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SUBMISSION: Examining the Canadian Competition Act in the Digital Era

STATEMENT OF THE AMERICAN ECONOMIC LIBERTIES PROJECT
via electronic filing
American Economic Liberties Project
1150 Connecticut Ave., NW, Ste. 800
Washington, DC 20036

December 15, 2021

Introduction & Summary

The American Economic Liberties Project (Economic Liberties) works to ensure America's system of commerce is structured to advance economic liberty, fair commerce, and a secure, inclusive democracy. Economic Libertiesbelieves true economic liberty means entrepreneurs and businesses large and small succeed on the merits of their ideas and hard work; commerce empowers consumers, workers, farmers, and engineers instead of subjecting them to discrimination and abuse from financiers and monopolists; foreign trade arrangements support domestic security and democracy; and wealth is broadly distributed to support equitable political power.

We write in response to the request for submissions by Senator Howard Wetston in response to the commissioned paper *Examining the Canadian Competition Act in the Digital Era.* [1] We applaud the Senator's initiative in beginning a discussion on reforming the Canadian Competition Act, but we disagree with the paper's conclusions in fundamental ways.

We believe that a comprehensive review of the Act is urgently necessary, as the current Commissioner of Competition, Matthew Boswell, has also called for.[2] A wholesale legislative review of the Competition Act is overdue, given the last comprehensive review occurred in 1986 — over 35 years ago.[3]

[1] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," September 27, 2021 https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf
[2] Murad Hemmadi, "Competition law review 'overdue,' Boswell says," *The Logic*, November 2, 2021, https://thelogic.co/news/competition-law-review-overdue-boswell-says/.
[3] We do note the 2009 review and amendment of the Act, focusing on mergers and cartels, but think the entire Act is due for a comprehensive review.

However, while a comprehensive review of the Act is sorely needed, this is only one piece of a larger competition policy overhaul that is needed to bring Canadian competition legislation and enforcement into the 21st century and align it with Canada's peer countries.[4] While we agree, in principle, with some of the thoughtful recommendations in the paper, the overarching conclusion to retain status quo legislation and enforcement regimes reflects Canada's ongoing record of lagging its global peers in taking domestic competition matters seriously.

Iacobucci makes the case for tweaks to the existing *Act*, while generally advocating a status quo orientation towards antitrust interpretation and enforcement. Underpinning this orientation is a belief that the Canadian economy is competitive — domestically and globally — and generally running well. But much data suggests otherwise.

Canada has a longstanding industry concentration problem, which has played a role in falling and below OECD average entrepreneurship rates,[5] low business dynamism,[6] stifled innovation,[7] and harm to consumers[8] and workers. Covid-19 has only supercharged concentration, with cheap debt from central banks and Private Equity firms sitting on record amounts of cash.

Thus far, 2021 is the largest year ever (since records began in 1980) for global mergers, and world-wide deal-making in the first nine months has topped US$4.4trn from more than 40,000 transactions.[9] Canada is also in a historic merger boom[10] with more than 1,985 deals involving Canadian companies in 2021 (the highest number in more than twenty years).[11] Megadeals have also increased significancy, with fifteen deals valued at over CA$1 billion occurring as of June of this year.[12] Against this backdrop, Iacobucci claims that "the vast majority of mergers are competitively benign."

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[4] Competition and Markets Authority (developed with G7 competition authorities), *Compendium of approaches to improving competition in digital markets*, November 29, 2021, https://www.gov.uk/government/publications/compendium-of-approaches-to-improving-competition-in-digital-markets.

[5] Ray Bawania and Yelena Larkin, *Are Industries Becoming More Concentrated? The Canadian Perspective*, March 20, 2019, https://ssrn.com/abstract=3357041.

[6] Richard Archambault and May Song, *Canadian New Firms: Birth and Survival Rates over the Period 2002–2014,* Innovation, Science and Economic Development Canada — Small Business Branch, May 2018, https://www.ic.gc.ca/eic/site/061.nsf/eng/h_03075.html.

[7] Steven Globerman and Joel Emes, *Innovation in Canada: An Assessment of Recent Experience*, Fraser Institute, January 15, 2019, https://www.fraserinstitute.org/studies/innovation-in-canada-an-assessment-of-recent-experience

[8] Martin Pelletier, "Our nation of oligopolies not good for consumers, but great for investors," *Financial Post*, July 30, 2018, https://financialpost.com/investing/how-canadas-oligopolies-have-been-big-winners-for-investors

[9] Matthew Toole, "Global M&A soars as acquirers make up for lost time," *Refinitiv*, October 7, 2021, https://www.refinitiv.com/perspectives/market-insights/global-ma-soars-as-acquirers-make-up-for-lost-time/

[10] Stefanie Marotta, "Megadeals fuelling 'unprecedented' Canadian merger and acquisition boom," *Financial Post,* June 17, 2021, https://financialpost.com/fp-finance/megadeals-fuelling-unprecedented-canadian-merger-and-acquisition-boom

[11] Ibid. Numbers as of June 16, 2021.

[12] Ibid.

Increasingly, lack of competition is recognized as a global crisis[13] —not by politically motivated fringe groups, but by the IMF, Federal Reserve, OECD, and many other leading global institutions. The debate about antitrust being politicized for multiple policy objectives beyond economic efficiency ignores the political history of antitrust and its objectives.[14] It also presumes that policy cannot accomplish many goals simultaneously. In fact, good policy should do just that.

The challenge of reigning in corporate power is an existential threat to democratic political systems globally, and it presents a similar crisis in Canada, too. While many interconnected problems afflict the Canadian economy, the concentrated power of dominant, incumbent players is a core economic and political problem for Canada. A conversation about how best to deal with the many associated ills of this reality should not be forestalled before it has even gotten off the ground. The conclusions drawn in this paper have the appearance of wanting to do just that.

We agree that anti-competitive challenges present in numerous industries, not solely in digital markets, and that better enforcement of an updated Act is critical to ensuring fair markets for Canadians. But strong enforcement must also rest on strong laws and a change in orientation to antitrust interpretation.

We do not believe that the status quo interpretation of antitrust law in favor of economic efficiency is valid. For more than forty years, this interpretation has failed to create fair market conditions for several Canadian stakeholders: consumers, entrepreneurs and business owners, and workers.

Given the historically low number of cases brought by the Competition Bureau, coupled with the high degree of concentration in Canada's economy, there are only three explanations: 1) weakness in the existing antitrust law; 2) ineffective or lax enforcement of the law; or 3) both. In Canada's case, we believe a strong case could be made for both.

Our three primary recommendations to remedy these issues are as follows:

1. Undertake a comprehensive legislative review of the Competition Act
2. Remove the efficiencies defense from the Act entirely
3. Seek to better understand anticompetitive effects on small and medium-sized businesses

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[13] See: Romain Duval, Davide Furceri, and Marina M. Tavares, "Taming market power could (also) help monetary policy," IMF, July 21, 2021, https://blogs.imf.org/2021/07/21/taming-market-power-could-also-help-monetary-policy/; Isabel Cairo and Jae Sim, *Market Power, Inequality, and Financial Instability*, Finance and Economics Discussion Series 2020-057. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/FEDS.2020.057; Patrick Durkin, "OECD issues warning amid record wave of mergers," *Financial Review*, December 13, 2021, https://www.afr.com/policy/economy/oecd-issues-warning-amid-record-wave-of-mergers-20211213-p59h1i.

[14] Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy*, Simon & Schuster, October 2019.

Simultaneous to these three steps, the Government of Canada should also undertake a structuralist, whole-of-government approach to investigating and enforcing against anticompetitive behavior, as the US is doing with its newly formed White House Competition Council following the July 2021 Executive Order on Competition.[15]

Without a government-wide effort to take the challenges of concentrated markets seriously, Canada will continue to lose its place in the global economy, while its citizens are simultaneously subjected to higher prices, less innovation, and a more stagnant economy.

We urge the Senator to reconsider the conclusions of the paper, and to champion a truly robust discussion of these issues in Canada.

Concentrated Industries: A Canadian Crisis

Canadians have long known (and long decried) the highly concentrated nature Canada's economy. Canadians pay some of the highest rates globally for international travel[16] and banking services.[17] But concentration afflicts numerous other industries including funeral services,[18] grocery, newspapers, garbage, agriculture, and more. And it is growing.

According to a 2019 report[19], Canadian industries are becoming more concentrated in three ways:

- Large firms have become more dominant, and the number of TSX publicly traded firms has dropped.
- Firms in industries with the largest increases in product market concentration started to generate higher profit margins.

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[15] The Order creates a new White House Competition Council, involving numerous agencies who are tasked with reporting back to White House after conducting industry-specific investigations into competition-related issues. The Council is led by the Assistant to the President for Economic Policy (Tim Wu) and Director of the National Economic Council (Brian Deese), who will Chair the Council. The Competition Council will also include the Secretary of the Treasury (Janet Yellen), the Secretary of Defense (Lloyd J. Austin III), the Attorney General (Merrick Garland), the Secretary of Agriculture (Thomas Vilsack), the Secretary of Commerce (Gina Raimondo), the Secretary of Labor (Martin Walsh), the Secretary of Health and Human Services (Xavier Becerra), the Secretary of Transportation (Pete Buttigieg), the Administrator of the Office of Information and Regulatory Affairs (Neomi Rao), the Chairman of the U.S. Securities and Exchange Commission (Gary Gensler) and other department heads as requested. See: Executive Order on Promoting Competition in the American Economy, July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[16] Alicja Siekierska, "Flights from Canada among the most expensive in the world: survey," *Financial Post*, June 1, 2017, https://financialpost.com/transportation/flights-from-canada-among-the-most-expensive-in-the-world-survey

[17] Vanmala Subramaniam, "Canadians pay high bank fees but seem okay with it," *Vice*, July 20, 2017, https://news.vice.com/en_ca/article/3kp4j5/canadians-pay-high-bank-fees-but-seem-okay-with-it

[18] Denise Hearn, "Canadian, U.S. regulators asleep at the switch as monopolies thrive," *The Globe and Mail*, February 25, 2019, https://www.theglobeandmail.com/business/commentary/article-canadian-us-regulators-asleep-at-the-switch-as-monopolies-thrive/

[19] Yelena Larkin and Ray Bawania, "Are Industries Becoming More Concentrated? The Canadian Perspective," May 9, 2019, https://ssrn.com/abstract=3357041.

- The volume of M&A deals, and particularly horizontal deals, has increased.

The researchers attribute these changes to an increase in market power that stems from weak antitrust legislation and enforcement and increasing barriers to entry.

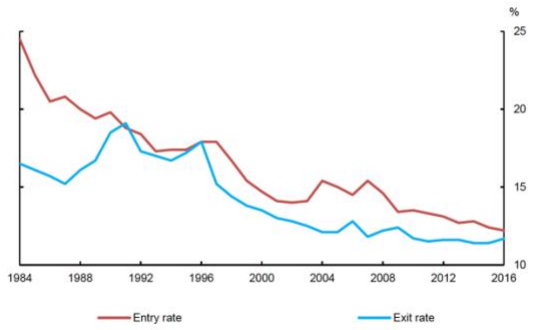
Media and internet services are highly concentrated in Canada, with the "Big Four" (Bell, Rogers, Shaw and Telus) maintaining 65% or more combined market share for over a decade. Bell is the largest of the four, maintaining a 25.8% share of the network media economy in 2020, with revenue double that of the 'big five' US internet giants in Canada combined.[20]

Canada has long struggled with stagnant productivity and weak business dynamism relative to other developed countries. According to the OECD[21], Canada has the highest number of older firms among 15 other developed countries, with firm entry and exit rates waning since the 1980s (see Chart 1 below).[22]

Canada's top companies are more than a century old, and a lax antitrust enforcement regime has actively stifled new entrants. The median age of the top 15 largest publicly traded Canadian firms is 122 years, versus 45 years in the US. This makes the median founding year 1899 — before the turn of the 20th century.[23] The OECD report states that "regulatory protection of incumbents is high by international standards and arises primarily from an above-average use of antitrust exemptions."

Chart 1: Aggregate entry and exit rates of new firms have been declining

Aggregate entry and exit rates, annual data



Sources: Bank of Canada calculations using data from Statistics Canada's Longitudinal Employment Analysis Program. For the year 2016, quarterly firm creation data were used.

Last observation: 2016

[20] Dwayne Winseck, "Media and Internet Concentration in Canada, 1984-2020," Global Media and Internet Concentration Project, Carleton University, 2021, http://www.cmcrp.org/media-and-internet-concentration-in-canada-1984-2020/.

[21] *Policies For Stronger And More Inclusive Growth In Canada*, OECD, June 2017, www.oecd.org/canada/Policies-for-stronger-and-more-inclusive-growth-in-Canada.pdf

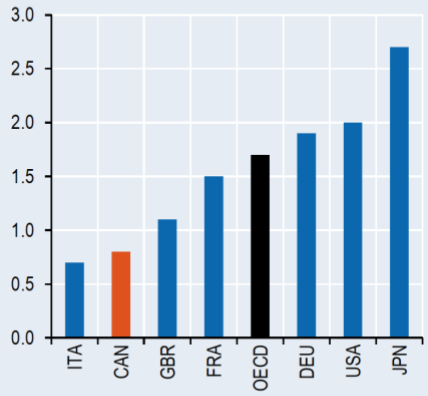
[22] Remarks by Sylvain Leduc, Deputy Governor of the Bank of Canada, "Seeking Gazelles in Polar Bear Country," Sherbrooke Chamber of Commerce, Quebec, October 3, 2017, https://www.bankofcanada.ca/wp-content/uploads/2017/10/remarks-031017.pdf

[23] Graeme Moffat, https://twitter.com/graemedmoffat/status/1462889345648578564

Canadian firms also spend less on R&D than many of their counterparts among developed countries. [24] This has been attributed to low risk-appetite within Canadian firms, a smaller national market-size, and high corporate taxes. But perhaps a more compelling reason is: When large incumbents lack competition, there is little need to innovate or self-disrupt.

FIGURE 3.4. **CANADA HAS LOW R&D BUSINESS INVESTMENT BY INTERNATIONAL COMPARISON**

Business R&D expenditure, % of GDP, 2015 or latest available year



Note: Canada data refer to 2014.

Source: OECD, Main Science and Technology Indicators Database, www.oecd.org/sti/msti.htm, February 2017.

This makes Canada less globally competitive, and it has become less globally competitive over time. Canada ranked number 8 on the World Economic Forum's Global Competitiveness Report in 1999. Today, it is 14.[25] In response, the traditional antitrust establishment in Canada has often claimed the need to foster home-grown dominant firms to compete internationally. This is a classic red herring argument, which is increasingly recognized as such.

Biden's July Executive Order on Competition explicitly recognizes this by stating: "This order reasserts as United States policy that the answer to the rising power of foreign monopolies and cartels is not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at home and worldwide."

Canada Lags the Developed World in Taking Competition Seriously

Many jurisdictions globally including the United States, the United Kingdom, and Europe are updating their antitrust laws to deal with the challenges that concentrated markets, and digital markets in particular, present. The recently released *G7 Compendium of approaches to improving competition in digital markets*, for example, notes in its Key Challenges section,

[24] *Policies For Stronger And More Inclusive Growth In Canada*, OECD.
[25] Global Competitiveness Report 2019, World Economic Forum, October 8, 2019, https://www.weforum.org/reports/how-to-end-a-decade-of-lost-productivity-growth

"Whilst competition authorities are active in tackling the market power of the most powerful digital firms, many of these investigations and associated remedial challenges have not sufficiently restored competition. This suggests the need for reforms to existing laws, and in some cases for new complementary regulation, to address competition concerns more effectively in digital markets."

Iacobucci's assertion that the Competition Act is fit to deal with the challenges of digital markets is simply a view not shared by the rest of the developed world (as his paper, itself, well demonstrates). The global conversation is robust and growing, whereas Canada seems desirous to stifle dialogue before it has begun.

Canada also lags its global peers in enforcement. Antitrust enforcers around the world are acting with new fervor, recognizing the gatekeeping role that the largest firms — and technology firms in particular — occupy in markets. There are more than one hundred ongoing investigations into the tech giants globally, and Canada is behind the ball despite the Bureau's more recent efforts to investigate Google and Amazon.

In the US, numerous State-led Attorneys General coalitions are tackling the problem of big tech with active cases, including: Washington D.C. against Amazon;[26] a coalition of 36 state AGs led by Colorado (including Puerto Rico and Guam) against Google Search;[27] a coalition of 9 states, led by Texas, against Google Ad Tech;[28] the state of Ohio against Google (in attempts to convert the company into a public utility);[29] and a 48 state co-sponsored case against Facebook.[30]

As Canada has no provincial authority to bring such cases, the burden falls exclusively on the Bureau. This should be another area of consideration, beyond simply green-lighting private actions. Private actions can be useful as a supplementary enforcement mechanism, but without vigilant enforcement by the Bureau, only private actors with enough means and legal might will be able to seek redress for anticompetitive abuses.

Canada also lags its peers in terms of severity of remedies, with the maximum fine penalties hopelessly low. We agree with the paper's recommendation that the Act be amended, and we suggest that it be aligned more closely with European standards. Instead of imposing maximum

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[26] District of Columbia v. Amazon.com Inc, 2021 CA 001775 B | District Of Columbia, Superior Court, https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf

[27] State of Colorado et al vs. Google LLC, 1:20-cv-03715 | District Of Columbia District Court, https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf

[28] State of Texas, et al v. Google LLC, Case 4:20-cv-00957-SDJ, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf

[29] Ohio Common Pleas Court, "State of Ohio v. Google" (2021). *Historical and Topical Legal Documents*. 2469. https://digitalcommons.law.scu.edu/historical/2469/

[30] State of New York et al vs. Facebook, Inc. https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf

penalties in rapidly shifting and speculative markets which push corporate valuations ever higher, enforcers can apply a flexible formula based on a percentage of turnover.[31]

The EU competition authority has fined Google and FB $5billion each, the FTC fined Facebook $5 billion,[32] and Italy recently fined Amazon 1.3 billion for abusing its dominant position[33] These kinds of fines, while not wholly adequate to deter abuses, do allow infraction penalties to be more substantively deterring.

Comprehensive review of the Competition Act

While we agree, in principle, with some of the recommendations of Act amendments in the report,[34] they are woefully insufficient overall. A comprehensive review and overhaul of the Act is required to align Canada's competition legislation with 21st century challenges.

We recommend looking to New York State's new "Twenty-First Century Anti-Trust Act" (Bill *S933, New York, 2021-2022),*[35] as a guide. This landmark bill, introduced by Senator Mike Gianaris in 2021*,* is the most comprehensive update to state antitrust law in years which could also provide a model for future federal legislative updates. Provisions in the bill are intended to make it easier for a wider set of stakeholders to bring cases, including workers.

The bill makes provisions for workers, recognizing the role of monopsony power and corporate abuses of power against labor. The bill states: "(a) It shall be unlawful for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in this state. (b) It shall be unlawful for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position."

Importantly, the bill shifts the focus away from efficiency and consumer welfare concerns and towards an 'abuse of dominance' interpretation of antitrust law, reasserting the original

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[31] The EU applies a maximum of 10% of turnover per infringement) to calculate fines. See: "Fines for breaking EU competition law" https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf.

[32] "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook," Federal Trade Commission, July 24, 2019, https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions

[33] Elvira Pollina and Maria Pia Quaglia, "Italy fines Amazon record $1.3 bln for abuse of market dominance," *Reuters*, December 9, 2021**,** https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09/

[34] Such as: carving out digital markets; raising fine maximums; recognition of monopsony power and provisions for workers, including your call to amend "laws against horizontal conspiracy to include wage-fixing and no-poach agreements"

[35] The New York State Senate, Senate Bill S933A, https://www.nysenate.gov/legislation/bills/2021/S933#:~:text=senate%20Bill%20S933A%202021-2022%20Legislative%20Session%20Relates%20to,the%20state%20anti-trust%20law%20download%20bill%20text%20pdf

zeitgeist of American antitrust law: challenging corporate abuses of dominance.[36] It directly states, "Evidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm." This is a critical rebuttal of econometric obsessions with efficiency which have characterized antitrust legal interpretation for the last forty years.

Remove the efficiencies defense

Economic efficiency is unsuitable as a north star for antitrust law interpretation and enforcement, and the efficiencies defense exemptions to Mergers (96.1) and Agreements or Arrangements that Prevent or Lessen Competition Substantially (90.4) should be immediately overturned and removed from the Act.

As previous Competition Commissioner John Pecman has stated, "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."[37] CD Howe's Competition Council also agrees that the efficiency defense should be revisited.[38]

The efficiencies defense provisions, added to the Act in 1986, reflected a devolution in antitrust enforcement principles in both Canada and the US. Iacobucci states, "Economic efficiency is always at stake in competition policy matters, while other values only occasionally arise." Throughout the paper, he seeks to reassert traditional econometric interpretations of antitrust along the lines of efficiency concerns.

Whereas previous antitrust enforcers focused on addressing concentrated corporate power and associated market abuses, an intellectual movement by law and economics scholars from the Chicago School, narrowed antitrust to a singular focus on economic efficiency. Concurrent with Ronald Reagan's push to deregulate, Chicago School scholars such as Robert Bork, Harold Demsetz, and Yale Bronzen initiated an assault on the structuralist approach of previous antitrust judges and rulings of the past.

The consumer welfare standard became the predominant lens through which mergers and enforcement action was evaluated, leaving little room for broader considerations of market power on other stakeholder groups, like workers, and on the economy at large. Antitrust scholar Milton Handler wrote in 1990, that US antitrust agencies went "from an anti-

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[36] "SB 933: Protecting Workers and Small Businesses from Dominant Corporations," American Economic Liberties Project, June 3, 2021, https://www.economicliberties.us/our-work/sb-933-explainer/#.

[37] John Pecman, "Populism, Public Interest and Competition," s*peech to C.D. Howe Institute, April 27, 2018,* https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition---populism-public-interest-and-competition.html

[38] *Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government*, Competition Policy council — CD Howe Institute, September 9, 2021, https://www.cdhowe.org/sites/default/files/attachments/communiques/mixed/Communique_2021_0909_CPC.pdf

concentration to a pro-efficiency measure, and the public was given the feeling that anything goes."[39]

This has been disastrous on multiple levels.

Under the mantle of deregulation, we abdicated rule making authority for markets away from democratic institutions, giving it to the largest, most powerful, and most politically connected firms. In the vacuum of democratic oversight, these firms took up the mantle — writing market rules in their favor.

And efficiency gains from increasingly concentrated markets, while sometimes helpful to consumers in the short-term, can cause structural fragility in markets. Covid-19 and other climate-related issues, like the recent flooding in British Columbia, have demonstrated the limitations of structuring economic systems with a goal of eliminating all slack.

Just-in-time delivery is being re-thought,[40] off-shoring all domestic manufacturing capacity is now seen as a national security issue,[41] and supply chain issues caused by an obsessive focus on efficiency have left many struggling to receive critical goods as the system crumbles under its own homogeneity.

For far too long, increasing concentrations of corporate power have been allowed due to supposed 'efficiency gains' which are notoriously difficult to predict and are often illusory. Half of all mergers in the US are reversed within 10 years, as companies fail to realize promised synergies.[42] Researches Nancy Rose and Jonathan Sallet rightly state, "The current methods used by the federal antitrust agencies to determine whether to investigate a horizontal merger likely rests on an overly-optimistic view of the existence of cognizable efficiencies, which we believe has the effect of justifying market-concentration thresholds that are likely too lax."[43]

Rather than providing consumer benefit, mergers more often are used to raise prices on consumers. John Kwoka, a competition policy expert, analyzed over 3000 mergers and found that in mergers that led to six or fewer significant competitors, *prices rose in nearly 95% of cases*. And on average, post-merger prices increased 4.3%.[44] We also know that corporate

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[39] Milton Handler, "Introduction," The Antitrust Bulletin 35, no. 1 (March 1990): 21.
[40] FT Editorial Board "Companies should shift from 'just in time' to 'just in case'" *Financial Times*, April 21, 2020, https://www.ft.com/content/606d1460-83c6-11ea-b555-37a289098206
[41] Bradley Martin, "Supply Chains and National Security," RAND, April 12, 2021, https://www.rand.org/blog/2021/04/supply-chains-and-national-security.html
[42] Paul McCaffrey, "Aswath Damodaran on Acquisitions: Just Say No," CFA Institute, February 28, 2019, https://blogs.cfainstitute.org/investor/2019/02/28/aswath-damodaran-on-acquisitions-just-say-no/
[43] Nancy L. Rose and Jonathan Sallet, "The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right," University of Pennsylvania Law Review, Forthcoming, June 30, 2020, https://ssrn.com/abstract=3639184.
[44] John Kowka, "U.S. antitrust and competition policy amid the new merger wave," Washington Center for Equitable Growth, July 27, 2017, http://equitablegrowth.org/report/u-s-merger-policy-amid-the-new-merger-wave/.

mark-ups have increased dramatically in the last few decades, from 18% in 1980 to 67% today.[45] This trends with higher industry concentration levels and rising market power.

So not only is it necessary to remove the efficiencies defense from the Act, but it is incumbent upon enforcers and the antitrust establishment to move beyond economic efficiency as the highest aim of antitrust law. Instead, focusing on the abuse of dominance by incumbent players and reviving antitrust law as a true challenge to concentrated private power, is of paramount importance.

A recent report, *Reforming the Competition Act,* by Vivic Research provides additional detailed reasoning for removing the efficiencies defense.[46] We agree with its assessment and recommendations.

How anti-competitive behavior of dominant firms harms small businesses and entrepreneurship

Canadian competition narratives tend to emphasize restraints on businesses coming largely from policy proscriptions and overburdensome government regulation. "Pro-competition" language is often used synonymously with a deregulation agenda. However, restraints on entrepreneurs increasingly come from *lack* of policy and enforcement against incumbent players.

In the absence of adequate competition policy enforcement, incumbent firms now act as gatekeepers and de facto *private* regulators in markets — setting terms, prices, and erecting barriers between businesses and their customers in the marketplace. Enforcers should more closely consider how anti-competitive behavior of dominant firms harms innovation and entrepreneurship.

The opening Purpose statement of the Act states that the Act exists, "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" which the commissioned paper takes issue with. Iacobucci claims that "if protecting SME's does not promote efficiency, it is not clear what value is at stake; why would competition policy consider sacrificing efficiency to promote the well-being of SME's? Again, SME's are vital engines of economic growth in Canada, but competition policy protecting economic efficiency appropriately protects them."

In May of this year, the American Economic Liberties Project launched the Access to Markets initiative[47] after hearing from increasing numbers of entrepreneurs across industries who were

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[45] Jan De Loecker and Jan Eeckhout, "The Rise of Market Power and the Macroeconomic Implications," NBER, August 2017, https://www.nber.org/papers/w23687.

[46] Robin Shaban, *Reforming the Competition Act: Suggested Changes to Enhance Competitiveness and Equity of the Canadian Economy*, Vivic Research, April 29, 2021. https://vivicresearch.ca/assets/PDFS/INDU-Committee-Submission-April-29-2021.pdf

[47] See: www.accesstomarkets.org

facing difficulty competing due to the anticompetitive practices of dominant players. We have heard from entrepreneurs in industries as diverse as: brewing, farming, journalism, pharmacy, grocery, franchising, ecommerce, music and entertainment, technology including search engines, app development, cloud storage, and many others.[48]

They tell horror stories of their inability to build and grow their business due to the anticompetitive tactics of dominant players including tying, predatory pricing, self-preferencing, tollbooths, copycatting, and a host of others. Our paper *The Other Red Tape: Market Concentration and The Rise of Private Gatekeepers*[49] explores these themes in greater detail with industry case studies.

Many entrepreneurs cite coercive contract terms which restrain their businesses, or their avenues of recourse, including: non-disclosure agreements or non-disparagement clauses, class action waiver clauses, liability disclaimers, exclusive supply or purchaser agreements, loyalty discounts and slotting fees which favor the largest players, no price competition clauses, vertical price maintenance restrictions, perpetual claims on intellectual property and/or patents, and mandatory disclosure of competitive business information.[50]

The Act has provisions in section 77 (Exclusive Dealing, Tied Selling and Market Restriction) and sections 78 and 79 (Abuse of Dominant Position). But more enforcement of these and other gatekeeping activities and coercive contract terms which harm entrepreneurs and small and medium-sized businesses is of the utmost importance to fostering a thriving entrepreneurial ecosystem in Canada.

Large-scale government programs to spur entrepreneurship and innovation (like the Superclusters and the Strategic Innovation Fund) are important but are akin to seeding new trees in a redwood forest — ultimately ineffective. Innovation spending is useful, but it must also be complemented with commensurate whole of government efforts on competition policy enforcement. Otherwise, new businesses will not have adequate access to markets to credibly compete.

It would be useful to hold public forums in Canada with entrepreneurs to better understand what anticompetitive practices they may be facing which impede the growth of their business, and their ability to compete before getting acquired. This could be done through engagement with groups like the Council of Canadian Innovators and the Canadian Federation of Independent Businesses.

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[48] See: https://accesstomarkets.org/testimonials/; Economic Liberties' Virtual Town Hall with the White House National Economic Council, https://www.economicliberties.us/event/economic-liberties-virtual-town-hall-with-the-white-house-national-economic-council/#

[49] Denise Hearn, Nidhi Hegde, and Matt Stoller, "The Other Red Tape: Market Concentration and The Rise of Private Gatekeepers," American Economic Liberties Project, June 2021, https://accesstomarkets.org/learn/the-other-red-tape-market-concentration-and-the-rise-of-private-gatekeepers/

[50] Unfair or Coercive Business Contract Terms, American Economic Liberties Project, https://accesstomarkets.org/the-latest/potentially-unfair-or-coercive-business-contract-terms/

Conclusion

It is time for Canada to take industry concentration and its associated harms seriously. The issue of concentrated corporate power is too critical to ignore or sideline any longer. By fostering a robust dialogue (which does not simply advocate for the status quo), Canada will align itself with the rest of the world.

A key issue with competition analysis in Canada is the sparse availability of research on industry consolidation and its dynamics. Alongside a wholesale review of the Competition Act, there should be a concerted whole of government push for investigations into concentration and its market effects across the nation.

We are available to discuss any of these recommendations and other matters, with the Senator or others, if we can be helpful in advancing this conversation in Canada.

Thank you,

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