Promoting Competition in Ontario to Benefit Consumers, Workers, and Businesses

Promoting competition and positioning Ontario to be a leader in the post-COVID-19 marketplace

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Executive Summary

COVID-19 has accelerated changes to the ways that people interact with businesses and the functioning of the marketplace across many sectors, particularly the increase in digital transactions. Businesses need to adapt to these new realities to survive and thrive. In order to support economic recovery and growth, governments need to review and revise their legislative and regulatory regimes to remove barriers to evolving marketplace models and promote competition, while ensuring that the rights of consumers continue to be protected.

The Consumer Protection Act (CPA) Review in Ontario creates a unique and timely opportunity to consider a range of competition issues that intersect with consumer protection concerns.

The pandemic has accelerated economic trends well-underway prior: merger waves leading to increased industry concentration and the rise of the digital economy, in particular. Inflation, and concerns about price gouging, are also having negative ramifications for independent businesses and consumers.

Economies have structurally re-oriented in many ways, ushering in new winner-take-all dynamics for digital platforms and increasing economies of scale for the largest players. As these, and other market conditions rapidly shift, addressing anti-competitive behaviour while prioritising consumer and worker protection concerns become all the more critical.

Building on the competition-adjacent issue areas that the province of Ontario has already engaged on — including the banning of non-compete clauses in employment contracts, the banning of price-gouging during the pandemic, and the recent review of the Consumer Protection Act — this paper contends that the province has a critical role to play in evaluating changing market dynamics through the conjoined lenses of both competition and consumer protection.

The province can play an important complementary role — not duplicating, but rather, supplementing and supporting — the monitoring and enforcement efforts of the Competition Bureau. This paper takes an issues-based approach to explore a collaborative, all-of-government approach that capitalises on and enhances the existing Memorandum of Understanding that the province of Ontario has with the Competition Bureau. We contend that two orders of government working thoughtfully on competition and consumer protection issues will create fewer enforcement gaps, and better protect stakeholders like consumers, independent businesses, and even workers. In this way, the province can help Canada 'move the dial' faster through regulatory experimentation.

The 'silos' that we have come to rely on from a legislative perspective are not working well in an intangible economy. And the complaint-driven model is broken; especially because stakeholders may have fear of coming forward due to power asymmetries in market relationships and a lack of recourse if and when issues are identified. More simply, consumers, smaller businesses, and workers may not have time or capacity to engage in political processes, in contrast to the largest and most well-resourced private-sector players.

For this reason, the province needs to take a more exploratory approach to engaging stakeholders on key issues relevant to consumer protection and competition. Conducting market studies, engaging stakeholders directly (rather than over-relying on their industry associations or groups), and hosting public forums are encouraged.

The paper examines various federalist approaches to competition policy, present in the United States, the European Union, and Spain. The pros and cons of these approaches are explored, hypothesising that perhaps the absence of a federated approach in Canada has been a barrier to competition reform, and is therefore a promising opportunity.

The paper also scans relevant legislative and policy examples in the United States, Europe, and British Columbia to cover significant historical and new ground-breaking competition policy efforts. These include: President Biden's Executive Order on Promotion Competition in the American Economy, New York State's 21st Century Anti-trust Act, the Robinson-Patman Act, the Digital Markets Act, and the distance seller rules in British Columbia's Consumer Protection legislation.

We then survey digital competition issues relevant to consumers, including drip pricing, price gouging, hyper dynamic pricing, algorithmic and "personalised" pricing, dark patterns, automatic contract renewal, unsubscribing, self-preferencing, junk fees, fake reviews, and online scams. This allows our analysis to take an "issues" or "problem-based" approach to scoping the prospect of a competition strategy for the province. Additional consumer protection issues including health tech and consumer protection, privacy, and the right to repair are also briefly discussed.

Competition-relevant issues for small businesses are covered, including: tied selling, predatory pricing, toll booths, copycatting, coercive contract terms, contracts of adhesion (take-it-or-leave-it agreements with inherent power-imbalances), gatekeeping, and price discrimination by dominant players. We also discuss the influence of dominant companies using their influence to forestall policy intervention, or to create incentives which lock-in smaller businesses to their ecosystem of services.

Labour issues including wage fixing, worker mobility, and the monopsony power of gig platforms is presented. Given the province's jurisdiction to govern labour concerns, this is a promising area for thoughtful legislative intervention.

Given the multiplicity of challenges facing stakeholders, we situate market realities in contrast to the current competition reform conversation in Canada. Concurrent with the conversation on whether to update the Competition Act, federal and provincial regulators should consider and embrace the *conditions* which create a competitive economy. In other words, not only is legislative change or amendment necessary, but so are changes in enforcement policy, regulatory decision-making, and information gathering and sharing. More fundamentally, these require a conceptual shift towards an all-of-government approach to competition policy and consumer protection by the province.

We briefly address the option of retaining the status quo, recommending instead a more expansive approach to competition policy for the province. We survey and identify policy and leadership opportunities that are uniquely and squarely in the purview of the province. We

then outline key steps the province can take immediately, in the near future, and imagine a potential provincial competition strategy or authority as a longer-term option.

In the near-term, we recommend adopting an all-of-government approach to competition policy at the provincial level, by making competition assessments a mandatory aspect of regulation. We encourage the ministry to clarify areas of coordination with the Bureau under the existing MOU, without needing to alter the MOU itself. Promising areas of coordination include: health technology, consumer privacy (including children and youth digital privacy), data privacy for consumers, workers, and smaller businesses, and data mobility.

Given the complex and overlapping nature of many of the issues we identify in the report, we recommend that other provincial ministries also develop an MOU with the Competition Bureau, or perhaps amend and enhance the existing MOU. Specifically, we think the Ministries of Labour, Training and Skills Development, Health, Agriculture, Food and Rural Affairs, Intergovernmental Affairs, and the Attorney General are particularly relevant.

Similarly, creating a Provincial Competition Council to investigate and monitor progress on initiatives that promote competition in Ontario could aid in the adoption of the all-of-government approach to competition. We recommend the Ministers from each of the following ministries participate: Government and Consumer Services; Labour, Training and Skills Development; Health; Agriculture, Food and Rural Affairs; Intergovernmental Affairs; Children, Community and Social Services; Economic Development, Job Creation and Trade; Finance; Energy; Northern Development, Mines, Natural Resources and Forestry; and the Treasury Board Secretariat.

Finally, our last near-term recommendation is that MCGS should require certificates of independent bid determination during procurement, perhaps as part of the Building Ontario Businesses Initiative that was recently launched, and which is recommended by both the OECD and the Competition Bureau as best practice.

Medium-term recommended actions include having the province engage with the ongoing Competition Act review process as a stakeholder, while also engaging and amplifying other stakeholder voices including: consumers, workers, and small businesses. Thus far, Canada's policy elite, economists, and think tanks have predominated the conversation, but it is important that stakeholders most affected by these policy changes have avenues to make their voices heard.

Other potentially beneficial areas for study are: 1) commissioning an OECD Competition Assessment, as well as 2) initiating and conducting a 12-month Productivity Review, as Australia does every five years. And lastly, exploring continued collaboration with other provinces, specifically on labour mobility and lowering barriers to entry for out-of-province workers (beyond the 55 Red Seal trades) is recommended as a medium-term action.

Longer-term actions involve clarifying new structures to strengthen competition, including legislative reviews and the potential for a stand-alone Provincial Competition Authority. One

recommendation is to update (or repeal and replace) the Discriminatory Business Practices Act, so that is suits the needs of modern markets more squarely.

We briefly cover areas for additional analysis, including the role of provincial subsidies in favouring larger players, the role of investors as stakeholders, other inter-provincial competition issues, and the role of banking consolidation in creating banking deserts and predatory lending for consumers and small businesses.

In Canada, competition regulation has been decoupled from consumer protection and other dimensions that are related to markets and economic activity because of the federal-provincial split. However, in an increasingly digital economy, this decoupling is contributing to an administrative murkiness that is perpetuating challenges for small businesses, entrepreneurs, workers, and consumers in Ontario.

Having a province more closely involved in issues that affect and reflect competition allows policy people to take a different look at the same problems. Ultimately, a province-led lens on competition can be achieved without immediate legislative change. An all-of-government approach will be meaningful and promote competition in Ontario to benefit consumers, businesses, and workers while establishing Ontario as a leader in the federation on competition issues of provincial significance.

Context

COVID-19 has accelerated changes to the ways that people interact with businesses and the functioning of the marketplace across many sectors, particularly the increase in digital transactions. Businesses need to adapt to these new realities to survive and thrive. In order to support economic recovery and growth, governments need to review and revise their legislative and regulatory regimes to remove barriers to evolving marketplace models and promote competition, while ensuring the rights of consumers continue to be protected.

In support of these objectives, the Ministry of Government and Consumer Services has recently undertaken the first extensive review of Ontario's Consumer Protection Act (2002) in over fifteen years and is considering a new, streamlined statue that would better reflect the modern marketplace and make it easier for businesses to comply and for consumers to understand their rights and remedies. This foundational new Act, if introduced and passed, would also provide the Ministry with new tools to promote business compliance and take more timely and effective action in response to egregious business behaviours, while strengthening protections for consumers in certain key sectors where they face harm or risk. Taken together, the provisions of the new Act would support a more fair, competitive environment in Ontario.

This paper is timely given that excess corporate profits are making inflation tougher for Canadians. A recent report from the Canadian Centre for Policy Alternatives found that twenty-six per cent of higher inflation for Canadian households is being driven by excess profits. This corporate profiteering warrants strengthened consumer protection that can protect and promote competitiveness in the province.

The government wishes to build upon and broaden the benefits that would be realised under a new Consumer Protection Act, if introduced and passed, by exploring opportunities for competition policy or strategy for Ontario that will support economic recovery post-COVID-19, with particular emphasis on small to mid-sized businesses,[1] consumers, and workers with the ultimate aspiration of positioning the province as a leader in the post-COVID economy.

Intention

This research paper follows Ontario's review of the Consumer Protection Act and infuses a competition lens to this review. Associated analysis takes an issue-driven approach that emphasises the policy levers that the province holds that are relevant to facilitating fair competition, recognizing that many of the issues raised during the review of the CPA are competition-relevant.

The intention of this research is not to suggest that the province replicate the powers of the federal Competition Bureau. Rather, we posit that the provinces could play a stronger, more complementary role to protect and facilitate fair competition that strengthens the province's business environment through a modernised policy approach. In doing so, we ask what an

[1] Small businesses, said Mallough, have also taken on an average of $180,000 in debt during COVID.

“all-of-government” approach to competition modernisation could look like and how it could be exemplified by the province of Ontario.

In outlining this vision, we survey other jurisdictions that take a federalist approach to competition regulation and comment on the strengths and weaknesses of such an approach. We acknowledge that historically, Canada has decoupled consumer protection from competition concerns, while other jurisdictions - such as Australia - have notably linked the two together.

This research initiative was undertaken in a pandemic context, making the strengthening of Canada’s broader competition regime all the more urgent and relevant. The COVID-19 pandemic has seen a loss of small and medium sized business; leading to a loss of power for consumers, a loss of power for small businesses and entrepreneurs, and growing concern for and interest in worker mobility.

Economic Shifts

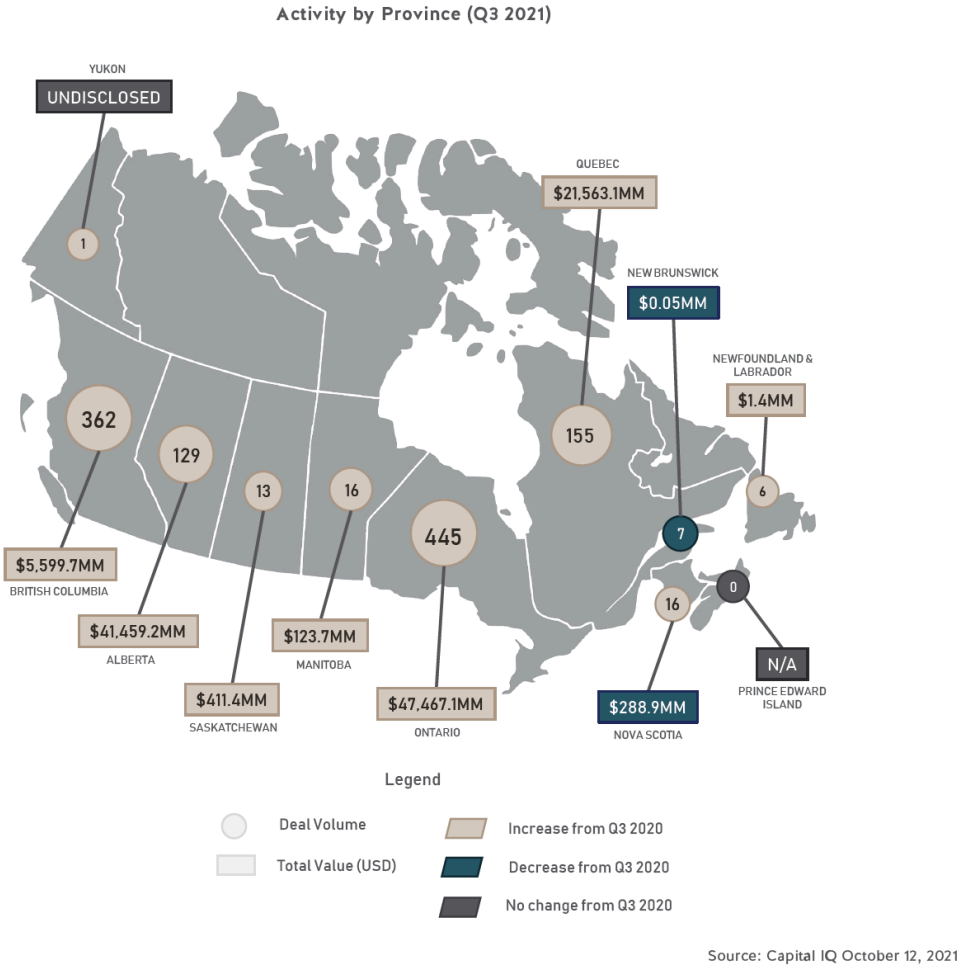
The Covid-19 pandemic accelerated trends already at work long prior in the economy. Two, in particular, are relevant to the province as it contemplates the intersection of competition policy and consumer protection: 1) industry consolidation and 2) the rise of digital markets.

Industry consolidation

Canada came out of 2021 on a historic merger boom with more than 1,985 deals involving Canadian companies (the highest number in more than twenty years).[2] Megadeals have also increased significantly, with fifteen deals valued at over CA$1 billion occurring as of June of this year.[3] Ontario also regularly leads the country by deal volume and deal value, as shown here in Q3 of 2021.

[2] Financial Post, Numbers as of June 16, 2021.
[3] Ibid.

Table 1 - Geographic Trends: M&A Deal Making across Canada
Source: STRAIGHT TALK: RECENT TRENDS IN CANADIAN M&A 2021 | Issue 04, Miller Thompson



This merger wave may have worsened a longstanding industry concentration problem in Canada, which has played a role in the nation's falling and below OECD average entrepreneurship rates, low business dynamism, stifled innovation, and harm to consumers and workers.

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

According to a 2019 report, Canadian industries are concentrating in three ways:

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

3. 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. And despite the increasing presence of US tech firms and investors in Canadian markets, the authors state "We find that the largest portion of the M&A activity has taken place within the Canadian market, whereas the number of cross-border deals between Canadian and U.S. firms has remained fairly stable. These findings support the notion that a separate consolidation process has been occurring within the Canadian market and is unlikely to be driven by coalescence with the U.S. markets."

Covid-19 has only supercharged concentration, as mainstreet businesses have struggled to compete with dominant players both within and outside digital markets.

The rise of digital markets

> *"Today, distinct features of digital technologies have ushered in new market dynamics and business strategies that require us to update our approach once again. While dominant networks are not new, several aspects of the digital economy have altered certain core capabilities and incentives. Minimal marginal costs have enabled digital platforms to grow larger and more quickly, while network effects and high barriers to entry have protected incumbents and led certain markets to tip towards a single winner. Data feedback loops, meanwhile, have similarly conferred enormous advantages on early movers, incentivizing firms to prioritise expanding and securing a large user base as quickly as possible. The ability to surveil users, furthermore, has let firms provide services for zero dollars while monetizing user data, a business model that incentivizes endless tracking and hoovering up of data, while also providing platforms with another way to draw large groups of users to scale quickly. Digital platforms can also deploy surveillance techniques to spot and monitor potential threats, equipping incumbents to defend and maintain their dominance in a highly targeted manner."*[4]

A deeper appreciation of the challenges that entrepreneurs and small businesses may face when competing in a digital context is warranted given the government's investment(s) in supporting firms to transition online (e.g. Digital Main Street). We suggest that a follow up step to supporting businesses with their online sales must consider and seek to address potentially anti-competitive behaviours that are prevalent in digital marketplaces.

The shift to an increasingly digital marketplace is further motivating policy people to re-evaluate the suitability of the federal Competition Act, which was last revised in 2008 - the same year that Apple's App Store was introduced. An outdated competition law has implications for independent merchants that sell online (small businesses), such as: these firms are spending more money on advertising, which is inefficient; these firms are subject to more marketplace "tolls," which is exploitative; these firms are vulnerable to being ripped off

[4] Remarks of Chair Lina M. Khan Charles River Associates Conference Competition & Regulation in Disrupted Times Brussels, Belgium.

via “copycatting” or “informed replication,” which means they can be cloned out of existence; and merchants that compete as a third-party in an online marketplace(s) may face potential pressure to become acquired as a private label product through killer acquisitions or serial acquisitions that “roll up” third-party sellers.

In 2019, the digital economy made the largest contributions to the economies of Ontario (6.8%),[5] and early in the pandemic, retail e-commerce sales nearly doubled. The imperative of competing in an online context has - appropriately - increased attention to the dynamics and challenges that face independent third party sellers and characterise digital marketplaces and contexts.

Concurrent with these economic shifts, many jurisdictions around the world recognize that new market realities require new policy approaches. There has been a marked shift in the global zeitgeist around competition policy enforcement and renewed attention to its relevance. A recent G7 Compendium Report in Competition in Digital Markets benchmarked Canada’s policy progress on competition alongside France, Germany, Italy, Japan, the United Kingdom and the United States as well as the European Union and revealed that the nation is falling behind international peers.

This investigation by the Ministry, aligns the province with global conversations which increasingly recognize concentrated industries and the rise of digital markets as unique economic challenges for a variety of stakeholders.

Ontario Uniquely Positioned[6]

Ontario is well-positioned to infuse a competition lens across government ministries, given its important economic position for Canada.

Ontario generates 37% of the national GDP and is home to almost 50% of all employees in high tech, financial services and other knowledge-intensive industries. This warrants more direct engagement in market behaviours and outcomes.

Further, Ontario is the largest subnational automotive assembly jurisdiction in North America - after California and Texas, Ontario has the most manufacturing employees of any jurisdiction in Canada and the United States.

Ontario also has more than half of the highest quality (“Class 1”) farmland in Canada. There are 51,950 farms in Ontario (Census of Agriculture, 2011) and they make up almost one-quarter of all farm revenue in Canada. Therefore, issues related to competition and pricing for meat and produce are especially relevant.

Ontario contains many diverse and important industries which affect Canada’s future productivity, economic growth, and innovation prospects. As a result, using an

[5] Digital supply and use tables, 2017 to 2019

[6] Source information: About Ontario, Business and economy, and Ontario attracts investment: New builds, M&A among the highlights of recent activity, but rising costs are a concern.

all-of-government approach to competition across provincial ministries will have benefits for all Canadians.

Stakeholders

We consider competition issues as experienced by the following stakeholders: **consumers, entrepreneurs, business owners, and workers**.

Competition Issues in the News

While competition law is federal in Canada, there are many competition-related issues that have made headlines in Ontario alongside price gouging and the temporary delivery free commission cap.

The **HVAC and water heater sectors** in Canada exploit customers and are the source of frequent complaints to the province. It has been found that they market their contacts to finance companies, which compels consumers to deal with another entity and thus separates financing from service obligations which can complicate consumer access to remedies. Meaningful consumer protection is further compounded by the use of liens as a tool by both the service providers and finance companies.

In the broader financial sector, the abandonment of certain markets by the charter banks has opened the door to **dominance in certain areas by larger payday lenders** and alternative financial institutions, arguably to the detriment of vulnerable consumers.

The legal digital infrastructure tool Dye and Durham has been covered widely in the media for its deliberative 400% + price increases that are being passed onto the consumer. In Canada, competition law does not explicitly address excessive pricing, and the digital infrastructure layer between a business and its consumers is a regulatory “no-man’s land.”

The policy ambiguity around Dye and Durham demonstrates a peculiar policy gap between the feds (Competition Bureau) and the provinces (Consumer Protection). In Canada, we have decoupled consumer protection from competition, which creates a sort of standstill whereby no single authority “owns” this new problem.

Another example of an anticompetitive sector is moving companies in Ontario. It was found in a CTV News investigation that one individual/married couple was associated with three moving companies that purported to be distinct from each other. This practice - whereby there are multiple companies with common ownership - seems to be fairly common in certain sectors and this misrepresents the reality of choice. Consumers are led to believe that companies are competitors when in fact they are affiliated in some way. They (owners) may position the companies on a cost spectrum - bargain, mid-range, and high-end - and then inflate the costs for the “bargain” supplier through additional charges that effectively bring them to par with the other companies.

Lastly, a class action lawsuit was recently brought against four major beef companies alleging that the U.S. beef producers conspired to fix prices and "unduly restrict competition" of beef sales and production in Canada by a non-profit consumer organisation in the province of Quebec. While Quebec operates under civil law, this is a unique instance of a provincial authority potentially addressing a significant competition issue and is an encouraging indicator that there is a stronger role for provinces within our federalist system to engage on matters of competition.

There have also been many news stories regarding the proposed Rogers-Shaw telecommunications merger and whether it will lead to higher prices for consumers. While telecommunications is decidedly federal, it is reflective of an active competition conversation in Canada that is affecting the pocketbooks and budgeting of Ontario families, similar to insurance products like home and car insurance (and these are relevant at the provincial level).

Ontario's Engagement on Competition-Adjacent Issues

The absence of explicit legislation or policy strategy on competition has not prevented the province of Ontario from engaging on competition-relevant issues. In the past, a private members bill on the right to repair (2019) was considered. At that time, it was 'killed' by Big Tech lobbying on intellectual property grounds. However, the right to repair movement has been growing globally (in particular, in the US and Europe) and was recently considered through potential amendments to the Copyright Act in Canada.

In 2021, Ontario became the first province to ban non-compete clauses in an effort to protect worker mobility. While this was, in many ways, a win for workers, some opposed the ban. According to the Canadian Federation of Independent Businesses, some small businesses claimed that banning non-competes could benefit large US tech firms like Alphabet, Meta, and Amazon, moving increasingly into Canada and poaching talent with higher salaries. When surveyed, 541 businesses (around 30% of the total 1769 surveyed), were unsure about whether the province should ban non-competes in employment contracts.

A recent court case, Parekh v. Schecter also set a legal precedent that the Act does not apply to non-compete agreements entered into prior to the prohibition's effective date of October 25, 2021. This means that the benefits of the Act may take time to reveal themselves, and the effects of the non-compete ban are yet to be fully understood.

The province also sought to proactively address price gouging in the pandemic by instituting a ban on price gouging for certain products related to consumer health and safety, including masks, wipes, gloves, soap, and other essential pandemic goods. Using a comparative approach to competitor prices, complaints were collected anonymously through an online portal. Based on the decreasing number of complaints received over time, the order was deemed effective in deterring price gouging within its narrow scope. But the order raised additional questions like: how should the ministry deal with price gouging for other consumer goods? and what is a clear definition of price gouging, so businesses know what constitutes a violation? This is an opportunity area for future investigation.

Further, the province's recent review of the Consumer Protection Act illuminated the inadequacy of disclosures as a consumer protection tool in the context of an online market.

The Building Ontario Businesses Initiative (March 2022) aims to strengthen supply chain security and boost domestic production of critical goods, by mandating more procurement from Ontario-based businesses. This can broadly contribute to the aims of this paper, by applying a competition lens, and some simple safeguards, to the procurement process.

Federalist Approaches to Competition

In this section, we analyse the legal and constitutional framework for competition policy in Canada, and assess the implications of subnational activity and policies on competition.

Various jurisdictions around the world employ a federalist or subnational approach to competition policy. We present three examples here — the United States, the European Union, and Australia — as well as discuss some challenges and benefits to shared or overlapping authority enforcement of competition and/or consumer protection law.

The US

Competition policy in Canada has historically been decoupled from consumer protection. In the US, antitrust and consumer protection law enforcement are treated as complementary tools for achieving the benefit of market competition. In that context, the Federal Trade Commission (FTC) is responsible for both bodies of law. Comparatively, US policy treats antitrust and consumer protection law enforcement as **complementary tools** for achieving the benefits of market competition.

In addition to the designated federal agencies responsible for antitrust enforcement in the US — the Department of Justice, Antitrust Division and the Federal Trade Commission — fifty-six "state" attorneys general (including the District of Columbia and five territories) can bring antitrust cases against dominant firms on behalf of the state and of citizens.

The states can enforce federal antitrust laws, and the substance of US federal antitrust enforcement is derived from 5 statutes: the Sherman Act of 1890, the Clayton Act of 1914, The Robinson-Patman Act of 1936, the Celler-Kefauver Merger Act of 1950, and The Hart-Scott-Rodino Antitrust Improvements Act of 1976).

Additionally, approximately 28 states (54%) have their own FTC equivalents, commonly referred to as the "Little FTC Acts." These laws give state attorneys general the broad authority to police anticompetitive conduct but, because commerce is increasingly interstate the federal antitrust laws are often better suited for legal action. That said, all 50 states as well as the District of Columbia have passed laws designed to prevent unfair competition.

However, state antitrust laws actually preceded the Sherman Act of 1890, and states have had an active role in investigating and prosecuting anti-competitive behaviour since.

According to antitrust law expert Stephen D. Houck, “The states have come to be regarded as a significant feature of the institutional antitrust enforcement landscape in this country.”[7]

The Hart-Scott-Rodino Act also gives states the authority to bring antitrust cases for citizens of that state (for consumer protection). State attorneys general can bring cases individually, or as a multi-state group, and can bring both civil and criminal cases. The top three areas of antitrust enforcement for state AGs are, in order: merger review, price-fixing, bid-rigging, and monopolisation cases. States also have strong procurement power, so can be the subjects of bid-rigging or price-fixing, themselves.

The National Association of Attorneys General,[8] formed to encourage partnership between states, lays out the following purview for states as relevant to antitrust cases: “Attorneys general are able to pursue enforcement actions using both federal and state statutes. They can:

- Civilly enforce antitrust statutes as state law enforcement officer;
- Bring criminal actions for antitrust violations under state statutes;
- Represent their natural citizens who have been harmed by an antitrust violation and recover damages for those citizens under federal antitrust law;
- Represent the state (or a state entity) in its proprietary capacity (as a buyer of goods or services) if it has been harmed by antitrust violations;
- Bring an action for damages to the general economy of the state, under some state statutes;
- Challenge anticompetitive mergers that may hurt the state or its citizens, in the same capacity as a private party.”

The relationship between state and federal enforcers has waxed and waned over time, but state enforcers can provide an important counterbalance to federal activity. For example, when federal antitrust was scaled back in the 1980s under the Reagan administration, states followed their own path – they even had a different set of merger guidelines, published by the National Association of Attorneys General: “Vertical Restraints and Horizontal Merger Guidelines.”

During different administrations, the relationships have been more contentious or cooperative,[9] but states act as an important counterbalance to the changing of ideological winds at the federal level.

States also cooperate in bringing complex cases, as is currently the case with big tech firms. Current US State Attorneys General who are bringing antitrust cases against big tech: Washington D.C. against Amazon; a coalition of 36 state AGs led by Colorado (including Puerto Rico and Guam) against Google Search; a coalition of 9 states, led by Texas, against Google Ad Tech; the state of Ohio against Google (in attempts to convert the company into a public utility); and a 48 state co-sponsored case against Facebook.

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[7] Stephen D. Houck, Transition Report: The State of State Antitrust Enforcement

[8] National Association of Attorneys General was "founded in 1907 initially to create a forum for state attorneys general to discuss a common approach to antitrust issues related to the Standard Oil Company. Since then, antitrust efforts have consistently been a core aspect of the attorney general’s role.”

[9] Houck, Transition Report.

Cooperation between states and federal enforcers

The FTC, DOJ, and state AGs can cooperate in investigating mergers according to the guidelines set forth in the: Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General.

In particular, information sharing and cooperation can involve the following:

- States have legal access to any materials requested (or provided voluntarily) to federal agencies during merger reviews, and parties being investigated are required to provide any additional requested materials from states in a reasonable time period;[10]
- Merging parties under investigation are required to waive confidentiality provisions, so information can flow freely between the FTC, DOJ & State AGs;
- Both state AGs and federal enforcers can use the same witnesses in cases or can build evidence for testimony from a shared pool (e.g. joint interviews, depositions, selection of experts or local stakeholders affected, etc.)

The EU

In the EU, competition policy is developed and enforced from two central rules of the Treaty on the Functioning of the European Union (TFEU) — Articles 101 and 102. The European Commission is the primary agency that enforces the law and brings the largest, most complex cases. The EU Commission can bring investigations, cases, requests for information, and issue fines, under these laws.

However, in addition, there are 28 National Competition Authorities[11] who, as of 2004, are empowered to enforce all aspects of EU competition law in supplement to the Commission's actions. These nations cooperate through the European Competition Network (ECN) and bring cases within their own national courts.[12]

The NCAs cooperate with the European Commission by

- "informing each other of new cases and envisaged enforcement decisions;
- coordinating investigations, where necessary;
- helping each other with investigations;
- exchanging evidence and other information; and
- discussing various issues of common interest."

[10] Via the Voluntary Premerger Compact

[11] National Competition Authorities and Members of the European Competition Network (ECN) include: Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

[12] Application of antitrust law by National Courts

This federalist approach has greatly expanded the enforcement of EU competition law[13] and NCAs brought over 90% of cases in 2020 and over 85% of cases since 2004: (2804 total since 2004, of which 410 were brought by Commission and 2394 brought by NCAs).[14]

Part of the motivation of this approach is that the EU investigates and brings bigger cases while national competition authorities address smaller, more regional competition concerns. Diversity of languages in the EU also makes more local enforcement desirable.

However, enforcement can vary tremendously by authority and problems can occur whereby one nation may apply a lax standard of enforcement, weakening the effectiveness of the overall regime. For example, Malta has prevented its NCA from imposing fines on companies found in breach of the law.[15] And Ireland's Data Protection Commission has been noticeably and frustratingly — according to both the EU Parliament and EU Court of Justice — slow on enforcement.[16]

With a major update to merger enforcement policy in March 2021, national competition authorities can now flag problematic mergers to be investigated by the EU, even if the merger falls below typical reporting thresholds or is outside the jurisdiction of the reporting nation.[17]

Many EU member states also co-house their consumer protection and competition regulatory mandates, and the OECD has a strong presumption that these functions are conjoined.

Spain has a constitutionally decentralised administrative law system. It has a National Competition Authority, which functions under EU law, as well as two regional authorities whose enforcement scope is limited to conduct within their geographic jurisdiction: the Basque Competition Authority and Catalan Competition Authority (ACCO).

Australia

Australia has a national competition authority that is merged with consumer protection, the Australian Competition and Consumer commission or "ACCC." It is the competition regulator and national consumer law champion. This dual mandate allows the authority to touch on digital issues and focus on small businesses as well. We present Australia's model to help the reader imagine what a concurrent and explicit focus on competition and consumer protection could look like and achieve for the province of Ontario, as decision-makers contemplate the benefits of promoting competition. The dual/concurrent lens deployed in Australia allows the regulator to consider digital market issues while also focussing on small

[13] "There are now multiple enforcers of the EU competition rules, which has led to their much wider application. In the period covered from 1 May 2004 to 31 December 2013, the application of the EU competition rules has grown at a remarkable rate, with approximately 780 cases being investigated by the Commission (122) and the NCAs (665). Enforcement by the NCAs has developed in a broadly coherent manner." https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:453:FIN
[14] https://ec.europa.eu/competition-policy/european-competition-network/statistics_en
[15] The shared enforcement of antitrust cases: effectivity difficulties at the national level
[16] Ireland's the Wrong Privacy Watchdog for Europe
[17] Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control

businesses (for instance, the ACCC is currently surveying small businesses on their dealings with digital platforms like Facebook, Google, and Apple).

Discussion Paper - Digital Platform Services Inquiry

A recent report from the ACCC surveys a range of issues that are highly relevant from an integrated consumer protection and competition framework.

These include: digital platform market power and the gatekeeper role of some digital firms. The paper also looks ahead to new services and products, such as augmented and virtual reality, which can raise new concerns and possibly exacerbate existing harms. While the paper calls out dark patterns[18] (UX – user experience) that encourage shoppers to make particular decisions about options or features that may not be in their best interests, it goes further - considering additional harms to consumers (48) such as the excessive use of online tracking (what data is being collected, how it is being used, and the effective consumer control over that data). This is aligned with the province's initiative on new proposed privacy legislation.

Therefore, the province's ambition of "empowering Ontarians and enabling the digital economy" is yet another source of strategic policy alignment on a concurrent consumer protection and competition lens.

There are four other topics — in particular — that the Digital Platform Services Inquiry surveys that are relevant for provincial policy makers to reconsider. The first is **online scams, harmful apps and fake reviews**. While the Bureau engages in education on online scams and enforces on fake reviews, both of these situations have substantial implications for consumers and small businesses. A second is **consumer lock in and reduced choice**, where the report engages on the promise of more interoperability and how to combat rising switching costs that hurt consumers. A third is **unfair terms of use or access** (53), described as "The substantial bargaining power of some digital platforms vis-à-vis their business users, can have negative impacts on consumers. The more costly it is for business users to access the consumers of a platform, the more consumers are ultimately likely to pay for the business's services, and the lower the incentive for such businesses to innovate and develop services for these consumers." While it is unlikely that the province can directly address these unfair terms of use or access, it is yet another explicit policy priority that could be prioritised under the existing Memorandum of Understanding with the Bureau. Fourth, the report considers how a general **lack of transparency** hurts innovators, "the ACCC has identified concerns about a lack of transparency in several digital platform markets. For example, the operation of app marketplaces, such as their search algorithms and featured editorials, can have a large impact on an app's ability to reach consumers and compete effectively in downstream markets for apps. In addition, many app developers have raised concerns about the opacity of algorithms and the lack of notification about changes to these

[18] Defined in the paper as: **Choice architecture -** Consumers may face direct harms where dark patterns impact their ability to make free and informed decisions about, for example: which services best serve their needs; whether to sign up for or continue with ongoing paid subscriptions, or whether to accept particular terms and conditions, including in relation to digital platforms' data practices.

algorithms, as this can have significant flow-on effects to rankings within app store search results and visibility to users" (56).

Like Canada, Australia is also considering merger reform or entirely new laws.[19] The ACCC is evaluating whether a new framework for digital platform services is needed to supplement the existing legislative environment and to address specific digital harms. Indeed, "digital harms" could be another collaborative lens for the province to engage on alongside the federal Competition Bureau.

Productivity Review

A second source of inspiration from Australia is the practice of a "productivity review" that they engage in every five years. This is a 12-month process. An inquiry takes place in order to "provide an overarching analysis of where Australia stands in terms of its productivity performance, and to support and to develop and prioritise reform options to improve the wellbeing of Australiians by supporting greater productivity growth."

"In 2008, the Australian Productivity Commission recommended sweeping changes to the country's consumer policy framework – that included creating stand-alone consumer protection legislation – and was later described as the most comprehensive law reform initiative to date in Australia".[20]

Canada

When Canada's competition law was first introduced, the common conception of what the 'public interest' was may be different than how we understand it today. This is one reason why the consumer protection lens on competition issues is so critical.

The province cannot create criminal laws. This presents a challenge for implementing effective provincial competition regulation. However, it is not a massive barrier as there is a lot of room in the civil sphere. A provincial Commissioner of Competition could take cases to a provincial court, or a specialised tribunal, or the Competition Tribunal. The province could also empower private access to the Tribunal, which means that other parties could bring cases forward. A federalist model of competition policy is present in both the US and the EU.

The interest of the public or "consumers" in competition law seems to have most often been limited to pricing considerations. Legislative debates from the introduction of the first competition bill (the Combines Act) shows that parliamentarians were concerned primarily with the abuse of economic power and the effect that has on other businesses and the public interest.

The idea of "public interest" can be thought of as conceptually separate from the idea of consumer protection. Consumer protection is a creature of the mass production/civil rights

[19] ACCC proposes extensive reform to Australia's merger regime

[20] Russell Miller, "On the Road to Improved Social and Economic Welfare: The Contribution to Australian Competition and Consumer Law and Policy Law Reform" in Ron Levy et al, eds, New Directions for Law in Australia: Essays in Contemporary Law Reform (Canberra: ANU Press, 2017).

movements of the 60s and 70s. The original objectives of competition bills weren't necessarily concerns with consumer protection as we now know it today. For some, economic efficiency is what is (or was) in the "public interest."

But it is important to note that the protection of the consumer was actually part of the initial parliamentary debates, esp from Mackenzie King speeches: "*the main purpose of this measure is the protection of the consume*r". Future speeches by Commissioners though do focus mostly on the price issue, not consumer protection in other senses.

The interesting part of competition laws in relation to consumer protection are the **misleading advertising provisions** that were introduced in the early 1960s. The drive behind this was business, not consumer, interests -- they were worried that misleading advertising led to less honest advertising.

In the Superior Propane merger, we see the tribunal grapple with the idea of public interest, but this is limited to considering which "standard" to apply to analysing the effects of a merger, and the role that the efficiency defence has in this analysis. This short paper by a Goodmans lawyer explains the discussion in Superior Propane re: the standard that should be adopted.

In an inter- and intra- provincial context, internal trade restrictions are also relevant when considering the most promising priority focus areas for a provincial competition strategy. This also made the range of provincially-regulated professions relevant in terms of whether licensing and associated mobility limitations are overly restrictive; especially in instances where a worker may frequently cross a border (trucking) or where a worker may be able to work remotely and access new opportunities and a global audience. Yet another instance is food inspections.

Today, the 'public interest' has come to be associated with low prices and consumer welfare. This can be further broadened to include considering workers and small businesses. The capstone of Canada's competition law - the efficiency defence - is increasingly being called into question by scholars, activists, and enforcers.

Pros and Cons of the Federalist Approach

Federalist approaches to competition policy, viewed by their merits, can:

- Provide more resources to police increasingly complex markets, particularly when federal enforcers are overburdened by the sheer number of investigations and cases;
- Offer a scaled approach to competition policy enforcement, whereby states or provinces which understand local markets, and are closer to constituents for consumer protection concerns, can play an important role in bringing cases;
- Bring a diversity of perspectives on enforcement, which is an important counterbalance to the changing, or entrenchment, of ideological perspectives at the federal level;
- Create case law or precedent that is relevant, or even enforceable, federally;[21]

[21] As an example, Washington State brought a case against Amazon for price-fixing, finding that it was in breach of federal antitrust laws. The ruling forced the company to suspend its "Sold By Amazon"

- More “eyes on the street.”

Arguments against federalist approaches claim that:

- Provinces or states should stick to ‘local’ cases only (and not meddle in cases handled by federal enforcers);
- Smaller jurisdictions don’t have the resources to take on big cases alone, or to substantially contribute to federal cases;
- In some cases, provinces may be “re-inventing the wheel” on cases, especially when requesting information from companies, causing more unnecessary paperwork;
- Companies can game the system by engaging in jurisdictional shopping for their competition policy trials – in other words, companies can find favourable enforcers with a lower likelihood of ruling against them.

It is our belief that federalist or subnational approaches to competition policy and consumer protection are a promising option for Canada, given their effective use in other G7 nations. This approach can:

- Lead to policy innovation and experimentation, not duplication;
- Can be complementary, not competitive with existing federal law and enforcement;
- Maintain a conversation, whereby salient issues, complaints, and cases flow easily between the provinces and the federal government;
- Can provide an integrated approach to a topic of mutual concern/interest and provide more resources for understanding complex and ever-changing market dynamics;
- Allow for improved enforcement, with increased visibility and attention paid to the concerns of stakeholders.

Legislative/Policy Scan

Relevant legislation in other countries can help illuminate potential pathways for Canadian lawmakers and regulators. In this section, we highlight three relevant US laws and policy initiatives, which are substantially altering the landscape of competition policy enforcement in the country.

President Biden’s Executive Order on Promoting Competition in the American Economy

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy. The order established a historic whole-of-government approach to competition policy, recognizing the wide-sweeping problem of consolidation across industries in the United States.

The Order established a White House Competition Council, led by the Assistant to the President for Economic Policy (Tim Wu) and Director of the National Economic Council (Brian Deese), who Chair the Council. The heads of many government agencies are included on the council. And it catalyses 72 initiatives by more than a dozen federal agencies, including a requirement for some agencies to report on how competition issues

program across the country. See: AG Ferguson investigation shuts down Amazon price-fixing program nationwide

affect their industry. The Department of Defence and the USDA have already submitted reports.

The Order focuses, in particular, on agricultural markets, healthcare markets (including prescription drugs, hospital consolidation, and insurance), the tech sector, and on labour markets and issues which limit the rights or freedom of workers. It issued specific tactical directives like tasking Health and Human Services to present a plan to combat high prescription drug prices and price gouging in the pharmaceutical industry.

The Order also calls on the Department of Justice (DOJ) and Federal Trade Commission (FTC), to enforce antitrust laws vigorously and potentially challenge prior bad mergers that were approved under previous administrations. And it affirms that America's geopolitical policy stance regarding foreign monopolies and cartels is "not the tolerance of domestic monopolisation, but rather the promotion of competition and innovation by firms small and large, at home and worldwide."

The Deputy Director of Antitrust at the Department of Justice, Jonathan Kanter, explains how the the agency has embraced and built upon this executive order: "The department is eager to help other federal departments and agencies win cases targeting anticompetitive conduct that violates industry-specific statutes, including through direct litigation support and by formalising our cooperation in MOUs. We call the new initiative Antitrust Enforcement for All-of-Government. Our cooperation through this initiative could transform our approach to competition policy and law enforcement. We plan to work collaboratively with partner agencies to ensure that competition issues are thoroughly considered, and pursued, under all of the statutes that promote competition in the economy."[22]

This structuralist approach can be mimicked by the province by considering how competition intersects its numerous other jurisdictional authority, as we attempt to lay out in this report.

New York State's "Twenty-First Century Anti-Trust Act"

New York State's groundbreaking "Twenty-First Century Anti-Trust Act" (Bill S933A New York, 2021-2022) was introduced by Senator Mike Gianaris, and is the most comprehensive update to US state antitrust law in over a century. If passed, it will be the strongest antitrust law in the nation. It passed the State Senate in June 2021 with bipartisan support.

The bill includes notable provisions for workers, recognizing the role of monopsony power and corporate abuses of power against labour.[23] It also recognizes buying (or monopsony) power that can be wielded against smaller suppliers. The bill ensures that collective bargaining agreements, which act as a countervailing force, are not an abuse of dominance.

[22] Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section

[23] The bill states: "(a) It shall be unlawful for any person or persons to monopolise or monopolise, or attempt to monopolise or monopolise, or combine or conspire with any other person or persons to monopolise or monopolise 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 labour market, or in the furnishing of any service in this state to abuse that dominant position."

The bill also shifts the focus away from the consumer welfare standard and towards an 'abuse of dominance' interpretation of antitrust law, making it easier to bring cases and protect workers and small businesses from the anticompetitive tactics of dominant players. This landmark bill could set a precedent for other state antitrust legislation, and also bolster federal attempts to reassert the original aim of antitrust law and enforcement: challenging corporate abuses of dominance.

The bill's stated purpose is "To specify that any actions or practices which attempt to establish a monopoly or monopsony are illegal and void; to make unlawful that persons in a dominant position in the conduct of any business, trade, or commerce, in any labour market, abuse that dominant position; to establish premerger notification requirements; and allow recoverable damages to be recovered in any action which a court may authorise as a class action."

When bringing cases against dominant firms, the bill establishes the use of both direct and indirect evidence to support claims.[24] Direct evidence can include a firm's unilateral ability to set prices or wages, or to dictate one-sided, take-it-or-leave-it contracts such as non-competes or no-poach agreements. Indirect evidence can include relevant market share, but only 30 or 40% is taken to infer dominance, and indirect evidence is not required to prove dominance if direct evidence is present. In this way, the bill is fundamentally redefining what constitutes dominance by a single firm. Remedies for violations can include criminal penalties up to US$100 million for corporations or $1 million for individuals.

The Robinson-Patman Act (price discrimination)

The Robinson-Patman Act was introduced in 1936, and it has recently gained popularity in US conversations as a promising policy tool to address instances where suppliers set different prices for big businesses than small businesses ('economic discrimination'). The Act aims to restrict abuses of buyer power in supplier/buyer relationships, often present in the retail industry, including grocery and alcohol distribution. It has been alleged that, "what large retailers are doing now by demanding special deals and better service from its suppliers is a violation of the Robinson-Patman Act."

In March, a bipartisan group of 43 lawmakers wrote to the FTC urging them to revive price discrimination probes under the Robinson-Patman Act. At present, antitrust enforcers have

[24] "Direct evidence may include, but is not limited to, the unilateral power to set prices, terms, conditions, or standards; the unilateral power to dictate non-price contractual terms without compensation; or other evidence that a person is not constrained by meaningful competitive pressures, such as the ability to degrade quality without suffering reduction in profitability. In labour markets, direct evidence of dominant position may include, but is not limited to, the use of non-compete clauses or no-poach agreements, or the unilateral power to set wages.
(2) a person's dominant position may also be established by indirect evidence such as the person's share of a relevant market. a person who has a share of forty percent or greater of a relevant market as a seller shall be presumed to have a dominant position in that market under this paragraph. A person who has a share of thirty percent or greater of a relevant market as a buyer shall be presumed to have a dominant position in that market under this paragraph.
(3) if direct evidence is sufficient to demonstrate that a person has a dominant position or has abused such a dominant position, no court shall require definition of a relevant market in order to evaluate the evidence, find liability, or find that a claim has been stated under this paragraph."

not brought a case under this law for more than two decades, even as courts have weakened it dramatically. But enforcement in the 1960s led to a vibrant retail sector in the United States, and even helped smaller Black-owned businesses compete on fairer terms with established businesses.

In Canada, the Competition Act previously had a provision for price discrimination — section 50 (1) a, but which was repealed in 2009. The now archived provision stated that "everyone engaged in business: to be a party or privy to or assist in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity…is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Given the removal of this provision from the Act, it is worth potentially considering the role that the province could play in helping to protect small and medium-sized businesses from paying more to larger retailers, or from instances of price discrimination. In the case of Loblaws and Walmart Canada increasing fees on their suppliers, and employing other potentially anti-competitive contract terms, it is unclear what recourse businesses have under the current competition law and enforcement regime.

Digital Markets Act

The European Union recently agreed on the Digital Markets Act (DMA) to deal with "gatekeepers" who have a strong intermediation position in digital markets, connecting large numbers of customers to large numbers of businesses, and who have (or are about to have) an entrenched and durable position in the marketplace. The Act still needs to pass in the European Parliament later this year.

The DMA exemplifies the choice of modernising existing regulations or creating entirely new ones to deal with shifting market realities in the digital era. It raises questions for Canada. Should Canada move to create distinct digital markets legislation (although there is no current indicator that this is favoured by enforcers)? Or should Canada try to fit digital enforcement under the existing Act, or some modified version of it?

Last year, the Bureau created a new digital markets unit, and stated their intention to "establish a new digital and data analytics team to enhance our enforcement capabilities" in their 2022 vision document. This could be another promising area of dialogue between consumer protection authorities and the competition enforcer, and a potential area of collaboration given the MOU between the province and the Bureau.

British Columbia: Distance Sales Contracts

We highlight the British Columbia-specific Consumer Protection legislation on Distance Sales[25] Contracts as a source of legislative inspiration. A "distance sale" occurs when there is a contract between a seller and a consumer that is not done in person (so, on the telephone or over the internet, or by other means).

The BC legislation clarifies what information the supplier of a distance sales contract must disclose, outlines a consumer's cancellation rights when it comes to distance sales contracts, and supports consumers with a comprehensive list of their rights and responsibilities.

> *"The law requires that certain information, including a detailed description, the total price, the delivery arrangements and any cancellation, return, exchange and refund policies, be disclosed in a clear manner before a consumer enters into an agreement. For distance sales in electronic form, you must be able to* ***review, correct****, print, or change an agreement, and accept or reject the agreement."*

Our interpretation of this aspect of the consumer protection legislation is that it applies to any online purchase, endowing the customer with the right to cancel or return a product that was purchased online.

If such terms were diffused to the Ontario context, this could have implications for firms such as Amazon, who have previously shirked liability (passing it onto the seller) for counterfeit items that are purchased on their platform.

The current Ontario Consumer Protection Act contains provisions pertaining to "Remote Agreements," which are distinguished from an "internet agreement." These provisions require that the supplier disclose information to a consumer and provide a copy of the agreement in writing upon an agreement of purchase. In the Ministry's consultation paper, "Improving Ontario's Consumer Protection Act: Strengthening Consumer Protection in Ontario," it is proposed that one set of core requirements for written consumer agreements be considered.

We present the opportunity for a better articulation of "distance sales" that can promote greater platform accountability for the product that is sold online.

Survey of Provincial Issues Relevant to Competition

In this section, we identify anti-competitive business behaviours or tactics that may be present in Ontario and discuss sectors that are particularly impacted by these behaviours and/or government policies.

Through discussion of these anti-competitive business behaviours that may affect Ontario stakeholders (small to midsize businesses, consumers, and workers), we consider: potential

[25] In England, "distance sales" are defined as, "the sales of good, services and digital content without face-to-face contact with the customer - for example, online, mail order or by telephone.

remedies under the existing legislative framework, potential reforms to the existing legislative framework, and potential benefits to be achieved through a new sub-national policy/strategy.

Digital and Data-Driven Consumer Issues

One of the most pressing contemporary consumer issues related to competition and consumer protection is the intensity of price dynamism. The dynamics of pricing have been changing as they are increasingly informed by responsive algorithms. This has fundamentally altered the interaction between consumers and sellers, making it more opaque and less stable. As the New York Times has noted, "costs are so fluid that household goods fluctuate almost like Bitcoin." This new dynamism is especially relevant during this inflationary period, where Ontario families are experiencing significant pressure to their household budget.

The Economist recently surveyed how companies use AI to set prices, noting that "to gain an edge, shopkeepers have been turning to price-optimization systems." These systems can "predict how customers will respond to different pricing scenarios, and recommend those that maximise sales or profits." This means that some products may be advertised at different price points to different consumers. While algorithmically-driven price optimization may be efficient for firms, it also raises questions of transparency and equity that have a distinct consumer protection lens given that the practice may be manipulative.

Because new forms of pricing may not be property labelled or explained, the case can be made that their use is a consumer protection issue (rather than a competition concern). In this section, we survey drip pricing, price gouging, hyper-dynamic pricing, and algorithmic and "personalised" pricing. We further discuss dark patterns, automatic contract renewal, the consumer's experience with unsubscribing, the consumer's challenge with self-preferencing, and the problem of junk fees.

Drip Pricing

"**Drip pricing**" is a pricing technique where only part of an item's price is advertised, with the total amount revealed at the end of the buying process. It is common in hospitality and travel markets, such as when you see a price for an aeroplane ticket that doesn't include baggage fees, or when the cleaning and service fee is not advertised when browsing potential Airbnb bookings.

The Competition Bureau currently enforces against drip pricing, and the Bureau recently advocated for drip pricing to be explicitly prohibited by the Competition Act in their response to a Senator-led consultation. When Minister Champagne announced a review of Canada's competition law, he commented that the government wants to tackle issues such as drip pricing, which sees consumers pay more than the advertised price through fees that are tacked on later. Since that announcement, there has not been further discussion of drip pricing in the mainstream media, suggesting that most competition stakeholders are supportive of this evolution.

However, there could be a larger role for the province to support the Bureau's continued enforcement of this practice through educational interventions and supplementary reporting tools.

Price gouging

"**Price gouging**" occurs when a seller increases the prices of goods, services, or commodities to a level much higher than is considered reasonable or fair.

In the US, a website that reviews products and services for small businesses reported that 56% of the 1,000 businesses surveyed in November 2021 increased prices beyond inflation to boost profitability.

The province could work with the federal government to interrogate price gouging at every node of a supply chain. Further, it could be feasible to seek to limit price increases to the amount of cost increases — in other words, ensuring the profit margins remain relatively stable. However, it is not clear what role profit plays in determining whether price gouging has occurred, especially during a period of abnormal market disruptions through price increases. Steps should be taken to increase transparency by disclosing companies' cost increases to consumers to help detect price gouging.

The province's consultation paper for the review of the Consumer Protection act proposed to amend the unfair practices regime by adding more examples to the list of unfair practices under the Act, and taking a stronger approach to certain prices such as price gouging.

One potential way to deal with price gouging, as identified by learnings from the province's Price-Gouging Emergency Order in 2020, is to issue a cap on the percentage of mark-up over cost of production of goods. Another possible consideration is to institute an excess profits tax on key industries, which has been used in wartime to combat price gouging.

A recent report from the American Economic Liberties Project outlines model legislation to stop large corporations from price fixing – illegally colluding to raise prices or keep wages down.

Hyper dynamic pricing

A recent article in BlogTO (!) documented that a Toronto Starbucks was charging more than others located nearby for the same drink. The lack of rationale for such a difference is challenging to comprehend and is seemingly random. In its article on AI and pricing, *The Economist* noted that, "In February Starbucks, a chain of coffee shops, boasted about its use of analytics and ai to model pricing "on an ongoing basis"

This kind of price variation is arguably at odds with consumer expectations related to price consistency for the same product. It is difficult to monitor on an ongoing basis.

While this kind of price variation is not illegal, it is deceptive for consumers and is becoming increasingly precise due to improved data inputs. Such pricing lacks explainability. Justifying

a price increase or explaining how a price was calculated could be practices that the province pushes for in order to achieve better transparency for consumers.

Algorithmic and "personalised" pricing

Algorithmic and "personalised"pricing was one of nine case studies in the Vivic Research "Study of Competition Issues in Data-Driven Markets in Canada."

Such personalised pricing is distinct from the pricing variability that is intended to benefit identified groups of consumers (e.g. a flat discount for seniors or students).

From the Vivic paper:

> *"Personalised pricing uses automation (increasingly, artificially intelligent systems) to target users with a price that matches their personal buying threshold. It is distinct from "dynamic" pricing, which looks at the broader market rather than the individual customer. The OECD defines personalised pricing as "the practice whereby companies can use information that is observed, offered voluntarily, inferred or collected about individuals' conduct or characteristics, based on what the business thinks they are willing to pay."*

The Vivic analysis found that, "In the Canadian context, concerted efforts by firms to collude via pricing algorithms could be illegal under the criminal conspiracy provisions of the Act (section 45)." It further concluded that competition law is "not an adequate tool for addressing the specific fairness and transparency issues resulting from personalised pricing."

The Vivic analysis called for transparency with and scrutiny of pricing algorithms and posited that a productive policy intervention could be algorithmic auditability for accountability.

We note that the FTC is considering drafting new rules on the use of consumer data in a bid to 'crack down' on privacy abuses and discrimnatory algorithms. The effort could lead to "market-wide requirements" targeting "harms that can result from commercial surveillance and other data practices." Such an intervention could have implications for algorithmic pricing regimes.

Certainly, the nearly invisible practice of algorithmic or personalised pricing is closely connected to growing price gouging concerns that come on the heels of the province's review of the Consumer Protection Act.

Failure to disclose pricing when advertising a product in a catalogue

It has been documented that some catalogues – such as Amazon's – are no longer advertising a price when showcasing a product. This makes it nearly impossible for a consumer to comparison shop, budget, or know whether the 'shelf' or purchase price is accurate. By obscuring the baseline retail price of an item, this practice may be considered a form of deceptive marketing under the Competition Act.

A provincial competition strategy could coordinate with the federal government to make the failure to advertise a clear, standard price alongside a product could be viewed as a practice that is dishonest and frustrating for consumers. It could also be viewed as a 'labelling' deficiency.

Alongside the implications for consumers of not knowing the suggested retail price of a product, this practice is also harmful for competitors as it obscures a key element of competition – price. Further, we have established that pricing – in an online context – may either be personalised OR hyper-dynamic, expressing a new and opaque volatility. As this may not clearly fit the definition(s) of an "abuse of dominance," there may be more of a role for consumer protection here.

The failure to disclose the price of a product could have a cascading effect with hyper-dynamic or personalised pricing.

Dark patterns[26]

"Dark patterns" are tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something.

While the federal Competition Bureau does not have an explicit policy statement about 'dark patterns,' the Bureau currently enforces against dark patterns under deceptive advertising and deceptive representations in the Competition Act. Investigations are taken under the Act both criminally and civilly, and the criminal side is often referred to as "mass marketing fraud."

Dark patterns are highly relevant from a consumer protection perspective. There could be an enhanced provincial role in educating consumers about the various UX tactics and associated harms with [digital] dark patterns. This in turn would strengthen the Bureau's enforcement of this difficult-to-detect behaviour.

A recent Twitter thread outlined five different manifestations of 'dark patterns': when the customer cancels by registered mail, and there is no online option available; the instant loss of access when cancelling a free trial; bait and switch pricing; unusable cancellation links [consumers get frustrated and forget to cancel]; and deceptive gifts or payments.

Perhaps sharing the duties of identifying (more provincial involvement) and enforcing (federal) could be a source of refreshed collaboration between MGCS and the Competition Bureau.

Automatic Contract Renewal

[26] "Bait and switch, disguised ads, forced continuity, hidden costs, friend spam, price comparison prevention, and misdirection are the common dark UX examples."

Automatic contract renewal occurs when a contractual agreement renews automatically at the end of a scheduled term unless it is terminated. This is sometimes referred to as an "evergreen" clause.

The Supreme Court of Canada recently ruled that automatic renewals are legal in Canada, confirming the validity of a clause providing for the automatic renewal of a fixed term contract – meaning that it is not a form of 'unfair' contracting.

However, a stronger consumer protection lens on this practice would educate consumers about automatic renewals and encourage them to take steps to prevent recurring charges that may be superfluous. Such an intervention is relevant in the context of growing 'subscription fatigue' that consumers may be feeling.[27]

Unsubscribing

In the US, the FTC has upheld the example of "Planet Fitness" as an example of a firm that makes it difficult for consumers to 'unsubscribe' from. FTC Chair Lina Khan shared on social media that, "If you click to subscribe, you should be able to click to cancel," and that the "FTC has made clear that to comply with the law, businesses must ensure sign ups are clear, consensual and easy to cancel."

Following this announcement, in the US, the FTC is cracking down on companies that use deceptive tactics to 'lock' customers into subscriptions.

This creates an opportunity for Canadian policymakers to consider whether our existing consumer protection regime sufficiently addresses unnecessarily complex un-subscription schemes. The current Consumer Protection Act "allows for amendments to a consumer agreement if prescribed conditions are met," and the Ministry is considering a range of requirements for amendments to consumer agreements. One of these is that "an automatic agreement renewal would only be permitted if the consumer has an ongoing ability to cancel at no cost."

Further, as this is a fairly simplistic issue, it may not warrant the enforcement attention of the Bureau; creating an opportunity for the province to better educate consumers about burdensome unsubscription processes and encouraging firms to implement more suitable unsubscription 'flows.'

Self-Preferencing

Self-preferencing is one of 9 case studies in a recent working paper that Bednar co-authored with Robin Shaban and Ana Qarri. That paper looks at competition issues in data-driven markets in Canada.

"Self-preferencing is the behaviour whereby market operators give their products preferential placement over those of other competitors, independent of the product's price, quality, or

[27] The Average US Household Now Has 9 Simultaneous Subscriptions

user reviews." Firms of all sizes do it - it's similar to gatekeeping where the platform both owns and operates in the marketplace.

Fundamentally, the practice limits competition. Self-preferencing may stifle competition, as large companies can prevent competitors from achieving choice positioning in search results, or charge them (in the form of ads or loyalty discounts), in order to obtain equal access to the same customer base.

In terms of what it means for consumers: It may be deceptive, especially when a product has a distinct name and branding.

There have not been any 'self-preferencing' cases at the Bureau, so we do not know for certain whether and how the practice would be interpreted as either an abuse of dominance or false or misleading advertising (deceptive marketing).

In the meantime, it is informative to look at related research from other jurisdictions. A 2021 investigation from The Markup found that Amazon lists its own brands and products sold exclusively on its site first, often above better-rated products. There is no evidence that self-preferencing cases on the practice have been brought forward to the Bureau in Canada.

Blake's law addressed self-preferencing in a recent memo, where the firm stated that, "*technology firms should be aware that the Competition Act contains provisions regarding abuse of dominance that could provide a legal basis for challenging this type of conduct. A successful challenge by the Bureau could result in behavioural remedies as well as significant monetary penalties.*"

Bednar, Qarri and Shaban are of the view that changes are needed to the abuse of dominance provisions to adequately address anti-competitive self-preferencing, as well as other abuses of dominance in the Competition Act. Specifically, changes to the substantive test used to evaluate anti-competitive conduct are needed.Another option they put forward is that self-preferencing could be considered a form of misleading advertising or deceptive marketing.

Junk Fees

In the US, Rohit Chopra, the Director of the Consumer Financial Protection Bureau, recently launched a broad inquiry into the "junk fees" charged on financial products such as loans, mortgages and credit cards. "Junk fees" may take the form of: overdraft fees, ticket fees, or resort fees.

There is a growing concern that junk fees are becoming part of some firms' core business models. Much like the example of drip pricing, junk fees are not included in a posted price, meaning that people cannot shop around for services based on price. Junk fees undermine competition and have implications for household finances.

An initial scan of popular media suggests that the issue of 'junk fees' has not been a recent part of the broader competition discourse in Canada. In the US, the Consumer Financial

Protection Bureau (CFPB) recently launched a broad review over "junk" fees charged by banks, credit unions, mortgage lenders and fintechs. Canada's rough equivalent is the Financial Consumer Agency of Canada (FCAC). As the province has the Ontario Securities Commission, perhaps an inquiry into/review of 'junk fees' would be productive. There has been some coverage of excessive banking fees in Canada, noting that TD adjusts overdraft fees in US after scrutiny from consumer watchdog and 'a money grab' As big banks raise fees, experts say Canadians have options.

This coverage of growing banking fees may have influenced the recently-announced "excess profit tax"[28] in the banking industry in Canada. Amid greater scrutiny of banking prices, we suggest that the province has an opportunity to similarly evaluate 'junk fees' in order to inform associated policy proposals.

Small Business Issues

> *"Small and Medium Enterprises (SMEs) are the lifeblood of a dynamic and resilient economy. They create jobs, bring innovative products and ideas to the market, and put pressure on larger businesses to remain competitive. Pro-competitive policies support the ongoing participation of SMEs in the marketplace and promote dynamism and competitiveness in the Canadian economy…The COVID-19 pandemic has had a disproportionate impact on SMEs. Pro-competitive policies that minimise barriers to entry and expansion for SMEs are vital to stimulating economic growth, innovation and job creation. Following an economic downturn, markets in which businesses can easily enter and expand are likely to recover the fastest. Obstacles that make it more difficult for businesses to* enter or expand in a market diminish competitive intensity and slow growth."
> — Competition Bureau, "Empowering Small and Medium Enterprises through Pro-Competitive Policies," August 28, 2020

Increasingly, small, medium, and even large businesses must negotiate with a dominant gatekeeper — or colluding set of gatekeepers — across numerous industries. Despite narratives of regulatory red tape being the primary burden of small businesses, business owners now deal with multiple defacto private regulators who control access to the market, charge high tolls, and set terms.

If you are an app developer, it is the Apple/Google app store duopoly. If you are a grocery store supplier, you must contend with the grocery retail oligopoly of Loblaws, Empire, and Metro. If you sell consumer goods, Amazon largely controls your destiny.

In sector after sector, entrepreneurs and businesspeople cannot access markets on fair and equal terms, which means that they cannot compete based on producing better quality goods and services. Many businesses are justifiably afraid of speaking out for fear of retaliation by the dominant company engaged in gatekeeping.

[28] "Moving forward in the near term on tax changes on financial institutions who have made strong profits during the pandemic."

Anticompetitive tactics and unfair practices[29]

Tying / Tied Selling

A practice which is illegal under the Competition Act, section 77, in which a seller ties or bundles two products together so that the buyer cannot purchase only one of the products, or cannot do so from another supplier.

This technique is often used to exclude competitors by leveraging dominance in one market to gain market share in a secondary market. For example, when Microsoft pre-installed Internet Explorer on its personal computers, or when Microsoft Office products are tied to Microsoft Teams.

Predatory Pricing

Predatory pricing is an anti-competitive practice in which a company uses below-cost pricing to undercut rivals or market entrants to gain market share. It may then use that market power to set above market level prices or fees.

Predatory pricing is technically illegal under section 78 of the Competition Act, but rarely enforced. In Canada, the guidelines require plaintiffs to prove that a corporation could or did "recoup" its losses on the underpriced goods. This view ignores the way a monopolist such as Amazon might use predatory pricing to gain market power beyond a specific product, which may bolster other, tangential lines of revenue, potentially in different markets. It also ignores how a company may use predatory pricing for other anti-competitive effects, like the elimination of a rival.

Toll Booths and increased fees

In an economy ripe with gatekeepers, toll booths are more and more ubiquitous. During the Gilded Age, railroads would charge exorbitant fees to ship goods across the country – the lifeline of commercial activity at the time. Today, gatekeepers charge businesses fees to access customers, or fans, in a similar way: large retailers like Loblaws or Walmart Canada, digital platforms like Facebook, Amazon, Google, and Apple, and for music and entertainment performance, Spotify and LiveNation.

Under our current legal and regulatory framework, operating a tollbooth on a vital artery of a market is the best imaginable business model, one that returns high margins and requires little effort. Investors also encourage this strategy, knowing it will lead to outsized returns.

In Canada, there have been loud outcries from suppliers when Loblaws and Walmart Canada instituted increased fees on suppliers in 2020, arguing that they were necessary to keep consumer prices low.

Various industry associations, including the Canadian Federation of Independent Grocers (CFIG) and Food, Health & Consumer Products of Canada (FHCP) lobbied for a federal code of conduct to regulate supplier and grocer relationships, stating "This kind of thing can't continue. You're going to see independent grocers go out of business." But, according to the

[29] https://www.accc.gov.au/publications/small-business-the-competition-and-consumer-act

Financial Post "the federal government has since clarified that it doesn't have jurisdiction over the grocery sector and encouraged the provinces to examine the issue."

The Bureau closed its investigation into Loblaws in 2017, concluding there was insufficient evidence to justify an abuse of dominance breach. When Loblaws acquired Shoppers in 2014, the consent agreement included provisions against seeking financial compensation to maintain profit margins from suppliers for 5 years.

In 2020, as discussions about abuses in the grocery sector during the pandemic came to the fore again, Commissioner Boswell stated that "As it stands today, competition law in Canada focuses on conduct that could potentially dampen competitive intensity or thwart competition on the merits. **Competition law in Canada does not regulate imbalances in bargaining power, and in its current role, the Bureau cannot develop or enforce a code of conduct for any industry**…Returning to imbalances of bargaining power, the line between hard bargaining and anticompetitive conduct is not always a bright one. The intent to reduce incentives to compete, such as a retailer passing on the costs of retail competition to suppliers, can push what some might see as simply hard bargaining by a large player into a violation of the *Competition Act*." (emphasis ours).

The Bureau has the ability to regulate pure play competition issues, but the provinces have the capacity to actually regulate the industry and therefore the product. This is an opportunity space for the province.

Copycatting

Copycatting is the imitation of a product or service by a dominant corporation so that it closely resembles a rival's successful product or service. For example, Amazon is well known for launching copycat products after third-party merchants successfully market and sell original versions through its online store.

Private label products have been a strategy of traditional retailers, including grocers, for years. And copycatting is not new — knock off versions of luxury goods, for example, have long flourished. But with the advent of digital marketplaces, copycatting can occur more quickly, with greater frequency, and with greater precision than in the past.

Within digital marketplaces and platforms, copycatting behaviours can often go hand-in-hand with the gatekeeping and self-preferencing and may compound one another. Platforms can derive insights based on customer and/or data in order to identify the most high-value products that should be imitated through their private label brands. Target, for example, has been accused of imitating entire brands – not simply products.

It is the combination of dominant players, operating marketplaces in which they also compete, with large asymmetries of information and the ability to self-preference their own products, which makes copycatting in digital markets a uniquely new anti-competitive challenge deserving of attention.

Consumer and business privacy laws could help, in part, to mitigate the danger of copycatting which derives from insights gathered through the vast data troves captured by

dominant players. But, as with many of these issues now affecting smaller competitors, a holistic approach to competition law and consumer protection is needed.

Coercive, unfair, or unclear contract terms

Increasingly, workers, consumers, and smaller businesses must accept the contract terms given to them by dominant companies, and these stakeholders may not have the legal capacity, time, or resources to investigate and challenge their contract terms.

Coercive or unfair contract terms are often referred to as "contracts of adhesion" which signify a take-it-or-leave-it agreement with inherent power-imbalances. These contracts are increasingly used to weaken the bargaining power of smaller suppliers or counterparties, workers, and consumers.

Some examples of potentially one-sided contract terms include the below.[30]

Terms used to silence stakeholders:

- **Nondisclosure agreements (NDAs)** which may have indefinite or vague time periods as well as overly broad definitions of intellectual property or confidential company information.
- **Price nondisclosure**, sometimes known as a gag or suppression order — when a private entity, like an employer or trading partner, prevents an individual from disclosing prices.
- **Non-disparagement clauses** which have unreasonable time periods and/or which lack exceptions (carve-outs) for reporting illegal and/or criminal behaviour, or to provide testimony and information for a government investigation or legally issued subpoena. These can also be used to remove consumer rights to review a product freely, or a worker from speaking out against a company's wrongdoing.

Tactics to limit legal options or rights:

- **Class action waiver clauses** which limit the legal avenues available to a business, worker, or consumer in the event of a breach of contract or otherwise illegal conduct by their counterparty.
- **Confession of judgement** — a written agreement in which a person automatically accepts the liability and damages listed in the contract (e.g. a borrower signing a cognovit note which subjects the defendant to court authority and waives their ability to defend themselves in court)
- **Waiver of statutory rights** — statutory rights are an individual's legal rights that are provided by state or federal statute. Some attempts to limit a stakeholder's statutory rights, such as minimum product quality and warranty standards, are illegal because these statutory rights cannot be waived by contract.

[30] Updated and adapted slightly from "Unfair or Coercive Business Contract Terms," written by Denise Hearn.

- **Unilateral modification clauses / change-of-terms provisions** — gives one company the ability to unilaterally, without warning or written agreement, change the terms of a contract.

Tactics to impede fair business dealings, equal opportunity, and free markets

- **Exclusionary contracts** — contracts entered by a company with a dominant market position that tends to prevent fair competition from competitors, and which favours the largest players. These agreements are not always illegal, but violate competition laws when done by a company to maintain a monopoly position. Types of contracts that may be illegal exclusionary contracts include:
    - **Exclusive supply agreements** — a supplier agrees to exclusively sell goods to one purchaser.
    - **Exclusive purchaser agreements** — a dealer agrees to only purchase goods from one supplier. These are sometimes called sole source, sole supplier, or sole purchaser contracts, or requirements contracts.
    - **Loyalty discounts** — discounts given if a business purchases a certain percentage of goods or services from the seller.
    - **Slotting allowances** — a supplier pays a fee for preferred or exclusive shelf space.
    - **Most Favoured Supplier/Purchaser/Entity Clauses** — these clauses often guarantee the supplier/purchaser with the most market power always gets the best deal and therefore exacerbates existing differences in market power.

Tactics to restrict the freedom to set prices

- **No price competition clauses** — often seen with restaurants forced to keep prices the same on all delivery apps and in-person dining, which prevents restaurants from using elastic pricing and having autonomy to set their own prices.
- **Vertical price maintenance restrictions** — used to control the prices charged by downstream suppliers.

Tactics to extract profits or information

- **Perpetual claims on intellectual property, patents, or royalties** — wide-sweeping definitions of intellectual property which include registered and unregistered IP and/or the rights to collect royalties, products, and proceeds in perpetuity from the supplier's intellectual property or creative property (e.g., music or writing).
- **Mandatory disclosure of competitive business information** — requirements to disclose who a business' customers are, what percentage of business they do with each customer, portions of a company's intellectual property, etc. Can also happen during due diligence processes while fundraising from a corporate venture capital fund.

In some cases, companies now resort to a lack of contracts all together, so that smaller businesses have a complete inability to seek legal recourse. As one food production business owner from Ontario stated, "...no written contracts for the products being put on

shelves at Loblaws. We are provided with supplier guidelines, not a contract." And "No detail provided as to why the product is deemed unsellable, just an invoice and we have no recourse."[31]

Incentives from larger players that lock-in small businesses

The largest corporations also regularly participate in entrepreneurial ecosystems, and may offer cash grant equivalents of their products and services, which benefit small businesses but also lock them into their services and prevent other providers from competing.

Google

Google launched 'Google for Startups Accelerator: Canada' in 2020, to benefit Seed and Series A-stage businesses.[32] Based in Kitchener, Waterloo the program provides "equity-free support, three in-person boot camps hosted at Google, personal mentorship and feedback from Google experts. In addition, the accelerator program includes workshops on product design, customer acquisition, and leadership development to help the team develop a strong business foundation."[33]

Google has also provided millions of dollars to small businesses during and throughout the pandemic, including $180 million in low-interest loans to businesses through a CDFI, as well as free ad marketing credits.

Amazon

Amazon is playing an increasingly active role in Canada, and may be subtly influencing competition policy at the provincial and federal level.

As an online marketplace, Amazon also competes directly with its third party sellers, and has referred to them as "internal competitors" in its corporate documents.[34] Regulators should be concerned, then, that Amazon's "IP Accelerator," which launched in 2019, came to Canada in 2021. The program matches third-party sellers on its platform with trademark and patent law firms, with which it has negotiated set rates to aid sellers in "protecting their brand."[35]

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[31] (2021-07-08) CFIB letter to Minister Bibeau and Minister Lamontagne regarding CFIB's support for the adoption of a Grocery Code of Conduct.

[32] Google for Startups Accelerator Canada, Google to launch its first Canadian incubator and three new offices as part of national expansion plan.

[33] Google announces startup accelerator in Waterloo and new office in Toronto

[34] "Investigation of Competition in Digital Markets," US House of Representatives Committee on the Judiciary, 2020.

[35] Amazon claims, on its Accelerator website, that "Because the participating law firms have been thoroughly vetted, when a business works with one of the law firms in IP Accelerator and a trademark has been filed on their behalf, they will be strong candidates for registration. As a result, Amazon will provide these brands with accelerated access to brand protections in Amazon's stores, to better protect their brand months, or even years, before their trademark registration is officially issued. Brands will benefit from automated brand protections, which proactively block bad listings from Amazon's stores, increased authority over product data in our store, and access to our Report a

However, the nature of the contracts between the law firms and Amazon is not transparent. What is the fine print of the agreements between Amazon and the law firms? How much information sharing goes on? Amazon, which has been accused of stealing intellectual property and copycatting products during its due diligence phase of acquiring companies through its corporate venture capital programs, may also use this as a way to access information about seller intellectual property.

In the site's FAQ section, the question "What happens if my trademark application filed through IP Accelerator is denied?" is answered this way: "We regularly monitor the status of trademark applications filed through IP Accelerator. If your application is denied, then you will no longer have access to the brand protection features for that trademark application."

One example: In the US, Amazon offers startups going through accelerator programs like Y Combinator or 500 Startups $100,000 worth of free AWS credits. Though helpful for startups, it also serves to tie even more businesses to Amazon's platform as it aims to maintain an early lead in cloud storage. Competitors cannot afford to do the same. As one founder of a cloud storage company told Economic Liberties, "I would love to offer thousands of dollars' worth of free storage credits to startups, but that would bankrupt my business."[36]

Gatekeepers forestalling policy intervention

Large firms can use their lobbying muscle, or political influence, to intervene in policy-making in ways which help maintain their dominance to the detriment of smaller rivals.

In the United States, both Google and Amazon have tried to enlist (and intimidate) small businesses in their fight against antitrust legislation and enforcement. Setting up websites and emailing small businesses, Google tells small businesses "As you may have heard, Congress is considering tech breakup laws that could hurt the digital tools your business uses every day."

Amazon's email to small businesses stated, "We're reaching out to a small group of our sellers to make them aware of a package of legislative proposals, currently in Congress, that is aimed at regulating Amazon and other large technology companies. It is early in the process and the bills are subject to change, but we are concerned that they could potentially have significant negative effects on small and medium-sized businesses like yours that sell in our store."

Another so-called small business group called the Connected Commerce Council, bankrolled by Google and Amazon, claimed to have thousands of SME members. But when Politico called dozens of the members listed on the website, most of them had never heard of it or said they were not affiliated with it.

Violation tool, a powerful tool to search for and report bad listings that have made it past our automated protections."

[36] American Economic Liberties Project phone interview with entrepreneur, February 2021.

On a similar note, Big Tech talking points about privacy legislation disproportionately harming small businesses is another way that dominant gatekeepers attempt to stall legislators. In both cases, small businesses become a 'pawn' in debates about regulatory modernization.

These, and other similar tactics, are ways that dominant firms use to create the illusion of support from stakeholders, while also using fear and intimidation to forestall regulatory action. It is fair to anticipate the same thing happening in Canada, if it is not already.

Delivery Platform Commission(s)

It has been documented that the addition of a competitor in the platform delivery market counters traditional economic logic; namely, that the introduction of a competitor will drive down prices. Rather, the 30% commission rate that food delivery platforms such as Uber Eats, DoorDash or Skip the Dishes collect are 'sticky.'

Delivery app fees can eclipse restaurant's costs for labour and rent.A temporary 'cap' on these fees was introduced in Ontario in November 2020, moving the rate down to 20% from 30%.

When the cap returned, the *Toronto Star* reported that, "Given the competition among delivery apps, a senior executive with Restaurants Canada is puzzled why at least one of the major companies hasn't voluntarily lowered its fees in an attempt to capture more market share." Perhaps the delivery firms are collusive and do not want to set a precedent of lowering their exploitative rate in a jurisdiction.

There could be a stronger role for the province to support restaurants by capping the commission at 20% in perpetuity. There are model bills for the province to look at: the first is AB2149, California, 2020 (prevents menu/trademark stealing); and the second is the City of Chicago's rules for third-party delivery services (require fee transparency).

Entrepreneurship and Innovation

Canadians exhibit "world-leading levels of entrepreneurial ambition," but the Conference Board of Canada gave Canada a "C" rating on its 2021 Innovation Report Card, stating: "Canada continues to exhibit relatively weak innovation performance."

One culprit is the regulatory regime that has protected dominant firms at the expense of new entrants and entrepreneurs. In Canada, the median age of the top 15 largest publicly traded firms is 122 years versus 45 years in the United States. The median founding year for Canada's largest firms is 1899 – before the turn of the 20th century. And, according to an OECD report, Canada has the highest number of older firms among 15 other developed countries. Older firms have less incentive to innovate, and spend less on research and development.

Dominant players can use anti-competitive behaviour to stifle or foreclose access to markets for entrepreneurs and independent business owners, as detailed in the report: "The Other Red Tape" - Market Concentration and the Rise of Private Gatekeepers.

While the province launches its Digital Main Street program in response to the pandemic, special attention should be paid to the barriers and challenges that new entrants will face online. And as the province concurrently works on a broader entrepreneurship strategy, a competition lens is critical to spur innovation.

Labour Issues

Employment law is generally provincial in Canada (save for federally-regulated professions. While the province would not be overstepping its bounds if it went further than what it has already done regarding the recent banning of non-compete agreements (such as considering wage fixing or no-poach agreements), it is important to keep in mind that labour issues are of provincial jurisdiction if they are civil. That means that no-hiring agreements, non-disclosure requirements, and other restrictions on labour mobility, entry, and power are highly relevant. A recent FTC study of tech acquisitions which fall under HSR reporting threshold found that 75% of acquisitions included non-compete clauses for founders or key employees of the acquired company, locking up and concentrating labour pools. FTC Chair Lina Khan has said that, "exploring how firms in digital markets may be using acquisitions to lock up talent alongside key assets will be a worthy area of study."

A 2021 paper from the Canadian Centre for Policy Alternatives by Robin Shaban and Ana Qarri, "Check and Balance," makes the case for improving Canada's Competition Act to protect workers. The authors emphasise that in a statement published in November 2020, the Competition Bureau stated that it does not have the power to take on criminal cases against wage fixing or no-poach agreements between companies. Bednar and Shaban have previously written that the Competition Bureau signals worker welfare is not a priority in Canada after the Bureau said that it will not criminally prosecute companies that fix wages or actively prevent workers from getting jobs at other firms.

There could be a stronger role for the provinces regarding competition and labour markets. As they are currently written, our merger laws blatantly hurt workers and smaller businesses through the so-called efficiencies defence. The defence allows mergers that are going to hurt competition, even mergers that create monopolies, because they create cost savings for the corporation. The defence also allows businesses to become more dominant in their markets, creating and exacerbating bargaining power imbalances. Further, the Bureau does not fully enforce the law when it comes to labour markets. Based on publicly available information, there is no evidence to suggest that they have ever investigated anti competitive behaviour that hurts workers.

Overall, Ontario is more familiar with its critical markets and can more competently analyse and address factors holding back competition.

Wage Fixing

Firms in highly concentrated industries can engage in coordinated wage suppression, and workers have become some of the biggest losers in today's monopolised economy. For decades, the labour share was two-thirds of GDP globally. Then, in 1980, the labour share began to decline, from 65-66% of GDP, to about 58-59% today (a decline of 7%). This may not sound like much, but overall, that is around $6 trillion less going to workers every year.

While wages have been rising due to a tight labour market the last two years, gains for workers have paled in comparison to corporate profit margins, which have remained robust and even exceeded historic highs.

As it currently stands, the law does not effectively protect workers against wage-fixing schemes, which was made evident when the three major grocery companies — Loblaws, Empire, and Metro — were able to communicate about, and coordinate, the conclusion of hero pay at the same time in 2020.

Wage-fixing is not currently criminal in Canada, but it was recently announced that this would be a focus of competition reform. The Competition Bureau may decide to criminalise wage-fixing. However, the Bureau may not be the optimal authority to take on this work, or alone. The provinces handle most labour and employment matters. This could be an item of discussion in the forthcoming/anticipated review of the Competition Act, or an area for consideration in envisioning a Provincial Competition Authority.

Other barriers to worker mobility

Also relevant to labour mobility are over-burdensome or redundancies in occupational licensing. The province of Ontario has brought in regulations to lessen restrictions on both foreign trained and domestically regulated folks via the Plan to Stay Open, which gives regulatory colleges 30 days to register people from other provinces, unless they have an exemption.[37]

There may other areas where provincial legislation could be harmonised, particularly for workers that have the newfound ability to "work from home" or "work from anywhere," such as:

- E.g. psychotherapy services that are increasingly being offered online;
- E.g. teachers and school boards;

[37] Reducing registration barriers for foreign-credentialed medical professionals: The government is proposing legislative amendments to the Regulated Health Professions Act, 1991 (RHPA), to reduce barriers for individuals seeking to be registered with the health regulatory colleges, including internationally trained professionals. The legislation would prohibit regulatory colleges from requiring Canadian work experience as a qualification for registration, subject to any exemptions provided for in accompanying regulation. Removing undue barriers will help to address health human resource challenges while continuing to ensure proper standards are in place to support high-quality patient care.

- E.g. lawyers.

Ontario could take a unilateral approach, and decide to recognize the credentials of anybody that is certified in another province in Ontario as a strategy to empower workers and help solve provincial needs (e.g. with the availability of affordable psychotherapy services).

Monopsony power of gig platforms

Bednar and Shaban recently proposed that a provincial competition law targeted specifically at employers could uniquely address the monopsony power of gig platforms.

They review that some scholars have argued that gig work platforms are essentially price-fixing schemes between contract workers, which is yet another manifestation of monopsony power.

Their analysis found that authorities traditionally focus on addressing the strategies companies use to exert their monopsony power, like wage-fixing and non-poaching agreements. However, they have done little to address monopsony directly, mainly because competition law does not provide many tools for tackling it at its root.

They propose that a provincial authority may be better positioned to address competition issues in labour markets, given that labour law is generally under the purview of the province, and that such an authority could consider coercive contract terms that prevent workers and consumers from enforcing their rights under law and other anti-competitive tactics that entrepreneurs and small business owners may face.

Other

Online scams

The Ministry of Government and Consumer Services has been enforcing the "HVAC scam"[38] for years. However, the Bureau has been unable to intervene on the scam. This is because the legal standards officers have to meet to make a successful case for abuse of dominance is very high, which hurts consumers across Canada. A classic example is the Bureau's filed investigation into water heater rentals in Ontario.

> *"The evidence also suggests that Enercare is engaging in conduct that, in certain circumstances, could raise concerns under the abuse of dominance provisions. However, the evidence obtained by the Bureau to date does not support a conclusion that Enercare's conduct is having or has had the effect of substantially lessening or*

[38] The "scam" occurs when, "companies that rent out home heating, ventilation, plumbing, or air conditioning equipment are using deceptive, high-pressure sales techniques to get vulnerable homeowners to rent equipment at many times the fair market price. These companies are then registering illegal liens against the home where the equipment is installed. If you rent equipment for your home, you may have one of these illegal liens registered against your property."

preventing competition, which is one of the requirements for conduct to be an abuse of dominance."[39]

Since the Consumer Protection Act was last updated (2002) the range of online scams (fraud) and their tactics have expanded. In the US, online fraud scams were up 25% and a recent study found that teens are falling prey to online scams faster than their grandparents. A 2021 study found that digital fraud attempts in Canada were growing twice as fast as the percentage rise globally, and that the focus of the attacks is shifting.

The increasingly digital nature of scams has enabled them to scale with greater coordination. Online or digital scams may occur in the cryptocurrency world (e.g. rug pulls, fraud, NFTs), identify theft, loyalty points phishing, hijacked profiles (deep fakes), and other tactics. For instance, a recent NPR investigation found that a "smiling LinkedIn profile face might be a computer-generated fake."

While the Competition Bureau enforces against Fraud and Scams, with a call out for Scams that target consumers, the scope of online scams may warrant more identification (reporting) and education from a provincial perspective.

Health tech and consumer protection

In July 2020, the Competition Bureau announced a market study into health technologies. The objective of the study is to examine how to support digital health care in Canada through pro-competitive policies. Pro-competitive policies can bring about greater innovation, choice and access to digital health care across the country.

It is significant to note that health technology and interoperability will broadly be a focus of the federal Competition Bureau. Given that healthcare and consumer protection are decidedly provincial in nature, this is a promising area of collaboration.

The development of digital health products is an emerging industry in Canada. While markets for digital health products and services may generally be abroad, there is a clear consumer protection angle. Health technology is a complicated, forward-looking case study to consider potential competition issues.

There is a notable policy gap related to health technology and consumer protection. As described in the Substack newsletter "regs to riches," a policy decision from 1991 could be leaving people that pay out of pocket for a medical consultation via health tech without meaningful consumer protection. There is an opportunity for the province to bring back digital health tools under consumer protection legislation when they provide services that are either not publicly funded and/or look and feel a lot more like consumer products than health care.

This is more related to consumer protection than competition, but is relevant in light of private actors arguably competing with the public sector on health care provision.

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[39] Competition Bureau statement regarding its inquiry into alleged anti-competitive conduct by Enercare

We suggest that this (health tech and digital health interoperability) is a significant area of potential collaboration in an updated Memorandum of Understanding with the Bureau.

Privacy

In a recent piece for Policy Options, McGill law graduate Ana Qarri argued that "Canada must reform competition and privacy together to protect consumers." In it, she argues that, "without a robust competition policy that recognizes the potential harm of platform capitalism to consumer privacy rights, Canadians will continue to lack serious protection from abuses of digital market power arising from the accumulation of personal data."

In December, the Privacy Commissioner of Canada responded to the Senator Wetston consultation on "Examining the Canadian Competition Act in the Digital Era," noting that "the digital transformation of our economy…has led to an increased cross-regulatory intersection between privacy, competition and consumer protection." These intersections present another imperative for an integrated policy approach that recognizes these intersections.

The complementarity of these policy areas is another area of opportunity for collaboration not only through the strengthened MOU, but also through a new, substantive/strategic provincial focus on competition. This is particularly salient given that Ontario is moving towards introducing new privacy law.

The Right to Repair

The "Right to Repair" movement is both a legal and social movement. It seeks to require that original equipment manufacturers (OEMs) provide tools, software and instruction manuals to their customers in order for them to perform their own diagnostics and repairs. It also promotes the social, environmental, and economic benefits of a more repairable world.

Another past private member's bill (Bill 72 "Consumer Protection Amendment Act: Right to Repair Electronic Product) in Ontario failed, and it was speculated at the time that this was due to lobbying from large technology firms.

In June 2021, another Private Member's Bill (BillC-272) targeted technological protection measures (TPMs) under Canada's *Copyrig*ht Act, but ultimately died on the order paper when the autumn election was called. Most recently, the Bill was substantially reintroduced by Liberal MP Wilson Miao in the form of Bill C-244.

Bill C-244 echoes the most recent statutory review of the Copyright Act, which included a strong focus on repair and a call for related evidence in its discussion on the Internet of Things.

The "CanRepair" group is currently drafting a provincial model bill for amending provincial Consumer Protection Acts in favour of the right to repair. This prototypical legislation will focus on warranties (upholding warranties that have been repaired by independent technicians) and product labelling about repairability.

The “right to repair” is another competition-relevant intervention/opportunity for Ontario. To provide greater consumer choice and empower independent repair businesses, the government could work with opposition parties to pass an updated version of the previous private member’s bill. Such progress could also lead to a reduction in e-waste.

Fake reviews

Fake reviews, both positive and negative, are increasingly an issue for small businesses who may not have the resources to compete with larger businesses who purchase these reviews to bolster their own brands, or to damage competitors. They can have a material impact on competition.

In the United States, the FTC Says It’s Cracking Down on Fake Reviews Online, and Samuel Levine, Director of the FTC’s Bureau of Consumer Protection, stated that, “Fake reviews and other forms of deceptive endorsements cheat consumers and undercut honest businesses.”

The Competition Bureau recently put out an explainer on fake reviews, and these would typically fall under deceptive marketing practices which is under the jurisdiction of the Bureau. For instance, the Bureau reached a settlement with FlightHub Group Inc. that included a CA$5 million penalty following an investigation that concluded the online travel agency misled consumers about prices and services, made millions in revenue from hidden fees, and posted false online reviews.

The province, in its efforts to protect consumers from misleading advertising claims, could support the Bureau’s efforts to flag, remove, and remedy fake reviews which are increasingly ubiquitous online.

Competition Collaboration in Canada

As for 2015, there is a Memorandum of Understanding between the Ministry of Government and Consumer Services, Province of Ontario and the Commissioner of Competition of the Competition Bureau. This MOU acknowledges that “plays an important role in fostering innovation and competition for the benefit of consumers and the economy in Ontario and Canada” and is intended to “advance their mutual interests and to develop a framework for cooperation to assist in the delivery of their mandates.”

It establishes the following:

Where possible, and subject to their respective confidentiality obligations, the Participants will:

A. ***notify each other*** *with respect to matters of mutual interest under the Competition Act, the Consumer Protection Act or other statutes enforced and administered under their respective jurisdictions, where such matters could be* ***enforced by each Participant under its mandate****, and exchange timing and other procedural information related to these matters;*

B. *regularly share information related to enforcement, strategic priorities, marketplace trends, policy and matters that may be of **mutual interest**;*
C. *participate in knowledge transfer sessions to increase expertise in areas of mutual interest related to the laws they enforce, including, where appropriate, information obtained from international bodies related to consumer protection or competition issues;*
D. *coordinate communications, where appropriate, on consumer protection and competition matters; and*
E. *meet semi-annually to discuss the items enumerated above and to explore further opportunities for cooperation and coordination.*

The foundation of this MOU is promising for deeper collaboration between the province and the Government of Canada. As currently written, we find that it is sufficiently broad so as to potentially encompass many of the various anti-competitive activities previously discussed.

Competition Reform in Canada

Mandate Letter

Minister Champagne's mandate letter references competition reform, stating the following:

- *…."introduce legislation to advance the Digital Charter, strengthen privacy protections for consumers and provide **a clear set of rules that ensure fair competition in the online marketplace**."*
- *"To enhance consumer protection and ensure a level playing field for all businesses, undertake a broad review of the current legislative and structural elements that may restrict or hinder competition. This includes directly reviewing the mandate of the Commissioner of Competition, and in so doing, ensuring that Canadians are protected from **anti-consumer practices** in critical sectors, including in the oil and gas, telecommunications and financial services sectors."*

It is notable that the mandate letter references "anti-consumer practices," as anti-consumer practices are not a key concern of the Competition Act.[40]

A Review of the Act

Though the "review" was in a Toronto Star exclusive, it is not explicitly in the associated press release (Minister Champagne maintains the Competition Act's merger notification threshold to support a dynamic, fair and resilient economy). Reformers have been

[40] The Act's Purpose Statement is: 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Comprehensive review that engages a broad audience, go beyond the usual suspects (labour, entrepreneurs and small businesses, consumers themselves).

Budget 2022

Budget 2022 contains a brief note on “Making Canada’s Economy More Competitive.”

The section makes mention of “tackling practices harmful to workers and consumers,” which are relevant areas for the province.

It further notes that, “**Reducing barriers to interprovincial trade and labour mobility** has been consistently identified by economists as among the top ways for Canada to increase our long-term economic prosperity”(73).

Table 2: Excerpt from Budget 2022

Making Canada’s Economy More Competitive

A competitive economy is a fair, growing, and innovative economy. In this regard, the government will consult broadly on the role and functioning of the Competition Act and its enforcement regime. However, there are also shortcomings in the Act that can easily be addressed and move Canada in line with international best practices.

- Budget 2022 announces the government’s intention to introduce legislative amendments to the *Competition Act* as a preliminary phase in modernizing the competition regime. This will include fixing loopholes; tackling practices harmful to workers and consumers; modernizing access to justice and penalties; and adapting the law to today’s digital reality.

72 Chapter 2

Policy Options

Status Quo

Limiting the review of the Consumer Protection Act to not consider the many complementary intersections with competition issues both federally and across the province will be a missed opportunity to promote competition in Ontario to benefit consumers, businesses, and workers. We advise that the review of the Consumer Protection Act be leveraged as a prompt to take a renewed approach to competition issues that are relevant to the province.

It is worth noting that where federalist competition structures exist, multiple modes of legislation also support those structures. While a the prospect of a provincial competition authority will likely warrant legislation, there are a series of immediate actions that the province can take that are relevant to competition.

Near-term Actions → Tangible and manageable

Adopt an all-of-government approach to competition policy

In the immediate term, we advise that the province adopt an 'all of government' approach to promoting competition.[41] In Ontario, the Ministry of the Attorney General, the Ministry of Government and Consumer Services, the Ministry of Labour, Training and Skills Development, and the Ministry of Intergovernmental Affairs (and others) could collaborate in an "all-of-government" approach to improving competition in Ontario. Such an approach could strengthen competition outcomes for Ontario consumers, small business owners, and workers, while complementing federal efforts.

As a first practical step in implementing this approach, a competition assessment could be incorporated in government regulatory decision making.

Make competition assessments a mandatory aspect of regulation

The province could make competition impact assessments mandatory for all further government decisions and regulations. There is a toolkit for competition assessments available on the Competition Bureau website: Strengthening Canada's economy through pro-competitive policies: A step-by-step guide to competition assessment. This could be complementary to the Red Tape Challenge, "Fewer Fees, Better Services Act, 2022." Competition assessments can help to eliminate barriers to entry for small-medium sized enterprises, and also help protect taxpayer dollars through healthy scrutiny and the lens of increasing competition.

Other jurisdictions have implemented various competition impact regimes, and there is empirical proof[42] of how it has materially improved their economy and/or added to their GDP. Competition assessments are recommended by the OECD, and are considered best practice.

"Commentators in both international and domestic fora have long called for the establishment of a competition impact assessment framework in Canada. Doing so would bring Canada in line with its international counterparts, and could materially improve productivity and economic well-being without compromising regulatory goals such as health, safety, security and environmental sustainability."[43]

For the largest provincial government to adopt this would be powerful — it would move the needle and show leadership on competition.

[41] Biden's executive order on competition should be a wakeup call for Canada.
[42] National competition policy added 2.5% to Australian GDP.
[43] Competition Bureau, CB submission_competition assessment_November 2019 doc

Clarify areas of coordination with the Bureau under the MOU

We do not think that an amended MOU is necessary, as it is broad enough as it stands to encompass many areas of collaboration. However, if during the course of increased collaboration, it is determined that an update is necessary, the MOU may be amended upon the mutual written consent of the participants.

However, clarifying specific areas of concern and collaboration with the Bureau is encouraged to respond more nimble and effectively to evolving marketplace dynamics. We recommend the following areas, as specific priorities that are rich areas of alignment between the province and the Bureau's interests:

1. Health technology;
2. Consumer privacy;
    a. Children and youth digital privacy
3. Data mobility and privacy.

These areas of collaboration could be formalised in an appendix to the MOU, if desired.

Given the province does not currently have regulations for privacy in the private sector, and that it has already engaged in a public consultation on privacy reform with Ontarioans, this is a rich area of coordination under the MOU. Consumer privacy, including a focus on children and youth digital privacy, and other data privacy issues – including those which affect workers and small businesses, are critical areas in need of attention, and which could benefit from provincial leadership.

Develop an Enhanced Memorandum of Understanding with the Competition Bureau to include other Provincial Ministries[44]

Given that many competition issues extend beyond and overlap with other areas of provincial jurisdiction, including labour, health, and agriculture, as part of the all-of-government approach which we are championing in our recommendations, we suggest that other provincial ministries also develop an MOU with the Competition Bureau. The ministries listed below are identified as high-value places to expand collaboration (with the first five, which are bolded, are suggested areas to explore first):

- **Labour, Training and Skills Development;**
- **Health;**
- **Attorney General;**
- **Agriculture, Food and Rural Affairs;**
- **Intergovernmental Affairs;**
- Children, Community and Social Services;

[44] An analysis of the current Memorandum of Understanding between MGCS and the Competition Bureau will be included, along with recommendations for its enhancement in response to possible reforms.

- Economic Development, Job Creation and Trade;
- Finance;
- Energy.

Create a Provincial Competition Council to investigate and monitor progress on initiatives that promote competition in Ontario

Modelled off of the White House Competition Council,[45] established by Biden's Executive Order on Promoting Competition in the American Economy, we recommend the province create a Competition Council to aid the adoption of an all-of-government approach to competition. The Council would have the ministers of the following ministries and meet on a quarterly (or more frequent) basis to ensure that a competition lens was being applied to regulatory decision-making, as specified in the Competition Assessments recommended by the Bureau:

- Government and Consumer Services;
- Labour, Training and Skills Development;
- Health;
- Agriculture, Food and Rural Affairs;
- Intergovernmental Affairs;
- Children, Community and Social Services;
- Economic Development, Job Creation and Trade;
- Finance;
- Energy;[46]
- Northern Development, Mines, Natural Resources and Forestry;
- Treasury Board Secretariat.

It may be that the province has a current Council or working group that could take on this role. Or, it may be determined that the council should be created at the federal level. Either way, this is a practical way to begin instituting a competition lens and accountability in governance practices.

The Council could also, where relevant, commission industry-specific reports to assess how competition issues are affecting their industry (as has been done with the Department of Defense, Department of Labor, Health and Human Services, and Treasury on Beer, Wine, and Spirits in the United States).

[45] The Competition Council will also include the Secretary of the Treasury (Janet Yellen), the Secretary of Defence (Lloyd J. Austin III), the Attorney General (Merrick Garland), the Secretary of Agriculture (Thomas Vilsack) , the Secretary of Commerce (Gina Raimondo), the Secretary of Labour (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.

[46] Bureau will host a summit on Green Economy and competition in 2022, as mentioned in their 2022 Vision

MCGS should require certificates of independent bid determination during procurement

The province recently announced the launch of the Building Ontario Businesses Initiative (BOBI), which provides expanded procurement requirements for Ontario-based businesses in order to strengthen the supply chain and help businesses recover from the pandemic.

One simple way to add a competition framing to this initiative, would be to require that all bidders sign a Certificate of Independent Bid Determination. This would make Ontario the first province to require them, which would help protect the government procurement process and taxpayer dollars, as the Bureau outlines in its article: Competitive bidding processes in the public sector: Procuring good value for taxpayer money.

Such certificates are OECD best practice, and the OECD recommended adding them to Canada's procurement in 2017 for the following reasons:

- "To assist procurement practitioners detect suspect bid rigging in a timely manner.
- To communicate to suppliers that bid rigging is an unacceptable practice in public procurement.
- To support competition authorities to investigate suspected cases of bid rigging."

The Competition Bureau has developed its own Certificate, which can help with deterrence and potential later prosecution. We recommend adding this requirement to the procurement process across all provincial departments, as a relatively easy way to begin the all-of-government competition policy process.

Medium-term Actions → Review and recalibrate

Province of Ontario to engage with Competition Act Review process as a stakeholder

The province should plan to participate in any policy activity related to the Competition Act. Budget 2022 acknowledged that "the government will consult broadly on the role and functioning of the Competition Act and its enforcement regime." This will provide an opportunity for the province to reflect perspectives, challenges, and ideas for additional areas of cooperation and coordination to the Ministry of Innovation, Science, and Economic Development.

Province of Ontario engage and amplify stakeholder voices

Subsequent to full participation in a pending policy process, the province must ensure that the voices of small businesses, workers, and consumers feature prominently in the ongoing debate about reviewing the Competition Act. The province should continue to seek to better understand anticompetitive effects/monopsony dynamics on small and medium-sized businesses.

We suggest that the Government of Ontario hold public forums with entrepreneurs and small businesses in order to better understand what anti-competitive practices they may be facing. While stakeholder groups such as the Canadian Federation of Independent Businesses (CFIB) and the Council of Canadian Innovators (CCI) can be engaged in this process, we recommend going directly to these stakeholders without over-relying on their advocacy groups.

Commission an OECD Competition Assessment

In order to identify existing or proposed public policies that unduly restrict competition, and to revise them by adopting more pro-competitive alternatives, we propose that Ontario commission a sub-national OECD Competition Assessment. Such an assessment would aid the province in reducing unduly restrictive regulations and promote beneficial market activity. The resulting report would act as a companion to establishing a new cadence through a Productivity Review.

Initiate and conduct a 12-month Productivity Review

We take policy inspiration from Australia's 12-month productivity review process that takes place every five year. It may be that Ontario decision-makers focus on areas previously identified by Australia as being relevant, such as monitoring consumer law developments in Australia to ensure that consumer law applies to the higher education sector.

In March 2022, the Productivity Commission's Review of Australia's Productivity Performance was published. The report recommended: tax reform, regulatory reform, business investment, infrastructure investment, and a focus on technology and innovation, digitalisation and labour and skills.

Explore collaboration with other provinces

In order to promote competition and opportunities for Ontario businesses, additional opportunities for regulatory coordination should be considered.

There is an opportunity for policy diffusion of the BC Distance Sales legislation. Another opportunity identified in this paper is to move unilaterally to recognize all credentials from other provinces in Ontario. Another promising area is the opportunity to lessen interprovincial trade barriers. There is a massive economic opportunity to reduce needless constraints on competition. Such barriers could be addressed on a sector-by-sector case, such as: liquor, cannabis, water heaters, real estate, etc.

Longer-term Actions → Clarify new structures to strengthen competition

Update (or repeal and replace) the Discriminatory Business Practices Act

We believe that this legislation could be updated to not only deal with dealings between businesses, but also when servicing consumers in the digital age (e.g. with algorithms). It could be expanded to more broadly outlaw refusals to deal and discriminatory behavior based on market realities, and not simply attributions of the company or person.

Passed in 1978, Ontario's Discriminatory Business Practices Act was created to ensure fair dealing by making illegal any refusals to deal or discriminatatory business practices based on the attributes such as race, sex, color, nationality, ancestry, religion, etc. of the other party. Last updated in 1990, individuals who contravene the Act can be fined up to $25,000, and corporations up to $100,000.

The Ministry has received very few complaints regarding this Act in recent years, and the few that they have, many have been misinterpretations of the Act or are not relevant.

The Competition Act outlines, broadly, the illegal nature of refusals to deal (and other restrictive trade practices) in Section 75.[47] There may be value in assessing whether the scope of the Discriminatory Business Practices Act should be expanded to more closely align with the Competition Act, where refusals to deal — regardless of motivation — would also be illegal under Ontario law. In other words, if a company refuses to deal or discriminates against a counterparty, based on the counterparty's attributes, or their size, market position, relative power, other customers, or the like, it would also be illegal under Ontario Law.

This may also be an area to consider opening private access for cases, as refusals to deal are typically difficult to bring under the Competition Act, as they are usually brought under the abuse of dominance statutes. So if you are a private company and you are victimised by a refusal to deal, you can theoretically bring your own claim to the Competition Tribunal and you don't need to go through the Bureau. However, the test for leave is difficult to meet.[48] This could be a potential area of collaboration between the province and the Bureau.

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[47] Section 75 of the Competition Act on Restrictive Trade Practices states, "Jurisdiction of Tribunal where refusal to deal

- **75** (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
    - (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
    - (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
    - (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
    - (d) the product is in ample supply, and
    - (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
- the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

[48] Examining the Canadian Competition Act in the Digital Era - "Recommendation 8.7 (Leave requirements for private access): The standard for businesses to obtain leave for private access to the Tribunal may be unduly high, with the effect that most firms who apply for leave ultimately fail to meet the standard set out in the Act. The test to obtain private access should be examined to ensure that businesses can appropriately obtain leave."

Additionally, discrimination in commercial dealings increasingly happens in the shadows. Algorithms now govern everything from accessing a loan or a mortgage, to the news and information consumers receive and even the hiring process. Banks in the US have been shown to discriminate against Black borrowers. In one instance, applicants named Jared who played lacrosse were favoured over other applicants.

Attorney General Karl Racine in Washington D.C. has introduced the Stop Discrimination by Algorithms Act to prevent algorithms from negatively affecting a person's ability to find housing, healthcare, a job, or a loan. He has stated, "Often, the algorithm learns the biases of the real world, and given the power to make decisions about the future, it perpetuates the discrimination rather than leveling the playing field."

Given the complex and changing nature of discriminatory practices for commercial transactions, reviewing, updating, and expanding the Discriminatory Business Practices Act is a space of opportunity for the province.

Further research the development of a Provincial Competition and Consumer Protection Authority.

This paper has already demonstrated that a new authority is not necessary for the province to act now on competition issues. As an example, the province could unilaterally work to develop new labour legislation to tackle wage-fixing and monopsony power of gig platforms. However, there is also a larger opportunity to design new legislation and regulatory authority through a provincial competition and consumer protection authority.

Last updated over ten years ago[49] Canada's Competition Act is out of date, and ill-suited to address competition issues in a digital era. A *provincial* competition authority could address many of the existing gaps in the current federal regime, providing a productive supplement to federal enforcement gaps that provides another check on the Competition Bureau's policies and priorities. It could also solve for the current decoupling of competition policy from consumer protection.

We believe that there is a way to draft the creation of a provincial competition authority that allows Ontario to regulate competition within its own jurisdiction while not infringing on the **jurisdiction** of other provinces or the federal government.

The federal government has power over trade and commerce, which is the power most likely to be infringed by something like this. The trade and commerce power has been generally interpreted as – "the regulation of interprovincial trade" and the "general regulation of trade and commerce" (which is far narrower than it sounds, and does not allow Parliament to regulate any particular trade).

On the other hand, the provincial power of property and civil rights has been narrowed down to the regulation of intra-provincial trade. "This means that, for example, regulation of all contracts, marketing, manufacture or production, labelling, etc will be a provincial matter - even though this may affect goods that are destined for interprovincial trade or that come

[49] The last major update was 35 years ago in 1986.

from out of the province" (Hinarejos 2012).

An important precedent for this discussion is the 1989 case of GM v. City National Leasing (SCC): in this case, the court found that the federal government had the competence to regulate competition even if the transactions happen only in a single province. The conclusion of this case was that the federal parliament (in addition to the provinces) could regulate intraprovincial aspects of competition. At page 682 of the judgement, the SCC writes that: "Competition is not a single matter, any more than inflation or pollution " and the provinces also had the power to "deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like".

This leads to identifying two different legal questions within the constitutional issue that require further interrogation:

1. Will a provincial competition authority infringe on the **trade and commerce power** of the federal government? If so, can it be drafted in a way where it does not?
2. Is a provincial competition authority still useful if it cannot apply to areas of trade and commerce that are under federal jurisdiction, like banking?
    a. The authors don't imagine this will be a big impediment because consumer protection legislation, for example, applies to all businesses/consumer contracts even if they are a result of a federal undertaking (company), but at the root of consumer contracts is the provincial power over civil and property rights, so the competition regime may have to find something similar to ground itself in.

A Provincial Competition Authority (PCA) could address **issues of provincial significance**, focussed on **small businesses and workers** with deep expertise in the economies of the region. It could be a strong policy instrument to deal with competition issues that the federal legislation is currently silent on.

Any conversation about jobs and the economic recovery comes back to workers and quality of work. Greater competition in labour markets can help create better quality jobs by providing workers with more opportunities to get good-quality employment. Competition and competition law also prevents the small number of bad-acting employers from taking advantage of workers as they re-enter the labour market and adjust to our new, post-pandemic economy. Further, small businesses need assurance that there is a level playing field.

A provincial competition authority could regulate conduct that hurts workers and consumers that would fall under the authority's jurisdiction, such as:

- Merger control law that is beneficial to workers;
- Specific abuse of dominance or competitor collaboration provisions that are specific to labour markets;
- Anti-competitive dimensions of employment contracts, such as non-competes and mandatory arbitration clauses;
- Wage collusion among firms;

- Price discrimination;
- Exclusionary or coercive contracts between small and large businesses that undermine entrepreneurship and innovation; and
- Others --
    - Such as: exclusionary or coercive contracts for suppliers or businesses.

Given that labour markets are very regional and specific, there are dimensions of the province of Ontario's labour market that may be overlooked at the national level when it comes to competition policy. A provincial competition authority could create better laws that target behaviours that consistently undermine workers, like no-poach agreements.[50] The PCA could consider the effect and implications of layoffs that may result from a merger or acquisition. Further, being able to evaluate mergers at the provincial level could go a long way towards preventing mergers that hurt work and don't benefit the Ontario economy.[51]

If Ontario were to implement its own competition authority, legal advisors would need to assess core questions related to powers and remedies. On powers, the province would require a constitutional analysis on whether such an authority would infringe on the federal government's powers on trade and commerce. On remedies, given that the federal government also has inter-provincial authority, our initial analysis suggests that the province would be able to enforce through civil law (not criminal). On civil and property rights, and provincial authority could address contracts, property agreements, and commercial transactions. A provincial competition authority could also address legislative gaps related to hardcore cartels.

There is a massive opportunity for the province to better regulate competition issues that are relevant to workers. There may be conduct that hurts workers that could be addressed under civil provisions. The province could introduce specific abuse of dominance provisions that are specific to labour markets. On labour, the province could work to enforce against wage collusion and price discrimination. A constitutional legal analysis will clarify how this can be best operationalised.

Given the province's deep expertise in the economies of the region, a provincial supplement to federal competition legislation that addresses issues of provincial significance such as workers and small businesses could help supplement the Bureau's complaint-driven model and shift towards more active, ongoing engagement with stakeholders.

As we have proposed, a provincial competition authority could focus on: securities regulation, coercive contracts, non-competes, labour conditions, consumer protection, privacy, data protection, and discriminatory algorithms.

A Provincial Competition Policy or Strategy

[50] There is a lot of enforcement on non-poach agreements in the US.
[51] For instance, in the US, there were individual state-led cases against the T-Mobile and Sprint merger in 2020. This is an example of lawmakers protecting their citizens. A similar example in Canada would be the proposed Rogers-Shaw merger.

In this section, we survey a range of interventions and approaches that could contribute to the province's approach to improving competitiveness.

Work to eliminate interprovincial trade barriers

A 2021 report found that interprovincial trade barriers impose the equivalent of a 6.9% tariff on goods across Canada. Another report prepared for the Working Group on Interprovincial Trade Barriers made the care for liberalising interprovincial trade in Canada.

Ontario is already working to ensure that out-of-province workers can register in their regulated profession or trade within 30 days. Collaborating to dismantle redundant trade barriers with other provinces will further Ontario's competitiveness.

Support data mobility initiatives that enhance competition

As the Competition Bureau recently reminded, "Competition is essential to harnessing the power of the digital economy." The Bureau made a submission to the Government of Ontario's Data Strategy.

Data mobility is part of the Competition Bureau's 2022 Annual Plan ("begin examining how data mobility can support greater competition in the digital age). While data mobility is broadly useful to the consumer, it is not a proper solution to ongoing concentration issues.

Data mobility may be particularly salient to insurance markets; which are mostly provincial but also federally regulated. Insurance – both home and automobile – is a major cost for households in Canada. Switching costs in insurance markets can also be very high.

Connect consumer protection to the experiences of children online

The Age Appropriate Design Code in the UK has led to beneficial changes by major social media platforms Instagram (prevents adults from messaging children that don't follow them on the app), TikTok (bedtime for notifications), YouTube (turned off auto-play for users aged 13-17) and Google (blocked the targeted advertising of under-18s) that ensure a healthier online environment for minors. Similar legislation was recently proposed in California (AB-2273 The California Age-Appropriate Design Code Act).

These legislative interventions introduce safeguards from bad actors and manipulative digital designs that exploit the attention of young people. Given that the Ministry of Children and Youth Services is provincial, there are obvious linkages to a children-first consumer protection lens that also integrates privacy considerations and boosts the protection of children's data.

Considering the merits of an age-appropriate design code that is Ontario-led would challenge large technology firms to compete through stronger safeguards that protect the best interests of children.

Future Analysis

Given the timeline of this project, there was insufficient time to cover the full scope of all competition-relevant issues and areas. We suggest a few areas here that are relevant to competition, which could be the focus of future analysis.

Provincial subsidies can sometimes disproportionately favour larger players at the expense of smaller ones. Tens of billions in energy subsidies, as is claimed in this article, have benefitted the largest players such as Loblaws and Amazon.

Large players often seek tax subsidies or concessions from municipalities and provinces in development deals. These can be anti-competitive in that they bolster the dominant position of the largest players. A thorough review of all provincial subsidies, tax concessions, and special deals should be conducted through the lens of competition and how they may be tilting the playing field in favour of the largest players.

Additionally, inter-provincial competition issues are not covered in depth (aside from labour mobility and credentialing, which were covered). This could be an additional area for review.

One key stakeholder which has enormous influence on the competitive dynamics of the province is investors – both foreign and domestic. Further analysis of investment activity, and its positive and negative effects on competition issues in the province, is also warranted. This seems particularly relevant given the record year for mergers and acquisitions in 2021, and the continued influence of Ontario's pension funds and Bay Street banks on market dynamics.

An additional area for further study is the consolidation of banking in Canada which has led to banking deserts in certain communities. This has made access to credit more difficult for consumers and smaller businesses, leading to a rise in predatory lending or higher-than-average interest rates. This is a ripe area for study, perhaps which could be evaluated by the Finance ministry as part of its duty in the proposed Provincial Competition Council.

Conclusion

Canada has yet to recalibrate economic policy for a 21st century economy. Decision-makers are recognizing and reconciling with the reality that we must be more integrative to properly respond to the challenges of an increasingly digital marketplace. As this paper has shown, many competition-relevant policy approaches are squarely of provincial jurisdiction; despite the Competition Act being a federal legislation.

In many ways, the broader competition space is similar to the broader environmental law space. For instance, the environment was not something that was the subject of a specific allocation of legislative authority under the Constitution Act (1867). Yet over time, both the federal government and the provinces have development legislation relevant to the

environment. This co-governance creates less policy gaps and strengthens the policy response to an important issue.

In exploring the merits of a more federalist approach to competition policy in Canada that would be led by Ontario, we remind the reader that the construction of the Constitution was designed to foster a conversation between the provinces and the federal government, and that this active conversation is fundamentally good.

In our country, competition regulation has been decoupled from consumer protection and other dimensions that are related to markets and economic activity because of this federal-provincial split. However, in an increasingly digital economy, this decoupling is contributing to an administrative murkiness that is perpetuating challenges for small businesses, entrepreneurs, workers, and consumers in Ontario.

This report has imagined what a provincial counterpart to the federal Competition Bureau could accomplish. It considers an authority that is not limited to issues of consumer protection, but more broadly interested in economic questions that are competition-related.

Having a province more closely involved in issues that affect and reflect competition allows policy people to take a different look at the same problems. It also facilitates a whole-of-government approach that can marshall the provincial lens. We believe that regulatory competition and strengthened competition between regulators can also be productive and not duplicative (i.e. not red-tape additive).

Ultimately, a province-led lens on competition can be achieved without immediate legislative change. An all-of-government approach will be meaningful and promote competition in Ontario to benefit consumers, businesses, and workers while establishing Ontario as a leader in the federation on competition issues of provincial significance.

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