The amended Canadian Competition Act: what businesses need to know

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Following a series of high-profile amendments aimed at strengthening Canada's competition law regime culminating in royal assent for Bill C-59 on June 20, 2024, the legislative framework governing competition law and the conduct of businesses in Canada as set out in the Competition Act has changed substantially. The amendments to the Competition Act are broad in scope and materially increase the potential exposure of businesses in Canada to enforcement activity, as well as financial penalties, litigation, and monetary claims from private parties. Businesses operating in Canada are advised to consider their market strategies and conduct carefully in light of the amendments and to assess whether adjustments are needed to reflect the new grounds for enforcement, legal standards and potential exposure.

At the same time, the amendments are, in a number of important respects, uncertain in their intended application, complicating compliance efforts until further clarity has been provided. In addition, while many of the amendments have immediate effect, others are subject to a one-year delay before coming into force, during which time additional details and guidance are likely to become available. The full implications of the amended *Competition Act* will, therefore, unfold over time as guidance is released by the Competition Bureau and the law is tested by the Commissioner of Competition, as well as by private litigants who will, after the one-year delay, have expanded access to the Competition Tribunal and the right to seek monetary remedies for a range of reviewable trade practices. While guidance from the Competition Bureau to assist the business and legal communities in navigating the new landscape will be welcome, the breadth of the changes and the expanded role for private litigants promise that a broad range of new interpretations and legal theories will come before the Competition Tribunal and the courts, who will ultimately determine the scope of application of the new laws.

Below, we discuss brief highlights of the amendments, and invite you to read our in-depth summaries and analyses of the changes about which businesses in Canada need to be aware.

Increased rigour in merger enforcement

The recent amendments to the Competition Act affecting the review of mergers include the repeal of the efficiencies defence, new presumptions on the competitive effects of a merger that place greater weight on market structure (share and concentration levels), an expanded notification regime, enhanced interim injunction powers and a longer period after closing (three years) for the Commissioner to challenge non-notified mergers.

These changes are intended to enhance the enforcement of mergers viewed as anti-competitive and may result in a greater frequency of remedies being sought by the Commissioner either on a consent basis or by order of the Competition Tribunal following litigation. While there remains broad scope for mergers and acquisitions in Canada, the amendments to the merger review regime will have a wide range of implications for transacting parties including assessment of risk, transaction negotiation and transaction planning including overall timing.

Expansion of private enforcement of competition laws

Perhaps the most significant change to the Competition Act is the forthcoming expansion of private rights of access to the Competition Tribunal and the availability of new monetary remedies for a broad range of reviewable practices. Prior to the amendments, there was only a limited private right of action for damages in respect of the most egregious criminal conduct under the Competition Act. In 2002, Parliament adopted amendments that permitted limited private access to the Competition Tribunal in respect of certain limited reviewable practices. However, private litigants were required to meet a high test for leave to bring a proceeding and had no access to monetary remedies. To date, there have been only a handful of applications for private access under the reviewable practices provisions, and most of these applications were settled, withdrawn or did not reach a finding on the merits.

The new amendments will vastly expand private access to the Competition Tribunal, and represent the most dramatic expansion of private enforcement of Canada's competition laws in a generation. In particular, under these amendments, the test for leave will be significantly liberalized; private access to a broad range of reviewable practices — including deceptive marketing practices, abuse of dominance and horizontal and vertical agreements — will be expanded; new remedies of monetary relief will be created; and a new collective relief regime may open up the Tribunal to the equivalent of modern class action litigation. These changes increase the incentive for private enforcement of Canada's competition laws by a broad range of private litigants, including consumers, competitive rivals and even public-interest organizations on an individual or potentially collective basis in cases where the Commissioner has taken no enforcement action.

Given the significant nature of these changes, there will be a one-year period before the new private rights of access come into effect, providing a window for businesses to assess their practices and for the Competition Bureau and the Competition Tribunal to provide guidance and consider rules to accommodate this new private enforcement regime.

Increased competition law risk for leading firms and oligopolies

The principal civil provision of the Competition Act — abuse of a dominant position — has been amended such that an abuse of dominance is now easier to establish. Notably, a prohibition order (though not structural remedies or monetary penalties) can now be made against a dominant firm (or firms that are found to be jointly dominant) based on a finding of only one of anti-competitive intent or anti-competitive effect that cannot be attributed to "superior competitive performance".

The consequences of an adverse finding under the abuse provisions where both anti-competitive intent and effects are proven have also grown, with higher administrative monetary penalties ($25 million up from $10 million) and, once the new private enforcement regime is in effect, claims for monetary relief based on the benefit derived from anti-competitive conduct.

In addition, new concepts such as "excessive and unfair selling prices" have been incorporated, adding to existing areas of uncertainty that have not been judicially tested. These include the circumstances in which firms may be considered to be jointly dominant as well as the meaning of "superior competitive performance".

Substantially enhanced scrutiny and potential liability for commercial agreements that affect competition

The stakes are higher for parties to commercial agreements owing to three significant changes to the civil agreements provision in the Competition Act (section 90.1), some of which come into effect immediately and some of which will be delayed in coming into effect.

First, remedies have been expanded to include administrative monetary penalties of up to $10 million for a first order (previously, no monetary penalties were provided for).

Second, covered agreements will expand (effective December 15, 2024) from agreements between competitors to all commercial agreements between businesses regardless of whether they compete with each other where "any part of" the agreement has a significant purpose to prevent or lessen competition (e.g., a non-compete provision or exclusivity provision). This will expose for the first time a broad range of ordinary commercial agreements between non-competitors to potential scrutiny and liability where a substantial prevention or lessening of competition is likely to result.

Third, the new private access regime will be available for applications relating to civil agreements and private litigants will be able to seek monetary relief (effective June 20, 2025). Moreover, it is left open whether mergers could be the subject of an application by a private party under the restructured commercial agreement provisions.

Deceptive marketing practices remain an enforcement priority

Canada's deceptive marketing practices regime has been the subject of incremental change since 2022, strengthening the Competition Bureau's ability to take enforcement action in relation to deceptive marketing, particularly as it relates to price representations and environmental claims. Substantial monetary penalties are available and, most recently, a new private right of action will come into force on June 20, 2025.

It remains to be seen whether the new private right of action for those satisfying the public-interest test will open the door to a wave of new litigation before the Tribunal considering there are already other well-established avenues to pursue monetary relief from the courts in respect of deceptive marketing practices and the lack of availability of additional monetary relief payable to private litigants (beyond the traditional restitution remedy, which is only available in certain cases). Nevertheless, the Commissioner has prioritized the enforcement of these provisions, particularly as they relate to drip pricing and greenwashing, so businesses should brace for ongoing scrutiny.

Expanded criminal conspiracy offence

Amendments that came into force on June 23, 2023 no-poach and wage-fixing agreements between unaffiliated employers (regardless of whether they are competitors). Businesses have had a year now to adjust to these new provisions. Canadian businesses have worked diligently to review their business practices, including benchmarking activities and non-solicit/non-hire provisions in contracts, to ensure compliance with the law.

To date, the Competition Bureau has not publicized an investigation under these provisions or taken enforcement action to our knowledge. However, given these parallel amendments, the possibility of private damage claims and enforcement activity in the U.S., compliance with these provisions remains a priority.

Easing the burden for refusals to deal and the new right to repair

Historically, private parties have had limited success when bringing applications under the refusal to deal provision of the Competition Act. With amendments to the refusal to deal provision, it may be that private litigants will now have greater success. The refusal to deal provision has been revamped, with a lowered standard for private litigants to be granted leave to the Competition Tribunal and an expanded scope of remedial orders. The amendments also introduce a “right to repair”, prohibiting suppliers from refusing to offer repair of or diagnostic services for a product, or to make the means of diagnosis or repair available within a specified period.

Formal market studies power

The Commissioner of Competition has long been able to conduct “market studies,” which examine the state of competition in a particular sector or industry. However, until recently, the Commissioner could only compel information where there were grounds to believe there has been non-compliance with the Competition Act. Commencing December 2023, the Commissioner can now initiate market studies even in the absence of non-compliance concerns.

Other notable amendments now in force

In addition to the above amendments, other notable changes to the Competition Act include a new prohibition on “reprisal actions”, limitations on cost awards against the Commissioner, and a new certification regime to immunize agreements intended to protect the environment from the application of certain provisions of the Competition Act.

Takeaways

In summary, the Competition Bureau is now poised for a strengthened role in competition law enforcement, alongside a larger role for private enforcement and a new era of significance for the Competition Tribunal.

Commissioner Boswell has been provided with long-sought tools, increased resources and a stronger enforcement hand. In addition to lowered legal thresholds for securing remedies under the Competition Act and substantially increased consequences for non-compliance, the Commissioner also has a new market studies power and a clearer path to obtaining interim injunctions. Further, with the enhanced role for private parties to contest market conduct, the Competition Bureau’s enforcement burden will be reduced, potentially leaving the Commissioner freer to pursue investigations of interest ranging from complaints about market conduct to non-notifiable mergers, to bring legal challenges and to focus on needed guidance and development of competition policy.

Recognizing the legal and business communities’ need for clarity, the Competition Bureau is preparing to issue guidance on its enforcement approach under the amended law, with publication anticipated soon. In addition, to mitigate the potential for private litigation to interfere with public enforcement strategies, Commissioner Boswell has communicated the Competition Bureau’s intention to contribute to the development of jurisprudence by intervening in private actions before the Competition Tribunal, alongside its own challenges. While the Competition Bureau's stated priority is to focus on areas that have an "impact on the affordability of daily life for Canadians", enforcement activity may increase across a wide range of market sectors.

The Competition Tribunal also enters a new era of significance. Since its inception in 1986, the Competition Tribunal's role in the development of competition law in Canada has been limited by the dearth of contested proceedings. The Competition Tribunal is now on the cusp of a potentially transformative period. Important amendments to the Competition Act that are uncertain in their application (e.g., the provision applicable to agreements between non-competitors, the amendments to the abuse of dominance regime, the new private access regime and the new merger concentration thresholds) will require interpretation, likely through contested proceedings, leading to a more robust body of jurisprudence. The Federal Court justices at the helm of the Competition Tribunal appear to be embracing the forthcoming challenges. There will be an opportunity to continue to refine expedited procedures, including mediation, which have been introduced in recent years to streamline the adjudication process.

Mergers

Increased rigour in merger enforcement

Significant changes to Canada's merger review regime are now in force, including rebuttable structural presumptions of harm, a heightened remedial standard, the repeal of the efficiencies defence, and more.

The Canadian merger review regime under the *Competition Act* (the Act) has undergone significant change from a substantive, technical and procedural perspective. We address the key amendments below — namely, the introduction of a rebuttable presumption of harm based on market shares and concentration levels; a heightened remedial standard for anti-competitive mergers; the repeal of the efficiencies defence; the codification in statute of additional factors to be considered during a merger review; adjustments to the pre-merger notification thresholds; and certain procedural amendments designed to improve the Commissioner of Competition's (Commissioner) ability to review and challenge mergers.

The amendments bring the merger review provisions of the Act closer to U.S. merger law (i.e., a more onerous remedial standard, with no efficiencies "defence") and mirror aspects of the more aggressive enforcement approach of the U.S. Department of Justice (Antitrust Division) and the Federal Trade Commission as set out in their 2023 U.S. Merger Enforcement Guidelines.

While the full impact of these changes on merger reviews in Canada will only be appreciated with experience, overall, there is the potential for more robust merger enforcement activity in Canada. This places a premium on merging parties engaging in comprehensive pre-signing assessments of the competitive effects of a proposed transaction and mapping a path to a successful completion.

New rebuttable presumptions of harm for mergers

The substantive legal test to be met before the Competition Tribunal (the Tribunal) can issue any remedial order in respect of a merger has not changed. Under section 92 of the Act, the Commissioner must establish that the merger prevents, lessens or is likely to prevent or lessen competition substantially (SLPC). However, section 92, which establishes a framework for assessing whether the SLPC test has been satisfied has been changed in a number of important respects. Notably, the assessment framework now includes a rebuttable presumption of competitive harm based on post-merger market share and concentration levels.

Previously, section 92(2) of the Act explicitly stated that the Tribunal could not find that a merger was likely to result in an SLPC on the basis of evidence of concentration or market share alone. While the Competition Bureau's (Bureau) Merger Enforcement Guidelines have long indicated that the Commissioner generally would not challenge a merger on the basis of a concern related to the unilateral exercise of market power where the parties' combined share was less than 35%, or one related to a coordinated exercise of market power when the post-merger market share accounted for by the four largest firms in the market would be less than 65% or the parties' combined share would be less than 10%, the Act did not previously contain prescribed market share or concentration thresholds for purposes of analyzing the likely competitive effects of a merger. Following the amendments to the Act, section 92(2) now provides that if the Tribunal finds, on a balance of probabilities, that a merger is likely to result in a significant increase in concentration or market share, the Tribunal shall (i.e., not discretionary) also find that the merger is likely to result in an SLPC unless the contrary is proven on a balance of probabilities by the merging parties. Accordingly, where the concentration or market share thresholds are established, the onus shifts from the Commissioner to the merging parties to demonstrate why, notwithstanding the significant increase, the transaction is not likely to result in an SLPC. Section 92(3) prescribes what constitutes a significant increase in concentration or market share. Now, a merger is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger, both

(a) the concentration index (measured as the sum of the squares of the market shares of the suppliers or customers) increases by more than 100

(b) either the concentration index is more than 1800 or the market share of the merging parties is more than 30%

Not only does the Act now prescribe the market share and concentration thresholds that will result in a presumption of anti-competitive harm, but they do so at levels that — at least from a unilateral perspective — are lower relative to those previously articulated by the Bureau in the Merger Enforcement Guidelines as likely to raise concerns. The new market share and concentration levels do, however, align exactly with the approach taken in the recently revised U.S. Merger Guidelines.

The establishment of a rebuttable presumption of harm based on post-merger market share and concentration levels draws upon the enforcement practice in the United States that has been in place for some time. However, unlike in the United States, the presumption in Canada is now prescribed by statute, raising concern that there may be less room for flexibility and discretion than would be the case where the presumption is set out as part of an enforcement approach or directive.[1] Indeed, U.S. case law has commented that the framework for merger reviews in the U.S. is applied “flexibly” with “evidence considered all at once and the burdens are often analyzed together.”[2]

In practice, we expect the merger review process will continue in many respects as it has previously, with the merging parties and the Bureau engaging in a dialogue on market definition, shares, and competitive effects. However, a heightened focus on quantifying market shares and concentration levels can be expected, placing a premium on assessing market definition, shares and concentration levels when considering a proposed transaction. A focus on quantifying shares and concentration levels presents potential challenges for merging parties in industries where there is very little or no reportable share data (or where such data does not align with defined markets for purposes of a competitive effects analysis). In such cases, merging parties may be on a poor informational footing relative to the Bureau, which has access to information gathering tools to obtain data and information from third-party market participants on a confidential basis. It remains to be seen how, from a procedural and substantive perspective, the rebuttable presumption (and the corresponding burden-shifting to merging parties) will play out in the context of contested merger litigation at the Tribunal.

Most importantly, however, it continues to be the case that market shares and concentration levels are not the end of the story. A presumption is just that: a presumption that can be rebutted by evidence sufficient to demonstrate that, on a balance of probabilities, an SLPC is not likely to occur. Such evidence may include, for example, the likelihood of entry or expansion by other market participants; ongoing innovation efforts and change within a dynamic market; customers’ countervailing power; and whether the target was likely to fail absent the merger, to name a few of the key factors.

New remedial standard: all anti-competitive effects must be eliminated

Alongside the introduction of a rebuttable presumption of harm based on market shares and concentration levels, a remedial order to address the anti-competitive effects of merger must now preserve or restore the level of competition that would have prevailed in the absence of the merger.

This change directly undoes the decades-old Supreme Court of Canada decision in *Canada (Director of Investigation and Research) v. Southam Inc.*,[3] which held that a remedy need only to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. In other words, remedies that are fashioned only to take the “S” out of the “SLPC” are no longer sufficient; instead, remedies must go further to restore (in the case of a completed merger) or preserve (in the case of a proposed merger) competition.

1 While section 92(5) provides that federal Cabinet may by regulation prescribe different values than those set out in section 92(3), this nonetheless involves a regulatory drafting process and therefore is less flexible than the guidelines approach taken in the United States.

2 *Illumina, Inc. v. Federal Trade Commission*, 23-60167 1 at 9 (5th Cir, 15 December 2023).

3 [1997] 1 SCR 748 at para. 85, 144 DLR (4th) 1 (SCC).

While contrary to longstanding jurisprudence and the Act's express focus on "substantial" impacts on competition, this change is not entirely surprising given the Bureau's stated preference for a remedy that fully eliminates the anti-competitive effect in the applicable market rather than one that only addresses substantial anti-competitive effects. It remains to be seen what actual impact the change in the remedy standard will have in the determination of merger remedies, which to date have been largely negotiated on a consensual basis.

Statutory efficiencies defence has been repealed, but efficiencies remain important

The efficiencies defence, previously found in section 96 of the Act and repealed in December 2023, provided that the Tribunal may not make a remedial order if it found that a merger was likely to bring about gains in efficiencies that would be greater than and offset the anti-competitive effects of the merger, and that such efficiencies would be lost if the order were made. Successive Commissioners had called for the repeal of the efficiencies defence for over a decade, frequently commenting that the defence (which was unique to Canada) was out of step with the approach to merger review and enforcement by the Bureau's peer antitrust enforcement agencies globally.

First introduced as part of the Act in the 1980s, section 96 had only been relied upon to clear a small handful of mergers, either by the Commissioner declining to challenge a transaction or through a successful defence by merging parties at the Tribunal. The most recent decision involving the efficiencies defence — which was upheld on appeal — was the Tribunal's decision in the Secure/Tervita merger. In that case, the Tribunal held that the efficiencies defence did not apply and ordered multiple divestitures to remedy the anti-competitive effects.[4] Notwithstanding its limited application in merger reviews, the availability of the efficiencies defence had a broader impact on the merger review process and timelines in Canada.

While efficiencies no longer provide a complete defence to a merger that is otherwise likely to result in an SLPC, efficiencies still remain relevant in assessing competitive effects, just as they have in the U.S., where there has never been an efficiencies defence. As stated in section 1 of the Act, the promotion of economic efficiency remains one of the Act's central purposes, and section 93(h) provides that when assessing the competitive effects of a merger, the Tribunal may have regard to, among other things, any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger. Accordingly, the Tribunal is still able to consider submissions regarding claims of efficiencies (particularly those which would be passed on to consumers in the form of lower prices, increased quality or innovation). Moreover, the Commissioner has clearly stated that "the pro-competitive efficiencies of a merger could absolutely be considered in the framework of considering whether the merger substantially lessens or prevents competition".[5]

Additional assessment factors to be considered in merger review

The factors the Tribunal must consider in determining whether a merger is likely to result in an SLPC, which are set out in section 93, were first expanded in June 2022 and then again through additional amendments in June 2024. The list of factors in section 93 has long been non-exhaustive, but the expanded factors highlight the Bureau's areas of focus in recent years:

- *Innovation:* The Tribunal is to consider the nature and extent of change and innovation in a relevant market.
- *Network effects:* The Tribunal is to consider network effects within a market.
- *Entrenchment of incumbents:* The Tribunal is to consider whether the merger would contribute to the entrenchment of the market position of leading incumbents.
- *Non-price effects:* The Tribunal is to consider any effect of the merger on price or non-price competition, including quality, choice or consumer privacy.
- *Coordination between competitors:* The Tribunal is to consider whether the merger is likely to result in express or tacit coordination between competitors.
- *Change in market share or concentration:* The Tribunal is to consider any effect resulting from the change in concentration or market share that the merger has or is likely to bring about. This addition aligns the section 93 factors with the new rebuttable presumptions of harm discussed above.

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4 *Canada (Commissioner of Competition) v. Secure Energy Services Inc*, 2023 Comp Trib 2, aff'd 2023 FCA 172.

5 Senate of Canada, Standing Committee on National Finance, Evidence [PDF], 44-1, No 88 (13 December 2023) at page 34 (Matthew Boswell).

Lastly, it is noteworthy that section 92 itself has been amended to itemize labour specifically as a "market" in which the Tribunal may find that a merger is likely to result in an SLPC. Labour markets have come under increased scrutiny by competition enforcement agencies, particularly in the U.S., including in the context of merger reviews. The recently revised *U.S. Merger Guidelines* state that when evaluating a merger, the enforcement agencies will consider whether workers "face a risk that the merger may substantially lessen competition for their labor" and that "where a merger between employers may substantially lessen competition for workers, that reduction in labour market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."[6]

We anticipate that the Bureau's forthcoming guidance will address labour market considerations, potentially drawing upon the considerations explored in the *U.S. Merger Guidelines*.

More mergers will be subject to mandatory pre-closing notification

The Bureau must generally be given advance notice of proposed transactions when both the transaction-size and parties-size thresholds are met. Two significant changes to the calculation of the transaction-size threshold set out in Part IX of the Act have been implemented. These changes generally align Canada's approach with that taken in other jurisdictions where jurisdictional turnover is a focus, and can be expected to increase the number of transactions that are subject to the mandatory pre-closing notification regime.

While the Bureau has the discretionary right to challenge any "merger" under section 92 of the Act, only certain types of prescribed transactions that exceed prescribed financial thresholds are subject to the mandatory pre-merger notification regime. A transaction that meets the prescribed transaction type must also exceed both the party-size threshold and the transaction-size threshold in order to trigger mandatory notification. The party-size threshold is met where the parties to the transaction, together with their affiliates, have in the aggregate either assets in Canada, or revenues in, from or into Canada, exceeding $400 million. Previously, the transaction-size threshold was met where the transaction target had either assets in Canada, or revenues in or from Canada generated from such assets, exceeding $93 million (may be adjusted annually). For the purposes of calculating the transaction-size threshold, parties were not required to include the target's sales into Canada (i.e., imports). Now, merging parties must include sales into Canada in determining whether the transaction-size threshold is met. It can be noted that the "transaction type" criterion still requires (among other things) that there be an operating business, which is defined as a "business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work". Accordingly, while Canadian sales generated from outside of Canada are now clearly captured in the calculation of the thresholds, it remains the case that transactions involving targets with only sales into Canada who have no presence in Canada will continue to fall outside the pre-merger notification provisions of the Act.

Previously, the pre-merger notification regime did not treat a transaction implemented by way of both a share acquisition and an asset acquisition as a single notifiable event. Accordingly, the transaction-size threshold was calculated separately for each of the share acquisition and the asset acquisition, notwithstanding that they comprised part of a single transaction. If the transaction-size threshold was not exceeded for either the share acquisition or the asset acquisition, then the transaction was not subject to pre-merger notification as there was no requirement to aggregate the assets or revenues. Now, where a transaction is being implemented by way of a share acquisition and an asset acquisition, the value of the assets being acquired are to be aggregated — and the value of the revenues in, from or into Canada are to be aggregated — for the purposes of assessing the transaction-size threshold.

Lastly, it is worth noting that in June 2022, an anti-avoidance provision was introduced to the Act's merger notification regime to prevent merging parties from purposefully structuring transactions so as to avoid notification. Under section 113.1, if a transaction is specifically designed to avoid the application of the notifiable transaction provisions of the Act, the provisions will still apply to the substance of the transaction. This addition came as somewhat of a surprise, considering that the Commissioner has the power to review all "mergers" including those not subject to the mandatory pre-closing merger notification regime. Since the new provision came into force two years ago, we are not aware of a transaction where the Bureau asserted that section 113.1 applied to the transaction.

6 U.S. Department of Justice and the Federal Trade Commission, "2023 Merger Guidelines" [PDF], (28 December 2023).

Enhanced ability to secure interim injunctions

By way of background, the merger review regime provides that once the applicable statutory review periods have expired, the parties are legally in a position to complete their merger unless the Commissioner has applied for and obtained from the Tribunal an injunction to prevent or delay closing. More specifically:

- Section 100 of the Act provides that the Commissioner may apply for an interim order to delay closing of a merger where the Commissioner requires more time to complete the merger review.
- Section 104 of the Act provides that the Commissioner may apply for an interim order to prevent or delay closing of a merger where an application challenging a proposed merger has been filed with the Tribunal.

Historically, there has been very little contested merger litigation in Canada, particularly on a pre-closing basis. Moreover, there have been only two fully contested proceedings under section 104 concerning a merger.[7] In 2021, the Commissioner entered into a timing agreement with Secure and Tervita which provided that following the expiry of the statutory waiting period, the parties would provide the Commissioner with 72 hours' notice of their intention to close. In compliance with this provision, the merging parties did so at 11:15 p.m. on June 28, 2021, and therefore were free to complete their transaction after 11:15 p.m. on July 1, 2021, absent a Tribunal order. On June 29, the Commissioner filed an application for an interim order under section 104 and an application challenging the merger under section 92. The Commissioner then requested an emergency case conference seeking an "interim interim" injunction to prevent the merger from completion prior to the hearing of the section 104 application. The Commissioner's request for "interim interim" relief was denied at the Tribunal on June 30 and at the Federal Court of Appeal on July 1, and the transaction closed shortly thereafter on July 2. Of note, the Commissioner successfully challenged the transaction on a post-closing basis, with the Tribunal ordering multiple divestitures.

As a result of amendments to the Act, a "lack of time" to hear an injunction application will not be a factor in the Commissioner's ability to obtain an injunction. Now, where the Commissioner has applied for an interim order under either section 100 or 104 of the Act to prevent or delay the closing of a merger, the merger is automatically prohibited from closing until the application has been disposed of by the Tribunal. The Commissioner therefore now has greater ability to prevent closing — at least temporarily — while the Bureau completes its review or prepares for litigation. While a noteworthy change, it remains to be seen how the Commissioner's ability to prevent closing by simply filing an application for an interim order will impact the dynamics of merger review in practice, considering that the vast majority of mergers have been resolved without litigation.

Look-back period increased to three years for non-notified transactions

Previously, the Commissioner had a one-year period following closing to challenge any merger before the Tribunal, unless the Commissioner had previously issued an Advance Ruling Certificate (ARC) in respect of the merger. Now, the Commissioner will be able to challenge, for three years following closing, mergers that were not subject to mandatory notification or for which an ARC request was not filed. Where a merger is subject to notification or where an ARC request is filed, the Commissioner continues to have one year following closing to challenge the merger (unless an ARC was issued). This change creates for the first time a potential incentive to file a request for an ARC in advance of closing for a merger that is not subject to the mandatory pre-closing notification regime. The market intelligence branch of the Bureau continues to monitor the market actively for mergers falling below the notification thresholds.

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7 The two contested proceedings under section 104 are *The Commissioner of Competition v. Parkland Industries Ltd*, 2015 Comp Trib 4, and *Canada (Commissioner of Competition) v. Secure Energy Services Inc*, 2021 Comp Trib 7. In another recent contested merger, Rogers/Shaw, the Commissioner applied for an interim order under section 104 following which a consent agreement was registered with the Tribunal pursuant to which Rogers and Shaw agreed not to close their transaction until the section 92 application was concluded. See: *The Commissioner of Competition v. Rogers Communications Inc and Shaw Communications Inc*, 2022 Comp Trib 2

Abuse of dominance

Leading firms and oligopolies: beware

Leading firms beware: higher monetary penalties, a lowered standard for obtaining prohibition orders, and soon, financial incentives for private litigation.

The competition law landscape for businesses holding a dominant market position, as well as those operating within oligopolistic markets, has changed with the recent amendments to the abuse of dominance provisions of the Competition Act (the Act). These changes increase the risk of both public enforcement by the Commissioner of Competition (the Commissioner) and private access applications initiated by competitors, consumers or public-interest organizations. Businesses with significant market power now face higher monetary penalties, the possibility of prohibition orders for conduct that was not previously considered an abuse of dominance and, in the near future, private litigation with the potential for financial awards.

In light of these changes, dominant firms will need to consider the strategic calculus when assessing pricing, distribution and access. Firms generally (especially those operating in markets with limited competition) will also need to consider the implications of engaging in conduct that may be perceived as "joint" action with competitors.

New lower burden to restrict conduct of dominant firms

Abuse of a dominant position, Canada's anti-monopolization law, has long been the key civil reviewable trade practice of the Act. Indeed, it is often commented that the abuse of dominance provisions, contained in sections 78 and 79 of the Act, arguably render the other civil (non-merger) provisions unnecessary.

The abuse of dominance provisions apply only to the conduct of firms that are dominant (or jointly dominant). They also do not prohibit dominance itself, but rather provide for remedial action in relation to certain types of conduct. The key challenge in the formulation and enforcement of the abuse of dominance provisions has, therefore, long been distinguishing between anti-competitive conduct by dominant firms, on the one hand, and healthy and aggressive — even cut-throat— conduct on the other, which is desirable. As the Competition Tribunal (the Tribunal) has noted, discerning the line between anti-competitive conduct and competition on merits is "not an easy task".[8]

For nearly 40 years, the Commissioner (and, until recently, *only* the Commissioner) had to establish three legal elements before the Tribunal could exercise its discretion under the abuse of dominance provision and issue *any* type of remedy:

1. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business which the jurisprudence has established is synonymous with dominance or market power
2. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts
3. the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market (an SLPC)

Following amendments that came into effect in December 2023, the Commissioner or a private litigant (having obtained leave) can apply for an order against a dominant firm (or firms) prohibiting them from engaging in certain conduct or business practices if dominance (i.e., market power) is proven on an individual or joint basis and it is established that there is *either* anti-competitive intent or anti-competitive

8 *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc*, [1997] CCTD No 8 at 263, 73 CPR (3d) 1 (Comp. Trib.).

effect (i.e., an SLPC) that is not the result of "superior competitive performance".

To obtain a remedial order other than a prohibition order, the Tribunal must still determine that all three elements (dominance, anti-competitive acts/intent and anti-competitive effect) are satisfied. In addition (and as has always been the case for alternative remedial orders), the Tribunal must find that a prohibition order is not likely to restore competition in that market. However, the lower burden to obtain a prescriptive order is a material change to the enforcement of abuse of dominance.

Private enforcement

The private right of action under the abuse of dominance provisions has been in effect for two years. Although the use of the right has been limited, there have been early indications of its utility (e.g., Apotex's withdrawn leave application in September 2023 following a consensual resolution).[9]

As a result of the amendments, private parties with leave will, in June 2025, be able for the first time to seek a monetary remedy in respect of unilateral conduct. If the Tribunal finds the existence of abuse by a dominant firm, the Tribunal will be empowered to order "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, the manner that the Tribunal considers appropriate". It remains to be seen how the addition of potential financial recovery, as well as other changes to the private access regime (see Section Private access regime), will affect the use of the private access right for abuse of dominance.

Expanded Tribunal remedies

The Tribunal now has a full range of strong remedies at its disposal, which include

- *Prohibition orders:* Prohibition orders are common remedies in these cases and have included prohibitions on certain contractual terms (e.g., exclusivity, rights of first refusal, non-competes, automatic renewals, most-favoured-nation clauses, bundling and tied selling) and prohibitions on future acquisitions.
- *Prescriptive orders:* an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market. Prescriptive remedies have included orders to provide access or supply on reasonable terms and conditions.
- *Monetary penalties:* administrative monetary penalties (AMPs) in an amount not exceeding the greater of (a) \$25 million (\$35 million for subsequent orders) (up from \$10 and \$15 million) and (b) three times the value of the benefit derived or, if this amount cannot be calculated, 3% of the respondent's annual worldwide gross revenues. In this regard, the Act enumerates the factors the Tribunal must consider when determining the amount of any AMP and explicitly provides that the purpose of an AMP is "to promote practices by that person that are in conformity with the purposes of this section and not to punish that person".
- *Private remedies:* Once the private access regime takes effect, a private litigant will be able to seek relief in respect of unilateral conduct. If the Tribunal finds the existence of abuse by a dominant firm, the Tribunal will be empowered to order "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, the manner that the Tribunal considers appropriate".

Expansion of the meaning of anti-competitive acts, but intent remains key

In June 2022, section 79 was amended to define "a practice of anti-competitive acts" as an act that is intended to have (a) a predatory, exclusionary or disciplinary negative effect on a competitor (which reflects the jurisprudence to date) or (b) an adverse effect on competition (which introduced a new concept that has yet to be judicially considered). Following this amendment, any conduct intended to harm competition or the competitive process is captured.

The Act's non-exhaustive list of examples illustrating the types of conduct that may be considered anti-competitive was expanded in 2022 to include explicitly a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry or expansion, or to eliminate that competitor. In the Competition Bureau's (Bureau) Draft Bulletin on Amendments to the Abuse of Dominance Provisions (yet to be finalized),[10] the Bureau further elaborated on its position that acts intended "to have an

9 For more information, please see our earlier Osler Update on the Apotex application for leave.

10 Competition Bureau Canada, "Bulletin on Amendments to the Abuse of Dominance Provisions", at section 4.

adverse effect on competition" include MFN clauses, price parity clauses and non-discrimination clauses, as well as serial acquisitions by dominant firms.

In December 2023, the list of the types of conduct that may be considered anti-competitive was, more controversially, expanded to include "directly or indirectly imposing excessive and unfair selling prices." The Bureau did not seek this addition, and it was met with many questions regarding its intended application. While further guidance and experience with the new provision will provide greater clarity, it is important to note that the practical application should be limited given the inclusion within the overall framework of the abuse of dominance provisions.

The concept of excessive pricing has been a feature of competition law in the European Union for decades as it relates to exploitative practices by dominant firms. In the E.U., the concern relates to situations in which a dominant firm charges a price that is excessive relative to an appropriate competitive benchmark (either an appropriate measure of costs or a comparison with a lower price charged in a situation comparable to the dominant firm's circumstances). Unlike Canada's abuse of dominance provisions, as discussed below, the E.U. violation does not require a finding of potential intent or harm to the competitive process; rather, it can occur as a result of the mere exploitation of buyers by the dominant firm. For this reason, the E.U. experience should not be a good model for determining either whether a price is "excessive and unfair" or the consequences of such a finding.

The jurisprudence on the meaning of "a practice of anti-competitive acts" has established that conduct will only be considered "anti-competitive" if its "overall character" or "overriding purpose" is anti-competitive in nature. A valid pro-competitive or efficiency-enhancing business justification for the conduct can overcome the actual or reasonably foreseeable anti-competitive effects of conduct if it can be shown that it is attributable to the respondent; is independent of the anti-competitive effect of the practices concerned; and counterbalances the anti-competitive effects and/or subject intent of the acts. Such justifications may include legal compliance; cost reductions in production; improvements in technology or production; processes that result in innovative new products and improvements in product quality; and protecting the viability of existing competition so as to avoid disruptions in operations. The introductory language to the list of anti-competitive acts in section 78 reflects the need for a finding of anti-competitive intent. Accordingly, although pre-dating June 2022, we expect the jurisprudence relating to anti-competitive intent and business justifications to remain still very much applicable.

Accordingly, despite the expanded definition of anti-competitive acts, a firm's intent, rationale and justification for its conduct, practice or strategy remains a critical consideration in determining whether an act is in fact anti-competitive. As before, it is important that firms with leading market positions or operating in highly concentrated markets be aware of how certain aggressive business strategies are affecting or may affect the market and carefully consider and contemporaneously document the business justifications for their conduct or business practices.

Notable areas of uncertainty

Scope of joint dominance

The robust jurisprudence on dominance has confirmed that dominance is synonymous with market power. Market power of a single firm may be measured either directly by showing that the firm has already exercised market power (e.g., pricing practices or large profits can be an indication of market power) or indirectly using various indicia. While not definitive, market shares in particular may be indicative of whether an entity is dominant and has market power. The Bureau's Abuse of Dominance Enforcement Guidelines (which are in the process of being revised to reflect the most recent legislative developments) state that the Bureau generally will not pursue allegations of abuse against a single firm with market share of less than 50%.

The abuse of dominance provisions, however, also contemplate the possibility of abuse by jointly dominant firms. To date, none of the fully contested abuse cases have dealt with joint abuse of dominance and there continues to be uncertainty about the scope of conduct that will result in firms being found to be acting "jointly." While there have been two litigated cases based on a joint dominance theory of harm, in both cases the existence of joint dominance was taken as a given as there was an explicit agreement between the firms involved. Furthermore, both cases ended with a consent order being issued such that the Tribunal did not render a decision that establishes the requisite elements for a finding of joint abuse of dominance.

The Bureau has, through its guidelines, public comments and the 2009 consent agreement with two major suppliers in the waste industry, emphasized that parallel or complementary — albeit unilateral — conduct by competitors in relatively concentrated markets may ground a finding of joint dominance. A theory based on a concept of "facilitating practices" has also been suggested on a number of occasions. However, the meaning and scope of joint dominance has yet to be tested before the Tribunal. The Bureau has previously stated in its guidance that it will not investigate allegations of joint abuse of dominance where the firms collectively have a combined share below 65%.

SLPC and superior competitive performance

The assessment of whether the market impact of impugned conduct results from "superior competitive performance" has been provided for in the abuse of dominance provisions for some time. However, with the possibility now of the Tribunal making prohibition orders without any need to show anti-competitive intent, the circumstances in which a SLPC may reflect superior competitive performance are of potentially heightened importance.

When assessing whether a practice or conduct is resulting in or likely to result in an SPLC, the Tribunal is required to consider whether the practice is a result of superior competitive performance. In making this assessment, it may consider

- the effect of the conduct on barriers to entry in the market, including network effects
- the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy
- the nature and extent of change and innovation in a relevant market
- any other factor that is relevant to competition in the market that is or would be affected by the conduct

The Tribunal, therefore, is asked to engage in some form of balancing of pro-competitive effects against the effects of conduct and to attempt to assess what the market would look like in the absence of the behaviour at issue. For example, even the Bureau has recognized that exclusionary conduct may be beneficial to consumers and the legality of the behaviour involves a balancing of the pro-competitive and anti-competitive consequence of the practice. As it has previously stated: Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.[11]

Certainly, further guidance on the concept of superior competitive performance is warranted.

Limitation period

Section 79 is subject to a three-year limitation period whereby an application may not be made by the Commissioner in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased. A one-year limitation period applies in respect of applications made by private parties.

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11 Competition Bureau Canada, "Enforcement Guidelines on the Abuse of Dominance Provisions" [PDF] (July 2001).

Commercial agreements: a new legal framework

Agreements between competitors and non-competitors now face exposure under the Competition Act, with significant penalties for anti-competitive agreements and a forthcoming private right of action.

For almost 40 years, only agreements between competitors (actual or potential) to rig bids, fix prices, allocate markets or restrict output and certain agreements between federally regulated financial institutions were subject to potential criminal liability under the Competition Act (the Act). Further, outside of mergers, there was no exposure (criminal or civil) for agreements between businesses that are not competitors.

The competition law framework applicable to agreements between competitors and between non-competitors has fundamentally changed. Potential liability, on a criminal or civil basis, is no longer reserved for agreements between competitors. Further, the Commissioner of Competition (the Commissioner) will no longer have a monopoly on enforcing the civil provisions applicable to commercial agreements and the potential consequences of non-compliance are substantial. Businesses need to adapt their compliance approach accordingly.

Criminal liability framework relating to commercial agreements

Until June 2023, criminal liability (including exposure to fines in the discretion of the court,[12] imprisonment and private actions for damages) only applied to three types of agreements between competitors — specifically, those that, subject to certain defences including the ancillary restraints defence (ARD)[13]

- fix, maintain, increase or control the price for the supply of the product (i.e., price-fixing)
- allocate sales, territories, customers or markets for the production or supply of the product (i.e., market allocation)
- fix, maintain, control, prevent, lessen or eliminate the production or supply of the product (i.e., output restriction)

Given the express references to “supply” in the Act, the courts confirmed the Bureau’s enforcement position that criminal liability did not apply to buy-side agreements between competitors.

As a result of amendments that came into effect on June 23, 2023, certain agreements between employers, regardless of whether they are competitors, are now subject to the criminal provisions of the Act. Specifically, agreements between unaffiliated employers to fix or control wages or other terms of employment (wage-fixing provision) and not to solicit or hire each other’s employees (no-poach provision) have been criminalized. The provisions were, in part, a response to concerns that Canadian competition law was out of step with the enforcement approach being taken in the United States.[14]

12 As of June 2023, the fines available under the criminal conspiracy provisions were amended to remove the $25-million-per-count maximum. Fines are now uncapped and in the complete discretion of the sentencing court.

13 There are several statutory exemptions (e.g., agreements between affiliates) and statutory defences, including the regulated conduct defence and the ancillary restraints defence. Subsection 45(7) codifies the common law defence of regulated conduct, which applies where conduct is authorized or mandated by federal or provincial law.

14 In the United States, such agreements between employers were and are being challenged under U.S. antitrust laws. In contrast, prior to June 2023, the narrow drafting of the criminal conspiracy provision clearly excluded agreements regarding the purchase of an input, including labour. Accordingly, section 45(1.1) was introduced to address this perceived gap in the legislation.

The wage-fixing provision captures agreements between unaffiliated employers to fix, maintain, decrease or control salaries or wages, as well as "terms and conditions of employment", which is interpreted broadly by the Competition Bureau (the Bureau) to include terms and conditions that could affect a person's decision to enter or remain in an employment contract (e.g., job descriptions, per diems, non-monetary compensation, working hours, location and non-compete clauses). The no-poach provision prohibits agreements between unaffiliated employers not to solicit or hire each other's employees, and therefore requires reciprocity.

Importantly, the criminal offences apply to agreements between employers, regardless of whether they compete, and do not require that an agreement have any market impact to be illegal. Moreover, the Bureau's view is that the provisions apply to agreements entered into by employers on or after June 23, 2023, and to conduct following that date, that reaffirms or implements older agreements which contravene the provisions.

The existing ARD is available to shield an agreement between employers from criminal enforcement where a party proves, on a balance of probabilities, that a restraint that would otherwise violate the criminal provisions is (a) ancillary to a broader or separate legitimate agreement that includes the same parties and (b) directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement. For example, the Bureau has stated that it will generally not investigate no-poach agreements that are ancillary to merger transactions, joint ventures, strategic alliances or business arrangements such as franchise agreements and certain service provider-client relationships under the new criminal no-poach provisions, unless the agreements are "clearly broader than necessary in terms of duration or effected employees" or where the broader agreement is a "sham." To determine whether a restraint is ancillary, the Bureau will examine the terms and form of the agreement, the relationship between the restraint and the broader agreement and how the restraint furthers the broader agreement's purpose. The Bureau will consider the restraint's duration, subject matter and geographic scope (e.g., whether it applies to employees unrelated to the collaboration).

An area of increased attention for businesses and industry associations since June 2023 has been information sharing and benchmarking activities that cover employment-related matters. As was previously the case, sharing information relating to matters that are the subject of the criminal conspiracy provisions, such as wages or terms of employment, is not by itself illegal. However, as is the case with sharing competitively sensitive information with downstream competitors, the sharing of information by employers, if not carried out very carefully, carries the risk of being viewed as facilitating or being evidence of an illegal agreement. Accordingly, organizations must take care in how such information is exchanged to avoid the risk of facilitating or suggesting an agreement between employers on the relevant subject matter.

As discussed elsewhere in this Update on the amendments, the Bureau is not the only enforcer of the criminal conspiracy provisions. Private parties have long had a right to bring private actions for damages based on alleged violations of the criminal provisions of the Act. Since these amendments came into force on June 23, 2023, private parties may bring a claim for damages (on an individual or class basis) based on an alleged violation of the new wage-fixing and no-poach provisions. While the judiciary does afford Bureau guidance significant deference, the guidance is not dispositive. In any event, private plaintiffs do not necessarily adopt or rely upon it and may nonetheless choose to test the bounds of the law with the court notwithstanding the Bureau's guidance.

Civil liability framework relating to commercial agreements

Agreements between competitors

As has been the case for some time, agreements between competitors that do not fall within the price-fixing, market allocation or output restriction categories of the criminal conspiracy provisions (or that meet the statutory defences to these provisions) may still be challenged by the Commissioner under the civil agreement provisions of section 90.115 and be subject to a Competition Tribunal (Tribunal) order

15 Agreements between competitors may also be reviewed under the abuse of dominance provisions of section 79 on a joint abuse theory of harm (refer to the section on abuse of dominance of this guide). Where the Commissioner or private litigant is seeking more than a prohibition order, given that the legal test to be met under section 79 remains more onerous than that under section 90.1 and there is symmetry in the remedies available under these provisions, it is likely that competitor agreements that are not conspiracies or mergers will generally be examined and challenged under section 90.1. However, if the only remedy being sought in respect of an arrangement between two or more major competitors is a prohibition order, then it may be less burdensome to pursue this remedy under section 79 as the Commissioner or private litigant need only to establish a practice of anti-competitive acts (i.e., they do not need to establish any adverse competitive effect).

where they are found likely to result in an SLPC. The types of competitor agreements that may be reviewed under section 90.1 range from strategic alliances, joint ventures, joint development and production agreements, commercialization agreements, research and development agreements, patent settlement agreements and joint procurement/buying group arrangements to standard-setting arrangements, information-sharing and benchmarking agreements. However, as a result of the new amendments, these types of agreements will by subject to challenge not just by the by Bureau but by private litigants as well. In addition, parties to these types of agreements will face increased exposure from a wide array of possible remedies, including potential financial consequences for agreements that are found to be anti-competitive on a civil basis.

Prior to the recent series of amendments, the Tribunal's remedial jurisdiction under section 90.1 was limited to issuing orders prohibiting any person from doing anything under the agreement and orders requiring any person, with that person's consent, to take any other action. The Tribunal did not have the authority to impose financial penalties for breaches of section 90.1. Further, if the Tribunal found that the arrangement was likely to bring about gains in efficiency that would be greater than and offset the substantially adverse competitive effects, and such efficiencies were not otherwise attainable in the absence of the agreement, the Tribunal was foreclosed from making any order or granting any remedy.

In addition, the Commissioner had a monopoly on bringing enforcement action in relation to civil agreements between competitors. (Private parties have had no ability to enforce these provisions of the Act and the Commissioner's enforcement activity under section 90.1 has been very limited.) Overall, the Bureau's enforcement approach, as articulated in its Competitor Collaboration Guidelines and its actions over the 15-year period since section 90.1 was enacted in 2009, reflect an acknowledgement that non-criminal competitor agreements are efficiency- or innovation-enhancing or are often relatively benign from a competitive impact perspective.

With the recent amendments, civil agreements will need to be considered even more carefully. As discussed below, as of June 20, 2024, the Tribunal's remedial jurisdiction under section 90.1 has been substantially expanded to include the types of remedial orders available under the abuse of dominance provisions including the power to issue, at the most extreme, divestiture orders. Significant administrative monetary penalties can also now be ordered. Since December 15, 2023, parties to agreements also no longer have the benefit of the efficiencies defence (though efficiencies will likely remain relevant to a determination of the anti-competitive effects of any agreement).

Further, commencing June 20, 2025, in a significant change from the current law governing civil agreements between competitors, private litigants will have the ability to challenge such agreements as anti-competitive with leave from the Tribunal, and private litigants will be able to seek remedial orders under section 90.1, as well as monetary relief under the new private access provisions of the Act.

While it will likely take time for the impact of these changes in the law to become apparent, the risk calculus for businesses entering into agreements with one or more of their competitors has fundamentally changed.

Another important question is whether there is scope for private parties to seek leave to bring civil applications in relation to mergers. Although the Bureau still has sole authority to review and challenge mergers under section 92 of the Act, it is conceivable that a merger could be an "agreement or arrangement" within the scope of section 90.1 and therefore be subject to a Tribunal application brought by a private party, assuming leave would be granted. Time will tell whether this is a significant risk for merging parties or only a theoretical concern.

Agreements between persons, regardless of whether they are competitors

Agreements between businesses that do not compete with each other were historically not exposed to any remedy under the Act. Only unilateral conduct — such as price maintenance, refusals to deal/supply, exclusive dealing or other anti-competitive behaviour — by one firm (typically the supplier) towards another firm in the supply chain has been subject to potential civil redress under the Act where the required anti-competitive effects in the relevant market are established.

Beginning December 15, 2024, any agreement between non-competitors (as well as competitors) will be subject to challenge by the Commissioner where (a) a "significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market" and (b) the agreement is likely to result in an SLPC. Further, as of June 20, 2025, such agreements will also be subject to challenge by private parties (with leave of the Tribunal).

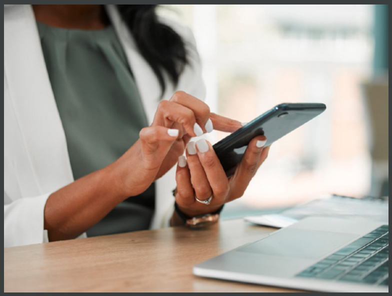
The scope and analytical framework for the new provision will require guidance from the Bureau (and likely clarification through jurisprudence, as well). The new provision provides that anti-competitive conduct may be found where "any part of" an agreement has a significant purpose to prevent or lessen competition, with potential implications for common clauses found in commercial agreements (e.g., a lease covenant or exclusivity provisions in licensing agreements). The "significant purpose" concept is new to the Act and the absence of any adjective (such as "substantially" or "adverse") to modify "prevent or lessen competition" is also noteworthy. Clauses limiting competition are common and important elements of commonplace commercial agreements such as leases, licensing agreements, distribution agreements, contract manufacturing agreements and outsourcing agreements, to name just a few. Accordingly, the potential scope of this new provision is very broad and guidance is needed to assure Canadian businesses that the new provision is intended to be reserved for restrictive clauses that lack a reasonable commercial justification.

The implications of the potential breadth of this provision are compounded by the fact that both private parties (having obtained leave) and the Commissioner will be able to apply for remedial orders under the provision and that, where the Tribunal finds that the legal test is satisfied, the Tribunal has the discretion to make the same type of orders as it can under the abuse of dominance provisions. These range from prohibiting enforcement of certain elements of the agreement to granting significant monetary penalties, monetary relief and prescriptive orders, including — at the most extreme — divestiture orders.

In recognition of the substantial expansion of the existing civil provision, the coming ability of private parties to seek remedial orders and the potential severity of the consequences of non-compliance, the Bureau has committed to issuing guidance on its approach to enforcing these new provisions quickly, including in relation to restrictive covenants. While such guidance will be welcome, it will not be binding on the Tribunal and so cannot fully mitigate the risk of strategic litigation by private parties.

Refusal to supply and right of repair

Easing the burden for refusals to deal and the new right to repair



The expanded refusal to deal provision has been revamped with a lower leave standard and a new "right to repair."

Historically, private parties have brought applications to the Competition Tribunal (the Tribunal) under the refusal to deal provision under section 75 of the *Competition Act* (the Act) more frequently than the Commissioner of Competition (the Commissioner), but with limited success. The available remedy under these provisions was limited to an order to supply on usual trade terms. Moreover, in order to obtain leave to bring an application, an applicant had to demonstrate that — among other things — a person was "substantially affected in his business" due to the inability to obtain adequate supplies of an input on usual trade terms. This requirement was, more often than not, a stumbling block in the context of section 75 and the related applications for leave, as the Tribunal consistently interpreted the requirement to refer to the entirety of the person's business, rather than only a business unit or product line. Over the past two decades, six applications for leave were specifically denied with respect to alleged refusals to deal because only part of a business (whether by percentage of revenue or by lines of business) was affected.[16]

The amendments expand the refusal to deal provision by now providing that a party seeking leave is only required to show that they are "substantially affected in the whole or part of their business". The new leave standard is discussed in more detail in the section of this guide discussing private actions. The available remedy has also been expanded somewhat: previously, the Tribunal could order a supplier to accept a person as a customer "on usual trade terms", whereas now the Tribunal can order a supplier to accept a person as a customer "on the terms that the Tribunal considers appropriate". We expect that the terms established by the Tribunal will be informed to some extent by the usual trade terms, though the Tribunal may require additional conditions to address concerns on a case-by-case basis. In addition (and as discussed in more detail in the private actionssection of this guide), similar to the new remedies for other non-merger civil provisions of the Act, private parties may now seek monetary relief under the refusal to deal provision.

The amendments also introduce into section 75 a "right to repair," which refers to the concept that end users of products and devices should have the freedom to repair those items, including by ensuring that manufacturers provide for timely access to the spare parts, software and technical support required to perform necessary repairs. A manufacturer's rationale for imposing repair restrictions may include intellectual property, safety, liability/reputation and service quality. As with recent developments in other countries (e.g., the U.S. FTC's Nixing the Fix: An FTC Report to Congress on Repair Restrictions [PDF]), Canada has for several years seen calls on multiple fronts for legislation providing for consumers' right to repair, citing sustainability, economic benefits and consumer rights.

Section 75 now includes a right to repair, capturing circumstances where a supplier refuses to offer repair of or diagnostic services for a product, or to make the

16 *Broadview Pharmacy v. Pfizer Canada*, 2004 Comp Trib 23, in the supply of pharmaceutical products to a pharmacy; *1177057 Ontario Inc [Broadview Pharmacy] v. Wyeth Canada Inc*, 2004 Comp Trib 22, also in the supply of pharmaceutical products to a pharmacy; *Sears Canada Inc v. Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6, in the supply of fragrances and cosmetics product; *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp Trib 21, in the supply of motor vehicles (also sought leave under section 77); *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp Trib 28, in the supply of total loss valuation services; and *CarGurus, Inc v. Trader Corporation*, 2016 Comp Trib 15, in the supply of vehicle listings services in online marketing.

means of diagnosis or repair available within a specified period. Where the following statutory factors of the refusal to deal provision are demonstrated, the Tribunal may order a supplier to repair or provide diagnostic services for a product:

(a) The person is substantially affected in the whole or the part of their business or is precluded from carrying on business due to their inability to obtain adequate supplies of the product anywhere in the market on usual trade terms.

(b) The person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market.

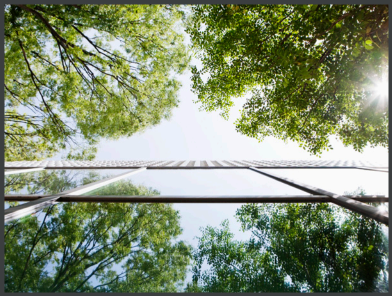
(c) The person is willing and able to meet the usual trade terms of the supplier or suppliers of the product.

(d) The product is in ample supply or, in the case of a means of diagnosis or repair, can be readily supplied.

(e) The refusal to deal is having or is likely to have an adverse effect on competition in a market.

The revised provision includes an important exemption confirming that nothing in the refusal to deal provision requires a supplier to disclose a trade secret. It may be that Tribunal case law will need to address the scope of this exemption.

Deceptive marketing provisions continue to be enforcement priority



Recent amendments put greenwashing and drip pricing in the spotlight, with significantly increased monetary penalties, and soon, a new private right of action.

Canada's deceptive marketing practices regime has been the subject of incremental change since 2022 to strengthen the enforcement stance against deceptive marketing. The civil enforcement of the deceptive marketing practices provisions includes substantial monetary penalties and, commencing in June 2025, a new private right of access to the Competition Tribunal (Tribunal), albeit without the ability to seek financial relief beyond the traditional restitution remedy (which is only available in certain cases, and is not available for the new greenwashing provisions). Enforcing the deceptive marketing practices provisions of the *Competition Act* (Act) is an enforcement priority for the Competition Bureau (Bureau), with a particular focus on price representations and environmental claims.

The Commissioner of Competition (Commissioner) has advised that the Bureau will "[c]ontinue to crack down on deceptive marketing practices in relation to environmental claims ("greenwashing") and junk fees in the form of drip pricing."[17] As such, businesses should ensure that they understand the heightened risks associated with their marketing efforts and update their compliance efforts accordingly.

Spotlight on 'greenwashing'

In recent years, consumers have become more environmentally conscious and frequently seek products and services that are environmentally friendly — "clean," "green" or "sustainable." In response to this demand, it has become increasingly common for businesses to promote their products or services with claims about their environmental aspects and impacts. When these environmental claims are misleading or unsubstantiated, businesses are considered tobe engaging in "greenwashing" and expose themselves to liability under the deceptive marketing provisions of the Act.

The Bureau, consistent with actions by antitrust, securities and other enforcers and regulators around the world, has already taken enforcement action against greenwashing and commenced several inquiries and investigations into environmental claims. To date, such Bureau enforcement action has been based on a breach of the general misrepresentation provision of the Act, which exposes businesses to liability where

- they make a representation to the public that is false or misleading in a material respect
- they make a performance claim, being a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product, that is not based on an adequate and proper test

Now, environmental representations or claims may also be challenged under two new specific provisions. Under these new provisions, businesses (rather than the Commissioner or a private litigant) bear the onus of being able to prove, on a balance of probabilities, that

- any statement, warranty or guarantee of "a *product's* benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" is based on an adequate and proper test
- any representation with respect to the "benefits of a business or business activity" for "protecting or restoring the environment or mitigating the environmental and ecological causes or effects of

17 Competition Bureau Canada, "2024-2025 Annual Plan – Onwards and upwards: Strengthening competition for Canadians" (30 April 2024).

climate change" is based on adequate and proper substantiation "in accordance with internationally recognized methodology"

Notably, these new provisions do not require the applicant to also establish that the representation is materially false or misleading in any respect.

Importantly, the Act has always required that performance claims (including statements, warranties or guarantees) be substantiated by adequate and proper tests and the Bureau has investigated and has ongoing investigations regarding environmental performance claims. There have been several cases over the years where the courts have considered advertising of all kinds of different performance claims and whether the claims could be said to be based on "adequate and proper" testing.[18] The change arising from these new provisions is that environmental claims regarding the benefits of a business or business activities must be substantiated by an "adequate and proper test" in accordance with an "internationally recognized methodology". This standard is undefined in the new amendments. However, it is notable that during the Senate debates just prior to royal assent, certain senators remarked that while the expression "internationally recognized methodology" may appear vague, the words should be interpreted in accordance with their ordinary meaning. It was also commented that an analysis of a representation should consider federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada.[19] Moreover, the Bureau has committed to consult with stakeholders and to release guidance[20] to provide a predictable framework for purposes of assessing the substantiation of environmental claims.

In the interim, businesses will have to grapple with a degree of uncertainty, though the Act continues to include an explicit due diligence defence in section 74.1(3). As has been the case before the amendments, it is critical that businesses making claims or representations relating to concepts such as "sustainability," "net-zero" and "carbon-neutral" are doing so in a manner that is consistent with the most recent evidence and methodologies of independent third-party organizations with well recognized expertise in the appropriate field. Wherever possible, when making environmental representations, businesses should clearly disclose the substantiation source(s) that provide support for the claim. Businesses should also prioritize compliance efforts and begin taking proactive measures to address potential risks with existing representations and claims.

OSP: shifting legal burden places premium on compliance records

The "ordinary selling price" (OSP) provisions of the deceptive marketing regime are designed to prevent suppliers from taking advantage of consumers through the false promise of savings. The OSP provisions ensure that suppliers (typically retailers) do not mislead consumers by referring to inflated prices as the "ordinary" or "regular" selling price of a certain product and then suggest a discount. They also ensure that retailers do not mislead consumers by falsely claiming that their own prices (for a specific product or in general) are lower than those offered by competitors in the market.

The OSP is the regular price at which a product is commonly offered for sale, either by (a) the supplier, where the supplier is suggesting that its products are on sale or being offered at a discount, or (b) the other competitors in the market, where the supplier is suggesting that its prices are cheaper than competing retailers' prices for the same product. Establishing the OSP is typically the most critical element when assessing compliance with these provisions.

The Act requires that where a supplier advertises a discount on its product, the reduced price should be compared to the product's OSP, and not an artificially inflated regular price to create the illusion of larger savings. While the Act does not prescribe specific time periods, according to the Bureau's guidance, the OSP can be established through the application of either

- *the volume test*, under which the OSP is the price or a higher price at which the business sold a substantial volume of the product (usually 50% of the product) within a reasonable period of time (usually 12 months, but it can be less depending on the particular context)

18 See, e.g., *Canada (Commissioner of Competition) v. Imperial Brush Co*, 2008 Comp Trib 2, at para 128.

19 "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023" [PDF], 3rd reading, Debates of the Senate (Hansard), 44-1, 153, No. 214 (18 June 2024) at 6736.

20 Prior to the 2022 amendments, the Bureau had been working on new guidance for environmental claims as it archived its 2008 environmental claims guidance developed with the Canadian Standards Association (Competition Bureau Canada, "Environmental Claims: A Guide for Industry and Advertisers" (25 June 2008).

- *the time test*, under which the OSP is the price or a higher price at which the business offered the product for sale, in good faith, for a substantial period of time (usually 6 months, though this is also context-dependent and can be shorter)

For a supplier to promote its prices as lower in comparison to those charged by other suppliers in a market, the Bureau's guidance indicates that competitors in the relevant market must have either (a) sold a substantial volume of the product (usually 50% or more) at the higher price within a reasonable period of time (usually 12 months) before or after making the representation, or (b) offered the product for sale at the higher price in good faith for a substantial period of time (usually six months) before or after making the representation.

Prior to June 20, 2024, the Commissioner had the burden in any proceedings under these provisions to establish the supplier's OSP. This burden has now shifted to the supplier, who now has the onus of proving, on a balance of probabilities, the OSP of a product using the tests discussed above.

Businesses should carefully review their internal OSP compliance programs and ensure that appropriate record-keeping practices are implemented, which will allow them to demonstrate clearly and quickly that the OSP being represented is genuine and compliant with the Act.

Clarification on drip pricing

Drip pricing is a deceptive pricing strategy where a company only advertises part of a product's price upfront and reveals additional costs as the consumer goes through the purchasing process. As a result of additional fees that "drip" into the final purchase price, the initially advertised price is unattainably low and, therefore, misleading to consumers. This has been an area of active enforcement by the Bureau.

In June 2022, the practice of "drip pricing" was expressly codified as misleading under the criminal and civil deceptive marketing provisions. This change obviated the need for the Commissioner to establish that such practices are misleading in each case, though other elements of the provision still need to be established.

The 2022 amendments expressly excluded obligatory fees imposed by law from the scope of fees that would be subject to drip pricing provisions. This was interpreted by some as creating an exemption allowing suppliers to pass on fees imposed by the government by law on the supplier without disclosing such fees. The latest amendments strengthen the drip pricing provisions to clarify that only fixed, mandatory amounts imposed by law directly on the *purchaser of a product*, such as sales tax, can be excluded from the advertised price. Accordingly, it is now clear that a supplier seeking to pass on fees or amounts imposed by the government on purchasers of its products cannot exclude any such fees or amounts from the advertised price. As described by the Commissioner, this change is intended to "close a potential loophole in the 'drip pricing' provision and guard against the unintended proliferation of junk fees."[21]

Since June 2022, the Bureau has already brought a case before the Tribunal under the new provision, alleging that Cineplex engaged in drip pricing when selling movie tickets online.[22] The hearing concluded in February 2024, and the Tribunal decision is pending. The Bureau also reached a settlement with TicketNetwork regarding concerns over drip pricing and other misleading claims in reselling tickets online, requiring the company to pay an $825,000 penalty and to cease all deceptive marketing practices.[23] Most recently, in June 2024, the Bureau reached a settlement with SiriusXM Canada to resolve drip pricing concerns regarding subscription price representations, which included the payment of a $3.3-million penalty.[24] These cases follow several other drip pricing enforcement actions that were brought before drip pricing was explicitly referenced in the Act.

21 Competition Bureau Canada, "Brief to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance" [PDF] (1 March 2024).

22 Competition Tribunal, "Case Details: Commissioner of Competition v. Cineplex Inc.".

23 Competition Bureau Canada, "TicketNetwork to pay $825,000 penalty to settle misleading advertising concerns in the ticket resale market" (21 November 2023).

24 Competition Bureau Canada, "Sirius to pay $3.3 million penalty to settle concerns over subscription price advertising" (5 June 2024).

Consequences of non-compliance

Where the Tribunal or a court finds that a business has violated the Act's deceptive marketing provisions, it has the discretion to issue a broad range of remedial orders, including an order or combination of orders

- prohibiting the reviewable conduct, being the representation or unsubstantiated claim in question and similar representations and claims
- requiring the publication of corrective notices
- imposing monetary penalties, payable to the government (not to private parties), of up to the greater of $10 million for the first order (and $15 million for each subsequent order) and three times the value of the benefit derived from the agreement (or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues) for businesses
- requiring the payment of restitution to those who purchased the products at issue (only available for orders relating to violations of the general prohibition against materially false or misleading representations; this is not available for breach of either of the two new greenwashing provisions)

Currently, interim orders are only available to the Commissioner, but effective June 20, 2025, interim orders will also be available to private applicants. As such, private litigants (with leave) will be able to compel a business to cease or alter their marketing campaigns before a full hearing on the merits can be held.

Importantly, unlike the situation with other civil reviewable trade practices, the new remedy of monetary relief from the Tribunal will not be available under the civil deceptive marketing practices provisions. Instead, once the private access regime comes into force on June 20, 2025, private litigants bringing applications under the civil provisions will be limited to the traditional restitutionary remedy, which is only available for violations of the general prohibition against representations that are false or misleading in a material respect. (Notably, this remedy is not available for other deceptive marketing practices, including the two new greenwashing provisions discussed above.) However, as noted below, private parties already have the ability to obtain monetary relief in the form of damages where a private litigant can demonstrate a breach of the criminal provisions or an actionable misrepresentation at common law or under provincial consumer protection statutes.

Potential for increase in private actions

Each year, the Bureau receives thousands of complaints — both informal and formal (via the section 9 regime of the Act) — regarding alleged deceptive marketing practices. For example, in 2022–23, the Bureau received nearly 6,000 complaints relating to deceptive marketing over a 12-month period, accounting for more than 90% of the total complaints received.[25] While these facts illustrate that deceptive marketing is an area of significant public concern and an enforcement priority for the Bureau, the sheer volume of annual complaints highlights that the Bureau cannot investigate all of them in a timely manner.

To date, under the Act, private parties can only commence an action for damages on the basis that the alleged misrepresentation amounts to a violation of the criminal deceptive marketing practices. While private parties have no right of action under the civil deceptive marketing provisions of the Act, they can pursue claims for damages and other relief in respect of false and misleading representations at common law and under provincial consumer protection legislation. Over the years, private plaintiffs, including class action plaintiffs, have pursued such claims with some success.

As discussed in section The expansion of private enforcement of this guide on the expansion of private enforcement under the Act, as of June 20, 2025, private parties able to satisfy the Tribunal or a court that it is in the "public interest" to grant them leave will now be able to challenge deceptive marketing practices under the civil provisions themselves. Given the existence of a well-established avenue to pursue monetary relief from the courts in respect of deceptive marketing practices, the lack of availability of additional monetary awards payable to private litigants under the Act's new right of private action combined with the public-interest leave test, it is unclear whether this change will open the door to a wave of new litigation before the Tribunal. In terms of possible early private litigants, environmental justice groups such as Ecojustice and Greenpeace have long been pursuing businesses by lodging formal complaints with the Bureau regarding environmental claims. These groups were also active in making submissions before Parliament on the new environmental claims provisions. Once the new private access regime comes into force on June 20, 2025, these groups (assuming they obtain public-interest leave) will be able to file and litigate their applications for remedies directly and on their own

25 Competition Bureau Canada, "Competition Bureau Performance Measurement & Statistics Report 2023-2024" (28 March 2024).

terms. As a result, the resource-strapped Bureau may soon be eclipsed by private plaintiffs and public-interest organizations as the primary enforcer of greenwashing complaints in Canada.

Private actions

The dramatic expansion of private enforcement of Canada's competition laws

New amendments will vastly expand private access to the Competition Tribunal and represent the most dramatic expansion of private enforcement of Canada's competition laws in a generation.

For over a century, Canada has generally relied on a public enforcement model for the enforcement of its federal competition laws. Indeed, for most of the history of the *Competition Act* (the Act), the Commissioner of Competition (Commissioner) has had a near-monopoly on enforcing the Act. In the 1970s, Parliament adopted a private right of action for damages, but only in respect of the most egregious forms of criminal conduct under the Act. In 2002, after much consultation and debate, Parliament adopted a limited right of private access to the Competition Tribunal (Tribunal). However, this right of private access was subject to a leave requirement, was limited to certain reviewable practices and included no ability to seek monetary relief from the Tribunal.

In short, for decades, Parliament has deliberately pursued a limited and measured approach to permitting private enforcement of Canada's competition laws, particularly in light of the perceived excesses of private antitrust litigation in the United States. In addition, legislators and policy makers had expressed concern about the risks of tactical and opportunistic private litigation chilling pro-competitive conduct. In the absence of any compelling evidence of the "underenforcement" of Canada's competition laws, Parliament took the policy approach of leaving enforcement of Canada's competition laws to the Commissioner and limiting private access to the Competition Tribunal.

In its recent amendments to the Act, Parliament has abandoned this measured approach and has opened the doors of the Tribunal to private litigants that seek to enforce the civil provisions of the Act. For the first time in Canada's history, Parliament has created a right for private litigants to pursue proceedings before the Tribunal for monetary relief on behalf of themselves as well as on behalf of others. In particular, these amendments include

- the creation of new rights of private access to the Tribunal in respect of civil deceptive marketing practices and anti-competitive commercial agreements
- a liberalizing of the test for "leave" that a private party has to meet to commence an application before the Tribunal, potentially enabling public-interest organizations to pursue proceedings before the Tribunal
- the creation of a new right for a private party to seek monetary relief from the Tribunal in respect of civil reviewable practices
- the recognition of a right for a private party to seek monetary remedies on behalf of other "affected parties" and the apparent creation of a nascent class action regime that will be overseen by the Tribunal

In order to give businesses an opportunity to assess their practices and the Bureau to publish guidance, as well as to provide time to consider the framework and procedural rules for private enforcement, most of these new private access provisions will be subject to a one-year delay before they come into force. In other words, they will only come into force on June 20, 2025.

These amendments represent a fundamental change in the enforcement of Canada's competition laws. For many observers, these significant amendments are troubling. While the concept of providing for some additional private enforcement has been discussed over the years (e.g., abuse of dominance, for which private enforcement came into effect in June 2022) the broad-sweeping amendments have been passed with limited consultation, they depart from Parliament's historically measured approach to private enforcement and they adopt open-ended remedies with no developed procedural rules for the award of collective relief. On their face, these new amendments potentially expose domestic and foreign companies that conduct business in Canada to tactical litigation and financial risks before the Tribunal in respect of market conduct that the Commissioner has declined to investigate or enforce.

We have set out our summary of these amendments under the headings that follow.

The existing regime

The existing regime in Canada (until the amendments take effect) provides for limited avenues to pursue private enforcement of Canada's competition laws.

In 1976, Parliament enacted a limited private action remedy for damages under section 36 of the Act. However, a private party could only invoke this provision before the courts for actual damages arising from criminal conduct under the Act, particularly for price-fixing offences under section 45 and criminal deceptive marketing practices under section 52. Following the adoption of class proceedings legislation in the various provinces in the 1990s, the plaintiffs bar in Canada has successfully invoked these provisions to pursue collective monetary relief for class members who have suffered harm arising from criminal anti-competitive conduct. However, given the restrictions under section 36, plaintiffs have generally been unable to invoke these provisions in respect of non-criminal conduct under the Act, and they have had no ability to seek relief from the Tribunal. In a number of prior cases, private plaintiffs have sought to claim restitutionary relief and disgorgement under the Act, but the courts have consistently held that the remedies under section 36 are limited to actual damages.

In 2002, after a long policy debate, Parliament enacted amendments that opened up limited private access to the Tribunal for certain types of reviewable and non-criminal conduct. In particular, under section 103.1 of the Act, private parties have the ability to seek leave to bring applications to seek injunctive relief in respect of conduct constituting refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77). In June 2022, this list was expanded to include abuse of dominance (section 79). Under these provisions, private litigants could seek "leave" or permission from the Tribunal to bring an application to pursue the enforcement of these civil reviewable practices. The test for leave has presented a high bar, requiring that an applicant show it has been directly and substantially affected in its business. But even if leave was granted, private litigants had no ability to seek any form of damages or monetary relief from the Tribunal. Given the limits of this remedy and the stringent leave test, over the past 20 years, the Tribunal has only granted leave in a limited number of cases, and most of these have been either dismissed or resolved through settlement.

In June 2022, Parliament adopted new substantive amendments that criminalized certain types of wage-fixing and no-poach agreements under the Act. These amendments came into force in June 2023, and private parties are now able to pursue claims for actual damages under section 36 in respect of such criminal conduct. However, to date, there have been few signs of litigation in this area.

Over the past two years, there has been renewed policy debate over a potential expansion of private enforcement of the Act, particularly in light of larger debates over inflation and consumer pricing in certain sectors in Canada. In its recent policy submissions, the Bureau has noted its resource constraints, and opined that there may be a role for private enforcement to supplement the Commissioner's enforcement of the Act in respect of certain reviewable practices. Through these new amendments, Parliament has dramatically expanded private access to the Tribunal and has transformed the enforcement of Canada's competition laws.

Changes to private enforcement of the Act

As a result of the new amendments to the Act which will come into force after a one-year delay, private parties will have significantly expanded access to the Tribunal to seek behavioural as well as monetary relief in respect of reviewable conduct under the Act. These new rights of access will be available to individuals and businesses (including competitive rivals) as well as potentially public-interest organizations. A private party must still obtain leave from the Tribunal to bring a proceeding, but Parliament has liberalized the existing test for leave to encourage more private enforcement of the Act.

While Parliament has adopted a broad range of changes to the regime of private enforcement under the Act, we have highlighted some of the most significant changes under the headings below.

Expanded rights of access to the Competition Tribunal

First, Parliament has amended the Act to permit private parties to seek leave from the Tribunal to pursue proceedings in respect of two additional types of anti-competitive conduct under the Act — namely, civil deceptive marketing practices and civil anti-competitive agreements. These expanded rights of access will come into effect on June 20, 2025, the first anniversary of the passage of the amendments.

New private right of access in respect of deceptive marketing practices

Under these amendments, a private party will be able seek leave from the Tribunal to challenge a deceptive marketing practice under section 74.1 of the Act. In particular, a private party can seek leave to pursue relief against an individual or company that has made false or misleading representations to the public in respect of the promotion of the supply or use of a product or the promotion of any business interest. And as a result of the parallel amendments in respect of the new greenwashing provisions of the Act (see above), it will now be expressly open for a private litigant to seek leave to pursue a proceeding in respect of alleged misrepresentations relating to a product's benefits in protecting the environment or in mitigating the effects of climate change.

It remains to be seen how impactful this new right of access will be. Under the existing Act, private parties already have the ability to pursue claims for damages under section 36 for false and misleading representations that contravene the criminal deceptive marketing provisions of the Act. Private parties also have the ability to pursue claims for damages and other relief in respect of false and misleading representations at common law and under provincial consumer protection legislation, and the courts have certified numerous deceptive marketing class actions over the years. As a result, given the existence of a well established avenue to pursue monetary relief from the courts in respect of deceptive marketing practices, as well as the absence of a remedy of monetary relief under the new amendments (beyond the traditional restitutionary remedy), it is unclear whether these amendments will open the door to a wave of new litigation before the Tribunal, particularly given the continuing requirement to obtain leave. But as noted above, these amendments do appear to open the door for public-interest litigants to challenge deceptive marketing practices, including in respect of greenwashing claims.

New private right of access in respect of anti-competitive agreements

Under these amendments, a private party will be able to seek leave from the Tribunal to challenge a civil anti-competitive agreement under section 90.1 of the Act. In particular, a private party will be able to seek leave to challenge an agreement between two or more parties who are competitors on the alleged basis that the agreement has substantially prevented or lessened (or is likely to substantially prevent or lessen) competition in Canada. And as noted above, as a result of separate amendments of the Act that will come into effect in December 2024, section 90.1 will be extended to include agreements between two or more parties that are not competitors, if the Tribunal finds that a *significant purpose of the agreement, or any part of it*, is to prevent or lessen competition in any market.

In short, once both sets of amendments are in force on June 20, 2025, private parties will have the right to seek relief from the Tribunal in respect of a wide range of horizontal and vertical agreements that may have an impact on competition in a particular market. As discussed above, there is no precedent for the new "significant purpose" test under Canadian competition law, and these amendments could potentially be invoked by private parties in an attempt to challenge "any part" of a horizontal or vertical commercial agreement that has a "significant purpose" of restricting competition. In concept, a private litigant could seek access to the Tribunal to challenge leases, licensing agreements, distribution agreements, patent settlements and other types of agreements that contain exclusivity or non-compete provisions.

New incentives for pursuing existing private rights of access

As noted above, there are existing rights for private parties to seek leave from the Tribunal in respect of a broad range of civil reviewable practices, including abuse of dominance. However, given the existing leave test and the absence of monetary remedies prior to these amendments, there have only been a handful of private access cases that been pursued before the Tribunal to date. With the changes to the leave test and the new ability to seek monetary remedies, as well as the amendments to the test for abuse of dominance that came into effect in December 2023, an increase in applications by private parties can be anticipated that seek to invoke these existing rights of access in respect of refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77) and perhaps most significantly, abuse of dominance (section 79).

Lower threshold for private parties to seek leave for access to the Tribunal

Second, Parliament has amended and loosened the test for obtaining leave to pursue proceedings before the Tribunal. Again, this lowered test will come into effect on the first anniversary of the amendments (June 20, 2025).

Historically, a private party seeking access to the Tribunal had to demonstrate that they were "directly and substantially affected" in their business by the alleged anti-competitive conduct. However, with the amendments, the test for leave has been lowered for most reviewable practices with the result that a private party will only be required to show that it has been "directly and substantially affected" in "whole or part" of their business. For the reviewable practices of refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77) and abuse of dominance (section 79), a private party may obtain leave by advancing credible evidence that gives rise to a *bona fide* belief that the party may have been directly and substantially affected in "whole or part" of their business. In addition to these grounds, in an expansive change to existing law, a private party may also seek leave to bring a proceeding before the Tribunal in respect of these practices if the Tribunal is "satisfied that it is in the public interest to do so".

However, it is important to note that a private party that is seeking private access in respect of a deceptive marketing practice (section 74.1) may only seek leave on the basis of the public-interest test. This restriction is interesting: Parliament appears to have been alive to the risk of tactical litigation by a competitive rival that claims that it was harmed in its business as a result of marketing claims, but it nonetheless extended a right of access to rivals and organizations that were not harmed to seek private access on public-interest grounds.

The liberalized test for leave that only requires a showing of a limited impact in respect of part of the applicant's business has no precedent in the long history of Canadian competition law. In addition, in the body of the amendments, Parliament has not defined or elaborated on the meaning of the phrase "public interest". While some commentators have speculated that the Tribunal may resort to the limited case law that recognizes "public interest standing" to advance arguments in constitutional litigation, this case law is not analogous to the regime of private access given that the Commissioner has existing powers to bring proceedings and that there may be competitive rivals and/or customers who have a direct interest in the underlying applications. As a result of this amendment, the Tribunal will be placed in a significantly new role as gatekeeper of its processes in assessing what proposed proceedings are "in the public interest".

It is important to note that there are other important aspects of the leave regime that remain unchanged under the amendments. For example, private enforcement remains unavailable where the Commissioner has already brought an application to the Tribunal challenging the conduct at issue, is currently investigating the conduct at issue or has already reached a settlement concerning the conduct at issue. Private parties must bring their applications no more than one year after the practice or conduct that is the subject of the application has ceased. Finally, in considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter.

New remedies for monetary relief

Third, Parliament has dramatically expanded the remedies for private parties by creating a right to pursue monetary relief from the Tribunal. Again, these new remedies will come into effect on the first anniversary of the amendments (June 20, 2025).

Prior to these amendments, private parties had no ability to pursue monetary relief from the Tribunal for any anti-competitive practice. As a result of these amendments, if a private party obtains leave to pursue a proceeding before the Tribunal and is successful on the merits of its application, the private party may seek an order from the Tribunal for the payment of "an amount, not exceeding the value of the benefit derived from the conduct [...] to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate".

There are several major implications of this change.

To begin, once all of these amendments come into force, for the first time a private party can pursue a claim for monetary relief before the Tribunal in respect of a broad range of non-criminal conduct under the Act, including in respect of refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79) and anti-competitive agreements (section 90.1). For deceptive marketing practices (section 74.1), the only financial remedy available that is payable to private litigants is the traditional restitution remedy, and it is only available in certain cases.

Second, the existence of a new remedy for monetary relief will create new incentives for consumers, customers, competitive rivals, public-interest organizations and entrepreneurial plaintiff lawyers to seek access to the Tribunal in a broad range of cases where the Commissioner has not initiated any investigation or taken any enforcement action.

Third, the nature and scope of the monetary remedy is uncertain, particularly since there is no express language that appears to tie the remedy to actual loss or compensatory damages. There is a live debate as to whether this remedy could be limited to actual damages, restitutionary damages, actual disgorgement, an amount to ensure compliance or some other monetary measure. Some observers have opined that Parliament adopted a disgorgement remedy, since it adopted an express limit on the remedy that precludes recovery of amounts that exceed "the value of the benefit derived". However, that language is only framed as a statutory limit, and there has been a long line of cases holding that there is no remedy of restitution or disgorgement under the Act. There is a compelling argument that Parliament's amendments do not change that settled law. However, given the open-ended language of the amendments, the scope of the amendments will likely be the subject of significant litigation and private parties are going to be incentivized to propose the broadest interpretation and the highest monetary awards.

Fourth, the amendments appear intended to permit some form of rights of collective recovery in favour of the applicant and any other person "affected by the conduct" or to "whom the products were sold". This language has raised the question of whether Parliament has contemplated a form of class proceedings before the Tribunal. However, in contrast to the rigorous provisions of provincial class proceedings legislation, the amendments offer little guidance in respect of process or substance for this regime of collective relief. On their face, the amendments only address potential distribution and claims administration issues at the highest level of generality, and do not provide any meaningful guidance as to how a proceeding for collective relief would actually be litigated before the Tribunal. Perhaps most importantly, the amendments include no statutory authority for the Tribunal to issue orders that bind the interests of "absent class members" (i.e., interested parties, competitors or purchasers who are not before the Tribunal) or any mechanism for "absent class members" to opt out or object to the Tribunal's proceedings.

Many obvious procedural questions remain.
For example:

- What test will an applicant need to satisfy to obtain a form of collective relief? There are currently no detailed class action procedural rules under the Competition Tribunal Rules. There has been speculation that the Tribunal could have reference to the "gap rule" under section 34 of those Rules, and thereby apply the test applicable in the Federal Court under the Federal Courts Rules. However, even the Federal Court test does not address all potential issues. We understand the Tribunal is working on more detailed rules, possibly to take the form of a practice direction or regulations.
- Will applicants be required to satisfy the traditional criteria for certification in common law jurisdictions (e.g., will they need to show the existence of an identifiable class? that there are common issues? preferable procedure?)? Will applicants need to show a causal relationship between the anti-competitive conduct and some type of common impact or gain? In other words, how does aggregate monetary relief work in cases where there is no right to damages per se?
- Which evidentiary standard will apply –the well known "some basis in fact" test? The same standard applied at leave applications?
- When will certification be addressed? Simultaneously with leave, or at some subsequent pre-merit stage? Will there be an ability for class members to opt out of the collective proceeding? Will settlements be binding on the class? Again, under the amendments, there is no statutory authority for the Tribunal to issue orders with preclusive effect, and it is unlikely that the Tribunal could find such authority in simple rule amendments.
- How will individual issues be dealt with?

Conclusion

In summary, these amendments represent the broadest expansion of private enforcement of Canada's competition laws in a generation. The adoption of new rights of access to the Tribunal, a lowered test for leave, a new monetary remedy and a mechanism of collective relief, coupled with surrounding substantive amendments that have changed the test for abuse of dominance and civil anti-competitive agreements and that have adopted new reviewable practices (such as greenwashing) will create incentives for consumers, businesses, public-interest organizations and class action plaintiffs to pursue proceedings before the Tribunal. While Parliament has wisely delayed the impact of these amendments until June 20, 2025, domestic and foreign companies in Canada will be exposed to significant new litigation risks in Canada, and will need to assess their competitive practices and exposure risks before these amendments come into force.

Market studies and other amendments

Formal market studies power and other procedural and remedial matters

Among other notable amendments, the Commissioner can now initiate formal market studies in the absence of suspected non-compliance with the *Competition Act*.

In addition to the significant changes to the Competition Act (Act) discussed throughout this guide, recent amendments also include the enactment of a formalized market studies power, a new prohibition of "reprisal actions", limitations on cost awards against the Commissioner of Competition (Commissioner) and a new certification regime to immunize agreements intended to protect the environment from the application of certain provisions of the Act. In this section, we discuss these additional amendments to the Act.

Formal market studies power established

Since December 15, 2023, a formal market studies power has been available to the Commissioner. Prior to the December amendments, only once a market inquiry had commenced because the Competition Bureau (Bureau) had reason to believe the Act had been violated was the Commissioner empowered to apply to the Competition Tribunal (Tribunal) for an order under its compulsory information gathering powers set out in the Act. Commissioners had called for a formal market studies power for several years now to enable the use of compulsory information gathering powers (which include oral examinations and production of documents or records under oath) outside of formal inquiries into specific conduct or arrangements under the Act.

There is a multi-step procedure required for the Commissioner to commence a market study, in addition to the court application process required to access compulsory powers. The procedure includes the following checks and balances:

- The Commissioner must consult with the Minister prior to commencing a market study. Similarly, prior to directing the Commissioner to commence a market study, the Minister must consult the Commissioner to assess whether the study would be feasible, including its cost.
- If the consultation determines that the market study will proceed, the Commissioner must prepare draft terms of reference to be published online for a public consultation period of at least 15 days. After considering any comments, the Commissioner then submits the terms of reference for the Minister's approval and, if approved, publishes the final terms of reference online.
- Once the final terms of reference are published, the Commissioner has 18 months, subject to an extension of up to three months at the Minister's discretion, to conduct the market inquiry and prepare a report.
- Prior to publishing the report, the Commissioner must circulate a full or partial draft report to every person who was compelled by court order to participate in the inquiry, who then has three working days to identify concerns regarding inaccurate or confidential information. Following this, the Commissioner must make the report available online.

First market study under new powers commenced

Since the Bureau's market study power expanded, the Commissioner commenced a market study into domestic air passenger services in Canada. On May 27, 2024, the Bureau launched a study of the state of competition of Canada's airline industry, its barriers to entry and expansion, and impediments to informed customer choice. The stated purpose of the study is to examine and improve competition for the benefit of domestic air passengers as well as the workers and entrepreneurs who enable such services. The market study is anticipated to run for approximately 12 months.

Update to statutory process for determination of privilege claims

The Act sets out a legislative scheme for dealing with claims of privilege in the context of a court-ordered production of records. Where an individual or business is compelled to produce records under the Act, they may claim that certain records are subject to solicitor-client privilege. These records are held in custody by a designated authority. Previously, the court had 30 days after a record was placed in custody to determine whether the record was in fact privileged based upon an application by the Commissioner or the owner of the record. If no such application was made within the 30 days, the Commissioner could apply on an ex parte basis for the record to be delivered to the Commissioner. There is now no timeframe within which the application for a determination of privilege must be filed. Notwithstanding this statutory process, it is common for privilege claims to be addressed on a more informal basis without judicial involvement.

Introduction of jury trials for corporations

Previously, if a corporation was accused of any offence against the Act, the corporation could only be tried without a jury. Corporations may now, subject to the court's discretion, be subject to jury trials where one or more individuals are also charged. Specifically, in a single indictment:

- If an individual plus one or more corporations are charged, the individual's election to be tried with or without a jury dictates whether the corporation is tried with or without a jury.
- If one or more corporations plus two or more individuals are charged, and all the individuals elect to be charged with or without a jury, the corporations must be tried in the same manner. If some but not all the individuals elect to be tried without a jury, the Attorney General makes the determination of whether each corporation is tried with or without a jury.

If only corporations are charged (i.e., no individuals), the corporations will be tried without a jury.

Prohibition of 'reprisal actions'

Completely new to the Act is a prohibition of "reprisal actions", which are defined as actions taken to "penalize, punish, discipline, harass or disadvantage another person" because of that person's communications with the Commissioner or their cooperation (or expressed intention to cooperate) in an investigation or proceeding under the Act. Upon application to a court by the Commissioner or an affected party, the court may issue a prohibition order and impose an administrative monetary penalty of up to $750,000 for individuals and $10 million for corporations, on first instance. While the maximum available penalties for reprisal actions are significant, the Act explicitly states that these penalties should not be calculated with a view to punishing individuals or corporations engaging in this conduct, but rather should promote conformity with the Act.

Environmental certification regime for agreements intended to protect the environment

The Act now provides that the Commissioner may grant an environmental certificate indicating that he/she is satisfied that an agreement or arrangement was made for the purpose of protecting the environment and is not likely to result in a substantial lessening or prevention of competition (SLPC). The certificate, which may have a term of up to 10 years (with a possibility of extension if requested by the parties), may also include any terms that the Commissioner considers appropriate. This process immunizes the agreement from the application of the criminal conspiracy, bid-rigging and civil collaboration provisions of the Act. The certificate is filed with the Tribunal and may be rescinded or varied by the Tribunal in certain circumstances.

It is noteworthy that in the Commissioner's letter, to the House of Commons Standing Committee on Finance dated March 1, 2024, which discussed several aspects of legislative reform to the Act,[26] he strongly recommended against adopting the environmental certificate regime due to "potentially significant unintended consequences". The Commissioner pointed to the numerous established ways for businesses to collaborate for environmental or other purposes while conforming with the Act, including the ancillary restraints defence against conspiracy provisions, conformity with extensive

26 Competition Bureau Canada, "Brief to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance" [PDF] (1 March 2024).

guidelines published by the Bureau and the existing written opinion program for businesses to seek clarity from the Commissioner on the application of the Act. The Commissioner also indicated that businesses may take advantage of the new regime by mischaracterizing an agreement to receive immunity unfairly for problematic conduct.

It is not clear that the introduction of this new regime will materially change the written opinion practice, as historically these have been requested only rarely. However, the reward of immunity from portions of the Act (at least from the Bureau perspective) including the possibility of private actions may generate renewed interest in written opinions.

Enhanced penalties for violating consent agreements

Under the Act, the Commissioner can enter into consent agreements with companies or individuals to resolve the Commissioner's concerns or to settle commenced litigation under the civil provisions of the Act. Once registered with the Tribunal, a consent agreement has the effect of a Tribunal order and, further, the Act provides that it is a criminal offence not to comply with a Tribunal order under the civil provisions of the Act (other than certain orders relating to administrative monetary penalties). The amendments provide for new civil penalties for failure (or likely failure) to comply with a consent agreement, enabling the Commissioner to challenge actual or likely non-compliance short of recommending the filing of criminal charges. The new civil penalties include a Tribunal order prohibiting non-compliance, requiring other action necessary for compliance, imposing an administrative monetary penalty of up to $10,000 per day of non-compliance and a catch-all penalty of any other relief the Tribunal considers appropriate.

Limited cost awards against the commissioner

The *Competition Tribunal Act* provides that the Tribunal may award the costs of proceedings in respect of reviewable matters under the Act, without specific considerations for granting cost awards against the Commissioner. Now the *Competition Tribunal Act* prevents the Tribunal from awarding costs against the Commissioner unless the Tribunal is satisfied that the award is necessary to maintain confidence in administration of justice, or the absence of the award would have a substantial adverse effect on the respondent's ability to carry on business. The amendment was most likely precipitated by the recent Rogers/Shaw litigation, where the Commissioner was ordered by the Tribunal to pay nearly $13 million in costs and disbursements.

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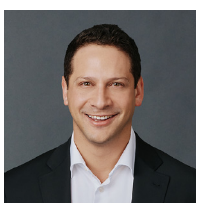

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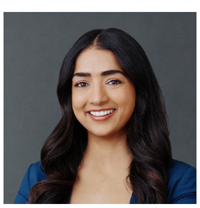

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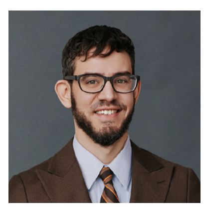

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