ABUSE OF DOMINANCE AND COMPETITOR LOSSES—THE "BENEFIT DERIVED" REGIME IS NOT FIT FOR PURPOSE

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As part of the amendments to the Competition Act enacted in June 2024, Parliament created a right for affected private parties to seek monetary compensation for abuses of dominant position. The new private compensation regime is centered around the concept of the "benefit derived" by the dominant firm from its anticompetitive conduct. This language frames compensation around a concept of disgorgement, as opposed to a concept of awarding damages for losses suffered by affected parties. The creation of a disgorgement-style remedy will pose a number of challenges for both private parties and the Competition Tribunal. This paper traces the history of the new compensation provision. It then identifies some of the challenges created by the legislative language, particularly for competitors that have been affected by anticompetitive conduct, and explains how these challenges would be addressed by implementing a damages-based regime, or failing such amendment, through a broad and remedial interpretation of the "benefit derived."

Vu les modifications apportées à la Loi sur la concurrence en juin 2024, le Parlement confère maintenant aux parties privées lésées le droit de demander une compensation monétaire en cas d'abus de position dominante. Cette nouvelle compensation s'articule sur le concept de l'avantage dérivé obtenu par l'entreprise dominante en raison de son comportement anticoncurrentiel. La compensation reposera ainsi sur le reversement de bénéfices indus plutôt que sur l'octroi de dommages-intérêts pour les parties lésées ayant subi des pertes. L'instauration de ce recours posera plusieurs défis, tant pour les parties privées que pour le Tribunal de la concurrence. Les auteurs de cet article retracent l'histoire de la nouvelle disposition d'indemnisation. Ils traitent aussi de quelques-uns des défis posés par le libellé de la loi, surtout pour les concurrents victimes d'un comportement anticoncurrentiel, et expliquent comment ces défis pourraient être relevés par l'instauration d'un régime fondé sur les dommages-intérêts, ou à défaut, par une interprétation large et réparatrice de l'avantage dérivé.

I. Introduction

The newly created right for private parties to seek monetary compensation for abuse of dominance is a welcome, and long overdue development. However, the compensation regime recently enacted by Parliament creates challenges that will undermine the legislative objectives of increasing enforcement of the *Competition Act*, and undermine the right, particularly of harmed competitors, to receive fair compensation in the face of anticompetitive conduct.

The new right to private compensation in abuse of dominance cases, which will come into force on June 20, 2025, permits the Competition Tribunal to award persons affected by the anticompetitive conduct an amount not to exceed "the value of the benefit derived from the conduct," and shared among all affected persons.[2] This right to compensation is framed in the language of disgorgement, as it looks not to the losses suffered by any particular party as a result of the conduct, but instead looks to the benefit obtained by the dominant firm. This style of remedy is not suitable in cases of abuse of dominance, as it groups together marginalized competitors with marginalized consumers, pitting these groups against each other in vying for the same aggregate pool of money. The problems with this regime are several.

First, there will be challenges in quantifying the benefit derived in a manner that is fair, and permits fair compensation for all parties affected by the anticompetitive conduct. The "benefit derived" by the dominant firm is unlikely to capture all harm caused by the anticompetitive conduct, particularly losses suffered by the dominant firm's competitors. This means the aggregate pool of money that is available for affected parties will be less than the aggregate losses of all affected parties.

Second, the benefit derived framework groups together disparate categories of affected parties without a mechanism for distribution. The kinds of losses suffered by affected competitors are different in nature from the kinds of losses suffered by consumers. These disparate groups will be pitted against each other, as each will seek to maximize their own recovery at the expense of the other.

Third, the benefit derived framework, which calls on distributions to be made not only to applicants in the Tribunal proceeding, but to all affected parties, will present practical challenges for parties and the Tribunal.

Together, the above challenges create additional risk and uncertainty for potential applicants in bringing cases, particularly harmed competitors. This

will reduce the likelihood an affected party will want to take on the cost and trouble of litigating – indeed, since distributions will be made to all affected parties regardless of whether they are applicants, some affected parties may attempt to wait on the sidelines and "free ride". For those potential applicants requiring litigation funding, the uncertainty of the regime will likely complicate attempts to secure such funding.

The challenges identified above would be solved, or significantly mitigated, by way of a legislative amendment adopting a damages-based compensation regime. Failing a legislative amendment, in order to ensure fairness of all affected persons, the Tribunal ought to take a broad and remedial approach to quantifying the "benefit derived." This is particularly important, as discussed below, to ensure fair outcomes for competitors that have been impacted by anticompetitive behaviour.

This article is organized as follows. Part II gives a brief history of the provision and traces the path to the current disgorgement regime. Part III discusses the challenges created by the current framework. Part IV concludes that a damages framework is more appropriate for compensating parties affected by abuses of dominance.

II. History and Path to Amendment

Historical Background

The modern abuse of dominance provision has its roots in sections 2 and 33 of the *Combines Investigation Act*, which established a criminal prohibition against monopolization.[3] The provisions under the old statute were notoriously difficult to enforce, requiring proof beyond a reasonable doubt that a firm had complete control over a market and also that its conduct had prejudiced the public through increased prices or profits.[4] Due to the high threshold for monopolization, there was only one conviction in the criminal regime's seventy-five year history.[5]

Commentators underscored the need for competition law reform in light of the ineffectiveness of the criminal provision. This view was articulated in both the Economic Council of Canada's 1969 *Interim Competition Law Report* and the 1976 *Skeoch-McDonald Report*.[6] The latter recommended moving away from prohibitions of dominance *per se* toward reviewing dominant firms' abuse of their monopoly power.[7]

These reports culminated in the introduction of Bill C-91 in 1984, which was later enacted as the *Competition Act* and the *Competition Tribunal Act*

in 1985.[8] The *Competition Act* modernized the abuse of dominance framework, with cases being adjudicated before the newly created Competition Tribunal.[9]

The newly created civil provision for abuse of dominance required that the Director of Investigations and Research (now the Commissioner of Competition) prove that the dominant firm: (1) substantially controlled a class of business throughout a Canadian market; (2) was engaging in or had engaged in a practice of anti-competitive acts; and (3) the practice had, is having, or is likely to have the effect of substantially lessening or preventing competition.[10]

The civil abuse of dominance provisions saw greater enforcement success than the criminal provision, although the volume of abuse of dominance cases remained low.[11] Since the enactment of the *Competition Act*, there have only been seven abuse of dominance cases brought to a hearing, plus a handful of consent settlements.[12]

One of, if not the primary, reason for the paucity of abuse of dominance litigation is that, until recently, only the Commissioner of Competition was permitted to bring an abuse of dominance application. The Commissioner, and the Bureau, are resource-constrained and not funded to the degree of being able to prosecute all meritorious abuse of dominance cases in Canada, and particularly not those cases that involve more localized interests.[13]

In 2022, the *Competition Act* was amended to permit a private right of action to complement the enforcement activities of the Commissioner. The 2022 amendments for the first time allowed private parties, with leave of the Tribunal, to commence abuse of dominance applications against dominant firms.[14] However, parties bringing such proceedings were not entitled to seek monetary compensation for themselves. This omission deprived potential applicants of a powerful financial incentive to take on the risk and cost of litigation.[15] Few abuse of dominance cases were brought in the immediate aftermath of the new private right of action coming into force.[16]

In 2024, the abuse of dominance provisions of the *Competition Act* were again amended, finally giving private parties the right to seek monetary awards for abuses of dominant positions. As noted, the right of private parties to claim compensation in abuse of dominance proceedings before the Competition Tribunal comes into force on June 20, 2025.

Origins of the "benefit derived" concept

Pursuant to the 2024 amendments to the *Competition Act*, the monetary award in an abuse of dominance case is not to exceed the value of the benefit derived by the dominant firm from the anticompetitive practice, with such amount to be distributed among the applicant and any other person affected by the practice, in a manner to be determined by the Tribunal.[17]

As argued in this paper, the "benefit derived" framework is not fit for purpose in compensating parties affected by abuses of dominant position. That raises the question: where did this language come from?

The phrase "benefit derived" was first introduced into the *Competition Act* during the 2022 round of amendments to the *Act*, in modifying the upper limits of administrative monetary penalties available for civilly reviewable conduct.

The 2022 amendments followed Senator Howard Wetston's work soliciting feedback for future parliamentary consideration of amendments to the *Competition Act*. As part of his efforts, Senator Wetston commissioned Professor Edward Iacobucci to prepare a discussion paper exploring whether Canada's competition policy framework remained effective in the modern digital economy. The resulting paper, *Examining the Canadian Competition Act in the Digital Era*, was published on September 27, 2021.[18] The paper made recommendations for amendments to the *Competition Act* covering a variety of topics, including abuse of dominance.

Professor Iacobucci made the following recommendations for amending the abuse of dominance provisions:

- clarifying the legal test as it relates to proof of both an anti-competitive act under section 79(1)(b) and harm to competition under section 79(1)(c);
- recognizing that an anti-competitive act may not be directed at a competitor but rather harm competition generally; and
- increasing the administrative monetary penalty for abuse of dominance beyond the current cap of $10 million.

Professor Iacobucci further pointed out that the lack of private rights of action for damages, combined with the low ceiling for administrative monetary penalties, implied minimal financial deterrence for abuse of dominance.[19]

Senator Wetston also solicited feedback directly from stakeholders by way of a letter dated October 27, 2021.[20] The Competition Bureau provided submissions to Senator Wetston on February 8, 2022.[21] As part of its submissions, the Bureau made several recommendations for amending the abuse of dominance framework. Regarding the available administrative monetary penalty, the Bureau noted that Canada was out of step with its foreign counterparts. The Bureau cited the monetary penalties in the EU, UK, Australia, and South Korea as examples.[22]

In particular, the Australian statute in force at the time provided for administrative monetary penalties for abuse of dominance not to exceed the greatest of the following:

i) $10,000,000;

ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;

iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the ***turnover period***) of 12 months ending at the end of the month in which the act or omission occurred.[23]

Parliament ultimately adopted the Australian model for calculating administrative monetary penalties for reviewable conduct, with some modification, as part of the *Budget Implementation Act, 2022, No 1*,[24] and the *Affordable Housing and Groceries Act*.[25] Further to these amendments, the Tribunal now has the jurisdiction to impose administrative monetary penalties for abuse of dominance not exceeding the greater of: (a) $25,000,000 for initial offences or $35,000,000 for subsequent offences; (b) three times the *value of the benefit derived from the conduct*, or if that cannot be determined, (c) 3% of the firm's annual worldwide gross revenues.[26]

Parliament clearly took inspiration from Australia in revamping the Canadian administrative monetary regime, considering the similarities in structure and language of the new Canadian provision with its Australian cousin.

As noted above, the 2024 amendments to the *Competition Act* will, as of June 2025, create a right for private parties to seek compensation for abuse of dominance, among other types of reviewable conduct.

The provision concerning compensation for abuse of dominance reads as follows:

> **79(4.1)** ***Additional order—person granted leave***
>
> If, as the result of an application by a person granted leave under section 103.1, the Tribunal makes an order under subsection (1) or (2), it may also order the person against whom the order is made to pay an amount, not exceeding *the value of the benefit derived* from the practice that is the subject of the order, to be distributed among the applicant and any other person affected by the practice, in any manner that the Tribunal considers appropriate.[27] [emphasis added]

Like the administrative monetary penalty provisions, Parliament set the maximum amount of a private award of compensation by reference to "the value of the benefit derived" by the dominant firm.

Administrative monetary penalties are payable to the Crown.[28]An administrative monetary penalty is a remedy that, when properly structured, "provide[s] a strong financial incentive for business to comply with the *Competition Act*."[29] To be effective, such penalties must be "greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct."[30] Otherwise, businesses may still realize profits from the conduct even after paying the monetary penalty.[31]

It makes sense to define administrative monetary penalties around the benefit derived by the firm engaging in anticompetitive conduct. The Tribunal may award an administrative monetary penalty of up to three times the benefit derived from the conduct to achieve the desired legislative objective of deterrence. Deterrence is important for both the firm subject to the administrative monetary penalty, and any other dominant firms in Canada considering engaging in anticompetitive conduct.

The "benefit derived" notion makes less conceptual sense as the basis for a model of private compensation, and this model creates problems, as described below. When a private party is injured by anticompetitive conduct, it makes far more sense to structure the remedy around the actual loss suffered by each party through a damages regime. In fact, it was a damages regime that was proposed during the consultation process launched by the Ministry of Innovation, Science, and Economic Development in late 2022, building on the earlier work of Senator Wetston.

To kick off the consultation process, the Ministry published a discussion paper on November 17, 2022 called *The Future of Canada's Competition*

Policy.[32] This paper touched on many different areas for potential amendment of the *Competition Act*, including the potential introduction of private damages for abuse of dominance, noting:

> A more robust framework for private enforcement, encompassing both 'private access' to the Competition Tribunal and 'private action' to provincial and federal courts for damages, would complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and lead to quicker case resolutions.[33]

The Bureau provided an extensive submission to the Ministry on potential amendments to the *Act*, including on the topic of damages for civilly reviewable conduct. The Bureau noted its agreement with the passage from the Ministry quoted above, and recommended that "a damages regime should be considered so that persons injured by anti-competitive conduct can seek compensation."[34]

At the conclusion of its consultation, the Ministry published a "What We Heard Report," summarizing public feedback on potential amendments to the *Competition Act*.[35] The document reports on feedback both for and against *damages*, with the "pro-amendment" side represented by the sentiment that "[m]any submissions […] recommended allowing the Tribunal to award damages alongside remedial orders, or else opening up civil conduct to lawsuits for damage recovery through s. 36 (or a similar provision), or some combination of both," with the "anti-amendment" side represented by the sentiment that "[m]any voices, particularly among the larger business community […] expressed concerns that […] allowing financial awards either by the Tribunal or in court proceedings for damages could open up the floodgates for unmeritorious, frivolous, and strategic litigation."[36] The Ministry did not report any feedback that damages were an inappropriate way to measure the compensation for private proceedings for abuse of dominance.

There is nothing in the legislative record to reflect why the drafters of the civil compensation clause did not frame the remedy in terms of damages (the language that had been the subject of all the feedback provided to the Ministry), but instead framed the remedy in terms of the benefit derived by the anticompetitive firm. The concept of "benefit derived" seems to have just been copied over from the administrative monetary penalty provision.

Similarly, there is nothing in the legislative record to show that Members of Parliament turned their minds to this question, as the provision was passed without debate.[37] This lack of consideration may be a byproduct of

the amendments being passed as part of an omnibus bill implementing numerous elements of the Government's 2023 Fall Economic Statement.

There is no small amount of irony inherent in Canada implementing a private right to compensation based on the disgorgement-themed concept of the benefit derived, given that the law in Australia, whose language we borrowed in updating our administrative monetary penalty provisions in the first place, permits private parties to claim *damages* for abuse of dominance.[38]

III. Challenges Posed By The "Benefit Derived" Regime

Fairness in Quantifying the Benefit Derived

It is expected that, broadly speaking, there will be two types of parties that will be adversely affected by abuses of dominant position: consumers, and competitors of the dominant firm. Consumers are affected in a variety of ways when a dominant firm creates, enhances, or maintains its market power through an abuse of dominant position. These include paying higher prices, receiving lower quality goods or services, and having less choice. Competitors are also affected in a variety of ways, as the anticompetitive conduct from the dominant firm can lead to, among other things, loss of market share, increased costs to the competitor, and, in the event of a competitor being forced out of a market, a complete loss of investment.

The "benefit derived" regime poses several challenges to the fair quantification of the pool of funds available to be distributed among affected parties. These challenges could lead in any given case to an aggregate pool of compensation that is less than the aggregate quantifiable loss suffered by the community of affected parties.

First, although some of the financial loss suffered by affected parties may be captured by looking to the benefit derived by the dominant firm (for example the overcharge paid by consumers, and an approximation of the value of the loss of market share experienced by competitors), the analysis may exclude other quantifiable financial loss, particularly certain kinds of loss suffered by competitors.

In particular, losses of competitors through an increase to their own costs, or the loss of investment through a complete exit from the market will not be captured in a "benefit derived" analysis.

Consider an instance of predatory pricing, where a nascent competitor incurs significant start-up costs followed by months of losses competing

against a dominant firm that employs a predatory pricing strategy before ultimately having to exit the market. The dominant firm can recoup its losses from selling below cost, and earn further monopoly rents, after the exit of the nascent competitor.

The profits earned by the dominant firm after the competitor's exit would surely be reflected in the "benefit derived" by the dominant firm. Perhaps the competitor could also prove, after incurring the expense of presenting complex economic evidence, that some portion of the dominant firm's excess profits were earned in lieu of what would have otherwise been that own competitor's market share. This is a significantly more challenging, and more speculative, case to meet that merely proving the amount of the lost investment.

But there is no reason to think that the "benefits derived" would include the lost "sunk costs" of investment should the nascent competitor be forced to exit, nor its higher per unit costs caused by its loss of business even if it should be able to cling to life .

The same challenge exists in any situation where an abuse of dominant position has imposed any additional cost on a competitor, for example through margin squeezing by a vertically integrated competitor, or more generally "raising rivals costs". Instead of the easier task of proving the out-of-pocket losses, the competitor, in order to grow the aggregate compensation pool, is stuck trying to contort that straightforward case of damages into an economic theory of enrichment to the dominant firm.

The second challenge in the fair quantification of the aggregate compensation pool is that there is no fallback position if the "benefit derived" is difficult to prove. This is in contrast to the administrative monetary penalty regime, which provides alternative methods of quantifying the upper limits of the penalty: $25 million dollars, or 3% of worldwide revenues.[39]

In the predatory pricing example cited, above, suppose after the exit of the affected competitor, the dominant firm faces competition from a new, better resourced, entrant, and is never able to earn long-term excess profits from its predatory pricing strategy. In this scenario, there is arguably no "benefit derived" from the anticompetitive conduct, as the dominant firm has lost money during its period of predation. Instead of being able to easily prove damages through evidence of out-of-pocket losses, the vanquished competitor is dealing with an aggregate compensation pool of zero, with no right of redress.

In the absence of an amendment permitting claims for damages, the Tribunal will be required to determine the "benefit derived" from anticompetitive conduct. While less optimal than a damages regime, it is certainly an improvement from a position where there is no monetary compensation available whatsoever.

There may be many instances where the proof of the benefit derived is difficult. The only guidance thus far on how the Tribunal will interpret "benefit derived" comes from a misleading advertising case against Cineplex, where the conduct in question involved an alleged drip fee of $1.50, and the benefit derived was determined by multiplying that fee by the number of consumers who paid the fee.[40] In that case, it would appear that the Tribunal assumed that implementation of the extra fee had been costless to Cineplex, such that the entirety of the extra revenues earned by the fees in question constituted ill-gotten gains.

The calculation in *Cineplex* is more straightforward than could reasonably be expected in any abuse of dominance case. Economic modelling will be essential in proving the benefit derived by the dominant firm.

It would be appropriate for the Tribunal to take a broad and remedial approach in weighing whether economic evidence is sufficient to meet the burden of proof, and remember the Federal Court of Appeal's direction that "it is well settled law that once it is known that a plaintiff has suffered damage, a court cannot refuse to make an award simply because the proof of the precise amount thereof is difficult or impossible."[41] In the face of anticompetitive conduct that has clearly caused loss to an affected party, it would not be in the interests of justice to deny affected parties a remedy because the "benefit derived" by the dominant firm is challenging to establish.

With the foregoing in mind, a "benefit derived" regime is set up to produce outcomes where the starting pool of money, which must later be divided among all affected parties, is less than the aggregate amount of loss suffered by those parties, because it systematically excludes from the calculation costs imposed on competitors by the anticompetitive conduct.

Fairness in Sharing the Benefit Derived[42]

Once the abuse of dominance compensation provisions of the *Competition Act* come into force, s. 79(4.1) of the *Act* will grant the Tribunal the discretion to distribute an award "among the applicant and any other person affected by the practice, in any manner that the Tribunal considers appropriate."[43] Subsection 79(4.2) will permit the Tribunal to add any term

to an order that it deems necessary, including those that will be contained in subsection 75(1.3).[44] The terms that will be set out by subsection 75(1.3) provide for a distribution system designed with a consumer class in mind, providing for administration of payment, notice to claimants, eligibility of claimants, and dealing with the residual funds from the award.[45]

The "benefit derived" regime appears to have been established with consumers at the forefront, and with affected competitors seemingly as an afterthought. This is unfortunate, considering that in most abuse of dominance cases, the front-line impact of the anticompetitive act is felt by competitors. It is this injury to competitors that results in the lessened or prevented competition, which in turn leads indirectly to consumer harm.

The purpose of the abuse of dominance provision is to ensure healthy competition, which ultimately benefits consumers. Ensuring proper compensation to competitors for abuses of dominant positions will help facilitate that competition on a going-forward basis. The Tribunal must be mindful of the rights of affected competitors in dividing the benefit derived among affected parties.

While s. 79(4.1) permits the Tribunal to distribute an award among affected parties in any manner the Tribunal considers appropriate, no guidance is provided for how that determination is to be made.

It would be unfair to allow affected parties only to share in an award to the extent that a portion of the "benefit derived" is directly attributable to that party's loss. Illustrated by way of example: in a scenario where a dominant firm engaged in predatory pricing that lead to a benefit derived of $1,000,000, an overcharge paid by consumers of $1,000,000, and a lost investment by a nascent competitor of $500,000, it would be unfair to allocate the entire award to the consumer class, merely because their loss can be traced to the dominant firm's gain. In such a scenario, at the very least the competitor firm should be entitled to participate in sharing the monetary award in a manner that proportionally reflects its loss.

A complication in coming up with a fair distribution system among different kinds of affected parties (competitors vs consumers) within the same proceeding is that the kinds of losses may be different between these different categories of parties. Where the competitor loss is related not to its own increased costs or sunk costs, but is instead based on a loss of market share, the scenario would be similar to that in *Pro-Sys Consultants Ltd v Microsoft Corp*, where the Supreme Court held that price fixing class actions could contain classes made up of both direct and indirect purchasers because the

same harm flows through the direct purchaser as intermediary to indirect purchasers.[46] By contrast, where the competitor has suffered loss by way of an increase of its own costs, or through sunk costs through a lost investment, the competitor is suffering a type of harm distinct from the type of harm suffered by consumers that have paid an overcharge. By grouping both consumers and competitors together to share the same pool of compensation, the current private award framework creates an adversarial relationship between these different classes of affected parties, where each is incentivized to try and diminish the share of the pool enjoyed by the other.

Fairness in Procedural Matters

The current abuse of dominance compensation framework will also create novel procedural issues for parties and the Tribunal, and there are more questions than answers on these points.

It is unclear how cases will be prosecuted, where groups with different interests are made to compete for the same aggregate pool of compensation. Will competitors be forced to co-prosecute abuse of dominance claims alongside consumer classes? Certainly, there is a community of interest in proving that the constituent elements of the abuse of dominance provision have been engaged, but in a scenario with multiple impacted competitors, plus a class of consumers, it could be procedurally unwieldy to have multiple applicants with separate representation prosecuting the case.

Similarly, how will the Tribunal resolve issues of carriage battles between plaintiff class action firms seeking to represent the interests of a consumer class? Would multiple consumer groups have standing and separate representation? Will harmed competitors be made to spectate on the sidelines as procedural wrangling takes place among members of the plaintiff class action bar?

While some guidance by analogy may be taken from class action statutes and common law principles concerning class actions, there is no express mechanism provided in the amendments to address these issues. The Finance Committee, in considering the adoption of this compensation regime, received testimony that the lack of procedural guardrails was concerning,[47] yet the amendments do not contain any specific guidance.

Finally, what mechanism will be used to divide up the "benefit derived"? Will abuse of dominance proceedings turn into bifurcated proceedings, where the first stage is focused on making out that an abuse of dominance has happened and determining the benefit derived, and the second stage is

a dispute among the affected parties on how to divide the pool of available funds?

One could imagine a scenario where each affected party has presented evidence of the extent of its losses, with that evidence then being challenged by the other affected parties in this bifurcated distribution hearing. This would particularly be the case in situations where the benefit derived is less than 100% of aggregate loss suffered by all affected parties. In such situations, justice would require this additional step to allow parties to advocate for fair compensation, although such a proceeding would be a drain on judicial resources.

The current regime seems to have been designed only with regard to consumers and consumer harm, imagining a class action-like regime. Absent an amendment changing to a damages regime, which would resolve many of the above issues, the Tribunal will have to be mindful of preserving the rights of affected competitors in overseeing these cases.

Challenges Will Undermine Enforcement

The current disgorgement framework for private claims is unsuitable for encouraging private enforcement by competitors of the *Act*'s abuse of dominance provisions. The challenges, risks, and uncertainties noted above will undermine the goal of increased enforcement through private litigation.

Competitors that are marginalized by a dominant firm often suffer severe economic impacts, and are not well suited to take on the large costs associated with bringing an abuse of dominance proceeding, which is often lengthy and requires complex economic evidence.

Marginalized competitors are likely to require the assistance of litigation funders in order to prosecute claims. The uncertainties outlined above create uncertainties around what a litigation funder's prospects for recovery might be. It is expected that this uncertainty, in a "benefit derived" regime, is going to make it difficult for affected competitors to secure litigation funding, sidelining competitors from the process, and thereby denying them an opportunity to advocate for fair compensation.

IV. Conclusion

Amending the abuse of dominance compensation framework to allow for damages would address many of the challenges identified in this paper. In other areas of the law, we are taken to be liable for damages caused by the foreseeable consequences of our unwise (negligent, deceitful, abusive …)

behaviour. It is certainly not unfair to require a dominant firm to have to pay compensation for all loss caused by its anticompetitive conduct.

A compensatory regime which permits competitors to seek damages for their losses would promote greater compliance with the *Act*. The impetus behind the private award scheme was to bolster the resources available for enforcement.[48] The amount of expenditure on civil enforcement of monopolistic practices accounts for a fraction of the Mergers and Monopolistic Practices Branch, which itself accounted for 30.31% of the Bureau's budget for 2022–2023.[49]

A damages regime, with a greater certainty on questions of compensation, would increase the resources available for enforcement by incentivizing claims by competitors. Such competitors are well positioned to bring claims against dominant firms given their knowledge of the relevant market.[50] Consumers, on the other hand, are much more disparate and less likely to bring proceedings absent a fully-modeled class action regime, which the Competition Act currently lacks.

A compensatory damage model, in contrast to one focused solely on disgorgement, would also offer a stronger deterrent for dominant firms considering abusing their market power, because it would bolster private enforcement of the abuse of dominance provisions. This rationale underpins the treble damages provision for private parties in the US, which creates a more powerful deterrent to dominant firms abusing their market power.[51]

The availability of damages would ensure appropriate compensation to affected parties, would encourage litigation, and would bolster private enforcement of the abuse of dominance provisions to the benefit of the Canadian economy.

In the absence of amendment, the Tribunal must ensure that the rights of affected competitors are preserved through all phases of the private compensation regime: from procedural rights during the hearing, to the quantification of the benefit derived, to the division of an award at the conclusion of the proceeding.

ENDNOTES

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[2] *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 247(2).

[3] John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 360.

[4] *Ibid*. *R v KC Irving, Ltd et al*, 1976 CanLII 146 (SCC).

[5] John S Tyhurst, *supra* note 3; *R v Eddy Match Company Limited*, [1953] QJ No 8 (CA), 18 C.R. 357.

[6] John S Tyhurst, *supra* note 3 at 362

[7] *Ibid*.

[8] Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60:2 Can Bus LJ 171 at 173, online (pdf): <https://utoronto.scholaris.ca/server/api/core/bitstreams/59db5a6b-a704-492f-ba02-98e76eda8f7f/content>.

[9] John S Tyhurst, *supra* note 3 at 363.

[10] Antonio Di Domenico, *Competition Enforcement and Litigation in Canada* (Toronto: Emond Montgomery Publications, 2019) at 469-470.

[11] Julie Rosenthal, Adil Abdulla and Arash Rouhi, "Optimal Enforcement of Abuse of Dominance: The Case for a Private Cause of Action" (2023) 36:2 Can Competition L Rev 34; Saro Turner and Andrea Roulet, "Empowering Private Attorneys General Under Bill C-59: Disequilibrium Persists in Canadian Competition Law" (2024) 37:1 Can Competition L Rev 40.

[12] See the following decisions: *Canada (Director of Investigation and Research) v NutraSweet Co*, [1990] C.C.T.D. No. 17, 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, [1992] C.C.T.D. No. 1, 40 CPR (3d) 289 (Comp Trib); *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd*, 1995 CanLII 8 (CT); *Commissioner of Competition v Canada Pipe Co*, 2005 Comp Trib 3; *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7; *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6. See also: *The Commissioner of Competition v The Canadian Real Estate Association*, CT-2010-002 (Consent Agreement), online (pdf): <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463512/1/document.do>; *Canada (Commissioner of Competition) v Direct Energy Marketing Limited,* CT-2012-003 (Consent Agreement), online (pdf): <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463069/1/document.do>; *Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership,* CT-2012-002 (Consent Agreement), online (pdf): <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463069/1/document.do>.

[13] Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (2022) at 53, online (pdf): <https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf> [ISED Future of Competition]; Competition Bureau Canada, "The Future of

Competition Policy in Canada" (15 March 2023) at s 3.1.5, online: <https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-3-1>.

[14] *Budget Implementation Act, 2022, No 1,* SC 2022, c 10, s 262.

[15] ISED Future of Competition, *supra* note 13 at 52-53.

[16] *Apotex Inc v Paladin Labs Inc et al*, CT-2023-007; *Winston Gaskin et al v Rogers Communications Inc et al*, CT-2024-002; *JAMP Pharma Corporation v Janssen Inc*, CT-2024-006; *Goshen Professional Care Inc v The Saskatchewan Health Authority and The Ministry of Health*, CT-2024-007.

[17] *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 247(2).

[18] Senator Howard Wetston, "Consultation Invitation – *Examining the Canadian Competition Act in the Digital Era*" (27 October 2021), online (pdf): <https://sencanada.ca/media/368379/letter-pdf.pdf>.

[19] Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021) at 24, 33-34, 71, online (pdf): <https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

[20] Senator Howard Wetston, "Consultation Invitation – *Examining the Canadian Competition Act in the Digital Era*" (27 October 2021), online (pdf): <https://sencanada.ca/media/368379/letter-pdf.pdf>.

[21] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era" (8 February 2022), online: <https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec03> [CB Digital Era].

[22] *Ibid.*

[23] *Competition and Consumer Act 2010*, 2019/120, s 76(1A)(b) (Austl) as it appeared on 12 December 2019.

[24] SC 2022, c 10, s 262.

[25] SC 2023, c 31, s 7.2(2).

[26] *Competition Act*, RSC 1985, c C-34, s 79(3.1).

[27] *Fall Economic Statement Implementation Act, 2023*, *supra* note 2.

[28] *Competition Act*, *supra* note 26.

[29] CB Digital Era, *supra* note 21.

[30] Report of the Standing Committee on Industry, Science and Technology (2002), *A Plan to Modernize Canada's Competition Regime* (2002) at 49, online (pdf): <https://www.ourcommons.ca/Content/Committee/371/INST/Reports/RP1032077/indurp08/indurp08-e.pdf>.

[31] *Ibid.*

[32] ISED Future of Competition, *supra* note 13.

[33] *Ibid* at 53.

[34] Competition Bureau Canada, "The Future of Competition Policy in Canada" (15 March 2023) at s 5.5.2, online: <https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-5-5> [CB Future of Competition].

[35] Innovation, Science and Economic Development Canada, "Future of Canada's Competition Policy Consultation—What We Heard Report" (20 September 2023), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report#si>.

[36] *Ibid.*

[37] House of Commons, Standing Committee on Finance, *Evidence*, 44-1, No 140 (30 April 2024) at 18:45 passage of Clause 247 (Peter Fonseca). Note that one of the witnesses, did, in her opening statement to the Finance Committee, point out that the remedy created a disgorgement remedy, however this point was not picked up in any further discussion or debate on the record amongst Parliamentarians. See House of Commons, Standing Committee on Finance, *Evidence*, 44-1, No 135 (9 April 2024) at 16:40 (Kate McNeece).

[38] Arlen Duke, *Corones' Competition Law in Australia*, 7th ed (Australia: Thomson Reuters, 2018) ch 18 at 18.140 (WL); *Competition and Consumer Act 2010*, 2024/38, ss 82 and 87 (Austl).

[39] *Competition Act*, *supra* note 26.

[40] *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5 at paras 444, 458, 459, 477 and 478.

[41] *Public Service Alliance of Canada v. Canada (Department of National Defence)*, 1996 CanLII 4067 (FCA) at para 44.

[42] How to ensure fairness in settlements of abuse of dominance cases is another complex topic that is beyond the scope of this paper. It is unclear how the partial settlement of an abuse of dominance case would be possible, or how a release in such partial settlement could be effective in providing any relief to a Respondent that is subject to a claim seeking to recover 100% of the benefit derived from the anticompetitive conduct.

[43] *Fall Economic Statement Implementation Act, 2023*, *supra* note 2.

[44] *Ibid.*

[45] *Ibid* at s 244(2).

[46] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 121-126. See also Paul-Erik Veel & David Quayat, "Price-Fixing Actions After *Pro-Sys v Microsoft*: Worrying Implications of the Supreme Court's Decision" (2014) 27:2 Can Competition L Rev 385 at 396.

[47] House of Commons, Standing Committee on Finance, *Evidence*, 44-1, No 136 (11 April 2024) at 11:10 (Aaron Wudrick).

[48] Edward M Iacobucci, *supra* note 19 at 24; CB Future of Competition, *supra* note 13 at s 5.5.

[49] Competition Bureau Canada, *Annual Report of the Commissioner of Competition for the Year Ending 2023* (Gatineau, QC: Competition Bureau, 2023), online: <https://publications.gc.ca/site/fra/9.851027/publication.html>.

[50] Michael Trebilcock & Francesco Ducci, *supra* note 8 at 180.

[51] *Ibid* at 184.