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Senator Wetston Response re: *Examining the Canadian Competition Act in the Digital Era* Consultation Paper

Dear Senator Wetston, Jonathan, and Lisa:

My name is Vass Bednar. I am the Executive Director of McMaster University's Master of Public Policy in Digital Society Program, where I am an Adjunct Professor of Political Science. I am also a Public Policy Forum Fellow and I write the newsletter "regs to riches."

*I recently concluded advisory work for the Ontario Workforce Advisory Committee, and one of the direct outcomes from that report is the ban on non-compete clauses in the province - a competition-adjacent policy intervention.

Thank you for the opportunity to relay some of my views regarding opportunities related to competition policy in Canada, and thank you for stimulating more discussion on this important topic. It is my hope that this only leads to *more* discussion regarding policy opportunities related to competition and competition-adjacent issues in our country. My worry, if I may express it, is that this consultation will inadvertently act to shut down debate on competition by mistakenly concluding that the Act is "fine."

More about me: earlier this year, I published The State of Competition Policy in Canada: Towards an Agenda for Reform, with McGill University's Centre for Media, Technology and Democracy with one of my research collaborators, Robin Shaban. Robin is currently completing her PhD in Public Policy at Carleton, and she is the co-founder and economist at Vivic Research. Robin is writing to you separately. She and Ana Qarri had an excellent paper in the Canadian Centre for Policy Alternatives this summer, "Check and balance: the case for improving Canada's Competition Act to protect workers."

The McGill report is essentially a primer or backgrounder on some competition history in Canada and offers an overview of the basic mechanics of the law. It echoed some "zombie" ideas, like **empowering the Bureau to conduct market studies.** We also suggested that **"buyer cartels" be made a criminal offence**, which could enable the Bureau to address anti-competitive conduct related to arbitration clauses and employment contracts. We contemplated some changes to merger control, such as **eliminating ARCs** and changing Section 110 of the Act to **lower the threshold for the notification of mergers**. We've also discussed the fact that changes could be made to **Section 78 of the Act to name anticompetitive conduct that is specific to digital markets**. In Canada, the Competition Act does not currently contemplate data privacy practices when evaluating anti-competitive behaviour, though it has considered data management in the context of deceptive marketing. We believe that the role and value of data is a missing aspect of the competition conversation, and should be more aligned with privacy policy and consumer protection reform. .

*With Robin's permission, I've summarized the ideas for modernizing Canada's Competition Act that we have been public with in an Appendix to this submission.

This year, through my opinion editorials in the Globe and Mail and the National Post, as well as my newsletter/blog "regs to riches," and a few podcast interviews, I have been helping to catalyze more conversation about competition policy in Canada following the publication of the McGill paper. Most of this work has been volunteer-based.

For your benefit, and for the benefit of those in your office and anyone that may have access to my written submission in the future, I list and link to these 24 modest artefacts below:

- I made an open-source chart comparing the Biden Administration's Executive Order on Promoting Competition in the American Economy to Canada
- Opinion: Canada's Competition Act needs an overhaul (Globe and Mail)
- Opinion: Competition Bureau signals worker welfare is not a priority in Canada (Globe and Mail)
- Opinion: Breaking up Facebook may not solve its greatest harms (Globe and Mail)
- Opinion: Why Canada's toothless Competition Bureau can't go after Big Tech (National Post)
- Opinion: When it comes to Big Tech, Canada's fighting 21st-century battles with 20th-century weapons (National Post)
- Opinion: Modernize competition law without penalizing domestic firms (National Post)
- Opinion: Creating a more competitive country (National Post)
- Opinion: The Saturday Debate: Should foreign telecoms be allowed in Canada? (Toronto Star)
- Opinion: The chance to lower costs is right in front of us (The Hub)
- Opinion: Canada already has big companies - it needs young, dynamic ones too (The Hub)
- Regs to Riches: A garbage merger
- Regs to Riches: Antitrust and Loyalty Programs
- Regs to Riches: e-books
- Regs to Riches: Merger Reviews Aren't Simple

- Regs to Riches: digital marketplaces
- Regs to Riches: a sleeper hit
- Regs to Riches: Wild blueberries
- Regs to Riches: Seven reasons
- Regs to Riches: Wanted - new thinking
- Podcast: Levelling Up with TELUS #2: Vass Bednar and Robin Shaban on competition in the digital age (Conference Board of Canada)
- Podcast: Free Boswell: Canada's Anti-Competitive Policy (Betakit)

I also testified at the Standing Committee on Industry, Science, and Technology in the spring. You can read my remarks here.

What else? I hosted a session at the Toronto Public Library that discussed the American Economic Liberties Project's Matt Stoller's book *Goaliath: the 100-year War Between Monopoly Power and Democracy* in conversation with Not Amazon's Ali Haberstroh. You can watch the playback: Big Tech, Monopolies, and Imagining Alternatives.

In short, I have been working to engage a broad public audience, which is something that competition scholarship in this country isn't great at. I thought about why that could be, because I've been fascinated with competition policy since I started researching it. The seven reasons I've hypothesized that we lack broader capacity on competition policy are:

- *the Competition Commissioner **lacks the intellectual independence** to speak freely on matters of competition because the Bureau is nested within the Ministry of Innovation, Science, and Economic Development (ISED);*
- *we have a **basic literacy gap** on the file that is a barrier to entry into the conversation;*
- *public policy and administration programs graduate too many new practitioners that have **never been exposed** to the basic mechanics of competition policy;*
- *we have a **dearth of scholarship** on competition issues in Canada;*
- *existing **expertise has been privatized**;*
- *we lack strong, effective **consumer advocacy groups**;*
- *and **unions** in Canada are failing to advocate at the intersection of labour and competition.*

I don't think it is productive for me to respond point-by-point to the consultation paper you released. This is partially related to the pandemic context and my own burnt-out-vibe. I do, however, think the frame of comparing the utility of "fairness" to that of economic efficiency is a distraction from the broader question(s) of whether the current Competition enforcement regime in Canada is sufficiently resourced, and has the right tools and research to facilitate robust competition in and for a digital economy.

We need a much bigger, broader conversation about competition policy in Canada that is grounded in facts and numbers. This is something that your work is helping to build momentum for. Thank you.

To that end, what do we know?

An oft-cited 2019 report "Are Industries Becoming More Concentrated? The Canadian Perspective," finds that Canadian firms have also exhibited signs of consolidation. Studies indicate Canadian industries are on average twice as concentrated as their U.S. counterparts, and a study shows that levels of consolidation have risen over the last 20 years, a trend that the authors attribute, in part, to "weak antitrust legislation and practices and increased barriers to entry."

The rate at which Canadians start new businesses has collapsed over the past forty years, over the past 30 years, the rate at which Canadians start new businesses has fallen in half. Economists have estimated that Canada could see a two to five percent boost in productivity through pro-competitive regulatory reform.

The recent compendium from the G7 on improving competition in digital markets, notes that Canada has done very little on digital when benchmarked against peers. This suggests that we have an opportunity to do more thoughtful work in this policy space, perhaps in partnership with the Department of Heritage. We should also talk about the intersection(s) between competition and privacy, and discuss the value of data.

Canada's Competition Commissioner has called for a review of the Act. For me, that's the strongest indicator that a comprehensive review would be worthwhile. I see no reason to delay such a review.

That said, we could (always!) use more data. Senators could call for a Senate Inquiry into Competition. Researchers could take inspiration from this 2018 Brookings report, "The state of competition and dynamism: Facts about concentration, start-ups, and related policies," and mirror it for Canada.

We also need to work to engage a broad, diverse public audience on the topic. One idea is that MASS LBP could strike a Citizen's Assembly on competition policy.

Senator, I am concerned that private interests will mobilize to shut down a worthwhile debate on competition in Canada. Preventing a comprehensive review of Canada's Competition Act would be both efficient for private actors that benefit from a weak, out-moded Act and unfair to citizens (little joke there re: efficiency and unfairness). More seriously, we should move away from this vague and esoteric framing of "fairness" and get down to brass tacks.

We need more research on competition and business dynamism in Canada, and we also need to test the Act's presumed flexibility to meet the challenges of our digital economy. One frame that I have been using for a collaborative research paper on competition in data-driven markets is: *what would need to be true in order for a case to be brought forward?* This is helping us hone in on some of the Act's blind sports. Without more research, we risk falling massively out of step with peer jurisdictions that are studying digital issues carefully.

Lastly, the digital frame should not stand alone when calling for a review of the Competition Act. There are troubling trends in traditional sectors that warrant a review of the Act, and the digital context can be a catalyst for an expansive review. Perhaps it is becoming a red herring of sorts?

Thank you again for the opportunity to summarize some of my own thinking and advocacy on this topic. I look forward to learning from others that have taken the time to respond to the paper - and anticipate they will be largely confined to be economists and lawyers - and hope to speak with you one day soon.

Regards,
Vass Bednar

Appendix A: Summary of Public Ideas from Bednar and Shaban

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This memo outlines a series of initial proposals for reforms to the Competition Act. In addition to the detailed proposals put forward by Robin Shaban in her submission to the INDU committee and the analysis done by Vass Bednar and Robin Shaban in their report, "The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era," we suggest the following changes to the Act and other, supplementary interventions that could be meaningful in the context of broader competition modernization in Canada.

We thank you for the opportunity to surface these ideas and look forward to continued conversation.

1. Reforming the Purpose Statement of the Act

Section 1 of the Act could be revised to enable the Competition Bureau to enforce the law in a way that recognizes the diversity of the Canadian populations and their intersectionalities. The current purpose statement of the Act enables the Bureau to enforce the law to 1) promote the efficiency and adaptability of the Canadian economy, 2) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, 3) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and 4) provide consumers with competitive prices and product choices.

However, the provision is limited in its ability to enforce the Act for other critical social and economic purposes. For example, in the Commissioner's challenge of Tervita Corporation's acquisition of Complete Environmental Inc. from Babkirk Land Services Inc., the Tribunal found that the deal would likely lead to negative environmental outcomes that should be considered anti-competitive harms of the merger.[1] However, this ruling was rejected by the Federal Court of Appeal on the basis that these environmental concerns are not applicable under the Act since they do not fall within the purpose statement.[2]

Furthermore, there appears to be interest from the current government in applying competition law to advance and protect the economic interests of women. With support from the federal government and the Competition Bureau, the OECD has recently launched its Gender Inclusive Competition Policy project. The aim of the project is to "to develop guidance for competition agencies" on how to integrate a gender lens in enforcement activities and competition policy more generally. However, given the limited scope of the Act's purpose statement, Canada's international leadership in this area is somewhat ironic. The Bureau could face significant challenges in applying a gender lens to its own enforcement activity because gender and gender equity is not a factor named in the purpose statement.

[1] For the purposes of weighing the anticompetitive effects of the merger against its purported efficiencies under section 96 of the Act.
[2] See paragraphs 154-156 and 163 of the Court's decision.

The purpose statement of the Act should be revised to allow the Bureau to apply the Act for the purposes of protecting and advancing the economic and social interests of underprivileged groups within Canadian society, as well as environmental protection. **It could also make clear that the Competition Act is intended to address the negative implications of concentrated economic power.**

While South Africa's competition law does not name environmental concerns specifically, it could serve as a good model for a competition law that better integrates social considerations into competition law. The preamble of South Africa's law states,

The people of South Africa recognise:

- *That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.*
- *That the economy must be open to greater ownership by a greater number of South Africans.*
- *That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.*
- *That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.*

In addition, we have listed examples of purpose statements from competition legislation elsewhere that contain language related to these issues, sourced from the Comparative Competition Law Dataset:

- **Fiji (1998):** The Commission has the following objectives in relation to regulated industries and access regimes- (a) to promote effective competition in the interests of consumers; (b) *to facilitate an approximate balance between efficiency and environmental and social considerations*; (c) to ensure non-discriminatory access to monopoly and near monopoly infrastructure or services.
- **Namibia (2003):** The purpose of this Act is to enhance the promotion and safeguarding of competition in Namibia in order to - (a) promote the efficiency, adaptability and development of the Namibian economy; (b) provide consumers with competitive prices and product choices; (c) *promote employment and advance the social and economic welfare of Namibians*; (d) expand opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia; (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and (f) *promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons*.
- **Norway (1988):** This law is intended to serve as part of the effort to *promote full employment*, efficient production capabilities, counteract production crises and *promote a fair distribution of national income* by: a) promoting socially justifiable price developments and counteracting prices, 1 profits and business terms that appear unreasonable, b) preventing the payment of higher dividends than necessary, c) safeguarding against unjustified revenues or competitive conditions and regulatory decisions that are unfair or prejudicial to public policy."

- **Philippines (1987):** The goals of the national economy are *a more equitable distribution of opportunities, income, and wealth*; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to *raising the quality of life for all, especially the underprivileged*...

2. Drop the Efficiencies Defense

Consider dropping the efficiencies defense. A past commissioner of the Competition Bureau has called for dropping the efficiencies defense from the Competition Act, and the current Commissioner has also endorsed this change, saying that, "*the efficiencies defense is bad for business and bad for consumers. It is also out of line with the approach being taken by many of our country's major trading partners, including most notably, the United States*." That said, quite a few jurisdictions name "efficiency" as a goal in their competition legislation - about 30% of all countries in the world.

For additional context on the efficiency defense within Canada's competition policy, see page 32 of "The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era." A detailed discussion of the efficiencies defense and rationale for removing it from the Act is in Reforming the Competition Act.

Below is an excerpt from the McGill paper:

But historically, despite the purpose statement of the Act, competition thinkers in Canada have prioritized efficiency over all other considerations including consumer prices. This thinking shows up in key parts of the Act, such as the "efficiencies defense" for mergers. Under section 96.1 of the Act, mergers that will increase prices are legal if they create efficiencies that are "greater than and offset" the "competitive harm" of the merger.[10]

Since, to many, the sole aim of competition policy in Canada is to enhance efficiency in the economy, conceptions of competitive harm are also focused on efficiency. That is, when businesses undermine competition, it is only bad when this hurts the efficiency of their business or the market, not because it hurts consumers, users of digital services or even democracy. Even if policy thinkers were to create new conceptions of competitive harm for the digital era, we would likely not be able to use them because they are incompatible with the current philosophy that underpins our competition policy system. This means that the conceptions would be incompatible with our law, but also the views of key decision makers within Canada's competition policy system. For example, the efficiency defense could override a modernized interpretation of consumer harm.

3. Empower the Bureau to Conduct Market Studies

Empowering the Bureau in this way would bring the Bureau into alignment with US competition authorities. Both the DOJ and FTC can undertake "market studies" to "develop a deeper understanding of sectors and business practices." Importantly, the FTC and DOJ can legally compel businesses to provide sensitive, internal business information for these

studies. This information is critical for understanding how their business practices have evolved and, ultimately, identifying potential anti-competitive conduct.

In Canada, the Competition Bureau does not have this power. The only way it can compel information from businesses is if it is undertaking a formal inquiry. To get a company's data, the bureau must get a court order. And to get that kind of order, the bureau must provide some evidence that the behaviour it wants to investigate has already occurred.

This shortcoming prevents the bureau from monitoring the digital landscape for anti-competitive conduct. If the Competition Bureau had the power to get information from businesses outside the context of a formal investigation, like authorities in the U.S. can, perhaps it would be more proactive.

A detailed discussion of the need for market-study powers as well as sample legislative language can be found in Reforming the Competition Act.

4. Make "Buyer Cartels" a Criminal Offence

This would enable the Bureau to address anti-competitive conduct related to arbitration clauses and employment contracts.

The absence of criminal liability for so-called "buyer cartels" sets Canada apart from many other countries. Most notably, buyer cartels have been subject to increased interest in Canada since 2016, when US antitrust regulators announced that employment-related buy-side agreements could attract criminal prosecution.

This shortcoming of the Act has significant bearing on the Bureau's ability to address non-poach agreements and other anticompetitive conduct that negatively impacts workers. It also brings us out of step with competition law and recent enforcement action in the US. As of July 2021, the Department of Justice (DOJ) has initiated three criminal proceedings on collusion in the labour markets related to no-poach and wage-fixing agreements in the healthcare sector (related to physical therapy services and healthcare staffing companies). In 2010, the DOJ initiated several investigations into high tech companies for their no-poaching agreements against highly skilled tech workers. The businesses involved were wide-ranging and included Pixar, Lucasfilm, Adobe, Apple, Google, Intel, and Intuit. The firms ended up settling with the DOJ.

While authorities in the US are taking serious action to address anti-competitive behaviours in labour markets and monopsony issues, Canada's federal competition authority, the Competition Bureau, has lagged behind. Based on publicly available information, there is no indication that the Competition Bureau has done a serious investigation into any labour market issues in Canada.

This lack of action from Canada's competition authority is driven in large part by Canada's current weak competition legislation. For example, non-poach agreements are illegal under US antitrust law. But this is not the case in Canada. In fact, under Canada's Competition Act,

firms can outright collude to suppress wages without legal recourse. For additional information, see the section Labour Markets in Reforming the Competition Act.

We also need more research in Canada to understand the pervasiveness of non-compete agreements across all types of workers, and to survey policy options that can increase competition in the labour market and empower worker mobility. Additionally, it is likely that the opportunity to explicitly intervene regarding non-compete agreements and non-disclosure agreements rests with the provinces, given their regulation of labour.

- Slow Boring: The case for banning non-competes
- Biden is preparing an executive order targeting non compete clauses for workers.
- Competition Bureau Clarifies Approach to Buy-Side Competitor Collaborations: No Criminal Sanction for Wage-Fixing and No-Poaching Agreements

5. Changes to Merger Control

We propose three major changes to Canada's current system of merger control within the Act. First, we propose changes to the Act to enable the Bureau to review mergers after they have been consummated. This change would bring our system in closer alignment with the US. Second, Advanced Ruling Certificates for mergers should no longer be part of our merger control system. ARCs prevent the Bureau from reconsidering a decision if new information comes to light. The Bureau should reserve and maintain the right to revisit mergers as necessary, perhaps under specific guidelines. These proposals are outlined in more detail in the section "More Efficient Laws" in the document Reforming the Competition Act.

Third, parliament should change section 110 of the Act to lower the threshold for the notification of mergers. This change would require more merging parties engaging in smaller transactions to notify the Bureau of their merger. Doing so would enable the Bureau to better consider the anti-competitive potential of mergers and acquisitions in the digital sector, which typically do not meet the merger notification threshold.

6. Explore the Merits of Private Access to the Competition Tribunal[3]

Private access was recently advocated for by the Macdonald Laurier Institute. See: Commentary Paper: Monopoly Games:

> The Competition Bureau has previously noted that limited "private access

[3] Our recent research into private competition cases in the US related to labour markets has suggested that private competition cases tended to be less successful than those taken by competition authorities. Further, many private lawyers may not have the deep expertise needed to launch a compelling competition case. There is a risk that private access would justify underfunding the Bureau and DOJ in place of private action, leading to weaker enforcement overall. Nonetheless, this option is worthy of debate and consideration as it would democratize access to the Tribunal.

provisions were added to the Act to complement the Bureau's public enforcement and increase the deterrent effect of the Act"[4] (Competition Bureau 2015), More recently, discussions within the CD Howe Institute Competition Policy Council (of which I am a member) – as well as discussions during the Competition and Growth Summit hosted by the Bureau last week – have **highlighted the need to allow private access to the Competition Tribunal for a broader range of reviewable conduct, including, most importantly, abuse of dominance** (CD Howe Institute Competition Policy Council 2016).

Private action has the potential to be a useful and complementary tool in the Competition Act, but it should not replace public enforcement efforts by the Bureau. Instead, private access will be most successful as an additional tool for deterrence and enforcement only if it is combined and complemented by public enforcement. Private access and public regulation for competition violations have different and complementary aims and this must be considered when drafting new provisions that allow public access to the tribunal: private action is often less about public enforcement and more about compensation and individual dispute resolution.

Private rights of action in the Competition Act should not be used as an excuse to underfund the Competition Bureau or seen as a primary source of enforcement. Private access works best when it is used to catch and address issues that the public regulator might not have the time or resources or interest in investigating. Private access also allows for individuals to be compensated for any anti-competitive harm or loss that they experience as a result of Competition Act violations. This is not possible when action is launched by the Bureau. For this reason, it is important to have private access for all types of violations written into the Competition Act reforms.

7. Revisions Specific to Digital Markets

Further study is required in order to consider revisions specific to digital markets in a Canadian context. This could also fall under the mandate of the Data Commissioner. Changes could be made to section 78 of the Act to name anticompetitive conduct that is specific to digital markets.

In June, the US House Democrats introduced five antitrust bills as part of an antitrust agenda under "A Stronger Online Economy: Opportunity, Innovation, Choice." These include: the "American Innovation and Choice Online Act," to to prohibit discriminatory conduct by dominant platforms, including **a ban on self-preferencing and picking winners and losers online**; the "Ending Platform Monopolies Act," to eliminate the ability of dominant platforms to leverage their control over across multiple business lines to self-preference and disadvantage competitors; and the "Platform Competition and Opportunity Act," prohibiting acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of online platforms.

[4] See also Competition Bureau 2018, which states, among other things, that "[s]section 36 of the Act serves not only the private interests of consumers to recover losses or damages but also the broader public interest of deterrence."

8. Mandate More Diversity on the Competition Tribunal

The Competition Tribunal Act details the appointment process for the Competition Tribunal, the quasi-judicial body that hears certain competition cases. We propose revisions to this section that would require that the Tribunal be made up of members that meet certain diversity/representation targets. The Employment Insurance (EI) system, with its tri-partied oversight structure, could serve as a model.

9. *Something related to the Right to Repair[5]

Note that ISED recently held consultations on the Copyright Act - The Government of Canada Launches Consultation on a Modern Copyright Framework for AI and the Internet of Things. There is enthusiasm for the "Right to Repair" in Canada, and this should be part of any competition reform conversation.

- FTC: Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers
- The Canadian Repair Coalition
- Submissions to the Australian Government re: Right to Repair
- Private members bill - Right to Repair Private Member's Bill (C-272) – targeting the digital lock provisions in Canada's Copyright Act.
- Policy Options: Canada needs right-to-repair legislation (May 2021)
    - "The Copyright Act imposes significant penalties for circumventing digital locks without authorization from the manufacturer, and May's bill looks to carve out an exception for the purposes of "diagnosing, maintaining, or repairing" products with embedded computer programs."
    - The bill has been sent to committee after passing second reading in mid-April. There are also various provincial attempts to move this forward through the consumer protection angle.
- CCPA: when will Canadians have the right to repair? (January 2020)
- References in the copyright act to competition, and then a lack of mention in the competition act when it comes to intellectual property - not speaking the same language. Essential facilities and PPMs. This is globally an issue. This is an area where Canada could lead.

[5] Could be worth connecting with Anthony Rosborough on this.

10. Grant the Competition Bureau More Independence

Parliament should consider taking the Competition Bureau out of the Ministry of Innovation, Science, and Economic Development in order to reduce the perception of political interference and give the Commissioner more voice and autonomy. For a detailed discussion of specific reforms that would enhance the Bureau's independence, see section Greater Independence in Reforming the Competition Act.

11. Make it Easier to File a Merger Notification

- Reviewing mergers - How to file a pre-merger notification
    - *All merger notifications are subject to a **$74,905.57** fee, which is subject to an annual Consumer Price Index adjustment effective April 1st. The Bureau will announce the adjusted fee annually. Payment to the Receiver General of Canada can be made by cheque or wire transfer. Please note that merging parties are responsible for the payment of administration fees relating to wire transfers.*

If the Government of Canada proposes to significantly change the threshold for a merger notification, this change must be coupled with work to lower the cost (both financial and administrative) of filing a merger notification. That said, filing fees are a significant portion of the Bureau's revenues. Perhaps there should be a higher fee for larger businesses or complex reviews.

12. Further Study to Consider Changes to Substantive Tests to Enable a "Balance of Harm" Test.

The current Competition Act does not consider consumer protection when evaluating anti-competitive behaviour in a conventional way. Canada has generally decoupled consumer protection considerations from competition policy, and this has led to gaps in our approach. The SLPC test is based on consumer welfare, as defined within neoclassical economics. Yet consumer welfare is consistently trumped by the efficiencies defense.

Several sections of the Act outline the substantive test by which civil anticompetitive conduct is evaluated for the purposes of enforcing the Act. Specifically, the Act requires that the Commissioner find that the conduct leads to a "substantial lessening or prevention of competition".

We propose that the Bureau consult with the Consumer Protection leaders in each of the provinces to consider changes to Canada's substantive test to bring it into alignment with a new standard: the "balance of harm test". There may be synergies between the recently proposed "Online Harms Bill" consultations.

- OECD - Consumer Data Rights and Competition - Background Note
- The Role of a Consumer Harm Test in Competition Policy
- What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect
- We reviewed 36 NDAs from major tech companies and discovered how far Silicon Valley's giants will go to silence and control their employees

13. Non-legislative Interventions

➔ A Whole-of-Government Approach

- Canada could similarly **strike a formal council** with the heads of most cabinet agencies and regulators to meet about competition, creating critical links between the Competition Bureau and the Privacy Commissioner, the Canadian Radio-television and Telecommunications Commission, the Ministry of International Trade Diversification, and the Minister of Small Business, Export Promotion and International Trade of Canada (and others).

➔ Open Meetings

- The Bureau could work toward **open meetings** for merger reviews, potentially engaging more Canadians in the activities of the Bureau.

➔ Canadian Competitiveness Council

- The Government of Canada could **create an independent Canadian Competitiveness Council** that would report to Parliament and take on the advocacy and policy work for competition.[6]
  - *There was one under Morneau, Freeland has one.

➔ More Policy Expertise

- The Competition Bureau lacks internal policy capacity, as it focuses on enforcement. It would be worthwhile to further empower the Bureau with more policy expertise rather than housing the policy function in ISED.

[6] This is from the competition review policy report done by L.R. (Red) Wilson for the Canadian Council of Chief Executives in 2008.

➔ **Public Education**

- Canadian consumers should continue to be empowered with relevant information and education about these changes and rules.

➔ **Apply Open Government Principles to Competition Investigations**

- The Bureau should report on all investigations. This would be more aligned with the transparency principles of open government.

➔ **Incentivize Antitrust Whistleblowers through A Reward or Bounty System**

- Protect and incentivize antitrust whistleblowers through creating a reward or bounty system (as has been called for by Senator Amy Klobuchar) for individuals who expose anti-competitive conduct or turn in cartels.

➔ **Maintain the Relevance of the Competition Act**

- Commit to reviewing the Act every ~5 years (like the Banking Act) so that it does not fall out of date.

Select - Other Revent Competition Policy Reports from Governments

- Back in 2017, the Australian Competition and Consumer Commission launched its "Digital platforms inquiry," to examine the effect that digital search engines, social media platforms, and other digital content aggregation platforms have on competition in media and advertising services markets.

- In Europe, an expert panel produced a report in 2019, "Competition policy for the digital era," which explores how competition policy can evolve to continue to promote pro-consumer innovation in the digital age.

- The UK recently launched in open consultation on "Reforming competition and consumer policy," and has signalled the intention to work more closely with the EU on antitrust enforcement. In 2019, their Digital Competition Expert Panel produced a report, "Unlocking digital competition," which considered the potential opportunities and challenges that the digital economy may pose.

- Back in 2019, the FTC created a task force that focussed on monitoring competition in the tech industry. Between 2018-2019, the FTC held public Hearings on Competition and Consumer Protection in the 21st Century.

References and Additional Reading

- FACT SHEET: Executive Order on Promoting Competition in the American Economy
- Executive Order on Promoting Competition in the American Economy
- Contrasting the Biden EO with the Canadian Context (open access Google document)
- The Roosevelt Institute: The Effective Competition Standard: A New Standard for Antitrust
    - America's failing antitrust system is, in large part, to blame for today's market power problem. Lax antitrust law and enforcement have allowed troubling trends like corporate consolidation to remain unchallenged, further embedding our skewed economy. In highly consolidated markets, consumers have limited choice and little power to pick their price, quality, or provider for the goods and services they need; workers are met with massive employers and have little agency to shop around for competitive wages and benefits; and suppliers can't reach the market without paying powerful intermediaries or succumbing to acquisition.
- The Great Democracy Initiative: Taking Antitrust Away from the Courts
    - A small number of firms hold significant market power in a wide variety of sectors of the economy, leading commentators across the political spectrum to call for a reinvigoration of antitrust enforcement. But the antitrust agencies have been surprisingly timid in response to this challenge, and when they have tried to assert themselves, they have often found that hostile courts block their ability to foster competitive markets. In other areas of law, Congress delegates power to agencies, agencies make regulations setting standards, and courts provide deferential review after the fact. Antitrust doesn't work this way. Courts – made up of non-expert, unaccountable judges – set much antitrust policy. This report provides a set of recommendations to take antitrust away from the courts – to restructure the antitrust laws and agencies in order to enhance the government's ability to enforce antitrust laws more effectively and more transparently.
- Reforming the Competition Act: Suggested Changes to Enhance Competitiveness and Equity of the Canadian Economy