Bednar, Vass; Bester, Keldon

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Competing ideas: Canada's competition reform conversation

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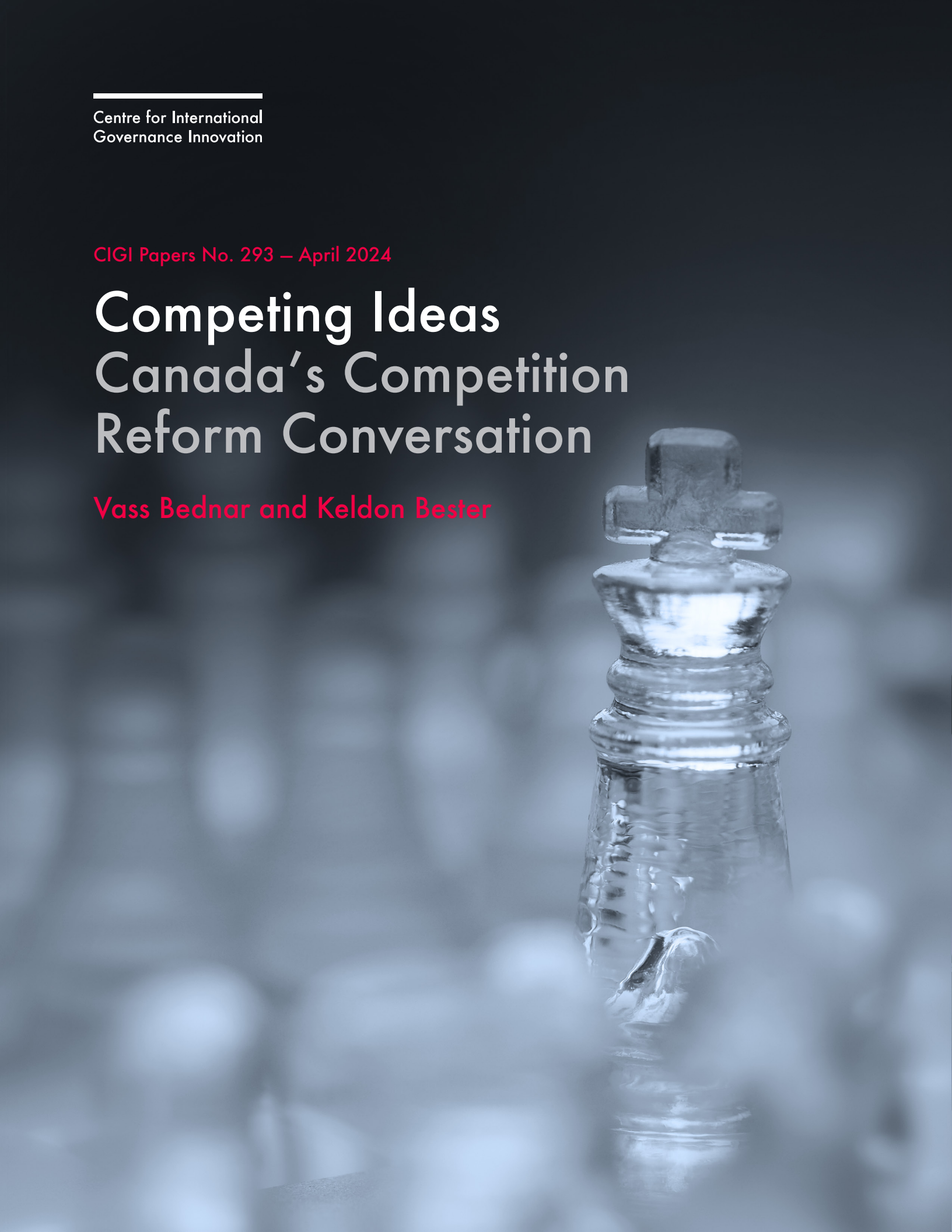

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Director, Program Management Dianna English
Program Manager Jenny Thiel
Publications Editor Susan Bubak
Graphic Designer Abhilasha Dewan

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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About the Authors

Vass Bednar is a CIGI senior fellow working at the intersection of technology and public policy as the executive director of the Master of Public Policy in Digital Society program at McMaster University, where she is an adjunct professor of political science. She writes a newsletter about start-ups and public policy called "regs to riches" and is a Public Policy Forum fellow.

Vass is recognized as a creative, data-driven thinker and recently advised Ontario's minister of labour, training and skills development on the province's Workforce Recovery Advisory Committee (2021). She was previously chair of Prime Minister Justin Trudeau's Expert Panel on Youth Employment (2016–2017).

Passionate about public dialogue, she was also the co-host of *Detangled*, a weekly pop culture and public policy radio show and podcast that ran from 2016 to 2018. Vass currently contributes to public dialogue as a panellist on CBC's *The Sunday Magazine* show and on Newstalk 1010's "Free for All" panel on Thursday mornings.

She is a graduate of McMaster University's Arts & Science Program (2008) and holds a master of public policy from the University of Toronto (2010).

Keldon Bester is a CIGI fellow and the executive director of the Canadian Anti-Monopoly Project, a think tank dedicated to addressing the harms of monopoly and building a more democratic economy. He is a leading voice in Canada's competition policy conversation, and his writing and thinking have been featured in *The Globe and Mail*, *National Post* and *Toronto Star*.

Keldon has worked as a special adviser at Canada's Competition Bureau, as a fellow at the Open Markets Institute and as a consultant for organizations across the Canadian economy. He holds a master of public policy degree from the Harvard Kennedy School.

Canadians deserve open and competitive markets, where firms are able to succeed or fail on their own merits. Unfortunately, at present, there are significant substantive challenges with the application of the abuse of dominance provisions under the Act, giving powerful firms undue ability to shape how competition evolves.

—Commissioner of Competition Matthew Boswell (Competition Bureau 2023a)

Executive Summary

The Government of Canada has recently concluded a comprehensive review of and made initial updates to the core of the country's competition law framework, the Competition Act, which was last reviewed in 2007. The act — just one component of Canada's overall economic policy — along with economic trends and recent events have brought increased scrutiny of the state of competition in Canada and the laws designed to protect and promote it. Amid the rise of digital platforms and an explosion in the cost of living, competition has become a watchword for policy makers and everyday Canadians alike. But despite its relevance to daily life, the mechanics of competition law are often esoteric — the domain of a handful of legal and economic experts. This kind of asymmetry risks excluding constituents who should otherwise have the opportunity to contribute to this important public policy conversation. In an attempt to counter this tendency, this paper provides an overview of the motivation for a more effective and modern competition law, and briefly summarizes previous reform efforts to provide context for the quick policy action on the modernization of Canada's competition law. Reviewing and highlighting a handful of stakeholders that have participated publicly to date, the paper considers how different contributors have shifted compared to past reform initiatives and what that means for the future of competition policy making in Canada.

Introduction

Competition has become a watchword for economic policy discussion in Canada. Amid a renewed focus on maintaining and improving affordability, the federal government is reconsidering the path taken since the 1986 introduction of the Competition Act, the component of Canada's competition law policy framework applied generally across the economy. While sectors including air travel, banking and telecommunications have other legislative layers (or "levers") that add additional policy elements governing their associated marketplaces, the Competition Act, enforced by the Competition Bureau, is at the heart of Canada's approach to protecting and promoting competition. In the wake of similar competition reform exercises in peer jurisdictions, global macroeconomic shifts and high-profile glimpses into the limitations of the current framework, the current review of the Competition Act is as timely as it is intricate, and is at times convoluted — a reality that risks extinguishing the considerable public energy and interest in seeing this law updated.

In the fall of 2022, Minister of Innovation, Science and Industry François-Philippe Champagne launched a public consultation[1] on the Competition Act centred on a substantial discussion paper, "The Future of Competition Policy in Canada" (Innovation, Science and Economic Development Canada [ISED] 2022a). The publication canvassed the major areas of the existing legislation, posing probing questions throughout to stakeholders. While the document was an admirable attempt to translate the esoteric language of competition policy into everyday terms, the discussion paper presented a substantial hurdle to individuals and organizations that were not already well-versed on the law. The publication necessarily uses terms of art such as "anti-competitive," "unilateral conduct" and "competitor collaborations" without offering further context or elaboration. Nonetheless, the themes outlined in the discussion paper point to the more accessible question being asked at the heart of the consultation: Do we have the right powers, rules and strategies to protect and promote competition in Canada?

1 Both authors have participated in current and previous consultations on Canada's competition law and have advocated for change to existing legislation.

The piece transposed that question onto the various dimensions of enforcement activity that the Competition Act enables Canada's competition law enforcer, the Competition Bureau, to administer, including:

- Are the constraints on mergers and acquisitions that allow corporations to acquire their competitors appropriately tuned to prevent the accumulation of power in a market?
- Where that power has been obtained, through legitimate or illegitimate means, does Canada have the right authority to prevent corporations from using that power to dull the forces of competition?
- Does the law adequately consider the impacts of corporate conduct on competition in the labour market — one in which nearly every Canadian participates?

Although rooted in bureaucratic language, these questions go to the heart of the balances of power in the Canadian economy among consumers, producers and workers; between businesses that dominate markets and those that challenge them; and between established markets and those emerging around them.

By opening the discussion to fundamental questions of the viability of Canada's existing framework to protect competition, the government has signalled a willingness to change the direction of a core economic policy framework. This comprehensive review and open call for feedback has catalyzed responses from a spectrum of rich perspectives.

Canadians are increasingly responding to the consequences of an economy characterized by a few major players in important markets, and an apparent slow drift toward even fewer in the future (Competition Bureau 2023b). Should competition evolve as a cornerstone of Canada's economic plan for the coming decades, contributions to the policy process today will have had a hand in shaping that evolution.

By rooting the discussion in the importance of competition to the growth and vitality of the Canadian economy, revisiting how engagement on the competition policy file has played out in the past and surveying how the current consultation compares to previous policy exercises, this paper seeks to highlight some of the core debates that are shaping what the future of competition in Canada may look like in the coming decades.

Why Competition Matters

Because of its integration into so many facets of economic life, competition has a multidimensional effect on the lives of Canadians. Although these effects are always present, trends and recent events have served to intensify the focus on the question of Canada's ability to protect and adequately promote competition. Internationally, there has been a reckoning of sorts with the accumulated power of a handful of technology firms in digital markets, and the policy conditions under which that power was allowed to be attained. This policy energy coincided with a review and reassessment of the overall state of competition in major economies, led by the United States, and made present in the lives of individuals following a tightening of macroeconomic conditions.

Beginning with its multidimensional impact on Canadians, in the most familiar example, competition is a force that can increase choice and drive prices down for consumers. Although often framed by its relevance to pocketbooks, the nature of choice also speaks to the question of how well individuals and communities with specialized needs are served by the economy. But the consequences of competition (or lack thereof) extend well beyond the prices Canadians pay for goods and services. Competition in the labour market — the balance of power between employers and employees — sets the boundaries for wages and employment opportunities for workers across the country. Healthy labour competition means that workers capture more of the value they generate and raises the standards for the treatment of workers by providing exit options. Open and contestable markets — the foundation of competition — matter to entrepreneurs and businesses of all sizes, but especially those striking out in the shadow of incumbents. By maintaining contestability, assumptions about the status quo in markets are challenged by newcomers. Accordingly, competition is also the process through which innovation and the cycle of markets generate new ideas, goods and services, and ways of conducting business. Although

mostly abstract, the ability of competition to drive creativity and ingenuity may be one of its most important long-term contributions to any economy. Finally, competitive markets are important to governments and taxpayers, who expect value for money on any public spending in the near term, and who wish to see the economy grow organically and responsibly in the long term.

In the wake of giants of digital commerce such as Amazon, Apple, Google and Meta, countries around the world have spent the past decade grappling with the question of how this power was permitted to accumulate and the appropriate policy responses to that power. Although covering topics well outside the bounds of competition to include connections such as user privacy as a potential "excessive cost" (although the authors note that the 2022 update to the act added "effects on both price competition and non-price competition, such as quality, choice or consumer privacy" (ISED 2022b) to the list of factors to determine an impact on competition), online safety and cultural policy, much of international policy discussion has focused on the fitness of competition laws in maintaining competitive and dynamic markets in light of the tech firms that now occupy prominent places in daily life. To date, the responses to these challenges have differed across jurisdictions. Entities such as the European Union have embarked on two major pieces of "bright-line" regulatory legislation — the Digital Markets Act and the Digital Services Act — while the United States has largely decided to ramp up enforcement of existing laws. Other countries, such as Australia, Germany and the United Kingdom, have adopted a more reform-minded path, strengthening existing competition law frameworks.

Looking beyond digital markets, evidence suggests that competitive indicators such as industry concentration, markups and profit margins, and industry dynamism were showing a growing competitive problem across economies. In the United States, research showed that the average markups above marginal cost, relatively flat until the 1950s, had grown materially since the 1980s, possibly reflecting reduced competitive pressure (De Loecker, Eeckhout and Unger 2020). Expanding the view to advanced economies, a similar trend appears to have played out with a documented increase in the market power of publicly listed firms, with a sharp increase in industries such as technology and pharmaceuticals (Akcigit et al. 2021). While market power may be an abstract concept to most, the recent global bout of inflation has made more tangible the rise in corporate power these studies document, with an emphasis on sectors such as grocery where the ability for consumers to change their spending habits is limited (Competition Bureau 2023c).

On the domestic front, a recent report from the Competition Bureau (2023b), produced in partnership with Statistics Canada, found that the country's competitive intensity has fallen over the past 20 years, infusing the current reform exercise with renewed urgency. Some of the report's key findings include:

- Concentration rose in the most concentrated industries and the number of highly concentrated industries grew. This means that a few large firms earn a large share of the revenues compared to smaller firms.
- Top firms are less and less challenged by their competition. This means that the largest firms in an industry are maintaining their position over time — and this stability has increased.
- Fewer firms are entering and exiting industries. This is concerning because new firms challenge existing ones and encourage innovation and better value, which is a major driver of competition.
- Profits and markups rose. Competition puts pressure on firms to keep prices low. However, the report found that profits and markups increased and that these increases were generally greater for firms where these were already high.
- The result of declining competitive intensity is that both consumers and businesses have seen fewer of the benefits that a more competitive economy has to offer, such as lower prices, greater choice and more innovation.

Although not able to diagnose specific issues in particular markets, the findings of the Competition Bureau and Statistics Canada report speak to the broader macroeconomic motivations underlying Canada's review of its competition law framework. This is reflected not only in the tone of the discussion paper kicking off the Future of Competition Policy in Canada consultation, but as will be explored later, in the calls for change found in the submissions of a diverse set of

stakeholders. As the rise in cost of living begins to bite and gain prominence in public opinion polling, there is a sense that competition has not played an adequate role in economic policy making.

In addition to evidence of national trends, domestic events have also raised questions about the fitness of Canada's competition law. Years before the rising food prices that have made headlines in Canada, revelations of a wide-ranging and long-lasting bread price-fixing scandal eroded the trust between Canadians and the firms they rely on to put food on their tables (Russell 2018). In 2023, the $26 billion Rogers-Shaw telecommunications merger was allowed to take place in markets where Canadians already pay some of the highest prices relative to global peers (ISED 2023a). Taken together, these discrete events bring home to Canadians the trends that international studies have pointed to: that the force of competition is waning in important sectors of the economy.

Although the federal government's consultation on the Competition Act reflects this phenomenon, the most recent consultation has not been the sole site of conversation in the evolving discourse on competition and is a spiritual successor to the efforts of previous governments on this important topic. Before considering the current state and future of the competition policy conversation in Canada, it is worthwhile to understand the work that has come before it and the broader policy context in which it takes place.

Previous Consultations on Canada's Competition Policy

This is not the first time that the federal government has embarked on a consultation on the fitness of its competition policy since the 1986 introduction of the Competition Act. In 2007, an expert panel dubbed the Competition Policy Review Panel was tasked with reviewing Canada's approach to competition. The product of that review, the 2008 *Compete to Win* report, laid out a suite of recommendations, referred to by the panel as a "competitiveness agenda," that they saw as crucial to improving competition and raising the standard of living in Canada (Competition Policy Review Panel 2008).

The government's previous approach to consultation on Canada's competition framework is different from today's process in important ways. First, the two consultations differed in their intended scope, with the 2022 Future of Competition Policy in Canada consultation focusing specifically on the Competition Act while the 2007 Competition Policy Review Panel consultation looked beyond the Competition Act to include the Investment Canada Act and other sectoral regulatory approaches. The latest consultation also differed in the individuals tasked with executing it, with the 2022 consultation delegating information gathering and reporting to the public servants of ISED, compared to the expert panel that structured the 2007 consultation. Despite these differences, both consultations made use of motivating discussion papers to solicit public submissions from interested parties and engaged in round-table discussions with a range of stakeholders across Canada, but it is unclear whether the 2007 consultation allowed members of the general public to contribute their opinions and experiences to the process as the 2022 consultation did.

The 2009 Competition Act amendments that resulted from the 2007 consultation reflect the general position that, while there was room for productive change to the act, the framework was essentially sound. The structure of the merger review process was made to align more closely with the two-stage review structure of the United States, but the window of time for the bureau to challenge already completed mergers was narrowed from three years to one year. Provisions for specific conduct such as predatory pricing were repealed, but the Competition Tribunal, Canada's specialized competition adjudicator, was given the power to order administrative monetary penalties for abuses of dominance. The 2009 amendments made the Competition Act more and less assertive in different areas of the law but left the purpose and foundation largely intact. Notably not taken up was the recommendation to create a "Canadian Competitiveness Council" envisioned to take responsibility for advocating on issues of competition across the economy away from the Competition Bureau.

Although not instigated by the federal government, the 2022 consultation was also preceded by then Senator Howard Wetston's 2021 independently

led consultation on the Competition Act, centred on Edward M. Iacobucci's (2021) discussion paper, "Examining the Canadian Competition Act in the Digital Era." Effectively unadvertised except to invited stakeholders, the less formal consultation still represents an important step in the process of reform consideration of Canada's competition law framework, generating 31 submissions that were made public.[2] Because many of the individuals and groups that participated in the Wetston consultation also participated in the federal government's 2022 consultation, the senator's consultation can be understood as a precursor to and instigator of the policy conversation captured by the Future of Competition Policy in Canada consultation.

In the lead-up to the recent consultation activity, the Government of Canada introduced interim amendments in 2022. The hallmark of these amendments was the introduction of labour-focused changes to the act, with the expansion of criminal cartel provisions to cover wage fixing and no-poach agreements. Showing a desire for a broader conception of dimensions of competition, the 2022 amendments also added factors for potential consideration under abuse of dominance and merger provisions including price and non-price competition, such as privacy, quality and choice. Described by the federal government as the jumping-off point for more comprehensive reform of the Competition Act, the contributions to the senator-led 2021 consultation contain the seeds of the federal government's most recent consultation and a preview of the future of Canada's competition law.

Who Participated and What Did They Say?

After four months of open consultation, the federal government closed the most far-reaching consultation on Canada's competition law since 2007. Made public in the summer of 2023, more than 120 organizations and stakeholders made submissions in response to the government's consultation paper, less than the more than 150 that participated in the Competition Policy Review Panel consultation (ISED 2023b). Drawing views from a wide range of interested parties, the public release of submissions offers a snapshot of the Canadian competition policy conversation, summarized at a high level in the fall 2023 release of the government's "What We Heard Report" (ISED 2023c).

Comparing across the consultation populations, the composition of the public submissions to the two consultations was strikingly similar. Using ISED's categories of academic experts; legal practitioners; labour, consumer or public interest groups; businesses or business associations; government organizations; and "other," a material shift in composition is not clear between the two consultations (see Table 1).

Table 1: Composition of Contributors to Federal Competition Policy Consulations

ISED Category	2022	2007
Academic experts	8%	3%
Practitioners in competition law	8%	8%
Labour, consumer or public interest groups	18%	12%
Business or business associations	52%	61%
Government organizations	4%	9%
Other	10%	7%

Source: Data gathered from ISED online materials.

Unsurprisingly, in 2023, more than 50 percent of the submissions were made by businesses and the associations that represent them. In one sense, this is to be expected. Competition cannot occur without competitors, and although competition has far-reaching effects in Canadian society, businesses vying for existing markets and creating new ones lay at the heart of the competitive process. But it is important that the full range of actors that experience the effects of competition (or its absence) are represented in such a process. Whether half of the received submissions is appropriate is unclear, but at a superficial level, there does appear to have been strong participation from constituents outside of

2 See www.colindeacon.ca/projects/competition-consultation/submissions.

the traditional business community. The numeric presence of submissions from businesses and their associations actually decreased compared to 2007 when they made up just over 60 percent of submissions. Encouragingly, this difference appears to have been made up by greater participation on the part of academic experts and labour, consumer or public interest groups, reflecting engagement of more diverse civil society perspectives.

Digging deeper into the composition of the businesses and associations that participated in the two consultations shows a shift in the kinds of organizations within the category. In 2007, 40 percent of the submissions from the business community were from industry associations, a figure that rises to 70 percent in 2022. That shift in the 2022 consultation was composed, in part, by the pullback of individual submissions from industry players such as Canada's major banks, telecommunications firms and media entities. Although this was likely the result of the narrower scope of the 2022 consultation compared to 2007, with its lack of focus on sectoral regulatory regimes, it is interesting to consider whether these firms are taking a backseat to competition reform, working primarily through their representative institutions or choosing to shape policy through lobbying channels. More prominent in the more recent consultation is the presence of domestic and international technology firms, with individual submissions from Google Canada, Proton and Wealthsimple.

Another notable difference was the relative lack of participation of provincial government bodies when compared to the 2007 consultation. Fifteen years ago, the governments of Alberta, British Columbia, Nova Scotia, Nunavut, Quebec and Ontario provided their perspectives on the future of competition in Canada, but in 2022, only Ontario engaged in the process. This may have been a result of the relatively narrow focus of the consultation, but as the 2022 submission of the Government of Ontario highlights, there is substantial overlap between the regulatory and consumer protection responsibilities of the provinces and federal competition law.

Without attempting to recreate the work of ISED's "What We Heard Report" and canvass the spectrum of contributions to the 2022 consultation, it is worthwhile to highlight a selection of submissions that are notable either for the nature of the stakeholders or the content of their submissions as a companion to the ministry's publication.

Beginning with the organization responsible for administering the Competition Act, the Competition Bureau (2023a) proactively published its submission to the consultation in March 2023, documenting approximately 32 ideas for reform. These ideas were presented based on the bureau's experience as the enforcer of the Competition Act. The substance of the bureau's submission speaks to what it sees as material limitations to the current Competition Act, with the deck stacked against the enforcer in bringing cases, especially in what it describes as digital and dynamic markets. The tone of the submission is not surprising considering the bureau's later analysis of national trends in competitive intensity that describe a slow but broad-based decline across a number of indicators. The submission is an important window into the otherwise private enforcer, but the submission risks inadvertently pitting the bureau at odds with ISED under which it sits, depending on which and how many of the suggestions are ultimately adopted. Entering the policy conversation is not entirely new to the bureau, as the bureau also participated in the 2007 Compete to Win consultation, and that publication will likely become a benchmark of sorts from which to evaluate future reform efforts.

As noted, the province of Ontario was the only subnational jurisdiction that contributed to the consultation. This is notable, especially given that the Competition Bureau has agreements with domestic partners such as the Ville de Laval, the Market Surveillance Administrator of Alberta, the Inspector General of Montreal, the Government of Yukon, as well as the Business Practices and Consumer Protection Authority of British Columbia and the BC Financial Services Authority, suggesting that more of these partners may have been compelled to contribute to the review process. Ontario noted that the province recently amended its Employment Standards Act, 2000, to prohibit the use of non-compete clauses. This is a pro-competitive policy that contributes to better worker mobility. To date, no other provinces have followed suit.

The province also called out "hyper-dynamic pricing through use of algorithms built on biases and discriminatory assumptions which result in unfair prices for different groups of consumers

or businesses."[3] The prospective Bill C-27[4] may prompt consideration of the effects of algorithmic conduct in the public interest. Evoking a more transversal approach, the province also mentioned dark patterns, which are enforced under the Competition Act but also have considerable implications for consumer protection, as well as marketing strategies and platforms that target youth and children. The latter may be addressed through forthcoming online harms legislation.

Remaining in the public sector category but expanding to Canada's international partners, the joint submission of the US Federal Trade Commission (FTC) and Department of Justice Antitrust Division reflects the Biden administration's commitment to increasing competition in the American economy. Providing lessons from their experience for Canadian policy makers, the joint submission points to the more vigorous approach both authorities have taken to enforcing their existing laws, albeit in bureaucratically neutral language (Khan and Kanter 2023). In particular, the American enforcers' submission casts doubt on the efficiency arguments that have been prominent in Canada's competition law and policy discourse. Recommending a skeptical view of claims that excuse otherwise anti-competitive conduct, the authorities raise the value of structural presumptions against further consolidation of already concentrated industries, something absent today from the Canadian framework. Although the submission points to legislation proposed in the United States to strengthen that country's antitrust law, the content of the submission focuses primarily on the role of assumptions and presumptions on the part of the enforcer in effectively protecting and promoting competition.

Shifting to the perspective of private sector participants, of note is a submission by the Business Competition Policy Coalition (BCPC), a loose association of telecommunications giant Bell, grocery chain Empire Company Limited, German pharmaceutical conglomerate Bayer, one-half of Canada's rail duopoly CN Rail and the Hudson's Bay Company. Given the companies' positions and tenure in their respective industries, the submission is useful as a temperature check on the perspective of incumbents on Canada's competition law framework. For established incumbents, there is an expected bias toward the status quo, even if that status quo does not fully serve the interests of incumbents. Change to that status quo invites risk to business models and decisions made in the context of the existing framework, even if eventually beneficial, and so advice anchored in caution is to be expected.

Even with consideration of this status quo bias in mind, the submission of the BCPC is a signal that the somewhat artificial category of incumbents is largely satisfied with the current state of Canada's competition law. The group is quick to highlight that the existing framework does not and should not allow the government to take steps to proactively increase competition, only to respond and prevent distortion of competitive markets. With limited exception, the coalition is in favour of the status quo in merger enforcement, emphasizing that the supposedly unique nature of the Canadian economy requires an approach that allows harms to competition to be excused by efficiency arguments. One area where the coalition does take issue with the current state is the role of the Competition Tribunal. The coalition describes the tribunal as becoming too onerous and formalistic a decision-making body, recommending streamlining the body but notably not the delegating of decision-making power to the Competition Bureau, which was a potentiality raised by ISED in its consultation discussion paper.

Considering the perspective of a representative of smaller players in the Canadian market, the Canadian Federation of Independent Businesses (CFIB) drew important connections between consolidation and high industry concentration that has persisted or intensified under the current act and its effects on the association's membership. The CFIB's submission highlights the lack of agency that smaller players feel in industries composed of a few very large customers or suppliers, subject to seemingly arbitrary actions such as sudden price increases, superfluous fees and disciplinary action. In particular, the association's submission focused on the relationship between Amazon and the small and medium-

3 See the Government of Ontario's submission at https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/submissions-consultation-future-competition-policy-canada/government-organizations.

4 Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2021, online: *Parliament of Canada* <www.parl.ca/legisinfo/en/bill/44-1/c-27>.

sized businesses that rely on the e-commerce platform. Speaking to a familiar tension in competition law, the CFIB notes the important role that Amazon plays in providing access to markets for businesses and the implications of that dependency for individual sellers.

Covering a wide range of conduct, CFIB members describe Amazon limiting their ability to offer goods for a lower price on other e-commerce platforms, restricting their ability to communicate with their customers and adding conditions to access the "buy box" on the platform that eat into seller margins, claiming up to 40 percent of the total sale price. Much of the conduct described by CFIB members echoes not only the areas of interest of the Competition Bureau's possibly still ongoing investigation into Amazon, but also much of the content of the FTC's recent complaint against the firm (Competition Bureau 2020a; FTC 2023). The CFIB's submission is noteworthy both because of the group of stakeholders it represents and the questions it poses about the boundaries that competition places on a platform offering an otherwise valuable service to participants in a market.

While Amazon did not explicitly participate in the public consultation, the Canadian arm of Google, another tech giant currently facing antitrust challenges abroad and possibly ongoing investigation in Canada, did participate in the consultation (Competition Bureau 2021). Notable elements of the Google submission were repeat references to a "more participative competition approach" reliant more on discussions between enforcers and corporations than on formal legal processes and arguments to keep presumptions against the conduct of firms considered dominant out of the Competition Act. Echoing familiar support for the status quo, Google raised the spectre of the risk of unintended consequences for otherwise well-intended regulatory changes.

Moving from the private sector and reflecting the potential for a renewed focus on the effects of competition in the labour market embodied by the 2022 amendments, private sector union Unifor's submission includes the recommendation for formal consideration of the impact of mergers on relevant labour markets. While today, there is nothing stopping the Competition Bureau from considering said labour impacts, to date there has been no public evidence that a merger intervention has turned on that question. Unifor also suggested an expansion of the existing carve-out for collective bargaining agreements to ensure that gig workers, often considered contractors, are not prevented from union activity by the Competition Act.

Collapsing a diverse group that included domestic and foreign organizations, representatives of Canada's agricultural and media landscape, and advocates for consumers, small businesses and gig workers, public interest groups offered an array of potential paths away from the status quo. While the content of those paths reflected different levels of focus and ambition, the common thread was dissatisfaction with the current performance and abilities of Canada's competition law. Groups were united in the belief that, whether protecting privacy, maintaining the rights of consumers or promoting diversity in their respective marketplaces, the Competition Act as it stands is not fulfilling its mandate, and that this may be an opportunity to reset that mandate entirely. The consultation also drew the attention of American think tanks such as the Open Markets Institute[5] and the American Economic Liberties Project,[6] with each offering lessons from their own work responding to the concentrated economic power they see as a threat to the future of both the American and Canadian economies.

Although the organizational stakeholders making public submissions expressed a range of opinions on the current state of Canada's competition law framework, one group seemingly in concert were the more than 400 Canadians who responded to the call for responses from the general public. Summarized in the government's "What We Heard Report," the resounding response from the general public was that of general dissatisfaction and the need for greater action (ISED 2023c). Keeping in mind that those responding are likely to represent selection bias, the unity portrayed by the government's report is striking. Individuals felt that corporations in Canada had been allowed to form monopolies and oligopolies in spite of the Competition Act, and that the same firms held too much power over the lives of Canadians. Also present was the desire for greater support for small businesses in Canada and stronger consumer protection laws, although it was noted that this is primarily the jurisdiction of provinces in Canada. Taken

5 See www.openmarketsinstitute.org/.

6 See www.economicliberties.us/.

together, the responses envision a larger role for the Competition Bureau and government, including even the active break-up of existing concentrated markets and the opening of markets previously perceived as being closed to foreign competition.

What Does This Mean for the Future of Competition in Canada?

This scope of potential legislative reform put forward in the most recent consultation is considerable. Multiple dimensions of the Competition Act are being reconsidered for revision, and placing each of these elements under the spotlight has surfaced a range of perspectives and objections that ISED continues to consider carefully. While the department has sought to shape the debate through their key consultation questions, there is an umbrella opportunity for other comments that many stakeholders have utilized to share additional positions that may not fit as a direct response to the core question set. This outlet created additional richness for policy makers to consider new, complementary ideas that are pro-competitive and could be addressed through the Competition Act or another, more appropriate policy lever. In this way, the reform process is still clarifying; by highlighting key elements of contention, the reform process can begin to address concerns more directly.

That said, as acknowledged in the "What We Heard Report," at the time of writing there are few areas of obvious consensus on the key questions that the ministry has posed. Where there is general consensus, it tends to be in relation to debates that have been long-ongoing in Canada — some carrying over from the 2008 *Compete to Win* report.

While the consultation has not resolved all key questions, it has brought attention to them in a productive and transparent manner. By bringing a range of issues forward, especially in light of policy progress in peer jurisdictions, the consultation created the basis for the federal government to move forward on initial reform of the Competition Act. In the timescale of legislative change, the resulting action and its scale have been impressive. Before the end of 2023, the government had brought into force Competition Act reform with Bill C-56 and proposed further changes to come in 2024 with Bill C-59 (see Box 1).

Stepping back from the details of C-56 and C-59 allows for an assessment of what the bills mean in the broader context of Canada's evolving approach to competition law. One decision avoided to date is the question of what a new organizing principle will be for Canada's approach to competition law. Given that C-56 repeals the efficiency defence for mergers, there has certainly been a shift in guiding vision, but also a missed opportunity to articulate a new vision for Canadian competition law. Canada's competition law might be leaning toward a post-efficiency era, but the purpose clause of the Competition Act remains unchanged, still including efficiency as one of its goals. In this way, while supporters of the status quo will certainly not be pleased about the comprehensive reforms, they may have scored a macro victory in that the act has not made a wholesale break with the past. By leaving the purpose of the Competition Act unchanged, legislators leave the goals of the next era of the Competition Act open to either debate or retrenchment.

While the guiding purpose of the legislation may remain the same, what has emerged is an articulation of those principles through a more assertive stance against the accumulation and exploitation of economic power. Both the tone of the consultation discussion paper and amendments to date signal an understanding that the current act has not gone far enough in this regard. Giving the bureau greater powers, expanding the range of conduct considered a violation of the act and removing provisions that traded off competition for other policy goals, reflect the temperature of the public conversation as represented by the government's summary of the submissions of individual Canadians. Despite the overall structure and purpose of the Competition Act remaining in place, this more assertive stance represents another break from the same kind of thinking that led to the efficiency focus of Canada's framework. What remains to be seen, of course, is whether enforcement, soon to be a decentralized account of C-59, lives up to this perceived break.

That the framework remains largely intact answers the same question, albeit more targeted, whether the act can sufficiently address challenges raised by large technology firms that have spurred

Box 1: Initial Products of the Consultation (Bills C-56 and C-59)

At time of writing, Bill C-56 had been passed into law and Bill C-59 is set to be debated by parliamentarians in early 2024. While the details of C-59 may change as a result of committee activity, its proposed form is worth considering ahead of potential amendments.

Bill C-56: Also known as the Affordable Housing and Groceries Act, Bill C-56* was tabled September 21, 2023. Although the bill followed the government's consultation and addressed some issues raised by it, the motivation of the bill is clear from its title. Responding to the cost-of-living issues faced by Canadians, C-56 was framed as the government's first steps toward improving competition and affordability. In its original form, C-56 addressed two long-standing issues with the Competition Act and one more unique one. By removing the efficiencies defence and providing the Competition Bureau with the authority to compel information for market studies, C-56 brings Canada's competition law in closer alignment with international peers. Given their long tenure in the competition policy debate, the issue of efficiencies and market studies was raised by a number of parties, with arguments concentrated within civil society groups and academia. In addition to addressing issues subject to years-long debate, C-56 also redrew the provisions against agreements that reduce competition to allow for enforcement against agreements between companies that are not competitors but reduce competition, nonetheless. Although there were recommendations raised to strengthen the approach against anti-competitive agreements in general, notably by the Competition Bureau, the focus on the relationship between competitors was likely drawn from popular news coverage of the impact of these agreements on competition in the grocery sector in a highly localized context.

A reflection of the cross-party support for stronger competition law in Canada, C-56 was strengthened materially by amendments from the other three major federal parties as it progressed through the Standing Committee on Finance. While the most material amendments, expanding the scope and penalties for abuse of dominance, originated from the New Democratic Party, the Conservatives and Bloc Québécois included important amendments to remove shadow efficiency defences in other areas of the law and include language to capture excessive pricing as an abuse of dominance. Even while operating outside of the government's consultation process, opposition parties clearly drew from the content of the consultation to inform their amendments. In particular, the broadening of the abuse of dominance provisions drew on alignment between the Competition Bureau and civil society groups on the limitation of the existing law.

Bill C-59: While Bill C-56 was targeted in its amendments to the Competition Act, Bill C-59 takes a more comprehensive approach, touching almost every area of competition law enforcement while maintaining the structure of the existing framework. As part of an omnibus bill to implement the 2023 Fall Economic Statement, the Competition Act components come alongside other indirect changes to the role of competition in Canada's economic policy, including open banking and employee ownership.

Possibly most consequential for the future of the development of Canada's competition policy framework is the opening of access and inclusion of damages for private parties to bring their own cases under the Competition Act (often referred to as "private access rights"). In the United States, private parties play a major role in the development of competition law jurisprudence, a component that has been largely absent in the Canadian context. By decentralizing enforcement of the Competition Act, C-59 sets the stage for an increased pace of cases and richer body of case law going forward. Advocates for this kind of change through the consultation reflected segments

* Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023, online: *Parliament of Canada* <www.parl.ca/DocumentViewer/en/44-1/bill/C-56/royal-assent>.

Box 1 (continued):

of the legal community, members of the business community and civil society organizations who noted the strain on the bureau's ability to administer the act as the sole federal enforcer of the Competition Act.

Companies bringing their own cases will have access to bolstered laws against agreements that harm competition. Lacking the ability to pursue past agreements and levy financial penalties, provisions against anti-competitive agreements that do not rise to the standard of criminal cartel enforcement went effectively unused by the Competition Bureau. While not included in the new private access regime, C-59 makes important changes to the merger enforcement framework, arguably the most prominent element of Canada's competition law, especially in the wake of mergers such as Rogers-Shaw and RBC-HSBC Canada. In addition to increasing the scope for the Competition Bureau to intervene against harmful mergers, C-59 removes barriers for the bureau to consider structural factors such as market shares in competition analysis and make explicit the government's desire for impacts on labour markets to be taken into account when assessing mergers. Here, the incorporation of labour as a factor represents the recognition of the contribution of civil society organizations, particularly organized labour, and the extension of the policy discourse on labour and competition that spurred the 2022 amendments.

Reflecting the ongoing discussion on the intersection between competition law and environmental policy goals, C-59 also creates a process for the Competition Bureau to authorize agreements between competitors with an environmental purpose, so long as they are judged not to reduce competition. Present in select submissions from the legal community and civil society, the inclusion of environmental authorizations is an example of the government's reform efforts reflecting not just the content of the consultation but also wider policy conversations occurring outside of it.

action by international peers. Respondents were divided on whether and how the act may better address such issues or whether net new "bright-line" legislation should be introduced to directly address "big tech." Here, those advocating for either the status quo or remedy via an enhanced competition law framework rather than targeted regulation were heard the clearest. So far at least, Canada is keeping the designation of certain behaviours as inherently problematic off the table, keeping in place an approach that prices case-by-case investigation and resolution. Should this approach not bear fruit, policy makers might begin to consider building out new frameworks rather than expanding the scope of existing ones as some international peers have done.

Focusing on the institutions responsible for enforcing and adjudicating the Competition Act, the role of the Competition Bureau and the Competition Tribunal has largely been passed over in this current round of reforms. Submissions imagine a Competition Bureau with more independent decision-making power as in jurisdictions such as the United Kingdom and the European Union, while others strenuously argued that these powers should remain the remit of the courts. So far, the decision-making power of the Competition Bureau and Competition Tribunal has been kept as is, but whether this remains the case as the private access regime brought in through C-59 takes shape remains to be seen. By decentralizing enforcement of the Competition Act, legislators may be setting the table for a future look at the institutions supporting the effective operation of this legal framework.

Looking for Competition beyond the Competition Act

Although this discussion has mimicked the focus of the Future of Competition Policy in Canada consultation by prioritizing analysis of the Competition Act, a number of policy levers have the potential to affect the path of competition in Canada. In a recent speech, Commissioner of Competition Matthew Boswell (2023) pointed to a "whole-of-government approach" to competition in Canada. The bureau has long called for the inclusion of competition assessments in policy decisions as a mechanism to promote the consideration of whether and how a decision will influence whether and how a policy impacts competition (Competition Bureau Canada 2020b). Legislative modifications to one piece of legislation alone may not have restorative effects in the immediate term. For this reason, proponents for this whole-of-government approach echo US President Joe Biden's historic Executive Order on Promoting Competition in the American Economy, which contains 72 different actions related to competition across a range of federal agencies (The White House 2021).

It seems likely that the future of competition policy in Canada will be more comprehensive, extending beyond the act to complementary activities and interventions in different ministries and across orders of government. To that end, Canada already has a suite of promising activities that could serve as the foundation for such an approach. For instance, two significant bills from Heritage Canada seek to address the market power of major technology companies and its consequences for Canadian cultural and media markets: Bill C-18 (the Online News Act) and Bill C-11 (the Online Streaming Act). The bureau already has 24 memoranda of understanding with domestic partners that have a shared interest in promoting competition and fair marketplaces, and 16 with other jurisdictions, laying the groundwork for ongoing cross-sectoral and international collaboration. Also empowering the bureau to collaborate more effectively is the Canadian Digital Regulators Forum, linking the bureau with the Privacy Commissioner and the head of the Canadian Radio-television and Telecommunications Commission, each with a hand in guiding the future of digital markets. Canada is also midway through legislative efforts related to open banking and payment modernization, which will improve consumer choice and facilitate new entrants in the banking sector.

But the federal government is not alone in its push for fostering greater competition in Canada. The province of Ontario has shown leadership on relevant competition issues, banning non-competes in labour agreements in the summer of 2022 and more recently tackling subscription traps by giving consumers the right to rescind a contract for one year after entering it. The province of Quebec has also put forward legislation supporting the right to report, reducing the hold that technology companies have over customer purchases and opening up opportunities for independent service providers (Serebrin 2023). Occurring outside the legislature, there are also a number of class action lawsuits stemming from the revelation of alleged price-fixing activity in the grocery space, with meat packers in Quebec a target apparently beyond the scope of the bureau's own investigation. In a similar vein, the North American MyMerch campaign is gaining traction in Canada to rebalance the relationship between musicians and the consolidated venues they rely on to access audiences.[7] Although these efforts are not nearly as coordinated as Biden's executive order on competition, they are a snapshot of efforts in Canada beyond the Competition Act to create more competitive and diverse markets across the country.

Conclusion

Amid a historic inflationary period that has catalyzed a cost-of-living crisis, the potential of competition law amendments that can better govern firm behaviour is garnering considerable and consistent attention from federal political parties. But beyond emergent economic issues, the potential of a greater focus on competition speaks to longer-running issues in the Canadian economy. Today, Canada ranks seventeenth among members of the Organisation for Economic Co-operation and Development regarding the percentage of GDP spent on research and

7 See https://weareumaw.org/news/mymerch-campaign-launch.

development (R&D), one indicator of investment in innovation, and among the lowest of G7 peers.[8] Further, Canadian firms have historically underinvested in R&D (Parkinson 2023). If it is the case that a latent lack of competition means firms are not compelled to take on the hard work of actually innovating, modernizing Canada's competition law — and a greater focus on competition in general — could be an important part of solving Canada's productivity "puzzle."

Previous consultations on competition in Canada correctly understood that there is more to fostering and protecting competition than simply updating the Competition Act, as other policy decisions can have significant implications for markets. But as the sole piece of purely competition-focused legislation, the act is a keystone: important not only as the guardrails for fair commerce in Canada but also a signal of the role of competition in the economy. Who shapes that law and how they shape it has implications for the future structure of markets and how they generate and distribute the spoils of the rivalry that forms the foundation of Canada's economy.

It is clear that the consultation on the Future of Competition in Canada was unable to be a consensus-building exercise across stakeholders. Submissions to the consultation painted a diverse but effectively bifurcated path. One side argues for marginal — if any — amendment to the current approach, while those in favour of reform offer an array of future directions for the legislation to take. However, recent years have shown that there is not one single opportunity to chart the course of Canada's competition law. It may be that reshaping the Competition Act is an iterative activity for years to come, as a new logic that can underpin our legislative approach emerges and is used to refine Canada's economic policy.

As the outcomes of the consultation exercise continue to take shape, it is important to recognize the important work Canada has undertaken by subjecting a key piece of economic policy to public scrutiny and debate. Attracting disparate voices from industry, government, civil society and academia, the government has faced the task of translating those voices into the future of competition in Canada. Nearly four decades after its last major reform, the future development path of the Competition Act and competition law in Canada may instead be one of ongoing and iterative reform.

8 See https://data.oecd.org/rd/gross-domestic-spending-on-r-d.htm.

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Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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