Some Comments on Professor Iacobucci's paper "Examining the Canadian Competition Act in the Digital Era"

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1. First, this is a magnificent piece of work, comprehensive and thorough and written with great lucidity. I have divided my comments into three parts, whose titles are self-explanatory.

I. COMMENTS DIRECTLY ON PROFESSOR IACOBUCCI'S PAPER

2. Many of Professor Iacobucci's recommendations would be valid whether we are in a digital era or not. They are faults in the Competition Act that have needed correcting for some time.

3. (P.4) "….. the *Superior Propane* case have failed to clarify *why* the efficiencies defence exists …" This seems like an overstatement to me. The Tribunal in *Superior Propane* clarified that the coherent articulation of the efficiencies defense was to create a merger enforcement framework based on total surplus i.e. that would allow mergers that increased total surplus, and disallow those where total surplus was likely to fall. More recently, the SCC in *Tervita* reinforced the total surplus framework.

4. (P.8) The Digital Economy creates Network Effects, explosive growth, and dominant firms. Professor Iacobucci describes the first two of these but not the last. The last has given us Amazon, Facebook, Google all three of which have operated without any effective competition for more than 20 years. I think most antitrust economists including Professor Iacobucci would agree that these firms are dominant. The existence of dominance does not violate the Competition Act, or Section 2 of the Sherman Act in the US and herein lies the problem. The digital economy leads to more dominant firms and this process is not regulated effectively by the Competition Act. Of course, these dominant firms create new products and generate much surplus for consumers, partly due the network economies and scale effects. But we have no counteracting policy framework to regulate them if the Competition Act fails to do so. Professor Iacobucci says in several places that regulation is the appropriate response to this kind of phenomenon, but in most cases there is no regulatory framework in place to do so.

5. (P.8) On the same topic Professor Iacobucci states that in these markets subject to network externalities and a tendency towards dominance, that "Competition for the market replaces competition in the market". This is a catchy phrase, stemming from the contestability era in

industrial organization economic theory, but it is rarely substantiated in practice.[1] Is Amazon afraid of competition "for" its market? I don't think so. The same is true for Google and Facebook.

6. (P.19) – In Professor Iacobucci's discussion of the difficulties in creating a price for access to data, should access be mandated by some regulatory authority (including the Tribunal)? He does not mention that this is a well studied problem in regulatory economics, and has been discussed at the CRTC on many occasions.[2] I think once agreement is reached to provide access to the data possessed by a dominant firm, the problem of pricing is of second order and can be resolved.

7. P.24 "Canadian Competition law ……. Does not penalize a dominant firm that sets high prices, or degrades its product, in order to *exploit* market power." Well, this is the conventional view, but I think a firm that degrades its product to exploit market power could perhaps be subject to a section 79 action, even though from an economic theory point of view, there is no difference between degrading quality and raising prices.

8. (P.34) Professor Iacobucci's three proposed amendments to the Act.

    a. Clarify that anticompetitive acts do not require a negative effect on a competitor

    b. Clean up S. 79.

    c. Larger AMPs

    Are all important and I support them without qualification.

9. Professor Iacobucci proposes an innovative approach to dealing with the "acquisition of nascent competitors" problem. He proposes that it should be rolled into s.79 as an anticompetitive act. This sounds promising, but I do wonder if enforcement is realistic – it would require the Tribunal to take a long retrospective view of a large company and judge the competitive effects of whole sequence of acquisitions. One can imagine a highly contentious and expensive litigation process. Moreover, the remedy would not be to undo the acquisitions but to enjoin the firm from making further acquisitions. Why not simply prevent the first of these acquisitions on the grounds either of a hostile stance towards mergers generally or that this particular merger has a question mark (that is all that should be required, not "a balance of probabilities") concerning its effects on innovation.

10. A point of general clarification. On p62 Professor Iacobucci refers to "efficiency related deadweight losses" and contrasts this with an approach where the "equitable effects of any

[1] There is a voluminous literature on this topic, summarized for example in Church and Ware, *Industrial Organization: a Strategic Approach*, McGraw-Hill (2000), pp507-513.
[2] See for example, Church and Ware, *ibid*, pp.873-875.

transfers" might be considered. This is not an accurate clarification of the relevant welfare economics. Professor Iacobucci's first descriptive term describes an approach to applied welfare economics or cost benefit analysis where we *assume* that transferring a dollar from one person in the economy to another has no effect on total welfare. In other words, it is distributionally neutral. But there is no principle or result in welfare economics that indicates that this is the correct or the only approach. It is just as valid to put a 25% weight on changes in producer surplus and a 75% weight on changes in producer surplus. One of the important results of the paper by Ross and Winter that Professor Iacobucci cites, is that significant variation in the underlying weights given, for example, to the lowest income segment of the population, does not move the implied weight on consumer surplus changes very far from 50%.

II.The table below sets out my depiction of the debate over the reform of the Competition Act.

A. *The Status Quo* ("minor revisions"). This position, eloquently stated by Professor Iacobucci argues that the Competition Act is broad and flexible enough to capture all of the anti-competitive practices that we actually want to pursue. All that is required to modernize it is to correct some of the defects and sloppy wording that have been identified for a decade or more. As far as I can tell the digital economy is essentially irrelevant, it hasn't affected the required changes, or the urgency of the need for change.	B. *The American Left position* Tim Wu, Lina Khan, Amy Klobuchar and others have argued for a dramatic change of direction in US antitrust policy. They point to the unchallenged monopoly position of the US giant tech companies, and the fact that they have been allowed to absorb small start up companies who are potential competitors for decades. There is also concern about a trend towards increasing concentration, and its implications for income inequality. This group would like to see a more hostile stance taken towards both horizontal and vertical mergers.
C. *Section 96 is broken*. This view, which seems to be that of the current Commissioner, is that Section 96, the efficiencies defence, should simply be repealed. This would align Canada's competition law more closely with that of both the US and the EU, which is a major argument for the change. A more sophisticated version, advanced by Paul Johnson and Mathew Chiasson (CCLR) is that abolishing the efficiencies defense would allow fewer mergers to be approved, and since mergers are bad for innovation, this should advance a higher rate of innovation.	D. *The European Model* . This strand of reform would consciously move Canada's Competition framework to align with that of the European Commission. Key features of the European model are that competitive *processes* are valued as much as, or more than, measurable competitive *outcomes*. A corollary of this is that dominant firms are frowned upon whether or not they have engaged in the kind of abusive acts that would be necessary for an intervention under North American competition law. The European Commission holds sway more like a regulatory body than a competition law enforcement agency. Recently both the EC and the UK have created new agencies and/or statutes for the regulation of digital markets.

III. MY SUMMARY OF THE ISSUES

11. Canadian competition law has polished a diamond in the form of the total surplus model, the closest available approximation to a standard based on economic efficiency and applied welfare economics. This program started with the *Superior Propane* cases, and has continued through the Supreme Court of Canada decision in *Tervita*.

12. Unfortunately, this approach to enforcement is underpinned by a static model of economic efficiency. Modern industrial economies including Canada are characterized by network effects, innovation, and scale effects to such a major extent that the static efficiency calculus, while not irrelevant or technically incorrect, may not be all that important. This is, of course, a very Schumpeterian conclusion.

13. It may be, that within the current tech driven dynamic economy, it is preferable to referee the competitive landscape, the terms under which competition takes place, rather than to focus in a minute legalistic way on the outcomes of particular cases. As an example, letting a dominant firm accumulate an unassailable monopoly position because it is highly efficient and because it hasn't engaged in any named abusive practices may be worse than intervening early to block mergers, to encourage competitive entry, or even to break up the dominant firm when the reality of its dominance has become clear.

14. Canada, like the United States, has maintained a presumptively permissive attitude towards mergers. It is commonplace in antitrust commentary to say that "the vast majority of mergers are either pro-competitive or competitively neutral". What evidence do we have for this? I doubt that this is true. Any basic Industrial Organization framework will tell us that the incentive for merger comes from one of two reasons: either to enhance market power, or to increase efficiency. I would have thought that the balance of empirical work on mergers over the past 50 year or so suggest that the latter reason is rarely achieved, which leaves an incentive to enhance market power as the primary purpose of mergers.

15. As a result, there is a case for a presumptively hostile approach to mergers, as has been suggested by several US commentators in recent years. The approach advocated several decades ago by Farrell and Shapiro[3], but not confirmed by any changes in enforcement, was for a presumptively hostile approach with only well verified cost synergies arising from a merger as a justification for allowing a merger.

16. The correct rubric to accompany this is not that most mergers are either pro-competitive or competitively neutral, but that most mergers are likely anticompetitive but small enough that their effect on market power is minimal, and they should escape the scrutiny of the Competition Bureau for that reason.

17. With respect to the proposed mergers that are large enough to warrant the investigative resources of the Bureau, the onus should be on the parties to submit evidence first on the likely

[3] Farrell, J. and C. Shapiro. 2001. "Scale Economies and Synergies in Horizontal Merger Analysis." Antitrust Law Journal. 68: 685-710.

quantitative and qualitative efficiency gains attributable to the merger.[4] The Commissioner would then have the option to present both quantitative and qualitative evidence on the likely dead weight loss attributable to the merger, if he believes that these exceed the efficiency gains. This would require a change in the sequence of decision making, and likely an amendment to the Competition Act.

Mergers and Innovation

18. Professor Iacobucci's paper was notionally inspired by a perceived need for the Competition Act to be modernized in the face of the new challenges presented by the digital economy. Perhaps the most important of these challenges is the connection between mergers and innovation, and the perception at least that this has changed fundamentally in the digital economy. Again the perception is that future competition is being thwarted because incumbent dominant firms frequently acquire smaller nascent competitors, without attracting the scrutiny of competition regulators, but are thereby able to snuff out future competition in many cases before the competitor is even offering products that are substitutes within the standard economists' toolkit of product market definition.

19. More fundamentally, competition law in North America has always distinguished between possession of market power, including the existence of a dominant firm, and abuse of market power, or abuse of dominance. Section 78 of the Competition Act is dedicated to spelling out a list of such abuses, although it is not intended to be exhaustive. I would argue that this approach has largely served Canada well, and has prevented the pursuit of dominant firms who have achieved their position in the marketplace by superior innovation and by offering superior products and services.

20. The relationship between mergers and innovation is complex and not amenable to easy and policy friendly generalizations. The paper by Paul Johnson and Mathew Chiasson in a recent CCLR addresses this issue head on, and argues that Canada's efficiency oriented approach to mergers is misguided essentially because it leads to the easy approval of too many mergers, which frustrates the goal of innovation and a more dynamic definition of efficiency.[5] There is also work that argues that innovation can be promoted by allowing large capital rich firms to easily acquire small start up innovators, leading to the opposite conclusion to that of Johnson and Chiasson.[6]

[4] This is the opposite of the procedure endorsed by SCC in Tervita. This proposal was set out by Roger Ware and Ralph Winter in "Merger Efficiencies in Canada: Lessons for the Integration of Economics into Antitrust Law," 2016 *Antitrust Bulletin* Vol 61(3) 365-375.

[5] See also my comments in "A Reply to Chiasson and Johnson, Facey and Dueck", *Canadian Competition Law Review* Summer 2020.

[6] Cabral, L. "Merger Policy in Digital Industries" (2021) *Information Economics and Policy*, 54.