CHAPTER 1

OVERVIEW OF COMPETITION ENFORCEMENT AND LITIGATION IN CANADA

I. STATUTORY AND ENFORCEMENT FRAMEWORK

A. Overview

Competition laws in Canada are contained in one federal statute, the *Competition Act*.[1] The Act contains a relatively detailed code for competition enforcement, which is supplemented by jurisprudence and non-statutory instruments, primarily in the form of enforcement guidelines published by the Competition Bureau.[2] The Act contains 25 civil reviewable practices and 26 criminal offences that prohibit different forms of anticompetitive conduct.[3] These reviewable practices and criminal offences, collectively, can be generally compartmentalized into five major areas:

1. **Unilateral conduct:** A number of reviewable practices in the Act prohibit one or more firms with market power from unilaterally misusing their market power through anticompetitive conduct.[4]
2. **Competitor collaborations:** The Act has a dual-track approach for competitor collaborations—namely *per se* criminal offences for "hard-core" conspiracies between competitors, such as price-fixing and bid-rigging, and a civil prohibition against collaborations that are not "hard-core" but have anticompetitive effects.[5]
3. **Mergers:** All mergers in Canada are subject to review by the Commissioner of Competition to determine if they will substantially lessen or prevent competition in one or more relevant markets. Parties to proposed mergers that exceed certain thresholds must notify the Commissioner of the proposed merger and provide the Commissioner with prescribed information before

1 RSC 1985, c C-34 [the Act].

2 As non-statutory instruments, the Competition Bureau's enforcement guidelines are not binding upon the Competition Tribunal or the courts. However, these guidelines assist the Tribunal and the courts when determining the appropriate approach to adopt, both in general and in particular cases. See *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 94, aff'g 2005 Comp Trib 3 at para 66, 40 CPR (4th) 453; *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc*, 73 CPR (3d) 1 at 82, 1997 CanLII 11 (CT); *Canada (Commissioner of Competition) v The Toronto Real Estate Board*, 2016 CACT 7 at para 711.

3 The framework for reviewable practices generally is discussed in Chapter 7. Each reviewable practice under part VIII of the Act is discussed in Chapter 8. Each reviewable practice under part VII.1 of the Act is discussed in Chapter 9.

4 These reviewable practices are contained in part VIII of the Act: s 75 (refusal to deal), s 76 (price maintenance), s 77 (exclusive dealing), s 77 (tied selling), s 77 (market restriction), ss 78 and 79 (abuse of dominance), and ss 80 and 81 (delivered pricing). These reviewable practices are discussed in Chapter 8.

5 Criminal offences focused on agreements between competitors are contained in part IV of the Act: s 45 (conspiracy), s 45(1.1)(a) and (b) (wage-fixing/no-poach), s 46 (foreign directives), s 47 (bid-rigging), s 48 (conspiracy related to professional sport), and s 49 (agreements or arrangements of federal financial institutions). For a discussion of these offences, see Chapter 4. The reviewable practice focused on agreements between competitors is covered under s 90.1 (agreements between competitors), which is discussed in Chapter 8.

completing the proposed merger.[6] The Act also contains an offence for failing to notify the Commissioner of a proposed notifiable transaction.[7]

4. **Deceptive marketing practices:** The Act has a dual-track approach for deceptive marketing practices. Egregious forms of conduct are reserved for criminal offences, whereas less serious forms of conduct are reserved for reviewable practices.[8]
5. **Obstruction, limiting foreign directive/supply, and specialization agreements:** The Act identifies criminal offences focused on the obstruction of the Commissioner's evidence-gathering powers and orders of the Competition Tribunal and the courts. It also contains reviewable practices focused on prohibiting or limiting the implementation of a foreign judgment, law, or directive in Canada; refusal to supply by a foreign supplier; specialization agreements; and reprisal actions.[9]

Each of these criminal offences and reviewable practices is discussed in more detail later in this book.

6 Parts VIII (ss 91-103) and IX of the Act contain the merger review provisions of the Act. Sections 91-103 of the Act focus on substantive merger review, whereas part IX of the Act focuses on merger notification. For a discussion of all of the merger review provisions of the Act, see Chapter 8.

7 Section 65(2) (failure to notify the Commissioner of Competition of a proposed notifiable transaction) is discussed in Chapter 4.

8 Criminal deceptive marketing offences under the Act are covered under s 52 (false or misleading representations), s 52.01(1) (false or misleading representation—sender or subject matter information), s 52.01(2) (false or misleading representation—electronic message), s 52.01(3) (false or misleading representation—locator), s 52.1(2) (deceptive telemarketing—failing to make required disclosures), s 52.1(3) (deceptive telemarketing—deceptive telemarketing practices), s 53(1) (deceptive notice of winning a prize), s 54 (double ticketing), s 55(2) (multi-level marketing—representations as to compensation), s 55(2.1) (multi-level marketing—fair, reasonable, and timely disclosure of representations as to compensation), and s 55.1(2) (pyramid selling). For a discussion of these criminal offences, see Chapter 4.

Reviewable practices focused on deceptive marketing practices are contained in part VII.1 of the Act: s 74.01(1)(a) (false or misleading representations), s 74.01(1)(b) (performance claims), s 74.01(1)(c) (misleading warranty or guarantee representations), ss 74.01(2) and 74.01(3) (ordinary price claims), s 74.011(1) (false or misleading representation—sender or subject matter information), s 74.011(2) (false or misleading representation—electronic message), s 74.011(3) (false or misleading representation—locator), s 74.02 (tests and testimonials), s 74.04 (bait and switch selling), s 74.05 (sale above advertised prices), and s 74.06 (promotional contests). For a discussion of these reviewable practices, see Chapter 9.

9 These obstruction offences are contained in part IV of the Act: s 64(1) (obstruction—general), s 65(1) (obstruction—failure to comply with s 11 orders and s 15 search warrants), s 65(3) (obstruction—destruction or alteration of records or things), s 65.1(1) (contravention of order permitting evidence gathering for use in a foreign state—failure to comply with search warrant), s 65.1(2) (contravention of order permitting evidence gathering for use in a foreign state—destruction or alteration of records or things), s 65.2(1) (refusal after objection overruled), s 65.2(2) (refusal where no ruling made on objection), and s 66 (contravention of order under part VII.1 or VIII of the Act). For a discussion of these offences, see Chapter 4. These reviewable practices are contained in part VIII of the Act: s 82 (prohibiting or limiting the implementation of a foreign judgment in Canada), s 83 (prohibiting or limiting the implementation of a foreign law or directive in Canada), s 84 (refusal to supply by foreign supplier), ss 85-90 (specialized agreements), and s 107.1 (reprisal actions). For a discussion of these reviewable practices, see Chapter 8.

B. Enforcement Actors

The enforcement of reviewable practices and criminal offences in the *Competition Act* involves a number of enforcement actors:

1. the Commissioner of Competition and the Competition Bureau,
2. the Director of Public Prosecutions (under and on behalf of the attorney general of Canada),
3. the Competition Tribunal and the courts, and
4. private persons.

1. The Commissioner of Competition and the Competition Bureau

The Commissioner of Competition is Canada's chief competition enforcement official. The Commissioner heads the Competition Bureau, an independent law enforcement agency responsible for the administration and enforcement of the Act.[10] The Commissioner, through the Competition Bureau, investigates complaints and potential breaches of the Act. The Commissioner has the exclusive jurisdiction to use formal evidence-gathering powers to investigate potential breaches of the Act.[11] For reviewable practices, the Commissioner, through the Competition Bureau, has the dual role of investigator of potential anticompetitive conduct and prosecutor before the Competition Tribunal and the courts. For criminal matters, the Commissioner, through the Competition Bureau, investigates potential criminal anticompetitive conduct, but the attorney general of Canada (through the Director of Public Prosecutions) has the ultimate autonomy to decide whether or not to lay charges as against the criminal target under investigation.

In particular, the Commissioner has the jurisdiction to commence a proceeding as of right before the Competition Tribunal in respect of reviewable matters under part VIII of the Act and before the Competition Tribunal or a court in respect of reviewable matters under part VII.1 of the Act.[12] The Commissioner may also enter into negotiated resolutions with persons under investigation by way of registered consent agreements.[13] The Commissioner's enforcement power reflects their statutory responsibility to administer and enforce the Act and the presumption that the Commissioner's actions taken pursuant to the Act are in the public interest.[14]

10 The Act, s 7(1)(a).

11 See Chapter 4 for a discussion of these evidence-gathering powers.

12 The Commissioner's independence is also reflected by the limited role of the Ministry of Innovation, Science and Economic Development (formerly known as the Ministry of Industry), regarding enforcement matters. As described more fully in Chapter 2, the Act provides that the minister may direct the Commissioner to commence an inquiry or review a decision by the Commissioner to discontinue an inquiry. See ss 10(1) and 22(4) of the Act.

13 See Chapter 7 for a discussion of consent agreements under the Act.

14 The Act, s 7(1). See *Canada (Commissioner of Competition) v Pearson Canada Inc*, 2014 FC 376 at para 43; *Canada (Competition Act, Director of Investigation and Research) v Bank of Montreal*, [1996] CCTD No 12 (QL) at para 32, 68 CPR (3d) 527; *Canada (Director of Investigation and Research) v Superior Propane Inc*, [1998] CCTD No 20 (QL) at para 19; *Rona Inc v Commissioner of Competition*, 2005 CACT 26 at

The Commissioner has published a *Competition and Compliance Framework*, which describes the general approach of the Commissioner and the Competition Bureau to the administration and enforcement of the Act.[15] According to the *Framework*, the Commissioner operates from the assumption that most businesses and their managers prefer to comply with the law rather than to become involved in enforcement proceedings under the Act.[16] In response to actual or potential non-compliance, the Commissioner relies on a range of instruments to enforce the Act, such as facilitating voluntary compliance and resolutions to non-compliance.[17] When negotiated settlements are not possible or appropriate, the Commissioner will pursue litigation to address contraventions of the Act.[18]

2. The Director of Public Prosecutions, Under and on Behalf of the Attorney General of Canada

The Director of Public Prosecutions (DPP), under and on behalf of the attorney general of Canada, initiates and conducts prosecutions on behalf of the federal Crown.[19] The DPP delegates this power and function to federal Crown prosecutors who are appointed for this purpose and act as the DPP's agents.[20] If the Commissioner concludes that a criminal offence under the Act has been committed, evidence may be referred to the DPP with a recommendation that criminal charges be laid. The DPP will then decide whether a prosecution is in the public interest in accordance with criteria set out in the *Public Prosecution Service of Canada Deskbook*.[21] The office of the DPP, otherwise referred to as the Public Prosecution Service of Canada (PPSC), has a section composed of prosecutors (the Competition Law Section) specifically assigned to prosecute offences under the

para 17; *Industrial Milk Producers Assn v British Columbia (Milk Board)*, [1989] 1 FC 463 at para 28, 1988 CanLII 9411 (TD); *North of Smokey Fishermen's Assn v Canada (Attorney General)*, 2003 FCT 33 at para 24 (TD); *Entreprises Sibeca Inc c Frelighsburg (Municipalité)*, 2002 CanLII 41283 at paras 59-61 (QCCA); *Canada (Commissioner of Competition) v Parkland Industries Ltd*, 2015 Comp Trib 4 at para 62.

15 Competition Bureau Canada, "Competition and Compliance Framework," Bulletin (10 November 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>.

16 *Ibid*, s 1.1.

17 *Ibid*, ss 3.1-3.1.1.

18 *Ibid*, s 3.1.2.

19 See s 3(3) of the *Director of Public Prosecutions Act*, SC 2006, c 9, s 121.

20 *Ibid*, s 7; Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Public Prosecution Service of Canada, 2014), part II, guideline 2.3, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html> [PPSC Deskbook].

21 PPSC Deskbook, *supra* note 20. In particular, part V, guideline 5.2 of the PPSC Deskbook is devoted to prosecutions under the Act. This guideline sets out the practices and policies of the DPP with respect to competition law cases under part V, guideline 5.2, s 2. This guideline also attaches and relies on the Memorandum of Understanding between the DPP and the Commissioner. The Memorandum of Understanding sets out the roles and responsibilities of the PPSC and the Commissioner at the investigative and prosecution stages of a case under the Act (part V, guideline 5.2, s 2). The public interest considerations that animate the DPP's decision to prosecute are also discussed (part II, guideline 2.3, s 3.2).

Act.[22] Once a referral and recommendation is made by the Bureau, PPSC counsel has the exclusive discretion to take such action as it wishes to take, including in the prosecution of the case, sentencing, and whether to enter into and conduct discussions leading to a resolution of the case.[23]

3. The Competition Tribunal and the Courts

Canada's Competition Tribunal, the superior courts of the provinces and the Federal Court of Canada may all hear matters arising from the Act.

With respect to reviewable practices, the Competition Tribunal and, in more limited circumstances, the courts have the jurisdiction to adjudicate proceedings and impose remedies. As discussed in Chapter 10, the Competition Tribunal is a specialized adjudicative tribunal that only hears proceedings and orders remedies arising from reviewable practices under parts VIII and VII.1 of the Act. Created in 1986, the tribunal was conceived as a hybrid panel of federal court judges and expert laypersons that could impartially adjudicate reviewable practices.[24] The tribunal may also hear references and provide opinions regarding questions of law, mixed law and fact, jurisdiction, and practice or procedure, in relation to the application or interpretation of reviewable practices.

Reviewable practices under part VIII (encompassing unilateral conduct, agreements between competitors and mergers) may only be adjudicated before the Competition Tribunal. Reviewable practices under part VII.1 of the Act (deceptive marketing practices) can be adjudicated before three adjudicative bodies: the Competition Tribunal, the Federal Court of Canada, or a superior court of a province.[25] The Competition Tribunal and the Federal Court of Canada are creatures of statute and only have their powers conferred on them by Parliament. The jurisdiction of the Competition Tribunal is conferred by the Act and the

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22 PPSC Deskbook, *supra* note 20, "Memorandum of Understanding Between the Commissioner of Competition and the Director of Public Prosecutions," part V, guideline 5.2, appendix A.

23 *Ibid* at para 3.7; PPSC Deskbook, *supra* note 20, part V, guideline 5.2, s 6.1.

24 Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1st Sess, 33rd Parl, 1985 (assented to 17 June 1986), SC 1986, c 26; Canada, Department of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (Ottawa: DCCA, 1985) at 10-12; Canada, Department of Consumer and Corporate Affairs, "Proposals for a New Competition Policy for Canada, Second Stage, Combines Investigation Act Amendments" (Ottawa: DCCA, March 1977) at 17-19. The Tribunal was created together with major reforms of Canada's competition law that included replacing the then *Combines Investigation Act* with the *Competition Act*. Previously, the Restrictive Trade Practices Commission (RTPC) had jurisdiction over a limited number of reviewable practices. The RTPC was authorized to carry out administrative and investigative tasks, conduct examinations of witnesses, and conduct research inquiries into the state of competition in a market or industry. In *Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145, 1984 CanLII 33, the RTPC's investigative powers were declared a violation of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which signalled the need for an autonomous adjudicative body without investigative powers.

25 The Act, s 74.09.

Competition Tribunal Act.[26] The jurisdiction of the Federal Court is conferred by the *Federal Courts Act* and, with respect to reviewable practices, the *Competition Act*.[27] This is unlike the superior courts of the provinces that have "inherent jurisdiction" (i.e., they do not derive their existence from legislation), which gives superior courts the authority to hear any matter that is not specifically assigned to another level of court.[28]

With respect to criminal offences under the Act, the attorney general of Canada may prosecute offences in the courts of criminal jurisdiction as defined by the *Criminal Code*[29] and the *Competition Act*. As discussed in Chapter 5, certain criminal offences under the *Competition Act* may be prosecuted before the superior court of a province and the Federal Court of Canada.

4. Private Persons

The Act recognizes dual public and private enforcement. Private enforcement is a significant mechanism of enforcement not only for private parties who have suffered loss or damage but the broader public interest in deterrence.[30]

Private enforcement was first introduced in the Act in 1976, with the introduction of a statutory private right of action.[31] The private right of action permits victims of criminal anticompetitive conduct to seek recovery for loss or damage suffered. In particular, section 36(1) of the Act provides a statutory right of action for damages to any person who has suffered loss or damage as a result of conduct contrary to part VI of the Act. To date, the vast majority of private rights of action

26 *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 8(1). See also *Canada (Commissioner of Competition) v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 at paras 55-56.

27 The Act, s 74.09; *Federal Courts Act*, RSC 1985, c F-7, s 17(6).

28 Superior courts of the provinces derive their inherent jurisdiction under s 96 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, Appendix II, No 5.

29 RSC 1985, c C-46.

30 See e.g. *General Motors of Canada Ltd v City National Leasing Ltd*, [1989] 1 SCR 641, 1989 CanLII 133; *Shah v LG Chem, Ltd*, 2017 ONSC 2586 at para 22; Competition Bureau Canada, "Requests for Information from Private Parties in Proceedings Under Section 36 of the Competition Act," Bulletin (20 November 2017), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html>; Competition Bureau Canada, "Competition Bureau Submission to the OECD Competition Committee Roundtable on the Relationship Between Public and Private Antitrust Enforcement," Bulletin (10 June 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03926.html>; Margaret Sanderson & Michael Trebilcock, "Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales" in Stephen GA Pitel, ed, *Litigating Conspiracy: An Analysis of Competition Class Actions* (Toronto: Irwin Law, 2006) at 15.

31 The private right of action was introduced as s 31.1 of the *Combines Investigation Act*, which later became s 26 of the Act. See also Canada, Department of Consumer and Corporate Affairs, *Background Papers: Stage 1 Competition Policy* (Ottawa: Bureau of Competition Policy, April 1976) at 32. As noted therein, the introduction of the statutory private right of action was, in part, motivated by jurisprudence that concluded that anti-combines laws in Canada gave no civil cause of action for its breach. See *Transport Oil Ltd v Imperial Oil Ltd*, [1935] OR 215, [1935] 2 DLR 500 (CA); *Director Lumber Co Ltd v Western Plywood Co Ltd*, 32 DLR (2d) 227, 1962 CanLII 419 (ABCA), aff'd [1962] SCR 646, 35 DLR (2d) 1. The constitutional validity of the statutory cause of action was recognized in *General Motors of Canada Ltd v City National Leasing Ltd*, *supra* note 30.

commenced under section 36(1) are class proceedings, primarily from allegations of conduct contrary to sections 45 (conspiracy), 46 (foreign directions), and 47 (bid-rigging) of the Act. To a lesser degree, section 36(1) proceedings have arisen from allegations of conduct contrary to sections 52 (false or misleading representations) and 55 (multi-level marketing and pyramid selling). Section 36(1) proceedings are also expected to arise from allegations of conduct contrary to section 45(1.1) (wage-fixing/no-poaching) of the Act. See Chapter 11 for a discussion of proceedings under section 36(1) of the Act.

A further mechanism of private enforcement of the Act was introduced in 2002, which afforded private persons the opportunity to seek leave of the Competition Tribunal to bring an application to the tribunal in respect of five reviewable practices: refusal to deal (s 75), price maintenance (s 76), exclusive dealing (s 77), tied selling (s 77), market restriction (s 77) and abuse of dominance (s 79). In 2022, abuse of dominance (s 79) was added. On June 20, 2025, further extended private enforcement came into force, allowing private persons the opportunity to seek leave of the Competition Tribunal under a modified leave test and also extended private enforcement in respect all deceptive marketing practices (part VII.1), civil competitor collaborations (s 90.1). This form of private enforcement is discussed more fully in Chapters 7 and 10.

C. Application of the Competition Act

The Act applies to business activity in Canada. It has very broad application, capturing almost all economic activity in markets for products or services, whether engaged in on a for-profit, not-for-profit or charitable basis.[32] There are narrow exceptions to the Act's application at common law and by statute, as described below.

1. Regulated Conduct Doctrine

There are numerous statutes other than the *Competition Act* that apply to market conduct and economic activity. Conflicts may arise between the Act and conduct that is authorized or directed under other federal or provincial legislation or regulatory regimes. Conduct that is anticompetitive under the Act may otherwise be authorized or directed by other federal or provincial legislation or regulatory regimes under the regulated conduct doctrine.

The regulated conduct doctrine is a principle of statutory interpretation. Pursuant to the principle, a criminal law statute, such as the Act, leaves room for certain conduct that otherwise would be regarded as criminal to be "innocent."[33]

32 Business is defined in s 2(1) of the Act as including "the business of (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and (b) acquiring, supplying and otherwise dealing in services. It also includes the raising of funds for charitable or other non-profit purposes."

33 *Hughes v Ontario (Liquor Control Board)*, 2018 ONSC 1723 at para 201. As noted by Perell J in *Hughes*, "[i]t is helpful to understand that the Regulated Conduct Defence is a principle of statutory interpretation and that it is different from, although complimentary to, the paramountcy principle under which

The regulated conduct doctrine was originally developed as a means to address potential conflicts between the Act and provincial statutes, particularly in the context of regulated industries or self-governing professions.[34] The regulated conduct doctrine seeks to reconcile federal and provincial jurisdiction and to ensure that the Act serves its objectives without interfering with valid provincial regulatory schemes.[35]

The regulated conduct doctrine allows a person to avoid liability under the criminal provisions of the Act when the conduct in question was required or authorized by or under an Act of Parliament or the legislature of a province.[36] The Supreme Court of Canada has held that application of the regulated conduct doctrine requires the wording of the criminal offence to clearly allow for the application of the regulated conduct defence through "leeway language," such as "against the interests of the public" or "unduly" limiting competition, which was found in section 45(1) before section 45(1) became a *per se* offence.[37] Section 45(7) explicitly provides that the regulated conduct doctrine will continue to apply to the amended section 45.[38]

The regulated conduct doctrine has been applied in a number of cases involving the Act (and predecessor versions) and provincial or federal regulatory regimes.[39] Recently, the regulated conduct doctrine was discussed in the context

constitutionally *infra vires* provincial law must give way to constitutionally *infra vires* federal law in cases of conflict. Under the Regulated Conduct Defence there is no conflict between the federal criminal enactment and provincial legislation because the federal enactment leaves room for the provincial legislation to operate."

34 *Ibid* at para 202.

35 *Ibid*.

36 The Act, s 45(7). Section 45(7) provides that the regulated conduct doctrine as it applied to section 45 prior to amendments coming into force as of March 12, 2010 will continue to apply to the amended section 45. As of March 12, 2010, section 45 no longer requires proof that an agreement or arrangement prevents or lessens competition "unduly." See Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009 (assented to 12 March 2009), SC 2009, c 2, s 410.

37 *Garland v Consumers' Gas Co*, 2004 SCC 25. As of March 12, 2010, section 45 no longer requires proof that an agreement or arrangement prevents or lessens competition "unduly." See Bill C-10, *supra* note 36.

38 Pursuant to Parliament's Standing Senate Committee on Banking, Trade and Finance in its report on the 2010 amendments to the *Competition Act*, s 45(7) of the Act was designed to preserve the Regulated Conduct Defence despite the removal of the word "unduly" from s 45(1) of the Act. The Competition Bureau also recognizes that the regulated conduct doctrine may apply to the enforcement of the Act, including the conspiracy provision in s 45, with respect to conduct that is regulated by another federal, provincial, or municipal law or legislative regime. See Competition Bureau Canada, "Competitor Collaboration Guidelines," Enforcement Guidelines (23 December 2009), s 2.6.4, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html#ccg-2.6.4>. See also *Hughes v Ontario (Liquor Control Board)*, *supra* note 33.

39 See e.g. *Reference Re Farm Products Marketing Act*, [1957] SCR 198, 1957 CanLII 1; *Waterloo Law Association v Canada (Attorney General)*, 1986 CanLII 2697 (ONSC); *Industrial Milk Producers Association v British Columbia (Milk Board)*, *supra* note 14; *R v Independent Order of Foresters*, 1989 CarswellOnt 975, 26 CPR (3d) 229; *Society of Composers, Authors and Music Publishers of Canada v Landmark Cinemas of Canada Ltd*, 2002 CarswellNat 4443 (FCTD Prothonotary), aff'd 2003 FCT 425, aff'd 2004 FCA 57; *Law Society of Upper Canada v Canada (Attorney General)*, 1996 CanLII 7981 (ONSC); *Rogers Communications Inc v Shaw*

of a civil statutory claim under section 36 of the Act, arising from an alleged breach of the criminal conspiracy provision of the Act. The court summarizes the following salient principles of law regarding the regulated conduct doctrine, which arises from these cases:

- the regulated conduct doctrine, a principle of statutory interpretation, determines the scope or reach of a criminal offence, including offences under the Act;
- in order for the regulated conduct doctrine to be available, it is necessary that the person whose conduct is impugned be regulated by federal or provincial legislation and that the impugned conduct be required, directed, or authorized by the provincial or federal legislation; and
- the person seeking to rely on the regulated conduct doctrine must identify a provision in the legislation governing its industry or profession that expressly or by necessary implication directs or authorizes the person to engage in the impugned conduct.[40]

Historically, jurisprudence suggested that the regulated conduct defence applied to civil reviewable practices.[41] However, the Competition Tribunal concluded that, as a matter of law, the regulated conduct defence does not apply to section 79 (abuse of dominance provision) or any of the reviewable conduct provisions of the Act.[42] The Competition Tribunal concluded that the abuse of dominance reviewable practice does not require criminal intent and, accordingly, the traditional criminal law rationale for the regulated conduct defence did not apply.[43] Further, the Competition Tribunal concluded the abuse of dominance reviewable practice did not contain the necessary leeway language that would permit the application of Regulated Conduct defence in any event.[44]

The Bureau has noted that it will consider a number of factors when determining whether it will pursue conduct regulated by another law—namely the purpose of the Act, the other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provision(s) of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the matter.[45]

Communications Inc, 2009 CanLII 48839 (ONSC); *Fournier Leasing Co v Mercedes-Benz Canada Inc*, 2012 ONSC 2752; *Cami International Poultry Inc v Chicken Farmers of Ontario*, 2013 ONSC 7142; *Hughes v Ontario (Liquor Control Board)*, *supra* note 33.

40 *Hughes v Ontario (Liquor Control Board)*, *supra* note 33 at para 220.

41 See e.g. *Law Society of Upper Canada v Canada (Attorney General)*, *supra* note 39; *Alex Couture Inc v Canada (Attorney General)*, 1991 CanLII 3120 (QCCA), leave to appeal to SCC refused (1992), 91 DLR (4th) vii (note). The interpretation and scope of the regulated conduct defence has been subject to significant debate. See e.g. Michael Trebilcock, “Regulated Conduct and the Competition Act” (2004-2005) 41 Can Bus LJ 492.

42 *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 at paras 187-294.

43 *Ibid.*

44 *Ibid.*

45 “‘Regulated’ Conduct,” *supra* note 41. The Bureau’s general approach to enforcement of the Act with respect to conduct that may be regulated by another law or legislative regime is contained in this bulletin.

2. Statutory Exemptions

The Act prescribes a limited number of statutory exemptions, which exempt the application of the Act to certain industries or activities, in whole or in part:

- **Collective bargaining:** The *Competition Act* effectively exempts collective bargaining by providing that the Act does not apply to "combinations or activities of workmen or employees for their own reasonable protection" (s 4(1)(a)) and "contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession … pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment" (s 4(1)(c)).
- **Fisheries:** The *Competition Act* effectively exempts fisheries by providing that the Act does not apply to "contracts, agreements or arrangements between or among fishermen or associations of fishermen" and "persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen" (s 4(1)(b)).
- **Amateur sport:** The *Competition Act* effectively exempts amateur sport by providing that the Act does not apply to "agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport"—namely "sport in which the participants receive no remuneration for their services as participants" (ss 6(1) and (2)).
- **Shipping:** The *Shipping Conferences Exemption Act, 1987*[46] exempts the application of the *Competition Act* to certain agreements of international shipping conferences, allowing them to operate into and out of Canadian ports without contravening the *Competition Act*.[47]

Other statutory exemptions, which exempt, in part, the application of the *Competition Act* to certain industries or activities, are addressed in varying degrees of greater detail throughout this book. These include partial exemptions for financial institutions,[48] underwriters of securities,[49] exporters,[50] and transportation activities.[51]

II. HISTORY OF COMPETITION ENFORCEMENT IN CANADA

Canada's competition legislation dates back to 1889. Canada was the first Western industrialized nation to enact competition legislation, a year before the United States enacted its antitrust legislation. However, competition enforcement in

46 RSC 1985, c 17 (3rd Supp).
47 *Ibid*, s 4(1).
48 The Act, ss 45(6)(b), 49, and 94(b). See also Chapters 4 and 8.
49 The Act, s 5; *Notifiable Transactions Regulations*, SOR/87-348, ss 2 and 15. See also Chapter 8.
50 The Act, s 45(5). See also Chapter 4.
51 The Act, s 94(c). See also Chapter 8.

Canada largely languished until 1986, due to constitutional uncertainty, prosecutorial challenges, and various statutory amendments. Since then, Canada has had robust competition enforcement with a tandem of criminal offences and civil reviewable practices, together with a specialized adjudicative tribunal to adjudicate competition disputes.

A. An Act for the Prevention and Suppression of Combinations in Restraint of Trade

Canada enacted *An Act for the Prevention and Suppression of Combinations in Restraint of Trade* in 1889.[52] This preceded the enactment of antitrust legislation in the United States, the *Sherman Act*, a year later in 1890.[53] Canada's legislation was limited to a criminal prohibition against conspiracies, combinations, agreements, or arrangements whose purpose was to unduly prevent or lessen competition.[54] During the general codification of the criminal law in 1892, a misdemeanour offence was also codified in the first *Criminal Code*[55] as "combinations in restraint of trade" where it became an indictable offence.[56]

Both prohibitions proved to be ineffective. This legislation was enacted as federal criminal legislation, in part, due to constitutional uncertainty regarding the federal government's power to regulate the economic aspects of business.[57] This reliance on criminal law to enforce anticompetitive conduct impeded the effectiveness of the legislation.

52 RSC 1889, c 41.

53 15 USC §1-7.

54 *An Act for the Prevention and Suppression of Combinations in Restraint of Trade* created a misdemeanour offence, as outlined in section 1:

> 1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,
>   (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or
>   (b) To restrain or injure trade or commerce in relation to any such article or commodity; or
>   (c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or
>   (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.
>
> The statutory penalty on conviction ranged from $200 to $4,000 for an individual and $1,000 to $10,000 for a corporation.

55 SC 1892, c 29.

56 *Ibid*, s 520. Everyone guilty of an offence under section 520 was liable to a fine in the same amount as in the 1889 Act or two years' imprisonment. Section 516 defined conspiracies in restraint of trade as an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

57 The *Constitution Act, 1867*, s 92(13) grants the provincial legislatures of Canada the authority to legislate on property and civil rights in their province, which largely captures trade and commerce. Constitutional challenges of competition legislation in Canada have a long history. For a helpful discussion of this history, see Peter W Hogg, *Constitutional Law of Canada*, vol 1 (Toronto: Carswell, 2007) (loose-leaf) at 18-13; Mahmud Jamal, "Constitutional Issues in Canadian Competition Litigation" (2004-2005) 41 Can Bus LJ 66.

Convictions were challenging to secure due to difficulties in gathering sufficient evidence and the reluctance of courts to convict defendants for anticompetitive conduct at a time when such conduct between competitors was not uncommon.[58] Furthermore, language in the legislation that included the terms "unlawfully,"[59] "unduly," and "unreasonably"[60] led to difficulties of interpretation and afforded courts an area of discretion that aided their reluctance to enter convictions.[61] Further, the criminal legislation did not create an enforcer focused on competition. Enforcement was left to the attorneys general of the provinces who did not have a strong interest in enforcing competition legislation that often clashed with local interests.[62]

B. The First Combines Investigation Act, 1910

The *Combines Investigation Act*[63] of 1910 was introduced following a rise in the number of mergers and a period of sharply rising prices.[64] The legislation sought to remedy past difficulties with competition investigations by introducing an administrative body, in the form of an *ad hoc* board of inquiry, to investigate alleged combines.[65] A combine was defined by the 1910 Act in section 2(c) as inclusive of monopolies or mergers that operated or were likely to operate to the detriment of the public.[66]

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58 Brian A Facey & Dany H Assaf, *Competition and Antitrust Law: Canada and the United States*, 4th ed (Markham, ON: LexisNexis Canada, 2014) at 2-3; Canada, Department of Consumer and Corporate Affairs, "Proposals for a New Competition Policy for Canada," First Stage (Ottawa: DCCA, November 1973) at 3A.

59 Section 520 of the *Criminal Code* was amended in 1900 striking the word "unlawfully" in order to remove dependence on the common law restraint of trade doctrine. See *An Act to further amend the Criminal Code, 1892* (UK), 63 & 64 Vict (assented to 18 July 1900), SC 1900, c 46.

60 In 1899, the words "unduly" and "unreasonably" were removed. See section 1 of *An Act to amend the Criminal Code, 1892, with respect to Combinations in restraint of Trade* (UK), 62 & 63 Vict (assented to 11 August 1899), SC 1899, c 46. In 1900, section 520 of the *Criminal Code* was amended again, and the words "unduly" and "unreasonably" were added back in. See *An Act to further amend the Criminal Code, 1892*, *supra* note 59.

61 Maxwell Cohen, "The Canadian Anti-Trust Laws—Doctrinal and Legislative Beginnings" (1938) 16 Can Bar Rev 456. For example, in *The Queen v American Tobacco Company of Canada* (1897), 3 Rev de Jur 453, the first reported antitrust prosecution under section 520, the prosecution against the accused for employing a system of contracts directed toward controlling the distribution, manufacture, and resale price of certain tobacco products was unsuccessful because the court interpreted "unlawfully" as describing actions that would have to be objectionable at common law.

62 Michael J Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 10; Cohen, *supra* note 61 at 459.

63 SC 1910, c 9 [CIA].

64 Trebilcock et al, *supra* note 62 at 11.

65 Facey & Assaf, *supra* note 58 at 7.

66 The CIA, s 2(c) defines "combine" as

> any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article or trade or commerce or the cost of the storage or transportation thereof, or of the restricting competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition, leasing or otherwise taking over, or obtaining by any person to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger.

Under the *Combines Investigation Act*, any six or more British subjects resident in Canada could initiate an investigation if they persuaded a judge of a *prima facie* violation of the Act.[67] If persuaded, the judge could order an inquiry requiring the minister of labour to convene an *ad hoc* three-member Board of Investigation.[68] A board could compel the attendance of witnesses, examine them under oath, require the production of documents, and exercise the general incidental powers to carry out a full inquiry.[69] Following an investigation, the minister of labour could prepare a report to be published in the *Canada Gazette*, on the premise that publicity would have a deterring effect on anticompetitive conduct.[70] Any person who did not cease their offending activities was subject to monetary penalties.[71] The previous *Criminal Code* provisions remained in force. The *Combines Investigation Act* also contained tariff and patent provisions.[72]

The 1910 Act proved to be ineffective. Only one investigation took place under the Act.[73] The weaknesses of the 1910 Act were at least threefold: (1) private citizens were reluctant to exercise the burden of enforcing the Act;[74] (2) there was no body to provide continuity in the administration of the Act;[75] and (3) it was difficult to prove a restraint of trade.[76]

C. The 1919 Legislation

The *Combines Investigation Act* was repealed in 1919 and replaced with the *Board of Commerce Act* and the *Combines and Fair Practices Act*, and a Board of Commerce was created to enforce the *Combines and Fair Practices Act*.[77] The Board of Commerce was afforded extensive powers to sanction or prevent the operation of a combine and to examine and regulate the price of goods.[78]

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67 CIA, s 5; Trebilcock et al, *supra* note 62 at 12; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 4A; Facey & Assaf, *supra* note 58 at 7.

68 CIA, ss 7-10; Trebilcock et al, *supra* note 62 at 12; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 4A; Facey & Assaf, *supra* note 58 at 7.

69 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 4A.

70 *Ibid*; Trebilcock et al, *supra* note 62 at 12; Paul Gorecki & WT Stanbury, "The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952" in RS Khemani & WT Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991) at 68; Facey & Assaf, *supra* note 58 at 7.

71 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 5A; Trebilcock et al, *supra* note 62 at 12; Facey & Assaf, *supra* note 58 at 7.

72 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 5A.

73 Trebilcock et al, *supra* note 62 at 12.

74 Canada, House of Commons, Committee to Study Combines Legislation, *Report and Interim Report on Resale Price Maintenance* (Ottawa: Queen's Printer, 1952) at 10 [MacQuarrie Report]; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 6A; Trebilcock et al, *supra* note 62 at 12.

75 MacQuarrie Report, *supra* note 74 at 10; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 6A; Facey & Assaf, *supra* note 58 at 7.

76 Trebilcock et al, *supra* note 62 at 12.

77 MacQuarrie Report, *supra* note 74 at 10; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 6A; Trebilcock et al, *supra* note 62 at 12-13; Facey & Assaf, *supra* note 58 at 7.

78 MacQuarrie Report, *supra* note 74 at 10; Trebilcock et al, *supra* note 62 at 13; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 7A.

The Board was active in the exercise of its powers, overcoming two deficiencies of the 1910 Act: the absence of a permanent enforcement body and the reliance on private individuals to initiate an application.[79]

The Board of Commerce was abolished, however, following a 1922 decision of the Privy Council declaring the *Combines Investigation Act* unconstitutional—namely *ultra vires* Parliament's authority for encroached provincial jurisdiction over property and civil rights.[80]

D. The Second Combines Investigation Act, 1923

In 1923, the second *Combines Investigation Act*[81] was enacted. It was much like its predecessor, retaining the six-person application process to initiate an inquiry.[82] However, it also provided for a permanent registrar for its own administration.[83] The registrar was empowered to make an inquiry under the Act on their own initiative, upon ministerial direction, or on petition by a six-person application. It also provided for separate investigatory and judicial functions.[84] Like the first *Combines Investigation Act*, prosecutions were undertaken by provincial attorneys general, although in some instances, where a province did not proceed, the federal government would move forward with a prosecution.[85]

The 1923 Act returned the prohibition against certain combines under criminal law. The 1923 Act made it an offence to be a party or privy to, or knowingly to assist, in the formation or operation of a combine.[86]

The Great Depression led to two main changes in the *Combines Investigation Act*, both in 1935. A Royal Commission on price spreads and trade practices brought discriminatory discounts, territorial price discrimination, and predatory pricing under the jurisdiction of the Act and made criminal offences of actions that reflected small business concerns over the impact of what was deemed "destructive competition" from larger enterprises.[87] The government also passed the *Dominion Trade and Industry Commission Act, 1935*, which established a commission

79 MacQuarrie Report, *supra* note 74 at 11; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 9A; Facey & Assaf, *supra* note 58 at 7.

80 *Re Board of Commerce Act, 1919 and Combines and Fair Practices Act, 1919*, [1922] 1 AC 191, 60 DLR 513 (PC).

81 *Combines Investigation Act, 1923*, SC 1923, c 9.

82 *Ibid*, s 5.

83 *Ibid*, s 4.

84 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 10A; Facey & Assaf, *supra* note 58 at 8.

85 Trebilcock et al, *supra* note 62 at 14.

86 Any person found guilty of the offence was liable to a penalty not exceeding $10,000 or $25,000 in the case of an individual or a corporation, respectively; MacQuarrie Report, *supra* note 74 at 12; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 10A; Facey & Assaf, *supra* note 58 at 8.

87 Trebilcock et al, *supra* note 62 at 14; Facey & Assaf, *supra* note 58 at 8; Susan M Hutton, *Competition Law in Canada* (Alphen aan den Rijn, NL: Kluwer Law International, 2013) at 16.

to administer the *Combines Investigation Act, 1923* and to authorize combines prosecutions under the *Criminal Code*.[88]

Section 14 of the *Dominion Trade and Industry Commission Act* provided, *inter alia*, "that agreements between persons engaged in any specific industry entered into in order to modify wasteful or demoralizing competition existing in such industry, may be approved by the Governor in Council on the advice of the Commission."[89] This power was declared *ultra vires* Parliament's authority in 1936 by the Supreme Court of Canada.[90] However, the Commission's investigatory powers were upheld.[91]

During the Second World War, Parliament suspended the operation of the *Combines Investigation Act* and placed production, the allocation of resources, and the setting of prices under the authority of the Wartime Prices and Trade Board. Following the Second World War, an inquiry revealed that, under the government's tacit consent, the flour mill industry had maintained price-fixing agreements and colluded in bidding for government contracts.[92] In response to intense criticism for its handling of the matter, the government appointed the MacQuarrie Committee in 1950 to study the Act and recommend amendments to enhance its effectiveness.[93]

As a consequence of the first MacQuarrie Report, there were significant changes made to the *Combines Investigation Act* in the 1950s.[94] In 1951, resale price maintenance was added as a criminal offence.[95] In 1952, the first recommendation of the MacQuarrie Committee was implemented, which stated "[t]hat there should be separation of functions between investigation and research on the one hand and appraisal and report on the other hand."[96] The Restrictive Trade Practices Commission was created for the purpose of issuing reports and making recommendations for enforcement action.[97] The Office of the Director of

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88 Hutton, *supra* note 87 at 16; Trebilcock et al, *supra* note 62 at 15.

89 *Reference re Legislative Jurisdiction of Parliament of Canada to Enact the Dominion Trade and Industry Commission Act, 1935*, [1936] SCR 379, 1936 CanLII 51.

90 *Ibid.*

91 MacQuarrie Report, *supra* note 74 at 13; Facey & Assaf, *supra* note 58 at 8; *Reference re Legislative Jurisdiction of Parliament of Canada to Enact the Dominion Trade and Industry Commission Act, 1935*, *supra* note 89.

92 Facey & Assaf, *supra* note 58 at 8; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 15A; "Economic Council of Canada—Interim Report on Competition Policy" (1969) 14:4 Antitrust Bull 933.

93 Facey & Assaf, *supra* note 58 at 8; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 15A; MacQuarrie Report, *supra* note 74.

94 Maxwell Cohen et al, "The MacQuarrie Report and the Reform of Combines Legislation" (1952) 30:6 Can Bar Rev 549; Trebilcock et al, *supra* note 62 at 15; MacQuarrie Report, *supra* note 74 at 47-49.

95 See s 37, *An Act to amend the Combines Investigation Act* (UK), 15 & 16 Geo VI (assented to 29 December 1951), SC 1951, c 30; MacQuarrie Report, *supra* note 74 at 67-72.

96 MacQuarrie Report, *supra* note 74 at 47.

97 Sandra Walker & Michael Kirby, "Institutional Overview and Statutory History" in James B Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) at 23-24; *An Act to amend the Combines Investigation Act and the Criminal Code* (UK), 1 Eliz II (assented to 4 July 1952), SC 1952, c 39.

Investigation and Research, renamed the Commissioner of Competition in 1999, was created to administer and enforce the Act.[98]

Further changes reflecting the recommendations of the MacQuarrie Report were made in 1960.[99] The *Criminal Code* provisions relating to combinations were repealed and brought into the *Combines Investigation Act*. In this process, the definition of "combine" was dropped, the word "trust" was eliminated, and separate provisions were enacted to define mergers and monopolies, making them offences only where they were likely to operate, "to the detriment or against the interest of the public."[100] Additional provisions were added relating to conspiracies and misleading advertising.[101]

While prosecutions under the amended *Combines Investigation Act* were more numerous than under previous legislation, the Act was unsuccessful in addressing problematic mergers, even where the parties had very high combined market shares.[102] In response, Prime Minister Lester B Pearson's government tasked the Economic Council of Canada with modernizing Canada's competition law regime.[103]

E. Modernization: The Development of the Competition Act

The report of the Economic Council of Canada, released in 1969, laid the groundwork for the current *Competition Act*. The report made a number of recommendations—namely that the objective of Canadian competition policy should be economic efficiency, and competition policy should be extended to all commercial activities including services.[104]

The report further recommended a mixed criminal and regulatory regime. It proposed that criminal prohibitions against five practices be retained: (1) collusion between competitors to fix prices (including bid-rigging), (2) collusion between competitors to allocate markets, (3) collusion between competitors to prevent the entry into markets of new competitors or the expansion of existing competition, (4) resale price maintenance, and (5) misleading advertising.[105] The report further recommended that criminal offences involving mergers and monopolies, then in the *Combines Investigation Act*, be replaced by a civil regime. The report further proposed the creation of a tribunal comprised of membership and staff experienced in

98 Hutton, *supra* note 87 at 16; Walker & Kirby, *supra* note 97 at 23; Trebilcock et al, *supra* note 62 at 16; MacQuarrie Report, *supra* note 74 at 31-32, 47; *An Act to amend the Combines Investigation Act and the Criminal Code*, *supra* note 97.

99 MacQuarrie Report, *supra* note 74 at 47-49.

100 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 23A.

101 Canada, *Prefix to Statutes*, *An Act to amend the Combines Investigation Act and the Criminal Code*, 8 & 9 Eliz II, 3rd Sess, 24th Parl, SC 1960, c 45, ss 523-34; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 23A; Facey & Assaf, *supra* note 58 at 8; Trebilcock et al, *supra* note 62 at 16; Walker & Kirby, *supra* note 97 at 24.

102 Walker & Kirby, *supra* note 97 at 23; Trebilcock et al, *supra* note 62 at 16-19.

103 Walker & Kirby, *supra* note 97 at 24.

104 "Economic Council of Canada—Interim Report on Competition Policy," *supra* note 92 at 934, 979.

105 "Economic Council of Canada—Interim Report on Competition Policy," *supra* note 92 at 946-47.

economics, business, and law, which would have the power to break up problematic mergers or stop harmful business practices through interim and final injunctions.[106] The report also proposed a role for private enforcement.[107]

In June 1971, the Economic Council of Canada's recommendations were introduced in the House of Commons as Bill C-256, the *Competition Act*.[108] Bill C-256 was never enacted, however, due to opposition from the Canadian business community, which believed that the Bill would be generally detrimental to their interests.[109] In response, the federal government proposed amendments in two phases.[110] Phase I would implement the least controversial amendments, and Phase II would implement the remainder.[111]

The Phase I amendments to the *Combines Investigation Act* came into force in 1976.[112] These amendments included making bid-rigging a *per se* offence, the application of the law to goods and services, and the creation of certain reviewable practices—namely refusal to deal, consignment selling, tied selling, and exclusive dealing.[113] In addition, the Commission was empowered to review situations where foreign judgments, laws, or directives were applied in Canada, as well as cases of refusal to supply by foreign suppliers to a person in Canada.[114] Mergers and monopolies remained criminal offences.[115] A private cause of action for parties harmed by criminally prohibited conduct was also introduced.[116]

Repeated attempts to introduce the Phase II amendments were made between 1978 and 1986 against intense opposition from the Canadian business community.[117] In 1985, Prime Minister Brian Mulroney's government introduced Bill C-91,[118] embodying many of the recommendations that the Economic Council of

106 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 31A.

107 Trebilcock et al, *supra* note 62 at 19; Walker & Kirby, *supra* note 97 at 25.

108 Trebilcock et al, *supra* note 62 at 20; "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58 at 40A; Facey & Assaf, *supra* note 58 at 8.

109 Trebilcock et al, *supra* note 62 at 19.

110 "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58; "Proposals for a New Competition Policy for Canada," Second Stage, *supra* note 24.

111 Trebilcock et al, *supra* note 62 at 19; Facey & Assaf, *supra* note 58 at 9; "Proposals for a New Competition Policy for Canada," Second Stage, *supra* note 24 at 2.

112 "Proposals for a New Competition Policy for Canada," Second Stage, *supra* note 24 at 1; Canada, "Proposals for a New Competition Policy for Canada," First Stage, *supra* note 58.

113 *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 23 & 24 Eliz II (assented to 15 December 1975), SC 1975, c 76, ss 31.2, 31.3, and 31.4; *Background Papers: Stage 1 Competition Policy*, *supra* note 31 at 2.

114 *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, ss 31.5, 31.6, 31.7; *Background Papers: Stage 1 Competition Policy*, *supra* note 31 at 2.

115 Walker & Kirby, *supra* note 97 at 25; Trebilcock et al, *supra* note 62 at 20.

116 *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, s 31.1; *Background Papers: Stage 1 Competition Policy*, *supra* note 31 at 32; Walker & Kirby, *supra* note 97 at 25; Trebilcock et al, *supra* note 62 at 20.

117 Trebilcock et al, *supra* note 62 at 21.

118 *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, *supra* note 24.

Canada had made two decades earlier.[119] Bill C-91 was proclaimed in force on June 19, 1986, and the *Competition Act* and the *Competition Tribunal Act* became law.[120]

The passage of Bill C-91 marked a significant milestone for the modernization of Canadian competition law. The *Combines Investigation Act* was renamed the *Competition Act*. A number of criminal offences remained—namely for conspiracies, bid-rigging, predatory pricing, price discrimination, promotional allowances, and misleading advertising. Civil reviewable practices were included to address mergers, abuse of dominance, refusal to deal, exclusive dealing, and tied selling.[121] The *Competition Tribunal Act* established a specialized, expert adjudicative body, the Competition Tribunal, to adjudicate reviewable practices.[122]

F. The Competition Act to Date

In 1989, longstanding constitutional skepticism about the basis for the federal government's civil law competition regulations was settled when the Supreme Court of Canada upheld the constitutionality of the Act, confirming that the federal government has the constitutional authority to regulate competition under its "trade and commerce" power.[123]

On July 21, 2001, Bill C-23 came into force and introduced a number of changes to the Act.[124] It introduced a new framework, Mutual Legal Assistance with Foreign States, to facilitate cooperation between foreign competition authorities where the laws of the foreign state that address the conduct are substantially similar to Canadian law. Bill C-23 also afforded the Competition Tribunal significant new powers, including the authority to award costs in respect of reviewable practices, to award summary dispositions, and to hear references.[125] It also empowered private parties affected by a refusal to deal, exclusive dealing, tied selling, and market restriction to seek leave and a remedy directly from the Competition Tribunal.[126]

In 2007, the government of Prime Minister Stephen Harper established the Competition Policy Review Panel in response to a growing national debate over

119 Trebilcock et al, *supra* note 62 at 22; Facey & Assaf, *supra* note 58 at 10; Walker & Kirby, *supra* note 97 at 26.

120 Facey & Assaf, *supra* note 58 at 10.

121 *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, *supra* note 24; Walker & Kirby, *supra* note 97 at 26.

122 *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, *supra* note 24; Trebilcock et al, *supra* note 62 at 22; Walker & Kirby, *supra* note 97 at 26.

123 *General Motors of Canada Ltd v City National Leasing*, *supra* note 30.

124 Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess, 37th Parl, 2002 (assented to 4 June 2002), SC 2002, c 16.

125 *Ibid*, s 3.

126 *Ibid*, s 12.

whether Canada's economy was being "hollowed out" by foreign takeovers.[127] The panel was mandated to review Canadian competition and foreign investment policies.[128] The panel issued a report in 2008 that made numerous recommendations, including that the government adopt a two-stage merger review process similar to the one used in the United States and that it replace various criminal provisions of the Act with civil provisions. It also proposed administrative monetary penalties for abuse of dominance offences.[129]

The most significant changes to the Act since 1986 came in 2009 with the introduction of Bill C-10.[130] Bill C-10 contained the government's stimulus package created in response to the 2008 financial crisis, also known as the "Great Recession." There was virtually no debate about the *Competition Act* amendments due to the urgency of passing economic stimulus measures. Bill C-10 received royal assent on March 12, 2009.[131]

Bill C-10 implemented almost all of the recommendations of the Competition Policy Review Panel related to the *Competition Act*.[132] It introduced a two-stage process for merger review, decriminalized price maintenance, and repealed the former criminal provisions concerning price discrimination, predatory pricing, and promotional allowances. It created administrative monetary penalties for abuse of dominance.[133] It further created a two-tier approach to anticompetitive agreements: (1) the implementation of a *per se* criminal offence for hard-core anticompetitive conduct (s 45) and (2) the introduction of a new civil provision for non-criminal arrangements between competitors (s 90.1).[134] The maximum fines, prison terms, and administrative monetary penalties for deceptive marketing practices and misleading advertising were significantly increased.[135]

From 2022 to 2024, the government of Prime Minister Justin Trudeau enacted amendments to the Act in three tranches. Following a wide consultation, significant competition law reform was introduced through the passage of Bill C-19 on June 23, 2022; Bill C-56 on December 15, 2023; and Bill C-59 on June 20, 2024. These bills include amendments that touch on virtually all facets of competition policy in Canada, including merger review, abuse of dominance, criminal cartels,

127 Paul Boothe, *Compete to Win: The Wilson Panel Report Six Years Later* (Ottawa: Business Council of Canada, 2 March 2015) at 4, online (pdf): <https://www.thebusinesscouncil.ca/wp-content/uploads/2015/03/Compete-to-Win-The-Wilson-panel-report-6-years-later-March-2015.pdf>; Canada, Competition Policy Review Panel, *Compete to Win—Final Report—June 2008* (Ottawa: Industry Canada, 26 June 2008).

128 Boothe, *supra* note 127 at 4; Competition Policy Review Panel, *supra* note 127.

129 Boothe, *supra* note 127 at 8; Competition Policy Review Panel, *supra* note 127.

130 Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009 (assented to 12 March 2009), SC 2009, c 2.

131 *Ibid*; Walker & Kirby, *supra* note 97 at 28-29; Facey & Assaf, *supra* note 58 at 10; Boothe, *supra* note 127 at 11.

132 *Budget Implementation Act*; Facey & Assaf, *supra* note 58 at 10; Boothe, *supra* note 127 at 11.

133 Facey & Assaf, *supra* note 58 at 10; Hutton, *supra* note 87 at 17.

134 Facey & Assaf, *supra* note 58 at 10; Hutton, *supra* note 87 at 17.

135 Walker & Kirby, *supra* note 97 at 29.

competitor collaborations, deceptive marketing, private rights of action, and market studies.

III. PURPOSE OF COMPETITION LAW

In his highly influential book *The Antitrust Paradox*,[136] US antitrust scholar Robert Bork explained:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give … . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive antitrust rules.[137]

Although competition law in Canada is over 130 years old (as are antitrust laws in the United States), there remains no consensus of what, in fact, ought to be the goals of competition law.[138] Canada lacks a precise formulation of the goals of its competition policy, and there is no better example of this than the *Competition Act* itself, which outlines the following as its purpose:

> 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.[139]

Accordingly, with a purpose to maintain and encourage competition, the *Competition Act* has four objectives:

1. to promote the efficiency and adaptability of the Canadian economy,
2. to allow Canadian companies to compete effectively in world markets,
3. to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and
4. to provide consumers with competitive prices and product choices.

These four objectives are not easy to reconcile. For example, the goal of ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy can conflict with the goal of providing consumers with competitive

136 Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).
137 *Ibid* at 50.
138 As noted by US antitrust lawyer and scholar Jonathan M Jacobson, "[t]here is wide agreement today that Judge Bork's assessment was current. Antitrust policy cannot be coherent unless its goals are understood. The problem, however, is that there remains no consensus of what those goals really are." See Jonathan M Jacobson, "Another Take on the Relevant Welfare Standard for Antitrust" (Delivered at the Chair's Showcase: Rethinking Antitrust Economics for the 21st Century, Washington, DC, 16 April 2015) at 1.
139 The Act, s 1.1.

prices and product choices from the most competitive enterprises, regardless of size. Further, the objective of expanding opportunities for Canadian participation in world markets may be irrelevant to merging parties not competing abroad.[140]

Jurisprudence arising from the Act's purpose provision has suggested that decision-making by the Competition Tribunal and the courts ought to reflect all four objectives, even where conflicts between these objectives arise.[141] However, jurisprudence and the enforcement approach taken by the Competition Bureau itself suggests a greater focus on maintaining and encouraging competition in order to promote an efficient and adaptable economy (objective 1) and to provide consumers with competitive prices and product choices (objective 4).[142] For example, in written submissions arising from the proposed joint venture between Air Canada and United Continental, the Commissioner of Competition replied to the parties' submissions with the following:

> Air Canada's appeal to nationalistic sympathies, suggesting that competition policy should support a "national champion" in the "international air transportation world"—by permitting monopolistic prices, reduced service, and less consumer choice—is contrary to the Act and, in any event, exceeds this Tribunal's jurisdiction … .
>
> In the absence of an incentive to compete, regardless of what they claim, the Respondents will not compete; to do otherwise would be irrational and violate their obligations to their respective shareholders. If the Respondents are permitted to behave in this manner, and cease competing with one another, consumers will face higher prices, reduced service, and less choice on Transborder Routes, and the efficiency and adaptability of the Canadian economy will be undermined.[143]

The dominant themes of economic efficiency and competitive consumer prices and product choices reflect a broader evolution of antitrust policy in the 1970s and 1980s away from economic structuralism (broadly speaking, an approach to economics emphasizing that concentrated market structures promote anticompetitive

140 *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 at para 106.

141 *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd*, 41 CPR (3d) 289 at paras 339-40, 1992 CanLII 2092 (CT); *Canada (Commissioner of Competition) v Superior Propane Inc*, *supra* note 140 at paras 108-10, leave to appeal refused, 2003 FCA 53; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 48.

142 *Canada (Commissioner of Competition) v Superior Propane Inc*, *supra* note 140 at paras 109-10; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 2; *Canada (Commissioner of Competition) v Air Canada, United Continental Holdings Inc, United Airlines Inc, and Continental Airlines Inc* (29 August 2011), CT-2011-004 at paras 1-3 (reply of the Commissioner of Competition, discussed more fully below). See also James Musgrove & Janine MacNeil, "Introduction and Overview: The Purpose of Canadian Competition Law" in James B Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) at 10.

143 *Canada (Commissioner of Competition) v Air Canada, United Continental Holdings Inc, United Airlines Inc, and Continental Airlines Inc*, *supra* note 142 at paras 1-3. This litigation was resolved by way of a Consent Agreement: Competition Bureau Canada, Media Release, "Competition Bureau Reaches Agreement with Air Canada and United Continental" (24 October 2012), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03507.html>; *The Commissioner of Competition v Air Canada, United Continental Holdings, Inc, United Airlines, Inc, and Continental Airlines Inc* (24 October 2012), CT-2012-001 (Registered Consent Agreement), online: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463302/1/document.do>.

behaviour) and non-economic considerations (such as social and political goals) toward economic welfare.[144] The catalyst for this evolution was the work of Robert Bork, who argued that the maximization of consumer welfare ought to be the goal of antitrust law, in particular "the maximization of wealth or consumer want satisfaction," known as allocative efficiency.[145] Today, economic goals in the form of economic welfare and efficiencies are a central tenet of competition policy and enforcement in Canada.[146] Canada's model under the *Competition Act* is generally regarded as akin or close to a total welfare standard, analyzing the effects of conduct or a proposed transaction on the economic welfare of all participants in a market, including both consumers and producers.[147] Vigorous competition is desired in order to maximize economic efficiency, which encompasses *allocative efficiency* (the degree to which available resources in a market are allocated to their most valuable uses); *productive efficiency* (the optimal use of resources for the

144 Joshua D Wright & Douglas H Ginsburg, "The Goals of Antitrust: Welfare Trumps Choice" (2012-2013) 81 Fordham L Rev 2405; Lina M Khan, "Amazon's Antitrust Paradox" (2017) 126:3 Yale LJ 718; Kenneth Heyler, "Consumer Welfare and the Legacy of Robert Bork" (2014) 57 JL & Econ S20; Jacobson, *supra* note 138 at 5; Douglas A Ginsberg, "Judge Bork, Consumer Welfare, and Antitrust Law" (2008) 31 Harv JL & Pub Pol'y 449 at 450; Marcel Boyer, Thomas W Ross & Ralph A Winter, "The Rise of Economics in Competition Policy: A Canadian Perspective" (2017) CIRANO, Working Papers: Scientific Series at 1-3, online (pdf): <https://www.cirano.qc.ca/files/publications/2017s-26.pdf>; Cohen, *supra* note 61 at 439.

145 Robert H Bork, "Legislative Intent and the Policy of the Sherman Act" (1966) 9 JL & Econ 7; Bork, *supra* note 136 at 35; Ginsberg, *supra* note 144 at 450; Wright & Ginsburg, *supra* note 144 at 2405-6. Beginning in 1977, the US federal courts began adopting Robert Bork's thesis. See *Continental TV, Inc v GTE Sylvania Inc*, 433 US 36 (1977); *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477 (1977). Further, the neoclassical economic approach to antitrust advanced by the Chicago School, which, rejecting economic structuralism, gained prominence in the 1970s and 1980s. See e.g. Richard A Posner, "The Chicago School of Antitrust Analysis" (1979) 127 U Pa L Rev 925 at 932.

146 *Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 48, 1997 CanLII 385; *Tervita Corp v Canada (Commissioner of Competition)*, *supra* note 142; Facey & Assaf, *supra* note 58 at 18; Boyer, Ross & Winter, *supra* note 144 at 1.

147 As Jonathan M Jacobson's helpful article, "Another Take on the Relevant Welfare Standard for Antitrust" discusses, there has been significant and longstanding debate regarding the proper choice of welfare standards. These include the *total welfare standard*, the *consumer welfare standard* (focusing on the end-user—namely what consumers actually pay and what they would be prepared to pay), the *consumer choice standard* (focusing on conduct that artificially limits the natural range of consumer choices in a market), the *multiple goals standard* (focusing on the protection of small business), the *competitive process standard* (focusing on economic effects without focusing on a particular welfare standard), and the *competitive process and market output* standard (protecting the competitive process, with anticompetitive effects analyzed through the impact on market output). For a discussion of these welfare standards, see Jacobson, *supra* note 138; Steven A Salop, "Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard" (2010) 22 Loy Con L Rev 336; Robert H Lande, "Consumer Choice as the Ultimate Goal of Antitrust" (2001) 62 U Pitt L Rev 503; Heyler, *supra* note 144 at S26; Herbert Hovenkamp, "Antitrust's Protected Classes" (1989) 88 Mich L Rev 1 at 24-20; Gregory J Werden, "Antitrust's Rule of Reason: Only Competition Matters" (2014) 79 Antitrust LJ 713 at 723; Jérôme Mathis & Wilfried Sand-Zantman, "Welfare Standards in Competition Policy," *Institute D'Economie Industrielle* (June 2015), online (pdf): <http://idei.fr/sites/default/files/medias/doc/rap/Welfare_Standard-Rapport_Final.pdf>; Joseph F Broadley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" (1987) 62 NYUL Rev 1020. See also Boyer, Ross & Winter, *supra* note 144 at 27, 33-34; Facey & Assaf, *supra* note 58 at 18-19; Thomas W Ross & Ralph A Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments" (2005) 72 Antitrust LJ 471.

production of goods and services at the lowest possible cost); and *dynamic efficiency* (the optimal introduction of new products and new product processes over time, as well as the improvement of product quality and service).[148] Collectively, the optimization of these efficiencies—the sum of consumers' surplus and producers' surplus—represents the total surplus, which is seen as affording firms the opportunity to squeeze the greatest value out of the economy's scarce resources[149] and maximizing the average standard of living of people within the economy.[150]

Despite the lack of precise competition policy goals in the *Competition Act*, the focus of competition enforcement in Canada has been relatively straightforward since the modern version of the Act was proclaimed in force in 1986. Competition enforcement pursues economic goals, recognizing that vigorous competition promotes an efficient and adaptable economy and provides consumers with competitive prices, innovative product choices, and information to make informed purchasing decisions. Accordingly, practices that will attract enforcement scrutiny include conduct that raises prices, restricts output, limits product or service choices, restricts innovation, and limits the information necessary for consumers to make informed purchasing decisions.

There has, however, been ongoing and vigorous global debate regarding what ought to be goals of competition/antitrust law. It has been argued that the current framework for antitrust/competition policy, focused on economic welfare and allocative efficiency, is not equipped to address the modern forms of market power, and that other considerations ought to form part of the antitrust/competition enforcement framework.[151] This perspective gained significant prominence in the administration of US President Joe Biden beginning in 2020.

148 Competition Bureau Canada, "Merger Enforcement Guidelines," Enforcement Guidelines (6 October 2011) at para 12.4, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>; Marcel Côté, Jalynn H Bennett & Roger Gibbins, "Report of the Advisory Panel on Efficiencies," submitted to Sheridan Scott, Commissioner of Competition, August 2005, at 10; Organisation for Economic Cooperation and Development (OECD), *Canada—The Role of Competition Policy in Regulatory Reform* (Paris: OECD, 2002) at 9, online (pdf): <https://web-archive.oecd.org/pdfViewer?path=/2012-06-15/158332-27067414.pdf>; Facey & Assaf, *supra* note 58 at 18-19; Competition Bureau Canada, "Innovation and Dynamic Efficiencies in Merger Review," Report (9 April 2007), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02376.html> (offline as of 30 March 2026); *Tervita Corp v Canada (Commissioner of Competition)*, *supra* note 142 at para 102; *Canada (Commissioner of Competition) v Superior Propane Inc*, *supra* note 140 at para 4; *Canada (Commissioner of Competition) v CCS Corp*, 2012 Comp Trib 14 at para 262.

149 Heyler, *supra* note 144 at S26.

150 Facey & Assaf, *supra* note 58 at 18-19. See also PS Crampton, "Alternative Approaches to Competition Law: Consumer Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals" (1994) 17 World Competition 55; J Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress" (1988) 62 NYUL Rev 1020.

151 See e.g. Khan, "Amazon's Antitrust Paradox," *supra* note 144; US Democratic Party, "A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power" (last visited 15 April 2026), online (pdf): <https://appliedantitrust.com/00_basic_materials/hipster_antitrust/A-Better-Deal-on-Competition-and-Costs.pdf>; Jonathan B Baker & Steven C Salop, "Antitrust, Competition Policy, and Inequality" (2015-2016) 104 Geo LJ 1; Thomas J Horton, "Restructuring American Antitrust's Moral Arc" (2017) 62:1 South Dakota Law Review 11; Lina Khan & Sandeep Vaheesan, "Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents" (2017) 11:1 Harv L & Pol'y Rev 235; Rutger Claassen & Anna Gerbrandy, "Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach" (2016) 12:1 Utrecht L Rev 1.

In 2021, US President Biden signed into law an Executive Order on Promoting Competition in the American Economy.[152] The Executive Order created a White House Competition Counsel to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization and unfair competition" and also required US federal agencies that enforce antitrust and consumer protection to take a more aggressive stance on matters such as mergers and so-called "unfair competitive practices."[153] In doing so, the White House was critical of past antitrust enforcement, noting, for example, that "[f]or decades, corporate consolidation has been accelerating" and that "[i]n over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago."[154] The US government's change in approach was also signalled by the appointment of Linda Khan as the head of the US Federal Trade Commission.[155] Ms Khan was well known for authoring the "Amazon's Antitrust Paradox" 2017 article in *Yale Law Journal*, arguing that current interpretations of antitrust are insufficient to address the market power of platforms.[156]

The role of competition law in Canada has also evolved. Through the consultation initiated by Senator Howard Wetston in 2021, Canadians and stakeholders were invited to participate in a consultation to promote additional dialogue on paths forward for Canadian competition law.[157] Through this process, it was acknowledged that "[s]ince the passage of the *Competition Act* in 1986, competition policy has generally sought to promote economic welfare" and that "[c]ompetition policy plays a critical role in promoting economic prosperity by facilitating greater efficiency, innovation and productivity."[158] At the same time, it was also acknowledged that "with the emergence of a series of digital platforms, questions have surfaced whether Canada's competition policy framework remains effective in this new economic environment."[159] This led to a commissioned discussion paper by Professor Edward M Iacobucci of the University of Toronto Faculty of Law, numerous stakeholder responses to Senator Wetston's invitation and, in turn, amendments to the *Competition Act* in three tranches.[160]

152 The White House, "Executive Order on Promoting Competition in the American Economy" (9 July 2021), online: <https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

153 *Ibid*; White House Competition Council.

154 The White House, "Fact Sheet: Executive Order on Promoting Competition in the American Economy" (9 July 2021), online: <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy>.

155 US Federal Trade Commission, "Lina M Khan Sworn in as Chair of the FTC" (15 June 2021), online: <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc>.

156 Khan, "Amazon's Antitrust Paradox," *supra* note 144.

157 Howard Wetston, "Letter from the Honourable Howard Wetston" (27 October 2021), online (pdf): <https://sencanada.ca/media/368379/letter-pdf.pdf>.

158 *Ibid*.

159 *Ibid*.

160 Edward M Iacobucci, *Examining the Canadian Competition Act in the Digital Era* (Ottawa: Senate of Canada, 27 September 2021), online (pdf): <https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

The first tranche of amendments came into effect on June 23, 2022 through Bill C-19, also known as the *Budget Implementation Act, 2022, No.1*.[161] These amendments were significant, impacting abuse of dominance, criminal cartel and competitor collaborations, deceptive marketing practices, merger review, and evidence gathering. Among these amendments was the creation of a new criminal offence against "wage-fixing" agreements that "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" and "no-poaching" agreements to "not solicit or hire employees" between unaffiliated employers. This change was intended to align Canada's approach to types of agreements with the highly controversial approach adopted by the United States, focusing on anticompetitive conduct affecting employees. This represented a departure from the traditional antitrust focus on harm to consumers, particularly to employees, and also represented a departure from the Act's traditional focus on economic welfare and allocative efficiency.

On November 17, 2022—five months after the first tranche of amendments came into effect—Canada's Minister of Innovation, Science and Industry, the Honourable François-Philippe Champagne, launched a public consultation for potential and comprehensive amendments to the Act, ranging from the administration and enforcement of the law, including the role and functioning of the Act, the role and powers of the Competition Bureau, and effectiveness of remedies and private redress mechanisms.[162] The consultation also included potential areas of reform in the areas of merger review, unilateral conduct, competitor collaborations, and deceptive marketing practices. Following a consultation, proposed legislation was introduced on December 15, 2023 through the passage of Bill C-56[163] and, subsequently, on June 20, 2024 through the passage of Bill C-59.[164]

Collectively Bills C-19, C-56, and C-59 touch on virtually all facets of competition policy in Canada, including merger review, abuse of dominance, criminal cartels, competitor collaborations, deceptive marketing, private rights of action, and market studies. The Trudeau government described these amendments as "generational changes" that "will help bring Canada into alignment with international best practices to ensure that our marketplaces promote fairness, affordability, and innovation."[165]

161 Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2021 (assented to 23 June 2022), online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-19>.

162 Government of Canada, "The Future of Competition Policy in Canada" (17 November 2022), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>.

163 Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2021 (assented to 15 December 2023), online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-56>.

164 Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2021 (assented to 20 June 2024), SC 2024, c 15, online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-59>.

165 Competition Bureau Canada, "2023 Fall Economic Statement" (25 October 2023) at 36-37, online: <https://www.budget.canada.ca/fes-eea/2023/report-rapport/chap2-en.html>.