From Fiction and Fantasy to Reality: How a New Era of Competition Law in Canada Came To Be

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Canada is a country with abundant natural resources, a diverse and talented workforce, stable institutions, and tremendous economic growth potential. However, for decades, we have punched below our weight on productivity measures while our economy has experienced declining levels of competitive intensity and business dynamism.[1] We rank near the bottom of the Organisation for Economic Co-Operation and Development (OECD) on a wide array of regulatory barriers to competition and, for many years, the funding and tooling of our competition law regime has been lackluster in comparison to other advanced economies. To put it bluntly: as a country, we have not placed sufficient importance on competition, and Canadians have been bearing the cost.

But that's beginning to change.

Over the past four years, Canadian competition law has seen some significant and long overdue improvements. Ideas that were once a forlorn hope of officials of the Competition Bureau, Canada's competition law enforcement agency, and a small group of Canadian competition advocates are now a reality. Interest in pro-competitive policymaking has never been stronger in Canada's Parliament or in the general public, across the political spectrum. We have entered a new era.[2]

Recent reforms to Canada's antitrust regime have tackled both resourcing and tools. In 2021, the Competition Bureau was granted a major budget increase to help us better protect and promote competition. These investments, still being phased in, have nearly brought our resources back to levels we enjoyed in the early 2000s, prior to a prolonged period of austerity.

This much-needed resource injection was followed by three waves of substantive amendments to the Competition Act (Act) that strengthen virtually all aspects of our framework. The full list of reforms is, in the words of at least one Canadian law firm, breathtaking.[3] A short list of some of the major changes include:

- Eliminating fixed maximum fines for criminal cartel offenses (previously capped at C$25 million) by allowing fines to be set in the discretion of the court;
- Replacing fixed maximum penalties for civil violations (previously capped at C$10 million) with maximums that can scale up in proportion to the benefit derived from the conduct or firm turnover, as necessary;

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[1] Competition Bureau, *Competition in Canada from 2000 to 2020: An Economy at a Crossroads* (Oct. 19, 2023), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-canada-2000-2020-economy-crossroads.

[2] *See*, Matthew Boswell, The New Era of Competition Enforcement in Canada," Speech to the Canadian Bar Association Competition Law Fall Conference (Sep. 26, 2024), https://www.canada.ca/en/competition-bureau/news/2024/09/the-new-era-of-competition-enforcement-in-canada.html.

[3] McMillan LLP, *Transformative Change: Your Guide to Canada's Breathtaking Competition Act Changes* (Dec. 5, 2023), https://mcmillan.ca/insights/transformative-change-your-guide-to-canadas-breathtaking-competition-act-changes/.

- Criminalizing hard core wage-fixing and no-poaching agreements;
- Granting the Competition Bureau formal market study powers;
- Repealing Canada's unique statutory efficiencies defense for anti-competitive mergers;
- Introducing new rebuttable structural presumptions for mergers;
- Strengthening the standard for merger remedies so that they seek to preserve or restore the level of competition that would have existed without the merger;
- Expanding the private enforcement regime to include abuse of dominance claims, and allowing private parties to seek monetary awards as part of those suits;
- Relaxing the requirement established in prior case law to prove that an abuse of dominance was intended to harm a competitor (as opposed to competition); and
- Allowing the Competition Tribunal (Tribunal)[4] to make prohibition orders to stop dominant firm conduct that has either subverted competition in the marketplace or was intended to do so.

U.S. practitioners will likely recognize most of these as pre-existing and longstanding features of U.S. antitrust policy—they are. But for Canada, these and other reforms represented hard-earned, generational changes.

While Canada adopted a competition law in 1889, one year ahead of the *Sherman Act*, the ambit of our law has almost always been narrower, reflecting a view that Canada needed to be less skeptical and more tolerant of concentration of economic power given the realities of our small, open economy.[5] Our competition law did not cover mergers and monopolistic practices until 1910, and even then, only on a nearly-impossible-to-apply criminal law basis until civil provisions were introduced in 1986.[6] Our antitrust regime did not have a dedicated investigative body until 1923, roughly 34 years after having a law on the books. Our competition laws did not apply to services until 1976 by which time service sectors had already grown to represent 60% of Canada's economic output.[7] There was no *per se* offense for hardcore cartels in Canada until 2010, at least 40 years after the need was recognized.[8] There was no private enforcement regime for abuse of dominance cases—arguably the quintessential private antitrust action—until 2022 and the ability of private parties to seek monetary awards in these suits does not kick in until June 2025.[9]

Canadians are known for their modesty, but the modesty reflected in our antitrust regime over the past 130+ years did not serve our economy well, and that became increasingly hard to ignore in the face of pressing challenges related to affordability and growth. As our department for Innovation, Science and Economic Development soberly stated following a wide-ranging consultation on the Act: "[I]t is clear that a wide variety of stakeholders—individual Canadians, consumer

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[4] The Competition Tribunal is the specialized adjudicative body that hears and decides civil competition law matters in Canada.

[5] John S. Tyhurst, Canadian Competition Law and Policy, Chapter 2 (2021).

[6] Between 1910 and 1986 there were no successful prosecutions in merger cases, and there was only one successful prosecution in a monopolization case, Eddy Match Co. Ltd. et al. v. The Queen, 1953 CanLII 457 (Can. Que. C.A.).

[7] In one case, a group of road-paving companies was acquitted on bid-rigging charges because the contracts were predominantly for work and labor with the tangible paving materials supplied only incidentally. The court observed that, "[w]hile the methods employed by the respondents in presenting rigged bids were reprehensible in the highest degree and cannot be condoned, the Court is called upon to determine whether their conduct, however censurable on moral grounds, fell within the penal provisions [of the law]." R v. J.J. Beamish Construction Co. Ltd., et. al, 1967 CanLII 239 (Can. Ont. C.A.).

[8] Economic Council of Canada, *Interim Report on Competition Policy* (1969) https://publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf.

[9] Private access to the Tribunal has been available, since 2002, for specialized civil provisions dealing with refusals to deal, exclusive dealing, tied selling and market restriction and, since 2009, for resale price maintenance. However, there has never been a successful private applicant under any of these provisions, and the only remedy available to applicants has been injunctive relief.

groups, unions, civil society organizations, academics, as well as several sectoral business associations—felt that the current Act and its enforcement framework had not consistently achieved its objectives and led to suboptimal outcomes."[10]

Addressing this problem was not simple. We never had a trust-busting era to try to rekindle simply by using our existing tools more assertively. Unlike the U.S., there is a dearth of case law in Canada, especially pro-enforcement case law, and courts have rarely applied the full force of the law.[11] When our law was overhauled in 1986, it was cast into a technocratic mold with complex, multi-part economic tests and a specialized Tribunal to interpret them.

To economists and academics of the time, our Act was the conceptual ideal of a competition law, often described as one of the most economically-sophisticated statutes in the world.[12] But to practitioners and the Competition Bureau it was challenging to apply, and only became more so over time. To stakeholders and the general public, it was largely incomprehensible. Mergers to monopoly could not be presumed to be anti-competitive in Canada, and even when they were proven to be anti-competitive, they could still be saved by a unique efficiencies defense (and that actually happened, twice!).[13] It was obvious that significant legislative amendments were needed to better protect and promote competition in Canada.

Fortunately, these legislative reforms do not represent a radical rethink of the *purpose* of competition law, which is to maintain and encourage competition in Canada. Instead, the changes bring our law up to par with international best practice to help achieve those aims. In our view, the changes make the law more administrable and more likely to meet its policy objectives. They will enable more timely and effective enforcement by the Competition Bureau, complemented by a stronger and more accessible private enforcement regime. U.S. practitioners advising companies with cross-border operations should hopefully see greater convergence between Canadian and U.S. antitrust law, which should facilitate compliance.

Importantly, the Act remains subject to robust due process protections, evidentiary requirements and leave standards, to ensure fairness for all parties and to weed out clearly unmeritorious cases. As always, the Competition Bureau will continue to apply the law in a transparent, predictable and evidence-based manner. Guidelines and case law will clarify aspects of the law over time, sanding down rough edges, which are inevitable when a framework law is amended.

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[10] Innovation, Science and Economic Development Canada, *Future of Canada's Competition Policy Consultation—What We Heard Report* (Sep. 20, 2023), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report.

[11] By way of example, no individuals have faced jail time for a cartel or bid rigging offense since 1996, with courts favouring less severe conditional sentences such as house arrest or community service. In the case of mergers, the Tribunal has never issued an injunction temporarily preventing a merger from closing, favouring targeted "hold separate" arrangements. Similarly, no merger has been permanently blocked or dissolved in Canada and partial divestiture has been ordered in a total of just three merger cases since 1986. Likewise, there has never been a structural or break-up remedy in a monopolization case, only conduct remedies. And no private applicant has obtained a permanent remedial order in any case brought to the Tribunal under any provision, with most applicants failing at the leave stage, although a modest number have obtained interim orders. In fairness to the courts, the law has historically set a high bar for intervention, and the Bureau and public prosecutors, perhaps chastened by weak precedents, have not always pressed for the strongest remedies.

[12] Michael J. Trebilcock, and Ralph A. Winter, *The State of Efficiencies in Canadian Merger Policy*, Canadian Competition Record, Winter 1999-2000, at 106.

[13] One case involved a merger to monopoly in various retail propane markets across Canada with an estimated average price increase of 8%. Canada (Commissioner of Competition) v. Superior Propane Inc., 2003 FCA 53 (Can. Fed. C.A.), [2003] 3 FC 529 (Can. Fed. Ct.). Another case involved a merger to monopoly for hazardous waste disposal services in Northeastern British Columbia with an estimated price effect of 10% and cognizable efficiencies that were found to be marginal to the point of being negligible. Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3 (Can.).

Of course, there were (and still are) segments of the business and practitioner community who strongly oppose some of the changes. Some practitioners rejected the premise that fundamental change was needed at all.[14] However, a well-known adage in the competition law community holds that, when powerful interests oppose a policy change, it is often a good indication that the change will be beneficial for competition.

Historically, competition policy in Canada has been predominantly shaped by the business community, at a plodding pace, and not always transparently.[15] Recent amendments were a sharp break from this tradition as they were influenced by a broader range of viewpoints and perspectives generated through Senator- and government-led consultations, Parliamentary committee studies, and public and expert dialogue.[16] Amendments were introduced decisively, in contrast with the analysis paralysis that characterized previous reform efforts. The reforms were well considered and widely supported, garnering virtually unanimous approval in an otherwise deeply-divided minority Parliament.

While a confluence of factors contributed to these historic changes, the balance of this paper will focus on the Competition Bureau's role as an advocate. In our view, we said and did a number of things that likely moved the needle in advancing the amendments and may help practitioners understand how certain changes came to be. These insights may also be useful for other competition policy advocates, particularly those in countries transitioning to a stronger competition culture.

Lessons learned from the reform process

1. Getting the ball rolling through plain-spoken public advocacy. Consistent with other competition agencies, the Competition Bureau has always played an active role in providing input and advice on competition policy reform, drawing on our unique perspective as the expert body tasked with administering and enforcing Canada's competition law.

Prior to the recent wave of reform, the last review of competition policy in Canada had taken place in 2007-2008, although that review placed much greater emphasis on public policies relating to international "competitiveness" like our foreign investment regime, our immigration system, and our tax and trade policies.[17] While some positive amendments to the Act came out of that process, many issues were not explored, and in the years that followed many new questions arose as a result of case law, digital transformation, international developments, and evolving economic thinking.

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[14] James Musgrove and Hannah Johnson, *What's it all about, Matthew? Some thoughts on the Future of Competition Policy in Canada* (Feb. 2023), https://mcmillan.ca/wp-content/uploads/2023/02/Our-paper-Whats-It-All-About-Matthew.pdf (arguing that the Act "has served Canada well" and that the Canadian economy "literally, has never been better").

[15] Successful campaigns by the Canadian business community to defeat or delay competition law reforms are well documented in, e.g., H.G. Thorburn, *Pressure groups in Canadian politics: Recent revisions of the anti-combines legislation*, 30:2 Canadian Journal of Economics and Political Science, 157—174 (May 1964); W.T. Stanbury, Business Interests and the Reform of Canadian Competition Policy, 1971-1975 (1977); Roy Vogt, *Corporate Power and the Development of New Competition Policies in Canada*, 19:2 Journal of Economic Issues, 551-558 (1985); and, Peter C. Newman, Mavericks: Canadian Rebels, Renegades and Anti-Heroes (2010) at 259-260.

[16] For an overview of some of these consultative efforts, see Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (Nov. 22, 2022), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada.

[17] Competition Policy Review Panel, Industry Canada, *Compete to Win: Final Report—June 2008*, (2008). Note that only four of the 59 recommendations made in the report pertain to the Act.

By 2016, if not earlier, the Competition Bureau had formed a view that there should be a comprehensive review of the Act. In February of that year, then-Commissioner John Pecman reported that we were "not on the radar" of the then newly-elected government but he was hopeful that, in time, the government would "focus on improving the competition laws in Canada".[18]

The Competition Bureau's attempts to advocate internally to the Canadian government about the importance of competition and the need to look at the Act and resourcing the Bureau were making little progress. However, in May 2019, there was a glimmer of hope. Then-Minister Bains, Canada's Minister of Innovation, Science and Industry, wrote a public letter asking us to consider whether our "competition infrastructure" was "fit for purpose and able to remain responsive to a modern and changing economy."[19]

We took that invitation and ran with it. We started speaking publicly and plainly about the Competition Bureau's resource pressures and what we viewed as shortcomings of the Act.[20] When called to appear before Parliamentary committees, which became increasingly prevalent, we reiterated those messages.[21] For the Commissioner's traditional keynote speech at the Canadian Bar Association's Competition Law Fall Conference we used a simple four-word title—"Canada needs more competition"—and spoke about the urgent need to review and modernize our law.[22] We also started diversifying our speaking engagements, looking for opportunities to speak to broader groups of Canadians and not just to competition law insiders with whom we already had significant contact. When the time came, we pushed back publicly on boogeyman arguments that competition law reform would stifle business investment.[23]

These efforts and many other similar initiatives over several years paid dividends. Policymakers and the general public appreciated the candor and perspective. A new generation of competition policy advocates took note of our pleas and enthusiastically joined the fray with their perspectives (at one point our cause was likened to the #FreeBritney movement, which made for some surreal media questions).[24]

After a snap election in fall 2021, the then-Minister responsible for competition policy was issued a mandate letter from the Prime Minister asking him to "undertake a broad review of the current legislative and structural elements that may restrict or hinder competition."[25] The public conversation

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[18] Guniganti, Pallavi, *Pecman prepares for new Canadian government*, Global Competition Review (Feb. 2, 2016), https://globalcompetitionreview.com/article/pecman-prepares-new-canadian-government.

[19] Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition (May 21, 2019), https://competition-bureau.canada.ca/how-we-foster-competition/our-organization/letter-minister-innovation-science-and-economic-development-commissioner-competition.

[20] Thompson, Elizabeth, *New tools, stiffer penalties needed to police big tech companies, says competition watchdog*, CBC News (May 31, 2019), https://www.cbc.ca/news/politics/digital-economy-regulation-competition-1.5156743

[21] See, e.g., Meeting Number Nine of the House of Commons Standing Committee on Industry, Science, and Technology : Can. House of Commons Standing Comm. on Industry, Science and Technology (Dec. 3, 2020) (statements by Competition Bureau representatives), https://www.ourcommons.ca/documentviewer/en/43-2/INDU/meeting-9/evidence and, *ibid* (Apr. 7, 2021) https://www.ourcommons.ca/documentviewer/en/43-2/INDU/meeting-29/evidence.

[22] Matthew Boswell, Canada needs more competition, Speech to the Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2021), https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html.

[23] Matthew Boswell, *Monopoly runs deep in Canada—we still hear arguments against competition reform*, The Globe and Mail (May 1, 2023), https://www.theglobeandmail.com/business/commentary/article-canada-monopoly-competition-reform/.

[24] Vass Bednar (@VassB), X (Nov. 5, 2021, 4:42 pm), https://x.com/VassB/status/1456723688317980673, and Soltys, Douglas, *Free Boswell: Canada's Anti-Competitive Policy*, BetaKit (Aug. 14, 2021), https://betakit.com/free-boswell-canadas-anti-competitive-policy/.

[25] Mandate Letter from the Prime Minister of Canada Justin Trudeau, (Dec. 16, 2021), https://www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter.

expanded from there, with a constant stream of opinion pieces in major Canadian news outlets, the emergence of new competition-focused podcasts, new anti-monopoly think tanks, and vigorous debate. The ball was rolling.

2. Being relentless and seizing opportunities. In addition to being more transparent and plain-spoken about the shortcomings of the Act, we were persistent, making sure that we were constantly repeating our message internally throughout government. When we learned about relevant research or international developments, we pro-actively shared that information. We highlighted the benefits of competition at every chance in departmental meetings. We drew linkages between competition and the issues of the day like affordability and economic recovery. And when there were opportunities to provide our views on specific gaps in the Act, we seized them.

For example, in the summer of 2020, there was a scandal involving alleged wage-fixing, which captured the public's attention. On the same day, the three largest grocery retailers in Canada simultaneously ended "hero pay" bonuses they had been offering to their front-line workers throughout the early months of the COVID-19 pandemic. Executives of the three companies were called to appear before a Parliamentary committee to explain their decisions.[26] Their testimony revealed that they had been in contact with one another about their decisions to end their respective bonus programs; however, they maintained that they had reached their decisions independently.

Unsurprisingly, there were calls for the Competition Bureau to investigate the situation for possible collusion. However, as part of the move to a *per se* criminal cartel offence in 2010, the word "purchase" was removed from the section and, as a result, the offence only applied to *sell-side* conspiracies and not to *buy-side* conspiracies like wage-fixing.[27] To provide clarity and transparency for stakeholders, we issued a public statement explaining that we could not investigate alleged buy-side agreements (including wage-fixing and no-poaching agreements) under our cartel provisions.[28] We explicitly acknowledged that this diverged from the approach of our U.S. counterparts under U.S. antitrust law. And we explained this regrettable situation to Parliamentarians when we were called to testify. The Parliamentary committee looking into the hero pay issue subsequently recommended that the government address this gap in our cartel provisions.[29] The following year, amendments were passed to criminalize wage-fixing and no-poaching agreements.

Previously, the Competition Bureau may have demurred or equivocated when asked about a potential gap in the law. Now, we were starting to be more forthright about these issues.

3. Providing comprehensive, balanced and evidence-based advice. In late 2021, a then-sitting Senator, Howard Wetston, who previously headed the Competition Bureau from 1989-1993, decided to initiate a consultation on the Act, commissioning a discussion paper and

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[26] Report of the Standing Comm. on Industry, Science and Technology , *Wage Fixing in Canada and Fairness in the Grocery Sector*, Report of the Standing Comm. on Industry, Science and Technology (June 2021), https://www.ourcommons.ca/Content/Committee/432/INDU/Reports/RP11435180/indurp06/indurp06-e.pdf.

[27] This interpretation would later be confirmed by the courts in the context of class action proceedings. See, e.g., Mohr v. National Hockey League, 2022 FCA 145 (Can. Fed C.A.), [2021] 4 FCR 465 (Can. Fed Ct.).

[28] Competition Bureau, Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements (Nov. 27, 2020), https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html. Our statement also noted the challenges applying our civil provision, which, among other things, only applied to existing or proposed agreements (not past) and only provided for injunctive relief.

[29] *Wage Fixing in Canada and Fairness in the Grocery Sector*, *supra*, note 26, Recommendation 1.

inviting submissions from a wide range of stakeholders.[30] The Bureau took the opportunity to make a comprehensive public submission, providing specific recommendations on a large number of improvements to the Act spanning all areas of our work.[31]

Previously, the Competition Bureau may have been selective in advocating for a small number of changes. We had done so in the past, for example, in advocating for market study powers[32], for a notification regime for reverse patent settlements,[33] or for reform of our efficiencies defense[34] for anti-competitive mergers. However, these calls for targeted changes to the Act often did not bear fruit, possibly because of bad timing, possibly because we were not presenting these ideas to the right audiences, and possibly because it is hard to get policymakers excited about one-off changes.

By this point, we had been calling for a comprehensive review of the Act for some time, and we had a long list of specific changes we thought were needed as well as detailed justifications based on our enforcement and advocacy expertise. Presenting these publicly, we reasoned, would add to the public record and promote more constructive dialogue while demonstrating to policymakers that there was a meaningful slate of improvements that could be made. We supported these recommendations with evidence, including case examples, international benchmarks, and economic research, drawing on the experience of career staff from across the organization.

Our approach proved to be on point. The government introduced a 'down payment' package of legislative reforms in early 2022 that included many of the consensus items identified in Senator Wetston's consultation, including increasing maximum fines and penalties, expanding our private access regime to include abuse of dominance claims, and criminalizing wage-fixing and no poaching agreements (as noted above). All of these were issues that the Competition Bureau recommended addressing in its submission. The reform package also pulled other ideas from the Bureau's submission like the introduction of an anti-avoidance provision in our pre-merger notification regime, the explicit recognition of drip pricing as a form of deceptive marketing, and changes to improve our ability to gather information from foreign targets. If we had been highly selective we may not have mentioned these ideas, and these additional positive changes may not have been made.

Perhaps more importantly, the government was convinced of the need to do more, launching its own consultation in late 2022 to solicit views on more comprehensive changes to the Act. The consultation was aptly titled "The Future of Competition Policy in Canada" and featured a 56-page discussion paper with dozens of questions spanning all areas of the Act.[35] In terms of scope and

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[30] The consultation materials and submissions are currently hosted on the website for Senator Colin Deacon following Senator Wetston's retirement from the Senate: https://www.colindeacon.ca/projects/competition-consultation.

[31] Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (Feb. 8, 2022), https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era.

[32] John Pecman, Building antitrust with trust, Speech to the Canadian Bar Association Spring Competition Law Conference (May 10, 2018), https://www.canada.ca/en/competition-bureau/news/2018/05/building-antitrust-with-trust.html.

[33] Competition Bureau, Patent Litigation Settlement Agreements: A Canadian Perspective, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry (Sep. 23, 2014), https://web.archive.org/web/20150104160352/http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html.

[34] John Pecman, Populism, Public Interest and Competition, Speech to the C.D. Howe Institute (Apr. 27, 2018), https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition---populism-public-interest-and-competition.html.

[35] Innovation Science and Economic Development Canada, *The Future of Competition Policy in Canada* (Nov. 22, 2022), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada.

ambition, this was clearly the review of the Act we had been hoping for. The government received hundreds of submissions from stakeholders and the general public, generating a consultation record of thousands of pages, containing over 100 reform proposals.[36]

The Competition Bureau participated publicly in this consultation as well, reiterating and expanding on the list of recommendations made in our previous submission to Senator Wetston's consultation.[37] And, again, we believe we were well served by providing a thorough submission with specific recommendations, as many of our ideas (big and small) were picked up in one form or another in the amendment packages that followed.

For example, the Competition Bureau had been advocating for formal market study powers for at least 20 years, but those efforts were stymied by concerns from the business community around the burden they would potentially impose. Our submissions on this issue cited OECD best practices, contrasted our lack of powers with peer agencies such as the U.S. Federal Trade Commission and U.K. Competition and Markets Authority, and pointed to practical challenges we were encountering in studying competition in the retail grocery sector (an issue of significant import for policymakers) in the absence of compulsory information-gathering powers. However, we also went further and explained how market study powers could be designed to address legitimate stakeholder concerns. We recommended, for instance, requirements on the Competition Bureau to publish terms of reference for market studies to guard against the perception that they would be used as "fishing expeditions." We also recommended time limits for the Bureau to complete a study and judicial oversight over compulsory information production to the Bureau (consistent with productions in the context of enforcement efforts). These checks and balances were included by the government when market study powers were introduced into the Act.

4. Being prepared to implement. Given that recent reforms were introduced in phases, we were well served by having a plan to implement the amendments swiftly and transparently, demonstrating to policymakers that we could put new tools into action in an effective and responsible manner.

For example, the June 2022 amendments criminalizing wage-fixing and no-poaching agreements had a one-year delayed coming into force. We published draft guidelines within six months, consulted extensively on them in collaboration with stakeholders, and finalized the guidelines prior to the coming into force date so that businesses and their advisors could have guidance on how to comply with the law.[38]

The June 2022 amendments also contained a new provision clarifying that drip pricing (omitting mandatory fees from advertised prices) was a deceptive marketing practice. We brought our first test case under this new provision less than a year later, and obtained a successful ruling from our Competition Tribunal in September 2024, including a record administrative monetary penalty.[39]

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[36] *Innovation Science and Economic Development Canada, Future of Canada's Competition Policy Consultation—What We Heard Report* (Sep. 20, 2023), *supra* note 16.

[37] Competition Bureau, *The Future of Competition Policy in Canada* (Mar. 15, 2023), https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada.

[38] Press Release, Competition Bureau, Competition Bureau publishes wage-fixing and no-poaching enforcement guidelines (May 30, 2024), https://www.canada.ca/en/competition-bureau/news/2023/05/competition-bureau-publishes-wage-fixing-and-no-poaching-enforcement-guidelines.html.

[39] Press release, Competition Bureau, Competition Bureau wins deceptive marketing case against Cineplex (Sep. 23, 2024), https://www.canada.ca/en/competition-bureau/news/2024/09/competition-bureau-wins-deceptive-marketing-case-against-cineplex.html. The Tribunal's decision is under appeal at the Federal Court of Appeal.

There are many other examples. We launched our first market study under our new powers within months of those amendments coming into effect.[40] We made written representations in the first private application for leave under the abuse of dominance provisions heard by our Tribunal.[41] We moved quickly to consult on guidance relating to new greenwashing provisions, and are in the process of consulting stakeholders as part of updates to our merger enforcement guidelines, among other guidelines that are being created or updated.[42]

All of these steps, we believe, have contributed to the Competition Bureau's credibility in advocating for reforms.

5. Keeping the momentum going. Last but not least, we have tried to keep the momentum going. Recent reforms have proven that there is wide support for pro-competition policies. And we had made no secret of the fact that competition law reform is only part of the solution to addressing Canada's competition problems. Over the past few years we have organized workshops,[43] given speeches,[44] and published op-eds[45] on the need to address a wide array of regulatory barriers to competition in Canada, which span all levels of government. We have published a toolkit[46] to help regulators apply a competition lens when designing or evaluating regulations, and we have an extremely active advocacy program that we use to provide specific advice to regulators on how to achieve regulatory goals in a competition-friendly way.[47] And with formal market study powers we are now better equipped to provide evidence-based advice under our advocacy mandate.

Conclusion

Five years ago, the idea that, by 2025, Canada's Competition Act would be dramatically overhauled and updated was something that only the most optimistic and imaginative Canadians would have predicted. And yet, that is exactly what has happened.

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[40] Press release, Competition Bureau, Competition Bureau officially launches study of competition in Canada's airlines industry (Jul. 29, 2024), https://www.canada.ca/en/competition-bureau/news/2024/07/competition-bureau-officially-launches-study-of-competition-in-canadas-airlines-industry.html.

[41] Written Representations of Commissioner of Competition, JAMP Pharma Corporation v Janssen Inc., CT-2024-006 #45 (Can. Comp. Trib.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521292/index.do. This was the first time the Commissioner had ever intervened in a private access case before the Tribunal.

[42] The Bureau maintains a database of open and closed consultations on its website, https://competition-bureau.canada.ca/how-we-foster-competition/consultations/open-and-closed-consultations.

[43] Competition Bureau, Canada Needs More Competition: takeaways from the Competition and Growth Summit (June 2021), https://competition-bureau.canada.ca/canada-needs-more-competition-takeaways-competition-and-growth-summit.

[44] See, e.g., Matthew Boswell, Seizing the Moment to Build a More Competitive Canada,, remarks to Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2022), https://www.canada.ca/en/competition-bureau/news/2022/10/seizing-the-moment-to-build-a-more-competitive-canada.html; Matthew Boswell, Why Canada needs an urgent competition upgrade, Remarks to Annual Conference of the Canadian Chapter of the Institute of Communications (May 16, 2023), https://www.canada.ca/en/competition-bureau/news/2023/05/why-canada-needs-an-urgent-competition-upgrade.html; Matthew Boswell, A whole-of-government approach to promoting competition, Remarks to Canada's Competition Summit (Oct. 5, 2023), https://www.canada.ca/en/competition-bureau/news/2023/10/a-whole-of-government-approach-to-promoting-competition.html.

[45] Matthew Boswell, *The alarm bells are ringing: Competition is the solution to Canada's productivity crisis*, The Globe and Mail (Jun. 17, 2024), https://www.theglobeandmail.com/business/commentary/article-the-alarm-bells-are-ringing-competition-is-the-solution-to-canadas/.

[46] Competition Bureau, Strengthening Canada's economy through pro-competitive policies: A step-by-step guide to competition assessment (Aug. 20, 2020), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/strengthening-canadas-economy-through-pro-competitive-policies.

[47] The Bureau maintains a database of its advocacy submissions on its website: https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau.

Competition had long been the "elephant in the room" when Canadians discussed the economy, the cost of living or the quality of services they received in their daily lives. This is no longer the case. There has been a great awakening in Canada. An awakening to the importance of competition throughout our economy and to the fact that Canada needs more competition.

Significant changes to the law have ushered in a new era of competition policy in this country and the Bureau is proud to have played a role in advocating for many of the changes that have been made to the law. The Bureau is committed to principled, transparent and evidence-based enforcement of the Act, and going forward, we will continue to advocate for competition at all levels of government. By reducing or eliminating unnecessary regulatory barriers to competition, we can build on the significant improvements made to the Act and deliver more competitive outcomes for Canadians. ●