

# **Examining the Canadian Competition Act in the Digital Era**

## **A Submission of the Public Interest Advocacy Centre**



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**LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC**

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## **Table of Contents**

Introduction .....	3
PIAC Comments .....	4
Specific Submissions.....	4
a. Goals of Competition Law and Policy .....	4
i. Integral to protect Consumer Interests .....	6
ii. Clarify the scope of consumer protection and applicable standard .....	10
iii. Reliance on other regimes unworkable .....	12
b. Abuse of dominance and safeguards for consumer privacy and data .....	13
c. Remove Efficiencies Defence .....	15
i. Examples where efficiencies undermined consumer interests and competition .....	19
ii. Addressing misguided perceptions regarding efficiencies defence .....	20
d. Ex post Merger Review .....	22
e. Practices from Other Jurisdictions .....	24
i. United States of America (U.S).....	24
ii. European Union (EU).....	27
iii. United Kingdom (UK) .....	28

## Introduction

The Public Interest Advocacy Centre (“PIAC”) is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. PIAC has been active in the field of consumer protection for over 40 years.

PIAC welcomes this opportunity to comment on Senator Howard Wetston’s inquiry regarding the reform of the *Competition Act* (Act) in this digital age.<sup>1</sup> The last review of the Act took place 14 years ago. Much has changed since then, with the most significant development being the emergence of digital platforms and the rapidly changing competitive landscape. This review is long overdue and certainly a step in the right direction. These digital times aptly call into question the adequacy of the Canadian *Competition Act* and policy to effectively address the present and forthcoming challenges presented by this evolving economy. This reform process should be capitalized to set our priorities right.

For the record, we notice many arguments in the discussion paper<sup>2</sup> that seem tenuous. Many arguments support companies’ ability to merge rather than promote competition. Due to time constraint, we do not address each concern noted in the discussion paper, rather we focus on major issues that in our view affect competition and consumer interests in Canada in these digital times. Going forward, we welcome any opportunities to participate in any hearings to discuss our concerns and recommendations in more detail.

We hope that these comments will assist in moving towards a modern competition framework that protects competition, consumer interests and propels our economy forward in this digital age.

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<sup>1</sup> The Honourable Howard Wetston, Senator for Ontario, “Re: Consultation Invitation - Examining the Canadian Competition Act in the Digital Era,” (October 27, 2021).

<sup>2</sup> Edward M. Iacobucci, “Examining the Canadian Competition Act in the Digital Era,” (September 27, 2021).

## PIAC Comments

1. This submission presents our major concerns and proposes some pragmatic measures to protect competition and consumer interests in this digital age. Specifically, we suggest preserving protection of consumer interests in the objectives clause of the *Competition Act* (Act) and propose additional safeguards to clarify the scope of consumer protection under the Act, and comment on measures to consider concerning abuse of dominance by digital platforms. We also recommend the removal of the problematic efficiencies defence. The Supreme Court's decision *Tervita Corp. v. Canada (Commissioner of Competition)*<sup>3</sup> that places onerous requirements such as the quantification of anticompetitive effects to block mergers, has pushed the Canadian competition law further back by making it harder to block mergers and has in effect, enabled a path for significant market concentration. On the contrary, other jurisdictions are moving forward towards more stringent merger review processes.<sup>4</sup> This is deeply concerning and needs to change. We also discuss measures from other jurisdictions that could be applied in Canada.
2. We clarify that this submission does not present an exhaustive list of our concerns and recommendations but rather identifies our main concerns and suggestions at this stage. As noted earlier, we would welcome a further opportunity to share our thoughts on this matter.

## Specific Submissions

### a. Goals of Competition Law and Policy

Recommendation 1: Must retain consumer protection in the purpose clause along with protections for SMEs, and added protections for workers, besides economic objectives. This clause should be aimed at achieving a fair and open market that protects consumer interests and keeps a check on corporate power.

Recommendation 2: An appropriate standard for applying competition law and policy would be one that prioritizes consumer protection in an open and fair market.

3. Goals of competition policy have been subject to extensive debate over the years and resulted in differing perspectives and schools of thought, with renewed interest on this matter due to the emergence of dominant of digital platforms that have a significant influence on our lives. This calls for a rethinking of our traditional framework and values. Our submission recommends applying standards under the competition framework that focus on protecting consumer interests and competition in this digital age by keeping corporate supremacy in check. Unfortunately, this has not always been the case, despite the inclusion of various non-economic objectives in this clause, economic efficiency has

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<sup>3</sup> *Tervita Corp. v. Canada (Commissioner of Competition)* (2015) SCC 3.

<sup>4</sup> See section (d) of our submission for more details.

often been found to take precedence over other objectives.<sup>5</sup> This is worsened by the existence of regimes like efficiencies defence, provided under s.96 and s.90(1) of the Act.

4. This reform process should not only reaffirm the place of consumer protection under the competition policy framework but clarify its scope and applicable standards to ensure that economic efficiency is not being unduly prioritized over other objectives. We first address what should be the underlying goal of competition policy in relation to the purpose clause and then assess what standards could apply.
5. One specific issue discussed in the discussion paper relates to the reform of the purpose clause, s 1.1 in the Act.<sup>6</sup> The purpose clause presently identifies several economic and non-economic objectives underlying Canadian competition policy, such as promoting economic efficiency and adaptability of the Canadian economy, expanding Canadian participation in world markets while also recognizing the role of foreign competition in Canada, providing an equitable opportunity to small and medium-sized enterprises, and providing consumers with competitive prices and product choices.

#### **Purpose of Act**

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.<sup>7</sup>

6. Iacobucci in the discussion paper, raised several issues with the current purpose clause, critiquing it to be over-inclusive with the presence of several inconsistent objectives, and at the same time finding it to be under-inclusive by not including protection for workers.<sup>8</sup> He mentioned issues such as the indeterminacy and unpredictability brought about by the inclusion of various non-economic policy objectives, and the policy-laden choices that have to be eventually made by the adjudicator between different policy objectives and that may mean choosing different conflicting policy directions, which could undermine competition policy in certain instances.<sup>9</sup> He explored different options for reform while noting the pros and cons of each approach, and presented his own clearly preferred option that is to prioritize efficiency within the *Competition Act* over other objectives and a

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<sup>5</sup> Vass Bednar and Robin Shaban, “The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era,” Research Report- Platform Governance (McGill’s Centre for Media, Technology and Democracy) (April 21, 2021), online: <<https://www.mediatechdemocracy.com/work/the-state-of-competition-policy-in-canada>>.

<sup>6</sup> Edward M. Iacobucci, “Examining the Canadian Competition Act in the Digital Era,” (2021) at p.47-49. More details and analysis regarding the purpose clause is provided at p.45-69.

<sup>7</sup> *Competition Act* R.S.C., 1985, c. C-34, s.1.1

<sup>8</sup> Edward M. Iacobucci, “Examining the Canadian Competition Act in the Digital Era,” (2021) at p.47-49.

<sup>9</sup> Edward M. Iacobucci, “Examining the Canadian Competition Act in the Digital Era,” (2021) at p.54-59.

deference to other policy instruments to account for other social objectives.<sup>10</sup> He acknowledged that the price for this focus would be that other values will not be incorporated within competition law and policy, but noted that sometimes efficiency and other goals such as low prices would be in sync, and then there are other instruments that exist to advance other values or could be established, if they do not exist.<sup>11</sup>

**i. Integral to protect Consumer Interests**

7. The analysis provided by Iacobucci in this discussion paper clearly suggests removing non-efficiency objectives from the purpose clause of the competition law and policy or at least deprioritizing them, and to rely on other regimes to protect these non-economic objectives. We submit that this attempt to redefine the competition framework, which in effect makes economic efficiency its sole purpose, must be rejected.
8. The purpose clause in the competition framework was an outcome of years of debate<sup>12</sup> with a place designated for various non-economic objectives. Particularly, the protection of consumer interests has been a core feature of this clause. An OECD paper's historical account of the Canadian competition law notes that although consumer issues come at the end of the statute's list, history shows that consumer interests were considered important from the outset.<sup>13</sup> It also noted that the labour minister who was responsible for the *Combines Investigation Act* of 1910 said that the "main purpose of this measure is the protection of the consumer" (Gorecki, 1984, p. 34; quoted in Fisher, 2000), while stating that a merger case in the courts presents serious questions about the priority of consumer interests in Canadian competition policy.<sup>14</sup>
9. We consider it important to look at the big picture and the underlying purpose to guide the application of the purpose clause under the Canadian competition framework, to reach an effective determination.
10. In our view, protection of consumer interests forms this underlying purpose of the Act, with other non-economic objectives important for steering the Act in a balanced direction and ensuring that this Act is not applied in a vacuum that just focuses on economic efficiency, which may often result in favouring incumbents and their business interests, while undermining consumer interests and competition. Increasing efficiency should be seen as a means for facilitating and attaining consumer protection in a fair and open market. Some might argue that this is an overly-simplistic and misguided view, particularly economists who view economic efficiency as the sole purpose of the competition framework, but we argue that without identifying a clear base in consumer protection, all this Act would do is in effect make large corporations more powerful with greater market share and control

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<sup>10</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.59-69.

<sup>11</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.68.

<sup>12</sup> OECD, "Canada - The Role of Competition Policy in Regulatory Reform," (2002) at p.9

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

over prices and product options through increased efficiency, with no safeguards or at least no adequate safeguards for consumers and other stakeholders in the market. The focus on increased efficiency could mean price hikes, and there won't be any effective measures stopping the companies from raising prices, and reducing product choices and diminishing quality to save more costs. The Competition Bureau would be crippled in its ability to fight these issues without the requisite authority provided under the statute. Thus, we submit that the focus of the *Competition Act* should be on safeguarding consumer interests and advancing the well-being of individual members of society, enabled through open and fair markets.

11. In our earlier arguments to the Competition Bureau, we similarly noted that the objective regarding promoting efficiency and adaptability of the Canadian economy while laudable, cannot be end in itself, rather, it is a means to an end.<sup>15</sup> Specifically in relation to the fourth objective regarding competitive prices and choices, we stated that the “[o]bjective, to provide consumers with competitive prices and product choices, is directly linked to a higher standard of living and a better quality of life. At the end of the day, the purpose of efficiency gains, a better balance of trade, and higher employment, is to allow individual members of our society to consume more, to enjoy more leisure, to live a healthy life in a sound environment, and to build worthwhile social institutions.”<sup>16</sup>

Considering efficiency as a goal in itself is analogous to accumulating gold and other forms of money for their own sake, as the seventeenth-century French mercantilists advocated. We no longer believe money is intrinsically desirable; what is desirable is the goods and services the money will buy.<sup>17</sup>

12. The removal or even weakening of consumer safeguards under the purpose clause and closing doors on non-economic objectives to focus on efficiency would inevitably mean protecting the business interests of large incumbents who can demonstrate efficiency through mergers and acquisitions, which would indeed facilitate further market concentration and enable leading digital platforms and businesses to dictate our choices. In such a scenario, protection of consumer interests might be a by-product or an ancillary consequence of improving efficiency or might be disregarded all together. This approach not only de-prioritizes consumer protection but takes away any assurance that measures exist within the competition law to protect consumers against unfair competitive practices, price hikes and limited choices, as the Competition Bureau and Tribunal; would be limited in what they can do based on the limited goals and purpose laid out in the Act.
13. Some might argue that provisions regarding abuse of dominance exist and those could be availed to protect consumers and SMEs, but redefining the goal of the competition policy, just in terms of economic efficiency would have negative implications on the interpretation

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<sup>15</sup> PIAC, Response to “Treatment of Efficiencies in the Competition Act,” (December 8, 2004) at p.3

<sup>16</sup> PIAC, Response to “Treatment of Efficiencies in the Competition Act,” (2004) at p.4

<sup>17</sup> PIAC, Response to “Treatment of Efficiencies in the Competition Act,” (2004) at p.3, footnote 1

and application of all other provisions, including abuse of dominance. By this we mean, that other provisions could be measured by the yard stick of economic efficiency, if it is identified as the underlying purpose of the Act. Thus, in a conflict between consumer protection, other non-economic values and economic efficiency, clearly efficiency would be prioritized. This is a troubling prospect, particularly in this digital age where the importance of consumer data and privacy is undeniable. Having an Act and policy framework that fails to protect consumer safeguards and protect such values, would be regressive and totally unacceptable.

14. Indeed, protecting consumers has never been more important than in this digital age, when the emergence of dominant digital platforms has reshaped many aspects of our societies and lives, triggering a clear need to do more to protect consumers. These platforms raise significant concerns regarding privacy, data protection, freedom of expression and even affect our political viewpoints, with the content we watch and/or read. We acknowledge that the privacy legislative framework is meant to cater to the data privacy issues but the role of competition policy in these matters cannot and should not be downplayed. One research paper by Bednar and Shaban (2021) aptly notes that competition policy remains a significant tool for limiting the dominance of these data-driven platforms and can create new accountabilities for the associated harms to the economy and society.<sup>18</sup>
15. The considerable amount of data being accumulated by leading digital platforms such as Google, Facebook, and Amazon, is indisputable. Such dominance affects not just consumers but also smaller to medium sized competitors, particularly those competitors who rely on the infrastructure provided by these dominant platforms to provide their own services. The clearest example of this is presented by the ingenious findings of Lina Khan in her paper, Amazon's Anti-trust paradox. In this paper, Khan demonstrated how Amazon has been able to engage in predatory practices, that hurt competition, with the traditional anti-trust models not able to capture and address these issues. Khan's paper illustrated how Amazon's strategy that focused on achieving scale and growth, rather than profits by consistently charging low prices over the years that was backed by investors, along with integration across multiple business lines, cemented its position as a dominant online platform.<sup>19</sup> Indeed, Amazon listed consistent losses for the first seven years it was in business with debts of \$2 billion,<sup>20</sup> and only in more recent years it started to report profits.<sup>21</sup> Importantly, Khan argued that Amazon expanded its domain by engaging in different business lines, which often meant that its competitors were also its customers as these competitors depended on Amazon's platform to do business.<sup>22</sup> This inevitably placed

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<sup>18</sup> Vass Bednar and Robin Shaban, "The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era," Research Report (McGill's Centre for Media, Technology and Democracy) (April 21, 2021).

<sup>19</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal* at p.713, 746-747.

<sup>20</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal* at p.713.

<sup>21</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal* at p.747-748.

<sup>22</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal* at p.754-755.



these competitors in a vulnerable position and has allowed Amazon to have an unparalleled dominance in the market.

16. Notably, these concerns are not just unique to U.S. We live in an increasingly digitized world where online platforms' influence on Canadian consumers, businesses and economy is a stark reality, and so are the risks associated with it. The Competition Bureau's website notes that in 2018 alone, Canadians spent \$57.4 billion on online purchases, compared to only \$18.9 billion in 2012.<sup>23</sup> In August 2020, the Competition Bureau Canada launched an investigation under abuse of dominance, to examine Amazon's conduct on its Canadian marketplace, Amazon.ca, and to inquire whether such conduct is impacting competition to the detriment of consumers and businesses here.<sup>24</sup>
17. The significant market control of Amazon and other dominant firms requires as much scrutiny in Canada as other jurisdictions to ensure corporate power is kept in check, and that consumers and SMEs are adequately protected. If the underlying purpose of competition policy is redefined just in terms of economic efficiency, it would certainly have implications not just on the basic premise for the Competition Bureau's investigations but as noted earlier, it could affect the implementation of specific tools of inquiry such as abuse of dominance, and may render the law either ill-equipped or severely weak in its ability to investigate and enforce actions against such corporate practices.
18. We briefly comment on another issue that was also discussed in Iacobucci's paper, which is protection for workers. Iacobucci questioned the omission of workers from the purpose clause.<sup>25</sup> In his discussion of s.1.1 objectives, he noted there are no distributive concerns for workers and that the efficiencies defence treats cost savings, including saving labour costs as a positive impact of a merger.<sup>26</sup> He notes that losing a job will on average negatively impact workers' economic well-being but distributive concerns for them are not covered.<sup>27</sup> We agree with the need to protect workers' interests under our competition framework and would support addition of protections for them. This is to not only to ensure that loss of jobs and labour issues are fairly addressed, but also that job losses are not considered an efficiency gain, which unduly hurts workers at the cost of promoting business interests.
19. Accordingly, we submit our competition framework must be aimed at providing a fair and open market that protects consumers, businesses, and workers against corporate abuse and promotes innovation. We strongly oppose any attempt to remove consumer protection

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<sup>23</sup> Competition Bureau Canada, "Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon," (August 14, 2020) online: <<https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html>>.

<sup>24</sup> *Ibid.*

<sup>25</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.48

<sup>26</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.48.

<sup>27</sup> *Ibid*

from this clause. That said, there are clarifications required as to the scope of consumer protection to be covered by the statute, which in its present form is in terms of competitive prices and product choices. These are discussed below.

## ii. Clarify the scope of consumer protection and applicable standard

20. Having identified protection of consumer interests in an open and fair market as the underlying goal of the Act and competition policy, it is important to review the adequacy of the current interpretation of consumer protection in this digital age, and the underlying standard that should guide the application of competition law in Canada.

21. There have been several theories and standards when it comes to the application of the competition law. In recent times, questions have been raised as to the adequacy and interpretation of 'consumer welfare' standards, with push towards other models to better protect competition. For instance, Khan's paper argued that consumer welfare, defined as 'short-term price effects' [that is, downwards] does not capture certain anti-competitive conduct, and argued that assessing the market structure and competitive process is vital for protecting important antitrust values.<sup>28</sup> While in Canada competition law has not hewed as closely to this conception of "consumer welfare" as law in the U.S., in part due to the relative paucity of competition law litigation and attendant lack of defining caselaw from the courts,<sup>29</sup> in part due to the nefarious influence of s. 96 of the *Competition Act*,<sup>30</sup> Canada still feels the effect of this argument and it colours our interpretation of the *Competition Act*.

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<sup>28</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal*

<sup>29</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 FC 185, per Evans J.A. at para. 22: "The appeal raises a question of fundamental importance to the administration of the Competition Act that has been the subject of vigorous debate among economists and lawyers in Canada and elsewhere. Indeed, the issue is one on which the Commissioner, and his predecessor, the Director of Investigation and Research, Bureau of Competition Policy, have at different times propounded more than one view. However, the volume of the literature to which it has given rise far exceeds that of the jurisprudence and, prior to the decision under appeal, the question had been the subject of judicial comment in only one case."

<sup>30</sup> J. F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress (1987), 62 N.Y.U.L. Rev. 1020, at 1035-36. See also *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 FC 185, per Evans J.A. at para. 157: "In addition, some commentators in the United States have expressed surprise at the interpretation of section 96 adopted in the MEG. See, for example, J. F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress (1987), 62 N.Y.U.L. Rev. 1020, at 1035-36; S. F. Ross, "Afterword--Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so the World can be More Efficient?" (1997), 65 *Antitrust L.J.* 641. Thus, Ross writes (*supra*, at 652, note 41):

As Professor Brodley has observed, the logical extension of competition policy based solely on societal wealth maximization would be to prefer a monopolist that was able to perfectly price discriminate (charge each consumer the maximum amount each consumer was willing to pay) to the typical Canadian industry with a relatively few number of firms, which would not produce at a single competitive price.

22. In relation to market structure in the U.S., Khan posits that seeking to assess competition without acknowledging the role of market and its structure (i.e. open or highly concentrated) is misguided and that aspects such as the market structure and competitive process would offer better insight into the state of competition, rather than measures of consumer welfare.<sup>31</sup> In practice, she elaborated it to mean assessing factors that give insight into the neutrality of the competitive process and openness of the market, based on factors such as entry barriers, conflicts of interest, emergence of gatekeepers, use of and control over data and the dynamics of bargaining power.<sup>32</sup> Khan also explained that that the long-term interests of consumers are (besides just price): product quality; variety; and innovation-factors; and that these non-price effects are best achieved through a robust competitive process and open market, while a highly concentrated market structure endangers these long-term interests, and that even if a consumer welfare standard is accepted as a “touchstone of antitrust,” then looking in part to how the market is in fact structured is key.<sup>33</sup>
23. We agree with Khan’s analysis and believe that mere consideration of consumer interests, in terms of price and output, without considering the entire market and its actual state of competition (including other non-price aspects) would not only be inaccurate but even be deceptive. This is because consumers could be getting low prices but their choices, quality of services and products and innovation could be seriously hampered. Moreover, dominance by some players in the market can certainly allow for price hikes without any downward pressure from competitors. We understand that issues such as predatory pricing could be hard to prove<sup>34</sup> but these practices exist in the marketplace as shown by Khan’s paper and considering a pre-emptive approach to address these risks might be worth it in the long-term. This is because even if some dominant firms might not be raising prices now, they could do so in the future after driving out their competitors from the market and leaving consumers with no choice but to rely on the goods and/or services provided by these dominant digital platforms.
24. Khan suggested other approaches for addressing the anticompetitive challenges *i.e.*, by relying on traditional antitrust principles to create a presumption of predation and to ban vertical market integration by dominant platforms to uphold competition or to accept dominant platforms as natural monopolies or oligopolies and applying elements of a public utility regime to them or essential facilities obligations.<sup>35</sup> We concur with Khan’s observations regarding the issue of highly concentrated markets hurting consumers over time and certainly support measures that presume predation and seek to ban vertical mergers within our regime. Though to be clear, we believe that protection of consumer

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<sup>31</sup> Lina M. Khan, “Amazon’s Anti-trust paradox,” (2017) 126:710, *The Yale Law Journal* at p.745

<sup>32</sup> Lina M. Khan, “Amazon’s Anti-trust paradox,” (2017) 126:710, *The Yale Law Journal* at p.746

<sup>33</sup> Lina M. Khan, “Amazon’s Anti-trust paradox,” (2017) 126:710, *The Yale Law Journal* at p.739

<sup>34</sup> Federal Trade Commission, “Predatory or Below-Cost Pricing,” online: <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost>>.

<sup>35</sup> Lina M. Khan, “Amazon’s Anti-trust paradox,” (2017) 126:710, *The Yale Law Journal* at p.803

interests in the long and short term should be the guiding principle, enabled through an open and fair market, that also protects workers and SMEs against corporate abuse.

25. We note that the Majority Staff Report, “Investigation of Competition in Digital Markets,” by U.S Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, also discussed issues concerning the narrow interpretation of consumer welfare and weakening of antitrust laws in the U.S.<sup>36</sup> It recommended that the Congress consider reasserting the original intent and broad goals of antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.<sup>37</sup> As noted above, in our view, it is important to consider consumer interests in relation to an open and fair market, not in isolation or based on mere prices. Our current purpose clause already includes protections for SMEs; thus, entrepreneurs and businesses should be covered under a broad interpretation of SMEs, with protections added for workers.
26. Thus, we submit that a standard that prioritizes consumer protection in an open and fair market would be an appropriate standard to guide the application of Canadian competition law and policy. Call it “antitrust welfare”;<sup>38</sup> call it “balanced competition”: what is needed is an admixture of consumer protection with the usual competition goals of economic efficiency and room for competitive rivalry and innovation.

### iii. Reliance on other regimes unworkable

27. As briefly noted earlier, a purported solution proposed by Iacobucci to address the issue of having several objectives in the *Competition Act* is to prioritize efficiency within the Act over other objectives and defer to other policy instruments to account for social objectives.<sup>39</sup> We view reliance on other policy instruments for protecting non-economic objectives, particularly those that conflict with economic efficiency, as highly problematic. This is because different agencies and their legal and/or policy framework do not have the same powers as the Commissioner or the Tribunal under the *Competition Act*, particularly, enforcement powers, and in the absence of such an overarching regime with uniform powers, this approach cannot work.
28. Even if such a regime were put in place, it would be extremely impractical and ineffective in reaching enforceable and timely determinations. This would require coordination between different agencies vested with the responsibility for protecting different objectives, and may lead to administrative challenges and procedural delays. One need look no farther than the jousting between the Canadian Radio-television and Telecommunications

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<sup>36</sup> Majority Staff Report, “Investigation of Competition in Digital Markets,” (2020) at p.391

<sup>37</sup> *Ibid.*

<sup>38</sup> Eleanor M. Fox, “‘Antitrust Welfare’ – The Brodley Synthesis” Boston University Law Review, Vol. 90, at p. 1375.

<sup>39</sup> Edward M. Iacobucci, “Examining the Canadian Competition Act in the Digital Era,” (2021) at p.68.

Commission (CRTC) and the Bureau in proposed broadcasting mega-mergers, such as BCE Inc.'s eventual takeover of Astral Media and more lately, Rogers Communications Inc.'s proposed takeover of Shaw Communications Inc., as each agency applies different tests to the same broadcasting assets and attempts to judge the deal on differing goals – with a high chance of divergent results.

29. As Iacobucci himself also noted, there are often competing policy values at play that require determinations.<sup>40</sup> Such determinations have to be eventually made, even if different agencies and policy instruments are involved, a priority setting exercise in relation to different objectives has to be conducted, if not by the Competition Tribunal then by some other agency. There are also always chances of there being conflicts between agencies and no consensus as to the eventual outcome.
30. As noted earlier, Iacobucci cites issues such as, indeterminacy and unpredictability in relation to vesting control in the Tribunal for making policy choices but involving different agencies could also lead to indeterminacy and unpredictability. Even more so with different agencies who have different mandates, unless a coherent framework could be developed and clear guidance established as to how this regime would work. Currently, we do not have such a regime in place and we do not know whether such a regime could be set up in Canada and it would achieve the desired aim of protecting different values and reaching fair determinations. Creating agencies like the Federal Trade Commission (FTC) as present in the US might be worth looking into. That said, in the absence of such an agency and a clear regime to rely on, we submit that the suggestion of involving different agencies and regimes for protecting non-economic values at this stage, is more of an abstract than a pragmatic measure.

**b. Abuse of dominance and safeguards for consumer privacy and data**

Recommendation 3: Given the increasing dominance of large digital platforms, consider including explicit protections in Canada's competition framework to protect user privacy and data.

31. When it comes to digital platforms, it is not particularly price that triggers concerns, because some platforms like Facebook, and Google do not charge individual consumers for their services. Though, we in effect pay with our data and privacy. The *Competition Act* and policy in Canada was not originally drafted to deal with this and the many social and political upsets caused by the big techs in this economy.
32. Questions do arise as to whether the competition framework is best suited to respond to these challenges and why not seek relief from other regimes, specifically, the privacy

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<sup>40</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.59.

legislation. As briefly noted above, the role of competition law in these matters should not be downplayed and more so because of the greater power, specifically enforcement power available under the Act, which is currently lacking in several other regimes. Moreover, the Office of Privacy Commissioner of Canada can always collaborate and/or share responsibilities with the Competition Bureau in such matters, but what is important is that the competition law is also equipped to address these issues.

33. Thus, in our view, Canada's competition framework should provide specific protections for consumer privacy and data under the abuse of dominance provisions. There are certainly various other non-economic values meriting attention, but the threat to our privacy and data is one of the most widespread and prevailing issue in this digital age, which calls for immediate attention. Moreover, data and competition are so intertwined together due to the importance of data in this economy that reviewing competition practices of several digital platforms is in many cases incomplete without considering issues concerning privacy and/or users' data.
34. There are also issues of large concentrations of data within a few companies, which not only gives them an edge over their competitors but also carries of risk of misuse and/or data breaches. As Khan noted in her paper "[t]hat a huge share of consumer retail data concentrated within a single company makes hacks of or technical failures by that company all that more disruptive."<sup>41</sup> These large platforms also take advantage of such easy access to data by gaining it from their subsidiaries and even sharing it with their subsidiaries. For instance, in 2017, the European Commission fined Facebook \$122 million for sharing WhatsApp user data with Facebook even though the parent company informed European regulators that it was not possible to link the profiles of users on WhatsApp and Facebook.<sup>42</sup>
35. There are also concerns of large platforms with significant access to data of misusing other companies' data, with the latter relying on the infrastructure provided by these platforms to do business. For instance, the US Staff Report, "Investigation of Competition in Digital Markets," said that their investigation showed that the dominant platforms had misappropriated data from the third parties that rely on them to do business, effectively collecting information from these businesses to use it against them as rivals.<sup>43</sup> The Report recommended structural separation to prohibit a dominant intermediary from operating in markets that place that intermediary in competition with those firms that depended on its infrastructure, and also called for limits as to the market in which a dominant firm can engage.<sup>44</sup>

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<sup>41</sup> Lina M. Khan, "Amazon's Anti-trust paradox," (2017) 126:710, *The Yale Law Journal* at p.796

<sup>42</sup> Amar Toor, "Facebook fined \$122 million by EU for 'misleading information' about WhatsApp acquisition" (18 May 2017), *The Verge* (blog), online:

[www.theverge.com/2017/5/18/15657158/facebook-whatsapp-european-commission-fine-data-sharing](https://www.theverge.com/2017/5/18/15657158/facebook-whatsapp-european-commission-fine-data-sharing).

<sup>43</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.378-379

<sup>44</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.379

36. Canada won't be a first in using tools to prosecute firms for unfair data collection practices under competition law. For instance, in 2019, German antitrust regulators determined that Facebook abused its dominant position by illegally harvesting users' data, as it combined data collected from users across its different platforms, including WhatsApp, and Instagram as well other websites and third party apps.<sup>45</sup> This decision was upheld by the Federal Court of Justice.<sup>46</sup> Last thing we know about this matter is that it is subject to an appeal from Facebook.<sup>47</sup> That said, this case indicates not only the abusive practices by dominant firms in relation to consumer data and creation of unfair advantages for themselves, but also indicates certain regulators well-directed actions to fight big techs and abusive practices. This reform process must add explicit measures to our framework to address and mitigate such abuse of dominance, and enable the Bureau to have the necessary tools to take on such actions.

37. We suggest some specific measures that could be considered. Firstly, there should be clearly defined limits to companies', particularly digital platforms' access to data during an acquisition i.e. the acquiring party should be entirely limited or provided restricted access to the other party's data. At the very least, only data of those consumers should be shared who expressly and explicitly consent to such transfer, otherwise such data should be deleted. Secondly, there should be clear rules limiting dominant firms from misusing data, obtained from consumers and third parties, including use of data across their own different platforms. Thirdly, a related rule could be to impose structural separation remedies as recommended in the US Report to ensure that dominant firms do not compete with those who rely on their firms to do business. Fourthly, large digital platforms should be prohibited from acquiring competing, smaller firms, unless they show that such acquisition would not negatively affect competition. In this regard, a high threshold should be required to be met by the large digital platforms.

**c. Remove Efficiencies Defence**

Recommendation 4: Remove the outdated efficiencies defence, provided under s.96 and s.90.1 of the *Competition Act*.

38. Efficiencies defence has historically underpinned the emphasis on economic efficiency over other objectives, and continues to undermine other policy considerations at the cost

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<sup>45</sup> Adam Satariano, "Facebook Loses Antitrust Decision in Germany Over Data Collection," *The New York Times* (23 June 2020), online: <<https://www.nytimes.com/2020/06/23/technology/facebook-antitrust-germany.html>>.

<sup>46</sup> *Ibid*.

<sup>47</sup> Natasha Lomas, "Competition challenge to Facebook's 'superprofiling' of users sparks referral to Europe's top court," TechCrunch (24 March 2021), online: <<https://techcrunch.com/2021/03/24/competition-challenge-to-facebooks-superprofiling-of-users-sparks-referral-to-europes-top-court/>>.

of increased efficiencies. Indeed, Canada is the only G7 country that has this defense in its competition framework, which has continued to allow increased market concentration, price hikes and lower competition, as long as the efficiencies defence is met. It is high time that this outdated defence is removed from our competitive framework.

39. The efficiencies defence was originally introduced to combat the impact of foreign companies over the Canadian economy and to enable domestic businesses to flourish. The assumption supporting this defense was that Canada needed disproportionately large enterprises to compete globally and efficiency was the means to achieve it.<sup>48</sup> The Canadian economy was very different and much smaller, relative to other national economies, at the time the Act was enacted.<sup>49</sup> However, this does not make sense in today's economy, particularly in this digital economy where the traditional concept of borders does not carry much weight and the risks of corporate abuse, is much more widespread and rapid as compared to before, generating a need to do more to protect consumers and other non-economic values.
40. The efficiencies defence provided under s.90.1 and s.96 of the Act, enables agreements or arrangements, and mergers or proposed mergers, respectively, to be permitted if it could be shown that efficiency gains from these transactions would be greater than and will offset the effects of any prevention or lessening of competition that will result or is likely to result from these transactions and that the gains in efficiency would not have been attained or would not likely be attained otherwise. The direct consequence of these provisions is that they allow several transactions to pass through even if they would hurt competition and affect consumers, if it could be shown that the efficiency gains are greater than the negative implications on competition. Prima facie, it may seem benign if efficiency gains can be shown to be greater than the anti-competitive effects, and this might even seem fair to some. However, this is far from what transpires, due to the significant weight given to efficiency gains, and the practical challenges in determining the anti-competitive effects vs efficiency gains.
41. In several prominent articles, economics and legal commenters (as quoted in Canadian jurisprudence) have noted the bitter irony and nefarious outcome of the efficiencies defence, even in purely economic terms alone. In *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 FC 185, Evans J.A. at para. 157 highlights this criticism: "In addition, some commentators in the United States have expressed surprise at the interpretation of section 96 adopted in the MEG. See, for example, J. F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress (1987), 62 N.Y.U.L. Rev. 1020, at 1035-36; S. F. Ross, "Afterword--Did the Canadian Parliament Really Permit Mergers that Exploit Canadian

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<sup>48</sup> Also see: William Rosenfel, [Goodmans LLP] "Superior Propane: the case that broke the law," (2003) 6:9 *Global Competition Review*, online: <<https://www.goodmans.ca/files/file/docs/SuperiorPropane.pdf>>

<sup>49</sup> PIAC comments on the Competition Bureau's Consultation Paper, "Treatment of Efficiencies in the Competition Act" online: <<https://www.piac.ca/research-reports/treatment-of-efficiencies-in-the-competition-act/>>.



Consumers so the World can be More Efficient?" (1997), 65 Antitrust L.J. 641. Thus, Ross writes (*supra*, at 652, note 41):

As Professor Brodley has observed, **the logical extension of competition policy based solely on societal wealth maximization [as allowed by s. 96] would be to prefer a monopolist that was able to perfectly price discriminate (charge each consumer the maximum amount each consumer was willing to pay) to the typical Canadian industry with a relatively few number of firms, which would not produce at a single competitive price.** [Emphasis added.]

42. The situation has worsened since the Supreme Court of Canada's decision in *Tervita* in 2015 that created significant roadblocks for the Competition Bureau and Tribunal to pass in order to overcome this defence. Among other considerations, *Tervita* places the burden on the Commissioner to quantify all quantifiable anti-competitive effects.<sup>50</sup> As per *Tervita*, the balancing test under s.96 requires the Tribunal must determine both quantitative and qualitative aspects of the merger and then weigh and balance those aspects, thus, first quantitative efficiencies should be compared with quantitative anti-competitive effects, and if necessary qualitative efficiencies should be balanced with qualitative anti-competitive effects. The Court even held that more than marginal efficiency gains should not be required for the defence to apply.<sup>51</sup>

The balancing test under s. 96 mandates a flexible but objectively reasonable approach by which the Tribunal must determine both quantitative and qualitative aspects of the merger, and then weigh and balance those aspects. The test may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger should be compared against the quantitative anti-competitive effects. Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue. However, despite the flexibility the Tribunal has in applying this balancing approach, more than marginal efficiency gains should not be required for the defence to apply. The words of the Act do not provide a basis for requiring this kind of threshold. Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. As a result, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.<sup>52</sup>

43. This test places an onerous burden on the Competition Bureau, to combat this defence and block mergers. The law enforcement challenges in this regard, were recently noted by the Commissioner of Competition in his remarks to the Canadian Bar Association where he highlighted that none of the G7 countries have followed Canada's approach in

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<sup>50</sup> *Tervita Corp. v. Canada (Commissioner of Competition)* (2015) SCC 3.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

relation to the efficiencies defense, and that it creates significant practical challenges for the Bureau to estimate and measure anti-competitive harms, especially in these digital markets, and that more and more parties are using this defence, seeing how impactful it can be.<sup>53</sup> The Commissioner aptly asked for us to pause and ask whether our competition laws are working in the best interest of all Canadians.<sup>54</sup>

While some early commentators hailed Canada as a leader in its pro-efficiency treatment of mergers, with the passage of time, three things have now become clear from a law enforcement perspective.

**First**, since the efficiencies defense was included in our law in 1986, no other G-7 country has followed Canada's approach. This should be cause for concern. In fact, most likeminded countries are looking to toughen up already tougher merger review laws.

**Second**, the efficiencies defence raises significant practical challenges for the Bureau to estimate and measure anti-competitive harm, especially in fast moving digital markets. These are markets where competition often depends on non-price dimensions such as innovation and quality, which are inherently difficult to measure.

**Third**, we are clearly seeing more and more use of this defence as parties realize how impactful it can be. Since 2015, there have been four mergers where either the Bureau or the courts have concluded a merger is likely to result in anti-competitive effects, including higher prices. Yet the efficiencies were thought to outweigh those effects. There are currently two more merger challenges before the Competition Tribunal where the efficiencies defence is in play

The consequences of increased concentration, higher prices and lower competition across sectors of the economy – all in the name of merger efficiencies – are very real for consumers and our economic performance as a country. It's high time we pause and ask ourselves whether our competition laws are really working in the best interest of all Canadians.

Around the world, countries are already tackling these challenges head-on. Internationally, the review of competition laws has become a priority. The US, UK, Europe and Australia are actively working to modernize their laws and increase competitive intensity in their economies. These countries are not only developing stronger laws to protect consumers they are becoming more vigorous in enforcing existing laws.<sup>55</sup>

44. We agree with the remarks of the Commissioner and his call for action. We note that his third point effectively mirrors the prediction of Professor Brodley that higher prices, not lower ones, are to be expected from the concentration permitted by the defence. In our view, the problems emanating from this efficiencies defence will continue to pull us back until we remove this antiquated defence from our framework. Otherwise, we are very likely to see many anti-competitive transactions and mergers go through, undermining consumer interests and competition.

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<sup>53</sup> Competition Bureau Canada, "Pre-recorded remarks from Matthew Boswell, Commissioner of Competition," Canadian Bar Association Competition Law Fall Conference, (October 20, 2021).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

## i. Examples where efficiencies undermined consumer interests and competition

45. There are quite a few recent examples where this defence was successfully applied and allowed the merger or transaction to go through even there would have been a substantial lessening or prevention of competition, including a clear risk of price hikes and reduced competition. For instance:

- In 2019, the Bureau's investigation of the Canadian National Railway Company's (CN) acquisition of H&R Transport Limited revealed that the transaction would likely result in a substantial lessening of competition for full truckload refrigerated intermodal services in eight relevant markets in Canada, and importantly, concluded that CN could charge materially high prices and offer lower quality services, yet the claimed efficiencies outweighed the anti-competitive effects.<sup>56</sup>
- In another transaction, relating to Superior Plus LP's acquisition of Canwest Propane from Gibson Energy ULC, the Bureau concluded that the merger would likely lessen competition substantially in 22 of the 25 geographic markets and Superior would have a monopoly in some markets post-merger.<sup>57</sup> It also predicted post-merger material price increases were likely in these 22 markets. However, for ten local markets, efficiency gains resulting from the transaction were found to outweigh the likely anticompetitive markets. For the remaining 12 other markets, it required some remedies to apply as the efficiencies defence was not met.<sup>58</sup>
- For the acquisition of Canexus Corporation by Chemtrade Logistics Income Fund, the Bureau concluded that the proposed transaction would likely result in anti-competitive effects because among other things, it would eliminate a competitor in a market with limited remaining competition. However, the efficiency gains from this transaction were found to likely outweigh these anti-competitive effects.<sup>59</sup>
- In relation to the proposed acquisition by Superior Plus Corp. ("Superior") of Canexus Corporation ("Canexus"), the Bureau concluded that the efficiency gains would clearly be more than the likely significant anti- competitive effects of the transaction. Even though, during the investigation, the Bureau had learned that the customers of these companies could face materially higher prices for pertinent chemical inputs and would have limited options for alternative supply.<sup>60</sup>

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<sup>56</sup> Competition Bureau Canada, "Competition Bureau statement regarding Canadian National Railway Company's proposed acquisition of H&R Transport Limited," (April 22, 2020), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04527.html>>.

<sup>57</sup> Competition Bureau Canada, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC," (September 28, 2017), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html>>.

<sup>58</sup> *Ibid.*

<sup>59</sup> Competition Bureau Canada, "Acquisition of Canexus by Chemtrade will not be challenged," (March 8, 2017), online: <[https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition\\_of\\_canexusbychemtradewillnotbechallenged.html](https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html)>.

<sup>60</sup> Competition Bureau Canada, "Competition Bureau statement regarding Superior's proposed acquisition of Canexus," (June 28, 2016), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html>>.

46. Issues relating to mergers and the application of efficiencies defence have also rightly raised concerns regarding market concentration and price hikes in the already concentrated telecommunications sector. For instance, in 2017 when the Bell-MTS merger occurred, the Bureau concluded that where Bell, TELUS and Rogers face competition from a strong regional competitor, prices are substantially lower, and that the anti-competitive effects, were not outweighed by the claimed efficiencies.<sup>61</sup> But it allowed the merger to pass through by imposing certain remedies.<sup>62</sup> The reality of the matter is that this merger has culminated in notable price increases for consumers,<sup>63</sup> and affected Manitoba's mobile market and affordable pricing.<sup>64</sup>
47. The ongoing proposed acquisition of Shaw by Rogers, due to its wide scale, raises significantly more concerns of prices hikes and increased concentration in various product markets, particularly the wireless market in several geographic regions. This transaction is still under review at the Competition Bureau, but it would be fair to say that the existence of efficiencies defence provides an advantage to Rogers and Shaw, much to the detriment of consumers and competition in a largely oligopolistic market, with Canada already having one of the highest wireless prices in the world.<sup>65</sup> This means that even if the Competition Bureau's investigation shows that this merger would be bad for consumers and competition, the Bureau cannot block it as long as Rogers can show that the combined entities would save costs and that the claimed efficiencies would outweigh the anti-competitive effects. This needs to change. The only clear and obvious solution to this is to repeal the efficiencies defence.

## ii. Addressing misguided perceptions regarding efficiencies defence

48. Some proponents of the efficiencies defence, like the CBA (Competition Law and Foreign Investment Review section), stated that it is short-sighted to characterize the defence as favouring businesses over consumers or restricting the Bureau's powers to protect consumers, while referring to increase productivity and innovation arising from efficiency based agreements and mergers.<sup>66</sup> Further, it noted that only a small number of mergers

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<sup>61</sup> Competition Bureau Canada, "Competition Bureau statement regarding Bell's acquisition of MTS," (February 15, 2017), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>>.

<sup>62</sup> *Ibid.*

<sup>63</sup> Cameron MacLean, "Bell MTS customers see prices rise for most services", *CBC News* (29 September 2017), online: <<https://www.cbc.ca/news/canada/manitoba/bell-mts-price-increase-1.4314116>>.

<sup>64</sup> Winseck, Dwayne, 2020, "Media and Internet Concentration in Canada, 1984–2019", <https://doi.org/10.22215/cmcrp/2020.2>, Canadian Media Concentration Research Project, Carleton University at p.34.

<sup>65</sup> Rewheel Research, "Is Canada the most expensive wireless market in the world?" (April 2021), online: <[http://research.rewheel.fi/downloads/Canada\\_most\\_expensive\\_wireless\\_market\\_world\\_PUBLIC\\_VERSION.pdf](http://research.rewheel.fi/downloads/Canada_most_expensive_wireless_market_world_PUBLIC_VERSION.pdf)>.

<sup>66</sup> Navin Joneja, Chair, Competition Law and Foreign Investment Review Section, "Summary of CBA Views on Potential Competition Act Amendments," [Remarks to] Sherry Romanado, M.P., Chair, Standing Committee on Industry, Science and Technology, (April 28, 2021) online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=4be8e2d6-77d4-4ecc-8457-d35a4373522f>>.

are cleared in reliance of this defence and that efficiency claims are difficult to prove and the Bureau has recourse to the Tribunal to determine if a merger should proceed.<sup>67</sup> There are several problems with this reasoning. Firstly, it reinforces the traditional view that unfairly focuses on efficiencies over other objectives. Secondly, it fails to acknowledge the significant practical challenges in quantifying anti-competitive harms, as also noted in the remarks of the Commissioner of Competition. Thirdly, this defence has been successfully used by large corporations earlier, affecting significant product markets. Its not just about the frequency of its use but the significant impact it has had and could have, like in the proposed Rogers-Shaw merger.

49. Importantly, what such perspectives fail to acknowledge is that this defence clearly makes large companies more powerful based on increased efficiencies, and undermines consumer interests, competition and innovation. It rewards companies with most market control, and leaves smaller companies and consumers in a vulnerable position, likely exposing them to price hikes and limited choices and innovation, as noted above.
50. Iacobucci's discussion paper also acknowledged the challenges associated with the requirement to quantify anti-competitive effects,<sup>68</sup> but his recommendations do not go far enough. He recommended that the s. 96 defence should be amended to provide that the Commissioner need not rely on quantitative evidence to establish a probable substantial lessening or prevention of competition from a merger, and that the merging parties should bear the burden of showing that efficiencies outweigh the anti-competitive effects after it been established that such a merger is anti-competitive, and with the Tribunal to exercise its judgment in relation to the gains and losses of the merger, including those that are not totally quantified.<sup>69</sup> We argue that this is not sufficient in order to address the underlying problems associated with the efficiencies defense. This is because even before *Tervita*, earlier precedents indicate the clear precedence given to efficiencies over consumer interests and competition, such as the *Superior Propane* case. Despite, the Competition Bureau's rigorous efforts to block the merger between Superior Propane Inc. and ICG Propane Inc, which went through several litigation and tribunal stages, the end-result of this whole process was that economic efficiency was upheld over other considerations.<sup>70</sup> The Federal Court of Appeal left it to the Tribunal to weigh distributive and efficiency objectives in applying the efficiencies defence, possibly varying on a case-by-case basis.<sup>71</sup> Thus, even if *Tervita* were overturned, and the strictures proposed in the Iacobucci paper added, the law as laid down in *Superior Propane* indicates that efficiency could still be unduly prioritized by the Tribunal over consumer interests and competition under the efficiencies defence.

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<sup>67</sup> *Ibid.*

<sup>68</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.28-33.

<sup>69</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.33

<sup>70</sup> Also see: William Rosenfel, [Goodmans LLP] "Superior Propane: the case that broke the law," (2003) 6:9 *Global Competition Review*.

<sup>71</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.50-51.

51. Considering the above, we strongly urge that this reform process must be taken as an opportunity to strike out the efficiencies defence from Canada's competition framework by repealing both provisions, under s. 96 and s. 90.1 in relation to a similar defence. We specifically recommend that all the provisions relating to the efficiencies defence under s. 96 and s. 90.1 (*i.e.* s. 90.1(4) to (7)) should be repealed.
52. We suggest alternate and more stringent methods should be considered to review mergers, particularly those mergers that can lead to significant market concentration. In this regard, we can look at other jurisdictions for guidance. This is discussed in part (e) of this submission.

**d. Ex post Merger Reviews**

Recommendation 5: Mandate ex post merger reviews to be undertaken after a period of at least five to ten years from merger approvals, particularly for those mergers that carried significant risk of market concentration. The results of such reviews should be publicly disclosed.

53. We recommend that this reform process must also identify and set certain standards and requirements relating to ex post merger reviews. This is to allow for a better understanding of the long-term effects of an approved merger on competition, consumer interests and economic efficiency, particularly those mergers that carried significant risk of market concentration. We understand that the Bureau has previously been involved in certain ex post merger reviews.<sup>72</sup> However, this reform process should consider mandating such reviews, at set time frames to provide for more clarity, regularity and transparency.
54. Bednar and Shaban in their paper recommended that the Bureau should review digital mergers that happened over the past decade and flag harmful mergers that may be overlooked due to an outdated understanding of consumer harm and high merger notification thresholds.<sup>73</sup> We agree with the writers that the Bureau should review mergers after they have been approved, and specifically take note of those mergers that were based on a misguided understanding of consumer harms and/or those mergers that significantly undermined competition over the years. This may provide insight and teach lessons to be applied for upcoming merger reviews. That said, in our view, a decade might be too long a time in this digital age when corporations and businesses, including merged entities grow and expand at a rapidly fast pace. We believe that five years might be a more

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<sup>72</sup> Competition Bureau Canada, Ex post merger review: An evaluation of three Competition Bureau merger assessments (August 1, 2007), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02447.html>>. Prepared by Mark Neumann and Margaret Sanderson, CRA International. "CRA International was awarded a contract from the Competition Bureau ("Bureau") to undertake an independent review of one of the Bureau's past merger assessments. This ex post merger review is a case study of the Bureau's merger assessment process."

<sup>73</sup> Vass Bednar and Robin Shaban, "The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era," Research Report (McGill's Centre for Media, Technology and Democracy) (April 21, 2021).

reasonable requirement for some transactions, particularly those involving digital platforms and for other businesses ten years might be better suited. Thus, an overall time frame of five to ten years could be set to begin with, and reviewed again as necessary. This time frame could also be different based on any other input received during this reform process, provided it is not too far stretched out in the future.

55. We are aware of the challenges for the Bureau to conduct such merger reviews and after-the-fact studies. For instance, the Commissioner of Competition at his appearance before the INDU Committee, relating to the proposed acquisition of Shaw by Rogers, was asked about the level of monitoring done of other approvals.<sup>74</sup> He said that the Bureau cannot afford to do after the fact assessments of their merger remedies, and also that they lacked the authority to ask for the necessary information and data to properly assess prior remedies.<sup>75</sup>

“I should say, sir, that we simply don't have the resources to conduct after-the-fact assessments of our merger remedies. The resources we have are going full out on current mergers, which we are tasked with reviewing under the law.

Second, we don't have powers in the Competition Act to compel the necessary information and data from parties in the marketplace in order to properly assess the effectiveness of a prior remedy. I can tell you, sir, that internally we would like to set up what we call a “remedies unit”, where we would have a centre of expertise inside the organization that monitors consent agreements, goes back and looks at them for their effectiveness and advises us on future agreements, but we simply don't have the human or financial resources to set up that remedies unit at this time.”<sup>76</sup>

56. We submit that the law should be amended to add a provision for such reviews with the requisite funding support and authority provided under the Act to conduct such studies. If for instance, the implications of Bell-MTS transaction and remedies could have been formally studied by the Bureau, its results might have been quite useful for the Bureau in its assessment of the Rogers-Shaw transaction.

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<sup>74</sup> See the remarks of the Commissioner of Competition at the INDU Committee Meeting, (April 7, 2021), online: <<https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-29/evidence>>.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

#### e. Practices from Other Jurisdictions

Recommendation 6: Adopt more stringent processes for merger reviews that align with the tougher approaches being considered in the U.S.

Recommendation 7: Incorporate specific measures to combat and mitigate anti-competitive practices by digital platforms, such as prohibiting self-preferencing practices, and mandating interoperability and data portability requirements. EU's gatekeeper proposals could be a useful consideration in designing this framework.

Recommendation 8: Canada should consult with various stakeholders, including consumer representatives to better structure Canada's Digital Enforcement and Intelligence Branch, and importantly, to ensure that its objectives are well-defined and provide a fair and open market with comprehensive protections.

57. Canada's current competition framework lacks tools that are necessary to identify and address anti-competitive behaviours in this digital age. Many countries are in the process of revising their current legal and/or regulatory frameworks to be able to better respond to these issues. We briefly consider some of these measures and assess their suitability for the Canadian framework. Our view is that several measures from other jurisdictions present a promising approach for keeping corporate power in check and promote consumer interest and an open and fair market, which must be considered for Canada.

58. Notably, this issue requires a deeper consideration than offered here. As noted earlier, we welcome any future opportunity to discuss these issues in more detail. In this submission, we highlight specific issues from different regimes that in our view could be integral to better equip our competitive framework to address the challenges of this digital economy. We specifically find certain merger review recommendations to be useful and other measures for containing the dominance of large digital platforms.

#### i. **United States of America (U.S.)**

59. As noted earlier, in the U.S., the underlying standard of competition law and policy is being questioned with debate concerning the consumer welfare standard, in particular. Recently, U.S. President Joe Biden signed an Executive Order for promoting competition in the American economy, to address overconcentration, monopolization and unfair competition.<sup>77</sup> This Order also requires federal agencies to adopt a more aggressive approach in relation to matters such as mergers and unfair competitive practices.<sup>78</sup> One of the notable recent developments in the U.S. was the release of the Majority Staff Report,

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<sup>77</sup> Executive Order on Promoting Competition in the American Economy, (July 9, 2021), online: <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>>.

<sup>78</sup> *Ibid.*



“Investigation of Competition in Digital Markets,” by U.S Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary.<sup>79</sup> This Report revealed findings based on a comprehensive review of the anti-competitive practices of four dominant platforms, Amazon, Apple, Facebook and Google, where it found evidence of monopolization and monopoly power,<sup>80</sup> and recommended measures to combat the anti-competitive issues uncovered.<sup>81</sup> In terms of harms from the online platform’s dominance, it found issues, such as diminished consumer choice, eroded innovation and entrepreneurship, and effect on editorial diversity and Americans’ privacy.<sup>82</sup>

60. In order to address several anti-competitive concerns found during this comprehensive investigation, the Report recommended specific reforms that included proposals to (1) promote fair competition in digital markets; (2) strengthen laws relating to mergers and monopolization; and (3) restore vigorous oversight and enforcement of the antitrust laws.<sup>83</sup>

61. The recommendations from the U.S. Subcommittee Report provide several useful suggestions. We specifically note that the tougher measures recommended for merger reviews could be an integral addition to our competitive framework. The Report recommended codifying certain bright-line rules and structural presumptions in concentrated markets, that is mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be

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<sup>79</sup> Jerrold Nadler, and David N. Cicilline, “Investigation of Competition in Digital Markets,” Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, (2020), online:

<[https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519)>.

<sup>80</sup> *Ibid.* More specifically, the U.S Investigation Report found that:

- Facebook has monopoly power in the market for social networking and that Facebook acquired its competitive threats to keep and expand its dominance. It also found that Facebook competes more vigorously with its own products (Instagram, WhatsApp and Messenger), than with competitors. In the absence of competition, its quality has deteriorated over time with worse privacy protections and a rise in misinformation.
- Google was found to have a monopoly in the markets for general online search and search advertising. It was found to maintain its monopoly over general search through a series of anticompetitive tactics, such as an aggressive campaign to undermine vertical search providers that were viewed as a threat by Google. Google was found to have also been through a series of anticompetitive contracts to maintain its monopoly over general search. It was also found that Google engages in various businesses, and that each of its service provides it with significant use data, reinforcing its dominance and driving greater monetization through ads.
- While Amazon was found to have monopoly power over small and medium-sized businesses that do not have an alternative to Amazon for reaching online consumers. Amazon’s dual role as an operator of its marketplace that hosts third-party sellers and also as a seller in that same marketplace creates a conflict. This incentivizes it to exploit its access to competing sellers’ data and information, among other anticompetitive practices.

Apple was found to have significant market power in the mobile operating system, exerting monopoly power in the mobile app store and controlling access to more than 100 million iPhones and iPads in the U.S. [Some highlights noted from the Investigation of Competition in Digital Markets Report]

<sup>81</sup> Majority Staff Report, “Investigation of Competition in Digital Markets,” (2020) at p.11-12.

<sup>82</sup> *Ibid.*

<sup>83</sup> Majority Staff Report, “Investigation of Competition in Digital Markets,” (2020) at p.377

presumptively prohibited so as to place the burden on merging parties to show that the merger would not reduce competition.<sup>84</sup> The Subcommittee also recommended measures to prohibit acquisitions of potential rivals and nascent competitors and to examine the law relating to vertical mergers and exploring presumptions of them being anti-competitive.<sup>85</sup>

62. This bright-line recommendation that shifts the burden on merging parties for transactions that would result in significant market concentration, should be considered as an alternative to the outdated efficiencies defense and the general structure of s. 92 of the Act. This not only gives due consideration to consumer interests and competition, but also makes it easier for the Competition Bureau to block anti-competitive mergers. As per this approach, certain large mergers would be presumed to be anti-competitive, unless proven otherwise. This could be extremely useful in curbing mergers that result in significant market concentration as it would rightly focus on competitive effects, rather than efficiencies. It would also provide the Bureau with considerably more leverage to encourage parties to structure mergers more fairly. Other measures regarding prohibiting acquiring nascent competitors could also be quite useful. It's high time we change gears and bring back the focus on open and fair markets for consumers in Canada.

63. Measures regarding structural separation and restrictions between lines of business to protect against dominance by digital platforms should also be considered. These measures prohibit a dominant intermediary from operating in markets that place an intermediary in competition with the firms dependent on its infrastructure, and line of business restrictions, which means there are limits to the market in which a dominant firm can engage.<sup>86</sup> Other measures against self-preferencing,<sup>87</sup> and increased interoperability and data portability,<sup>88</sup> would also be particularly useful considerations for Canada. In relation to self-preferencing, the Subcommittee's study showed that dominant platforms engaged in preferential or discriminatory treatment at many instances, such as preferencing their own products or services, or certain businesses over others.<sup>89</sup> Thus, non-discrimination rules were recommended that would require dominant platforms to offer equal terms for equal service, with these rules to apply to price and terms of access too.<sup>90</sup> Introducing rules against self-preferencing could be integrally important for fighting against corporate abuse and to ensure protection of consumer choice and innovation, and must be considered for Canada.

64. Notably, Iacobucci recommends against banning self-preferencing, reasoning it to be bad for consumers, noting that dominant firms, including platforms may be able to offer better products downstream than stand-alone firms.<sup>91</sup> We disagree, self-preferencing not only

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<sup>84</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.392-393

<sup>85</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.394-395.

<sup>86</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.378-379

<sup>87</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.382

<sup>88</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.384-386.

<sup>89</sup> Majority Staff Report, "Investigation of Competition in Digital Markets," (2020) at p.382

<sup>90</sup> *Ibid.*

<sup>91</sup> Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (2021) at p.33

severely limits other businesses' ability to compete fairly but also affects consumer choice in and innovation in the long-term. It is not just the US, even the European Union has called for measures to combat self-preferencing.<sup>92</sup> We note that the concern expressed by Iacobucci is addressed by the concept of "undue" or "unreasonable" preference – a test long applied in telecommunications law, with great effect in cases of abuse, while allowing a large scope for dominant firms to deliver innovation.

65. In the absence of any extensive investigations on digital platforms under the Canadian framework, it makes sense to learn from this investigation and suggestions put forward in the U.S. More so because in this digital age, these anticompetitive practices and harms to consumers and competition have much more symmetry, relative to other industries and therefore, considering these recommendations is particularly useful. We also definitely support enhanced enforcement rules and powers for the Competition Bureau.

## ii. European Union (EU)

66. The European Union (EU) has introduced comprehensive proposals to combat the challenges in this digital age under their Digital Markets Act and the Digital Services Act.<sup>93</sup> The Digital Services Act seeks to provide new rules that are aimed at better protecting consumers and their fundamental rights online, establish a powerful transparency and a clear accountability framework for online platforms, and to foster innovation, growth and competitiveness within the market.<sup>94</sup> The European Union website highlights specific values advanced under this regime, for citizens, for providers of digital services, for business users of digital services, and for the society at large, with the latter providing for greater democratic control and oversight over systemic platforms, mitigation of systemic risks such as manipulation or disinformation.<sup>95</sup> Some of the new obligations include, transparency reporting, terms of service to account for fundamental rights, data sharing and several other requirements.<sup>96</sup>

67. While the *Digital Markets Act* establishes a narrow criteria for a large online platform, to qualify as a gatekeeper, and establishes specific rules that these gatekeepers would have to comply with, covering matters such as interoperability, allowing business users' access to data they generate in their use of the gatekeeper's platform, amidst other

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<sup>92</sup> Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_17\\_1785](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785)>.

<sup>93</sup> The Digital Services Act package, online: <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>>.

<sup>94</sup> European Commission, "The Digital Services Act: ensuring a safe and accountable online environment," online: <[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)>. For more, see: Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) (15 December 2020).

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

requirements.<sup>97</sup> It also sets out what these gatekeepers cannot do such as self-preferencing, prevent consumers from linking up to businesses outside their platforms, prevent users from uninstalling any pre-installed software or app, with certain fines and penalties and other remedies identified in case of non-compliance.<sup>98</sup>

68. The gatekeeper proposals in particular under the Digital Markets Act could be a useful consideration for keeping corporate power and dominant digital platforms in check here. Also, its specific proposals for protecting consumers would add useful safeguards in our framework. The Digital Services Act on the other hand provides strong approaches for dealing with accountability and transparency issues.

### iii. United Kingdom (UK)

69. In the UK, a Digital Markets Unit (DMU) has been established within the Competitions Markets Authority to develop a pro-competition regime for digital markets.<sup>99</sup> This unit would oversee the regulatory regime applicable to powerful digital firms, promote greater competition and innovation and protect consumers and businesses from unfair practices.<sup>100</sup> Some of the major issues covered in its recently held consultation, included identifying the criteria for firms that will fall under the scope of this regime, objectives for this unit, input on its approach to a new code of conduct to promote open choices, fair trading and trust and transparency, powers of this unit and other measures.<sup>101</sup>

70. More specifically, the DMU will designate firms with strategic market status (SMS), and these firms would have to follow a code of conduct and they may also be subject to new merger requirements by the Competitions Market Authority.<sup>102</sup> The consultation provides several issues and questions that would be worth looking into it, such as the aim of the code, that is to manage the effects of these firms' market power, with certain issues listed that are meant to help anticipate and prevent practices that exploit consumers and businesses or exclude innovative competitors, such as entrenching and protecting market power by a firm, unfairly extending market power, exploitative conduct, such as unfair or unreasonable contract terms and unreasonably restricting consumer choice.<sup>103</sup> Amidst

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<sup>97</sup> European Commission, "The Digital Markets Act: ensuring fair and open digital markets," online: <[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)>. For more, see: Proposal for a Regulation on Digital markets act (15 December 2020).

<sup>98</sup> *Ibid.*

<sup>99</sup> Gov.UK, Collection "Digital Markets Unit," online: <<https://www.gov.uk/government/collections/digital-markets-unit>>.

<sup>100</sup> *Ibid.*

<sup>101</sup> Gov.UK, Closed consultation, "A new pro-competition regime for digital markets," online: <<https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>>.

<sup>102</sup> Gov.UK, Closed consultation, "A new pro-competition regime for digital markets," consultation document (9 August 2021), online: <<https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/consultation-document-html-version>>.

<sup>103</sup> *Ibid.*

other issues, it also covers merger issues with the government seeking to ensure there is proportionate visibility and assessment of merger activity by firms with SMS.<sup>104</sup>

71. Notably, Canada has a Digital Enforcement and Intelligence Branch, which is a centre of expertise on digital business practices and technologies, and provides intelligence expertise for all directorates at the Competition Bureau.<sup>105</sup> Similar to the consultation process in the UK, Canada should consult with various stakeholders, including consumer representatives to better structure, and design this branch. Importantly, this is to ensure that the specific objectives of this branch are well-defined and drafted to provide a fair and open market with comprehensive protections for consumers, SMEs and workers in this digital economy that is largely dominated by huge corporations.

\*\*\*End of Document\*\*\*

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<sup>104</sup> *Ibid.*

<sup>105</sup> Competition Bureau Canada, Our structure [See Digital Enforcement and Intelligence Branch], online: <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00018.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00018.html)>.