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VIA EMAIL (ministerofisi-ministredeisi@ised-isde.gc.ca, francois-philippe.champagne@parl.gc.ca)

September 26, 2022

The Honourable François-Philippe Champagne
Minister of Innovation, Science, and Industry
632 Grand-Mère Avenue, Suite 1
Shawinigan, Québec G9T 2H5

Dear Minister Champagne:

Re: Review of the *Competition Act*

I write to you in response to your request for a second round of comments on the *Competition Act*, RSC 1985, c C-34 (the "***Act***"). Bill C-19 represents a genuine attempt to improve competition in Canada's markets, and I congratulate you for that. Unfortunately, one aspect of that legislation will undermine your goal. This letter proposes a better way to accomplish your goal.

In brief, Bill C-19 allows private actors to bring complaints under section 79 of the *Act* ("**Abuse of Dominance**") to the Competition Tribunal (the "**Tribunal**"), with leave – a form of "private access". This change was motivated by a request by the Commissioner of Competition (the "**Commissioner**") about inadequate enforcement of Abuse of Dominance. But this form of private access will not solve that problem. That is because private complaints, even if successful, will not result in compensation to consumers or affected competitors. As I explain below:

(1) **The Commissioner Will Continue to Struggle with Inadequate Resources**: The main reason the Commissioner asked for private access was to create more jurisprudence that it can rely on to deal with future cases at lower cost, but so few cases will be brought to the Tribunal that this will not happen;

(2) **The Benefits Will Go to Large Corporations**: The only parties who will go to the Tribunal are large competitors, so even to the extent that a few cases are brought, regular consumers will not benefit from those cases;

(3) **Innovation Will Still Be Stifled**: No claims will be brought to enhance innovation;

(4) **Small Towns Will Suffer**: No claims will be brought to address Abuse of Dominance affecting small towns, keeping those communities down; and

(5) **Canada Will Remain Behind Internationally in Policing Abusive Conduct**: The US, UK, EU, Australia, and New Zealand all allow genuine private access to the courts, and those provisions have succeeded at addressing more Abuse of Dominance than has been addressed in Canada.

Sotos
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Instead, we ask that you consider a different form of private access: allowing consumers to bring claims to court and seek compensation. You can do this by adding three words to section 36(1)(a): "… Part VI or Part VIII". This simple change would mobilize the resources of the private bar to address Abuse of Dominance and other restrictive trade practices, and resolve all five issues listed above.

Solving the Commissioner's Problem

The Commissioner asked for private access because it recognized that it does not have the capacity to address Abuse of Dominance on its own.[1]

- The Commissioner cannot investigate the vast majority of complaints. For example, in 2019-2020, there were 467 complaints but the Commission could only start 11 investigations.[2]
- The Commissioner cannot keep investigations open for long. For example, there are currently only 3 ongoing Abuse of Dominance investigations.[3]
- The Commissioner cannot stop anticompetitive acts. Since 1986, the Competition Bureau has only brought 14 applications to the Tribunal[4] – fewer than one every two years.

Aside from budget limitations, the main difficulty is that there have been so few cases on Abuse of Dominance that bringing any case would require the Commissioner to litigate novel legal issues, which is expensive. In the Commissioner's words, the "greatest benefit of private access" is that "a broader body of case law would be developed. Such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses".[5]

This benefit only arises if people actually sue. This is the first problem with private access to the Tribunal – almost no one uses it.

- Between 2005 and 2019, only 18 private cases were brought to the Tribunal.[6]

There are two main reasons for this. First, the Tribunal cannot grant damages.[7] This means that complainants receive no monetary benefit from bringing a claim. David Vaillancourt explained this problem, and argued that private access to courts would be better:

[1] Canada, Commissioner of Competition, "Examining the Canadian *Competition Act* in the Digital Era: Submission by the Competition Bureau" (8 February 2022), s 3.4.
[2] David Vaillancourt, "A Private Right of Action for Abuse of Dominance" (26 April 2021).
[3] Competition Bureau Canada, "Restrictive trade practices–Cases and outcomes".
[4] David Vaillancourt, "A Private Right of Action for Abuse of Dominance" (26 April 2021).
[5] Canada, Commissioner of Competition, "Examining the Canadian *Competition Act* in the Digital Era: Submission by the Competition Bureau" (8 February 2022), s 3.4, s 3.4.
[6] Paul-Erik Veel, "An Empirical Analysis of Cases at the Competition Tribunal".
[7] *Competition Act*, RSC 1985, c C-34, s 77(3.1).

Sotos
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> "Private litigants should also be allowed to make a claim for damages suffered as a result of anti-competitive conduct. Behavioural remedies alone might not be sufficient incentive for private parties to incur the significant costs of prosecuting an abuse of dominance proceeding. More victimized competitors would be willing to pay for legal proceedings if there is some chance of monetary recovery."[8]

Second, going to the Tribunal requires leave. Obtaining leave is expensive. A party needs a lawyer with expertise in competition law and the Tribunal's specialized procedure. Also, both defendants[9] and the Commissioner[10] have the right to make submissions, responding to which is expensive. By definition, large corporations that can afford to manipulate entire markets on their own can easily outspend a consumer to try to prevent leave from being granted.

Considering these two factors together, the picture is bleak for even the most motivated consumer. To challenge an act of Abuse of Dominance, they must pay hundreds of thousands of dollars just to find out whether they are allowed to bring their claim. If they are, then they must pay further hundreds of thousands of dollars to prosecute the claim. Finally, even if they are successful, they receive no money to compensate them for those expenses. Lawyers will not bring such claims on a contingency fee basis. In short, it would be irrational for any consumer to bring any Abuse of Dominance claim to the Tribunal.

By contrast, private access to courts is financially viable because consumers can obtain damages. The prospect of damages incentivizes lawyers to take the case on contingency, so that individual harms can be vindicated. If the goal is to maximize the amount of case law on Abuse of Dominance, private access to the courts achieves that goal more than private access to the Tribunal.

Ensuring Benefits Go to Consumers

As described above, consumers will not bring claims to the Tribunal. However, one group might still bring claims: large corporations. Unfortunately, those claimants have an incentive to settle in a manner that gives them a piece of the action at consumers' expense. Consider two examples.

- **Sharing Private Data**: If the allegation is that the dominant company is refusing access to consumers' private data, the complainant might agree to drop the complaint in exchange for access to that data. This hurts consumers not only by entrenching the market power of those companies at the expense of everyone else, but also by reducing privacy protections.
- **Raising Prices**: If the allegation is that the dominant company has predatory pricing, the complainant might agree to drop the complaint in exchange for increasing prices to above

[8] David Vaillancourt, "A Private Right of Action for Abuse of Dominance" (26 April 2021).
[9] *Competition Act*, RSC 1985, c C-34, ss 103.1(2), (6).
[10] *Competition Act*, RSC 1985, c C-34, ss 103.1(3), 103.2.

Sotos
LAWYERS & TRADEMARK AGENTS

competitive levels. This not only hurts consumers by raising prices, but also perverts the Tribunal's process, using its imprimatur to legitimize an anticompetitive conspiracy.

The possibilities for misconduct through settlement are endless. This may be why only one private application to the Tribunal has ever been litigated to conclusion.[11] By contrast, private access to courts would allow consumers to recover their damages.

This is why some defence firms have advised their clients not to worry about public access to the Tribunal, except possibly by competitors seeking leverage for other cases:

> **BLG**: "However, the Amendments do not allow private litigants to recover damages, contrary to some other jurisdictions such as the United States, where private litigants can recover damages for similar conduct."[12]
>
> **Dentons**: "No damages will be available to successful applicants and no class actions based on abuse of dominance will be possible. While the number of abuse of dominance cases may increase, the leave requirement and lack of financial incentives may ultimately curb enthusiasm."[13]
>
> **Norton Rose**: "As there is no right to damages, there may be limited incentives for private parties to bring private abuse of dominance cases, as these cases are generally a costly, time-consuming undertaking. … The availability of a right of private enforcement may create incentives to bring strategic cases or be used as leverage in commercial disputes."[14]
>
> **Gowling**: "Private enforcement actions may also be somewhat muted by the inability to seek monetary damages for the harm suffered as a result of the alleged abuse of dominance".[15]

Enhancing Innovation

Many credible sources have argued that lack of enforcement of competition laws – especially Abuse of Dominance – is stifling innovation in Canada. Those sources have spanned the political

[11] Paul-Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18 Dal J Leg Stud 1 at 25.
[12] Subrata Bhattacharjee et al, "Proposed amendments to the *Competition Act* become law" (18 July 2022).
[13] Sandy Walker et al, "Proposed amendments to the *Competition Act* – new prohibitions and higher penalties" (6 May 2022).
[14] Chris Hersh & Katarina Wasielewski, "Change has come: Significant *Competition Act* amendments enacted; more to follow…" (17 August 2022).
[15] Elad Gafni & Ian Macdonald, "Significant First-Round Amendments to the *Competition Act* Come Into Force" (28 June 2022).

spectrum, including the Fraser Institute,[16] Policy Options,[17] the Brookfield Institute,[18] and the Hill Times.[19] Canada lags far behind other countries in addressing Abuse of Dominance in a variety of industries. In particular, failures in three industries are frequently in the news.

- **Big Tech**: Since 2019, US and EU regulators have brought 16 Abuse of Dominance claims against Google, Apple, Meta, and Amazon ("**GAMA**").[20] Meanwhile, the Commissioner has yet to bring a single enforcement action against any of GAMA. Commentators have noted that Canada is falling behind in enforcement of Abuse of Dominance against GAMA.[21] Many people have noted that innovation in digital technologies is being stifled by this lack of enforcement and various types of Abuse of Dominance.[22]
- **Telecoms**: For years, TekSavvy has been trying to convince the Commissioner to address Abuse of Dominance by Rogers and Bell.[23] You and your predecessor confirmed that more competition is needed to spur innovation in this sector.[24] Others have said the same.[25]
- **Agriculture**: Many people have noted that innovation in Canadian agriculture is being stifled by lack of competition and various types of unchecked Abuse of Dominance.[26] That includes the House of Commons Standing Committee on Agriculture and Agri-Food.[27]

In these industries, private access to the Tribunal is especially toothless. Cases against GAMA are extraordinarily expensive. The innovators are usually small start-ups that cannot afford to upset GAMA, much less to sustain a complaint through leave and a hearing. Even if they pursue a complaint, GAMA has every possible resource to convince them to enter a settlement, which may further entrench their dominance.

Cases against the big telecom companies are complicated by the CRTC's overlapping jurisdiction. Cases against the big agricultural companies are complicated by vertical integration between input suppliers, producers, processors, and retailers. All of this makes complaints more expensive to pursue, and so less likely to be sustained through to a decision.

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[16] Fraser Institute, "Canada's Faltering Business Dynamism and Lagging Innovation" (29 September 2021).
[17] Denise Hearn, "Lack of competition blunts Canadian innovation" (24 February 2022).
[18] Denise Hearn, "Keep Canada innovative by avoiding monopolies" (27 March 2019).
[19] Brian Masse, "Canada's lack of competition and unequal access to technology leads to a lack of innovation and to productivity failure, making all of us poorer" (9 May 2022).
[20] Nicolás Rivero, "A cheat sheet to all of the antitrust cases against Big Tech in 2021" (29 September 2021).
[21] Kean Birch, "Big tech, little oversight" (23 February 2022).
[22] Vass Bendar et al., "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022); Edward Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021).
[23] TekSavvy Solutions Inc., "Seeking an Inquiry and Enforcement Action by the Commissioner of Competition" (20 February 2020); TekSavvy Solutions Inc., Letter to Jeanne Pratt (17 August 2022).
[24] Innovation, Science and Economic Development Canada, "Minister of Innovation, Science and Industry reaffirms that competitiveness is central to a vibrant telecommunications sector" (3 March 2022); Terry Pedwell, "Innovation Minister Navdeep Bains orders CRTC to review decision restricting small providers' use of larger wireless networks" (5 June 2017).
[25] Daniel Tencer, "Big 3 Telecoms 'Stifle Innovation And Economic Development', Entrepreneurs Tell James Moore" (9 September 2013); British Columbia Broadband Association, Letter to ISED (18 March 2019).
[26] Keldon Bester & Andrew Nixon, "Canadian agriculture cannot become an innovation engine without competition" (25 February 2022); Anthony Rosborough & Carlo Dade, "The serious hidden problem facing Canada's agricultural innovators" (25 February 2021).
[27] House of Commons, "Competitiveness of Canadian Agriculture" (May 2010).

Sotos
LAWYERS & TRADEMARK AGENTS

Abuse of Dominance in these industries causes tens of billions of dollars of damages to consumers, but relatively small damages to any single consumer. These are precisely the circumstances in which class actions should be used, but that is only possible if there is private access to courts.

Supporting Small Towns

There are a number of ways that small towns can be especially affected by Abuse of Dominance.[28]

- **Tied Selling**: Dominant companies often drive local businesses out of regional markets. The effects of major online retailers are well-known throughout the economy, but the effects are more severe in small towns since the market is too small to avoid the tied product. For example, in Aspen, Colorado, one ski resort chain nearly drove the others out of business by bundling access to all its resorts, but not allowing its competitors to join the bundle on reasonable terms. The conduct was only addressed when a competitor brought a claim to court for Abuse of Dominance and argued it all the way up to the Supreme Court.[29]
- **Non-Compete Clauses**: Dominant companies often use non-competes to undermine smaller businesses. This is especially problematic in one-industry towns, where due to the lack of alternative employment, this conduct meaningfully depresses wages. For example, in Mount Vernon, Iowa, one grocery wholesaler nearly drove a number of family-owned grocery stores out of business with non-competes. The conduct was only addressed when a competitor brought a claim to court for Abuse of Dominance and argued it all the way up to the Court of Appeals for the Eighth Circuit.[30]
- **Limiting Access to Essential Services**: Dominant companies often deny their competitors access to essential services. In small towns, transportation is one of those services. You will recall the devastation that Greyhound left in its wake when it pulled out of rural areas in Canada. Those effects were drastic in part because of Greyhound's dominance. Greyhound engaged in the same conduct in the US, but there it was addressed in a private claim that was argued up to the Court of Appeals for the Ninth Circuit.[31]

All three of these examples show how private access to courts in the United States strengthened small towns, addressing Abuse of Dominance that is equally prevalent in Canada. All of those claims were appealed and thus would have been very expensive. They were only viable because of the prospect of damages to the plaintiff, which the law currently denies to Canadians.

[28] See generally Lillian Salerno, "Want to rescue rural America? Bust monopolies." (20 April 2017).
[29] Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985).
[30] *In re: Wholesale Grocery Products Litigation*, No. 13-1297 (8th Cir. May 21, 2014).
[31] *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977).

Sotos
LAWYERS & TRADEMARK AGENTS

Following International Best Practices

Private access to courts for Abuse of Dominance is available in almost all major developed countries, including the United States,[32] the United Kingdom,[33] every member state of the European Union,[34] Australia,[35] New Zealand,[36] and South Korea.[37] It is even available in some developing countries, like Argentina[38] and even Saudi Arabia.[39]

Portugal's courts have explained that private access to courts is essential to the ability to enforce Abuse of Dominance:

> "The full effectiveness of [the EU's Abuse of Dominance rule] would be put at risk if it were not open to any individual to claim damages for loss caused to him by abusive conduct of a dominant undertaking".[40]

As suggested above, granting private access to courts has positive effects. The clearest empirical evidence is from the United States, where 96% of Abuse of Dominance claims are brought by private actors.[41] In other words, private access to courts has increased the enforcement of Abuse of Dominance provisions 25 times over. Various articles have shown that private access to courts has been successful. For example, one assessment of a random sample of 60 cases found that:

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[32] 15 USC § 15.
[33] *Competition Act 1998* (UK), s 47A.
[34] Directive 2014/104/EU; European Commission, "Transposition of the Directive in Member States". For Austria, see *Federal Act against Cartels and other Restrictions of Competition* (Cartel Act 2005 – KartG 20052), ss 37b-d. For Belgium, see *Code de droit économique*, art XVII.72. For Bulgaria, see *Law amending and supplementing the Law on Protection of Competition*, Decree No 270, s 2. For Croatia, see *Law on compensation procedures for violations of competition law*, NN 69/17, arts 1, 3. For the Czech Republic, see *Act No. 262/2017 Coll., on Compensation of Damage in the Area of Economic Competition*, art 4. For Denmark, see *Act on the processing of compensation cases relating to infringements of competition law*, Act no 1541, c 2. For Estonia, see *Competition Act*, RT I 2001, 56, 332, s 78. For Finland, see *Act on Damages under Competition Law* (1077/2016), ss 1-2. For France, see *Décret n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles*. For Germany, see *Act against Restraints of Competition*, s 33. For Greece, see *Law 4529/2018 on the Protection of Free Competition as amended and in force*, art 3. For Hungary, see *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act)*, arts 88/A, 88/C. For Ireland, see *Competition Act 2002*, s 14(1). For Italy, see *Legislative Decree 19 January 2017, n 3*, art 1. For Latvia, see *Konkurences Likmus*, art 21.For Lithuania, see *Law of the Republic of Lithuania on Competition No. VIII-1099*, art 43-44. For Luxembourg, see *Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence*. For Malta, see *Competition Act*, c 379, s 9; *Competition Law Infringements (Actions for Damages) Regulations, 2017*, LN 117 of 2017, s 4. For the Netherlands, see Article 193k-t Civil Code (Netherlands). For Poland, see *Act of 21 April 2017 on the private enforcement of competition law*, arts 3, 11. For Portugal, see *Law No. 23/2018*, of June 5, art 3. For Romania, see *Emergency Ordinance no. 170 of October 14, 2020*, arts 2(l), 3. For Slovakia, *Act on Certain Rules for Applying Claims for Compensation for Damage Caused by Violation of Competition Law*, art 3. For Slovenia, see *Act on the Prevention of Restriction of Competition*, art 62. For Spain, see *Royal Decree-Law 9/2017 of 26 May* (*Real Decreto-ley 9/2017, de 26 de mayo*), arts 71-81. For Sweden, see *Competition Damages Act* (2016:964), s 2.
[35] *Competition and Consumer Act 2010* (Cth), s 82.
[36] *Commerce Act 1986* (Cth), s 82.
[37] *Monopoly Regulation and Fair Trade Act*, Act No 16998, art 56.
[38] *Antitrust Law No. 27,442*, art 62.
[39] *Competition Law*, Royal Decree No. (M/75), 6 March 2019, art 25.
[40] *Cogeco Communications Inc v Sport TV Portugal SA*, C-637/17, [2019] ECLI:EU:C:2019:263 at para 39.
[41] United States Courts, "Table C-2–U.S. District Courts–Civil Federal Judicial Caseload Statistics" (31 March 2021).

- 88% of cases resulted in at least one court decision suggesting it was meritorious.
- 28% of cases have resulted in damages payable to the government;
- 28% of cases have resulted in guilty pleas for criminal offences;
- Those 60 cases obtained tens of billions of dollars in compensation; and
- Overall, the deterrent effect of private access to courts is three times higher than the deterrent effect of government prosecution, even after accounting for the fact that only the latter can seek imprisonment as a remedy.[42]

Similarly, the European Commission found that the number of meritorious Abuse of Dominance prosecutions "significantly increased" after private access to courts was introduced.[43] Within one year of its introduction, France alone had granted damages in 31 meritorious private cases.[44]

Conclusion

In short, this is a golden opportunity to mobilize the resources of the private bar to help small businesses and consumers stand up to economic bullies. Adding three words to the *Competition Act* could save consumers billions of dollars, level the economic playing field that some large companies have worked so hard to tilt, and ramp up Canadian innovation. It's time for Canada to catch up with the rest of the world, and for the government to champion struggling small towns.

We would welcome the opportunity to present this submission to those charged with studying it.

Yours very truly,
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[42] Joshua P Davis & Robert H Lande, "Defying Conventional Wisdom: The Case for Private Antitrust Enforcement" (2013) 48:1 Georgia L Rev 1 at 17-20, 26 (HeinOnline).
[43] European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament" (2020) at 3.
[44] Suzanne Carval & Jean-Francois Laborde, "Compensation for Damages Caused by Abuse of Dominance" (2018) *Concurrences* N° 1-2018, Art. N° 84884.