

DERIVING BENEFIT FROM RECENT REFORMS: A CONFINED ROLE FOR THE BENEFIT DERIVED REMEDIAL STANDARD

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Through successive amending bills enacted since 2022, the Competition Act's civil reviewable conduct provisions, under Part VIII of the Competition Act, have been significantly reformed, with the substantive elements of many provisions altered, private access introduced or expanded and new remedies made available. In connection with the latter, the amendments have introduced an altogether new yardstick for monetary penalties under the Competition Act, namely, the "value of the benefit derived" from the impugned conduct. This paper argues that in calculating financial penalties under these new provisions, while the value of the benefit derived may be codified as a determinant of the maximum available penalty, this does not necessarily establish it as the appropriate benchmark for quantifying the order to be made in any given case. Rather, consistent with the scheme, purpose and development of the Competition Act, the value of the benefit derived will often not be an appropriate consideration in determining the consequences for conduct challenged under the Competition Act's civil regime. Rather, to guard against the recent Competition Act amendments serving as a disincentive to pro-competitive conduct, the Competition Tribunal must be cautious in tying the financial jeopardy associated with civilly reviewable conduct to the value of the benefit derived from such conduct.

En raison de l'adoption de plusieurs projets de loi modificatifs depuis 2022, les dispositions sur le comportement susceptible d'examen civil prévues à la partie VIII de la Loi sur la concurrence ont été passablement refondues. En effet, les éléments de fond de beaucoup de ces dispositions ont été modifiés, un droit d'accès a été introduit pour les parties privées ou le droit d'accès existant a été élargi, et des recours ont été ajoutés. Concernant ces derniers, les modifications ont permis d'enchâsser un nouveau critère pour les sanctions pécuniaires, soit la « valeur du bénéfice tiré » du comportement reproché. L'auteur de cet article soutient que le calcul de ces sanctions d'après le nouveau critère, étant donné que la valeur du bénéfice tiré peut être considérée comme déterminante pour la sanction maximale possible, ne fait pas nécessairement de cette valeur le meilleur repère pour quantifier l'ordonnance à rendre dans un cas donné. Plus exactement, conformément à l'esprit, à l'objet et à l'élaboration de la Loi, la valeur du bénéfice tiré sera souvent inappropriée pour déterminer les conséquences du comportement reproché sur le plan de la responsabilité civile. Pour protéger les parties contre les récentes modifications apportées à la Loi visant à dissuader les comportements proconcurrentiels,

le Tribunal de la concurrence doit plutôt redoubler de prudence au moment de faire le lien entre le volet financier du comportement susceptible d'examen civil et la valeur du bénéfice tiré d'un tel comportement.

1. Introduction

For the past few years, competition law has been basking in the glow of renewed interest among Canadian policy makers.² Since 2022, Canada's *Competition Act* has been the subject of three separate amending bills, which have cumulatively ushered in the most significant transformation to Canada's competition law landscape since at least 2009.³ As has been championed by the proponents of these reforms, competition law and policy can play an important and beneficial role in fostering a fair, efficient and dynamic economy. However, as lawmakers enact new tools to correct for what the Competition Bureau (the "**Bureau**") has described as an "outdated, weak, complex, slow, and out of touch" framework,⁴ it is important to guard against an overcorrection. As businesses, consumers, lawyers, the Bureau and the Competition Tribunal (the "**Tribunal**") navigate through the operationalization of Canada's amended competition laws, the determination of monetary orders under the civilly reviewable conduct provisions in Part VIII of the *Competition Act* represents one important area for ensuring moderation as the pendulum swings towards stronger competition law enforcement.

Through the successive amending bills of the past two years, Part VIII of the *Competition Act* has been substantially reformed. Taken together, the recent wave of amendments have altered the substantive elements of many provisions, opened the door to private enforcement and significantly expanded the range of available remedies. In connection with the latter, the amendments have introduced an altogether new yardstick for monetary penalties under the *Competition Act*, namely, the "value of the benefit derived" from the impugned conduct. This paper argues that in calculating financial penalties under these new provisions, while the value of the benefit derived may be codified as a determinant of the maximum available penalty, this does not necessarily establish it as the appropriate benchmark for quantifying the order to be made in any given case. Rather, consistent with the scheme, purpose and development of the *Competition Act*, the value of the benefit derived will often not be an appropriate consideration in determining the consequences for conduct impugned under Part VIII. To guard against the recent *Competition Act* amendments serving as a disincentive to pro-competitive conduct, the Tribunal must be cautious in tying

the financial jeopardy associated with Part VIII conduct to the value of the benefit derived from such conduct.

The remainder of this paper is structured as follows: first, it situates Part VIII within the *Competition Act* and briefly summarizes the history of its development; second, it explains the amendments that have been made to the financial penalties available under Part VIII over the past two years and outlines the broader changes that have been introduced to Part VIII, which provide the backdrop against which such penalties may be ordered; and third, it proposes a confined role for consideration of the benefit derived and surveys the risks associated with a more expansive reliance on such a methodology.

2. The Long Journey to a Second Track

Part VIII of the *Competition Act* addresses matters that are civilly reviewable by the Tribunal. It in essence creates a body of conduct that is actionable on a “rule of reason” basis, as a counterpart to the criminal prohibitions codified under Part VI of the *Competition Act*. The evolution of the *Competition Act* to encompass both a civil and a criminal regime was a long and intentional process.

For the better part of a century, beginning in 1889, Canada’s competition laws took the form solely of criminal offences. This approach has been characterized as leading to “a steady trickle of price-fixing convictions”, but being “largely ineffective in addressing anticompetitive mergers and monopolization” and failing “to create the conditions for more robust law enforcement in Canada.”⁵

In 1969, the Economic Council of Canada, as part of a broad call for competition law reform, recognized the weaknesses of a purely criminal regime and proposed the introduction of a civil component. As the Council wrote in its Interim Report on Competition Policy:

The basic reasons for seeking to place some of the federal government’s competition policy on a civil law basis would be to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public. The greater flexibility afforded by civil law is especially to be desired in those areas of the policy that do not lend themselves well to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices.⁶

The following year, in 1970, Canada took its first steps toward a bifurcated competition law regime, with the passage of amendments to Canada's then *Combines Investigation Act* (the precursor to the *Competition Act*). Among other changes, the amendments introduced a number of civilly reviewable practices to be adjudicated by the Restrictive Trade Practices Commission, including refusal to deal, consignment selling, exclusive dealing, tied selling and market restrictions.⁷ While these amendments were intended as the first stage in a broader two-stage process, further meaningful change did not come until the passage of the *Competition Act* in 1985. Under the *Competition Act*, as initially enacted, conspiracies, resale price maintenance, bid-rigging, predatory pricing, price discrimination, promotional allowances and misleading advertising were criminalized, while mergers and abuse of dominance joined the civil regime (alongside reviewable practices previously established under the *Combines Investigation Act*) to be administered by the newly created Tribunal.⁸

The *Competition Act* remained largely in its original form until 2009, when a set of amendments were enacted that established the division between criminally and civilly actionable conduct that broadly persists through to today.⁹ The 2009 amendments were in part an outgrowth of the Competition Policy Review Panel's 2008 report *Compete to Win*, which reiterated the perspective of the Economic Council of Canada from 40 years prior that many practices addressed through competition law exist in a nuanced space, with commendable and condemnable conduct not necessarily being distinguishable *ex-ante*:

The Panel is of the view that the criminal law, with its attendant sanctions including fines and imprisonment, should be reserved for conduct that is unambiguously harmful to competition and where clear standards can be applied that are understandable to the business community. This is not the case with the price discrimination, promotional allowances and predatory pricing provisions. The Panel concludes that these practices should be addressed as civil matters reviewable by the Competition Tribunal.

...

At the same time, criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the "hardcore" cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts to deal with this category of agreements between competitors.¹⁰

Consistent with the Competition Policy Review Panel's recommendations, through the 2009 amendments, predatory pricing, price discrimination, promotional allowances and price maintenance were all decriminalized and brought under the more flexible civil regime in Part VIII of the *Competition Act*.¹¹ In addition, the amendments introduced a two-track approach for horizontal agreements between competitors, refashioning the criminal prohibition in section 45 under Part VI as a narrow *per se* offence and introducing section 90.1 to Part VIII as a broader civil provision applicable to agreements among competitors that substantially lessen or prevent competition.¹²

While not the focus of this paper, it bears noting that deceptive marketing has followed a similar path from a purely criminal law approach to a hybrid regime. Upon the adoption of the *Competition Act*, deceptive marketing remained actionable only as criminal offence. In 1999, following on longstanding calls for reform, a civil counterpart to the criminal regime was introduced as Part VII.1 of the *Competition Act*. As the Bureau explained in a 1995 discussion paper, among other issues, "criminal sanctions can be too severe a response for some instances of unintentional misleading advertising, even when the advertiser has failed to meet the due diligence standard."¹³

3. Diminished Civility on the Civil Track

The 2009 amendments, together with expanding the breadth of the *Competition Act's* civil regime, introduced the first financial penalties of general application for Part VIII reviewable conduct.¹⁴ In 2009, such financial penalties were limited to the imposition of Administrative Monetary Penalties ("AMPs") for abuse of dominance.¹⁵ The wave of amendments enacted since 2022 has substantially expanded the range of conduct for which financial penalties can be imposed and raised the maximum value of existing penalties.

As summarized in Figure 1, since 2022, the financial penalties available for abuse of dominance have been drastically increased and such penalties have been made available in respect of nearly every other Part VIII reviewable practice, specifically: refusal to deal under section 75; resale price maintenance under section 76; tied selling, exclusive dealing and market restrictions under section 77; and anti-competitive agreements under section 90.1.

The financial penalties introduced through the amendments take two forms. First, for abuse of dominance and anti-competitive agreements, the

Tribunal can impose an AMP (payable to the Crown).¹⁶ In respect of both provisions, the maximum value of the AMP is dynamic. While the amendments establish a lower bound on the maximum applicable across all cases (as set out in Figure 1), the maximum possible value in any given case is three times the value of the benefit derived from the conduct, or, if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues.¹⁷ Second, for refusal to deal, resale price maintenance, tied selling, exclusive dealing, market restriction, abuse of dominance and anti-competitive agreements, in the case of a private action, the Tribunal can make an order for disgorgement in an amount not exceeding the value of the benefit derived from the conduct that is the subject of the order to be distributed among the applicant and any other person affected by the conduct.¹⁸

In the case of abuse of dominance and anti-competitive agreements, for which both AMPs and disgorgement are available, these orders are not mutually exclusive. Rather, where an application is brought by a private party (rather than the Commissioner of Competition), the Tribunal may order both an AMP and disgorgement; though, the *Competition Act* provides that in determining the value of the AMP the Tribunal shall take into account any amount being ordered as disgorgement.¹⁹

Figure 1: Evolution of Part VIII Financial Penalties

Part VIII Reviewable Practice	Pre-2022 Financial Penalties	Post Bill C-59 Financial Penalties	
		AMP	Disgorgement ²⁰
Refusal to Deal (s. 75)	None	None	Yes—up to the value of the benefit derived
Resale Price Maintenance (s. 76)	None	None	Yes—up to the value of the benefit derived
Exclusive Dealing, Tied Selling and Market Restriction (s. 77)	None	None	Yes—up to the value of the benefit derived

Part VIII Reviewable Practice	Pre-2022 Financial Penalties	Post Bill C-59 Financial Penalties	
		AMP	Disgorgement
Abuse of Dominance (s. 79)	AMP—up to a maximum value of \$10 million for a first order and \$15 million for a subsequent order	Yes—up to a maximum value of the greater of (a) \$25 million for a first order and \$35 million for a subsequent order and (b) three times the value of the benefit derived from the conduct, or, if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues ²¹	Yes—up to the value of the benefit derived
Anti-Competitive Agreements (s.90.1)	None	Yes—up to a maximum value of the greater of (a) \$10 million for a first order and \$15 million for a subsequent order and (b) three times the value of the benefit derived from the agreement, or, if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues ²²	Yes—up to the value of the benefit derived

Notably, the expanded and enhanced financial penalties introduced since 2022 have been accompanied by material substantive and procedural changes to Part VIII of the *Competition Act*. The cumulative impact of these amendments is to significantly expand the scope for enforcement under Part VIII of the *Competition Act*. While a comprehensive overview of the changes introduced since 2022 is beyond the scope of this paper, notable developments include:

- **Expanded Private Access:** The ability of private parties to apply to the Tribunal for Part VIII conduct has been greatly expanded, with a private right of action introduced in respect of abuse of dominance and anti-competitive agreements.²³ For each of the Part VIII reviewable practices for which a private right of action is available, the test for leave has also been made more flexible. As of June 20, 2025, leave will be available where the impugned conduct has substantially affected

at least part of the applicant's business (whereas the pre-amendment leave test has been interpreted as requiring an applicant to be substantially affected in the whole of their business) or where the Tribunal considers leave to be in the public interest. In addition, the new disgorgement remedy, discussed above, provides private applicants for the first time with the ability to recover a monetary award from the Tribunal.

- **Agreements Between Non-Competitors:** Section 90.1 has historically applied only to agreements or arrangements between persons of whom two or more are competitors that prevents or lessens competition substantially. The amendments have expanded this provision to also capture agreements between parties that are not competitors where a significant purpose of the agreement is to lessen or prevent competition.²⁴
- **Repeal of the Efficiencies Defence:** Since the introduction of the civil anti-competitive agreement track, the provisions have provided for an efficiencies defence, barring the Tribunal from making an order in respect of an agreement for which the gains in efficiency are greater than and offset any anti-competitive effects (where such efficiencies would not have been attained if an order were made). This provision has been repealed, such that efficiencies no longer play an explicit role in the analysis under section 90.1.²⁵
- **Simplified Abuse of Dominance:** Prior to the recent wave of amendments, an order for abuse of dominance required that a three-part test be satisfied: (a) a firm must be dominant, (b) be engaged in a practice of anti-competitive acts and (c) such conduct must be likely to result in a substantial lessening or prevention of competition. The latter two requirements have now, in effect, become disjunctive. The Tribunal can make an order where it finds that a dominant firm is engaged in either (a) a practice of anti-competitive acts or (b) conduct that substantially lessens or prevents competition, where the effect is not a result of superior competitive performance.²⁶

Taken together, the changes to Part VIII's substantive scope, procedural enforcement mechanisms and remedial options have fundamentally shifted the *Competition Act's* civil regime.

4. Modulating the Pendulum's Swing

Sections 2 and 3 of this paper can be broadly read as tracing through two phases in the development of Canadian competition law. From at least the 1960s, there was a recognition of the need for flexible competition law enforcement, modulated to the ambiguity of commercial conduct and responsive to the risk posed by harsh sanctions. This *Zeitgeist* was gradually incorporated into Canada's competition law framework, culminating with the passage of the 2009 *Competition Act* amendments. More recently, there has been a renewed interest in stronger competition law enforcement, which has occurred "against a backdrop of increasing concerns about the rise of corporate titans and the changing nature of our digital marketplace."²⁷ As policymakers search for tools to curb market power and promote a competitive economy, the *Competition Act's* civil regime has been reformed to facilitate more intervention and harsher consequences for non-compliance. As the pendulum swings towards more stringent competition law enforcement, the considerations that underpinned the prior reformulation of Canada's competition framework remain pertinent for interpreting and applying the *Competition Act's* new provisions, including the value of the benefit derived financial penalty standard.

A. The Questionable Role of Financial Penalties in Part VIII

The availability of financial sanction for Part VIII, under any standard, gives rise to potential tension with the motives for the bifurcation of competition law between a criminal and civil regime. As described in Section 2 of the paper, the latter, as codified in Part VIII, is intended to address conduct that is not "unambiguously harmful" and is worthy of "case-by-case consideration of the likely economic effects". In this context, the imposition of financial penalties risks over-deterrence and potentially disincentivizing commercial conduct that is economically beneficial.

Following the initial introduction of AMPs for abuse of dominance in 2009, a report from the C.D. Howe Institute Competition Policy Council warned that "[t]here was some agreement among the Council that AMPs are a useful enforcement tool in at least some circumstances, but there was strong agreement that AMPs pose the risk of creating an unwanted chilling effect on behaviour." The report ultimately concluded that "[t]here was a consensus among members that the AMPs, if imposed, should respond only to blatant abuses of dominance."²⁸ Similarly, Innovation Science and Economic Development's recent consultation on the future of Canada's competition policy reported that, with respect to section 90.1 reform, "[t]

hose in opposition warned of a potential chilling effect on procompetitive collaborations were the scope of enforcement to be expanded. Generally, the opposition was more vocal about the introduction of administrative monetary penalties rather than the review of past conduct as such, with some acknowledging that the latter may be appropriate with a limitation period and the possibility of non-monetary remedies to restore competition [emphasis added].²⁹

B. Value of the Benefit Derived—The Wrong Answer to the Question

Given the potentially harmful effects of applying financial penalties to Part VIII conduct, the manner in which such penalties are calculated and applied must be carefully calibrated to the accompanying objectives. Determining the financial penalty specifically with reference to the benefit derived exacerbates, rather than ameliorates, the inherent tension of imposing financial penalties under the civil regime.³⁰ Such an approach will cause the risk a firm faces to rise as its benefit from the conduct being undertaken increases, irrespective of whether the firm's benefit is correlated with the anti-competitive harm. The benefits and harms of Part VIII conduct will not necessarily correlate to one another and the degree to which a firm may benefit from engaging in such conduct may not be demonstrative of the extent to which the conduct should be discouraged. Rather, the greater the private benefit to the firm, the more such conduct could potentially be something that society would want encouraged, because (from an economic welfare point of view) balancing the conduct's anti-competitive and pro-competitive effects may be net positive.³¹

The inclusion of conduct under Part VIII rather than Part VI is premised, at least in part, on the recognition that such conduct may be beneficial (and not worthy of sanction). For example, the Bureau's Competitor Collaboration Guidelines repeatedly recognize that competitor agreements, of the kind that can be captured by section 90.1 of the *Competition Act*, may be pro-competitive. Indeed, the Competitor Collaboration Guidelines describe the absence of any potentially pro-competitive effect as the hallmark of activity worthy of the criminal regime: "Section 45 describes categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects."³²

Stated differently, Part VIII, by design, captures a universe of conduct that in certain circumstances can be pro-competitive and ought to be encouraged

(or which, at least, is competitively benign and for which there is not a state interest in intervention), while in others is competitively harmful and is to be discouraged. Although this may be a straightforward maxim, in practice, determining the category to which specific conduct belongs can often be difficult and ambiguous. The assessment of whether unilateral or coordinated conduct is likely to result in a substantial lessening or prevention of competition can often require sophisticated economic analysis, which is itself premised on assumptions and predictions and requires reliable data (to which an individual firm's access will often be limited). Given this uncertainty, a perverse incentive is created by exposing a firm to more substantial potential consequences the greater the benefit derived from the conduct, whereby a firm's potential jeopardy may increase the greater the potential pro-competitive benefits the conduct offers.

The rationale for tying the quantum of the financial penalty to the benefit derived is admittedly intuitive and attractive. Indeed, disgorgement is often viewed as an "equitable remedy" because the mere payment of damages to parties that suffered losses from the conduct could still leave the defendant unjustly enriched. As the Tribunal recently observed in determining the appropriate order in respect of a deceptive marketing practice, "the respondent should not keep any of the financial gains it made by its false or misleading representations."³³ The Tribunal further explained that it must "consider whether the possible financial consequences of a Tribunal order would operate as a form of licence fee (e.g., where the financial gains outweigh the possible negative consequences of the reviewable conduct)."³⁴ The Tribunal went on to conclude that "[a] remedy for proven reviewable conduct under Part VII.1 should not be a cost of doing business";³⁵ undoubtedly, such a principle must apply equally to Part VIII as it does to Part VII.1.

However, there are structural differences between Part VII.1 and Part VIII of the *Competition Act*, which make the focus on the benefit derived less appropriate with respect to the latter than the former. Specifically, under Part VII.1 of the *Competition Act*, so long as a person can establish that they "exercised due diligence to prevent the reviewable conduct from occurring", the only order the Tribunal may impose is a prohibition order.³⁶ There is no similar statutory release valve for conduct under Part VIII. Rather, a firm must bear the risk of getting its competitive effects assessment (which as described above, is not a straightforward exercise) wrong. Without an option for *ex-ante* risk mitigation, and given the reality that conduct intended as vigorous—and beneficial—competitive behaviour may result in anti-competitive effects, judicial recourse premised on

the benefit derived (and, indeed, up to three times that value) risks chilling appropriate (and desirable) commercial conduct.³⁷

C. Application of the Recent Amendments

Notwithstanding the potentially detrimental effects of determining financial penalties based on the value of the benefit derived, the law of the land now establishes the benefit derived as a relevant metric. However, while the value of the benefit derived is codified as a determinant of the maximum available penalty, this does not establish it as the necessary yardstick in every case. Rather, for the reasons above, and consistent with the scheme of the *Competition Act* and the purpose for which the civil regime was developed, its role in such regard should be limited. While the benefit derived may be an appropriate basis on which to quantify the financial penalty in certain specific cases, for example, to address egregious conduct or repeat offenders, it ought not to be the default measure by which financial penalties are assessed.³⁸

Fortunately, the principle articulated in *Cineplex*, that a Tribunal order must not simply be viewed as a cost of doing business, can be achieved without recourse to the benefit derived and the perverse incentives that metric creates. For example, in certain cases, it may be appropriate to quantify a financial penalty based on the value of anti-competitive harm or on the principles of compensatory damages, with the value of the benefit derived serving as the ceiling. Moreover, effective deterrence may be achievable without the imposition of a financial penalty altogether. As the Ontario Superior Court has held in connection with an application under Part VII.1: “Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.”³⁹

5. Conclusion

Canada’s competition law framework has undergone a long and gradual transformation, which, through concerted effort, has seen competition law enforcement move increasingly towards a more flexible civil track. Over the past two years, new tools have been added to the civil regime, which are likely to facilitate and strengthen enforcement of Part VIII. As enforcement increases, it is important that it proceeds in a manner responsive to the principles underpinning the bifurcation of Part VI and Part VIII conduct. That the latter may be competitively beneficial (or benign) must be reflected in

the basis on which such conduct is reprimanded. Remedial standards must be developed in a manner that is conscious of and seeks to mitigate the risk of chilling beneficial and pro-competitive conduct.

ENDNOTES

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² See e.g., Innovation Science and Economic Development, “The Future of Competition Policy in Canada” (22 November 2022), online: <<https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>>: “Competition law has been thrust into the centre of Canadian policy debate as concerns mount about affordability, market concentration and the enormous influence of new economic giants. Our economy has changed: the rise of digital commerce has upended the way Canadians do business and consume products, leading to a new class of dominant gatekeepers and uneven growth. Following the COVID-19 pandemic, an increasing cost of living threatens to worsen inequalities and has Canadians worried about their bottom line and the security of supply chains.”

³ See Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (assented to on 23 June 2022) [Bill C-19]; Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to on 15 December 2023) [Bill C-56]; and 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 (assented to on 20 June 2024) [Bill C-59].

⁴ Competition Bureau, “The Future of Competition Policy in Canada” (15 March 2023), online: <<https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/future-competition-policy-canada>>.

⁵ Michael Trebilcock & Francesco Ducci, “The Evolution of Canadian Competition Policy: A Retrospective” (2018) 60:2 *Can Bus LJ* 172 [Trebilcock].

⁶ Economic Council of Canada, “Interim Report on Competition Policy” (July 1969), online (pdf): <https://publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf> at 109.

⁷ Trebilcock, *supra* note 5 at 172.

⁸ *Competition Act*, R.S.C. 1985, c 34 [*Competition Act*]; *Competition Tribunal Act*, R.S.C. 1985, c 19.

⁹ One notable more recent change has been the criminalization of no-poach and wage-fixing agreements between unaffiliated employers, which was introduced through the 2022 amendments to the *Competition Act*. Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009 (assented to on 12 March 2009) [Bill C-10].

¹⁰ Competition Policy Review Panel, “Compete to Win, Final Report” (June 2008), online (pdf): <https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf> at 58-59.

- ¹¹ Bill C-10, *supra* note 9, Part 12 (Competition Act—Amendments to the Act).
- ¹² Section 45 was limited to what are commonly referred to as “hard core” cartels pertaining to agreements between competitors to fix prices, allocate markets and limit supply.
- ¹³ Bill C-20, *An Act to Amend the Competition Act and to Make Consequential and Related Amendments to Other Acts*, 1st Sess, 36th Parl, 1999 (assented to on 11 March 1999).
- ¹⁴ The civil deceptive marketing regime, under Part VII.1 of the *Competition Act*, has allowed for the imposition of an administrative monetary penalty since the enactment of Part VII.1 in 1999.
- ¹⁵ Prior to 2009, AMPs had been available for abuse of dominance but only in respect of domestic air carriers.
- ¹⁶ *Competition Act*, *supra* note 9, ss 79(3.1) and 90.1(1.3).
- ¹⁷ *Ibid.*
- ¹⁸ *Competition Act*, *supra* note 9, ss 75(1.2), 76(11.1), 77(3.1), 79(4.1), and 90.1(10.1) (as it appears on 20 June 2025). Each of these provisions will come into force on June 20, 2025 (Bill C-59, *supra* note 3, cl 272). This paper will refer to such an order as a disgorgement remedy.
- ¹⁹ Bill C-59, *supra* note 3, cls 247(1) and 248(4).
- ²⁰ Disgorgement was introduced for each practice in Figure 1 through Bill C-59, the relevant provisions of which will come into force on June 20, 2025 (*supra* note 16).
- ²¹ The secondary maximum of three times the value of the benefit derived from the conduct, or, if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues was introduced in 2022 through Bill C-19. The minimum maximum was raised to \$25 million for a first order and \$35 million for a subsequent order in 2023 through Bill C-56.
- ²² AMPs were introduced in 2024 through Bill C-59.
- ²³ A private right of action for abuse of was introduced in 2022 through the Bill C-19. The private right of action was introduced for anti-competitive agreements through Bill C-59, but will come into force only on June 20, 2025. Prior to 2022, a private right of action was available for refusal to deal, exclusive dealing, tied selling and market restrictions and price maintenance.
- ²⁴ This change was adopted in 2023 through Bill C-56 and is in force as of December 15, 2024 (Bill C-56, s 8).
- ²⁵ This change was adopted in 2023 through Bill C-56 and is in force as of December 15, 2024 (Bill C-56, s 8).
- ²⁶ While AMPs are only available where the Tribunal finds that there is a practice of anti-competitive acts and a substantial lessening or prevention of competition, disgorgement can be ordered even where a private party is able to make out only one of those two elements.
- ²⁷ Matthew Boswell, “Building a More Competitive Canada” (26 May 2022), online (speech): <<https://www.canada.ca/en/competition-bureau/news/2022/05/building-a-more-competitive-canada.html>>.
- ²⁸ C.D. Howe Institute Competition Policy Council, “The

Distortive Power of AMPs: Why the Competition Bureau Must Clarify Its Stance on Administrative Monetary Penalties” (15 May 2012), online (pdf): <<https://www.cdhowe.org/wp-content/uploads/2024/12/The20Distortive20Power20of20AMPs20Why20the20Competition20Bureau20Must.pdf>> [C.D. Howe].

²⁹ Innovation Science and Economic Development, “Future of Canada’s Competition Policy Consultation—What We Heard Report” (20 Sep 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#s72>>.

³⁰ This paper’s critique of the benefit derived standard should not be read as an endorsement of the alternative quantification method introduced by the amendments for abuse of dominance and anti-competitive agreements, namely, 3% of worldwide revenues. Rather, while detailed consideration of that remedial standard is beyond the scope of this paper, it bears noting that such an approach appears to be both arbitrary (with respect to 3% being an appropriate quantum) and grossly disproportionate (with worldwide revenues being detached from the underlying substantive analysis, which is properly limited to competitive effects in, at most, Canada, and, in many individual cases, will concern only an even more narrow geographic region).

³¹ This principle underlies the four-step approach that has been developed in the United States for adjudicating conduct under the “rule of reason.” Cf Michael A Carrier, “The Four-Step Rule of Reason” (2020), 33:2 Antitrust 50.

³² Competition Bureau Canada, “Competitor Collaboration Guidelines” (6 May 2021), online: <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines>> at s 2.1.

³³ *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5 at para 438 [Cineplex].

³⁴ *Ibid* at para 439.

³⁵ *Ibid*.

³⁶ *Competition Act*, s 74.1(3).

³⁷ In a similar vein, in a May 2021 letter to the House of Commons Standing Committee on Industry, Science and Technology, Jason Gudofsky and Kate McNeece had proposed that any enhancement to the consequences available under Part VIII be “paired with a statutory exemption from such consequences where a firm or firms provide notification to the Bureau of proposed conduct before implementation so that the Bureau is able to engage in proactive assessment of potential effects and, if needed, impose a proactive remedy (in accordance with the enforcement powers currently available to the Tribunal under each provision of Part VIII). In this respect, as long as the Bureau is made aware of the commercial agreement, conduct or merger, and thus can investigate it and decide whether to challenge it before the Tribunal (or enter into a consent agreement with the proponent(s)), the firm or firms should not face adverse consequences,

including not being subject to AMPs, beyond those currently available under Part VIII if it should later be determined that the impugned agreement, conduct or merger prevents or lessens competition substantially.” Jason Gudofsky and Kate McNeece, “Re: Competitiveness in Canada—Competition Act Considerations” (28 May 2021), online (letter): <<https://www.ourcommons.ca/Content/Committee/432/INDU/Brief/BR11425646/br-external/Jointly1-e.pdf>>.

³⁸ Cf. Trebilcock, *supra* note 5 at 186; C.D. Howe, *supra* note 28 at 4.

³⁹ *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146 at para 15.