Internet Society
Canada Chapter

Consultation: Examining the Canadian *Competition Act* in the Digital Era

Submission

of the

Internet Society Canada Chapter

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Introduction

1. In this submission, the Internet Society Canada Chapter, will provide its comments on what it believes to be essential to revising the *Competition Act* and the in addressing the impoverished role that competition policy plays in the Canadian economy. We will address as appropriate the excellent paper "Examining the Canadian *Competition Act* in the Digital Era", authored by Professor Edward Iacobucci – but our comments take a much broader view of competition law and the unmet needs of Canadian who are daily harmed by uncompetitive behaviours that mark so many aspects of Canadian markets.

Who we are

2. The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages on internet legal and policy issues to advocate for an open, accessible and affordable internet for Canadians. An open internet means one in which ideas and expression can be communicated and received except where limits have been imposed by law. An accessible internet is one where all persons and all interests can freely access websites that span all legal forms of expression. An affordable internet is one by which all Canadians can access internet services at a reasonable price.

Fundamental Review Needed

3. ISCC believes that it is timely to undertake a fundamental examination of the *Competition Act* which, while incrementally amended over the years, has existed in its present form since the 1970's. The challenges to competitive markets posed by digital giants may provoke an examination of the *Competition Act*, but any examination has to go beyond the immediate issues and look more fundamentally at the structure of the *Competition Act* and its place in ensuring effective competition in the Canadian economy.

4. Competition law in Canada has become the sandbox of specialist economists and lawyers: the old saw is that competition law is an inch wide and a mile deep. It is fraught with impenetrable jargon and economic theories that seem – and are – remote from the interests and preoccupations of ordinary Canadians. But competition law, while difficult in application, is a corrective whose basic functions are understandable to laymen: consumers and businessmen alike.

5. This moment calls for a plain language discussion of the policy and purposes of competition law in Canada. It is contrary to the interests of Canada and Canadians that a fifty-year-old legal framework is discussed only within the confines of the competition elite. The issues engaged by competition policy are vital to the interests of Canadians. They must be engaged in a manner that permits a sounding of their views on issues that affect their well-being and the health of the Canadian economy. Given the challenges posed by the digital economy, an examination from first principles of competition law is both timely and indispensable.

6. A casual review of competition jurisprudence in Canada reveals a shocking hostility to the most basic principles of competition law. The answer to this judicial resistance to market regulation does not lie in minor tinkering with the *Competition Act*. To overcome the entrenched conservatism of our courts, a thorough review of competition legislation and the adoption of clear and unambiguous legislation that removes any doubt that Parliament is serious about marketplace reforms and committed to a culture of competition.

ISCC Comments and Suggestions

7. While we regard the current consultation as insufficient for the purpose, ISCC, in the interests of furthering public debate, would like to briefly address some of the areas where we believe that legislative action is required.

8. ISCC has reviewed Prof. Iacobucci's paper. We believe that most of the points he has raised are valid. Except as expressed below, we endorse his recommendations for change. Our main concern is that they do not go far enough and will do little to encourage the growth of a culture of competition in Canada.

Competition Act Objectives

9. The objectives of the *Competition Act* are, as Prof. Iacobucci rightly observes, extraordinarily muddled – to the point of policy incoherence.

10. ISCC believes that the focus of competition policy should be the interests of consumers. The purpose of markets is to allocate costs and resources. Market distortions that favour any class of economic organization – whether it be small business or exporters – reduce consumer choice or increase prices to consumers. We believe there is one objective to competition policy: to ensure that consumers benefit from competitive prices and competitive choices of goods and services – all the rest is dross.

Efficiencies Defence

11. In this light, ISCC believes that the "efficiencies defence" should be completely eliminated. Any merger that significantly prevents or lessens competition should be prohibited. Where a merger raises consumer prices or reduces consumer choices it should not be saved by prospective cost savings. It is illusory to believe that short term cost savings will produce long term benefits for the economy.

12. Efficiencies, as understood by economists, undermine the ultimate the welfare of the ultimate object of competition policy – the consumer. Canada erred in creating the efficiencies defence. It is past time to correct course.

13. It is noteworthy that no other major international partner has adopted the efficiencies defence. Canada, despite its highly concentrated web of major economic players, has

chosen to favour a path to higher economic concentration. Canada needs to reduce the concentration of economic power and to breathe life into our markets.

The Digital Economy

14. Professor Iacobucci has concluded from his review of the *Competition Act* that amendments are not necessary to deal with the digital economy. We do not believe that his opinions are conclusive on this issue, and far more public discourse is essential to arriving at an appropriate response to the challenges posed by the digital giants.

15. We note that economic partners such as Germany have already moved to enhance competition law to meet the specific challenges posed by the dominance of digital giants such as Alphabet and Meta.

16. We believe that only a thorough public debate can ensure that Canada choses the correct path in dealing with the challenges to competition that are posed by the emerging digital economy.

Private Remedies

17. ISCC is concerned that the current *Competition Act* concentrates initiative in the Commissioner of Competition and, apart from ss. 75, 76 and 77, prevents private initiative as a factor in remedying anti-competitive behaviour. We believe that the private parties injured by all forms of anti-competitive behaviour should have access to remedies, including damages and injunctive relief for the harms caused to competitors resulting from anti-competitive behaviours.

18. There are no plausible circumstances in which the Competition Bureau will have the resources or the policy interest in pursuing all anti-competitive behaviour in all parts of a trillion-dollar economy. Opening abuse of dominance to private action will create a market support for competition: if a business is seriously harmed by anti-competitive behaviour, then giving it the right to pursue damages and injunctive relief incentivizes competition law enforcement.

19. Cases that may have little public importance from the viewpoint of the Commissioner of Competition may have life and death consequences for private actors. Those private actors should be empowered to pursue those whose conduct is causing them harm. Indeed, class actions on behalf of consumers might be both a deterrent and a remedy to the abuse of dominance in the marketplace.

20. The often-repeated concerns of opponents or private remedies decry the possibility that opening up competition law to private remedies will lead to frivolous and nuisance lawsuits. We believe that the existing Canadian law of costs will sufficiently discipline would-be litigants. Bankruptcy faces a legitimate but unsuccessful litigant.

21. Any review of the *Competition Act* should take a fresh look at statutory damages where anti-competitive behaviour is established but common law damages may be too difficult to ascertain.

22. In general, Canada has to create a competition culture. This cannot be done by leaving competition to a tiny agency with limited resources. The insularity of competition law and policy is an impediment to effective markets and to a broader appreciation of the benefits that can be realized through competition.

Regulated Conduct

23. There is no reference in the *Competition Act* to the regulated conduct defence: it is a doctrine of interpretation invented by the courts to avoid conflict between relatively narrow provincial legislation (e.g. the regulation of milk prices) and the broad scope of the *Competition Act* and its predecessors backed with the weight of constitutional paramountcy threatening provincial economic regulation.

24. It is our view that the regulated conduct defence is not available for entities that are regulated at the federal level (e.g. broadcasting mergers), but it is nonetheless unseemly to have to litigate matters in court that have at least the appearance of competition between federal regulatory agencies.

25. ISCC believes it time to circumscribe the regulated conduct defence: it should be limited to clear provincial legislative objectives (e.g. agricultural marketing boards), but should clearly exclude anti-competitive aspects of the regulation of professions, services and trades.

Institutional Framework

26. When considering the functioning of the *Competition Act*, special regard should be given to the continued role of the Competition Tribunal. Is a specialized tribunal the answer to remediation of competition harms? Has the Tribunal functioned as intended? Do its processes yield timely and predictable results? Has the Tribunal created a coherent body of competition jurisprudence? Does it further competition policy? Could the Federal Court or provincial superior courts serve the function equally well? Would moving competition law into the courts create a broader competition bar and greater judicial awareness of competition law and its importance?

27. ISCC has no position on these questions, but it notes that competition policy and competition law are insular within the general Canadian system of governance and law enforcement. We do not believe that this has been a positive development. Competition law and policy should be a significant factor in our economic lives. It is not. Canadians are largely unaware of how our markets are regulated or who does the regulating. We believe that the institutional structures created around competition law should be closely scrutinized to ensure that they are contributing to a culture of competition in Canada. Canadians should be aware of how competition and its imperfections affect them as individuals and as a collective.

Conclusion

ISCC believes it is timely for the Government to undertake a fundamental review of the *Competition Act* to chart a new course that reflects a commitment to enhanced competition and to provide a legal framework that will obtain that objective.