



LEVERAGING COMPETITION LAW AND POLICY TO PROMOTE INCLUSIVE GROWTH IN CANADA

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The Canadian Anti-Monopoly Project (CAMP) is a think tank dedicated to addressing the issues caused by monopoly power in Canada. CAMP assists individuals and organizations navigating and reforming Canadian competition law, and produces research and policy proposals to make Canada's economy more fair, free, and democratic.

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Regulators are increasingly being asked to consider questions that they were not originally set up to answer. As a result, regulatory institutions are now grappling to define their role in governing multiple complex issues – like driving innovation, reducing environmental harm, and enhancing equity and inclusivity.

This paper provides a starting point for one of these discussions: **how competition law, policy, and regulation in Canada can promote more inclusive growth.**

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INTRODUCTION

Conventional economic wisdom says that the growth of our national GDP is important because it leads to higher living standards. However, in recent decades this traditional wisdom has been challenged as inequality in income and wealth has grown in Canada and globally.

While many Canadians benefit from increases in our collective prosperity, the data are clear that wealthy and high-income individuals are reaping the most from economic growth. And while certain levels of economic inequality are expected in competitive market economies, at current levels, countries risk not only failing to uphold normative 'good governance' functions but also risk increased exposure to the many economic, social, and environmental problems accelerated by economic inequality.

As a result, arguments are mounting for more inclusive economic growth, defined by the OECD as "economic growth that creates opportunity for all segments of the population and distributes the dividends of increased prosperity, both in monetary and non-monetary terms, fairly across society."

One way that inclusive growth can be encouraged is by ensuring markets are sufficiently competitive. Specifically, market competition can foster a more equal distribution of income. Outcomes of competition, like greater productivity and innovations leading to new products or services, can also

enhance living standards. In competitive markets, firms may compete on factors other than price – like providing more environmentally friendly and socially conscious products – which have positive spillover effects outside the specific market in which they compete, enhancing living standards. However, *this causation is not automatic*. When laws and policies regulating market competition are designed with inclusivity in mind, there is great potential for economic inequality to be addressed at this fundamental institutional level.

In recent years research into competition law has begun to more seriously consider the intersection of competition and dimensions of inclusion, particularly related to race and gender. There has also been limited study into the intersection of competition and inclusive growth in developing economies. Our study adds to this literature by elaborating on how to design competition legislation that specifically supports inclusive growth for the Canadian economy and beyond.

Recently in Canada, there is renewed awareness and interest in competition law and its role in protecting consumers and making our economy fairer and more accessible. In November 2022, the federal government opened a consultation to review the Competition Act, Canada’s competition law, to modernize it “to better serve the public interest.”¹

In light of the announced review of the Act, this paper provides a robust discussion on the problem of un-inclusive economic growth and argues for inclusive growth as path forward, realized in part through reform to Canadian competition law.

We put forth a workable definition of inclusive growth – “growth that enhances living standards for all people in Canada” – that can be used to guide the creation of competition legislation that fosters this kind of growth.

Building from this definition, we present a framework that maps the intersections of competition law to various dimensions of inclusive growth. In this way, we articulate how competition law can best contribute to inclusive growth, acknowledging its comparative advantage as a core driver of inclusive growth and its supporting role for other policy interventions directed at promoting inclusive growth. Based on this framework and analysis, we put forward recommendations for legislative reform.



THE PROBLEM OF UN-INCLUSIVE GROWTH

Economic growth is important because it enables us to enhance our standard of living, expanding access to the goods and services we need and improving their quality.² Growth in our national GDP, either overall or per capita, is our conventional measure of economic growth. However, GDP growth alone is insufficient for enhancing living standards if the gains from that growth are not widely enjoyed.

Economic inequalities, particularly trends towards increasing income inequality since the mid-1990s, undermine growing living standards for society. If the gains associated with GDP growth are only enjoyed by those at the top end of income or wealth distributions, then economic growth does not translate into higher standards of living for all Canadians. Furthermore, research into the relationship between economic inequality and economic growth has found that higher inequalities undermine economic growth, particularly in the long term.³ For example, one OECD study of 19 countries⁴ found that the “rise of income inequality between 1985 and 2005 [...] is estimated to have knocked 4.7 percentage points off cumulative growth between 1990 and 2010, on average.”⁵

Income and wealth inequality plays a vital role in ensuring that economic growth translates into higher living standards, but standards of living cannot be captured by GDP, income, or wealth measures alone. As the OECD's inclusive growth framework articulates, one's health, environment and experience of climate change, opportunities for social and economic participation, and perception of safety are all critical aspects of a person's quality of life. And not all people have the same opportunity to enjoy these facets of well-being. Pursuing a fair distribution of health, environmental safety, and social outcomes is also central to inclusive growth.⁶

The notion of inclusive growth is critical for both developed and developing economies alike, including Canada. As the OECD has observed, “[c]ountries with higher GDP are not necessarily the best at converting their wealth into improvement in living standards for their citizens” due in part to “structural factors such as the fiscal stance or the respective roles of the private and public sector.”⁷

From a political perspective, social resentment and instability can arise when small segments of the population prosper while the broader population perceives themselves as falling behind. As the OECD points out, “In some parts of the world, such as in Northern and Southern Africa, the effect of persistently high unemployment combined with severe levels of inequality has already resulted in social instability.”⁸ In the global north, growing economic inequality and a hollowing out of the middle class have sparked anger against ‘elites,’ and significantly contributed to the rise in right-wing populism, which increasingly threatens political stability and the legitimacy of democratic institutions.⁹

Economic inequity in Canada

In Canada, families with the highest incomes have been earning more than most other Canadian families, particularly those families in the middle of the income distribution. Similarly, individuals with the most wealth, particularly the top 5%, are accumulating more wealth than the rest of Canadians.¹⁰ Workers also earn less for their productive output than they were in the past as wage growth has increasingly decoupled from labour productivity growth in Canada and abroad.¹¹ While the productivity of Canadian workers has increased over time, these increases have not translated into commensurate increases in income and higher living standards.

From an international perspective, although Canada “enjoys a higher quality of life than many other OECD countries,” with above average employment rates and student skills, key issues remain. Compared to the OECD average, Canada suffers from high housing costs (which have increased since 2017, the year the cited report was published), less time off for full-time employees, and high unemployment rates all undermine the quality of life in Canada. Canada also lags in terms of personal security, with homicide rates being higher than in most other OECD nations.¹²



INCLUSIVE GROWTH AS A WAY FORWARD

Through its Inclusive Growth Program, launched in 2012, the OECD has developed a robust body of research that provides a detailed understanding of what inclusive growth is and how it can be achieved.¹³ The OECD defines inclusive growth as “economic growth that creates opportunity for all segments of the population and distributes the dividends of increased prosperity, both in monetary and non-monetary terms, fairly across society.”¹⁴

Within Canadian literature, another useful description of inclusive growth from the report *Race to the Top: Developing an Inclusive Growth Agenda for Canada* states that “the goal of inclusive growth is to find a virtuous cycle, where success breeds success, success is widespread and there is less need for government intervention to propel the momentum.”¹⁵

Under this framework, quality of life is not measured by income or wealth alone, but also through non-monetary measures reflecting health, environment and experience of climate change, opportunities for social and economic participation, and perception of safety. In this way, progress towards inclusive growth is captured through a dashboard of various metrics that also consider differences in the distribution of welfare among people. This approach to economic growth provides governments with a framework for promoting economic growth so that the gains of growth are shared broadly across society and translate into higher living standards.

Strategic benefits of inclusive growth

The growth of material wealth is contingent, in part, on the degree of economic inequality within a society. So, if policymakers want to maximize economic growth, they must pursue policies that both enhance growth and keep inequality in check. Furthermore, actions to address and curb inequality also contribute to higher living standards across the board by ensuring that the gains from growth are broadly distributed. In this way, initiatives aimed at curbing the rise of inequality are integral to enhancing living standards. The pursuit of growth and the equitable distribution of those gains must be done in tandem.

Inclusive growth also provides certain benefits to different segments of society, particularly households, businesses, and governments.

For households, inclusive growth enables the pursuit of higher living standards, and provides economic empowerment and opportunities for self-efficacy that are necessary for a liberal society. When all individuals have opportunities to fully develop their skills, contribute to society, and reap the fruits of their contributions, they can achieve economic independence and autonomy.

Lower levels of inequality are also tied to greater social mobility.¹⁶ When people have greater financial resources, they are better able to pursue educational opportunities or provide those opportunities to their children. This mobility both empowers families and children to increase their living standards, and benefits society more broadly as we can make best use of the talent that individuals can offer to society.

These benefits of inclusive growth to households, in turn, support businesses. Inclusive growth is a long-term strategy for maintaining high social mobility, which ensures everyone has the opportunity to contribute their talents and businesses have a larger talent pool from which to draw. Furthermore, economic empowerment and household purchasing power are critical for maintaining demand for the products and services businesses provide, fostering a sustainable marketplace.¹⁷ Conversely, when growth is not inclusive, businesses risk not only a declining source of talent but also shrinking markets for goods and services purchased by families in the middle and lower ends of the income distribution. This forces stiffer and potentially ruinous competition as firms fight to maintain a share of shrinking markets.

For governments, economic growth and the corresponding growth in household incomes translates into higher tax revenues. Furthermore, policies that foster economic growth where the gains are equitably shared across society can be a more efficient and cost-effective way of tackling economic inequality. Transfer programs play an important role in fostering inclusive growth.¹⁸ However, recent research into transfer programs in the context of basic income has highlighted that transfer programs may be a less efficient means of creating economic equity compared to interventions that foster labour force participation and economic inclusion.¹⁹ Furthermore, a strategy of inclusive growth may reduce the need for transfer income in some households by enabling them to earn more, thus reducing their need for government transfers and their costs. As governments move into an economic environment of high inflation and interest rates, their capacity to fund expensive redistribution programs may be reduced.²⁰

Finally, growth that enhances the well-being of all members of society is also an important avenue for promoting peace, which benefits all of us.



THE ROLE OF COMPETITION LAW IN PROMOTING INCLUSIVE GROWTH

While trends in living standards, on the surface, may appear to have very little to do with competition and competition law, the two issues are intrinsically linked.

The Canadian economy is a market-based economy; markets intersect with every aspect of living standards and well-being. Competition is fundamental to the health and proper functioning of markets because it helps mitigate firms' accumulation of market power. When markets work well, we foster favourable conditions for governments, businesses, consumers, and workers to create greater levels of well-being.

Market power is the ability of firms selling products to charge higher prices or otherwise dictate the terms of trade within a marketplace without the threat of recourse from other companies. If a business does not have a competitor, it has greater latitude to charge whatever price it wants, to the detriment of consumers. Purchasers can also wield market

power against sellers. For example, employers may have market power in labour markets, enabling them to set lower wages or offer lower quality employment. This market power arises when there are few competing employers, meaning that workers have fewer options for where to work and are less able to leave unsatisfactory jobs.

Competition (antitrust) law is the key tool at our disposal for regulating market power, fostering competition in markets, and ensuring that markets operate in a way that meets our needs. In Canada, the fundamental competition legislation is the Competition Act,²¹ which is enforced by the Competition Bureau of Canada, headed by the Commissioner of Competition.²²

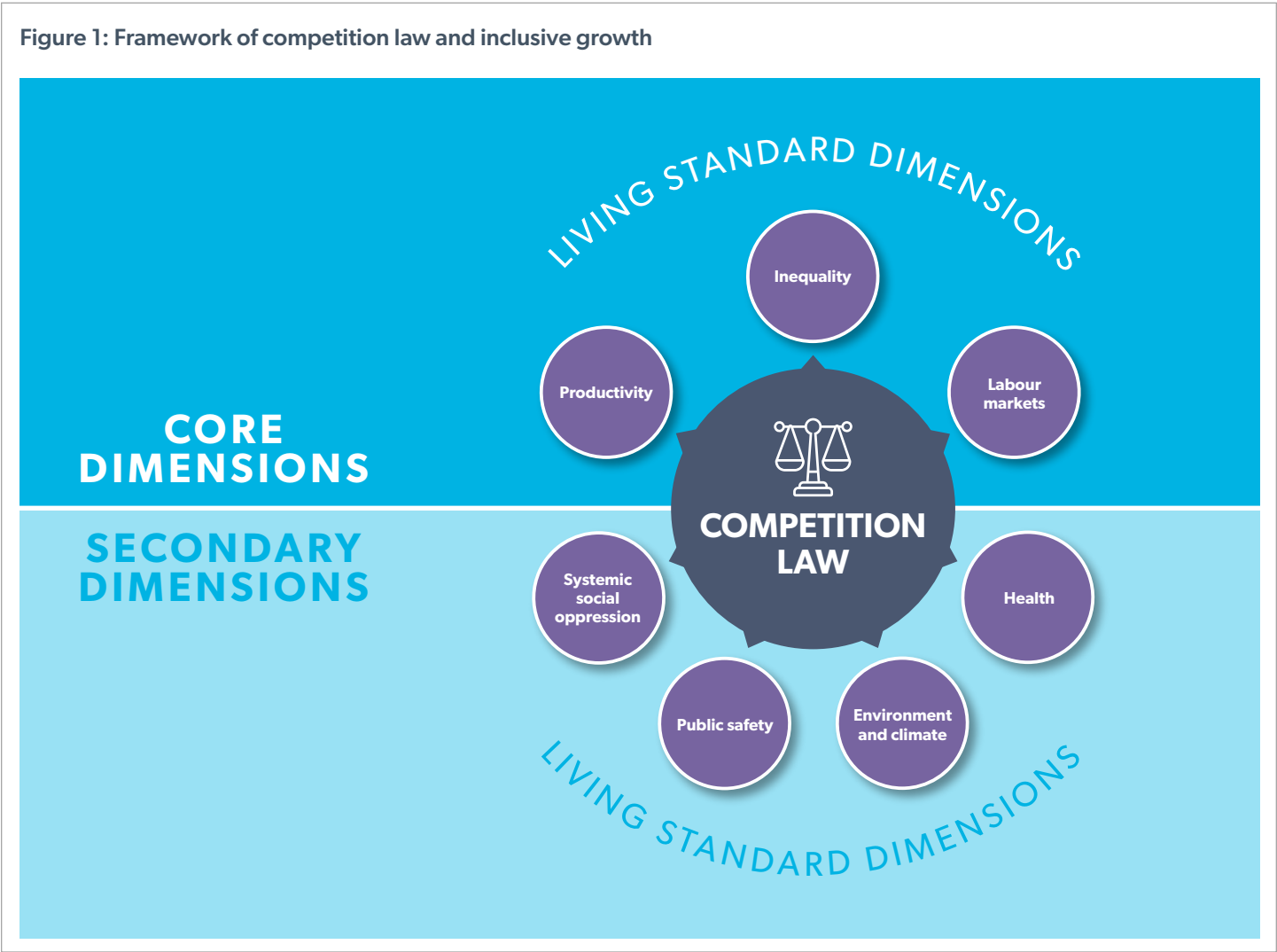
To date, there is limited research on the role of competition policy in promoting inclusive growth. Specifically, the research scope has been limited and framed as a growth intervention for developing economies, rather than inclusive growth as articulated by the OECD and others.²³ However, some agencies and scholars around the globe have been more seriously considering the intersection of competition law and dimensions of inclusion related to income inequality, race and gender.²⁴ The Competition Bureau has also undertaken work

with international partners to explore the intersection of gender and competition law.²⁵ However, there has been relatively little investigation into how to design competition legislation that specifically supports inclusive growth.

As a first step in filling this knowledge gap, we present a framework for exploring the intersections of competition and inclusive growth, building on the OECD’s framework for inclusive growth²⁶ and Statistics Canada’s recent System of National Quality-of-Life Statistics.²⁷ We have categorized eight interrelated dimensions of living standards from these existing frameworks that serve as metrics of inclusive growth, outlined in Figure 1.

We have grouped these factors into two categories. The **core dimensions** are those where competition law can play a fundamental role: productivity, economic distribution, and employment. The **secondary dimensions** are those aspects of living standards where competition and competition law are important but may play a supporting role. In these secondary dimensions, developers of competition law will need to consider whether the law aligns with current policy goals already in place and whether competition and markets are the right intervention at all.

Figure 1: Framework of competition law and inclusive growth



Core dimensions

Productivity and economic growth. Productivity growth, including the creation and implementation of innovations, is a core driver of economic growth for mature economies like Canada's. A robust body of literature ties greater degrees of competition to greater productivity and innovation in firms.²⁸ However, the link between competition and productivity at the macro-economic level is more ambiguous.²⁹ Nevertheless, research has shown that competition law can enhance economy-wide productivity.³⁰

Economic inequality. There are two main channels by which competition can mitigate income and wealth inequality. First, keeping market power in check ensures fair prices for consumers. This downward pressure on prices increases the purchasing power of households on the lower end of the income distribution. Second, competition mitigates the ability of businesses, which are more likely to be owned by households on the upper end of the wealth distribution, to extract income from consumers through higher prices. In this way, market power limits the ability of the wealthiest to earn more wealth by merely extracting it from consumers or workers, versus making value-enhancing contributions to society. Based on findings from the OECD study titled *Inequality: The Hidden Cost of Market Power*, without excess market power in the Canadian economy, the incomes of the poorest 20% of Canadians could be 20% greater and the wealth held by the top one percent could be 24% lower.

Employment. Traditionally, unionization and labour standards have been the main tools used to mediate the power dynamics between workers and employers. In more recent decades, unionization rates have fallen, and new business models that challenge established labour laws, like platforms, have become more prominent.³¹ In light of these changes, competition law has an increasing role in ensuring that workers are reaping their fair share of the gains resulting from economic growth, particularly growth in labour productivity. In a survey of US literature, the US Department of the Treasury concluded that market power leads to workers earning 75 to 85 cents for every dollar of value they produce for their employers.³² Higher wages through mitigating market power in labour markets can also translate into substantial cost savings for government programs that are geared to income, like redistribution programs.³³ Furthermore, competition in labour markets could not only enhance wages, but may also improve work quality overall as employers compete more vigorously for workers by offering better benefits and other non-monetary compensation.

Secondary dimensions

Enhancing competition in Canadian markets can support the pursuit of greater welfare, particularly in the spheres of health, environment and climate, and public safety. By helping to keep prices in check, competition and competition law enforcement can help ensure that goods and services critical to our future well-being are accessible to people in Canada. Likewise, competition and competition law can support innovation development that helps our society achieve our GHG emissions targets, protect our natural environment, improve healthcare, or accomplish other important goals.

Addressing economic barriers and injustices imposed by social systems of oppression, like racism and misogyny, can make markets more accessible and competitive.

For example, addressing barriers that black business owners face in accessing capital could help increase the number of competitors within markets.³⁴ However, it is also important to acknowledge that competition and market dynamics can create perverse outcomes in some social contexts.³⁵ Policymakers and competition law enforcement need to tread carefully when considering competition as a policy intervention where social systems of oppression are prominent organizing principles.

Are productivity and inequality at odds?



There is a long-standing argument that competition law cannot pursue the dual mandate of addressing economic inequities while also promoting greater economic efficiency and productivity. There are two core suppositions to this argument: 1) that the pursuit of greater economic equality and economic efficiency are at odds with each other, and 2) other policy areas, like the tax and transfer system, are more effective at addressing economic inequities.³⁶

A point that is overlooked in this argument is the negative impact of economic inequality on productivity driven by human capital. Higher inequality is associated with lower intergenerational mobility. That is, in more unequal societies,

one's family income is a more significant determinant of their future success than hard work and aptitudes. People from less economically well-off families have fewer opportunities, particularly educational opportunities, to create their own success than those from families with more.³⁷ The knock-on effect of less intergenerational mobility is lower levels of human capital and labour productivity, as many people cannot enhance and contribute their skills to society.³⁸

Furthermore, enhancing productivity and efficiency can also reduce inequality, particularly with respect to wages. Analysis into wage differences across firms finds that the most productive firms offer the highest wages, on average.³⁹ Based on Canadian data from 2002 to 2015, workers employed at the 10% of firms with the highest labour productivity had average employment earnings 3.9 times greater than the average earnings of workers at all other firms.⁴⁰ Enhancing competition between firms could incentivize the least productive firms to adopt the technologies and business practices of the most productive, and in this way, help to equalize wages paid out across the economy.

Based on Canadian data from 2002 to 2015, workers employed at the 10% of firms with the highest labour productivity had average employment earnings 3.9 times greater than the average earnings of workers at all other firms.

Contrary to conventional wisdom, there is a meaningful alignment between the pursuit of less inequality and more productivity and efficiency. Furthermore, when pursued in tandem, policymakers may be able to foster a virtuous cycle where productivity begets broad-based increases in economic well-being, which in turn fosters more productivity. Ignoring distributional considerations within competition law is counterproductive to the goal of productivity and efficiency growth. To evoke the seminal work of Robert Bork, leaving distributional considerations out of competition law will only create a policy at war with itself.

One may argue that even if curbing the rise of inequality is a meaningful intervention for enhancing productivity, other interventions, like the tax and transfer system, are still more effective tools for addressing these issues. Thus, competition law should not be concerned with distributional issues. We find no evidence that this claim has been supported with empirical evidence. While there has been little research into this question, very preliminary analysis suggests that this claim may not be correct. Given the massive cost of redistribution programs relative to the cost of competition law enforcement, retooling competition law to address inequality concerns may lead to cost savings within the government.⁴¹

Furthermore, modern research on redistribution programs highlights the limits of these programs for addressing inequality at a fundamental level. In 2018, the BC government commissioned an expert report to answer the question of whether the province should implement a basic income pilot project. Adopting a justice-based approach to their analysis, the expert panel concluded that for several reasons, a pilot should not be attempted. One reason they articulated is that redistribution programs are incredibly costly. One of the recommendations put forward was to instead take steps to foster a more just labour market through initiatives that "improve wages and job conditions for low-skill, low-income workers."⁴² Competition law cannot single-handedly improve work conditions for low-income workers. However, it is well positioned to support this goal by curbing market power wielded by employers to suppress wages and undermine work conditions.



TOWARDS AN INCLUSIVE COMPETITION LAW FOR CANADA

As the federal government contemplates reforms to modernize the Competition Act, some changes can be made to better leverage competition to promote inclusive growth. We explore three changes to the Act:

- 1) Adding inclusive growth to the purpose statement;**
- 2) Reforming tests for anti-competitive harm; and**
- 3) Removing the efficiencies defense for mergers and competitor collaborations.**

1. Adding inclusive growth to the purpose statement

The purpose statement of the Act is important to the legislation because it provides the guiding rationale for the law. It may inform judicial decisions in some instances, providing guidance to the Tribunal in cases where there are conflicting outcomes of a particular business conduct, and elaborating how these outcomes should be weighted or considered against each other.

Currently, the purpose statement puts forward four objectives for promoting competition under the Act: 1) promote the efficiency and adaptability of the Canadian economy, 2) expand opportunities for Canadian participation in world markets, 3) ensure that small and medium-sized enterprises have an

equitable opportunity to participate in the Canadian economy, and 4) provide consumers with competitive prices and product choices. **An inclusive competition law should state economic inclusiveness and/or inclusive growth as an objective of the legislation.**

To retool Canada's competition law to promote inclusive growth, the notion of inclusion should be integrated into the purpose statement. An example of how this integration could be done is the following:

“The purpose of this Act is to maintain and encourage competition in Canada in order to [...] foster economic inclusion and advance inclusive economic growth.”

Ultimately, an inclusive competition law aims to promote all dimensions of welfare, taking into account the reality that these dimensions of well-being are not enjoyed by all people equally. Furthermore, the pursuit of some welfare dimensions will inevitably conflict with that of other dimensions.⁴³ Critics of a more holistic and multidimensional approach to competition law have highlighted this fact, pointing out that conflicting priorities may make the law intractable or “indeterminant.” The solution posed by these critics is to narrow the objectives of competition law so that its only goal is to promote greater economic efficiency in markets and firms.⁴⁴ Such an approach would side-step the whole indeterminacy issue.

Indeterminacy is an important issue that needs to be addressed within an inclusive competition law. When the law has multiple and conflicting priorities, adjudicators in some cases may be forced to tradeoff one priority for another without adequate guidance in the legislation on how those complex tradeoff decisions should be made. They may be put in a situation where they are required to make values-based decisions that are outside what is specified in the law, overstepping their role, and ultimately taking the role of parliament. Furthermore, this predicament is not unique to this context; regulators are increasingly being put into positions where they must navigate competing priorities. To address indeterminacy, we propose two solutions.

First, designers of Canada's competition legislation must clearly articulate to themselves (and perhaps in the legislation itself) the role of competition law within the broader suite of policies aimed at enhancing inclusive growth. One such articulation is outlined in Figure 1, with competition law playing a primary role in restraining market power to enhance productivity, promote healthy labour markets, and curb inequality. Under that model, competition law's secondary role is to support the pursuit of other dimensions by containing market power, in turn fostering healthy, well-functioning markets.

Articulating the role of competition law helps to narrow its focus and ensure that its contribution to inclusive growth aligns with its comparative advantage as a policy area.

In the framework proposed here, competition law's comparative advantage is its ability to curb the growth of market power. It also ensures that the law works in conjunction with other policy areas, not against them, enhancing their effectiveness and potentially generating cost savings within government.

Second, legislators can revise the law to simplify the way the Competition Bureau, the Competition Tribunal, and the courts evaluate anti-competitive conduct. Currently, the approach used is excessively complex, requiring the Commissioner to demonstrate the effects of business behaviours that are, by all other indicators, clearly harmful to competition. Simplifying our methods for evaluating anti-competitive conduct would help us avoid the indeterminacy problem because adjudicators will not be required to evaluate the different effects of the conduct and the trade-offs between them. This point is discussed in more detail in the section that follows.

2. Reforming tests for anti-competitive harm

To determine whether a firm or firms have violated many civil provisions of the Act, the Commissioner of the Competition Bureau must show that the conduct has led to, or is likely to lead to, a **substantial lessening or prevention of competition**, or SLPC. As part of the test, the Commissioner must generally show that there are negative, substantial effects of the conduct in question. These effects could include increased market prices, reduced output or product/service quality, or less variety or innovation.⁴⁵

To retool Canada's competition law to promote inclusive growth, we must change how we evaluate anti-competitive behaviours under the Act. Specifically, Canada should adopt an approach that considers whether a business behaviour “is capable of having anti-competitive effects,” or “has as its very object an anti-competitive outcome.”⁴⁶ In the specific context of mergers and acquisitions, the law should also “explicitly recognize the harmful impacts of merger that contribute significantly to marketplace concentration,” as the Competition Bureau has highlighted.⁴⁷ One way to integrate concentration concerns into the law is to implement **bright-line rules** that prohibit transactions that result in a market share for the merged firm over a specific limit. These approaches to evaluating conduct may both simplify the law while also better align it with inclusive growth because it will enhance the enforceability of the law. The law will be more effective at curbing market power throughout the economy and in this way, create the conditions necessary for inclusive growth.

Shortcomings of SLPC approach

Canada's effects-based method for assessing anti-competitive harm presents serious problems for inclusive growth, and effective competition law overall, because it makes the law more difficult to enforce. The relative ineffectiveness of our effects-based approach is best illustrated by Canada's weak track record of taking cases against big-tech companies relative to other jurisdictions like the EU, which does not take the same effects-based approach.⁴⁸

Ultimately, the weak enforcement associated with our effects-based standard reduces the ability of the law to regulate market power across the economy.

Evaluating anti-competitive behaviour primarily on the effects it produces in the market is an unrealistic standard. In some instances, it simply may not be possible to show the anti-competitive effects arising from a behaviour. Some negative effects of a business practice may only be realized in the medium or long term, particularly as markets become more digitized and "winner-take-all" dynamics become more prevalent. In these instances, the effects-based standard requires that the Commissioner be able to predict the future, which is impractical. Even when harms are immediate, there may simply be insufficient data to show effects. As a result, harmful behaviours may go unchecked by authorities.⁴⁹

Furthermore, not only must the Commissioner generally show the anti-competitive effects of the behaviour being investigated, but these effects typically must also be "substantial." The requirement that the negative effects of a behaviour be substantial typically implies that the average impact across the market be sufficiently large. However, there can be instances where a business behaviour leads to substantial harm for a smaller group of individuals in a market. When that effect is evaluated on average across the entire market, the impact may not be deemed "substantial." As a result, certain people may be materially harmed by an anti-competitive behaviour, but the law provides no recourse for addressing this harm. This issue may arise in two key areas: labour markets and markets containing vulnerable groups.

Many successful cases taken internationally have involved labour markets where a small number of employers employ specialized workers.⁵⁰ In these cases, showing market-wide effects is more feasible because the number of workers in the market is small and the proportion of workers impacted is relatively large. However, there have also been several other instances of anti-competitive behaviours where there are a large number of workers and employers, such as in markets for low-wage work like fast food.⁵¹ Harmful business behaviours in these markets may go unchecked because of their more fragmented structure.

To illustrate, as of October 2022, about 499,000 people in the Toronto census metropolitan area in sales and service occupations earned an hourly wage less than the living wage of \$23.15.⁵² About 80% of these people worked at establishments of less than 100 people.⁵³ If 1,000 workers were impacted by an anti-competitive business strategy that reduced their wages by 10%, the average change in sales and service wages across the entire region would be a fraction of a percent. Furthermore, there are several well-established barriers workers face in changing jobs. These "labour market frictions" undermine workers' ability to find better employment, keeping them captive. As a result, employers can engage in anti-competitive practices for long periods, absent law enforcement intervention.⁵⁴

In the same vein, harm experienced by vulnerable segments of the population may be overlooked when these people make up only part of the market being examined by the Bureau. For example, if a grocery retailer merged with another, closing some retail locations, and raising prices, people with vehicles could travel to other stores that offer lower prices. On this basis, the effect of the merger may be deemed unsubstantial (that is, these commuters could discipline the exercise of market power). However, people with more limited mobility may not be able to do the same. These individuals could include people with physical disabilities, people who cannot afford a vehicle or other modes of transportation, or precarious, low-income workers that are unable to devote time to lengthy transit trips.

Research into "food deserts" – communities, typically low-income, where few or no retailers offer nutritious and affordable foods – highlights the consequences of overlooking the impact of mobility when investigating anti-competitive conduct in grocery or restaurant markets. Absent suitable food retail options, low-mobility people in these communities are more reliant on corner stores and other smaller retailers. These retailers are less likely to offer nutritious foods and more likely to charge higher prices. Research on food deserts has found that people experience poorer health outcomes as a result.⁵⁵ Despite the wide-spread prevalence of food deserts across Canada and the role competition law could play in mitigating them, these market failures have not been formally acknowledged by Canada's competition law enforcement.

Revisions to the law and enforcement guidelines

To retool Canada's competition law to promote inclusive growth, we need to move away from the effects-based approach to evaluating anti-competitive conduct and adopt a simpler method. Simplifying the tests by which the law assesses anti-competitiveness will better enable the Act to curb market power, which is its primary contribution to enhancing inclusive growth in Canada.

Beyond legislative change, the Competition Bureau should also update its enforcement guidelines. The issues related to substantiality can also be addressed through the approaches used for defining relevant product and geographic markets during investigations into business conduct. These approaches are specified in the various enforcement guidelines developed by the Bureau. When defining markets, the Bureau should consider the demographic characteristics of consumers (and workers in the case of labour markets) and the unique challenges these population segments may face when participating in markets.

In addition, section 92(2) should be removed from the Competition Act. The provision explicitly forbids the Competition Tribunal from blocking a merger on the basis of market share alone. The implication is that mergers that create monopolies or highly concentrated markets cannot be effectively challenged unless the Commissioner can show that, as a result of this monopoly, there are, or are likely to be, anti-competitive harms in the market. In essence, the legislation requires that the Commissioner provide evidence demonstrating the well-established fact that monopolies are harmful. This requirement is wasteful and threatens to undermine the effectiveness of the law.

3. Removing the efficiencies defense

Under the Competition Act, if a merger or collaboration between competing businesses reduces competition and leads to higher prices or some other harm, the merger or collaboration may still be legal. These mergers and collaborations are valid under the law if they create cost savings to the businesses that are “greater than and offset” the anti-competitive harm they cause. This aspect of the Competition Act is commonly called the “efficiencies defense.”

The defense poses some clear challenges to inclusive growth. Specifically, it permits mergers that ostensibly create greater economic efficiency at the cost of higher prices for consumers and worker layoffs. The provision permits mergers that decrease competition and undermine the economic welfare of consumers and workers, while enhancing the wealth and income of business owners.

One of the most illustrative examples of the defense in practice was the purchase of ICG Propane Inc. by Superior Propane Inc. in 1997. Both firms operated propane distribution networks in several communities across Canada. The merger was permitted because of the efficiencies defense, despite creating monopolies in 16 communities across Canada. In addition, the merger also

created near-monopolies in 32 other communities, leading to more than 80% market shares in these regions. As a result of the deal, prices for propane were estimated to increase by 8%, equating to \$40.5 million in additional revenue for Superior Propane every year. Ultimately, the merger was permitted because it created an estimated \$20.2 million in annual efficiencies for the next 10 years, part of which was projected layoffs of about 200 employees. These efficiencies outweighed the estimated inefficiency caused by the higher propane prices (the market deadweight loss) of just \$3 million a year.⁵⁶

At a minimum, the defense should be revised so that the efficiencies generated by a merger or competitor collaboration do not undermine inclusive growth. For example, many jurisdictions with efficiencies defenses for mergers require that the efficiencies realized by the merger lead to lower prices or other consumer benefits. The efficiencies defenses of the EU and, to some extent, the US are examples.⁵⁷ Adopting a defense like this would bring Canada into alignment with other leading jurisdictions.

However, evidence from the US and EU show that despite having laws and guidelines requiring efficiency gains to translate to consumer benefit, enforcers of the law have generally not been successful at implementing these laws and guidelines. Evidence from the US and EU shows that even with this requirement for efficiencies, many mergers that are reviewed and approved by authorities lead to higher prices. Furthermore, in many instances the efficiencies expected through mergers are never realized.⁵⁸ These findings suggest a discrepancy between legislation and enforcement guidelines and what can realistically be predicted and enforced by competition authorities, let alone the managers and business analysts conceiving these deals.

Removing the efficiencies defense altogether would align with this evidence and would make Canada’s law more advanced relative to international peers.



CONCLUSION

Canada's Competition Act was first enacted in 1986. While changes have been made to the legislation since that time, the guiding rationales underpinning the law have not kept pace with our changing economic and social realities. As we face the prospect of an increasingly inequitable society and a decline in the growth of the economy and living standards, economic policies and Canada's competition law must be reoriented to face these modern challenges.

Using competition law to pursue more inclusive growth provides an economically efficient avenue for addressing important equity-related problems in Canada. Although the Canadian Competition Act and Competition Bureau were not originally designed to address equity concerns explicitly, this work falls squarely within their 'regulatory wheelhouse'.

Initial steps toward achieving incremental reform to the Competition Act include:

- 1) **Updating the mandate to integrate inclusive growth into the purpose statement;**
- 2) **Reforming tests for anti-competitive harm; and**
- 3) **Removing the efficiencies defense for mergers and competitor collaborations.**

ENDNOTES

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