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Examining the Canadian Competition Act in the Digital Era
Submission to the Consultation Established by the Honourable Howard Wetston

On October 27, 2021, Senator Howard Wetston established a consultation process and requested comments from the public in order "to promote additional dialogue on paths forward for Canadian competition law".

Certainly, there is room for review and improvement, and I applaud Senator Wetston's initiative. I believe that significant substantive changes to competition policy should be based on a full appreciation that the Act is an integral part of Canada's fundamental framework for economic development. Changes in this framework legislation must be considered carefully because the future development of the Canadian economy and hence the standard of living of all Canadians are at stake.

Senator Wetston commissioned Professor Ed Iacobucci to prepare a discussion paper for this consultation.[1] The paper addresses issues that are central in the ongoing debate over the appropriate goals and objectives of Canadian competition policy and the Competition Act ("the Act"). I limit my remarks below to his statutory interpretation of s.1.1 and the efficiency defence in s.96.

1. **Overview**

Professor Iacobucci does not mince his words:

> "Regardless of one's views on the optimal efficiencies defence to mergers, the *status quo* is not satisfactory either from an economic or a non-economic perspective. The defence does not have a clear conceptual foundation at present. The purpose clause of the *Act*, Section 1.1, the defence itself in s. 96 and the *Superior Propane* case have failed to clarify *why* the efficiencies defence exists, which in turn have rendered its application subject to the individual policy preferences of the Tribunal members who may consider it in a given case. It is not appropriate to require legal adjudicators to answer on a case-by-case basis the question of what the fundamental objectives of competition policy are.[2]

> "But this harmony does not always hold, and economic objectives are not the only important goals in either the *Competition Act* or the case law. Rather, the *Act* outlines a variety of objectives, and the case law sometimes reflects this variety (though not always). Indeed, the largest problem with the statutory *status quo* is not an overly narrow focus on economics but a framework that is on occasion dangerously indeterminate in its reliance on various policy objectives…."[3]

[1] Edward M. Iacobucci. "Examining the Canadian Competition Act in the Digital Era". September 27, 2021 (hereinafter cited as "Iacobucci paper"
[2] Iacobucci paper at 3-4
[3] Iacobucci paper at 46-47

I take it for granted that Professor Iacobucci is not here alleging that Tribunal members have actually and knowingly abused their positions of public trust or disregarded their sworn obligations under the Act and under the Competition Tribunal Act by substituting their personal preferences in specific cases.

Rather, it seems to me that he is concerned that Tribunal members may be forced into doing so because, in his view, the Act is so unspecific and offers so little guidance that they cannot perform their adjudications in a professional manner and must rely on their personal preferences.

I dispute his central contention that the Act, particularly the purpose clause in s.1.1, is unclear or lacking in its direction to the Tribunal. For example, Professor Iacobucci writes the following:

> "But the goals may point to different outcomes in particular cases. A merger that results in lower costs and less competition may increase efficiency from lower costs, and lead to higher uncompetitive prices from the reduction in competition.[4]
>
> "Section 1.1, which simply lists various objectives, provides no guide to private parties or adjudicators when goals point in different directions".[5]

The first assertion seems to indicate his disagreement with the efficiency defence to an anti-competitive merger in s.96 of the Act. As I discuss below that provision clearly and unambiguously makes efficiency the paramount goal of the merger provisions of the Act.

The second assertion above indicates his misreading of s.1.1. The various listed objectives that he refers to are the desired results of the competitive environment that the Act seeks to maintain and encourage. *Hence, s.1.1 does not require the Tribunal members to decide among the various objectives listed therein when they adjudicate.*

Accordingly, I disagree with these and other similar assertions throughout Professor Iacobucci's paper and I demonstrate below that there are no conflicts among "various objectives" in s.1.1. I will further show that the Competition Tribunal had provided a clear and coherent interpretation of s.1.1 in its two decisions in the *Superior Propane* case.

2. The Purpose Clause

In December 1985, the Minister introduced Bill C-91 to amend the Combines Investigation Act; it included the so-called "purpose clause" in s.1.1. It states:

[4] Iacobucci at 47.
[5] Ibid.

> 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.

In understanding the purpose clause, it is helpful to note the repeated use of the phrase "in order to" in regard to each of the listed objectives in s.1.1. This is central in itself, as it emphasizes that these objectives are to be achieved by maintaining and encouraging competition.

a. The Early History of S.1.1

The history of the Act records repeated attempts to include a preamble to the proposed statutory provisions in the various bills that came before Parliament. This process became so difficult that Bill 29 (1983) contained no preamble at all. Finally, Bill C-91 ended the dispute by including the purpose clause not as preamble, but as a statutory provision. This means that the courts are not free to disregard it; they must interpret and follow it.

Nonetheless, there was considerable skepticism in the competition bar about its meaning and implications. Some early legal commentators viewed s.1.1 as a high-level statement of objectives that failed to specify the true goal of the Act and, further, provided no guidance on how the various listed objectives should be ordered. Outside of the bar, economists and other lay readers appeared to share the same view. This skepticism was reinforced by Madame Justice Reed's obiter dicta remarks in the *Hillsdown* decision.

The Competition Tribunal addressed the meaning and interpretation of s.1.1 in its first and second decisions in the landmark *Superior Propane* merger case. The Tribunal's approach was to consider s.1.1 in light of (i) the history of Canadian competition policy, (ii) the government's many unsuccessful attempts to reform the Combines Investigation Act and (iii) the 1969 Interim Report on Competition Policy of the Economic Council of Canada following the mandate it had received from the federal government in 1966. To my knowledge, no previous commentator on s.1.1 had done so.

3. The Tribunal's Interpretation of S.1.1

In its first decision in the *Superior Propane* merger case, the Competition Tribunal gave a coherent and unambiguous interpretation of the purpose clause.

The Tribunal made it clear that the overall purpose of the Act was, as stated in s.1.1, to "maintain and encourage competition". It held that the listed objectives in s.1.1 would be realized as a result of this competition policy, and the Tribunal also pointed out that the Act did not give it any other means to achieve those objectives individually.

Accordingly, there is no hierarchy in the listed objectives of competition policy in s.1.1. To illustrate, although "efficiency and adaptability" is listed first and "competitive prices for consumers" is listed last, they are of the same significance and standing because their attainment is through the competitive regime that the Act seeks to maintain and encourage. In this sense, there is no conflict among the listed objectives in s.1.1.

Put differently, s.1.1 of the Act endorses the "competitive process" because of the benefits that it produces. It was open to Parliament to set a different competition policy, one that "protects competitors", a theme that the Economic Council Report associated with US antitrust law and rejected because it was antithetical to economic efficiency and industrial modernization.

Table 1 provides an extract of the relevant discussion of the purpose clause in the Tribunal's first decision in the *Superior Propane* merger case.

As noted therein, the Tribunal's first decision in the Superior Propane merger case recognized that achieving the socially-desired distribution of income and wealth in society was not a listed objective and it noted that a competitive regime would not necessarily produce such a distribution. Accordingly, the Tribunal concluded that distributional matters were outside the scope of the Act.[6]

Therefore, s.1.1 is in fact quite clear. Its critics include those who would like to expand competition policy to address a broader range of issues, including the distribution of income and wealth in society, basic justice, and various definitions of fairness. Other critics may object that "big is bad" per se and that competition policy should deal with industrial concentration out of concerns about political power and influence.

The 1969 Interim Report of the Economic Council on Competition Policy was aware of these concerns but, based on its assessment of Canada's industrial structure, its recommendations emphasized economic goals and assigned non-economic goals to other branches of government.

[6] Tribunal Member Christine Lloyd dissented from the Tribunal's first decision over the distributional issue. In so doing, she evidenced her personal interpretation of the Competition Act and ignored the decision of the presiding Chair (Mr. Justice Marc Nadon of the Federal Court) who alone decides matters of law including statutory interpretation.

To exemplify further, the Act is not, as sometimes thought, a direct instrument of consumer protection. As the Tribunal explained in its second decision in the *Superior Propane* case, the Act reflected the constitutional limits on the power of the federal government to legislate in light of provincial jurisdiction regarding contracts or property and civil rights in the province. If this division of powers still remains in place, it will be difficult to amend the either the Act or s.1.1 to give greater prominence to consumer prices.

TABLE 1
Extract from Competition Tribunal Decision in Superior Propane I

[406] There are significant differences in the positions of the parties as to the proper interpretation of sections 1.1 (the purpose clause) and 96 (the efficiency exception) of the Act. Many of the issues raised are of long standing, in part because there have been so few litigated mergers in Canada since the Act was amended. In particular, no decision in a litigated merger has turned on the question of efficiency gains and hence it appears to the Tribunal that there is considerable confusion over the meaning of certain key terms. Before dealing with the positions of the parties, the Tribunal will set out its understanding of the relevant sections of the Act.

[407] The Act seeks to obtain the benefits of a competitive economy. As set out in the purpose clause, these benefits, which we have characterized as the objectives of competition policy, are economic efficiency and adaptability, the expansion of opportunities for Canadian participation in world markets and openness to foreign competition at home, opportunities for small businesses to participate in economic activity, and competitive consumer prices and product choices. Under the purpose clause, the Act seeks to achieve these objectives by maintaining and encouraging competition. To this end the Tribunal may, pursuant to section 92 of the Act, order divestiture where a merger is found to prevent or lessen competition substantially.

[408] There was some discussion at the hearing concerning the status that should be given to the stated objectives, particularly whether the ordering of objectives in the list contains any useful information in interpreting the Act. Such discussion is misdirected; the true goal specified in the purpose clause is the maintenance and encouragement of competition. It is noteworthy that the Act does not give the Tribunal the powers to achieve the objectives individually.

[409] For example, small businesses are not protected under the Act. The purpose clause indicates only that the opportunities for small businesses to participate in economic activity will result from maintaining and encouraging competition. Hence, no other powers are needed to realize this objective.

[410] Accordingly, the listing of objectives of competition policy simply presents the rationale for maintaining and encouraging competition. No hierarchy among the listed objectives is indicated and hence no meaning can be taken from the order in which the listed objectives of competition policy appear in the purpose clause. Under the purpose clause, all of the objectives flow from competition.

[411] There are, of course, other objectives that could be sought, one such being the proper distribution of income and wealth in society. It is clear, however, that when competition is maintained and encouraged, the resulting distribution of income and wealth may not be the proper one depending on one's political or social outlook. By not including distributional considerations in the list of objectives in the purpose clause, Parliament appears to have recognized this. Indeed, if distributional issues were a concern, Parliament might have felt it necessary to restrict or place limits on competition in order to achieve the proper distribution of income and wealth in society. However, such limits would place competition policy at war with itself.

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4. The Tribunal's interpretation of S.96

The Tribunal's first decision also clarified the relationship of the merger efficiency defence in s.96 to s.1.1:

> **[413]** The existence of section 96 signals the importance that Parliament attached to achieving efficiency in the Canadian economy. Indeed, in the view of the Tribunal, section 96 makes efficiency the paramount objective of the merger provisions of the Act and this paramountcy means that the efficiency exception cannot be impeded by other objectives, particularly when those other objectives are not stated in the purpose clause. To be more explicit, if, pursuant to the purpose clause, the pursuit of competition is not to be limited by distributional concerns, then as a matter of both law and logic, the attainment of efficiency in merger review cannot be limited thereby when competition and efficiency conflict.

5. Reaction to the Tribunal's First Decision

The Tribunal's first decision provoked much public discussion, both pro and con. The decision of the Federal Court of Appeal followed.

a. Public Reaction

Most notably perhaps, Mr. William Rosenfeld Esq. wrote an article entitled "Superior Propane: the case that broke the law".[7]

After the Tribunal's first decision was released, it was examined in a new legal textbook, "The Law and Economics of Canadian Competition Policy" by Trebilcock et al.

The authors considered, inter alia, the history and the goals Canada's competition policy and dealt with the Tribunal's first decision in the *Superior Propane* case in some detail. In particular, they evaluated the reasons that the Tribunal had given for excluding distributional issues and also commented on Professor Townley's "balancing weights approach".

Their broad conclusion was that the introduction of distributional considerations into the adjudication of mergers would introduce considerable complexity and uncertainty. Table 2 provides an extract of their analysis.

They noted that the Commissioner had already appealed the Tribunal's first decision in the *Superior Propane* merger case to the Federal Court of Appeal.

[7] William Rosenfeld, "Superior Propane: the case that broke the law", Global Competition Review, Volume 6, Issue 9, October 2003 at 34-36.

TABLE 2

"It is within the mandate of the tribunal to provide an interpretation of the statute, however, and the economic arguments that the tribunal draws upon are persuasive. The alternative to the total surplus argued by the commissioner in *Superior Propane* invites the tribunal to apply welfare weights based largely or exclusively on the regressivity of the transfer from consumers to shareholders (a 'welfare-weights" approach). Are the consumers of the products produced by the merging firms among the less wealthy members of society, and if so to what extent should the transfer be regarded as a negative outcome of the merger? In the commissioner's approach, the negative outcome would be incorporated in the "balancing weights" or welfare weights attached to surplus accruing to individuals of different wealth levels. The tribunal's decision to reject this approach has merit. If one were to incorporate redistributive effects in merger analysis, it would be necessary to consider not just the wealth of consumers but also the wealth of the shareholders of the merging firms. The income redistributive effect of the transfer from one group of individuals to another depends on the wealth levels of *both* groups. If redistributive effects were consistently accounted for, a merger that was unacceptable when wealthy Canadian families closely held the merging firms would suddenly become acceptable if a teachers' pension fund bought the shares.

Furthermore, carrying the welfare-weights approach to its full conclusion means that mergers such as the IntraWest acquisition of Whistler Mountain (which combined the adjacent Blackcomb and Whistler mountain ski areas) could be accepted in spite of the *negative* cost efficiencies and a positive dead-weight loss because the merger produced a favourable redistribution of wealth from very wealthy consumers (on average) to less wealthy shareholders. A welfare-weights approach results in acceptance of some transactions with overall negative net efficiencies, including the dead-weight loss if the distribution of wealth in improved with the transaction. The welfare-weights approach, in other words, would lead to the acceptance of mergers involving both a lessening of competition and negative cost efficiencies.

The dependence of merger decisions on the pattern of share ownership of the merging parties and the acceptance of cost-increasing, competition-lessening mergers, are arguably both absurd implications of the proposed use of competition policy not just to maximize the total wealth (surplus) of individuals but to distribute wealth fairly. At the very least, these examples suggest that the use of competition policy to redistribute income — rather than leaving income redistribution to government instruments such as taxation and social insurance, which are explicitly designed for this purpose – would be extremely complex.

Source: Michael Trebilcock, Ralph A. Winter, Paul Collins, Edward M Iacobucci. The Law and Economics of Canadian Competition Policy, University of Toronto Press, 2002 at 149-150

b. The First Court of Appeal Decision

The Commissioner appealed the Tribunal's first decision in the *Superior Propane* merger case. It is noteworthy that, in its decision, the Federal Court of Appeal did not identify or comment on the portion of the Tribunal's decision shown in Table 1 above. The Court did not directly disturb this portion of the Tribunal's decision.

Nevertheless, the Court instructed the Tribunal that it had erred by not considering distributional considerations, that the Tribunal must consider each of the listed objectives in the purpose clause when applying the efficiency defence in s.96, and that, as a court, it lacked the capacity to determine the appropriate standard for assessing the distributional issues that arise merger cases. It acknowledged that "balancing weights approach" of the Commissioner's expert Professor Townley appeared to meet the requirements of the Act for deciding distributional issues.

The Court stressed that the application of the "balancing weights approach" would require a factual basis:

> [141] It seems to me that the balancing weights approach proposed by Professor Townley, and adopted by the Commissioner, meets these broad requirements. Of course, this approach will no doubt require considerable elaboration and refinement when it comes to be applied to the facts of particular cases.

It is noteworthy that the Federal Court of Appeal accepted the Tribunal's strong statement that the existence of s.96 meant that efficiency was the paramount consideration in the merger provisions of the Act:

> [90] In spite of the existence of multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective to another. Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be prohibited by section 92. In this sense, the Tribunal was correct to state that section 96 gives paramountcy to the statutory objective of economic efficiency.
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> (Appeal Judgment, at 36-37)

Note the Court's view that s.1.1 sets out "multiple and ultimately inconsistent objectives", in sharp contrast to the Tribunal's contrary conclusion.

The Court also stated that this conclusion did not limit the definition of effects to be considered:

> [92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects" should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to *all* of the statutory purposes set out in section 1.1.
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> (Appeal Judgment, at 37)

In other words, with a suitably enlarged set of effects (including distributional concerns), an anti-competitive merger could be found to fail the test in s.96.[8]

Ultimately, the Court remanded the case back to the Tribunal for re-consideration, although it declined to prescribe how the Tribunal should incorporate distributional considerations into its decision.

6. The Tribunal's Second Decision

In its second decision following remand by the Federal Court of Appeal, the Tribunal provided in-depth reviews of the 1969 Interim Report on Competition Policy of the Economic Council of Canada, of the lengthy statutory history of the Act, and of Ministerial statements and Parliamentary debates, all of which supported its initial understanding of s.1.1 and, in particular, its view that distributional issues were excluded from the Act.

The Tribunal also reviewed its jurisdiction and mandate under the Competition Tribunal Act and the role of lay members. It pointed out that it was a purely adjudicative body and that it did not have a "public interest" mandate sometimes given to regulatory bodies. It further noted the Parliamentary discussion confirming that lay members of the Tribunal were appointed only for their knowledge and experience in matters of economics and business and not as representatives of various groups in society.

Moreover, because the Federal Court of Appeal's first decision discussed US antitrust law extensively, the Tribunal reviewed that regime and discussed the several important differences between it and the Act.

Strangely in this second case, the Commissioner downplayed the value of his own expert Professor Townley's "balancing weights approach" despite its approval by the Court. Instead, he

[8] It may be asked whether the Court did not contradict its view that efficiency is the paramount goal of the merger provisions of the Act.

advocated that the Tribunal apply the "Consumer Surplus Standard" even though Professor Townley had criticized that Standard in his expert report.

The Tribunal nevertheless applied the "balancing weights approach" and quantified the adverse distributional effect in light of the available evidence. The Tribunal concluded that the gains in efficiency exceeded and offset all of the effects of lessening and prevention of competition attributable to the merger.

The Commissioner again appealed the Tribunal's decision.

7. The Second Court of Appeal Decision

In its second decision, the Federal Court of Appeal held that the Tribunal had followed the instruction of the first Appellate decision, and it upheld the Tribunal's second decision. Notably, it did not criticize the Tribunal for its extensive discussion of the history of Canadian competition policy, the legislative record of the Act, and the differences between Canadian and US competition law regimes.[9]

While again dissenting from the Court's majority decision, Justice LeTourneau, who participated in both Appellate hearings, wrote that if he had had the benefit of the historical and statutory background and the Canada-US contrasts that the Tribunal provided in its remand decision, he might have voted differently in the first Appellate decision.

8. Concluding Remarks

S.1.1 is not confusing or indeterminate. Any impression to the contrary is due to the first decision of the Federal Court of Appeal in the *Superior Propane* case which understood neither the history of Canadian policy, the legislative and statutory history of the Act, the 1969 Interim Report on Competition Policy of the Economic Council of Canada nor the awkward inconsistencies in US antitrust law that the Economic Council warned against.

The Court's instruction that the Tribunal must apply each of the objectives in s.1.1 when applying s.96 only exacerbates the confusion its decision has created. That said, it is not clear that the Tribunal actually does (or would) do so.

In order to terminate the endless debate whether the Act is concerned with distributional issues, consideration could be given to amending the Competition Act by adding something akin to:

[9] The Appendix briefly discusses certainly anomalies in US antitrust law. These anomalies are well-known to specialists in competition policy, but not to the general public.

> s.1.2 For greater certainty, maintaining and encouraging competition may not produce an appropriate distribution of income and wealth in society.

By design, Canada's competition policy focuses on national economic development, increased productivity, and improving the standard of living for all Canadians. Proponents of any alternate policy regime should be required to produce evidence that their policies would better deal with these concerns that the Act currently does.

APPENDIX
Notable Failures of US Antitrust Law

In its second decision in the *Superior Propane* case, the Competition Tribunal went to some length to articulate the differences between Canada's competition policy an US antitrust law.

The matter is particularly relevant at this time when US antitrust law appears to be returning to a heavily-populist theory of competition policy based largely on industrial concentration, an approach that had been abandoned decades ago. Indeed, the consumer welfare standard of the last 50 years is itself under attack in the U.S. from those who argue that it has contributed to under-enforcement of the antitrust laws.

Proponents of moving in this direction are often not aware of the historic failures in US antitrust law.

a. Brown Shoe

Perhaps the most famous anomaly was the 1963 decision of the United States Supreme Court in the "Brown Shoe" merger case. Initially, the district court had agreed with the government enforcement agency that certain advantages such as cost savings to Brown Shoe would actually lower the price of shoes or raise product quality but would be harmful to the small independent retailers by making it more difficult for them to compete with the more efficient merged firm. On appeal to the United States Supreme Court, the Brown Shoe Company strongly denied that the merger would produce any cost savings while the government enforcement agency, believing that such savings existed, attacked the alleged efficiency gains charging that they would allow Brown Shoe to lower its prices!

The United States Supreme Court recognized that consumers might benefit from the merger, and further noted that the law protected competition, not competitors. Nonetheless, the Court was primarily concerned that American antitrust law protected viable, locally-owned businesses and resolved the competing considerations in favour of "decentralization".

b. Robinson-Patman Act[10]

Professors Niblett and Sokol have recently written about US antitrust law as follows:

> [A]nti-bigness bias was pronounced in decades of Robinson-Patman jurisprudence in which large companies were punished merely for using buyer size to offer price reductions.

[10] Extracted from Niblet and Sokol. "Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech", MacDonald-Laurier Institute, at 1-14, November 2021. Available at: https://www.macdonaldlaurier.ca/big-isnt-bad-tougher-competition-policy-big-tech-solution-search-problem/

Robinson-Patman created some of the worst decisions in antitrust history in the sense that they hurt consumers. Those consumers who benefit the most from low prices – the poor – bore the brunt of higher food prices.

To the extent that there was a trade-off that supported smaller and inefficient competitors, such competitors benefited over the most vulnerable and diverse members of society. Such a lesson bears remembering today as populist policies would likely hurt the poor through higher priced goods.

c. Senator Warren's "Platform Utilities"[11]

In the 1970's, U.S. antitrust law began to move away from Brown Shoe et al. and to give greater respect to economic efficiency under the so-called "consumer welfare standard". However, the hostility to efficiency did not disappear. If anything, it seems to be experiencing a resurgence in our time. Indeed, the consumer welfare standard itself is under attack in the U.S. from those who argue that it has contributed to under-enforcement of the antitrust laws.

Consider the proposal by U.S. presidential candidate Senator Elizabeth Warren in 2019 to use the antitrust laws to designate "platform utilities". So designated, Amazon would be prohibited from selling its own low-priced batteries on its platform but could sell the higher-priced branded batteries such as Duracell, Energizer and Eveready.

So much for the idea that U.S. antitrust should focus on lower consumer prices!

[11] Lawrence P. Schwartz, Submission to the House of Commons Standing Committee on Industry, Science and Technology: Study of Competitiveness in Canada", April 29, 2021. Available at: https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11192572