

## MONOPSONY POWER AND THE RELEVANCE OF THE SELL-SIDE MARKET

*Neil Campbell, Jun Chao Meng and François Tougas<sup>1</sup>*

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*There is a tendency to view buy-side monopsony power as a mirror image of sell-side market power. However, this ignores the fact that firms purchase either to resell a product or use it as an input to produce and sell some other product, so the prices, margins and sales volumes in the sell-side market(s) have an important effect on the buy-side market. It is difficult to identify a credible theory of economic harm arising from monopsony unless the firm(s) can exercise market power in sell-side markets. In buyer mergers, the Competition Bureau appears to be motivated more by wealth transfer issues. While the Bureau has indicated that joint purchasing arrangements will not be reviewed under the amended criminal conspiracy offence, it has adopted the same analytical framework for the new civil competitor agreements provision as for mergers. With respect to dominant buyers, concerns have tended to involve contractual or other activities in buy-side markets that have been contributing to market power in sell-side markets.*

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*On a tendance à considérer le pouvoir de monopsonie du point de vue de l'acheteur comme un reflet du pouvoir de marché du point de vue du vendeur. Toutefois, cela ne tient pas compte du fait que les sociétés achètent un produit pour le revendre ou pour l'utiliser comme composante dans un autre produit qu'elles vendent, de sorte que les prix, les marges et les volumes de vente sur le marché du point de vue du vendeur ont un effet important sur le marché du point de vue de l'acheteur. Il est difficile de cerner une théorie crédible de préjudice économique découlant du monopsonie sauf si la ou les sociétés peuvent exercer un pouvoir de marché dans les marchés du point de vue du vendeur. Dans les fusions d'acheteurs, le Bureau de la concurrence semble se concentrer davantage sur les questions de transfert de richesse. Le Bureau a indiqué que les ententes d'achat conjoint ne seront pas examinées dans le cadre de la version modifiée de la disposition constitutive de l'infraction de complot, mais il a adopté le même cadre analytique en ce qui concerne la nouvelle disposition civile sur les ententes entre concurrents quant aux fusions. À l'égard des acheteurs dominants, on se préoccupe généralement des activités, notamment contractuelles, dans les marchés du point de vue de l'acheteur qui contribuent au pouvoir de marché dans les marchés du point de vue du vendeur.*

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## INTRODUCTION

Competition issues related to firms' purchasing activities are much less common than issues involving selling activities. While the same three main types of concerns are possible — market power exercised through mergers, collaboration between competitors or unilateral conduct — the tendency to view buy-side market power issues as a mirror-image of sell-side issues is too simplistic. Firms buy products or services either to resell them or to use them as inputs in order to supply the products or services they are selling. The dynamics of the market in which firms compete to make sales (the "sell-side" market) will often negate the ability or incentive to exercise market power in the market in which firms compete to purchase inputs or items for resale (the "buy-side" market).

The Competition Bureau (Bureau) applies a light touch on collaborations between competing buyers, focusing on the remedially-oriented civil provision rather than the criminal restraint of trade offence in the *Competition Act*.<sup>2</sup> It has also shown little inclination to intervene in respect of unilateral buy-side conduct, except where the buyer's actions are being used to disadvantage competitors in a way that allows the buyer to exercise market power in the sell-side market (such as by raising barriers to entry). However, the Bureau has been quite attentive to cases where it perceives suppliers to be vulnerable to an exercise of market power by merging buyers, even in situations where the sell-side market is competitive.

The Bureau's approach to buyer mergers appears to be motivated more by concerns about wealth transfers than economic welfare. If sell-side output is not likely to decline as a result of a merger, buy-side purchases (and hence the output of the firms who sell those articles or services<sup>3</sup>) are also not likely to decline. In such circumstances, an attempt to exercise market power will either fail or have distributive rather than efficiency effects. Even the long run effect on investment in the industry supplying the inputs to a concentrated market is open to question. For the same reason that purchases of inputs will be directly informed by price and quantity signals in the sell-side market, investment will be indirectly informed by those same signals. Investment may be curtailed if purchases are static or declining, regardless of how many buyers or suppliers of the input are present in the buy-side market.

## MERGING BUYERS

The Commissioner of Competition (Commissioner) may seek a remedial order from the Competition Tribunal (Tribunal) if a merger is likely to result in a substantial lessening or prevention of competition (SLC) in any relevant market.<sup>4</sup> There is nothing in the merger provisions which suggests that they apply only to competition between merging sellers of products. To the contrary, it is generally accepted that the merger provisions are applicable to competition between merging buyers.<sup>5</sup> The Bureau has consistently maintained this position in its *Merger Enforcement Guidelines (MEGs)*<sup>6</sup> and has obtained remedies in several cases involving an alleged SLC in a buy-side market. We first examine the analytical framework for such assessments and then review the major cases in which it has been applied.

### Analytical Framework

The merger provisions set out several relevant factors for an SLC assessment: the availability of acceptable substitutes; effective remaining competition, including foreign competition; whether a particularly vigorous competitor or a failing firm is being removed from the market; ease of, or barriers to, entry; change and innovation; and any other relevant factor.<sup>7</sup> One other factor that is often relevant is whether the merging parties' activities are disciplined by any countervailing power.<sup>8</sup> Efficiencies are also relevant, but are considered as a separate defence if an SLC is found, rather than as a factor in an SLC analysis.<sup>9</sup>

The Bureau has indicated that the analytical framework for merger review will usually involve the definition of relevant product and geographic markets (using the "hypothetical monopolist" methodology) and the calculation of market shares as well as industry concentration.<sup>10</sup> High market shares and/or industry concentration historically have been viewed as a necessary (although they are not a sufficient<sup>11</sup>) basis for establishing that an SLC is likely to occur. The most recent version of the *MEGs* notes that unilateral and coordinated anti-competitive effects may be assessed using direct evidence in addition to, or instead of, the indirect predictions from the market definition/market share/concentration analysis.<sup>12</sup> However, the longstanding "safe harbours" (<35% post-merger combined share for unilateral effects; and <65% post-merger concentration for the four largest firms (CR<sub>4</sub>), or

<10% combined share of the merging parties, for coordinated effects) continue to apply.<sup>13</sup>

### ***Buy-side Market Definition and Market Shares***

The *MEGs* approach market definition in respect of a merger between buyers in a similar manner as for a merger between sellers:

Consistent with its general analytical framework for merger review, the Bureau considers both market definition-based and other evidence of competitive effects in monopsony cases. The conceptual basis used for defining relevant markets is, mirroring the selling side, the hypothetical monopsonist test. A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a “hypothetical monopsonist”) would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the merger. The relevant product market definition question is thus whether suppliers, in response to a decrease in the price of an input, would switch to alternative buyers or reposition or modify the product they sell in sufficient quantity to render the hypothetical monopsonist’s price decrease unprofitable.<sup>14</sup>

While the hypothetical monopolist and monopsonist methodologies provide a theoretical framework, in most cases the analysis is based on more practical indicia of actual or potential substitution between alternative products.

In theory, the Bureau also applies a similar hypothetical monopsonist methodology in respect of the geographic dimension of buy-side markets, mirroring the approach for sell-side markets.<sup>15</sup> Again, the actual analysis in most cases is based on other quantitative or qualitative indicators about the extent to which firms in different locations provide actual or potential substitution possibilities.

As with mergers between sellers, the Bureau will attempt to determine buyers’ market shares and concentration levels once the relevant market is defined. It will examine the merging parties’ purchases of the relevant product in comparison with the total purchases of the relevant product by all buyers in the relevant geographic market.<sup>16</sup> It

also applies the same market share and industry concentration safe harbour thresholds as are used for mergers between sellers.<sup>17</sup>

### ***Assessment of Competitive Effects***

None of the evaluative criteria for merger review in section 93 of the *Act* make specific reference to buy-side markets. The Bureau has indicated that it will generally apply the approach adopted for these factors in the sell-side markets symmetrically to mergers between buyers.<sup>18</sup>

In addition, the Bureau has outlined five more specific potential indicators of an ability to exercise monopsony power in a relevant market:

- (i) whether the merged firm can restrict its purchases by an amount that is large enough to reduce the relevant product's price in the market;
- (ii) whether supply of the relevant product being purchased by the merging buyers is characterized by a large number of sellers and low barriers to entry into buying, such that the normal selling price of a supplier is likely competitive;
- (iii) whether it seems likely that certain suppliers will exit the market or otherwise reduce production, or will reduce investments in new products and processes in response to the anticipated price decrease;
- (iv) whether a reduction in the merged firm's purchases of the relevant (input) product is likely to reduce the profits earned by the merged firm in the market(s) in which it sells, and, if so, whether the lost profit on the output reduction is large enough to reduce the merged firm's incentive to restrict its purchases; and
- (v) whether a reduction in the merged firm's purchases of the relevant product is likely to reduce its access to adequate supply of the relevant product in the long run.<sup>19</sup>

These factors appear to be a loose and partial attempt to adapt the standard sell-side competitive effects analysis to the buy-side context. Effective remaining competition (encompassed by item (ii)) is obviously of fundamental importance in a buy-side market, as it is in a sell-side market. However, some difficulties in the adaptation of other evaluative criteria become apparent when one considers the practical dynamics of a merger between firms which compete in a buy-side market (whether or not they also compete in the sell-side market(s)).

In a sell-side market, the entry/expansion and change/innovation factors address future competitive responses by sellers. While they

might also apply to buyers in theory, in practice the behaviours of participants in a buy-side market are more likely to be driven by the conditions these firms face in the markets in which they sell their products. It is possible that entry/expansion or change/innovation may occur in respect of purchasing, but firms do not purchase products for the sake of purchasing — they do so to resell or to convert them into other products. Whether competing buyers enter, expand or innovate will normally depend on the sales volume and margin that can be achieved in the sell-side market, not just a potential decrease in the price of one particular input.

The focus in the *MEGs* on the existing number of suppliers (part of item (ii)), and whether exit, entry or innovation will occur at the supplier level (item (iii)), appears to be misplaced and has little to do with the ability of the merging parties to exercise monopsony power. The additional criterion related to whether a merged firm might reduce its purchases to such an extent that it undermines its own access to adequate supply of the input in the long run (item (v)) is another area where the adaptation breaks down. It would be economically irrational behaviour for a monopsonist to destroy its own long-run supply requirements.

In our view, the key factor in the foregoing *MEGs* list is item (iv), which recognizes the interaction between a firm's buy-side and sell-side activities. We discuss this more fully below.

### ***Buy-side Price and Output***

In the standard analysis of seller market power, it is recognized that price increases and output restrictions go hand-in-hand, and that evidence related to either is probative in determining whether an SLC is likely to occur.<sup>20</sup> Similarly, economic theory recognizes that an exercise of monopsony power involves a direct connection between price reductions and reductions of purchase quantities (*i.e.* the output of the suppliers who are making the sales to the competing purchasers in a buy-side market). This relationship is recognized in the *MEGs*:

A merger of competing buyers may create or enhance the ability of the merged firm, unilaterally or in coordination with other firms, to exercise monopsony power. The Bureau is generally concerned with monopsony power when a buyer holds market

power in the relevant purchasing market, such that it has the ability to decrease the price of a relevant product below competitive levels with a corresponding reduction in the overall quantity of the input produced or supplied in a relevant market, or a corresponding reduction in any other dimension of competition.<sup>21</sup>

While this is an important primary statement, it is accompanied by a caveat that the Bureau is also prepared to treat price effects as problematic when there is no reduction in buy-side purchases (*i.e.* suppliers' output):

Cases where the supply curve is perfectly inelastic, such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer, may also give rise to concerns. This scenario should be understood to be generally included in the category of monopsony.<sup>22</sup>

Vertical supply curves are a theoretical possibility but are exceedingly rare in practice. Most buyers expect that increased purchase volumes will be met with price discounts, whether through suppliers' structured volume rebate plans or on a negotiated basis. This may reflect efficiencies of scale or scope that are available to the seller, and/or its desire to expand sales to individual customers. There may also be efficiencies available for buyers in consolidating purchasing activities and functions. A reduction in purchase price that arises from efficiencies or volume buying involves the aggregate quantity remaining the same or increasing rather than being reduced and is not an exercise of monopsony power.<sup>23</sup>

The U.S. competition authorities have also explicitly asserted that output effects (in the buy-side or sell-side market(s)) are not required to support a finding of monopsony power.<sup>24</sup> Nevertheless, the U.S. Federal Trade Commission (FTC) has considered buy-side market output to be relevant in some cases. For example, in 2004 and again in 2012, it decided not to challenge mergers between prescription benefit management services providers because it was unlikely that lower output or a curtailment of services would result in the buy-side markets, even if the merged entity could reduce dispensing fees paid to retail pharmacies.<sup>25</sup> In both cases the FTC noted that, generally, increased bargaining power which allows larger buyers to obtain lower prices without decreasing overall input purchases does not harm competition or consumers.<sup>26</sup>

It is unclear how a credible theory of economic harm could be established without output effects.<sup>27</sup> The wealth transfer effect is really a concern about equity, and economists generally have difficulty connecting overall economic harm or benefit to wealth transfers. The potential basis for considering such distributive effects in Canada would have to be derived from the broad purpose clause in the *Act*, which juxtaposes efficiency and consumer welfare concerns with attention to opportunities for small and medium enterprises:

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.<sup>28</sup>

It is notable that the purpose clause refers to competitive prices and product choices for consumers, but makes no mention of suppliers. This could be interpreted as placing less emphasis on wealth transfer effects in respect of suppliers than has been the case for customers. Such an interpretation would be consistent with the fact that reductions of input prices resulting from buyer power can lead to lower prices for consumers, particularly where sell-side markets are competitive.<sup>29</sup>

### ***The Importance of the Sell-Side Market***

As noted above, the Bureau's list of buy-side analytical criteria includes the relationship between the sell-side activities and the buy-side activities of the merged firm (item (iv) in the list above). This interrelationship has important commercial, economic and legal implications. Unfortunately, this does not appear to be consistently considered in the overall analysis of market power.

The first key point is that the demand curve for a purchaser is a "derived demand" that is shaped by the revenue, cost, margin and volume characteristics of its overall business. Most of these are determined in the sell-side markets and the overall cost of a product may be a function of input costs from many buy-side markets beyond the one(s)



in which there is a possible market power concern. This is true regardless of whether the firm is using the purchased product as an input to produce and sell some other product, or merely acting as a reseller.

The second critical fact is that the supply curve that intersects with the derived demand curve may not be upward sloping. The Bureau's *Round Table on Monopsony and Buyer Power* report (*OECD Roundtable Report*) recognizes that "[a] necessary condition for an exercise of monopsony power is that the input be supplied in a market characterised by an upward-sloping supply curve."<sup>30</sup> While this assumption underlies the *MEGs* framework on monopsony, it may not be correct in many cases — at least within the narrow range of changes in output that are at issue when assessing market power arising from a merger (e.g. a 5–10% reduction in purchases). As Jacobson points out:

a large number of empirical studies of costs and supply conditions in manufacturing industries... provide evidence that, at prevailing levels of production, industrial market supply curves are typically flat. ... And flat or downward sloping supply curves are by no means limited to traditional manufacturing. Very important sectors of our economy also exhibit high initial fixed costs accompanied by zero to trivial incremental costs.<sup>31</sup>

The *MEGs* should focus on the more relevant horizontal or downward-sloping supply curve rather than the hypothetical vertical supply curve. As Jacobson goes on to describe, in the absence of an upward-sloping supply curve:

an effort to reduce the market price paid by restricting the monopsonist's purchases will fail. The monopsonist cannot lower his purchasing costs by reducing his purchases: with a flat supply curve the monopsonist pays the same price for the input regardless of how much he buys. ... If the supply curve is downwardsloping, a reduction in purchases theoretically could even lead prices to increase as scale economies disappear.<sup>32</sup>

The third fundamental issue is that there is often a fixed or at least close relationship between the quantities of a firm's sales of its products, and the quantities of inputs that it purchases. This is certainly true in the case of resellers, where the product itself is being resold either as is or with other associated goods or services. It is often also true of inputs into manufacturing or processing operations, where the

firm generates some fixed amount of incremental output from each additional purchased input. As a result, there is frequently a tight linkage between aggregate output effects in buy-side markets and aggregate output changes in sell-side markets. Such an interrelationship means that there should not be a reduction in economic welfare in the buy-side market in which the merging parties compete (*i.e.* an output restriction through an exercise of market power) unless there is also an output restriction (*i.e.* an exercise of market power) in the sell-side market(s) (in which they may or may not compete).

More specifically, the interrelationship between buy-side versus sell-side markets can be considered in three possible variations of the comparative product and geographic scope of such markets:

- *Same Scope:* It is theoretically possible that a firm operates as a purchaser and reseller in respect of markets for a product that has the exact same buy-side and sell-side relevant market. However, this would be rare since such a firm would not be performing any function that could not be handled directly by its suppliers. Most reseller situations involve either a broadening of the product scope (*e.g.* by selling additional related products or services, which frequently occurs in wholesaling / distribution businesses) and/or variations in geographic scope (*e.g.* to reach more distant geographic markets or serve more localized retail markets).
- *Sell-side Markets are Narrower than Buy-side Market:* This can occur where a reseller competes in a narrow geographic market or where an input is used to produce a different product that is sold in a narrower sell-side market. In this situation, it is unlikely that the merging parties could exercise any buy-side market power in the absence of having the ability to exercise market power in the narrow sell-side market(s). If the narrower market(s) in which the merging parties sell is (are) competitive, then they and the other effective remaining competitors are likely purchasing the relevant input from suppliers in the buy-side market in approximate proportion to their sales volumes. In addition, because the buy-side market is broader than the sell-side market(s) in which any competitive overlap may exist, there likely also will be additional buyers competing to purchase

in the buy-side market that are in different sell-side markets. (An example would be a national market for the supply of manufactured products to wholesalers who compete in more localized regions such as eastern, central and western Canada, where the merger involves only the eastern Canada wholesalers.) Market power might or might not be exercisable in the broader buy-side market if the merger conferred market power in one or more sell-side markets. However, if there is no sell-side market power, then an attempt by the merged firm to drive down purchase prices by reducing its purchase quantities would be disciplined by the increased purchases of competitors who will take advantage of the opportunity to expand their sales in response to the volume given up by the merged firm.

- *Sell-side Market is Broader than Buy-side Market:* This can also occur either in respect of resellers or firms that transform inputs into other products. It can be seen in many of the monopsony cases in sectors such as agriculture and forestry (see the cases discussed below). It may be possible for a merging firm to exercise monopsony power in a specific local buy-side market even though the broader sell-side market in which it sells is competitive.<sup>33</sup> The *MEGs* therefore properly recognize that it is necessary to consider whether the lost profit on the reduced volume of sales in the sell-side market would outweigh the possible gains from reducing the purchase price on the (lower) quantity of inputs acquired in the buy-side market.<sup>34</sup> However, the *MEGs* do not discuss the fact that, in a competitive sell-side market, the aggregate output quantity of all sellers will not be reduced. Assuming that there is a fixed or even reasonably close relationship between inputs and outputs, the total quantity supplied and purchased will also not be materially reduced (even though the competing firms in the sell-side market may make some or all of their incremental purchases from other suppliers (*e.g.* in other adjacent local buy-side markets)).<sup>35</sup>

### *Efficiencies*

Mergers among buyers may also generate allocative, productive and/or dynamic efficiencies. Merging parties may invoke efficiencies as a defence to a merger that is found to generate an SLC, but the merging

parties bear the burden of establishing that the cognizable efficiencies outweigh the anti-competitive effects.<sup>36</sup>

The Federal Court of Appeal and the Tribunal have adopted the Balancing Weights Approach for assessing efficiencies. Conceptually, it attempts to compare producer gains and consumer losses (although the implementation is not without challenges).<sup>37</sup> One of the factors to be weighed that has particular relevance for the above discussion is adverse redistributive effects.<sup>38</sup> The Tribunal has sought to clarify that it is not the wealth redistribution itself which is an anti-competitive effect, because this does not reduce real income and wealth within a society.<sup>39</sup> However, an anti-competitive merger may have the *effect* of redistributing income in a way that reduces consumer surplus or that creates a socially adverse effect.<sup>40</sup> The Tribunal has indicated that it need not consider the entire amount of the wealth transfer as an “effect” in the SLC analysis<sup>41</sup> and that it may weigh redistributive effects differently in cases of different groups of consumers.<sup>42</sup>

In *Superior Propane*, the Tribunal did not ultimately resolve how much weight should be accorded to the adverse redistributive effects. It found that the redistributive effects of the merger on low-income households that used propane for essential purposes (*i.e.* heating) would be socially adverse, especially as they had no good alternatives.<sup>43</sup> This socially adverse wealth transfer was calculated to be approximately \$2.6 million a year.<sup>44</sup> The Tribunal concluded that such effects were so small that, with any reasonable weight attached, the effects of the lessening and prevention of competition attributable to the merger were less than, and offset by, the substantial gains in efficiency.<sup>45</sup>

In the purchasing context, the *MEGs* state that wealth transfer effects will be considered when the supply curve is vertical.<sup>46</sup> Based on the cases discussed below, it appears that the Bureau may also be concerned about negative price effects (*i.e.* wealth transfers), not just the allocative inefficiencies, in situations where the supply curve is not vertical. To the extent that such price reductions are regarded as anti-competitive, it would be necessary to consider whether and how any redistributive effects between the merging buyers and the suppliers in the buy-side market would be weighed. It is possible that certain types of suppliers could be viewed as vulnerable low-income market participants (*e.g.* farmers or log sellers, although in fact there

are many sizeable businesses in these sectors). Each analysis would be fact-specific, but as a general matter it might be expected that in the absence of any negative output effects, efficiencies are more likely to exceed anti-competitive effects that could be asserted based purely on a distributive basis.<sup>47</sup>

### Cases

The Competition Tribunal has had relatively little opportunity to consider mergers that raise buy-side market power issues. In its very first merger decision, when assessing a combination of meat-rendering competitors, the Tribunal canvassed two possible characterizations of the relevant product market: purchases of renderable materials by the renderers, or services provided by the renderers to parties seeking to dispose of such materials. The Tribunal commented that “[n]o significant difference results from the two characterizations” and chose to analyze the case as a sale of services due to “conceptual convenience.”<sup>48</sup> For the reasons set out above, we believe that the distinction does matter and the correct analytical approach depends on which direction the buy-sell transactions are in fact flowing.

The Bureau has negotiated remedies in several other mergers which were not litigated before the Tribunal.<sup>49</sup> While these cases are not binding legal precedents, they reflect the Bureau’s enforcement approach over the past decade and a half.

The merger between Chapters and Indigo involved the two main brick-and-mortar retail bookstore chains in Canada. The Bureau was concerned about the effect of the merger on publishers in the buy-side market, in which the merged entity would be by far the largest purchaser, as well as market power in various local sell-side markets in which the parties made retail sales to consumers. The merging parties agreed to divest 23 bookstores to address concerns in specific sell-side markets.<sup>50</sup> In addition, the consent order contained detailed terms governing several aspects of the business relationship between the merged retailer and the publishers in the buy-side market, including allowances, store closures, and nondiscrimination guarantees.<sup>51</sup> While some publishers are sizeable commercial enterprises, there are many small independent Canadian publishers and their trade association actively opposed the transaction and pressed the Bureau to obtain remedies.<sup>52</sup>

The acquisition of Famous Players by Cineplex involved a similar combination of the leading movie theatre operators in several Canadian provinces. The Bureau identified SLCs in 17 urban sell-side markets for the exhibition of first-run motion pictures and negotiated a consent agreement for the divestiture of 35 theatres.<sup>53</sup> There were also buy-side concerns, but they related to a sub-set of narrower local “zones” in which distributors licensed films to theatres, and all were remedied by the theatre divestitures.<sup>54</sup>

During 2004, three back-to-back mergers in the forest products sector in British Columbia led to consent agreements being filed with the Tribunal to address buy-side market power concerns:<sup>55</sup>

- In Canfor Corporation’s acquisition of Slocan Forest Products, the Bureau was concerned about the reduction in options for the log sellers from whom the merging parties purchased. There were also sell-side concerns in specific narrow markets involving sales to local wood re-manufacturers (who purchased a small portion of the output from the parties’ lumber mills) and the sales of wood chips (an ancillary product).<sup>56</sup> The matter was resolved by way of a consent agreement, but a press release from the Bureau indicates its concern being that the “transaction would have resulted in less choice for log sellers, wood re-manufacturers and wood-chip sellers.”<sup>57</sup> Canfor agreed to divest a lumber mill, which addressed the buy-side and sell-side issues.<sup>58</sup>
- Shortly thereafter, West Fraser Timber agreed to divest its interests in certain British Columbia lumber mills in order to proceed with its acquisition of Weldwood of Canada, then owned by International Paper.<sup>59</sup> Again, the Bureau was concerned that the merger would negatively affect timber harvesters and log sellers who sold to the merging parties. There were also sell-side issues in respect of the portion of mill output sold to local wood re-manufacturers.<sup>60</sup>
- Finally, the Bureau had preliminary concerns about the potential exercise of monopsony power in the buy-side log market in respect of Tolko Industries’ unsolicited bid to acquire Riverside Forest Products. In an interim consent agreement, Tolko Industries undertook to hold separate and maintain the forestry

facilities of Riverside as an independent and competitive business while the Bureau review continued.<sup>61</sup> However, after completing its review, the Bureau did not seek a remedy with respect to this merger.

Similarly, the Bureau has had concerns about mergers affecting buy-side markets in the grain industry. These cases were resolved on consent, with the result that there is very little discussion of monopsony or anti-competitive effects. However, comments by the Bureau indicate that it was particularly concerned about the competitiveness of prices received by farmers selling grain to grain-handling companies.<sup>62</sup>

- In Saskatchewan Wheat Pool's (SWP's) acquisition of United Grain Growers Limited (UGG), carrying on business as Agricore United, the merging parties were competitors in the provision of grain-handling services at a number of in-country grain elevators as well as at terminals used to export grain.<sup>63</sup> Although the SLC was expressed in terms of the provision of services, the Agreed Statement of Facts stated that "[i]n the absence of the agreed upon divestitures, the merged entity would be able to exercise market power, resulting in higher handling fees and lower grain prices or financial inducements offered to farmers"<sup>64</sup> who sold their grain to the grain-handling companies.
- In an earlier merger case with very similar issues, UGG agreed to divest a number of grain elevators and a port terminal in connection with its acquisition of Agricore.<sup>65</sup> The merger combined the largest grain-handling companies in Alberta and Manitoba.<sup>66</sup> The Commissioner alleged that the acquisition was likely to result in an SLC in certain markets for grain-handling services in Western Canada as well as port terminal grain-handling services at the Port of Vancouver. In the interim, the merged company was required to continue to honour all existing contracts for grain-handling with independent grain companies and offer to handle a stipulated minimum amount of grain for such suppliers each year.<sup>67</sup>

The Commissioner was also concerned about potential coordinated effects in canola oil-seed purchasing and processing in Canada. Agricore had an ownership interest in a leading canola

processor and UGG was partially owned (42%) by a major canola processor.<sup>68</sup> Processors purchase canola seed from grain-handling companies, who in turn, purchase it from farmers.<sup>69</sup> The Commissioner alleged that the acquisition was likely to result in an SLC in the canola purchasing and processing markets in which these processors had significant market shares.<sup>70</sup> More specifically, the Commissioner alleged that the transaction would reinforce one of the affiliated canola processors' already significant market position and likely result in lower prices being offered to growers of canola in the absence of agreed-upon behavioural remedies.<sup>71</sup>

- Similarly, when James Richardson International acquired grain elevators and crop input facilities from SWP in 2007, the Commissioner required divestiture of two grain elevators based on a likely SLC in certain grain-handling markets in Western Canada.<sup>72</sup> The consent agreement does not elaborate on these concerns, but given the similar facts and industry structure, they were likely similar to the SWP and UGG acquisitions discussed earlier.

In American Iron & Metal Company's (AIM's) proposed acquisition of S N F Inc. (SNF), the Bureau's investigation was primarily concerned with whether the transaction would cause an SLC in the purchase of unprocessed scrap metal. Post-transaction, the merged entity would be one of the largest purchasers of unprocessed scrap metal in the relatively localized buy-side geographic markets.<sup>73</sup> The merged entity would control four of the five available shredders which were used to process ferrous scrap metal.<sup>74</sup> The Bureau was also examining possible issues in the sell-side markets in which recycled scrap metal was sold<sup>75</sup> (although there was evidence of considerably broader shipment distances for the products being sold). In an interim consent agreement, AIM agreed to preserve certain key SNF assets.<sup>76</sup> However, as with the *Tolko/Riverside* transaction, the Bureau ultimately decided not to seek a remedy after completion of its review.

The matters resolved on consent do not provide the doctrinal discussions of monopsony or oligopsony that would have been included in a Tribunal decision. However, in both the grain and forestry cases, the divestitures were targeted to overcome perceived SLCs in local/regional buy-side markets, even though the sell-side grain and lumber



markets are generally regarded as geographically broad and competitive. As a result, it was unlikely that output on the sell-side would decline and therefore also unlikely that output in the supply of grain and logs would be reduced (even though some of the volume might be sourced from different suppliers).<sup>77</sup>

## BUYING GROUPS AND OTHER PURCHASER COLLABORATIONS

### Historical Approach

#### *Buyer Conspiracies*

Until amendments to create a “*per se*” offence took effect in 2010, the “conspiracy” offence applicable to agreements between competitors required a demonstration of anti-competitive effects.<sup>78</sup> The anti-competitive threshold of “undue lessening of competition” was interpreted by the Supreme Court of Canada in the “*PANS*” case to mean “the capacity to behave independently of the market, in a passive way.”<sup>79</sup>

Buyer conspiracies have only been considered occasionally under the pre-amendment conspiracy provision. The most notable prosecution is *R v Abitibi Power & Paper Co*, where the Court found that 17 accused companies conspired not to compete with each other in the purchase of pulpwood in those geographic markets in which they normally competed.<sup>80</sup> Over the seven-year period covered by the charge, there were some 50 general meetings, attended by some if not all of the accused, at which they fixed schedules of maximum prices for the purchase of pulpwood.<sup>81</sup> The Court found that the activities constituted a prevention or lessening of competition that was undue.<sup>82</sup>

The Bureau has also investigated various buy-side collaborations that were not prosecuted. For example, in the early 2000s, the Bureau initiated an investigation into the snow crab processing market in Newfoundland and Labrador. The complaints against a number of processors alleged that they had conspired to fix or eliminate bonuses paid to fish harvesters in the buy-side market for snow crab. However, the Bureau concluded that these processors did not have sufficient control over the market to cause an undue lessening of competition under the conspiracy provisions and discontinued the inquiry.<sup>83</sup>

There also have been occasional private actions relating to alleged buy-side conspiracies.<sup>84</sup> For example, in a case involving the same market as *PANS*, four pharmacies brought a private action against Blue Cross of Atlantic Canada, a health care insurer, alleging that it had entered into agreements that unduly lessened competition in the purchase of pharmaceutical supplies and services from pharmacies.<sup>85</sup> The Nova Scotia Supreme Court found that the plaintiffs failed to show any agreement between the defendant Blue Cross and policy holders or subscribers to lessen competition unduly, and furthermore, that Blue Cross did not have the requisite market power for any lessening of competition to be undue, since its customers constituted less than 7% of the prescriptions in a typical local market for prescription drug services.<sup>86</sup> In the buy-side market, the Court found that the only agreements were between the defendant and the individual pharmacies, and not with any competitors (*i.e.* this was not a “buyers cartel”).<sup>87</sup>

One decision that had suggested harsher treatment of joint purchasing activities was recently overturned on appeal. In *321665 Alberta Ltd v Husky Oil Operations, Ltd*,<sup>88</sup> a terminated supplier of fluid hauling services sued two oil companies which had entered into an agreement to purchase such services exclusively from a competing supplier. The defendants had previously employed both suppliers, but decided that they could obtain efficiencies by relying on a sole supplier. The plaintiff was not selected in its bid for the combined business, and was forced to shut down its operations a year later due (in part) to the loss of a large portion of its revenue base. It then brought a private action based on the pre amendment conspiracy offence and was awarded damages at trial.<sup>89</sup>

The Alberta Court of Appeal overturned the trial court decision, emphasizing that the plaintiff had been given a fair opportunity to be selected as the exclusive supplier.<sup>90</sup> Throughout the defendants’ “extensive, in-depth assessment”, the focus was not on the price or quantity, but on the suitability and quality of each candidate.<sup>91</sup> The fact that some of the facilities were jointly owned by the defendants did not insulate them from the operation of the Act. However, the Court drew a distinction between the *de facto*, permissible lessening of competition that arises naturally from the operation of the free market economy, and the artificial “undue” lessening of competition that contravenes the conspiracy provision.<sup>92</sup> The Court was also cognizant of

the benefit of allowing businesses to rationalize their operations to generate efficiencies,<sup>93</sup> although this position seems to be contrary to well-established jurisprudence that there is no efficiency defence for unlawful conspiracies.<sup>94</sup>

Unfortunately, neither the appeal nor trial decision provide a clear framework for assessing whether purchaser collaborations are likely to lessen or prevent competition unduly.<sup>95</sup> The trial court found that the defendants had “enormous degrees of market power” over the fluid haulers, having defined the market as the provision of fluid hauling services rather than the purchase of such services.<sup>96</sup> The Court of Appeal noted the market definition error, but declined to address the issue of whether the defendant purchasers had the ability to exercise market power in the buy-side market.

### ***Buying Groups and Price Discrimination***

Most of the historical consideration of buying groups under Canadian competition law arose as a result of a price discrimination offence which required sellers of goods to make price concessions “available” to “competitors of a purchaser” of “like quality and quantity.”<sup>97</sup> The key issue arising in the buying group context was whether the volumes of individual members or the collective buying group should be considered when applying the “like quantity” test. Thus, the legal exposure related to the pricing activities of the supplier, not the buying group members. This may in part have reflected a recognition that buying groups were often used by small and medium-sized enterprises in order to aggregate purchase volumes in dealings with much larger suppliers (and to compete against large national or international distributors and retailers).

In 1993, recognizing the general economic irrationality of price discrimination laws, the Bureau issued guidelines which replaced its rather technical approach with more liberal interpretations of the law in several areas, including its application to buying groups and their members. The *Price Discrimination Enforcement Guidelines* indicated that the volume for the “like quantity” test depended on the identity of the true “purchaser” in the transaction, which could be either the buying group or the individual members.<sup>98</sup> The *Guidelines* provided three indicia for determining whether the purchaser would be

regarded as the buying group or the individual members of the buying group. Most importantly, where the buying group assumed liability to pay for the goods, it generally would be found to be the purchaser.<sup>99</sup>

The price discrimination offence was repealed in 2009. As a result, the activities of buying groups or other collaborations between purchasers under the *Act* have shifted to the new criminal and civil competitor agreements regime.<sup>100</sup>

### The Amended Conspiracy Offence

The amendment to the conspiracy offence which came into force in March 2010 removed the “undue lessening of competition” element and reformulated the conspiracy offence as a *per se* illegal prohibition of three types of agreements between competitors:

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.<sup>101</sup>

Notably, each branch of the offence refers to the *supply* (or production) of a product. This is a significant change from the pre-amendment formulation, which included references to the “purchase” of a product<sup>102</sup> and other language that clearly encompassed purchasers.<sup>103</sup> The Bureau has therefore taken the position in its *Competitor Collaboration Guidelines (CCGs)* that the amended conspiracy offence does not apply to agreements between purchasers.<sup>104</sup> This approach is based partly on the “supply of a product” phrasing, but also on the recognition that joint purchasing agreements can have pro-competitive effects<sup>105</sup> and do not have the unambiguously negative impacts associated with hard core cartels among competing sellers of products.

The Bureau's approach provides important assurances for purchasers who are considering collaboration.<sup>106</sup> However, the *CCGs* do not bind plaintiffs, their counsel or the courts, and the amended conspiracy offence could be interpreted more broadly to reach buy-side conduct. We expect that there will be cases testing whether the phrase "for the supply of the product" could cover agreements between buyers regarding prices they are prepared to pay (s. 45(1)(a)), the markets or territories in which they will purchase (s. 45(1)(b)) or what quantities they will purchase (s. 45(1)(c)). It will be important to have this area of uncertainty clarified through jurisprudence.

### **The Civil Competitor Agreements Provision**

The new civil provision governing anti-competitive agreements allows the Commissioner to obtain a prohibition order where an agreement or arrangement between competitors is likely to result in an SLC.<sup>107</sup> To date, there is very little case experience relating to this provision.<sup>108</sup> However, the statutory analytical framework is virtually the same as for mergers and much of the merger jurisprudence would likely be applied.

Not surprisingly, the *CCGs* provide similar enforcement guidance for competitor agreements as the *MEGs* do for mergers. Most notably, the Bureau has imported the symmetry principle and indicated in the *CCGs* that joint purchasing and other forms of collaboration between buyers will be analyzed in a manner similar to collaborations between competing sellers.<sup>109</sup> For the reasons set out above, this approach does not adequately address the important differences between monopsony (or, more properly, oligopsony) and monopoly (or oligopoly), nor does it recognize the importance of examining sell-side output impacts when assessing buy-side issues.

### **UNILATERAL CONDUCT**

The unilateral conduct centrepiece of the *Competition Act* is an abuse of dominance provision<sup>110</sup> which bears some likeness to article 102 in the *European Union Treaty*,<sup>111</sup> although in application it also has some similarity to the jurisprudence under section 2 of the U.S. *Sherman Act*.<sup>112</sup> The Tribunal may make a remedial order where: (i) "one or more persons substantially or completely control...a class or species of

business” (*i.e.* have market power in a relevant product and geographic market); (ii) the person(s) engage(s) in a “practice of anti-competitive acts” (which has been interpreted to mean any type of exclusionary or predatory conduct targeted at a competitor); (iii) with the result that there is a likely or actual SLC (in other words, a negative consumer welfare effect).<sup>113</sup> There is no efficiency defence available, although conduct which reflects “superior competitive performance” is deemed not to be a practice of anti-competitive acts.<sup>114</sup>

There is nothing in the statutory wording which would limit the abuse of dominant position to sell-side conduct. To the contrary, three practices in the non-exhaustive list of potential “anti-competitive acts” relate explicitly to buy-side conduct:

- acquiring a supplier who would otherwise be available to supply competitors in the market, in order to prevent entry or eliminate the competitor from the market;
- buying up products in order to prevent the decline of existing price levels; and
- inducing or requiring a supplier to supply only, or primarily, certain customers, or to refrain from selling to the purchaser’s competitor(s).<sup>115</sup>

### **Dominant Position**

In defining the relevant market for a buy-side abuse of dominance case, the Bureau will apply the same “hypothetical monopsonist” approach articulated in the *MEGs*.<sup>116</sup> It will also consider similar competitive effects factors as in merger assessments, such as substitutes (including switching costs), foreign competition, market share, barriers to entry, and countervailing power.<sup>117</sup> However, the *Enforcement Guidelines on the Abuse of Dominance Provisions (ADEGs)* do not address the sell-side output effects in the assessment of a potential buy-side abuse of dominance. The Bureau simply notes that

If the market of concern is the downstream market, the required elements of the abuse provisions will normally entail an increase in downstream consumer prices (or a negative effect on some non-price element of competition, such as quality). If the market of concern is the upstream market for the purchase of inputs,

prices to consumers need not necessarily increase for the conduct to be considered anti-competitive, but upstream input prices would typically have to fall below competitive levels.<sup>118</sup>

The Bureau has indicated that it generally has been more concerned about the behaviour of dominant firms in sell-side markets rather than buy-side markets, but has cautioned that this does not mean that sell-side output effects are a necessary factor for finding an SLC in a buy-side market.<sup>119</sup>

### **Anti-Competitive Acts**

The two main types of anti-competitive acts that may give rise to an abuse of dominance are exclusionary and predatory conduct.<sup>120</sup> In a sell-side market, supra-competitive prices charged by a dominant firm do not constitute an abuse of a dominant position unless they arise from acts targeted at competitors.<sup>121</sup> Similarly, in a buy-side market, the focus would be on the effect of the monopsonist's conduct on a competing purchaser, rather than the supplier against whom it exercises market power. Thus, the Bureau's *OECD Roundtable Report* notes that, in cases of allegedly abusive bargaining power, "[i]t is unlikely that lower input prices would, in isolation, meet the requirement of a practice of anti-competitive acts."<sup>122</sup> Likewise, the Federal Court of Appeal has held that conduct which merely causes detriment to the consumer, on its own, is not anti-competitive behaviour within the meaning of the *Act's* abuse of dominance provisions. However, the effects on consumers may be relevant in determining the credibility and weight of any potential business justifications that may be presented in the SLC assessment.<sup>123</sup>

### **Exclusionary Conduct**

Two of the three enumerated anti-competitive acts that focus on buy-side conduct relate to exclusionary practices: acquiring a supplier or entering into exclusivity arrangements with a supplier, in either case in order to restrict the supply sources available to a competitor.<sup>124</sup>

In a set of enforcement guidelines pertaining to the grocery sector (which were withdrawn when the current *ADEGs* were issued), the Bureau expressly recognized that dominant firms could raise rivals' costs by entering into agreements with manufacturers or distributors to preclude access to facilities (such as distribution systems or shelf

space).<sup>125</sup> Alternatively, dominant firms could also “pre-empt access to important brands or suppliers through the use of exclusive agreements.”<sup>126</sup> Even though these types of behaviours involve competitors in the buy-side market, the implicit focus is on the possibility that such conduct could be used to support an exercise of market power in a sell-side market rather than a concern that buy-side prices and output would be lowered to the detriment of suppliers.

In the “*AC Nielsen*” case, the Tribunal examined conduct in both the buy-side and sell-side markets. Its focus was on an alleged abuse of a dominant market position in the sell-side market consisting of the supply of scanner-based market tracking services in Canada, where A.C. Nielsen had a monopoly and its U.S. competitor was seeking to enter.<sup>127</sup> In the buy-side market, A.C. Nielsen had contracts with major retailers for exclusive access to their scanner data.<sup>128</sup> The Tribunal found that such contracts were a *prima facie* barrier to entry, noting that “[t]here can be little doubt that the reason that [A.C. Nielsen] entered into these contracts was to ensure that the data were and are unavailable to other potential suppliers.”<sup>129</sup> Staggering of the exclusive retailer data contract renewals reinforced the exclusion of potential competitors and also strengthened A.C. Nielsen’s bargaining position with retailers providing the data.<sup>130</sup>

The Tribunal prohibited A.C. Nielsen from using exclusivity restrictions in future contracts that would preclude retailers from supplying scanner data to others, as well as from using “most-favoured-nation” clauses in contracts with supplier retailers for a period of 24 months.<sup>131</sup> It also found that such prohibition orders would be insufficient to restore competition in the market, because a potential entrant to the market for the supply of scanner-based market tracking services would need access to current, future, *and* historical scanner data.<sup>132</sup> Thus, it ordered A.C. Nielsen to supply historical scanner data, for the most recent 15-month period, upon request by a supplier or potential supplier.<sup>133</sup> While the case involved buy-side and sell-side conduct, the overall focus of the Bureau and the Tribunal was on enabling entry of a new sell-side competitor and the expected pro-competitive impact that would result in the sell-side market. They were not explicitly concerned about the competitiveness of prices paid to, or reductions of quantities purchased from, the suppliers of scanner data in the buy-side market.<sup>134</sup>



### ***Predation***

The predatory pricing provisions in the *Act*, which made it a criminal offence to sell at “unreasonably low” prices, were repealed in 2009.<sup>135</sup> As a result, predation is now dealt with solely as a possible “practice of anti-competitive acts” under the abuse of dominance regime.<sup>136</sup>

In a buy-side context, predation would entail bidding up prices in the short run, which would benefit suppliers while putting financial pressure on the competing buyer(s). This in turn could result in competing buyers either exiting the market or bidding less aggressively against the dominant buyer, with the long run effect of lowering prices below competitive levels. We are not aware of any cases involving such a theory of harm in Canada.

The U.S. Supreme Court has considered a predatory buying case under section 2 of the *Sherman Act*. The plaintiff sawmill, which competed with Weyerhaeuser for the purchase of sawlogs (as well as the sale of lumber), accused Weyerhaeuser of using “its dominant position in the alder sawlog market to drive up the prices” to the point where the plaintiff could no longer operate profitably.<sup>137</sup> The Court held that the two-pronged economic test applicable to sell-side predatory pricing (from the *Brooke Group* case)<sup>138</sup> also applies in predatory bidding cases.<sup>139</sup> It required a plaintiff to prove that: (i) the alleged predatory bidding raised the firm’s costs above the revenue generated by the sale of its output (the buy-side version of pricing below cost); and (ii) there was a dangerous possibility that the defendant would recoup these losses through an exercise of monopsony power in the longer term.<sup>140</sup> The sell-side market for lumber products was much broader geographically than the buy-side region from which the plaintiff and the Weyerhaeuser mill sources their logs. Weyerhaeuser’s share of the sell-side market was also insufficient to affect price or quantity.

### ***Substantial Lessening of Competition***

Monopsony power “is only a concern if the intended effect is an exclusionary, disciplinary or predatory effect on a competitor such that there is a substantial lessening [or prevention] of competition in the market in which the competitor participates or would have participated.”<sup>141</sup> The Federal Court of Appeal has clarified that it is not

the absolute level of competition in the market which is at issue, “but rather the preventing or lessening of competition that results from the impugned practice must be substantial.”<sup>142</sup> This requires the Bureau, Tribunal or court, as the case may be, to “compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is ‘substantial.’”<sup>143</sup>

The Bureau’s *OECD Roundtable Report* stated that acts merely resulting in transfers of wealth among the market participants, which do not create a corresponding SLC, or do not have an adverse effect on a competitor which results in an SLC, generally do not give rise to competition concerns.<sup>144</sup> However, it takes the position that the SLC could occur at the supplier level on the buy-side irrespective of what is happening in the sell-side market(s).<sup>145</sup>

The Bureau has adopted a cautious approach to sell-side predatory pricing cases on the basis that there is an immediate benefit to customers from low pricing and intervention is only warranted if this is expected to be outweighed by long-term price increases after the competitor(s) exit(s) or is (are) disciplined. More specifically, the *ADEGs* have incorporated the recoupment test in assessing whether conduct is predatory:

Predatory conduct involves a firm deliberately setting the price of a product(s) below an appropriate measure of cost to incur losses on the sale of product(s) in the relevant market(s) for a period of time sufficient to eliminate, discipline, or deter entry or expansion of a competitor, in the expectation that the firm will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct. Predatory pricing may be implicit (through discounts or rebates, for example), or explicit.<sup>146</sup>

The Bureau has indicated that it would adopt a similar approach in predatory buying cases. It would be concerned where the buyer’s conduct would result, after competitors are excluded or disciplined, in lowering input prices below the level which would have otherwise prevailed, for a sufficiently long period of time to allow the predatory firm to recoup the costs incurred during the initial period in which it paid high input prices.<sup>147</sup>

## CONCLUDING OBSERVATIONS

Monopsony power cases are much less common than cases involving sell-side market power. In part, this reflects the fact that many markets are quite unconcentrated on the buy-side and suppliers may have a range of options to whom they can sell, as well as the fact that supply curves do not always slope upwards in the relevant range (whereas demand curves almost always slope downward).<sup>148</sup> In addition, much of the price pressure arising from mergers of buyers or the formation of buying groups takes the form of volume-based purchasing where suppliers and their customers expect that larger aggregate quantities will receive volume rebates or other forms of price reductions and that these do not constitute an attempt to exercise market power by reducing purchases.

In merger review, the *Act* and the *MEGs* treat the analysis of monopoly and monopsony issues under a similar framework. However, the case for intervening to remedy a merger with potential buy-side effects is clearest when sell-side market power can be established and is expected to have corresponding negative output effects. In the absence of output being reduced, economic welfare would not be expected to decrease and all that is left in such no-output-loss mergers are considerations of equity (wealth transfer) and opportunity (rights of participation in the economy). There is no clear basis in the *Act* or the *MEGs* for determining whether either of those purposes would trump the economic welfare purpose of the *Act*. Such a finding would, in effect, result in the merging parties and their customers “paying” for the welfare gains of those enjoying the equity or opportunity, as appears to have happened in various cases — including the forestry and grain cases — where sell-side markets were broad and competitive but suppliers in localized buy-side markets were perceived to be vulnerable. In our view, if wealth transfer effects are to be considered at all, they should be given less priority relative to cases of real economic harm when allocating scarce enforcement resources.

The Bureau has helpfully indicated that buy-side agreements or arrangements are not subject to the criminal conspiracy offence and will be dealt with under the new civil anti-competitive agreements provisions (although private / class action litigants likely will test this point). The analytical framework is likely to be almost identical to that used in merger reviews.

There is limited Canadian jurisprudence relating to unilateral conduct by dominant purchasers. Anti-competitive concerns could arise where the conduct excludes competitors or involves predation. However, to date, the focus has been on anti-competitive means by which a competitor's buy-side contractual or other practices would help to facilitate an SLC in sell-side markets.

The Bureau's enforcement track record is consistent with the U.S. experience that monopsony concerns have tended to arise in agriculture or agriculture-like sectors, including forest products.<sup>149</sup> However, the Bureau's guidelines do not make any sectoral distinctions and similar concerns could arise in other sectors. It will be important for the Tribunal and the Bureau to move beyond the simplistic symmetry principle and rigorously analyze the interrelationship between buy-side and sell-side market output levels when assessing monopsony power.

### Endnotes

<sup>1</sup> Neil Campbell is the Co-Chair of the Competition and International Trade practice at McMillan LLP in Toronto. Jun Chao Meng is a Competition Group associate in the firm's Toronto office. François Tougas practices in Vancouver and is a member of the firm's Competition Group and Co-Chair of the firm's Transportation Group.

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<sup>2</sup> *Competition Act*, RSC 1985 c C-34, as amended [*Act*], particularly ss 45, 90.1.

<sup>3</sup> In the remainder of this paper we use the term "products" to refer to both "articles" (goods) and "services," all as defined in *Act*, *supra* note 2, s 2(1).

<sup>4</sup> *Ibid* at s 92(1).

<sup>5</sup> For example, the pre-notification filing requirements explicitly seek information about suppliers. See *Notifiable Transactions Regulations*, SOR/87-348, as amended by SOR/2008-8, SOR/2003-104 and SOR/2010-22, ss 16(1)(c) (iv) (C), (C.1).

<sup>6</sup> Competition Bureau, *Merger Enforcement Guidelines* (2011), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/03420.html>> [*MEGs*]; Competition Bureau, *Merger Enforcement Guidelines* (2004), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html>>; Competition Bureau, *Merger Enforcement Guidelines* (1991), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01673.html>>.

<sup>7</sup> *Act, supra* note 2 at s 93.

<sup>8</sup> *MEGs, supra* note 6 at part 8.

<sup>9</sup> *Act, supra* note 2 at s 96; *MEGs, supra* note 6 at part 12.

<sup>10</sup> *MEGs, supra* note 6 at paras 4.1–4.5, 5.1.

<sup>11</sup> *Act, supra* note 2 at s 92(2).

<sup>12</sup> *MEGs, supra* note 6 at part 6.

<sup>13</sup> *Ibid* at para 5.9. Concentration is usually measured using the CR<sub>4</sub> ratio, although the Herfindahl-Hirschman Index (HHI) may also be considered where analyzing likely competitive effects.

<sup>14</sup> *Ibid* at para 9.2.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at paras 9.1, 9.3.

<sup>17</sup> *Ibid* at para 5.9; see *supra* note 13 and accompanying text.

<sup>18</sup> *Ibid* at part 9.

<sup>19</sup> *Ibid* at para 9.4.

<sup>20</sup> See, e.g., Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 50.

Generally, customers are willing to pay more for each unit of a product as quantity declines, thus lowering output will increase the price that can be charged (or, raising the price will reduce sales). See also *MEGs, supra* note 6 at para 6.10, noting that where merging parties can exercise unilateral market power, the merger may create an incentive to increase price and restrict supply.

<sup>21</sup> *MEGs supra* note 6 at para 9.1.

<sup>22</sup> *Ibid* at fn 47. Similar statements can be found in a briefing note submitted by the Bureau for an OECD roundtable discussion on monopsony and buyer power: see Competition Bureau, “Round Table on Monopsony and Buyer Power” (submitted for meeting of the OECD Competition Committee, 21-23 October 2008), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02995.html>> [*OECD Roundtable Report*] at para 7.

<sup>23</sup> See Jonathan M Jacobson, “Monopsony 2013: Still not Truly Symmetric,” paper prepared for ABA, Section of Antitrust Law, 61<sup>st</sup> Spring Meeting, Washington DC, April 2013 [Jacobson, “Not Truly Symmetric”] at 16. It is difficult to think of a real-world example where suppliers in an industry have no ability to sell more at a higher price and would not sell less if faced with a lower price.

<sup>24</sup> See U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines” (19 August 2010), online: Department of Justice <<http://www.justice.gov/atr/public/guidelines/hmg-2010.html>> at part 12:

[The Department of justice and Federal Trade Commission] do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers

between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.

<sup>25</sup> Federal Trade Commission, *In the Matter of Caremark Rx, Inc./AdvancePCS* (11 February 2004), FTC File No. 031-0239, online: Federal Trade Commission <<http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf>> [*Caremark/AdvancePCS*] at 2; Federal Trade Commission, *Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc.*, (2 April 2012), FTC File No. 111-0212, online: Federal Trade Commission <<http://www.ftc.gov/os/2012/04/120402expressmedcostatement.pdf>> [*Express Scripts/Medco*] at 8. The FTC has, however, also challenged other mergers without identifying expected output reductions. For example, in a 1999 merger between two grain-trading companies, the FTC was concerned that the transaction could create an SLC by depressing the prices paid to farmers for the purchases of corn, soybeans, and wheat in the relevant geographic markets: see *United States v Cargill Inc and Continental Grain Co.*, (8 July 1999), online: Department of Justice <<http://www.justice.gov/atr.cases/indx159htm>> (Complaint) at paras 34–37 and (23 July 1999), online: Department of Justice <<http://www.justice.gov/atr/cases/f2500/2584.htm>> (Competitive Impact Statement). The matter was resolved on consent. The merging parties agreed to divest grain elevators in a number of geographic areas and enter throughput agreements with independent grain companies: see *United States v Cargill Inc and Continental Grain Co.*, (30 June 2000), online: Department of Justice <<http://www.justice.gov/atr/cases/f6600/6628.htm>> (Final Judgment).

<sup>26</sup> *Caremark/AdvancePCS*, *supra* note 25 at 2 and *Express Scripts/Medco*, *supra* note 25 at 7–8. However, the U.S. Department of Justice (DOJ) has challenged proposed mergers between health insurers involved in selling health insurance plans to employers and purchasing health care services from physicians (and other providers) where output restrictions *were* likely to occur. The DOJ alleged that the mergers would “unduly depress physician reimbursement rates” and lead to a degradation in the quantity or quality of physician services. See *United States v UnitedHealth Group, Inc and Pacificare Health Systems, Inc.*, Civil Action No. 1:05CV02436 (3 March 2006), online: Department of Justice <<http://www.justice.gov/atr/cases/f215000/215034.htm>> (Competitive Impact Statement). Similar allegations were made, in nearly identical language, in *United States and the State of Texas v Aetna and The Prudential Insurance Company of America* (16 July 1999), Civil Action No. 3-99 CV 398-H, online: Department of Justice <<http://www.justice.gov/atr/cases/f2500/2571.htm>> (Competitive Impact Statement). For a more detailed discussion of monopsony issues in the U.S. health care sector, see Joshua H. Soven, “Monopsony in the Health Care Sector: Obstacles and Opportunities,” paper prepared for the ABA Section of Antitrust Law, 61st Spring Meeting, Washington, DC, April 2013.

<sup>27</sup> See Jonathan M Jacobson and Gary J Dorman, “Joint Purchasing, Monopsony and Antitrust” (1991) 36 *Antitrust Bulletin* 1 at 17; and Jonathan M Jacobson

and Gary J Dorman, “Monopsony Revisited: A Comment on Blair & Harrison” (1992) 37 *The Journal of American and Foreign Antitrust and Trade Regulation* 151 [Jacobson, “Monopsony Revisited”] at 161.

<sup>28</sup> *Act, supra* note 2 at s 1.1.

<sup>29</sup> We are indebted to an anonymous external reviewer for this observation.

<sup>30</sup> *OECD Roundtable Report, supra* note 22 at para 10.

<sup>31</sup> See Jacobson, “Not Truly Symmetric,” *supra* note 23 at 5-6.

<sup>32</sup> *Ibid* at 7.

<sup>33</sup> See, e.g., Jacobson, “Not Truly Symmetric,” *supra* note 23 at 17.

<sup>34</sup> See *MEGs, supra* note 6 at para 9.4, discussed above.

<sup>35</sup> By way of simplified illustration, assume that, pre-merger, two lumber mills each purchased 100 units of logs for \$1,000 and used them to produce 1,000 units of lumber (all units fictional). Post-merger, assuming that the mills do not have any sell-side market power and there is no change in demand, the merged firm still requires the same combined output of 2,000 units of lumber for its customers and will need to purchase 200 units of logs to produce that output. If it reduced its purchases by 5% (to 190 units of logs) in an attempt to reduce log input prices, its lumber sales would be reduced to 1,900 units. However, other sell-side competitors would be expected to make up those 100 units of lumber sales. In order to do so, they would need to acquire 10 units of logs — either from the same supplier(s) with whom the merging parties were dealing with or other suppliers that compete in that market or other local log selling markets.

If, post-merger, fewer logs can be used by the merged firm to produce the same output (e.g. by reducing waste), an efficiency gain may be presumed. Similarly, if the costs of the merged lumber producer and/or its log supplier(s) are now lower due to the consolidated purchased volume of the merged firms, we are again in the realm of efficiencies, not a reduction in economic welfare.

<sup>36</sup> *Act, supra* note 2 at s 96. Only efficiencies which are nonpecuniary and are merger-specific will be considered. See also *MEGs supra* note 6 at para 12.13.

<sup>37</sup> See *Canada (Commissioner of Competition) v Superior Propane Inc*, 18 CPR (4<sup>th</sup>) 417 (Reconsideration) [*Superior Propane*] at paras 102–103, aff’d 2003 FCA 53.

<sup>38</sup> *Ibid* at paras 369–371.

<sup>39</sup> *Ibid* at para 327.

<sup>40</sup> *Ibid* at para 329.

<sup>41</sup> *Ibid* at para 369.

<sup>42</sup> *Ibid* at para 354–357.

<sup>43</sup> *Ibid* at paras 355–356.

<sup>44</sup> *Ibid* at para 368. Under the Balancing Weights Approach, the interests of the low-income households would be weighed more heavily than the interests of the shareholders in the merged entity. However, in this case, “the higher weight is not determinable given the information on the record”

(see *ibid.* at paras. 357 and 367). The Tribunal also gave equal weight to shareholders' interests and the interests of the other households and business owners who used propane for non-essential purposes, such as barbeques, heating of cottages or swimming pools (see *ibid* at para 367).

<sup>45</sup> *Ibid* at para 371.

<sup>46</sup> See *MEGs, supra* note 6, reproduced above.

<sup>47</sup> We are indebted to an anonymous external reviewer for this observation.

<sup>48</sup> *Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd*, 41 CPR (3d) 289 (Competition Tribunal) at para 26.

<sup>49</sup> In addition to the cases resolved on consent, the Bureau has also considered buy-side issues in a number of other mergers, but concluded that an SLC was unlikely to occur.

In the *Cargill Ltd/Better Beef Group* transaction, the Bureau's inquiry was focused on the buy-side issue of cattle procurement and the sell-side issue of case ready beef. The Bureau did not require a remedy due to findings that the direct competitive overlap in purchasing was limited, small-scale entry *had* occurred and there was further planned entry into Western Canada. Furthermore, there was sufficient remaining competition from other Canadian and U.S. based packing plants. See Competition Bureau, Technical Backgrounder, "Acquisition of Better Beef by Cargill Limited" (August 2005), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01941.html>>.

In the *Abitibi-Consolidated/Bowater* merger, the Bureau identified several competition issues, but concluded there was insufficient evidence to support a proceeding under the *Act*. On the buy-side, the merging parties competed in the purchase of woodchips and roundwood logs. However, the existence of long-term contracts for the purchase of woodchips constrained the parties' ability to exercise any market power. The significant regulatory oversight in the market for logs also contributed to the conclusion that an SLC was unlikely. See Competition Bureau, Technical Backgrounder, "Merger between Abitibi-Consolidated Inc. and Bowater Incorporated" (30 October 2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02508.html>>.

In the *RONA/Matériaux Coupal Inc* acquisition, some market participants expressed concerns about RONA's buying power for lumber and building materials. The Bureau found insufficient grounds for challenging the merger, but decided to monitor the effects of the transaction in case there was excessive growth in buying power. See Competition Bureau, Technical Backgrounder, "Acquisition of Control Matériaux Coupal inc. by RONA inc." (August 2006), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02151.html>>.

In the *Bell Globemedia/CHUM Ltd* acquisition, the Bureau considered the merged entity's ability to exercise monopsony power over programme sellers, but dismissed it, as there was no supporting evidence. See Competition Bureau, Technical Backgrounder, "BGM/CHUM Technical Backgrounder"



(28 November 2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02521.html>>.

<sup>50</sup> *Commissioner of Competition v Trilogy Retail Enterprises LP* (6 June 2001), CT-2001-003 (Competition Tribunal) [*Chapters / Indigo*] at paras 12–13.

<sup>51</sup> *Ibid* at paras 84–120.

<sup>52</sup> For further information on the Association of Canadian Publishers and its members, see <[www.publishers.ca](http://www.publishers.ca)>.

<sup>53</sup> *Commissioner of Competition v Cineplex Galaxy Limited Partnership* (13 June 2005), CT-2005-005, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2005-005\\_0001c\\_38JVE-10102006-4432.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2005-005_0001c_38JVE-10102006-4432.pdf)> (Consent Agreement) [*Cineplex / Famous Players*]. One of the authors was counsel to a competitor in respect of this review.

<sup>54</sup> Competition Bureau, Technical Backgrounder, “Acquisition of Famous Players by Cineplex Galaxy” (July 2005), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01921.html>>.

<sup>55</sup> Upstream considerations were also mentioned in PaperlinX Canada’s acquisition of Cascades Fine Papers Group. However, the case is best understood as a vertical merger case rather than a monopsony case. The Bureau was primarily concerned about market power in the sell-side paper distribution market in Canada, which was resolved through a consent agreement involving the divestiture of the fine paper merchant business. See *Commissioner of Competition v PaperlinX Canada Ltd* (1 March 2006), CT-2006-004, online: Competition Tribunal <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=272>>. PaperlinX Canada also agreed not to obstruct the supply of fine paper by any mill to the purchaser of the divested assets. This concern arose because of the parties’ fine paper mills and the fact that historically, such mills tended to work closely with only one or two fine paper merchants, which could constitute a barrier to entry into the fine paper merchant market. See Competition Bureau, Technical Backgrounder, “Asset Acquisition by PaperlinX Canada Ltd. from Cascades Resources Fine Papers Group Inc.” (August 2006), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02157.html>>.

<sup>56</sup> Competition Bureau, Announcement, “Bureau resolves competition issues in forestry merger” (1 April 2004).

<sup>57</sup> *Ibid*.

<sup>58</sup> *Commissioner of Competition v Canfor Corporation* (31 March 2004), CT-2004-002 (Competition Tribunal) [*Canfor*].

<sup>59</sup> *Commissioner of Competition v West Fraser Timber Co Ltd and West Fraser Mills Ltd* (7 December 2004), CT-2004-013 (Competition Tribunal) [*West Fraser Timber*]. One of the authors was counsel to West Fraser in respect of this transaction.

<sup>60</sup> Competition Bureau, Announcement, “Competition Bureau reaches agreement to preserve competition in two B.C. Forestry markets” (7 December 2004).

<sup>61</sup> *Commissioner of Competition v Tolko Industries Ltd* (17 November 2004), CT-2004-012 (Competition Tribunal).

<sup>62</sup> See Competition Bureau, Announcement, “Competition Bureau completes measures to increase competition in grain handling industry” (5 July 2007). Generally, grain is transported to in-country grain elevators, where the grain is elevated, graded and segregated, and also may be cleaned, dried, blended and stored. The farmer is then paid a fee for the grain delivered, less charges for any applicable elevation, dockage and cleaning fees. See also Schedule “E” (Agreed Statement of Facts) to *Commissioner of Competition v Saskatchewan Wheat Pool Inc* (28 March 2008), CT-2007-005 (Competition Tribunal) [SWP] at 6-9. Note, however, that elsewhere in the Agreed Statement of Facts, the Bureau characterizes the relationship as the provision of goods and services by SWP to farmers and others in the industry.

<sup>63</sup> SWP, *supra* note 62 at 5.

<sup>64</sup> *Ibid* at 9.

<sup>65</sup> *Commissioner of Competition v United Grain Growers Limited* (17 December 2001), CT-2001-007 [UGG #1] (Consent Order) and (17 October 2002), CT-2002-001 (Competition Tribunal) [UGG #2] (Consent Agreement).

<sup>66</sup> UGG #1, *supra* note 65 (Statement of Grounds and Material Facts).

<sup>67</sup> UGG #2, *supra* note 65.

<sup>68</sup> *Ibid* at 16-17.

<sup>69</sup> *Ibid* at 17.

<sup>70</sup> UGG #1, *supra* note 65 (Statement of Grounds and Material Facts) at paras 2, 15.

<sup>71</sup> UGG #1, *supra* note 65 at paras 42-45 (Consent Agreement). As part of the behavioural remedies, the merged entity, Agricore United, agreed that it would not nominate any director, officer or employee of one of the canola processors to the Board of the other canola processor. Also, the mandate of the Agricore United Grain Operations Committee would exclude canola oil-seed processing.

<sup>72</sup> *Commissioner of Competition v James Richardson International Limited* (4 July 2007), CT-2007-008 (Competition Tribunal).

<sup>73</sup> *Ibid* at para 24.

<sup>74</sup> *Ibid* at paras 31-32.

<sup>75</sup> *Commissioner of Competition v American Iron & Metal Company* (29 January 2008), CT-2008-001, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2008-001\\_0002-Memorandum\\_of\\_Argument-Public\\_Version\\_40OSY-262008-1051.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2008-001_0002-Memorandum_of_Argument-Public_Version_40OSY-262008-1051.pdf)> (Memorandum of Argument of the Commissioner of Competition – Public Version) at paras. 24-25. One of the authors was counsel to AIM in respect of this transaction.

<sup>76</sup> *Commissioner of Competition v American Iron & Metal Company* (29 January 2008), CT-2008-001, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2008-001\\_0012\\_40OPS-262008-9441.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2008-001_0012_40OPS-262008-9441.pdf)> (Consent Agreement).

<sup>77</sup> As noted above, the sell-side market effects (involving wood re-manufacturers and woodchip buyers) were secondary considerations in

the *Canfor* and *West Fraser Timber* cases. Similarly in the *Chapters / Indigo* and *Cineplex / Famous Players* mergers, there were sell-side market power concerns, but only in certain specific local geographic markets and the negotiated resolutions addressed them through proposed store and theatre divestitures. The additional code of conduct remedy for Chapters' and Indigo's dealings with publishers must therefore have been based on a view that there was an ability to exercise market power generally in the buy-side market, even though many of the sell-side markets already were, and the remainder were to be restored through divestiture to being, markets in which the merged entity would not be able to exercise market power.

<sup>78</sup> *Act, supra* note 2, s 45(1).

<sup>79</sup> *Canada v Pharmaceutical Society (Nova Scotia)*, 120 NSR (2d) 304 at para 90 (NSSC). In *PANS*, the accused pharmacy associations allegedly agreed, on behalf of their members, to negotiate for the maximum allowable fees for drugs and services in dealings with third party insurers. At the subsequent trial, the judge found that an undue lessening of competition was likely to occur as a result of the arrangements. However, the parties were acquitted on the basis that the *mens rea* element for the offence was not proven beyond a reasonable doubt. See *Canada v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606 at para 103 [*PANS*]; aff'g 80 DLR (4th) 206 (NSCA); rev'g 73 DLR (4th) 500 (NSSC) particularly at 96–98. The Crown had established the subjective *mens rea* element by proving that the accused intended to enter into the agreement and had knowledge of its terms, but the Court found that the Crown failed to establish an intent to lessen competition unduly on the objective “reasonable business person standard,” in part due to the “intricate and complicated effects of the various dealings” among numerous pharmacies, their associations, government parties and insurers.

<sup>80</sup> *R v Abitibi Power & Paper Co.*, (1960) 36 CPR 188 (Que QB).

<sup>81</sup> *Ibid* at paras 40, 126.

<sup>82</sup> *Ibid* at paras 30–34.

<sup>83</sup> See Competition Bureau, Discontinued Cases, “Nova Scotia Snow Crab” (2003), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01086.html>>.

<sup>84</sup> The basis for such actions is *Act, supra* note 2, s 36.

<sup>85</sup> *Janelle Pharmacy Ltd v Blue Cross of Atlantic Canada*, 2003 NSSC 179, particularly at paras 1 and 7. Under the amended version of the conspiracy offence in effect since March 2010, such a vertical agreement would not constitute an offence.

<sup>86</sup> *Ibid* at paras 99–102, 109, 111, 114–116.

<sup>87</sup> *Ibid* at para 141. One of the defendant's witnesses testified that a “buyers cartel” would have aimed to restrict purchases of a product in order to force the price of the product below the competitive level: see *ibid* at para 71. The Court also commented, in *obiter*, that the setting of maximum prices could give rise to an undue lessening of competition if it involved an agreement between a buyer (the insurance seller) and pharmacies to raise prices to the

detriment of the public: *ibid* at para 122. However, in this case, the maximum prices negotiated by Blue Cross were lower than those that the plaintiffs charged cash customers.

<sup>88</sup> *321665 Alberta Ltd v Mobil Oil Canada Ltd*, 2011 ABQB 292 [*Mobil Oil*], rev'd by 2013 ABCA 221 [*Husky Oil*]. See also Neil Campbell, James B. Musgrove, François Tougas and Jun Chao Meng, "Court of Appeal Dismisses Conspiracy Claim Against Joint Purchasers" (June 2013), online: McMillan <<http://mcmillan.ca/Court-of-Appeal-Dismisses-Conspiracy-Claim-Against-Joint-Purchasers>>.

<sup>89</sup> *Mobil Oil*, *supra* note 88 at paras 283, 288.

<sup>90</sup> *Husky Oil*, *supra* note 88 at para 20.

<sup>91</sup> *Ibid* at paras 11, 20.

<sup>92</sup> *Ibid* at para 24.

<sup>93</sup> *Ibid* at para 23.

<sup>94</sup> See *PANS*, *supra* note 79 at para 89.

<sup>95</sup> In obiter, the Court of Appeal noted that the defendants' conduct would not be characterized as criminal under the amended conspiracy offence *Husky Oil*, *supra* note 88 at para 55. However, a framework for analyzing market power of buyers is necessary under the new civil competitor agreements provision.

<sup>96</sup> *Mobil Oil*, *supra* note 88 at paras, 115–117, 139, 172.

<sup>97</sup> *Act*, *supra* note 2, s 50(1)(a), repealed March 2009.

<sup>98</sup> Director of Investigation and Research (Head of the Competition Bureau), *Price Discrimination Enforcement Guidelines* (Ottawa, 1993), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01810.html>> [*PDEGs*] at part 2.5.4.2.

<sup>99</sup> *Ibid*. However, the *PDEGs* noted that none of the factors were determinative and that the Bureau would review all the circumstances of each case (see part 2.5.4.1).

<sup>100</sup> There is also the possibility that price discrimination may be addressed under either the amended price maintenance reviewable practice (*Act*, *supra* note 2, s 76), or the abuse of dominance provisions (ss 78–79, discussed more fully below). However, price maintenance relates only to sell-side markets and in practice, price discrimination on its own rarely will meet the definition of an "anti-competitive act" as that term has been interpreted for purposes of s 79.

<sup>101</sup> *Act*, *supra* note 2, s 45(1) as amended. For a general discussion of the amendments, see A. Neil Campbell & Sorcha O'Carroll, "The Americanization of Canada's Competition Law," (2010) 48 Can Bus LJ 446.

<sup>102</sup> *Ibid* at s 45(1)(c), prior to amendment in March 2009.

<sup>103</sup> *Ibid* at s 45(1)(d), prior to amendment in March 2009; *Combines Investigation Act*, RSC 1970, c C-23, s 32(1)(c).

<sup>104</sup> Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009), online: Competition Bureau <<http://www.competitionbureau.gc.ca/>

eic/site/cb-bc.nsf/eng/03177.html> [CCGs] at part 2.4.1.

<sup>105</sup> *Ibid* at parts 2.4.1 and 3.9–3.10. However, conduct between competing purchasers that involves activities beyond the purchasing collaboration (e.g. information exchanges and coordination of related sell-side activities) would potentially be subject to the conspiracy offence.

<sup>106</sup> *Ibid* at part 2.4.1.

<sup>107</sup> *Act, supra* note 2 at s 90.1.

<sup>108</sup> In 2011–2012, the Commissioner challenged a proposed joint venture between United Continental and Air Canada under the merger provisions of the *Act*, and also included applications for remedial orders under the competitor agreements provision in respect of prior strategic alliances between Air Canada and United and Continental, respectively. However, the case was settled by way of a consent agreement. See *Commissioner of Competition v Air Canada, United Continental Holdings Inc, United Airlines, Inc and Continental Airlines Inc* (24 October 2012), CT-2012-001; see also Competition Bureau, Announcement, “Competition Bureau Reaches Agreement with Air Canada and United Continental” (24 October 2012), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03507.html>>.

<sup>109</sup> *Ibid* at paras 3.10.1–3.10.3.

<sup>110</sup> A dominant position may be abused by “one or more firms”: *Act, supra* note 2 at s 79(1)(a).

<sup>111</sup> *Treaty on the Functioning of the European Union*, OJ 115, 09/05/2008 P 0089–0089, art 102.

<sup>112</sup> *Sherman Antitrust Act*, 15 USC §2.

<sup>113</sup> *Act, supra* note 2 at s 79(1); *Commissioner of Competition v Canada Pipe Co*, 2006 FCA 233 [*Canada Pipe*], rev’g 40 CPR (4<sup>th</sup>) 453 (Competition Tribunal).

<sup>114</sup> *Act, supra* note 2 at s 79(4).

<sup>115</sup> *Ibid* at ss 78(1)(b), (f), (h). In addition, there is a reference to pre-emption of scarce facilities or resources with the purpose of withholding them from a competitor, which could also apply to buy-side conduct: see *ibid* at s 78(1)(e).

<sup>116</sup> Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (20 September 2012), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html#footnote11>> [ADEGs] at fn 11.

<sup>117</sup> *Ibid* at part 2.

<sup>118</sup> *OECD Roundtable Report, supra* note 22, at para 27. The report further indicates that the SLC elements need not be related to price or output, although that will typically be the case. For example, it may be sufficient to demonstrate a negative effect on a non-price element of competition, such as product quality.

<sup>119</sup> *Ibid* at para 36.

<sup>120</sup> *Ibid* at para 29.

<sup>121</sup> *Canada Pipe, supra* note 108 at paras 77–79.

<sup>122</sup> *OECD Roundtable Report, supra* note 22 at para 5.

<sup>123</sup> *Canada Pipe*, *supra* note 108 at paras 75–79. A valid business justification must demonstrate credible evidence of efficiency, or provide a pro-competitive explanation why the dominant firm engaged in the exclusionary, predatory, or disciplinary action: *ibid* at para 90.

<sup>124</sup> *Supra* note 110.

<sup>125</sup> Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector Enforcement Guidelines* (November 2002), repealed September 2012, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01642.html>> at para 5.2.1.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd*, (1995) 64 CPR (3d) 216 (Competition Tribunal) at para 192.

<sup>128</sup> *Ibid* at para 123.

<sup>129</sup> *Ibid* at paras 131, 159.

<sup>130</sup> *Ibid* at para 132.

<sup>131</sup> *Ibid* at paras 200–201. The Tribunal found that there would be no reason to object to most-favoured-nation clauses once there was a second supplier of market-based tracking services in the market.

<sup>132</sup> *Ibid* at para 220.

<sup>133</sup> *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd* (30 August 1995) CT-1994-001 (Consolidated Order), online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-1994-001\\_0143c\\_45QED-4152004-6360.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1994-001_0143c_45QED-4152004-6360.pdf)> at 8.

<sup>134</sup> The Tribunal did consider the fact that the most-favoured-nation clauses allowed A.C. Nielsen to set the price for data higher than what it thought a rival would pay, thereby inducing exclusivity: *ibid* at para 202.

<sup>135</sup> *Act*, *supra* note 2 at s 50(1)(c), repealed March 2009.

<sup>136</sup> *Ibid* at s 79(1)(b). Section 78(1)(i) lists “selling articles at a price below acquisition cost” as a specific type of anti-competitive practice, but the list is non-exhaustive and any other predatory conduct targeted at a competitor could also be challenged: see *Director of Investigation and Research v The NutraSweet Company* (4 October 1990), CT-1989-002, Doc #176a, at paras 57, 73–74.

<sup>137</sup> *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co, Inc*, 549 US 312 [*Weyerhaeuser*] at 314–316.

<sup>138</sup> *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209.

<sup>139</sup> *Ibid* at 325.

<sup>140</sup> *Weyerhaeuser*, *supra* note 141 at 325. The plaintiff Ross-Simmons conceded that it had not satisfied the two-pronged *Brooke Group* standard (at 326). The Court remanded the case for further proceedings based on the correct legal test.

<sup>141</sup> *OECD Roundtable Report*, *supra* note 22 at para 27. The effect of the SLC could have occurred in the past, or may occur in the present or future: *Act*, *supra* note 2 at s 79(1)(c).

<sup>142</sup> *Canada Pipe*, *supra* note 108 at para 36.

<sup>143</sup> *Ibid* at para 37.

<sup>144</sup> *OECD Roundtable Report*, *supra* note 22 at para 26.

<sup>145</sup> *Ibid* at paras 20, 23.

<sup>146</sup> *ADEGs*, *supra* note 111 at para 3.2.2.

<sup>147</sup> *OECD Roundtable Report*, *supra* note 22 at para 37.

<sup>148</sup> Jacobson, "Not Truly Symmetric," *supra* note 23 at 9.

<sup>149</sup> Jacobson, "Monopsony Revisited," *supra* note 23 at 157. These types of markets tend to have upward-sloping supply curves.