Written Submission for the Study of Bill C-59, the *Fall Economic Statement Implementation Act*

Canadian Chamber of Commerce
Chambre de Commerce du Canada

February 2024

Recommendations

1) **Further amend the *Excise Tax Act* to ensure the GST New Residential Rental Property Rebate maximizes creation of housing supply.**

2) **Ensure proper safeguards for expanded Private Rights of Action Before the Competition Tribunal.**

3) **Leave Subsection 92(2) in the *Competition Act* to ensure the Competition Tribunal evaluates the competitive effects of mergers based on solid evidence rather than presumptions.**

4) **Maintain the ability of the Competition Tribunal to make cost awards in favour of a party who has had costs visited upon them by proceedings of the Commissioner of Competition.**

5) **Include intangible property and mine development investments in the Clean Technology Manufacturing Tax Credit.**

6) **Extend the timeline for phasing out the Clean Technology Manufacturing Investment Tax Credit and Clean Electricity Investment Tax Credit.**

7) **Abandon the Digital Services Tax or at a Minimum, Eliminate its Retroactivity.**

Introduction

The Canadian Chamber of Commerce welcomes the opportunity to provide written feedback to the Senate Standing Committee on National Finance as part of their study of Bill C-59, the *Fall Economic Statement Implementation Act*.

Canada's competitiveness is slipping. Our productivity continues to decline. This means Canadians are poorer overall, have fewer opportunities to pursue their personal goals, and have to pay more just to stay where they are. We must pursue growth if we are to maintain our standard of living and continue to provide the services Canadians require.

Bill C-59 signals that the government heard the business community on issues such as addressing our housing needs and the importance of ensuring workers can work in any community where and when their skills are needed most. We all agree on the need for measures that will help build our homes, support businesses in finding the right talent, and ease the burden of doing business in Canada.

We welcome amendments to the *Excise Tax Act* that should assist in the creation of much needed housing supply. That said, C-59 presents an opportunity to go further to help Canada tackle the housing crisis and restore affordability for Canadian families.
We support the government's efforts to strengthen our competition laws in support of a thriving and innovative economy. We recognize that strong competition laws are necessary to encourage entrepreneurism, investment, and innovation, and ensure consumers benefit from lower prices and better products and services. Competition is also shown to have positive effects on a firm's productivity and efficiency – which are important goals given the current economic challenges facing Canada.

We welcomed the government's consultation on the future of competition policy in Canada, but again emphasize our concern with the speed at which the government is moving with piece-meal changes to the *Competition Act*. The public consultation launched in late 2022 was welcome, but it shouldn't preclude consulting with Canadians on actual legislative proposals, which ISED's discussion document "The Future of Competition Policy in Canada" did not include.

The speed with which successive legislative reforms to the *Competition Act* have been introduced – in Bills C-56 and C-59 – has made it difficult for stakeholders to evaluate and comment on the government's proposals. Bill C-56 specifically was amended following a closed-door negotiation that left Canadians, and even members of Parliament, in the dark on the government's changes to the bill until the last minute. The bill was pushed through Parliament in an unprecedented manner before the holidays without real debate and study. The *Competition Act* is a law of general application, meaning that reforms to the Act have implications for all businesses in Canada. Recent and proposed changes subject businesses to compliance with vague and untested laws, while also exposing them to punitive administrative penalties and potentially frivolous litigation. The piecemeal and rushed approach that is being pursued to overhaul the Act is not conducive to good public policy and risks unintended consequences. We hope that the government will demonstrate greater transparency and allow for real analysis and consultation on Bill C-59. Below we highlight our key concerns with changes to Canada's competition law in Bill C-59.

We continue to express concern on the government's decision to move forward on a unilateral, discriminatory Digital Services Tax. The Canadian Chamber urges the government to cease implementation of the Digital Services Tax Act, drop its retroactive application, and fully support the implementation of the G20/OECD two-pillar plan that has been agreed to by over 130 countries.

About the Canadian Chamber of Commerce

We are Canada's largest and most activated business network — representing 400 chambers of commerce and boards of trade and more than 200,000 businesses of all sizes, from all sectors of the economy and from every part of the country — to create the conditions for our collective success. We use deep local connections to create a powerful national vantage point no other network can equal. And, from working with government on economy-friendly policy to providing services that inform commerce and enable trade, we give each of our members more of what they need to succeed: insight into markets, competitors and trends, influence over the decisions and policies that drive business success and impact on business and economic performance.

Recommendations

1) Further amend the *Excise Tax Act* to ensure the GST New Residential Rental Property Rebate maximizes creation of housing supply.

Canada's global competitiveness and economic prosperity is intricately linked with our ability to attract investment. For companies to set up shop and create jobs in Canada, we need to assure them we remain able to attract the best talent, and we can't do that unless we can convince those talented workers they'll have somewhere affordable to live.

While it is critical to incentivize the construction of new apartment buildings, student housing, and senior residences, it is also important to ensure projects currently under construction are completed in a timely manner.

Unfortunately, those projects are contending with interest rate increases, a shortage of skilled labour, lack of supply for raw materials, and challenges in refinancing or attracting new capital. The reality is the viability of current projects is now in question, which impacts the ability to successfully complete them, while also having the capacity to allocate capital to new ones.

Extending the 100% GST rebate with respect to new purpose-built rental housing to certain cooperative housing corporations is a good solution. However, further changes to the *Excise Tax Act* to extend the removal of GST to cover projects currently under construction would help get more housing built, and free up capital to build even more. To do so, subsection (3.1) of section 256.2 of the *Excise Tax Act* should be amended as follows:

> ***Rebate for purpose-built rental housing***
> ***(3.1)*** *The amount of a rebate under subsection (3) in respect of a taxable supply of purpose-built rental housing — being prescribed property — is determined in accordance with subsection (3.2) if prescribed conditions are met and if*
>
> ***(a)*** *the taxable supply is a supply by way of sale of a residential complex or an interest in a residential complex to a person that is not a builder of the residential complex, or of a residential complex or an addition to a residential complex to a person that is, otherwise than by reason of subsection 190(1), a builder of the residential complex or addition, as the case may be, and the construction or last substantial renovation of the residential complex or addition, as the case may be, begins after, or is underway as of, September 13, 2023 but before 2031 and is substantially completed before 2036; or*
>
> ***(b)*** *the taxable supply is a supply by way of sale of a residential complex that is deemed to be made to a person that has converted real property for use as the residential complex and is, as a result, deemed under subsection 190(1) to be a builder of the residential complex and the construction or alteration necessary to effect the conversion begins after, or is underway as of, September 13, 2023 but before 2031 and is substantially completed before 2036.*

The government can enable the creation of the housing supply Canadians need if it demonstrates ambition and a commitment to implementing good policy while partnering with the private sector to leverage every tool at its disposal.

2) Ensure proper safeguards for expanded Private Rights of Action Before the Competition Tribunal.

Bill C-59 would expand and create new private rights of action for certain conduct before the Competition Tribunal and new remedies such as disgorgement that can be distributed to *any number of persons* affected by the conduct. This essentially introduces a form of collective (or "class") action regime before the Competition Tribunal.

However, the legislation does not include the numerous safeguards that are normally included in class action statutes to filter out inappropriate litigation. This means that claims could be brought on behalf of hundreds of thousands of persons without an early assessment of whether these persons have a reasonable and sufficiently common cause of action, and whether it is the appropriate form of proceeding to adjudicate any potentially common issues. Lacking proper safeguards, this provision could be a cash cow for plaintiff lawyers, while using up the Competition Tribunal's staff time and resources, burdening businesses with abusive litigation and potentially resulting in consumers not receiving financial compensation to which they are entitled.

The effect of a class action regime on Competition Tribunal resources is an especially important consideration, given that the Tribunal has only five permanent judicial members and has heard only 40 cases in the last five years (an average of eight cases per year). It is unclear how, without additional resources, the Tribunal would be expected to handle the potential influx of cases these changes could generate. Proper safeguards are thus critical to minimize the risk of the Tribunal being bogged down with inappropriate class action lawsuits.

Including safeguards consistent with Canadian class action statutes will ensure claims are evaluated on a consistent basis and provide greater certainty to businesses and consumers. Basic safeguards will also ensure that funds are properly distributed to the persons affected by the conduct, and not disproportionately or unfairly to plaintiff lawyers. Adding these guardrails will not unduly impose on or limit potentially meritorious private actions. In fact, it would more effectively advance the policy objective of introducing meaningful private enforcement in Canada.

The below recommended amendment to C-59 proposes changes to the leave test that should be satisfied for a private applicant to have permission to bring an application before the Tribunal. The changes require the application to disclose a reasonable cause of action and, where the application involves multiple affected persons, put in place sufficient procedural guardrails.

Recommended Amendment

Additional order – person granted leave

If, as the result of an application by a person granted leave under section 103.1, the Tribunal makes an order under subsection (1) or (2), it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the practice that is the subject of the order, to be distributed among the applicant and any other person affected by the practice, in any manner that the Tribunal considers appropriate.

Granting leave — section 74.1
103.1 (6.1) Subject to section 103.1(7.01), the Tribunal may grant leave to make an application under section 74.1 if it is satisfied that it is in the public interest to do so.

Granting leave — sections 75, 77, 79 or 90.1
103.1 (7) Subject to section 103.1(7.01), the Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or if it is satisfied that it is in the public interest to do so.

Granting leave – general limitation

103.1 (7.01)

For the purpose of sections 103.1 (6.1) and (7), the Tribunal may only grant leave to make an application under section 75, 77, 79 or 90.1 if it is satisfied that

1. it is plain and obvious, assuming the facts pleaded to be true, that the applicant's pleaded application discloses a reasonable cause of action;
2. the conduct in question could be subject to an order under the applicable section of the Act for which leave is sought and the applicant has provided cogent evidence to demonstrate each of the elements required to make an order under the section of the Act for which leave is sought; and
3. to the extent that the application for leave is being brought on behalf of a group of persons affected by the conduct,
    1. there is an identifiable group of two or more persons affected by the conduct that would be represented by the applicant;
    2. the claims of the group members raise common issues;
    3. proceeding by way of a private application represented by the applicant before the Tribunal is superior to all reasonably available means of determining the entitlement of each group member to relief or addressing the impugned conduct of the defendant, including, each group member seeking leave individually to bring an application before the Tribunal; and
    4. the questions of fact or law common to the group members predominate over any questions affecting only individual group members.

3) Leave Subsection 92(2) in the *Competition Act* to ensure the Competition Tribunal evaluates the competitive effects of mergers based on solid evidence rather than presumptions.

Bill C-59 proposes to repeal subsection 92(2) of the *Competition Act*, which states, "…the [Competition] Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share."

Judging a merger solely based on its effects on market share is misguided, and introducing this as a possibility raises significant uncertainty. For instance, there are numerous ways to measure concentration (e.g., capacity or production), and their application in any given case could yield different results. Market share statistics also depend on how markets are defined, which can be highly contestable. As a result, a focus on market share often shifts the focus away from an analysis of competitive effects to an unproductive debate around market definition.

Moreover, while concentration may generally be associated with a lack of competition in a market, this is not universally the case. It is possible for a concentrative merger, or a merger in which a player with a significant market share acquires only a smaller incremental share of the market, to efficiently lower costs and create other social benefits without harming competition. Additionally, a merger between two smaller players that enables them to compete more effectively against larger companies may increase rivalry – decreasing market power – while increasing concentration. The heightened focus on market share that this amendment would result in moves merger analysis further away from its grounding in rigorous fact-based analysis of the actual effects on competition and consumers to one that is based on presumptions that fail to account for the unique characteristics of each merger. The result is likely to be over-enforcement that causes more social harm than benefit.

The standard to block any merger should be that it can be demonstrated, on a balance of probabilities, that it is likely to result in a substantial lessening or prevention of competition, not that it will result in a certain market share or concentration, which is not proof of anti-competitive effects in itself. If competitive harm cannot be demonstrated along with the effects on concentration of a given merger, then it would be bad for the Canadian economy to block the transaction. The numerous other amendments to substantive merger review provisions, including extending the review period for non-notified mergers, already greatly expand the Bureau's ability to prevent or remedy potentially harmful mergers. In this context, we believe that the removal of subsection 92(2) would be misguided, and we recommend that this provision remain in the *Competition Act.*

4) Maintain the ability of the Competition Tribunal to make cost awards in favour of a party who has had costs visited upon them by proceedings of the Commissioner of Competition.

Bill C-59 proposed to amend the *Competition Tribunal Act* to prevent the Competition Tribunal from making cost awards against the Commissioner of Competition, except for in

exceptional circumstances, including when "…the absence of an award would have a substantial adverse effect on the other party's ability to carry on business."

This amendment is concerning because it removes any discipline on the Commissioner in bringing proceedings against a company and results in an asymmetrical situation in which only companies are liable for costs. It is also a significant departure from the current law, in which all parties are on an equal footing for seeking cost awards. With the ongoing review of our competition laws expanding the Commissioner's powers, it is critical that the Commissioner not simultaneously be shielded from accountability in the wielding of these powers. Such a result could seriously compromise Canadians' trust in the enforcement of our competition laws. Therefore, if a company incurs costs because the Bureau initiated proceedings against them when it shouldn't have, these costs should be recoverable.

5) Include intangible property and mine development investments in the Clean Technology Manufacturing Tax Credit.

Unlocking and maintaining the economic potential of Canada's critical mineral resources will require governments to consider the international mining and investment landscape to ensure that federal incentives are targeted to make this country a preferred and predictable destination for mining investment. The Clean Technology Manufacturing Investment Tax Credit (ITC) announced in Budget 2023 offers a starting point for improving Canada's international competitiveness. At present, however, this ITC is too narrowly defined and largely limited to investments in physical property. To serve as a meaningful incentive for critical mineral development – and to begin to level the playing field with the U.S. and European Union – this credit would need to be expanded to capture investments in intangible property and development costs. While every mining project differs in its technical and financial requirements – intangible property and development costs usually account for 75-85 per cent of total capital requirements for mine development.

In contrast to brownfield and greenfield projects abroad, mature Canadian mining operations demand more capital due to deeper and technically challenging mines. These operations face substantial upfront investments, particularly in intangible assets like building tunnels, installing ventilation, and developing infrastructure for new deposits. This cost is notably higher compared to jurisdictions with surface deposits or open-pit mining. Moreover, for established mining operations aiming to boost production it is not the tangible property (i.e., vehicles, equipment) that presents the largest financial barrier to increasing tonnage of critical minerals, but rather the intangible property, including the building of new tunnels, installation of ventilation, electricity systems, and all other adjacent infrastructure to access new ore bodies.

If the ITC is designed in a way that only covers the cost of machinery and other tangible property, Canada will miss a fundamental piece of the supply chain. Without this missing piece to incentivize domestic tonnage properly, Canada's battery and automotive industries will likely seek to import foreign ore feed. Expanding the scope of the ITC to include these adjacent activities would enable industry to deliver additional supply to meet the demands of customers and enable more capital investments that align and support the government's strategic investments into the EV supply chain.

6) Extend the timeline for phasing-out the Clean Technology Manufacturing Investment Tax Credit and Clean Electricity Investment Tax Credit.

Developing new nickel, copper, or cobalt deposits to meet increased demand requires significant capital investment and a prolonged timeframe. In Canada it takes upwards of 12 to 15 years from the discovery of a viable deposit until commercial production is achieved. Accordingly, the Clean Technology Manufacturing Investment Tax Credit's lifetime should extend beyond 2034 to ensure that it will be applicable to mines which will require at least 12 years to be permitted, designed, engineered, constructed, and opened. Given the uncertainty around the permitting environment in Canada – which will no doubt be amplified in the upcoming years, this tax credit will be increasingly necessary to secure large investments within the Canadian mining sector.

In a similar vein, the phase-out for the Clean Electricity Investment Tax Credit should be extended beyond 2034. Building large-scale clean electricity projects in remote jurisdictions – where most mining companies operate – will require extensive drilling, research, planning, funding, permitting, and building efforts. Though ambitious, it's improbable that most projects will qualify within this timeframe. Accordingly, to ensure that businesses and project proponents across the country are incentivized to undertake these large-scale clean electricity projects, the government should provide the right financial support through an extended tax credit phase-out. After all, these projects would not only benefit them, but also many local communities across the country while contributing to Canada's efforts to reaching net-zero by 2050.

7) Abandon the Digital Services Tax or, at a Minimum, Eliminate its Retroactivity.

Bill C-59 seeks to enact "the Digital Services Tax (DST) Act and its regulations. Though Canada is not alone in considering a Digital Services Tax, our circumstances are unique.

First, at a time when affordability and the rising cost of services are top of mind, the government should be thinking twice before putting forward a new tax. The true cost of Canada's DST would ultimately be passed on to consumers in the form of higher prices for daily digital services. France's DST caused an estimated 2-3 per cent price increase in services for consumers.

Second, now is not the time to be implementing measures our largest trading partner has been long opposed to. Our dependence on U.S. trade makes us especially susceptible to retaliation. Our participation in the North American free trade also comes into play. Washington would have solid grounds to pursue retaliatory trade measures on the basis that U.S.-based companies would be discriminated against. Indeed, WTO rules prohibit members from implementing measures that afford de facto discrimination even when such measures provide "formally identical" treatment.

Finally, the government's Digital Services Tax Act proposes to make the new tax retroactive from 2022. This unprecedented measure is not only contrary to long-held

taxation norms, but will have a chilling effect on Canada's investment climate. While there have been other DSTs implemented across the globe, none go as far back retroactively as what Canada is proposing. This will be seen as especially provocative and sets a dangerous precedent, while also giving tacit permission to other nations to engage in this type of action. This is simply not in Canada's interest. This significant concern can be alleviated by changing regulations associated with the Act, making DST a go-forward tax.

Recommended amendment

Under section 6 of the proposed Digital Services Tax Regulations (Canada), the current reading is as follows; "For the purpose of the description of B in subsection 10(2) of the Act, the rate prescribed in respect of a taxpayer is 3%."

We propose that the rate of 3% be changed to 0%, to fully eliminate the retroactive aspect of the proposed Digital Services Tax Act.

Contact

Matthew Holmes
Senior Vice President, Policy and Government Relations
mholmes@chamber.ca

Robin Guy
Vice President and Deputy Leader, Government Relations
rguy@chamber.ca

Pascal Chan
Senior Director, Transportation, Infrastructure & Construction
pchan@chamber.ca

Bryan N. Detchou
Senior Director, Natural Resources, Environment & Sustainability
bdetchou@chamber.ca

Liam MacDonald
Director, Government Relations
lmacdonald@chamber.ca