Internet Society
Canada Chapter

Consultation:

The Future of Competition Policy in Canada

Submission

of the

Internet Society Canada Chapter

To

Innovation Science and Economic Development Canada

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 limit our remarks to a limited number of reforms that we believe to be critical to ensuring that Canadian markets are competitive, and that our markets provide Canadian businesses and consumers with a wide choice of quality and prices for goods and services.

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 is pleased that ISED has untaken a fundamental examination of the *Competition Act* which, while incrementally amended over the years, has existed in its present form since the 1980s. The challenges to competitive markets posed by digital giants may have provoked this examination of the *Competition Act*, but it is good that this examination goes 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.

5. ISCC believes that competition law, while difficult in application, is a corrective whose basic functions are understandable to laymen: consumers, and business leaders alike.
6. While we do not believe that it is necessary to embody particular social objectives in competition legislation, we do believe that competition law is one of the necessary guardrails to protect a free and democratic society. The ability to seek out and find alternative goods and services of different quality and at different price levels is fundamental to a liberal society in which individuals may make real choices that affect the enjoyment of their lives.
7. The digital revolution has transformed our economy as it has the global economy. Information and information technology has become the key to economic growth. The internet is the basic tool for transferring information and for providing services in the digital economy. The internet is increasingly the means by which Canadians access and use information. This transformation is not without its challenges, and some of those must be addressed through competition policy.
8. It is critical to Canada's future economic future that we have a competition regime that facilitates our participation in the global digital economy and positions Canada to be both a consumer and exporter of digital services. This will only happen if we can both reduce the grip of over-concentration in our industry and reduce the predatory behaviour of our dominant economic players.
9. A robustly competitive economy underpins a robust democratic polity.

ISCC Analysis and Recommendations

Competition Act Objectives

10. The objectives of the *Competition Act* are extraordinarily muddled – to the point of policy incoherence.
11. 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.
12. ISCC suggests that the purpose clause be reworked along the following lines:

> The purpose of this Act is to foster competition in Canada so that markets allocate costs and resources so that consumers enjoy maximum benefits in terms of price and quality of goods and services.

Efficiencies Defence

13. No other major international partner has adopted the efficiencies defence. Canada, despite its highly concentrated web of major economic players, has favoured a path leading to greater economic concentration. Canada must reduce the concentration of economic power and to breathe life into our markets.
14. ISCC believes that the "efficiencies defence" should be eliminated. Any merger that substantially lessens or prevents 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.
15. Efficiencies, as understood by economists, undermine the interests of the ultimate object of competition policy – the consumer. It is owners, not consumers who benefit from efficiencies. Canada erred in creating the efficiencies defence. It is past time to correct course.

Restrictive Trade Practices

16. The role of the Commissioner of Competition in reviewing and challenging mergers and acquisitions draws the headlines and public awareness. Less dramatic, but equally important to the functioning of the economy, is the challenge posed by abuse of dominance and other restrictive trade practices. It is these practices that are equally costly to consumers and damaging to the economy.
17. ISCC believes that the restrictive trade practices and abuse of a dominant position as defined in the Act are manifestations of the same phenomena. They harm competition through harming competitors.
18. ISCC recommends that the restrictive trade practices provisions and the abuse of dominance provisions should be consolidated with the abuse of dominance provisions and they be subject to the same remedies.
19. ISCC further recommends that abuse of dominance and restrictive trade practices be assessed by applying the same criteria as currently applied to merger reviews under s. 93 of the Competition Act. The real issue is the lessening or prevention of

competition, whether we are talking of mergers or of abuse of dominance and restrictive trade practices. These should not be in separate silos – they should be addressed as presenting the same challenges and harms to competition and judged according to the same criteria.

20. Whatever the historical reasons for the divergence of merger review, abuse of dominance, and restrictive trade practices, that divergence makes no sense in the digital economy. Their harm to the interests of consumers do not differ, the remedies to correct them and the criteria applied to their seriousness should be the same.

21. Private Remedies

22. 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 Canada's trillion-dollar economy. The cost of investigation is significant, both in dollar terms and in the dedication of scarce human resources to any investigation. A penalty awarded by the Competition Tribunal has no impact on the resourcing of the Bureau. A loss brings reputational harm to the Bureau. It is a small wonder, under these circumstances, that the Bureau brings relatively few restrictive trade practice cases to the Tribunal. The incentive structure is lacking.
23. The current *Competition Act* continues to concentrate in the Commissioner of Competition too much enforcement initiative respecting restrictive trade practices – the main victims of which are private sector competitors and purchasers. The concentration of initiative in the Commissioner hobbles effective private enforcement to remedy abuses in marketplace behaviour that cause damage to individual businesses.
24. 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.
25. While the Act has been amended over time to permit private recourse to correct anti-competitive behaviour, including abuse of dominance, ISCC believes that the remedies available and the process to obtain relief are deficient.
26. We believe that parties should have the right to initiate proceedings against those who use anti-competitive behaviour that is injuring them At present, private parties

must seek leave to initiate a proceeding before the Tribunal. This restriction must be lifted.

27. At present, the remedies that can be provided are limited to corrective orders from the Competition Tribunal and Administrative Monetary Penalties (amps). Any amps levied go not to the party bringing a case of abuse of dominance to the Tribunal but to the government's coffers. ISCC believes that private parties injured by any forms of anti-competitive behaviour should have access to all effective remedies, including damages and injunctive relief.
28. The right to the enjoyment of property and the right to start a business must be accompanied by a right to be free from abusive economic conduct. That right should be enforceable and enjoy appropriate and effective remedies. Anti-competitive conduct is no less harmful to its victim than the torts of trespass or unlawful interference with contract: those suffering economic harms from abusive practices should be entitled to no lesser remedies. Competition law should provide equally effective remedies. Not only the US, but the European Union and Australia permit the award of damages to aggrieved parties in abuse of dominance cases.
29. The opponents or private remedies have in the past decried the possibility that private remedies will lead to frivolous and nuisance lawsuits. We believe this to be a phantasm. A party initiating an abuse of dominance case must invest considerable time and money just to meet the evidentiary thresholds to determine there is both dominance and its abuse. In addition, the existing Canadian law of costs is an effective deterrent to nuisance or frivolous actions.
30. Any review of the *Competition Act* should take a fresh look at statutory damages where anti-competitive behaviour is established but where common law damages may be too difficult to ascertain. We believe that statutory damages may be a useful remedy in appropriate circumstances. In suggesting this remedy, ISCC is not advocating following the triple damages approach provided for in the United States.
31. In general, Canada must 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.

Institutional Framework

Competition Tribunal

32. ISCC believes that the Competition Tribunal has outlived its usefulness. There is no evidence that the addition of economist and lay persons to the Tribunal have led to better decisions or provided swifter relief. In our opinion, both the Commissioner of Competition and private litigators should be able to initiate competition law proceedings in the provincial superior courts and the Federal Court.
33. 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.
34. Competition law and policy should be a significant factor in our economic lives and a fundamental building stone of a market-based economy. It is not.
35. Canadians are largely unaware of how our markets are regulated or who does the regulating.
36. We believe that the institutional structures created around competition law should 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. ISCC believes that opening the regular courts to competition litigation will both broaden both public and professional awareness of competition law, and assist in the creation of a competition culture. It also would mean that litigation takes place within an institutional framework that is familiar to all legal professionals and their clients.

Commissioner of Competition

37. Serious thought should be given to how best to manage the Competition Bureau itself. A tremendous amount of power is vested in one individual – the Commissioner of Competition. This creates a tremendous weight of decision-making in one person, and also imposes an extraordinary burden on them. Thought should be given to creating a commission of at least three who could share responsibility for the making of major decisions and establishing Bureau policies. We note the example of the Federal Trade Commission as a precedent.

Independence of Commissioner

38. At present, the Competition Bureau is constituted as a branch of the Department of Innovation, Science, and Economic Development. The Commissioner reports to the Deputy Minister of ISED and is a member of the senior management team of the Department. We do not believe this to be the proper reporting relationship for a law enforcement agency that must exercise broad discretion in deciding what action to take and against whom.
39. It is the Minister of ISED who sets the government's industrial strategy, of which competition policy and enforcement is a part. We recommend that the Competition Bureau be treated as a separate entity within the portfolio of the Minister of ISED and report directly to the Minister. The enforcement decisions of the Commissioner of Competition must not be perceived to be skewed by its subordination to the Department.

Comprehensive Revised Act

40. ISCC notes that the current *Competition Act* is an amalgam of amendments that date from various eras and reflects a variety of legislative drafting styles. Its numbering is complex and unwieldy – its language uninviting. The repeated process of amendment and further amendment has left the Act difficult to read and access. One worthy outcome of legislative review should be a new revised *Competition Act*, whose drafting would be coherent and accessible to both professionals and lay audiences alike.

Conclusion

ISCC is grateful that a comprehensive review of competition law and policy is now underway. It is our hope that a revised and strengthened *Competition Act* will emerge from this process and competition policy receive the support necessary to enhance the Canadian marketplace.