

EMPOWERING PRIVATE ATTORNEYS GENERAL UNDER BILL C-59: DISEQUILIBRIUM PERSISTS IN CANADIAN COMPETITION LAW

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This article considers whether the amendments to the Competition Act introduced by Bill C-59 go far enough to allow access to justice for everyday consumers who incur real losses because of anti-competitive conduct. Through a corrective justice lens, the authors conduct this analysis on the premise that when the law fails to make compensatory damages available to a class of persons who suffered loss because of unlawful anti-competitive conduct, then there is disequilibrium in law. From this perspective, the authors conclude that the amendments of Bill C-59 fail to provide practical access to repair financial losses and do not go far enough to empower or incentivize the “private attorneys general” to enforce Canada’s competition laws through private class action litigation.

Les auteurs de cet article s’interrogent sur la question de savoir si les modifications proposées à la Loi sur la concurrence dans le projet de loi C-59 vont assez loin pour rendre la justice accessible au plus grand nombre de consommateurs, à qui les actions anticoncurrentielles causent des pertes bien réelles. Sous l’angle de la justice commutative, les auteurs mènent cette analyse en partant de la prémisse suivante : si le droit ferme la porte aux dommages-intérêts compensatoires pour un groupe de personnes ayant subi des pertes du fait d’une conduite déloyale et anticoncurrentielle, il y a alors un déséquilibre dans le droit. De ce point de vue, ils concluent que dans la pratique les modifications proposées par le projet de loi C-59 ne permettent pas de compenser les pertes financières, et ne vont pas assez loin pour encourager ou outiller les « procureurs privés » lorsque des actions collectives privées sont envisagées pour faire respecter le droit de la concurrence au Canada.

Introduction

1. On June 20, 2024, the amendments to the *Competition Act*, R.S.C., 1985, c. C-34 (the “Act”) included in the *Fall Economic Statement Implementation Act* (hereinafter “Bill C-59”) received royal assent.¹ This paper analyzes the amendments to the *Act* regarding private legal access to remedies for unlawful conduct using class action litigation through a corrective justice lens.

2. Corrective justice is the notion underlying private law that individuals may obtain compensation for their losses from the person whose

unlawful conduct caused them harm.² The class action procedure augments private citizens' access to justice where the losses are relatively small because correcting an unlawful transaction is only economically viable when individual claims are bundled together.³ In prosecuting private class action competition law claims, the entrepreneurial plaintiffs' bar—the so-called “private attorneys general”—may breathe life into substantive rights. This paper argues that when the law fails to make compensatory damages available to a class of persons who incurred loss because of unlawful anti-competitive conduct, including conduct subject to the *Act*, then there is disequilibrium in law. From this perspective, the Bill C-59 amendments fail to provide practical access for corrective justice to repair financial losses and have not gone far enough to empower the “private attorneys general” to breathe life into the newly accessible substantive rights.

3. Part I sets out the conceptual framework for the analysis of the amendments to the *Act* adopted in June 2024. This section first discusses the legal theory of corrective justice before setting out basic principles underlying class action litigation and concludes with an explanation of the concept of the “private attorneys general”.

4. Part II reviews private access for causes of action in the *Act* before Bill C-59 through an access to justice perspective for Canadian consumers who suffer loss caused by anti-competitive conduct. Before the amendments, consumers could seek to recover restitutionary damages for causes of action found in Part VI of the *Act*, which the authors contend represents a point of equilibrium between the reasonable expectations of private parties and the law's ability to resolve their differences. The same cannot be said for the causes of action found outside Part VI of the *Act*, for which a select few allowed for private action at the Competition Tribunal (the “Tribunal”), but those injunctive remedies provided nothing more than window dressing.

5. Part III describes the amendments of Bill C-59 that engage a consumer's ability to access justice before the Tribunal. Now that these amendments are law, private parties may seek an order from the Tribunal for two different class monetary awards: the gain-based disgorgement remedy for conduct contrary to sections 75, 76, 77, 79 or 90.1, found in Part VIII of the *Act*, and restitutionary damages for conduct contrary to section 74.01(1)(a), found in Part VII.1 of the *Act*. The changes omit procedural rules governing how class actions will proceed before the Tribunal. There are also new “right to repair” and “greenwashing” causes of action. In addition, the legal test for a private party to bring an application before the Tribunal has been lowered in that leave may be granted where only part of an applicant's business has

been affected (previously, leave was only granted where the whole of the applicant's business was affected) or if it is in the "public interest" to do so.

6. Part IV concludes that Bill C-59 is a missed opportunity. While the amendments advance the rights of private litigants, the changes keep Canadian competition law in a state of disequilibrium. Private persons, in particular consumers, will only obtain meaningful access to justice, through class procedure litigation, when they can pursue causes of action outside Part VI through the section 36 damages provision.

I—Breathing Life Into Substantive Rights

7. Before diving into substantive competition law, we provide preliminary comments on three notions that will arise throughout this paper: the legal theory of corrective justice, class action basics, and the concept of Private Attorneys General.

A) Corrective Justice

8. Grounded in the theory of corrective justice, private law is a mechanism to arm individuals with legal power to demand and hold others accountable.⁴ Private law refers to the "rights and duties of individuals and private entities as they relate to one another."⁵ The corrective justice legal theory contends that private law embodies a regime of correlative rights and duties with causation of harm by the defendant upon the plaintiffs at its centre.⁶ The reason to grant the plaintiffs a remedy for the wrong suffered is the same reason that requires the defendant to make good the harm.⁷ Practically, private law involves a plaintiff filing a legal action against a defendant to retroactively affirm the rights and duties of each party, which manifest by way of compensation for violation of those rights and duties.⁸

9. In Canadian competition law, the section 36 damages provision⁹ allows plaintiffs to enforce their rights for unlawful conduct under certain causes of action found in Part VI of the *Act*, broadly, conspiracies and bid rigging, as well as certain deceptive or misleading marketing practices. Professors Roach and Trebilcock note that "... section 36 ... can be interpreted as a recognition of the compensation rather than deterrence rationale for private enforcement of our competition laws—most plausibly on a corrective justice basis."¹⁰ Where there is no legal right or practical ability for a private party to recover losses caused by unlawful anti-competitive conduct, then there is disequilibrium between private persons' losses and competition law's ability to remedy their differences.

B) Class Action Basics

10. For a consumer who pays unlawfully inflated prices for a product, it is often economically irrational to go to Court individually to recover their loss because the cost of litigation would far exceed the damages suffered by any single individual. Notwithstanding it may be economically irrational for consumers to pursue legal action individually, assuming there is unlawful conduct, they still have a loss. Not only that, but the actors who caused the loss would derive a benefit from the consumer's inaction. Individually, the loss might be minor, but across millions of purchasers—it may be enormous. This is where the class action comes in.

11. The class action procedure has three underlying principles: (1) to serve judicial economy by aggregating otherwise individual claims to avoid duplication in fact-finding and legal analysis; (2) to promote access to justice by making economical the prosecution of claims that would otherwise be too costly to pursue individually; and (3) to serve efficiency of justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public and modify behaviour deemed to be wrongful.¹¹ With respect to access to justice specifically, whether it is in the field of competition law or otherwise, the Supreme Court of Canada has observed that class actions overcome barriers to access to justice by “providing a procedural means to a substantive end. (...) [A] class procedure has the potential to ‘breath[e] new life into substantive rights’...”¹²

C) Private Attorneys General

12. The *Act* serves the dual purpose of providing compensation for those impacted by anti-competitive conduct, and incentivizing “private attorneys general” to assist public agencies with enforcement of Canada’s competition laws through private litigation.¹³ By prosecuting private class action claims, an entrepreneurial plaintiffs’ bar—the so-called “private attorneys general”—breathe life into substantive rights when they deliver private citizens access to justice. The premise of incentivizing so-called “private attorneys general” with monetary remedies for causes of action in the *Act* is that these claims may become economically viable. Lawyers prosecuting a class action case generally work on a contingency fee basis for a “representative plaintiff”, who instructs counsel in the best interest of the class, where no class member could or would otherwise retain counsel on an hourly basis because the economic imperative render individual action non-viable. Where class actions are available, class counsel generally assume the risk of not recovering anything and the opportunity for potentially lucrative fees.

This business model has led to claims where counsel, in many cases, theorize the case and then find a client, via advertisement or otherwise.

13. The Québec Court of Appeal observed that “it is best to recognize that lawyer-initiated proceedings are not just inevitable, given the costs involved, but can also represent a social good in the consumer class action setting.”¹⁴ Along the same vein, the Federal Court remarked that “the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases.”¹⁵ The Ontario Superior Court has commented that “the entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are all the driving policy goals of the *Class Proceedings Act, 1992*.”¹⁶

14. As will be set out in the following pages, two conditions must be met in order for the *Act* to provide equilibrium for the common losses shared by a class resulting from anti-competitive conduct: (1) private rights to seek damages for breaches of competition law must exist: and (2) there needs to be a meaningful procedural vehicle that will incentivise class action lawyers to take these cases on.

II—Disequilibrium—Act Provides Narrow Enforcement of Private Rights

15. Prior to the Bill C-59 amendments, the *Act* provided access to justice for losses resulting from anti-competitive conduct described in causes of action found in Part VI (broadly, conspiracies and bid rigging, as well as certain deceptive or misleading marketing practices), but not for anti-competitive conduct set out in causes of action found in Parts VII.1 and VIII (including abuse of dominance, price maintenance, and others).

16. While the average consumer could have sought injunctive relief at the Federal Court, a provincial superior court, or at the Tribunal for unlawful conduct under Parts VII.1 and VIII of the *Act*¹⁷ there was disequilibrium because a consumer had no ability to seek a monetary remedy to recover their losses. Indeed, without the ability to seek monetary compensation, plaintiffs would be unlikely to bring any case, including one seeking an injunction, in the first place.

A) Section 36 Damages—Equilibrium for Anti-Competitive Conduct in Part VI

17. The *Act* allows private litigation for damages under section 36(1)(a), which says “[a]ny person who has suffered loss or damages as a result of conduct that is contrary to any provision of Part VI (...) may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct (...) an amount equal to the loss or damage proved to have been suffered by him”.¹⁸

18. Due to the criminal law origins of the *Act*, the language of the legislation and regular competition law jargon describe the causes of action in Part VI as criminal provisions, or criminal matters. Indeed, each of the causes of action found in Part VI “Offenses in Relation to Competition,” is an indictable offense whereby violators may be liable to conviction of imprisonment (see s. 45(2) as an example). The nature of labelling these provisions as “criminal provisions” stems back to pre-private access to damages under section 36, when enforcement of the *Act* was only performed by the Commissioner. The distinction between parallel conduct found in both Part VI and elsewhere, such as conspiracy which is found at both s. 45 and s. 90.1, permitted the Commissioner to choose whether to pursue conduct under the criminal or civil track, depending on the outcome of their investigation and the severity of the conduct.

19. From a corrective justice perspective, when used in a private claim for damages through section 36, the provisions found in Part VI are arguably better conceptualized as civil statutory causes of action—like any other private cause of action grounded for example in contract or tort—under which one private person may seek compensation from another private person by demonstrating each of the cause of actions’ essential elements on the well-known balance of probability civil standard of proof. This means that while a plaintiff must demonstrate, for example, that the defendant carried out the *actus reus* to fix prices, the statutory elements must only be demonstrated on a balance of probabilities.¹⁹

20. More specifically, the average consumer can seek damages under section 36 of the *Act* at the Federal Court or a provincial superior court for a set of causes of action in relation to competition located in Part VI, which include:

- conspiracies to fix prices, allocate markets, or control product output (section 45);

- bid rigging (section 47);
- conspiracies related to professional sport (section 48);
- agreements between federal financial institutions (section 49);
- deceptive or misleading practices (section 52);
- drip-pricing (section 52(1.3));
- deceptive notice of winning a prize (section 53);
- double ticketing (section 54);
- multi-level marketing schemes (section 55); and
- pyramid selling (section 55.1).

21. In practice, the class action vehicle is the dominant method by which natural persons—i.e. consumers—seek private damages from an alleged wrongdoer under the *Act*.²⁰ Price-fixing claims brought under the section 45 conspiracy statutory cause of action, typically pleading a concurrent common law conspiracy cause of action (i.e., a tort), are well-suited for the class action mechanism.²¹ Section 52 false or misleading representation claims, which is another statutory cause of action in Part VI, often concurrently plead breaches of similar false or misleading representation causes of action found in provincial consumer protection statutes.²² The “price-dripping” amendments introduced in 2022 found in section 52 have been the subject of recent uptick in filings.²³

22. Since a private litigant may commence an action for damages in “any court of competent jurisdiction,” private litigants advance claims in the Federal Court of Canada or any provincial superior court.²⁴ Claims at the Federal Court may only assert causes of action allegedly in breach of federal statutes (i.e., no concurrent tort, contract, or provincial statute cause of action allegations),²⁵ while the provincial superior courts are courts of general jurisdiction that may hear non-federal statute-based causes of action. The Class Action Laboratory at the University of Montreal found that approximately 8% of all class action filings in Quebec Superior Court over a 25 year period asserted a cause of action grounded in the *Act*, while in Ontario, based on a sample size of 970 cases, the number was 15%.²⁶ Consumers do not advance claims at the Tribunal as it does not have jurisdiction over conduct set out in Part VI.²⁷

23. In terms of the nature of damages, section 36 allows for traditional restitution, which is the value of the loss incurred by the victim. Again, the *Act* reads that a private party who has “suffered loss or damage as a result of...” may seek damages “equal to the loss or damage proven to be suffered by him.”²⁸ The Supreme Court of Canada interprets this language to mean that *any person* who has suffered a loss or damage from conduct contrary to Part VI of the *Act* has standing to bring an action under section 36 regardless of whether they suffered this loss directly, as a direct purchaser, or indirectly, as an indirect purchaser.²⁹ In 2019, the Supreme Court of Canada clarified that an umbrella purchaser³⁰ can also assert damages under Part VI.³¹

24. While less frequently a matter of argument in private litigation, section 36 also allows a private litigant to assert damages caused by the “failure of any person to comply with an order of the Tribunal or another court under this Act” and to recover the costs of any investigation in connection with the matter and of proceedings.³² The *Act*, including section 36, does not allow a private person to seek punitive damages for breach of the *Act*.

B) Window Dressing—No Private Damages via Section 103.1 Actions

25. Prior to Bill C-59’s amendments, section 103.1 of the *Act* provided a statutory right for a private party to seek injunctive relief in an action for certain restrictive trade practices in Part VIII, namely refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), and abuse of dominance (section 79). These actions had to be filed at the Tribunal, and they required leave.³³ The Tribunal could refuse leave where the issue at the heart of the proposed application was the same subject matter of an ongoing inquiry, application or settlement led by the Commissioner.³⁴ Where the Tribunal considered the substantive leave application, a successful applicant had to demonstrate that their *entire* business was “directly and substantially” affected due to conduct found in one of the five causes of action in Part VIII: refusal to deal, exclusive dealing, tied selling, market restriction or abuse of dominance.³⁵ While for the price maintenance cause of action, the standard for leave was only proving the *entire* business was “directly affected” without the “substantially” requirement.³⁶ Courts have clarified that the burden of proof at this leave stage, like a class action certification or authorization hearing, is a lower standard than proof on a balance of probabilities.³⁷ Under the previous version of the *Act*, the applicant’s onus at the leave stage was to present sufficient and credible evidence to satisfy the court on a standard lower than

a balance of probabilities that the “directly and substantially” or simply “directly” thresholds, per sections 103.1(7) or 103.1(7.1), were met.

26. The statutory language omitting the word “business” in the test for leave related to the price maintenance cause of action suggests that businesses and consumers (i.e., legal and natural persons) were able to seek leave from the Tribunal for that cause of action, whereas it appears only businesses (i.e., legal persons only) were able to seek leave for the other three causes of action.³⁸

27. Previously, and going-forward after the Bill C-59 amendments, the Tribunal may award costs against unsuccessful private party applicants brought under section 103.1 of the *Act*.³⁹ Costs awards follow the *Federal Court Rules*, SOR/98-106, and they may be high.

28. As noted above, before Bill C-59 amendments to the *Act*, private litigants were not able to seek monetary relief for breach of the restrictive trade practice offences. Injunctive relief, or a request that the Tribunal administer a fine, were the only remedies.⁴⁰ It was also possible for the Tribunal to order a person to complete specific steps to restore competition.⁴¹

29. Given the scope of section 103.1 prior to the amendments, for natural persons with relatively small individual losses for wrongful conduct under any of the restrictive trade practices as defined in the *Act*, there was no ability to obtain financial compensation. Natural persons simply had no legal avenue—not at the Tribunal, or Federal or provincial courts—to claim monetary compensation for civil anti-competitive conduct like abuse of dominance, tied selling, and others. While consumers had a theoretical ability to bring a claim for deterrent relief in the case of price maintenance, they faced a practical brick wall because the value of their individual claim, and the cost-risk associated with pressing their rights, made an individual action economically irrational. Only a class action made sense, and the Tribunal had exclusive jurisdiction to hear these causes of action, but there was no class action procedure available at the Tribunal.

30. Even for businesses acting in an individual capacity, the test for leave was tough sledding. In theory, the standard of proof for the leave test of 103.1 was low with courts acknowledging that “the threshold for obtaining leave is not a difficult one to meet.”⁴² In practice, the Tribunal granted very few applications. In the 20 years since private access to the Tribunal has been available, only 28 applications for leave have been made under sections 75, 76 and 77 and none under section 79, of which eight were granted

leave (29% success rate).⁴³ Of the eight applications granted leave, all of them either settled before the hearing or were dismissed.⁴⁴

31. The House of Commons Committee that studied the 2002 version of section 103.1 of the *Act* summed up the lack of access to justice concerns nicely where they observed that:

The Committee believes that, with only injunctive relief as the carrot, private parties in most cases may only be exchanging the costs associated with the alleged anti-competitive conduct for litigation costs (hopefully less than \$1 million per case on average with reforms in the tribunal processes). Indeed, if this scenario does in fact unfold over the next few years, it will very quickly become common knowledge across the business sector and Canada will be no further ahead. Rights with no value attached to them are but window dressing—something that, as many observers have described, has adorned Canada’s antitrust Acts for too long.⁴⁵

[Underline added.]

32. The Bill C-59 amendments, adopted as law in June 2024, changed the trajectory of access to justice for private litigants. A closer look at these amendments follows in the next section.

III—In Pursuit of Equilibrium—Bill C-59

33. In broad strokes, Bill C-59 amended the *Act* by:

- 1) adding “disgorgement” as a monetary remedy available to private litigants for restrictive trade practice causes of action in Part VIII that proceed at the Tribunal;
- 2) extending private access to the Tribunal for additional deceptive marketing practices, and “arrangements-that-lesser-competition” claims in Parts VII.1 and VIII;
- 3) broadening existing causes of action to include “right to repair” and “greenwashing”;
- 4) indicating a class action mechanism exists but without defining its procedure; and
- 5) lowering the burden for persons to obtain leave to proceed at the Tribunal.

A) Disgorgement—Class Monetary Remedy for Restrictive Trade Practices found in Part VIII

34. Bill C-59 introduces “disgorgement” as a monetary remedy that the Tribunal may order to a class for seven types of anti-competitive conduct found in sections 75 (refusal to deal), 76 (price maintenance), 77 (exclusive dealing, tied selling and market restriction), 79 (abuse of dominance), and 90.1 (agreements or arrangements that prevent or lessen competition substantially).⁴⁶

35. Disgorgement means an order against wrongdoers in an amount “not more than the value of the benefit derived” from the prohibited conduct distributed to the party who brought the application and “any other person affected by the conduct.”⁴⁷ The Supreme Court of Canada describes disgorgement as a gain-based remedy, which is available without proof of deprivation to the plaintiff, so long as the plaintiff satisfies all the constituent elements of a cause of action.⁴⁸ Thus, the Tribunal may award the disgorgement remedy for the causes of action found in sections 75, 76, 77, 79 and 90.1. This new disgorgement remedy is not available under the proposed amendments for violations of deceptive marketing provisions in section 74.1.⁴⁹ Based on the above, it appears a plaintiff may now seek leave at the Tribunal to prosecute seven causes of action with disgorgement as the monetary compensation remedy. Before Bill C-59, no monetary remedy was available.⁵⁰

36. From a corrective justice perspective, the disgorgement remedy means that monetary compensation awarded to plaintiffs need not necessarily match the losses caused by the wrongdoing. Rather than the wrongdoer having to restore the value of the loss they caused to the victim, disgorgement focuses on the benefit gained by the defendant because of the unlawful conduct. This is in contrast, for example, to the unjust enrichment doctrine which requires a correspondence between the defendant’s gain and the deprivation to the plaintiffs.⁵¹ Indeed, with disgorgement, there may not be causation of damages at all, which is a necessary element for anti-competitive conduct in Part VI where section 36 restitutionary damages apply. While disgorgement may not align with corrective justice principles, its availability as a remedy offers some advantages in a class action claim.

37. First, with the objective of disgorgement being deterrence, it aligns with one of the three objectives of the class action procedure established by the Supreme Court of Canada in *Dutton*. While restitution’s objective is to repair the plaintiffs’ losses and thus aligns with corrective justice

underpinnings of private law, the objective of disgorgement is deterrence.⁵² Disgorgement deters potential wrongdoers by sending a message that should their unlawful behaviour result in ill-gotten gains, the Tribunal may order those away. In copyright law, the rationale for disgorgement is to deter potential infringers from appropriating the benefits for themselves which in turn discourages development and disclosure of new inventions.⁵³ Applying this to competition law, risk of disgorgement can deter potential wrongdoers from appropriating profits of anti-competitive behaviour which in turn discourages innovation and competition.

38. Second, the disgorgement remedy may simplify common evidentiary hurdles class action plaintiffs face in competition law due to the challenging nature of proving individual losses downstream from the anti-competitive conduct. As an example, consider the section 45 conspiracy (price-fixing) cause of action, where plaintiffs have historically encountered evidentiary hurdles showing that an overcharge from upstream anti-competitive conduct has passed through the chain of commerce to the indirect purchasers.⁵⁴ Under disgorgement, so long as the plaintiffs can prove the elements of these seven newly-identified statutory causes of action, the monetary remedy need not correspond to causation of loss, but rather will be evaluated in relation to the notion of the maximum benefit derived by the wrongdoer. While the loss to class members may very well form an aspect of the benefit derived by a wrongdoer, the lens of inquiry throughout a case may be much different.

B) New Private Right of Access—Monetary Compensation for More Types of Anti-competitive Conduct

39. Due to the *Act's* new amendments, private applicants may now seek leave to pursue a claim at the Tribunal for two new categories of wrongful conduct: 1) deceptive marketing practices found in section 74.01⁵⁵; and 2) agreements or arrangements that prevent or lessen competition substantially as described in section 90.1.⁵⁶ Private parties can seek monetary compensation from the Tribunal in the form of restitution for generally misleading or deceptive representation contrary to section 74.01(1)(a), while disgorgement is available for agreements that prevent or lessen competition substantially contrary to section 90.1, as discussed above.

40. Prior to the amendments, it was already possible for the Tribunal to order restitution to a class for conduct contrary to the general prohibition against false and misleading representations found in section 74.01(1)(a) of the *Act*.⁵⁷ The language setting out the availability of restitution found in

section 74.1(1)(d) is collective in nature, providing that the court may order a person to pay an amount “not exceeding the total of the amounts paid to [them] for the products in respect of which the conduct was engaged in, to be *distributed among the persons to whom the products were sold...*”. Such a remedy has been issued before, reportedly 12 times for cases before the Tribunal between 2005 and 2019.⁵⁸ In 2016, Bell Mobility Inc. agreed to pay an estimated amount of \$11.82 million dollars in rebates to its current and former affected customers who were charged for text messaging services the Commissioner concluded were misleading or deceptive, up to a maximum varying between \$30 and \$60 per consumer, depending on the type of service they were charged.⁵⁹ What has changed with the amendments is that now private parties can pursue claims found in Part VII.1 at the Tribunal, while before only the Commissioner could pursue such claims.

41. Most of the deceptive marketing practices listed in the newly accessible section 74.01 in Part VII.1 are distinct from the types of deceptive marketing practices described in Part VI, for which the consumer may already claim section 36 damages under the *Act*. The deceptive marketing practices under Part VI is a narrow set of misrepresentations made “knowingly” or “recklessly” relative to the more fulsome list of deceptive marketing practices set out in Part VII.1, which incorporate the lower standard that a representation need only be false or misleading in a material respect “by any means whatever”. There are three parallel types of deceptive marketing practices in both Parts VI and VII.1: general prohibition against false or misleading representations (at s. 52 and s. 74.01(1)(a)); drip pricing (at s. 52(1.3) and s. 74.01(1.1)); and false and misleading representations in electronic messages and web addresses (at s. 52.01 and 74.011)). Other than those three, all of the deceptive marketing practices found in Part VII.1 are distinct types of conduct not set out in Part VI, which include: performance claims not based on adequate tests (s. 74.01(1)(b)); warranties and guarantees (s. 74.01(1)(c)); ordinary selling price (s. 74.01(2) and (3)); use of tests and testimonials (s. 74.02); bait and switch (s. 74.04); and promotional contests (74.06).

42. Thus, at first glance, these amendments appear to breathe life into new substantive rights insofar as a private person may now access justice at the Tribunal for expanded causes of action. However, this is not the case as most of the conduct listed under Part VII.1 only allow for deterrent remedies, not monetary compensatory remedies. Notably, while section 74.1(1) of the *Act* provides a range of remedies, the remedy of restitution of 74.1(1)(d) is explicitly limited to conduct contrary to 74.01(1)(a) of the *Act*, the general prohibition against representations that are false and misleading in

a material aspect. As such, the *Act* provides that “in the case of *conduct that is reviewable under 74.01(1)(a)*”, the Tribunal may order restitution (...).⁶⁰ This explicit reference to conduct contrary to 74.01(1)(a), and not conduct found elsewhere, suggests that restitution may not be available for other marketing practices that are more accurately captured by the more specific conduct listed in the sections that follow 74.01(1)(a), including warranties and guarantees (s. 74.01(1)(c)), for example. The Competition Bureau appears to share this conclusion, where in 2023 the Bureau encouraged amending the *Act* to extend the restitution remedy to all deceptive marketing practices:

(...) [I]n respect of restitution, paragraph 74.1(1)(d) of the Act limits its application to conduct that is reviewable under paragraph 74.01(1)(a), or the making of misleading representations to the public. Restitution should be made available to all other deceptive marketing practices (which would include, for instance, the provision that prohibits making unsubstantiated performance claims about a product). Such a change would enrich the courts’ ability to promote compliance with the deceptive marketing practices provisions of the Act.⁶¹

43. In addition, insofar as section 74.01(1)(a) of the *Act* sets out the *general* prohibition against false and misleading representations and the following sections of the *Act* enumerate *specific* examples of misleading or deceptive marketing practices, it seems logical to infer that the subsequent examples of misleading practices, by their inherent nature as specific examples, constitute conduct that may also qualify as misleading under the general prohibition—as per the language of subsection 74.01(1)(a) of the *Act*. This point may apply to all subsequent causes of action, except for subsection 74.01(1)(b) as a performance claim can be accurate but nevertheless be unlawful if the statement regarding performance is not substantiated by adequate and proper testing. Except for performance claims set out in 74.01(1)(b), where any of the other specific qualify as inherently misleading conduct, then why would restitution not be available for those more specific misleading practices? Since there is a principle of statutory interpretation that the legislature does not intend to produce absurd consequences, including logical contradictions⁶²—the limited application of restitution to the *general* prohibition when *specific* sub-sections are excluded is opportunity for clarification.

44. From a corrective justice perspective, this amendment is a disappointing micro-advancement. For all intents and purposes, it adds a new forum—the Tribunal—where consumers may seek redress for a cause of action that they could already access justice through other existing forums,

while declining to allow compensatory remedies at the Tribunal for the full suite of false and misleading representations, some but not all of which consumers may already pursue at the Federal Court and provincial superior courts under section 36.

45. Section 90.1 of the *Act* addresses anti-competitive agreements and arrangements. According to the Competition Bureau, typically this provision governs agreements between competitors that are not conspiracies within the meaning of section 45 or mergers within the meaning of section 92, such as agreements between federal financial institutions and “bid-rigging.”⁶³ As an example, for the bank customer who may be harmed by an agreement between two banks to exchange pricing information on their banking products or to require that the sale of a financial product, like a line of credit or an insurance product, be made through a common sales agent⁶⁴, such a customer now has a private right of action to seek leave at the Tribunal and seek monetary compensation via the disgorgement remedy.

46. From a class action litigant perspective, the newly available private access to section 90.1 appears to open up a broader range of unlawful conduct to which consumers may seek monetary compensation at the Tribunal. Since this amendment will allow for claims related to agreements or arrangements not covered by section 45, it might allow for the “buy-side” or purchaser agreements currently excluded from section 45,⁶⁵ or other claims that initially sound in conspiracy but are not properly covered by section 45. Since section 90.1 opens up claims sounding in conspiracy, or generally similar in some respects, it is an open question whether consumers may attempt to press the limits of this section 90.1 cause of action to side-step the onerous evidentiary burden that is often required in proving causation of loss in a damages case under section 36, by preferring to prosecute a disgorgement-based claim at the Tribunal. In any event, there is now an additional cause of action that private litigants may access at the Tribunal.

C) New Causes of Action: Right to Repair and Greenwashing

47. Bill C-59’s changes broadened two existing causes of action: 1) a “right to repair”, which supplements the current refusal to deal provision of section 75; and 2) a “greenwashing” cause of action under the deceptive marketing provisions in section 74. While the addition of the “right to repair” may provide new terrain for competition law class actions, it is unlikely that the “greenwashing” cause of action will amount to anything more than window dressing.

48. A “right to repair” can be understood as the right for owners of a product to choose where to bring their product for repair and maintenance services. As everyday products become more software-based, including programmable fridges, smart phones, and cars with computers in their dashboards, when a problem arises, digital locks embedded in product software may force an owner to bring their product back to the manufacturer who sold it to them in the first place.⁶⁶

49. The amendments to section 75 prohibit a manufacturer from refusing to provide a means of repair to products in an anti-competitive manner. The proposed language will deem it anti-competitive conduct for a manufacturer or supplier to refuse to provide a person with a “means of diagnosis or repair” in circumstances where the means of diagnosis can be readily supplied.⁶⁷ Without a right to repair, private users may be forced to pay higher repair costs or they may choose to replace products that could otherwise reasonably be repaired but for a manufacturer’s anti-competitive conduct. Where independent repair shops can readily provide the repair or maintenance for a product, it is anti-competitive for a manufacturer to prohibit that. The end consumer who may suffer a loss—either equal to the inflated price to repair the product due to this refusal to supply or perhaps equal to the price of a new product that was unnecessarily acquired due to the refusal to supply—may pursue the disgorgement remedy at the Tribunal. While disgorgement may not be the best remedy from a corrective justice lens, this new cause of action will likely promote competition law class actions as it adds a method for consumers or small businesses to obtain a monetary remedy.

50. The amendments at new subsection 74.01(1)(b.1)—the so-called “greenwashing” provision—prohibits companies from making misleading representations about a product or service’s “benefits for protecting the environment or mitigating the environmental and ecological effects of climate change” where such a representation is not based on an adequate or proper test. The language of this new provision was originally limited to misrepresentations related to a product or a service, thereby excluding deceptive marketing representations related to a company’s misleading statements about their commitments to meet certain climate or environmental goals. But critics argued that the new provision did not go far enough to adequately address so-called “greenwashing” conduct.

51. As a result, new subsection 74.01(1)(b.2) was amended in Committee to also prohibit companies from making misleading representations “to the public 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 climate change” where such a representation is not based on an adequate or proper test. Therefore, extending the new provision to include misrepresentations about a business or a business activity. This prohibition would, for example, capture misleading representations by a company that publicly asserts they will be “net-zero” by a certain date or that they will be “carbon neutral” when in fact they have no practical plan in place to achieve those environmental commitments.⁶⁸

52. While it is positive that the greenwashing cause of action was extended to include misrepresentations about a product or service, a business or a business activity, the failure of Bill C-59 is that these new causes of action do not incorporate monetary remedies for “greenwashing” at all. As discussed above, the restitution remedy for deceptive marketing practices does not appear to be available for the new greenwashing cause of action—as restitution damages are only available for the cause of action set out in subsection 74.01(1)(a). Consequently, victims of greenwashing may be limited to claiming injunctive relief at the Tribunal, which may attract new claims led by non-governmental organizations but provide little to no incentive to “private attorneys general” to assume the risk of advancing this kind of litigation.

D) Class Actions Available—Class Procedure Not Clear

53. The existence of a class action mechanism under Bill C-59 is not self-evident. The disgorgement remedy that private litigants may now access for conduct in Part VIII is available to “the applicant and any other person affected by the conduct”⁶⁹ While the already existing restitution remedy that private litigants may now access for deceptive marketing practices allows monies “to be *distributed among the persons to whom the products were sold...*”. Readers may reasonably infer that this language now permits class action practice at the Tribunal led by private parties for conduct contrary 74.01(1)(a), 75, 76, 77, 79 or 90.1. Yet, Bill C-59 provided no procedural rules or criteria regarding how or under what conditions private representative actions will proceed before the Tribunal.

54. While it is perplexing that Parliament did not see fit to state more expressly the procedural rules applicable to class procedures, this does not mean the bench and bar are left with no guidance. The authors believe that the likely eventuality is that the *Federal Court Rules*—with their clear class action procedural guidance and developed body of jurisprudence—will apply at the Tribunal given the *Federal Court Rules* may fill any procedural

vacuum at the Tribunal. More specifically, section 34(1) of the *Competition Tribunal Rules*, which reads “[i]f, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Court Rules* may be followed”, will likely be interpreted to adopt the *Federal Court Rules* class action procedural mechanism into class action practice at the Tribunal. Interestingly, it is not novel for Parliament to consider a class action procedure by formal amendment to the *Act* as this practical solution has roots back to the mid-1970s.⁷⁰

E) Burden to Obtain Leave Lowered: “Part” of a Business & Public Interest Criteria

55. Bill C-59 lowers the threshold for leave from the Tribunal for claims grounded in the causes of action found in sections 74.01, 75, 77, 79 and 90.1. Under the new amendments, the Tribunal may grant leave where it is satisfied that only a *part* of a company’s business is affected by the anti-competitive conduct or it is in the public interest to do so. Likely because natural persons could already bring a claim grounded in price maintenance (section 76), applications for leave under that cause of action do not import the new ‘public interest’ consideration. For misleading or deceptive practices, leave may be granted if the Tribunal is satisfied that it is in the public interest to do so.⁷¹

56. Before Bill C-59, only businesses could seek leave for causes of action found in sections 75, 77 or 79 (i.e., refusal to deal, exclusive dealing, tied selling market restriction, and abuse of dominance). Before the amendments to the *Act*, applicants had to show that their *whole* business was substantially and directed affected by the conduct at issue.⁷² With the amendments, the new test lowers this threshold by allowing the Tribunal to grant leave for applicants who can show that only *part* of their business has been impacted by anti-competitive conduct. More important to consumers, by adding an alternative public interest criteria for leave, this appears to indicate that, through a representative plaintiff who brings a claim in the “public interest”, the Tribunal may grant leave to bring an application that seeks monetary compensation on behalf of a class resulting from unlawful anti-competitive conduct. But what does it mean for the Tribunal to be persuaded that it is in the “public interest” to hear a claim?

57. Acknowledging that claims commenced through section 103.1 will be pursued against private corporations, and not litigating the legality of government action, the legal test for public interest standing discussed by

the Supreme Court of Canada in *British Columbia (Attorney General) v. Council of Canadians with Disabilities* may provide insight into how the Tribunal will interpret the public interest test in the private law context of competition class action claims.⁷³ In *BC v CDD*, the Supreme Court of Canada held that a case is deemed to be in the “public interest” where its adjudication would transcend the interest held by the claimant themselves in that it also may provide access to justice for disadvantaged persons whose legal rights are affected.⁷⁴ The core principle that a claim will be in the “public interest” where its potential outcome will be of a collective benefit reaching beyond the private interest of the specific claimant whose name is attached to the claim is one that marries well to the purposes of competition class actions, which are filed for a class of persons across Canada suffering the same anti-competitive loss. The exact parameters of the new public interest test will take shape in the fullness of time.

58. With disgorgement and restitution as financial remedies available to private litigants for previously inaccessible causes of action, a class action procedure of some kind, a leave test that appears to be lower, the amendments in Bill C-59 take a step forward insofar as they provide private litigants, in particular consumers, a pathway to recover harms and losses where there is anti-competitive conduct set out in certain sections of Parts VII.1 and VIII of the *Act*. This new path to access to justice will occur at the Tribunal since there remains no compensatory legal remedy available for these causes of action in federal or provincial court. Notwithstanding this movement in pursuit of equilibrium, these amendments fall short of the mark, as will be discussed in the next section.

IV—Disequilibrium Persists—Bill C-59 Falls Short

59 From a corrective justice perspective, the reforms introduced by Bill C-59 represent a moderate advancement forward. Critically, there will be a class action mechanism, of some kind, albeit the details of what that will look like are unclear. Come what may procedurally, that consumers may seek monetary compensation for a sub-optimal gain-based remedy is a step toward equilibrium. That said, a better approach, one consistent with corrective justice principles, would be to also allow conduct contrary to Parts VII.1 and VIII to be pursued through a section 36 private damages action. Such an amendment would better optimize access to justice from a procedural and substantive perspective and would also serve the principles of behaviour modification and judicial economy.

A) Class Actions in the Competition Tribunal—Movement Forward, Come What May

60. Business lobby critics observed that Bill C-59 did not propose to add to the *Act* any of the safeguards normally included in Canadian class action statutes.⁷⁵ Lacking proper safeguards, they argue, section 103.1 “could be a cash cow for plaintiff lawyers, while using up the Competition Tribunal’s staff time and resources, burdening businesses with abusive litigation and potentially resulting in consumers not receiving financial compensation to which they are entitled.”⁷⁶ Not only is this criticism gratuitous and fantastical, it is inconsistent with literature that there was not a flood of unmeritorious claims at the Tribunal since the private action was first introduced.⁷⁷ For the business lobby, the appropriate safeguards would be that: 1) the evidentiary threshold for an applicant would be to provide “cogent evidence to demonstrate each of the elements required to make an [certification] order”; and 2) the preferability element of the certification test ought to include a superiority and predominance threshold consistent with Ontario’s 2020 amendment to its *Class Proceeding Act, 1992* at s 5(1.1).⁷⁸

61. A class action procedural leave test, as proposed by the business lobby, would make the standard for a class claim at the Tribunal the highest threshold of any judicial body anywhere in the country. The factual threshold of “cogent evidence to demonstrate each of the elements...” takes a merits-based lens and is higher than the existing “some basis in fact” threshold applicable in common law provinces and territories, which is a low purely procedural threshold best understood as being in contrast to no basis in fact.⁷⁹ Further, the superiority/predominance language imported from Ontario’s statute is the strictest standard on the preferability criterion in the country.⁸⁰ With the exception of Prince Edward Island, no other common law jurisdiction in Canada, including cases filed in the Federal Court under the *Federal Court Rules*, has a certification test as strict as Ontario—while the Supreme Court of Canada has described Quebec’s authorization test set out in article 575 of Quebec’s Code of Civil Procedure (“C.C.P.”) as the lowest in the country.⁸¹ Practically speaking, where Bill C-59 seeks to expand access to justice for competition class actions, it would be contrary to the objectives of the *Act* to impose the strictest test in the country, given that a very high majority of all other Canadian class action statutes have a lower certification threshold. Might it be that the business lobby prefers the test be so strict that consumer class actions do not proceed at all?

62. Further, it is inaccurate to suggest that the *Act* must incorporate provisions consistent with the various class proceeding statutes to have

reasonable safeguards for class action practice. As discussed above, in the absence of any procedural rules in the *Act* or in the *Competition Tribunal Rules*, the procedures governing class actions as set out by the *Federal Court Rules* likely apply to class proceedings at the Tribunal. In the event there remains a void, the common law regulates class actions in the absence of specific procedural statutes.⁸² The Tribunal adopting safeguards based on common law principles would not be the first administrative tribunal taking such an approach, as at least the BC Human Rights Tribunal has accommodated the class complaint procedure on common law principles for over 20 years.⁸³

63. Notwithstanding the *Federal Court Rules* and common law provide safeguards, detailed class procedural rules are preferred over dealing with class actions based only on common law principles. From a corrective justice perspective, the authorization (certification) test in art. 575 of Quebec's *C.C.P.* is optimal to promote access to justice. Certainly, the *C.C.P.* has numerous reasonable safeguards, set out in articles 574-601, that ought to satisfy any objective observer. From a nation-wide federalist perspective, perhaps there is already a middle ground as section 34(1) of the *Competition Tribunal Rules* incorporate the *Federal Court Rules* on class actions, which, for all intents and purposes, are equal to the non-Ontario/PEI common law jurisdictions' tests as they include the "some basis in fact" evidentiary standard and do not include the superiority/predominance threshold. Using the *Federal Court Rules* is a national compromise, as it burdens Quebec-residents with a higher standard than what they would face at the Quebec Superior Court but lowers the test for Ontario and PEI residents relative to what they would otherwise face in their provincial courts while providing consistency on the certification standard to residents in the rest of Canada. In addition, as the Tribunal already uses the *Federal Court Rules* to guide its decisions on costs, using those rules for guidance on class action procedure seems like an intuitive solution.⁸⁴

64. Come what may on the procedural rules of class action practice, the debate appears to center around how strict or permissive a certification test may be, not on the need for a class action mechanism. The inclusion of any class procedure is movement toward equilibrium.

B) Extend Section 36 Damages to Parts VII.1 & VIII Causes of Action

65. The disgorgement gain-based monetary remedy available to class members for the new causes of action does not accord with corrective justice

principles. The balance corrective justice teaches is that a victim receives what they lost, not more, and not less. The micro-advancement of allowing class restitution for misleading practices under subsection 74.01(1)(a), but not elsewhere, fails to provide monetary redress where wrongdoers cause losses for the broader suite of misleading and deceptive practices enumerated in Part VII.1.

66. Disgorgement is not an independent cause of action, but rather an alternative remedy for certain forms of wrongful conduct.⁸⁵ The Supreme Court of Canada noted in *Atlantic Lottery*—a case that discusses negligence, waiver of tort, breach of contract, and unjust enrichment—disgorgement is not available as a general proposition in negligence without proof of damages, and the key to the gains-based disgorgement remedy lies in “aligning the remedy with the injustice it corrects.”⁸⁶ It is not clear, based on the newly available causes of action set out in Part VIII of the *Act*, why Bill C-59 seeks to quantify a monetary remedy only in relation to the defendant’s gain while leaving out the traditional causation of damages corrective justice compensatory framework. Perhaps this stems from the public nature origins of the *Act*, which like other public law statutes—such as the *Criminal Code*—incorporates a deterrence objective. Or perhaps more practically this stems from the logistical challenges in identifying and quantifying downstream harms from anti-competitive behaviour while the harm to the market more generally is clear. It is odd that Parliament would deny private parties an ability to recover their own losses, limiting them to a remedy that is typically reserved for public deterrence. What about their individual losses, then? From an access to justice perspective, the preferred course is that both remedies would be available.

67. The solution to this conceptual difficulty is to bring future amendments to section 36(1)(a) to read: “conduct that is contrary to any provision of Parts VI, VII.1 or VIII, ...”. In other words, allow private parties access to pursue the losses they’ve suffered due to conduct under Parts VII.1 or VIII via the section 36 procedure in any court of competent jurisdiction. This would extend the restitutionary damages remedy to the newly accessible causes of action. This does away with the conceptual difficulty that may arise with amendments only permitting what is an alternative, gain-based remedy in disgorgement, where the remedy may result in monetary compensation that is higher or lower than the losses of the class members. Such an amendment would provide a greater range of monetary remedies available to potential plaintiffs, through a section 36 action in any court of competent jurisdiction, that will assist in matching the remedy to the harm wrongdoers cause.

68. A further benefit of extending section 36 damages would be greater availability of plaintiff counsel. The practical and geographic reality is that the Tribunal generally sits in Ottawa, albeit there are exceptions.⁸⁷ The plaintiffs bar, those that are experienced in class actions, are generally spread out around the country, and there is very little class litigation that is filed and advanced in Ottawa, and increasingly less in Ontario generally since Ontario's 2020 amendments. Simply put, if plaintiff counsel must travel to Ottawa for hearings over extended periods of time, the number of plaintiff-side lawyers that are willing and able to prosecute these new causes of action will decrease. But extending section 36 damages to the new causes of action would solve this problem because it would open the Federal Court as well as provincial and territorial superior courts, which of course are located in all major cities in each province, as forums of selection.

69. That the Tribunal has only five permanent judicial members is a practical concern, as an influx in cases may lead to serious delay. But the shortage of judicial resources, be it members at the Tribunal or at provincial and federal court, is not a reason to refuse to administer and deliver access to justice. Such judicial shortage considerations are important, but they are distinct from the principle of judicial economy, which seeks to aggregate claims where possible to avoid duplicative fact-finding and legal analysis. In the context of competition law class actions, there is a judicial economy concern given factually overlapping claims may be brought at both the Tribunal and at provincial and territorial superior courts, including possibly by competing plaintiff counsel.⁸⁸ Frequently plaintiff counsel plead multiple causes of action, in addition to *Competition Act* claims, that are often grounded in tort, or provincial or territorial consumer protection act statutory claims. It is not inconceivable that newly available causes of action—like the broader list of deceptive marketing practices, refusal to deal, price maintenance, or abuse of dominance—necessarily filed at the Tribunal may also see filings in provincial and territorial superior courts with similar or related factual conduct over a similar period of time but with legal liability grounded in causes of action other than those in Parts VII.1 and VIII of the *Act*. This is a judicial economy concern. And while it is beyond the scope of this paper to address filings in multiple or the same jurisdictions by competing firms that lead to carriage or inter-provincial stay applications, it may be unfair to defendants and the courts/tribunal when they are asked to address highly similar fact patterns filed by potentially different plaintiff counsel that allege different yet similar causes of action.

70. Critics may argue that extending section 36 damages to conduct found in Parts VII.1 and VIII runs contrary to the rationale for the Tribunal in the first place, which, being a specialized body composed of decision-makers with experience and knowledge necessary to hear competition cases, is particularly well-suited to hear competition law cases. That may well be true, but conduct grounded in conspiracy and false & misleading causes of action in Part VI of the *Act* have proceeded in superior courts for decades. Justices at provincial superior courts remain competent to hear claims under the *Act*, and frankly more options and flexibility in choice of forum enhances access to justice, behaviour modification and judicial economy. At minimum, adding the damages remedy as an option among the Tribunal's suite of remedies should be addressed without delay.

71. The purpose of the *Act* is to maintain and encourage competition in Canada in order to, among other things, provide consumers with competitive prices and product choices.⁸⁹ Not only does the class action process permit greater access to justice and promote judicial economy, but it is also a behavioural modification tool that maintains and encourages competition in Canada. Economic opinion dating back to the 1970s argues that class action compensatory remedies serve the interests of deterrence.⁹⁰ More contemporary writing underlines that providing access to justice for competition class action claims before the Tribunal allows everyday consumers the opportunity to hold actors of anti-competitive conduct accountable by forcing them to bear the costs of their anti-competitive conduct.⁹¹ As scholar and lawyer Mathew Good put it: "if class actions force malefactors to pay for their wrongdoings, then defendants will either change their ways or be bankrupted."⁹² In sum, extending the section 36 damages remedy to cover conduct under Parts VII.1 and VIII provides another important tool, a tool that will be more readily available, the whole serving the behaviour modification principle.

Conclusion

72. The amendments to the *Act* introduced by Bill C-59 represent an important and significant step forward. They fall short of equilibrium because consumers will absorb unlawfully caused harms and losses while the legal architecture in Canada cannot provide them redress. Broadening the damages remedy to Parts VII.1 and VIII of the *Act* coupled with a reasonable class action procedure finds equilibrium both in matching the quantum of damages to the causative element of wrongdoing and in the practical reality of the administration of legal services within a country that

has a rapidly growing population and the second-largest geographical land mass on the planet.

ENDNOTES

- ¹ *Competition Act*, R.S.C., 1985, c. C-34 [*Competition Act*]; 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*, 1st Sess, 44th Parl, 2024 (received royal assent on June 20, 2024) [*Bill C-59*].
- ² *Rankin (Rankin's Garage & Sales) v J.J.*, 2018 SCC 19 at para 63; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 189.
- ³ *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#) at paras 27-29 [*Dutton*].
- ⁴ John C. P. Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125:7 Harv L Rev 1640 at 1662.
- ⁵ Goldberg, *supra* note 4.
- ⁶ Ernest J Wienrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 9.
- ⁷ Ross Grantham & Darryn Jensen, "The Proper Role of Policy in Private Law Adjudication" (2018) 68:2 UTLJ 187 at 199.
- ⁸ Wienrib, *supra* note 6 at 9.
- ⁹ *Competition Act*, *supra* note 1, s 36.
- ¹⁰ Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:4 Osgoode Hall LJ 461 at 496-497.
- ¹¹ *Dutton*, *supra* note 3 at paras 27-29.
- ¹² *AIC Limited v Fischer*, 2013 SCC 69 at para 34.
- ¹³ Janet Walker, ed., *Class Actions in Canada: Cases, Notes and Materials*, 2nd ed (Toronto: Emond Publishing, 2018) at 524.
- ¹⁴ *Sibiga c Fido Solutions inc.*, 2016 QCCA 1299 at para 102 (consumer fee case).
- ¹⁵ *Condon v Canada*, 2018 FC 522 at para 91 (privacy data loss case).
- ¹⁶ *Fantl v Transamerica Life Canada*, [2008] OJ No 1536 (ONSCJ) at para 49; For scholarly comment on this see: Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interest of the Absent Client: Legal Ethics and Class Actions" (2011) 49 Osgoode Hall LJ 1 and Frank Iacobucci, "What is Access to Justice in the Context of Class Actions" (2011) 53 Sup. Ct L. Rev. (2d) 17.
- ¹⁷ See John S. Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 44.
- ¹⁸ *Competition Act*, *supra* note 1, s 36(1).
- ¹⁹ *Watson v Bank of America Corp.*, 2015 BCCA 362 at para 72; *F.H. v McDougall*, 2008 SCC 53 at para 40.
- ²⁰ Tyhurst, *supra* note 17 at 55. Also see the 2013 Supreme Court of Canada "trilogy": *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd v Archer Daniels Midland Co.*, 2013 SCC 58 [*Sun-Rype*]; and *Option consommateurs v Infineon Technologies AG*, 2013 SCC 59 [*Infineon*], (collectively, the "2013 Trilogy").
- ²¹ *Pro-Sys*, *supra* note 20; *Sun-Rype*, *supra* note 20; and *Infineon*, *supra* note 20.

- ²² *Rebuck v Ford Motor Company*, 2022 ONSC 2396, aff'd 2023 ONCA 121; *Gauthier c Johnson & Johnson Inc.*, 2020 QCCS 690, aff'd 2020 QCCA 1666.
- ²³ *Commissioner of Competition v Cineplex Inc.*, (Notice of Application pursuant to s. 74.01 filed on May 18, 2023) Ottawa CT-2023-003 (CT); *Ponton v Cineplex Inc. and Cineplex Entertainment Limited Partnership* (Application for Authorization filed January 19, 2024) Montreal 500-06-001291-240 (QCSC); *Bahrani v Cineplex inc. and Cineplex Entertainment LP* (Notice of Civil Claim filed January 22, 2024) Vancouver No. S-240406 (BCSC); *Sun v Bloomex Inc.* (Statement of Claim filed March 11, 2024) Vancouver Action No. T-545-24 (FC); *Commissioner of Competition v TicketNetwork, Inc.* (Registered Consent Agreement filed November 21, 2023) Ottawa CT-2023-009 (CT).
- ²⁴ *Competition Act*, *supra* note 1, ss. 36(1) and (3).
- ²⁵ *Federal Courts Act*, R.S.C. 1985, c F-7, ss 17 to 28 set out that jurisdiction is limited to matters identified in specific federal statutes, including class actions against the government or a federal ministry or Crown agency.
- ²⁶ Catherine Piché, *L'action collective: ses succès et ses défis*, (Montreal: Éditions Thémis, 2019) at 40-42, Tableau II - 3.2.1 & 3.2.2.
- ²⁷ *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp), s. 8(1) [*Tribunal Act*].
- ²⁸ *Competition Act*, *supra* note 1, s 36(1).
- ²⁹ *Pro-Sys*, *supra* note 20 at para 16: The Supreme Court of Canada defines “indirect purchasers” as “consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger’s direct purchasers, or from some other intermediary in the chain of distribution.”
- ³⁰ *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 58: The Supreme Court of Canada used the term “umbrella purchasers” to describe purchasers who have suffered loss as result of “the defendant’s anti-competitive cartel activity, creates an ‘umbrella’ of supra-competitive prices, causing non-cartel manufacturers to raise their prices” [*Godfrey*].
- ³¹ *Godfrey*, *supra* note 30 at para 64.
- ³² *Competition Act*, *supra* note 1, s 36(1)(b) and following.
- ³³ *Competition Act*, *supra* note 1, ss 103.1(1), (7) and (7.1).
- ³⁴ *Competition Act*, *supra* note 1, ss 103.1(4) and (5).
- ³⁵ *Competition Act*, *supra* note 1, s 103.1(7) reads: “The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section.” The Tribunal’s case law has consistently held that the “substantial affect” on a business is measured in the context of the *entire* business, see *Sears Canada Inc. v Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp Trib 6 at paras 20-21 where the Tribunal dismissed the application for leave because the matter at issue, prestige fragrances and cosmetics and accessories, did not represent the entirety of Sear’s business, but only one of

the six destination categories of its department stores and as a result the effect on Sear's department store business is not substantial.

³⁶ *Competition Act*, *supra* note 1, s 103.1(7.1) reads: "The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section." See for example, *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15 at para 60.

³⁷ *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 at para 16, citing *National Capital News Canada v Canada (Speaker of the House of Commons)*, 2002 Comp Trib 41 [*Symbol Technologies*].

³⁸ *Competition Act*, *supra* note 1, ss 103.1(7) and 103.1(7.1).

³⁹ *Tribunal Act*, *supra* note 27, s 8.1.

⁴⁰ *Competition Act*, *supra* note 1, for remedies for refusal to supply see s 75(1) para 2; for remedies for price maintenance see s 76(2); for remedies for exclusive dealing, market restriction or tied selling see ss 77(2) para 2, (3) and (3.1); for remedies for abuse of dominance see ss 79(2) and (3.1).

⁴¹ For example, where the elements of refusal to supply under s 75(1) of the *Act* are met, then under s 75(1) para 2, the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms; In addition, where the elements of price maintenance under s 76(1) of the *Act*, then under s 76(2) the Tribunal may choose one of the following remedies: prohibit a supplier from continuing to engage in price resale maintenance; or order the supplier to accept a customer on usual trade terms. These remedies are positive in nature, differentiating from interim injunctions that typically order a defendant to *stop* or *cease* behaviour.

⁴² *Symbol Technologies*, *supra* note 37 at para 17; *Safa Enterprises Inc v Imperial Tobacco Company Limited*, 2013 Comp Trib 19 at para 15; *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26, at paras 20-21.

⁴³ Laura Rowe, Tessa Martel & Zach Rudge, "Institutional Design and the Administration of Canadian Competition Law: Modernizing the Competition Tribunal" (2023) 36:2 *Can Competition L Rev* 53 at 56.

⁴⁴ *Ibid.*

⁴⁵ House of Commons, Standing Committee on Industry, Science and Technology, *Report: A Plan to Modernize Canada's Competition Regime*, 37th Parl, 1st Sess, (April 2002) at 33.

⁴⁶ As will be discussed in the next sub-part, Bill C-59 expands the jurisdiction of the Tribunal, which includes the ability of the Tribunal to hear and adjudicate applications with leave for conduct contrary to s 90.1.

⁴⁷ *Bill C-59*, *supra* note 1, ss 244(2), 245(2), 246, 247(2), and 248(7).

⁴⁸ *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 25 [*Atlantic Lottery*].

⁴⁹ *Competition Act*, *supra* note 1, s 74.1(1)(d) allows the Tribunal to award restitution for conduct contrary to the general prohibition against false and misleading practices set out in s 74.01(1)(a). For an example of restitution being

provided to consumers, see *Commissioner of Competition v Bell Mobility Inc* (27 May 2016), CT-2017-007 (Registered Consent Agreement), in which a Consent Agreement provided restitution to consumers who suffered financial loss as a result of allegedly deceptive marketing practices by Bell, Rogers, Telus and the Canadian Wireless Telecommunications Alliance regarding text messages services. As set out in the Consent Agreement, the companies agreed to make a total of \$24 million available in rebates to consumers whereby current customers received an automatic credit in their account up to a maximum amount of \$30 to \$60 and former customers would be contacted and informed of their entitlement to the same rebate.

⁵⁰ *Competition Act*, *supra* note 1, see note 40 for remedies for ss 75, 76, 77 and 79. None of these provisions make damages available and some of them explicitly note that damages are *not* available, see s 77(3.1) for example.

⁵¹ *Atlantic Lottery*, *supra* note 48 at para 24.

⁵² *Nova Chemicals Corp. v Dow Chemical Co.*, 2022 SCC 43 at para 47.

⁵³ *Ibid.*, at para 45.

⁵⁴ See *Pro-Sys*, *supra* note 20 at para 115 where the Supreme Court of Canada held that in indirect purchaser actions a methodology is required to “establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.”

⁵⁵ The anti-competitive marketing practices found in s 74.01 include the following: False or misleading representations (s 74.01(1)(a)); Warranties and guarantees (ss 74.01(1)(b) and (c)) Drip pricing (s 74.01(1.1)); Ordinary selling price (ss 74.01(2) and (3)); Representations in electronic messages and web addresses (s 74.011); Use of tests and testimonials (s 74.02); Bait and switch (s 74.04); Sale above advertised price (s 74.05(1)); Promotional contests (s 74.06); For descriptions of most of these practices and comparison of which ones also appear in Part VI of the Act, see Competition Bureau of Canada, “Misleading representations and deceptive marketing practices: Examples of conduct covered by the Competition Act” (January 2024), online (pdf): <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/deceptive-marketing-practices/types-deceptive-marketing-practices/misleading-representations-and-deceptive-marketing-practices#MisleadingRepresentations>>

⁵⁶ Agreements or arrangements covered by s 90.1 include agreements between competitors that are not conspiracies within the meaning of s 45 or mergers within the meaning of s 92, such as agreements between federal financial institutions and “bid-rigging.”

⁵⁷ *Competition Act*, *supra* note 1, s 74.1(1)(d).

⁵⁸ Paul-Erik Veel, “An Empirical Analysis of Cases at the Competition Tribunal” (9 September 2020), online (blog): <<https://litigate.com/assets/uploads/20200909-105852-4324-An-Empirical-Analysis-of-Cases-at-the-Competition-Tribunal.pdf>>.

⁵⁹ *The Commissioner of Competition v Bell Mobility Inc* (27 May 2016), CT-2016-007 (Registered Consent Agreement), at paras 3 and 4. The Commissioner

concluded that Bell Mobility Inc engaged in deceptive marketing practices contrary to s 74.01(1)(a) by charging its customers for third-party text messaging services they did not intend to purchase or for which they did not agree to pay.

⁶⁰ *Competition Act*, *supra* note 1, s 74.1(1)(d).

⁶¹ Competition Bureau, “The Future of Competition Policy in Canada” (15 March 2023), 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>>.

⁶² *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27.

⁶³ Competition Bureau of Canada, *Competitor Collaboration Guidelines* (Ottawa: Innovation, Science and Economic Development Canada, 2021) at 10 [*Collaboration Guidelines*].

⁶⁴ *Ibid*, at 40 (joint selling agreements) and at 42 (information sharing agreements).

⁶⁵ *Mohr v National Hockey League*, 2022 FCA 145 at paras 39-42.

⁶⁶ In high-tech everyday devices, manufacturers embed what’s called a technological protection measure (TPMs) that prevent consumers from getting their products repaired at the location of their choose. Rather, the consumer must go to the manufacture or the manufacture-authorized repair shop at where the designated repair person has the manufacturers digital key to proceed with the necessary repair or maintenance. In 2021, the Competition Bureau expressed their support against TPMs and how this practice negatively impacts competition in the Canadian markets: see Competition Bureau of Canada, “Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things—Unlocking Competition” (September 2021), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/competition-bureau-submission-consultation-modern-copyright-framework-artificial-intelligence-and>>.

⁶⁷ *Bill C-59*, *supra* note 1, s 244.

⁶⁸ See for example the decision rendered recently by the Dutch Court of Amsterdam in *Fossielvrij NL v KLM*. In *Fossielvrij*, airline KLM’s marketing breached the European Unfair Consumer Practices Directive (UCPD) by greenwashing their commitments to the Paris Climate Agreement and their commitment to “offset” the carbon footprint of their aviation activities. In essence, KLM was publicly advertising their commitment to the climate goals set out in the Paris Agreement without, according to the Dutch Court, ensuring that their claims were feasible or concrete. When filed, this was the first case in the world to challenge an airline industry for greenwashing over carbon offset products. See Dutch Court of Amsterdam, Amsterdam, 20 March 2024, *Fossielvrij NL v KLM*, File No. C/13/719848 / HA ZA 22-524.

⁶⁹ *Bill C-59*, *supra* note 1, ss 244(2), 245(2), 246, 247(2), and 248(7).

⁷⁰ The idea of adding a class procedural mechanism for causes of action set out

in the *Act* was raised back in 1975, before any provinces adopted class action legislation, during the enactment of the s 36's predecessor provision: see Neil J. Williams, *A Proposal for Class Actions Under Competition Policy Legislation, prepared for the Department of Consumer and Corporate Affairs* (Ottawa: Information Canada, 1976).

⁷¹ *Bill C-59, supra* note 1, s 254(4) proposes to add s 103.1(6.1) to describe the legal test for granting leave for applications made under s 74.1: "(6.1) The Tribunal may grant leave to make an application under 74.1 if it is satisfied that it is in the public interest to do so."

⁷² *Competition Act, supra* note 1, s 103.1(7).

⁷³ *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 36 "Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights."

⁷⁴ *Ibid*, see para 55(2), and more generally paras 28-72.

⁷⁵ Canadian Chamber of Commerce, "Written Submission for the Study of Bill C-59, the Fall Economic Statement Implementation Act" (February 2024) at 6, online (pdf): <https://sencanada.ca/Content/Sen/Committee/441/NFFN/briefs/CanadianChamberofCommerce_e.pdf>. [*Canadian Chamber of Commerce*]

⁷⁶ *Ibid*.

⁷⁷ Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment," (2009) 18 Dal J Leg Stud 1 at 4-5 after reviewing the statistics on the number of private applications for leave filed with the Tribunal between 2002 and December 2008 commented that "These figures, if taken alone, suggest mixed results from the Canadian experiment with private access. The anticipated flood of frivolous claims has not materialized, and with the possible exception of the two cases in which settlements were reached, private applications have not generally been successful, with the majority (68%) failing at the initial stage of seeking leave to bring an application. This lack of success by private applicants at the initial stage could indicate either that the claims were genuinely unmeritorious or that the rules governing private access prevented genuinely meritorious claims from being heard."

⁷⁸ *Canadian Chamber of Commerce, supra* note 75 at 7.

⁷⁹ *Nissan Canada Inc. v Mueller*, 2022 BCCA 338 at paras 134-137.

⁸⁰ *Banman v Ontario*, 2023 ONSC 6187 at paras 317-318, and *Underhill v Medtronic Canada*, 2023 ONSC 5919 at para 16.

⁸¹ *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35 at para 43 where the Supreme Court of Canada held that the test applied for commonality in "Quebec law appears to be less stringent than one the one that is applied in the common law provinces."; *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at para 57.

⁸² *Dutton, supra* note 3 at paras 33-34.

⁸³ *UBCIC ob Indigenous persons v BC Ministry of Health and others*, 2020 BCHRT 144 at paras 5-8, 16; *Kirchmeier and others v University of British*

Columbia (No. 2), 2017 BCHRT 186 at paras 21-25; *Vorley v BC (Ministry of Solicitor General)*, 2005 BCHRT 219 at paras 15-16, 24-33.

⁸⁴ *Tribunal Act*, *supra* note 27, s 8.1(1) reads: “The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules*, 1998.”

⁸⁵ *Atlantic Lottery*, *supra* note 48 at para 27.

⁸⁶ *Atlantic Lottery*, *supra* note 48 at para 32.

⁸⁷ Competition Tribunal, “Frequently Asked Questions”, (20 March 2020), online: <<https://www.ct-tc.gc.ca/en/procedure/faq.html#q10>>.

⁸⁸ The Competition Bureau acknowledges the possibility, and even inevitability of overlap, for claims grounded in conspiracy-like conduct when they indicate in the *Collaboration Guidelines*, *supra* note 63 at 9: “in some cases, investigation under multiple provisions of the Act may be required until adequate facts are uncovered to determine which provision of the Act is most appropriate.”

⁸⁹ *Competition Act*, *supra* note 1, s 1.1.

⁹⁰ Jennifer Whybrow, *The Case for Class Actions In Canadian Competition Policy: An Economist’s Viewpoint*, prepared for the Department of Consumer and Corporate Affairs (Ottawa: Information Canada), at 208-214.

⁹¹ Matthew Good, *Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions*, (2009) 47:1 *Alta L Rev* 185 at 211, citing *Dutton*, *supra* note 6 par. 29 and *Hollick v Toronto (City)*, 2001 SCC 68 at paras 15, 34-35.

⁹² Good, *supra* note 91 at 219.