

Canada's Competition Act: The Reform Process Continues

By Thomas W. Ross | University of British Columbia



Edited by Justin Stewart-Teitelbaum & Angela Landry

Canada's Competition Act: The Reform Process Continues

By Thomas W. Ross¹

The process of revisiting the elements, and even the goals, of competition policy in Canada continues, with important recent steps including the conclusion of extensive government consultations and the introduction of three bills to Parliament – with promises of more amendments to come. While pressure for change has been building for some time – since at least the adoption of significant amendments in 2009 – the current push has gathered steam since an October 2021 call by the Commissioner of Competition for an extensive review of the *Competition Act*² and a statement from the responsible Minister of Innovation, Science and Industry that quickly followed: “In recognition of the critical role of the *Competition Act* in promoting dynamic and fair markets, the Minister will also carefully evaluate potential ways to improve its operation.”³ The Minister subsequently launched a formal review process in November 2022.⁴

The consequence has been an extensive debate about all elements of Canada's competition policy system – from the purposes to be served by competition policy, to the agreements and conduct to be regulated, to the institutions that do the regulating.

Recent developments in this process have included the release of a government report on the results of its consultation on competition policy reform and the introduction the three bills, one tabled by the government itself. While

addressing some frequently raised issues, they present important challenges of their own.

I. Background

Canada's original competition legislation, enacted in 1889, had a narrow focus on price-fixing, targeting “combines” – essentially the Canadian version of the U.S. trusts. Amendments over the years broadened the scope of the law – to cover abuse of dominance, various vertical restraints, and mergers – and added an enforcement agency (now called the Competition Bureau).⁵ While the major reforms of 1986 and others that followed up to 2009 created a modern law generally adhering to best practices elsewhere, concerns did arise that further changes would be needed. Pressure for additional amendments came from at least three sources: (i) a widely held concern about the sudden rise to dominance of a number of players in digital markets, possibly protected from future entry by network effects and data barriers; (ii) a general perception that concentration levels had been rising in Canada (as in some other countries) and profit margins rising as well – with an assumed causal link between the two; and (iii) a widely recognized need to address a number of gaps that had

¹ The author is Professor Emeritus at the Sauder School of Business of the University of British Columbia. He wishes to thank Edward Iacobucci, John Pecman, John Tyhurst and Markus von Wartburg for very helpful discussions and Jennifer Ng for her exceptional research assistance. The author remains solely responsible for the views expressed here.

² *Competition Act* (R.S.C., 1985, c. C-34) (“*Competition Act*”). Matthew Boswell, Comm’r of Competition, Remarks to the Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2021), <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>.

³ Press Release, Innovation, Sci. & Econ. Dev. Can., Minister Champagne Maintains the Competition Act’s Merger Notification Threshold to Support a Dynamic, Fair and Resilient Economy, (Feb. 7, 2022), <https://www.canada.ca/en/innovation-science-economic-development/news/2022/02/minister-champagne-maintains-the-competition-acts-merger-notification-threshold-to-support-a-dynamic-fair-and-resilient-economy.html>. A review had also been suggested in a House of Commons hearing. Can. 43d Parliament, House of Commons 2d Session, Standing Comm. on Industry, Sci. & Tech., COMPETITIVENESS IN CANADA, <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11192572>.

⁴ See Press Release, Innovation, Sci. & Econ. Dev. Can., Statement from Minister Champagne on the launch of the Competition Act review (Nov. 17, 2022), <https://www.canada.ca/en/innovation-science-economic-development/news/2022/11/statement-from-minister-champagne-on-the-launch-of-the-competition-act-review.html>.

⁵ See MICHAEL TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY 3–36 (2002); JOHN TYHURST, CANADIAN COMPETITION LAW AND POLICY (2021) chs. 2–3.

appeared in Canadian competition law and enforcement as a result of certain cases.⁶

The call from the Commissioner's and the Minister's announcements kicked off a flurry of work from academics, think tanks, interest groups and others providing suggestions for changes (or arguing against certain changes) in Canada's competition law, policy and institutions.⁷ Then-Senator Howard Wetston sponsored an informal consultation process that attracted and housed much of this work, while other contributions appeared in magazines, in newspapers, and on the web pages of a variety of organizations.⁸

In a development that caught much of the competition policy community off guard, the government introduced a short list of amendments as part of a budget bill in 2022.⁹ Though their arrival was a bit of a surprise, these changes were generally less controversial than many under discussion in the competition community. For example, these amendments included:

(i) No-poach and wage-fixing agreements were included to be covered by the criminal price-fixing provisions. Buy-side collusion had been removed from the criminal provisions in the amendments of 2009 that made naked price-fixing illegal *per se*.

(ii) The abuse of dominance provisions were amended to clarify that an act may be considered anticompetitive if it negatively affects competition, not just because of negative effects on competitors (as some jurisprudence had determined). This (arguably) allows the provisions to reach "facilitating practices" (e.g., advanced public announcement of price increases) that stifle competition without necessarily hurting competitors.

(iii) Access to the Competition Tribunal was provided for private parties who believe they have been harmed by actions falling under the abuse of dominance provisions of the *Act*. Private access to bring cases before the Tribunal had, to that point, been limited to a few other sections of the *Act* (e.g., refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction). Importantly, no allowance for the Tribunal or any court to award damages was included in these amendments.

(iv) Many penalties provided for by the *Act* were increased. For example, the maximum fine under the criminal price-fixing provisions, previously \$25 million, is now up to the court's discretion. Administrative monetary penalties (essentially fines) under the civil

⁶ See, e.g. Thomas W. Ross, "Canada Looks at Revising its Competition Act", CPI US & CANADA COLUMNS (April 3, 2022); Thomas W. Ross, *Proposals for Amending the Competition Act*, 35 CAN. COMPETITION L. REV. 1, 1-45 (2022).

⁷ Importantly, the government signaled its interest in competition policy enforcement by granting the Canadian Competition Bureau a significant budget increase: an additional CDN \$96 million over the next five years and \$27.5 million more per year after that. *Competition Bureau Gets a Budget Boost, but Is It Enough to Make Companies Think Twice?*, FIN. POST, (May 3, 2021), <https://financialpost.com/news/economy/competition-bureau-gets-a-budget-boost-but-is-it-enough-to-make-companies-think-twice>. This represents a very significant increase: The Bureau's budget in 2020–21 was \$52.1 million (CDN). COMPETITION BUREAU, CHAMPIONING COMPETITION IN UNCERTAIN TIMES: 2020–21 ANNUAL REPORT (2021), https://publications.gc.ca/collections/collection_2021/isde-ised/lu50-2021-eng.pdf.

⁸ Senator Wetston kicked off his consultation by commissioning a paper by Professor Edward Iacobucci. See Edward M. Iacobucci, *Examining the Canadian Competition Act in the Digital Era* (Consultation Paper, 2021), <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/638fb56d34b5f4114c1446f1/1670362478131/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>; see also Colin Deacon, *Competition Consultation*, COLIN DEACON, <https://www.colindeacon.ca/projects/competition-consultation> (last visited October 31, 2023) (containing the paper by Professor Iacobucci and other related consultation materials). The public policy magazine POLICY OPTIONS invited submissions commenting on the *Competition Act* and has been publishing them over time. See, e.g., *Canada's Competition Law Is Due for an Overhaul*, POLICY OPTIONS (Feb. 2022), <https://policyoptions.irpp.org/magazines/february-2022/canadas-competition-law-is-overdue-for-an-overhaul/>. Articles also appeared in academic journals. See, e.g., John Pecman, *Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau*, 31 CAN. COMPETITION L. REV. 5 (2018) (publication by a former Commissioner). Several other articles have appeared in the *Canadian Competition Law Review*.

⁹ *Budget Implementation Act*, 2022. For a short summary of these amendments, see Press Release, Competition Bureau Canada, Important Amendments to the *Competition Act* Come into Effect (June 24, 2022), <https://www.canada.ca/en/competition-bureau/news/2022/06/important-amendments-to-the-competition-act-come-into-effect.html>.

provisions of the *Act* were also increased.¹⁰

As promised, the Minister followed up the adoption of these amendments by launching an elaborate consultation process led by his department, the Department of Industry, Science and Economic Development (“ISED”) in November 2022. This process began with the release of an ISED discussion paper titled “The Future of Competition Policy in Canada,” which put forward areas of interest and concern and solicited ideas from inside and outside of government (including from non-Canadian parties such as the Organization for Economic Cooperation and Development (“OECD”)).¹¹ The feedback received, with some reactions and commentary, was reported on in a follow-up ISED discussion paper titled “Future of Canada’s Competition Policy Consultation -- What We Heard Report” (“ISED Report”) released in September 2023.¹² ISED reported receiving 130 submissions from identified stakeholders and more than 400 from members of the general public.

Almost simultaneously with the release of this report, the government introduced a bill to make a small number of changes to the *Competition Act* – clearly intended to be a next, but not final, set of amendments.¹³ Bill C-56 has passed its first reading and there is every indication that it will become law in short order. Over the last few months, two private members’ bills¹⁴ to amend

the *Act* have also been introduced by opposition parties – revealing that competition policy reform is not a heavily partisan issue. Bill C-352 was introduced by the New Democratic Party which is currently supporting the Liberal government in its minority position in Parliament.¹⁵ Bill C-339 was introduced by Ryan Williams of the Conservative Party (the Official Opposition party).¹⁶

II. The Government’s Bill: C-56

While not laying out specific proposals, the ISED Report did point to some areas in which there was a great deal of interest expressed in the submissions and hinted at areas about which the government may be contemplating more immediate action.¹⁷ Bill C-56 introduced important amendments in three of these areas: mergers, market studies, and vertical agreements. Importantly, the bill has been described by the government as part of a program to moderate inflation in grocery prices.

¹⁰ This is an abbreviated list of the most important changes. Other changes included the addition of a section on “drip pricing” as a consumer protection provision, additions to the lists of “factors to be considered” by the Tribunal in various cases (many with a “digital economy” motivation), expanded evidence gathering powers for the Bureau and an expanded list of factors to determine impacts on competition.

¹¹ See *The Future of Competition Policy in Canada*, GOV. OF CAN. (Nov. 22, 2022), <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>. Notable among this feedback was the extensive set of recommendations from the Competition Bureau. See Competition Bureau, *The Future of Competition Policy in Canada*, GOV. OF CAN. (Mar 15, 2023), <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/future-competition-policy-canada>.

¹² See *Future of Canada’s Competition Policy Consultation – What We Heard Report*, GOV. OF CAN. (Sept. 20, 2023), <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report>.

¹³ See *Affordable Housing and Groceries Act* (2023), <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-56/first-reading>. First reading of C-56 was on September 21, 2023.

¹⁴ In the Canadian system a private member’s bill is proposed legislation introduced to the House of Commons by a member of parliament who is not a member of the cabinet.

¹⁵ See *Lowering Prices for Canadians Act* (2023), <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-352/first-reading>.

¹⁶ See *An Act to amend the Competition Act* (2023), <https://parl.ca/DocumentViewer/en/44-1/bill/C-339/first-reading>. This bill was introduced back in June 2023.

¹⁷ See Robin Spillette et. al., *Competition Act – Summary of Feedback*, FASKEN (Sept. 28, 2023), <https://www.competitionchronicle.com/2023/09/public-consultation-on-amendments-to-the-competition-act-summary-of-feedback/> (providing a concise summary of the ISED Report).

In fact, it can be cited as the *Affordable Housing and Groceries Act*.¹⁸

Mergers: Repeal of the Efficiency Defense

Canada is nearly unique in the competition policy world in the way it evaluates mergers that simultaneously risk a substantial lessening or prevention of competition and yield significant productive efficiencies. While many jurisdictions will consider efficiencies, if at all, only to the extent that they guarantee consumers will not be harmed by any loss of competition (e.g., prices will not rise), section 96 of the *Competition Act* provides for an “efficiency defence”¹⁹ that compels the Competition Tribunal to allow mergers that may prevent or lessen competition if there are efficiencies that are “large enough” and “will offset” any effects due to the lessening or prevention of competition. Some have argued that this brings the Canadian law close to what economists refer to as a “total surplus” approach to merger review – closer than other jurisdictions at any rate.²⁰

The efficiency defense has been under attack as being too permissive of anticompetitive mergers (and as being costly, delaying, and uncertain) since at least the *Superior Propane* merger case in the early 2000s.²¹ For example, the Competition Bureau itself has argued for a revision of the law removing the defense and replacing it with the inclusion of efficiencies as simply a factor to be considered by the Tribunal when evaluating a merger, specifically offering in the ISED consultation:

Recommendation 1.8 (Efficiencies exception):
The efficiencies defence should be repealed, and efficiency gains should instead be

incorporated into the list of factors that the Tribunal can consider in determining whether a merger substantially lessens or prevents competition.²²

The ISED Report confirmed that a majority of stakeholders supported major changes to the efficiencies defense, suggesting that even some members of the business community encouraged its reform.²³

In fact, Bill C-56 delivers the complete abolition of the efficiency defense – section 96 is to be struck from the *Competition Act* entirely, with no alternative language about efficiencies added in its place or elsewhere. As noted, wiping efficiencies out of merger review entirely is further than the Competition Bureau (and many others supporting reform) wanted to go. It is hard to imagine a serious modern merger review not taking efficiencies into account in any way, but this amendment creates significant uncertainty about how evidence of efficiencies will be considered.

One possibility is that efficiency arguments may be raised under section 93(h). Section 93 lists a number of factors that the Tribunal “may” consider in determining whether a merger is likely to lead to a substantial lessening or prevention of competition including the presence of foreign competition and any barriers to entry. Concluding this list, section 93(h) adds “any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.”²⁴

Some advocates for change had suggested that, in place of the full efficiency defense, the presence and magnitude of efficiencies should be a factor added separately to the section 93

¹⁸ The tabling of a bill containing a few amendments while promising more is to come later – rather than waiting to deliver the full package – may also reflect the government’s desire to be seen to be immediately addressing inflationary pressures in the grocery sector. The name of the bill reflects the fact that it includes some separate provisions (unrelated to the *Competition Act*) seeking to stimulate the construction of rental housing. See *Competition Act Amendments on a Rocket Docket*, MCMILLAN INSIGHTS (Sept. 26, 2023), <https://mcmillan.ca/insights/competition-act-amendments-on-a-rocket-docket/>.

¹⁹ While formally termed the “efficiency exception,” it is commonly referred to as a defense.

²⁰ Close, but not quite a full total surplus approach. See, e.g., Thomas Ross & Ralph Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 ANTITRUST L.J. 471 (2005).

²¹ See *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)*, 2003 FCA 53; (2003), 300 N.R. 104 (FCA).

²² See Competition Bureau, *supra* note 11, § 1.8.

²³ Admittedly, some of the push for reform came about as a result of a Supreme Court decision in the *Tervita* merger case that put a high burden on the Commissioner to quantify anticompetitive effects when parties were seeking to use the efficiency defense. *Tervita Corp v Canada*, 2015 S.C.C. 3; see also, e.g., Ralph A. Winter, *Tervita and the Efficiency Defense in Canadian Merger Law*, 28 CAN. COMPETITION L. REV 133 (2015).

²⁴ *Competition Act*, section 93(h).

list. Bill C-56 did not do this. While it might be argued that efficiencies could be brought in via section 93(h), this is far from obvious given that Parliament (assuming passage with the current wording) will have just deliberately removed efficiencies completely from the law's instructions on the review of mergers. In this light, how much weight can we expect the Tribunal to put on efficiencies?²⁵

There is another problem with relying on section 93(h) – which would apply as well if efficiencies were entered directly into the section 93 list: these factors are only relevant to the extent that they influence the lessening or prevention of competition. Sometimes efficiencies can do that, for example, when efficiencies will make the merged firm a stronger competitor – as mergers of smaller firms will often do by helping firms achieve economies of scale or combine complementary skills. However, in most cases under review by competition agencies, the efficiencies themselves are not directly affecting the competitiveness of the market – they represent a separate effect, observed through the lowering of costs which could exert downward pressure on prices, countering (to some degree) the upward pressure created by the lessening of competition. Hence, to rely on section 93 as the sole way to bring efficiencies into the review of mergers risks ignoring efficiencies all together.

What to do now, then, with mergers that lessen competition to some degree but, because of efficiencies do not produce consumer harm, for example, in the form of higher prices, lower quality or reduced variety? Allowing such mergers would seem to be in everyone's interest (at least consumers and producers) but the *Act*, with this amendment, would presumably not be flexible enough to allow it.²⁶

One possible work-around, assuming we did want to allow such mergers, would be to essentially redefine a lessening of competition to arise when consumers (or input suppliers, such as workers) are harmed.²⁷ This mixes the effect on competition with the effect on costs in an unsatisfying way – for example if we had a merger to monopoly that we wanted to allow because the efficiencies were so great that prices actually fell post-merger, we would do it by adopting the official fiction that competition was not lessened. Even though we now had a monopoly.²⁸ Such an approach could presumably be put into effect via administrative discretion since the Commissioner is the only party who can challenge a merger.

If we wanted to remove the efficiency defense to bring Canadian merger review standards closer to the consumer welfare standard (familiar in the U.S., Europe, and elsewhere) as many had suggested, there are other ways we could do it. Adding efficiencies as a factor separate from section 93, perhaps with requirements that efficiencies must benefit consumers (to the extent that they are not hurt at all, at least in the long run) would be closer to the European model. Another approach would have been to keep the section 96 efficiency defense but to add a provision that the exception may not be invoked if the merger would harm consumers (or input suppliers).

It is also noteworthy that parallel efficiencies exemption language had been added to the collaborator collaborations provisions (S. 90.1) introduced in amendments in 2009.²⁹ The idea, at the time, was to give competitor collaborations such as joint ventures and strategic alliances, a more complete “effects” review as if they were mergers. Bill C-56 has removed the defense for mergers but not for

²⁵ Minister Champagne speaking in support of the bill in Parliament said, “Of course, if a proposed merger creates efficiencies that strengthen competition in a sector, the tribunal would be able to consider them in its deliberations.” which would seem consistent with the s.93(h) path. See Canada, Parliament, *House of Commons Debates of the Legislative Assembly* (Hansard), 44th Parl, 1st Session, Vol 151, No 223 (Sept. 25, 2023) at 1624 (Hon F Champagne), <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-223/hansard>.

²⁶ Since achieving post-merger efficiencies can involve reducing employment levels in an industry, some have argued that efficiencies that flow from such sources should not be counted – a return of the “efficiency offense” concept in another form.

²⁷ This is related to the approach in the U.S. which similarly struggled with a law that bans mergers that harm competition without any statutory provisions to consider efficiencies.

²⁸ And if that monopoly subsequently started to abuse its dominant position, we would have to argue that the firm's position – that we had previously claimed to not represent a lessening of competition – was now dominant with significant market power.

²⁹ S. 90.1 (4) (efficiency exception).

competitor collaborations and it is not clear why – apart perhaps from the fact that mergers get a great deal more public attention.³⁰

Market Studies: New Powers

Under the current *Act*, the Competition Bureau has a very limited ability to launch market studies. While it can, and has, found ways to investigate markets outside an official inquiry into possible anticompetitive acts, it cannot compel stakeholders to cooperate by providing information or appearing to answer the Bureau's questions. As the ISED Report points out, this absence of formal market studies powers sets the Bureau apart from its G7 counterparts. It also explains that there was a great deal of interest in adding formal powers for the Bureau – in fact more than two-thirds of stakeholders commenting on the issue of market studies favored stronger powers for the Bureau. While some parties expressed concern over possible overreach, several of these were willing to consider such a change if sufficient guardrails (e.g., judicial oversight) were included in the new rules.

In the current Canadian context, market studies could have some particular benefits. For one, as Canada (like other countries) struggles to figure out how to deal with the rising tech giants, careful market studies could be very helpful in enhancing our understanding of how tech markets are working today and where they are going. Rather than jumping in with a new *ex ante* regulatory regime or launching expensive cases into poorly understood conduct, market studies could be the first steps toward a better understanding of these markets.

Second, it is widely recognized that significant impediments to competition in Canada derive from government actions, for example with

respect to supply management in the dairy and poultry sectors, foreign ownership restrictions in several industries (e.g., telecommunications, transportation) and interprovincial governmental barriers to trade across the country. Allowing the Bureau to conduct market studies in these kinds of markets could greatly enhance its role as the champion for competition in the Canadian economy.³¹ While others have suggested that Canada should have a competition/competitiveness/productivity commission separate from the Bureau – perhaps like the Australian Productivity Commission – this would at least give some official body the mandate and powers to do these kinds of studies.³²

Finally, the ability to conduct serious market studies could also improve the Bureau's enforcement by facilitating the kinds of in-depth merger (and possibly other types of cases) retrospectives that have been valuable in other jurisdictions such as the United States, Europe, and the UK.³³

Bill C-56 delivered on this interest – to some extent. The bill authorizes market studies and includes provisions that would allow the Bureau to apply to a judge to order cooperation from parties with information that could assist in such a study.

This much is good, and in keeping with the kind of change in this area many were looking for. However, rather than having the Bureau decide when and where to launch market studies, the bill provides that such a study must be initiated at the request of the Minister -- though the Minister must first consult with the

³⁰ Might this lead to mergers being redesigned to be sold to the Competition Bureau as collaborations, meriting review under s. 90.1?

³¹ The OECD was among those organizations arguing for the Bureau to have stronger market studies powers in part to shine further light on these regulatory barriers to entry. See *OECD Economic Surveys: Canada Overview*, OECD, 47 (Mar. 2021), <https://www.oecd.org/economy/surveys/Canada-2021-OECD-economic-survey-overview.pdf>.

³² See Australian Government Productivity Commission, <https://www.pc.gov.au/>. A decade and a half ago, in its final report commissioned by the Government of Canada, the Competition Policy Review Panel noted the gap created by not having a research body to conduct market studies, though it preferred the powers to conduct such studies be vested in a new specialized institution. Competition Policy Review Panel, *Compete to Win, Final Report June 2008*, GOV. OF CAN., 60 (June 2008), https://publications.gc.ca/collections/collection_2008/ic/lu173-1-2008E.pdf.

³³ Reviews of the success of merger remedies would also be extremely useful. See, e.g., *Reference Guide on Ex-Post Evaluation of Competition Agencies' Enforcement Decisions*, OECD (Apr. 2016), <https://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>.

Commissioner to determine whether such an inquiry would be feasible and affordable.³⁴

This is potentially problematic for a few reasons. First, it challenges the independence of the Bureau (already an issue raised by some in the ISED consultations) – the Bureau may come to be seen as simply an arm of the government, reporting to a Minister whose other responsibilities often involves regulatory structures that impede competition and the provision of subsidies that may distort competition (perhaps for some perfectly valid public purpose). There is a danger that the government of the day could come to use the Bureau to “turn down the heat” when it is facing criticisms related to some industry or another, diverting the Bureau from its other important work.³⁵ Second, in contrast to challenges associated with studies the Commissioner may not think valuable that he/she must nevertheless conduct, there is the problem of markets that should be studied but that the government of the day would not want the Bureau to touch because of political sensitivities – again, supply management in dairy and poultry comes to mind as well as foreign ownership restrictions that protect domestic dominant firms.

On the other hand, there could be some benefits of having the Minister hold this authority (but not exclusively). First, if he or she orders a market study the Minister will “own” it to some extent. This could imply, for example, that the Minister would be responsible for seeing that the Bureau had the resources necessary to do the job properly. It could also put pressure on the Minister to respond to, rather than ignore, the results of the study.³⁶ In the absence of a

statutory requirement for a government response (which some had recommended), this could be helpful.³⁷

Vertical Agreements: Now Covered with Competitor Collaborations

Civil provisions on agreements that might be anticompetitive contained in Section 90.1 of the current *Act* cover only agreements between “competitors” and therefore do not reach vertical agreements. Apparently motivated, in part, by concerns that large grocery chains were using restrictive covenants (exclusivity restrictions) with landlords to prevent the entry of other grocery stores within a certain area, Bill C-56 adds a new subsection 90.1(1.1) that allows the Tribunal to issue an order if a significant purpose of the agreement is to prevent or lessen competition, even when parties to the agreement are not competitors. Applying rules against anticompetitive agreements to firms in vertical relationships as well as firms in horizontal relationships is not itself unusual or undesirable. In fact, some competition laws do not distinguish between horizontal and vertical agreements in their provisions banning anticompetitive agreements.³⁸ That said, there are a couple of observations worth making here.

First, it seems an odd way to re-draft the law to include vertical arrangements. Rather than simply amending 90.1 to cover vertical as well as horizontal agreements (or any agreement that might lessen competition), the amendment adds a new subsection to remove the limitation of the previous subsection.³⁹ The reasoning here may lie in the fact that there is a difference between the regulation of agreements between

³⁴ In its submission to the ISED consultation, in arguing for stronger market powers, the Bureau suggested that it be the Commissioner who could authorize a market study. Competition Bureau, *supra* note 11, § 5.2.

³⁵ As noted, and reflected in the bill’s subtitle, the government is currently focused on challenges from inflation in the grocery sector and is looking at ways to bring prices in that sector down. See, e.g. Lara Dhillon Kane, “Trudeau’s Government Launches Plan to Stabilize Canada’s Food Prices”, BNN Bloomberg, October 5, 2023 at: <https://www.bnnbloomberg.ca/trudeau-s-government-launches-plan-to-stabilize-canada-s-food-prices-1.1980902>.

³⁶ Responses could include intervening with other government departments and regulators in the service of competition (e.g., to reduce barriers to entry) and possibly introducing new legislation needed to cover emerging areas of concern.

³⁷ Some recommendations related to additional market studies powers suggested that the government be required to respond to the Bureau’s final report after a market study. In its submission to the ISED consultation, with respect to market studies, the Bureau recommended that “the regime should require government entities subject to the Bureau’s recommendations to provide a public response within a reasonable timeframe after the report is published,” Competition Bureau, *supra* note 11, § 5.2; see also Ross (*Canadian Competition Law Review*) *supra* note 6, at page 26.

³⁸ E.g., Article 101 of the Treaty on the Functioning of the European Union.

³⁹ This will be section 90.1 (1.1). It may be that this approach makes it clearer that there is no change in the law with respect to agreements between competitors.

competitors in the original section 90.1 and the new provision for other (e.g., vertical) agreements. While the test for agreements between competitors under the existing provision is effects based – the Tribunal may make an order if it expects a prevention or lessening of competition – the test for agreements (presumably whether between competitors or not) in the new section relates to the “significant purpose” of the agreement to prevent or lessen competition. Why this new section would rely on purpose rather than the established effects tests is unclear.⁴⁰ One possibility is that the government expects certain practices to be seen as inherently anticompetitive and therefore subject to a simplified “by object” type of test. In this regard, it may be worth recalling the government’s concerns over the restrictive covenants between large grocery retailers and landlords mentioned earlier.

Second, while probably not harmful, it was not clear that the change was necessary. Other provisions of the current *Act*, notably those on abuse of dominance and those covering certain other vertical restraints (e.g., refusal to deal, price maintenance, exclusive dealing, and tied selling) may already cover much of the ground of the new provision. Admittedly, the new provisions do not require that the Commissioner establish dominance, and they may cover a wider set of restrictions than the current list.⁴¹

III. Bills from Opposition Parties: C-339 and C-352

Bill C-339, introduced by a Conservative member of Parliament in June 2023 simply calls for the repeal of section 96, the efficiency exception.⁴² Like the government bill, it does not provide for any alternative path for the

consideration of efficiencies in mergers, hence the issues raised above remain relevant here.

Bill C-352, introduced to Parliament by the leader of the New Democratic Party (“NDP”), Jagmeet Singh, in September 2023 is much more ambitious – and concerning.⁴³ While private members’ bills do not often make their way into law in Canada, this one deserves attention for at least two reasons: the support of the NDP is usually necessary for the Liberal government to carry votes in this Parliament and, importantly, the NDP is also interested in creating a more muscular competition policy regime in Canada. The NDP bill actually covers some of the same ground as the government’s bill but touches several other areas as well.

Mergers: With respect to mergers, Bill C-352 also proposes the removal of the efficiencies defense in section 96.⁴⁴ However, in this case, it is replaced with the addition of efficiencies as a factor to be considered under section 93 – an option critically examined above.⁴⁵ The NDP bill also removed the efficiency defense from the competitor collaborations section (section 90.14)) – again replacing it by making efficiencies an additional factor to be considered in section 90.1(2).⁴⁶

The bill takes some significantly different, and troubling, steps toward reform of merger review by mandating structural presumptions: if the merger leads to a combined market share in excess of 60% the Tribunal “shall” issue an order against the merger.⁴⁷ Notice the discretion taken from the Tribunal here. Under the current provisions in section 92 the Tribunal is instructed that it “may” issue an order if it anticipates a lessening or prevention of competition. This discretion, part of Canadian merger law since 1986, is now removed for mergers leading to this level of market share – the Tribunal must issue an order. Its expertise in

⁴⁰ Of course, to the extent that purpose or intent are, in practice, simply inferred from effects, the difference may not be substantial.

⁴¹ It could be that the adoption of this new provision would allow for the eventual repeal of the other vertical restraints sections.

⁴² “Bill C-339: An Act to amend the Competition Act (efficiencies defence)”, first reading June 8, 2023. Section 2 of this bill says simply: “Section 96 of the Act is repealed.”

⁴³ “Bill C-352: An Act to amend the Competition Act and the Competition Tribunal Act”, first reading September 18, 2023.

⁴⁴ Bill C-352 at section 11.

⁴⁵ Bill C-352, section 10(1). The new factor would be entered into the *Competition Act* at section 93 (g.4).

⁴⁶ Bill C-352, section 7(2) proposes the elimination of the efficiency defense for competitor collaborations, and section 7(1) add efficiencies as a factor the Tribunal may consider in evaluating competitor collaborations.

⁴⁷ B C-352, section 8. This would be in a new section 91.1(1) of the *Competition Act*.

such cases is simply tasked with measuring market shares – no need to look for competitive effects or evaluate efficiencies.⁴⁸

If the merger leads to a combined share between 30% and 60% there will be a rebuttable presumption that it is anticompetitive – rebuttable by the parties with evidence of “substantial procompetitive outcomes, including reductions in prices, increases in supply, reductions of anti-competitive act, increases in the qualities of goods or services, increases in wages and increases in consumer choice and consumer protection.”⁴⁹ A detailed critique of the challenges of structural presumptions – and in particular of formalizing them in statutes – is beyond the scope of this note, however they do represent a dramatic shift away from the full effects analysis that had been developed in Canada. One concern relates to the fact that structural presumptions can serve to simply shift the field of battle from one about harms to competition to one about market definition. Hence, the battle continues, but not focused on what we ultimately care about.

One more revision to the merger provisions proposed in the bill is worth noting. Section 92(2) would be replaced by a provision that would instruct the Tribunal to find a prevention or lessening of competition if it finds, on a balance of probabilities, that the merger will cause a significant increase in concentration or market share – though this is a presumption (of harm to competition) the parties may rebut.⁵⁰ The sheer vagueness of this provision (*i.e.*, what is a significant increase in concentration or market share?) may make this provision even more alarming to the business community than

the quantified market share structure presumptions just discussed.⁵¹

Market studies: Bill C-352, like the government bill would grant the Bureau formal powers to conduct market studies and compel the participation (again by court order) of those with information relevant to the study. The key difference lies in the fact that, under the NDP bill, the Commissioner can initiate the inquiry – it does not require an instruction from the Minister. Many will find this an improvement over the government bill. However, the government bill does include additional conditions for market studies that would enhance the transparency and accountability of the process. These kinds of guardrails were a common request even from those who otherwise supported expanded market study powers.

Other proposed changes: Bill C-352 does not include amendments to cover anticompetitive vertical agreements as the government bill did, but it does include a number of other notable changes; three are described here briefly. Two important modifications to the abuse of dominance provisions are included in the bill. Currently the main sections forbidding the abuse of a dominant position require a showing of intent (in section 78(1)) to commit an “anticompetitive act” and then (in section 79(1)(c)) require that this act will have an anticompetitive effect. As a result, the Commissioner must establish both purpose and effects. Of course, in many cases it could be that intent is inferred from effects, as intent can be very difficult to reliably establish apart from effects, for example from corporate “war room” type documents. Bill C-352 would remove the

⁴⁸ Admittedly, determining market shares is not without its challenges. First is the need to define the market which, with such strong structural rules becomes critical for all parties. There is then the challenge associated with deciding on what basis to define shares – will they be based on dollar sales (over what years – sales can fluctuate wildly in some industries), unit sales, capacities or some other variable? Third, there is the added complication that comes from needing to estimate what post-merger market shares will be – presuming that is the post-merger share that will matter. It is certainly true that we have been calculating market shares and concentration for many years and so have had to confront these issues to some extent. However, this has been in the context of the measures being simply a guide to enforcement and not the bright line standards for violations themselves. Interesting, as well, is the fact that this reliance on market definition is coming at a time when many experts and competition agencies are moving away from complex market definition exercises and focusing more on trying to assess effects more directly. On the criticisms of efforts to define markets, see, e.g., Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013).

⁴⁹ Bill C-352, section 8. This would be in a new S. 91.2(2) of the amended *Competition Act*.

⁵⁰ Bill C-352, section 9(2).

⁵¹ Bill C-352, at section 12, would also lengthen the limitation period such that an application can be made up to three years after the merger has been substantially completed – up from one year currently (in section 97 of the *Competition Act*). This may not be a highly controversial suggestion and is in line with recommendations heard in the ISED consultation.

79(1)(c) requirement to show effects or likely effects in order for the Tribunal to prohibit the conduct at issue.⁵² An amended section 79(2) in the bill would restore an effects test if the Tribunal wanted to issue an order for other kinds of remedies (including divestitures). It would appear that the Tribunal would retain the authority to impose administrative monetary penalties without a need to establish effects.

While a case could be made for applying abuse of dominance sanctions upon a demonstration of intent or effects, this approach requiring only a showing of intent risks both underreach and overreach. It could miss abusive acts if establishing intent, even in the presence of apparent effects, were to be difficult to establish in some cases. This is true, of course, with the current law as well.

It could overreach if intent comes to be associated – through jurisprudence, for example – with certain types of acts (by object) and those acts do not necessarily result in harm to competition. Another reason to expect overreach is that the current wording in section 78(1) allows an act to be termed anticompetitive if it negatively effects a competitor even if there is no negative (or even a positive) effect on competition. Of course, many aggressively procompetitive actions will hurt competitors and we do not want to discourage those. With the effects on competition test in current section 79(1)(c) this is not terribly concerning, as it requires a negative effect on competition in a final step. However, repealing 79(1)(c) would remove that protection for competition. And we cannot count on prosecutorial discretion by the Bureau here: now that private access to the Tribunal is permitted for abuse of dominance cases, we could expect to see private parties hurt by procompetitive actions of rivals to apply for relief from the Tribunal.⁵³

The second significant proposed amendment to the abuse provisions involves adding “directly or indirectly imposing excessive and unfair selling prices” to the list of anticompetitive acts in

section 78(1).⁵⁴ This would represent a very significant new direction for Canadian competition law which has historically tolerated market power legally gathered, and not punished its simple exploitation. It goes without saying that the key words “excessive” and “unfair” would create enormous uncertainty. Enforcement of such a provision would turn the Competition Bureau into a sort of price regulator – a responsibility that it has not sought and one that could well require a different set of skills and the establishment of new regulatory units. Even accepting the purpose of limiting the exploitation of market power, one would wonder about the focus here on price and not the sorts of non-price elements of competition which have received much greater attention from commentators in recent years (and in the ISED submissions.)

Finally, Bill C-352 proposes increasing (or refining the language around) punishment levels for price-fixing and abuse of dominance, and it proposes an amendment to the *Competition Tribunal Act* to remove the Tribunal’s authority to award costs against the government.⁵⁵

IV. Conclusions

This is indeed an exciting time for competition policy in Canada. There is a wide-open debate about not just the details of specific provisions of the *Competition Act*, but of even what the primary goals of competition policy should be and how the institutions should be designed and operated to address those goals. With the three major parties in Parliament all seemingly supportive of a stronger competition policy for Canada, there can be no doubt that legislative changes are coming.

The government has tabled a next set of amendments – with promises of more to come – as have two opposition parties. Many will be relieved that they do not radically redirect competition policy toward a new set of

⁵² Bill C-352, section 6.

⁵³ And, as the ISED Report indicated, there is support for allowing the Tribunal (or other courts) to award damages in abuse of dominance cases.

⁵⁴ Bill C-352, section 5.

⁵⁵ R.S.C. 1985, c. 19 (2nd Supp.).

objectives, nor do they contemplate significant changes to the roles of the Competition Bureau and Competition Tribunal. However, while including some useful elements, they also raise a number of serious concerns. Worries about the politicization of the new market studies regime and about the role of efficiencies in

merger review under the government's proposals will certainly be common. The very structural orientation of the bill put forward by the NDP will also remind many of the days when the size and market shares of businesses drew suspicion, even absent any evidence of negative effects.