

Canada Looks at Revising Its Competition Act

By Thomas W. Ross | University of British Columbia



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Momentum is building for a potentially far-reaching review of Canada's competition regime.² Canada does not modify its competition statute frequently. The first competition statute in Canada dates from 1889 and, while the law has been extensively amended a number of times, the current law took shape when the last comprehensive revisions produced the *Competition Act* in 1986. The most recent significant amendments to this Act came in 2009.³

However infrequent change has been, it is clear that the government is open to a thorough review at this time. It has said as much. 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."⁴ 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."⁵

In support of this effort, Senator Howard Wetston, himself a former Commissioner of Competition,⁶ launched a consultation; commissioned a paper by Professor Edward Iacobucci, a leading competition law scholar;⁷ invited commentary from others; and posted both the paper and commentary on his government website.⁸

I. Why Now?

A number of reasons motivate the present interest in reform. First, as is the case in the United States, Europe, and elsewhere, concerns have been expressed about the seemingly sudden rise to dominance of firms in the digital platform space such as Google, Facebook (now Meta), and Amazon. An often-expressed worry is that the traditional tools of modern competition policy may not be up to the task of controlling the market power amassed by these new titans.⁹ The push for changes in other leading competition law jurisdictions, by itself,

¹ Thomas Ross is the UPS Foundation Professor of Regulation and Competition Policy at the Sauder School of Business at UBC. The author wishes to thank Edward Iacobucci, John Kwoka, John Pecman, Lawrence Schwartz, Daniel Sokol, and Ralph Winter for helpful discussions and comments, and Jennifer Ng for excellent research assistance.

² The focus of this article is on proposed changes to the competition provisions of the *Competition Act*. The Act also contains consumer protection provisions for which amendments also have been proposed to take more direct account of practices such as "drip pricing." See, e.g., Competition Bureau, *infra* note 34, at section 6.1.

³ The amendments were included as part of the *Budget Implementation Act*, 2009.

⁴ Press Release, Innovation, Sci. & Econ. Dev. Can., Minister Champagne Maintains the Competition Act's Merger Notification Threshold to Support a Dynamic, Fair and Resilient Economy, (Feb. 7, 2022), <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, <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11192572>.

⁵ Matthew Boswell, Comm'r of Competition, Remarks to the Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2021), <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>.

⁶ The position's title at the time was "Director of Investigation and Research."

⁷ EDWARD M. IACOBUCCI, EXAMINING THE CANADIAN COMPETITION ACT IN THE DIGITAL ERA (2021), <http://howardwetston.sencanada.ca/media/50752/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

⁸ *Competition Consultation*, SEN. HOWARD WETSTON, <https://howardwetston.sencanada.ca/competition-consultation/>.

⁹ See, for example, the high profile reports issued by groups in the United States, Europe, and the United Kingdom: FINAL REPORT, STIGLER COMMITTEE ON DIGITAL PLATFORMS (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E> (U.S.); JACQUES CRÉMER ET AL., COMPETITION POLICY FOR THE DIGITAL ERA (2019) (EU), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; and UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (2019) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_firm_an_review_web.pdf. In many cases, concerns about large tech firms in particular seem to go beyond their market power and to their alleged growing political influence.

has encouraged discussion in Canada about keeping up and adapting in order to harmonize the Canadian system with others.

Second and related, in at least the United States and Canada, more general concerns about perceived increasing rates of concentration leading to higher profit margins have led many to wonder if competition policy and enforcement need to be strengthened across the economy, not only in the tech sector.¹⁰ This strengthening may involve simply increasing funding to the Competition Bureau to allow it to take on more cases, but some have also expressed the view that legislative changes may be necessary to add new teeth to the *Act*. Responding perhaps to these first two concerns, the government of Canada has committed to providing the Competition Bureau with significant additional resources: CDN \$96 million over the next five years and \$27.5 million more per year after that to enhance its enforcement capacity.¹¹ The Bureau's increase in resources to take on the new challenges has been met with approval.¹²

Finally, over the past twenty or so years a series of cases has exposed important gaps in the current statutory framework. Below, I delineate these gaps and some of the amendments to the *Competition Act* that are proposed to fill them.

II. Gaps

With the major amendments of the 1970s and 1980s, Canada had a modern, sophisticated competition statute.¹³ To a considerable extent

it codified best practices with attention to economic principles. However, gaps have emerged in each of the major areas of competition law.

A. Cartels

One feature that was not in alignment with economic principles related to the treatment of cartels. The Canadian law stated that to be illegal an agreement had to “unduly” limit competition. As is easy to imagine, the presence of the qualifier meant that price-fixing, even of the most naked variety, could not be taken as *per se* illegal. This early failing was at least partly corrected with the 2009 amendments that created two tracks for the review of agreements between competitors supplying products: a *per se* criminal track for naked collusion (*i.e.*, no undueness test) and a civil “rule of reason” track for other horizontal agreements such as joint ventures and strategic alliances.

In the process of fixing the old “undueness” problem by creating the two-track approach, a new problem was created—one that has recently been drawing significant attention. While the old price-fixing law had applied equally to sell-side and buy-side agreements, it was unclear whether the new *per se* provision applies only to collusion by suppliers. Recent cases revealed this uncertainty: cases involving no-poaching agreements in the fast-food

¹⁰ For a discussion of the U.S. evidence and its antitrust implications—together with references to many of the key papers—see Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018). Some evidence of increasing concentration in Canadian markets can be found in Ray Bawania & Yelena Larkin, *Are Industries becoming More Concentrated? The Canadian Perspective* (manuscript at 9) (March 20, 2019), <https://ssrn.com/abstract=3357041>. 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 (Jan. 15, 2022), <https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action>.

¹¹ *Competition Bureau Gets a Budget Boost, but Is It Enough to Make Companies Think Twice?*, FIN. POST, (May 3, 2021), <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). COMPETITION BUREAU, CHAMPIONING COMPETITION IN UNCERTAIN TIMES: 2020–21 ANNUAL REPORT (2021), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-AnnualReport-2020-2021-Eng.pdf/\\$file/CB-AnnualReport-2020-2021-Eng.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).

¹² See, *e.g.*, Competition Policy Council, *Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government*, C.D. HOWE INSTITUTE COMMUNIQUÉ, (September 9, 2021), <https://www.cdhowe.org/council-reports/distilled-wisdom-top-legal-and-economic-experts-most-needed-competition-reforms> and *Competition Bureau gets a budget boost, but is it enough to make companies think twice?*, FINANCIAL POST, (May 3, 2021), <https://financialpost.com/news/economy/competition-bureau-gets-a-budget-boost-but-is-it-enough-to-make-companies-think-twice>.

¹³ For more on the legislative history of the Canadian law, see MICHAEL TREBILCOCK ET AL., *THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY* 3–36 (2002); JOHN TYHURST, *CANADIAN COMPETITION LAW AND POLICY* (2021) chapters 2-3.

sector¹⁴ and allegations of an agreement among major grocery retailers to roll back “pandemic pay” bonuses they had been paying their workers during earlier stages of the COVID-19 pandemic.¹⁵ Following these cases, the Bureau was compelled to issue a statement clarifying that the criminal price fixing provisions could not be applied to buy-side collusion.¹⁶

B. Abuse of Dominance

A series of cases has moved the Canadian law on abuse of dominance away from modern competition economics. The key decisions on this subject came in the *NutraSweet*¹⁷ and *Canada Pipe*¹⁸ cases which determined that, for an anticompetitive act to be considered an abuse of a dominant position, it must have an exclusionary, predatory, or disciplinary character. In short, challenged conduct must hurt a competitor. This reliance on negative effects to competitors, rather than on competition, is not consistent with how most experts see the proper role of competition policy.¹⁹ Most importantly, it misses the various ways firms can harm competition without hurting competitors, for example through a series of acquisitions of very small firms (each too small to trigger a “substantial lessening or prevention of competition”)²⁰ or by adopting strategies to

facilitate tacit collusion among current market participants.²¹

C. Mergers

The review of mergers in general has been considerably complicated by court decisions in the *Superior Propane*²² and *Tervita*²³ cases. One way in which Canadian merger law differs from that of most other jurisdictions is the weight it attaches to efficiencies achieved by the merging parties and the balancing of those efficiencies against any potential lessening of competition. Many observers initially felt that the 1986 amendments had incorporated a total welfare standard for merger review.²⁴ This standard would allow an anticompetitive merger to proceed if the projected efficiencies attributable to the merger would be greater than and would offset the effects of the lessening of competition. The effect of lessening of competition was generally expected to be measured as the deadweight loss flowing from higher post-merger prices. The efficiencies in cost reduction (for example) would be measured by the reduction in costs of production of the post-merger quantity. This standard is less restrictive of mergers than the more common consumer welfare standard. It is nevertheless a clear standard and was supported by many

¹⁴ Vancouver Courier Staff, *Lawsuit Accuses Tim Hortons Parent Company of Unlawful ‘No-Hire’ Agreements, Suppressing Wages*, NEW WESTMINSTER REC. (Aug. 6, 2019), <https://www.newwestrecord.ca/local-news/lawsuit-accuses-tim-hortons-parent-company-of-unlawful-no-hire-agreements-suppressing-wages-3104762>.

¹⁵ See, e.g., Steven Chase, *Grocery Chain Executives To Be Called to Testify on Pay Cuts for Store Employees*, GLOBE & MAIL (June 18, 2020), <https://www.theglobeandmail.com/politics/article-grocery-chain-executives-to-be-called-to-testify-on-pay-cuts-for-store/>.

¹⁶ Press Release, Competition Bureau, *Competition Bureau Statement on the Application of the Competition Act to No-poaching, Wage-fixing and Other Buy-side Agreements* (Nov. 27, 2020), <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>.

¹⁷ *Canada v. NutraSweet Co.*, [1990] 32 C.P.R.3d 1 (Comp. Trib.).

¹⁸ *Canada v. Canada Pipe Company Ltd.*, 2006 F.C.R. 233.

¹⁹ This is not to deny the more recent emergence of a view, held by some in what is called the “New Brandeis” school, that competition law should protect smaller businesses in markets with a dominant firm even when there might be a (possibly short term) cost to consumers in the form of higher prices.

²⁰ While the Tribunal in the *Laidlaw* decision (after *NutraSweet*) held that a series of acquisitions could be an abuse of a dominant position, the Federal Court in the later *Canada Pipe* case reaffirmed the standard from *NutraSweet*. *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.*, [1992] 40 C.P.R.3d 289 (Comp. Trib.).

²¹ See, e.g. Ralph A. Winter, *The Gap in Canadian Competition Law Following Canada Pipe*, 27 CAN. COMPETITION L. REV. 292 (2014). The classic reference on such facilitating practices is Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Coordination*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265 (Joseph E. Stiglitz & G. Frank Mathewson, eds., 1986). These practices can, for example, include the use of “most favored customer” and “meeting competition” clauses.

²² *Canada v. Superior Propane Inc.* (CA), 2003 F.C.A. 53, [2003] 3 FC 52.

²³ *Tervita Corp v Canada*, 2015 S.C.C. 3.

²⁴ See, for example, Donald G. McFetridge, *Merger Enforcement under the Competition Act after Ten Years*, 13 REV IND. ORG. 25-56 (1998). See also Thomas W. Ross and Ralph A. Winter, *Canadian Merger Policy Following Superior Propane*, CAN. COMP. REC. 7-23 (2003) and the many articles cited therein.

economists.²⁵ The Competition Tribunal initially adopted the total surplus approach in *Superior Propane* (and cleared the merger). On appeal, however, the Federal Court instructed the Tribunal to consider a wider set of anticompetitive effects, in particular effects involving redistributions of surplus from lower income buyers to higher income sellers.²⁶ The Court directed the Tribunal to develop its own approach to weighing the effects on these different groups. As a result, whatever one thinks about the total welfare standard as compared to the consumer welfare standard, this has left the Canadian approach quite uncertain: what will these weights be, will they vary from case to case, and might they depend on who is sitting on the Tribunal at any point in time?²⁷

Tervita also added a new challenge. Many agreed that the merger would produce anticompetitive effects—supported by largely qualitative evidence—and that the possible efficiencies were negligible. But the Supreme Court decided in *Tervita* that the Commissioner bore the burden *quantifying* any anticompetitive effects that can possibly be quantified, with an expansive interpretation of “possibly.”²⁸ Under this standard, the Court rejected much of the qualitative evidence offered by the Commissioner and approved the merger. The

burden thus placed on the Commissioner, even in cases in which competitive harm is quite clear and efficiencies virtually non-existent, has been extensively criticized.²⁹

III. Proposed Amendments

There is no shortage of suggestions for amendments to the *Competition Act*. Nevertheless, there remains a great deal of support for Canada’s current approach to competition policy, as evidenced by commentary supporting the current model as sound and only in need of more vigorous enforcement (supported by larger Bureau budgets) with possibly a few tweaks to address some of the gaps that have emerged.³⁰

Amendment suggestions continue to come in,³¹ but a broad list of ideas can be compiled from an article by John Pecman,³² the previous Commissioner of Competition; from Professor Iacobucci’s Consultation Paper;³³ and from the Competition Bureau’s own submission to Senator Wetston’s consultation.³⁴ Some suggestions relate to assuring adequate funding of the Competition Bureau and enhancing its independence. Others relate to improving the timeliness and effectiveness of enforcement.³⁵ And there has been considerable commentary

²⁵ See, e.g. Lawrence P. Schwartz, *The “Price Standard” or the “Efficiency Standard”? Comments on the Hillsdown Decision*, CAN. COMP. POL. REC., 42-47 (1992) and Ross & Winter, *supra* note 24. See also the submissions by Professors Church and Ware to Senator Wetston’s consultation, *infra* note 35,

²⁶ *Canada v. Superior Propane Inc.* [2001] 3 F.C. 185.

²⁷ This is a major concern discussed in, for example, Iacobucci, *supra* note 7.

²⁸ Importantly, the Commissioner bears this burden before the parties have to prove any efficiency gains.

²⁹ See, e.g., Ralph A. Winter, *Tervita and the Efficiency Defense in Canadian Merger Law*, 28 CAN. COMPETITION L. REV. 133 (2015) (offering “three general criticisms” of the *Tervita* standard).

³⁰ See, e.g., Iacobucci, *supra* note 7; ANTHONY NIBLETT & DANIEL SOKOL, MACDONALD-LAURIER INST., UP TO THE TASK: WHY CANADIANS DON’T NEED SWEEPING CHANGES TO COMPETITION POLICY TO HANDLE BIG TECH (2021), https://macdonaldlaurier.ca/files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf.

³¹ For example, the public policy magazine POLICY OPTIONS recently invited submissions commenting on the *Competition Act* and will be publishing them over the coming year. *Canada’s Competition Law is Due for an Overhaul*, POLICY OPTIONS (Feb. 2022), <https://policyoptions.irpp.org/magazines/february-2022/canadas-competition-law-is-overdue-for-an-overhaul/>.

³² John Pecman, *Unleash Canada’s Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada’s Competition Bureau*, 31 CAN. COMPETITION L. REV. 5 (2018).

³³ *Supra* note 7.

³⁴ Competition Bureau, *Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau* (Feb. 8, 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>.

³⁵ These various proposals are presented in the set of submissions to Senator Wetston’s consultation here: <https://howardwetston.sencanada.ca/competition-consultation/submissions/>. For example, many have suggested increasing maximum cartel fines and civil administrative monetary penalties. Some considered changes that could be made to current enforcement activity that would not require legislative amendments. For example, some commentators have urged the Bureau to consider more seriously anticompetitive effects other than those related to price—for example on quality, innovation, or privacy. See, e.g., Iacobucci, *supra* note 7, at 20–23.

on the appropriate goals for a modern Canadian competition law, with some suggesting clarifying its central purpose be to enhance the efficiency of markets and others suggesting an expanded set of goals not unlike many suggested by subscribers to the New Brandeis school in the United States.³⁶

Important specific suggestions for improvements pertain to the key substantive areas of competition law: cartels, abuse of dominance and mergers. Many relate to fixing some of the gaps identified above.

1. Cartels

With respect to the price-fixing provisions, the most common suggestion is for revised statutory language that would bring buyer-side collusion under the *per se* prohibitions in § 45 of the *Act*. Proponents of this amendment argue that collusion by buyers can have efficiency effects similar to those resulting from the exercise of monopoly power by sellers. Proponents also argue that agreements on wage fixing can have potentially large effects on the welfare of employees through depressed earnings and reduced employment opportunities.³⁷ While in principle such agreements can now be reviewed on a civil standard under a different section of the *Act*, the relevant provisions do not allow for *per se* review and do not provide for fines or for damages to be paid to the victims.³⁸

2. Abuse of Dominance

As suggested, many have pointed to the gap created in the abuse of dominance area by the series of cases that led to the adoption of a “harm to competitors” test rather than a “harm to competition” test. Not surprisingly, several commentators have suggested clarifying in the law that a negative effect on competition is or should be the standard.³⁹

A second suggestion for the abuse of dominance provisions has also gained some traction. The *Competition Act* currently allows for private actions and damages for those who have suffered harm as a result of violation of the criminal provisions of the *Act*. For about twenty years private damage actions following price-fixing cases have been growing in importance in Canada.⁴⁰ However, because abuse of dominance is not criminal behavior under the *Act*, damages are not available as a remedy to victims of an abuse. This contrasts with the approach to monopolization in the United States. Allowing private parties to bring actions before the Competition Tribunal for injunctive relief and damages for abuse of dominance could bring the extra energy and enforcement to the abuse of dominance area that private actions have brought to the cartel area.⁴¹ The Competition Bureau itself recommended such an amendment in its submission to Senator Wetston’s consultation, emphasizing in particular the benefit of having more cases: “Such an extension of private access [to the Tribunal] will serve to more rapidly expand

³⁶ For discussion of a broader set of goals, see, for example, Iacobucci, *supra* note 7 and Shapiro, *supra* note 10. On the New Brandeis challenge to current antitrust approaches, see, for example, Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101 (2019).

³⁷ See, e.g., Peter Glossop, *A New Approach to Wage-Fixing and Anti-Poaching Employer Deals*, C.D. HOWE INST. INTEL. MEMO (July 9, 2021), <https://www.cdhowe.org/intelligence-memos/peter-glossop-%E2%80%93-new-approach-wage-fixing-and-anti-poaching-employer-deals>.

³⁸ The strong arguments for criminalizing buyer-side collusion notwithstanding, some have suggested that Canada move cautiously, arguing that there may be procompetitive explanations for these practices in some cases, such that *per se* criminal enforcement may not be appropriate. For example, a *per se* prohibition could catch buyer groups made up of small numbers of relatively small firms combining to achieve better supplier prices through bulk purchases. See, e.g., Chris Margison & Robin Spillette, *No-Poach and Wage-Fixing Agreements in Canada – So What’s the Issue?*, CPI COLUMNS – CARTELS (Mar. 29, 2021), <https://www.competitionpolicyinternational.com/no-poach-and-wage-fixing-agreements-in-canada-so-whats-the-issue/>.

³⁹ Suggested in both Iacobucci, *supra* note 7 and Competition Bureau, *supra* note 34.

⁴⁰ For some of the history here, see J.J. Camp, *A Historical Perspective of a Made-in-Canada Remedy for Anticompetitive Behaviour*, 31 CAN. COMPETITION L. REV. 85 (2018).

⁴¹ While not always distinguished clearly by commentators, there are two distinct powers at issue here. One would be to allow private access to the Tribunal to change a dominant firm’s behavior (e.g., through injunctions or access to an essential facility). This is currently allowed under S. 103.1 of the *Act* for matters related to refusals to deal, resale price maintenance, exclusive dealing, tied selling, and market restriction but not for the broader category of abuse of dominance. The second power would be to allow private parties to claim monetary damages for harms following from an abuse of dominance (and possibly the other just listed practices). Amendments then could include one of these powers or both.

valuable case law, and bring these sections into sharper relief for both the Commissioner and Canada's business community."⁴²

3. Mergers

With respect to merger review, experts recognize the uncertainty about welfare standards created by the *Superior Propane* case and the heavy burden placed on the Bureau, in *Tervita*, to quantify all possible anticompetitive effects if they are quantifiable—which could only be done at considerable expense and would come with some margin of error. That said, there are very different views as to how to move forward. One suggestion is to simply undo *Tervita* with an amendment making it clear that the Tribunal must consider all effects based on the quality of the evidence provided, whether those effects have been quantified or not.⁴³

A very different approach, taken by some, would be to remove the efficiency defense altogether.⁴⁴ Some arguing for its removal, though recognizing efficiencies as a source of wealth and seeing them considered in jurisdictions using a consumer welfare standard, suggest listing efficiencies as a “factor” to be considered by the Tribunal in its review of a transaction.⁴⁵ While this makes sense as a strategy to allow consideration of significant efficiencies when the evidence supports them, it does not address the uncertainty about welfare standards created by *Superior Propane*. What does it mean to be a factor: for example, how much weight will be put on efficiencies and will that weight depend on other circumstances

surrounding the merger, for example the identity and wealth levels of the various market participants?

One specific way to make efficiencies a factor (after eliminating the defense) would be to add efficiencies to the list in S. 93 of “Factors to be considered regarding prevention or lessening of competition.” This list currently includes considerations of foreign competition in the market, barriers to entry, and the nature and extent of change and innovation in the market, among others. A complication arising from adding efficiencies to this list is that the efficiencies would (in theory) only be relevant to the extent they had an impact on a lessening of competition. The Canadian merger provisions have clearly recognized that anticompetitive effects and efficiencies are two distinct possible outcomes from a merger. A particular merger may produce neither, one, or both and when they both arise in a merger they are to be, essentially, added up. Other jurisdictions that wish to take efficiencies into account but that do not have efficiency defenses may try to work around the problem by claiming that a merger that lessens competition “in fact” (perhaps as evidenced by increasing margins) does not lessen competition “in law” if efficiencies would be such as to keep the firm from raising prices (though margins and profits have risen).⁴⁶

If what is desired is to move Canadian merger review closer to the consumer welfare standard common in many other jurisdictions, perhaps a statutory statement of that standard is more direct, for example by amending the efficiency

⁴² Competition Bureau, *supra* note 34, § 3.4.

⁴³ If this were the only change to the merger provisions, it might leave Canada (as prior to *Tervita*) with a standard close to, but not exactly, a total welfare standard. See, e.g., Thomas Ross & Ralph Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 ANTITRUST L.J. 471 (2005). While there is support for reversing *Tervita*, support is not unanimous. For example, in its submission to Senator Wetston's consultation, the Competition Law and Foreign Investment Review Section of the Canadian Bar Association expressed less certainty that the approach is now broken and urge further study before changes are made. Letter from Omar Wakil, Chair, Canadian Bar Ass'n Competition L. & Foreign Inv. Rev. Section, to Sen. Howard Wetston 4 (Jan. 14, 2022), <https://howardwetston.sencanada.ca/media/50758/cba-22-01-eng.pdf>. Others have even more strongly defended the status quo. See, e.g., Brian Facey, Navin Joneja & David Dueck, *Efficiencies Exception: Let's Keep It*, C.D. HOWE INST. INTEL. MEMO (Feb. 17, 2022), <https://www.cdhowe.org/intelligence-memos/facey-joneja-dueck-efficiencies-exception-lets-keep-it>.

⁴⁴ Technically, S. 96 of the *Act* provides for an efficiency “exception” rather than “defense,” but it is commonly referred to as the efficiency defense.

⁴⁵ This is a suggestion made by the Competition Bureau in its submission to Senator Wetston's consultation, *supra* note 34, Recommendation 2.1, and by former Commissioner Pecman, *supra* note 32, at 37.

⁴⁶ Thus, we could have a situation in which a merger to monopoly would be viewed as not being anticompetitive just because the efficiencies were so large—a strange outcome. Making efficiencies a factor in S. 93 would risk creating this kind of situation, though it is not clear that Canadian case law would take us to this “work-around.”

exemption to require that the efficiencies must be of sufficient scale and scope such that consumers (or other trading partners) are not harmed.

4. Market Studies

An interesting suggestion for reform that lies outside the core areas of competition enforcement relates to market studies. The Organization for Economic Cooperation and Development (“OECD”) notes that “[m]arket studies can reveal previously unsuspected forms of private conduct or government regulation that impair competition. And study results can play an important role in promoting public understanding of how competition works and what benefits it produces.”⁴⁷ Competition authorities around the world have different powers when it comes to conducting market studies or market inquiries. In some, the powers to work outside the bounds of regular enforcement activity are very limited. In others, the authorities may be able to conduct studies but all participation must be voluntary and the provision of information cannot be compelled. Other authorities have much stronger powers, including the power to compel participation and the provision of information. Finally, some authorities are able to order remedies based on findings in a market inquiry.⁴⁸

The Bureau has powers on the weaker end of this spectrum. It has some authority to initiate studies but not compel participation or the provision of information. Adding these powers could be a valuable middle step in helping the Bureau work in the digital world.⁴⁹ Short of

creating new sectoral regulators, formal market study powers would enable the Bureau to launch detailed investigations into the workings of new industries that, at this point, might not be well understood. Out of the learning from such studies could come better targeted interventions, even possibly support for sectoral regulations if a study concludes that conventional competition policy tools are inadequate to the task. There could be benefits beyond the digital world from this kind of amendment. Stronger market study powers would put the Bureau in a better position to advocate across government for competition. To take a very important example, comprehensive market studies could evaluate the performance and inefficiencies of other government regulations, such as the foreign ownership limits in some sectors and the supply management programs for dairy, poultry, and eggs. The targeted regulatory authorities might even be compelled under such an amendment to provide a response to the Bureau’s findings.⁵⁰

IV. Ahead

There is no public timetable yet for the drafting of any amendments, hearings or consultations on that draft, or the presentation of a bill to Parliament.⁵¹ This likely leaves a long road ahead. But the widespread desire to open up the *Act*, and the energy to debate meaningful changes, are clearly present. It would indeed be surprising if significant changes to Canada’s core competition law are not presented to Parliament and if some are not enacted. Almost

⁴⁷ OECD, CANADA—UPDATED REPORT 36 (2004), <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/34425393.pdf>.

⁴⁸ For a description of the various powers related to market studies and market enquiries held by competition authorities around the world, see OECD Directorate for Financial and Enterprise Affairs, Competition Comm., *The Role of Market Studies as a Tool to Promote Competition: Background Note by the Secretariat*, DAF/COMP/GF(2016)4 (Dec. 2016), [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdfn](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdfn).

⁴⁹ Both the Bureau, *supra* note 34, and Pecman, *supra* note 32, among others, recommend stronger market study powers. Previous market inquiries powers in the *Combines Investigation Act* (S. 47) did not survive the amendments that created the *Competition Act* in 1986, though the Bureau has been able to conduct some studies in support of its mandate to make submissions to regulatory bodies. A notable example here is the Bureau’s examination of the fintech sector, which produced a number of suggestions for regulatory change, many of which led to action. Competition Bureau, *Canada’s Progress in FinTech* (Jan. 20, 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04392.html>. Other commentators have urged a greater use of *ex post* reviews of cases (generally mergers) which might usefully be conducted under a market studies provision.

⁵⁰ This is also a suggestion of the Bureau’s, *supra* note 34 (recommendation 7.2).

⁵¹ Change could come in stages, with some amendments proposed relatively quickly and a more substantial package put forward for consultation later. See, e.g., Christine Dobby, *Ottawa announces review of Canada’s competition law, with focus on wage fixing, deceptive pricing and ‘anti-consumer practices’*, TORONTO STAR (Feb. 7, 2022), <https://www.thestar.com/business/2022/02/07/in-an-exclusive-interview-innovation-minister-says-ottawa-to-consider-changes-to-competition-law-launch-comprehensive-review.html>.

all proposals seek to expand the Competition Bureau's (or private plaintiffs') powers, facilitate the exercise of these powers or at least argue for the status quo (i.e. no weakening of the law or enforcement). This fact, combined with the

additional resources being provided by the federal government, suggests that Canadians can look forward to a heightened level of antitrust enforcement in the coming years.