CANADIAN ANTI-MONOPOLY PROJECT

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

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About the Canadian Anti-Monopoly Project (CAMP)

The Canadian Anti-Monopoly Project (CAMP) is a think tank dedicated to addressing the issue of monopoly power in Canada. CAMP produces commentary, research and policy proposals in support of a more fair, free, and democratic Canadian economy.

C-59 Makes Material Improvements to Canada's Competition Law

Bill C-59 marks an important strengthening of Canada's *Competition Act*, the keystone of federal legislation protecting and promoting competition across the economy. Building on the recently passed Bill C-56, C-59 moves Canada further away from the competition law framework that has driven consolidation and reduced choice and competition for Canadian consumers, workers, and businesses.

CAMP welcomes the opportunity to provide written feedback to the Senate Standing Committee on National Finance as part of their study of Bill C-59. First, we would like to take the opportunity to highlight several elements of C-59 that we believe make particularly important contributions and should be passed in their current form.

Opens Canada's Competition Law to Private Parties

Today, outside of a handful of class action cases, the primary source of competition law cases is the Competition Bureau, Canada's sole competition law enforcement agency. This stands in contrast to the United States, where individual companies bring competition law cases against corporations engaging in conduct harming competition. These cases have made important contributions to the evolution of U.S. competition law and led to a much richer case law.

Despite its best efforts, at approximately 400 employees, the Competition Bureau cannot have eyes on every corner of Canada's $2 trillion economy. A robust private access framework is an important complement to the expert work of a federal competition authority. C-59 creates the foundation for this framework by expanding private access to a range of anticompetitive conduct covered by the Competition Act and allowing companies to seek damages against that conduct.

Companies take on serious risks when challenging the dominant firms in their industries, and the possibility of restitution for the anticompetitive conduct they face is an important incentive for companies to bring these cases. In 2022 Canada opened the door to private abuse of dominance claims without damages, which have already been used by a generic drug maker to gain quicker access to samples of a name brand leukemia drug for reproduction and increased choice and competition.

Key to an effective private access framework is a reasonable standard for leave for companies to bring cases against the anticompetitive conduct they face in the market. C-59 builds on those 2022 reforms in support of a more robust private access framework by lowering the bar for competitive harm and adding a public interest consideration for private access cases. As an expert adjudicative body, the Competition Tribunal is well-placed to determine whether cases brought before it have merit to proceed, and additional hurdles should not be added to restrict the effectiveness of private access to the *Competition Act*.

Looking ahead, the government should consider what resource levels or structure are best suited to efficiently adjudicate what will necessarily be a more active body of law.

Introduces Labour as a Factor in Merger Analysis

Though discussion of the effects of competition are often narrowed to the impact on consumers, Canadians benefit from a more competitive economy as consumers, as entrepreneurs, and as workers. While Canada's competition law has long considered the impact of anticompetitive conduct and consolidation on businesses and consumers it has been largely silent on the potential effects on workers.
Thankfully this is changing. This can be seen at home with the recent inclusion of wage-fixing and no-poach agreements under Canada's competition law, and with our international peers with the inclusion of effects on workers in the U.S. Federal Trade Commission's recent complaint against the proposed Kroger-Albertson's grocery merger. C-59 builds on this foundation by making clear that the effects on labour markets should be considered when analyzing a potentially harmful merger. By including labour market effects as a factor for review, C-59 takes steps towards a competition law that takes a more holistic view of the consequences of consolidation.

Creates Meaningful Penalties for Anticompetitive Agreements

C-59 also addresses a long-standing issue with enforcement against agreements that harm competition but do not rise to the criminal standard for cartel enforcement. Before C-59, powers against anticompetitive agreements could not be used against past agreements and carried no financial penalties. This meant that companies engaging in anticompetitive agreements could abandon agreements if they came under Bureau scrutiny and re-enter them once that scrutiny had passed. Even if successful in challenging the agreements, the Bureau would only be able to receive an order preventing the conduct going forward. Without coverage of previous agreements or financial penalties it is hard to imagine parties being deterred from entering such agreements.

C-59 corrects both deficiencies and allows for enforcement against past agreements along with financial penalties like the act's abuse of dominance provisions. As policy makers look at a range of methods of improving competition across the economy, meaningful provisions to deter anticompetitive agreements should be a part of that effort.

Protects Competition While Allowing Environmental Collaboration

There is also a growing policy discussion on the intersection of competition and environmental policy goals. Increasingly, companies are claiming the risk of competition law enforcement as a reason for not pursuing collaborative climate change goals. Policy makers are faced with the task of balancing the promotion of competition without compromising legitimate progress toward environmental policy goals.

By allowing the Competition Bureau to certify that an agreement or arrangement with environmental goals as its purpose does not lessen competition, C-59 strikes that balance. In creating an authorization process, C-59 allows companies to gain certainty that their environmental collaborations will not result in competition law enforcement action while giving the public certainty that the environmental collaborations are not a fig leaf for anticompetitive conduct.

With these important contributions in mind, there are two areas where C-59 could be improved to better protect Canadians and competition.

Strengthen Merger Laws with Structural Presumptions

Today the *Competition Act* downplays the role that market structure plays in competition, rejecting increases in concentration as indicative of a potential harm to competition. By removing the language of s.92 that rejects market structure as an indicator of competition and adding increases in concentration as a factor for the Competition Tribunal to consider when evaluating a merger, C-59 gives our competition law additional tools to defend against mergers in markets where Canadians already face limited choice.

But there is an opportunity to go further with C-59 and introduce structural presumptions against mergers in already concentrated markets. Presumptions are an important guide for enforcers, adjudicators and parties looking to merge. In their recently updated Merger Enforcement Guidelines, the U.S. Federal Trade Commission of Department of Justice Antitrust Division noted that "market concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition." Accordingly, presumptions based on market concentration are a useful tool for identifying and addressing mergers likely to harm competition.

Today, even a proposed merger to a literal monopoly (e.g. a single market participant) requires the Competition Bureau to demonstrate why the transaction harms competition. By introducing structural presumptions, competition law shifts the onus onto the parties seeking to merge to demonstrate how a merger will benefit Canadians before being allowed to proceed. Structural presumptions raise the bar for further consolidation in already concentrated markets while allowing that presumption to be rebutted by persuasive arguments that the transaction will be beneficial to competition.

Building on the example of U.S. enforcers, a combined market share of 30% is a useful benchmark over which a transaction should be presumed to substantially lessen or prevent competition. Structural presumptions can also be flexible, creating a relatively higher bar as the level of market concentration increases. In cases of extreme concentration, for example where a single participant holds over 50% market share, structural presumptions should ban acquisitions outright.

By bringing in consideration of market structure into Canada's competition law, C-59 makes an important improvement to Canada's merger law. By going a step further and introducing structural presumptions against mergers in already concentrated markets, C-59 would offer a stronger defense against consolidation when Canadians need it most.

Remove Chilling Cost Awards Against the Competition Bureau

Disregarding the public interest mandate of the Competition Bureau, Canada's competition law treats the Bureau effectively as a private litigant, with the risk of being responsible for a portion of a defendant's legal fees should it lose in court. Most recently, this resulted in the Competition Tribunal ordering the Bureau to pay $13 million of taxpayer's money, nearly a fifth of its annual budget, to multibillion dollar telecommunications firm Rogers.

The potential for cost awards not only discourages the Bureau from bringing cases in general, it also biases the Bureau away from bringing cases against the large, dominant firms it is intended to police. A case against a company able to spend tens of millions of dollars on legal and expert fees represents a greater risk to the Bureau than a smaller, less well-resourced defendant. In this way cost awards create the perverse effect of making the Bureau more likely to bring cases against small and medium-sized businesses rather than their larger counterparts.

C-59 makes progress on this front but does not remove cost awards entirely. Instead, it limits the circumstances where a judge could order the Bureau to pay these costs. Recognizing that the Competition Bureau acts in the public interest of Canadians, C-59 should be amended to remove cost awards from the *Competition Tribunal Act* entirely.