OPTIMAL ENFORCEMENT OF ABUSE OF DOMINANCE: THE CASE FOR A PRIVATE CAUSE OF ACTION

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We argue that there should be a private cause of action to courts, without leave, for abuse of dominance in Canada. We show that abuse of dominance is under-enforced; that this causes serious harm to consumers, competitors, and the economy; that the Competition Bureau cannot close the gap, whereas private parties can; and that private enforcement has been successful abroad. Finally, we suggest that any private cause of action should be modeled on section 36, with recourse to courts for compensatory damages and no leave requirement.

Dans cet article, nous soutenons qu'il y a lieu d'admettre une cause d'action privée au tribunal, sans autorisation, dans les cas d'abus de position dominante au Canada. Nous démontrons que ces cas sont trop peu sanctionnés; que cela cause beaucoup de tort aux parties consommatrices, parties concurrenteset à l'économie; que le Bureau de la concurrence ne parvient pas à combler cette lacune, tandis que les parties privées le peuvent; et que l'application des actions et recours privés en la matière s'est révélée une réussite à l'étranger. Enfin, nous faisons valoir que toute cause d'action devrait prendre modèle sur l'article 36, avec un recours aux tribunaux pour dommages-intérêts compensatoires sans exigence d'autorisation.

Introduction

The Ministry of Innovation, Science and Economic Development has asked for comments on whether private parties should be able to seek compensation for damages suffered from civilly reviewable (non-merger) conduct. This article focuses on a subset of that conduct: abuse of dominance within the scope of sections 75-81 and 84 of the *Competition Act* (the "***Act***").[1] Canada, unlike almost all other developed[2] countries—the United States,[3] the United Kingdom,[4] every member state of the European Union,[5] Australia,[6] New Zealand,[7] Japan,[8] South Korea,[9] and Taiwan[10]—has no private right of action for abuse of dominance.

This article argues that private parties should be able to bring an action in either the Federal Court or in one of the provincial superior courts, seeking compensation for losses suffered as a result of an abuse of dominance, much like they already can for criminally reviewable conduct.[11]

In Part I of this article we discuss evidence indicating that abuse of dominance is currently underenforced, and argue that current enforcement mechanisms provided by the *Act* are inadequate to address the problem. Part II focuses on some of the consequences of underenforcement for consumers, workers, competitors, and the economy at large. In Part III we review the benefits that would ensue from extending enforcement rights beyond the Competition Bureau to private actors. In Part IV we consider the best structure for a private cause of action, including the measure of damages (compensatory, punitive, or both), the forum (Competition Tribunal, courts, or both), and whether the right of action should be subject to a leave requirement.

I. Abuse of Dominance is Under-Enforced

A) Current Enforcement Mechanisms Are Inadequate

Under the *Act* as it currently stands, there are two mechanisms for enforcing abuse of dominance: (1) the Competition Bureau (the "**Bureau**") can apply to the Competition Tribunal (the "**Tribunal**") for a mandatory order and/or an administrative monetary penalty (an "**AMP**"); and (2) as of June 23, 2022, private parties can apply to the Tribunal for leave to bring a proceeding for the same remedies. We discuss each of these enforcement mechanisms in turn.

Since 1986, the Commissioner of Competition (the "**Commissioner**") has had the power to apply to the Tribunal for orders stopping companies from engaging in conduct that contravenes the abuse of dominance provisions.[12] Despite the Commissioner's statutory mandate to enforce the *Act*,[13] such proceedings have been few and far between. The Commissioner has only brought 14 applications,[14] of which only 7 have been litigated to a decision,[15] in almost 40 years.

According to the Bureau, this limited enforcement activity is due to a lack of resources.[16] Limited budgets are problematic because abuse of dominance cases are "unpredictable, lengthy and unnecessarily difficult and resource-intensive to prove".[17] In theory, an increase in funding should enable the Bureau to bring forward a greater number of cases. In late 2021, the government announced that Bureau's annual funding would increase by roughly $25 million per year.[18] That could result in an increase in applications to address abuse of dominance.

However, there is good reason to question whether that budgetary increase will have a measurable—let alone significant—impact on the actual

level of abuse of dominance enforcement. Throughout the history of the *Act*, through times of governmental belt-tightening and times when the spending taps were opened, the flow of cases brought before the Tribunal has remained a slow trickle—only one every 2-3 years.

Rather than pointing the finger solely at perceived under-funding, perhaps the Bureau's reluctance to bring cases forward is more a reflection of an institutional bias against the adversarial process and in favour of other, less coercive means of achieving compliance. Commentators have highlighted this historical bent in favour of prioritizing "voluntary conformity with the Act" through education and market studies,[19] rather than using the big stick of litigation.

Regardless of the reason, most commentators and policy-makers believe that the Bureau has not brought enough cases, and as a result, abuse of dominance is insufficiently enforced.[20] Not all commentators share this view, but we address their views in Part I, Section B below.

Most of that commentary occurred before the 2022 amendments to the *Act* which allow private parties to seek leave to apply to the Tribunal for remedies. Some[21] might say that this new mechanism will increase enforcement. We disagree with that view for the four reasons listed below, and we are not alone in our skepticism.[22]

First, access to section 103.1 is restricted such that the right to seek leave is extended only to competitors of the respondent.[23] Claims cannot be brought by consumers or other parties who might be harmed by the abusive conduct and might accordingly be motivated to seek remedies. Both the Commissioner and at least one commentator have expressed the view that the test for leave under section 103.1, viewed as a whole, is far too onerous.[24]

Second, few litigants have the necessary resources to pursue such a claim. Establishing abuse of dominance almost invariably requires expert evidence from economists and perhaps other experts. Obtaining leave usually requires another round of expert evidence. Indeed, even assessing whether to bring the case may require expert evidence. Few people can afford to pay for all of that expert evidence and legal fees. In civil litigation, a funder or law firm may be enticed to act on contingency. But here, that option is not available because it is impossible to obtain damages and any AMP obtained is paid to the government.

Third, without the prospect of compensatory damages, a putative applicant has little incentive to commence a proceeding.[25] The only possible

monetary recompense is an award of costs, which is customarily less than half of a party's actual legal fees. It is the rare litigant indeed for whom the possibility of a mandatory order, which will only be imposed at the end of a multi-year battle, will prove sufficiently valuable to justify the enormous commitment of management time and money required to see a case through.

Fourth, even in those rare instances where a competitor is willing to undertake the seemingly thankless task of seeking leave and, if leave is granted, pushing a case forward to trial, that litigant will likely face a strong incentive to settle with the respondent and, in particular, to do so in a manner that benefits themselves (and the respondent) at the expense of competition more generally.[26]

In the result, it seems highly unlikely that the expanded section 103.1 will meaningfully increase enforcement of abuse of dominance provisions.

B) Misleading Counterargument That No Abuse of Dominance Escapes Enforcement

Some commentators have asserted that the lack of enforcement activity in Canada is merely reflective of the fact that there is very little abuse of dominance actually occurring in Canada.[27] However, those assertions are unsupported by evidence. Meanwhile, there is evidence to the contrary—namely, that there is abusive conduct occurring in Canada which is not being checked by enforcement proceedings.

First, the Bureau receives hundreds of complaints per year. For example, in 2019-2020, the Bureau received 467 complaints but only opened 11 investigations.[28] While it stands to reason that some—perhaps even most—of the complaints received lack merit, it is more difficult to accept that 97% of the complaints were so wholly without merit that they did not even merit investigation. This is particularly so given that the Bureau provides no reasons for why it chooses not to pursue any given complaint.

Second, leaving aside complaints made by private parties, there are instances where the House of Commons Standing Committee on Agriculture and Agri-Food has raised concerns about conduct that it thought could constitute an abuse of dominance and even went so far as to direct the Bureau to investigate.[29] However, no enforcement proceedings were ever brought.

Third, there is a perceived disparity between the enforcement activities of the Bureau as compared to those of analogous public enforcement agencies in other major jurisdictions, such as the United States, the EU, and South Korea. In several cases, regulatory agencies in other jurisdictions have obtained judicial findings of misconduct and billion-dollar fines, and yet no analogous investigation was opened in Canada.[30]

Finally, given the extraordinarily low levels of enforcement activity in Canada, there would seem to be good reason to suspect that a significant amount of abusive activity is going undeterred and unaddressed.[31] Indeed, even those commentators who are largely predisposed against major changes to the *Competition Act* acknowledge that there are likely anti-competitive practices in Canada that are going unaddressed.[32]

All of this suggests that the lack of abuse of dominance cases in Canada cannot be persuasively explained by a lack of monopolistic behaviour in the Canadian economy.

II. Jurisprudential Problems of Under-Enforcement

The undesirable economic effects of insufficient enforcement activity regarding monopolistic practices—e.g., increased prices, lower quality, reduced innovation, reduced privacy protections and, from a labour perspective, poorer working conditions and reduced wages—are well-known and beyond the scope of our expertise. We instead address the harm that has been done to our understanding of competition law by the paucity of decided cases.

As noted above, Canada has only seven abuse of dominance cases[33] that have been litigated through a trial on the merits—only seven instances where an adjudicator has taken the very broad language of section 79 and applied it to a specific set of facts. In this sense, we would argue that the Bureau's unwillingness or inability to create a robust abuse of dominance docket for the Tribunal has stunted the indispensable—and necessarily incremental—process by which the meaning of a statutory provision is elucidated. While 41 years of *Charter* litigation has yielded thousands of decisions, each of which has worked to gradually shape and elucidate constitutional principles by repeatedly applying those principles to disparate fact patterns, 37 years of abuse of dominance litigation has yielded almost nothing. In contrast to the rich tapestry that comprises Canadian constitutional law, our competition law is threadbare in the extreme.[34]

This lack of a developed jurisprudence is not merely a concern because it leaves scholars and competition law wonks with little to discuss. It also poses a fundamental problem for competition law as a whole and for the economic actors who operate within its sphere. Without clarity—or even meaningful guidance—as to which types of conduct run afoul of the *Act*'s abuse of dominance provisions and which are permitted, economic actors are left guessing as to the legal risk inherent in any given course of conduct.[35]

Few would dispute that this uncertainty is undesirable, both from an economic perspective and from the perspective of the rule of law. Indeed, in advocating in favour of a private right of "access" to enforcing the abuse of dominance provisions, the Commissioner has stated that the "greatest benefit" of such private "access" is that "a broader body of case law would be developed". The Commissioner further noted that "such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses."[36] The C.D. Howe Institute's Competition Policy Council has expressed a similar view, warning of the dilemma facing businesses due to uncertainty "about how the law will be interpreted and enforced".[37] The words of VanDuzer and Paquet from 25 years ago remain just as apt today:

> More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it.[38]

Some have suggested that the problems arising from very thin jurisprudence can be mitigated to some extent by guidance documents issued by the Bureau.[39] However, guidance is a poor substitute for Tribunal decisions in actual cases. First, it cannot provide anything close to the degree of specificity that emerges from an actual case. It is not consider an actual set of facts, with all of the nuance and particularity and inconsistencies that make up real life. Even the illustrative examples provided by the Bureau in its guidance documents are necessarily reductive. At best, they provide a very rough sketch of which conduct is lawful and which is not.

And this leads to the second and more fundamental limitation of the Bureau's guidance documents: they are not binding. They do not bind the Tribunal. Indeed, they do not even bind the Commissioner.[40] At best, they provide some indication as to how the Bureau might view a type of conduct, but without any guarantee that that view might not change over time, and without any indication as to whether the Bureau's (or the Commissioner's) view might change if the specific facts of any given case were slightly different from the necessarily general facts of the illustrative examples. Accordingly,

the guidance documents do not, in fact, provide meaningful guidance—certainly nothing close to the level of guidance that is provided by decided cases—to economic actors or their legal advisors as to whether any given conduct is lawful or not.

III. Private Parties Are Best-Placed to Increase Enforcement

If, as we have argued, there is a need for more abuse of dominance litigation, the question arises how best to fill that need. Should we look chiefly to public enforcers—in this case, the Commissioner—to accomplish the task, or is it time to open the door wider to private enforcers? There are several reasons to believe that private enforcers are more likely to achieve the desired result of increasing the level of enforcement and increasing the volume of jurisprudence.

First, several commentators have noted that the Bureau's lack of resources is a strong argument for allowing private parties to fill the gap.[41] Indeed, even if the Bureau had resources that it considered adequate, it would likely still bring fewer cases than would be brought if private actors enjoyed a right of action. Public enforcers must balance a number of competing priorities in deciding whether to commence litigation before the Tribunal and often struggle with staffing constraints. Some commentators have postulated that there may be an institutional reluctance to litigate cases that are seen as close calls, in favour of pursuing only "sure things".[42]

Second, private parties are frequently better placed to identify abusive conduct,[43] as evidenced by the fact that a large proportion of the cases brought by the Commissioner were initiated by complaints from market participants. Not only are private parties better able to identify wrongdoing, they are often better able to prosecute it, by virtue of their superior knowledge of the relevant markets. As Ducci and Trebilcock explain, "Private enforcers often possess more information than public officials."[44]

Third, empirical evidence from both Canada and other jurisdictions suggest that private parties will energetically exercise the right to bring proceedings for abuse of dominance, if that right is granted. In Canada, there is a significant body of jurisprudence that has developed through private claims for damages arising from breach of the price fixing provisions of the *Act*. The European Commission found that the number of meritorious abuse of dominance prosecutions "significantly increased" after private access to courts was introduced.[45] Within one year of the introduction of a private cause of action, French courts had granted damages in 31 meritorious private cases.[46] In the United States, litigation instituted by private

parties has been described as a "bulwark of antitrust enforcement".[47] Recent statistics indicate that well over 90% of all antitrust claims in the United States are brought by private actors.[48] And in Australia, over the first 20 years in which private actions were permitted under their competition law statute, such cases accounted for over half of all of the competition law proceedings (79 cases, as compared to the 61 commenced by public enforcement agencies).[49]

IV. The Optimal Structure of a Private Cause of Action

If Parliament creates a private cause of action for abuse of dominance, the only remaining question is how it should be structured. We propose that plaintiffs should be able to bring actions for compensatory damages to the courts, with no leave requirement—the model under section 36 of the *Act*. Below, we respond to three objections to that model, namely (1) damages are not necessary; (2) the Tribunal is a better forum; and (3) the absence of a leave requirement will result in over-enforcement.

A) Compensatory Damages Are Necessary and Desirable

As explained above, the purpose of a private cause of action for abuse of dominance would be to increase the number of cases brought, so as to increase enforcement and the body of jurisprudence. To achieve that result, private parties must be incentivized to commit significant resources to the litigation. Prosecuting an abuse of dominance case requires the expenditure of hundreds of thousands, and often millions of dollars, not to mention the commitment of countless hours by personnel to assist and instruct counsel. Thus, to provide an effective incentive, the remedies available to a successful plaintiff must be of sufficient value to offset the cost of the litigation.[50] A broad range of commentators and policy-makers agree that the best form of incentive would be a right to recover compensatory damages.[51]

Such a right would eliminate an unnecessary distinction in the *Act*: compensatory damages are available for conduct that attracts criminal sanction, but not for conduct that is civilly reviewable. We do not see any compelling policy reason to justify this distinction. The corrective justice paradigm that justifies a right to claim damages for losses suffered as a result of criminal conduct should apply with equal force to losses suffered as a result of abuse of dominance.[52]

Some argue that the currently available remedies—mandatory orders and AMPs—offer a sufficient incentive to plaintiffs.[53] However, the exceedingly

small number of proceedings that have been commenced by private parties under sections 75, 76 and 77[54] belies that assertion.

In addition, some have argued that compensatory damages for abuse of dominance are inconsistent with the purpose of the *Act*, which they allege is to protect competition rather than to protect competitors or consumers.[55] This argument is problematic for two reasons.

First, it is inconsistent with the purpose clause of the *Act*, which includes "ensur[ing] that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and "provid[ing] consumers with competitive prices and product choices".[56]

Second, it runs headlong into section 36 and the fact that the *Act* already incorporates the notion of compensation for parties injured by anti-competitive conduct. This right is extended by subsection 36(1)(b) to breaches of an order granted under other sections of the *Act*, including section 79. It seems particularly hard to argue that a right to compensation for injury suffered as a result of a breach of section 79 is inconsistent with the purpose of the *Act*, when the statute already allows a right to compensation for injury suffered as a result of the breach of an order granted to remedy a breach of section 79.

Moreover, even if the current structure of the *Act* does not embrace corrective justice, Parliament can (and should) adjust the *Act* to encompass such a purpose. If Parliament were to amend the *Act* to allow a private right of action for damages to compensate for losses suffered as a result of a breach of section 79, it would be impossible to argue that the purpose of the *Act* does not encompass compensation for parties injured by anti-competitive conduct. In this sense, arguments about current legislative purpose are not particularly compelling when the question relates to proposed legislative reform.

B) Leave Should Not Be Required

We are of the view that there should not be any leave requirement imposed on a private action for damages. Such a requirement would undermine the goal of increasing enforcement and of developing the jurisprudence.

The current leave requirement has been criticized as unduly onerous.[57] And, indeed, of the 26 applications brought under section 103.1 that have resulted in a decision, leave was refused outright in 18 cases, leave was refused without prejudice in 1 case, leave was granted but rescinded in 2

cases, leave was granted in part in 2 cases, and leave was granted in full in only 4 cases.[58] Several other applications were abandoned or settled before a decision was rendered. Assuming a similar approach would be applied to applications for leave to bring an action for damages, one has to assume that the leave requirement would undermine the goal of increasing enforcement. Moreover, in the 26 applications, the Tribunal's decisions have rarely commented on the merits of the case, which further undermines the goal of increasing the amount of jurisprudence.

A number of commentators, arguing in favour of imposing a leave requirement on a right of action for damages, have raised the spectre of a flood of meritless litigation. They assert that private parties will use litigation "strategically", bringing frivolous claims that will act as an inefficient drag on beneficial commercial activity and/or that the threat of such unmeritorious claims will have a "chilling" effect, frightening companies away from desirable behaviour.[59] However, they provide no cogent evidence of these frivolous claims—a failure that has been noted by the Standing Committee on Industry, Science and Technology.[60] We are not aware of any reason to believe that the availability of a private right of action in any of Australia, the European Union, the United States, or any of the other jurisdictions discussed above has had an adverse effect on economic activity in those countries. In the absence of such evidence and in the absence of a compelling explanation as to why Canada's experience would be any different, the argument about the risk of such a "chill" does not seem to be one of substance.

Moreover, other commentators argue that any risk of such over-deterrence can be reduced to an acceptable degree through a well-designed private right of action (e.g. one in which remedies are limited to actual damages and one in which there are meaningful cost consequences to the unsuccessful litigant).[61]

C) The Courts Should Have Concurrent Jurisdiction

The final question to address is whether the Tribunal should retain exclusive jurisdiction for hearing cases asserting a breach of the abuse of dominance provisions. We believe that it should not, and that concurrent jurisdiction should be granted to both the provincial superior courts and to the Federal Court to hear plaintiffs' claims. We have three reasons.

First, the Competition Tribunal has no procedural mechanism by which a class action or representative action could be brought before it. Given that claims for harm done to consumers or workers by an alleged abuse of

dominance are likely to be brought exclusively by means of a class proceeding, if jurisdiction to hear claims for abuse of dominance were extended solely to the Tribunal, claims by consumers or workers would be effectively precluded—a result which does not seem justifiable from a policy perspective.

Second, the Tribunal cannot hear common law or provincial statutory claims. It is likely that claims for abuse of dominance will be brought concurrently with other claims, arising at common law or under provincial statutes (e.g., conspiracy, interference with economic relations, negligent misrepresentation, and breaches of consumer protection legislation). Provincial superior courts could deal with all of those claims in one proceeding. However, if jurisdiction over the abuse of dominance claim is granted exclusively to the Tribunal, a multiplicity of proceedings will necessarily result.

Third, the judges who sit on the Tribunal are few in number, which means that the pool of jurists who are called upon to hear cases brought before it is very small. If one of the purposes of creating a private right of action for abuse of dominance is to foster the growth of a robust body of jurisprudence, then limiting the voices who can contribute to that dialogue to fewer than half a dozen would seem counter-productive.

The most commonly-cited reason for maintaining the Tribunal generally and for maintaining its exclusive jurisdiction over abuse of dominance matters more specifically is that it includes economists whose expertise is particularly valuable in abuse of dominance cases.[62] Some have argued that criminal conduct requires limited economic evidence, whereas everything else—including abuse of dominance—requires significant economic evidence[63] and that, accordingly, the courts' ability to adjudicate conspiracy claims should not be used as a basis for concluding that they would be equally able to adjudicate abuse of dominance claims.

However, the premise for that argument is incorrect. Expert economic evidence is almost always required in price-fixing claims under section 36. Consider for example the following statements made by courts in section 36 cases:

> Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution … [emphasis added][64]

> In preparation for certification, expert materials will have to be prepared to address the economic impacts of the conspiracy, including the economic impact on umbrella purchasers.[65]

> The resolution of these issues will require extensive, expert economic evidence.[66]

Even if it were true that judges hearing price-fixing cases do not need to grapple with complex economic evidence, judges in both the superior courts and the Federal Court are routinely called upon to consider complex expert evidence from a wide range of disciplines, including economics. To suggest that those courts are somehow less capable than the Tribunal of understanding such evidence is without foundation.

Conclusion

Abuse of dominance appears to be plagued by underenforcement in Canada. While more resources have recently been allocated to the Bureau, there is good reason to doubt whether that additional funding will be sufficient to remedy the problem. With a widespread consensus that private litigants need to be part of the solution, the time seems ripe for Canada to join other jurisdictions with sophisticated competition law regimes and introduce a private right of action for damages suffered as a result of abuse of dominance. That right of action should be unshackled from any leave requirement, with jurisdiction over the claim being granted concurrently to the provincial superior courts and the Federal Court. After four decades years of inadequate enforcement, and close to 20 years of commentators and policy-makers advocating in favour of this legislative change, there is no reason to delay any further.

ENDNOTES

[1] *Competition Act*, RSC 1985, c C-34 [*Competition Act*].

[2] Private causes of action also exist in developing countries like China (*Anti-Monopoly Law of the People's Republic of China,* Standing Committee of the National People's Congress, Order no 68, 30 August 2007, art 50, online: <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm>); Mexico (see OECD, *Individual and Collective Private Enforcement of Competition Law: Insights for Mexico* (2018), online: <https://www.oecd.org/daf/competition/EN-WEB-private-enforcement-competition-law-mexico-2018.pdf>); Argentina (*Law on the Protection of Competition,* no 27442, 9 May 2018, art 62, online: <https://www.argentina.gob.ar/normativa/nacional/ley-27442-310241/texto>), and even Saudi Arabia (*Competition Law*, Royal Decree no M/75, 7 March 2019, art 62, online: <https://www.wipo.int/wipolex/en/text/566576>.

[3] 15 USC § 15 (1914).

[4] *Competition Act 1998* (UK), s 47A.

[5] The European laws on damages for abuse of dominance are reviewed in Philipp Kirst, "The temporal scope of the damages directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe" (2020) 16:1 Eur Competition J 97. For the European Union overall, see EU, *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance*, [2014] OJ, L 349/1; and EC, "Antitrust Overview" (nd), online: <https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en>. For Austria, see *Federal Cartel Act 2005*, BGBL I, no 61/2005, ss 37(b)-(d), online: <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>. For Belgium, see *Code of Economic Law*, MB, 29 March 2013, art XVII.72, online: <http://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel>. For Bulgaria, see *Law amending and supplementing the Law on Protection of Competition*, Decree No 270, 21 December 2017, s 2, online: <https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=121198> . For Croatia, see *Law on compensation procedures for violations of competition law*, NN, no 69/17, arts 1, 3, online: <https://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_69_1607.html>. For the Czech Republic, see *Act on Compensation for Damages in the Field of Economic Competition*, No 262/2017 Sb, art 4, online: <https://www.zakonyprolidi.cz/cs/2017-262>. For Denmark, see *Act on the processing of compensation cases relating to infringements of competition law*, no 1541, ch 2, online: <https://www.retsinformation.dk/eli/lta/2016/1541>. For Estonia, see *Competition Act*, RT I 2001, no 56 & 332, s 78, online: <https://www.riigiteataja.ee/akt/130122014015>. For Finland, see *Competition Act*, no 2011/948, s 20, online: <https://www.finlex.fi/en/laki/kaannokset/2011/en20110948.pdf>. For France, see *Décret n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles*, JO, 10 March 2017, no 59, online: <https://www.legifrance.

gouv.fr/jorf/id/JORFTEXT000034160256>. For Germany, see *Competition Act*, BGBL I, 2013, no 3245, s 33 & 33(a), online: <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0256>. For Greece, see *Law on the Protection of Free Competition*, no 4529/2018, art 3, online: <https://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/e-antag-pap-apospasma.pdf>. For Hungary, see *Act on the Prohibition of Unfair and Restrictive Market Practices*, no LVII/1996, arts 88/A & 88/C, online: <https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true> . For Ireland, see *Competition Act 2002*, no 14/2002, s 14(1), online: <https://revisedacts.lawreform.ie/eli/2002/act/14/revised/en/html#SEC14>. For Italy, see *Legislative Decree No 3, 19 January 2017, Implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,* GU, 19 January 2017, no 15, art 1, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104> . For Latvia, see *Competition Law*, LV, 23 October 2001, no 151, art 21, online: <https://likumi.lv/ta/en/en/id/54890>. For Lithuania, see *Law of the Republic of Lithuania on Competition,* TAR, 2017 January 18, no 1075, art 43-44, online : <https://www.e-tar.lt/portal/en/legalAct/ad961110dd8911e69ae9f38427b46dd7>. For Luxembourg, see *Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence,* Mémorial A, 2016, no 245, online: <https://legilux.public.lu/eli/etat/leg/loi/2016/12/05/n1/jo>. For Malta, see Competition Act, Cap 379, s 9, online: <https://legislation.mt/eli/cap/379/eng/pdf>; and *Competition Law Infringements (Actions for Damages) Regulations, 2017*, LN 117 of 2017, s 4, online: <https://legislation.mt/eli/ln/2017/117/eng/pdf>. For the Netherlands, see Art 6:193(a)-193(j) Civil Code, online: <http://www.dutchcivillaw.com/civilcodebook066.htm>. For Poland, see *Act of 21 April 2017 on the private enforcement of competition law*, arts 3, 11, online: <http://orka.sejm.gov.pl/proc8.nsf/ustawy/1370_u.htm#_ftn1>. For Portugal, see *Act no 23/2018*, DR, 2018 June 5, no 107/2018, art 3, online: <https://diariodarepublica.pt/dr/detalhe/lei/23-2018-115456103>. For Romania, see *Emergency Ordinance no 170 of October 14, 2020*, MO, 16 October 2020, no 952, arts 2(l), 3, online: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/231241>. For Slovakia see, *Act on Certain Rules for Applying Claims for Compensation for Damage Caused by Violation of Competition Law*, no 350/2016, art 3, online: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/350/20161227.html>. For Slovenia, see *Act on the Prevention of Restriction of Competition*, no 23/17, art 62, online: <http://www.pisrs.si/Pis.web/pregledPredpisa?sop=2017-01-1208>. For Spain, see *Real Decreto-ley 9/2017, de 26 de mayo, por el que se transponen directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores*, BOE, 27 May 2019, no 126, arts 71-81, online: <https://www.boe.es/boe/dias/2017/05/27/pdfs/BOE-A-2017-5855.pdf>. For Sweden, see

Competition Damages Act, no 964/2016, s 2, online: <https://rkrattsbaser.gov.se/sfst?bet=2016:964>.

[6] *Competition and Consumer Act 2010* (Commonwealth), 1974/51, s 82 (Austl).

[7] *Commerce Act 1986*, 1986/5, s 82 (NZ).

[8] Atsushi Yamada, "Private antitrust litigation in Japan: overview", Practical Law (1 April 2019), online: <https://uk.practicallaw.thomsonreuters.com/w-019-8839?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

[9] *Monopoly Regulation and Fair Trade Act*, no 2021/16998, art 56 (South Korea), online: <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61424&lang=ENG>.

[10] *Fair Trade Act*, arts 30-31. (Taiwan), online: <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61424&lang=ENG>.

[11] *Competition Act*, *supra* note 1, s 36(1).

[12] *Ibid*, ss 75(1), 76(2), 77(2), 79(1), 79(2), 79(3.1), 81(1) & 84.

[13] *Ibid,* s 7(1).

[14] David Vaillancourt, "A Private Right of Action for Abuse of Dominance" (26 April 2021), *CD Howe Institute*, online: <https://www.cdhowe.org/intelligence-memos/david-vaillancourt-%E2%80%93-private-right-action-abuse-dominance>.

[15] Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60:2 Can Bus LJ 171 at 197; *The Commissioner of Competition v Vancouver Airport Authority,* 2019 Comp Trib 6.

[16] Matthew Boswell, "Canada Needs More Competition" (delivered at the Canadian Bar Association Competition Law Fall Conference, 20 October 2021), online: <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>; Canada, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (Submission by the Competition Bureau) (8 February 2022), s 3.4, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> [Competition Bureau, *Competition Act in the Digital Era*]. See also Competition Policy Council, *Distilled Wisdom: Top Legal and Economic Experts on the Most Needed Competition Reforms* (9 September 2021), *CD Howe Institute*, online: <https://www.cdhowe.org/council-reports/distilled-wisdom-top-legal-and-economic-experts-most-needed-competition-reforms> [Competition Policy Council, *Distilled Wisdom*].

[17] Canada, Competition Bureau, *The Future of Competition Policy in Canada* (Submission by the Competition Bureau) (15 March 2023), ss 2.1, 3.1.5, 5.4.3 & 5.5.2, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada> [Competition Bureau, *Future of Competition Policy*].

[18] Boswell, *supra* note 16.

[19] George Addy, John Bodrug & Charles Tingley, "Abuse of Dominance in

Canada: Reflections on 25 Years of Section 79 Enforcement" (2012) 25:2 Can Competition L Rev 276 at 281.

[20] See e.g. Vaillancourt, *supra* note 14; Vass Bednar, Ana Qarri & Robin Shaban, *Study of Competition Issues in Data-Driven Markets in Canada* (January 2022), Vivic Research at 15, online: <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1f4b6217f9e441123144e/1674704058295/vivic-research-competition-data-driven-markets-final-report-2022.pdf>; Competition Policy Council, *A New Competition Act for a New Federal Government*, *CD Howe Institute* (April 28, 2016) at 4, online: <https://www.cdhowe.org/cpc-communique/new-competition-act-new-federal-government>; House of Commons, *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (April 2002) at 33, online: <https://publications.gc.ca/site/fra/9.536432/publication.html>; Paul-Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18 Dal J L Studies 1 at 28.

[21] We have been unable to find any commentary expressing this view.

[22] Chris Hersh & Katarina Wasielewski, "Change has come: Significant *Competition Act* amendments enacted; more to follow …", Norton Rose Fulbright (17 August 2022), online: <https://www.nortonrosefulbright.com/en/knowledge/publications/4b0f25f2/change-has-come-significant-competition-act-amendments-enacted> ("As there is no right to damages, there may be limited incentives for private parties to bring private abuse of dominance cases, as these cases are generally a costly, time-consuming undertaking"); Sandy Walker et al, "Proposed amendments to the *Competition Act*—new prohibitions and higher penalties", Dentons (6 May 2022), online: <https://www.dentons.com/en/insights/articles/2022/may/5/proposed-amendments-to-the-competition> ("While the number of abuse of dominance cases may increase, the leave requirement and lack of financial incentives may ultimately curb enthusiasm").

[23] Competition Bureau, *Future of Competition Policy*, *supra* note 17, s 5.5.2.

[24] Competition Bureau, *Competition Act in the Digital Era*, *supra* note 16, s 8 & Recommendation 8.8; Veel, *supra* note 20 at 9-10.

[25] Competition Bureau, *Future of Competition Policy*, *supra* note 17, s 5.5.2; Vaillancourt, *supra* note 14; Subrata Bhattacharjee et al, "Proposed amendments to the Competition Act become law" (18 July 2022), Mondaq, online: <https://www.mondaq.com/article/1214238>; Walker et al, *supra* note 22; Hersh & Wasielewski, *supra* note 22; Elad Gafni & Ian Macdonald, "Significant First-Round Amendments to the Competition Act Come Into Force" (28 June 2022), Gowling WLG, online: <https://gowlingwlg.com/en/insights-resources/articles/2022/significant-amendments-to-competition-act/>.

[26] Competition Bureau, *Future of Competition Policy, supra* note 17, s 3.1.7.

[27] Addy, Bodrug & Tingley, *supra* note 19 at 310; Competition Policy Council, "Damage Control: Abuse of Dominance and the State of Private Remedies in the *Competition Act*" (20 October 2016), *CD Howe Institute*, online: <https://www.cdhowe.org/cpc-communique/

damage-control-abuse-dominance-and-state-private-remedies-competition-act> [Competition Policy Council, *Damage Control*].

[28] Vaillancourt, *supra* note 14.

[29] House of Commons, *Competitiveness of Canadian Agriculture: Report of the Standing Committee on Agriculture and Agri-Food* (May 2010) at 20-23, online: <https://www.ourcommons.ca/Content/Committee/403/AGRI/Reports/RP4494785/agrirp03/agrirp03-e.pdf>.

[30] See e.g. Elvira Pollina & Maria Pia Quaglia, "Italy fines Amazon record $1.3 bln for abuse of market dominance", *Reuters* (9 December 2021), online <https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09/> ; EC, "Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime" (20 December 2022), online: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777>; as a further example, see *Davitashvili v Grubhub Inc* (30 March 2022), 37 in 1:20-cv-03000-LAK (SD NY), online: <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2020cv03000/535674/46/0.pdf?ts=1648740660> (denying motion to dismiss putative class action against Grubhub Inc, Uber Technologies Inc, and Postmates Inc for price fixing).

[31] As one scholar has noted in respect of enforcement generally (i.e., not limited to antitrust law), "One can safely suppose . . . that zero or near-zero levels of enforcement are not optimal. . ." J Maria Glover, "The Structural Role of Private Enforcement Mechanisms in Public Law" (2012) 53:4 Wm & Mary L Rev 1137 at 1146.

[32] Anthony Niblett and Daniel Sokol, *Up to the Task: Why Canadians don't need sweeping changes to competition policy to handle Big Tech* (November 2021), McDonald Laurier Institute, at 5 & 25, online: <https://macdonaldlaurier.ca/mli-files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf>.

[33] For clarity, the reference here to abuse of dominance cases refers to cases brought under section 79 of the *Competition Act, supra* note 1. It does not include cases brought under, for example, sections 75, 76 or 77.

[34] For commentary on the "sparse" nature of Canadian competition law jurisprudence, see e.g. Kent Roach and Michael J Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:3 Osgoode Hall LJ 461 at 470; Addy, Bodrug & Tingley, *supra* note 19 at 281.

[35] Roach and Trebilcock, *supra* note 34 at 481.

[36] Competition Bureau, *Competition Act in the Digital Era*, *supra* note 16, s 3.4.

[37] Competition Policy Council, *Distilled Wisdom, supra* note 16; see also Addy, Bodrug & Tingley, *supra* note 19 at 276 & 290.

[38] Canada, Competition Bureau, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice,* by J Anthony VanDuzer and Gilles Paquet (Ottawa: Industry Canada, 1999), Part III, online: <http://web.archive.org/web/20130629005037/http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01784.html#3Assess>.

[39] Addy, Bodrug & Tingley, *supra* note 19 at 292-293.

[40] *CCS Corporation v Secure Energy Services Inc*, 2013 ABQB 606 at paras 27-28; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 at para 711; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at para 94.

[41] Veel, *supra* note 20 at 18; Competition Policy Council, *Damage Control, supra* note 27.

[42] See e.g. Robert H Lande & Joshua P Davis, "Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws", 2011 BYUL Rev 315 at 337.

[43] Roach and Trebilcock, *supra* note 34 at 479.

[44] Francesco Ducci & Michael Trebilcock, "The Revival of Fairness Discourse in Competition Policy" (2019) 64:1 Antitrust Bulletin 79 at 101. See also Roach and Trebilcock, *supra* note 34 at 472; and see Niblett and Sokol, *supra* note 32 at 25 and Glover, *supra* note 31 at 1155.

[45] EC, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament*, SWD (2020) 338 (2020) at 3, online: <https://www.astrid-online.it/static/upload/repo/report_on_damages_directive_implementation.pdf>.

[46] Suzanne Carval & Jean-Francois Laborde, "Compensation for Damages Caused by Abuse of Dominance" (2018) 1 *Concurrences* art 84884, online: <https://www.concurrences.com/en/review/issues/no-1-2018/pratiques/compensation-for-damages-caused-by-abuse-of-a-dominant-position>.

[47] *Perma Life Mufflers Inc v International Parts Corp*, 392 US 134 at 139 (1968), cited in Sarah W Corman & Emily M Rix, "The New Landscape for Competition Private Actions" in Todd Archibald & Michael Cochrane, eds, *Annual Review of Civil Litigation 2009* (Toronto: Carswell, 2009) 371 at 371.

[48] Administrative Office of the United States Courts, "Table C-2–U.S. District Courts–Civil Federal Judicial Caseload Statistics" (last updated 31 March 2021), online: <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2021/03/31>.

[49] Roach and Trebilcock, *supra* note 34 at 467.

[50] *Ibid* at 476.

[51] Competition Policy Council, *Distilled Wisdom, supra* note 16 at 7; *Report of the Standing Committee on Industry, Science and Technology*, *supra* note 20 at 48; Vaillancourt, *supra* note 14; Roach and Trebilcock, *supra* note 34 at 496-497.

[52] *Ibid* at 461.

[53] Veel, *supra* note 20 at 24.

[54] Barely 20 over the last 20 years. For cases brought under section from 2002 to 2008, see *ibid.* From 2008 until 2023, only seven cases have been brought under sections 75, 76 and 77.

[55] *Ibid* at 26.

[56] *Competition Act*, *supra* note 1, s 1.1.

[57] Veel, *supra* note 20 at 9-10.

[58] Leave granted in full: *Nadeau Poultry Farm Limited v Groupe Westco Inc*, 2008 Comp Trib 7; *Allan Morgan & Sons Ltd v La-Z-Boy Canada Ltd*, 2004 Comp

Trib 4; *Quinlan's of Huntsville Inc v Fred Deeley Imports Ltd*, 2004 Comp Trib 15; *Robinson Motorcycle Ltd v Fred Deeley Imports Ltd*, 2004 Comp Trib 13. Leave granted in part: *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26; *The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10. Leave granted but rescinded: *Symbol Technologies Canada ULC v Barcode Systems Inc and Price Waterhouse Coopers Inc as Interim Receiver of Barcode Systems Inc*, 2005 Comp Trib 32; *B-Filer Inc et al v The Bank of Nova Scotia*, 2007 Comp Trib 5. Leave refused: *Coretti v Bureau de la Sécurité Privée and Garda World Security Corporation*, 2019 Comp Trib 4; *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28; *Safa Enterprises Inc v Imperial Tobacco Company Limited*, 2013 Comp Trib 19; *Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp Trib 1; *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada et al*, 2008 Comp Trib 29; *Canadian Standard Travel Agent Registry v International Air Transport Association*, 2008 Comp Trib 14; *Annable v Capital Sports and Entertainment Inc*, 2008 Comp Trib 5; *National Capital News Canada v Speaker of the House of Commons*, 2007 Comp Trib 23; *Sono Pro Inc v Sonotechnique PJL Inc*, 2007 Comp Trib 18; *Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd*, 2007 Comp Trib 6; *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp Trib 21; *Paradise Pharmacy Inc and Rymal Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp Trib 21; *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp Trib 22; *Mrs O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24; *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 23; *National Capital News Canada v Milliken*, 2002 Comp Trib 41. Leave refused without prejudice: *Swenson Inc v Trader Corporation*, 2008 Comp Trib 20.

[59] Competition Policy Council, *Damage Control, supra* note 27 at 3; Addy, Bodrug & Tingley, *supra* note 19 at 302, 313.

[60] *Report of the Standing Committee on Industry, Science and Technology*, *supra* note 20 at 28.

[61] Ducci & Trebilcock, *supra* note 44 at 101-102.

[62] Addy, Bodrug & Tingley, *supra* note 19 at 278-279.

[63] Frank Roseman & Jane Graham, "Expert Evidence in Competition Tribunal Proceedings" (1992) 20:3 Can Bus LJ 406 at 407.

[64] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 44.

[65] *Asquith v George Weston Limited*, 2018 BCSC 1557 at para 81.

[66] *Ewert v Nippon Yusen Kabushiki Kaisha*, 2022 BCSC 1908 at para 13. See also *Fanshawe College v LG Philips LCD Co*, 2011 ONSC 2484 at para 51.