

## THE NEW ABUSE OF DOMINANCE REGIME IN CANADA—AN OPPORTUNITY FOR GREATER ENFORCEMENT AND ACCESS TO JUSTICE

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*Between 2022 and 2024, the Parliament of Canada passed three rounds of amendments to the Competition Act. The amendments—intended to modernize Canada’s competition regime—fundamentally change the Canadian competition law landscape. Among other things, the amendments broaden the scope of the abuse of dominance provisions and expand the private right of action for civilly reviewable claims. The amendments allow private parties to seek an award equal to the benefit gained by the conduct at issue on behalf of the applicant and other persons affected by the conduct. The amendments will likely increase the enforcement of the abuse of dominance provisions and provide greater access to justice.*

*The amendments bring with them substantive and procedural uncertainty. They create new legal concepts and tests, which are layered onto existing legal concepts and tests that have received little or no judicial consideration. It is expected that greater clarity will be provided through updated guidelines from the Competition Bureau and the development of the case law.*

*The procedure for collective redress is somewhat lacking. Key concepts, such as settlement approval, fee approval, and tolling of limitation periods, are absent. Given that the collective redress amendments do not come into force until June 2025, there is an opportunity to address these gaps.*

*Entre 2022 et 2024, le Parlement du Canada a adopté trois séries de modifications à la Loi sur la concurrence. Ces modifications, qui visent à moderniser le régime de concurrence du Canada, changent fondamentalement ce régime canadien. Entre autres, elles élargissent la portée des dispositions relatives à l’abus de position dominante et étendent le droit d’action privé pour les plaintes faisant l’objet d’un examen au civil. Ces modifications permettent aux parties privées de demander des dommages-intérêts équivalents à l’avantage obtenu par le comportement en question au nom du demandeur et toute autre personne touchée par le comportement. Les modifications devraient renforcer l’application des dispositions relatives à l’abus de position dominante et améliorer l’accès à la justice.*

*Les modifications entraînent une incertitude quant à la substance et à la procédure. Elles créent de nouveaux concepts et tests juridiques, qui se superposent à des concepts et tests juridiques existants qui n’ont pas ou qui ont peu*

*été pris en compte par les tribunaux. On s'attend à ce que les lignes directrices mises à jour par le Bureau de la concurrence et les développements de la jurisprudence apportent plus de clarté.*

*La procédure de recours collectif présente quelques lacunes. Des concepts clés, tels que l'approbation du règlement, l'approbation des honoraires et l'écoulement des délais de prescription, sont absents. Étant donné que les modifications relatives aux recours collectifs n'entreront pas en vigueur avant juin 2025, il existe une occasion de combler ces lacunes.*

## Introduction

Over the past two years, the Government of Canada has passed three rounds of amendments to the *Competition Act* (the “**Act**”).<sup>2</sup> The amendments were intended to modernize Canada’s competition laws and improve access to justice.<sup>3</sup> The cumulative effect of these amendments fundamentally changes the Canadian competition law landscape.

This paper summarizes the three rounds of amendments and sets out the current state of play in Canadian competition law, focusing on the changes to the abuse of dominance provisions and the expanded rights for private parties to bring applications to the Competition Tribunal (the “**Tribunal**”).

Abuse of dominance generally refers to a scenario where a company (or a group of companies) who has a dominant position in a market engages in conduct that harms competition in that market.

Under the old regime, there were three core elements to an abuse of dominance claim: dominance, anti-competitive conduct, and a substantial lessening of competition. And only the Commissioner of Competition (the “**Commissioner**”) could bring enforcement actions under the abuse of dominance provisions.

The amendments to the abuse of dominance provisions have been wide-sweeping and include:

- broadening the definition of the “anti-competitive acts” grounding a claim in abuse of dominance;
- broadening the framework for obtaining a prohibition order. The previous framework required *both* anti-competitive intent *and* effects to obtain a prohibition order. The new framework allows for a prohibition order where there is *either* anti-competitive intent *or* effect.

However, an administrative monetary penalty (“AMP”) can only be imposed where there is *both* anti-competitive intent *and* effect;

- increasing the monetary penalty for engaging in abuse of dominance;
- creating a private right of action to the Tribunal;
- creating a monetary remedy for private parties up to the “benefit” derived from the conduct; and
- providing for collective redress, with an award to be distributed among the applicant and “other person affected” by the conduct.

The monetary remedy and collective redress amendments do not come into force until June 2025. The delay in implementation is intended to provide companies an opportunity to ensure compliance.

In our view, these amendments are welcome developments for Canadian businesses and consumers. The amendments are particularly beneficial for small to medium-sized businesses and consumers, for whom individual actions are prohibitively expensive. The aggregation of claims makes them more economical to bring and the availability of monetary remedies creates a stronger incentive to bring such claims. Indeed, these amendments have the potential to further the objectives of the *Competition Act*—namely, the maintenance and encouragement of competition in Canada, resulting in more competitive prices and product choices for Canadians.

That said, other commentators posit that the amendments risk leading to the over-enforcement of the abuse of dominance provisions, thereby chilling the use of efficient business practices.<sup>4</sup> One of the concerns for these scholars and practitioners is that companies will be adversely impacted by strategic litigation that both stymies commercial activity and discourages legitimate competitive behaviour.<sup>5</sup> Regardless of which viewpoint you subscribe to, as it stands, there is considerable procedural uncertainty surrounding the collective redress amendments. The *Competition Tribunal Rules* have not been amended to provide guidance on how actions before the Tribunal will be prosecuted on a collective basis. For example, the provisions do not contain a settlement approval process. In the class action context, settlements are subject to court approval, and it is the court order approving the settlement that makes the settlement—including the release provisions—binding on the class (subject to the right to opt-out). Without an equivalent process, there is uncertainty on how a release will become binding on other “affected” persons.

It is possible that these procedural uncertainties will be remedied by the “gap” rule. The *Competition Tribunal Rules* provide that the *Federal Court Rules*<sup>6</sup> may be followed where the *Competition Tribunal Rules* are lacking guidance on practice or procedure.<sup>7</sup> However, there is no guarantee in this regard.

As these monetary remedy and collective redress amendments do not come into force until June 2025, there is opportunity to achieve greater procedural certainty. Ideally, clarity can be provided through amendments to the *Competition Tribunal Rules*. This path forward would give litigants greater certainty and help ensure that the desired objectives of the amendments are achieved.

### Context Leading to the Amendments

The Act is structured such that certain conduct (for example, a price-fixing conspiracy) gives rise to criminal sanctions and a private right of action for damages to the courts under section 36.<sup>8</sup> A section 36 action can be brought before any court of competent jurisdiction, meaning the Federal or provincial courts, depending on the conduct at issue.<sup>9</sup> To obtain damages, litigants must demonstrate that their loss or damage occurred as a result of conduct that is contrary to Part VI of the Act.<sup>10</sup>

Other conduct—abuse of dominance, for example—is reviewable by the Tribunal.<sup>11</sup> Some conduct can fall within both the criminal and civilly reviewable branches of the Act. However, the Bureau can only pursue conduct under one track.<sup>12</sup>

Section 79(1) sets out the required elements for an abuse of dominance claim. Under the old regime, the three core elements were:

- *Dominance in the market*: dominance refers to a company with a “substantial degree of market power”. Market power is the ability of a company to profitably determine or influence the price or other dimensions of competition in a market (i.e., quality, services, advertising, etc.).<sup>13</sup> In many cases, the Bureau uses market share as an initial screening mechanism for abuse of dominance allegations. The Bureau’s general approach is as follows:
  - ◇ A market share below 50% will generally only prompt further examination if other evidence supports the existence of market power;

- ◇ A market share of 50% or more will generally prompt further examination; and
  - ◇ In the case of a group of firms alleged to be jointly dominant, a combined market share of 65% or more will generally prompt further examination.<sup>14</sup>
  - ◇ This aspect of the Bureau's analysis is described in enforcement guidelines, which are not binding on the Tribunal, and is therefore not affected by the amendments.
- *An anti-competitive act* (i.e., anti-competitive *intent*): Section 78(1) defines anti-competitive acts for the purpose of the abuse of dominance provisions. The prior version of section 78(1) defined an anti-competitive act as an act that is intended to have a negative effect on a competitor that is predatory, exclusionary, or disciplinary.<sup>15</sup> The Bureau's *Abuse of Dominance Enforcement Guidelines* describe predatory, exclusionary, and disciplinary conduct as follows:

Exclusionary acts may make current or potential competitors less effective, for example by increasing their costs. Predatory acts involve a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to eliminate, discipline, or deter entry or expansion of a competitor. Disciplinary acts involve actions intended to dissuade an actual or potential competitor from competing vigorously, or otherwise disrupting the status quo in a market.<sup>16</sup>

Section 78(1) provides a non-exhaustive list of examples of acts that may be deemed to be anti-competitive. As explained further below, the amendments broaden the definition of anti-competitive acts and provide additional examples of anti-competitive acts.

- *A substantial lessening or prevention of competition* (i.e., anti-competitive *effect*): This requirement asks: has the conduct had, is the conduct having, or will the conduct likely have the effect of substantially preventing or lessening competition in the market? Generally, this occurs when anti-competitive conduct causes a materially greater degree of market power to exist than in the absence of the conduct.<sup>17</sup> As part of this analysis, the Tribunal must consider whether the relevant practice is a result of superior competitive performance.<sup>18</sup>

This aspect of the test is not affected by the amendments. However, as explained below, to obtain a remedial order, it is now only necessary to prove anti-competitive intent *or* effect.

Where the requirements were met, on application by the Commissioner, the Tribunal could issue an order prohibiting the anti-competitive practice.<sup>19</sup>

Section 79(2) and (3.1) provide two additional remedies:

- under subsection (2), a remedial order directing the respondent to take such actions as are reasonable and necessary to overcome the effects of the practice in the market; and
- under subsection (3.1), an AMP in an amount not exceeding \$10,000,000 and, for subsequent orders, an amount not exceeding \$15,000,000.<sup>20</sup> These penalties have been increased as part of the amendments.

Under the old regime, only the Commissioner could bring enforcement actions under the abuse of dominance provisions. This fact meant that when a market participant was concerned with the anti-competitive conduct of a dominant player in the market, the only recourse was to make a complaint to the Commissioner. If the Commissioner decided not to move forward with the matter, there was no recourse available. In most cases, the Commissioner did not move forward with the matter. In our view, enforcement of the abuse of dominance provisions tends to take a back seat to enforcement of the criminal provisions of the Act (including price fixing and bid-rigging) and merger review.

Indeed, the under-enforcement of the abuse of dominance provisions is a longstanding reality.<sup>21</sup> Since 1986, the Commissioner has only brought 17 abuse of dominance applications before the Tribunal.<sup>22</sup> While it is difficult to say how many abuse of dominance cases *should* have been pursued over the years, commentators argue that there is evidence that abusive conduct is occurring in Canada without enforcement, namely:

- there is a large discrepancy between the number of complaints received by the Bureau compared with the number of investigations opened. For example, in 2019-2020, the Bureau received 467 complaints and only opened 11 investigations (approximately 3%);
- legislative bodies urged the Bureau to investigate conduct that could constitute abuse of dominance—specifically, alleged abuse of

dominance in the market for fertilizers—however, this call to action did not result in enforcement proceedings;<sup>23</sup> and

- the comparatively high levels of enforcement by regulatory agencies in other jurisdictions.<sup>24</sup>

The under-enforcement of the abuse of dominance provisions hurts competition and denies Canadian businesses and consumers a competitive marketplace.

There are several possible reasons why abuse of dominance has historically been under-enforced in Canada. After assuming the position in 2018, the current Commissioner, Matthew Boswell, expressed “serious concerns” about the Bureau’s budget.<sup>25</sup> Given the widely acknowledged scarcity of resources, it appears that a lack of adequate funding has been one potential impediment to the robust enforcement of the abuse of dominance provisions, particularly in the face of competing priorities.<sup>26</sup>

Despite a significant budget increase in 2021—which allocated an additional \$96 million to the Bureau over a period of five years, and \$27.5 million annually thereafter—the Bureau’s expanded coffers have not resulted in an increased prosecution of abuse of dominance cases.<sup>27</sup> As per annual statistics published by the Commissioner, in 2022-2023 there were 349 complaints about “monopolistic practices” (i.e., abuse of dominance).<sup>28</sup> Out of those complaints, the Bureau only commenced 14 investigations, which turned into 4 inquiries.<sup>29</sup> To date, none of these complaints have yielded a contested application.<sup>30</sup> This result is unsurprising—commentators have noted that, historically, in periods of both budgetary constraint and excess at the Bureau, the Commissioner only ever brought a few abuse of dominance cases per year before the Tribunal.<sup>31</sup>

As argued by the Commissioner, another deterrent to enforcing the abuse of dominance provisions is the dearth of relevant case law.<sup>32</sup> There have been so few cases on abuse of dominance that bringing any case raises novel legal issues, which are expensive to litigate.<sup>33</sup> In the Commissioner’s words, the “greatest benefit of private access” is that “a broader body of case law would be developed. Such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses”.<sup>34</sup>

In June 2002, the Act was amended to allow private access to the Tribunal for conduct reviewable under sections 75 (refusal to deal) and 77 (exclusive

dealing, tied selling and market restriction). According to the Bureau's *Information Bulletin on Private Access to the Competition Tribunal*, the:

private access provisions were added to the Act to complement the Bureau's public enforcement and increase the deterrent effect of the Act. Private litigation before the Tribunal will also yield valuable jurisprudence which will assist the Bureau in its enforcement and application of the Act and will better delineate the bounds of legitimate behaviour to the business community.<sup>35</sup>

In 2009, this provision was amended to include conduct reviewable under section 76 (price maintenance).<sup>36</sup>

Private rights of enforcement can supplement public enforcement, particularly where the public enforcer has limited resources. These considerations apply in the competition context, as the Bureau is resource-constrained and litigating complex competition cases is expensive. Private access to the Tribunal can therefore supplement Bureau activity and help ensure effective competition.<sup>37</sup>

This right of action is subject to the leave process in section 103.1 of the Act. The leave process is summarized as follows:

- The leave application must be accompanied by an affidavit setting out the facts in support of the person's application under the applicable section of the Act.<sup>38</sup>
- The respondent and the Commissioner can make responding representations to the Tribunal in writing.<sup>39</sup>
- The Tribunal cannot consider an application for leave regarding a matter that is currently subject to an inquiry by the Commissioner, was previously subject to an inquiry by the Commissioner and discontinued as a result of settlement, or is subject to an application to the Tribunal by the Commissioner.<sup>40</sup>
- The Tribunal cannot draw any inference from the fact that the Commissioner has or has not taken any action.<sup>41</sup>
- The Tribunal may grant leave where it "has reason to believe that the applicant is directly and substantially affected in the applicant's business" by the relevant conduct.<sup>42</sup> The Tribunal has consistently found that a "substantial affect" on a business is measured in the context of

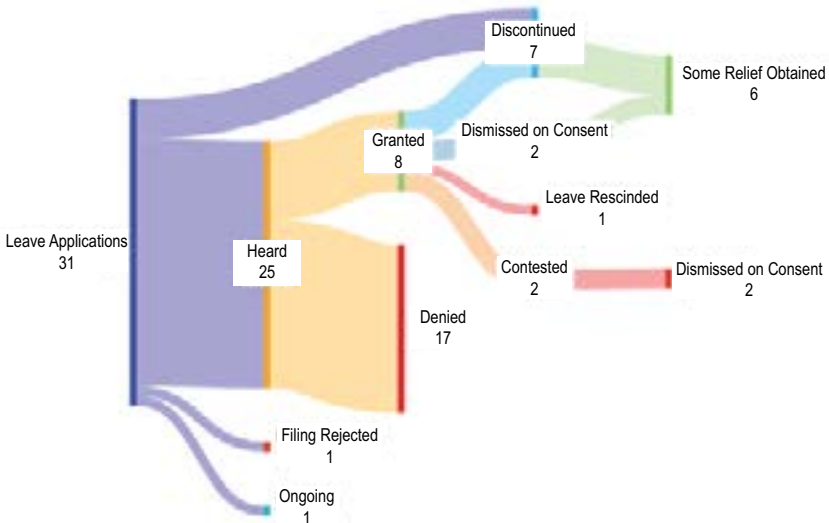
the applicant’s entire business, rather than a segment of its business, such as a product line.<sup>43</sup>

- The leave application must be brought within one year of the relevant conduct ceasing.<sup>44</sup>

Unfortunately, this right of action has proven to be largely ineffective in achieving the goals set out by the Bureau and the Commissioner, namely yielding valuable jurisprudence and increasing the deterrent effect of the Act.<sup>45</sup> In the 22 years since the 2002 enactment of the private right of access, there have been only 31 leave applications brought by private parties.<sup>46</sup> The success rate of these leave applications has been underwhelming. Only 8 of 25 contested leave applications were successful. Four applications were discontinued before the hearing of the leave application (possibly due to settlement), and one application was rejected for improper filing.<sup>47</sup> Where the applications were granted, only two applications resulted in a contested hearing for a remedial order and in both instances the relief sought was denied.<sup>48</sup>

The following diagram shows the results of the leave applications:<sup>49</sup>

Figure 1



The incentive to bring a private right of action—as structured under the old regime—was not strong given:

- *The requirement to obtain leave to bring an application:* This step both lengthens the process for bringing an action before the Tribunal and increases its expense, given that a party needs to retain a lawyer with expertise in competition law and the Tribunal's specialized procedure for both stages of the process. Also, both respondents and the Commissioner have the right to make responding submissions.<sup>50</sup> The lengthened timeline increases the chance that applications will be abandoned or settled before the Tribunal rules on the merits, which may not be advantageous for the putative applicants.<sup>51</sup>
- *The strictness of the leave test:* As indicated above, the leave test required showing a direct and substantial affect on the applicant's entire business. In most cases where leave was refused, it was on the basis that the applicant did not demonstrate that its business was directly and substantially affected.<sup>52</sup> It would be challenging for a company with multiple products lines to meet this test. This criterion leads to an arbitrary result, whereby small businesses can obtain leave, but medium to large businesses with multiple product lines may be unable to. A more appropriate test would focus on a particular product—this frame of reference would place small businesses and larger companies on a more equal footing at the leave stage, eliminating the hurdle of requiring a large company with several product lines to demonstrate that the allegedly monopolistic behaviour was impactful enough to directly and substantially affect its entire business.<sup>53</sup>
- *Adverse costs risks:* In *B-Filer Inc et al v The Bank of Nova Scotia*, an application under section 75, the Tribunal awarded costs to the respondent of almost \$900,000.<sup>54</sup> Companies able to exercise control in a market tend to be well-resourced and can easily outspend a small business while litigating applications.
- *The lack of access to monetary remedies:* Behavioural remedies alone have proven not to provide sufficient incentive for private parties to incur the significant costs of an abuse of dominance proceeding, especially considering the low probability of success. As stated above, since the 2002 amendments, only 31 applications have been brought in respect of civilly reviewable conduct. David Vaillancourt, a competition law lawyer, explained as follows:

Private litigants should also be allowed to make a claim for damages suffered as a result of anti-competitive conduct. Behavioural remedies alone might not be sufficient incentive for private parties to incur the significant costs of prosecuting an abuse of dominance proceeding. More victimized competitors would be willing to pay for legal proceedings if there is some chance of monetary recovery.<sup>55</sup>

Dr. Thomas Ross, the UPS Foundation Professor of Regulation and Competition Policy at the Sauder School of Business at University of British Columbia, indicates that the current interest in reform was driven by:

- The seemingly quick rise to dominance of firms in the digital marketplace, such as Google, Amazon, and Meta (formerly Facebook) and the often-expressed concerns that traditional tools of competition policy might not suffice in this context.
- More general concerns about perceived market concentration leading to higher profit margins and whether competition policy and enforcement need to be strengthened across the economy.<sup>56</sup>

Another motivation driving reform is harmonizing Canada with international competition law. Private access to courts for abuse of dominance is available in many countries, including the United States (“U.S.”),<sup>57</sup> the United Kingdom (“U.K.”),<sup>58</sup> European Union member states,<sup>59</sup> Australia,<sup>60</sup> New Zealand,<sup>61</sup> and South Korea.<sup>62</sup> Keeping Canadian competition law current with other nations will help ensure that Canadians benefit from the same opportunities and protections available to citizens of other countries, and assist domestic and foreign businesses to streamline their compliance regimes both at home and abroad.

The disadvantages of neglecting to harmonize Canadian law with international competition law are currently playing out in the digital marketplace, where commentators have noted that Canada has fallen behind other countries in addressing abuse of dominance.<sup>63</sup> Between 2019 and 2021 alone, U.S. and European regulators brought 16 abuse of dominance claims against Google, Apple, Meta, and Amazon.<sup>64</sup> By contrast, the Commissioner has yet to bring any abuse of dominance actions against these companies, despite conducting several investigations.<sup>65</sup> While it is beyond the scope of this paper to debate the Bureau’s reticence to prosecute actions against these digital giants—whether because of a weakness in the current law, or desire not to duplicate the efforts of regulators in other jurisdictions—it is clear that the Canadian regime is lacking in this growing arena, thus making the current amendments all the more timely.

## The Amendments

As discussed above, historically, there has been under-enforcement of the abuse of dominance provisions and section 103.1 of the Act has been an under-utilized mechanism for pursuing private right of actions. Moreover, under the old regime, the private right of access did not extend to conduct reviewable under section 79 (abuse of dominance). The only recourse available to affected persons was to file a complaint with the Commissioner and hope that the Commissioner decided to pursue the matter—which, based on historical statistics, was unlikely to happen. Even if the Commissioner decided to pursue that matter, under the old regime, there was no means of obtaining a monetary award for injury caused by the abuse of dominance.

In this context, it was important for Parliament to introduce a workable regime where private rights of action can be effectively brought. The three rounds of amendments go a long way in achieving this aim. However, these amendments bring with them considerable substantive and procedural uncertainties. The amendments create new legal concepts, layered onto existing legal concepts that have yet to be interpreted. The Tribunal may look to other jurisdictions and areas of the law to inform the interpretation of these provisions.

Below is a summary of the amendments and the potential implications of the amendments.

### The June 2022 Amendments

The first round of amendments was in June 2022. The most notable amendment was the expansion of the private right of access to the Tribunal to include abuse of dominance. The Apotex litigation provides an example where this private right of action appears to have led to an efficient resolution.

In September 2023, Apotex Inc. (“**Apotex**”) brought the first application for leave to the Tribunal based on abuse of dominance. Two weeks later, Apotex filed a notice of discontinuance.<sup>66</sup>

Apotex is a manufacturer of generic and branded drugs in Canada. For a pharmaceutical company to market a generic version of a branded drug without undergoing duplicative clinical trials, it must demonstrate that its version of the drug is a bioequivalent to the branded product. To do so, it requires samples of the branded product.

Apotex planned to manufacture and supply ponatinib, a leukemia treatment produced by Takeda Pharmaceuticals U.S.A. Inc (“**Takeda**”) and imported to and distributed in Canada by Paladin Labs Inc (“**Paladin**”). Apotex claimed that its attempts to obtain samples of the branded product were denied. Apotex claimed that the denials were intended to exclude, prevent, and delay Apotex from launching a lower-priced generic product that would compete with Takeda’s branded version. Among other things, Apotex sought a remedial order requiring the supply of samples of the branded product.

Within two weeks of applying for leave, Apotex filed a notice of discontinuance. Presumably, this sequence of events means that Apotex successfully secured samples from Takeda and/or Paladin. This result provides an example of the June 2022 Amendments working as intended. The matter was resolved quickly and effectively, without the uncertainty of whether the Commissioner would take up the cause.

Two other private abuse of dominance leave applications have been commenced:

- *Winston Gaskin et al v Rogers Communications Inc et al*:<sup>67</sup> related to allegations of abuse of dominance by Rogers Communication in the Western Canada telecommunications industry. This application was rejected for improper filing.
- *JAMP Pharma Corporation v Janssen Inc*:<sup>68</sup> related to allegations of abuse of dominance by Janssen Inc in relation to its monopoly position for a drug product (Ustekinumab) used for the treatment of certain chronic diseases. The Competition Tribunal dismissed the application for leave.<sup>69</sup>

The June 2022 Amendments also expanded the meaning of “anti-competitive acts”, adding language regarding conduct that is intended to have an adverse effect on competition. The revised section 79(1) reads as follows:

For the purposes of section 79, anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, *or to have an adverse effect on competition*, and includes any of the following acts: [...].<sup>70</sup>

[emphasis added]

In October 2023, the Bureau opened a consultation process on the draft *Bulletin on Amendments to the Abuse of Dominance Provisions*. The draft

bulletin provides examples of conduct that may be intended to have an “adverse effect on competition”:

- a) *agreements between competitors*: Agreements among competitors may reduce their ability or incentive to compete;
- b) *information sharing*: Making competitively sensitive information more transparent may increase the risk of conscious parallelism, a form of coordination between firms without an agreement between them;
- c) *contracts that reference rivals*: Contractual terms that depend on competitors in some way, such as most-favoured nation (MFN) clauses, may reduce incentives for competitors to compete as vigorously as they otherwise would, facilitate conscious parallelism, or exclude competitors; and
- d) *serial acquisitions*: Dominant firms may render a market less competitive by making a series of acquisitions.<sup>71</sup>

The Bureau provides hypothetical examples of how it might analyze such conduct and specifies that this is not intended to be an exhaustive list of the types of conduct that may intentionally harm competition.<sup>72</sup>

As indicated above, section 78(1) contains a non-exhaustive list of examples of business practices that may be an anti-competitive act. The June 2022 Amendments added a new example to the list: “a selective or discriminatory response by a dominant player to make it more difficult for a competitor to enter a market or grow, or to remove a competitor from a market.”<sup>73</sup>

Section 79(4) of the *Competition Act*—which speaks to “whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market” was expanded to include factors that may arise in digital commerce, namely:<sup>74</sup>

- a) the effect of the practice on barriers to entry in the market, including network effects;
- b) the effect of the practice on price or non-price competition, including quality, choice, or consumer privacy;
- c) the nature and extent of change and innovation in a relevant market; and

- d) any other factor that is relevant to competition in the market that is or would be affected by the practice.

The June 2022 Amendments increased the AMPs for abuse of dominance to the *greater* of (i) \$10 million (\$15 million for subsequent orders); or (ii) three times the value of the benefit derived from the conduct at issue, or if that amount cannot be calculated, three percent of annual worldwide gross revenues. Previously, penalties were capped at \$10 million (\$15 million for each subsequent violation). Tying the AMPs to the “benefit derived” helps avoid the situation where the AMP is seen as a cost of doing business—too significant for many companies to simply write-off, the increased AMPs will likely have a stronger deterrent effect on monopolistic practices, forcing businesses to more carefully evaluate whether their conduct is in contravention of the Act. That said, like the arguments regarding the amendments as a whole, some commentators believe that the increased AMPs risk deterring productive competition, thereby making the Canadian economy less, rather than more, competitive.<sup>75</sup>

These amendments were superseded by the December 2023 Amendments, which again increased the available monetary penalties.

### The December 2023 Amendments

The second round of amendments—in December 2023—further broadened the abuse of dominance framework.<sup>76</sup> The previous framework required *both* anti-competitive intent *and* effects to obtain a prohibition order. The new framework allows for a prohibition order where there is *either* anti-competitive intent *or* effects. Specifically, a prohibition order is available where a person engaged in:

- a) a practice of anti-competitive acts; or
- b) conduct
  - i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and
  - ii) the effect is not a result of superior competitive performance.<sup>77</sup>

However, the Tribunal can only order an AMP where there is *both* anti-competitive intent *and* effects.<sup>78</sup>

The December 2023 Amendments also introduced a new type of anti-competitive act: “directly or indirectly imposing excessive and unfair selling prices”.<sup>79</sup> The December 2023 Amendments arose from a public consultation that prompted more than 130 submissions, only one of which addressed excessive pricing.<sup>80</sup> The Competition Bureau did not propose a provision relating to excessive pricing; the amendment was added in November 2023, with little debate.<sup>81</sup> In the limited Parliamentary hearing on Bill C-56, the Commissioner emphasized that the provision was not intended to “make the Competition Bureau price regulators” but rather would operate in a “very circumscribed way.”<sup>82</sup> Whether this intention for a circumscribed application of these provisions bears out in practice remains to be seen—special attention will need to be paid to the interaction between these provisions and the expanded right of private access.

The Bureau’s *Guide to the December 2023 amendments to the Competition Act* states that, as with other types of anti-competitive acts, such practice must be intended to have a predatory, exclusionary, or disciplinary negative effect on a competitor, or to have an adverse effect on competition.<sup>83</sup> No guidance has been provided on what constitutes “excessive and unfair selling prices” under the Act, and it is unclear how these terms will be interpreted by the Tribunal. It is also debatable whether Parliament intended to capture excessive or unfair selling prices (i.e., price gouging) *only* where the conduct negatively effects a competitor or competition, or all price gouging (more akin to the European approach described below). This ambiguity is a matter that is likely to be litigated. Excessive pricing is currently a feature of consumer protection law across most Canadian provinces, as well as legislation in different international jurisdictions. Specifically, consumer protection legislation in each province but New Brunswick contains some form of price gouging prohibition.<sup>84</sup>

Looking internationally, in the U.S. excessive pricing is not explicitly banned by antitrust laws at the federal level. However, certain states have such laws—for example, actions for price gouging have been brought under the *California Penal Code* § 396(b), which prohibits price gouging during a declared emergency. That provision precludes a business from increasing its prices for essential products (foods, medical supplies, housing materials, gasoline, etc.) by more than 10% during 30-day period following the declaration of a state or local emergency.

In Europe, Article 102(a) of the *Treaty on the Functioning of the European Union* serves as the legal basis for addressing excessive pricing. That *Treaty* defines abuse of dominance to include “directly or indirectly imposing

unfair purchase or selling prices or other unfair trading conditions.” Jurisprudence has affirmed this provision as restricting excessive prices by dominant firms. Excessive pricing cases have been examined infrequently over the past four decades, with a shared view that intervention should be limited to the most exceptional circumstances.<sup>85</sup> In determining whether a price is excessive, relevant considerations include:

- whether the margins are excessive;<sup>86</sup>
- whether the price bears a reasonable relation to the economic value of the good or service;<sup>87</sup>
- whether there is a legitimate justification for the price—such as risk-taking activity, innovation or investment;<sup>88</sup> and
- comparison to competing goods or services.<sup>89</sup>

Finally, the December 2023 Amendments further increased the abuse of dominance AMPs. Penalties are now up to an amount not exceeding the greater of (i) \$25 million (\$35 million on a subsequent order) or (ii) three times the value of the benefit derived from the anticompetitive practice or, if that amount cannot be reasonably determined, 3% of the business’ annual worldwide gross revenues.<sup>90</sup>

### **The June 2024 Amendments**

The third round of amendments—which were proposed in November 2023 as part of Bill C-59 and received royal assent on June 20, 2024—are perhaps the most significant.

The June 2024 Amendments introduce a private right to a monetary award for civilly reviewable trade practices, including abuse of dominance. Private parties will be able to seek an award up the amount of the “benefit” derived from the conduct that is the subject of the order, to be distributed among the applicant and any other persons affected by the conduct “in any manner that the Tribunal considers appropriate.”<sup>91</sup> The amendments granting access to private monetary remedies do not come into force until one year after Bill C-59 received royal assent—meaning that private parties cannot bring applications for monetary relief in respect of these provisions until June 20, 2025.<sup>92</sup> The ability to recover a monetary remedy in these proceedings will—understandably—likely lead to increased private access applications: not only will the applicants be incentivized by the prospect of deterring the alleged monopolistic conduct, but the added financial

award will presumably make committing the resources necessary to pursue an application more palatable for would-be applicants.

That said, certain aspects of the monetary remedy remain unclear. The focus of the “benefit derived” is a departure from the norm of damages across most areas of Canadian law.<sup>93</sup> Though damages are measured differently depending on the area of law—for example, damages in tort versus damages in contract—many causes of action provide a remedy equal to damage or loss incurred. This holds true even within the Act. Section 36 of the Act allows a person harmed by conduct that is contrary to Part VI of the Act (price-fixing is included within Part VI) to recover an amount equal to the loss or damage proved to have been suffered by him.<sup>94</sup> By focusing on benefit derived, the economic evidence may in some cases be somewhat simplified, although one can still expect complicated and contested expert evidence on the benefit derived.

Additionally, given that the term “benefit” has not yet been defined, parties will likely take competing positions on whether this is intended to mean associated revenues or profits, potentially looking to jurisprudence on unjust enrichment and intellectual property law for guidance.<sup>95</sup>

As indicated above, private parties will be able to seek an award up the amount 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* “in any manner that the Tribunal considers appropriate.” This drafting suggests that the applicant will not receive the full award; instead, it will be shared with other persons affected by the conduct.

The June 2024 Amendments do not provide any boundaries around the term “any other person affected”. Following the approach of the Supreme Court of Canada in *Pioneer Corp v Godfrey*,<sup>96</sup> one could expect the Tribunal to adopt a position that any person affected by the conduct can file a claim.<sup>97</sup> This might include, for example, indirect purchasers of the affected product. In the price-fixing context, direct and indirect purchaser claims are brought in the same action, with damages allocated based on the extent to which any unlawful overcharge was passed down through the distribution chain.

In the context of abuse of dominance, there could be a scenario where both competitors and purchasers are affected by the conduct. For example, a dominant online marketing platform may design its platform to favour its own sales over the sales of other online suppliers. This could harm the other online suppliers through reduced sales and customers through reduced price competition and/or product choices.

It is unclear under the amendments when the scope of “other person affected by the conduct” is delineated—whether that is at the leave stage or post-leave. At the U.K. Competition Appeal Tribunal (“UK CAT” or “UK Tribunal”), this is done at an early stage. An application to commence collective proceedings is to be made by the proposed class representative by filing a “collective proceedings claim form”, which must include a “description of the proposed class”.<sup>98</sup>

Under the June 2024 Amendments, the Tribunal will be able to impose any term necessary for the implementation of an order, including terms related to notifying potential claimants, specifying the time and manner for making a claim, specifying the eligibility of claimants, and specifying how an unclaimed award should be distributed.

While not explicit in the amendments, it is likely that the Tribunal will implement a notice and claims process like that which exists in the class action context, as discussed further in Procedural Uncertainties section of this paper. In the class action context, the courts approve a plan for providing notice to class members and a protocol for the distribution of settlement funds or court awards. The protocol typically sets out the process and deadline for applying to participate in the distribution, and how the payments to individual claimants will be calculated. In the settlement context, third-party claims administrators are appointed to adjudicate claims.

The June 2024 Amendments also expand the test for private parties to seek leave to apply to the Tribunal for civilly reviewable conduct, including abuse of dominance, in the following ways:

- Private parties will no longer have to show that entire business was “directly and substantially” affected but will be able to obtain leave to bring an application where the conduct affects only *part* of their business.
- A second branch of leave is created. Leave can be granted if the Tribunal believes it is in the public interest to do so.

As indicated above, the previous requirement to show a direct and substantial affect on applicants’ entire business was a significant barrier to obtaining leave.

A plain language reading of the public interest branch does not limit its application to businesses; it is likely open to consumers or consumer advocacy groups and other public interest groups to seek leave under this

provision. Commentators have proposed that this public interest prong may allow for actions brought through a “representative plaintiff”, akin to the provincial class actions regimes.<sup>99</sup> Likewise, in the U.K., collective proceedings for abuse of dominance may be brought either by individual claimants or representative bodies, such as trade, professional, or consumer associations.<sup>100</sup> Consumer organizations have brought collective proceedings before the CAT.<sup>101</sup>

The public interest test for leave is entirely new in competition law, with some commentators concluding that the precise nature of the test will only become clear once a body of tribunal case law has been built around it.<sup>102</sup> This may be true, but it does not stop us from speculating on what the test may look like based on comparable tests in other areas of law. The most relevant example is likely found in the Ontario *Securities Act*,<sup>103</sup> which grants the Ontario Securities Commission (“OSC”) the jurisdiction to intervene in capital markets if it is in the public interest to do so.<sup>104</sup> The Supreme Court has interpreted this mandate as follows:

The permissive language of s. 127(1) expresses an intent to leave it to the OSC to determine whether and how to intervene in a particular case. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used in response to Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.<sup>105</sup>

This passage suggests that, in exercising its discretion, the OSC is guided by the primary purposes of the *Securities Act*: protecting investors and ensuring public confidence in capital markets.<sup>106</sup>

The Tribunal will likely take a similar approach. The Tribunal’s starting point for their public interest test will likely be whether the application furthers the purposes of the Act. The purpose of the Act is “to maintain and encourage competition in Canada in order to”:

- 1) promote the efficiency and adaptability of the Canadian economy;
- 2) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;

- 3) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- 4) provide consumers with competitive prices and product choices.<sup>107</sup>

### **Implications of the Amendments**

The amendments are a fundamental change that the authors believe are likely to breathe life into the abuse of dominance provisions and the private right of action. We can expect to see more enforcement of the abuse of dominance provisions and more rapid development of the case law, bringing clarity in the law for the Commissioner, litigants, and Canadian businesses.<sup>108</sup>

The availability of private monetary remedies—coupled with the collective redress mechanism—provide a much greater incentive for commencing private causes of action. This quasi-class action procedure has the same benefits of class proceeding legislation, enhancing access to justice, judicial economy, and behaviour modification. By allowing fixed litigation costs to be divided over many plaintiffs, class actions (or in this case, collective redress) improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.<sup>109</sup>

The European experience suggests that Canada will experience an uptick in abuse of dominance actions. In Europe, “the number of meritorious abuse of dominance prosecutions ‘significantly increased’ after private access to courts was introduced. Within one year of its introduction, France alone had granted damages in 31 meritorious private cases.”<sup>110</sup>

These amendments are an important step in modernizing Canada’s competition laws and bring Canada more in line with other countries’ approach to abuse of dominance.

The full implications of the amendments are uncertain, with new concepts and important changes to legal tests layered on top of existing concepts that have never been judicially tested. Likely, the Tribunal will look to other areas of the law and/or other jurisdictions for guidance on how some of these concepts may be applied (see, for example, the above discussion on excessive pricing and the public interest test for leave).

That said, some implications of the amendments are clear:

- There is increased exposure for dominant firms or jointly dominant firms in terms potential AMPs.

- It is easier for the Commissioner to obtain a prohibition order. Instead of requiring *both* anti-competitive intent *and* effect, now it is only necessary to prove anti-competitive intent *or* effect.
- It is easier for private parties to obtain leave to bring an application. They now only need to show that part of their business was directly and substantially affected. They also have a second branch available for obtaining leave—the public interest branch.
- There is greater incentive for private parties to seek leave to bring an application. The availability of a monetary award and a mechanism for collective redress make these applications much more attractive for litigants.

With more at stake—namely, the availability of a monetary remedy—the leave application could become a bigger battleground. To obtain leave, the applicant must “advance sufficient credible evidence supported by an affidavit”. The standard of proof is “less than a balance of probabilities.”<sup>111</sup> However, a “mere possibility” is not sufficient.<sup>112</sup> As held by the Federal Court of Appeal in *Symbol Technologies Canada ULC v Barcode Systems Inc*:

The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.<sup>113</sup>

Applicants are required to provide “a concise statement of the economic theory of the case”<sup>114</sup> Historically, this has been a statement by a company representative for the applicant as to the economic impact of the behaviour. With more at stake, it is possible that the parties will engage economic experts to speak to the economic theory, thus driving up the cost of the leave application.

With many new concepts flowing from the amendments and a dearth of relevant case law, clear and timely guidance from the Bureau will be critical for stakeholders to properly navigate this amended regime. It is expected that the Bureau will update its abuse of dominance guidelines to reflect the amendments.

### **Procedural Uncertainties**

As indicated above, the June 2024 Amendments create a form of collective redress; the Tribunal can award a monetary remedy to be distributed

among the applicant and any other persons affected by the conduct in any manner that the Tribunal considers appropriate. However, the June 2024 Amendments lack key elements that one would expect to see in a collective redress regime. Below, we explore some of the procedural gaps and potential solutions.

### Settlement Approval

A key procedural question is: how does a settlement become binding on “any other person affected”? In settling, defendants are looking to achieve an effective and binding release. In the class action context, this is achieved through the notice and settlement approval process. The settlement approval order makes the settlement binding on absent class members.

Private parties granted leave under section 103.1 can enter into a consent agreement to be filed with the Tribunal.<sup>115</sup> The consent agreement must be served on the Commissioner within 10 days after it was entered.<sup>116</sup> The consent agreement will be published in the *Canada Gazette*.<sup>117</sup> After a period of 30 days post-publication—during which third parties have the opportunity to make an application to the Tribunal to cancel an agreement or replace it with the order of the Tribunal—the consent agreement will be registered with the Tribunal, thereby giving it the same force and effect as an order of the Tribunal.<sup>118</sup> On application by the Commissioner, the Tribunal can vary or rescind the agreement if the Tribunal determines it to have anti-competitive effects.<sup>119</sup>

There are two factors that should provide some comfort to defendants:

- any “any other person affected” who participates in the distribution can be required to affirm a release; and
- it is unlikely that the Tribunal will grant leave for an application against the same defendants based on the same conduct, particularly if any monetary award is shared among affected persons.

However, there is no certainty in how the Tribunal will address these types of issues, which will likely be a significant concern for defendants.

On the other hand, in the class action context, in *Canada Post Corp v Lépine*,<sup>120</sup> the Supreme Court of Canada stressed the importance of notice in ensuring that absent class members’ rights are safeguarded.<sup>121</sup> The Supreme Court declined to give a class action settlement preclusive effect in Quebec on the basis that the published notice was unclear. Similarly, in *Currie v McDonald’s Restaurants of Canada Ltd*,<sup>122</sup> an application for recognition

of a U.S. class action judgment, the Ontario Court of Appeal stressed the importance of clear notices and an adequate mode of publication. Again, the settlement was not given preclusive effect.

Publication in the Canada Gazette would not likely be considered adequate notice in the class action context, creating significant question marks around the preclusive effect of a settlement.

It will benefit all parties if the Tribunal approves any settlements reached in applications brought under the public interest branch and/or under the collective redress provisions, in the same way that class action settlements are subject to court approval. A settlement approval process gives defendants comfort that settlements will be enforced against absent “affected” persons and provides an important oversight mechanism to ensure that settlements reached by the applicant’s counsel are fair, reasonable, and in the best interests of absent affected persons. Whether this requirement can be implemented by way of an amendment the *Competition Tribunal Rules* should be explored. Such an amendment could include the settlement approval provisions found in the *Federal Court Rules*, as supplemented by the details in some provincial class action regimes, including rules around providing the Tribunal (courts in the provincial legislation) ongoing supervisory authority over the administration and implementation of the consent agreement including such awards.<sup>123</sup>

### Fee Approval

In ordinary litigation, the retainer agreement governs fees payable to counsel. In the class action context, a retainer agreement is entered into between the proposed representative plaintiff and class counsel. The court is then asked to approve the retainer agreement. It is this approval process that makes the retainer agreement binding on other class members. Moreover, class counsel fees are subject to court approval.

There is no mechanism for fee approval provided for in the private right of access portion of the *Tribunal Rules*.<sup>124</sup> While it is possible that the *Federal Court Rules* on retainer and fee approval will be adopted by relying on the gap rule, the uncertainty in whether and how counsel will be paid could be a barrier to counsel agreeing to take on meritorious cases.

The courts have recognized that the objectives of the class proceeding legislation—judicial economy, access to justice, and behaviour modification—are dependent in part upon counsel’s willingness to undertake the risk of class proceedings. This, in turn, depends on the incentives available

to counsel to assume the risks and accept the financial burden of carrying class proceedings.<sup>125</sup> As noted in the Ontario Law Reform Commission Report on Class Actions, “[i]t is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them.”<sup>126</sup>

In *Ford v F Hoffman-La Roche Ltd*, the court cited an article by Professor Watson of Osgoode Hall Law School that emphasizes the importance of predictable and reliable class counsel fees in achieving the success of the class proceeding legislation and its objectives:

This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel’s pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the *Class Proceedings Act* will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on “judgment day” with judicial pronouncements (issued with the “benefit” of hindsight) that class counsel “spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all” and awarded a low base fee and a [small] multiplier—except in very clear cases.<sup>127</sup>

As gleaned from this passage, the issue of counsel fees may be determinative of whether the new collective redress regime is successful. Uncertainty surrounding the fee approval process is a clear deterrent for counsel.

At the UK CAT, fees are approved by the UK Tribunal much like in a class action.<sup>128</sup> The proposed fee award is a factor that the UK Tribunal considers when determining whether to approve the proposed collective settlement.<sup>129</sup>

## Litigation Funding

The amendments are silent as to third-party litigation funding. Third-party litigation funding offers opportunities for parties to obtain external funding to assist with the costs of litigation, including fees, disbursements, and adverse costs.

Litigation funding is generally permitted across Canada, particularly in circumstances where the funding promotes access to justice. In the 2021 Ontario Court of Appeal decision, *Przyk v Hamilton Retirement Group Ltd (The Court at Rushdale)*,<sup>130</sup> Justice of Appeal Zarnett acknowledged that litigation funding is one of the means through which an “apparently titled playing field might be levelled.”<sup>131</sup> That is, litigation funding promotes and protects access to justice by empowering individuals with modest individual claims to take on litigation against well-funded adversaries where class counsel is unable to provide an indemnity agreement.

The access to justice rationale was integral to Justice Strathy’s reasoning when approving the first litigation funding agreement in Ontario in the 2011 decision, *Dugal v Manulife Financial Corp.*<sup>132</sup> In *Dugal*, the representative plaintiff’s individual claim in the putative securities class action was modest and counsel was unable to accept the risk of an adverse costs award.<sup>133</sup> Justice Strathy opined that, “no matter how altruistic” someone is, “no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own”—without the litigation funding agreement, there would have been no access to justice for the representative plaintiff nor the class members as the costs of losing went “well beyond the reach of all but the powerful and wealthy.”<sup>134</sup>

Indeed, as stated by Justice Perell in the 2017 Ontario Superior Court decision, *Houle v St Jude Medical Inc.*,<sup>135</sup> over the years, the law in Ontario has evolved to recognize that, in certain circumstances, “the financial assistance of a third-party funder might be the only means for a litigant to achieve access to justice.”<sup>136</sup> Courts across Canada echo this sentiment, approving litigation funding agreements where they enable plaintiffs bring forth claims that would otherwise be precluded from seeking justice.<sup>137</sup>

Litigation funding is particularly relevant in the class proceedings context. Given the amount at stake, class actions are often highly contested. It is not unusual for counsel to docket thousands of hours on a single file and incur disbursements in the hundreds of thousands of dollars and, in more complex cases, over \$1 million. Additionally, in jurisdictions with adverse costs, such as Ontario, the costs awards can exceed \$1 million.

Thus, the absence of a provision addressing litigation funding agreements could be another barrier to counsel agreeing to take on meritorious cases. Only firms with deep pockets would be able to pursue a claim.

In Canada, only Ontario has legislation addressing the issue of third-party funders. Section 33.1 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 governs third-party litigation funding agreements as they apply to class proceedings. The key requirements under section 33.1 include:

- a) a third-party funding agreement is subject to court approval and is otherwise of no force and effect,<sup>138</sup> including changes to any agreements already approved,<sup>139</sup>
- b) a copy of the agreement must be produced to the defendants and filed, but may be redacted, although an unredacted version must be provided to the judge;<sup>140</sup>
- c) notwithstanding any redaction, the defendants can make submissions at the approval hearing and the court has discretion to order disclosure of any redacted information;<sup>141</sup>
- d) for approval, the court must be satisfied of the following:
  - i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable,
  - ii) the agreement will not diminish the representative plaintiff's rights to provide instructions or control the litigation, or impair the solicitor-client relationship,
  - iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement, and
  - iv) any prescribed requirements and other relevant requirements are met;<sup>142</sup>
- e) it must be a term of the agreement that the funder shall be subject to the same confidentiality requirements in respect of confidential or privileged information in the proceeding to which the representative plaintiff would be subject, and the deemed undertaking rules as if the funder were a party to the proceeding;<sup>143</sup>

- f) the court shall consider whether the representative plaintiff received independent legal advice with respect to the agreement;<sup>144</sup>
- g) the defendant can be entitled to costs or security for costs from the funder to the extent as provided under the agreement;<sup>145</sup>
- h) the court has jurisdiction to give any necessary directions respecting a dispute or question that arises in relation to a third-party funding agreement;<sup>146</sup> and
- i) the court must be notified should the agreement be terminated or should the funder become insolvent.<sup>147</sup>

Both in Ontario and elsewhere in Canada, there is a growing body of case law on litigation funding. The Federal Court has approved litigation funding agreements in the class action context. Two recent examples include the class proceedings in *Difederico v Amazon.Com Inc*<sup>148</sup> and *Pass Herald Ltd v Google LLC*.<sup>149</sup> Both of these decisions were decided by Chief Justice Paul Crampton and emphasize that such agreements must facilitate access to justice.<sup>150</sup> In *Difederico*, Chief Justice Crampton agreed with comments from the *amici* that “Amazon is a type of Goliath” where the litigation funding agreement would “level the playing field.”<sup>151</sup>

The UK CAT Rules address funding arrangements under Rule 113.<sup>152</sup> Rule 113 incorporates Part 2 of the U.K.’s *Courts and Legal Services Act*, which sets out extensive requirements regarding funding arrangements, including various conditions that must be met before a funding agreement is approved and enforceable.

### Adverse Costs

The amendments to the Act are silent as to which costs rule will apply in the context of a collective proceeding before the Tribunal. Section 8.1 of the *Competition Tribunal Act* provides that the Tribunal may award costs under Parts VII.1 and VIII of the *Competition Act* in accordance with the provisions governing costs in the *Federal Court Rules*.<sup>153</sup> The Tribunal has previously relied on Tariff B of the *Federal Court Rules* as a guideline when awarding costs. For example, in *B-Filer Inc et al v The Bank of Nova Scotia*, an application under section 75, the Tribunal awarded costs to the respondent of almost \$900,000.<sup>154</sup>

However, the *Federal Court Rules* contain two costs rules. Rule 400—the general costs rule—provides the Federal Court with “full discretionary power over the amount and allocation of costs and the determination of by

whom they are to be paid.” Rule 334.39—which is specific to class actions—is generally a no costs rule. Costs are only awarded where a party behaved in an inappropriate manner:

### **No costs**

**334.39 (1)** Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

- (a) the conduct of the party unnecessarily lengthened the duration of the proceeding;
- (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or
- (c) exceptional circumstances make it unjust to deprive the successful party of costs.

### **Individual claims**

(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.

The nuanced approach of Rule 334.39 balances the need to deter frivolous actions and improper litigation conduct with objective of access to justice. There is no compelling reason to depart from this approach in respect of the applications for collective relief to the Tribunal. Indeed, the requirement to obtain leave to pursue collective redress under section 103.1 of the Act is a tool for weeding out any frivolous litigation at an early stage.

In the class action context, Ontario is an outlier in maintaining a strict “loser pays” rule. Ontario’s adverse cost regime was adopted despite clear and contrary recommendations by the original Ontario Law Reform Commission.<sup>155</sup> It has persisted despite recommendations to abandon it.<sup>156</sup> Indeed, the Law Commission of Ontario (“LCO”) recommended that Ontario move away from an adverse cost regime in its 2019 Report.<sup>157</sup> The LCO explained that the magnitude of adverse costs orders has undermined litigants’ access to justice, creating several unintended consequences such as the abandonment of appeals and deterring public interest litigation.<sup>158</sup>

Instead of adopting the Ontario Law Reform Commission’s recommendation, the Ontario Legislature created the Class Proceeding Fund (“CPF”)

through an amendment to the *Law Society Act* in 1992 and an initial grant of funding.<sup>159</sup> The CPF uses this funding to indemnify representative plaintiffs in class actions against adverse costs.

The CPF is Ontario's attempt to address the chilling effect of costs on access to justice. The CPF can indemnify representative plaintiffs based on public interest as well as financial considerations, making it a key tool for promoting access to justice in Ontario. This system, while historically successful, has come under substantial strain. As explained by the LCO, the magnitude of today's adverse cost orders poses a serious threat to access to justice:

And in the past few years, costs orders in the millions of dollars have been made against unsuccessful plaintiffs and defendants. In the words of one judge: "costs in class proceedings have gotten out of control."

...

The magnitude of these costs orders is an access to justice problem. As the Supreme Court of Canada described them, class actions have become the "sport of kings in the sense that only kings or equivalent can afford it."<sup>160</sup>

Considering these problems, the LCO recommended "eradicating the costs rule altogether" because "the status quo is not an option."<sup>161</sup> Unfortunately, Ontario did not adopt the LCO's recommendations.

Although the June 2024 Amendments create a different mechanism for collective redress, the same considerations of access to justice apply. The threat of adverse costs is a significant deterrent to litigation and would significantly undermine the effectiveness of the amendments, particularly in respect of applications brought under the public interest branch.

### **Tolling of Limitation Periods**

The amendments are also silent on the tolling of limitation periods for "any other person affected by the conduct". Does the commencement of the application toll the limitation period for other affected persons?

When the *Class Proceedings Act* was first being considered in Ontario, the Ontario Law Reform Commission considered such a tolling provision a necessity:

A general rule that the commencement of a class action suspends the running of limitation periods against absent class members, whether

certification is granted or denied, would serve to promote the most efficient use of judicial resources. If the commencement of a class action did not have this effect, absent class members, where a class suit is filed shortly prior to the expiration of the statutory limitation period, would be forced to institute precautionary individual actions or to file formal motions to intervene as parties in order to preserve their legal rights. Moreover, even where, at the filing of a class action, the running of the limitation period had only commenced, protective measures would still be encouraged. Absent class members would be unsure whether certification would be granted and, in addition, they would be unable to ascertain with certainty the time that would elapse between the filing of the suit and the final resolution of the certification motion, particularly bearing in mind the possibility of appeal proceedings. In our view, such a result would be in direct contradiction to the class action goals of efficiency and economy of litigation.<sup>162</sup>

The Ontario Attorney General's Advisory Committee on Class Action Reform commented that, given the number of potential class members and the fact that many of them are absent and require protection, care must be taken to ensure that their rights are not prejudiced by the commencement of a class proceeding. Limitation periods are therefore suspended until a party decides to act alone (opting out) or until determination has been made in the proceeding itself.<sup>163</sup>

The Supreme Court of Canada held that the tolling of limitation periods further the objectives of access to justice and judicial economy:

The purpose of s. 28 CPA is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v Citigroup Global Markets Canada Inc*, 2010 ONSC 1596 (CanLII), 92 C.P.C. (6th) 301, at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108 (CanLII), 288 O.A.C. 355, at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter. Once certification is denied and appeals exhausted, the right to seek justice through a class proceeding is no longer actively engaged.<sup>164</sup>

Unlike the provincial class action regimes, the *Federal Court Rules* do not provide for the tolling of limitation periods for absent class members. The

Federal Court has partially addressed this gap. In *Hinton v Canada*,<sup>165</sup> the Court found:

The Crown takes issue with this point and submits that time is only tolled when the class is certified. This is incorrect in law. Time was protected for the Hinton when they filed proceedings proposing a class. *That filing also benefits those who have been held to fall within the class. However, those who were excluded by my Order were not protected. Time continued to run against them during the certification process, unlike in some jurisdictions such as Ontario and British Columbia.*<sup>166</sup>

[emphasis added]

In another recent case, *Jacques v Canada*,<sup>167</sup> the court made a similar finding and concluded that, as there was no agreement to toll the limitation period, putative class members' claims were limitation-barred.<sup>168</sup>

### Potential Solutions

There are two potential solutions to these (and other) procedural gaps:

- use the “gap rule” to import the *Federal Court Rules* relating to class actions; or
- amend the *Tribunal Rules* to address the gaps.

Rule 34(1) of the *Tribunal Rules* (commonly referred to as the “gap” rule) provides that “the practice and procedure set out in the *Federal Court Rules* may be followed” in instances where “a question arises as to the practice or procedure to be followed in cases not provided for by these Rules”.<sup>169</sup> This provision has been invoked, for example, in a private party access cases under section 75—*Canadian Standard Travel Agent Registry v International Air Transport Association*<sup>170</sup>—to address the applicant’s motion for an interim order prior to the commencement of a proceeding. As stated by Chairperson Simpson:

However the Competition Tribunal has jurisdiction over the management of its cases and its proceedings including pending proceedings. The Applicant’s request for interim relief is therefore properly characterized as a motion in a pending proceeding. The *Competition Tribunal Rules*, SOR/2008-141 do not cover this situation.

Rule 34 of the *Competition Tribunal Rules*, which is the gap rule, therefore applies, allowing the Tribunal to rely on Rule 372 of the *Federal Courts Rules*, SOR/2004-283. Rule 372 of the *Federal Courts*

*Rules* provides that in the case of urgency, prior to the commencement of a proceeding, a party may apply for interim relief.<sup>171</sup>

Similarly, in a summary dismissal motion in *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*,<sup>172</sup> the Tribunal adopted Federal Court Rule 221 dealing with motions to strike.

On the other hand, in *Canada (Commissioner of Competition v Secure Energy Services Inc and Tervita Corporation*,<sup>173</sup> the Tribunal declined to use the gap rule. In that case, the Commissioner sought an interim order directing one respondent not to proceed with its proposed acquisition of another respondent. The Tribunal refused to apply the gap rule on the basis that Parliament had enacted a detailed regime and can be assumed not to have intended to provide the proposed relief.<sup>174</sup>

Applying these principles to the procedural gaps identified above results in an uncertain outcome:

- *Settlement approval*: Given the existence of provisions relating to consent agreements, as set out above, it is not entirely clear that the Tribunal would apply the gap rule. So, a question mark remains as to whether a settlement would be binding in respect of absent “affected” persons.
- *Fee approval*: It is clearer that there is a gap in the *Tribunal Rules*. However, it would take a big leap of faith for counsel to spend what could easily be north of a million dollars (in expert fees and docketed time) to pursue an application, with no guarantee of payment (beyond fees payable by the retained client).
- *Litigation funding*: The *Federal Court Rules* are silent on litigation funding arrangements. While the Federal Court has permitted litigation funding arrangements in the class action context, there is no precedent for the gap rule being used to import common law principles from the Federal Court. It is therefore uncertain how this issue will be addressed at the Tribunal.
- *Adverse costs*: Relying on the gap rule would create considerable uncertainty for litigants. Where an application is brought seeking collective redress, would the Tribunal follow Rule 400 (the general costs rule) or Rule 334.39 (the rule specific to class actions)?
- *The tolling of limitation periods*: The tolling of limitation periods is

present in all provincial jurisdictions but is absent from the Federal regime. While the common law has partially addressed this gap, there is no precedent for the gap rule being used to import common law principles from the Federal Court.

As the June 2024 Amendments do not come into force until June 2025, there is time for Parliament to address these procedural gaps. This approach would be preferable over a “wait and see how the case law develops” approach. As indicated above, litigants are already faced with considerable uncertainties regarding the new and pre-existing legal tests and concepts. Layering on this level of procedural uncertainty could undermine the effectiveness of the amendments.

Concepts could be adopted from the Federal and provincial class action regimes, in addition to the UK CAT. In the U.K., there is a comprehensive set of rules regarding settlements in collective proceedings.<sup>175</sup> Much like the Canadian class action regime, collective settlements must be approved by the UK Tribunal, depending on whether the settlement has been achieved in an “opt-out” collective proceeding or in an “opt-in” collective proceeding.<sup>176</sup> A collective settlement order binds all class members except those who opted-out of the proceeding via the stipulated process or those not domiciled in the UK on the relevant date and failed to opt-in to the collective settlement.<sup>177</sup> There is also a process for fee approval.<sup>178</sup>

## Conclusion

The amendments to the Act fundamentally change the legal landscape relating to abuse of dominance and private access to the Tribunal. These amendments have the potential to further the objects of the Act and enhance access to justice. At the same time, these amendments carry with them considerable substantive and procedural uncertainty. The substantive uncertainty will likely be addressed over time through updated Bureau guidelines and the development of case law. The procedural uncertainty is best addressed through further legislative reform, but it may be that we also need to await the development of case law.

## ENDNOTES

- <sup>1</sup> Linda J. Visser and Charles M. Wright are partners at Siskinds LLP. They have extensive experience in prosecuting competition law class actions. Georgia Hamilton is a class actions associate at Siskinds LLP.
- <sup>2</sup> RSC, 1985, c C-34 [*Competition Act*].
- <sup>3</sup> Canada, Competition Bureau Canada, *Guide to the 2022 Amendments to the Competition Act* (Ottawa: Competition Bureau Canada, 2022) online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act)> [2022 *Amendments Guide*].
- <sup>4</sup> For instance, see James Musgrove & Hannah Johnson, “What’s It All about, Matthew?—Some Thoughts on the Future of Competition Policy in Canada” (2023) 36:1 *Can Competition L Rev* 46; Robert Eisenberg & Yalda Mousavi, “Out of control?—Recent Changes to the Competition Act and their Potential Impact on Commercial Leasing” (3 September 2024) online: <<https://www.weirfoulds.com/out-of-control-recent-changes-to-the-competition-act-and-their-potential-impact-on-commercial-leasing>>; Shuli Rodal et al, “The dramatic expansion of private enforcement of Canada’s competition laws” (28 June 2024) online: <<https://www.osler.com/en/insights/reports/the-dramatic-expansion-of-private-enforcement-of-canadas-competition-laws/>>.
- <sup>5</sup> Musgrove & Johnson, *supra* note 4 at 69–70.
- <sup>6</sup> *Federal Court Rules* (SOR/98-106) [*Federal Court Rules*].
- <sup>7</sup> *Competition Tribunal Rules*, CRC, c 19, s 34(1) (2008) [*Competition Tribunal Rules*].
- <sup>8</sup> In particular, the causes of action under section 36 include conduct that is contrary to Part VI of the *Act* (i.e., “Offenses in Relation to Competition”), each of which is an indictable offense.
- <sup>9</sup> *Competition Act*, *supra* note 2, s 36(1).
- <sup>10</sup> *Ibid.*
- <sup>11</sup> This includes the restrictive trade practices set out in Part VIII of the *Act*, including refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), and abuse of dominance (section 79).
- <sup>12</sup> Competition Bureau Canada, *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act* (Ottawa: Competition Bureau Canada, 2023) online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/misleading-representations-and-deceptive-marketing-practices-choice-criminal-or-civil-track-under](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/misleading-representations-and-deceptive-marketing-practices-choice-criminal-or-civil-track-under)>.
- <sup>13</sup> Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: Competition Bureau Canada, 2019) at para 23 online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines)> [*Enforcement Guidelines*].
- <sup>14</sup> *Ibid* at para 34.

- <sup>15</sup> *Ibid* at para 53.
- <sup>16</sup> *Enforcement Guidelines, supra* note 13 at Executive Summary.
- <sup>17</sup> *Ibid* at para 86.
- <sup>18</sup> *Competition Act*, RSC 1985, c C-34, s 79(4), as amended by *Budget Implementation Act, 2022, No. 1*, SC 2022, c 10, s 262(1).
- <sup>19</sup> *Ibid*, s 79(1).
- <sup>20</sup> *Ibid*, ss 79(2), (3.1).
- <sup>21</sup> See e.g. Rosenthal et al, “Optimal Enforcement of Abuse of Dominance: The Case for a Private Cause of Action” (2023) 36:2 *Can Competition L Rev* at 35–40.
- <sup>22</sup> Competition Bureau Canada, Case Details, online (database): <[https://decisions.ct-tc.gc.ca/ct-tc/cd/en/2023/nav\\_date.do](https://decisions.ct-tc.gc.ca/ct-tc/cd/en/2023/nav_date.do)> [*Competition Tribunal Database*].
- <sup>23</sup> Rosenthal et al, *supra* note 21 at 37–38, citing House of Commons, *Competitiveness of Canadian Agriculture: Report of the Standing Committee of Agriculture and Agri-Food* (May 2010) at 20–23, online: <<https://www.ourcommons.ca/Content/Committee/403/AGRI/Reports/RP4494785/agrirp03/agrirp03-e.pdf>>.
- <sup>24</sup> *Ibid* at 37–38.
- <sup>25</sup> Matthew Boswell, “Canada Needs More Competition” (delivered at the Canadian Bar Association Competition Law Fall Conference, 20 October 2021), online: <<https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>> [Boswell Remarks]; See Rosenthal et al 2023, *supra* note 21.
- <sup>26</sup> Financial Post, “Competition Bureau gets a budget boost, but is it enough to make companies think twice?” (3 May 2021), online: <<https://financialpost.com/news/economy/competition-bureau-gets-a-budget-boost-but-is-it-enough-to-make-companies-think-twice>>.
- <sup>27</sup> Boswell Remarks, *supra* note 25.
- <sup>28</sup> Canada, Competition Bureau Canada, *Competition Bureau Performance Measurement & Statistics Report 2022–2023* (Ottawa: Competition Bureau Canada, 2023) online <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-bureau-performance-measurement-statistics-report-2022-2023](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-bureau-performance-measurement-statistics-report-2022-2023)>.
- <sup>29</sup> *Ibid*.
- <sup>30</sup> *Competition Tribunal Database, supra* note 22.
- <sup>31</sup> Rosenthal et al, *supra* note 21.
- <sup>32</sup> Canada, Competition Bureau Canada, *Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau*” (Ottawa, Competition Bureau Canada, 2022), at s 3.4 online: <[competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era](https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era)>.
- <sup>33</sup> Rosenthal et al, *supra* note 21 at 38.
- <sup>34</sup> *Ibid*.
- <sup>35</sup> Canada, Competition Bureau Canada, *Information Bulletin on Private Access to the Competition Tribunal* (Ottawa: Competition Bureau Canada, 2005)

online <[competition-bureau.canada.ca/information-bulletin-private-access-competition-tribunal](http://competition-bureau.canada.ca/information-bulletin-private-access-competition-tribunal)> [*Private Access Bulletin*].

<sup>36</sup> *Budget Implementation Act, 2009*, SC 2009, c 2, s 426.

<sup>37</sup> Paul-Erik Veel, “Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment” (2009) 18:1 Dal J Leg Stud 1 at 18 online: <[canlii.org/en/commentary/doc/2009CanLIIDocs112](http://canlii.org/en/commentary/doc/2009CanLIIDocs112)>.

<sup>38</sup> *Competition Act*, *supra* note 2, s 103.1.

<sup>39</sup> *Ibid*, ss 103.1(2), (6).

<sup>40</sup> *Ibid*, ss 103.1(3), (4).

<sup>41</sup> *Ibid*, s 103.1(11).

<sup>42</sup> *Ibid*, s 103.1(7).

<sup>43</sup> Veel, *supra* note 37 at 18.

<sup>44</sup> *Competition Act*, *supra* note 2, s 103.1(8).

<sup>45</sup> *Private Access Bulletin*, *supra* note 35.

<sup>46</sup> Data gathered from: *Competition Tribunal Database*, *supra* note 22.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Nadeau Poultry Farm Limited v Groupe Westco Inc*, 2011 FCA 188; *B-Filer Inc et al v The Bank of Nova Scotia* (23 March 2007), CT-2005-006, Document No 0168, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463878/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463878/index.do)>.

<sup>49</sup> Data gathered from: *Competition Tribunal Database*, *supra* note 22.

<sup>50</sup> *Competition Act*, *supra* note 2, ss 103.1(2), (6).

<sup>51</sup> Rosenthal et al, *supra* note 21 at 43.

<sup>52</sup> Veel, *supra* note 37 at 8.

<sup>53</sup> *Ibid* at 21–22.

<sup>54</sup> *B-Filer Inc et al v The Bank of Nova Scotia*, (14 November 2007), CT-2005-006, Document No 0196, online: Competition Tribunal <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463789/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463789/index.do)> [*B-Filer*].

<sup>55</sup> Memo from David Vaillancourt to House of Commons Industry Committee (16 April 2021), CD Howe Institute, “A *Private Right of Action for Abuse of Dominance*”, online: <<https://cdhowe.org/publication/david-vaillancourt-private-right-action-abuse-dominance/>>.

<sup>56</sup> Thomas Ross, “Canada Looks at Revising Its *Competition Act*”, CPI Columns (April 2022), online: <[cresse.info/wp-content/uploads/2024/03/Canada-Looks-at-Revising-Its.pdf](http://cresse.info/wp-content/uploads/2024/03/Canada-Looks-at-Revising-Its.pdf)>.

<sup>57</sup> 15 USC § 15.

<sup>58</sup> *Competition Act 1998* (UK), s47A.

<sup>59</sup> For instance, see *Competition Act* (Ireland) 2002, s 14(1); *Act against Restraints of Competition* (Germany), s 33; *Law 4529/2018 on Private Enforcement of Competition Law* (Greece), art 3; *Government Emergency Ordinance no. 170/2020* (Romania); *Law on Private Enforcement No.23/2018 of 5 June* (Portugal) 2018, art 3.

<sup>60</sup> *Competition and Consumer Act 2010* (Commonwealth), s 82.

<sup>61</sup> *Commerce Act 1986*, 1986/5 (NZ) s 82.

<sup>62</sup> *Monopoly Regulation and Fair Trade Act*, (South Korea) 1980, art 56(1).

<sup>63</sup> See for instance: House of Commons, Standing Committee on Industry,

Science and Technology, Evidence, 43-2, No 30 (13 April 2021) at 11:12 (David Vaillancourt), online: <[ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-30/evidence](https://ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-30/evidence)>.

<sup>64</sup> Nicolás Rivero, “A cheat sheet to all of the antitrust cases against Big Tech in 2021”, QZ (29 September 2021), online: <[qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021](https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021)>.

<sup>65</sup> See Competition Bureau, “Competition Bureau expands its investigation into Google’s advertising practices” (29 February 2023), online: <<https://www.canada.ca/en/competition-bureau/news/2024/02/competition-bureau-expands-its-investigation-into-googles-advertising-practices.html>>; Competition Bureau, “Investigation into alleged anti-competitive conduct by Google” (19 April 2016), online: <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/investigation-alleged-anti-competitive-conduct-google>>; Competition Bureau, “Investigation into alleged anti-competitive conduct by Apple” (6 January 2017), online: <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/investigation-alleged-anti-competitive-conduct-apple>>; Competition Bureau, “Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon” (14 August 2020), online: <<https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html>>.

<sup>66</sup> *Apotex Inc v Paladin Labs Inc*, (29 September 2023), CT-2023-007, online: <[decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521224/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521224/index.do)>.

<sup>67</sup> *Winston Gaskin et al v Rogers Communications Inc et al*, (9 February 2023), CT-2024-002, online: <[decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521262/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521262/index.do)>.

<sup>68</sup> *JAMP Pharma Corporation v Janssen Inc*, (26 July 2024), CT-2024-006, online: <[decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521281/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521281/index.do)>.

<sup>69</sup> *JAMP Pharma Corporation v Janessen Inc*, 2024 Comp Trib 8, <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521328/index.do>>.

<sup>70</sup> *Competition Act*, *supra* note 2, s 79(1) [emphasis added].

<sup>71</sup> Competition Bureau Canada, *Bulletin on Amendments to the Abuse of Dominance Provisions* (Ottawa: Competition Bureau Canada, 2023) at para 18 online: <[competition-bureau.canada.ca/how-we-foster-competition/consultations/bulletin-amendments-abuse-dominance-provisions](https://competition-bureau.canada.ca/how-we-foster-competition/consultations/bulletin-amendments-abuse-dominance-provisions)>.

<sup>72</sup> *Ibid* at para 19.

<sup>73</sup> *Ibid* at para 8.

<sup>74</sup> *2022 Amendments Guide*, *supra* note 3.

<sup>75</sup> Michael & Osborne, “Back to the Future: Modernizing Canada’s Monopolization Law” (2023) Can Competition L Rev 36:2, <<https://cclr.cba.org/index.php/cclr/article/view/826>>.

<sup>76</sup> Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, SC 2023 c 31, cls 3–11 [December 2023 Amendments].

<sup>77</sup> *Competition Act*, *supra* note 2, s 79(1).

<sup>78</sup> *Competition Act*, *supra* note 2, ss 78(1), 79(3.1).

<sup>79</sup> *December 2023 Amendments*, *supra* note 76, cl 7.1.

<sup>80</sup> John Bodrug, “Making Sense of the New Excessive and Unfair Pricing Provision in Canada’s *Competition Act*”, *The Antitrust Source* (September 2024) at p 4–5, online: <<https://www.dwpv.com/en/Insights/News/Announcements/2024/New-Excessive-Unfair-Pricing-Provision-Competition-Act>>.

<sup>81</sup> *Ibid* at 3–4.

<sup>82</sup> *Ibid* at 7–8.

<sup>83</sup> Canada, Competition Bureau Canada, *Guide to the December 2023 Amendments to the Competition Act* (Ottawa: Competition Bureau Canada, 2023) online: <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act#sec06>>.

<sup>84</sup> *Business Practices and Consumer Protection Act*, SBC 2004, c 2; *Consumer Protection Act*, RSA 2000, c C-26.3; *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2; *The Business Practices Act*, CCSM c B120; *Consumer Protection Act*, CQLR c P-40; *Business Practices Act*, RSPEI 1988, c B-7; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1; *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A.

<sup>85</sup> Miroslava Marinova, “Unmasking excessive pricing: evolution of EU law on excessive pricing from United Brands to Aspen” (15 November 2023), online:<<https://doi.org/10.1080/17441056.2023.2280329>>.

<sup>86</sup> *Flynn Pharma Limited and Pfizer Inc. v Competition and Markets Authority* (UK) 2020 EWCA Civ 339 at para 92.

<sup>87</sup> *Ibid* at para 97.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

<sup>90</sup> *December 2023 Amendments*, *supra* note 76, cl 7.2.

<sup>91</sup> Bill C-59, *Fall Economic Statement Implementation Act, 2023*, SC 2023, c 15, cls 244–47 [*Bill C-59*].

<sup>92</sup> *Ibid*, cl 272.

<sup>93</sup> The authors acknowledge that in some areas of law, such as intellectual property law, an accounting of profits is a standard remedy.

<sup>94</sup> *Competition Act*, *supra* note 2, s 36(1).

<sup>95</sup> See for example, *Nova Chemicals Corp v Dow Chemical Co*, 2022 SCC 43, concerning the proper calculation for an accounting of profits in patent law.

<sup>96</sup> *Pioneer Corp v Godfrey*, 2019 SCC 42.

<sup>97</sup> *Ibid* at para 64.

<sup>98</sup> *The Competition Appeal Tribunal Rules 2015* (UK), SI 2015/1648, r 75(3)(a) [*UK Tribunal Rules*].

<sup>99</sup> Saro Turner & Andrea Roulet, “Empowering Private Attorneys General Under Bill C-59: Disequilibrium Persists in Canadian Competition Law” (2024) 37:1 *Can Competition L Rev* at 56 <<https://cclr.cba.org/index.php/cclr/article/view/850>>.

<sup>100</sup> James Hennah & Thomas Cardwell, “United Kingdom: Class actions—litigation, policy and latest developments” (6 November 2023), online:

[globalcompetitionreview.com/hub/class-actions-hub/2023/article/united-kingdom-class-actions-litigation-policy-and-latest-developments](https://globalcompetitionreview.com/hub/class-actions-hub/2023/article/united-kingdom-class-actions-litigation-policy-and-latest-developments)

<sup>101</sup> See *Consumers' Association v Qualcomm Incorporated*, (18 February 2021), online (Official Case Summary): <https://www.catribunal.org.uk/cases/13827721-consumers-association>.

<sup>102</sup> Chris Hersh, Erika Woolgar & Erin Brown, "Three years and three sets of amendments later: The state of Canada's *Competition Act*", (21 June 2024), online (blog): [nortonrosefulbright.com/en/knowledge/publications/6ab48b44/three-years-and-three-sets-of-amendments-later-the-state-of-canadas-competition-act](https://nortonrosefulbright.com/en/knowledge/publications/6ab48b44/three-years-and-three-sets-of-amendments-later-the-state-of-canadas-competition-act).

<sup>103</sup> Securities Act, RSO 1990, c S.5 [*Securities Act*].

<sup>104</sup> *Ibid*, s 127(1).

<sup>105</sup> *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at Preamble.

<sup>106</sup> *Securities Act*, *supra* note 102, ss 1.1(a)–(b).

<sup>107</sup> *Competition Act*, *supra* note 2, s 1.1.

<sup>108</sup> Ross, *supra* note 56 at 4–5.

<sup>109</sup> *Western Canada Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 28.

<sup>110</sup> Email from David Sterns to the Honourable François-Philippe Champagne, (26 September 2022), *Review of the Competition Act* at 8, online: [sotosllp.com/wp-content/uploads/2022/12/Sotos-LLP-Submission-on-Competition-Act-Review.pdf](https://sotosllp.com/wp-content/uploads/2022/12/Sotos-LLP-Submission-on-Competition-Act-Review.pdf), citing European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament" (2020) at 3 and Suzanne Carval & Jean-Francois Lalonde, "Compensation for damages caused by abuse of a dominant position", [2018] *Concurrences*.

<sup>111</sup> *Barcode Systems Inc v Symbol Technologies Canada ULC*, (15 January 2004), CT-2003-008, Document No 0011 at paras 12–13, online: [decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464383/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464383/index.do).

<sup>112</sup> *Ibid* at para 13.

<sup>113</sup> *Symbol Technologies Canada ULC v Barcode Systems Inc*, [2005] 2004 FCA 339 at para 17.

<sup>114</sup> *Competition Tribunal Rules*, *supra* note 7, r 36(1)(d).

<sup>115</sup> *Bill C-59*, *supra* note 90, cl 257.

<sup>116</sup> *Ibid*, cl 259.

<sup>117</sup> *Competition Act*, *supra* note 2, ss 106.1(2)–(3).

<sup>118</sup> *Ibid*, ss 106.1(4)–(5).

<sup>119</sup> *Bill C-59*, *supra* note 91, cl 257.

<sup>120</sup> *Canada Post Corp v Lépine*, 2009 SCC 16.

<sup>121</sup> *Ibid* at para 42.

<sup>122</sup> *Currie v McDonald's Restaurants of Canada Ltd* [2005], 74 OR (3d) 321, 137 ACWS (3d) 250 at paras 38–40.

<sup>123</sup> *Federal Court Rules*, *supra* note 6, rr 334.29, 334.34; *Class Proceedings Act*, 1992, SO 1992, c 6, s 27.1(13)–(15) [*Class Proceedings Act*].

<sup>124</sup> See *Competition Tribunal Rules*, *supra* note 7.

- <sup>125</sup> *Abdulrahim v Air France*, 2011 ONSC 512 at para 10; *Ford v F Hoffmann-La Roche Ltd*, [2005] 2005 CanLII 46753 (ON SCDC) at paras 59–61 [*Ford*].
- <sup>126</sup> Ontario Law Reform Commission, *Report on Class Actions*, vol 3 (Toronto: Ministry of the Attorney General, 1982) at 737 [*Report on Class Actions*].
- <sup>127</sup> *Ford*, *supra* note 125 at para 59.
- <sup>128</sup> *UK Tribunal Rules*, *supra* note 97, r 97(7)(a).
- <sup>129</sup> *Ibid.*
- <sup>130</sup> *Przyk v Hamilton Retirement Group Ltd (The Court at Rushdale)*, 2021 ONCA 267.
- <sup>131</sup> *Ibid* at para 20.
- <sup>132</sup> *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785.
- <sup>133</sup> *Ibid* at paras 3, 27–28, 32.
- <sup>134</sup> *Ibid* at paras 27–28.
- <sup>135</sup> *Houle v St Jude Medical Inc*, 2017 ONSC 5129.
- <sup>136</sup> *Ibid* at para 52.
- <sup>137</sup> See e.g., *Stanway v Wyeth Canada Inc*, 2014 BCSC 931; *Tidd v Regional Health Authority*, 2020 NBQB 140; *Difederico v Amazon.Com Inc*, 2021 FC 311.
- <sup>138</sup> *Class Proceedings Act*, *supra* note 122, s 33.1(2)–(3).
- <sup>139</sup> *Ibid*, s 33.1(14).
- <sup>140</sup> *Ibid*, s 33.1(4)–(6).
- <sup>141</sup> *Ibid*, s 33.1(7)–(8).
- <sup>142</sup> *Class Proceedings Act*, *supra* note 123, s 33.1(9)(a).
- <sup>143</sup> *Ibid*, s 33.1(9)(b).
- <sup>144</sup> *Ibid*, s 33.1(10).
- <sup>145</sup> *Ibid*, s 33.1(11)–(12).
- <sup>146</sup> *Ibid*, s 33.1(13).
- <sup>147</sup> *Ibid*, s 33.1(15).
- <sup>148</sup> *Difederico v Amazon.Com Inc*, 2021 FC 311 [*Difederico*].
- <sup>149</sup> *Pass Herald Ltd v Google LLC*, 2024 FC 305 [*Pass Herald*].
- <sup>150</sup> *Difederico*, *supra* note 147 at paras 34–36; *Pass Herald*, *supra* note 148 at paras 30–32.
- <sup>151</sup> *Difederico*, *supra* note 147 at paras 44–45.
- <sup>152</sup> *UK Tribunal Rules*, *supra* note 96, r 113.
- <sup>153</sup> See *Competition Tribunal Rules*, *supra* note 7. Rule 6 provides that a memorandum of fact and law must contain a statement of the order sought, including costs. Rule 28 provides that the Tribunal may award costs where a party withdraws from or discontinues the proceedings. Rule 58 provides that the Tribunal may consider the refusal to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document are subsequently proved at the hearing.
- <sup>154</sup> *B-Filer*, *supra* note 54.
- <sup>155</sup> *Report on Class Actions*, *supra* note 126 at 647.
- <sup>156</sup> Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019), at 9, online: Law Commission of

Ontario <[lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf](http://lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf)> [LCO Report].

<sup>157</sup> *Ibid* at 9.

<sup>158</sup> *Ibid* at 9.

<sup>159</sup> See e.g., *Law Society Act*, RSO 1990, c L.8, s. 59.1; Law Foundation of Ontario, “Class Proceedings Fund” (last visited 19 September 2024), online (info page): <[lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/](http://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/)> (“The Class Proceedings Fund receives a levy in the amount of 10% of any awards or settlements in favour of the plaintiffs in funded proceedings plus a return of any funded disbursements. Its initial funding came from a \$500,000 grant from The Law Foundation of Ontario”).

<sup>160</sup> *LCO Report*, *supra* note 156 at 79.

<sup>161</sup> *Ibid* at 83.

<sup>162</sup> *Report on Class Actions*, *supra* note 126 at 779.

<sup>163</sup> Ontario: Attorney General’s Advisory Committee on Class Action Reform, *Report of the Attorney General’s Advisory Committee on Class Action Reform*, (Toronto: The Committee, 1990) at 47.

<sup>164</sup> *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 60.

<sup>165</sup> 2017 FC 140.

<sup>166</sup> *Ibid* at para 16.

<sup>167</sup> 2024 FC 851.

<sup>168</sup> *Ibid* at paras 60, 77.

<sup>169</sup> *Competition Tribunal Rules*, *supra* note 7, r 34(1).

<sup>170</sup> *Canadian Standard Travel Agent Registry v International Air Transport Association*, (20 May 2008), CT-2008-006, online (application record): <[decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462594/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462594/index.do)>.

<sup>171</sup> *Canadian Standard Travel Agent Registry v International Air Transport Association*, (20 May 2008), CT-2008-006, Document No 0036 at paras 12–13, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463710/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463710/index.do)> (other cases where the Tribunal has relied on the *Federal Court Rules* to supplement the silence of the *Tribunal Rules* include, e.g.: *The Commissioner of Competition v Air Canada* (22 August 2012), CT-2011-004, Document No 164 at para 19, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463290/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463290/index.do)>; *Nadeau Poultry Farm Limited v Groupe Westco Inc*, (22 January 2010), CT-2008-004, Document No 0608 at para 52, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463571/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463571/index.do)>).

<sup>172</sup> *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, (3 May 2017), CT-2017-002, Document No 72 at paras 35–36, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462885/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462885/index.do)>.

<sup>173</sup> *Canada (Commissioner of Competition v Secure Energy Services Inc and Tertvita Corporation*, (1 July 2021), CT-2021-002, Document No 9, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/499680/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/499680/index.do)>.

<sup>174</sup> *Ibid* at paras 49–50.

<sup>175</sup> *UK Tribunal Rules*, *supra* note 96, rr 94–97.

<sup>176</sup> *Ibid*, rr 94–95. Opt-out collective proceedings may only be settled via settlement approval order from the CAT, whereas opt-in collective proceedings

may not settle without the permission of the Tribunal before the time in the collective proceedings where a class member may opt-in to those proceedings without the permission of the Tribunal expires.

<sup>177</sup> *Ibid*, r 97(9).

<sup>178</sup> *Ibid*, r 94(9).