the one at bar.[87]

It is submitted that this aspect of the decision is problematic for a number of reasons.

First, there is considerable jurisprudence, noted above, determining that civilly review conduct cannot found a claim for conspiracy to injure. That is, the law appears to be clearly settled.

Second, it is not section 36 of the *Act* (at least not directly) which precludes a claim for conspiracy based on conduct contrary to the civilly reviewable conduct provisions, although the logic of the *Act's* structure, including section 36, may suggest this. Section 36 of the *Act* provides for a cause of action for breach of the criminal provisions of the *Act*, but does not speak to the civilly reviewable provisions. However, the fact that section 36 allows damages claims respecting the criminal provisions of the *Act* but not the civil provisions suggests that one ought not to be able to use a 'back door' route to a damages action related to civilly reviewable conduct.

Third, the pure statutory reason that conduct allegedly contrary to the civilly reviewable provisions of the *Act*, without a finding by the Tribunal,

does not found a cause of action for conspiracy to injure are the various civilly reviewable provisions themselves. They provide that the conduct is challengeable only before the Tribunal, but do not provide that the conduct is unlawful before such a finding. Section 36 grants a cause of action for breach of the criminal provisions but not the civil provisions. If "breach" of the civil provisions could found a cause of action in damages, then private parties would have a collateral basis to attack the conduct, which was not the design of the *Act*. Moreover, the possibility of such collateral attack would chill conduct that is generally not thought to be economically problematic. The drafters of the *Act* only allowed such conduct to be challenged before the Tribunal, and expressly disallowed damages awards to be provided in respect of such challenges.

Finally, section 8 of the *Competition Tribunal Act*, as discussed in *Chrysler*, gives clear jurisdiction to the Tribunal on Part VIII matters:

> 8(1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.[88]

Despite the logic of the *Competition Act*'s approach to civilly reviewable conduct, and the very significant jurisprudence upholding the Tribunal's jurisdiction over such conduct—much of which was cited on appeal to the Ontario Divisional Court in the fall of 2021—the Divisional Court rejected Kimpex's appeal with a ruling of impressive brevity:

> The motion for leave to appeal the order of Bloom J., dated May 3, 2021 … is dismissed. Costs to the responding party fixed at $5,000.00 payable within 30 days.[89]

B) *Dow Chemical Canada ULC v NOVA Chemicals Corporation* ("*Dow Chemical*")

The second case[90] that represents a curveball in relation to the structure of the *Competition Act* is much more substantial than the *Royal J&M* case. It involved two Canadian petrochemical heavyweights, Dow and Nova. It did not involve an interlocutory motion, but rather a long-running battle resulting in a year-long trial and decisions from the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

The case involved a large number of issues in dispute with respect to a joint venture ethylene plant. Amongst the issues was Nova's allegation that Dow was in breach of provisions of an agreement forming part of the

joint venture arrangements that Nova argued restricted Dow from directly buying ethane from third parties in the relevant region. Dow opposed Nova's interpretation, but raised the alternative argument that if Nova's reading were correct, the relevant provisions would be unenforceable for, among other things, being contrary to section 90.1 of the *Competition Act* (as well as section 45, prior to its 2010 amendment). Section 90.1 is another civilly reviewable provision found in Part VIII of the *Act*, reading in relevant part as follows:

> 90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement—whether existing or proposed—between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> a) prohibiting any person—whether or not a party to the agreement or arrangement—from doing anything under the agreement or arrangement; or
>
> b) requiring any person—whether or not a party to the agreement or arrangement—with the consent of that person and the Commissioner, to take any other action.[91]

With respect to the elements of section 90.1, Dow argued that the relevant agreement was between competitors and that it would have, on Nova's interpretation, substantially lessened or prevented competition in the purchase of ethane by eliminating Dow as Nova's only competitor in the purchase of ethane in Alberta (a monopsony concern).

At the time the joint venture agreement was originally entered into, which included the contested ethane restrictions, the parties to the agreement were Nova and Union Carbide. Nova and Union Carbide were not competitors with respect to the purchase of ethane because Union Carbide did not have relevant operations in the geographic market. But, as a result of a subsequent merger between Union Carbide and Dow, Dow inherited the restrictions, which then bound the only two meaningful purchasers of ethane in the region. The trial court noted that the Competition Bureau reviewed and did not challenge the transaction, but that there was no evidence that it gave consideration to the issue of the ethane purchase restrictions, and so drew no conclusions from the Bureau having "cleared" the transaction.

Post-merger it appears that Dow did buy ethane from third parties. Both Dow and Nova appear to have tacitly recognized that the restrictions in the original pre-merger agreement might be problematic after the merger.

However, there was no formal acknowledgement of this issue. Once the parties were in dispute, however, Nova alleged, by way of counterclaim, that Dow was in breach of its obligations to not buy ethane elsewhere. Dow responded that it was not in breach of the agreement, properly construed, and that on Nova's interpretation the ethane restrictions would be illegal and unenforceable for, amongst other things, being contrary to section 90.1 of the *Competition Act* (which itself only came into existence years after the original agreement was entered into), and, prior to that time, contrary to the old section 45 of the *Competition Act*.

In reply to Dow's section 90.1 arguments, Nova argued that Dow could not defend its conduct by challenging the restrictions themselves in court, since only the Tribunal can determine that an agreement substantially lessens or prevents competition under section 90.1.[92] Before the Court of Queen's Bench, Nova apparently cited no authority for this submission.[93]

Ultimately, Madam Justice Romaine accepted Dow's narrower interpretation of the ethane restrictions, concluding that Dow was not in breach.[94] However, she proceeded to consider Dow's alternative *Competition Act* and other enforceability arguments.[95] The key aspect (for our purposes) of the very lengthy trial decision is as follows:

> … Nova submits that the civil conspiracy provisions of the *Competition Act* clearly reserve the determination as to whether an agreement prevents or lessens competition to the Competition Tribunal. It submits that this is quite different from the criminal provision [*sic*] of the *Competition Act* which are within the jurisdiction of the courts and which may be privately enforced through civil action. Nova states that this Court has no jurisdiction to assess whether an agreement violates section 90.1, as only the Competition Tribunal has such jurisdiction.
>
> No authority is cited for this submission, and it is clear that an ouster of the jurisdiction of a provincial superior court must be clear. There is nothing in section 90.1 that indicates such an ouster. The issue of whether the restriction is unenforceable as contrary to section 90.1 is incidental to this Court's determination of a counterclaim in which the plaintiff by counterclaim has asked the Court to enforce the restriction at issue: *Canada (Attorney General) v Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) at paras 40-41; *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 (S.C.C.) at para 43.[96]

Justice Romaine concluded that the contested restrictions would have been contrary to section 90.1 under Nova's interpretation,[97] even though there had been no application by the Commissioner of Competition, and

no finding by the Tribunal with respect to the restrictions. No damages were sought by Dow respecting the alleged breach of section 90.1 (it was alleged as a defense to Nova's breach of contract allegations), so we do not know what the court might have done had there been a damages claim.

In our view, this aspect of the decision is incorrect, for the reasons outlined in some detail above. The considerable jurisprudence states that determining matters under the civilly reviewable provisions of the *Act* is within the exclusive jurisdiction of the Tribunal, and that unless or until such a determination is made, the conduct is lawful.

On appeal, Justice Romaine's finding that Dow had not breached the joint venture agreement's ethane purchase restrictions was overturned by a majority of the Alberta Court of Appeal. However, her subsequent finding that the restrictions violated section 90.1 was upheld. The majority addressed the issue, after noting that the Competition Bureau's clearance of the Dow/Union Carbide merger was "somewhat puzzling" by simply saying, without specific reference to the jurisdiction of the provincial superior courts to decide a matter under section 90.1: "[t]he trial judge concluded that any attempt to enforce the Ethane Pooling covenants against Dow would result in a breach of the *Competition Act* …. This conclusion discloses no reviewable error."[98]

The reasoning in *Dow Chemical* does not address the extensive jurisprudence (noted above) which has held that the civilly reviewable provisions are only subject to challenge before the Tribunal and that there is nothing unlawful unless or until the Tribunal so finds.

6. Conclusion

These two recent cases, both wrongly decided on relevant points in our view (one on an interlocutory motion, and the other as one of literally dozens of complex issues in dispute), taken together, cast some doubt on the propositions that only the Commissioner of Competition can challenge civilly reviewable conduct under section 90.1; that only the Tribunal has jurisdiction to determine whether conduct falls within the civilly reviewable provisions (Part VIII) of the *Competition Act*; that civilly reviewable conduct is lawful unless and until the Tribunal finds otherwise; and that civilly reviewable conduct cannot be the basis for a claim for conspiracy to injure or other civil torts. These two cases may suggest, if upheld, that a cause of action for conspiracy to injure based on 'breach' of one of the civilly reviewable provisions of the *Act*, or the unlawful means tort based on such

conduct, could be advanced, and potentially give rise to damages, with no finding by the Tribunal required.

This development represents a potentially serious challenge to the structure of the *Act*, which was recently and explicitly reconfirmed by the Federal Court of Canada. The overwhelming weight of the jurisprudence, and the logic of the *Act*, suggests that such conduct does not, and should not, give rise to a cause of action for damages—directly or indirectly—and that civilly reviewable conduct, as defined under the *Act*, may only be condemned after a hearing by the Tribunal.

The *Dow Chemical* case, given the way in which the issues arose, does not find otherwise, but does raise the question as to the exclusive jurisdiction to address reviewable conduct, which in another case might be extended to a basis for a damages action. The *Royal J&M* case is a preliminary decision that the matter should go to trial—not a final decision on the merits. Nevertheless, the two cases cause some confusion, and it is to be hoped that the matter will be the basis of a carefully considered appeal decision at some point soon.

ENDNOTES

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

[2] *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452 [*Canada Cement LaFarge*].

[3] Which includes conduct such as tied selling, exclusive dealing, abuse of dominant market position, price maintenance and section 90.1 agreements between competitors.

[4] See G Frank Mathewson & Ralph A Winter, *Competition Policy and Vertical Exchange* (Toronto: University of Toronto Press, 1985); G Lermer "Vertical and Horizontal Arrangements: Is a Counter-Revolution Underway?" (Paper delivered at the Canadian Bar Association Competition Law Annual Conference, 29 September 1995) [unpublished].

[5] See Bruce C McDonald, "Reviewable Marketing Practices in Canada" (1977) 22:4 Antitrust Bull 801.

[6] *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para 90 [*Jensen*].

[7] *Ibid* at paras 90–91.

[8] *Competition Act*, *supra* note 1 at s 103.1(7).

[9] *An Act to amend the Competition Act and the Competition Tribunal Act,* SC 2002 c 16 at ss 11.1–11.3; see also *Competition Act*, *supra* note 1 at s 77(3.1).

[10] *Budget Implementation Act, 2009*, SC 2009 c 2 at Part 12 [*Budget Implementation Act*].

[11] *Ibid* at s 428; *Competition Act*, *supra* note 1 at s 79(3.1).

[12] *Competition Act*, *supra* note 1 at ss 75(1), 76(2), 76(8), 77(3.1).

[13] As noted at the time of the original conception: "[u]nder the proposed scheme the substantive jurisdiction of the courts and the Tribunal will be mutually exclusive … Such a basic division of responsibility, which has been advocated before, results from a widespread feeling that institutions of criminal law do not permit sufficient economic sophistication to be brought to bear on decisions concerning a competitive economy" (see Bruce C McDonald, "Canadian Competition Policy: Interim Report of the Economic Council of Canada" (1970) 15:3 Antitrust Bull 521 at 525); see also *House of Commons Debates* 33-1, vol 8 (7 April 1986) at 11928 (Hon Michel Côté, Minister of Consumer and Corporate Affairs): "Typically, the questions concern probable effects—future effects—and implications of various business activities, questions which have to be considered in their full commercial and economic context".

[14] *Competition Act*, *supra* note 1 at s 52(1).

[15] *Ibid*, ss 74.09–74.1(1).

[16] *Ibid*, s 74.1(3).

[17] *House of Commons Debates*, 33-1, vol 10 (5 June 1986) at 14026 (Mr. Bill Domm, Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post); see also, Dr Lawrence A Skeoch & Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Canada: Department of Consumer and Corporate Affairs, 1976) at 281–283, 316–333.

[18] *Budget Implementation Act, supra* note 10 at s 428.

[19] *Competition Act*, *supra* note 1 at s 36.

[20] *Watson v Bank of America Corp,* 2015 BCCA 362 at paras 40–41, 58, 135.

[21] See *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 [*AI Enterprises*].

[22] *Pindoff Record Sales Ltd v CBS Music Products Inc*, (1989), 27 CPR (3d) 380, 44 CPC (2d) 308 (Ont H Ct J) [*Pindoff*].

[23] *Daily Mirror Newspapers Ltd v Gardner*, [1968] 2 All ER 163, [1968] 2 QB 762 (CA); *Brekkes Ltd v Cattel*, [1971] 1 All ER 1031, [1972] Ch 105.

[24] *Pindoff*, *supra* note 22 at para 22.

[25] *Traveilleurs et Travilleuses Unis De L'Alimentation et Du Commerce, Local 500 et al v Corporation D'Acquisition Socanav-Caisse Inc et al*, AZ-90021188 (SOQUIJ) (Que Sup Ct) [*Traveilleurs*].

[26] *Ibid* at 16–17.

[27] *Procter & Gamble Co v Kimberley-Clark of Canada Ltd* (1991), 40 CPR (3d) 1, 49 FTR 31 (FCTD) [*Procter & Gamble*].

[28] *Ibid* at para 148.

[29] *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd*, 1991 CarswellOnt 3532, 26 ACWS (3d) 509, [1991] OJ No 538 (Gen Div) [*RD Belanger* Gen Div], rev'd 1991 CarswellOnt 735, 5 OR (3d) 778, 57 OAC 81 (CA) [*RD Belanger* CA].

[30] *RD Belanger* Gen Div, *supra* note 29 at para 25.

[31] *RD Belanger* CA, *supra* note 29 at para 13.

[32] *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 [*Chrysler*].

[33] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) [*Competition Tribunal Act*].
[34] *Chrysler*, *supra* note 32 at 405–06.
[35] *Harbord Insurance Services Ltd v Insurance Corp of British Columbia*, 1993 CarswellBC 526, 9 BLR (2d) 81 (Sup Ct) [*Harbord Insurance*].
[36] *Ibid* at para 12.
[37] *Ibid* at para 13.
[38] *Ibid* at para 16.
[39] *Polaroid Canada Inc v Continent-Wide Enterprises Ltd* (1994) 59 CPR (3d) 257 (Ont Ct J (Gen Div)) [*Polaroid* Gen Div]; additional reasons to *Polaroid Canada Inc v Continent-Wide Enterprises Ltd*, 1998 CarswellOnt 5074 (Ct J (Gen Div)), aff'd 2000 CarswellOnt. 2039, 7 CPR (4th) 73 (CA).
[40] *Tank Lining Corp v Dunlop Industries Ltd* (1982), 40 OR (2d) 219, 68 CPR (2d) 162, 140 DLR (3d) 659 (CA).
[41] *Polaroid* Gen Div, *supra* note 39 at para 78.
[42] *Cellular Rental Systems Inc v Bell Mobility Cellular Inc* (1994), 56 CPR (3d) 251; 48 ACWS (3d) 409 (Ont Ct (Gen Div)) [*Cellular Rental* Gen Div]; rev'd (1995), 61 CPR (3d) 204 (Ont Ct J (Gen Div) Div Ct) [*Cellular Rental* Div Ct].
[43] *Cellular Rental* Gen Div, *supra* note 42 at para 44.
[44] *Cellular Rental* Div Ct, *supra* note 42 at para 16.
[45] *Ibid* at para 17.
[46] *Ibid* at paras 22–24.
[47] *Ceminchuk v IBM Canada Ltd* (1995), 62 CPR (3d) 546 (FCTD) [*Ceminchuk*].
[48] *Ibid* at para 5.
[49] *Ibid* at para 10.
[50] *Visx Inc v Nidex Co* (1994), 58 CPR (3d) 51 (FCTD), aff'd 1996 CarswellNat 2475, 72 CPR (3d) 19 (FCA).
[51] *Eli Lilly & Co v Novapharm Ltd* (1996), 68 CPR (3d) 254 (FCTD) [*Eli Lilly* FCTD], aff'd 1996 CarswellNat 1558, 66 ACWS (3d) 433 (FCA).
[52] *Eli Lilly* FCTD, *supra* note 51 at para 15.
[53] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 [*Southam*].
[54] *Ibid* at paras 48–51.
[55] *Chadha v Bayer Inc*, 1998 CanLII 14791 (Ont Sup Ct) [*Chadha*].
[56] *Ibid* at para 14.
[57] *Belsat Video Marketing Inc v Astral Communications Inc*, (1998), 81 CPR (3d) 1 (Ont Ct J (Gen Div)) [*Belsat* Gen Div], aff'd (1999), 86 CPR (3d) 413 (Ont CA).
[58] *Belsat* Gen Div, *supra* note 57 at para 65.
[59] *Carrefour Langelier v Cineplex Odeon Corp*, 1999 Carswell Que 3546 (Sup Ct) [*Carrefour*].
[60] *Ibid* at para 30.
[61] *Manos Foods International Inc v Coca-Cola Ltd*, 1998 CarswellOnt 5824 (Ct J (Gen Div)) [*Manos Foods* Gen Div], rev'd 1999 CarswellOnt 3088 (CA) [*Manos Foods* CA].
[62] *Manos Foods* Gen Div, *supra* note 61 at para 4.

[63] *Manos Foods* CA, *supra* note 61 at para 10.
[64] *Ice Fashionable Accessories Inc v Holt Renfrew & Co*, 2001 CarswellOnt 1320 (Sup Ct) [*Ice Fashionable Accessories* Sup Ct], rev'd in part 2002 CarswellOnt 337 (CA).
[65] *Ice Fashionable Accessories* Sup Ct, *supra* note 64 at para 18.
[66] *Tremblay c Acier Leroux Inc*, 2004 CarswellQue 449 (CA) [*Tremblay*].
[67] *Canada Business Corporations Act*, RSC 1985, c C-44.
[68] *Tremblay*, *supra* note 66 at paras 60–65.
[69] *Unilever Canada Inc v Crosslee Trading Co*, 2006 CarswellNat 4893 (FC) [*Unilever*].
[70] *Ibid* at para 7.
[71] *Pro-Sys Consultants Ltd v Microsoft Corp,* 2006 BCSC 1047 [*Pro-Sys* BCSC]; rev'd on other grounds 2011 BCCA 186 [*Pro-Sys* BCCA], rev'd on other grounds 2013 SCC 57 [*Pro-Sys* SCC].
[72] *Pro-Sys* BCSC, *supra* note 71 at paras 32–49.
[73] *Pro-Sys* BCCA, *supra* note 71 at para 17.
[74] *Pro-Sys* SCC, *supra* note 71 at para 70.
[75] *Novus Entertainment Inc v Shaw Cablesystems Inc*, 2010 BCSC 1030 [*Novus*].
[76] *Ibid* at para 32.
[77] *Ibid* at para 35.
[78] *Metropolitan Toronto Apartment Builders' Assn and Universal Workers Union, Local 183 (Jurisdiction), Re*, 2014 ONSC 5775 [*Metropolitan Toronto*].
[79] *Ibid* at para 11.
[80] *Maddock v Law Society of British Columbia,* 2020 BCSC 71 [*Maddock*].
[81] *Ibid* at paras 138–150.
[82] This tort, formerly referred to as unlawful interference with economic or contractual interests, is now simply known as the "unlawful means tort" (see *AI Enterprises*, *supra* note 21).
[83] See *Jensen*, *supra* note 6 at para 91.
[84] *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777 [*Royal J&M* 3777], leave to appeal to Divisional Court refused, 2021 ONSC 6177 [*Royal J&M* 6177].
[85] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01(1)(b).
[86] *Competition Act*, *supra* note 1 ats 76.
[87] *Royal J&M* 3777, *supra* note 84 at para 14.
[88] *Competition Tribunal Act*, *supra* note 33 at s 8(1).
[89] *Royal J&M* 6177, *supra* note 84 at para 1.
[90] *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482 [*Dow Chemical* QB], rev'd *Dow Chemical Canada ULC v Nova Chemical Corporation*, 2020 ABCA 320 [*Dow Chemical* CA].
[91] *Competition Act*, *supra* note 1 at s 90.1.
[92] *Dow Chemical* QB, *supra* note 90 at para 1412.
[93] *Ibid* at para 1413.
[94] *Ibid* at para 1285.
[95] *Ibid* at para 1352.
[96] *Ibid* at paras 1412–1413.

[97] *Ibid* at para 1417.
[98] *Dow Chemical* CA, *supra* note 90 at para 157.

GREENWASHING: WHAT IT IS AND WHY IT MATTERS

By Robin Spillette, Huy Do and Antonio Di Domenico[1]

In marketing, companies often tout the environmental benefits, or environmental superiority, of their products. As environmental issues are becoming top of mind for consumers, many companies want to emphasize that their products have certain desirable qualities, such as being biodegradable, recyclable, or sourced from sustainable materials. But when exactly are these claims appropriate, and when does emphasizing these "green" qualities cross the line into misleading consumers about the environmental benefits of a product?

Pour commercialiser leurs produits, il n'est pas rare que les entreprises en vantent les bienfaits ou la supériorité sur le plan environnemental. L'environnement étant de plus en plus une préoccupation pour les consommateurs, bon nombre d'entreprises insistent sur les vertus de leurs produits : ils sont biodégradables, recyclables ou faits de matériaux durables. Mais comment savoir si ces prétentions écologiques sont justes et ne relèvent pas davantage de la publicité trompeuse?

1. What is Greenwashing?

Greenwashing involves making environmental (i.e., "green") claims which may leave consumers with the impression that a company or a product or service is "environmentally friendly" when in fact it is not. Greenwashing may, for example, involve claims that a product is "biodegradable", "non-toxic", or "made from natural ingredients", or may include more specific claims related to the materials or the amount of energy used to produce a product. The use of a third-party logo or seal, for example, a logo showing that a product is "Certified Organic", is another type of green claim. Greenwashing can involve either comparative (as against a competitor's product or service) or absolute environmental claims.

The Canadian Standards Association Group (the "**CSA**") (as described in more detail below) sets out a useful categorization of different types of green claims. The CSA considers three types of claims:

- **Type I Claims**: These are environmental labels, logos, certificates, etc. which generally give consumers an indication of the environmental preferability of a product. These labels are administered by an independent third party which will have a certification process or some

series of requirements or criteria that must be met before a company can display their label or logo. For example, use of the "FairTrade" logo that is seen on many coffee products by a company would be considered a Type I environmental claim by the company using the logo.[2]

- **Type II Claims**: These are self-declared environmental claims and are likely the most common type of environmental claims. Self-declarations can appear, for example, in advertisements, on packaging or labels, on a company's website, or in any other type of communication from a company. These types of claims can include self-declarations that a product is, for example, "organic", "sulfate free", "ethically sourced", "biodegradable", or "green". Type II claims have generally been the focus of most jurisdictions' enforcement and guidance with respect to greenwashing, as compared to the other types of claims.

- **Type III Claims**: These claims include the declaration of quantified environmental information on the life cycle of a product, similar to a nutrition label on food products. These types of claims include detailed, comprehensive data lists that completely profile a product (or service) and are generally used in business-to-business interactions, although they are sometimes used in business-to-consumer interactions as well.

Greenwashing—as a form of misrepresentation—can potentially be considered false or misleading advertising. As such, green claims by companies could potentially be in contravention of Canada's *Competition Act* (the "**Act**"), as well as in contravention of various other laws which regulate misleading advertising and misrepresentations, including securities laws, provincial consumer protection laws and personal injury (tort) law.

Greenwashing is becoming increasingly prevalent in recent years. A global sweep of over 500 websites by the International Consumer Protection Enforcement Network ("**ICPEN**")[3] and the UK Competition and Markets Authority (the "**CMA**") found that over 40% of these websites appeared to be using green advertising tactics that could be considered misleading and therefore may be in contravention of applicable consumer protection laws.[4] A similar website sweep undertaken by the European Commission found that 42% of green claims reviewed were either exaggerated, false or deceptive and could potentially qualify as unfair commercial practices.[5] Another sweep of sustainability advertisements undertaken by the European Commission found that in almost half of the claims reviewed, there was a reason

to believe that the claim may be false or deceptive and potentially an unfair commercial practice under the applicable consumer protection laws.[6]

This increase in green claims (and potential greenwashing) by companies is likely in response to the increasing concern which consumers are exhibiting with respect to the environmental impact of the goods and services which they purchase. In fact, some studies have found that the vast majority (approximately 73%) of consumers globally would change their consumption habits to reduce their environmental impact.[7]

In response to the increasing prevalence of environmental advertising, many international jurisdictions are renewing their focus on the regulation of green claims. Various jurisdictions (including the European Union, the United Kingdom, and the United States,) are revisiting their legislation, policies and guidance relating to the regulation of environmental claims. Various countries are also putting together task forces and undertaking market studies to assess just how big the issue of greenwashing is, and how it can be addressed.

As such, it would not be unexpected if Canada also saw increased interest with respect to the regulation of environmental claims, which may in turn mean increased enforcement through public and private channels alike. In fact, the Competition Bureau (the "**Bureau**") has announced that it will be hosting its first "Competition and Green Growth Summit", which is focused on the interaction of competition law and sustainability.[8] In the Bureau's press release announcing this summit, it highlights that "Canada and other countries across the world are taking significant actions to move towards a greener economy. Environmental and sustainability measures such as carbon taxes, net-zero targets and [e]nvironmental, [s]ocial, and [g] overnance factors are impacting business competitiveness more and more. Consumers are also changing their buying habits because of their growing environmental consciousness." The summit will occur on September 20, 2022. Accordingly, it is increasingly important for Canadian companies to carefully consider the environmental claims they are making in the context of applicable laws, both domestically and internationally.

This article examines the legal regimes applicable to environmental claims in Canada, including competition, securities and consumer protection laws. It also provides a brief summary of the treatment of such claims in other jurisdictions where there has been a recent increase in interest in greenwashing issues, including the United States, European Union and United Kingdom, among others.

Given the increased enforcement in this area, and given the lack of guidance from the Bureau (along with the lack of judicial guidance in case law in Canada), it is increasingly necessary for the Bureau to provide updated guidance with respect to environmental claims and related evolving issues in Canada. Moreover, due to the international nature of many businesses operations, it would be practical and beneficial if such new guidance from the Bureau was sufficiently detailed, practical and, where possible, consistent with the guidance being provided internationally.

2. Canada

a) Competition Law Enforcement

In Canada, greenwashing—as a form of misleading advertising—is largely governed by the Act. Specifically, section 74.01(1) of the Act sets out the general prohibition against making representations to the public for the purposes of promoting a product, service or business interest that are false or misleading in a material respect.[9]

A representation is "false" if the representation is, when properly construed, incorrect or inaccurate. A representation is "misleading" if it conveys an inaccurate or incorrect general impression, after giving consideration to all the surrounding circumstances.[10] A representation can be literally true, and still be considered misleading. A representation is considered "material" if it would likely influence an "ordinary citizen" in "deciding whether or not [they] would purchase the product."[11]

Section 52(1) of the Act contains the criminal prohibition against misleading advertising. This section prohibits a person from *knowingly or recklessly* engaging in the activities prohibited by section 74.01(1). It is this mental element that differentiates these two provisions.

Where a court finds, on an application brought by the Commissioner of Competition (the "**Commissioner**"), that a person has violated section 74.01(1) of the Act, the court may order the person not to engage in the impugned conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to the greater of (i) $750,000 (for a first offence) and (ii) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined. The administrative monetary penalties that could be awarded against a corporation are the greater of (i) $10 million (for a first offence) and (ii) three times the value of the benefit derived from the conduct in question or, if that amount cannot be reasonably determined, 3% of the corporation's annual

worldwide gross revenues. Where a person is found on indictment to have committed an offence under section 52(1) of the Act, they are liable for a fine (at the discretion of the court), imprisonment not to exceed one year, or both.[12] On a summary conviction under section 52(1) of the Act, a person is liable for a fine not to exceed $200,000, imprisonment not to exceed one year, or both.[13]

The Bureau is also responsible for enforcement under two additional acts: the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act*. Each of these acts also contains provisions against misleading advertising that may be contravened by certain greenwashing practices.[14]

i) Public Enforcement

Pursuant to the Act, the Commissioner, through the Bureau, can investigate conduct that the Commissioner has reason to believe may, or is about to, contravene different provisions of the Act. The Act grants the Commissioner numerous investigative powers to pursue their inquiries. As deceptive marketing is a "dual track" (i.e., criminal *or* civil) offence under the Act, the Bureau will have to choose whether to pursue potentially false or misleading representations under either the civil or criminal enforcement track. Generally, the Bureau will pursue only the most egregious conduct under the criminal track, which requires proof of recklessness or knowing intent.

As part of Canada's presidency of ICPEN for 2020-2021, the Bureau announced that environmental misleading advertising claims would be one of its areas of focus.[15] ICPEN has since worked with other competition authorities, such as the United Kingdom's Competition Markets Authority, to investigate the prevalence of greenwashing.[16] It is foreseeable that the increased focus on greenwashing by the Bureau in connection with its ICPEN presidency will carry over into its enforcement priorities in Canada moving forward.

That being said, this is not a new issue for the Bureau, which has investigated many instances of potential greenwashing in the past. For example:

- In 2010 the Bureau came to an agreement with a United States paint products company which was claiming that its products were made of biodegradable material, noting that its biodegradability could be dependent on conditions of use or disposal. The Bureau noted that, as per its environmental claims guidelines (discussed below), claims of biodegradability should not be made if a product releases any substances in concentrations harmful to the environment during

disposal or the degradation process. The company agreed to remove these claims from its products sold in Canada.[17]

- In 2013, the Bureau reached consent agreements with each of Hyundai Auto Canada Corp. ("**Hyundai**") and Kia Canada Inc. ("**Kia**").[18] These agreements each related to fuel consumption ratings that had been allegedly incorrectly represented in marketing and advertising materials for certain Hyundai and Kia vehicles sold in Canada. More specifically, Hyundai and Kia had allegedly each made representations regarding the fuel consumption of certain vehicles, based on testing that had been conducted at joint testing facilities in Korea. However, due to errors at this testing facility, the fuel consumption representations were incorrect. Accordingly, in each case, the Commissioner concluded that the representations contravened the civil deceptive marketing provisions of the Act.

- In 2016, Volkswagen Group Canada Inc. ("**Volkswagen**") and Audi Canada Inc. ("**Audi**") entered into a consent agreement with the Commissioner with respect to a contravention of the misleading advertising provisions of the Act (the "**2016 Volkswagen/Audi Consent Agreement**").[19] Representations had been made to the Canadian public promoting certain Volkswagen and Audi vehicles as being environmentally friendly and equipped with 2.0 litre clean diesel engines, which had reduced emissions and were cleaner than equivalent gasoline engines in Canada. In fact, the engines emitted nitrogen oxide emissions up to levels that well exceeded the standards to which they were certified. Accordingly, the Commissioner concluded that the representations contravened s. 74.01(1)(a) of the Act. To remedy the issue, an "Owner Credit Package" was voluntarily established by Volkswagen and Audi to owners and lessees of the affected vehicles, including pre-paid credit cards for use generally and in their dealerships, as well as free service visits and three years of roadside assistance. Volkswagen and Audi also agreed to pay an administrative monetary penalty of $7.5 million each.

- In 2018, Volkswagen, Audi and Porsche Cars Canada, Ltd. ("**Porsche**") were subject to a subsequent investigation by the Bureau regarding similar representations to those discussed above made in respect of 3.0 litre engines. A further consent agreement was reached with these parties, whereby they agreed to, among other things, that Volkswagen and Audi pay an administrative monetary penalty of $1.25 million each (the "**2018 Volkswagen/Audi/Porsche Consent Agreement**").[20]

- Most recently, at the outset of 2022, the Bureau concluded its investigation into Keurig Canada Inc. ("**Keurig Canada**")'s environmental claims made to consumers regarding the recyclability of Keurig Canada's single-use coffee pods.[21] The Bureau concluded that these claims were false or misleading in geographic areas where the pods were not widely accepted for recycling programs, specifically in all provinces except Quebec and British Columbia. The Bureau concluded that Keurig Canada's claims describing the steps required to prepare its pods for recycling were false or misleading in certain municipalities. Specifically, the Bureau concluded that while Keurig Canada's recyclable claims suggest to consumers that by peeling the lid off and emptying out the coffee grounds, the pods could be recycled, some local recycling programs require additional steps to recycle the pods.[22] As a result of the consent agreement between the Bureau and Keurig Canada following this investigation, Keurig Canada was required to pay a $3 million penalty, donate $800,000 to a Canadian charitable organisation focused on environmental causes, and pay an additional $85,000 for the costs of the Bureau's investigation. Pursuant to the consent agreement, Keurig Canada agreed to change its recyclable claims and the packaging of certain pods, and publish corrective notices about the recyclability of its product on its websites, on social media, in national and local news media, in the packaging of all new brewing machines and via email to its subscribers.[23]

Notably, in commenting on the conclusion of the Keurig investigation, the Commissioner reiterated the Bureau's concern over the increase of greenwashing marketing practices and its commitment to consumer protection. The Commissioner stated: "portraying products or services as having more environmental benefits than they truly have is an illegal practice in Canada. False or misleading claims by businesses to promote "greener" products harm consumers who are unable to make informed purchasing decisions, as well as competition and businesses who actually offer products with a lower environmental impact".[24]

ii) Private Enforcement

Under section 36 of the Act, an individual can bring a suit before either a Provincial Superior Court or the Federal Court with respect to conduct contrary to the criminal offences of the Act—including the criminal misleading advertising provisions—if that individual suffered loss or damage as a result of the conduct. Where successful, a plaintiff can recover single and actual damages suffered (i.e., full and fair compensation which places the

plaintiff in the same position it would have been in but for the conduct).[25] The Act also allows private actions to proceed by way of class action, which is the most common form of private competition proceeding in Canada.

A number of class actions have been pursued which allege greenwashing contrary to the Act, among other laws. For example:

- Class action lawsuits were pursued in relation to the Volkswagen, Audi, and Porsche emissions representations, discussed above. In relation to the conduct underlying the 2016 Volkswagen/Audi Consent Agreement, a class action resulted in a settlement requiring Volkswagen and Audi to pay $2.1 billion to consumers.[26] In relation to the conduct underlying the 2018 Volkswagen/Audi/Porsche Consent Agreement, a class action resulted in a settlement of $290.5 million, representing buyback, repair, and restitution payments for affected customers.[27]

- In *Kalra v Mercedes Benz*,[28] a class action was brought on behalf of all persons and corporations in Canada who own, owned, lease or leased a BlueTEC Mercedes-Benz vehicle between 2006 to 2016. The plaintiff alleged the vehicles contained a defect or "defeat device" that turned off the emission control system when the ambient air temperature dropped below 10 degrees Celsius, resulting in the emission of high and illegal levels of nitrogen oxide pollution. The class action alleges a wide range of statutory and common law claims, including that false or misleading statements were made contrary to the Act.

In addition to private enforcement under the Act, Ad Standards, a private self-regulatory body, also monitors misleading advertising in Canada. Ad Standards' mandate is to build "public confidence in advertising by helping ensure ads in all media, are truthful, fair and accurate." Essentially, Ad Standards will investigate complaints from private parties regarding alleged misleading advertising. Where an advertisement is found to contravene Ad Standards' code, Ad Standards will "name and shame" the company, posting a summary of its decision on the Ad Standards website.

Ad Standards has published the *Canadian Code of Advertising Standards* (the "**Code**") which sets criteria for acceptable advertising and provides a mechanism for adjudicating and resolving consumer complaints and competitive disputes.[29] With respect to environmental claims, Ad Standards has noted that in most cases it would review these under Clause 1 of the Code: Accuracy and Clarity.

Ad Standards has investigated various environmental claims, including the following:

- In 2020, an advertisement which claimed the product used less water than its competitors and "joked" about the benefits of using less water was found to be in contravention of Clause 1(a) of the Code. Although it had evidence to support the comparative claim, it was found to contravene the Code on the basis that the "joked" about benefits of using less water were exaggerated and may be taken seriously as "water scarcity is a very serious issue". [30] The company in this case was not identified.

- In 2019, an unidentified transit advertisement claimed that natural gas was a more environmentally friendly choice. Ad Standards found that the correct frame of reference for the advertisement was in relation to residents of British Columbia where the advertisement was seen. In that context, the general impression created would be a likely comparison of hydro against natural gas. The advertisement did not clearly indicate that the claim was based, instead, on a comparison with coal and accordingly was found to contravene Clause 1 (b) of the Code.[31]

- In a 2018 television commercial, an advertiser specifically claimed that the advertised product could improve the environment in certain specified ways. Ad Standards found that the evidence provided did not support the claim and as such the claim was in contravention of Clause 1(a) and (e) of the Code. The company in this case was not identified.

- In 2017, Ad Standards found that an advertisement by real estate group, claiming that its new condominium development would not impact a nearby fish hatchery and aquifer was contrary to Clause 1(a) and (e) of the Code as, among other things, the claim was unsupported by the evidence provided to Ad Standards. [32]

- In 2017, in a newspaper advertisement about making sustainable energy choices, an advertiser used the words "renewable natural gas". The advertiser explained that "renewable natural gas" (as opposed to conventional natural gas) is produced from decomposing organic waste from landfills, agricultural waste, and wastewater from treatment facilities. However, as the advertisement contained no explanatory statement clarifying that it was referring to "renewable natural gas" as opposed to conventional natural gas, Ad Standards

found that the impression the advertisement conveyed was misleading and, as such, the advertisement was in contravention of 1(a) and (d) of the Code.[33] The company in this case was not identified.

b) What Guidance is currently available to Canadian Businesses?

i) Guidance from the Competition Bureau

In 2008, the Bureau published *Environmental Claims: A guide for industry and advertisers* (the "**Environmental Claims Guide**"), which was intended to act as guidance with respect to the Bureau's enforcement of the misleading advertising provisions of the Act, the *Consumer Packaging and Labelling Act,* and the *Textile Labelling Act* in the context of environmental claims. The Environmental Claims Guide was released in conjunction with the CSA.

The CSA is a standard setting body affiliated with the Standards Council of Canada (the "**SCC**"). The SCC represents Canada at the International Organization for Standardization (the "**ISO**") - a worldwide federation of national standards bodies. The ISO publishes various standards which, while not mandatory, are adopted by many organizations internationally and generally serve as a best practices guide. The CSA/ISO have adopted several standards related to environmental claims. These include *CAN/CSA ISO 14021: Environmental labels and declarations—Self declared environmental claims (Type II environmental labelling)* ("**ISO 14021**"). The Environmental Claims Guide was based on a large part on the version of ISO 14021 published in 1999 and was intended to act as a best practice guide with respect to the application of ISO 14021 in addition to acting as guidance with respect to the application of the Act to Type II Claims. Further environmental claims standards published by the CSA are discussed below in more detail.

As of November 4, 2021, the Environmental Claims Guide was archived by the Bureau.[34] The Bureau noted that the Environmental Claims Guide may not reflect its current policies or practices and acknowledged that the Environmental Claims Guide does not reflect the latest standards and evolving environmental concerns. The guide will remain available for reference, research, and recordkeeping purposes, but it will not be altered or updated as of the date of archiving. Unfortunately, no new substantive guidance has yet been published by the Bureau in place of the Environmental Claims Guide, and there has been no suggestion of when such guidance should be expected. In the meantime, the Bureau offered limited guidance

in a bulletin dated November 3, 2021 (the "**2021 Greenwashing Bulletin**"), stating simply that advertisers should be sure that all environmental claims:

- are truthful and aren't misleading;
- are specific (*be precise about the environmental benefits of the product*);
- are substantiated and verifiable (*claims must be tested and all tests must be adequate and proper*);
- do not result in misinterpretations;
- do not exaggerate the environmental benefits of the product; and
- do not imply that the product is endorsed by a third-party organization if it is not.[35]

The 2021 Greenwashing Bulletin also notes that businesses should avoid vague claims such as "eco-friendly" or "safe for the environment", and that all claims should be, as applicable, based on adequate and proper testing.[36] Additionally, the Bureau stated that when assessing environmental claims, it may consider national and international standards, technological and scientific advances, consumer behaviour and other legal requirements. Accordingly, companies should similarly take each of these into consideration.

While the Environmental Claims Guide has been archived, it does remain available for reference. Moreover, while any new guidance will likely be substantially updated with respect to new and cutting-edge issues (such as sustainability and carbon neutral claims), one would expect that any new guidance from the Bureau will incorporate prior positions taken in relation to some of the more well established issues (such as issues with respect to recycling claims). Additionally, the Environmental Claims Guide remains the only detailed, substantive guidance provided by the Competition Bureau. As such, this guide may assist companies in the interim period until new guidance is provided by the Bureau, and it may also assist in predicting what updated guidance from the Bureau can be expected to look like. Accordingly, an overview of the Environmental Claims Guide is discussed below. However, companies should be cautious with respect to reliance on these guidelines.

The Environmental Claims Guide, as noted above, related to self-declared green claims (Type II claims, as defined by the CSA). As such, this guide did not assist businesses and industries in complying with the *Competition Act*

with respect to other types of green claims, such as the use of third-party certified eco-labels and logos.

The Environmental Claims Guide defined an environmental claim as "[a]ny statement or symbol that refers to, or creates the general impression that it reflects, the environmental aspects of any product or service …".[37] It also set out general requirements for all claims, as well as specific requirements with respect to the use of certain symbols and certain types of comparative claims.

The general requirements included the following:

- **Accurate and Verifiable**: While self-declared environmental claims specifically do not require third-party verification of supporting data prior to making the claim, the data relied on to make the claim must be available and accurate. As such, if claims are based on confidential business information which is not generally available for verification, a third party should have audited this claim. With respect to verification methodologies, ISO 14021 includes specified verification methodologies for certain types of claims defined in the standard, and includes a hierarchy of test methods that should be used for all other types of claims. Additionally, to be considered accurate, claims should be continually reassessed and updated to reflect changes in technology, competitive products or other circumstances that could affect the accuracy of the claim.

- **Life Cycle Considerations**: The Environmental Claims Guide emphasizes that the entire life cycle of a product should be considered before making claims. This includes everything from raw material acquisition or generation of natural resources to final disposal of the product, and every step in between. While a complete life cycle analysis is not mandated by the Environmental Claims Guide, it is emphasized that the entire life cycle should be considered.

- **Meaningful/ Relevant**: Claims should be made in an appropriate context and setting. For example, claims should only relate to an environmental aspect that either exists or is likely to be realized, during the life of the product. If a material is technically capable of being recycled, but recycling facilities for that material do not exist in the relevant geographic area (and are not likely to be built during the life of that product), it should not be claimed that it is recyclable. By way of further example, if a claim is based on a pre-existing but previously undisclosed aspect of a product, it should be presented in a manner

that does not lead consumers to believe that the claim is based on a recent product or process modification. If soaps used for dishes have never contained phosphate, a simple "phosphate-free" claim attached to the dish soap is inappropriate.

- **Specific**: An environmental claim that is vague or non-specific or which broadly implies that a product is environmentally beneficial or environmentally benign should not be used. Moreover, the claim should clearly specify to what aspect of the product it applies and should be specific as to the environmental aspect or environmental improvement which is claimed. Claims such as "environmentally friendly", "ecological (eco)", and "green" are examples of vague claims and should be reserved for products/services whose life cycles have been thoroughly examined and verified (this will require more comprehensive test results than fact specific claims, such as "contains no chlorine"). In most cases, it is best to avoid these types of vague claims. Additionally, if a comparative assertion of environmental superiority or improvement is made, a company must be specific and clear with respect to the basis for the comparison.

- **Reasonable Terminology**: In general, claims should use terminology that is unlikely to result in misinterpretation, and any likely or obvious ambiguities should be avoided. Consideration should also be given to literacy levels in the countries where the product is being sold when selecting terminology. Any claim that, despite being literally true, is likely to be misinterpreted by purchasers or is misleading through the omission of relevant facts should be avoided. Environmental claims should not be restated using different terminology to imply multiple benefits for a single environmental change. Moreover, no claim should, either directly or by implication, suggest an environmental improvement exists which does not exist, or exaggerate the environmental claim or its impact.

- **Explanatory Statements:** Self-declared environmental claims should be accompanied by an explanatory statement if the claim alone is likely to result in misunderstanding. This explanatory statement must itself not be misleading and must be presented in a manner that clearly indicates that the environmental claim and explanatory statement should be read together. For example, the explanatory statement should be of reasonable size and in reasonable proximity to the environmental claim it accompanies.

Some of the specific guidance provided in the Environmental Claims Guide included guidance on the following issues:

- claims of "… free" i.e., "pesticide free";
- claims using specific terms, including: sustainable, compostable, degradable, designed for disassembly, extended life product, recovered, recyclable, recycled content, reduced energy consumption, reduced resource use, reduced water consumption, reusable and refillable, and waste reduction;
- comparative claims; and
- the use of symbols (including both original symbols and wellknown symbols such as the recycling Mobius loop).

There were two major limitations to the Environmental Claims Guide, which will hopefully be remedied by the Bureau if it provides new guidance. First, as noted above, it only applied to Type II claims (self declarations) and therefore did not provide companies with guidance with respect to the Bureau's approach to other types of claims, including the use of third party-verified environmental labels.

Second, the Environmental Claims Guide was more than 12 years old when it was archived. The ISO standard that it was based upon (published in 1999) was replaced in 2016 with a new version of ISO 14021 and was further amended in 2021. As acknowledged by the Bureau, due to its age, the Environmental Claims Guide failed to provide relevant guidance on current key issues. For example, with respect to sustainability claims, the Environmental Claims Guide noted:

> … The concepts involved in sustainability are highly complex and still under study. At this time there are no definitive methods for measuring sustainability or confirming its accomplishment. Therefore, no claim of achieving sustainability shall be made …

Sustainability has become an increasingly important topic in recent years and there are many tools and methodologies that have been created to measure it.[38]

While the Environmental Claims Guide is incomplete and out of date, it at least provided some substantive guidance to companies. Archiving these guides without providing improved and updated guidance leaves companies in a decidedly worse and more uncertain place than before. While some

of the guidance contained in the Environmental Green Guides was obviously out of date and should not have been followed (for example, with respect to sustainability claims), it is likely that some of the guidance was useful and may still be reflective of the Bureau's current approach.

Since publishing the Environmental Claims Guide in 2008, the Bureau published additional limited guidance with respect to environmental claims:

- In 2017, the Bureau published a bulletin focusing on overly vague claims which use terms such as "organic", "green", "eco-friendly", "biodegradable" or "safe for the environment".[39] The bulletin emphasized that claims should be, among other things, accurate, specific, substantiated, and verifiable. While this publication from the Bureau signalled that it may be taking a closer look at overly "vague" green claims, it did not provide any additional meaningful guidance.

- On January 26, 2022, the Bureau published a short notice advising consumers to "[b]e on the lookout for greenwashing."[40] This notice highlighted that there has been an increase in false and misleading environmental claims in Canada and encouraged consumers to be vigilant with respect to potential greenwashing. Among other things, this notice also highlights the need for adequate evidence and the fact that vague or broad statement such as "eco-friendly" and "safe for the environment" should not be used without further explanation.

- On April 4, 2022, the Bureau published its 2022/2023 Annual Plan (the "**Annual Plan**"), in which it noted that it will be holding a summit focused on the role of competition policy and enforcement in the green economy.[41]

While each of the above publications by the Bureau shows its increased interest in greenwashing, they provide little guidance to businesses wanting to comply with misleading advertising laws.

ii) Guidance from the Canadian Standards Association

As noted above, the CSA has released several environmental claims standards. While these standards are not binding, and while the CSA, ISO and SCC have no power to enforce these standards, they are accepted in many industries as best practices guides and are adopted by many international organizations. ISO standards are also endorsed by various other internationally recognized eco-labelling bodies, such as the Global Ecolabelling Network.

These CSA standards can be viewed as best practices. The fact that the Bureau largely adopted the 1999 version of ISO 14021 with respect to Type II claims in its Environmental Claims Guide suggests that it is likely to look to the updated ISO 14021 guidance on Type II claims. Further, it may look to ISO guidance on other types of environmental claims as well in applying the false or misleading representation provision of the Act. Considering the Bureau's recent archiving of the Environmental Claims Guide, the updated ISO 14021 standard may now provide the best guidance available with respect to how the Bureau may approach environmental claims.

The following additional ISO guidelines also consider environmental claims and were cited briefly by the Bureau in the Environmental Claims Guide:

- CAN/ISO 14020: Environmental labels and declarations—General Principles
- CAN/ISO 14024: Environmental labels and declarations—Type I environmental labelling—Principles and procedure
- CAN/ISO 14025: Environmental labels and declarations—Type III environmental declarations

iii) Guidance from Ad Standards

Ad Standards has provided general advice on green claims and has also noted that it will take the guidance published by the Bureau (discussed above in more detail) into consideration.[42] Ad Standards will generally consider the following factors:

- Does the environmental benefit claimed for the product appear to be supported by science-based evidence?
- Is the scientific evidence that is being used to substantiate the claim generally well-recognized and accepted by authorities on the subject?
- Is the advertisement unbalanced by singling out one environmentally positive attribute of the product while ignoring other characteristics or issues that may be harmful to the environment?
- Does the advertisement make absolute and unqualified claims, such as "environmentally friendly" or "not harmful to the environment"? Or does the advertiser qualify its claims by appropriately communicating a product's limitations?

c) Enforcement under Other Legal Regimes

In addition to competition laws, green claims by companies could potentially be in contravention of various other laws which similarly regulate misleading advertising and misrepresentations, including securities laws, provincial consumer protection laws and industry specific regulation.

i) Securities Law

Misrepresentations made by public companies, including misrepresentations with respect to the environmental benefits of products, may create liability for a company under securities laws.

Under provincial securities laws, publicly traded companies have certain mandatory disclosure requirements. These include periodic disclosure requirements (including publication of annual financial statements, a management's discussion and analysis, and an annual information form) as well as timely disclosure requirements (including publication of material changes and material contracts, and disclosure required in a prospectus or meeting circular.).

Any misrepresentations made by companies, either in this mandated disclosure or otherwise may be found to be in contravention of, among other things, provincial securities laws, such as the *Ontario Securities Act* (the "**OSA**"), and can give rise to a private right of action by an individual that has relied on that representation to their detriment.[43] Moreover, a misrepresentation in any material, evidence or information submitted to the Ontario Securities Commission ("**OSC**") may give rise to an offence under the OSA. Upon conviction of such an offence, a person or company can be liable to a fine of not more than $5 million or (in the case of an individual) of imprisonment for a term of not more than five years less a day, or both. Accordingly, greenwashing—as a form of misleading representation—is also potentially punishable under securities laws.

For example, Greenpeace has brought several complaints against Kinder Morgan Canada ("**Kinder**") with the Alberta Securities Commission ("**ASC**"), OSC and Canadian Securities Administrators (for the purposes of this section, the "**CSA**"). Greenpeace initially alleged that Kinder failed to provide "full, true and plain" disclosure of material facts relating to the securities issued or proposed to be distributed in connection with its initial public offering. The allegations related to Kinder's reliance on so called "outdated" oil demand projections and "inadequate" disclosures on the impact that climate-related risks might have on its business.[44] After Kinder's

completion of its initial public offering, Greenpeace brought a subsequent complaint to the OSC (which was passed on to the ASC), alleging incomplete disclosure of climate-related risks in Kinder's first annual report.[45] The ASC agreed to review the complaint, but the results were not disclosed.

Recently, there has been increased pressure for companies to make more environmental, social and governance ("**ESG**") related disclosure: with more ESG statements meaning more chances for public companies to make (inadvertent) greenwashing claims.[46] In this regard, the OSC published a staff notice in 2019 (the "**Staff Notice**") emphasizing the requirements for companies to disclose environmental (and particularly, climate-change) related risks.[47] The notice revealed that 22% of issuers provided boilerplate climate change-related disclosure and another 22% provided no disclosure at all.[48] Additionally, on May 17, 2021, Bill 294, *Securities Amendment Act (Climate Risk Financial Disclosure), 2021* passed the first reading.[49] If it receives royal assent, issuers and reporting issuers will be required to conduct climate-related risk assessments to identify material facts and material changes for the purposes of the *Securities Act*.[50] Further, the OSC's priorities for the 2021–2022 year included a discussion of increased ESG disclosure,[51] and this issue was also considered by Ontario's Capital Markets Modernization Taskforce in their final report.[52]

The CSA is also recognizing the need for ESG-related disclosure in the investment fund industry specifically, as recently emphasized in Staff Notice 81-334.[53] While this notice does not create new legal requirements or modify existing ones, it does clarify and explain how the current securities regulatory requirements apply to ESG-related investment fund disclosure and sets out best practices to enhance ESG disclosure and communications. The Staff Notice specifically refers to the potential for ESG disclosure to mislead investors.[54]

In response to the Staff Notice and movement toward mandatory climate-related disclosure standards, the CSA recently proposed National Instrument 51-107 *Disclosure of Climate-related Matters* and a companion policy.[55] The proposed instrument would introduce substantive disclosure requirements regarding climate-related matters and also require that such disclosure be made in a consistent format (to improve the comparability of the information issuers disclose).[56] The proposed instrument would apply to all reporting issuers (excluding investment funds), issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable securities issuers and certain credit support issuers.[57] Disclosure

requirements are related to four core elements set out by the Task Force on Climate-related Financial Disclosures ("**TCFD**"):[58]

- **Governance**: Reporting issuers would be required to disclose the organization's governance around climate-related risks and opportunities.
- **Strategy**: Reporting issuers would be required to disclose the actual and potential impacts of climate-related risks and opportunities on the organization's business, strategy, and financial planning where such information is material.
- **Risk Management**: Reporting issuers would be required to disclose how the organization identifies, assesses, and manages climate-related risks.
- **Metrics and Targets**: Reporting issuers would be required to disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.

Reporting issuers would be required to disclose the information regarding "governance" and "risk management", while the required information regarding "strategy" and "metrics and targets" would only be required where such information is material.[59]

Accordingly, as companies increase the amount of environmental disclosure they are required (or encouraged) to make, there is a corresponding heightened risk of misrepresentations arising from such disclosure. In fact, the CSA, along with the OSC and the British Columbia Securities Commission, have recently undertaken a sweep of public companies disclosure to ensure compliance with securities laws focusing on the ESG claims made by investment fund managers.[60]

Similar sweeps have been done in the United States by the Securities Exchange Commission (the "**SEC**") and a related Climate and ESG Task Force has been established by the SEC.[61] The International Organization of Securities Commissions has also established a task force focused on sustainability related disclosure made by public companies and asset managers.[62] Moreover, on March 30, 2022, the SEC, Division of Examinations issued its 2022 Examination Priorities Report, which specifically includes reference to "greenwashing".[63] The Division of Examinations plans to focus on ESG-related advisory services, investment products, and private fund offerings. The Division of Examinations will also continue to focus on ESG-related advisory services and investment products. More specifically,

it will focus on whether ESG investing approaches are accurately being disclosed and whether registered investment advisors and registered funds have implemented policies, procedures, and practices in connection with their ESG-related disclosures. The Division of Examinations will also review whether proxy votes align with ESG-related disclosures and mandates, as well as whether there are misrepresentations of ESG factors with respect to portfolio selection.[64]

Other jurisdictions are also increasing focus on environmental claims in financial and public company disclosure including, for example, Switzerland,[65] France,[66] the European Union,[67] Australia,[68] Germany,[69] and Singapore.[70]

ii) Consumer Protection Laws

Most provinces have consumer protection legislation in place to protect consumers from unfair or deceptive practices including false, misleading, or deceptive representation.[71] Accordingly, these laws will also capture misleading advertising with respect to environmental claims.

For example, in Ontario, section 14 of the *Consumer Protection Act* (the "**CPA**") states that it is an unfair practice for a person to make a false, misleading, or deceptive representation. Subsection 14(2) of the CPA sets out a list of examples, including "a representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not."[72] The remaining provinces and territories have substantially similar provisions in their consumer protection legislation.[73]

Individuals may bring private actions under these laws, including with respect to false or misleading environmental claims. For example, in a proposed class action, the case of *Maginnis v FCA Canada Inc.,* the plaintiffs sought to certify certain common issues under the CPA. Certification was ultimately denied in part because the plaintiffs failed to adduce any evidence of harm or loss, and that without any such evidence, the action was not suitable for certification as a class action.

iii) Industry Specific Regulation

Certain specialized industries also have their own regulations which, in some cases, will contain general misleading advertising provisions that could capture misleading environmental claims.

For example, the food and beverage industry has several statutes in place to protect consumers from misrepresentation regarding the origin and

content of food, or the manner in which food was prepared. Section 5(1) of the *Food and Drugs Act* prohibits the labelling, packaging, treatment, processing, sale or advertising of food "in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."[74] In 2018, Cericola Farms Inc. ("**Cericola**") pled guilty to two counts of violating subsection 5(1) of the *Food and Drugs Act* for mislabelling conventional poultry as organic. The Canadian Food Inspection Agency investigated Cericola and determined that approximately 286,000 kilograms of poultry was sold "in a manner likely to create an erroneous impression of its character and nature." Cericola was ordered to pay total fines of $400,000.[75]

Similarly, the regulations under the *Drug and Pharmacy Regulation Act* ("**DPRA**")[76] and the *Pharmacy Act77* address false and misleading statements/advertisements by the general public and by pharmacists, respectively. Specifically, the General Regulation made under the DPRA prohibits anyone from falsely advertising a pharmacy or its services.[78] The General Regulation under the *Pharmacy Act* states that a pharmacist shall not publish, display, distribute or use an advertisement relating to drug services that is false, misleading, or deceptive, whether because of the inclusion of information or the omission of information.[79]

Additionally, the Pharmaceutical Advertising Advisory Board, an independent advisory board which grants preclearance of pharmaceutical advertising and certifies such advertising as compliant with its code, includes provisions against misleading advertising in its code. For instance, its code requires that all advertising be accurate, complete, and clear and be presented in a manner that accurately interprets valid and representative research findings.[80]

Accordingly, companies which operate in a regulated industry, such as food or pharma, should be cognizant of the additional misleading advertising regimes governing such industry, and should consider how these regimes may apply to environmental claims specifically.

3. Greenwashing in Other Jurisdictions

As noted above, scrutiny over green claims is not unique or isolated to Canada. Regulatory bodies around the world are focusing on these claims and the challenges that they represent when it comes to enforcement. Below are brief discussions of how this issue is being tackled in some jurisdictions where there has recently been an increased focus on regulating green claims.

a) United States

In the United States, green marketing is subject to scrutiny from the Federal Trade Commission (the "**FTC**"). Section 5 of the *Federal Trade Commission Act*, 15 U.S.C. § 45 (the "**FTC Act**") prohibits deceptive acts and practices in or affecting commerce. This would include certain marketing claims, including environmental claims that are unfair or deceptive. The FTC can prosecute such claims under the FTC Act.

The FTC published *Part 260—Guides for the Use of Environmental Marketing Claims* (the "**FTC Green Guides**")[81] to help businesses navigate environmental claims. First published in 1992, and revised most recently in 2012, the FTC Green Guides set out the following general principles that apply to all environmental marketing claims:

- qualifications and disclosures should be clear, prominent and understandable in order to prevent deceptive claims;
- unless it is clear from the context, an environmental claim should specify whether it refers to the product, packaging, service or just to a portion of the product, packaging or service;
- an environmental claim should not overstate, directly or by implication, any environmental attribute or benefit; and
- comparative environmental marketing claims should be substantiated and clear to avoid consumer confusion about the comparison.

Additionally, the FTC Green Guides caution against "general environmental benefit" claims (i.e., "eco-friendly" or "green") as they can be vague and misleading and also provide specific guidance on several targeted issues, including with respect to carbon offsets, certifications and seals of approval, "free of" claims, and claims using specific terminology (such as "compostable", "degradable", "non-toxic", "ozone-safe", "recyclables", or "renewable"). Notably, the FTC Green Guides do not specifically address claims pertaining to sustainability, or the use of the terms "natural" or "organic." In this regard, the FTC has stated that it "lacks a sufficient basis to provide meaningful guidance".[82] This mirrors the Bureau's hesitancy to provide guidance on sustainability and highlights that the FTC may also need to take another look at the progress made in tracking and measuring sustainability.

The FTC also published a Statement of Basis and Purpose ("**Statement of Basis**") which provides additional context for the FTC Green Guides.[83] The Statement of Basis provides an overview of the Green Guides and further discusses:

- general issues, including industry compliance;
- harmonization of the FTC Green Guides with international law or standards;
- life cycle-related issues;
- issues relating to specific environmental marketing claims addressed in the FTC Green Guides; and
- why certain claims are not addressed in the FTC Green Guides (including sustainable, organic and natural claims).

The Statement of Basis also notes that, while the FTC Green Guides are harmonized with ISO 14021 where possible, they are not entirely aligned due to the differential nature and purpose of the FTC Green Guides and ISO 14021. This is quite different from the Bureau's approach which was to adopt as part if its Environmental Claims Guides a substantial amount of the guidance set out in ISO 14021. The FTC noted that the CSA and ISO 14021 are concerned not only with preventing false and misleading claims, but also with encouraging the supply of more environmentally friendly products. Alternatively, as a regulatory enforcement agency, the FTC is focused only on preventing the dissemination of misleading claims, and it is not within its mandate to otherwise encourage or discourage environmental claims. Accordingly, the FTC's approach will not always align with ISO standards.

Notably, the FTC Green Guides are included in the FTC's regulatory review schedule which was published in July 2021 and are set to be updated for 2022.[84] The FTC has also announced that it is seeking public comment on revisions to its "energy labeling rule" which will allow consumers to more accurately compare the estimated annual energy consumption appliances before they buy them.[85] Changes made to these guidelines in the United States, and whether this leads to increased enforcement with respect to environmental claims in the United States, should be watched closely by Canadian companies. It is not uncommon for the Canadian competition authority to mirror the United States with respect to substantive changes to antitrust/consumer protection law, or enforcement priorities.

With respect to public enforcement of environmental claims in the United States, there have been numerous complaints filed with the FTC and investigations undertaken be the FTC. For example:

- In February 2021, a coalition of national and regional research, policy, and advocacy organizations filed a complaint with the FTC against Smithfield Foods Inc. ("**Smithfield**"), a large pork producer. The complaint was related to Smithfield's advertising relating to the company's sustainability efforts and environmental records. The coalition collectively called on the FTC to investigate and subsequently remove what they alleged were misleading claims.[86]

- In March 2021, several environmental groups, including Global Witness, Greenpeace, and Earthworks, filed a false advertising complaint with the FTC against Chevron Corporation. The groups (citing the FTC Green Guides) alleged that that the oil company had misled consumers regarding its actions to combat climate change by exaggerating its investment in renewables when in fact Chevron Corporation had only spent 0.2% of its capital expenditures on lower-carbon energy sources.[87]

- In April 2022, the Department of Justice (the "**DOJ**") (on behalf of the FTC) initiated an action against Kohl's, Inc. and Walmart, Inc. for allegedly falsely marketing rayon textile products as bamboo. The action also alleges that these companies are making deceptive environmental claims by representing that the so-called bamboo textiles were made using ecofriendly processes. The DOJ alleges that the process used to turn bamboo into rayon includes the use of toxic chemicals and produces hazardous by-products, and, as such, is not "ecofriendly". The DOJ is asking the court to impose penalties of USD$2.5 million and USD$3 million against Kohl's, Inc. and Walmart, Inc., respectively.[88]

As in Canada, there are also numerous additional consumer protection statutes in the United States aside from the FTC Act which provides public bodies and/or private individuals rights of action with respect to misleading representations or deceptive marketing. For example:

- Several greenwashing cases were brought in 2020 under the *California Business and Professions Code*, including *Bush v Rust-Oleum Corporation*,[89] *Toth v SC Johnson & Son, Inc.*,[90] and *Moran v SC Johnson and Son, Inc.*,[91] each involving claims that the products were "non-toxic" when the products were allegedly harmful to the environment. While *Bush v Rust-Oleum Corporation* was dismissed pursuant to a

settlement agreement, the case of *Toth v SC Johnson & Son, Inc*. was voluntarily dismissed[92] and the outcome of *Moran v SC Johnson and Son, Inc*. is still pending.[93]

- In 2021, the City of New York brought a securities fraud case against Exxon Mobil Corp., ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, BP p.l.c., BP America Inc., and American Petroleum Institute for engaging in deceptive trade practices in violation of NYC Code § 20-700.[94] The action alleged that the defendants deceived investors with respect to how it accounted for the cost of future climate-change regulation. More specifically, the claims included: (i) misrepresenting the purported environmental benefit of using the defendants' fossil fuel products and failing to disclose the risks of climate change caused by those products, including by; and (ii) deceiving New York City consumers by engaging in false and misleading greenwashing campaigns.[95]

Notably, the court ruled in favour of the defendants, noting that allegations of deception and misrepresentation must be substantiated and suggesting that the burden of proof falls on the accuser and not the accused. More specifically, the court found that the State did not present testimony that "any shareholder had been misled" nor that the defendants had made "any material misrepresentations" that would have misled a reasonable investor".[96]

- Between 2019 and 2020, there were also several civil actions filed involving misleading environmental advertising, including *Food & Water Watch Inc. v Tyson Foods Inc.*[97] (which alleged that Tyson Foods Inc. misled customers to believe that its poultry products were produced in an environmentally responsible way), and *Briseno v ConAgra Foods, Inc.98* (which disputes the use of "100% natural" on a product).

- In October of 2021, in a matter related to the investigation by the Bureau into Keurig Canada's recyclability claims (discussed above), Keurig Green Mountain ("**Keurig**") reportedly came to an agreement to a settle a class-action suit filed by a consumer in the United States District Court for the Northern District of California over similar alleged misleading recyclability claims. Keurig allegedly advertised that their single-use coffee pods were recyclable in various claims on their website and other promotional materials for the products despite the pods themselves not being recyclable or reusable, thus making

these claims "false and misleading" to the extent that "ordinary consumers, are likely to be deceived by such representations".[99] Keurig entered into a settlement, where it agreed to pay USD$10 million. Pursuant to the settlement, Keurig will not label, market, advertise, or otherwise represent that its products are recyclable (through use of the word "Recycling" or through the conspicuous use of the 'Chasing Arrow' symbol) without clearly and prominently including a revised qualifying statement, "Check Locally—Not Recycled in Many Communities".[100]

- Oatly Group AB ("**Oatly**") is facing a class action lawsuit brought in the Southern District of New York in July 2021.[101] The lawsuit alleges that Oatly made false and misleading statements about its sustainability practices and impact, among other things, by making Oatly's product (oatmilk) appear more sustainable than it actually is. The complaint was dismissed by the court in October 2021, but the court permitted the plaintiffs to re-submit amended pleadings.[102]

b) European Union

The *Unfair Commercial Practices Directive*[103] in the European Union (the "**EU**") captures misleading advertising in general, including green claims. However, the EU is also working towards improving its consumer protection legislation with respect to green claims more specifically.

As part of the EU's initiative to tackle greenwashing, the European Green Deal[104] includes considerations relating to environmental advertising and notes that "[c]ompanies making 'green claims' should substantiate these against a standard methodology to assess their impact on the environment". Environmental claims are also noted in the comprehensive report and action plan on the "circular" economy,[105] which was adopted by the EU in 2020 in connection with the European Green Deal.[106]

In connection with these initiatives, the European Commission has undertaken various public consultations. One public consultation (which closed in October 2020) focused on new policy directives that would:

- ensure that consumers obtain reliable & useful information on products, e.g., on their lifespan and repair options;
- prevent overstated environmental claims;
- prevent the sale of products with a covertly shortened lifespan; and

- set minimum requirements for sustainability logos & labels.[107]

The proposed directive resulting from the consultation has been published by the European Commission, and was open for feedback until May 29, 2022.[108] The proposed directive is focused on protecting consumers from, among other things, greenwashing practices and unreliable and non-transparent sustainability labels and information tools.

More specifically the proposed directive is aimed at, among other things:

- Ensuring that a trader can make an environmental claim related to future environmental performance only when this involves clear commitments;

- Ensuring that a trader can only compare products, including through a sustainability information tool, if they provide information about the method of the comparison, the products and suppliers covered, and the measures to keep information up to date;

- A ban on displaying a sustainability label which is not based on a certification scheme or not established by public authorities;

- A ban of generic environmental claims used in marketing towards consumers, where the excellent environmental performance of the product or trader cannot be demonstrated in accordance with Regulation (EC) 66/2010 (EU Ecolabel), officially recognised eco-labelling schemes in the Member States, or other applicable European Union laws, as relevant to the claim; and

- A ban on making an environmental claim about the entire product, when it actually concerns only a certain aspect of the product.[109]

A second public consultation (which closed in December 2020) was aimed at creating new regulations which would require companies to substantiate claims they make about the environmental footprint of their products/services by using standard methods for quantification.[110] Adoption by the European Commission of the results of this public consultation is expected in 2022.

c) United Kingdom

In the United Kingdom, the CMA can investigate how products and services claiming to be eco-friendly are being marketed and whether consumers could be misled.[111] The leading consumer protection legislation

which governs environmental advertising in the United Kingdom is the *Consumer Protection from Unfair Trading Regulations 2008* (the "**CPRs**"), which contain a general prohibition against unfair commercial practices and specific prohibitions against misleading actions or omissions.

On September 20, 2021, after completing a public consultation on the draft, the CMA published the long-awaited Green Claims Code (the "**Green Claims Code**")[112] which provides guidance to "help businesses to understand and comply with their existing obligations under consumer protection law when making environmental claims".[113] The Green Claims Code includes guidance with respect to making environmental claims on goods and services,[114] as well as a user-friendly checklist for businesses to follow.[115]

The guides set out basic principles for businesses regarding environmental claims, including encouraging businesses to:

- **Be Truthful, Up to Date and Accurate**: Businesses must live up to the claims they make about their products, services, brands, and activities. Notably, features or benefits that are necessary standard features or legal requirements of that product or service type, should not be claimed as environmental benefits;

- **Be Clear and Unambiguous**: The meaning that a consumer is likely to take from a product's messaging and the credentials of that product should match;

- **Not Omit/Hide Important Information**: Claims must not prevent someone from making an informed choice because of the information that is omitted. Information should be accessible to consumers and if it cannot fit in its entirety in a single advertising statement, it should be easily accessed by customers in another way (QR code, website, etc.);

- **Only make Fair and Meaningful Comparisons**: Any products compared should meet the same needs or be intended for the same purpose;

- **Consider the Full Life Cycle of the Entire Product**: When making claims, businesses must consider the total impact of a product or service. Claims can be misleading where they do not reflect the overall impact or where they focus on one aspect of a product but not another. Factors to consider in assessing the full cycle of the product

can include durability and disposability. Similarly, the claim should tell the whole story of a product or service; rather than relate to only one part of the product or service while misleading consumers about other parts or the overall impact on the environment; and

- **Be Able to Substantiate Claims**: Businesses should be able to back up their claims with robust, credible, and up to date evidence.[116]

In a press release published by the CMA on September 20, 2021, the CMA also emphasized that businesses should be "on notice", and warned that the CMA will carry out a full review of misleading green claims, both on and offline (e.g., claims made in-store or on labelling), at the start of 2022.[117] On January 14, 2022, the CMA announced that it has commenced its first review of compliance with the Green Claims Code in the fashion retail sector and plans to review other sectors in due course. If it considers a business to be engaged in "greenwashing", the CMA will take further action.[118]

Further, following a public consultation, the CMA recently proposed several recommendations for the government to amend the laws on providing environmental information to consumers.[119] The changes include setting standard legislative definitions for potentially misleading terms such as "carbon neutral" and "recyclable". These standard definitions would complement the CMA"s work on the Green Claims Code. The CMA also announced the creation of a Sustainability Task Force comprised of employees from the CMA as well as experts from outside organizations. General Counsel at the CMA has indicated that the Sustainability Task Force will clarify what businesses can and cannot do under competition and consumer laws while simultaneously advising the government on changes to assist the UK economy in delivering on its environmental responsibilities.[120]

The CMA has also recently partnered with ICPEN to conduct investigations into the prevalence of greenwashing,[121] and has stated that it "will increasingly devote and prioritize [its] resources to providing advice and support to central, local and devolved government on the impact of policies on competition and consumers in relation to climate change …".[122] Environmental claims clearly appear to be a key focus of the CMA moving forward. The CMA is also particularly interested in claims which concern climate change, as the CMA believes such claims are having a significant and wide-ranging impact on the UK economy and are consequently changing market dynamics and consumer behaviour.[123] In fact, according to some

estimates, the UK market for sustainable products before the COVID-19 pandemic was worth £41 billion.[124]

The United Kingdom's independent self-regulated agency, the Advertising Standards Authority (the "**ASA**"), also works to censure companies for a variety of misleading advertising practices.[125] The ASA administers various advertising codes published by its sister organization (the Committee of Advertising Practice ("**CAP**")), including separate codes for broadcasted advertising, and non-broadcasted advertising. Similar to Ad Standards in Canada, the ASA responds to complaints (and monitors ads on its own initiative), and its main sanctions include "bad publicity" for companies that refuse to work with the ASA to comply with its advertising codes. However, the ASA may also in some cases refer an issue to other regulatory bodies (such as Trade Standards) which can take legal action or impose other sanctions.[126]

The ASA's codes contain specific sections on environmental claims.[127] Generally, these sections of the code specify that advertisers should always: explain the basis of environmental claims; qualify claims where necessary; acknowledge whether informed debate exists; unless stated otherwise, use a 'cradle to grave' assessment when considering a product's environmental impact and make clear the limits of the life cycle; hold robust evidence for claims and comparisons and avoid misleading consumers by using confusing or pseudo-scientific claims.[128]

d) Recent Notable Events in Other Jurisdictions

i) France

On July 20, 2021, France adopted its new climate and resilience law (the "**Climate Law**"),[129] which came into force in part on August 24, 2021. This new law introduces provisions that prohibit greenwashing advertisements, as well as stricter requirements on goods/services manufacturers and distributors and punishments for offences against the environment. The objective of the law is to accelerate the "greening" of companies and consumers behaviours, in a variety of industries, including manufacturing, transportation and agriculture. Among other things, the Climate Law introduces a definition of misleading commercial practices that expressly targets false or misleading claims concerning the environmental impact of a good or service or the scope of the advertiser's commitments (including with respect to environmental matters). The Climate Law also specifically bans the use of any wording on a product, its packaging, or in advertising promoting a product or service which indicates that the product, service or

activity of the manufacturer is carbon-neutral or has no negative impact on the climate unless specified requirements are met.[130] These mandatory elements are:

- a greenhouse gas emissions report including the direct and indirect emissions of the product or service;
- the process by which the greenhouse gas emissions of the product or service are primarily avoided, then reduced and finally offset; and
- the terms of compensation for residual greenhouse gas emissions respecting the minimum standards.

The Climate Law also introduces stricter punishments including an increased monetary penalty imposed for all misleading commercial practices. Under the Consumer Code a fine of EUR 300,000 is normally imposed for each offence and may be increased up to 10% of the average annual turnover of the company and up to 50% of the advertising expenses incurred.[131] Notably, Article 11 of the Climate Law increases this rate to up to 80% of the total cost of the company's advertising expenses when the advertising is based on misleading environmental claims.[132] Additionally, for failing to comply with the mandatory elements needed in order to make an advertising claim that a good or service is carbon neutral, an administrative fine of EUR 20,000 is imposed for a natural person and EUR 100,000 for a legal person, with the possibility of an increase to the full amount of the expenses devoted to the illegal operation.

Some of the provisions of the Climate Law came into force immediately after the law was promulgated, while others will apply in 2022, 2023, 2025, and up to 2034. Many of the misleading advertising provisions will come into force on various dates in 2022.

ii) Australia

In 2016, the Australian Competition & Consumer Commission ("**ACCC**") brought an action against Kimberly-Clark Australia Pty Ltd alleging that it made false and misleading claims that its Kleenex Cottonelle toilet wipes were flushable.[133] The ACCC argued that labelling such products as "flushable" would mislead consumers into believing that the products would break up or disintegrate in a similar timeframe as toilet paper, when in fact these "flushable" wipes appeared to contribute to significant blockages in sewage systems. This case was dismissed at trial based on a failure by the ACCC to show that the wipes had caused real harm. This is notable, as

under Canadian competition law harm caused by the misrepresentation is not a required element under the false or misleading advertising provisions of the Act. The ACCC's subsequent appeal of this matter in 2020 was also dismissed. Notably, in 2019 a similar investigation was undertaken by the Bureau in Canada in response to a complaint filed by Friends of the Earth Canada and EcoJustice, on behalf of six individual Canadians,[134] regarding the "flushability" claims of wipes made by several companies. The complainants confirmed that the Bureau was investigating this matter, however the Bureau did not publicly confirm any investigations and did not publish any findings regarding this matter.[135]

In August 2021, an action was brought by the Australasian Centre for Corporate Responsibility against Santos Limited ("**Santos**") for alleged breaches of the Australian Consumer Law (the "**ACL**") (which contains a broad prohibition against misleading and deceptive conduct, and also contains a variety of false or misleading representation prohibitions with respect to specific aspects of goods and services) with respect to certain green claims made by Santos in its 2020 annual report.[136] The case also alleges breaches of Australian corporate law, namely the *Corporations Act 2001*. The action alleges, among other things, that the following statements made by Santos are misleading:

- that the natural gas Santos produces is a "clean fuel" and provides "clean energy"; and
- that Santos had a "clear and credible" plan to achieve "net zero" emissions by 2040.

Additionally, in March 2022, the Australian Securities and Investments Commission ("**ASIC**") and the ACCC announced their plans to take more action against greenwashing, and included consumer and fair trading issues in relation to environmental claims and sustainability as one of their compliance and enforcement priorities for 2022 and 2023.[137] The outgoing and incoming chairmen of the ACCC have both noted the ACCC's commitment to addressing greenwashing, with the outgoing chairman putting the manufacturing and energy sectors on notice as particular focus areas. ASIC, on the other hand, has announced its intention to review management and superannuation funds claiming to offer ESG alignment. The ASIC chair also encouraged boards to assess whether company disclosure and their promotion of ESG-focused products accurately reflects their practices in this area.[138]

iii) New Zealand

Recently, the New Zealand Commerce Commission (the authority responsible for enforcing New Zealand's competition laws) released updated guidelines with respect to how the Commerce Commission would apply the misleading advertisement provisions of the *Fair Trading Act* to environmental claims. The environmental claims guide, released in July 2020, sets out guiding principles, and also provides additional guidance with respect to lifecycle claims (including composition claims, production claims, and disposal claims), comparative claims, and certification claims (i.e., "certified organic").[139]

The principles set out in the guide include the following:

- Be truthful and accurate;
- Be specific;
- Substantiate your claims;
- Use plain language;
- Do not exaggerate;
- Take care when relying on tests or surveys; and
- Consider the overall impression.

The guide contains specific examples for each type of claim, showing businesses how these principals are applied. The guide also provides examples on key current issues including sustainability claims and carbon offset/carbon neutral claims.

iv) Netherlands

The Netherlands' Authority for Consumers and Markets ("**ACM**"), the authority responsible for enforcing competition laws in the Netherlands, has recently launched investigations into misleading sustainability claims in a variety of specific sectors, including energy, dairy, and clothing. [140] The ACM noted that these sectors were the focus of its investigation because sustainability plays a major role in consumers' purchasing decisions in these sectors.

These investigations followed closely the publishing of the ACM's new guidelines on sustainability.[141] These guidelines set out various "rules of

thumb", including that when making environmental claims companies should always:

- Make clear what sustainability benefit the product offers;
- Substantiate sustainability claims with up to date facts;
- Make only fair comparisons with other products, services, or companies;
- Be honest and specific about efforts regarding sustainability; and
- Make sure that visual claims and labels are useful to consumers, rather than confusing.

The ACM recognizes that 'sustainability' is a broad concept and that it may capture a variety of issues including environment, biodiversity, climate, public health, animal welfare, human rights, general working conditions and fair trade. More specifically, the ACM defines sustainability claims to refer to any environmental claims or ethical claims.

Additionally, in 2020, the ACM called out businesses for the use of misleading labels and logos. The ACM noted that there was a proliferation of labels and logos used by businesses touting environmental claims, but that "it is difficult for consumers to check whether these certificates are reliable and independent".[142] In its call out, the ACM emphasized that labels, logos and certificates must be correct and easy-to-understand.

v) Italy

On December 19, 2019, the Italian Competition Authority (the "**ICA**") fined Eni, an Italian oil and gas company, with the maximum monetary sanction of EUR 5 million for the dissemination of unfair commercial practices regarding environmental claims contrary to Articles 21 and 22 the *Italian Consumer Code*.[143] Eni's advertisements promoted Eni Diesel+ fuel as having a positive environmental impact, resulting in fuel consumption savings and reductions in greenhouse emissions. The ICA stated the misleading nature of the messages arose from Eni's so-called "Green Diesel" component and advertisements including the phrases "green component", "renewable component" and "helps protect the environment", which were wholly unfounded.[144]

The ICA found that Eni's advertising campaign circulated false and omissive information relating to the fuel's positive environmental impact. The

ICA also recognized that the increased sensitivity of consumers to environmental issues has made it easy for companies to mislead consumers by falsely representing the environmental benefits of their products or services. It clearly stated that "green" claims contained in advertising messages must: (1) precisely and unambiguously reflect the environmental benefits of the relevant products, (2) be scientifically verifiable, and (3) be communicated correctly.[145]

4. Looking Ahead

a) New Canadian Guidance Required

In Canada, there is in general a culture of compliance among businesses. However, in order for companies to be able to comply with laws, they require adequate guidance from regulators. The need for official guidance is compounded by the fact that in Canada—as compared to the United States, for example—there is a dearth of litigation. As such, businesses have limited case law to look to for assistance in interpreting and applying the law. Unfortunately, the current Canadian guidance with respect to environmental claims is, as seen above, also severely limited. As noted, the only substantive guidance from the Bureau has been archived, and the remaining available guidance provides only highlevel principles which do not provide much assistance to companies trying to apply the law to specific and complicated scenarios.

Given these issues, and given the increased interest in environmental claims, it seems clear that new guidance should be anticipated from the Bureau. But what exactly should businesses expect this new guidance to look like? While it is not possible to predict exactly what this guidance will be, we would hope that it is, among other things, principled, consistent and practical.

First, regulators should strive to take a cohesive approach to guidance in this area, taking into consideration, among other things, consistency with other regulatory regimes—both domestic and international. With respect to other domestic regimes, the Bureau should be cognisant of, and strive for consistency with: (i) CAN/ISO standards, (ii) sustainability standards being developed by a number of self-regulatory agencies, including the International Sustainability Standards Board,[146] the Global Reporting Initiative,[147] and the Sustainability Accounting Standards Board,[148] (iii) standards being developed in relation to public company and financial disclosure, including by the Task Force on Climate-related Financial Disclosures, and (iv) general consumer protection laws.

Moreover, the Bureau should look to the updated guidance being provided internationally. Given that many companies doing business in Canada are large, multinational companies which are required to comply with a variety of regulatory regimes, achieving at least some international convergence on these issues would reduce the transaction costs companies face when complying with various legal regimes. This would lead to efficiencies for these multinational companies, meaning reallocation of resources away from legal compliance and towards activities such as product development or customer service. Moreover, to the extent Canadian laws are easily understood and complied with by multinational companies, this will decrease friction for these companies to begin (or continue) operating in Canada, hence making Canada a more attractive place to do business.

Second, guidance provided by regulators should be practical and applicable, without being overly granular. From the perspective of the regulators, practical and pragmatic guidelines which businesses can easily interpret and apply will lead to higher levels of compliance, which not only reduces behavior that is potentially harmful to consumers and competition, but also decreases the resources regulators must spend on enforcement. Moreover, this is an evolving and fastmoving area with many emerging issues. As such, guidance that is too granular will risk being irrelevant and out of date in a short period of time, leading to more resources being spent on enforcement and additional updates to guidance. As such, any new guidance should be principled and flexible enough to accommodate changes in industries, technology, or our understanding of environmental and sustainability issues.

That being said, while over granularity will not be useful in the long run, any guidance provided should be specific enough to actually be helpful to companies. For instances, practical examples should be included in any new guidance which show how the principles set out in the guidance are applied in specific situations.

b) What Should Businesses Do in the Meantime?

While new guidance from the Bureau will be immeasurably helpful to companies moving forward, there are a number of best practices that can be adopted in the meantime.

To stay on side applicable laws (e.g., competition, securities, and consumer protection laws), companies should carefully consider all environmental claims they are making in order to assess whether these claims are potentially false or misleading.

Prior to making an environmental claim, companies should consider not only the existing guidance from the Bureau but should also look to the various other forms of guidance available. Among other things, companies can look to the current ISO guidelines, as well as the new guidance being provided by other jurisdictions internationally. Companies should also consider guidance and best practices being developed with respect to public company and financial disclosure regimes. As discussed above, these sources are the best available approximation of what the Bureau's enforcement approach in this area may look like, and the principles that any new guidance from the Bureau could follow.

Among other things, prior to making an environmental claim, companies should:

- to the extent that their products are marketed in multiple jurisdictions, take a holistic approach to ensure compliance with the laws of all applicable jurisdictions;
- thoroughly review any available guidance from applicable regulatory agencies, including any applicable CSA/ISO standards;
- ensure that the environmental claims comply with the available guidance, including that such claims:
    - ◊ Are not misleading, exaggerated, ambiguous or likely to result in misinterpretation;
    - ◊ Are accurate and specific: claims broadly implying that a product is environmentally beneficial or benign ("eco-friendly") should generally be avoided in favour of specific claims; broad claims must be accompanied by a statement that provides support;
    - ◊ Are substantiated and verifiable: claims must be tested, and all tests must be scientifically sound, conducted in good faith and documented;
    - ◊ Are meaningful and relevant: claims must be specific to a particular product, and used only in an appropriate context;
    - ◊ Do not imply that the product is endorsed by a third-party organization when this is not the case;
    - ◊ Take into consideration all aspects of the product (rather than

singling out one aspect and ignoring others) and the entire life cycle of a product; and

- ◊ Use appropriate terminology that is not likely to give rise to misinterpretation taking into consideration the context of the representation and expected literacy level of intended viewers;

- use clear and prominent explanatory/qualifying statements to accompany environmental claims, as applicable and appropriate;
- update environmental claims as further testing is done or new information becomes available, such as changes in technology, competitive products or other circumstances that could affect the accuracy of the claim;
- make accurate and easy to understand verification material publicly available;
- consider performing studies on their waste and emission practices to better and more fully understand their environmental impact; and
- consider obtaining third-party certifications to validate environmental metrics.

In many instances, companies should consult their legal counsel prior to making any environmental claims.

5. Conclusion

As the proceeding makes clear, law enforcement authorities, both within Canada and internationally, are increasingly concerned with the rise of potentially false or misleading environmental claims. This increased interest is showing itself in the form of new and revised guidelines, new legislation, and increased enforcement. Accordingly, businesses should carefully consider all public representations which contain environmental claims to ensure that such claims are not in contravention of any legal regime. Unfortunately, in Canada there remains a dearth of guidance available to businesses which want to comply with greenwashing laws, particularly those laws under the *Competition Act*. In the absence of such guidance, businesses should consider the guidance available internationally, as well as guidance from other Canadian regulatory agencies (including Canadian Standards Association Group and Ad Standards) and the archived guidance available from the Bureau, as helpful (although imperfect) sources for navigating environmental claims in Canada.

ENDNOTES

[1] With special thanks to articling students Rachel Wong and Montana Licari.

[2] For more examples, the EcoLabel Index is a global directory which provides a list of many of the ecolabels used on consumer products, online: *EcoLabel Index* <ecolabelindex.com/ecolabels>.

[3] The International Consumer Protection Enforcement Network is a consumer protection organization focused on developing and maintaining regular contact between consumer protection agencies. ICPEN's members include consumer protection law enforcement authorities from around the world. ICPEN encourages cooperation between these agencies with the goal of allowing each agency to more efficiently and effectively promote consumer protection and enforce its consumer protection laws and regulations.

[4] Competition and Markets Authority, "Global sweep finds 40% of firms' green claims could be misleading" (28 January 2021), online: *GOV.UK* <gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading>.

[5] European Commission, "Screening of websites for 'greenwashing': half of green claims lack Evidence" (28 January 2021), online: *European Union* <ec.europa.eu/commission/presscorner/detail/en/ip_21_269>.

[6] European Commission, "2020 - Sweeps on consumer scams related to the COVID-19 pandemic", online: *European Union* <ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en#2020-sweep-on-misleading-sustainability-claims>.

[7] Nielsen Consumer LLC, "A 'natural' rise in sustainability around the world" (19 January 2019), online, Nielsen IQ <nielseniq.com/global/en/insights/analysis/2019/a-natural-rise-in-sustainability-around-the-world>.

[8] Competition Bureau Canada, "The Competition and Green Growth Summit" (30 May 2022), online: < https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04576.html>.

[9] Additionally, 74.01(1)(b) and 74.01(a)(c) contain additional provisions against misleading representations in the context of warranties and guarantees. Specifically, section 74.01(1)(b) relates to false or misleading performance claims which provide a warranty or guarantee of the performance, efficacy or length of life of a product that is not based on adequate and proper testing and section 74.01(c) relates more generally to warranties, guarantees or promises to replace, maintain or repair an item. Section 74.01(1)(b) could likely apply in some environmental advertising contexts, for example, where a company makes compostability or biodegradability claims without adequate and proper testing.

[10] Competition Bureau Canada, *The Deceptive Marketing Practices Digest,* vol 1, Bulletin (10 June 2015) (*Deceptive Marketing Bulletin*), at 2.2, online at: <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>; see also *FTC v Sterling Drug, Inc,* 317 F (2d) 669 at 674; see also *Richard v Time Inc*, 2012 SCC

8 at para 78; see also *Canada (Competition Bureau) v Chatr Wireless Inc,* 2013 ONSC 5315 at para 128.

[11] Competition Bureau Canada, *The Deceptive Marketing Practices Digest,* vol 1, Bulletin (10 June 2015) (*Deceptive Marketing Bulletin*), at 2.2, online at: <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>; *Commissioner of Competition v Yellow Pages Marketing B.V.*, 2013 ONCA 71 at para 34. However, it should be noted that in certain circumstances, the "materiality" requirement is not included. Section 74.011(1), which is a prohibition against making falser or misleading representations in an electronic message in the sender information or subject matter information of such message, does not require "materiality" be shown.

[12] *Competition Act*, RSC 1985, c. C-34, s. 52(5)(a).

[13] *Competition Act*, RSC 1985, c. C-34, s. 52(5)(b).

[14] For example, see the section 7(1) of the *Consumer Packaging and Labelling Act* and section 5(1) of the *Textile Labelling Act*.

[15] Competition Bureau Canada, "Competition Bureau assuming the presidency of the International Consumer Protection and Enforcement Network for 2020-2021" (30 June 2020), online: *Government of Canada* <canada.ca/en/competition-bureau/news/2020/06/competition-bureau-assuming-the-presidency-of-the-international-consumer-protection-and-enforcement-networkfor-2020-2021.html>.

[16] International Consumer Protection and Enforcement, "Global sweep finds 40% of firms' green claims could be misleading" (29 January 2021), online: *ICPEN News*, <icpen.org/news/1147>.

[17] Competition Bureau Canada, "Paint products company agrees to end alleged misleading environmental and Made in Canada claims" (31 August 2010), online: *Government of Canada*: <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03282.html>.

[18] *The Commissioner of Competition v Hyundai Auto Canada Corp.* (2 Aug 2013), CT-2013-004 2013, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463251/index.do>; *The Commissioner of Competition v Kia Canada Inc.* (2 Aug 2013), CT-2013-005, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463257/index.do>; see also Competition Bureau Canada, "Competition Bureau secures consent agreements with automobile distributors Hyundai and Kia" (2 August 2013), online: *Government of Canada* <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03588.html>.

[19] *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (19 Dec 2016), CT-2016-017, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do>; see also Competition Bureau Canada, "Volkswagen and Audi to pay up to $2.1 billion to consumers and $15 million penalty for environmental marketing claims" (19 December 2016), online: *Government of Canada* <canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html>.

[20] *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (12

Jan 2018), CT-2018-003, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do>.

[21] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada*: <canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[22] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada*: <canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[23] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada*: <canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[24] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada*: <canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[25] *Ratych v. Bloomer*, [1990] 1 SCR 940.

[26] *Quenneville v Volkswagen*, 2017 ONSC 2448; see also Competition Bureau Canada, "Volkswagen and Audi to pay up to $2.1 billion to consumers and $15 million penalty for environmental marketing claims" (19 December 2016), online: *Government of Canada* <canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html>.

[27] *Quenneville v Volkswagen Group of Canada, Inc.*, 2018 ONSC 2516; see also Competition Bureau Canada, "Up to $290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case" (12 January 2018), online: *Government of Canada* <canada.ca/en/competition-bureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html>.

[28] *Kalra v Mercedes Benz*, 2017 ONSC 3795.

[29] Ad Standards, "The Canadian Code of Advertising Standards" (July 2019), online: *Ad Standards* <adstandards.ca/code/the-code-online/>.

[30] Ad Standards, "Recent Complaints Case Summaries" online: *Ad Standards* <adstandards.ca/complaints/complaints-reporting/recent-complaint-case-summaries/>.

[31] Ad Standards, "2019 Consumer Complaint Case Summaries" online: *Ad Standards* <adstandards.ca/wp-content/uploads/2019-Consumer-Complaint-Case-Summaries.pdf>.

[32] Ad Standards, "2017 Consumer Complaint Case Summaries" online: *Ad*

Standards <adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf>.

[33] Ad Standards, "2017 Consumer Complaint Case Summaries" online: *Ad Standards* <adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf>.

[34] Competition Bureau Canada, "Environmental claims and greenwashing" (3 November, 2021), online *Government of Canada* <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04>.

[35] Competition Bureau Canada, "Environmental claims and greenwashing" (3 November, 2021), online *Government of Canada* <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04>.

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THE RETAIL GASOLINE PRICE-FIXING CARTEL IN QUEBEC

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Prosecution of the retail gasoline price-fixing cartel in Quebec was the culmination of the largest and one of the most successful criminal investigations in the history of the Competition Bureau of Canada. In June 2008, criminal charges were brought against a number of individuals and companies under Section 45 of the Competition Act. The last trial occurred in late 2019. Prior to the 2009 amendments of the Competition Act, the public prosecutor had to demonstrate that the cartel not only existed, but also had the effect of "unduly" lessening competition—an unsuccessful cartel was not a crime. In this article, I review the empirical challenges and discuss how they were addressed to determine that the cartel did successfully increase prices in the markets under investigation. While the formal charges covered the period from early 2004 to mid-2006, data on price variation indicated that the cartel began in early 2001. Based on a difference-in-differences approach, the best estimate of cartel damages ranges from $18.5M to $42.0M for the period 2001–2006, and from $6.7M to $20.9M for the period 2004–2006. In addition to fines imposed on individuals and companies, numerous individuals received conditional prison sentences.

La poursuite intentée contre le cartel de fixation du prix de détail de l'essence au Québec a été l'aboutissement de l'enquête criminelle la plus vaste et parmi les plus couronnées de succès de toute l'histoire du Bureau de la concurrence du Canada. En juin 2008, des accusations criminelles ont été portées contre plusieurs personnes et entreprises en application de l'article 45 de la Loi sur la concurrence. Le dernier procès a eu lieu à la fin de 2019. Avant les modifications législatives de 2009, le procureur de l'État devait non seulement démontrer l'existence du cartel, mais aussi prouver qu'il avait nui « indûment » à la concurrence : les activités d'un cartel infructueux n'étaient donc pas criminelles. L'auteur examine les difficultés empiriques et montre comment elles ont été abordées pour que l'on puisse déterminer que le cartel avait réussi à faire augmenter les prix sur les marchés visés par l'enquête. Ainsi, on peut constater que si les accusations officielles couvrent la période allant du début de 2004 à la mi-2006, les données sur la variation des prix, elles, laissent entendre que la ruse a commencé au début de 2001. Réalisée selon la méthode des doubles différences, la meilleure estimation des dommages causés par le cartel se chiffre entre 18,5 et 42 millions de dollars pour 2001 à 2006, et entre 6,7 et 20,9 millions de dollars pour 2004 à 2006. Outre les amendes imposées aux personnes et aux entreprises en cause, on compte de nombreuses peines d'emprisonnement avec sursis.

1. Introduction

Triggered by complaints from gas station operators who were harassed by other operators for their unwillingness to participate in a price-fixing scheme, Canada's Competition Bureau (the "Bureau") launched an investigation in 2004 into allegations of collusion and price-fixing by owners of gas stations in four cities in Quebec: Sherbrooke, Victoriaville, Thetford Mines, and Magog.

Prior to the 2009 amendments of the *Competition Act*, it was not unlawful *per se* in Canada to conspire to fix prices.[1] Section 45 of the *Competition Act* required that the conspiracy had the effect of "unduly" preventing or lessening competition.[2] Even when participants in the conspiracy collectively had a significant share of the market in which they operated, it did not automatically follow that harm to competition would make the conspiracy unlawful, since the rules or guidelines for substantiating an undue lessening of competition were far from clear.[3] The amended conspiracy provisions in section 45 of the *Competition Act* limit the criminal offence to so-called "naked cartels," that is, cartels designed to fix prices, allocate markets, or restrict output. Following the 2009 amendments, it is not necessary to demonstrate any anti-competitive effect or undue lessening of competition in order to secure a criminal conviction.[4]

Since the Quebec retail gasoline cartel was a pre-2010 case, the Public Prosecution Service of Canada (the "PPSC") had to show that the cartel not only existed but did have the effect of unduly lessening competition. The existence of the conspiracy was established based on wiretaps of conversations among gas station operators over a two and a half year period, from early 2004 to June 2006. Hence, the proof of the existence of a conspiracy was quite direct. The remaining challenge was to show that the cartel did have an anti-competitive effect, that is, that it resulted in an undue lessening of competition and a significant increase in prices paid by consumers. That is where and when the economist becomes in a sense the law enforcement flag bearer.

On the basis of the wiretap evidence and the results of the economic report ("Boyer Report"[5]) showing that the cartel was indeed successful in unduly lessening competition between gas station operators, the PPSC decided to lay charges of criminal price-fixing against participating service station operators and some higher-up managers. In June 2008, criminal charges were brought against 13 individuals and 11 companies for fixing the price of gasoline at the pump from early 2004 to mid-2006 in four cities in Quebec:

Sherbrooke, Victoriaville, Thetford Mines, and Magog. In total, 39 individuals and 16 companies were charged in connection with the investigation, and 33 individuals and seven companies pleaded guilty or were found guilty and were fined in excess of $4 million.[6] Six individuals were sentenced to terms of imprisonment totalling 54 months.[7] This case is the largest and one of the most successful criminal investigation in the history of the Bureau.[8] The last trial occurred before a jury in the Fall of 2019 in the Criminal and Penal Division of the Superior Court of Quebec.

Challenges

Conspiracies are, by their secret nature, very difficult to detect and prove. And identical or similar prices may also result from generally available information and/or intense competition. The retail gasoline cartel case is interesting because it poses significant and unique empirical challenges:

i) Given that gasoline prices are public and transactions are repeated and numerous, a local (city-wide) cartel cannot raise prices by a large amount. However, artificial price increases may be small (a few cents or less per unit) yet statistically significant. Hence, the cartel impact may be small on any purchase, but may still amount to millions of dollars overall.

ii) Gasoline prices move up and down quickly, often more than once a day. Thus, comparing prices is challenging, especially since prices are typically recorded infrequently only and at times and dates that may differ between markets.

iii) A retail gasoline cartel involving numerous local gas station operators will continuously be vulnerable to defection by one or more participants, which implies that the cartel must be re-established regularly, typically more than once per week.

iv) Accurately assessing damages from the cartel may be challenging because the cartel period used by the antitrust authorities may be different from the beginning or end of the cartel conduct as suggested by economic analysis.

v) Comparing prices in cities where collusion was observed with "but-for" prices from comparable cities is a major challenge to the extent that market conditions in the different cities are difficult to observe and assess.

vi) Finally, estimating damages in a consistent way and determining their statistical significance is difficult because it requires blending different data sources.

To prosecute the cartel, the PPSC required a definition of the relevant market structure and a measure of the market power of participants during the collusion, as well as an economic analysis of prices and volumes in the cartelized and benchmark markets to assess whether the evolution of prices was consistent with the existence of collusion and, if so, to obtain a measure of damages.

Gasoline is a standardized product with a relatively uniform quality. Its market is generally determined by an area around the most used roads, that is, along the main roads of a city or its neighborhoods. In general, drivers are responsive to gasoline prices that they observe during their ride. However, they will not travel long distances—costly in terms of time and gas—simply to find a better price. Therefore, the market is geographically limited to a relatively small area around relevant locations or streets in a city for local trips or around roads used for intercity travel.

The magnitude of damages incurred by consumers depends on the size of the overcharge, i.e., the difference between the inflated price level created by the cartel and the price level that would have prevailed under competition. In order to isolate the impact of the cartel on prices, that is, the price increase considered "abnormal" given general market dynamics, a difference-in-differences analysis was used to compare prices in cartelized cities to those in collusion-free benchmark cities before, during, and after collusion.

In this article, I describe how these empirical challenges were addressed to determine that the cartel had an anti-competitive effect and to estimate damages incurred by consumers. As the author of the economic report, used by the PPSC in criminal court as well as in plea bargaining and out-of-court settlements, I testified in numerous criminal trials. Despite vigorous cross-examinations, as is expected in criminal cases, the defendants and their counsel did not bring forth any rebuttal reports and experts.

Section 2 of this article presents the data sources used in the empirical analysis and their limitations, and Section 3 discusses the market structure and the market power of participants in the different city cartels. Section 4 compares price dynamics using a difference-in-differences analysis between cartelized and benchmark markets to determine whether their comparative dynamics are consistent with collusion in cartelized markets and to identify

the relevant period of collusion. Section 5 presents the cartel-induced impact on prices and the estimation of damages and Section 6 concludes.

2. The Data

The data used for the detailed empirical analyses were obtained from two main sources: Kent Marketing Services and the Quebec energy board (Régie de l'énergie du Québec).

Kent Marketing Services (now Kalibrate) compiles detailed quarterly or bimonthly data on gasoline prices and volumes of sales for each gas station in many Canadian cities. We obtained price and volume data from Q1-1993 to Q2-2006 for gas stations in Sherbrooke, Victoriaville, and Thetford Mines, and from Q4-2005 to Q2-2006 for gas stations in Magog. Several cities were chosen to serve as benchmarks. These included Montreal, split into Montreal-Centre and Montreal-South, which are suitable benchmarks due to their size and the reasonable assumption that the effects of collusion in the four cities more than 100 km away cannot significantly affect the general dynamics of Montreal retail gasoline markets. The other city chosen as a benchmark is Saint-Hyacinthe, whose size is similar and location closer to the four cities where collusion was confirmed by wiretaps.

Since the survey by Kent Marketing Services for the Montreal region was conducted on a bimonthly basis, data obtained cover Mar-1993 to Aug-2006 for those two markets; for Saint-Hyacinthe, the quarterly data cover Q1-1993 to Q2-2006. Quantities sold and the dates on which the surveys were conducted vary from year to year and from one city to another. The absence of synchronization makes it more difficult to establish a direct price comparison between different cities.

The Régie de l'énergie du Québec (the "Régie") publishes a newsletter on the prices of petroleum products in Quebec (*Bulletin d'information sur les prix des produits pétroliers*) which provides a weekly survey of prices posted in various regions of Quebec, as well as the legal minimum price as calculated by the Régie for each of these regions.[9] The weekly data on average prices per city is available starting in December 1997. The sample is based on 297 retailers among 4,000 retailers in 187 cities or boroughs and 17 regions. As for the minimum estimated legal price, it is calculated on a weekly basis, using the minimum price at the loading dock on the preceding Thursday and adjusted to each city's specific taxes and transportation costs. This measure is quite useful because it allows us to compare prices between different cities taking into account tax and transportation cost variations between regions over time.

Data supplied by the Régie do not provide any information on price variations between retailers in the same city. Furthermore, the average price is based on a sample that usually includes one or two retailers per city. It is therefore possible that the average price listed by the Régie deviates from the actual average price charged in a specific city.

3. Market Structure and Market Power

Gasoline is a standardized product, even if some consumers may prefer one retailer over another for its location, its ancillary services, or its lower pump price. Different factors come into play with regard to drivers' response to pump prices. The demand elasticity for gasoline at the market-level, i.e., a uniform increase in pump prices across relevant buying locations, is usually low in the short-term, varying between –0.04 and –0.40, but higher in the long-term, varying between –0.23 to –1.37.[10] But it is the retailer-level (or own price) demand elasticity that provides information concerning a retailer's ability to unilaterally increase prices without losing many customers. Retailers' own price elasticity is high and so it is difficult for a single retailer to profitably increase its price.[11]

The only way for retailers to increase their prices above the market equilibrium price is to enter into an implicit or explicit price-fixing agreement, and apply price increases somewhat simultaneously across most, if not all, retailers. However, this then provides each retailer with an incentive to deviate from the collusive agreement and to unilaterally decrease the price at the pump to profit from the high retailer-level elasticity. This is one of the reasons why cohesion in a gas price-fixing agreement is difficult to maintain unless participating retailers agree to exert significant and sustained implementation and organizational efforts. Continued follow-up communication between retailers is therefore necessary to obtain and maintain a price increase above competitive levels as part of collusive activities in a market such as gasoline.

Another important factor that can affect the viability of a gasoline cartel is the ease with which new retailers can enter and exit the market if they become tempted to compete with the cartel to profit from the overcharge created by the cartel. Integrated oil refiner-marketers (such as Shell and Petro-Canada) and independent retailers (such as individual entrepreneurs, Couche-Tard, Olco, and Canadian Tire) are the two distinct groups marketing and selling gasoline in Canada. Based on data from Kent Marketing Services, in September 2005 in Sherbrooke for example, the three main commercial refiners had a 48.5% market share followed by the regional commercial refiners,

Irving Oil and Ultramar, with 35.2% and finally the independent retailers with 16.4%. The presence of integrated refiner-marketers with significant market share can be a major barrier to entry by new independent retailers. Indeed, substantial economies of scale characterize the gasoline retail industry, and economies of scope, such as the possibility of selling ancillary products, are also relevant. The substantial costs incurred in opening a new gas station and the cost of quickly acquiring a profitable market share are therefore significant barriers to entering the market. In recent years, some supermarkets (e.g., Wal-Mart, Costco, Loblaws) have become more visible competitors in the gasoline retail market. These newcomers have sold considerable volumes of gasoline, without necessarily generating profits comparable to those of other types of gas stations, because selling gasoline allows them to drive traffic to their stores and increase sales of their other products.

In essence, the gasoline retail market is not very favorable to the timely arrival of new entrants. The trend over the past decades has rather been a rationalization of retail gasoline networks with a relatively constant decline in the number of gas stations in various cities, including those of interest here.[12] The short-term variation in the number of gas stations is minimal.

We therefore have a market dynamic with the characteristics conducive to accommodate potentially viable cartels, insofar as participants can count on large market shares and on the relative difficulty for new players to enter the market. Another helpful factor would be if cartel participants were able to count on an efficient organization to coordinate decisions, to convince all those involved, and to quickly and accurately observe any deviating behaviour.

In gasoline markets, the relevant geographical distribution of sellers and buyers is practically the same, and so gas stations tend to be near groups of consumers and near main roads used by buyers. Each of the relevant city markets is well-defined by its service stations, with other service stations being sufficiently far away and inaccessible to be considered relevant competitors.

In this case, individual gas stations have no market power. However, the collective market power of the gas stations which are part of the price-fixing cartel is large in each of the four city-markets investigated. Indeed, the market share of gas stations participating in the respective city cartels was 89% (2005) and 87% (2006) in Sherbrooke, 93% (2005 and 2006) in

Thetford Mines, 98% (2005) and 99% (2006) in Victoriaville, and 92% (2006) in Magog.

4. The Dynamics of Price Volatility Across Retailers

Communication between retailers results in a much quicker price adjustment than what we would see if retailers had to find an "equilibrium" by trial and error. Hence, we expect price differences observed between gas stations at a given time to be smaller and less variable in a cartelized market than under normal competition. Indeed, the standard deviation of prices across retailers in cities where a cartel was shown to exist (by wiretapping) fell significantly in early 2001 and remained low compared to benchmark no-cartel cities. This is often considered a cartel marker.

Harrington (2006) for example presents eight collusive markers, defined as "some property of firm behavior which is much more consistent with collusion than with competition." One of his markers is "[i]ncreased uniformity across firms in product price, quality, and the prices for ancillary services."[13] Connor (2005) states that although there are suggestions that price dispersion changes when cartelization of a market occurs, there were few empirical studies of this effect at the time.[14] The results presented in the next section show a statistically significant reduction in the average and variance of the standard deviation of prices across retailers in cartel cities (as identified by wiretaps), not only over time but also in comparison with benchmark/non-cartelized city-markets.

The Boyer Report analyzed the price volatility *between* retailers over time (1993–2006) for Sherbrooke, Thetford Mines, and Victoriaville, and also for Montreal-Centre, Montreal-South, and Saint-Hyacinthe, using retailer-specific data provided by Kent Marketing Services. The standard deviations of prices between retailers from 1993 to 2006 for the different markets considered are illustrated in Figure 1A-1B in the Appendix. The figures show a change in the standard deviation in Sherbrooke, Thetford Mines, and Victoriaville, as of early 2001, compared to the dynamics of the standard deviation in Montreal-Centre, Montreal-South, and Saint-Hyacinthe.

Two statistical tests were conducted to evaluate whether the change in observed dynamics in 2001 is statistically significant. The first test compares the variance of standard deviations from 1993 to 2000 to the variance of standard deviations from 2001 to 2006 in each city market. The second test compares the average of the standard deviations over these two periods in each city market.

4.1 The Collusive City Markets

Table 1 (all tables are in the Appendix) shows that the two statistical tests for Sherbrooke are conclusive and the differences between the average and variance of the standard deviation in the two periods are significant. The standard deviation of prices between retailers has gone from an average level of 1.02 before 2001 to 0.44 after 2001, which represents a statistically significant decrease in the price dispersion of more than 50%. We also observe a statistically significant stabilization, with the variance of the standard deviation decreasing from 0.69 to 0.09.

The average standard deviation of prices between retailers in Thetford Mines fell from 0.49 for 1993–1999 to 0.33 for 1999–2006 and that, along with this decrease, there was a statistically significant decline in the variance of the standard deviation of prices between retailers, from 0.14 to 0.07 between the two periods.

For Victoriaville, a change in price dynamics occurred in early 2001, not in terms of the average standard deviation (similar for 1993–2000 and 2001–2006), but in terms of a statistically significant drop in the variance of standard deviations from 0.21 to 0.03.

Price data for the city of Magog do not allow for a temporal analysis, but it is worthwhile to mention that in the last quarter of 2005 prices were identical for all 13 retailers and, in the first two quarters of 2006, 11 of the 12 retailers listed identical prices.

To interpret the trends observed, namely the decrease in standard deviations of prices between retailers and their stabilization after 2001, we must compare them with what happened in the benchmark markets.

4.2 The Non-Collusive City-Markets

For Montreal-Centre, the average standard deviation of prices between retailers *increased* from 1.98 for 1993–2000 to 2.79 for 2001–2006, a statistically significant increase (see Table 1). The variance of standard deviations decreased slightly from 0.91 to 0.89 between the two periods, a non-significant difference. The dynamics of price variation therefore contrast starkly with those observed in collusive cities.

The average standard deviation of prices between retailers in Montreal-South increased from 1.53 CPL for 1993–2000 to 1.81 for 2001–2006, and the variance of standard deviations of prices between retailers decreased

from 0.81 to 0.64. In both cases, the differences are not statistically significant. Again, the dynamics of the standard deviation of prices between retailers contrast with those observed in cartelized cities.

For Saint-Hyacinthe, the average standard deviation of prices between retailers increased from 0.27 for 1993–2000 to 0.52 for 2001–2006 (not statistically significant at 5%), and the variance of standard deviations increased from 0.13 to 0.35, which is a statistically significant increase. Once again, the dynamics of the standard deviation of prices between retailers in Saint-Hyacinthe contrast with the those observed in collusive cities.

4.3 Conclusions from the Analysis of Between-Retailer Price Dispersion

The data analyses and statistical tests indicate that the cartelized city-markets of Sherbrooke, Thetford Mines, and Victoriaville displayed very different dynamics of price dispersion between retailers, contrasting with the price dispersion observed in the benchmark markets of Montreal-Centre, Montreal-South, and Saint-Hyacinthe.

The between-retailer standard deviations of prices actually decreased significantly in 2001, and remained consistently lower afterwards for all cities where collusive activities were shown to exist by wiretap evidence. Conversely, the between-retailer standard deviations of prices in benchmark markets actually increased after 2001, sometimes statistically significantly, and the level of price dispersion generally increased over time.

The dynamics of price dispersion in the Sherbrooke, Thetford Mines, and Victoriaville city-markets starting in 2001 are consistent with what one would expect in collusive markets. The significant drop in the standard deviation of prices across retailers is an indicator, or marker, of the beginning of a cartel. Hence, the data indicate that the cartel conduct likely started in 2001, rather than in 2004, the starting year of the cartel period used by the Bureau and for which legal documents and wiretap evidence (covering the 2004–2006 period) confirmed the existence of the city-market cartels.

Interestingly, under cross-examination by Government prosecutors, one of the defendants admitted in court that they did indeed begin to fix prices in 2001.[15] If one were to take the period of collusion as alleged in the legal proceedings, namely 2004 to 2006, and compare it with the previous, presumably non-collusive, period 2001–2004, one would find no statistically significant indication of a price-fixing conspiracy *because* that collusion already existed during the period 2001–2004. Hence the false conclusion

would be that no lessening of competition is observed, erroneously exonerating defendants and criminal cartel conduct that harmed consumers.

This situation is of course not specific to this case. Misdating a cartel might lead one to erroneously conclude that the cartel had little or no effect, to overestimate prices but-for the cartel conduct, and to underestimate overcharges due to the cartel.[16]

> "When assessing damages using a before-during or a before-during-after approach, the beginning and end points of the damages period must be identified. However, the beginning and the end of the damages period alleged in many cases may not accurately reflect the actual beginning or end of the alleged unlawful conduct. For example, in price-fixing class action cases, the plaintiffs' attorneys often choose the beginning and end dates for the 'class period' before discovery is undertaken. Moreover, the beginning or end of the effects of the alleged unlawful conduct may not coincide with the beginning or end of the conduct itself. The effects might occur later, end earlier, or last longer than the conduct. *Experts should rely on the evidence developed in discovery, market facts, and the analysis of liability experts when determining the relevant starting and ending dates for calculating damages.*" (emphasis added)[17]

5. Economic Impact and Damage Assessment

In this section, I will assess whether the evolution of retail gasoline prices observed in the cities in question is consistent with the existence of a collusive price-fixing system, and whether a statistically significant economic impact of the cartel on consumer prices can be quantified.

5.1 Analysis of Observed Average Prices

The impact of the cartel can be assess by contrasting the change in the level of the observed average price in colluding markets with the corresponding price in benchmark markets. To compare prices in different cities, I use weekly data supplied by the Régie on the average price per city and on the minimum price per region for the 1998–2006 period. Montreal (Centre and South combined) is used as a benchmark market, which provides a reasonable baseline for obtaining a conservative estimate of the economic impact of the price increases observed in the cartelized cities.[18]

To compare the dynamics of the Régie's average prices for different cities, prices were adjusted to take into account changes in cost dynamics using the Régie's minimum prices.[19] For example, suppose the average price for regular gasoline is 75 cents in Victoriaville and 72 cents in Montreal. If

the minimum price (which is set based on the price per liter, as well as on tax and transportation costs) is 65 cents for Victoriaville and 63 cents for Montreal during the same period, that means that the differences in supply costs would justify a 2-cent price difference (65 cents versus 63 cents). The average price of 75 cents in Victoriaville can therefore be associated with an equivalent average price of 73 cents in Montreal. The cost-adjusted difference in average prices between the two cities is then 1 cent (73 cents versus 72 cents).

The abrupt change in prices, which subsequently persisted over many years, seems to indicate that systematic price increases occurred in some cities independent of general market trends. These changes in dynamics are more precisely illustrated and statistically tested by a difference-in-differences analysis of prices (adjusted for costs) comparing the two markets over time, expressed in terms of percentages of the price in the benchmark city. If we apply this difference-in-differences approach using Montreal as a benchmark city, we tend to see larger price differences between 2002 to 2005 than before, despite particularly low prices in Montreal at the beginning of the time period.

Figure 2A shows the results of a comparison of all cartelized cities with Montreal as a percentage of the pump price in Montreal.[20] The moving average line illustrates the aggregate effect of the four cities studied and represents the average price difference between these four cities and Montreal over the preceding four quarters.

Statistical analyses can verify whether this increase in the difference of average prices corresponds to a larger price increase than could be expected based on normal variation. Table 2 shows the difference in the average price difference between Sherbrooke, Victoriaville, Thetford Mines, and Magog on one hand and Montreal on the other, showing that the difference, expressed in percentage of the Montreal pump price, rose from 2.22% between 1998 and 2000 to 3.51% between 2001 and 2006, and that the increase in this difference is statistically significant. Therefore, from 2001 to 2006, there was, on average, an aggregate 1.29 percentage point increase in the pump price in these cities compared to Montreal.

For a more detailed analysis, each city can be compared separately to assess the economic impact (price increase) associated with its cartel. In Sherbrooke, the price difference adjusted for cost differences went from 1.14% to 3.51%, a statistically significant increase representing 2.37% of the pump price in Montreal. The case of Thetford Mines is a bit more complex.

Indeed, the previous analysis showed a marked downward trend and a stabilization of the price dispersion between retailers, starting as early as 1998 in Thetford Mines. Unfortunately, the data of the Régie is not available before 1998 and it is therefore impossible for us to perform a difference-in-differences analysis adjusted for differences in costs between Thetford Mines and Montreal (or any other reference city) before and after 1998. In Victoriaville, from January 2001 to December 2004, the relative price increase compared to Montreal is statistically significant,[21] with the average price difference increasing from 2.50% to 4.45%, a 1.95 percentage point increase in the pump price during that period. For Magog, there is not enough data per retailer to allow an analysis of the price dispersion dynamics between retailers, so we cannot estimate how long any potential collusion might have lasted. However, there was a small increase in average monthly prices in Magog compared to Montreal starting in 2001—after adjusting for cost differences. This 1.56 percentage point increase in the pump price in Magog is statistically significant.

As mentioned before, Montreal appears to provide a reasonable and conservative baseline for estimating the relative price increases observed in cities where collusion did take place (confirmed by wiretap evidence). However, other reference cities could also be used. Choosing these cities is not an easy task because suitable benchmark cities must be representative of the market, must not be involved in price fixing activities and, if possible, have a market structure resembling those of the cartel cities.

Saint-Hyacinthe appears to provide another reasonable benchmark. Its price dynamics appear relatively similar to those of Montreal, despite its smaller size and geographical location. The price dispersion between retailers in Saint-Hyacinthe does not seem to systematically decrease over the time period of interest. Using Saint-Hyacinthe instead of Montreal as the benchmark city results in relative price increases in the cartelized cities that are larger and statistically significant. This is essentially due to the fact that gasoline in Montreal was relatively inexpensive at the beginning of the sample.

Using Saint-Hyacinthe as the benchmark city, the average monthly, cost-adjusted price difference in Sherbrooke goes from –1.95% between 1998 and 2000 to +1.43% between 2001 and 2006, which is a statistically significant increase of 3.38 percentage points of the pump price in Saint-Hyacinthe. In Thetford Mines, the price different increased by 2.54 percentage points during the same time period; Victoriaville showed a 2.33 percentage points increase and Magog, a 2.92 percentage point increase in the cost-adjusted

price difference. All of these increases are statistically significant. (See Table 2).

To assess the robustness of the observed cartel effect and to rule out any unique effect of the selected benchmarks, three additional cities of interest were compared because of their geographical location, their size and the breadth of their market: Trois-Rivières, Drummondville and Québec City.

The first two cities yielded results similar to those found with Montreal and Saint-Hyacinthe as benchmarks. For Québec City, we did not find the same trends because its pump prices had also greatly increased in comparison to those in Montreal after 2000. The effect of the relative price increase observed in comparison to Montreal (and to other benchmark cities) was counterbalanced by the price increase in Québec City. The reason for this unexpected result is a major price war taking place in Québec City during this period,[22] followed by a price correction around 2001.[23] Hence, comparing the relative price changes of the cartelized cities with Québec City would yield a biased and misleading estimate of the economic impact of the cartel.

5.2 Estimation of Damages

Estimating damages due to cartel activity is a challenging task. Even in cases where a cartel has been found guilty by the court, fines imposed in accordance with applicable guidelines are primarily a deterrence tool rather than an estimate of the harm or damages caused by the cartel.[24] For instance, the European Commission Fining Guidelines[25] consider the proportion of sales of goods or services to which the infringement relates, multiplied by the duration of the infringement, "*an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement,*" which can reach 30% of sales plus or minus some aggravating or mitigating factors. Hence the fine is not *directly* related to the value of harm and damages caused for the reason that estimating harm and damages is very difficult.

In this case, damages were estimated as follows. Prices and volumes of gasoline sold per retailer since the last price reading came from retailer-level data supplied by Kent Marketing Services and were aggregated to obtain an annual estimate for the volumes sold in each city.

Multiplying these volumes by the *incremental* price differential observed in comparison to the benchmark city during the period for which collusion is presumed—as compared to the usual differential during the period before the collusion appeared, i.e., the difference-in-difference —provides

an estimate of the annual damages incurred by consumers in each of the affected cities.

This estimated overcharge is consequently based on the chosen benchmark city. In our analysis, the incremental difference is generally lower with Montreal used as a benchmark and higher with Saint-Hyacinthe, primarily because the prices in Montreal were particularly low at the end of 1998. The reported estimates of economic damages for these two reference cities show the breadth of the economic impact as well as the sensitivity of the estimate to the choice of the benchmark city.

Moreover, choosing January 2001 as starting date for the collusion is, of course, somewhat arbitrary. It seems more likely that the quick and continued price increase in 2000 and 2001, after the 1999 Asian economic crisis and before the 2001 economic crisis, led to increased communication between retailers seeking to standardize price variations in periods of great volatility. These relations were maintained afterwards, which helped sustain the artificial price increases over the next few years. The collusion and price-fixing phenomena were certainly progressive, yet they seem to have become systematic in nature as of early 2001 and were particularly noticeable from 2002 to the end of 2004.

To fully account for variations in the scope of the potential effect of collusion activities over time, the economic impact is estimated by city and year.

This analysis brings together information from many sources: annual average prices for the benchmark cities calculated using the data supplied by the Régie de l'énergie, annual price differences adjusted for costs (taxes and transportation) as provided by the Régie, and gasoline volumes sold in each of the cities aggregated from retailer-level data provided by Kent Marketing Services. Moreover, all of the estimates are based on regular gas price volumes only. In our sample, this always makes up more than 80% of the gasoline bought and sold, so the estimation of the economic impact based on this data is an *underestimate* of the total impact.

Since the volumes for Magog are only available for one quarter in 2005 and two quarters in 2006, the volumes for the other years were extrapolated on the assumption that they followed the same temporal dynamics as those in Sherbrooke, the closest city with available data.

For Thetford Mines, determining the period of the collusion and the relative price increase is tricky because the analysis indicated that the price fixing system was in place from the beginning of the time period for which price

data for comparisons between cities was available. Without data available for a period of time preceding the collusion, it is not possible to obtain an estimate of the incremental price increase due to cartel conduct. In this context, a conservative estimation, *underestimating* the extent of the damages, can however be obtained as follows. Suppose that we use the period 1998–2000 during which the large price increase which followed the Asian crisis could dampen the effects of existing collusion as a temporal no-cartel reference,[26] and the "abnormal" price differentials of 2001–2006 as an indication of the extent of the price surcharge (as the difference-in-differences) that retailers in Thetford Mines were generally able to maintain. This imperfect measurement gives us a lower bound estimate of the economic impact of the cartel in Thetford Mines.[27]

Estimated damages are reported in Table 3. For an illustration of how damages were calculated, consider for example the amount of $1,353,244 estimated for the city of Sherbrooke in 2005. To calculate this amount of damages, a few intermediate numbers are required. First of all, we need the historical price difference between Montreal and Sherbrooke adjusted for differences in taxation and other costs before the alleged collusion. For this, we can use the average of the adjusted price differences in percentages between Sherbrooke and Montreal for the years 1998 to 2000. This average is 1.1%. That means that, historically, prices were 1.1% higher in Sherbrooke than in Montreal. In 2005, I calculated that this difference was 2.2%, or 1.1 percentage points higher than the normal historical difference, which is the difference-in-differences. Therefore, prices in Sherbrooke were 1.1 percentage point higher than their normal level, using Montreal as a baseline. The average price of gas in Montreal in 2005 was $0.974, so we can calculate the overcharge, in cents per litre, that Sherbrooke customers paid for their gasoline, $0.01 per litre ($0.974 * 1.1%). Gas customers in Sherbrooke paid 1 cent per litre extra for each litre bought in 2005. Since they bought 135,277,507 litres in 2005, the amount of is $1,353,244 ($0.010003 * 135,277,507 litres).

Instead of Montreal, we could use Saint-Hyacinthe as the benchmark city, where the historical price difference between Sherbrooke and Saint-Hyacinthe was –3.2% whereas the difference in 2005 was 1.7%. Hence, in 2005, prices in Sherbrooke were 1.7% – (–3.2%) = 4.9 percentage point higher than their historical value when using Saint-Hyacinthe as the benchmark city. The cartel overcharge therefore is $0.973 * 4.9% = 4.8 cents per litre. By applying this difference to the volume of regular gas bought and sold in Sherbrooke in 2005, the amount of damages is $6,368,861 ($0.04708 * 135,277,507 litres).

For certain cities, cartel damages are zero in some years, possibly due to price wars. Consider for example Victoriaville in 2006. Historically, the difference between Victoriaville and Montreal was 2.8% whereas in 2006 the difference was 1%. Consequently, in Victoriaville in 2006, prices were 1.8 percentage point *lower* than their historical value when Montreal is the benchmark city. During this year, there was a breakdown in the efficiency of collusion and consumers incurred no damages as a result of the city-cartel in 2006.

Table 3 shows the estimates of the economic impact of relative price increases which, for the period 2001 to 2006 range from $14.3M to $30.7M for Sherbrooke, from $592.3K to $2.5M for Thetford Mines, from $2.2M to $5.0M for Victoriaville and from $1.4M to $3.7M for Magog. In aggregate for these four cities, the damages caused by collusion are between $18.5M and $42.0M. For the years 2004 to 2006, the cartel period covered by the lawsuits filed by the public prosecutor, the estimation of damages ranges from $5.8M to $15.9M for Sherbrooke, from $153.5K to $1.3M for Thetford Mines, from $247.8K to $1.6M for Victoriaville and from $513.8K to $2.0M for Magog. In aggregate, for these four cities, the damages caused by collusive activities amount to an estimated total ranging from 6.7M$ to 20.9M$.

Some related literature

For comparison purposes, it is interesting to note that Wang (2008) described in detail the collusion dynamics and the phenomenon of price increases in a cartel case involving gas stations in Australia.[28] Among other things, the author had information on calls between retailers and the corresponding price variations spanning 90 days to identify the scale of the cartel-induced price increases. Wang isolated 16 "successful" price increases over a period of 90 days. The author also estimated that the price increases were, on average, 6.9 Australian cents per litre (approximately 6.3 Canadian cents per litre). If we aggregate this information by supposing, for example, that these artificial increases diminished and disappeared over 3 days following their implementation, we get an average increase of 2.24 CPL (in Canadian dollars) over the time period studied. This average increase is similar to my estimations here, which varies between 1 and 5 CPL, depending on the city and year.

Erutku and Hildebrand (2010) use a difference-in-differences approach for the period from June 2005 to May 2007, spanning one year before and one year after the announcement of the investigation by the Competition

Bureau, to derive a statistically significant price reduction in Sherbrooke of 1.75 CPL post-announcement, which translates into two million dollars in damages for the last year of the conspiracy.[29]

Clark and Houde (2013, 2014) provide a fascinating and detailed analysis of the internal working of the Quebec gasoline cartel, that is, the explicit mechanisms that were used by participants to obtain the allegiance of a large majority of station operators and to prevent defections.[30] Given the heterogeneity of gas stations, both in term of size and services provided, some form of transfer from weaker to stronger members of the cartel had to be imagined and executed. Those transfers originated through delayed price increases and decreases across participants favoring stronger players, generating short-term price discrepancies lasting a few minutes and yielding significant benefits to late movers. This set of peculiar mechanisms appear well-suited for collusion in markets where price posting is the norm.

6. Conclusion

The results of these descriptive analyses and regression analyses are consistent with a presumption of collusion in the cities of Magog, Sherbrooke, Thetford Mines and Victoriaville. Indeed, the level of price variation between retailers in cartel cities shows particular dynamics, which appear to be contrary to economic conditions and to dynamics observed in non-cartel cities of Montreal Centre, Montreal South, and Saint-Hyacinthe. Retailer-level prices from 1993 to 2006 highlight a change in pricing and a decrease and stabilization of between-retailer price variation starting in 1998 in Thetford Mines, and in 2001 in Sherbrooke and Victoriaville. For the benchmark cities, on the contrary, the price variation between retailers was either stable or on the rise during this period. This is consistent with a presumption of collusion and price fixing activities in cartel cities during these periods, as direct contact between retailers favours convergence towards the collusive price, while the search for a new equilibrium in a competitive market goes through a trial and error process.

Independent gas stations have no market power, but gas stations that are united by a price fixing agreement, as identified in the wiretap evidence, have a great deal of market power, as we see in all four cartel markets studied. Indeed, the market shares of the gas stations for which we have direct or indirect proof of participation in the cartel are around 90% (and above).

As for the impact of these activities on the gas prices paid by consumers, comparisons of price level using a difference-in-differences analysis make it clear that there was a relative price increase in the cartel cities compared

to the benchmark cities—even after adjusting for differentials in intertemporal cost fluctuations. For Sherbrooke and Magog, these relative price differences systematically appear and are statistically significant for the entire post-2001 period. This period corresponds to the one for which we see a decrease and a significant stabilization of the price divergence between retailers, confirming that the two phenomena are linked. For Victoriaville, the results are similar except that the price increase slows down during 2005, a sign that the cartel may have encountered some difficulties due to the market's high volatility that year. For Thetford Mines, the available data does not allow us to isolate a difference-in-differences in prices as the data indicates that that cartel's starting date was 1998, which corresponds to the beginning of our pricing data.

These relative price increases during periods for which we observed decreases and stabilizations in the price dispersion between retailers allow us to estimate the aggregate economic impact of cartel price fixing operations. Aggregate damages of the four city-cartels are between $18.5M and $42.0M for the period 2001–2006. For the period 2004–2006, the aggregate damage estimate is between $6.7M and $20.9M. The collusion period starting in 2001 as identified in the Boyer Report through an analysis of price variation was confirmed in court by the admission of one or the defendants under cross-examination, and the economic expert evidence provided in the Boyer Report was unrefuted.

7. Appendix

Figure 1A: Standard Deviation of Prices Between Retailers in Cartel Cities

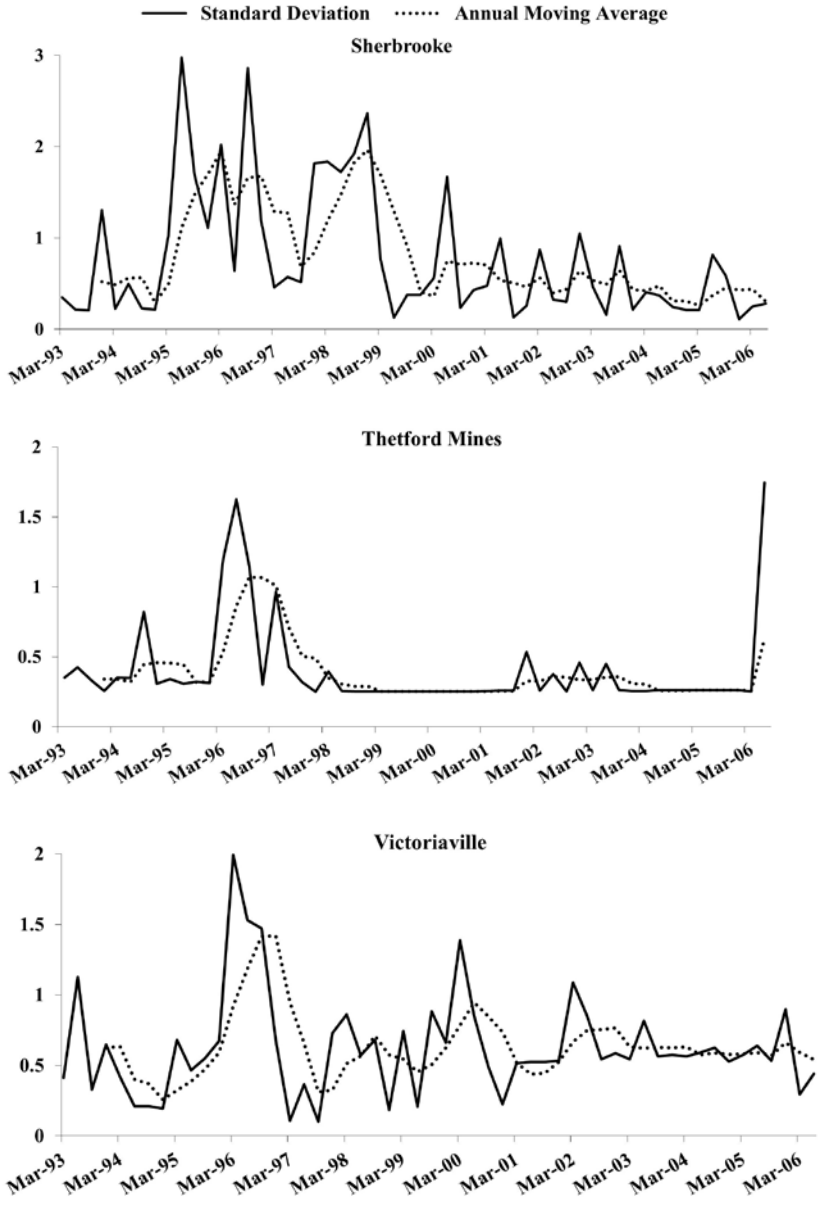

Figure 1B: Standard Deviation of Prices Between Retailers in Benchmark Cities

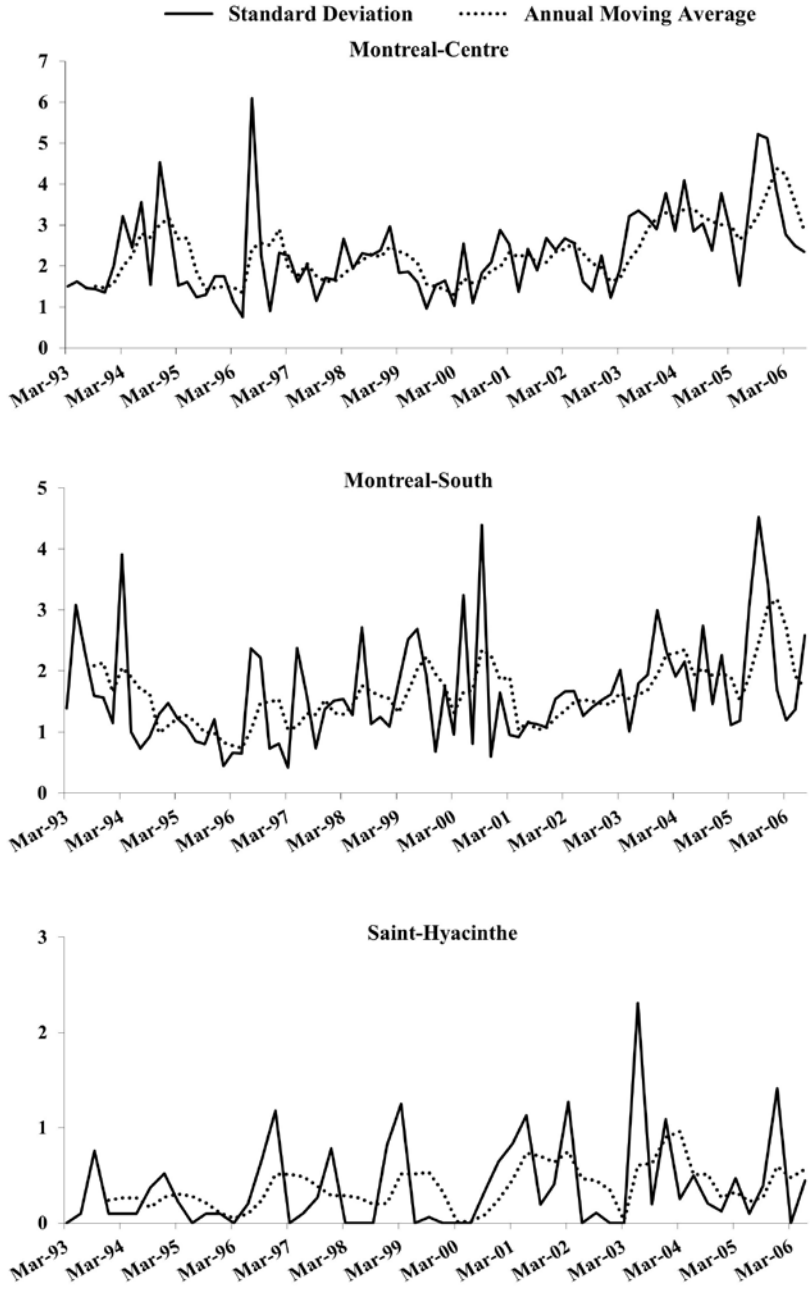

Table 1: Statistical Tests on the Standard Deviation of Prices Between Retailers

Cartel Cities	Sherbrooke		Thetford Mines		Victoriaville	
	1993–2000	2001–2006	1993–1998	1999–2006	1993–2000	2001–2006
Average of Standard Deviation	1.02	0.44	0.49	0.33	0.65	0.61
Variance of Standard Deviation	0.69	0.09	0.14	0.07	0.21	0.03
Number of Observations	32	22	24	30	32	22
t-Test for Difference in Average						
t-Statistic	**3.62**		1.82		0.45	
p-value	**0.001**		0.077		0.33	
F-Test for Difference in Variance						
F-Statistic	**7.79**		**1.92**		**7.31**	
p-value	**0.000**		**0.048**		**0.00**	

Note: Results in bold represent a statistically significant difference at the 5% level, i.e., the p-value is less than 0.05.

Benchmark Cities	Montreal-Centre		Montreal-South		Saint-Hyacinthe	
	1993–2000	2001–2006	1993–1998	1999–2006	1993–2000	2001–2006
Average of Standard Deviation	1.98	2.79	1.53	1.81	0.27	0.52
Variance of Standard Deviation	0.91	0.89	0.81	0.64	0.13	0.35
Number of Observations	47	34	47	34	32	22
t-Test for Difference in Average						
t-Statistic	**-3.76**		-1.48		-1.74	
p-value	**0.00**		0.14		0.09	

F-Test for Difference in Variance			
F-Statistic	1.03	1.26	**0.37**
p-value	0.48	0.24	**0.01**

Note: Results in bold represent a statistically significant difference at the 5% level, i.e., the p-value is less than 0.05.

Figure 2A: Dynamics of the Average Monthly Cost-Adjusted Difference in Prices Between Cartel Cities and Montreal (South and Centre)

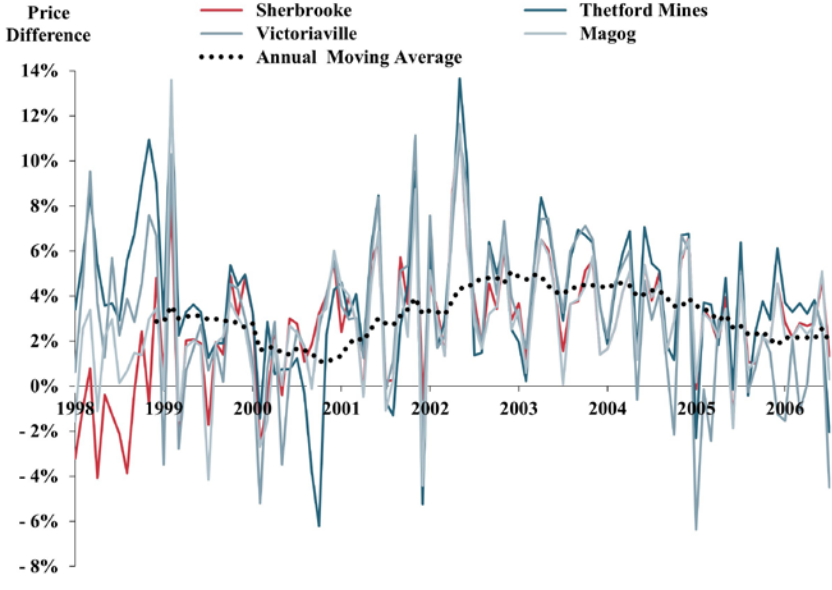

Figure 2B: Dynamics of the Average Monthly Cost-Adjusted Difference in Prices Between Cartel Cities and Sainte-Hyacinthe

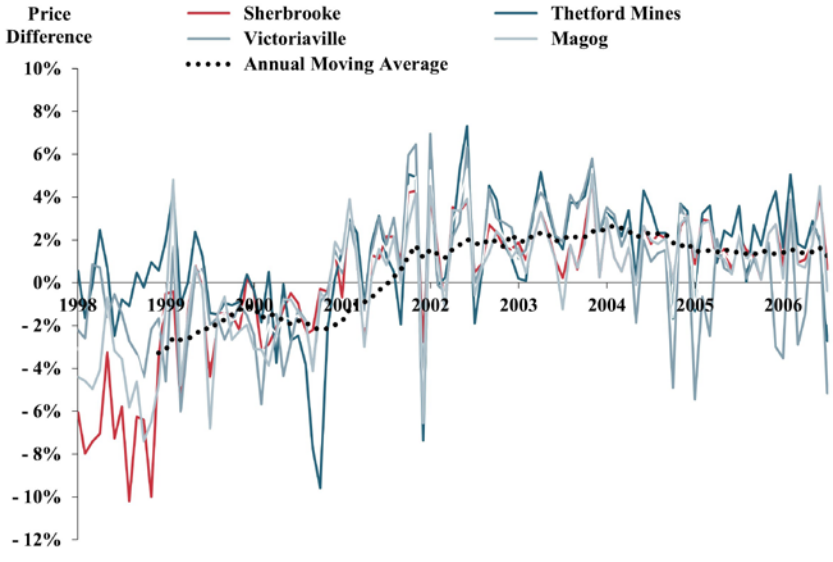

Table 2: Statistical Tests for the Average Cost-Adjusted Difference of Pump Prices Between Cartel and Benchmark Cities

Benchmark: Montreal	All Cartel Cities		Sherbrooke		Victoriaville		Magog	
	1998–2000	2001–2006	1998–2000	2001–2006	1998–2000	2001–2004	1998–2000	2001–2006
Average Price Difference	2.22%	3.51%	1.14%	3.51%	2.50%	4.45%	1.74%	3.29%
Number of Observations	36	67	36	67	36	48	36	67
t-Test for Difference in Prices								
t-Statistic	**-2.33**		**-4.55**		**-2.80**		**-2.79**	
p-value	**0.022**		**0.000**		**0.006**		**0.006**	

Notes: The average price difference is expressed as a percentage of the pump price in the benchmark city Montreal (Montreal-South and Montreal-Centre combined). Results in bold represent a statistically significant difference at the 5% level, i.e., the p-value is less than 0.05.

Benchmark: Sainte-Hyacinthe	All Cartel Cities		Sherbrooke		Thetford Mines		Victoriaville		Magog	
	1998–2000	2001–2006	1998–2000	2001–2006	1998–2000	2001–2006	1998–2000	2001–2006	1998–2000	2001–2006
Average Price Difference	-1.40%	1.39%	-1.95%	1.43%	-0.73%	1.81%	-1.26%	1.07%	-1.66%	1.25%
Number of Observations	36	67	36	67	36	67	36	67	36	67
t-Test for Difference in Prices										
t-Statistic	**-11.09**		**-10.20**		**-6.58**		**-6.76**		**-9.90**	
p-value	**0.000**		**0.000**		**0.000**		**0.000**		**0.000**	

Notes: The average price difference is expressed as a percentage of the pump price in the benchmark city Sainte-Hyacinthe. Results in bold represent a statistically significant difference at the 5% level, i.e., the p-value is less than 0.05.

Table 3: Estimate of the Economic Damages Due to Overcharges by City and Year (2001–2006) With Respect to Benchmark Cities Montreal and Saint-Hyacinthe

City		1998	1999	2000	2001	2002	2003	2004	2005	1H-2006
Montreal	Price (CPL)	55.8	63.3	77.3	73.7	71.6	76.3	85.4	97.4	103.9
Saint-Hyacinthe	Price (CPL)	57.6	64.1	78.2	73.8	73.0	77.2	86.5	97.3	104.1
Sherbrooke										
Sales Volume		130,400,331	123,127,718	126,571,318	130,504,228	137,612,137	136,390,077	135,557,643	135,277,507	68,213,375
Differential - Montreal		-0.7%	2.2%	1.9%	3.2%	4.9%	3.9%	3.8%	2.2%	3.0%
Differential - Saint-Hyacinthe		-6.8%	-1.5%	-1.2%	1.2%	2.0%	1.8%	1.8%	1.7%	2.1%
Thetford Mines										
Sales Volume		16,663,486	17,036,094	16,289,432	17,618,087	17,858,259	17,824,594	17,830,695	17,750,979	7,999,771
Differential - Montreal		6.2%	4.0%	0.3%	3.1%	5.4%	5.0%	4.5%	2.7%	3.4%
Differential - Saint-Hyacinthe		0.0%	0.3%	-2.8%	1.1%	2.5%	2.9%	2.5%	2.2%	2.5%
Victoriaville										
Sales Volume		40,694,195	41,441,588	43,962,601	43,021,184	43,637,565	44,278,938	47,960,702	49,726,497	23,380,383
Differential - Montreal		4.4%	2.0%	1.1%	3.7%	5.4%	5.2%	3.4%	0.3%	1.0%
Differential - Saint-Hyacinthe		-1.8%	-1.8%	-2.1%	1.7%	2.6%	3.2%	1.4%	-0.2%	0.1%
Magog										
Sales Volume		23,204,970	21,910,795	22,523,590	23,223,458	24,488,323	24,270,856	24,122,723	24,072,872	12,313,014
Differential - Montreal		1.5%	2.2%	1.5%	2.7%	4.7%	3.6%	3.8%	2.1%	2.9%
Differential - Saint-Hyacinthe		-4.5%	-1.5%	-1.7%	0.7%	1.8%	1.6%	1.7%	2.0%	1.6%

Notes: Data for 2006 cover only for the first half of 2006. Sales volumes for 1998-2005 in Magog are estimated assuming an evolution similar to Sherbrooke.

	Average Price Differential (1998–2000)	Total $ 2001–2006	Total $ 2004–2006	2001	2002	2003	2004	2005	1H-2006
Damages with Montreal Benchmark									
Sherbrooke	1.1%	14,346,392	5,795,820	2,031,262	3,675,421	2,843,889	3,126,114	1,353,244	1,316,462
Thetford Mines	3.5%	592,261	153,493	-	238,080	200,687	153,493	-	-
Victoriaville	2.8%	2,184,629	247,817	286,171	824,149	826,491	247,817	-	-
Magog	2.0%	1,412,867	513,754	124,840	470,707	303,566	368,235	31,812	113,707
		18,536,148	6,710,884	2,442,273	5,208,357	4,174,634	3,895,660	1,385,055	1,430,169
Damages with Sainte-Hyacinthe Benchmark									
Sherbrooke	-3.2%	30,678,554	15,929,823	4,248,776	5,231,275	5,268,679	5,811,456	6,368,861	3,749,506
Thetford Mines	-0.9%	2,543,013	1,323,382	252,790	443,755	523,086	512,898	532,043	278,441
Victoriaville	-1.0%	5,022,500	1,604,751	847,534	1,143,785	1,426,430	971,697	369,614	263,440
Magog	-1.8%	3,739,972	2,042,372	423,687	645,146	628,767	727,713	879,952	434,707
		41,984,039	20,900,328	5,772,787	7,463,961	7,846,963	8,023,764	8,150,472	4,726,093

ENDNOTES

[*] Marcel Boyer is Emeritus Professor of Economics, Université de Montréal; Associate Member, Toulouse School of Economics; Fellow of CIRANO and the C.D. Howe Institute; and Academic Affiliate, Analysis Group. He served as an expert witness for the Commissioner of Competition in this matter. He would like to thank Lisa Pinheiro and Anne Catherine Faye for their valuable help in preparing this article.

[1] The amendments were included as part of the *Budget Implementation Act, 2009*, and received royal assent on March 12, 2009. They came into force one year later.

[2] *Competition Act*, RSC 1985, c. C-34, s. 45

[3] Marcel Boyer, Thomas W. Ross & Ralph A. Winter., "The Rise of Economics in Competition Policy: A Canadian Perspective" (2017) 50:5 Can J Economics 1489; Tim Kennish & Thomas W. Ross, "Toward a New Canadian Approach to Agreements Between Competitors,"(1997) 28 Can Bus LJ 22; Paul S. Crampton & Joel T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" (1993) 38:3 McGill LJ 569.

[4] Adam Fanaki, "Recent Reforms to Canada's Competition Act: The First Year (and a Half)" (Paper delivered at the CBA Annual Fall Conference, Gatineau, 30 September 2010) [unpublished].

[5] The Boyer Report was completed in July 2007, one year after the confirmation by the Bureau that an investigation was under way, but officially signed in July 2008 and, from then on, shared with all parties in court cases as well as in out-of-court plea bargaining negotiations. See *La Reine c Gosselin,* 2013 QCCS 1223 at para 97.

[6] Irving Oil Ltd. was charged in 2017 for retail price maintenance in Thetford Mines and Sherbrooke. These charges relate to the *Competition Act* that was in force before the 2009 amendments that decriminalized price maintenance.

[7] For more detailed information on the "Quebec Gasoline Price-Fixing Cartel," see the Bureau's website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03079.html#Quebec>. The internal working of the cartels, including extensive communications among members and the price adjustments that supported the collusion by controlling deviations, was studied by Clark and Houde (2013, 2014). Erutku and Hildebrand (2010) derived an estimate of the price overcharge and the ensuing damage for one year (2005–2006) in the city of Sherbrooke. I discuss those results below.

[8] "The Bureau is increasingly making use of wiretaps in its investigations – a tool that played an important part in the largest criminal investigation in the history of the Bureau, which concluded this summer with new criminal charges laid against individuals and companies accused of fixing the price of gasoline in Quebec." Melanie L. Aitken (Address delivered at the CBA Annual Fall Conference, Gatineau, 30 September 2010); In the Competition Bureau submission to the OECD Competition Committee Roundtable on Cartels, Oct. 13 2013, one reads: "This investigation of retail gas prices in Quebec has been one of the Bureau's most

successful cases to date." (Compeition Bureau, "Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels, DAF/COMP" (2013) at 95, online (pdf): <https://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.)

[9] Régie de l'énergie Quebec, "Produits Petroliers", Website : *Régie de l'énergie Quebec* <http://www.regie-energie.qc.ca/energie/petrole_tarifs.php>.

[10] See California Energy Commission, "MTBE Phase Out in California" (2002), online (pdf): *California Energy Commission* <www.energy.ca.gov/reports/2002-03-14_600-02-008CR.PDF>. These estimates are consistent with the estimate of short term demand elasticity of –0.2 in the Boyer Report. Other studies confirm such estimates, for example, those by the Organisation for Economic Co-operation and Development (OECD) and by Dahl and Sterner. See Organisation for Economic Co-operation and Development (OECD),"Behavioral responses to Environmentally-Related Taxes" (2000), online (pdf): <https://one.oecd.org/document/COM/ENV/EPOC/DAFFE/CFA(99)111/FINAL/en/pdf>; see also Carol Dahl & Thomas Sterner,"Analyzing Gasoline Demand Elasticities: A Survey." (1991) 13:3 Energy Economics 203

[11] Wang (2008) finds that the retailer-level elasticity can reach values of –18. See Zhongmin Wang, "Collusive Communication and Pricing Coordination in a Retail Gasoline Market," (2008) 32:1 Rev Industrial Organization 35.

[12] Andrew Eckert & Douglas S. West, "Rationalization of Retail Gasoline Station Networks in Canada" (2005) 26:1 Rev Industrial Organization 1.

[13] Joseph E. Harrington Jr, "How Do Cartels Operate?" (2006) 2:1 Foundations and Trends in Microeconomics 1.

[14] Connor (2006) discusses four empirical studies of cartels where this was observed, including most prominently in a bid-rigging cartel in frozen fish is the clearest case. See also Luke M. Froeb, Rosa Abrantes-Metz & Chris T. Taylor, "Variance and Smoothness Screens for Collusion," (Address delivered at the Second Annual Meeting of the International Industrial Organization Conference, Chicago, Illinois 9 April 2004)[unpublished].

[15] In the court case *La Reine c. Les Pétroles Global inc.* (Cour Supérieure du Québec, chambre criminelle et pénale 2015 QCCS 1618), Justice Tôth writes in his April 17 2015 sentencing (following the guilty ruling of August 9 2013): (translation)

> "[61] Prof. Boyer observed, from 2001, price dynamics in target markets which contrasted with the reference markets and which could not be explained by local conditions. Collusion was the most plausible explanation, confirmed by investigations and searches by the Competition Bureau.
> [62] The evidence at trial, particularly the testimony of Pierre Bourassa, demonstrated that Professor Boyer was right. The collusion started around that time."

[16] See for example H. Peter Boswijk, Maurice J. G. Bun, & Maarten P. Schinkel, "Cartel Dating" (2019) 34:1 J Applied Econometrics 26; Kai Hüschelrath, Kathrin Müller, & Tobias Veith,"Concrete Shoes for Competition: The Effect of the German Cement Cartel on Market Price," (2012) 9:1 J Competition L & Economics 97.

[17] See American Bar Association, *Econometrics: Legal, Practical, and Technical Issues*, 2nd ed (Chicago, IL: ABA Publishing, 2014). The approach taken in the Boyer Report provides a good illustration that follows this recommendation.

[18] Using Saint-Hyacinthe as a benchmark provides similar results.

[19] Minimum prices are only available by region. The price adjustment can consequently not be as precise when specific changes in a city occur (such as, for example, changes in local taxation rules). Yet, unless there have been measures which could justify price increases, this adjustment is a good indication of the cost changes for retailers in a specific region, especially when we are interested in changes in price dynamics (unexplained increases), rather than differences in levels (which are constant over time).

[20] The analysis was also carried out in cents per litre with a similar result.

[21] Between 2001 and 2006 however, these numbers do not show a statistically significant difference, which is easy to understand since the lower price level (more intense competition due to the breakdown of the cartel) started again in 2005.

[22] Christos Constantatos, "Les guerres de prix entre les stations d'essence dans la région de Québec en 2000: signe d'anomalie au fonctionnement du marché?" (2001) at 4, online (pdf) : *Université Laval* <http://www.regie-energie.qc.ca/audiences/3457-00/Preuveetmemoires/Caa/Preuve-21fev.pdf>.

[23] In 2000, the profit margins had become so low in Québec City that the Régie de l'énergie accepted an addition of 3 cents per litre on the price during a period of 3 months as requested by the retailers in December 2000. See Régie de l'Énergie du Québec,"Analyse des impacts de l'exercice des pouvoirs de la Régie de l'énergie sur les prix et les pratiques commerciales de la vente au détail d'essence ou de carburant diesel" (2004) at 8, online (pdf) :<www.bibliotheque.assnat.qc.ca/01/PER/794146/2004.pdf>.

[24] Marcel Boyer et al,"Challenges and Pitfalls in Cartel Fining," (2018) 31:1 Can Competition L Rev 50.

[25] The European Commission Fining Guidelines are described in Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Fining rules are similar in other jurisdictions.

[26] We observe a relative price correction in Thetford Mines in comparison to Montreal and in comparison to Saint-Hyacinthe during this time period.

[27] Data in Table 3 for Thetford Mines correspond to these lower bound estimates.

[28] Zhongmin Wang, "Collusive Communication and Pricing Coordination in a Retail Gasoline Market," (2008) 32:1 Rev Industrial Organization 35.

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A NOTE ON THE UNIQUE IMPLICATIONS OF CONSUMER PRICE SENSITIVITY FOR MERGER ASSESSMENT IN CANADA

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Greater consumer price sensitivity is associated with lower merger price effects, all else equal. This is because a merged firm has less of an incentive to raise prices when its customers are more price sensitive. Less appreciated is the fact that greater consumer price sensitivity may lead to higher or lower effects from a merger on total welfare (i.e., deadweight loss), depending on the prevailing market prices and margins, as well as the features of demand. We show that under certain circumstances, the deadweight loss arising from a merger can be an "inverted U-shaped" function of the elasticity of demand, such that the effect of greater consumer price sensitivity on deadweight loss depends on case-specific facts and economic modelling assumptions. This has important implications for merging parties and their counsel putting forth an efficiencies defence: while greater consumer price sensitivity will lead to lower estimates of merger price effects, it may nonetheless result in a higher deadweight loss.

La sensibilité des consommateurs aux prix suit une courbe inverse aux effets d'une fusion sur les prix, toutes choses égales par ailleurs. La raison en est qu'une entreprise issue d'une fusion a moins intérêt à augmenter les prix lorsque sa clientèle y est plus sensible. Fait moins connu : une plus grande sensibilité des consommateurs aux prix peut avoir des effets plus ou moins grands sur le bien-être économique après la fusion d'une entreprise (perte sèche pour l'économie), d'après les prix en vigueur sur le marché et les marges ainsi que les caractéristiques de la demande. Les auteurs démontreront que dans certaines circonstances, la perte sèche pour l'économie découlant d'une fusion peut être une fonction en U inversé de l'élasticité de la demande, de sorte que l'effet d'une plus grande sensibilité des consommateurs aux prix sur la perte sèche pour l'économie dépendra des faits du cas précis et des hypothèses d'établissement de modèle économique. Tout cela a des conséquences importantes pour les parties qui fusionnent, et leurs conseillers juridiques qui recourent à une défense reposant sur les gains d'efficacité : même si la sensibilité accrue des consommateurs aux prix entraînera sans doute une moins forte hausse des prix après une fusion, il est tout de même possible que la perte sèche pour l'économie soit plus grande.

I. Introduction

The price sensitivity of consumers is an important factor in the assessment of merger price effects. Standard models of competition that

economists use to estimate the price effects of mergers most often employ some measure of consumers' price sensitivity. The price elasticity of demand (or simply the "elasticity of demand") is a direct measure of consumer sensitivity, or responsiveness, to price changes. The elasticity of demand is important for estimating merger price and welfare effects because it directly affects the merged firm's evaluation of whether a price increase would be profitable.[2] This is because when the merged firm is setting its profit-maximizing price(s), it must balance the gain from a price increase—which is the increased margin it earns on the sales it retains at the higher price—with the lost margin from customers unwilling to pay the higher price.

This article explains how the elasticity of demand can differentially affect estimated price effects and deadweight loss arising from a merger.[3] In particular, we show that as demand becomes increasingly elastic (inelastic), and holding other parameters constant, price effects *always* decrease (increase), but the effect on deadweight loss could work in *either direction*. This is due to the interaction between (1) the predicted price effect (from the model of competition) and (2) the subsequent calculation of deadweight loss that takes the predicted price effect as an input. For certain supply and demand specifications, as the elasticity of demand increases, deadweight loss can increase over an initial range of demand elasticities, reach a maximum, and then decrease (i.e., take on the form of an "inverted-U").

The elasticity of demand generally factors into a merger effects analysis in Canada in two ways:

1) Through a **price effects analysis**, which answers the question: "how much does the chosen model of competition predict that the market price(s) will rise post-merger?" This analysis can play a key role in the assessment of whether the merger is likely to substantially lessen or prevent competition in a relevant market.

2) Through an **anticompetitive effects analysis**, which generally quantifies the deadweight loss from the merger.[4] This analysis is required if the merging parties put forth an efficiencies defence under section 96 of the *Competition Act* ("Act"), as it quantifies the harm from the merger in the form of the merger's welfare effects against which to compare the efficiencies (the "s. 96 tradeoff"). The price effect from the merger is itself an input into the quantification of deadweight loss.

At higher elasticities of demand, the predicted price effect of the merger will be *smaller*, but the consumers' reactions to any given price increase (in the form of purchasing lower quantities) will be *larger*. This is intuitive:

when consumers are more price sensitive, a merged firm will have a lower incentive to increase price because of the risk of losing customers (resulting in a modest price effect), but even this modest price effect may cause many consumers to forego purchasing the product (leading to a higher output effect and higher deadweight loss). On the other hand, when consumers are less price sensitive, the reverse is true: a merged firm will have a greater incentive to increase price, but the higher price increase may not cause many consumers to forego their purchase.

Thus, it can be important for merging parties and their advisors (including legal counsel and economists) to understand the implications of the elasticity of demand in their specific case. This is especially true because deadweight loss arising from a merger can be an "inverted U-shaped" function of the elasticity of demand, such that higher elasticities may result in higher deadweight loss—despite a smaller price effect.

This article proceeds as follows. Section II explains the concept of elasticity of demand and common assumptions on demand used in merger analysis. Section III shows the effect of the elasticity of demand on merger-induced price effects. Section IV explains the standard economic welfare implications of a merger and shows the effect of the elasticity of demand on post-merger deadweight loss. Section V concludes.

II. Elasticity of Demand

The market elasticity of demand is a quantitative measure of consumers' aggregate responsiveness to a product's price changes. Formally, the price elasticity of demand is defined as the percentage change in total quantity demanded in response to a given percentage change in price. For example, an elasticity of 2 means that a 1% increase in price would be associated with a decrease in the quantity demanded of 2%.[5]

When consumers are relatively sensitive to price changes, demand is said to be "elastic," which means that when faced with a price increase a relatively high proportion of consumers would substitute away from the product(s) in question. On the other hand, when consumers are relatively insensitive to price changes, demand is said to be "inelastic," which means that when faced with a price increase relatively few consumers would substitute away.[6] The elasticity of demand ranges between two extremes: "perfectly elastic" demand, which implies *all* consumers would substitute away from the relevant product(s) when faced with a price increase, no matter how small; and "perfectly inelastic" demand, which implies *no* consumers would substitute away when faced with a price increase, no matter how large. In the middle

between these two extremes is "unitary elastic" demand (an elasticity of 1 in absolute value), where the price effect is equal to the quantity effect (in percentage terms).

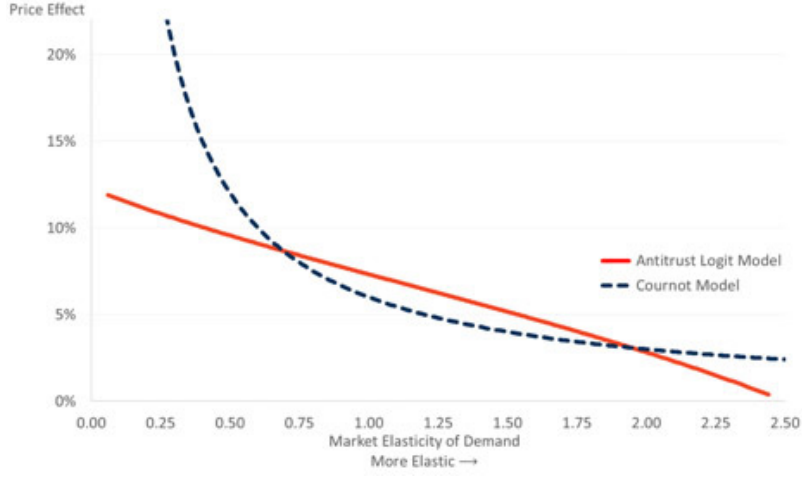
III. Effect of Elasticity of Demand on Merger-Induced Price Increases

Economic theory predicts that a merger between competitors will result in incentives for the merged firm to increase prices post-merger.[7] Prior to the merger, each company's incentive to raise prices is constrained, in part, by the possibility that customers will divert to the other company in the event of a price increase. Post-merger, the potential to recapture diverted sales may make a price increase profitable after the merger that would not have been profitable before the merger, and this causes upward pricing pressure on the merged firms' products.

Models of competition for estimating merger effects find that, all else equal, as demand becomes more elastic, a firm will have less incentive to raise its price. Intuitively, this is because as demand becomes more elastic, customers are more willing to substitute to alternatives outside the product(s) in question in greater number, leaving fewer to be potentially recaptured.

In Figure 1 below, we illustrate the relationship between the elasticity of demand and the equilibrium price increase for a hypothetical industry under two commonly used models of oligopoly competition: the Antitrust Logit Model and the Cournot model.[8] As shown, under both models, more elastic demand unequivocally results in lower price effects, all else equal.[9]

Figure 1: Relationship Between Elasticity of Demand and Price Effect



IV. Effect of Elasticity of Demand on Merger-Induced Deadweight Loss

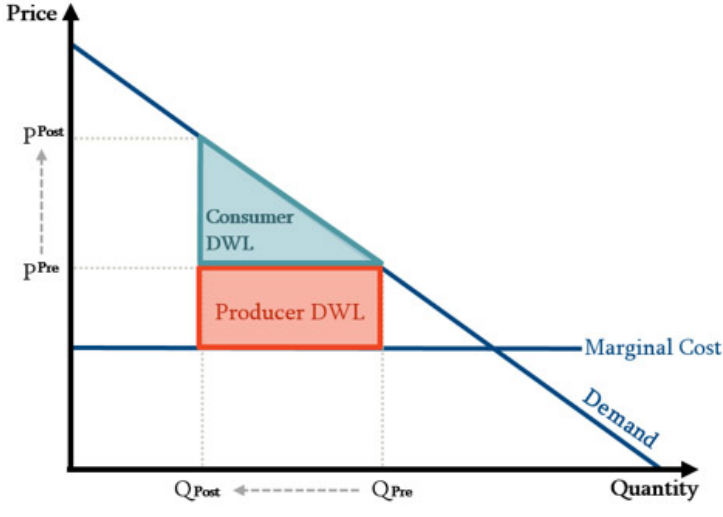
A) Deadweight Loss and Market Elasticity

A merger-induced price increase will generally lead to an allocative inefficiency—also known as deadweight loss—because the price increase will decrease the quantities demanded by consumers and therefore reduce market output.[10] Deadweight loss is generally a combination of loss in consumer surplus and loss in producer surplus.

The consumer deadweight loss ("Consumer DWL") is the lost consumer surplus on sales that would no longer occur at the higher post-merger price. The producer deadweight loss ("Producer DWL") is the lost profits on sales that would no longer occur as a result of the reduced demand following the merger.[11]

As illustrated in Figure 2, the Consumer DWL is the triangle under the market demand curve and above the pre-merger price, given the reduced quantity that stems from the merger-induced price increase. The Producer DWL is the rectangle below the market demand curve and above industry marginal cost, and can be estimated by multiplying the pre-merger price-cost margin by the reduction in sales associated with the higher post-merger price.

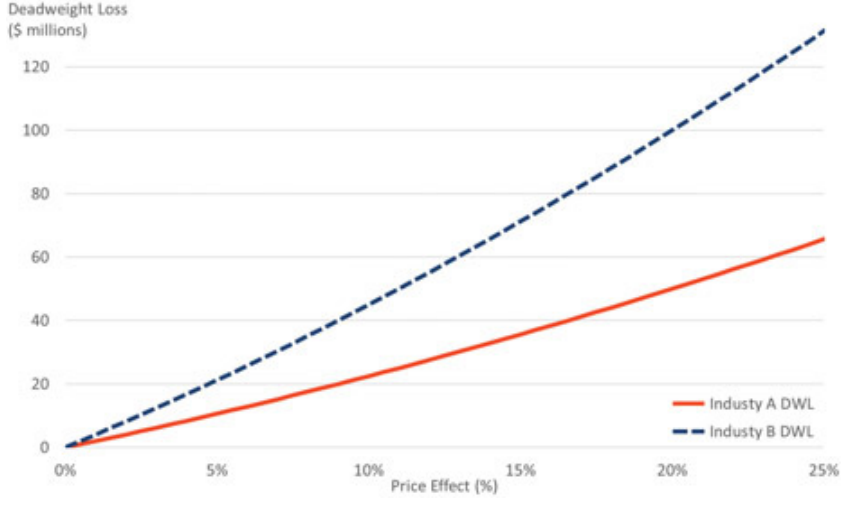
Figure 2: Deadweight Loss from a Merger-Induced Price Increase



The magnitudes of both the Consumer DWL and Producer DWL are affected by the elasticity of demand because they result from the reduced output following the merger-induced price increase.[12]

For given values of the industry parameters (including the elasticity of demand), the deadweight loss from a merger can be expressed as a function of the price increase alone. This allows us to examine how the deadweight loss is affected by the value of these parameters. For example, Industry A (the solid/red line) in Figure 3 reflects a case where the total market size is $1 billion in revenues, the producer margin is 40% and the elasticity of demand is 0.5. In this case, a merger-induced price increase of say 10% would lead to a deadweight loss of $22.5 million. Now consider Industry B (the dashed/blue line) with the same total market size and margin as Industry A, but with a market elasticity of 1 (i.e., twice as elastic). As shown, the greater the elasticity of demand, the greater the deadweight loss at any given merger-induced price increase. For example, the same assumed 10% price increase in Industry B would now be associated with a deadweight loss of $45 million—exactly double what it was in the baseline industry (since we "doubled" the elasticity of demand).

Figure 3: Relationship Between Deadweight Loss and Price Effect



B) Post-Merger Deadweight Loss

The previous section looked at how deadweight loss varies over a range of *given* price effects. We saw that more elastic demand leads to greater deadweight loss at any *given* price increase. However, the price increase is *itself*

dependent on the elasticity of demand. To fully capture how the elasticity of demand affects deadweight loss, we need to understand how elasticity of demand affects the price effect and deadweight loss *together*.

The elasticity of demand affects the magnitude of the deadweight loss from a merger in two opposite ways:

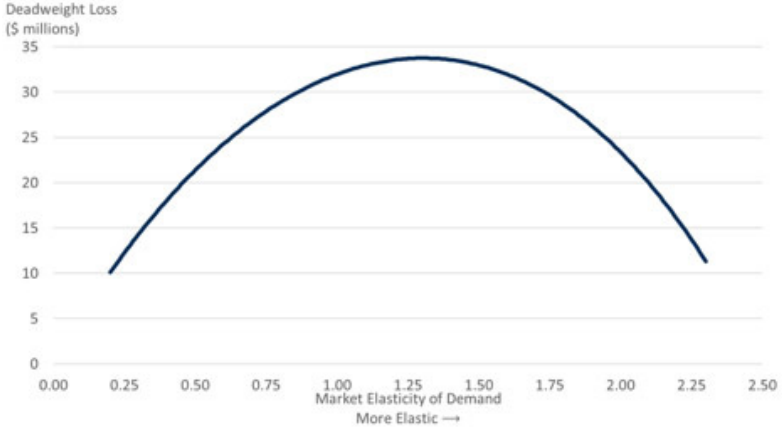
1) Price impact: More elastic demand indirectly *decreases* the deadweight loss from a merger by lowering the merger-induced price effect and thus lowering the output effect of the price increase.

2) Quantity impact: More elastic demand directly *increases* the deadweight loss from a merger through the reduced output associated with a given merger-induced price increase.

Accounting for the fact that the merger-induced price increase depends on the elasticity of demand, these two effects together *may*—under certain assumptions on demand and the mode of competition—result in an inverted U-shaped relationship between the elasticity of demand and deadweight loss.

Figure 4 illustrates this inverted U-shaped relationship between the elasticity of demand and deadweight loss for Industry A with price effects simulated using the Antitrust Logit Model.[13]

Figure 4: Relationship Between Elasticity of Demand and Post-Merger Deadweight Loss



Note: This figure uses inputs of a $1 billion market size, 40% producer margin, merging-party market shares of 40% and 30%, and three remaining competitors with respective market shares of 15%, 10%, and 5%.

Figure 4 shows that as the elasticity of demand increases over a range of inelastic and moderately elastic demand, below 1.3 in this example, deadweight loss also increases.[14] This is because the "quantity impact" on deadweight loss dominates the "price impact" on deadweight loss over this range of demand elasticity. In other words, as demand becomes more elastic: (1) the merger-induced price effect decreases, which indirectly lowers deadweight loss, but this effect is more than offset by (2) the direct increase in deadweight loss from the greater elasticity of demand. Over a range of more elastic demand however, above 1.3 in this example, the opposite is true: as demand becomes more elastic, the indirect "price impact" dominates the direct "quantity impact," and as a result deadweight loss decreases.[15]

As this example illustrates, care must be taken to ensure there is consistency across both the price effects and deadweight loss analyses in terms of the inputs and modeling assumptions. In particular, the elasticity used for the analysis must be consistent with the facts about market shares and producer margins, as all of these are related in equilibrium.[16] In other words, the degree to which the assumed elasticity can vary (e.g., within a reasonable range) is limited if other parameters are to be held constant, as they are in this illustration.

Note that while the inverted U-shaped relationship between the elasticity of demand and the deadweight loss exists in the particular example presented above, the relationship does not always take this form. Under certain alternative assumptions on demand, more elastic demand always leads to lower deadweight loss (i.e., the relationship between the elasticity of demand and the deadweight loss is downward-sloping rather than inverted U-shaped).[17]

V. Conclusion

In this article we have shown that, all else being equal, higher elasticity leads to lower merger–induced price effects, but the direction and magnitude of the corresponding impact on total welfare (deadweight loss) depends on other information and assumptions on demand and supply. In certain circumstances, higher elasticities may result in higher deadweight loss. It is therefore important that merging parties and their advisors fully understand the economic implications of arguments regarding the elasticity of demand, particularly when using a range of elasticity estimates and asserting an efficiencies defence under section 96 of the Act.

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ENDNOTES

[1] Ian Cass is a Senior Associate and Dimitri Dimitropoulos is a Senior Consultant at The Brattle Group in Toronto. The opinions expressed in this article are our own and do not necessarily reflect the views of The Brattle Group or its clients. We would like to thank our many colleagues and the editors at the CCLR who provided feedback on drafts of this article and greatly helped improve it.

[2] All references to the elasticity of demand in this article, unless otherwise indicated, refer to the market elasticity of demand (i.e., the demand across all firms and consumers for the product(s) in question). Market elasticity of demand measures consumer substitution between the product at issue and other goods, and it is this substitution that drives the deadweight loss arising from a given merger-induced price increase. This is distinct from the demand that any individual firm faces. For example, in oligopolistic markets, individual firms will face downward sloping demand curves that are related to—but generally

more elastic—than overall market demand because consumers, in addition to substituting between the product at issue and other goods (reflected by the market demand curve), can also switch between different producers of the product at issue. We note that, while it is ultimately individual firm-level elasticities that drive the price effects of a merger, these will be dependent on the overall market elasticity, as well as the mode of competition under which prices are set. See, for example, Moresi and Zenger (2018) for a detailed technical analysis of the relationship between the market elasticity of demand and firm-level price elasticities.

[3] This issue was the source of a misidentified controversy at the time of the original set of *Superior Propane* decisions. The dissenting Tribunal panelist opposed the decision allowing the merger, partly on the grounds that "an anti-competitive merger would more easily [pass the s. 96 efficiencies tradeoff under a total surplus standard] as the demand for the relevant product becomes less elastic (i.e., less price-sensitive). This perverse result arises from the fact that the calculated deadweight loss is proportional to the elasticity of demand." [*Superior Propane*, 2000 Comp Trib 15, para. 507.] This position was later echoed by the Federal Court of Appeal where it held that "where the demand for particular goods is inelastic, as it is for propane, the goods cannot be substituted as cost-effectively as where the demand is elastic. […] Therefore, a significant price increase will result in a smaller deadweight loss in a product where demand is inelastic than where it is elastic." [*Superior Propane*, 2001 FCA 104, para. 124] This reasoning is incorrect because it ignores the incentives of the merging firm to charge larger price increases as demand becomes more inelastic. Whether the larger price increases would be sufficient to outweigh the smaller output effect at low elasticities and thereby cause a larger deadweight loss depends on case-specific facts and economic modelling assumptions.

[4] The topic of what constitutes the totality of anticompetitive effects from a merger (e.g., whether to include some or all of the wealth transfer from consumers to producers in addition to the deadweight loss) is case-specific and beyond the scope of this article. In this article, we focus on the deadweight loss associated with the (static) loss of allocative efficiency that would result from a merger-induced price increase.

[5] The "law of demand" dictates that demand curves are downward sloping (i.e., consumers purchase lower quantities as prices rise) and the elasticity of demand is therefore a negative number. Nevertheless, with this understanding in mind, demand elasticities are often discussed—including in this article—in absolute value terms (i.e., ignoring the negative sign).

[6] More specifically, consumer demand is said to be "elastic" in cases where the elasticity of demand is greater than 1 in absolute value (i.e., where a 1% increase in price is associated with a more-than 1% percent decrease in quantity demanded). Conversely, consumer demand is said to be "inelastic" in cases where the elasticity of demand is less than 1 in absolute value (i.e., where a 1% increase in price is associated with a less than 1% decrease in quantity demanded).

[7] Variable cost savings may mitigate or offset a merger's upward pricing

pressure. However, in this article, we do not focus on this scenario as we are considering the scenario in which a merger has positive price effects and deadweight loss.

[8] The Antitrust Logit Model is a model of Bertrand price competition between producers of differentiated products. The implicit assumption is that consumers prefer certain "brands" due to their characteristics, and firms price accordingly. The Cournot Model is a model of quantity or capacity competition between producers of a commodity. The assumption underlying the Cournot model is that products are homogeneous, which means that consumers can perfectly substitute between the output of the different competitors in the market, i.e., there is no "brand" preference. The economics literature often refers to price competition as Bertrand competition in deference to mathematician Joseph Bertrand, who (upon reviewing Augustine Cournot's model of competition in terms of quantities) argued that it was more natural for competition to take place in terms of prices. For a technical discussion of these models, see e.g., Davis and Garcés (2009).

[9] In either model, prices will increase following the merger of two competitors. In the Bertrand price-setting case, this is due to the merging parties internalizing the inclination to undercut each other's prices to win out sales. In the Cournot quantity-setting case, it is due to the merging parties rationalizing their quantities/capacities.

[10] Mergers can also have effects on other forms of efficiency, including productive and dynamic efficiency. See, e.g., "Merger Enforcement Guidelines," Competition Bureau, October 6, 2011, ss. 12.14–12.18 and 12.25.

[11] Consumer surplus is an economic measure of consumer welfare based on the difference between what consumers are willing to pay for a good and the price consumers actually pay. Producer surplus is an economic measure of producer welfare based on the difference between the price of the good and what it costs to supply it (i.e., the price-cost margin). In an efficient market, transactions between consumers and producers should occur up to the point where the amount consumers are willing to pay for a marginal unit of the good is equal to the amount it costs to supply that marginal unit. The existence of Producer DWL implies some degree of pre-merger market power such that price exceeds marginal cost. In other words, it represents the surplus from consumers that had already been captured by firms in the industry but is now lost. As noted by Mathewson and Winter (2010, p. 5), "[a]s a consequence of the initial gap between price and marginal cost, the departing consumers are no longer consumers whose value for the product is only marginally above the cost of production. As a result, each of the departing consumers represents the loss of substantial gains to trade."

[12] For example, in the extreme, if output would not change at all following a price increase, there would be no deadweight loss (the price increase would entirely be a wealth transfer from consumers to producers). This would happen if demand was perfectly inelastic such that consumers would demand the same quantity at any price. It could also happen in situations where a single seller bargains with a single buyer over the terms of a contract with a fixed quantity.

[13] In addition to the assumptions of a 40% producer margin and market size

of $1 billion, the example assumes that the merging parties have a combined market share of 70% (40% and 30% pre-merger, respectively) and that there are three remaining competitors with respective market shares of 15%, 10%, and 5%. These assumptions are chosen for illustrative purposes only and do not change the general nature of the relationship shown in Figure 4 (provided, of course, the demand and modelling assumptions remain the same). For a formal discussion of merger simulation models see, e.g., Werden and Froeb (2008).

[14] It is important to note that this threshold of 1.3 is specific to the example presented in this article and cannot be generalized. The threshold, if it exists, would differ on a case-by-case basis.

[15] In this example, elasticities at the "extremes" of near 0 and 2.5 both result in zero or negligible deadweight loss. As the elasticity approaches 0, demand becomes perfectly inelastic, so there is no consumer substitution in response to the price effect (i.e., no output effect and thus no deadweight loss) regardless of the magnitude of the price effect. At an elasticity of 2.5, the equilibrium price effect is so negligible (because consumer substitution makes price any price increases unprofitable) that there is negligible deadweight loss even though consumers would be highly responsive to a price increase.

[16] See Werden and Froeb (2008) and Sheu and Taragin (2012) for a discussion of these relationships between parameters in the context of calibrating merger simulations models. See Grieco, Pinske and Slade (2018) for an application where the price effects and marginal-cost efficiencies from a merger are jointly estimated for purposes of ensuring consistency.

[17] For example, using the same parameter values as our example but estimating price effects under the Cournot model, the equilibrium relationship between the elasticity of demand and deadweight loss is monotonically downward sloping.