

Competition Policy that Works for Workers

*Unifor Submission to the
Competition Act Review*

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About Unifor

Unifor is Canada's largest union in the private sector with 315,000 members from coast to coast to coast in nearly every sector of the economy. Unifor members have been directly affected by a number of recent Competition Bureau investigations and decisions including:

- Air Canada's approved (and abandoned) acquisition of Transat AT¹;
- The investigation into TorStar and Post Media newspaper closures²;
- The accusations of wage-fixing at Canada's grocery giants³;
- The investigations into the approved acquisitions of Shaw by Rogers⁴ and Sunwing by WestJet⁵; and
- The on-going investigation into whether Google has engaged in certain practices that harm competition in the online display advertising industry in Canada⁶.

In each case, it was clear to Unifor members that worker outcomes including job growth, wage growth and working conditions were of little consequence to the *Competition Act* and as such of little consequence to the Bureau even when experts at the Bureau

¹ Unifor (2019). Available from: <https://www.unifor.org/news/all-news/grocers-wrong-cut-pandemic-pay>

² Unifor (2018). Postmedia cuts staff and stops printing nine newspapers. Available from: <https://www.unifor.org/news/all-news/postmedia-cuts-staff-and-stops-printing-nine-newspapers>

³ Unifor (2020). Grocers wrong to cut pandemic pay. Available from: <https://www.unifor.org/news/all-news/grocers-wrong-cut-pandemic-pay>

⁴ Unifor (2021). Unifor comments on an application by Rogers Communications Inc., on behalf of Shaw Communications Inc. Available from: <https://crtc.gc.ca/depot/Rogers-Shaw/Unifor.pdf>

⁵ Unifor (2022). WestJet must ensure Sunwing acquisition won't hurt Canadian jobs. Available from: <https://www.unifor.org/news/all-news/westjet-must-ensure-sunwing-acquisition-wont-hurt-canadian-jobs>

⁶ Unifor (2023). Unifor seeks update on Competition Bureau's display ad investigation into Google. Available from: <https://www.unifor.org/news/all-news/unifor-seeks-update-competition-bureaus-display-ad-investigation-google>

identified negative effects on the labour market or individual employees. Unifor is pleased to provide input into the Competition Act consultation. Unifor is pleased that Canada is participating in this conversation and committed to updating the Competition Act to better reflect the modern economy.

This review must result in substantial changes that ensure investigating the effects of anti-competitive behaviour on workers becomes a primary and routine activity of the Competition Bureau.

The Problem with Canada's Competition Act

Weak competition legislation and enforcement has exacerbated the cost of living crisis⁷, prevented the growth of good jobs with decent wages and working conditions⁸ and contributed to higher levels of wealth and income inequality⁹.

Competition law has neglected to address the effects of anti-competitive behaviour on workers. Emerging research has revealed that the effects of a wide-range of anti-competitive behaviours suppress wages and working conditions and limit society's ability to achieve inclusive growth, including harmful mergers and acquisitions, no poaching and non-compete agreements, and suppressing unionization¹⁰.

In its update to the *Competition Act*, government must ensure the *Act* and Bureau are capable of deterring and punishing harmful behaviour, while also bolstering the countervailing power of civil society, including workers, so that worker and consumer groups are able to successfully challenge harmful corporate concentration and abuses of dominance corporations engage in. Government must ensure strong and flexible abuse of dominance legislation, a well-resourced Competition Bureau and an expanded exemption for collective bargaining within the *Act* itself.

⁷ Federal Reserve Bank of Boston (2022). Cost-Price Relationships in a Concentrated Economy. Available from: <https://www.bostonfed.org/publications/current-policy-perspectives/2022/cost-price-relationships-in-a-concentrated-economy.aspx>

⁸ US Department of the Treasury (2022). The State of Labour Market Competition. Available from: <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>

⁹ OECD (2017). Inequality: A hidden cost of market power. Available from: <https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf>

¹⁰ Posner, Eric. A. (2021). *How Antitrust Failed Workers*. Oxford University Press. New York

The following recommendations are critical to curtailing anti-competitive corporate conduct and protecting workers and the Canadian economy from the resulting harms.

1. Update the Purpose Statement

The Purpose Statement in the *Competition Act* is narrowly defined and excludes reference to broader goals of inclusive economic growth, fairness, opportunity and prosperity. As a result, these important objectives are not considered by the Bureau or the Tribunal. Canadian civil society cannot rely on corporations to act in the public interest without strict rules and strong government enforcement.

Unifor recommends that government:

- Adapt the legislative Purpose Statement to explicitly include the goals of building countervailing power of civil society, including unions and consumer groups, promoting fairness and opportunity and advancing inclusion and shared prosperity.

2. Expand the Collective Bargaining Exclusion

Part I Section 4 of the *Competition Act* excludes collective bargaining between corporate entities and groups of employees from the purview of the *Act*. This preserves the Charter-protected right of unionized employees to collectively bargain with their employers without running afoul of anti-competition rules. However, gig workers and mis-classified dependent contractors are not considered employees and therefore not captured by this exclusion. Consequently, these workers, already more vulnerable due to the nature of their employment relationship, are left even more vulnerable in their employment relationships because the *Competition Act* may impede their access to collective bargaining.

Unifor recommends that government:

- Expand the collective bargaining exclusion in the *Act* to include all workers whether or not their relationship is structured as a traditional employment relationship so as to allow gig workers and misclassified independent contractors access to collective bargaining.

3. Abolish the Efficiencies Defence

Sections 96 (1) and 90.1(4) permit mergers and collaborations that are harmful to competition if they create larger efficiencies for the company than they do harms to the economy – these efficiencies include cost savings resulting from layoffs and job loss. In effect, this means that anti-competitive mergers can be justified under the *Competition Act* where the justification is, in part, that a merger will result in efficiencies that lead to layoffs and job losses. The cost savings of these efficiencies

are often directed into the pockets of already wealthy individuals while both workers and Canada's economy bear the cost. Prioritizing corporate profits over jobs drives growing income and wealth inequality in Canada.

Unifor recommends that government:

- Abolish the efficiencies defence and focus the *Competition Act* on prevention and enforcement of abuses of dominance and anti-competitive conduct, while also building laws and regulations that build countervailing worker and consumer power.

4. Implement a legislative requirement to investigate impact of mergers on workers

Corporate concentration can have just as much of an effect on the labour market as it does in a product market: firms can take advantage of their power to reduce wages and depress working conditions in an industry. Furthermore, as the number of employers shrinks they may be more easily able to collude, both tacitly and actively. In his book, *How Antitrust Failed Workers*, Eric Posner estimates that “*weak antitrust laws in the U.S. causes both employment and GDP to grow 13% slower than would otherwise be the case and leads labour to take a 22% smaller share of the smaller economic pie.*”¹¹ This is a scathing finding. It is reasonable to expect that the *Competition Act* in its current state leads to similar outcomes in Canada.

Unifor recommends that government:

- Introduce a legislative requirement that the Bureau investigate the impact of mergers on workers and the labour market, including investigating the number of jobs impacted and the effect of a merger on the quality of employment. This requirement combined with the erasure of the efficiencies defense will better capture the full effects of a merger on the broader economy and will allow the Bureau to make better decisions that support the purpose of fair and inclusive growth.

5. Design and implement a Civil Equivalent to Section 45 (1.1)

Wage fixing and non-compete agreements exploit the inherent power imbalance between employees and employers. The amendment of the *Act* to include criminal offences for wage-fixing and no poaching agreements in 2022 was a significant step towards protecting workers from anti-competitive conduct. However, the burden of

¹¹ Posner, Eric. A. (2021). *How Antitrust Failed Workers*. Oxford University Press. New York

proof for these offences is so high that meaningful criminal prosecutions for wage-fixing seem almost out of reach. In addition to the new criminal provisions, government must go further to protect workers and the Canadian economy from wage-fixing and no poaching agreements by amending the *Act* to establish civil liability for the conduct captured by section 45(1.1), including wage-fixing and no poaching agreements. Additionally, to ensure meaningful accountability for wage-fixing and no poaching agreements, unions and private individuals must be given standing to bring private right of action claims for these prohibitions.

Unifor recommends that government:

- Enact a civil prohibition on wage-fixing and no poach agreements as described in section 45 (1.1). This would allow the Bureau to investigate and fine entities that engage in undesirable activity.
- Introduce a new private right of action authorizing unions to bring claims for wage-fixing and no poaching agreements.

6. Further Strengthen Wage Fixing Provisions to Address Unilateral Behaviours

The draft enforcement guidance on wage-fixing and no poaching agreements¹² reveals a fatal flaw in the *Act* that cannot be solved by changing the guidance: wage-fixing and no poaching can only be addressed when there is an agreement between two employers. A one-way agreement or a commitment from one employer with no such reciprocal commitment from another, cannot be addressed by the current law.

This oversight leaves many workers vulnerable to one-way agreements. These are particularly rampant in relationships between recruitment agencies and their clients. In most instances in a temporary staffing arrangement, the client organization which contracts with a temporary help agency will not be in danger of having staff poached by the temporary help agency. However, the agency has an interest in preventing employees from being poached by the client organization, which would likely offer greater security, promotional and other opportunities, and possibly superior pay and benefits.

¹² ISED (2023). Enforcement guidance on wage-fixing and no poaching agreements. Available from: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements>

Consequently, temporary staffing agencies may require their clients to commit to not hiring the contract workers who are employed by the temporary staffing agency. Just as gruesome, these agencies will frequently require their employees by contract not to accept a position at the client organization where they are providing temporary services, although the terms and conditions of employment may be much stronger. Arrangements such as these must be prohibited in the law as well.

Unifor recommends that government:

- Design and implement a rule to address one-way agreements to fix-wages, one-way no poaching agreements, and one-way non-compete agreements.

7. Increase Transparency and Accountability

The public should be able to access information about the activities of the Bureau, including its investigations, litigation brought before the Tribunal and any ongoing monitoring of market structures. Findings, penalties, and enforcement of penalties as well as conditions and enforcement of conditions imposed on mergers and acquisitions should be easily identified and followed by the public. Unfortunately, the Competition Bureau is not required to be transparent and there is often no way of knowing the number of active investigations, the nature of those investigations, whether findings have been made against a corporate entity or whether conditions and penalties that were ordered by the Bureau have been followed through on.

Unifor recommends that government:

- Codify basic transparency requirements into the legislation and ensure the Bureau has appropriate funding to hire personnel dedicated to meet these legal requirements. This could include regular reporting about issues that the Bureau is following such as industrial concentration.
- Require the Bureau to conduct regular information sessions with stakeholders affected by the *Competition Act* to provide supporting information on why decisions are made. More information would assist civil society in assessing the effectiveness of the law and whether further improvements are needed.

8. Expand the Private Right of Action

Budget 2022 opened the door for private individuals to bring abuse of dominance cases before the Tribunal¹³. The private right of action for abuse of dominance needs to be expanded to give labour unions and consumer groups the right to bring claims for abuse of dominance, in addition to private individuals. In some cases, unions will be better placed than an individual to bring a claim before the Tribunal, and in other cases unions may be the only entities with sufficient resources to do so.

Unifor recommends that government:

- Expand standing for the private right of action for abuse of dominance to unions and consumer welfare groups.

9. Introduce an Advisory Role for Worker and Consumer representatives

Historically, Canada's competition law has neglected to consider the effects of abuse of dominance and other anti-competitive behaviours on workers. Budget 2022 changed that. Implementing the recommendations above will further broaden the Bureau's scope and allow it to capture a fuller range of anti-competitive conduct. In support of this broader focus, the Bureau will need to put in place systems that allow it to better understand and respond to harmful behaviour that hurts workers. These systems will also need to help the Bureau broaden the list of harms that result from anti-competitive behaviour – it's not just higher prices and lower wages.

Worker and consumer representatives could play an important role in assisting the Bureau and the Tribunal to expand its knowledge and understanding of the harmful effects of anti-competitive behaviour.

Unifor recommends that government:

- Introduce an advisory role for worker and consumer welfare representatives to support the Bureau to understand, investigate and address the full spectrum of harms resulting from anti-competitive behaviour and abuses of dominance.
- Expand the Tribunal lay members to include worker and consumer representatives.

¹³ ISED (2022). Guide to the 2022 amendments to the Competition Act. Available from: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act>

10. Target anti-competitive conduct in the digital advertising market

As online advertising growth continues to outpace all other segments, “traditional media sectors (i.e. broadcast TV, radio, newspapers, and magazines) have been fighting over a shrinking pool of advertising revenue.”¹⁴ In fact, Google, Facebook and Amazon now account for 90% of Internet advertising spending in Canada. This is clearly not the only dynamic driving the rapid transformation and restructuring of Canada’s media landscape, but advertising revenue has always been a fundamental building block in the news business.

Governments around the world have sued for a variety of alleged anti-trust and anti-competitive practices in this sub-sector of the economy. For example, Google’s control of the online advertising business is one obvious area of concern, but so is its increasing dominance in internet search, online business services and hardware. Large corporations continue to amalgamate an outsized presence in every aspect of digital technology and communications, wielding a concerning level of control over the very infrastructure of the internet.

Unifor recommends that government:

- Enhance cooperation with regulators in other jurisdictions, specifically the United States and the European Union, and adopt best practices.
- Act to prevent and prohibit companies from acting anti-competitively as both buyers and sellers in digital advertising markets.
- Put an end to anti-competitive self-preferencing practices and discriminating against competing products and services on online platforms.
- Look to the principles and approaches of regulators that have already been developed to protect the competitiveness of other electronic trading markets, such as stock exchanges and other gatekeeper examples.

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¹⁴ Winseck, Dwayne, 2022, “Growth and Upheaval in the Network Media Economy, 1984-2021”, <https://doi.org/10.22215/gmicp/2022.03>. Global Media and Internet Concentration Project, Carleton University.