CANADIAN ANTI-MONOPOLY PROJECT

Competition Law for a Fair Economy

Submission of the Canadian Anti-Monopoly Project (CAMP) to the consultation on the future of competition policy in Canada

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Executive Summary

The power of monopolies in Canada has exacerbated an ongoing cost of living crisis, enriched few at the expense of millions, and stifled innovation and creativity in our economy. The law intended to police monopoly in Canada, the *Competition Act*, and the agency responsible for enforcing the law, the Competition Bureau, are not up to the task of protecting Canadians and competition.

What is needed is a *Competition Act* that supports a fair economy.

Canada's policy makers can make this a reality with four key actions.

Emboldening the *Competition* Act's Purpose Clause

The current purpose clause of the *Competition Act* reflects the multiple policy goals that effective competition law can serve. However, since its introduction an outdated view of economic efficiency has grown to dominate the enforcement of the Act. Some proponents argue for a further narrowing of the purpose of Canada's competition law, focusing only on this conception of efficiency. But this view ignores the wide range of benefits effective competition law can bring to an economy. Rather than an artificially narrow guiding principle for the Act, the purpose statement should maintain a broad conception of the value of competition in an economy.

Government can accomplish this by:

- Introducing a purpose statement that includes fair competition, economic opportunity, inclusion and prosperity

Blocking and deterring harmful mergers

Despite already high levels of market concentration across the country, Canada's competition law is unable to block mergers that allow monopolies to kill competition and grow even larger. The approval of the Rogers-Shaw merger is just the latest step in a process that will continue to allow competitors to be swallowed up by dominant corporations. With a track record of allowing mergers to literal monopoly, Canada's competition law cannot protect Canadians from an end state where they depend on a single corporation for their daily needs without material reform.

Canada's competition law needs the power to stop dominant corporations from further consolidating the markets Canadians depend on everyday. By taking the

harms of mergers seriously, we can preserve independent competition and choice where it matters most for Canadians. Stronger merger laws will promote organic growth and investment instead of job-killing mergers that result in an increasingly fragile economy.

Government can accomplish this by:

- Modernising the substantive test for mergers
- Expanding the existing pre-merger notification system
- Bringing in open-ended merger review to protect long-term competition
- Modifying merger provisions to capture “roll-ups” and “creeping acquisitions”
- Removing the harmful, misguided and outdated efficiencies defence
- Protecting growing competitors in dynamic markets
- Creating a preference for simple and effective remedies
- Requiring the Bureau to conduct routine merger retrospectives

Preventing corporations from abusing their dominance

Though we can stop existing monopolies from becoming larger, Canadians should not be at the mercy of the monopolies that have already grown under our weak laws and lax enforcement. Canada’s laws preventing corporations from abusing their dominance are too narrow and restrictive, meaning harmful conduct is allowed to develop and persist, especially in dynamic and evolving markets. The result of this narrow approach is an absence of enforcement: despite multi-year investigations into corporations such as Google and Amazon, no abuse of dominance cases have been brought in nearly 7 years.

Canada’s competition law needs an effective and flexible tool to tackle abuses of corporate power in ever-evolving markets. By protecting fair competition, strong abuse of dominance laws can deter unfair methods of competition based on corporate power rather than competition through pricing, quality, and innovation. With stronger protections against abuse of corporate power, Canada can create opportunities for independent competitors to flourish.

Government can accomplish this by:

- Modernising the substantive test for abusive conduct
- Putting a stop to exploitative conduct
- Removing the business justification loophole
- Streamlining the Bureau’s ability to gather information
- Strengthening the ability to tackle arrangements or agreements that lessen competition

Enhancing the administration and enforcement of the Competition Act

Canada's competition law enforcer, the Competition Bureau, is ill-equipped to tackle the country- and even globe-spanning monopolies that comprise our economy. Unlike global peers, the Competition Bureau cannot proactively study markets to better police monopolies, and after a decade of stagnation only recently received a modest funding increase. At the same time, the Competition Bureau is a black box to Canadians, with no way for the public to know what markets and corporations are being investigated, and only infrequent updates at the whim of a given Commissioner of Competition.

Canada's competition enforcement framework needs both the powers to understand the harms caused by monopolies in Canada and the resources to go toe-to-toe with the largest corporations not just in Canada, but the world. In return for these powers and resources, Canadians deserve a transparent and public enforcement framework.

Government can accomplish this by:

- Increasing funding to the Competition Bureau
- Increasing funding towards research on the consequences of monopoly
- Giving the Competition Bureau full market study powers
- Increasing the Bureau's level of transparency with the public
- Reforming the Competition Tribunal

Introduction

For decades, Canadian law makers have studied and attempted to address the harms of outsized corporate power across the economy. In 1934 the House of Commons struck a Royal Commission to investigate price spreads between commodity and retail prices in the agricultural and manufacturing sectors. In its extensive report, the committee concluded that governments needed to intervene to protect individuals, small businesses, and communities from outsized corporate power.[i] They stated:

> "*At first sight, indeed, it appeared that the separate and distinct problems which emerged in the evidence called for separate treatment and almost separate reports. On closer study, however, it became clear that many of the grievances complained of, and problems disclosed, were manifestations of one fundamental and far-reaching social change, the concentration of economic power.*"

Over four decades later, in the 1970s and 1980s, both the senate and a government-appointed royal commission investigated corporate dominance in newspapers and media, both of which identified corporate concentration as a problem in the sector and proposed solutions that were never adopted.[ii]

Despite political awareness of corporate power and attempts to address it, our competition law – one of the most direct tools for tackling corporate power – has been relatively ineffective. Enacted in 1986, the *Competition Act* is ambivalent to the harm that corporate power inflicts on Canadians, allowing corporate power to grow for the sake of greater economic efficiency and profit. Despite more promising legislative proposals that rejected efficiency defences and focused on simple to administer rules to prevent abuse of corporate power, the final version of the Act adopted a more permissive approach.[iii]

This permissive approach has been to the detriment of Canadians. Today, Canadians face a cost of living crisis. Over the last year, Canadians have seen the cost of everyday goods and services skyrocket. Concurrent with this trend is an increase in corporate profits, with approximately 40% of higher prices from July and September of 2022 translating into higher profits.[iv]

The backdrop to Canada's rising cost of living and record corporate profits is the concentration of sectors critical to the Canadian economy. Corporate concentration in Canada has been on the rise, with approximately one third of industries seeing an increase in concentration of over 50% over the last two decades.[v] This increase in

concentration has coincided with declining business dynamism and entrepreneurship, undermining our capacity for innovation and greater productivity.[vi] Canada's decline in productivity growth and projected low growth raises serious concerns for our ability to recover from the current rising cost of living and to enhance living standards into the future.[vii]

Canada needs a robust anti-monopoly law that meets the challenge posed by our economic environment, curbs the exercise of corporate power against Canadians and protects economic fairness. Reforming the *Competition Act* gives us the opportunity to change our trajectory and foster an economy that works for all Canadians.

To do so, the Canadian Anti-Monopoly Project's (CAMP) submission outlines four key areas for reform within the *Competition Act*, which are each discussed in turn:

1. Emboldening the *Competition Act's* Purpose Clause
2. Blocking and deterring harmful mergers
3. Preventing corporations from abusing their dominance
4. Enhancing the administration and enforcement of the Competition Act

1. Emboldening the *Competition Act*'s purpose clause

Canada's competition law is having an identity crisis. Although the law was intended to meet multiple purposes, a narrow vision of efficiency has come to dominate the administration and enforcement of the law. This vision has shrunk the scope of conduct that the law applies to, and paved the way for harmful mega-mergers like the recently concluded Rogers-Shaw transaction.

Corporate interests and the competition law and economic community are working to further narrow the *Competition Act*'s purpose clause to focus on efficiency, removing its other current goals and foreclosing the addition of other economic policy goals.[viii]

The narrow focus on efficiency is detrimental to Canadians and the Canadian economy. This obsession with efficiency above all other considerations justifies harmful provisions in the *Act*, most notably the efficiencies defence for mergers which permits mergers that sacrifice competition and make consumers and workers worse off for the sake of corporate profits.

Not only does this efficiency-centric approach justify unfairness within the law, but it is also out of step with modern thinking on economic growth and the prosperity of society. It ignores the role of fairness and the wellbeing of individuals in fostering greater levels of productivity and wealth in our society. An efficiency-centric view also runs counter to the goal of promoting inclusive economic growth – growth that enhances living standards for all people in Canada.[ix]

CAMP's vision for Canada's competition law is one that does not trade off harms to Canadians for alleged efficiencies, and instead seeks to curb abuses of corporate power, encourage fair competition, and promote prosperity in the Canadian economy.

Rather than a single goal, the purpose of the *Competition Act* should reflect the wide range of benefits fair competition, competition on the merits rather than the basis of power, brings to an economy. As the Competition Bureau states in its submission to Senator Wetston's consultation *Examining the Canadian Competition Act in the Digital Era*, the government should maintain the multifaceted nature of the *Competition Act*'s purpose.[x] We propose that the purpose statement should re-orient around broader goals for the Canadian economy, including promoting fair competition, opportunity, inclusion and prosperity. In particular, a focus on fair competition would better align Canada's competition law developments in partner jurisdictions, most prominently the Federal Trade Commission's (FTC) revival of its jurisdiction over unfair methods of competition.[xi]

2. Blocking and deterring harmful mergers

Mergers are a common avenue for firms to achieve and maintain dominance in the markets on which Canadians depend. Despite the potential for mergers to generate harm, Canada's merger law is largely permissive, accepting the vast majority of mergers as benign or beneficial. Key to an effective competition law going forward is a realignment of the existing system towards a modern understanding of the harms arising from mergers. A more sceptical view of mergers that is easy to adjudicate will better allow Canada's competition law to not only protect Canadians but also encourage organic growth via fierce and fair competition.

2.1 Modernise the substantive test for mergers

A common refrain in the competition policy space is that Canada is a low enforcement activity jurisdiction. One reason for this lack of activity is that the

Competition Act's provisions regulating mergers and acquisitions are too narrowly targeted and miss a wide range of transactions.

The requirement within the law on identifying "substantial" effects of a merger narrows the law's focus and allows for otherwise anticompetitive acquisitions to occur. When cases are brought, an improper focus on quantitative over qualitative evidence results in judges leaning heavily on biased economic prediction exercises and ignoring the very real but qualitative consequences of harmful acquisitions. The recent Rogers-Shaw case serves as a prime example of the consequences of favouring a substantial effects focus over valuing the competitive process. In a market where Canadians already pay some of the highest prices in the world, the merger was allowed to proceed even though the Competition Tribunal conceded hundreds of thousands of Canadians would face price increases.[xii]

The weaknesses within our law manifests in Canada's enforcement record. Since the *Competition Act* was first enacted in 1986, the Competition Bureau has only filed 18 challenges and 81 consent agreements. In the past six years, less than one percent of mergers involving Canadian firms resulted in a consent agreement or were abandoned by the parties because of a challenge from the Bureau.[xiii]

The government should introduce brightline market share rules like those considered in the 1981 consultation that led up to the 1986 *Competition Act*. Brightline rules would reverse the existing presumption that even mergers proposed by dominant firms are likely benign, focusing those firms instead on achieving organic growth through investment and fierce competition. This brightline approach should intensify according to the level of dominance of a given firm, and ban mergers outright for firms with a commanding share of a market.

Consolidation is a one-way street. Today, the Bureau has a single opportunity to intervene in potentially harmful mergers and should be accordingly sceptical of mergers by incumbent players. Canada's already highly concentrated markets justify strict rules that deter harmful mergers from being proposed in the first place, and instead encourage organic growth through fierce competition.

To remedy Canada's current permissive merger enforcement, brightline rules should be introduced in the following form:

- Mergers resulting in a combined market share of 30% or more are presumed to be illegal, but still possible if the parties can show clear procompetitive outcomes; and
- Mergers resulting in a combined market share of 60% or more should be banned outright, with no exception made for allegedly procompetitive mergers.

2.2 Expand the existing pre-merger notification system

Canada's current merger pre-notification system is ill-suited for a modern economy, with the Bureau noting that of the hundreds of Big Tech acquisitions over the past decade, it was only notified of five.[xiv] The system uses a Canada-centric view of revenue and asset size to determine whether a merger qualifies for notification. This means that Canada's notification threshold misses pre-revenue and low-asset companies, increasingly common in a digital economy, and the value of intangible assets such as high value data holdings. This is particularly the case if the acquirer has a significant presence outside of Canada, causing even acquisitions by major global firms to be missed.

Canada should incorporate transaction value into its notification threshold, adopting a similar approach to the FTC in the United States, as well as recent reforms in Germany and Austria.[xv] Unlike the current asset and revenue thresholds, the transaction value threshold should not be indexed to GDP, potentially missing a greater portion of transactions as the economy grows. Not indexing the transaction value thresholds would bring Canada in alignment with the systems implemented in Germany and Austria.[xvi]

2.3 Bring in open-ended merger review to protect long-term competition

Although the Bureau can in theory challenge any merger, not just those that are notified, this power is time limited, expiring one year after the close of the merger transaction. Merger challenges are complex, requiring large volumes of information from merging parties and the time and resources to conduct economic and legal analysis that will hold up in court. Outside of formally notified transactions, the relatively narrow window of time, parties are incentivized not to cooperate with the Bureau and instead "run out of the clock" until the Bureau's jurisdiction lapses.[xvii]

Moving away from the constraining one year window for merger review, the Government should introduce open-ended merger review, avoiding creating an artificial barrier to addressing harmful transactions. An open-ended window for the retrospective evaluation of mergers is a more appropriate response to the dynamic characteristics of digital markets, and would align Canada with the United States, which recently put this power to use conducting ex post assessments of past mergers by major digital firms.[xviii] It would also remove the incentive for firms to game the system with otherwise anticompetitive transactions.

This opening should also be paired with a streamlining of the Bureau's merger clearance system. Currently, Canada has two types of clearance programs for mergers that are unlikely to generate competitive harms, No-Action Letters (NAL) or Advance Ruling Certificates (ARC). This system adds an additional burden to the Bureau, requiring staff to scrutinize likely unproblematic mergers to determine whether they require an ARC over a NAL. This analysis ties up valuable resources to the exclusive benefit of providing additional certainty to the merging parties. There is no ARC-like clearance for mergers in the US system.[xix] Removing the ARC option would allow the Bureau to focus more resources on identifying and addressing anticompetitive mergers.

2.4 Modify merger provisions to capture "roll-ups" and "creeping acquisitions"

"Serial" or "creeping" acquisitions are cases where, through a series of small mergers, a major company rolls up an otherwise fragmented market. These transactions are problematic because they can lead to significant concentration within an industry without triggering notification to the Bureau. These transactions allow companies to aggregate market power, leading to higher prices while going unnoticed by regulators. Private equity firms are well positioned to roll up markets, and 2021 saw the highest private-equity deal count on record in Canada, with 84% of all deals falling under $25 million.[xx]

The government should add a provision to the *Competition Act* that enables the Bureau to consider the collective anticompetitive harm of all acquisitions made by an acquirer in a given time period. Learning from the UK, Canada should require special notification rules for sectors vulnerable to serial acquisitions, requiring large players or private equity firms in those sectors to notify the Bureau of any acquisitions, no matter their size.[xxi]

These amendments should be part of a broader reorienting of Canada's competition law towards an incipiency standard akin to Section 7 of the US Clayton Act.[xxii] Of a kind with the proposed broader shift away from an effects-focused approach to competition law, a focus on incipiency seeks to prevent the harms of monopoly before they manifest in a market. Once economic harm has occurred, when businesses have had to exit the market or have been substantially weakened, it can often be too late to truly remedy the situation. Like concentration, the prevention or lessening of competition is often a one-way street, particularly in an environment where investigations and resolution of cases are a multi-year affair. Learning from our partners in the U.S., a focus on addressing monopoly in its incipiency is more

likely to effectively protect competition rather than a remedial approach that waits for substantial harms to occur.

2.5 Remove the harmful, misguided and outdated efficiencies defence

Sections 96(1) and 90.1(4) of the *Competition Act*, the so-called "efficiencies defence", permits mergers and competitor collaborations that are harmful to competition if they create sufficiently large efficiencies, including layoffs.[xxiii] The provision permits mergers that decrease competition and undermine the economic welfare of consumers and workers, while enhancing the wealth and income of business owners. The nature of the trade-off aside, empirical evidence increasingly finds that merger efficiencies are not realized, or cannot fully offset competitive harms.[xxiv]

Some proponents of the defence argue that it enhances the efficiency of the economy by permitting mergers that provide "innovation and productivity improvements through dynamic efficiencies, increased economies of scale, and greater incentives to develop new products and services".[xxv] They argue that critics of the defence overlook the importance of dynamic efficiencies whereby mergers allow the most productive competitors to grow to dominate markets, replacing less productive firms. In this view greater market concentration provides favorable conditions for innovation by reducing the duplication of R&D efforts. Further, greater market power that comes from being dominant in a market can increase the returns to innovations and allow firms to accumulate wealth from consumers to fund more innovation.[xxvi]

However, looking at the firms that have made use of the defence to acquire competitors, it is far from obvious that these companies have delivered many of the benefits claimed by proponents of the defence, save economies of scale. Since the introduction of the *Competition Act* in 1986, there have been six instances when the defence has been successfully evoked, based on publicly available information.

1. Superior Propane's acquisition of ICG in 1998.
2. Superior Plus Corp.'s proposed acquisition of Canexus Corporation in 2016, which was subsequently challenged by the US Federal Trade Commission.[xxvii]
3. Superior Plus LP's acquisition of Canwest Propane in 2017, which created further concentration in the retail sale of propane for ten communities.[xxviii]
4. Tervita's acquisition of a landfill permit from Babkirk Land Services 2010, resolved in the Supreme Court in 2015 (Tervita Corp. v. Canada (Commissioner of Competition), 2015).
5. The merger between First Air and Calm Air in 2015, which are airlines that both serve the North.[xxix]

6. Canadian National Railway Company's acquisition of H&R Transport Limited in 2019, which caused increased concentration in the market for refrigerated transportation services.[xxx]

Of all mergers that have been permitted through the efficiencies defence, most involved firms that operate large distribution networks essential to Canadians. The efficiencies defence was likely successful in these cases because it allowed these businesses to cut redundant networks, reducing both duplication and consumer choice. While duplication of critical distribution and transportation networks may not be "efficient," it may be prudent for national security and economic resiliency reasons. For example, if Canadian National Railway Company's acquisition of H&R Transport Limited were not permitted, Canada would have had greater capacity to distribute vaccines in the early days of the 2020 pandemic.

The government should remove the efficiencies defence and instead focus the *Competition Act* on preventing anticompetitive behaviour, incentivizing merging parties to recognize efficiencies through organic growth and procompetitive means. Other jurisdictions such as the US and EU have some bounded form of efficiency defence, requiring that efficiencies translate into benefits for consumers.[xxxi] However, evidence from the US and EU show that despite laws and guidelines that require efficiency gains to translate to consumer benefit, enforcers of the law have generally not been successful at implementing these laws and guidelines, and harmful mergers have been allowed.[xxxii] Removing the efficiencies defence altogether would align with this evidence and would make Canada's law more advanced relative to international peers.

2.6 Protect growing competitors in dynamic markets

As a result of the Supreme Court's decision in the *Tervita* case, the *Competition Act* has a high bar for proving that a transaction prevents future competition. Clearing this bar requires the Bureau to not only identify firms the merger would prevent from entering the market, but also show that without the merger those firms would be able to have a substantial effect on competition in a discernible time frame. This makes it extremely difficult for the Bureau to prove a prevention case, and focuses attention on attempting to predict the future rather than preserving potential competition. In digital markets where smaller players can have an outsized effect on competition, it is unclear whether it is possible for the Bureau to bring such a case.[xxxiii]

In alignment with the Bureau's proposal, Canada should reform the test for finding a substantial prevention of competition and focus the Bureau on protecting emerging competitors in dynamic markets. The *Act* should be revised to lower the threshold

for intervention away from a likely substantial prevention of competition, and enact a similar to that proposed in the United Kingdom, focusing on the "realistic prospect" of preventing competition. Reforms that increase the flexibility of enforcement against prevention of future competition would reorient the Bureau away from fruitlessly attempting to predict the future and instead valuing the potential competitive force small but growing can exert.[xxxiv]

2.7 Create a preference for simple and effective remedies

Even once a harmful merger has been identified and the Bureau has intervened to stop it, Canadian competition law includes a preference for complex and risky remedies that do not fully address the competitive harms brought about by the merger. The standard for remedies in Canada is not restoring competition to pre-merger levels but the removal of the "substantial" from a substantial lessening or prevention of competition. Competition law jurisprudence also guides the Bureau and Tribunal to pursue the least intrusive method of addressing competitive harms. This means our law prefers overly complicated remedies that still reduce competition over outright blocks of mergers. No such remedy has ever been ordered despite requests from the Bureau.[xxxv]

Reform of Canada's competition law should override the *Southam* jurisprudence that shapes the current approach to remedies and instruct the Competition Tribunal to favour straightforward and effective remedies that generate minimal administrative burden. The law should create an explicit preference for outright blocks of harmful mergers, and rarely allow for narrower structural remedies. By reversing the current preference for complex remedies that allow otherwise harmful transactions to go ahead, merging parties will be deterred from proposing harmful mergers in the first place.[xxxvi]

2.8 Require the Bureau to conduct routine merger retrospectives

Today, the Bureau has no way of knowing whether or not remedies ordered by the Tribunal have been effective in addressing competitive harms, or whether the decision not to intervene in a merger was correct. Because of the limitations on the Bureau's information gathering powers, the Bureau cannot compel industry data outside of an investigation. Though the Bureau could include data sharing as a requirement in a consent agreement, there is no way for other industry participants not involved in the consent agreement to show data because these agreements are

only binding on the parties to a merger, robbing the Bureau of an industry-wide view.

Reflecting the evolving nature of markets in our economy, the Bureau should have the tools and information to learn from past action or inaction and adapt its approach accordingly. A key use of streamlined and expanded information gathering powers should be conducting retrospective studies of the effectiveness of merger remedies.

At a set date following the enactment of a consent agreement, the Bureau should be required to conduct a retrospective study of the remedy and report back those findings to Parliament and the Canadian public. Beyond merger remedies enacted, the Bureau should also be required to conduct studies of select mergers which met the revised pre-notification threshold but on which it did not pursue a section 92 challenge. For example, the Bureau could adopt a merger review program like that of the US Federal Trade Commission's Merger Retrospective Program.[xxxvii] These reviews should focus on material transactions and mergers in dynamic and critical markets.

3. Preventing corporations from abusing their dominance

Though strong merger law is a requirement for halting further consolidation in Canada, we must still grapple with the monopoly power already existing in many markets. To address monopoly power that has been allowed to take root, Canada needs a flexible and effective abuse of dominance framework that protects Canadians and promotes fair competition.

3.1 Modernise the substantive test for abusive conduct

Like the *Act*'s merger provisions, the requirement to show "substantial" effects of the conduct being investigated under the abuse of dominance provisions contributes to Canada's low enforcement activity. This requirement narrows the focus of our law and allows anticompetitive conduct to flourish in the Canadian economy. In contrast to the flood of competition law activity in other jurisdictions, the Competition Bureau has not brought an abuse of dominance case since 2016.

Canada's current approach to abuse of dominance is fundamentally remedial, and misaligned with the nature of the economic harm caused by abuses of corporate dominance. Requiring not just anticompetitive conduct on the part of dominant

firms, but a showing of substantial effects as well creates room for anticompetitive conduct or the threat of that conduct to weaken the potential of competitors to dominant firms. This is made worse by the limited injunctive powers of the Act, unable to stop otherwise irreparable harm from occurring while a case is investigated and litigated. A competition law enforcement framework that routinely takes years to resolve cases means harms can continue to occur even in the rare case where the Bureau decides to challenge conduct.

Canada's approach also runs counter to the incipiency focus of US antitrust law, which aims to address the harms of monopoly before they can cause substantial harm to the economy. Once businesses have been substantially weakened or forced to exit the market as a result of anticompetitive conduct, there is often no going back. The substantial effects test, in conjunction with limited injunctive powers to stop conduct while it is being investigated, and the prolonged nature of competition law investigations and litigation results in a system ill-equipped to actually protect competition.

To remedy this situation, the government should remove the effects test, while preserving the existing two part tests for dominance and anticompetitive conduct. An abuse of dominance provision refocused on protecting fair competition would reverse the existing devaluation of the role of emerging and potential competitors in Canada's concentrated markets, often the only hope for revitalising stagnant markets. By maintaining an openness to arguments that investigated conduct is legitimately procompetitive, this approach would encourage dominant firms to compete on the merits, rather than attempting to skirt the line of substantiality with their anticompetitive conduct.

3.2 Put a stop to exploitative conduct

Other jurisdictions, most notably the EU, have laws that allow businesses to be fined for abusing their dominant position to exploit purchasers or sellers. These abuses could include setting unfair prices. For example, the European Commission pursued action against Aspen, a pharmaceutical company that increased the price of off-patent cancer medicines by several hundred per cent.[xxxviii]

Canada has no equivalent exploitation doctrine. As a result, dominant firms in Canada can leverage their market power to earn excess profits, exploit consumers or even exploit workers. In our current high-inflation environment where there are concerns that firms are using inflation as cover for setting higher prices and exploiting consumers, the Competition Bureau does not have the tools to tackle excessive pricing head-on once a corporation has established market power.[xxxix]

Canada, a country with higher levels of market concentration than peer jurisdictions, should have the power to rein in exploitative conduct.[xl] The government should integrate an exploitation doctrine into Canada's abuse of dominance framework, aligned with the current approach taken in the EU. Just as Canada's competition law should shift away from a focus on effects towards addressing anticompetitive conduct, that focus should be broadened to include exploitation by dominant corporations.

3.3 Remove the business justification loophole

Canada's abuse of dominance jurisprudence has created a precedent for considering "business justifications" when evaluating problematic conduct, effectively a business justification defence.[xli] These justifications can include "reducing the firm's costs of production or operation, or improvements in technology or production processes that result in innovative new products or improvements in product quality or service."[xlii] The business justification defence means that corporations can pursue harmful business practices if they can effectively claim that they improve efficiency. This shadow efficiency defence narrows the kind of harmful conduct that the Bureau can intervene against, similar to its equivalent in Canada's merger law.

As part of the broader shift away from the focus on efficiency in Canada's competition law, Government should override the abuse of dominance jurisprudence to make clear that business justifications should not be able to excuse otherwise anticompetitive conduct. The goal of Canada's abuse of dominance law should be the deterrence of anticompetitive conduct and the promotion of legitimately procompetitive conduct, not the creation of exceptions to fair competition.

3.4 Streamline the Bureau's ability to gather information

The foundation of an effective competition law is the ability of competition law enforcers to quickly and comprehensively collect the information needed to understand dynamic and often opaque markets. The Bureau's primary tool for gathering information in an investigation are court orders requiring a judge to compel the production of testimony and the information of a business. This process can set an investigation back by months, and differs from jurisdictions like the US, EU and Australia where the enforcer itself is able to compel the production of information.[xliii]

Following the recommendation suggested by the Bureau itself, the Government should streamline the Bureau's ability to gather information in a competition law investigation without judicial approval. Examples of preferable models can be drawn internationally or from other domestic agencies, such as the Ontario Securities Commission.[xliv] Streamlining information gathering will reduce the average length of an investigation and allow the Bureau to better understand dynamic markets and respond quickly to emerging forms of problematic conduct.

3.5 Strengthen the ability to tackle arrangements or agreements that lessen competition

Section 90.1, arrangements or agreements that prevent or lessen competition, only applies to current or proposed competitor collaborations, and provides no options for penalties. This means that the Bureau is unable to seek recourse for any harmful agreements that existed in the past. It also allows for situations where "parties to an agreement could merely terminate any agreement that draws the Commissioner's scrutiny, and then reinstate it at a future time."[xlv]

Section 90.1 should be revised to include past competitor collaborations, even if the harm from these collaborations has ceased, and allow for the Bureau to apply for an order from the Tribunal for monetary or structural penalties. This proposal aligns with that put forward by the Competition Bureau.[xlvi]

4. Enhancing the administration and enforcement of the *Competition Act*

The effectiveness of the *Competition Act* is a function of the organisations and mechanisms tasked with enforcing it. Canadians need not only a well-resourced enforcer, but also one with the tools to learn and adapt with the changing nature of the Canadian economy. When cases are brought, they should be adjudicated fairly and efficiently, particularly if Canada is to depart from its historically low levels of enforcement activity and make competition a focus of its economic policy strategy.

4.1 Increase funding to the Competition Bureau

Although Budget 2021 allocated an additional $96M in funding to the Competition Bureau over the next five years, more funding is required to empower the Bureau to adequately address competitive concerns within the Canadian economy.[xlvii] The

recent Rogers-Shaw merger hearings are just the latest example of the imbalance between the Competition Bureau and industry players, with the merging parties and Vidéotron spending tens of millions of dollars on multiple top-tier litigation firms to push through the harmful merger in comparison to the Bureau's $11M cost award request for the case.

Enforcement of Canada's competition law delivers value to Canadians, and we should be investing in it. Competitive markets reduce the costs of goods and services, and competitive labour markets allow Canadians to earn the wages they deserve. Following any amendments to the *Competition Act* the Government should commit additional resources to the Bureau, with a focus on injections of funding for investigations of mega-mergers, which the most recent funding increase is not earmarked to support.

Canada's merger filing fee system should be updated to reflect the actual cost of regulating and litigating mergers, particularly mega-mergers like Rogers-Shaw. A new filing fee system should be adopted akin to the new system enacted for the Federal Trade Commission (FTC) for 2023. Under the new system, filing fees are set based on the size of the transaction, with smaller transactions paying smaller fees.[xlviii] This would more closely align resources with the costs associated with investing and litigating mega-mergers, rather than the current system where large mergers are effectively subsidised by less significant mergers. For comparison, if Canada were to have implemented a system like the FTC's to the Roger-Shaw, the parties would have paid a filing fee of $2.25M. In reality the fee they paid was approximately $75,000. This fee represents less than 1% of the cost of litigating the case.

4.2 Increase funding towards research on the consequences of monopoly

There is a severe lack of in-depth research on the state of competition and corporate power in Canada, as well as the effectiveness of enforcement decisions by the Bureau. This lack of insight hinders the ability of policy makers, law enforcement, and courts to make evidence-based decisions on competition policy. It also makes Canada reliant on research done by private consultancies and authorities in other jurisdictions, which may not fully reflect the economic realities of the Canadian context.

Canada requires a robust research program that is publicly funded and provides publicly accessible research on issues related to competition, corporate power, and the effectiveness of our competition law and its enforcement. Our understanding of monopoly cannot be dependent on research undertaken by private actors who

benefit from the status quo. Statistics Canada, ISED, the Bank of Canada, and other departments within the Government have undertaken important research reports on the topic of competition within Canada, and dedicated funding should be increased to enhance their capacity to provide rigorous and timely analysis.

4.3 Give the Competition Bureau full market study powers

The inability for the Competition Bureau to compel information from businesses when undertaking market studies is an embarrassing deficiency in our legislation, and as the Bureau points out, long out of step with other jurisdictions.[xlix] This inability severely limits the ability of the Bureau to understand new and emerging markets and the effectiveness of its own enforcement decisions.

The Government should allow the Bureau to compel information from private parties without a corresponding enforcement action. Market studies should be publicly announced, require routine public updates on progress, and require the Bureau to accept comments from the broader public. A potential legislative model is the revisions proposed in Bill C-452, introduced in 2009 to allow for inquiries within sectors but never enacted.[l] Balancing concerns about overreaching studies, the *Competition Act* can adopt a model similar to the Competition and Markets Authority (CMA) in the UK, with bounded timelines and scope of market studies.

4.4 Increase the Bureau's level of transparency with the public

Corresponding with this increase in funding should be an increase in the level of transparency between the Bureau and Canadians. Canadians have no consistent way of knowing the number or nature of ongoing investigations, and whether the Bureau is aware of or reviewing a given merger. Though Section 29 of the *Competition Act* suggests a high degree of secrecy, recent but modest steps towards transparency suggest flexibility on the part of the Bureau. Some examples of this transparency include the Bureau's submission to the consultation *Examining the Canadian Competition Act in the Digital Era*,[li] its public request for input for it's investigation into Amazon,[lii] and its public announcement of its intention to review the proposed acquisition of HSBC Bank Canada by the Royal Bank of Canada.[liii] But this flexibility is left to the discretion of the Commissioner of Competition. A lack of consistent transparency erodes trust with the public, and raises concerns about accountability within Canada's competition law framework.

Transparency requirements should be codified into the legislation, and Bureau funding and personnel should be dedicated to meet these legal requirements on a routine and timely basis. Canadians should be able to see what investigations and litigation the Bureau is currently engaged in, and be provided a view of their progress. The Government can look to international partners, particularly the CMA in the UK, which maintains a public record of ongoing investigations, with routine updates as they progress, as a potential model to emulate.

4.5 Reform the Competition Tribunal

If Canada is going to depart from its current low activity approach to competition law and make vigorous enforcement a priority going forward, it will need an adjudicative system that can handle this increased volume of cases. With an existing system appearing to strain under the current status quo, something must change if Canada chooses to centre competition policy in its economic strategy.

Part of the rationale for the Competition Tribunal's current structure was the belief that there needed to be a specialised body to hear competition cases given their complexity. But this specialisation has come at the cost of concentrating the decision makers in Canada's competition law, with Rosenthal and Rosner noting that two judges have effectively made all Tribunal decisions in the past decade.[liv] This limited set of voices creates a bottleneck in the adjudication of competition law and stifles the evolution of jurisprudence.

Rather than surrendering to the idea that competition law cases are necessarily complicated, the Government should aim to simplify the application of the law such that a wider body of adjudicators can participate in generating a rich and effective body of case law that reflects Canada's evolving economy.

Though a proposed model is outside the scope of this submission, CAMP encourages the Government to consider models implemented in other jurisdictions to expand the capability of Canada's competition law system to effectively and efficiently adjudicate cases and ensure that it is informed by a diversity of viewpoints.

Conclusion

The current global antitrust movement provides Canada with an opportunity to evaluate the performance of our current competition law regime and strike a new, more fruitful path forward. The narrow efficiency focus that has grown to dominate Canada's competition law has resulted in a low activity body of law ill-equipped to protect competition in markets across the country. As Canada progresses into the

digital age and whatever economic shifts may come in the future, a robust competition law is necessary to promote a dynamic and productive economy, one that allows emerging competitors to grow and challenge the dominance of entrenched incumbents.

Canada can accomplish this task by emboldening the purpose of our competition law, adopting a modern understanding of the potential harms of mergers, bolstering our approach to prevent abuses of dominance, and investing in an enforcer and institutional framework suited for one of the world's top ten economies. Reform will not be easy, and a truly effective law will run counter to the interests of incumbents that seek to maintain their dominant positions. But the rewards for creating such a law, in concert with our international peers, will be a more prosperous, productive and dynamic Canadian economy for decades to come.

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