Reforming the Competition Act:

SUGGESTED CHANGES TO ENHANCE COMEPTITIVES AND EQUITY IN THE CANADIAN ECONOMY

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Summary

This brief aims to highlight potential changes to the Competition Act and other policy proposals that could enhance its effectiveness as a tool for promoting and protecting competition in our modern economy. The proposals I put forward are summarized below.

1. Re-establish the Economic Council of Canada to advance further research on competition in Canada and create a forum for transparent, democratic debate on competition policy.
2. Include a provision in the Competition Act that requires the Act be reviewed every five years, in a similar way that parliament regularly reviews the Bank Act and other legislation pertaining to financial institutions.
3. Make the Commissioner of Competition an Agent of Parliament, removing the Competition Bureau (the Bureau) from the purview of the Ministry of Industry, Science, and Economic Development Canada (ISED) and enhancing its independence.
4. Make changes to the Act to enhance its efficient enforcement, including simplifying the provisions related to our merger review system.
5. Provide the Bureau with the power to compel information from businesses when undertaking market studies.
6. Reform section 45 of the Act to make wage-fixing agreements criminally illegal.
7. Encourage the Bureau to make enforcement guidelines that are specific to labour markets.
8. Abolish the efficiencies defense for mergers (and joint collaborations under section 90.1).

Many other changes could be made to the Competition Act that I have not discussed in depth in this brief, but that are still important and worthy of further investigation.[1]

Reforming the Competition Policy Landscape

In April 2002, the Standing Committee on Industry, Science and Technology tabled the report *A Plan to Modernize Canada's Competition Regime*. The Committee contemplated whether competition laws could threaten to stifle the growth of new, innovative firms like Amazon, which launched just seven years prior. The Committee rationalized that even if firms like Amazon came to dominate their markets, the industrial structures and innovative nature of our new knowledge-based economy

[1] A topic I have not delved into in this brief is the role and scope of legal tests in determining anticompetitive conduct (i.e. "per se" versus "rule of reason"). Another area I believe is worth exploring is the role of consumer protection in competition policy.

would mean that "market dominance, when it occurs, is likely to be relatively short-lived" (Standing Committee on Industry, Science and Technology, 2002, p.25).

With the benefit of hindsight, we can see that witnesses and the Committee may have been overly optimistic about innovation in the new knowledge-based economy and its ability to keep firm dominance in check. In our recent paper, Vass Bednar and I argue that, in fact, dominance in the new economy is more durable than ever before because of the unique characteristics of digital commerce (2021). Digital firms like Amazon can achieve scale at an unprecedented rate, and with the power of data, can further grow their dominance and reinforce it.

Furthermore, modern economic research conducted in the last decade, and mainly in the US, has pointed to troubling trends in competition. These trends raise questions about the effectiveness of American and, by extension, Canadian competition policy. In my view, the evidence suggests the need for a fundamental rethink of our competition policy systems and the nature of competition more broadly. Vass Bednar and I outline some of this research in our recent paper (2021).

In its 2002 report, the Committee asserted that the "Competition Act is a modern piece of legislation that reflects contemporary economic thinking" (p.3). Since then, there have been some significant changes to the Act, notably major revisions to section 45, which pertains to conspiracies, agreements, or arrangements between competitors. However, the core of our Act has remained substantially unchanged since 2002. Given what we know now and our experience with the digital giants, we can no longer claim that the Act is based on modern economic knowledge. We also cannot be confident in the Act's ability to protect and promote competition in our modern economy that is increasingly becoming digitized.

A comprehensive review of the Act is needed. As part of this review, parliament, academia, and civil society need to fundamentally rethink our understanding of competition and its contribution to society. However, I believe that we are not prepared for such a review. We lack the institutional infrastructure needed to have an open and transparent discussion on competition policy in Canada. I fear that if parliament were to commit to fundamental reforms to the Competition Act and the Competition Tribunal Act, we might open ourselves up to reforms shaped by political interests rather than evidence.

As Vass Bednar stated in her testimony at the Committee's April 15, 2021 meeting, there is a significant amount of capture in the competition-policy space. Currently, much of Canada's competition policy discussion is couched within our nation's "competition law industry." Many of the people most engaged in public competition policy discussions in Canada are competition lawyers that represent businesses investigated by the Bureau and academic experts often hired by either the Bureau or businesses to provide expert analysis that supports investigations or litigation.

It is crucial that people in the industry share their expertise and opinions to inform competition policy. However, I believe we have historically over-relied on these individuals to shape policy. Vass Bednar and I outline this issue in our recent report (2021). Our reliance on the legal bar and others in the competition law industry is understandable since Canada lacks institutions that can openly provide neutral and trusted insight into our competition policy.

Therefore, my suggestion to parliament is to create an institutional infrastructure that enables transparent discussion and examination of Canada's competition policy. Specifically, I recommend that parliament reinstitute the Economic Council of Canada and give it the responsibility to lead competition policy development. This suggestion builds on the recommendations put forward by the Council of Canadian Innovators during the Committee hearing on April 20, 2021.

Large businesses, small businesses, consumers, workers, and even the Competition Bureau often have conflicting interests and diverse needs concerning competition policy. To make an effective competition policy that works for all Canadians, we need a neutral space like the Economic Council of Canada for understanding these interests and finding solutions that attempt to meet all stakeholder's needs.

I also suggest that the Economic Council of Canada have the responsibility to undertake in-depth research into the state and nature of competition in Canada. Relative to the US, we have limited knowledge of competition in Canada. A notable exception is the paper done by Bawania and Larkin (2019) that highlights the rise of firm concentration in Canadian industries. This lack of insight severely undermines our ability to make informed, evidence-based decisions on the nature, form, and content of competition law and policy in Canada.

With an ongoing research program devoted to understanding and tracking competition in Canada, parliament would have the resources it needs to make regular, evidence-based changes to the Competition Act and other relevant legislation. Once this institutional foundation is in place, I believe parliament should add a provision to the Competition Act that requires it to be reviewed every five years. Regular reviews of the Act will ensure that the legislation is responsive to the needs of businesses and aligned with current economic realities.[2]

[2] The Bank Act and other financial sector laws contain "sunset clauses" that require parliament to undertake regular legislative reviews. However, I do not believe these clauses could serve as a model for a similar clause within the Competition Act. Rather, the Committee may wish to identify competition laws elsewhere that contain provisions that force regular reviews of legislation.

Greater Independence

Former Commissioner John Pecman's 2018 paper in the Canadian Competition Law Review titled *Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau* provides a detailed overview of why it is critical for the Competition Bureau to be independent of ISED, as well as specific recommendations on how this can be done.[3]

The Competition Bureau has less independence relative to many of its international peers (Wise, 2002). Currently, the Commissioner of Competition serves as a senior officer of ISED and is directly answerable to the deputy minister. Enforcement actions of the Bureau are not subject to ministerial review or approval. However, the Commissioner reports to the deputy minister for non-enforcement matters, including policy and finances (Pecman, 2018).

The current structure of the Bureau within ISED makes it more vulnerable to political interference than other leading competition agencies around the globe. The current arrangement means that the Bureau's policy recommendations can be/are vetted by the deputy minister of ISED and that the Bureau, in effect, has no public voice of its own when it comes to policy matters. Thus, the current structure prevents the Bureau from meaningfully engaging in open and transparent discussion on competition policy. The current structure also places restrictions on how the Bureau spends its money internally, which could have implications for effective enforcement.

Pecman suggests several structural changes that would enhance the independence of the Bureau.

1. "Conversion of the Bureau to a Separate Entity"

The Commissioner would be an Agent of Parliament, making him accountable to parliament, not cabinet (Barnes, Brosseau & Hurtubise-Loranger, 2009). The US's Federal Trade Commission, the Australian Competition and Consumer Commission, the Autorité de la concurrence in France, and Germany's Bundeskartellamt are all organized similarly (Pecman, 2018). This option provides the Bureau with the most independence, relative to the other options outlined below, and is my recommended approach out of the three options presented.

[3] In addition, Pecman (2018) also highlights the possibility of political interference through certain provisions of the Act (section 94 in particular) that give the ministers of finance and transportation the authority to prevent the Competition Tribunal from acting against a merger (i.e. issuing an order under section 92). I do not address this issue here, but section 94 it may be worth considering as part of a broader evaluation of the potential for political interference within our competition policy system.

2. "Bureau to Report to Another Department"

Under this system, a new department would be created that is dedicated to competition issues, which is somewhat akin to how the competition function of the European Union is organized. Alternatively, the Bureau could become part of the Department of Justice, like the Antitrust Division of the US Department of Justice (Pecman, 2018). These approaches remove the Bureau from ISED, insulating it from potential political conflict concerning industrial policy. However, these arrangements would still make the Bureau indirectly answerable to cabinet, which may pose political interference issues.

3. "Bureau made a Portfolio Partner within ISED"

The Bureau could be made a Partner Organization to ISED, similar to the Canadian Radio-Television and Telecommunications Commission, Statistics Canada, or the Canadian Food Inspection Agency (Pecman, 2018). However, based on information provided in the Privy Council Office's *Guide Book for Heads of Agencies: Operations, Structures and Responsibilities* in the federal government, this arrangement would likely not be significantly different than the Bureau's status quo (1999).

More Efficient Laws

In a 2002 OECD paper, Michael Wise points to legislative changes that could make the application of Canada's competition law more efficient. One of his core suggestions is to allow for private access to the Tribunal, which would "give the now-underemployed Tribunal a larger role in developing policy" (2002, p.44). In addition to the changes put forward in the 2002 OECD report, I believe that legislative changes related to Canada's merger clearance system could also make enforcement of the Competition Act more efficient. There are two factors at play in Canada's current system that undermine efficiency.

First, due to revisions to section 97 of the Act in 2009, the Commissioner can only challenge a merger within one year after the transaction is completed.[4] This rule contrasts with the US system, where authorities can review or re-examine a transaction at any time (Patel, 2020).

Canada's limited time window for reviewing mergers means that the Bureau faces greater negative consequences of making an enforcement error than competition authorities in the US. If the Bureau makes a mistake and overlooks a harmful merger, that error is likely to be "permanent" because the Bureau cannot revisit the merger one year after the transaction takes place. Thus, officers need to do a more thorough analysis of mergers that are unlikely to raise competition issues to ensure that, on the off chance the merger is a problem, they can catch it before they lose the

[4] Prior to 2009, the Commissioner could challenge a merger within three years.

opportunity to address it. This situation ties up resources that could be spent on higher-impact enforcement activity, like reviews of mergers that are clearly problematic or taking on abuse of dominance cases.

Second, in effect, Canada has two types of "clearance" for mergers, which further ties up resources. Upon reviewing a merger, the Bureau typically issues either a No-Action Letter (NAL) or an Advance Ruling Certificate (ARC) (Competition Bureau, 2000). A NAL indicates that the Bureau does not intend to take action against a merger at this time, which leaves open the possibility that it will revisit the merger within one year after the merger occurs.[5] However, when the Bureau issues an ARC, it is committing never to revisit the merger.

Canada's two-tiered system for merger clearance adds an additional burden to the Competition Bureau because it requires officers to further scrutinize likely unproblematic mergers to determine whether they are sufficiently benign to warrant an ARC over a NAL. This additional analysis further ties up valuable resources to the exclusive benefit of the merging parties. There is no ARC-like clearance for mergers in the US system.

Aligning our merger clearance system so that it resembles that of the US could create efficiencies by reducing the amount of in-depth analysis officers undertake on mergers that are likely not to raise competition issues.

Market Studies

In 2010, the Committee heard testimony on Bill C-452, *An Act to amend the Competition Act (inquiry into industry sector)*. This bill would have enabled the Commissioner to launch industry inquiries and compel non-public information from businesses without direct allegations of wrongdoing under the Act. The member who brought forward this bill, Mr. Robert Vincent, pointed out to the Committee that competition authorities in the US, UK, Australia, and the EU can launch industry inquiries and collect critical information from businesses in the process. Ultimately, Bill-452 failed to receive Royal Assent.

The Competition Bureau must be able to access businesses' information for all its investigations, including market studies. Information from businesses provides the Bureau's officers with the detailed data they need to understand whether anti-competitive behaviors are taking place and the impact of those behaviors. In most cases, the Bureau cannot undertake meaningful investigations with publicly available information alone.

Nothing prevents the Bureau from undertaking a market study using publicly available information or information freely provided by businesses. However, the

[5] It is similar to an “early termination notice” in the US system (Federal Trade Commission, 2021).

Competition Bureau can only compel information from businesses if there is an indication that a business is engaging in behavior that contravenes the Act.[6] This requirement poses a conundrum for the Bureau, notably for conduct that is not highly visible to the public or where there is limited publicly available information. How is the Bureau expected to identify potential anti-competitive behavior if it cannot access the information it needs to do so? Giving the Bureau the power to compel information from businesses when it undertakes market studies provides it with a means to obtain this valuable information, increasing its effectiveness.

As Vass Bednar and I have pointed out elsewhere, the US Federal Trade Commission launched an investigation into the past merger activities of the largest big tech companies in February 2020. By December, it filed its suit against Facebook, asserting that its acquisitions of Instagram and Whatsapp were anti-competitive. We believe it is unlikely that the FTC would have launched this landmark case were it not for the industry probe they commenced months earlier (Bednar & Shaban, 2021).

To give the Bureau the ability to undertake in-depth market studies, parliament could adopt the proposed revisions to the Competition Act outlined in bill C-452 previously mentioned. Alternatively, parliament could draw inspiration from the language used in the Federal Trade Commission Act in the US or the laws of the many other jurisdictions that have competition authorities with this power.[7]

Lastly, it is also worth noting that historically members of Canada's legal bar, who represent firms that engage with the Bureau, have been hostile to the fact that the Bureau can compel any information from businesses. The bar's views were reflected in a 2008 study done for the Bureau on the use of section 11 orders, which are the primary mechanism by which the Bureau can compel information from firms in the context of a civil investigation. The authors of the study remark,

> *"[d]uring our consultations, it became apparent that the private competition law bar's main criticism was levelled at the existence of a s. 11 power itself. In our view, however, there is no doubt that s. 11 is a necessary power to enable the Commissioner to effectively administer and enforce the Act*" (Glover, 2008).

It is important that businesses not be excessively burdened by information demands from the Bureau. However, firms regularly volunteer information to the Bureau either as targets of an investigation or market informants. Giving the Bureau the ability to oblige firms to provide information for market studies legally would

[6] Section 10(1) details the situations in which the Commissioner can launch an inquiry.
[7] The OECD's 2018 study *Market Studies Guide for Competition Authorities 2018* may also be useful to the Committee (OECD, 2018)

likely be most burdensome for those firms that choose not to be forthcoming with information.

Labour Markets

Based on my own search, no publicly available information exists to suggest the Bureau has ever investigated potential anti-competitive behavior against workers. Unfortunately, the Competition Bureau is not the only authority that is a laggard in this regard. Competition authorities worldwide are only recently beginning to acknowledge the importance of healthy competition in labor markets and the role that competition law can play in ensuring that healthy competition (OECD, 2020). As the nature of work shifts and gig work mediated by digital platforms becomes more prevalent, healthy competition in labor markets will only become more imperative.

In Canada's case, there are several factors that undermine effective competition law enforcement in labor markets. The first significant issue relates to section 45 of the Competition Act, which deals with conspiracies, agreements, or arrangements between competitors. In 2009, there were significant revisions made to this section of the Act, and many of these changes were positive. However, one negative change made to the provision was that its scope was limited to conspiracies that fix prices of good sold, restrict output, or allocate markets amongst competitors. Prior to 2010, conspiracies that prevented or lessened the purchase of a product, such as a worker's labour, were criminally illegal.[8] Under the current provisions, this is no longer the case.

Wage fixing is not a criminal offense under our current laws, but such agreements may contravene section 90.1 of the Act, which is a civil provision. To craft a successful case under section 90.1, the Bureau must present evidence that meets several criteria: there is an agreement between competitors, the agreement is existing or proposed (not an agreement in the past), and that the agreement has resulted in a substantial lessening or prevention of competition. In its November 2020 statement regarding the limits of section 45 in addressing wage-fixing agreements, the Bureau points out that "[p]roving a substantial lessening or prevention of competition is not a low threshold" (even under a balance of probabilities). Furthermore, there is also a complementary efficiencies defense to section 90.1 similar to that of section 96(1) for mergers, which can make it even more challenging for the Bureau to successfully undertake a case.

A simple change parliament could consider to better support workers through the *Competition Act* is to revise section 45 so that it captures wage fixing as a criminal offense. For example, parliament could revise section 45(1)(a) to read (italics added):

[8] However, it is worth noting that the old provision was much less effective as an enforcement tool.

(a) to fix, maintain, increase or control the price for the supply *or purchase* of the product;

This change would make it feasible for the Bureau to prosecute blatant attempts to suppress wages.

Second, I find no evidence that the Bureau has assessed a merger's potential anti-competitive impact on jobs, even though it could. In this way, the Bureau is not fully enforcing the law. This is a major oversight, and to address this issue the Bureau should develop specific merger enforcement guidelines that outline how it plans to assess a merger's impact on wages, job quality and job availability. US competition authorities, the Japan Fair Trade Commission, and Hong Kong's Competition Commission have already developed enforcement guidelines as well as guidelines for human resource professionals to help them prevent anti-competitive acts that hurt workers (OECD, 2020).

Efficiencies Defense

Section 96(1) of the Competition Act, the so-called "efficiencies defense", is arguably one of the most controversial provisions of the Act. The provision permits mergers that are harmful to competition (i.e. they are contestable under section 92 of the Act) if the merger creates sufficiently large efficiencies that are merger-specific. In most cases, these efficiencies include job losses (Chiasson and Johnson, 2019).

These efficiencies created by the merger are weighed against the "anti-competitive effects" of the merger (Competition Bureau, 2011). If the efficiencies created by the merger are greater than and offset the value of the anti-competitive effects of the merger, then the merger is admissible. Typically, the anti-competitive effects of the merger that are considered are what economists call "deadweight loss": the inefficiency created when a merger leads to higher prices and decreased output in the market.

One of the clearest examples of the efficiencies defense in action is the litigated merger case involving Superior Propane Inc. and ICG Inc., two distributors of propane. The transaction was estimated to increase the price of retail propane in communities across Canada by about 8% and provide Superior with $40.5M more in annual revenue. Despite this, the merger was permitted because it was projected to create $20.2M in annual cost savings for Superior for the next 10 years, which included about 200 job losses. These cost savings dwarfed the estimated deadweight loss resulting from the merger, which was valued to be $3M year. The merger ultimately created a monopoly in the retail sale of propane in 16 communities across Canada, and near monopolies (80-per-cent market share or more) in 32 communities (The Commissioner of Competition v. Superior Propane Inc., 2002).

Since the introduction of the Competition Act in 1986, I have found six instances when the defense has been successfully evoked.

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 (Competition Bureau, 2016).
3. Superior Plus LP's acquisition of Canwest Propane in 2017, which created further concentration in the retail sale of propane for ten communities (Competition Bureau, 2017).
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 (Competition Bureau, 2017).
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 (Competition Bureau, 2020).

The efficiencies defense has been hotly debated ever since it was first introduced in 1986. Recently, contributors to the Canadian Bar Association's Canadian Competition Law Review – Chiasson and Johnson (2019) and Facey and Dueck (2019) – have openly debated the value of the efficiencies defense.

Chiasson and Johnson (2019) make several arguments against the defense, but one of their key claims is that the more competition a firm faces, the greater its productive efficiency. They claim that when firms face competitive pressure, they are more likely to develop innovations or implement innovative business practices that enhance their productivity. They substantiate their claim by presenting both case studies and macroeconomic research demonstrating the relationship between competition and productivity.

Facey and Dueck (2019) disagree, asserting that the defense 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" (p.35). They argue that Chiasson and Johnson overlook the importance of dynamic efficiencies whereby mergers allow the most productive competitors to grow to dominate markets, replacing less productive firms. Greater market concentration can also provide 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.

Ultimately, I find the argument put forward by Facey and Dueck less compelling. They may be correct that large, dominant firms can be more efficient or otherwise superior. However, looking at the mergers that have been permitted through the efficiencies defense, it is not obvious to me how these transactions would foster long-term innovation and dynamism in Canadian markets.

Furthermore, most of the mergers that benefited from the efficiencies defense involved firms that operate large distribution networks essential to Canadians. The efficiencies defense 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.

In his recent book, Roger Martin (2020), Professor Emeritus at the Rotman School of Management, echoes this sentiment. He argues that "our obsession with economic efficiency has featured too much pressure, too much connectedness, and too much pursuit of perfection, all of which has produced a dangerously unbalanced economy lacking resilience" (p. 216). He says further that "rather than striving singularly for ever more efficiency, we need to strive for balance between efficiency and a second feature: resilience" (p.25).

Many countries have efficiencies defenses, but few have defenses that are as permissive as Canada's. According to data reported in the Comparative Competition Law dataset, as of 2010 there are 70 jurisdictions (33.82% of all jurisdictions with a competition law) that have efficiencies defenses built into the law (versus regulations). Of these jurisdictions, Barbados, Malta, Mauritius, South Africa, and COMESA have efficiencies defenses with similar wording to Canada's (Bradford et al, 2019).

The US also has an efficiencies defense for mergers. But unlike in Canada, the US's defense is captured in regulation (the Horizontal Merger Guidelines), not legislation. Furthermore, it does not permit anti-competitive mergers on the basis that they create greater efficiency on net. Rather, efficiencies are an appropriate defense for a merger if they directly counteract the potential anti-competitive outcome of the merger (US Department of Justice & Federal Trade Commission, 2010).

In 2003 the Committee considered a substantial revision to the efficiencies defense (bill C-249) that is similar to that of the US.

> *"96. (1) In determining, for the purposes of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may, together with the factors that may be considered by the Tribunal under section 93, have regard to whether the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or product choices, and that would not likely be attained in the absence of the merger or proposed merger"* (An Act to amend the Competition Act, 2003).

While such a defense would be an improvement from the efficiencies defense we currently have, evidence from the US leaves me skeptical that it would be effective.

For example, a paper by Blonigen and Pierce (2016) demonstrates that, on average, M&A activity in US manufacturing sectors from 1997 to 2007 is associated with higher prices but not greater productivity or efficiency. A retrospective study by Ashenfelter and Hosken (2009) of five mergers that were on the margin of being problematic found that four of those transactions lead to higher prices. If US evidence suggests that its merger review system is not wholly effective at preventing price increases, adopting the US approach to evaluating mergers and their efficiencies may not be beneficial to the Canadian economy.

If parliament wishes for Canada to have a competition law that promotes equitable outcomes for consumers, businesses, and workers, it should consider abolishing the efficiencies defense (both section 96(1) pertaining to mergers and section 90.1(4) corresponding to competitor collaborations). Abolishing the defense does not mean that merger-control law will no longer promote economic efficiency. Rather, the law will prioritize efficiencies that benefit all Canadians, not just business owners.

If parliament outright removes the efficiencies defense, it is also possible for the Bureau to develop its own defense, modeled after that of the US, and embed it in its merger enforcement guidelines rather than legislation. This approach may make it easier to adapt the defense as we gain more knowledge into the impact and effectiveness of enforcement approaches in Canada and elsewhere.

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