THE EVOLVING COMPETITION LAW LANDSCAPE IN CANADA: WHERE ARE WE NOW?

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Recognizing the critical role of the Competition Act in promoting dynamic and fair markets, Canada's Minister of Innovation, Science and Industry, the Honourable François-Philippe Champagne, announced on February 7, 2022 that he would carefully consider ways to modernize and improve its operation. Following this announcement, significant competition law reform has taken place in Canada, including the passage of Bills C-19, C-56 and C-59. All provisions of the Bills are now in force.

These Bills include amendments that touch on virtually all facets of competition policy in Canada. According to the Government's 2023 Fall Economic Statement, these amendments are "generational changes" that "will help bring Canada into alignment with international best practices to ensure that our marketplaces promote fairness, affordability, and innovation". Arguably, these amendments are the most significant changes to the Act in almost 40 years—changes that fundamentally alter and transform the competition law landscape in Canada.

This article discusses the key changes to the Act in the areas of abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action. In doing so, it answers questions that many have been asking—including where are we now?

Reconnaissant le rôle essentiel de la Loi sur la concurrence dans la promotion de marchés dynamiques et équitables, le ministre de l'Innovation, des Sciences et de l'Industrie du Canada, l'honorable François Philippe Champagne, a annoncé le 7 février 2022 qu'il allait réfléchir avec attention aux moyens de moderniser et d'améliorer son application. À la suite de cette annonce, le droit de la concurrence au Canada a subi une réforme importante, notamment l'adoption des projets de loi C-19, C-56 et C-59, dont l'ensemble des dispositions sont maintenant en vigueur.

Ces projets de loi comprennent des modifications qui portent sur presque tous les aspects de la politique de la concurrence au Canada. Selon l'Énoncé économique de l'automne de 2023 du gouvernement, elles constituent un « changement générationnel » et elles « permettront au Canada de s'aligner sur les meilleures pratiques internationales afin de s'assurer que les marchés au pays favorisent l'équité, des prix abordables et l'innovation ». Ces modifications constituent sans contredit les changements les plus importants à la Loi

depuis les 40 dernières années, lesquels modifient et transforment fondamentalement le portrait du droit de la concurrence au Canada.

Les auteurs traitent des principaux changements de la Loi dans les domaines de l'abus de position dominante, de l'examen des fusions, des cartels criminels, de la collaboration entre concurrents, des pratiques commerciales trompeuses et des droits d'action privés. Ils répondent ainsi aux questions que se posent bon nombre de personnes, dont la suivante : Où en sommes-nous maintenant?

Introduction

Recognizing the critical role of the *Competition Act* (the "**Act**") in promoting dynamic and fair markets, Canada's Minister of Innovation, Science and Industry, the Honourable François-Philippe Champagne, announced on February 7, 2022 that he would carefully consider ways to modernize and improve its operation.[1] Following this announcement, significant competition law reform has taken place in Canada, including the passage of Bill C-19 on June 23, 2022,[2] Bill C-56 on December 15, 2023[3] and Bill C-59 on June 20, 2024[4] (collectively, the "**Bills**"). All provisions of the Bills are now in force.

The Bills include amendments that touch on virtually all facets of competition policy in Canada. According to the Government's 2023 Fall Economic Statement, these amendments are "generational changes" that "will help bring Canada into alignment with international best practices to ensure that our marketplaces promote fairness, affordability, and innovation."[5] Arguably, these amendments are the most significant changes to the Act in almost 40 years—changes that fundamentally alter and transform the competition law landscape in Canada.

This article discusses the key changes to the Act in the areas of abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action. In doing so, it answers questions that many have been asking—including where are we now?

I. Abuse of Dominance

1) New Framework

The Bills made significant changes to the abuse of dominance provisions, including, most importantly, introducing a new framework that applies a different test depending on the remedy being sought. These changes will have a profound and widespread impact on businesses operating in Canada.

Simply being a dominant firm, or even a monopoly, does not in and of itself engage the abuse of dominance provisions. Rather, the abuse of dominance provisions seek to ensure that a person with market power competes with others on merit—whether by ingenuity, competitive performance or investment—rather than by abusing its market power.

Historically, it was necessary to establish *each* of the following three elements to obtain a remedy under the abuse of dominance provisions:

- **Dominance**: One or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof.

- **Practice of Anti-Competitive Acts**: That person or those persons must have engaged in or be engaging in a practice of anti-competitive acts. As discussed below, an anti-competitive act relates to the "intent" or reasonably foreseeable effects of an action, and is often referred to as the "anti-competitive intent" element of abuse of dominance.

- **Anti-Competitive Effects**: The practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

Bill C-56 introduced the following new framework, which applies a different test depending on the remedy being sought:

- **Prohibition Order**: In order for a prohibition order to be imposed, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in *either* (1) a practice of anti-competitive acts *or* (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require *either* anti-competitive intent *or* anti-competitive effects.

- **Other Remedies**: In order for any additional or alternative orders (such as orders requiring the divestiture of assets or shares) and/or administrative monetary penalties ("**AMPs**") to be imposed, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in *both* (1) a practice of anti-competitive acts *and* (2) conduct (that

> is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require *both* anti-competitive intent *and* anti-competitive effects.

In light of this change, which significantly reduces the standard that must be satisfied to obtain a prohibition order, it will be particularly important for potentially dominant firms to carefully review their business practices to ensure that issues do not arise under the abuse of dominance provisions. For example, many common business practices, such as exclusive dealing, tying and bundling, could potentially raise concerns under these provisions even if they do not result in any meaningful competitive effects in the market.

2) Definition of Anti-Competitive Act

Bill C-19 defines the term "anti-competitive act" to mean "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Notably, jurisprudence arising from the abuse of dominance provisions historically held that an "anti-competitive act" is one that is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor in a relevant market. As such, the amendments codify this previously accepted definition, and also close an alleged "loophole" in which dominant firms could escape scrutiny when their conduct harms competition but does not have a negative effect on a competitor.

The *Bulletin on Amendments to the Abuse of Dominance Provisions* (the "**Abuse Bulletin**"), which was released for public comment in October 25, 2023 and is still in draft, discusses the updated definition of "anti-competitive act."[6] In this regard, the Abuse Bulletin notes that, in general, the Competition Bureau (the "**Bureau**") will continue to apply its existing analysis to identify anti-competitive acts, including considering subjective evidence of intent, the reasonably foreseeable consequences of the conduct, and any pro-competitive or efficiency-enhancing justifications for the conduct.[7]

With respect to the addition of "adverse effect on competition", the Abuse Bulletin notes that this should be considered to capture "any form of conduct that has the purpose of negatively affecting the competitive process", such as "conduct that softens competition, benefitting one or more competitors", conduct that reduces firms' abilities or incentives to compete, or conduct that makes conscious parallelism "more likely or effective" or otherwise

facilitates coordination.[8] By way of example, the Abuse Bulletin notes that this may include the following:

- agreements between competitors (such as licensing agreements or joint venture agreements);[9]
- sharing competitively sensitive information (which can include a single firm unilaterally choosing to disclose information; firms sharing competitively sensitive information in a reciprocal manner; competitively sensitive information being shared through intermediaries such as trade associations, joint ventures or pricing algorithm developers; or the use of meet-or-release clauses that result in mutual knowledge of pricing decisions);[10] or
- contracts that reference or depend on rivals (i.e., where a contract contains terms that relate to a different commercial relationship involving at least one of the two contracting parties, such as most favoured nation clauses, price parity clauses, non-discrimination clauses or meet-or-release clauses).[11]

Given the above, it is clear that a wide range of commercial agreements and practices could potentially be viewed as having an intended adverse effect on competition. Again, this re-enforces the need for potentially dominant firms to carefully review commercial agreements and practices—even if they do not result in any meaningful competitive effects in the market.

3) List of Anti-Competitive Acts

Subsection 78(1) of the Act include a non-exhaustive list of examples of anti-competitive acts, including, for example, using fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor; pre-empting scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market; and selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Bill C-19 expanded the list of anti-competitive acts in section 78 of the Act to include "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market." While the Abuse Bulletin recognizes that this new example may clarify the scope of section 78, it notes that the list under section 78 has always been non-exhaustive and, in the Bureau's opinion, the abuse of

dominance provisions previously applied to this type of conduct.[12] As such, the Bureau is of the opinion that this amendment does not expand the scope of the abuse of dominance provisions.

More importantly, Bill C-56 expanded the list of anti-competitive acts in section 78 of the Act to include "directly or indirectly imposing excessive and unfair selling prices"—something that arose from the government's attempt to address rising prices in the Canadian economy. While this example was added after the Abuse Bulletin was released, the Bureau has issued some preliminary guidance as to when, in its view, charging high prices could potentially raise concerns under the abuse of dominance provisions.[13]

Specifically, the Burau has stated that "[s]imply charging high prices to consumers is not usually an abuse of dominance regardless of how high those prices are", even if it amounts to "price gouging."[14] Rather, charging high prices would only be an abuse of dominance where it is done by a dominant firm and either (1) meets the definition of an anti-competitive act (i.e., is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or an adverse effect on competition) or (2) has the effect of harming competition substantially. In this regard, the Bureau notes as follows:

> If a firm charges too high a price this normally encourages customers to seek out other options which helps its competitors. So, high prices are not normally intended to have a negative effect on a competitor.
>
> Similarly, a firm usually does not charge high prices so that it can adversely affect competition. Firms make investments and take risks in the hope of making profits. High prices may therefore be how a firm is rewarded for those investments or risks. High prices can also attract new firms to enter the market.
>
> …
>
> We expect it will be rare that we investigate claims of excessive and unfair pricing. For us to investigate, we would typically need a credible reason to suspect it is an anti-competitive act or that it has the effect of harming competition substantially. This would include a clear theory of how the pricing harms competition.[15]

While the Bureau expects that investigations of excessive and unfair pricing will be rare, it does provide the following example of when charging excessive and unfair prices could be considered anti-competitive:

> … charging excessive and unfair prices may be an anti-competitive act when [the prices] amount to a "constructive refusal" to supply. A constructive refusal occurs when a firm says it is willing to supply a product, but only in a way that means purchasing it is not a real option, such as because it is too expensive. The outcome is the same as if it simply refused to supply.
>
> A constructive refusal to supply through excessive and unfair pricing can also be a means to achieve other types of anti-competitive behaviour. For example, a dominant firm may tie two products together by charging an excessive and unfair price if they are purchased separately instead of together.[16]

Determining whether pricing falls within the scope of this new example appears to involve consideration of three elements. First, prices must be "excessive". Based on the experience in foreign jurisdictions, determining whether a price is excessive may involve (1) confirming the price that is being or has been imposed; (2) establishing an appropriate benchmark against which the price is to be measured; and (3) determining whether the difference between the actual price and the benchmark is excessive. The benchmarks used by competition authorities to assess whether prices are excessive have included both (a) price-cost comparisons and profitability analyses and (b) price comparisons across geographies, time and/or competitors.[17] Second, prices must be "unfair". While there is no guidance interpreting fairness, it is possible that fairness will be evaluated having regard to the interests of both the buyer and the seller, including (1) the need for a supplier to recover its costs and investments; (2) the commercial risk being borne by the supplier; and (3) any other legitimate reasons for imposing a particular price. Third, prices must be "imposed". Accordingly, prices resulting from negotiations with a purchaser that has significant buying power may not fall within the scope of this example.

4) Competitive Effects Factors

Bill C-19 introduced a list of factors to be considered for the purposes determining whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. These factors include (1) the effect of the practice on barriers to entry in the market, including network effects; (2) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy; (3) the nature and extent of change and innovation in a relevant market; and (4) any other factor that is relevant to competition in the market that is or would be affected by the practice.

Notably, the Bureau (and the courts) already considered these factors as part of its analysis under the abuse of dominance provisions. In fact, many of these factors were included in previous guidance from the Bureau. As such, similar to the expanded list of anti-competitive acts discussed above, the Abuse Bulletin confirms that these amendments do not change the Bureau's enforcement approach.[18] However, it does signal that there may be an increased emphasis on the importance of these factors in future abuse of dominance reviews.

Importantly, with respect to consumer privacy, the Abuse Bulletin also confirms that the Bureau does not view the introduction of "consumer privacy" as creating a new, stand-alone goal or purpose for the Act (i.e., protection of privacy), but simply confirms that privacy is a relevant feature of product quality with respect to which firms may compete (e.g., by offering greater privacy protection).[19]

5) Increased Administrative Monetary Penalties

Each of Bill C-19 and Bill C-56 increased the size of AMPs available under the abuse of dominance provisions. Prior to these amendments, AMPs could be imposed in amounts of up to $10 million for a first violation and $15 million for subsequent violations. However, these amendments increased the maximum size of the AMPs that can be imposed under the abuse of dominance provisions to the greater of (1) $25 million (or $35 million for each subsequent order under the abuse of dominance provisions) or (2) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

To date, courts and tribunals have upheld the constitutionality of AMPs. For example, in *Canada (Commissioner of Competition) v. Gestion Lebski Inc.*,[20] the Competition Tribunal (the "**Tribunal**") held that the AMPs available for misleading advertising were constitutional. The Tribunal accepted the argument that AMPs were designed to encourage compliance, not to punish. The maximum AMPs, which at the time were $100,000 for individuals and $200,000 for corporations, were not considered large enough to be considered truly penal in nature. As such, the Tribunal held that *Charter* guarantees were not available to defendants subject to the AMPs.

That said, Google Canada Corporation and Google LLC (collectively, "**Google**") recently filed a Notice of Constitutional Question challenging the existing AMP provisions (the "**NCQ**").[21] In its NCQ, Google argues that "the extraordinary financial penalty sought by the Commissioner [in

an abuse of dominance application filed in November 2024]—an amount that could well be measured in the billions of dollars, given the worldwide gross revenues of Google—is a true penal sanction" for which "Google is entitled to the protection in this proceeding of rights guaranteed by the *Charter* and the *Bill of Rights*."[22] The Commissioner subsequently filed a Notice of Motion seeking to strike Google's NCQ in its entirety.[23] In this regard, the Commissioner argues, among other things, that Google's NCQ is premature because "[t]he Tribunal has not yet awarded or even considered the awarding of any AMP, let alone the quantum of such an AMP"; that "Google's position disregards both the jurisdictional limits on the Tribunal's discretion … and the fact that the determination of an appropriate AMP is a context dependent exercise"; and that "Google's motion flies in the face of the presumption that [the] Tribunal will interpret and exercise its discretion under the Act in a way that does not result in *Charter* rights being infringed."[24] It remains to be seen when and how the Tribunal will address Google's NCQ.

Regardless of the outcome of Google's NCQ, the ability of the Tribunal to potentially order the payment of significant AMPs further enforces the need for potentially dominant firms take steps to ensure they do not engage in conduct that could run afoul of the abuse of dominance provisions. This includes, among other things, implementing and/or updating their competition law compliance policies to take into account these "generational changes" to the Act.

II. Merger Review

The Bills made significant changes to the merger review provisions, including, most importantly, introducing rebuttable structural presumptions and revising the standard for merger remedies. These changes will have a resounding and far-reaching impact on the merger review process in Canada.

1) Rebuttable Structural Presumptions

In order to obtain a remedy from the Tribunal, the Commissioner must establish that a merger results in, or is likely to result in, a substantial prevention or lessening of competition (an "**SPLC**"). If the Commissioner is unable to meet this threshold, the Tribunal cannot order a remedy in respect of the merger.

Historically, the Act prevented the Tribunal from finding that a merger results in an SPLC solely on the basis of evidence of concentration or

market share. However, Bill C-59 removed this limitation and, at the same time, introduced what are known as "rebuttable structural presumptions", namely a presumption of anti-competitive effects for mergers where certain market share and/or Herfindahl-Hirschman Index ("**HHI**") thresholds are exceeded. If and when these thresholds are exceeded, the onus shifts to the merging parties to rebut the presumption of anti-competitive effects.

With the passage of Bill C-59, the Act now includes the same structural presumptions found in the *2023 US Merger Guidelines*,[25] which are set out below:

Table 1

Indicator	**Threshold for Structural Presumptions**
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

Importantly, Bill C-59 also provides that "the Governor in Council may by regulation prescribe different values than those provided in [the Act]." This provision appears to address concerns that the structural presumptions are included in guidelines in the US (which can be changed relatively easily) and in legislation in Canada (which is much more challenging to change).

Going forward, it will be necessary for merging parties to carefully review mergers to determine if either of the above thresholds is exceeded. While exceeding the above thresholds will not necessarily be fatal to a transaction, the merger review exercise to secure clearance from the Bureau is expected to be more rigorous and challenging, particularly where concentration levels and/or market shares are high. In this regard, the *2023 US Merger Guidelines* state that "[t]he higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it."[26] This approach may also be adopted in Canada.

2) Remedial Standard

The merger provisions allow the Tribunal to order a remedy where it finds that a merger results in, or is likely to result in, an SPLC. Consistent with these provisions, the Supreme Court of Canada held in *Canada (Director of Investigation and Research) v. Southam Inc.* that "the appropriate remedy

for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[27]

Following the passage of Bill C-59, the remedies ordered by the Tribunal will need to restore competition to the level that would have prevailed but for the merger (in the case of a completed merger) or preserve the level of competition that would prevail but for the merger (in the case of a proposed merger), such that *no* lessening or prevention of competition is permitted. This represents a fundamental shift in the approach to merger remedies in Canada—a shift that merging parties will need to carefully consider when negotiating antitrust risk language in their transaction agreements.

It remains to be seen what impact this change will have on the use of and/or approach to consent agreements in the mergers context. In this regard, subsection 105(1) of the Act provides that "[t]he Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under [the merger provisions] may sign a consent agreement." Subsection 105(2), in turn, provides that "[t]he consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person." As such, it appears that the remedies included in a consent agreement must also restore competition to the level that would have prevailed but for the merger (in the case of a completed merger) or preserve the level of competition that would prevail but for the merger (in the case of a proposed merger). That said, the consent agreements filed in connection with the RONA/All-Fab[28] and TransAlta/Heartland[29] transactions state that "the implementation of this Agreement is necessary to ensure that any substantial lessening of competition will not result from the Transaction"—perhaps signalling that the Commissioner is open to remedies in the consent context that do not fully restore or preserve competition in markets in which there is an SPLC.

From a practical perspective, merging parties will want to consider the impact that this new remedial standard may have on their transactions and transaction documents. For example, purchasers that agree to a full "hell or highwater" provision in the context of a transaction that could potentially raise significant competition concerns may now face increased risks.[30] This is because, all else being equal, more assets, revenue, EBITDA, contracts or routes may need to be divested to fully restore or preserve competition in markets in which there is an SPLC than to "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."

3) Efficiencies Defence

Bill C-56 repealed the efficiencies defence, which previously prevented the Tribunal from making a remedial order in relation to an anti-competitive merger where it found that the efficiencies likely to arise from a merger were greater than, and would offset, the anti-competitive effects of the merger. When contemplating mergers, businesses must now be cognizant that efficiencies originating from such mergers will no longer be sufficient to save a merger which would otherwise be found to result in an SPLC.

Importantly, efficiencies have not been added as a factor in section 93 of the Act. That said, the Commissioner acknowledged during testimony before the Standing Senate Committee on National Finance that it will continue to be open to the Bureau to consider efficiencies during the merger review process:

> … the pro-competitive efficiencies of a merger could absolutely be considered in the framework of considering whether the merger substantially lessens or prevents competition. There is a line, section 93(h), that allows the Tribunal and, of course, the Bureau, to consider any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger. All our colleagues around the world look at efficiencies in their merger reviews in the sense of whether there are efficiencies that will be pro-competitive or that will enhance rivalry. Yes, we would absolutely look at that, and if they were there, then maybe the merger could go ahead. [31]

Notwithstanding the above, it remains to be seen what types of efficiencies the Bureau is willing to consider as part of the merger review process going forward and how much weight will be given to any such efficiencies.

4) Expansion of Relevant Factors When Assessing Competitive Effects

Section 93 of the Act include a non-exhaustive list of factors that the Tribunal may have regard to for the purpose of determining whether a merger is likely to result in an SPLC. Bills C-19 and C-59 have added new factors to this list, including the following:

- “network effects within a market”;
- “whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents”;

- "any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy";
- "the change in concentration or market share that the merger or proposed merger has brought about or is likely to bring about"; and
- "any likelihood that the merger or proposed merger will or would result in express or tacit coordination between competitors in a market."

As the factors that may be considered by the Tribunal are non-exhaustive and these "new" factors were previously considered by the Bureau and the Tribunal to some degree, this is not a significant change to the law. However, it does signal that there may be an increased emphasis on the importance of these factors in future merger review.

5) Labour Considerations

Pursuant to subsection 92(1) of the Act, the Tribunal can make an order where it finds that a merger is likely to result in an SPLC. Bill C-59 amends paragraphs 92(1)(b) and (c) to explicitly state that the SPLC can arise in respect of labour (i.e., "among the sources from which a trade, industry or profession obtains a product, including labour" and "among the outlets through which a trade, industry or profession disposes of a product, including labour"). On a plain reading, this change clarifies that a product would include labour, such that impacts on the competitiveness of labour markets will be considered when evaluating mergers.

It is widely accepted that subsection 92(1) of the Act has always applied to labour markets. That said, as with the additional factors added to section 93, this change signals that there may be an increased emphasis on the importance of labour markets in future merger review.

6) Limitation Period

Previously, the Commissioner could challenge a completed merger up to one year after closing (unless the Commissioner had issued an advance ruling certificate in relation to the merger)—regardless of whether the Commissioner was notified of the transaction. Bill C-59 changes this, creating different limitation periods for notified transactions and non-notified transactions. In particular, the Commissioner can now challenge a notified transaction up to one year after closing (unless the Commissioner has issued an advance ruling certificate in relation to the merger) and a non-notified transaction up to three years after closing.

Historically, merging parties rarely notified the Commissioner of small transactions that did not exceed the applicable thresholds for mandatory pre-merger notification in Canada—even transactions that could potentially raise competition concerns. However, the revised approach to the limitation period may create an incentive for merging parties to make a competition filing in advance of closing in the case of non-notifiable transactions—something that will need to be assessed on a case-by-case basis.

7) Injunctions

Bill C-59 added sections 100(3.1) and 104(1.1) to the Act. These provisions provide that if an application is made for an interim order under section 100 or 104 of the Act, the proposed merger shall not be completed until the application under section 100 or 104 has been disposed of by the Tribunal. In effect, this creates an automatic "interim interim" injunction where an injunction has been sought in the mergers context.[32] It will be necessary for merging parties to consider the impact that this change could have on transaction timing and take it into account when negotiating the outside date in their transaction agreements.

8) Pre-Merger Notification

Proposed transactions may be subject to pre-merger notification in Canada where certain financial thresholds are satisfied. Immediately prior to the passage of Bill C-59, these financial thresholds were as follows:

- **Size-of-Parties**: The parties to the transaction (together with their affiliates) have (1) in the aggregate, assets in Canada with a book value of more than $400 million or (2) in the aggregate, annual gross revenues from sales in, from or into Canada of more than $400 million.

- **Size-of-Transaction**: The book value of the assets in Canada being acquired, or the gross revenues from sales in or from Canada generated from those assets, exceeds $93 million.

Bill C-59 has made two technical changes to the size-of-transaction threshold, each of which will result in additional transactions being subject to pre-merger notification in Canada.

a) Sales Into Canada Need to be Included

Historically, when calculating the size-of-transaction threshold, only assets in Canada and the gross revenues from sales in or from Canada

generated from those assets were taken into account. However, Bill C-59 revises the calculation of this threshold to include the value of sales in, from *or into* Canada generated from assets in or outside of Canada. This change could result in a merger of two foreign companies with no assets in Canada being subject to pre-merger notification in Canada if the target has sufficient sales into Canada and an operating business in Canada. Notably, this brings the Canadian notification regime closer to many international regimes (such as those in Europe), which consider primarily a company's turnover within a country.

b) Aggregation of Components of Proposed Transaction

Historically, if a proposed transaction involved both an acquisition of assets and an acquisition of shares, there was no requirement to aggregate the applicable asset and gross revenue values across each component of the transaction for the purpose of determining whether the size-of-transaction threshold was exceeded. Rather, each component of the transaction was looked at separately, with the result that a proposed transaction would not be notifiable if neither component of the proposed transaction exceeded the size-of-transaction threshold on its own—even if the proposed transaction exceeded this threshold when considered wholistically.

This is no longer the case. Specifically, as a result of the recent amendments, the applicable asset and gross revenue values must now be aggregated across the various components of a proposed transaction. For example, if a transaction involves both an acquisition of assets and an acquisition of shares, then (1) the value of the assets in Canada for the asset component will need to be aggregated with the value of the assets in Canada of the entity the shares of which are being acquired and (2) the applicable gross revenues for the asset component will need to be aggregated with the applicable gross revenues of the entity the shares of which are being acquired. This change is intended to fill a perceived gap in the pre-merger notification provisions.

c) Anti-Avoidance Provision

In addition to the two technical changes summarized above, Bill C-19 introduced an anti-avoidance provision. This provision states that "[i] f a transaction or proposed transaction is designed to avoid the application of [the pre-merger notification provisions, these provisions] apply to the substance of the transaction or proposed transaction." In other words, notification and pre-closing approval is required for transactions that were deliberately structured to avoid the application of the Act's pre-merger notification regime. This anti-avoidance provision will not apply when there are

legitimate reasons for structuring a transaction in a certain way, such as to take advantage to tax benefits that may be available in some structures but not others.

III. Cartels, Agreements and Collaboration

The Bills have also made several significant changes to the criminal cartel and civil collaboration provisions in the Act. These changes include the introduction of a criminal provision prohibiting wage-fixing and no-poaching agreements between unaffiliated employers and the extension of the civil collaboration provisions to past agreements and, in certain cases, to agreements between non-competitors.

1) Criminal Cartel Provisions

Bill C-19 added a criminal cartel provision prohibiting wage-fixing and no-poaching agreements between unaffiliated employers and increased the fines available under the criminal cartel provisions. Each of these changes is discussed below.

a) Wage-Fixing/No-Poaching Agreement Offence

Effective June 23, 2023, Bill C-19 added subsection 45(1.1) to the Act, which prohibits agreements between unaffiliated employers to "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" and "not solicit or hire employees." As with the existing criminal cartel provisions, this provision allows wage-fixing and no-poaching agreements to be inferred from circumstantial evidence and includes both an ancillary restraints defence and a regulated conduct defence. This change was intended to align Canada's approach to these types of agreements with the highly controversial approach adopted by the United States Department of Justice—an approach that has not been fully embraced by courts in the United States.

Importantly, on May 30, 2023, the Bureau released guidelines that describe its approach to the interpretation and application of this provision (the "**Wage-Fixing Guidelines**").[33] It is worth emphasizing the following points from the Wage-Fixing Guidelines:

- **Naked Restraints versus Legitimate Collaborations**: The provision is directed at "naked restraints" on competition, namely restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture.[34] Restraints that further a legitimate collaboration, strategic alliance or joint venture

may be reviewed by the Bureau under the civil collaboration provisions, which only apply to agreements that are likely to result in an SPLC.[35] This approach echoes the Bureau's traditional two-step approach when deciding whether to review an agreement under the criminal cartel provisions (section 45) or the civil collaboration provisions (section 90.1).

- **Scope of Employers**: The provision applies to agreements between "unaffiliated employers", regardless of whether they compete in the supply of a product or service.[36] In this regard, as indicated in the Wage-Fixing Guidelines, "employers" include not only businesses, but also directors, officers, agents and employees, such as human resource professionals.[37] Accordingly, and by way of example, the Bureau views agreements between an officer of one company and a director of another company as captured.[38] In that case, each of the individuals and companies could, according to the Bureau, potentially be subject to prosecution under the provision.[39]

- **Wage-Fixing Agreements**: Agreements to fix, maintain, decrease or control salaries, wages and other terms and conditions of employment come within the scope of the provision. Significantly, the Wage-Fixing Guidelines note that "terms and conditions" include the responsibilities, benefits and policies associated with a job, including, for example, job descriptions, allowances (such as per diem and mileage reimbursements), non-monetary compensation, working hours, location and non-compete clauses, and other directives that may restrict an individual's job opportunities.[40] That said, the Wage-Fixing Guidelines make clear that the Bureau's enforcement generally is limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.[41]

- **No-Poaching Agreements**: Consistent with the language in the provision, the Wage-Fixing Guidelines indicated that the no-poach offence applies only where unaffiliated employers agree to not solicit or hire "each other's" employees.[42] Issues will not arise in situations where only one employer agrees not to poach another employer's employees—something that is definitely relevant in the context of purchase and sale transactions. Put differently, "one-way" no-poach agreements will not raise issues under the Act.

Employers should ensure that they are not involved in practices with other unaffiliated employers (whether or not those employers are competing

businesses) that (1) may be considered wage-fixing or no-poach agreements/arrangements or (2) involve improper information sharing or other practices that could be perceived as facilitating such agreements/arrangements. The need for businesses to comply with these provisions cannot be overstated, as employers that breach them could face significant criminal penalties. They may also be subject to damages claims (primarily in the form of class actions) from those who allegedly suffered damage as a result of an alleged illegal agreement.

b) Increased Fines

Bill C-19 also increased available fines under the criminal cartel provisions from a maximum of $25 million to an amount "in the discretion of the court." As a result, a person found to have breached these provisions (including the new provision prohibiting wage-fixing agreements and no-poaching agreements) could face fines in the discretion of the court and/or imprisonment for a term of up to 14 years. These are some of the highest penalties for cartel conduct anywhere in the world.

2) Civil Collaboration Provision

Historically, section 90.1 of the Act (the civil competitor collaboration provision) has allowed the Tribunal to issue certain remedies in respect of existing or proposed agreements between competitors or potential competitors that are likely to result in an SPLC. However, Bills C-56 and C-59 have significantly expanded the scope of this provision and increased the remedies available to the Tribunal.

a) Collaborations Between Non-Competitors

Since December 15, 2024, section 90.1 of the Act has applied to collaborations among parties that are not competitors, provided that a "significant purpose" of the collaboration, or any part of it, is to prevent or lessen competition in any market. While this change was motivated by restrictive covenants in the retail grocery industry that limit new entrants' ability to lease premises near incumbent retail locations, it could potentially apply to any commercial agreement—including agreements between a firm and its customers or suppliers. That said, the Bureau still has the burden of showing that a given agreement or arrangement is likely to result in an SPLC.

It bears noting that many agreements between firms and customers/suppliers can already be reviewed under other provisions of the Act that apply to "vertical" collaborations. However, these provisions require, in many

cases, several complex elements to be made out. As such, the government may be signalling that it is looking for a "simpler" way to regulate vertical relationships and that, in turn, it intends for closer scrutiny to be given to such collaborations in the future.

Going forward, businesses will need to be cognizant of any aspects of their contracting practices with customers and suppliers which could potentially be considered (or perceived) as intended to prevent or lessen competition and whether those practices in fact do, or are likely to, result in an SPLC.

b) Past Agreements

Section 90.1 of the Act historically applied only to "existing or proposed" agreements. The Bureau and other commentators raised concerns with this approach. For example, in its submission in response to the Wetston consultation, the Bureau stated as follows:

> … this [approach] leaves no recourse under the Act for agreements that existed in the past, but are no longer in effect. This temporal framing creates uncertainty over whether parties to an agreement could merely terminate any agreement that draws the Commissioner's scrutiny, and then re-instate it at a future time.[43]

Similarly, section 90.1 of the Act historically provided relief only for harm to competition that was presently happening or was likely to happen in the future. It did not provide the power to address harm that had happened in the past but has since ceased. This stood in stark contrast to the abuse of dominance provisions in section 79, which provide relief for anti-competitive behaviour that has arisen in the past, is arising in the present and is likely to arise in the future.

To address these concerns, Bill C-59 has expanded the scope of section 90.1 of the Act to capture past conduct, provided that such conduct has occurred in the last three years. Given this change, parties will no longer be able to pre-emptively resolve potential concerns under section 90.1 of the Act simply by terminating or withdrawing from potentially anti-competitive agreements. This re-enforces the need for parties—whether or not competitors—to carefully assess their agreements with a view to determining whether issues could arise under the Act, including the civil collaboration provisions.

c) Efficiencies Defence

Bill C-56 repealed the efficiencies defence, which previously prevented the Tribunal from making an order in respect of an otherwise anti-competitive agreement where it found that the agreement had brought about or was likely to bring about gains in efficiency that would be greater than, and would offset, the effects of any prevention or lessening of competition that would result or is likely to result from the agreement. As such, businesses will need to be cognizant that efficiencies originating from agreements will not be sufficient to save an agreement which would otherwise be found to give rise to an SPLC.

Importantly, Bill C-56 did not add efficiencies as a factor in subsection 90.1(2) of the Act. That said, consistent with the Commissioner's approach to the treatment of efficiencies in the mergers context, it is expected that the Commissioner will likely continue to be open to considering efficiencies in the context of section 90.1. However, it remains to be seen what types of efficiencies the Commissioner may be willing to consider and how much weight will be given to any such efficiencies.

d) Remedies

Prior to the passage of Bill C-59, the remedies available under section 90.1 were limited to a prohibition order or any other order on consent of the parties. However, this is no longer the case, as Bill C-59 has expanded the scope of remedies available under section 90.1 to include AMPs, the divestiture of assets or shares, or any other action that is reasonable and necessary to overcome the effects of the agreement or arrangement. For example, the Tribunal is now permitted to order the payment of AMPs not exceeding the greater of (1) $10 million (or $15 million foreach subsequent order under section 90.1) or (2) three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues. This is similar to the remedies currently available elsewhere in the Act, such as under the abuse of dominance provisions, and is likely to result in more frequent reliance on section 90.1 by the Commissioner and private parties.

As noted above, Google recently challenged the constitutionality of the significantly increased AMPs in the abuse of dominance context. The decision in that case will likely extend to the AMPs available under other sections of the Act as well, including section 90.1.

IV. Deceptive Marketing Practices (Ordinary Sales Pricing, Drip Pricing and Greenwashing)

Transformative amendments to the Act's deceptive marketing provisions will require that companies, among other things, maintain sufficient pricing records to support discount claims; carefully consider when and how prices are disclosed to consumers; and substantiate certain types of environmental claims. Companies that fail to do so could be subject to significant penalties, including large AMPs.

1) Ordinary Selling Price Provisions

The ordinary selling price ("**OSP**") provisions prohibit a supplier from making materially false or misleading representations to the public as to the OSP (i.e., the regular, non-sale price) of a product. OSP claims underpin claims of discounts or sales (e.g., 50% off). The OSP must be supported by one of two tests: either a substantial volume of the product was sold at that price or a higher price within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (time test).

Under these provisions, the Commissioner, through the Bureau, has historically borne the burden of proving that advertised discounts are not genuine having regard to the volume test and the time test. For example, in its submission to Senator Wetston, the Bureau stated that "[f]or the Bureau to evaluate the truthfulness of a single advertisement, it is required to gather and analyze large volumes of sales and marketing data, and present these analyses to the courts in a compact and meaningful way."[44] In light of these concerns, the Bureau recommended that the burden of proof regarding ordinary selling price matters be reversed, as currently "the advertiser bears no burden at all to show that the claim that it made represented a genuine discount."[45]

Consistent with this recommendation, Bill C-59 shifts the burden to suppliers to prove that discounts from their own prices are genuine having regard to the volume tests and/or the time test (i.e., that the claimed regular price meets the volume test or the time test). Ultimately, this change reinforces the importance for suppliers to maintain sufficient pricing records to ensure that they can prove that advertised discounts are genuine when the advertised price is compared to their own ordinary prices. Failure to maintain such records could significantly increase risk under the OSP provisions.

2) Drip Pricing Provisions

Drip pricing involves advertising a price that is not attainable due to additional mandatory fixed fees or charges. Since 2016, the Bureau has taken enforcement action against numerous companies for their drip pricing practices under the general false or misleading representations provision (i.e., paragraph 74.01(1)(a) of the Act). These cases have resulted in, among other things, the imposition of AMPs of more than $38 million.

New drip pricing provisions have been added to the civil (section 74.01(1.1)) and criminal (section 52(1.3)) prohibitions on false or misleading representations and to the civil (section 74.011(3.1)) and criminal (section 52.01(4.1)) electronic messaging provisions. These provisions provide that the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed on a purchaser of the product by or under an Act of Parliament or the legislature of a province. Put differently, these provisions seek to deem drip pricing to be false or misleading.

Further, the exemption to the drip pricing provisions is limited to "obligatory charges or fees … *imposed on a purchaser of the product* by or under an Act of Parliament or the legislature of a province" (emphasis added). According to the Bureau, this captures charges or fees that represent federal, provincial or territorial sales taxes and does not capture charges, fees or other costs incurred by or imposed on a business for the purpose of complying with various laws, which are then passed on to customers.[46]

3) Greenwashing Claims

"Greenwashing" involves making environmental (i.e., "green") claims that leave consumers with the false or misleading impression that a product or service is "environmentally friendly" when, in fact, it is not. In Canada, greenwashing—as a form of misleading advertising—is largely governed by the civil and criminal false or misleading advertising provisions in the Act.

On June 5, 2025, the Bureau released final guidelines that aim to clarify its enforcement approach and interpretation with respect to provisions of the Act that apply to environmental and climate claims (the "**Greenwashing Guidelines**").[47] The Greenwashing Guidelines were published in response to June 2024 amendments to the Act that added new provisions dealing specifically with environmental claims. Guidance in the Greenwashing Guidelines relating to the application of the general provisions to

environmental claims closely mirrors guidance previously released by the Bureau in Volume 7 of the Deceptive Marketing Practices Digest.[48]

Greenwashing is not a new issue for the Bureau, which has investigated many instances of potential greenwashing in the past. That said, greenwashing claims have become increasingly prevalent in recent years. For example, a global sweep of over 500 websites by the International Consumer Protection Enforcement Network and the UK Competition and Markets Authority in 2020 found that over 40% of these websites appeared to be using green advertising tactics that could be considered misleading and therefore may be in contravention of applicable consumer protection laws.[49]

In response to the increasing prevalence of environmental advertising, many jurisdictions around the world are revisiting their legislation, policies and guidance relating to the regulation of environmental claims. Consistent with this focus on environmental claims, the recent amendments to the Act have added two civil provisions intended to address unsubstantiated environmental claims.

- **Representations Relating to Product** (paragraph 74.01(1)(b.1)): This provision prohibits a person from making a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change *that is not based on an adequate and proper test*, the proof of which lies on the person making the representation.

- **Representations Relating to Business or Business Activity** (paragraph 74.01(1)(b.2)): This provisions prohibits a person from making a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change *that is not based on adequate and proper substantiation in accordance with internationally recognized methodology*, the proof of which lies on the person making the representation.

4) Existing interpretation will be applied where possible

The Greenwashing Guidelines apply a contextual approach to the interpretation of the new environmental claims provisions. The Bureau explicitly states that it will assume that the same interpretation and considerations previously set out by courts in the context of the general deceptive

marketing provisions will also apply to the terms "adequate and proper" and "test" in respect of new paragraph 74.01(1)(b.1).[50] This means that testing or substantiation must be "fit, apt, suitable or as required by the circumstances."[51] The Bureau further explains that what qualifies as "adequate and proper" will depend on the general impression a representation creates for consumers.

With respect to terms that have not yet been interpreted by the courts, but which have a clear ordinary meaning, the Bureau indicates that it will rely on this ordinary meaning until those terms are subject to interpretation in the courts.[52] This guidance applies in respect of terms such as "benefits", "climate change", "ecological", "environment", "mitigating", "protecting", "restoring" and "social".

5) Internationally Recognized Methodology

One key aspect of paragraph 74.01(1)(b.2) that is new to the Act and which was the subject of significant public commentary is the phrase "substantiation in accordance with internationally recognized methodology." While many submissions during the public comment period requested that the Bureau provide specific direction as to which methodologies would meet this standard, the Greenwashing Guidelines provide only general direction and leave it to businesses to determine whether this standard is satisfied.

First, the Bureau defines "substantiation" as "establishing by proof or competent evidence" (but does not necessarily involve testing) and "methodology" as "a procedure used to determine something."[53] The Greenwashing Guidelines go on to indicate that the Bureau will *likely* consider a methodology to be internationally recognized if it is "recognized in two or more countries", although not necessarily by governments in those countries.[54] The Bureau emphasizes that the chosen methodology must also be shown to be "adequate and proper" substantiation of the claim, as that term has been interpreted by prior jurisprudence.[55]

Furthermore, the Greenwashing Guidelines draw a clear distinction between "methodologies" and "international standards", emphasizing that while international standards may contain or reflect internationally recognized methodologies, the two concepts are not the same.[56] Businesses are not required to comply with an international standard, nor must they be members of a specific multistakeholder standards body, to substantiate environmental claims using internationally recognized methodologies.

6) Additional Key Issues

The Greenwashing Guidelines address several key issues regarding environmental claims under the Act, including the following:

- **Required or Recommended Methodologies**: The Greenwashing Guidelines clarify that the Bureau will assume that methodologies required or recommended by federal, provincial or territorial government programs in Canada for the substantiation of environmental claims are consistent with internationally recognized methodologies.[57] In this regard, the Greenwashing Guidelines state that "it is unlikely that the Bureau will pursue enforcement action under paragraph 74.01(1)(b.2) if an advertiser has followed such a methodology, provided that the chosen methodology provides adequate and proper substantiation for the claim."[58]

- **Claims Regarding New Technologies**: The Greenwashing Guidelines acknowledge concerns about the impact of the new provisions on claims related to emerging climate technologies, warning that unsupported claims could lead to "greenhushing". However, they provide flexibility by allowing businesses to rely on multiple internationally recognized methodologies that are used to substantiate similar claims or that can be used together to substantiate the claim.[59]

- **Regulatory Disclosure**: The Greenwashing Guidelines indicate that "the provinces and territories are responsible for the regulation of securities"; that "[t]hese regulations can include evolving frameworks for the voluntary and mandatory communication of certain environmental information to current and prospective securities investors"; and that "[t]he Bureau does not concern itself with these representations."[60] However, if a business reuses any of the environmental claims for the purposes of promoting a product or business interest outside of the sale of securities (such as in marketing materials), the Bureau will apply the Act as appropriate.[61]

- **Claims About the Future**: The Greenwashing Guidelines note that "claims about the future can be considered greenwashing if they represent little more than wishful thinking."[62] According to the Greenwashing Guidelines, businesses should ensure that such claims are well-founded and are adequately and properly substantiated in accordance with internationally recognized methodology.[63] Before making these kinds of claims, businesses should have (1) a clear understanding of what needs to be done to achieve what is being claimed; (2) a

concrete, realistic and verifiable plan to accomplish the objective, with interim targets; and (3) meaningful steps underway to accomplish the plan.[64]

- **No Requirement for Public Disclosure**: The Greenwashing Guidelines note that businesses are not required to publicly disclose their substantiation or testing data, although doing so may reduce enforcement risks.[65]

7) Increased Financial Penalties

The amendments have significantly increased the size of AMPs that can be awarded against both individuals and corporations found to have breached the civil deceptive marketing practices provisions, including the provisions relating to OSP claims, drip pricing and environmental claims. In particular:

- **Individuals**: Maximum allowable AMPs have been increased from $750,000 (for a first violation) to the greater of (1) $750,000 (for a first violation) or (2) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.

- **Corporations**: Maximum allowable AMPs have been increased from $10 million (for a first violation) to the greater of (1) $10 million (for a first violation) or (2) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

The penalties under the criminal track (which include imprisonment for a term not exceeding 14 years and/or a fine in the discretion of the court) have not been changed.

V. Private Competition Litigation

Traditionally, competition risk in Canada has arisen primarily from public enforcement by the Bureau without meaningful private risk, other than in relation to criminal conduct, such as cartels. However, the amendments change this. In particular, as discussed in more detail below, the amendments provide private parties with access to the Tribunal under more sections of the Act; seek to lower the leave test that must be satisfied by private parties wanting to bring a private action to the Tribunal; and permit the Tribunal to award monetary relief to successful applicants.

1) Expanded Scope of Conduct Captured

The Bills have expanded the number of provisions under which private parties can seek leave to bring applications before the Tribunal. In this regard, Bill C-19 initially extended private rights of access to section 79 (abuse of dominance) and Bill C-59 further extended private rights of access to section 74.1 (deceptive marketing) and section 90.1 (civil competitor collaboration). Prior to the passage of these Bills, private rights of access were only available with respect to sections 75 (refusal to deal), 76 (price maintenance) and 77 (exclusive dealing, tied selling and market restriction).

Perhaps the most significant types of conduct captured are the abuse of dominance and civil collaboration provisions, the new stand-alone greenwashing provisions and the new "right to repair" within the existing refusal to deal provision:

- **Abuse of Dominance:** As stated above, the abuse of dominance provision would only require a party to show that a "dominant" firm has engaged in either (1) a practice of anti-competitive acts or (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. This is in contrast with the prior version of the abuse of dominance provision, which requires both anti-competitive intent and effects. However, both anti-competitive intent and effects need to be demonstrated in order for monetary relief to be awarded.

- **Competitor Collaborations:** As stated above, this provision not only captures collaborations between competitors or potential competitors, but also collaborations among parties that are not competitors, to the extent that a "significant purpose" of the collaboration is anti-competitive (notably, the amendments do not elaborate on when an anti-competitive purpose would be considered a "significant purposes"). As such, the competitor collaboration provision may apply to essentially any commercial agreement—including agreements with customers and suppliers.

- **Greenwashing:** As stated above, the stand-alone greenwashing prohibitions are intended to address unsubstantiated environmental claims, whether relating to "a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" or "the benefits of

a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change." A person making an environmental claim must ensure that the claim is supported by "an adequate and proper test" or "adequate and proper substantiation in accordance with internationally recognized methodology", the proof of which lies on the person making the claim.

- **Refusal to deal (and Right to Repair):** The amendments make several changes to the refusal to deal provision in the Act. First, the amendments change the requirement for a person to be substantially affected in its entire business to a requirement that a person be substantially affected in the whole or part of its business. Second, the amendments extend this provision to include the supply of the means of diagnosis or repair, creating the ability for a person to compel a company to provide the means of diagnosis or repair in certain cases. So-called "right to repair" laws already exist in other jurisdictions that seek to ensure that consumers can have devices serviced or repaired by independent firms (i.e., firms other than the original manufacturer).

2) Leave Test

In order for private parties to bring a private right of action before the Tribunal, they must first apply for and obtain leave of the Tribunal. Bill C-59 eases the test that private parties were previously required to meet in order to bring a private action before the Tribunal, other than the test applicable to section 76 (price maintenance) of the Act that remains unchanged.

Historically, the Tribunal could grant leave to bring an application under sections 75 and 77 of the Act if it had reason to believe that the applicant was directly and substantially affected with respect to the entirety of its business. Going forward, the new leave test, which applies to sections 75, 77, 79 and 90.1 of the Act, provides that the applicant need only be directly and substantially affected with respect to *part* of its business. Notably, in many unsuccessful leave applications to date, the applicant has failed to prove it was substantially affected with respect to its entire business.

Additionally, Bill C-59 introduces a second potential leave mechanism for these provisions, which applies where the Tribunal is satisfied that it is in the public interest to grant leave to an applicant. Similarly, Bill C-59 permits the Tribunal to grant leave to bring a private application under section 74.1 of the Act where it is satisfied that it is in the public interest to do so. While the scope of public interest is currently unknown, a public interest test

could open the door to representative-style proceedings and public interest litigants.

3) Private Monetary Relief

Bill C-59 creates the ability for applicants to receive monetary relief in connection with successful applications brought under section 75, 76, 77, 79 or 90.1 and the deceptive marketing provisions of the Act.

In the case of successful applications under these sections of the Act, the Tribunal can order that the person against whom the order is made pay "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, the manner that the Tribunal considers appropriate." With this choice of language, the monetary amount that an applicant may seek is not damages. However, it resembles a form of disgorgement, the quantification of which can be very difficult in many circumstances.

Further, for Part VII.1 (deceptive marketing practices) and where representations to the public are found to be materially false or misleading, an applicant can seek "an amount, not exceeding the total of the amounts paid to the [advertiser] for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold… in any manner that the court considers appropriate." This choice of language (which is already contained in the Act but now available to private parties) is akin to restitution.

4) A Form of a Class or Collective Action Regime

Bill C-59 includes two amendments that suggest the creation of a form of a class or collective action regime before the Tribunal.

First, the inclusion of the phrase "be distributed among the applicant and any other persons affected by the practice, in any manner that the Tribunal considers appropriate" suggests a broad discretion for the Tribunal to order monetary relief to a large group of persons (businesses and individuals) affected by the alleged conduct.

Second, Bill C-59 expressly gives the Tribunal the power to establish a payment, claims and notice process akin to the powers of courts in a class action context. These powers include "specifying how the payment is to be administered"; "the appointment of an administrator to administer the payment and specifying the terms of administration"; "requiring that

potential claimants be notified in the time and manner specified by the Tribunal"; "specifying the time and manner for making claims"; and "specifying the conditions for the eligibility of claimants."

Collectively, these features appear to give the Tribunal the power to order the payment of monetary relief to a significant group of affected persons and to manage the related notice, payment and claims process. This effectively creates a form of a class or collective action regime, but with differences to the existing class action regime in the civil courts. Significantly, Bill C-59 does not create a certification process that has historically served as a procedural screening mechanism, where a court decides, at an early stage, whether a class action is the appropriate procedural mechanism to advance an action. However, the leave requirement may provide an opportunity to screen claims that should be disposed of at an early stage—although this remains to be seen in light of what appears to be a significantly lowered leave test.

Conclusion

The amendments introduced through Bill C-19, Bill C-56 and Bill C-59 represent the most significant changes to the Act in nearly 40 years. These reforms, which impact nearly every aspect of Canadian competition law—including abuse of dominance, merger review, criminal cartels, competitor collaborations, deceptive marketing and private rights of action—have fundamentally reshaped the competition law landscape in our country. In light of these sweeping reforms, the modernization of the Act marks a pivotal moment in the evolution of Canada's competition policy, with wide ranging implications for businesses operating in Canada. Whether these "generational changes" ultimately foster fairness, affordability and innovation, as intended, remains to be seen.

ENDNOTES

[1] Innovation, Science and Economic Development Canada, News Release, "Minister Champagne maintains the *Competition Act*'s merger notification threshold to support a dynamic, fair and resilient economy" (7 February 2022).

[2] Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (assented to 23 June 2022), SC 2022, c 10.

[3] Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to 15 December 2023), SC 2023, c 31.

[4] Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2024 (assented to 20 June 2024), SC 2024, c 15.

[5] Canada, Department of Finance, *2023 Fall Economic Statement* (Fiscal Updates), Catalogue No F1-52E (Ottawa: Finance Canada, 21 November 2023) at 37.

[6] Canada, Competition Bureau, *Bulletin on Amendments to the Abuse of Dominance Provisions* (Draft for Public Consultation) (Ottawa: Competition Bureau, 25 October 2023).

[7] *Ibid* at para 17.

[8] *Ibid* at paras 18, 28, 38.

[9] *Ibid* at paras 5, 18, 21–25.

[10] *Ibid* at paras 5, 18, 26–33.

[11] *Ibid* at paras 5, 18, 34–43.

[12] *Ibid* at paras 8, 55.

[13] Canada, Competition Bureau, *Changes to the Provisions on Mergers and Restrictive Trade Practices in the Competition Act* (Ottawa: Competition Bureau, 7 November 2024).

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] See e.g. OECD, *Excessive Prices*, Series Roundtables on Competition Policy No 121, Doc No DAF/COMP(2011)18 (Paris: OECD, 2012) at 62–71.

[18] *Supra* note 6 at para 58.

[19] *Ibid* at para. 59.

[20] 2006 CACT 32 (Competition Tribunal).

[21] *Commissioner of Competition v Google Canada Corporation and Google LLC* (14 February 2025), Competition Tribunal, CT-2024-010 (Notice of Constitutional Question).

[22] *Ibid* at para 3 [emphasis added].

[23] *Commissioner of Competition v Google Canada Corporation and Google LLC* (4 June 2025), Competition Tribunal, CT-2024-010 (Commissioner's Notice of Motion to Strike the Constitutional Question).

[24] *Ibid* at paras 36, 40–41.

[25] US, Department of Justice and the Federal Trade Commission, *Merger Guidelines* (Washington, DC: 2023) at 5–6,
[26] *Ibid* at 6.
[27] [1997] 1 SCR 748 at para 85, 1997 CanLII 385 (SCC).
[28] *Commissioner of Competition v RONA Inc* (20 December 2024), Competition Tribunal, CT-2024-011 (Registered Consent Agreement).
[29] *Commissioner of Competition v TransAlta Corporation* (13 November 2024), Competition Tribunal, CT-2024-008 (Registered Consent Agreement).
[30] Such provisions require that purchasers do anything and everything necessary to secure approval under the Act.
[31] Senate, Standing Committee on National Finance, *Evidence*, 44-1 (13 December 2023) at 88:34 (Matthew Boswell).
[32] It bears noting that prior jurisprudence provided for "interim interim" relief in the context of section 104 of the Act. See *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25 at paras 63, 65, in which the Federal Court of Appeal found that there is nothing in either the "context of section 104" or the "goal of encouraging completion of merger review before closing" which "suggests that the broad power of the Tribunal to issue 'any interim order that it considers appropriate' should be read more narrowly than a plain textual reading suggests—with the result that this provision captures both "interim" orders and "interim interim" orders.
[33] Canada, Competition Bureau, *Enforcement Guidelines on Wage-Fixing and No Poaching Agreements* (Ottawa: Competition Bureau, 2023).
[34] *Ibid* at s 1.1.
[35] *Ibid* at s 3.1.
[36] *Ibid* at s 1.2.3.
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid* at s 2.1.
[41] *Ibid.*
[42] *Ibid* at s 2.2.
[43] Canada, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (Ottawa: Competition Bureau, 2022) at s 4.2.
[44] *Ibid* at s 6.2.
[45] *Ibid.*
[46] See e.g. Canada, Competition Bureau, *The Future of Competition Policy in Canada* (Regulatory advice/intervention), submission to Innovation, Science and Economic Development Canada (Ottawa: Competition Bureau, 2023) at s 5.4.8.
[47] Canada, Competition Bureau, *Environmental claims and the Competition Act* (Ottawa: Competition Bureau, 2025).
[48] Canada, Competition Bureau, *The Deceptive Marketing Practices Digest*, vol 7 (Bulletin) (Ottawa: Competition Bureau, 2024).
[49] See e.g. United Kingdom, Competition and Markets Authority, Press Release,

"Global sweep finds 40% of firms' green claims could be misleading" (28 January 2021).

[50] *Supra* note 47 at "Claims about the environmental benefit of a product—Key Concepts."

[51] *Ibid* at "Product performance claims – Key Concepts."

[52] *Ibid* at "Claims about the environmental benefit of a product—Key Concepts."

[53] *Ibid* at "Claims about the environmental benefit of a business or business activity – Key Concepts."

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid* at "Frequently asked questions—No. 20."

[57] *Ibid* at "Frequently asked questions—No. 23."

[58] *Ibid.*

[59] *Ibid* at "Frequently asked questions—No. 25."

[60] *Ibid* at "Frequently asked questions—No. 8."

[61] *Ibid.*

[62] *Ibid* at "Principle 6: Environmental claims about the future should be supported by substantiation and a clear plan."

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid* at "Frequently asked questions—No. 14."