SUBMISSION TO THE HOUSE OF COMMONS STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY: STUDY OF COMPETITIVENESS IN CANADA

From: Lawrence P. Schwartz (as an individual) regarding the Competition Act

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About the Author

Lawrence P. Schwartz is a (retired) consulting economist specializing in competition policy and regulatory matters. In 1998, he was appointed to the position of full-time economics Lay Member of the Competition Tribunal for a five-year term and adjudicated merger and abuse cases as well as consent agreements. He was a member of the Tribunal panel that decided the landmark "Propane merger" case, the first case to test the "efficiency defence" in s.96 of the Competition Act.

In his private consulting practice, he has appeared as an expert witness before the Tribunal on refusal-to-deal and at the Ontario Energy Board on rate-of-return regulation. He has provided research and policy advise to a number of government departments and agencies, special inquiries and private and international organizations on competition, energy regulation and financial-sector policy, and has published articles on merger efficiency, market definition and financial and capital market regulation. He was a part-time lecturer in finance at the Schulich School of Business, York University for ten years, and also taught the Economic Analysis of Law undergraduate course at the University of Toronto.

He also served as a member of the Consumer Advisory Committee of the Technical Standards and Safety Association of Ontario and is a past member of the American Bar Association Section of Antitrust Law.

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RATIONALE AND ORGANIZATION OF MY SUBMISSION

In its several meetings on the issue of competitiveness beginning on April 13, 2021, the Standing Committee received comments and suggestions concerning the Competition Act ("the Act") from several witnesses. I watched these meetings via Parlvu, and I am concerned that some of the witnesses who addressed the Act have provided a one-sided and uninformed perspective.

I have no reason to doubt the sincerity of these witnesses, but I have deep reservations about their understanding of Canadian competition policy, of the rationale for the Act as a whole, and of the several provisions therein that they have attacked.

No doubt, there is room for review and improvement, and I applaud the Standing Committee for its decision to review of the Act in connection with its current study of competitiveness. However, 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.[1]

For this reason, it is imperative that the Standing Committee delve more deeply into some of the claims made by the witnesses it has heard from and not be overtaken by easy slogans no matter how well-intentioned they may be.

Part A of my submission presents a brief history of the Act. Part B examines several matters in which the witness evidence is incomplete or unreliable.

[1] I have, separately, called the Standing Committee's attention to the degraded role of the Competition Tribunal which, as a result of Bill C-23 (2002), has become a "rubber stamp" of the Commissioner of Competition's consent agreements because it no longer holds hearings on those agreements. (E-mail message to the Clerk of the Standing Committee on March 12, 2021)

PART A: HISTORY

1. The Roots of the Act

While certain witnesses have been critical of the Act, none of them have acknowledged that its predecessor legislation, the Combines Investigation Act had, by the 1960's, proved largely ineffective due, in part, to the criminal treatment of merger and monopolization offenses. Indeed, the Crown had stopped bringing merger cases to the courts because it could not meet its legal burden to prove that the merger violated the criminal-law provisions "beyond a reasonable doubt".

For years, attempts to reform the Combines Investigation Act failed because of strong opposition in certain quarters. In 1966, the federal government requested the Economic Council of Canada, an independent body, to undertake a detailed study of "combines, mergers, monopolies and restraint of trade" and to advise how the government might proceed.

The Economic Council of Canada's *Interim Report on Competition Policy* of 1969 advised, inter alia:

a. That competition policy should be distinguished from the federal role in consumer protection.

b. That the criminalization of merger and monopolization offences under the Combines Investigation Act was inadequate and also harmful to economic development especially in light of increasing international competition and should be replaced by a civil-law regime.

c. That federal competition policy should aim primarily at bringing about more efficient performance by the economy as a whole and that "*Competition should not itself be the objective* but rather the most important single *means* by which efficiency is achieved". (Italicized emphasis included from original source)

d. That other objectives sometimes considered for competition policy, such as a more equitable distribution of income and the diffusion of economic power, were more effectively addressed by other instruments, particularly the tax system and the structure of transfer payments.

e. That, because the Canadian economy was much smaller and more oriented to world-trade than was the larger, more diverse, and relatively insular American economy, Canadian competition policy should reject key aspects of the U.S. antitrust regime, particularly the latter's hostility to considerations of economic efficiency.

f. That a tribunal be established to adjudicate mergers to determine anti-competitive effects and offsetting public benefits and to undertake a "balancing assessment" to determine if the negative effects on competition exceeded the positive effects thereon.

The Economic Council thus affirmed that "competition" is not an end in itself; rather, competition policy protects the "competitive process".

After the Economic Council report was presented, the government introduced and successively withdrew several bills. In December 1985, the Minister introduced Bill C-91 which included the so-called "purpose clause" (now s.1.1 of the Act) which states:

> 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.[2]

[2] See: https://lois.justice.gc.ca/eng/acts/C-34/page-1.html#h-87829

This purpose clause clearly adopts the Economic Council's view that competition policy should protect the competitive process in order to attain the advantages stated therein.

Bill C-91 also adopted the Economic Council's recommended approach to merger review including the efficiency defence to an anti-competitive merger, now in s.96 of the Act. Bill C-91 received intensive Parliamentary review and received royal assent in June 1986.

It is unfortunate that witnesses before the Standing Committee appear not to understand how the Act was developed, including the crucial role of the advice of the independent Economic Council of Canada going back to 1969. Further, they do not acknowledge that the Council had made a detailed review of the U.S. antitrust regime and had concluded, as discussed further below, that it was ill-suited to the Canadian economy.

2. Constitutional Considerations and the Priority of Consumer Prices

Witnesses before the Standing Committee appear to be unaware of the Constitutional issues that led the Economic Council of Canada and the drafters of Bill C-91 to distinguish national competition policy from the federal role in consumer protection.[3]

These Constitutional limits on the federal power were discussed by Mr. Morris Rosenberg, General Counsel for the Department of Consumer and Corporate Affairs during the Parliamentary hearings on the proposed purpose clause that became s.1.1 of the Act:

> **Mr. Rosenberg:** This morning, Mr. Ouellett, you raise the question about the constitutionality of the tribunal's jurisdiction. In looking at your amendment, I am a little bit concerned that in characterizing the purpose of the act as being first and foremost to provide consumers with competitive prices and product choices, essentially it seems to be characterized as a concern with individual contracts between consumers and the prices consumers pay for goods rather than with a concern for competition generally.

[3] For background on the constitutional separation of powers, see Faculty of Law, University of Alberta. Centre for Constitutional Studies. "Property and Civil Rights". Available at: https://www.constitutionalstudies.ca/2019/07/property-and-civil-rights/#:~:text='Property%20and%20civil%20rights'%20is,%2C%20contracts%2C%20torts%20and%20trusts.

> I am concerned when you start characterizing the business of the federal government as being individual consumer contracts, you are straying into an area which is within provincial jurisdiction; that is, contracts or property and civil rights in the province. I think it is important to characterize the goal of the law as being the encouragement of competition.
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> That being the purpose, one of the effects of it is going to be to lead to lower consumer prices and better product choice, but I think it is important not to lose sight of the fact the general purpose has got to be the competitive system generally throughout the country and not with respect to specific consumer concerns. The provinces have consumer protection statutes within their jurisdiction.[4]

In evaluating the witness claims that the Act does not give priority to consumer prices, the Standing Committee should seriously consider the possibility that doing so could lead the Courts to invalidate the statutory regime. Thus, the Standing Committee should consider the elements of Canadian federalism and the Constitutional limits on the federal government's ability to legislate in respect of consumer protection.

3. Lessons from U.S. Antitrust: The Role of Efficiency in Competition Policy

Some of the witnesses have found the Act deficient in comparison to the antitrust laws of the United States. In particular, they have criticized the efficiency defence to an anti-competitive merger in s.96 of the Act.

These witnesses appear not to be aware of the anomalies that had developed in U.S. antitrust law by the 1960's and they do not appreciate that the Economic Council of Canada's Interim Report was aware of them, particularly in merger review.

[4] Minutes of Proceedings and Evidence of the Legislative Committee on Bill CV-91. House of Commons, Issue No. 10, Tuesday, May 20, 1986 at 10:59-10:62.

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".

In its 2002 reconsideration decision after remand from the Court of Appeal in the landmark "Propane merger" case, the Canadian Competition Tribunal discussed the Brown Shoe decision and noted the several follow-on cases (Philadelphia National Bank, Proctor and Gamble, and Foremost Dairies). The line of these cases created a legal hostility to efficiency considerations in U.S. merger review that led the Tribunal to state:

> "In so doing, the Court [of Appeal] does not appear to take account of the historic and continuing hostility toward efficiencies in merger review under American antitrust law, and the reasons for that hostility, and it may not have completely realized the several critical, and perhaps subtle, ways in which the merger provisions of Canada's Act differ from the antitrust statutes and the judicial histories thereof in the United States."[5]

[5] Competition Tribunal. Reasons and Order Following the Reasons For Judgment of the Federal Court of Appeal, (Date of Order April 4, 2002), 2002 Comp Trib 16 at paragraph 131. Available at: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/464511/1/document.do

4. Does Competition Policy Protect Competitors or the Competitive Process?

The witnesses do not discuss what they mean by "competition". However, the Act is clear: it protects the competitive process in which some firms survive and grow while others may not. If markets are indeed competitively structured then, as stated in the purpose clause above, this competitive process will encourage national economic efficiency, competitive prices for consumers and provide small and medium-size businesses the "equitable opportunity" to participate in economic activity.

The line of cases in the U.S. starting with the Brown Shoe decision demonstrated a very different conception of competition policy, one that protects competitors from the competitive challenge posed by more efficient firms in a competitive market. The Economic Council of Canada rejected this approach to competition policy and recommended the efficiency defence as it now appears in s.96 of the Act.

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".[6] 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!*

In its deliberations on the Act, the Standing Committee cannot avoid the ultimate issue: Does its preferred competition policy protect competitors or the competitive process?

[6] See Elizabeth Warren, "Here's how we can break up Big Tech," March 8, 2019, online: <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>

PART B: COMMENTS ON SPECIFIC WITNESS CRITICISMS

5. Regarding Criticisms that the Act Tolerates Higher Prices and Profits

Certain witnesses have called for reforms to the Act because high consumer prices and excess business profits are sometimes permitted. Such views clearly misunderstand what the Act seeks to achieve.

The Economic Council Report recommended that the focus of competition policy should be on the establishment and maintenance of competitive markets in order, inter alia, to provide consumers with competitive prices, i.e., prices that were based on costs of production and not on the exercise of market power. Such competitive prices would incent producers to produce the efficient levels of goods and services at the lowest cost thereby earning a competitive profit rather than a supra-competitive profit.

For this reason, economic efficiency, competitive prices for consumers, and the equitable opportunity of small businesses to participate in economic activity are among the listed benefits of the policy of maintaining and encouraging competition in Canada in s.1.1 of the Act, the purpose clause discussed above.

In one sense, the witnesses may be right. The Economic Council also recognized that there could be a conflict between achieving both economic efficiency and competitive prices for consumers. However, the witnesses fail to mention that monopoly (however defined) itself is not illegal in *any* jurisdiction (whether Canada, the U.S, or the European Union) and, as a consequence, competition law does not prevent a monopoly from charging supra-competitive prices and earning excess profits. *Rather, the competition-policy issue is always <u>how</u> that monopoly was attained. If, for example, a monopolist maintains its supra-competitive price and profits by creating barriers to entry, then the firm (or group of firms) has abused its dominant position and hence violates the competition laws.*

But, if the monopoly's supra-competitive price and excess profits are the result of, for example, investment, successful innovation, or superior management (all such being examples of greater efficiency), then the monopoly has *not* abused its dominant position.

For this reason, s.79 1(4) of the Act requires that the Competition Tribunal determine whether an alleged anti-competitive act was in furtherance of "superior competitive performance". Such a finding is not a defence to the allegation that a firm has engaged in anti-competitive conduct but, rather, is an alternate, *pro-competitive* explanation for the overriding purpose of that conduct.[7]

Similarly, s.96 of the Act provides that a merger found to be anti-competitive may proceed, but only on evidence that the efficiency gains from such merger exceed and offset the loss of efficiency that results from the merger. Where proven efficiencies meet this pro-competitive test, then the higher price and profits are tolerated. The Economic Council Report endorsed this "trade-off" approach rather than follow American antitrust law after Brown Shoe and the resulting anomalies described above.

6. Regarding Job Layoffs in Merger Review

Some witnesses noted that efficiency defence to an anti-competitive merger in s.96 of the Act does not recognize the loss of jobs resulting from a merger. They also criticize the fact that the efficiency defence counts the cost-savings from layoffs among "gains in efficiency" while giving no recognition to the unemployed workers.

The "efficiency defence" in s.96 requires the Competition Bureau and the Tribunal to compare "gains in efficiency" that the merger brings about with the "effects of any prevention or lessening of competition" that result from the merger.

Mergers that are <u>not</u> anti-competitive under s.92 of the Act may indeed result in job layoffs and in other negative effects on the local community. However, since these mergers do not violate

[7] See Competition Bureau. Abuse of Dominance Enforcement Guidelines, March 7, 2019. Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/04420.html

s.92, such layoffs and community impacts cannot be considered by the Competition Bureau or the Tribunal.

Layoffs and community impacts may also result from mergers that are anti-competitive under s.92, but since they also commonly occur from mergers that are not, such layoffs and community impacts are not "effects" of the lessening of competition that results from such mergers, and hence cannot be included in the "effects" referred to in s.96.

It is evident that the witnesses' critique is about layoffs resulting from mergers quite generally, whether anti-competitive or not. If the witnesses want to argue that layoffs from pro-competitive mergers should also be scrutinized, then they must look to a different statutory regime.

The Standing Committee should distinguish the "anti-competitive effects" of a merger from the effects of mergers that do not violate s.92. Consideration of the latter may be appropriate, but not under the Act.

7. Regarding Claims That Administrative Monetary Penalties ("AMPs") Are Too Low

Certain witnesses have criticized the imposition of AMPs by the Competition Bureau, particularly in connection with the Abuse-of-Dominance provisions of the Act. They claim that AMPs are inadequate because they are too low to affect the future behaviour of the company, that the company will simply treat the AMP as a "cost of doing business", and that the AMP will not adequately penalize the company for its wrongful conduct.

These witnesses have not distinguished between an AMP and a fine. A fine is imposed not only to deter future wrongful conduct by the company (and others), but also to penalize it for violating the law. In criminal cases, courts may impose fines and/or other measures such as incarceration.

The Standing Committee should take particular note that the Abuse-of-Dominance provisions are not criminal offences but are among the civil provisions of the Act. Further, the Competition Tribunal does not hear criminal cases under the Act, and it has no authority to impose fines under the civil-law provisions that are within its domain.

Whereas fines for violating the criminal provisions of the Act have both deterring and penalizing goals, an AMP serves to promote and encourage compliance; its purpose is **not** punitive. As the Competition Bureau has stated:

> "Administrative monetary penalties, or "AMPs," are civil remedies, and quite distinct from fines (which are criminal). The purpose of an AMP is to promote and encourage compliance with the Competition Act, and failure to pay one may be enforced civilly as a debt due to the Crown. A fine, by contrast, is a punishment imposed by a court upon conviction of a criminal offence, and failure to pay may lead to imprisonment."[8]

Accordingly, the Standing Committee should discount these criticisms of AMPs by the witnesses who raised them.

All of which is submitted respectfully,

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[8] Competition Bureau. "Frequently asked questions-Amendments to the Competition Act", November 5, 2015. Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03046.html