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# CANADIAN COMPETITION LAW REVIEW

## REVUE CANADIENNE DU DROIT DE LA CONCURRENCE





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## CULTIVATING CHANGE: HOW CANADA'S COMPETITION ACT CAN ADDRESS THE USE OF TECHNOLOGICAL PROTECTION MEASURES IN AGRICULTURE

Mark Musselman

*Since the late 1990s, large, multinational “full-line” manufacturers of agricultural tractors and combine harvesters have worked collaboratively with smaller, independent “short-line” manufacturers of accessory equipment to ensure the compatibility and interoperability of their products. This longstanding co-operative tradition served both manufacturers and their customers, which could build out their operations with the equipment of their choice, based on their own personal preferences, or unique priorities—budget limitations, topographical considerations, crop-specific needs, uncommon soil characteristics, etc.—confident that, regardless of the manufacturer, their new equipment would operate with their other machinery. However, as agricultural practice has continued to evolve towards “smart farming”, full-line manufacturers have increasingly employed “technological protection measures” to prevent unauthorized access to the on-board data, computer programs, and operating systems of their tractors and combines. The inability of short-line equipment to access the digital data and systems of tractors and combines renders their equipment unusable, and thus their business non-viable. The effectiveness of “technological protection measures” in Canada is due, in part, to the statutory protection afforded them under the anti-circumvention provisions of the Copyright Act (Canada). It is perhaps unsurprising therefore, that politicians, legal scholars, and practitioners have assumed an effective regulatory response to the issue would be best achieved via amendments to Canadian copyright law. This paper takes a different position, arguing that responses based on copyright law will not adequately address the challenges of short-line manufacturers, and proposing the use of competition law to respond to conduct which amounts to an effort by full-line manufacturers to restrict or prohibit competition via exclusive dealing, tied selling and an abuse of dominance which results in the substantial lessening or prevention of competition. The affording of relief to Canada’s short-line manufacturing sector flows from competition law, not copyright law, and through the commencement of applications to the Competition Tribunal, such relief can ultimately be provided.*

*Depuis la fin des années 90, les grands fabricants multinationaux de tracteurs et de moissonneuses-batteuses agricoles à large gamme de production collaborent avec les petits fabricants indépendants d'équipement auxiliaire à série restreinte pour assurer la compatibilité et l'interopérabilité de leurs*

*produits respectifs. Cette collaboration de longue date a servi aux deux types de fabricants et à leurs clients, lesquels ont pu accroître leurs activités avec l'équipement de leur choix, selon leurs préférences personnelles ou leurs priorités uniques—limitation du budget, considérations topographiques, besoins agricoles précis, caractéristiques du sol, etc.—confiants que peu importe le fabricant, leur nouvel équipement s'adapterait à leurs autres machines. Toutefois, comme la pratique agricole devient de plus en plus « intelligente », les fabricants à large gamme de production utilisent davantage des « mesures de protection technologique » pour empêcher l'accès non autorisé aux données internes, aux programmes informatiques et aux systèmes d'exploitation de leurs tracteurs et de leurs moissonneusesbatteuses. L'impossibilité des fabricants à série restreinte à avoir accès à ces données et systèmes rend leur équipement inutilisable, et leurs activités de moins en moins viables. Les « mesures de protection technologique » au Canada doivent leur efficacité, en partie, à la protection législative qui leur est accordée par les dispositions de la Loi sur le droit d'auteur (Canada). Il n'est donc pas surprenant que les politiciens et politiciennes, les juristes et les praticiens aient supposé qu'une réponse réglementaire efficace à la question serait obtenue par la modification de la législation canadienne en matière de droit d'auteur. L'auteur de cet article adopte une position différente, selon laquelle les interventions fondées sur les lois canadiennes sur le droit d'auteur ne répondraient pas adéquatement aux préoccupations des fabricants à série restreinte. Il propose plutôt de recourir au droit de la concurrence pour corriger un comportement s'apparentant à un effort des fabricants à large gamme de production de limiter ou d'interdire la concurrence au moyen de contrats d'exclusivité, de ventes liées et de l'abus de dominance afin de réduire ou de prévenir considérablement la concurrence. L'allègement accordé au secteur de fabrication à série restreinte du Canada découle du droit de la concurrence et non du droit d'auteur, et cet allègement pourra en définitive être accordé au moyen de demandes présentées au Tribunal de la concurrence.*

## 1. Introduction

### 1.1 The Regulatory Issue

When it comes to agricultural equipment on Canadian farms, the undisputed heavyweight champions are tractors and combine harvesters (referred to herein together as “T&Cs”) which represent the mechanical hubs on which Canadian farmers build out their wide complement of specialized accessory equipment. T&Cs pull, push, carry, or drag every other piece of farm machinery providing the power, mobility, and mechanical movement on which all other accessory equipment relies

to function. The evolution of T&Cs from their humble origins of steam and brute force into today's sophisticated and complex wonders of digital data processing is truly bewildering, a sense nicely captured by the title of Nilay Patel's 2021 article in *The Verge*: "John Deere Turned Tractors Into Computers—What's Next?"<sup>1</sup> However, as is often the case with shiny new technologies, ground-breaking innovation is often followed by the appearance of unintended (or intended) consequences. These consequences can disrupt a previously stable commercial ecosystem and introduce novel and complex challenges which require regulatory intervention to restore market order and reinstate market balance.

Just such a disruption is now occurring in the Canadian agricultural equipment manufacturing industry (the "Industry") along with the unintended (or intended) consequences to the market. This paper considers this current disruption which results from the deployment of "technological protection measures" ("TPMs") by full-line manufacturers<sup>2</sup> of T&Cs, and which is disrupting the previously stable agricultural equipment manufacturing market. More specifically, this paper argues that the use of TPMs in T&Cs represents an effort by full-line manufacturers to substantially prevent or lessen competition<sup>3</sup> and has an exclusionary effect in the market including, in particular, the impeding of entry into or their expansion in the market<sup>4</sup> by Canadian "short-line manufacturers"<sup>5</sup>.

The exclusionary issues addressed in this paper, while specifically focused on full-line and short-line manufacturers of agricultural equipment, are emblematic of broader concerns prevalent in numerous "Big Tech" antitrust cases.<sup>6</sup> The potential for exclusion through electronic, digital, and data restrictions is a critical issue that extends beyond the agricultural sector, impacting a wide range of industries where smaller niche suppliers interact with larger, established competitors. In the context of antitrust cases involving "Big Tech" companies, self-preferencing practices are frequently scrutinized. These practices involve dominant firms leveraging their market power to favour their own products or services over those of competitors, often through digital and data restrictions. This paper's examination of how full-line agricultural equipment manufacturers employ TPMs to exclude short-line manufacturers serves as a microcosm of these antitrust concerns. By restricting access to essential digital data and systems, full-line manufacturers can effectively suppress competition, analogous to how technology giants may limit interoperability or access to their platforms to disadvantage rivals.

The agricultural equipment industry provides a compelling case study for these broader issues because it illustrates how exclusionary practices using data and digital technologies can impact even traditional, “non-tech” industries. As agricultural practices evolve towards “smart farming,” the reliance on digital data and systems becomes increasingly significant. This evolution underscores the necessity of ensuring competitive markets across all sectors, not solely within high-tech industries. The parallels between the agricultural example and broader “Big Tech” antitrust cases highlight the essential need for robust regulatory frameworks to address and mitigate anti-competitive conduct rooted in digital and data restrictions. By focusing on the agricultural sector, this paper emphasizes that the challenges posed by digital and data-based exclusionary practices are not confined to the technology industry alone. They are pervasive issues that have the potential to disrupt any market where digital interoperability is crucial for competition. Thus, the insights and regulatory responses discussed herein are broadly applicable and hold significant relevance for policymakers and stakeholders across various industries striving to promote fair competition and prevent the abuse of market power.

Finally, while this paper recognizes that TPM use is facilitated, in part, by the anti-circumvention provisions of the Canadian *Copyright Act*,<sup>7</sup> a regulatory response based on that legislation will fail due to the nature of short-line manufacturers’ business, and the role short-line manufacturers play in the Industry. This paper argues instead for the grounding of an effective regulatory response in Canada’s *Competition Act*,<sup>8</sup> which is capable of appropriately answering full-line manufacturer’s anti-competitive conduct and furthering the legislative purposes of Canadian competition law.

## 1.2 Outline of Paper

This paper utilizes an interdisciplinary approach, combining literature review, legal and industrial analysis, and comparative legal study to address Canada’s TPM issue in the agricultural equipment industry under the *Competition Act*. Part 2 offers contextual background information, including the historical roles of full-line and short-line manufacturers, their relationship, the nature of TPMs, and their impact on the competitiveness of short-line manufacturers. Part 3 discusses regulatory responses considered through amendments to Canadian copyright law, while Part 4 proposes a *Competition Act*-based response. Part 5 examines relevant provisions and recommends applying for an order from the Competition Tribunal (the “Tribunal”) to prohibit full-line manufacturers from using TPMs, citing violations of sections 77(2) and 79(1) of the *Competition Act*. Part 6 reviews

proposed recommendations in light of Canada's obligations under the WIPO Copyright Treaty<sup>9</sup> and the Agreement between the United States of America, the United Mexican States, and Canada (the "USMCA").<sup>10</sup> Finally, Part 7 offers a brief conclusion.

### 1.3 The Literature

Very little literature focuses directly on the employment of TPMs in the agricultural context, particularly regarding the use of TPMs to thwart the objectives of competition law. As discussed in detail below, the relevance of TPMs to agriculture in general, and the agricultural equipment manufacturing industry in particular, was only established in the mid-1990s and thus the impact of TPMs on agriculture, markets, and competition is a recent phenomenon. Recent works have considered issues which, while relevant to technology and agricultural, are rather general in nature, such as a 2018 article which considered the ownership of agricultural data, how it is gathered, who controls it and what rules apply to accessing it.<sup>11</sup> Other articles have considered related general concepts such as the models within which agricultural innovation occurs.<sup>12</sup> Looking at the international marketplace, Peter Phillips's 2019 article reviewed commercial trends in agricultural markets and noted that eight global farm machinery manufacturers "supply the lion's share of the international tractor and combine market" and are thus possessed of the "scale, reach and commercial interest to coordinate and exploit digital opportunities in agriculture."<sup>13</sup> Narrowing the focus, there has been an examination of corporate advantages gained by John Deere's leveraging of "significant issues regarding copyright and farmer access (right-to-repair) to equipment"<sup>14</sup> and a consideration of how financing required to fund the high cost of innovation research and development is available only to the largest and the most vertically-integrated of corporate manufacturers. This dearth of available financing to smaller manufacturers is found by Phillips to have a direct impact on both the nature and the pace of innovation due, in part, to the introduction of "highly vertically integrated suite[s] of machinery, hardware and software solutions" with "tightly controlled [platforms] ... initially designed to operate with little or no connection to other systems."<sup>15</sup> Inequalities which result from the lack of financing to fund research and development are the focus of study by Sarah Hackfort, whose 2021 article analyzes financing patterns linked to the development and adoption of digital technologies in agriculture, and reviews strategies "to reduce these inequalities and challenge the power relations in which they are embedded".<sup>16</sup>

Where implications of the *Copyright Act's* TPM provisions are concerned, the literature is more developed; however, it focuses primarily on a discussion of causes and proposed responses from within the parameters of copyright law. Michael Geist has considered TPM impacts on copyright law at some length, focusing primarily on their effect on “fair dealing” provisions, arguing for “a need to fix this problem by establishing an exception within the anti-circumvention rules [of the *Copyright Act*] to allow for circumvention [of TPMs] for any lawful purpose.”<sup>17</sup> Anthony D. Rosborough has written extensively on the “right-to-repair” in Canada, including a 2022 article which looks at the challenges faced by consumer protection reforms around TPMs in Ontario and Quebec, and the likely effect of a proposed exception to the *Copyright Act's* anti-circumvention provisions.<sup>18</sup>

Edward M. Iacobucci considered whether the *Competition Act* was “fit-for-purpose” in the digital era in his 2021 and 2023 articles which focused on issues arising as a consequence of technological innovation, and the relevance of competition law concepts and principles in the digital context.<sup>19</sup> Iacobucci's earlier work, written with Ralph Winter, looks specifically at the competitive problems which arise when enterprises abuse positions of dominance, a subject which is central to this paper.<sup>20</sup> A 2007 article by Alex Cameron and Robert Tomkowicz<sup>21</sup> considers challenges posed by digital networks to copyright owners and how the use of TPMs helps or hinders users' exploitation of creative material. Cameron and Tomkowicz touch also on implications for Canadian competition policy, and the issues spawned by TPMs through digital rights management programs and processes.

The refocusing of the issue of TPM use in the agricultural equipment market from one of copyright law to one of competition law comprises this paper's original contribution to the academic literature, arguing that since the issue results from a compromised competitive marketplace, it is the *Competition Act*, and not the *Copyright Act*, which is best equipped to serve as the legal basis of an effective regulatory response. While existing literature has considered the interaction between copyright and competition law in Canada, such consideration has not specifically focused on the subject in the agricultural equipment manufacturing market. Similarly, while scholars have analyzed competitive concerns in agriculture, there has been no evaluation of the role played by TPMs therein.

## 2. The Context

Through the deployment of TPMs, full-line T&C manufacturers can electronically restrict or prevent third-party access to their equipment's

on-board computer programs, data files, and operating systems. These digital files represent the operational “brain” of today’s increasingly sophisticated T&Cs, a complex hive of data processing which controls virtually every aspect of the functioning and performance of both T&Cs and the accessory implements connected thereto. These processes range from the most macro (ex. the equipment’s ignition), to the most micro (ex. the adjustment of the depth of a seed drill’s articulation to within millimetres). While innovation has always been the lifeblood of the agricultural equipment manufacturing industry, recent trends towards “smart farming” have seen full-line manufacturers refocus their innovative attention and innovative investment from equipment hardware (ex. the introduction by Henry Ford of the first mass-produced gasoline-fuelled tractor in 1917), to equipment software (ex. Deere & Co.’s (“John Deere”) 1994 launch in of the *Green-Star™ Precision Farming System*—one of the first commercial applications of global positioning system (GPS) technology to farm equipment.) The increasing focus on digital innovation has allowed full-line manufacturers to market their products, and the resulting enhancements to performance, as “brand-exclusive” features which favourably differentiate their products from those of their competitors.

That innovation is both an objective and a hallmark of any healthy commercial marketplace does not represent radical thinking, and this paper enthusiastically supports robust and spirited competition between commercial rivals based on innovative foresight and technical competence. Regardless of whether a competitive edge is achieved in an analogue or digital format or through a hardware or software application, such innovation should be encouraged by applicable law, government policy, and industry practice. However, it is the position of this paper that full-line manufacturers of T&Cs have recently sought to exploit a key difference between contemporary electronic and digital innovation and its historical mechanical equivalent ... *access*.

Prior to the wide adoption of electronics in agricultural equipment, the components of a farm implement’s design and construction could be seen, touched, measured, and reverse-engineered by commercial competitors. This ready access both permitted and supported the ongoing process of mechanical design innovation and iteration. The results of innovation in the context of digital software design and control however, are, by their nature, more difficult to see, touch, and measure—particularly when locked away in T&Cs behind TPMs by full-line manufacturers. This fact adds grist to the innovative mill and can prevent, restrict or retard competitors’ access to the digital processes and routines of modern T&Cs. Without access to

such data, systems, platforms, and interfaces, competitors' equipment will not function, thereby rendering their products commercially irrelevant. Were the commercial and competitive advantages in the market gained as a result of a full-line manufacturer's superior product design, increased efficiencies, or decreased cost, the competitive market could function as desired and reward the manufacturer for its innovation with increases in sales and revenues. However, when full-line manufacturers gain a commercial and competitive advantage through the use of technology to exclude competitors from the market by denying them access to data (whether through TPMs, proprietary software, unique electronic connection interfaces, etc.), a regulatory response is required to ensure an open and competitive market.

Before turning to a review of the Canadian agricultural equipment manufacturing industry, it is helpful to briefly consider the wider legal and regulatory system of intellectual property rights which has long provided for the compelled access to proprietary data ... the issuance of *patents*. Patents protect inventions and innovations to existing design through the granting of an exclusive rights to commercially exploit the invention or innovation for a limited period of time. The patent system's granting of commercial protection is contingent, however, upon the disclosure of information by the inventor/innovator which not only facilitates innovation but also permits and encourages subsequent enhancements to prior inventions. This mandatory disclosure of information as the *quid pro quo* for patent protection reflects society's statutory endorsement of progressive development, allowing innovations to build upon existing knowledge. Conversely, the law around the protection of "trade secrets" represents an alternative route available to inventors/innovators in the protection of their intellectual property and its commercial exploitation. Reliance upon trade secret protection will theoretically provide exclusivity for commercial exploitation in perpetuity, however such protection is entirely contingent upon the inventor's/innovator's successful maintenance of secrecy in perpetuity.

This bifurcation presents inventors with a clear strategic choice: opt for public disclosure and a temporally limited monopoly under patent law or maintain secrecy to safeguard their invention/innovation indefinitely. This framework of intellectual property rights highlights a critical junction of legal and strategic decision-making that directly impacts the technological and competitive landscape within the agricultural sector, particularly in the use of TPMs. Indeed, in the context of this paper's present examination, the cynic might suspect that the strategic objective of T&C manufacturers is to secure patent-like protections against commercial competition without the disclosure obligations imposed by patent law.

## 2.1 The Industry Players

Of the more than 4,500 companies which comprise the international agricultural equipment manufacturing industry,<sup>22</sup> the majority fall within one of two general categories known as “full-line manufacturers” and “short-line manufacturers.”

### 2.1.1 Full-line Manufacturers

While fewer in number, full-line manufacturers occupy a position of considerably greater prominence within the Industry. While these customarily international enterprises are engaged in the production of a wide array of farm machinery and implements (seed drills, sprayers, mowers, balers, harvest pickers, etc.) the hallmark of full-line manufacturers is their design, production, sale, and maintenance of T&Cs. Due to the size, complexity, and cost associated with the research and development, design, and manufacture of T&Cs, only the largest and best-financed manufacturers are able to enter, compete, and remain in the business of producing, marketing, and selling. This fact, together with the role T&Cs play in modern agriculture, places full-line manufacturers at the very centre of the Industry.

T&Cs are different than all other agricultural machinery. Tractors with a power rating exceeding 100 horsepower, a threshold deemed essential for operational viability on commercial farms,<sup>23</sup> can operate with a variety of attachments, making them capable of undertaking different agricultural tasks. Similarly, combine harvesters are designed to perform multiple harvesting functions simultaneously. They can reap (cut), thresh (separate grains from the crop), and winnow (remove chaff) in a single operation, making them highly efficient, versatile, and timesaving. Due to the central role played by T&Cs in the operation of modern farms, and the significant financial investment by farmers which T&Cs require compared to accessory implements,<sup>24</sup> the relationship between farmer and full-line manufacturer is one of the most critical to a farm’s success.

Due to this commanding position, full-line manufacturers are among the most influential and recognized players in the agricultural machinery industry, engaged in international sales, leasing, maintenance, research and development, all of which results in multi-billions of dollars in annual revenue. The largest and best known of the full-line manufacturers is John Deere. This Moline, Illinois-based juggernaut boasts a history dating back to 1804, more than 82,000 employees around the world,<sup>25</sup> facilities in more than 30 countries,<sup>26</sup> and 2023 global revenues in excess of \$61 billion.<sup>27</sup> Summarized rather accurately in 1958 by A.A. Thornburgh—the president

of full-line manufacturer Massey-Ferguson Limited, “The full-line companies necessarily shape the pattern of the industry. Their operations reflect the basic economic changes that affect the industry as a whole.”<sup>28</sup>

The words spoken by Mr. Thornburgh in 1958 remain as true today as when they were first uttered 66 years ago. The 2022 market value of the international agricultural equipment market was US\$137.6 billion, a number which is expected to grow at an annual rate of 5.5%, reaching US\$255 billion by 2032.<sup>29</sup> Despite the size of the international manufacturing marketplace, it is dominated by a surprisingly small number of large, vertically integrated, international corporations.<sup>30</sup> As of 2021, the top five<sup>31</sup> global agricultural equipment manufacturers were comprised of John Deere with 25.3% of the global market (and 46% of the U.S. market), CNH Industrial N.V. with 12.9% of the global market (brands: Case IH, New Holland, and Steyer), Kubota Corporation with 11.7% of the global market (brands: Kubota, Great Plains, Kvernland, and KIOTI), AGCO Corporation with 9.8% of the global market (brands: Massey Ferguson, Fendt, and Valtus), and CLAAS KGaA mbh with 4.2% of the global market. When considered together, these five global full-line manufacturing behemoths control around 65% of the global agricultural equipment market. This position of dominance in the global industry has only grown with the passage of time,<sup>32</sup> however, notwithstanding their dominance, full-line manufacturers are not lone actors in the Industry.

### 2.1.2 Short-line Manufacturers

While full-line manufacturers are the agricultural equipment manufacturing industry’s generalists, short-line manufacturers comprise in many ways the industry’s specialists. Short-liners dedicate their design and production capabilities to a limited line of products within limited product segments. Unlike their full-line counterparts which offer the farming community an extensive range of T&Cs and accessory equipment, short-line companies concentrate their efforts on developing expertise and technological advancements in specific niches where they have identified a potential competitive edge. These niches can vary widely, encompassing specialized sectors such as advanced harvesting or tillage machinery, sophisticated irrigation systems, innovative grain handling and storage solutions, or cutting-edge equipment for the precise application of fertilizers and chemicals.

Thus, short-line manufacturer’s offer equipment which falls generally into two categories. The paper refers to the first category as “Competing Products” which are offered by short-line manufacturers as competitive

alternatives to similar products manufactured by their full-line counterparts (ex. the “WS Grain Belt Swather” manufactured by Honey Bee Manufacturing Ltd. of Frontier, Saskatchewan which competes with John Deere’s W170 swather.) The second category of short-liner products is referred to as “Original Products” and represents products for which no full-line manufactured alternative exists (ex. manure injectors manufactured by Bazooka Farmstar of Washington, Iowa which inject manure directly into the soil offering various advantages. In either category, short-line manufacturers’ products serve to complement the range of products offered by full-line manufacturers.<sup>33</sup>

By channeling resources and research into targeted areas and products, short-line manufacturers not only refine their product offerings but also establish themselves as benchmarks of quality and innovation within their chosen niche product areas. This focused strategy enables short-line manufacturers to achieve a level of product excellence and reliability that is often recognized by the market, enabling them to secure and sometimes surpass the market share of larger, full-line producers in their specific categories. Examples of short-line manufacturers which have achieved success in carving out global leadership positions include Great Plains Manufacturing Inc., a U.S.-based manufacturer which, prior to its acquisition by Kubota in 2016, grew to become the leading designer and manufacturer of grain drills which are essential for efficient seed planting; and Kinze Manufacturing Inc., a frontrunner in the manufacture of high-efficiency planters and which currently remains privately held by the Kinzenbaw family of Williamsburg, Indiana. The success of these companies, and others like them, demonstrates that there remains a strategic advantage for some in specializing in a few, carefully chosen segments, thereby achieving market recognition and success within niche areas of manufacturing.<sup>34</sup>

While relatively inconsequential compared to the commercial activities, expenditures and profits of full-line manufacturers, the Canadian short-line industry does make a sizable contribution to Canadian gross domestic product (GDP). A 2021 study prepared by Western Economic Diversification Canada<sup>35</sup> reported that as of that year, the Canadian agricultural implements manufacturing sector<sup>36</sup> accounted for over \$4 billion of revenue, with manufacturing revenue growth exceeding 47% between 2015 and 2018. Statistics Canada determined that sectoral revenues reached \$4.3 billion in 2021 compared to \$3.6 billion the previous year, an increase of 19.4%,<sup>37</sup> with Canadian sectoral salaries and wages totalling \$855.7 million. The study also reported 529 Canadian agricultural implement manufacturing businesses in 2019 with 87.7% of employment represented by micro

employers (1-4 employees) and small employers (5-99 employees) located primarily in the provinces of Ontario, Quebec, Manitoba, and Saskatchewan.<sup>38</sup> While the industry may not be among the top industrial contributors to Canada's GDP, the importance of the Canadian short-line manufacturing industry on Canadian communities should not be underestimated. As Rosborough and Dade note, "[t]he economic contribution may be lost in national GDP numbers but stands out in rural communities where the loss of 100 or 200 good middle-class manufacturing jobs can mean the senseless loss of economic viability for rural regions."<sup>39</sup>

Having considered the roles played by full-line and short-line manufacturers in the agricultural equipment ecosystem, the paper's next section will review the historical context in which they have recently co-existed.

## 2.2 Trending Towards "Smart Farming"

Technological advances of recent years have enabled a new era in farming practice—known commonly as "smart farming". Smart farming has its origins in the "precision agriculture" work of Professor Pierre Robert at the University of Minnesota during the late 1980s and early 1990s. Professor Robert's work focused on variable rate application of inputs—a practice based on the recognition that different parts of a field have different crop yields and, therefore, different nutrient needs.<sup>40</sup> The early work of Professor Robert ultimately formed the cornerstone for variable rate field management systems that now form the foundation of contemporary smart farming practice. Professor Robert's work was premised on a simple axiom which emphasized the application of the "right input at the right time, in the right amount, and at the right place". This approach marked a significant shift in agricultural practice, which enabled increases to efficiency, yields, and sustainability—all through the precise management of resources.

Precise resource management requires precise resource measurement and Professor Robert's early work was limited practically by the inability of agricultural technology to collect and process data. Over time, however, as the pace of agricultural technology development hastened, farmers were soon able to utilize information technology and a wide array of electronic monitoring devices to optimize agricultural production processes—at planting and at harvest—more fully realizing Professor Robert's goal of greater accuracy and control in farming. As noted above, the introduction of GPS technology to agricultural practice in 1994 by John Deere represented a watershed moment in the realization of Professor Robert's smart farming goals as the technology enabled radical changes to farming practice

including field mapping, yield mapping, soil sampling, and the precision application of fertilizers and pesticides.<sup>41</sup>

The development and application of these novel technologies have led to significant improvements in efficiency, cost reduction, and environmental sustainability in the agricultural sector. These benefits are manifested through both the equipment's mechanical efficiencies (increased power, improved fuel consumption, reduction of pollutive discharge)<sup>42</sup> and the agricultural products which they tend (improvements in yields). With each passing year, smart farming technologies evolve towards ever more sophisticated data collection, analytics, machine learning, and artificial intelligence—to encompass a broader range of technologies and applications. Three examples of recent technological innovations in agriculture include the introduction in 2021 of fully autonomous T&Cs, the increasing use of unmanned aerial drones for remote crop and livestock observation and data collection, and the introduction by John Deere in 2021 of its proprietary “Smart-Apply Intelligent Control System™,” which employs Light Detection and Ranging (LiDAR) technology in the air-blast sprayers that are towed behind a John Deere tractor and which uses sensors and artificial intelligence to find and remove weeds from within growing crops through the application of herbicides only where needed, and at the individual plant level.

### 2.3 Technological Protection Measures

TPMs are used to control access to digital copyrighted content or to prevent users from exercising the rights afforded by the *Copyright Act* to content owners. While TPM protections were originally considered necessary to encourage content creators to make their material available in digital media, the measures are now broadly used to protect software incorporated within products for purposes which have little if any connection to the protection of copyright. The first use of “technological protection measures,” as anything approaching a term of art seems tied to the implementation in 1996 of the World Intellectual Property Organization’s (“WIPO”) *WIPO Copyright Treaty*<sup>43</sup> and *WIPO Performances and Phonograms Treaty*.<sup>44</sup>

As now commonly used, and as used in this paper, the term refers to technologies which either control *access to* or the *use of* works which are subject to protection of copyright law.<sup>45</sup> TPMs which control access are exemplified by simple password protection or the employment of complex cryptography, while the control of use (beyond access control, obviously) can be achieved through the control of a work's duplication which, in turn,

prevents its unauthorized modification, its inclusion in independent works, etc. often through “digital rights management” systems.<sup>46</sup>

In the agricultural context, TPMs which control access currently include passwords, paywalls or subscriptions, registration keys, access time limits, limits on the number of simultaneous users, and encryption; while those which control use currently include read-only limits, download blocking, copy blocking, print blocking, labeling, and watermarks.<sup>47</sup> Measures can include digital locks, encrypted software, and proprietary data or power connectors—but regardless of the particular technology employed, the effect in the circumstances considered here is to prevent or restrict access to the data and operating systems of T&Cs on which short-line manufacturers rely to ensure that their equipment will function properly and efficiently with full-line equipment.

#### **2.4 The Full-line—Short-line Relationship: Complementary to Adversarial**

A cursory reading of this paper’s thesis might suggest that the forces of full-line and short-line manufacturers are locked in endless “winner-take-all” combat for supremacy in the agricultural equipment manufacturing industry. That understanding would, until very recently, have been incorrect. In fact, for decades full-line manufacturers worked in something of a collaborative way with short-liners via a symbiotic relationship—more complementary than competitive. Full-line manufacturers have traditionally facilitated short-line participation in the equipment industry, whether in respect of Competing Products or Original Products. As mentioned above, full-line manufacturers’ T&Cs have historically served as the platforms on which farmers assemble multi-modal equipment which works together to achieve agricultural objectives. For example, a farmer might choose to equip his John Deere combine harvester with a front-mounted “header” for grain harvesting manufactured by Buhler Industries of Manitoba or Prairie Star Manufacturing of Alberta. Similarly, a tractor manufactured by CLAAS might tow a trailing storage unit with grain processing features manufactured by the Winnipeg-headquartered Ag Growth International. Until recently, farmers were free to choose from among the product lines of both full- and short-line manufacturers, confident that regardless of the implement’s manufacturer, its use and efficient operation would be facilitated via standardized electronic connections and common programming languages in operating systems.<sup>48</sup>

In the agricultural setting, this work towards the practice of standardization has been led since 2008 by the Agricultural Industry Electronics Foundation (the “AEF”), an organization established in 2008, which currently counts eleven international agricultural equipment manufacturers<sup>49</sup> (including John Deere) as “core members”, along with 280 general members. The foundation’s objective is to improve cross-manufacturer compatibility of electronic and electric components in agricultural equipment, and to “establish transparency about compatibility issues.”<sup>50</sup> According to the AEF’s website,

“Compatibility across manufacturers or brands is increasingly considered as a competitive advantage ... This renunciation of the idea that customers should buy all their machinery from one manufacturer fuels the desire for standards within the industry. This is accompanied by the ***need to establish transparency about compatibility*** and to provide customers with relevant information prior to a purchase of agricultural machinery.”<sup>51</sup> [Emphasis added].

This practice of providing short-line manufacturers’ equipment with access to the power, data processing, and operating systems of full-line T&Cs was accomplished through the AEF’s design and introduction of universal protocols such as the 2001 introduction of the internationally recognized ISOBUS standard for agricultural electronics, and its more recent release of the AEF-designed *Tractor Implement Management* standard which “allow[s] for closer integration between the tractor’s central computer system and add-on components from different manufacturers.”<sup>52</sup>

Notwithstanding the work of the AEF—or John Deere’s founding membership therein—this longstanding practice of promoting product interoperability was significantly disrupted for the first time in 2020 with the introduction by John Deere of the company’s X9 line of combine harvesters. A state-of-the-art combine with a retail cost in excess of US\$1 million, the X9 illustrates John Deere’s continued practice of integrating ever more sophisticated computer systems and data interfaces into its flagship equipment. What was novel in the X9, however, was its use of an exclusive proprietary interface which prevented any short-line or third-party equipment from communicating with it, and its repair without digital authorization from John Deere.<sup>53</sup> The obvious result of John Deere’s adoption of a new exclusive technological strategy is that the longstanding practice of product compatibility with short-line equipment has been ended. The introduction of the X9 combine represents a pivotal moment in the history of agricultural equipment manufacturing ... a rejection by the market’s dominant player of a historical norm supporting equipment

compatibility, and its replacement with a practice resulting in the inoperability of competitors' equipment and, thus, their restriction in or elimination from the marketplace.

Difficulties confronting the short-line manufacturing industry have not arisen due to an inability to compete through the innovation of efficient and effective products which can respond to the unique needs of farmers, but rather from the increasingly complex and expensive task of developing technological solutions to facilitate interoperability with full-line manufacturer's recent iterations of their flagship T&Cs. John Deere's practice, in particular, has introduced technologies which incorporate "the most impenetrable proprietary interfaces and connectors, which make reverse engineering extraordinarily difficult."<sup>54</sup> And as Rosborough notes, "In controlling access to the machine's software code, which manages its entire functioning, the full-line manufacturer can preclude short-line equipment from working altogether by requiring full-line manufacturer authorization to "activate" (or not) the short-line-made components and by preventing its proprietary interfaces and connectors from sending or receiving data to third-party peripherals."<sup>55</sup> Perhaps relevant to the inference of John Deere's motives behind the adoption of its exclusive proprietary technology is the company's refusal to provide details about its new software, which could be used by competitors (whether short-line manufacturers or competing full-line manufacturers) for purposes of reverse engineering.<sup>56</sup>

Regardless of John Deere's intentions, be they commercial advantage, product safety, efficiencies, or "brand purity",<sup>57</sup> the impact on Canadian short-line manufacturers is the same ... they are excluded from the agricultural manufacturing industry, hindered or prohibited from the performance of their historical role as product innovators because of their inability to ensure that their innovations are, and will continue to be, usable with full-line manufacturers' machinery.

### **3. Consideration of Regulatory Responses Under Copyright Law**

Having reviewed the context in which the subject regulatory issue lives; the parties, their commercial positions and relationships; and the marketplace in which they operate, the paper will now consider potential regulatory responses.

### 3.1 The Copyright Act's Anti-Circumvention Provisions

As a result of amendments enacted in 2012, the Canadian *Copyright Act* currently affords statutory protection to TPMs. More specifically, section 41 of the act implements several provisions which protect the efficacy of TPMs including, *inter alia*, provisions which (i) provide that “no person shall circumvent a technological protection measure”;<sup>58</sup> (ii) define TPMs to include “any effective technology, device or component” which either controls access to a work, or prevents the unauthorized exercise of any right which copyright owners enjoy under the *Copyright Act*;<sup>59</sup> and (iii) provide for the imposition on violators of the anti-circumvention provision of all the remedies to which copyright owners are generally entitled (injunction, damages, accounts, etc.) in the case of a breach of copyright.<sup>60</sup> These amendments were promoted by government in 2011 as necessary in order for Canada to implement the provisions of the WCCT<sup>61</sup> which Canada signed in 1997.

### 3.2 Proposed *Copyright Act* Amendment: section 41.12(1)

In response to the challenges facing short-line manufacturers as a result of TPM use, it could be argued that the existing language of section 41.12(1) already provides sufficient redress. This section of the *Copyright Act* provides that its anti-circumvention provisions do not apply to anyone “who owns a computer program ... and who circumvents a [TPM] ... for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable.”<sup>62</sup> Unfortunately, as other commentators have noted, while the “interoperability” exception has been characterized as the “most robust” of the statutory exceptions from anti-circumvention provisions,<sup>63</sup> section 41.12(1) fails to adequately address the issue for two principal reasons.

Firstly, the *Copyright Act* contains no definition of “interoperability,” and what parliament intended by the term is therefore unclear. This lack of clarity in respect of the exemption’s application renders its usefulness questionable. Rosborough notes that during the debate in connection with the passage of Bill C-11, parliamentarians often used the terms “interoperability” and “compatibility” interchangeably and suggests that this free-wheeling use of different terminology during debate and statutory drafting may have been the result of legislators’ good faith attempts at compromise, or a simple lack of appreciation for the technical nuances arising as a result of their use of one term over the other.<sup>64</sup> Rosborough has carefully considered the inadequacies of section 41.12(1)<sup>65</sup> and I will not restate his analysis here, other

than to note that he concludes that the existing interoperability exception fails to satisfactorily address the needs of the short-line industry due to (a) a lack of clarity about what terms such as “interoperability” and “computer program” mean in respect of today’s sophisticated technological equipment, and (b) the exception’s reference to the sole purpose of any excluded circumvention being “the making of one computer program interoperable with another.” While perhaps inadvertent, the language of section 41.12(1) fails to recognize short-liners’ need to access TPM-protected content which may fall outside the parameters of a “computer program,” such as proprietary cable connections, data interfaces, or electronic components or digital data which operate independently of full-liner computer programs, but for which access is essential for the ability of short-line accessories to communicate and operate with T&Cs.

For the purposes of this paper, it is sufficient to note that there is a lack of clarity around both the meaning and the parameters of important terms such as “interoperability”, “compatibility”, and “integration” and that further clarity—whether provided by parliament or the courts—would assist in a more coherent understanding of the intent and practical effect of the “interoperability” exception currently set out at section 41.12(1). Like Rosborough, this paper supports a statutory amendment to section 41.12(1) in an effort to achieve parliament’s likely intention underlying the 2012 amendments—the inclusion of the concept of compatibility along with interoperability.

Bill C-294,<sup>66</sup> a private member’s bill introduced in June 2021, is an example of a proposed legislative response to the issues discussed in this section. The bill would create an expanded interoperability exception to the anti-circumvention measures in the *Copyright Act* by way of amendment of section 41.12(1) to include in the exemption any circumvention of TPMs in order to facilitate the making of “the program or a device in which it is embedded interoperable with any other computer program, device or component.” While Bill C-294 may partially address concerns related to interoperability by addressing the interface between computer programs, devices, and components, its focus on TPMs within the domain of “computer programs” may be too narrow to capture exclusionary efforts such as proprietary data cable connections or other data interfaces. While the paper acknowledges potential arguments in favour of the applicability of Bill C-294 to non-programmatic hardware,<sup>67</sup> the success of such arguments is not a certainty. Furthermore, as mentioned further in section 3.3 of the paper, arguments attempting to shoehorn results into the provisions of Bill C-294 seem to comprise technology-specific, “band-aid”, or use-by-use

solutions where public policy would benefit from a more principled and technologically-agnostic response by government.

In any event, Bill C-294 passed third reading in the House of Commons on June 14, 2023, but is currently stalled at second reading in the Senate.<sup>68</sup> That similar efforts in approach have resulted in little, if any, progress is one reason underlying this paper's focus on competition law as an alternative mechanism for relief. That said, Section 3.4.1 below considers recent events which may suggest that the approach taken by Bill C-294 may well now enjoy a greater chance of success than previously believed.

### **3.3 Proposed Copyright Act Amendment: section 41.21(1)**

Subsection 41.21(1) and (2) of the *Copyright Act* gives the Governor in Council ("GiC") the authority to create regulations that may exempt certain TPMs (or categories thereof) from the protection afforded by section 41.1(1). Such exemptions may be made "if the [GiC] considers that the application of that section to the technological protection measure ... would unduly restrict competition in the aftermarket sector in which the technological protection measure is used."<sup>69</sup> Furthermore, in the making of any decision regarding the creation of regulations, the GiC may consider "any relevant factor" including, *inter alia*, the legal use of copyrighted material, the commercially accessibility of the content; and the possible detrimental effects of TPMs on the principle of fair dealing.<sup>70</sup> As mentioned above in this paper's consideration of existing literature, the analysis of the impact of TPMs on the ability of users to access content in order to exercise their fair use rights has been given significant attention.

The GiC's use of this regulatory authority would ensure that short-line manufacturers could access the data, programs, and operating systems of T&Cs for the legal purpose of ensuring their equipment's interoperability *and* compatibility and thus warrants further consideration particularly in light of recent events discussed below in section 3.4.1. However, grounding a response to the TPM dilemma in the regulation-making powers of the GiC leaves remediation (and the ongoing effect of remediation) entirely in the hands of the government of the day, beyond the purview of wider parliamentary consideration, debate, and decision-making. Furthermore, any remediation through section 41.21(1) and (2) of the *Copyright Act* would not address the underlying anti-competitive nature of full-line manufacturers' conduct and is therefore something of an attempt to regulate on a responsive "use-by-use" basis over remedies constructed from more principled perspectives, with wider application and effect. Finally, it is important

to highlight the inherent differences between the nature of a GiC consideration of an “undue restriction of competition in an aftermarket”, and that of a Tribunal consideration of whether a “significant lessening or prevention of competition” exists in accordance with the provisions of the Act. In the interests of transparency, accountability, and the creation of good public policy, the paper argues that the former response would be open to political considerations, pressures, and influences which should play no role in a the Tribunal’s investigative, administrative and judicial processes.

### 3.4 The “Right-to-Repair”

The contemporary “right-to-repair” movement advocates for legislation and policies that would allow consumers (and/or third-party repair professionals) to have access to the tools, parts, software, and instruction manuals which are necessary to repair electronic devices and other consumer products. Proponents argue that consumers should have the option to repair their own products or choose someone other than the manufacturer to do so, aiming to reduce costs, extend the lifespan of products, promote sustainability by reducing electronic waste, and foster a competitive repair market.<sup>71</sup> This push for reparability challenges manufacturers’ restrictive practices in respect of design elements which make third party repair more difficult, or the limiting access to electronics or repair documentation.<sup>72</sup>

Efforts to establish a right-to-repair have been underway in Canada for several years. The Canadian government, for example, prioritized the establishment of a right-to-repair through Prime Minister Justin Trudeau’s mandate letter to the Minister of Innovation, Science and Industry in 2021, which instructed the minister to (a) implement a right-to-repair for home appliances through the compulsory availability of repair manuals and spare parts from appliance manufacturers, and (b) “[amend] the *Copyright Act* to facilitate the repair of digital devices and systems”.<sup>73</sup> Notwithstanding this “prioritization” in 2021, and subject to the discussion in section 3.4.1 below, no evidence of progress on either front exists.

While mandate letters and ministerial priorities have accomplished little, Bill C-244,<sup>74</sup> a private member’s bill which would establish a right-to-repair through an amendment to the *Copyright Act* has been inching its way through the Canadian parliament. The bill’s proponents argue that its effect—which would permit the circumvention of TPMs for the purpose of product maintenance or repair—will empower consumers by facilitating the repair of their electronic devices; allow for more options for repair services; foster innovation in the repair and aftermarket sectors; enhance

competition; and make repairs more practical for individuals in remote or rural areas where authorized repair services might not be readily accessible. The success of Bill C-244 is far from assured, however, since after having received second reading in the Senate on February 27, 2024, the bill, as of the time of this writing, has not been assigned for review by committee. With the next Canadian federal election scheduled to take place no later than October 2025, the bill, may well die on the government's order paper.

While efforts in Canada to establish a right-to-repair may be instructive, this paper argues that such efforts will not sufficiently assist short-line manufacturers in responding to the challenges flowing from the use of TPMs discussed herein. This argument is the consequence of a distinction between the nature of an implement's "repair" and the facilitating of "compatibility" and "interoperability" between two separate implements.

The Oxford English Dictionary's definition for "repair" is, "an act of restoring an object or structure to good condition by replacing or fixing parts in order to maintain it in good condition."<sup>75</sup> With the limits of this definition in mind, one can understand that the work required of short-line manufacturers to ensure the interoperability or compatibility of its accessory equipment with the electronics platform of a T&C is not fully captured. Short-line manufacturers must do considerably more than simply "replace or fix a part". In fact, it is not necessary for a short-line manufacturer to repair anything, since neither its implement nor the T&C requires a replacement or a fix of any kind ... indeed both pieces of equipment are in perfect operating condition. What *is* required is beyond the concept of "repair"—the ensuring of interoperability and compatibility of two pieces of equipment which may involve the programming or reprogramming of the electronic components, the de-encryption and rewriting of computer code, or the adaptation of proprietary interfaces to facilitate communication. As a result, even if eventually enacted, traditional efforts to establish a right-to-repair would fall short of providing an effective regulatory response to the impugned use of TPMs by full-line manufacturers.<sup>76</sup>

### 3.4.1 Recent Developments

On April 17, 2024, the Liberal government tabled its federal budget. The document sets out, under a heading entitled, "Lower Costs and Fairer Treatment for Farmers," a statement of government support for amendments to the *Copyright Act* to "help achieve interoperability between devices and equipment."<sup>77</sup> Unlike the previous legislative initiatives discussed above, which were focused on the establishment of a right-to-repair, *Budget 2024*

addresses the issue discussed herein specifically, mentioning the Canadian short-line industry directly:

“Whether on the farm, on the jobsite, or in the backyard, Canadians deserve greater interoperability of the equipment they purchase—regardless of the brand. Farmers should be able to connect their John Deere Tractor or New Holland combine, to the specialized equipment they need from third parties, including short-line manufacturers, for various farming tasks.”<sup>78</sup>

Clearly, (and conveniently a mere days before the completion of this paper) the release of *Budget 2024* demonstrates that short-line manufacturers have succeeded in efforts to at least place TPM-based challenges on the table for discussion, a development which represents a considerable preliminary success. The government plans to hold consultations on the issue later in 2024, along with consultations on amendments relating to the right-to-repair. Whether the current piquing of government interest in the issue will result in practical relief for short-line manufactures via amendments to the *Copyright Act* will be determined over the coming consultative processes. However, the acknowledgement of the issue by the federal government in *Budget 2024* has clearly “moved the needle”, perhaps increasing the chances of relief being realized through legislative amendment of Canadian copyright law. Having considered strategies to address the regulatory issue through copyright law, the paper will move on to a consideration of responses based in Canadian competition law.

## **4. Consideration of Regulatory Responses Under Competition Law**

While there has been a cursory examination of the relevance of Canadian competition law to the central issue of this paper,<sup>79</sup> the following sections of the paper will more carefully consider the potential use of the *Competition Act* as the medium for an effective regulatory response.

### **4.1 Preliminary Considerations:**

#### **4.1.1 The Purpose(s) of the Competition Act**

Before turning to the specifics of a proposed application to the Tribunal, the paper will first consider the *Competition Act's* provisions setting out its legislative purpose. Section 1.1, states:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation

in world markets while at the same time recognizing the role of foreign competition in Canada, *in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy* and in order to provide consumers with competitive prices and product choices.<sup>80</sup> [Emphasis added.]

The primary purpose of the *Competition Act*—the maintenance and encouragement of competition for the provision of competitive prices and product choices—is perhaps unsurprising to anyone reading this section. However, the act’s reference to a specific sector of Canadian market participants—“small and medium-sized enterprises” (“SMEs”)—may go unnoticed or under-appreciated, and its inclusion is particularly pertinent to the considerations contained in this paper.<sup>81</sup>

In his 2021 treatise entitled “Canadian Competition Law and Policy,” John Tyhurst considers the origins of the reference to small and medium size enterprises in the *Competition Act’s* statement of purposes. In noting that the act’s *central* purpose is the promotion of economic efficiency, Tyhurst characterized the reference to SMEs as one in a “cluster of objectives” which are concerned with the distribution of wealth and concern for economic power/business equity. These so-called “lesser objectives”<sup>82</sup> have, according to Tyhurst, played a diminishing role as Canadian competition law has evolved, yet he points out that they remain “part of [the *Competition Act’s*] fabric, content, and context.”<sup>83</sup> Tyhurst references several decisions by the Tribunal which, over time, have given statutory weight to the act’s explicit mention of SMEs interests in the list of purposes<sup>84</sup> noting that the promotion of small businesses’ participation in markets can increase competition and promote competitive prices and choices for consumers. Support for the furtherance of SMEs’ interests through the *Competition Act* is not universally held, however. Both Tyhurst<sup>85</sup> and competition law scholar Edward Iacobucci<sup>86</sup> have questioned the relevance of the *Competition Act’s* reference to the consideration of SMEs as an explicit purpose of the legislation. As per Iacobucci, “It is ... not clear why concern for small and medium-sized businesses *per se* is included as a motivation for the Act in s. 1.1. SMEs are clearly essential to the Canadian economy, but it does not necessarily follow that competition policy should seek to promote their well-being.”<sup>87</sup>

Regardless, in the context of this discussion, until such time as parliament amends the *Competition Act* to remove its current reference to the ensuring of an opportunity for SMEs to participate in the Canadian economy, the courts and the Tribunal must afford the reference an appropriate degree of interpretive consideration. While not suggesting that any one of

the Act's statutory purposes should supersede the effect of its provisions, it is appropriate for courts and tribunals, consistent with the "rule against surplusage",<sup>88</sup> to strive to give meaning to every provision, thus avoiding legislative interpretations rendering any clause redundant in the course of the Act's interpretation and application.

#### 4.1.2 The Definition of Market

A market's definition for purposes of competition law is the starting point for any analysis regarding competitive behaviour and regulatory oversight.<sup>89</sup> Market definition provides a framework for understanding and evaluating how businesses interact in the marketplace and the impact of their actions on other competitors and consumers.<sup>90</sup> A relevant market typically encompasses two components: the "product market" and the "geographic market." "Product market" refers to the range of products or services considered substitutable by the consumer based on characteristics, prices, and intended use; and "geographic market" defines the area in which companies compete for customers.<sup>91</sup> Defining a product market helps determine which products or services compete against each other, while defining a geographic market (ex. local, national, or international) helps define the area in which companies compete. This preliminary definition of the market helps assess the market power of a company, that is, the ability to significantly control prices, exclude competitors, or behave independently of competitive pressures.<sup>92</sup> A well-defined market is crucial to identify if a company holds a dominant position and if it abuses that position.

In *Canada (Commissioner of Competition) v. Vancouver Airport Authority*<sup>93</sup>, the Canada Competition Tribunal meticulously evaluated several key factors in determining both the product and geographic markets, which were essential for assessing the alleged anti-competitive conduct. For the product market, the Tribunal applied the hypothetical monopolist test to ascertain whether airside access and galley handling services could be deemed distinct markets, focusing on the unique role of these services in the logistics of loading and unloading aircraft. The Tribunal also considered the possibility of functional substitution, examining whether airlines could self-supply or use double catering as viable alternatives to the services offered at Vancouver International Airport (YVR). Additionally, the demand characteristics, particularly the airlines' need for local and timely service delivery, were critical in defining these services as a distinct product market. In determining the geographic market, the Tribunal concluded that it should be confined to YVR, given the necessity of local airside access and the significant barriers to entry, including regulatory and operational requirements

controlled exclusively by the Vancouver Airport Authority. The Tribunal also considered whether practices such as double catering and self-supply could extend the geographic market beyond YVR but found them insufficient to replace the services provided locally. Consequently, the Tribunal identified the relevant markets as the Airside Access Market and the Galley Handling Market at YVR, supporting the analysis of the competition issues within this specific context.

In the context of this paper's subject, where full-line manufacturers introduce TPMs that inhibit the functionality of short-line manufacturers' equipment, the Tribunal's analysis would require a nuanced approach distinct from that applied in the *Vancouver Airport Authority* case. The Tribunal would first need to consider the specific nature of agricultural equipment, distinguishing between full-line products, such as tractors and combines, and the complementary or specialized tools produced by short-line manufacturers. This analysis would focus on whether the short-line equipment constitutes a separate product market or merely complements the broader market dominated by full-line manufacturers. The introduction of TPMs could effectively result in the bifurcation of the market, creating a distinct market for TPM-compatible equipment and another for independent, non-protected products.

The Tribunal would also likely assess the substitutability of short-line products for those offered by full-line manufacturers. If TPMs significantly diminish the substitutability of short-line products—such as attachments or software—the Tribunal might recognize separate product markets for TPM-protected versus non-protected equipment. The hypothetical monopolist test could be applied to determine if a full-line manufacturer could profitably impose a price increase on TPM-protected equipment without losing customers to short-line manufacturers. If TPMs effectively lock customers into a specific manufacturer's ecosystem, this would indicate the existence of a distinct market for such TPM-protected equipment.

Geographically, the Tribunal would examine the market reach and distribution of both full-line and short-line manufacturers, acknowledging that agricultural equipment markets often span regional, national, or international boundaries. TPMs could introduce significant barriers to entry for short-line manufacturers, potentially limiting their ability to compete in broader markets or confining them to regions where TPM restrictions are less impactful. The analysis would determine whether the effects of TPMs are consistent across various regions or whether they vary, potentially leading to different geographic market definitions.

In terms of anti-competitive effects, the Tribunal would scrutinize whether the use of TPMs constitutes exclusionary conduct by full-line manufacturers, with the potential to foreclose competition from short-line manufacturers. This would involve evaluating whether TPMs substantially lessen or prevent competition by restricting market access or reducing product variety. Additionally, the Tribunal would assess the impact of TPMs on innovation, considering whether these restrictions diminish incentives for both full-line and short-line manufacturers to innovate, akin to the non-price effects analyzed in the Vancouver Airport case.

Finally, the Tribunal would weigh the business justifications for TPMs, such as claims of necessity for product safety, interoperability, or intellectual property protection, against their potential anti-competitive effects. The analysis would involve a detailed evaluation of whether TPMs primarily serve legitimate business purposes or if they are predominantly tools for excluding competition. This framework would mirror the approach used in the Vancouver Airport case but would be specifically tailored to the dynamics of the agricultural equipment industry and the role of TPMs in shaping market competition.

Notwithstanding the foregoing analysis based on the considerations made in *Vancouver Airport Authority*, this paper raises the possibility that the current approach to market definition, which centers on identifying substitutable products, evaluating cross-elasticity of demand, and applying the hypothetical monopolist test, may prove inadequate in the context of TPMs. The traditional framework assumes that consumers can freely choose among competing and/or complementary products based on factors such as price, quality, and availability, which allows for a straightforward delineation of market boundaries. However, TPMs introduce complexities that disrupt these assumptions, challenging the efficacy of traditional methodologies.

TPMs inherently create barriers that restrict consumer choice and limit interoperability between products from different manufacturers. These measures can compel consumers to remain within a specific product ecosystem, thereby altering the competitive dynamics of the market. As a result, the conventional emphasis on product substitutability may fall short in accurately defining the market, as TPMs shape market boundaries based on the strategic decisions of the firm implementing them rather than on consumer preferences or product characteristics. The presence of TPMs renders once-complementary short-liner products non-complementary, and leads to the formation of what might be termed “artificial” market boundaries. In such a market, the competitive landscape is dictated not by open competition

but by the constraints imposed by TPMs, effectively excluding otherwise substitutable or complementary products from the market definition. Traditional market definition approaches may overlook the extent to which TPMs distort market structures, as they do not fully account for the market-transforming restrictions on competition imposed by these measures.

Moreover, TPMs can significantly impact innovation and market entry by enhancing the market power of the firms that deploy them. This, in turn, may stifle innovation and deter new competitors from entering the market. The conventional framework for market definition might fail to capture the reduction in competition and innovation within a TPM-locked ecosystem, as it is primarily designed to assess open and competitive markets.

The Tribunal's traditional approach to market definition may therefore not adequately address the complexities introduced by TPMs. There may well be a need for a more refined approach that considers how TPMs alter market structures, constrain consumer choice, and create ecosystems where competition is artificially limited. Such an approach may better assist with the accurate assessment of the competitive effects of TPMs and ensuring that competition law effectively addresses the challenges posed by these technological measures.

While defining a market is not an exact science<sup>94</sup> and it is not necessary to define the product and geographic dimensions of a market with absolute precision,<sup>95</sup> the fact that the Canadian T&C market is comprised entirely of products manufactured by four companies<sup>96</sup> is evidence of full-line manufacturers' industry dominance of the agricultural T&C market and, thus for the reasons discussed above, the entirety of the Canadian agricultural equipment market. Having concluded that full-line manufacturers currently hold a dominant position in the Canadian agricultural equipment market, the paper will discuss the nature of the recommended applications.

## 4.2 Discussion of Regulatory Response

This paper argues that commencement of an application by the Commissioner seeking an order by the Tribunal prohibiting full-liners' continued use of TPMs in a manner which restricts or prohibits short-line manufacturer's participation in the agricultural equipment market would constitute an appropriate and effective regulatory response. The proposed application would be advanced under two claims, namely (i) an application under section 77 (Exclusive Dealing and Tied Selling)<sup>97</sup>; and (ii) an application under sections 78 and 79 (Abuse of Dominant Position).<sup>98</sup> In the context of the proposed application, it is important to recognize that the

Tribunal's order in favour of either claim requires its first having found that the impugned TPM use by full-line manufacturers results in a "substantial lessening or prevention of competition",<sup>99</sup> a question that will be addressed below.

#### 4.2.1 Application Under Section 77—Exclusive Dealing and Tied Selling

The effects of the employment of TPMs by full-line manufacturers of T&Cs support arguments that the practice constitutes conduct in violation of prohibitions against "exclusive dealing"<sup>100</sup> and "tied selling".<sup>101</sup> A farmer's decision to purchase a TPM-enabled tractor from John Deere is subject implicitly, if not explicitly, to the condition that she "deal only or primarily in products supplied by or designated by"<sup>102</sup> John Deere going forward. Failure to comply with this condition will result in the farmer's purchase of accessory equipment which cannot operate in conjunction with her John Deere tractor. This result is evidence of a condition of exclusivity imposed as a result of full-line manufacturer's conduct. A similar example can illustrate engagement in tied selling. The implicit or explicit condition applicable to a farmer's purchase of a John Deere X9 combine (defined as the "tying product" under section 77(1)) requires that any accessory equipment must also be manufactured by John Deere. The farmer must, from a practical (if not legal) perspective, refrain "from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier".<sup>103</sup>

This paper argues that through the imposing of explicit or implicit conditions, full-line manufacturers (the "major suppliers" of agricultural equipment and, arguably, the "exclusive suppliers" of T&Cs) (a) are impeding short-liners' entry into, or expansion in, the market, (b) are impeding short-liners' introduction of products or the expansion of the sale of such products in the market, and (c) will ultimately exclude short-liners entirely from participation in the agricultural equipment market by virtue of their products being rendered inoperable. The effect of full-line manufacturers' use of TPMs will (or likely will) substantially lessen competition and such conduct justifies an order by the Tribunal prohibiting the continued engagement in such exclusive dealing and tied selling. Pursuant to section 77(2), the Tribunal's order may also contain "any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market,"<sup>104</sup> a possibility which is briefly touched on in the paper's recommendations below.

## 4.2.2 Application Under Sections 78 & 79—Abuse of Dominant Position

Prior to the December 2023 amendments to the *Competition Act*, an abuse of a dominant position occurred when a dominant firm (or group of firms) engaged in an intentional practice of anti-competitive acts, with the effect of substantially lessening or preventing competition. The legislation required proving all three elements: dominance, anti-competitive intent, and anti-competitive effect. Following the December 2023 amendments, however, (a) the Tribunal may now make a prohibition order against a dominant firm (or group) if their conduct meets *either* the anti-competitive intent or the anti-competitive effect requirement, thus permitting an order by the Tribunal where conduct either subverts competition or was intended to do so;<sup>105</sup> and (b) a potential abuse of dominance is no longer limited to “anti-competitive acts” (i.e. one of the anti-competitive acts set out in the non-exhaustive list contained in section 78(1) (a)-(k));<sup>106</sup> but now may include any conduct that had, is having, or is likely to have a substantial anti-competitive effect in a market (i.e. conduct which has or is likely to have an effect which prevents or lessens competition in a market),<sup>107</sup> where such effect is not a result of “superior competitive performance”.<sup>108</sup>

### 4.2.2.1 Do full-line manufacturers exhibit dominance in the Canadian agricultural equipment market?

This paper argues that the full-line manufacturers of Canadian agricultural equipment enjoy a position of dominance in the market. While a limited amount of available market share research focuses on the agricultural equipment market as a whole in Canada, the data’s categorisation and presentation makes it difficult to determine the market share of individual T&C manufacturers on a national basis. That said, this paper argues that the following three data points—while not precisely on point, together provide convincing circumstantial evidence of the dominance of full-line manufacturers in the Canadian agricultural equipment market. Firstly, research conducted by IBISWorld in late 2023 found that five full-line manufacturers (John Deere (46.0%), CNH Global NV (17.3%), AGCO Corporation (9.1%), MTD Products Inc. (3.3%) and CLAAS KGaA mbH (2.6%)) together enjoyed a combined market share of more than 78% of the American agricultural equipment market.<sup>109</sup> Without a domestic Canadian full-line manufacturer, and in light of the close integration of the Canadian and American markets in general, one might reasonably expect that agricultural equipment market share numbers in Canada would be credibly consistent with those of the United States. Secondly, the Canadian

counterpart to the IBISWorld study of the American market revealed that “[m]ost of the major Canadian agricultural machinery manufacturers are based abroad,” and that among those based in Canada, Buhler Industries Inc. held the largest share of the Canadian manufacturing market, with 2.3% of the total 2023 market.<sup>110</sup> It follows that there are no domestic equipment manufacturers which could uniquely influence the Canadian market, which supports the assumption that the above-referenced statistics on market dominance in the United States are applicable, generally, to Canada.

#### 4.2.2.2 Does the use of TPMs in tractors and combine harvesters constitute an abuse of a dominant position under section 79?

Considering the December 2023 amendments to the *Competition Act*, the use of TPMs by full-line manufacturers constitutes abuse of a dominant position, whether as anti-competitive acts under section 79(1)(a) or as conduct resulting in a substantial lessening or prevention of competition under section 79(1)(b), without reliance on superior competitive performance.

Firstly, in respect of section 79(1)(a), it is important to note that the list of anti-competitive acts prescribed in section 78(1) is non-exhaustive.<sup>111</sup> If the Commissioner were to determine a strategic advantage in proceeding under section 78(1),<sup>112</sup> one could foresee her argument that TPM use has a “predatory, exclusionary or disciplinary negative effect on a competitor, or ... an adverse effect on competition” in a manner analogous to the acts explicitly prescribed by section 78(1). Beyond the making of analogous arguments, the conduct prescribed by 78(1)(g) (i.e. the “adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market”) seems sufficiently wide to capture the effect of TPMs such as digital locks, encrypted software, and proprietary data or power connectors as discussed in section 2.3 above.

Secondly, in respect of section 79(1)(b) and its determination as to whether the conduct in issue results in a substantial lessening or prevention of competition, the Tribunal is provided some assistance in the form of considerations under section 79(4). A brief review of these conditions will lead, I argue, to the conclusion by the Tribunal that full-line manufacturers’ actions result in undesired consequences through:

- a) the raising of market barriers to entry, such as increased costs for short-line manufacturers in research and development, product design, security, and servicing to ensure compatibility with full-line

manufacturers' T&Cs. These costs would be incurred in respect of technical design, engineering, licensing or access fees demanded by full-line manufacturers for T&C data access, and the need to eschew agreements with manufacturers of the most popular T&Cs—entering into agreements with less popular T&C manufacturers—which limits short-line manufacturers' access to the broader equipment market. The use of TPMs by full-line manufacturers will also enable them to secure exclusive benefits from related network effects. By introducing TPMs, full-liners can create a closed ecosystem where their machinery, software, and services are tightly integrated, ensuring that only authorized accessories, tools, and parts function with their equipment. As more farmers adopt their equipment, the value of this ecosystem increases, driving additional users to choose their products to gain access to the enhanced functionality and seamless compatibility that the TPM-protected network offers. This, in turn, reinforces full-line manufacturers' market dominance, as the cost and inconvenience of switching to a short-line's brand outside this protected network become prohibitively high for customers. Consequently, the positive feedback loop generated by these network effects can lead to full-liner's higher customer retention, increased market share, and the ability to set higher prices, all while limiting competition from third-party suppliers and short-line manufacturers;

- b) the significant reduction in product variety on the market, particularly affecting short-line manufacturers. TPMs create barriers that prevent third-party manufacturers from producing compatible or competing products, thereby limiting the ability of short-line manufacturers to offer alternative tools, accessories, or parts that work with the dominant equipment. As a result, the market experiences a decrease in product diversity, as farmers are forced to rely solely on the offerings of the full-line manufacturers who control the TPM-protected ecosystem. This reduction in product variety constitutes a non-price effect that can substantially lessen or prevent competition, as consumers are left with fewer choices and less innovation in the market. The diminished availability of alternatives stifles competitive dynamics, ultimately harming consumer welfare by reducing the ability to choose products that best meet their specific needs; and
- c) the significant reduction in product innovation by restricting access to underlying technology and ensuring that only authorized parts, tools, or software can interface with their equipment, TPMs effectively block third-party competitors from entering the market or offering

alternative solutions. This anti-competitive control discourages innovation from both within full-line manufacturers and from short-line manufacturers, as the incentive to improve or create competing products diminishes in the absence of robust market competition. When competition is stifled, there is less pressure on full-line manufacturers to innovate, leading to a stagnation in product development and technological advancement. Consumers are ultimately disadvantaged, as they are deprived of potentially superior, more efficient, or more cost-effective alternatives that might have emerged in a more competitive environment. Thus, TPMs, while protecting proprietary interests, can contribute to a broader decline in innovation across the industry.

The above considerations—the erection of market barriers, the reduction in product variety, and the reduction in product innovation all support the Tribunal’s conclusion that TPM use by full-line manufacturers results in a substantial lessening or prevention of competition, thus justifying an order in support of the Commissioner’s application.

Before moving on, a reference to the Tribunal’s analysis of “substitution” and “diversion” patterns is warranted. In the context of its abuse of dominance analysis, the Tribunal will consider whether actions (i.e. the imposition of TPMs) by dominant firms (i.e. full-line manufacturers) hinder competition by affecting substitution patterns or causing a diversion of sales. Here, “substitution” refers to the degree to which farmers are able to switch from one agricultural product to another in response to changes in price or market conditions (i.e. the imposition of TPMs), and “diversion” refers to the shift of sales or market share from one product to another due to the imposition of competitive actions (i.e. the imposition of TPMs). In fact that the imposition of TPMs results in the exclusion of short-line manufacturers from the equipment marketplace entirely, rendering this analysis relatively straightforward. The introduction of TPMs and the resulting inability of short-line manufacturers’ products to operate with full-liner T&Cs eliminates farmers’ ability to substitute a Competing Product for a similar full-liner product entirely—thus rendering substitution impossible. While technically not “substitution” given that full-line manufacturers do not offer competing equipment to the market, short-liners’ ability to sell Original Products is also eliminated on account of such products’ lack of interoperability. TPMs maximize “diversion”—in fact TPMS do more than maximize—they force the complete diversion of farmers’ purchasing decisions from short-line manufacturers’ equipment to their full-line counterparts’ equipment.

#### 4.2.2.3 Are the competitive impacts of TPM use in tractors and combine harvesters the result of superior competitive performance?

Since the December 2023 amendments to the *Competition Act*, any conduct by dominant firms that significantly reduces competition may violate section 79, unless it can be attributed to “superior competitive performance.”<sup>113</sup> Full-line manufacturers may well argue in that context that their use of TPMs facilitates their ability to offer products which advance interests such as product safety and efficiency, and customer convenience through product customization and personalization. Aside from the fact that these benefits, to the extent they can be shown to exist, result from the leveraging by full-line manufacturers of the network effects discussed above, historical market data (and common sense) does not support the argument that it is their products’ superior performance—and not the exclusionary effects of TPMs—which underlies any reduction or elimination of short-line manufacturers’ share of the agricultural equipment market.

For decades, short-line manufacturers consistently secured and retained market share in respect of their Competing Products and Original Products. This history of short-line manufacturer success was achieved despite the various commercial advantages enjoyed by their full-line counterparts such as (a) the ability to offer purchase price discounts when T&Cs are bundled with same-brand accessories, or (b) price or non-price efficiencies resulting from full-liner’s ability to consolidate customer’s maintenance, servicing, and parts needs via one-stop-shopping by the manufacturer of their T&Cs. Notwithstanding these commercial advantages, short-line manufacturers have carved out successful businesses for years. The suggestion that a reduction in short-liner market share for Competing Products is due to the sudden achievement of product superiority by full-line manufacturers beggars belief—particularly given the curious fact that such a reduction in market share would occur contemporaneously with the introduction of TPMs. Of course, where Original Products are concerned, the absence of any competitive presence by full-line manufacturers renders moot a full-liner suggestion that it is “product superiority” that has resulted in short-line manufacturers’ sudden inability to sell their Original Products. In this context, the exclusionary effect of TPMs is laid bare.

Beyond the foregoing, arguments raised by full-line manufacturers supporting the exclusion of competitors from access to data seem counter to the proposition that product safety and efficiency are universal societal goals, and that competition policy should be designed, interpreted, and applied

to encourage the innovation of products which maximize safe and efficient products across industries. Excluding segments of the agricultural equipment manufacturing industry from such data contradicts the *Competition Act's* objectives, especially when one considers the explicit reference to the ensuring of equitable opportunities for small and medium-sized enterprises in the national economy.

#### 4.2.3 Pro-Competitive Rationales for TPMs

Any discussion on regulatory responses to the use of TPMs must consider the pro-competitive arguments that are often raised in their defence. Proponents contend that TPMs are vital for protecting the fruits of innovation, enabling companies to secure returns on their investments in research and development. By ensuring that these innovations are safeguarded from unauthorized use, TPMs are believed to incentivize further technological advancements, driving continuous innovation that benefits the innovators, the market, and consumers alike. However, while the role of TPMs in fostering innovation is a compelling argument, it must be critically examined against the potential risks of misuse—risks that can lead to reduced competition, restricted market access, and ultimately, a stifling of the very innovation which proponents contend that these measures promote.

These pro-competitive arguments can oversimplify the relationship between innovation, investment, and competition. While it is undeniable that companies must protect their intellectual property to secure returns on investment, the broad application of TPMs can have unintended consequences that stifle competition and innovation rather than foster it. As demonstrated in the agricultural equipment industry, the use of TPMs by dominant full-line manufacturers like John Deere has led to significant market distortions. By employing TPMs that prevent interoperability with third-party or short-line manufacturers' products, these companies effectively lock out competitors, consolidating their market power and reducing the incentive for other players to innovate.

This anti-competitive behaviour, justified under the guise of protecting innovation (and profits), undermines the competitive landscape that is crucial for long-term technological advancement. Innovation thrives in environments where multiple entities can build upon existing technologies, offering improvements and alternatives that drive the industry forward. The overuse of TPMs, however, restricts this collaborative potential, leading to a market where only the largest players with the most extensive resources can survive. This not only limits consumer choice but also hinders the overall

pace of innovation by reducing the diversity of ideas and solutions that smaller, more agile companies can bring to the table.

Therefore, while the protection of intellectual property is necessary to some extent, it must be carefully balanced with the need to maintain a competitive market. By promoting interoperability and preventing the abuse of dominant positions, regulators can create an environment where innovation is both protected and encouraged across the entire industry, rather than concentrated in the hands of a few dominant players where they are used as tools for anti-competitive behaviour.

## **5. Recommendations**

### **5.1 Recommendation 1:**

That the Commissioner file an application under section 77(2) of the *Competition Act* seeking an order against full-line manufacturers of T&Cs that their employment of TPMs constitutes exclusive dealing and tied selling and is subject to an injunction against any further such use, together with such “other requirement that, in [the Tribunal’s] opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.”<sup>114</sup>

### **5.2 Recommendation 2:**

That the Commissioner file an application under section 79(1) of the *Competition Act* seeking an order against full-line manufacturers of T&Cs that their employment of TPMs constitutes an abuse of a dominant position in the agricultural equipment manufacturing industry and is subject to an injunction against any further such use, together with an order that full-line manufacturers take such additional action as the Tribunal considers “reasonable and necessary to overcome the effects of the practice in the market.”<sup>115</sup>

Regarding both recommendations, sections 77(2) and 79(1) empower the Tribunal to include “additional terms necessary to restore or stimulate competition in the market” in its decision. Examples of such terms could entail: (a) requiring full-line manufacturers to adhere to international standards for product design to enhance interoperability, (b) mandating the use of “open design architecture” and “open standards” for data interoperability, and (c) facilitating information exchange between full-line and short-line manufacturers through the Ministry of Innovation, Science, and Industry.

## 6. WIPO and USMCA Considerations

### 6.1 WIPO Considerations

While many WIPO signatories enforce restrictions on the bypassing of TPMs, Canada's 2012 amendments to the *Copyright Act* established strict protections of both access and use controls<sup>116</sup> which exceed the provisions of the WCT and surpass those of other WCT member countries. For example, France has adopted a system which creates a digital rights authority focused on promoting interoperability; U.S. law mandates legislative reviews by the Library of Congress to determine whether current anti-circumvention exceptions in the *Digital Millennium Copyright Act*<sup>117</sup> remain appropriate and whether new exceptions are warranted; and on March 22, 2023, the European Commission proposed a directive establishing consumer rights to demand repairs.<sup>118</sup> While the regulation of TPMs is required under the WCT, these global responses illustrate that the signing of the WCT does not preclude sensible reforms.

### 6.2 USMCA Considerations

Amending the *Copyright Act* provisions related to TPMs must be carried out within the framework of Section 20.66(4) of the Agreement between the United States of America, the United Mexican States, and Canada (the "USMCA")<sup>119</sup> which sets out permissible exceptions or limitations to the parties' obligations with respect to the protection of TPMs. The government's options in this regard were considered in a 2021 consultation<sup>120</sup> which concluded that desired changes could be implemented by regulation by the GiC under either of two *Copyright Act* provisions, namely (1) if, under subsection 41.21(1), the GiC considers that the undue restriction of competition in the aftermarket sector will result; or if, under subsection 41.21(2), a TPM could adversely affect the market for the work. Section 41.21(2) also permits the GiC to make associated regulations to require the owner of the copyright in a work protected by a TPM to provide access to the work, and to "prescribe the manner in which, and the time within which, access is to be provided, as well as any conditions that the owner of the copyright is to comply with."<sup>121</sup> Clearly Canada is not prevented by law from the implementation of reasonable restrictions on the existing use of TPMs. What is required, however, is the political will.

## 7. Conclusion

This paper recommends that the Commissioner make applications under sections 77(2) and 79(1) of the *Competition Act* seeking orders from the

Tribunal that current use of TPMs by full-line manufacturers of T&Cs results in a substantial prevention or lessening of competition in the agricultural equipment industry. The commencement of applications is an appropriate regulatory response to the employment of TPMs which further the commercial interests of full-liners at the expense of a competitive market. The paper recognizes that although previous attempts to amend the *Copyright Act* have failed, the federal government's recent support for these amendments might offer a new regulatory solution. Nonetheless, the recommendations concerning the *Competition Act* still stand as viable alternative responses to the issue.

## ENDNOTES

- <sup>1</sup> Nilay Patel, [John Deere turned tractors into computers—what’s next?](https://www.theverge.com/22533735/johndeere-cto-hindman-decoder-interview-right-to-repair-tractors) (15 June 2021) The Verge, online: <<https://www.theverge.com/22533735/johndeere-cto-hindman-decoder-interview-right-to-repair-tractors>> [<https://perma.cc/9TEC-7BW2>].
- <sup>2</sup> “Full-line manufacturers,” as used herein are defined in section 2.1 below.
- <sup>3</sup> *Competition Act*, RSC 1985, c C-34, s 79(1).
- <sup>4</sup> *Competition Act*, *supra* note 3 at s 77(2).
- <sup>5</sup> “Short-line manufacturers,” as used herein are defined in section 2.1 below.
- <sup>6</sup> *United States v Apple Inc.*, No. 24-cv-00123 (N.D. Cal. 2024) (Smartphone Market Monopolization Case), *Federal Trade Commission et al v Amazon.com, Inc.*, No. 2:23-cv-01338 (W.D. Wash. 2023) (Online Retail Monopoly Case), *United States v Google LLC*, No. 20-cv-03010 (D.D.C. 2024) (Search Engine Monopoly Case), *United States v Google LLC*, No. 21-cv-06841 (E.D. Va. 2024) (Ad Tech Practices Case), *Federal Trade Commission v Meta Platforms, Inc.*, No. 21-cv-05837 (D.D.C. 2021) (Social Media Monopoly Case).
- <sup>7</sup> *Copyright Act*, RSC 1985, c C-42.
- <sup>8</sup> *Competition Act*, *supra* note 3.
- <sup>9</sup> *WIPO Copyright Treaty*, 20 December 1996, [1996] 2186 UNTS 303.
- <sup>10</sup> Agreement between the United States of America, the United Mexican States, and Canada [USMCA], 30 November 2018, online: USTR <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.
- <sup>11</sup> E Jakku et al, “If they don’t tell us what they do with it, why would we trust them? Trust, transparency and benefit-sharing in Smart Farming.” (2018) 90-91:1 NJAS—Wageningen. *Journal of Life Sciences* 1-13.
- <sup>12</sup> Peter WB Phillips et al, “Configuring the new digital landscape in western Canadian agriculture, (2019) 90-91:1 NJAS: Wageningen *Journal of Life Sciences* 1-11.
- <sup>13</sup> Peter Phillips et al, “Configuring the new digital landscape in western Canadian agriculture”, *supra* note 12 at 7.
- <sup>14</sup> K. Wiens, “We Can’t Let John Deere Destroy the Very Ideal of Ownership, (2015) *Wired* 1-13, and L Sydell, “DIY Tractor Repair Runs Afoul of Copyright Law” (2015) *Privacy & Security*, online (audio file): <http://www.npr.org/ssections/alltechconsidered/>.
- <sup>15</sup> Peter Phillips et al, “Configuring the new digital landscape in western Canadian agriculture”, *supra*, note 12 at 7.
- <sup>16</sup> Sarah Hackfort, “Patterns of Inequalities in Digital Agriculture: A Systematic Literature Review.” (2021) *13 Sustainability*, 12345.
- <sup>17</sup> Michael Geist, “Fixing Fair Dealing for the Digital Age: What Lies Behind the Copyright Review’s Most Important Recommendation” (2019) online (blog): <https://www.michaelgeist.ca/2019/06/fixing-fair-dealing/>.
- <sup>18</sup> Anthony D. Rosborough, “Toward a Canadian Right-to-repair: Opportunities and Challenges” (2022) 37:3 *Berkeley Technology Law Journal*



- <sup>35</sup> Western Economic Diversification Canada, “Interoperability: An overview with a Western perspective” (5 February, 2021) at 6.
- <sup>36</sup> This sector is categorized under Code 33311 of the North American Industry Categorization System. While foreign-based full-line manufacturers do have operations within Canada, the *domestic* manufacturing industry is comprised entirely of enterprises best characterized as “short-line manufacturers”.
- <sup>37</sup> Government of Canada, “Agricultural implement manufacturing - 33311 - Manufacturing - Canadian Industry Statistics - Innovation, Science and Economic Development Canada”, online: <<https://ised-isde.canada.ca/app/ixb/cis/manufacturing-fabrication/33311>>.
- <sup>38</sup> Rosborough, “The Serious Hidden Problem Facing Canada’s Agricultural Innovators”, *supra* note 33.
- <sup>39</sup> Rosborough, “The Serious Hidden Problem Facing Canada’s Agricultural Innovators” *supra* note 33.
- <sup>40</sup> Pierre C Robert, “Precision Agriculture: An Informative Revolution In Agriculture” (1999) IDEAS Working Paper Series from RePEc, online: <https://search.proquest.com/docview/1697555679?pq-origsite=primo>.
- <sup>41</sup> Robert, “Precision Agriculture: An Informative Revolution In Agriculture”, *supra* note 40.
- <sup>42</sup> Dalton Erickson, “An Evaluation of Tractors Tested at The Nebraska Tractor Test Lab and the Effect of EPA Emission Standards Based Upon Average PTO Horsepower and Fuel Efficiency”, (14 March 2022) (B.A. Honours Theses, University of Nebraska - Lincoln) (on file with the Digital Commons, University of Nebraska-Lincoln).
- <sup>43</sup> *WIPO Copyright Treaty*, art 12, *supra* note 9.
- <sup>44</sup> *WIPO Performances and Phonograms Treaty*, art 18, 20 December 1996, [1996] 2186 UNTS 203.
- <sup>45</sup> Cameron, “Competition Policy and Canada’s New Breed of ‘Copyright’ Law”, *supra* note 21 at 300.
- <sup>46</sup> Cameron, “Competition Policy and Canada’s New Breed of ‘Copyright’ Law”, *supra* note 21 at 300.
- <sup>47</sup> Ryan Iwahashi, “How to Circumvent Technological Protection Measures Without Violating the DMCA: An Examination of Technological Protection Measures Under Current Legal Standards” (2011) 26:1 Berkeley Technology Law Journal 491–526, online: <<https://www.jstor.org/stable/26377545>>.
- <sup>48</sup> Jennifer Blair, “Canada’s Short Line Equipment Makers on the Cutting Edge” (17 September 2018), online: <https://www.albertafarmexpress.ca/news/canadas-short-line-equipment-makers-on-the-cutting-edge/>.
- <sup>49</sup> The founding members of the AEF included the world’s largest agricultural equipment manufacturers - AGCO, CLAAS, CNHi, John Deere, and Kubota/Kverneland, Kuhn.
- <sup>50</sup> “AEF Online - About the AEF”, online: <<https://www.aef-online.org/about-us/about-the-aef.html#/About>>.
- <sup>51</sup> “AEF Online - About the AEF”, *supra* note 50.
- <sup>52</sup> “Tractor Implement Management (TIM): The Implement Controls

the Tractor” (last visited 19 March 2021), online: <https://www.aef-online.org/about-us/activities/tractor-implement-management-tim.html>.

<sup>53</sup> Anthony Rosborough, “Unscrewing the Future: The Right-to-repair and the Circumvention of Software TPMs in the EU” (2020) 11:3 J. Intellectual Property, Information Technology and E-Commerce L. 26 at para 24.

<sup>54</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It,” *supra* note 18.

<sup>55</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It”, *supra* note 18 at 149.

<sup>56</sup> Rosborough, “The Serious Hidden Problem Facing Canada’s Agricultural Innovators”, *supra* note 33.

<sup>57</sup> World Intellectual Property Organization, WIPO Doc, “Chapter 3: Branding, Innovation and Competition” at 127, online: <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_944\\_2013-chapter3.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2013-chapter3.pdf)>.

<sup>58</sup> *Copyright Act*, *supra* note 6 at s 41.1(1).

<sup>59</sup> *Copyright Act*, *supra* note 6 at s 41.

<sup>60</sup> *Copyright Act*, *supra* note 6 at s 41.1(2).

<sup>61</sup> *WIPO Copyright Treaty*, *supra* note 9.

<sup>62</sup> *Copyright Act*, *supra* note 6 at s 41.12(1).

<sup>63</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It”, *supra* note 18 at 158.

<sup>64</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It”, *supra* note 18 at 158.

<sup>65</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It”, *supra* note 18.

<sup>66</sup> *An Act to amend the Copyright Act (interoperability)*, Bill C-294, 1st Sess, 44th Parl, 2023.

<sup>67</sup> The argument would presumably require a court to determine that non-programmatic elements such as proprietary data connections (for example) fall within the definition of “technological protection measure” pursuant to section 41 of the *Copyright Act* (Canada). The definition includes any “effective technology, device or component” that controls access to a “work”; and restricts the exercise of rights thereto. If successful on this preliminary issue, one could thereafter argue that the creation and installation of an adapter for a proprietary connector, while constituting a “circumvention” under section 41 (“descrambling, avoiding, bypassing, removing, deactivating, or impairing of a [TPM]”), the amendments proposed by section 41.12(a) and (b) of Bill C-294 serve to render such technological circumventions legal.

<sup>68</sup> Parliament of Canada, LEGISinfo, online: <<https://www.parl.ca/legisinfo/en/bill/44-1/C-294>>.

<sup>69</sup> *Copyright Act*, *supra* note 6 at s 41.21(1).

<sup>70</sup> *Copyright Act*, *supra* note 6 at s 41.21(2).

<sup>71</sup> Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge: Cambridge University Press, 2022).

<sup>72</sup> Perzanowski, *The Right-to-repair*, *supra* note 71.

<sup>73</sup> “Minister of Innovation, Science and Industry Mandate Letter”, (15 December 2021), online: *Prime Minister of Canada* <<https://www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter>>.

<sup>74</sup> Canada, House of Commons, Bill C-244, An Act to amend the Copyright Act (diagnosis, maintenance and repair), 1st Sess, 44th Parl, 2021, (first reading 9 February 2022). Bill C-244 effectively mirrors the Bill C-272, a private member’s bill presented in February 2021. Bill C-272 enjoyed support across party lines passing unanimously its first and second readings in the House of Commons, and was forwarded for consideration by committee in June 2021. Committee consideration was interrupted by the Canadian federal election in the fall of 2021.

<sup>75</sup> Oxford English Dictionary, “Repair, N. (2)”, Oxford UP, online: <<https://doi.org/10.1093/OED/6633058429>>.

<sup>76</sup> As noted above, the approach of Bill C-294 with its specific reference to the circumvention of TPMs in order to facilitate the making of “the program or a device in which it is embedded interoperable with any other computer program, device or component” may present a sufficiently responsive legislative amendment to address short-line manufacturer’s needs but only in the context of a right-to-repair.

<sup>77</sup> Budget 2024 (Canada), 1st Session, 44th Parliament, (2024), <<https://budget.canada.ca/2024/report-rapport/budget-2024.pdf>> (accessed 19 April 2024) at 141.

<sup>78</sup> Budget 2024 (Canada), *supra* note 77 at 141.

<sup>79</sup> Rosborough, “If a Machine Could Talk, We Would Not Understand It” *supra* note 18.

<sup>80</sup> *Competition Act*, *supra* note 3 at s 1.1.

<sup>81</sup> In comparison, the *Treaty on the Functioning of the European Union*, and the *Sherman Act* which comprise the principal anti-trust legislation of the European Union and the United States, respectively, make no reference to legislative priorities around a specific economic class or size of competitor, instead referencing only legislative purposes of general application - “undertakings and concerted practices which may affect trade between Member States” in the case of the *Treaty on the Functioning of the European Union*, and “every contract, combination, or conspiracy in restraint of trade” in the case of the *Sherman Act*. [Treaty on the Functioning of the European Union, art 101, [2007] OJ C 115/47; *Sherman Act*, 1890, 15 U.S.C. at s 1.] That the Canadian parliament saw fit to include an explicit reference to “small and mid-sized enterprises” amongst the *Competition Act’s* purposes could be interpreted as an indication of the importance with which Canadian law places on the economic and commercial role such enterprises play in the Canadian context.

<sup>82</sup> John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law Inc., 2021).

<sup>83</sup> Tyhurst, *Canadian Competition Law and Policy*, *supra* note 82 at 74.

<sup>84</sup> *Canada (Director of Investigation & Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (CCT) at para 92.

<sup>85</sup> Tyhurst, *Canadian Competition Law and Policy*, *supra* note 82 at 130.

<sup>86</sup> Edward Iacobucci, *Is the Canadian Competition Act Fit For Purpose in the Digital Era? What Purpose (s)?*, (2023) 67 Canadian Business Law Journal, p 7 at 27.

<sup>87</sup> Iacobucci, *Is the Canadian Competition Act Fit For Purpose in the Digital Era? What Purpose(s)*, *supra* note 86 at 48.

<sup>88</sup> Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 297-302.

<sup>89</sup> Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, 2003).

<sup>90</sup> Trebilcock et al., *The Law and Economics of Canadian Competition Policy*, *supra* note 89 at 24-5.

<sup>91</sup> Trebilcock et al., *The Law and Economics of Canadian Competition Policy*, *supra* note 89 at 24-5.

<sup>92</sup> Tyhurst, *Canadian Competition Law and Policy*, *supra* note 82 at 130.

<sup>93</sup> *Canada (Commissioner of Competition) v. Vancouver Airport Authority*, [2019] C.C.T.D. No. 6.

<sup>94</sup> *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (CCT) at para 61.

<sup>95</sup> *Canada (Commissioner of Competition) v Toronto Real Estate Board*, [2016] CCTD No 7 (CCT) at para 132, affirmed 2017 FCA 236, leave to appeal to SCC refused, [2018] SCCA No 24.

<sup>96</sup> Drake, *A Profile of the Farm Machinery Industry*, *supra* at note 22 at 28.

<sup>97</sup> *Competition Act*, *supra* note 3 at s 77.

<sup>98</sup> *Competition Act*, *supra* note 3 at s 78 and 79.

<sup>99</sup> See *Competition Act*, *supra* note 3 at s 77(2), 77(3), and 79(1)(b)(i).

<sup>100</sup> *Competition Act*, *supra* note 3 at s 77(1).

<sup>101</sup> *Competition Act*, *supra* note 3 at s 77(1).

<sup>102</sup> *Competition Act*, *supra* note 3 at s 77(1)(a)(i) and (ii).

<sup>103</sup> *Competition Act*, *supra* note 3 at s 77(1)(a)(i) and (ii).

<sup>104</sup> *Competition Act*, *supra* note 3 at s 77(2).

<sup>105</sup> “Guide to the December 2023 amendments to the Competition Act”, (18 December 2023), online: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act>>.

<sup>106</sup> *Competition Act*, *supra* note 3 at s 78(1)(a)-(k).

<sup>107</sup> *Competition Act*, *supra* note 3 at s 79(1)(a) and (b).

<sup>108</sup> The interpretation of what constitutes “superior competitive performance” is unclear and will likely remain so until such time as future decisions of the Tribunal or the courts provide further consideration and clarity. A related consideration here is the role of *legitimate business justification* as such concept appears in existing jurisprudence relating to anti-competitive acts [*Canada (Commissioner of Competition) v. Canada Pipe Co.*, (2005) 40 C.P.R. (4th) 453].

<sup>109</sup> IBISWorld, “Industry Report - Tractors & Agricultural Machinery

Manufacturing in the US”, February 2024, online: <<https://www.ibisworld.com/united-states/market-research-reports/tractors-agricultural-machinery-manufacturing-industry/>> (accessed March 10, 2024).

<sup>110</sup> IBISWorld, “Industry Report - Tractors & Agricultural Machinery Manufacturing in Canada”, November 2023, online: <<https://www.ibisworld.com/canada/industry/tractors-agricultural-machinery-manufacturing/672/>> (accessed March 9, 2024).

<sup>111</sup> *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236.

<sup>112</sup> One strategic advantage in opting *not* to base an application on the characterization of the impugned use of TPMs as constituting an anti-competitive act under section 78(1) is the avoidance of needing to subsequently respond to an argument by a full-line manufacturer respondent that their use of TPMs is precluded from characterization as an anti-competitive act by virtue of section 79(5), a matter which is addressed in detail by Cameron and Tomkowicz in “Competition Policy and Canada’s New Breed of ‘Copyright’ Law”, (2007) online: McGill Law Journal <<https://lawjournal.mcgill.ca/article/competition-policy-and-canadas-new-breed-of-copyright-law/>>.

<sup>113</sup> The paper recognizes that some uncertainty currently exists regarding the meaning of the “superior competitive performance” concept under the Act. The term’s definition and relevance will be clarified by future decisions of the Tribunal and the courts.

<sup>114</sup> *Competition Act*, *supra* note 3 at s 77(2). Examples of such “additional terms necessary to restore or stimulate competition in the market” might include the Tribunal’s establishment of (a) an obligation on full-line manufacturers to align product design with international standards in order to promote and facilitate interoperability, (b) the mandated use of “open design architecture” and “open standards” for data interoperability and exchange, and (c) the mandated facilitation of information exchange between full-line and short-line manufacturers through the Ministry of Innovation Science and Industry.

<sup>115</sup> *Competition Act*, *supra* note 3 at s 79(2). See footnote 114 for examples of actions that the Tribunal might consider “reasonable and necessary to overcome the effects of full-line manufacturers’ use of TPMs in the market.

<sup>116</sup> *Copyright Modernization Act*, S.C. 2012, c. 20, s 32.

<sup>117</sup> *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 1201).

<sup>118</sup> European Commission, Proposal for a Directive on common rules promoting the repair of goods (22 March 2023).

<sup>119</sup> Agreement between the United States of America, the United Mexican States, and Canada [USMCA], 30 November 2018, online: <USTR <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>> .

<sup>120</sup> Innovation, Science and Economic Development Canada, A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things

(2022), available at <<https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/ConsultationPaperAIEN.pdf>>.

<sup>121</sup> Innovation, Science and Economic Development Canada, A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things (2022), *supra* note 120 at 22.

## A DEFENCE OF DETRIMENTAL RELIANCE IN COMPETITION ACT MISREPRESENTATION CLASS ACTIONS

By Emrys Davis<sup>1</sup>

*This paper examines the recent jurisprudence which, some suggest, holds that detrimental reliance is unnecessary to certify a class in product misrepresentation cases under the Competition Act. Contrary to that conclusion, the author reviews the applicable jurisprudence and demonstrates that detrimental reliance is always required in misrepresentation cases. Cases that claim not to require detrimental reliance do in fact require it—just from third parties, not necessarily from the plaintiff class. Thus, detrimental reliance remains a critical link in the chain of causation in all misrepresentation cases. Where representations are made to the plaintiff class as opposed to third parties, experience demonstrates that such cases continue to raise individual issues and are not likely suitable for class treatment. It remains to be seen whether the recent amendments to the Competition Act will prove an effective option for consumers seeking compensation for misrepresentations.*

*L'auteur recense la jurisprudence récente qui, selon certains, soutient que l'acte de confiance préjudiciable n'est pas nécessaire pour autoriser un recours dans les cas de fausse déclaration de produit en vertu de la Loi sur la concurrence. Contrairement à cette conclusion, l'examen de la jurisprudence applicable démontre que l'acte de confiance préjudiciable est toujours requis dans les cas de fausses déclarations. Les affaires qui prétendent ne pas nécessiter de confiance préjudiciable l'exigent en fait—simplement de la part de tiers, pas nécessairement de la part du groupe de demandereses. Ainsi, l'acte de confiance préjudiciable demeure un maillon essentiel de la chaîne de causalité dans tous les cas de fausse déclaration. Lorsque des observations sont faites au groupe des plaignantes plutôt qu'à des tiers, l'expérience démontre que de tels cas continuent de soulever des questions individuelles et ne sont probablement pas propices à un traitement en recours collectif. Il reste à voir si les récentes modifications apportées à la Loi sur la concurrence constitueront une option efficace pour les consommateurs qui cherchent à obtenir une indemnisation pour de fausses déclarations.*

**M**y car's seats are said to be covered in “vegan leather”—a fact which had no influence on my decision to buy it. In fact, I do not know what vegan leather is. But had I been vegan, I suspect that I would care rather more about what material I was sitting on.

That reality—that different customers value product attributes differently—has long influenced class actions about product misrepresentations.

Take my vegan leather example. Were I to find out that the manufacturer's representation about the material used in the seats was false and that my seats were actually covered in leather derived from animals, I would shrug and continue driving my car. Were I vegan, I would feel cheated; I would not have bought that car had I known that the seats were made of animal skin. If compensation were available *via* a lawsuit, many would agree that, as between the two of us, only vegan-me should receive that compensation. Why should non-vegan me be compensated for something I never cared about in the first place and which did not influence my decision to buy the car or the amount I was willing to pay for it?

The point of the hypothetical is this: whether I was harmed by the lie that the seats were covered with vegan leather depends on who I am, what I care about, and what I knew, including whether I even knew of the claim that the seats were covered with vegan leather when I chose to buy the car.

Because customers value product attributes differently, courts have been skeptical of class actions on behalf of large groups who seek compensation for product misrepresentations using the statutory cause of action in the *Competition Act*. Because proof of damages in such cases depends on evidence from each of the individual class members (who they are, what they knew, why they bought, *etc.*), a class action is no more efficient than thousands or even millions of individual actions.<sup>2</sup>

Recently, however, judicial consensus around the inherently individual nature of these cases has fractured. Some decisions adhere to the historical orthodoxy: misrepresentations harm different people differently—or not at all. Because of this, trials require individual evidence, and a class action is no more efficient than many individual trials. Other decisions, however, state that the historical orthodoxy is wrong, that detrimental reliance and individual evidence are not required. Thus, those decisions have held that *Competition Act* misrepresentation cases can be certified as class actions.<sup>3</sup>

Who is right? In my view, defenders of the historical orthodoxy have the better side of the argument. In fact, upon close inspection, the decisions that purport to veer from that orthodoxy do not actually do so. Despite saying that the law does not require detrimental reliance, these decisions actually bake such reliance into their analysis.

If that is true, why the fuss (and this paper)? Two reasons:

First, as happened with waiver of tort,<sup>4</sup> one or two decisions can send the law into a decade-long holding pattern in which statements taken out of context lead subsequent decision-makers to see conflict in the law when there is none. This is particularly problematic when such conflict saves ill-conceived case theories from being struck because it is no longer “plain and obvious” that they will fail. Our justice system is too overburdened to permit ill-conceived cases to linger.

Second, amendments to the *Competition Act*<sup>5</sup> have opened a new door for consumers who seek compensation for product misrepresentations. Beginning in June 2025, private parties will be able to seek leave to bring product misrepresentation cases to the Competition Tribunal. If successful, those parties may access the existing disgorgement remedy to receive an amount up to the total amount paid for the product.<sup>6</sup> That compensation may not require proof of loss and, hence, may not raise individual issues. However, such cases may only be brought before the Tribunal, only with leave and do not currently have procedural structures in place like the existing class proceedings regimes that would encourage plaintiffs’ counsel to fund the cases to the same extent as they do class actions (certification, class-wide releases, court-approved settlements, court-approved contingency fees, etc.).<sup>7</sup> Whether plaintiffs (and their counsel) choose this new door despite the procedural uncertainty will depend in large measure on the substantive law that applies to claims under the Tribunal regime and under the existing class actions regime. If neither regime requires detrimental reliance, plaintiffs may prefer the process they know to the process they do not. On the other hand, if detrimental reliance and the individual issues it raises persists in the class actions realm, plaintiffs may prefer to take their chances in the Tribunal’s new regime, despite the procedural uncertainty.

In this paper, I argue that detrimental reliance remains a key link in the chain of causation for *Competition Act* misrepresentation class actions. Although some cases have been characterized as suggesting otherwise, they do not. Detrimental reliance has not disappeared; it has just moved up the chain of causation such that—in appropriate cases—class members may have been harmed because *someone else* relied on the misrepresentation. Specifically, the entities who relied on the misrepresentation were not the plaintiffs themselves, but rather a third party with whom the plaintiffs may have transacted. And it was these third parties’ reliance on the misrepresentations—upward in the chain of causation—that led to the plaintiffs’ loss.

Conversely, in the classic case in which class members claim harm because of a misrepresentation made to *them*, experience confirms the

common law's long-standing intuition: misrepresentation cases raise individual issues that are not suitable for class treatment.

To the extent that outcome seems unfair, the remedy has been and should remain legislative intervention to create avenues for compensation that do not require reliance. Indeed, that is what Parliament appears to have done through the recent amendments to the *Competition Act* which give private plaintiffs access to the existing disgorgement remedy, and provincial legislatures have done in the past in the securities<sup>8</sup> and consumer protection spheres.<sup>9</sup>

To situate the argument, I first describe the relevant statutory framework and how courts historically applied that framework—what I am calling the “historical orthodoxy.” I then analyze some decisions that appear to challenge that orthodoxy, but on closer inspection I find to fit within it. While these decisions do not acknowledge it, they typically rest on an assumption that someone up the chain of causation from the plaintiffs relied on the misrepresentation. I conclude by discussing the evidentiary challenges plaintiffs face when they try to prove loss from misrepresentations. This analysis suggests that plaintiffs will welcome the changes to the *Competition Act* and will likely take advantage of the new Tribunal regime that may compensate consumers without proof of loss.<sup>10</sup>

### **The Historical Orthodoxy**

Section 52 of the *Competition Act* concerns false and misleading representations. Statements made to promote a product, service or business interest must be true. Businesses violate s. 52 when, to promote a business interest, they knowingly or recklessly make a representation to the public that is false or misleading in a material respect. To establish a contravention, of s. 52(1), it is not necessary to prove that any person was deceived or misled.<sup>11</sup>

Criminal consequences for violating s. 52 are severe: up to 14 years in prison and a fine in the discretion of the court.<sup>12</sup> So too are the civil consequences. Section 36 of the *Competition Act* permits plaintiffs (usually consumers who purchased the product) to sue and recover an amount equal to the loss or damage suffered. But s. 36 has an important safeguard. Claimants must prove that the loss or damage resulted from the false or misleading representation. Courts have described this as the “causal connection” between the unlawful conduct and the plaintiff's loss.

Very early, courts equated this causal connection with detrimental reliance—the idea that a purchaser could only have been harmed by the

misrepresentation if the misrepresentation had caused the purchaser to do something differently than if the misrepresentation had not been made.

Justice Strathy (as he then was), in an oft-quoted passage from the 2010 case *Singer v. Schering-Plough Canada Inc.*, stated the prevailing view as follows:

As I have noted, s. 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage “as a result” of the defendant’s conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant’s conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. **In my view, this can only be done by pleading that the misrepresentation caused him to do something—i.e., that he relied on it to his detriment.**<sup>13</sup> (emphasis supplied)

As Justice Strathy said in the same decision, the plaintiff had not pleaded detrimental reliance, “for the obvious reason that proof of reliance and causation could only be done on an individual basis and this would be fatal to certification: the proceeding would break down into individual proceedings to prove reliance.”<sup>14</sup> To certify a case as a class proceeding, the plaintiff had to plead a reasonable cause of action and provide “some basis in fact” that there were common issues and that the class action was the preferable procedure. The problem was that detrimental reliance could not be proved in common and a class action was not likely preferable to a myriad of individual actions. To avoid that outcome, the plaintiff had avoided pleading detrimental reliance. But as Justice Strathy held, by failing to plead reliance,

the plaintiff had failed to plead a reasonable cause of action, and so the class action failed anyway.

Returning to my earlier hypothetical, vegan-me choosing to buy the car or agreeing to pay a higher price for the car because it was represented to have “vegan leather” seats is detrimental reliance. Actual-me buying the car without caring about the seat material is not, since I did not rely on the veracity of the representation in making my purchase decision. Determining which class members relied on the misrepresentation to their detriment, and which did not, requires individual evidence from each of them. As Justice Strathy said, this reality means that a class action should not be certified because it will invariably break down into a series of individual cases.

Many cases before and after Justice Strathy’s decision adhered to his conclusion: for a misrepresentation to have harmed consumers, plaintiffs must have each and individually relied on the misrepresentation to their detriment. Because such reliance could only be proven through individual evidence, the case was not appropriately tried as a class action.

### **Heresy or Orthodoxy in Disguise?**

If judicial consensus was so firm, what happened to fracture it? Clever arguments. Plaintiffs noted that s. 36 does not explicitly require detrimental reliance; it requires a causal connection. Building on that idea, they identified some earlier cases in which courts had held, either expressly or implicitly, that detrimental reliance was not required on the facts of the particular case. These arguments culminated in the British Columbia Court of Appeal’s conclusion in *Live Nation*<sup>15</sup> that, “if there is an alternative means of establishing the causal link required to make out a claim under s. 36 of the *Competition Act*, a plaintiff need not plead and prove detrimental reliance. The outcome will depend on the circumstances and the nature of the claim.”<sup>16</sup>

At first blush, the logic appears sound. If there is an alternative means of establishing a causal connection, why the need for detrimental reliance? The problem is that this conclusion ignores the crucial question: what could the alternative means be? How do misrepresentations cause harm if **no one** relied on them (or even heard or read them)?

When we examine the decisions that *Live Nation* cited as well as *Live Nation* itself, we see that detrimental reliance remains a crucial aspect of the analysis. In **all** cases, someone heard or read the misrepresentations and relied on them. The critical distinction between these cases and the

historical orthodoxy cases is not that there was no reliance. Rather, it is that the “someone” who relied on the representations was *not* the plaintiff.

Take three cases considered in *Live Nation: Go Travel*,<sup>17</sup> *Pro-Sys*<sup>18</sup> and *Valeant*.<sup>19</sup> *Go Travel* arose after the defendant, Go Travel, made misleading representations in newspaper ads comparing its Southern vacation packages to those available through its competitor, Maritime Travel. Maritime’s market share fell after the ads ran, and it sued Go Travel for damages. The trial judge found for Maritime in respect of ads placed in 2004, but not those placed in 2003 or 2005. On appeal, Go Travel argued that the judge had erred by finding for Maritime without finding that any consumer had been deceived by Go Travel’s ads. The Court of Appeal recognized that cases brought by consumers under s. 36 alleging a violation of s. 52 require evidence of detrimental reliance. In fact, it held that, “[i]n such a situation [*i.e.*, a consumer case], it is difficult to conceive how the plaintiffs might establish loss without demonstrating they had been deceived by the false statements.”<sup>20</sup> But it distinguished those cases because Maritime was not Go Travel’s customer; it was its competitor. The Court of Appeal held that, “[p]rovided Maritime can prove it suffered a loss caused by the misrepresentation, it is not additionally required to prove a consumer relied on and was misled by the 2004 ad.”<sup>21</sup>

Like *Live Nation*, here the Court of Appeal appeared to leave unexplained how Maritime could prove it had suffered a loss without showing that customers had been misled. Or did it? While the Court of Appeal noted that the trial judge had not specifically referred to the evidence she relied on to reach her conclusion on causation, it listed several pieces of evidence and factual findings that supported the trial judge’s conclusion that the 2004 ad had caused loss to Maritime.<sup>22</sup> These factors told the following story: just before the peak sales season, Go Travel ran a misleading ad that wrongly implied its prices were lower than Maritime’s. Maritime’s sales during the peak travel period fell relative to other years and in a larger amount than could be explained by other factors. With no other explanation for the fall in sales, the trial judge did not err by finding that the 2004 ad caused the part of the sales drop that could not otherwise be explained.

What does that story imply about the 2004 ad’s effect on customers? It implies that (i) customers saw the ad, and (ii) they relied on it to book travel with Go Travel and not Maritime (hence the drop in Maritime’s sales and market share). Viewed in this way, the Court of Appeal was not saying that reliance is not required. Rather, on the facts of that case, reliance had been

proven on a balance of probabilities without evidence from any of Go Travel's customers.

The situation was similar in *Pro-Sys*, although the facts were different. There, purchasers of Microsoft products alleged that Microsoft had "made false claims about the nature and timing of the release of one of its products in order to deprive a competitor of the advantage of being the first in the market, thereby allegedly allowing Microsoft to sell its products at a higher price to intermediate corporate resellers."<sup>23</sup> There was no suggestion that the plaintiff class of consumers had relied on Microsoft's misrepresentations. But, like *Go Travel*, that did not mean that **no one** relied on the misrepresentation. Implicit in the description of the case is that, at a minimum, intermediate corporate resellers had relied on Microsoft's misrepresentations and had done so to their detriment. Why else would they have agreed to pay a higher price for Microsoft's products and not bought from Microsoft's competitor at a lower price? As in *Go Travel*, the entities who relied on the misrepresentations were not the plaintiff, but it was these entities' reliance on the misrepresentations that led to the plaintiff's loss. In *Go Travel*, customers produced the loss by purchasing vacation packages from Go Travel instead of Maritime, and the court found indirect evidence of reliance (*i.e.*, the otherwise unexplained drop in sales) to be persuasive. In *Pro-Sys*, resellers produced the loss by not buying from Microsoft's competitor, paying more for Microsoft's products based on Microsoft's representations that it would be first-to-market, and then passing on some portion of that higher cost to class members.

The British Columbia Court of Appeal's decision in *Valeant* fits into this same mold. There, among other causes of action, the province alleged that the defendants had misrepresented certain opioid-based painkillers as safe, effective, non-addictive, *etc.* The Court of Appeal permitted the claim to proceed without the province having to plead that it had relied on the alleged misrepresentations. But like *Go Travel* and *Pro-Sys*, that did not mean that **no one** had relied on the misrepresentations. The province pleaded that doctors and patients had relied on the misrepresentations, and that their reliance had caused the province's loss.<sup>24</sup> Reliance remained an integral link in the chain of causation of harm to the plaintiffs; it just did not have to be the final link.

What about the Court of Appeal's decision in *Live Nation*? It upheld what was described as a "general inflationary effect" theory that the Court said, "does not depend on detrimental reliance."<sup>25</sup> Arguably, the Court could be interpreted to have said that detrimental reliance is not required in a

*Competition Act* misrepresentation case. Certainly, that is how its decision was interpreted in a subsequent Ontario decision.<sup>26</sup> But as with *Go Travel*, *Pro-Sys*, and *Valeant*, looking at *Live Nation* more closely reveals that reliance—by someone, perhaps just not by the plaintiffs—remains an integral link in the chain of causation.

To see this, one needs to unpack the “general inflationary effect” theory that the Court of Appeal referred to in *Live Nation*. The Court of Appeal summarized it as follows:

- Through its Terms of Use and Purchase Policy, Ticketmaster represented that it provided consumers with a fair opportunity to purchase event tickets in the primary market by prohibiting ticket bots and enforcing ticket limits.
- As a result, consumers trusted Ticketmaster, had confidence in the secondary market and purchased tickets on the secondary market. The demand for tickets on the secondary market drove prices up.
- Contrary to its representations, in order to earn substantial additional fees, Ticketmaster fostered an artificial secondary market by facilitating or turning a blind eye to professional ticket resellers using ticket bots in the primary market to exceed ticket limits.
- If consumers were aware of the true state of affairs, they would have lost trust in Ticketmaster, concluded that the secondary market was unfair and declined to participate in the secondary market.
- Further or alternatively, in the absence of the representations, consumers may have been wary of the activity of professional ticket resellers on the Ticketmaster website, concluded that the secondary market was unfair and declined to participate in the secondary market.
- As a result, demand on the secondary market would have decreased, resulting in lower prices.<sup>27</sup>

Respectfully, it is hard to square the above summary with the Court of Appeal’s statement that the “general inflationary effect” theory does not require detrimental reliance. It clearly does; consumers relied on Ticketmaster’s representations and participated in the secondary market to their detriment. Had Ticketmaster told them the truth, the above summary says that some consumers would not have participated in the secondary market.

This suggests that the Court of Appeal was making a slightly different point in saying that detrimental reliance is not required—a point that is in line with *Go Travel*, *Pro-Sys* and *Valeant*: detrimental reliance is still part of the chain of causation, it just does not have to be the last link in that chain, and proven on behalf of each and every plaintiff in the class. In other words, a plaintiff need not plead that she relied on the misrepresentation to her detriment. It will be sufficient if she pleads that *someone else* relied on the misrepresentation and that person's reliance led to her loss. In *Live Nation*, the “someone else” were those consumers who would not have participated in the secondary market.<sup>28</sup> In *Valeant*, the “someone else” was the doctors and patients. In *Pro-Sys*, it was the resellers. In *Go Travel*, it was *Go Travel's* customers.

This analysis suggests that courts are too categorical in saying that plaintiffs do not need to plead detrimental reliance. The “other causal connection” that the Court of Appeal described in *Live Nation* still requires detrimental reliance up the chain of causation. If that element has not been pleaded, it is hard to see how the claim could survive. Put another way, I suggest that it is “plain and obvious” that if plaintiffs do not plead detrimental reliance somewhere in the chain of causation (even implicitly as in *Live Nation*), their claim is doomed to fail and should be struck. This makes sense. As noted earlier, in the most extreme example, it is difficult to understand how misrepresentations caused harm if no one heard or read them.

To be sure, through *Go Travel*, *Pro-Sys*, *Valeant*, and *Live Nation* plaintiffs appear to have identified a way to avoid individual issues trials on behalf of class members. If the loss did not depend on class members' reliance, then the court does not require evidence from class members through individual trials. But this approach seems to be an exception that would apply to a very narrow set of cases where the misrepresentation has not been made to class members. The Nova Scotia Court of Appeal's words in *Go Travel* still ring true: it is difficult to conceive how plaintiffs might establish loss to consumers without demonstrating they had been deceived by the false statements.<sup>29</sup> As discussed in a later section, the *Rebuck*<sup>30</sup> summary judgment following class certification only confirms the truth of this intuition.

But even in this narrow set of cases in which someone else's reliance caused the plaintiffs' losses, big questions remain about how plaintiffs can prove such reliance to establish the necessary link in the chain of causation leading to damages. Such proof might be possible in a case like *Pro-Sys* in which a defined set of third-party corporate resellers might be called to testify or where contemporaneous documents (emails, recitals in contracts,

*etc.*) might confirm the necessary reliance. It is hard to conceive of that in a case like *Live Nation* in which the theory depends on some unknown (but potentially large) number of customers choosing not to participate in the market.

In *Live Nation*, the Court of Appeal has sent the parties back to the lower court on several issues. One is whether the plaintiffs have a credible and plausible methodology to show harm arising from their “general inflationary effect” theory. It remains to be seen how the plaintiffs will propose to identify that portion of customers who relied on the misrepresentations and would not have participated in the market. How this can be done on the facts of that case is incredibly unclear, including because “but for” participation rates would vary by ticketed event. For example, it is hard to imagine demand for Taylor Swift tickets falling significantly in the secondary market no matter what *Live Nation* or Ticketmaster had said about the primary ticket market. But the same may not be true for all events. Then, there is the further question of how one can reasonably disentangle the demand effects in the secondary ticket market caused by the alleged misrepresentations from those caused by the presence of bots in the primary market (which independently allegedly restricted the availability of tickets in the primary market thereby increasing demand in the secondary market). Frankly, if this matter survives certification, it will not surprise me to see it flounder at the merits stage owing to inherently individual issues, as was the case in *Rebuck*, discussed later in this paper.

### **The Fraud-on-the-Market Theory in Consumer Products Cases**

Admittedly, *Live Nation* doesn’t fit as neatly into the framework of representations made to “someone else” as do *Go Travel*, *Pro-Sys* and *Valeant* because the plaintiff’s “general inflationary effect” theory may depend on an assumption that some class members (as opposed to a separate category of non-class members) would not have participated in the secondary ticket market.

Not only will this be difficult to prove for the reasons I have outlined above, but, in my view, it risks importing the fraud-on-the-market theory into consumer products markets despite Canadian courts having rejected that theory for less complicated and more transparent financial markets.<sup>31</sup> To the extent that is what the Court of Appeal did (and it is by no means clear), in my view, that approach is not supportable given that (i) Canadian courts have rejected the fraud-on-the-market theory for cases involving

financial markets, and (ii) consumer product markets do not exhibit the essential characteristics necessary for the assumptions that underly the fraud-on-the-market theory as applied to financial markets.

A full analysis of the fraud-on-the-market theory is beyond the scope of this paper. To summarize, however, the theory assumes that the price of the financial instrument in question reflects all the material information available to the market. It has been applied in the United States to dispense with proof of individual reliance in securities misrepresentation cases. The U.S. Supreme Court held that, “because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations may be presumed for purposes of a [securities misrepresentation] action.”<sup>32</sup>

The “general inflationary effect” theory as expressed in *Live Nation* does not explicitly assume that **all** class members relied on the misrepresentation as does the fraud-on-the-market theory. Instead, it assumes (or perhaps proposes to prove) that **some** ticket buyers did and that because those **some** would not have bought the product in the “but for” world, the price of **all** other tickets sold in the secondary market would have been lower than they were in the actual world.

Very different from the fraud-on-the-market theory, right? Wrong. In my view, the “general inflationary effect” theory is just a different way of expressing the same foundational principle that underlies the fraud-on-the-market theory. The fraud-on-the-market theory assumes that publicly available information is reflected in the market price of a financial instrument. How does this occur? Because in a “thick” market, arbitrage opportunities for any given financial instrument based on available information will be quickly identified and eliminated by market participants. Accordingly, positive information for a particular financial instrument increases market participants’ willingness to pay—and thus the price—for that financial instrument, while negative information depresses it. The changing demand for the specific financial instrument changes its price.

When you unpack it, the “general inflationary effect” theory is an extension of the fraud-on-the-market theory. The positive information (in the form of the alleged misrepresentation) allegedly increased peoples’ willingness to participate in the market (i.e. created a “thick market”) relative to what it should have been, with the resulting increased overall demand across all products thereby increasing the market price of every product sold.

Should we accept an extension of fraud-on-the-market theory for consumer products when we have rejected the theory itself in Canada for financial instruments?<sup>33</sup> It is hard to see why we would. If anything, the assumptions that underly the fraud-on-the-market theory are much more compelling for financial markets than for consumer products. In financial markets, information is widely published, participants are usually highly sophisticated, and there is often a single market on which the instrument trades. In many instances, corrective disclosures have triggered immediate and observable share price changes, providing intuitive support for the assumptions underlying a theory based on deemed reliance, as well as providing relatively straightforward ways to estimate investor losses. Perhaps most importantly, there is a single market price at any given point in time for the instrument.

None of this is true for most consumer products. Different stores sell the same consumer product at different prices. Prices at different stores, as well as consumer decisions about which product to buy, will be influenced by different alternatives: some stores will offer substitute products thereby influencing consumer demand at the specific store while others may not (or may offer different substitutes). Some products (like cars) are the subject of individual price negotiations between car buyers and dealers. Other products (like cough syrup) are not.

Put simply: unless all these variations are assumed away, which they should not be, there is no prevailing “market price” in a single “market” for a consumer product in the same way that there is for financial instruments. The assumption underlying the fraud-on-the-market theory for financial instruments—that the “market price” includes all publicly available material information—does not hold for most consumer products. Instead, we see a multitude of different prices offered by different stores at different times, and prices are sometimes subject to individual negotiation (presumably based on the information known to the specific parties at that time). Some may argue that markets for event tickets are as “thick” as those for financial instruments. That is debatable, and even if true would hold only for the specific event in question, not all tickets for different events, in different geographies.

A more complete discussion of the fraud-on-the-market theory is beyond the scope of this paper. For the moment, it will be obvious that I do not support the application of the theory to consumer products markets, and I see the Court of Appeal’s decision in *Live Nation* as a *potential* attempt to do so. Ultimately, Canadian courts will determine whether Canadian common

law should accept such an approach. The redetermination hearing in *Live Nation* may present the lower court, and perhaps eventually the Court of Appeal, an opportunity to engage with the methodology that the plaintiff proposes in that case and to determine whether that methodology attempts to import the fraud-on-the-market theory into consumer products cases.

### Alleged Illegality

Another theory of causation that some plaintiffs have advanced as not requiring detrimental reliance involves claims that the product sales could not have taken place at all “but for” the misrepresentations. Accordingly, the misrepresentations “caused” harm because if the misrepresentations had not been made, the product would not have been approved for sale to consumers in the first place, and so consumers could never have purchased it.

Even here, we see reliance. And again, we see it is *someone else’s* reliance on the alleged misrepresentation that allegedly caused the plaintiff’s loss. For this theory to apply, the product must be subject to a regulatory regime that permits the product’s sale only on certain conditions or following certain regulatory approvals. The alleged misrepresentations relate to these conditions or approvals and enable the product to be sold. For that to be so, the misrepresentations must have been made to a regulator who then relies on those representations to permit the product’s sale. The regulator’s reliance forms the link in the chain of causation between the original misrepresentation and the alleged harm to consumers. As in the other examples I’ve reviewed, *someone else’s* reliance has led to the plaintiffs’ alleged harm. The challenge for plaintiffs under this theory is that s. 52 applies only to representations “made to the public,” not to representations made to a regulator.<sup>34</sup>

This argument appeared in *Krishnan*.<sup>35</sup> There, the plaintiffs alleged that the product could not have been sold because its labeling violated the applicable regulations. Accordingly, the misrepresentations had “caused” the plaintiffs’ losses because the plaintiffs should never have been able to buy the mislabeled product in the first place. The court accepted that the argument was not doomed to fail, but in my view, the court misunderstood the applicable “but for” world when considering how the alleged mislabeling could have caused the plaintiffs’ alleged losses. There is a difference between (i) a product that could not have been sold “but for” the alleged misrepresentation, and (ii) a product that could still have been sold had the labelling been correct (*i.e.*, had the misrepresentation not been made). Only in the former situation has the alleged misrepresentation arguably caused loss to

consumers on the basis that they could *never* have bought the product “but for” the alleged misrepresentation.

Take the example of glucosamine sulphate supplements from *Krishnan*. The regulations in question did not prohibit the sale of the underlying supplements; they prohibited the sale of the supplements only if they were improperly labeled. Had the supplements been properly labeled, the supplements could have been sold as glucosamine chondroitin, not as glucosamine sulphate. In that case, “but for” the alleged misrepresentation of the products as glucosamine sulphate, the plaintiffs would still have had an opportunity to buy the supplements. The only difference between the “but for” world and the actual world is that the labels in the “but for” world would have contained no reference to glucosamine sulphate. The question is whether the plaintiffs would have bought the product had they been labeled as glucosamine chondroitin.

That situation is different than if, for example, the law had required supplement manufacturers to provide test results showing a sufficient concentration of glucosamine sulphate to obtain a license to sell the supplement at all. Imagine if, to obtain that license, a manufacturer had misrepresented its test results to the applicable regulator. “But for” the misrepresentation, the license would not have been obtained, the supplement could not have been sold, and the plaintiffs would have had no opportunity to buy the supplement.<sup>36</sup>

### ***Rebuck and Drynan***

That brings me to two Ontario decisions that do not necessarily fit into the above framework in which “someone else’s” reliance caused the plaintiff’s loss: *Rebuck* and *Drynan*.<sup>37</sup> As *Drynan* followed the result in *Rebuck* with little additional analysis, there is little to say about it. In contrast, there is much to say about *Rebuck*.

In *Rebuck*, the plaintiff alleged that Ford had understated the fuel consumption of its 2013 and 2014 model year vehicles. He sought compensation for the value of the extra fuel he and his fellow class members would have to buy relative to what they had expected based on Ford’s representations.

Ford argued at the certification motion that the plaintiff had not pleaded detrimental reliance. That is, he had not pleaded that he would not have bought the car had he known the truth about its fuel consumption. The court rejected Ford’s argument and held (ostensibly) that the plaintiff did not have to plead detrimental reliance. It wrote that:

Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the Competition Act for breach of s. 52: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para 107. For example, in *Pro-Sys*, at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. [1964] AC 465, 502-4.

This approach suggests that the causal connection between the Defendants' alleged misrepresentations and the Plaintiff's alleged loss is sufficiently pleaded here. That is, the Plaintiff claims that misrepresenting the fuel consumption of the Vehicles has caused buyers and lessees of the Vehicles to spend more on fuel consumption than they were expecting.

The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the Competition Act what the Plaintiff must plead is that the misrepresentations caused him to acquire less value than he expected to acquire—i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle.

Framed in this way, causation is an issue that is common to all purchasers and lessees of the Vehicles. The facts as pleaded match the requirements of the statutory causes of action that are pleaded.

These paragraphs are striking in several respects. For one, they misunderstand the result in *Pro-Sys*, which as I have noted above, did require detrimental reliance, just not as the final link in the chain of causation. Second, it is arguable that they do not actually do away with detrimental reliance as they appear to suggest; they simply use different words to mean the same thing. The court in *Rebuck* wrote that the misrepresentations must have *caused* the plaintiff to acquire less *value* than he *expected* to acquire. This standard is arguably detrimental reliance in the sense that Justice Strathy described it in *Singer*. In any event, and contrary to the conclusion in *Rebuck*, it certainly raises individual issues. A plaintiff can only have *expectations* if she heard the misrepresentations and believed them (which would usually require individual evidence from the plaintiff). She could only have acquired *less value* than *expected* if she valued the attribute differently based

on the misrepresentation (which, again, would usually require individual evidence from the plaintiff).

Once those elements are established, it is not a giant leap to infer that, if a consumer had agreed to pay a certain price for a product based on certain, subjective expectations of value that were influenced by the misrepresentation, then the consumer would not likely have bought the product at the agreed upon price had she known the true value. That is detrimental reliance.

By using the language of “expectations” and “value”, the court in *Rebuck* said that it was avoiding detrimental reliance, but hardly seems to have done so. That reality is likely why one subsequent decision has suggested that *Rebuck* is not at odds with prior authorities<sup>38</sup> and another has held that prior authorities remain good law.<sup>39</sup>

Let’s return to my example of my vegan leather seats. There are at least three possibilities that could have applied when I bought my car: (i) I never heard or read the representation, in which case I could have had no expectations about the value I expected to receive from the vegan leather seats; (ii) I heard or read the representation but attributed no value to the vegan leather seats; or (iii) I heard or read the representation and attributed value to the vegan leather seats.

*Rebuck* jumps right to the third possibility and identifies it as the *only* possibility. Why?

In my view, although the court did not put it this way, the result in *Rebuck* indicates that the court believed that reliance could be proven on a common basis because of the formulaic and common representations in that case.<sup>40</sup> The court appears to have assumed that class members all had the same expectations about fuel economy because of the uniform representations made by Ford. That is, they all expected to receive the same “value” (i.e., how much they would have to spend on gas given the represented fuel economy). As well, because fuel economy is often relevant to car purchasing decisions, it must have seemed likely that all class members would have relied on the fuel economy representations when purchasing their cars at the price that they did. Otherwise, as I have demonstrated above, it is not clear how the court could have talked about class members’ expectations about value without immediately triggering the need for individualized evidence.

Alternatively—and although it does not fit with the court’s comments about class members’ “expectations”—the court in *Rebuck* (and in *Drynan*) may have been saying what the Court of Appeal said in *Live Nation*: because some purchasers relied on the representations, demand was higher than it would otherwise have been and higher demand increased prices for all car purchasers, whether or not they relied on the misrepresentations.

I will not repeat the criticisms I expressed earlier about this apparent fraud-on-the-market theory in consumer product cases. But I will note that the common issues decision in *Rebuck* demonstrated that any assumptions about proving reliance on a common basis because of formulaic misrepresentations proved to be incredibly unrealistic on the facts of that case.

The eventual common issues decision in *Rebuck* revealed the utter lack of commonality in class members’ expectations arising from Ford’s representations. The court granted summary judgment for Ford, primarily on the basis that its representations could not have contravened s. 52 because they complied with another government regulation concerning fuel economy testing and labeling. But the court also held that the plaintiff had not demonstrated that the representations created any particular “general impression” as required under the applicable legal test. This was so for several reasons, including because the plaintiff’s evidence confirmed that ***different class members would have had different expectations about the expected fuel economy when buying their cars.*** This lack of common expectations proved fatal to establishing any “general impression” and, hence, proving a violation of s. 52.

In my view, the lack of common expectations would have proven equally fatal if the court had continued its analysis to consider whether the representations had caused loss to class members. The plaintiff testified that he had never expected to obtain the fuel economy represented by Ford because he knew that fuel economy is affected by several factors, such as weather, driving conditions, driving habits, etc. One of the plaintiff’s experts confirmed that these realities are “well known... to most vehicle owners.”<sup>41</sup> The plaintiff even testified he would have been content with fuel consumption that was 25% higher than the represented consumption.<sup>42</sup> That evidence raised the obvious implication that other class members would have had their own expectations based on their own knowledge, and that across so many thousands of class members, those expectations would vary.

In other words, the merits evidence in *Rebuck* confirmed the logic behind the historical orthodoxy expressed by Justice Strathy over a decade ago in *Singer*: misrepresentation cases require individual evidence because customers have individual interactions with the representations in question (assuming they have even heard them). They understand them differently, have different expectations about them, and differently value what they are told about the product in question. As the Ontario Court of Appeal held, “[a] court cannot extrapolate from the motivation of one person to a conclusion respecting others. As discussed above, proof of reliance must be based on evidence of the experience of each individual class member.”<sup>43</sup> Given its outcome in which a purportedly common issue foundered at the merits stage,<sup>44</sup> *Rebuck* is a cautionary tale about the dangers of assuming commonality in misrepresentation cases at the class certification stage.

## Conclusion

So where does this leave misrepresentation class actions under the *Competition Act*? I offer three thoughts. First, detrimental reliance remains a critical link in the chain of causation. Decisions that suggest otherwise misread the law. That outcome aligns with a commonsense principle: an unheard or unread misrepresentation cannot cause harm. **Someone** must have heard or read the misrepresentation and acted differently because they heard it or read it. Otherwise, the misrepresentation did not **cause** anything to happen at all.

Second, in the few cases where the misrepresentation has not been made to class members, the necessary detrimental reliance can occur up the chain of causation from the plaintiffs—but must still exist. To the extent that these cases are a narrow exception to the ordinary rule that misrepresentation cases cannot be certified because they depend on individualized evidence, courts must nevertheless be vigilant to ensure that the plaintiffs can demonstrate, among other things, (i) that the representation was made “to the public,” and (ii) how the plaintiffs will prove reliance by these third parties in a common issues trial. As the lower court’s reconsideration of *Live Nation* may reveal, this could prove much more complicated than the plaintiffs expect. As well, to the extent that *Live Nation* implies a fraud-on-the-market theory for consumer products cases, that outcome should be rejected.

Third, where as in *Rebuck*, the claim rests on misrepresentations made to the plaintiff class, the logic of the historical orthodoxy remains true: misrepresentation cases raise inherently individual issues that are not suitable

for class treatment. Different consumers really are different. They have different expectations arising from the misrepresentations; they value different product attributes differently. Consequently, any harm they experience is inherently individualized.

This outcome aligns with the commonsense proposition with which this paper began: why should non-vegan me receive a windfall if I never attributed value to my vegan leather seats (or never even heard the representation) in the first place?

To the extent that plaintiffs reject that outcome as presenting an unfair barrier to justice for vegan-me, the appropriate solution is legislative change. Where Parliament or other legislatures have considered the common law rule of detrimental reliance too severe, they have legislated it away (albeit, often with other safeguards). That is their prerogative. Indeed, the recent amendments to the Competition Act may be another example of such legislative action.<sup>45</sup>

Admittedly, the Competition Act changes come with significant procedural uncertainty relative to the known procedures that have developed over the last 30 years since Ontario passed its Class Proceedings Act. As well, the Tribunal will have broad discretion to fashion appropriate remedies on the facts of each case. It may apply that discretion to prevent unharmed consumers from receiving significant windfalls. Such an approach might end up producing an outcome very similar to what a detrimental reliance standard would produce. These and other questions remain to be answered by the Tribunal in the coming years.

Regardless of the preferred procedural vehicle, I think that we can all rely on two things: businesses will keep making representations about their products and groups of consumers will continue to seek damages when those representations are wrong.

## ENDNOTES

<sup>1</sup> Partner at Bennett Jones LLP. The author thanks Mike Eizenga, Cheryl Woodin and Ilan Ishai for their helpful comments on drafts of this paper.

<sup>2</sup> See the cases cited at note 13.

<sup>3</sup> See the cases cited at notes 15, 19, 26, 30, 35, and 37.

<sup>4</sup> As the Supreme Court of Canada noted in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para 15, plaintiffs maintained that it was not “plain and obvious” that waiver of tort was not an independent cause of action because “courts have *refrained* from finding that it is plain and obvious that such an action *does not exist*.” (emphasis in original) The law remained in that state of uncertainty for 16 years, a period in which the Supreme Court stated: “Nothing is gained, and much court time and considerable litigant resources are lost, by leaving this issue unresolved.” (at para 21).

<sup>5</sup> R.S.C., 1985, c. C-34.

<sup>6</sup> 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*. The Bill received Royal Assent on June 20, 2024 and the amendments providing for private access will come into force on June 20, 2025. The amendments enable private litigants to bring misleading representation cases before the Competition Tribunal with leave. Disgorgement is an available remedy: the Tribunal may order the respondent to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate (s. 74.1(1)(d)).

<sup>7</sup> Although s. 74.1(8) of the *Competition Act* gives the Tribunal broad powers concerning the terms necessary to implement any disgorgement remedy it orders, many of the enumerated examples appear in orders made in class proceedings: “The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order’s implementation, including terms (a) specifying how the payment is to be administered; (b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration; (c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator; (d) requiring that potential claimants be notified in the time and manner specified by the court; (e) specifying the time and manner for making claims; (f) specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and (g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.”

<sup>8</sup> For example, the statutory causes of action in the Ontario *Securities Act* R.S.O. 1990, c. S.5 permit recovery “without regard to whether the person or company

relied on the misrepresentation”: s. 130 (prospectus misrepresentations); s. 130.1 (offering memorandum misrepresentations); s. 131 (circular misrepresentations); s. 138.3 (secondary market misrepresentations).

<sup>9</sup> For example, the Ontario *Consumer Protection Act*, RSO 1990, c C.31 does not require reliance for consumers to obtain compensation. See *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at para 86-87 (“*Ramdath*”).

<sup>10</sup> Subject to the Tribunal’s broad discretion on who will be entitled to a remedy and in what amount. As noted later in this paper, it remains open to the Tribunal include some element of reliance in its assessment to avoid windfall gains to unharmed consumers.

<sup>11</sup> Section 52(1.1)(a).

<sup>12</sup> Section 52(5).

<sup>13</sup> *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at paras 107-108 (“*Singer*”). Other cases include: *Magill v. Expedia Canada Corporation*, 2010 ONSC 5247 at paras. 105-106; *LBI Brands Inc. v. Aquaterra Corporation*, 2016 ONSC 3572 at paras. 20-21; *Murphy v. Compagnie Amway Canada*, 2015 FC 958 at paras. 82-89; *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 71; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 82; and *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36.

<sup>14</sup> *Singer* at para 70.

<sup>15</sup> *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 (“*Live Nation*”).

<sup>16</sup> *Live Nation* at para 125.

<sup>17</sup> *Go Travel Direct Inc. v. Maritime Travel Inc.*, 2009 NSCA 42 (“*Go Travel*”).

<sup>18</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (“*Pro-Sys*”).

<sup>19</sup> *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 (“*Valeant*”).

<sup>20</sup> *Go Travel* at para 62.

<sup>21</sup> *Go Travel* at para 64.

<sup>22</sup> *Go Travel* at paras 8 and 42.

<sup>23</sup> *Valeant* at para 235.

<sup>24</sup> *Valeant* at paras 224 and 228.

<sup>25</sup> *Live Nation* at para 126.

<sup>26</sup> *Thompson-Marcial v. Ticketmaster Canada LP*, 2024 ONSC 2305 at paras 198 and 203.

<sup>27</sup> *Live Nation* at para 85 (emphasis added).

<sup>28</sup> Admittedly, it is conceivable that at least some consumers who would not have participated in the secondary market are also class members, which somewhat strains the idea that “someone else” relied on the misrepresentations. Regardless, this simply leads to additional problems of proof as discussed later in this paper. Alternatively, the Court of Appeal may have meant that, given the nature of the representations, reliance could be inferred on a class-wide basis, although this is even less consistent with its statement that the “general inflationary effect” theory did not require reliance.

<sup>29</sup> *Go Travel* at para 62.

<sup>30</sup> *Rebuck v. Ford Motor Company*, 2018 ONSC 7405 (“*Rebuck*”).

<sup>31</sup> *Carom v. Bre-X Minerals Ltd.*, 1998 CanLII 14705 (ON SC), 41 OR (3d) 780, 83 ACWS (3d) 363, 78 OTC 356, 41 BLR (2d) 246, 27 CPC (4th) 73, 43 CCLT (2d) 310 & *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at para. 231: “It is settled law that reliance issues in a common law securities misrepresentation claim cannot be certified on the basis of deemed reliance arising from a “fraud on the market” or “efficient market” theory.” See also: *Peters v. SNC-Lavalin Group Inc.*, 2021 ONSC 5021 at para. 236; *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686 at para. 135-139; *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.); *Menegon v. Philip Services Corp.*, 2003 CanLII 36468 (ON CA), leave to appeal refused [2003] S.C.C.A. No. 95; & *Mondor v. Fisherman*, 2001 CanLII 28388 (ON SC).

<sup>32</sup> *Basic v. Levinson*, 485 U.S. 224 (1988) at 485.

<sup>33</sup> See the cases cited at note 31.

<sup>34</sup> *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295 & *R v Stucky*, 2009 ONCA 151.

<sup>35</sup> *Krishnan v Jamieson Laboratories Inc.*, 2021 BCSC 1396.

<sup>36</sup> But as noted earlier, such a misrepresentation has arguably not been made “to the public” and so would not be captured under s. 52.

<sup>37</sup> *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423 (“*Drynan*”).

<sup>38</sup> *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650 at para 116.

<sup>39</sup> *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 6190 at para 74.

<sup>40</sup> As the Ontario Court of Appeal noted in a footnote in *Ramdath*, reliance as a common issue may not be impossible. It gave the example of recitals in a consumer contract that state that the consumer has read and relied on a previous document. It also cited *Cannon v. Funds for Canada*, 2012 ONSC 399 at para. 351 where the court held that it may be possible to infer that donors relied on the representations regarding the enhanced tax deduction since that was the entire reason donors would have participated in the tax shelter in question. As demonstrated below, *Rebuck* did not fit that mold.

<sup>41</sup> *Rebuck* at para 62.

<sup>42</sup> *Rebuck* at para 65.

<sup>43</sup> *Ramdath* at para 91.

<sup>44</sup> This is the very result that the Supreme Court of Canada warned against in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 104.

<sup>45</sup> Although, admittedly, these remedies will not be available if the Competition Bureau obtains a remedy against a respondent meaning that class actions under s. 36 will remain the only means of recovery where the class action “follows on” from a regulatory outcome.

## JUST WATCH ME: PROCEDURAL FAIRNESS UNDER THE INVESTMENT CANADA ACT'S NATIONAL SECURITY REGIME<sup>1</sup>

Kate McNeece<sup>2</sup> & Will Rooney<sup>3</sup>

*What procedural protections does fairness demand for foreign investors subject to Canada's regime for the national security review of investments? This paper argues that much more is required than is presently provided. Under the Investment Canada Act, the Minister of Innovation, Science and Industry and the federal Cabinet both make decisions about whether the investment poses a potential national security threat, with minimal reasons or information provided to the investor. Legally speaking, the significance of these decisions to investors and the statutory scheme (a final, non-appealable determination) warrant greater procedural safeguards. Further, greater justification should only serve to benefit the government in the event of contested proceedings. Finally, as a practical matter, providing more information to investors about the government's concerns would only serve to improve the mitigation that investors may offer and facilitate the conditional approval of investments, a clear objective of both the existing regime and recent amendments.*

*Quelles protections procédurales l'équité exige-t-elle pour les investisseurs étrangers assujettis au régime canadien d'examen des investissements aux fins de la sécurité nationale? Les auteurs de cet article soutiennent que les besoins sont bien plus importants que ce qui est actuellement prévu. En vertu de la Loi sur Investissement Canada, le ministre de l'Innovation, des Sciences et de l'Industrie et le cabinet fédéral prennent tous deux des décisions quant à savoir si l'investissement porte atteinte à la sécurité nationale, avec un minimum de raisons ou d'informations fournies à l'investisseur. D'un point de vue juridique, l'importance de ces décisions pour les investisseurs et le cadre législatif (une décision définitive et sans appel) justifient des protections procédurales plus importantes. De plus, une justification mieux articulée ne devrait servir qu'à avantager le gouvernement en cas de procédure contestée. Enfin, d'un point de vue pratique, fournir davantage d'informations aux investisseurs sur les préoccupations du gouvernement ne servirait qu'à améliorer les mesures d'atténuation que les investisseurs peuvent proposer et faciliter l'approbation conditionnelle des investissements, un objectif clair du régime existant et des modifications récentes.*

## 1. Introduction

On November 2, 2022, the Canadian government announced that it had ordered the divestiture of lithium assets acquired by three Chinese companies in three separate transactions. A statement by the Minister of Innovation, Science and Industry (the “**Minister**”) explained that this unprecedented announcement would be the prelude to greater transparency, noting that “[t]ransparency and certainty are core principles for the government’s modernization efforts where the [*Investment Canada Act* (“*ICA*”)] is concerned”, and that the government “will continue to announce outcomes of such orders going forward.”<sup>4</sup> Just over a month later, on December 7, 2022, the Minister proposed a bill setting out a suite of amendments to the *ICA*, with transparency again being a stated aim (the “**Amendments**”).<sup>5</sup> On March 22, 2024, the Amendments were passed by the House of Commons, with select amendments coming into force on September 3, 2024.

This paper argues that additional steps to promote transparency in the administration of the *ICA* are both welcome and necessary, especially in light of the new Ministerial powers granted by the Amendments. Greater transparency in the national security review of investments, specifically as it relates to the information the government provides to investors over the course of a review, ought to be pursued for three principal reasons. First, procedural fairness requires greater justification of *ICA* national security decisions than is presently provided. Second, it is in the government’s interest to provide more robust reasons in order to ensure its decisions withstand judicial review. Third, greater transparency can assist the government in balancing its statutory objective to encourage investment in Canada with its responsibility to protect national security. Equipping investors with better information will ensure that *ICA* enforcement does not chill investment any more than is necessary while at the same time facilitating the conditional approval of investments where appropriate (predicated on meaningful dialogue on national security issues).

This paper proceeds as follows. Section 2 details the process by which various decision-makers have evaluated investments under the pre-Amendments national security regime, describes how the Amendments alter this process, and illustrates the practical reality of the quantity and quality of information provided to foreign investors: namely, that investors are often left largely in the dark about the government’s concerns.

Section 3 details the basic legal framework for procedural fairness. It reviews two related species of procedural fairness that support greater disclosure to investors who are subject to national security review. The first is the duty to provide reasons. The second is the principle that those subject to administrative proceedings are entitled to know the case to be met.

Section 4 argues that more and better information ought to be provided to investors throughout the national security review process. First, as a matter of first principles regarding procedural fairness, the information provided at present is inadequate. A substantial duty of procedural fairness, supported by the importance of these decisions to investors and the absence of a statutory route of appeal, militates in favor of greater reasons. While the need to withhold certain privileged information is obviously a factor to be considered, this argument has its limits.

Second, given the increasing centrality of reasons to substantive judicial review, it is in the government's interest to provide more robust reasons beyond the minimum required by procedural fairness principles. The Amendments specifically contemplate more frequent contested national security proceedings, and provide the ideal opportunity for the government to reconsider the procedure that such reviews follow.

Third, we set aside the legal arguments to apply a purposive policy lens. In particular, the Amendments establish a process by which the Minister can accept binding undertakings to allow an investment to proceed subject to conditions that mitigate national security concerns; a process which necessarily envisions a dialogue between investors and the government. Such a dialogue can only occur if the government provides investors with the information they need to productively participate in the negotiations. We argue that this process will proceed inefficiently, at best, absent greater transparency.

Section 5 concludes. The government has every reason to provide greater information to foreign investors. Legally, equipping investors with greater information is required as a matter of procedural fairness and to buttress decisions in the event of judicial review. But further, greater information exchange only stands to improve the administration of the national security process.

## 2. Legal Framework for the National Security Review of Investments

This section details the legal framework and practical reality of national security reviews under the *ICA* to provide the reader with a better understanding of the review process, and the rights and interests impacted at each stage. The legal framework contemplates an extended process with regular milestones in the form of decisions of the Minister and/or federal Cabinet. In practice, certain of these decision-points are the only time at which investors are given any statements as to why the government believes that a certain investment poses a threat to national security.

### (a) The *ICA* National Security Regime

Under the *ICA*, the Canadian federal government has the power to review a broad range of investments by a non-Canadian with a nexus to Canada on national security grounds.<sup>6</sup> In particular, the national security provisions of the *ICA* (Part IV.1) apply to any investment, whether implemented or proposed, by a non-Canadian to (a) establish a new Canadian business; (b) acquire control of a Canadian business; or (c) acquire, in whole or in part, or to establish an entity carrying on all or part of its operations in Canada if the entity has a place of operations in Canada, Canadian employees, or Canadian assets.<sup>7</sup>

Below, we set out the *ICA* national security regime prior to and after the Amendments. As certain of the Amendments have yet to come into force, we note throughout this piece where particular legislative changes are not yet in operation. Each of these steps impacts investors' legal interests, as detailed further below, but the statutory scheme is silent on disclosure and reasons. While at certain stages, practice has developed to fill this procedural gap, the reasons provided remain insufficient to allow investors to meet the case being made against them or meaningfully engage in mitigation discussions.

For investments subject to the mandatory filing regime under the *ICA*, the national security process begins with the filing of a complete notification or application for review on "net benefit" grounds.<sup>8</sup> At any point after the notification is filed up until the review is complete, the Minister can request relevant information from persons and entities connected with the investment.<sup>9</sup>

The first decision-point under the *ICA* comes at the end of the prescribed period following either the receipt of a complete notification (45 calendar days) or, where a notification is not required, implementation of the

investment (5 years).<sup>10</sup> By the end of the applicable period, the Minister must decide whether to take national security action. If the Minister does not take action, the matter is concluded.

Under the prior version of the ICA, if the Minister did take action at this stage, it could take one of two forms:

- If the Minister had “reasonable grounds to believe” that an investment “could be injurious to national security” the Minister could unilaterally extend the period of time to consider the investment by 45 days in the form of a notice (“**25.2(1) Extension**”) that a national security review may be ordered.<sup>11</sup> In the event that the investor had not implemented the investment, this notice had suspensory effect.<sup>12</sup>
- Alternatively, if the Minister had already concluded that the investment “could be injurious to national security”, the Minister could have, after consulting with the Minister of Public Safety, referred the matter to the federal Cabinet (the “**Initial Referral**”).<sup>13</sup> (The Minister could also make such a referral following a 25.2(1) Extension.) Federal Cabinet could then order the commencement of a national security review (a “**25.3(1) Review Order**”).<sup>14</sup> Should such a review be ordered, the Minister was required to notify the investor “without delay.”<sup>15</sup> The 25.3(1) Review Order, like the 25.2(1) Extension, had suspensory effect.<sup>16</sup>

As a practical matter, in most cases the Minister has first issued a 25.2(1) Extension, preventing closing of a transaction that has not already closed, and extending the screening period by 45 days; and subsequently (unless satisfied during this initial period that there is no risk to national security) has obtained a 25.3(1) Review Order at the end of this period. Whether issued following a 25.2(1) Extension or at the end of the initial screening period, notice to the Investor that a 25.3(1) Review Order has been made is accompanied by a brief “Summary of Concerns”—meaning that the first instance at which any reasons justifying a suspensory national security review of an investment often comes nearly 3 months after filing of a complete notification.

The Amendments modify the outset of the process in two primary ways. First, instead of referring the matter to federal Cabinet for a 25.3(1) Review Order, under the new regime, the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, may launch an analogous “**Further Review**” of the investment provided the Minister believes that the investment “could be injurious to national security.”<sup>17</sup> Second, the

Amendments equip the Minister with the ability to impose interim measures pending the completion of the review.<sup>18</sup>

As of November 2024, the Minister has not publicly disclosed any case in which the interim measures power has been used; however, by virtue of the power's placement in section 25.3 and government guidance, it seems clear that a 25.3(1) Review Order / order for Further Review must be issued either prior to or simultaneously with an order imposing interim measures.<sup>19</sup> Notably, despite granting the Minister significant new powers to impact the implementation of an investment that "could be" (but has not been determined *to be*) injurious to national security, the Amendments do not codify a requirement for the Minister to provide a "Summary of Concerns" to the investor, nor do they require the Minister to provide the investor with reasons detailing why such interim measures are necessary.

Under the prior regime, where Cabinet issued a 25.3(1) Review Order, the initial statutory period for the review would be lengthened by 45 days, which could be unilaterally extended by the Minister by an additional 45 days (creating a potential total of 90 days).<sup>20</sup> Further extensions were possible with the consent of the investor. The 25.3(1) Review Order would also trigger an investor's right to make representations.<sup>21</sup> This is one of the few procedural rights afforded to investors under the *ICA*'s national security regime.

Following the Amendments, a decision by the Minister to order Further Review provides the Minister with an additional 45 days to consider the investment.<sup>22</sup> Subsequent timing is unchanged. The Minister can unilaterally extend a Further Review by an additional 45 days, and additional extensions remain possible on consent.<sup>23</sup> Like the 25.3(1) Review Order, initiating Further Review triggers the investor's right to make representations.<sup>24</sup> The Amendments have removed the Minister's duty to provide investors with the reasonable opportunity to make "in person" representations, and replaced them with the ability for the Investor to make "representations and submit written undertakings, within the time and in the manner specified in the notice."<sup>25</sup>

A complete *ICA* national security review that did not result in unconditional approval by the Minister traditionally culminated in a referral to Cabinet. Prior to the Amendments, the Minister had limited formal legal powers to approve investments subject to conditions. By no later than the end of the national security review period, the Minister had either to determine that the investment was not likely to be injurious to national security, or, after consulting with the Minister of Public Safety, to refer the investment

to the federal Cabinet for review (the “**Final Referral**”).<sup>26</sup> No notice was required to be provided to the investor when this referral was made, or on what grounds (*i.e.*, the Minister could refer the investment to Cabinet on the basis that the Minister had concluded that the investment was likely to be injurious to national security, or that the Minister had not been able to determine whether the investment was likely to be injurious to national security, without informing the investor).

Following the Amendments, where an investment may be injurious to national security, the Minister now has the legal ability to approve the investment subject to binding undertakings without referring the investment to Cabinet.<sup>27</sup> As noted above, the Amendments do not require the Minister to provide reasons (in a Summary of Concerns or otherwise) supporting the Further Review or detailing why such binding undertakings are necessary to resolve national security concerns.

Under both the pre-Amendment and post-Amendment *ICA*, following the Final Referral, the federal Cabinet has 20 days to take action (this period cannot be extended).<sup>28</sup> The federal Cabinet may make an order requiring the investor to take any action it considers advisable to protect national security, including authorizing the investment on the basis of undertakings, terms or conditions agreed with the investor; blocking the transaction (if the review proceeds pre-closing); or requiring the investor to divest their investment, refrain from voting their interests, *etc.* (if the review proceeds post-closing) (the “**Final Order**”).<sup>29</sup> The Final Order customarily contains recitals setting out the concerns leading to the Order (though the *ICA* does not require such recitals to be included, and the concerns are again expressed in very general terms).

To recap, the key decisions under the current and post-amendment *ICA* are depicted in *Figure 1*, below.

**Figure 1. Decisions under the ICA's National Security Regime**

<b>Prior ICA</b>	<b>Prior ICA</b>	<b>Amended ICA</b>	<b>Amended ICA</b>	<b>Reasons</b>
<i>Decision</i>	<i>Description</i>	<i>Decision</i>	<i>Description</i>	<i>Description</i>
<b>25.2(1) Extension</b>	The Minister's decision to extend the initial period (or terminate the process), which requires the Minister to have reasonable probable grounds to believe that the investment "could be injurious to national security."	<b>25.2(1) Extension</b>	No change to the legal standard.	No statutory requirement to provide reasons and none traditionally provided.
<b>Initial Referral</b>	The Minister's initial decision to refer the matter to the federal Cabinet to order a review (or terminate the process), which requires the Minister to consider that the investment "could be injurious to national security."	<b>Further Review</b>	It is now the Minister's initial decision to commence a 'further review' of the investment (or terminate the process), which requires the Minister to consider that the investment "could be injurious to national security."	No statutory requirement to provide reasons; brief "Summary of Concerns" customarily provided along with notice under section 25.3(2) that an order had been made.
<b>25.3(1) Review Order</b>	Cabinet's decision to order a review.			
<b>Final Referral</b>	It was the Minister's decision to refer the matter to the federal Cabinet (or terminate the process), which required (i) the Minister to be satisfied that the investment would be injurious to national security, or (ii) on the basis of the information available, the Minister was not able to determine whether the investment would be injurious to national security.	<b>Final Referral (or Ministerial Conditional Approval)</b>	It is now the Minister's decision either to refer the matter to federal Cabinet, or to approve the investment subject to conditions (or to terminate the process). Referral requires that (i) the Minister be satisfied that the investment would be injurious to national security, or (ii) on the basis of the information available, the Minister is not able to determine whether the investment would be injurious to national security.	No statutory requirement to provide reasons or basis on which the referral has been made; no reasons customarily provided.

<b>Final Order</b>	If referred to federal Cabinet, federal Cabinet's order to block, unwind, or approve (with or without conditions) the investment.	<b>Final Order</b>	If referred to federal Cabinet, federal Cabinet's order to block, unwind, or approve (with or without conditions) the investment.	No statutory requirement to provide reasons; recitals customarily included in the Order in Council.
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## (b) The Practice

This section describes how a national security review proceeds in practice (including a public example from the pre-amendment *ICA*), with particular emphasis on the time and nature of the reasons provided (or lack thereof).

At the outset, it is important to note that the national security review of investments is an area of law driven by the government's *changing* view of what constitutes a matter of national security. The term "injurious to national security" is not defined under the *ICA* or its accompanying regulations. Instead, "national security" is a flexible standard that may reflect the prevailing concerns of the government at the time of the review. Prospective investors can look to the government's *Guidelines on the National Security Review of Investments* (the "**Guidelines**"),<sup>30</sup> which describe the government's approach to national security reviews under the *ICA* as well as prior reviews (to the extent they have become public, including through the government's annual report on the administration of the *ICA*), to understand the types of investments that could be considered sensitive.

This paper does not take issue with this framework—it may well be appropriate for "injurious to national security" to be a flexible and shifting standard, consistent with the ever-shifting national security landscape. But this context—a subject area without bright line rules or established case law—makes transparency of process all the more important. The process involves significant information asymmetries. The flexible definition of "injurious to national security" is just one example (*e.g.*, due to recent geopolitical developments, has an investor from a traditionally 'friendly' nation become a potential national security risk). In addition, owing to intelligence gathering efforts, it is reasonable to anticipate that the government will often have developed specific concerns when it chooses to launch a national security review. These concerns may relate to any number of topics (*e.g.*, one part of a company's global supply chain), but the government may not wish to share granular details with the investor.<sup>31</sup>

As described briefly above, under the pre-Amendments *ICA* national security regime, written reasons<sup>32</sup> have historically been provided at just

two of the five discrete points identified in the prior section: at the outset of a formal 'review' (following a 25.3(1) Review Order), and alongside a Final Order from the federal Cabinet. Post-Amendments, these two inflection points correspond to the order for Further Review and the Final Order (or, alternatively, Ministerial Conditional Approval).

An investor subject to national security scrutiny (typically after a 25.2(1) Extension, but sometimes before) can expect to receive one or more requests for information from the Foreign Investment Review and Economic Security Branch of Innovation, Science and Economic Development Canada (the agency that administers the *ICA* on behalf of the Minister, abbreviated as "FIRES"), and in some cases may have additional engagement with FIRES, as described further below. Though an investor may be able to glean some aspects of the government's concern from the questions included in the information request(s) (which range widely in breadth and depth), disclosure is typically limited at this stage and it is only if the national security process moves to the next stage, the 25.3(1) Review Order (now Further Review), that the investor is provided with any direct indication of the government's concerns.

An investor's first indication of the government's concerns will typically come in the form of a "Summary of Concerns." The Summary of Concerns accompanies the notice communicating to the investor that Cabinet has made a section 25.3(1) Review Order (under the new regime, that the Minister has initiated Further Review). Under the post-Amendments *ICA*, any order imposing interim conditions is likely to be received simultaneously with, or after, the order for Further Review. FIRES' recent guidance explains that "a ministerial order imposing interim conditions, if any, would be delivered to the investor and any other relevant party(ies) along with the notice referred to under subsection 25.3(2),"<sup>33</sup> and indicates that the content of the Summary of Concerns will serve as the basis to inform undertakings and interim conditions.<sup>34</sup> This guidance also states that a deadline for the submission of national security undertakings will be included with this notice.<sup>35</sup>

While we welcome the recognition within the Minister's non-binding guidance of the importance of providing some reasons in the form of a Summary of Concerns, the procedural protection provided by this 'soft law' is limited. As a practical matter, the delivery of the Summary of Concerns at this time means the investor typically must wait until at least 90 days after the filing of a complete notification (and for investors filing prior to closing, typically 45 days after suspension of the ability to close) before the

government provides any justification for the enhanced scrutiny to which the investment is subject.

Moreover, Summaries of Concerns—when finally delivered—can be brief and uninformative. They usually (a) provide a brief summary of relevant facts and (b) reference particular elements of the Guidelines that are applicable to the investment being considered. For example, in a recent litigated case (where the Summary of Concerns was made public in court records), the Summary of Concerns read:

[The Investor via its affiliates maintains] several points of presence within Canada's telecommunications infrastructure, including providing telephony services to individual customers, and offering general ICT services to third parties in Canada.

As the Investor is a state-owned enterprise ultimately controlled by the Chinese state, this investment could result in the Canadian business being leveraged by the Investor's ultimate controller for non-commercial purposes, such as compromise of critical infrastructure and foreign interference, to the detriment of Canada's national security.<sup>36</sup>

Equipped with the above and a few requests for information from the government, FIRES' latest administrative policies would require an investor to make representations to support undertakings and (if applicable) to lift interim conditions within just 10 business days of receipt of the Summary of Concerns.<sup>37</sup>

In the event that an investor is subject to a complete review and a Final Order from Cabinet, the statement above is all an investor will receive by way of reasons until Cabinet's order (which would be received 90-110 days, or more, after the Summary of Concerns). During this time, the investor may receive requests for information from FIRES staff; engage with FIRES regarding these requests; and receive feedback from FIRES as to representations and informal mitigation. At the Canadian Bar Association 2024 Fall Conference, FIRES leadership indicated that they intended to be more forthcoming to suggest undertakings (and provide feedback on undertakings) during a national security review. We welcome the recognition at the FIRES level that greater transparency would benefit investors at this stage. However, an intent to provide informal oral or written feedback from the reviewing agency (who can only provide such feedback on the basis that they cannot bind the Minister's discretion to come to a different conclusion) is no substitute for written reasons from the ultimate decision-maker (the Minister).

In the same court case noted above, Cabinet's Final Order contained two substantive elements (embedded within extended recitals stating that the procedural steps required under the *ICA* had been adhered to). The order contained a brief recitation of the same facts outlined in the Summary of Concerns:

Where [the Canadian Business]:

- (a) Maintains points of presence within Canada's telecommunications infrastructure;
- (b) Offers mobile telephone services within Canada to Canadians and individuals; and
- (c) Offers information and communication technology services within Canada to businesses within the meaning of the [*ICA*] to Canadian non-governmental organizations and individuals as well as to embassies;<sup>38</sup>

Subsequently, it restated many of the same alleged national security risks as outlined in the Summary of Concerns, now slightly expanded upon:

And whereas the Minister of Industry, after consideration of all of the information collected and all of the representations made during the course of the review and after consultation with the Minister of Public Safety and Emergency Preparedness, being satisfied that the investment—by posing the following risks—would be injurious to national security, has, under subparagraph 25.3(6)(a)(i) of the Act, referred the investment under review to the Governor in Council, together with a report of the Minister's findings and recommendations on the review:

- (a) that [the Investor's ultimate parent] and its subsidiaries and affiliates may be subject to the influence or demand of, or control by, a foreign government;
- (b) that [the Investor's ultimate parent] and its subsidiaries and affiliates may disrupt or otherwise compromise Canadian critical telecommunications infrastructure; and
- (c) that [the Investor's ultimate parent] and its subsidiaries and affiliates may gain access to highly sensitive telecommunications data and personal information that could be used for non-commercial purposes such as military applications or espionage.

Therefore, Her Excellency the Governor General in Council, considering it advisable to protect national security, on the recommendation of the Minister of Industry, pursuant to subsection 25.4(1) of the *Investment Canada*

Act, makes the annexed [order for the divestment/winding-up of the Canadian business].<sup>39</sup>

In this case, the foreign investor and its affiliates, companies involved in the telecommunications services sector with Chinese state ownership, merely had these facts recited back to them by the government as sources of national security risk without further explanation. This is the sparse *status quo*. Unless the Summary of Concerns is made more robust, it is not clear how Summaries of Concerns will effectively allow investors to prepare a robust and meaningful undertakings proposal, or provide effective representations concerning interim conditions, within the short 10 business day timeline required by the government.

### 3. Procedural Fairness, Reasons, and the Case to be Met

In the remainder of this paper, we argue that additional reasons must, and should, be provided to allow investors the full benefit of the procedural rights established by the ICA. To ground this discussion, this section first briefly details two administrative law doctrines (derived from the common law duty of procedural fairness) that are particularly important for present purposes: the duty to provide reasons and the duty to provide a party with the case to be met.

#### (a) The Duty of Procedural Fairness

In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada set out five principal considerations that inform an administrative decision-maker's common law duty of procedural fairness. Where an administrative body makes decisions affecting individuals' "rights, interests, or privileges," this triggers a common law duty for public bodies to treat those rights, interests, and privileges fairly—a duty of "procedural fairness."<sup>40</sup>

In evaluating the duty of procedural fairness in this context, the Supreme Court of Canada set out five principal factors that inform the strength of the duty. They are:

- **The Nature of the Decision.** This factor evaluates whether the decision in question is of a legislative or policy nature and affects the community as a whole, or is an adjudicative decision that turns on a question of fact and law and affects the interests of a single individual. Accordingly, the "more the process provided for, the function of the tribunal, the nature of the decision-making body, and the

determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required.”<sup>41</sup>

- **The Importance of the Decision to the Individual.** The “more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”<sup>42</sup> For example, at the high end, decisions that risk individual life attract a high level of procedural fairness.<sup>43</sup> Conversely, at the low end, neither risk of harm to reputation of the individual nor a plea to receive government funding result in significant procedural protections.<sup>44</sup>
- **The Statutory Scheme Governing the Decision.** Another important consideration is the nature of the statutory scheme and the terms of the statute pursuant to which the decision-making body operates. Accordingly, the “role of the particular decision within the statutory scheme and other surrounding indications in the statute help to determine the content of the duty of fairness.”<sup>45</sup> Greater procedural protections will therefore be required when “no appeal procedure is provided within the statute, or when the decision is final and further requests cannot be submitted.”<sup>46</sup>
- **The Individual’s Legitimate Expectations.** A Tribunal may be reasonably expected to follow the same procedures it has in the past, provided that the evidence of past practice is clear and unequivocal, that it has been the tribunal’s common practice, it is directly applicable in the circumstances and the person seeking to enforce it knew of it and relied on it, and it does not conflict with statutory requirements. Accordingly, the legitimate expectations of the person challenging the decision given these past procedures may also determine what procedures the duty of fairness requires. If a legitimate expectation is found to exist, “this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision.”<sup>47</sup>
- **The Administrative Decision-Maker’s Choice of Procedure.** Tribunals are given reasonable latitude in setting their own procedure. Consequently, the “analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are

appropriate in the circumstances.”<sup>48</sup> However, the procedure adopted by a tribunal must ensure that those who come before it are treated fairly. Therefore, while “important weight must be given to the choice of procedures made by the agency itself,” it is not determinative.<sup>49</sup>

In *Baker*, Mavis Baker was ordered deported to Jamaica, despite having Canadian-born, dependent children in Canada. As a result, she made a written application on humanitarian and compassionate grounds for an exemption to the requirement under subsection 114(2) of the *Immigration Act* that her application for immigration be made from abroad. In a letter received from a senior immigration officer, her application was denied without a hearing and without reasons being provided. Upon requesting reasons, Ms. Baker was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. She sought judicial review of the officer’s determination, and pursued the matter to an appeal before the Supreme Court of Canada.

The Supreme Court of Canada held that the nature of the decision (which involved considerable discretion), and the statutory scheme (categorizing compassionate relief as an exception to the general principles of Canadian immigration law) both militated in favour of a more relaxed duty of fairness. However, the lack of appeal procedure and the exceptional importance of this decision both weighed in favour of more extensive procedural protections. Balancing these factors, the Supreme Court of Canada held that the resulting duty of fairness was more than minimal.

Nevertheless, even in light of a ‘more than minimal’ duty of fairness, the Supreme Court of Canada recognized that reasons ought to have been provided. The Court held that, “in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.”<sup>50</sup> Moreover, it would be unfair, the Supreme Court of Canada held, for a person subject to a decision such as this one which is so critical to their future not to be told why the result had been reached.<sup>51</sup>

### **(b) The Duty to Provide Reasons and the Case to be Met**

This general duty of fairness informs the particular procedural remedies required in given circumstances. *Baker* is therefore doubly relevant in that it also established that even minimal procedural fairness can require administrative decision-makers to provide written reasons for a decision.<sup>52</sup>

In addition, procedural fairness also entitles those appearing before a decision-maker to know the case to be met. As Lord Denning stated:

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.<sup>53</sup>

Where decisions are ‘serialized’ as they are under the *ICA*’s national security regime, one can think of a document like the Summary of Concerns in two ways. One way to think of it is as a form of reasons (for example, for the Minister’s Further Review), the other, as a document which sets out the case to be met. In either case, procedural fairness demands more than investors receive under the current regime.

#### **4. Investors are Owed Greater Procedural Protections**

While this paper does not attempt to pinpoint the precise legal bounds of the requirements of procedural protections that must be afforded to investors subject to national security review under the *ICA*, in the authors’ view, the vague and high level “Summary of Concerns” issued thus far is insufficient. At the very least, the Minister’s reasons should provide investors with a clear understanding of the nature and extent of the national security concerns that have been identified, including which business segments, products/services, locations, personnel or practices are causing the concern. Where interim measures are concurrently imposed, the Minister should also provide reasons why these measures are required to mitigate national security concerns. These key pieces of information will allow the investor to make meaningful and robust representations to the Minister, and will provide an informed basis on which the investor can develop a package of undertakings that could potentially address national security concerns.

This section details three principal arguments for why these more detailed reasons ought to be provided during the national security review of an investment. Further detail is required because: (a) procedural fairness demands it, (b) the current, sparse reasons risk undercutting the substantive result following the Supreme Court of Canada’s clarification of substantive judicial review principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (described further below) and (c) conditional approval of investments, which we argue is a desirable outcome in many national security cases, requires a meaningful dialogue to craft workable remedies.

### **(a) Greater Justification is Required as a Matter of Procedural Fairness**

We understand from FIRES' September 3, 2024 *Administrative Note on Interim Conditions* that, in a post-Amendments world, the Minister anticipates continuing to provide a high-level Summary of Concerns only at the Further Review stage. In our view, this is insufficient to satisfy the requirements of procedural fairness.

The *ICA* process contemplates multiple decision-points, and the duty of procedural fairness attaches to each decision.<sup>54</sup> For example, the 25.2(1) Extension is suspensory and therefore in a pre-closing context is the first point at which a foreign investor's rights are impacted; it is unclear why this decision ought not to be justified with reasons. Nevertheless, for the sake of brevity, we focus on two important inflection points where reasons are already provided: the order for Further Review and the Final Referral (or Ministerial Conditional Approval).<sup>55</sup> At both points, investors deserve better information than that which is currently provided.

#### **(i) Investors are Owed a Significant Degree of Procedural Fairness**

The five factors set out in *Baker* militate toward a significant degree of procedural fairness to investors caught in an *ICA* national security process. On the one hand, the importance of the decisions to investors, investors' legitimate expectations, and the nature of the statutory scheme entail that Canada owes foreign investors a high degree of procedural fairness. On the other hand, deference is owed to the decision-maker with respect to its choice of procedure, and one may argue that the national security review process is merely an "investigatory" administrative regime and not a quasi-judicial one, militating in favor of fewer procedural protections. Ultimately, we conclude that even affording the latter two factors due consideration, the government's common law duty of procedural fairness at least requires investors be furnished with greater information under the *ICA*'s national security regime than they presently receive.

Three *Baker* factors weigh in favour of a strengthened duty of fairness in national security reviews.

First, the nature of the statutory scheme demands greater procedural fairness.<sup>56</sup> The absence of any appeal under the regime significantly strengthens the duty of procedural fairness owed to investors. The *ICA* makes abundantly clear that there is no right of appeal for decisions relating to national

security. Section 25.6 provides that “[d]ecisions and orders of the Governor in Council, and decisions of the Minister, under this Part [IV.1] are final and binding and, except for judicial review under the *Federal Courts Act*, are not subject to appeal or to review by any court.”<sup>57</sup> Applying *Baker*, there is “no appeal procedure provided within the statute”, which entails that “greater procedural protections” are needed.<sup>58</sup> Moreover, the express provision for the possibility of judicial review makes it obvious that a duty of fairness is owed. If meaningful reasons are not provided, how can judicial review itself be meaningful?

Second, investors legitimately expect reasons at these key inflection points. The *ICA* is silent as to whether reasons are specifically required, but the *ICA* does provide the investor with a right to make representations to the government during the Further Review, and to offer mitigation undertakings to resolve national security concerns. This procedural protection is empty if the investor does not understand the specific nature of the government’s concerns and what specific steps may be needed to address them. The fact that the government provides *some* reasons in the form of the Summary of Concerns and as a part of the Final Order also reinforces the expectation and the requirement for the government to provide justification for action taken under the national security regime; but these reasons cannot inform meaningful representations if they are vague and non-specific. It is, in our view, hollow to say that FIRES will propose interim undertakings. An investor cannot reasonably assess the propriety of such a proposal without knowing the case against it.

Third, the potential for significant consequences weighs heavily in favor of greater procedural protections. The sole prior decision contemplating procedural fairness under the *ICA*, *Canada (Attorney General) v United States Steel Corporation*, dealt with an entirely different regime.<sup>59</sup> *United States Steel Corporation* considered enforcement action under section 40 of the *ICA* relating to undertakings given by US Steel under the *ICA*’s “net benefit” (economic) review regime.<sup>60</sup> Under section 40 of the *ICA*, the government may seek a court order requiring investors to comply with an earlier demand. US Steel argued that procedural fairness required the company to be furnished with the same level of disclosure as in a criminal trial.<sup>61</sup> In *United States Steel Corporation*, the Federal Court recognized that “the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property.”<sup>62</sup> However, because the remedies under that section of the *ICA* were purely pecuniary, they did not “rise to the level of those decisions in which the life, liberty and security of the person are at stake” (as in criminal decisions), and the duty of procedural fairness

did not require disclosure above and beyond that which was provided for in the *Federal Courts Rules*.<sup>63</sup> Though not as high as in a criminal proceeding, the *Federal Courts Rules* set out procedural protections that are significantly more robust than those afforded to investors subject to the ICA's national security provisions.

In contrast with the economic review regime, national security decisions go beyond merely pecuniary impacts. The gravity of such decisions is greater in severity and broader in scope. National security attention invites stigma akin to criminal proceedings. Indeed, the Minister's statutory standard for the 25.2(1) Extension explicitly borrows a criminal law standard (e.g., "reasonable grounds to believe").<sup>64</sup> The impact of an adverse finding will also reverberate beyond Canada when they are reported to agencies in other jurisdictions (especially the "Five Eyes" countries)<sup>65</sup>, or when they may need to be reported in securities disclosure in respect of a public transaction, or in future diligence or other commercial contexts. Finally, national security scrutiny impacts real people. Surveillance or intelligence gathering with respect to a company is naturally effected *via* its employees. The consequences of being branded a national security concern stretch far-beyond the pecuniary impacts. The potential consequences of a national security order are weighty.

The Amendments expose investors subject to national security review to additional risks. For example, once in force (as of writing, expected to be during mid-2025), a mandatory pre-closing notification regime will apply to certain classes of investments, and the commencement of a national security review will enjoin such transactions pending completion. Further, the Amendments already in force empower the Minister to make interim orders relating to an investment, impacting investments that have already closed prior to any national security order being made. FIRES' administrative guidance on interim conditions details the intrusiveness of these measures, which can include "temporarily suspending the investor's voting rights", "prohibiting or suspending contracts with the investor", as well as stringent restrictions on integration of the investment within the investor's business (including with respect to communications systems, workforce, and physical access).<sup>66</sup> All of these significant consequences speak in favor of greater procedural protections.

Conversely, two other *Baker* factors may appear to militate in favor of a reduced duty of procedural fairness.

First, concerning the nature of the decision, while the Minister's and Cabinet's decision-making under the *ICA*'s national security regime is not "quasi-judicial", neither is it entirely discretionary or investigative. Accordingly, this *Baker* factor speaks in favor of a moderate duty of procedural fairness.

*Baker* explains that the closer the nature of the determination and the processes used to reach it parallel the judicial model of decision-making, the greater the need for procedural protections.<sup>67</sup> Here, there are important differences to be acknowledged between the determinations made under the *ICA*'s national security framework and the judicial model. Most importantly, while there is a right to make submissions, there is no adversarial hearing.<sup>68</sup> However, these are also not fundamentally mere "investigative" or "discretionary" processes.<sup>69</sup> The Minister's decisions are each driven by explicit statutory standards, and the Minister must adjudicate, at each stage, if that standard is met.<sup>70</sup> As such, the nature of the decision is a factor that may somewhat diminish the duty of procedural fairness owed to investors, though not one which outweighs the importance of the decision to investors or the nature of the statutory scheme.

Second, deference to the administrative decision-maker's choice of procedure only has a limited impact on the government's duty in this case, as there are statutory guarantees with respect to the procedure to be followed. This factor, as the Supreme Court of Canada reaffirmed in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, requires courts to "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances."<sup>71</sup> The *ICA*'s national security regime leaves a great deal of procedure up to its multiple decision-makers, but not everything. In particular, investors are guaranteed the right to make representations.<sup>72</sup> But the current reasons (or, equivalently, disclosure) that accompany the Further Review and Final Referral (or Ministerial Conditional Approval) are so sparse as to undercut this right. As described above, a vague and high-level Summary of Concerns does not offer investors any ability to make *effective* representations under the *ICA* national security regime, nor to offer a meaningful undertakings package to resolve such concerns. Where the decisionmaker's choice of procedure undermines the procedural rights expressly afforded by Parliament, *Baker* does not afford that procedure any deference.<sup>73</sup>

Considering all of the *Baker* factors together, while the duty of procedural fairness may not approach the exacting level required of a criminal trial, the government still owes investors substantial procedural safeguards.

## (ii) National Security Privilege and Cabinet Privilege do not Abrogate Procedural Fairness

Perhaps the most substantial limit on the provision of additional information by the government is legal privilege. For example, in *Suresh v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada explained that, while disclosure of the case to be met and reasons are each required where a refugee is deported as posing a threat to the security of Canada, both requirements are “subject to privilege or valid legal reasons for not disclosing detailed information.”<sup>74</sup>

At least two forms of privilege<sup>75</sup> could apply to information considered over the course of a national security review under the *ICA*. Sections 38 through 38.17 of the *Canada Evidence Act (CEA)* set out a comprehensive scheme for the assertion of privilege over information that, if disclosed, could injure international relations, national defence, or national security.<sup>76</sup> Section 39 of the *CEA* sets out the regime for the assertion of Cabinet privilege.<sup>77</sup>

National security privilege only applies to information whose release would be injurious to international relations, national defence, or national security. It is common sense that a meaningful amount of the information in the government’s hands in the course of the national security review of an investment may be subject to such privilege. However, it is much less credible to suggest that the information currently provided to investors is *all* the non-privileged information that the government can provide.

Further, even if the information itself is privileged, section 38 provides for a mechanism by which a non-privileged summary can be provided. Specifically, the judge designated to oversee the application by which national security privileged is claimed is entitled to make an order to release the information subject to conditions (e.g., a non-privileged summary, or a redacted summary) on the basis that the public interest requires it.<sup>78</sup>

In fact, the Amendments suggest that Parliament believes greater disclosure is in the public interest. The Amendments provide what is, in essence, an accelerated route to claim national security privilege where judicial review is sought of an order under the *ICA*. They include a slightly altered regime than the mechanism contemplated in section 38 of the *CEA*. Specifically,

the new section 25.7(1)(c) mandates that a non-privileged summary be made where the Minister makes *ex parte* submissions to the judge hearing the judicial review that involve information that is potentially injurious to national security:

throughout the proceeding, the judge shall ensure that the applicant is provided with a summary of the evidence and other information available to the judge that enables the applicant to be reasonably informed of the Government of Canada's case but that does not include anything that, in the judge's opinion, would be injurious to international relations, national defence or national security or would endanger the safety of any person if disclosed.<sup>79</sup> [Emphasis added]

As a result, national security privilege scarcely provides a justification for the limited disclosure under the *status quo*. It does not credibly apply to all information that is not presently disclosed. Even if it did, the statutory schemes that would be used to assert national security privilege in the event of a judicial review both contemplate providing non-privileged summaries of the information where the public interest demands it. These summaries ought to be provided to the investor during the course of a national security review—not for the first time during judicial review of the administrative procedure below.

Cabinet privilege does not have similar statutory exceptions. If successfully asserted, the *CEA* acts as an absolute bar to the disclosure of broad categories of information.<sup>80</sup> As a result, it may arguably apply to the entirety of the information before Cabinet when it makes a Final Order.<sup>81</sup>

Yet while Cabinet privilege appears to present a greater obstacle, the problem of what to do with information protected by Cabinet privilege has already been considered, and neatly addressed, in the immigration context. In *Al Yamani v Canada (Solicitor General)*, the Federal Court considered what reasons are required where Cabinet relies on a report by a prior decision maker.<sup>82</sup> There, the Court explained:

Where a decision is specifically based on the grounds set out in the Minister's report, and there is no evidence otherwise, the reasons for the determination of the Governor General in Council are those of the Minister.<sup>83</sup>

In like fashion, non-Cabinet privileged reasons for which the Minister reaches their decision to refer could be substituted for the reasons of Cabinet in similar fashion.<sup>84</sup>

To be clear, the above simply sets out one of *many* avenues to resolve a procedural fairness deficit arising as a result of Cabinet privilege. The Federal Court of Appeal has noted that courts are only limited by their own creativity in this regard. For example, in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, the Federal Court of Appeal noted it was “alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making.”<sup>85</sup> In response, the Court of Appeal highlighted a number of solutions to resolve potential unfairness flowing from national security and Cabinet privilege, including ordering special advocates (counsel with security clearance able to represent a party’s interest in confidential hearings without disclosing privileged information to that party) or fashioning a highly-bespoke order for the conditional disclosure of particular documents.<sup>86</sup>

Such proposals are consistent with practice in other jurisdictions. Analogous results have flowed from the Committee on Foreign Investment in the United States (“CFIUS”) national security review process. In *Ralls Corp v Committee on Foreign Investment in the US*, Ralls Corp. challenged a CFIUS review and Presidential executive order in part on the grounds that they were reached without regard to due process, with the courts finding that the non-classified evidence upon which both decision-makers relied in reaching their determination ought to have been provided to the company.<sup>87</sup> Courts can and should ensure fair process, even in matters relating to national security. So should the Minister.

### **(c) Greater Procedural Protections are Required to Avoid Imperiling the Substantive Result**

Yet another rationale for providing more and better reasons from the Minister is that they serve to buttress the decisions to which they relate in the event of a substantive review.

Following *Canada (Minister of Citizenship and Immigration) v Vavilov*,<sup>88</sup> reasons have emerged as all the more important to substantive review, with knock-on implications for their sufficiency. As the Federal Court detailed in *Okojie v Canada (Citizenship and Immigration)*:

In my view, the Supreme Court’s decision in *Vavilov* raised the bar for what passes as sufficient reasons to justify some kinds of decisions. The majority of the Court emphasized the creation of a “culture of justification” in administrative decision-making: at paras 2 and 14. The Court held that on

a judicial review application, the reviewing judge must consider both the reasons provided by decision-maker and the overall outcome: at paras 83 and 87. The reviewing court should start with the reasons, as they are the “primary mechanism by which administrative decision-makers show that their decisions are reasonable”: at para 81. “[C]lose attention” must be paid to those reasons: at para 97. In addition, a decision must not only be justifiable; where reasons are required, the decision must actually be justified, by way of reasons, by the decision-maker: at para 86. The Court outlined in detail how to approach and analyze a decision-maker’s reasons, providing guidance about what will, and will not, be sufficient as justification for judicial review purposes: esp. at paras 84-86, 96 and following.<sup>89</sup>

Of course, *Vavilov* also recognizes that judicial review as to the reasonableness of an administrative decision can take place in the absence of reasons entirely, though that analysis will inevitably focus “on the outcome, rather than on the decision maker’s reasoning process.”<sup>90</sup> The problem with such an approach is that, in matters of national security, outcomes can often make little sense without explanation. Consider an investor from a non-allied country who wishes to set up an innocuous business in a particular location. Unbeknownst to them (or anyone apart from military personnel), a key military installation sits nearby. It would be difficult for a reviewing court to make sense of an order blocking that transaction (and the Minister’s decisions below), without some indication that the location is sensitive. This is just one illustration of how asking a decision to “speak for itself” may render the decision vulnerable to substantive review.<sup>91</sup>

The Amendments explicitly contemplate the potential for more contested judicial review proceedings going forward. Section 25.7(1)(c) of the *ICA*, discussed above, provides a special mechanism akin to national security privilege for the information provided by the Minister to a court seized with an application for judicial review relating to a national security order.<sup>92</sup> Further, section 25.3(1.1) enables the Minister to impose interim conditions “necessary for the purpose of preventing injury to national security that could arise during” the review process.<sup>93</sup> Both provisions signal that the government is contemplating a greater number of contentious, and more highly contested, national security reviews. If reviews are to see more litigation, it would only serve the government’s own interests to ensure decisions are supported with robust reasons.

## (d) First Principles Militate Toward Greater Procedural Protections

Finally, separate and apart from the purely legal reasons for equipping investors with greater information over the course of a national security review of an investment, there are at least two other principled arguments in favor of greater disclosure. First, reasons are the bedrock of transparency in public decision-making, a value that extends beyond the interests of parties involved in a particular dispute. Second, both the original and amended *ICA* contemplate a regime by which investments that pose national security risk may be approved subject to conditions that mitigate this risk—a procedure which would be improved by greater transparency.

### (i) Reasons and Accountability

The first principled argument in favor of greater reasons is simple: transparency provides the light required for public justification and accountability. In the context of weighty government decisions relating to national security, it is not just good for the parties to have greater information, but also good for public confidence that the administration of a significant executive power has been carried out appropriately.

Academic commentators have credited greater transparency in administrative decision-making with the Supreme Court of Canada's fresh demand for public justification post-*Vavilov*. Professor Paul Daly argues that the Vavlovian "culture of justification", a substantive review principle, has been fueled first and foremost by the provision of reasons, a procedural instrument. Professor Daly compellingly describes how, as a window into administrative decision-making, more expansive reasons and administrative records naturally lead to greater scrutiny of public administration "warts and all," informing the approach taken by the Supreme Court in reviewing administrative decision-making.<sup>94</sup> In turn, this culture of justification, fueled by reasons, both reinforces and is reinforced by unwritten constitutional commitments to democracy and the rule of law.<sup>95</sup>

Adopting such a posture in the national security context aligns with the Canadian government's own recognition of the importance of transparency in such matters. The Minister's November 2, 2022 announcement committed to publishing the outcomes of Final Orders going forward was an important acknowledgement of the importance of transparency (although as a practical matter few such orders have been disclosed since the announcement).<sup>96</sup> The Amendments, too, were advanced by the Minister's office as a means of achieving greater transparency, and the authors

recognize as a positive step that the Amendments include a mandate to report on the use of the Minister's national security authorities in the annual report.<sup>97</sup> This is consistent with established national security mandates such as the National Security Transparency Advisory Group, which, since 2019 has been tasked with advising Public Safety Canada on how to, among other things, "infuse transparency into Canada's national security policies, programs, best practices, and activities in a way that will increase democratic accountability" and "promote transparency while ensuring the safety and security of Canadians."<sup>98</sup>

The Minister's commitment to sharing the results of national security orders, the final form of which remains uncertain, is clearly a step in the right direction. But the public interest requires more. Canadians should not only see national security authorities working on their behalf, they should also know that those actions have been justified to the parties involved.

## (ii) Reasons and the Conditional Approval of Investments

Increased transparency is needed to facilitate the *ICA*'s own stated objectives. Both the prior *ICA* and the newly amended *ICA* contemplate the approval of investments that may present national security concerns provided they are subject to mitigation. An absence of meaningful dialogue between investors and government, however, impairs this goal. Given the importance of encouraging foreign investment in Canada to a number of policy issues—including closing the productivity gap and stimulating Canada's "green economy", among others—and the potential chilling effect that a poorly-administered national security process could have on investment in critical sectors, striking the right balance on conditional approvals is critical.

The *ICA*'s purpose clause recognizes that there is a necessary tradeoff between national security risk on the one hand and the benefits of foreign investment on the other. It states:

Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.<sup>99</sup>

As a consequence, the *ICA* provides for compromises. Previously, Cabinet could approve investments subject to conditions required to

mitigate national security risk; following the Amendments, so too can the Minister.<sup>100</sup> That said, conditional approval by Cabinet has been limited. The last conditional approval from Cabinet was ordered with respect to two investments in the Investment Review Division's 2016-2017 fiscal year.<sup>101</sup> By contrast, the CFIUS review process in the United States involves substantial mitigation, and minimal blocking. To illustrate, CFIUS pursued mitigation in 18% of notices in 2022, while roughly 4% of notices were effectively blocked (withdrawn either after CFIUS informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns or where CFIUS requested mitigation which the parties were unable to accept).<sup>102</sup>

The Canadian system evidently aspires to emulate the American regime. Likely as a result of the cumbersome process involved in seeking conditional approval from Cabinet, the Amendments now provide authority for the Minister to accept binding undertakings and, on the basis of same, to conditionally approve investments in lieu of a Final Referral.<sup>103</sup> In this regard, the Amendments codify the Minister's recent practice of accepting investors' representations as to the "commitments" they will undertake in order to assuage national security concerns.<sup>104</sup>

Yet conditional approval in Canada is stymied by inadequate information. First, prior to the Amendments, there was no public disclosure as to the nature and frequency of soft commitments obtained by the Minister in national security reviews (which reviews would be reported in the annual report as cases in which "no further action" was taken following a 25.3(1) Review Order). Second, the lack of reasons provided by the Minister for his decisions—especially given the dynamic in which Investors negotiate undertakings with FIRES officials rather than with the Minister (who is the ultimate decision maker), which in the writers' experience can lead to a misalignment that results in material last-minute requests after extensive negotiation—mean that in certain cases investors and the government simply are unable to have a meaningful conversation about national security risk and proposed mitigation. If the new undertakings process in the Amendments is to be applied effectively, in our view, it will need to be paired with greater public transparency and more effective communication with investors. We recommend that the government continue its customary practice of providing a Summary of Concerns and written reasons along with a final decision (whether in the form of a final order or conditional approval); work to ensure that this disclosure is as robust as possible; provide greater transparency as to the Minister's feedback in negotiation of undertakings; and consider providing reasons at interim stages of the

process (for example at the 25.2(1) Extension stage). While further amendment to the *ICA* may be unlikely in the near future, we also recommend that Parliament consider codifying these customary practices by amending Part IV.1 of the *ICA* to require the Minister to provide reasons at least justifying each of the decisions to order a national security review, impose interim measures, and accept undertakings.

## **5. Conclusion**

The Canadian government owes greater procedural protections to foreign investors. As a matter of procedural fairness, the government should at least provide a more robust Summary of Concerns to inform investors' representations and more fulsome reasons for Cabinet's Final Order or the Minister's conditional order. Further, greater justification should only serve to benefit the government in the event of judicial review. Finally, as a practical matter, providing more information to investors about the government's concerns would improve the mitigation investors may offer and facilitate the conditional approval of investments, a clear objective of the Amendments.

## ENDNOTES

- <sup>1</sup> This piece would not be possible without the hard work of Samantha Steeves (Associate, Competition/Antitrust & Foreign Investment—McCarthy Tétrault LLP), Sophie D'Souza (Summer Student, 2023), and Foti Vito (Summer Student, 2023). Sincere thanks to all for their invaluable assistance.
- <sup>2</sup> Counsel, Competition and Foreign Investment—Goodmans LLP
- <sup>3</sup> Associate, Competition/Antitrust & Foreign Investment—McCarthy Tétrault LLP
- <sup>4</sup> Innovation, Science and Economic Development Canada, “Government of Canada orders the divestiture of investments by foreign companies in Canadian critical minerals companies” (November 2, 2022), online: Government of Canada <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html>>.
- <sup>5</sup> Innovation, Science and Economic Development Canada, “An Act to amend the *Investment Canada Act*” (December 7, 2022), online: *Government of Canada* <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/12/an-act-to-amend-the-investment-canada-act.html>>. The final version of the Bill, which received Royal Assent and is referred to within as the “Amendments” is “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).
- <sup>6</sup> The ICA was initially enacted as a regime for the economic review of foreign investment into Canada. Part III of the ICA requires mandatory technical notification of acquisitions of control of Canadian businesses, and establishments of new Canadian businesses, by non-Canadians; Part IV of the ICA requires mandatory pre-closing review, and approval by the relevant Minister on the basis that the investment would likely be of “net benefit” to Canada, of acquisitions of control of Canadian businesses by non-Canadians that exceed (significant) prescribed financial thresholds. Certain of the Amendments will introduce mandatory pre-closing notification for investments meeting certain prescribed criteria; this portion of the Amendments is not yet in force and timing will be dependent on the issuance of relevant regulation. The national security review regime set out in Part IV.1 of the ICA was implemented in 2009, and applies to all investments covered by the mandatory filing regime set out in Parts III and IV, as well as other investments with more limited nexus to Canada.
- <sup>7</sup> *Investment Canada Act*, RSC 1985, c 28 (1<sup>st</sup> Supp), s 25.1 as it appeared on September 2, 2024 [“**Prior ICA**”]. Certain Amendments not yet in force expand the ICA’s scope to apply to acquisitions of any assets of a Canadian business by a state-owned enterprise, and note that acquisitions of assets under s. 25.1(1)(c) include “investment to acquire, in whole or in part, the assets of an entity”. “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).
- <sup>8</sup> Where an investment is subject to a mandatory application for review under Part IV of the ICA, the national security timelines run from the date a complete

application for review is submitted, with the initial 45-day period running in parallel with the initial period for “net benefit” review under the *ICA*; where an investment is subject only to a notification obligation under the *ICA*, the national security timelines run from the date a complete notification is submitted. Where an investment is not subject to a mandatory filing obligation under the *ICA*, the foreign investor may choose to submit a voluntary notification, after which the process proceeds as described here from the date the complete voluntary notification is submitted (*National Security Review of Investment Regulations*, SOR/2009-271, s 2). The Minister may also “call in” an investment that is not subject to a mandatory filing requirement but is covered by the residual jurisdiction of section 25.1(c). However, in practice, the vast majority of national security reviews begin by the filing of a mandatory application for review or a mandatory or voluntary notification. For brevity, through the rest of this paper we treat national security reviews as being triggered by an initial filing and have referred to each of these initial filings (i.e. application for review, mandatory notification or voluntary notification) as the “notification”.

<sup>9</sup> Prior *ICA*, s 25.2(3); *Investment Canada Act*, RSC 1985, c 28 (1st Supp), s 25.12 as it appeared on September 3, 2024 [“**New ICA**”].

<sup>10</sup> For completeness, we note that where a foreign investor does not submit a voluntary notification, the national security timelines run from the date the investment is “implemented” (i.e. the closing date, for an acquisition, or the date a new entity is established, for the establishment of a new Canadian entity), and the initial period within which the Minister must decide to take action is 5 years (*National Security Review of Investment Regulations*, SOR/2009-271, s 2). If the Minister decides to take action under the *ICA* within this initial period, the subsequent timelines proceed as described below.

<sup>11</sup> Prior *ICA*, s 25.2(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 2.

<sup>12</sup> Prior *ICA*, s 25.2(2).

<sup>13</sup> Prior *ICA*, s 25.3(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 4.

<sup>14</sup> Prior *ICA*, s 25.3(1).

<sup>15</sup> Prior *ICA*, s 25.3(2).

<sup>16</sup> Prior *ICA*, s 25.3(3).

<sup>17</sup> New *ICA*, s 25.3(1).

<sup>18</sup> “Review” is deemed by s. 25.11 to begin “on the day on which [the investment] first comes to the attention of the Minister”. New *ICA*, s 25.11. For the power to impose interim conditions, see New *ICA*, s 25.3(1.1).

<sup>19</sup> See Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>> (noting that a “ministerial order imposing interim conditions, if any, would be delivered to the investor and any other relevant party(ies) along with the notice [that an order for Further Review had been made] referred to under subsection 25.3(2).”)

<sup>20</sup> Prior ICA, s 25.3(7).

<sup>21</sup> Prior ICA, s 25.3(4).

<sup>22</sup> New ICA, s 25.3(1); National Security Review of Investment Regulations, SOR/2009-271, s 2.

<sup>23</sup> New ICA, s 25.3(7).

<sup>24</sup> New ICA, s 25.3(4).

<sup>25</sup> Prior ICA, s 25.3(4); New ICA, s 25.3(4)

<sup>26</sup> Prior ICA, s 25.3(6); New ICA, s 25.3(6).

<sup>27</sup> New ICA, s 25.3(6).

<sup>28</sup> Prior ICA, s 25.4(1); New ICA, s 25.4(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 2.

<sup>29</sup> Prior ICA, s 25.4(1); New ICA, s 25.4(1).

<sup>30</sup> Foreign Investment Review and Economic Security Branch, Guidelines on the National Security Review of Investments (March 24, 2021), online: <<https://ised-isde.canada.ca/site/investment-canada-act/en/investment-canada-act/guidelines/guidelines-national-security-review-investments>>.

<sup>31</sup> “Dual-use” goods—those with both civilian and military applications—provide one good example. Providers of products like these, especially where their product is just one component of a broader defence system, may underestimate the significance of their products to certain end-users. Defence end-users may make up a *de minimis* portion of overall sales, but those sales may be critical from a national security perspective.

<sup>32</sup> What exactly constitutes reasons is, of course, understood flexibly, recognizing the “day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured”. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 848.

<sup>33</sup> Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>.

<sup>34</sup> Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>; Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

<sup>35</sup> Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

<sup>36</sup> Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 156.

<sup>37</sup> Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://>

[ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions](https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions)>; Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

<sup>38</sup> Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 258.

<sup>39</sup> Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 259-60.

<sup>40</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 836-37; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840-41.

<sup>41</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

<sup>42</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838-39.

<sup>43</sup> *Sexsmith v Canada (Attorney General)*, [2021 FCA 111](#).

<sup>44</sup> *Black v Advisory Council for the Order of Canada*, [2012 FC 1234](#), aff'd [2013 FCA 267](#).

<sup>45</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

<sup>46</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

<sup>47</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 839-40.

<sup>48</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840.

<sup>49</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840.

<sup>50</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

<sup>51</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

<sup>52</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

<sup>53</sup> *R v Race Relations Board, Ex parte Selvarajan*, [1975] 1 WLR 1686 at 1694 (CA), cited with approval by the Supreme Court of Canada in *Syndicat des employés de production du Québec & de l'Acadie v Canada (Human Rights Commission)*, [1989] [2 SCR 879](#) at 899.

<sup>54</sup> All of the inflection points detailed above are decisions for the purposes of the *Baker* framework. In *China Mobile*, the Federal Court of Appeal, in considering a challenge to a national security order under the ICA, explained that the “ICA is clear that orders from the Governor in Council are reviewable separately from decisions of the Minister, as shown by the distinct and separate reference to each category of decision in the section of the ICA dealing with the availability

of judicial review” [Emphasis added]. The fact that the ICA also incorporates an explicit statutory standard upon which the Minister’s decisions are based (for example, “reasonable probable grounds to believe”), and that the Minister may dispose of matters before a Cabinet decision is contemplated by the statute, only support this conclusion. See further: *China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, [2023 FCA 202](#), para 48.

<sup>55</sup> Note that each of these referrals are final decisions even though, if the decision is made to refer, Cabinet is provided with subsequent decision-making authority. This is because they are final decisions *vis-à-vis* the particular decision-maker. For an example of a regime where two successive decisions were both recognized as final in this manner, see *Al Yamani v Canada (Solicitor General) (TD)*, [\[1996\] 1 FC 174](#).

<sup>56</sup> A discussion of the impact of Cabinet and national security privilege follows in the next section, but, in the interim, note that the rules of evidence under the Canada Evidence Act (“CEA”) are not a component of this statutory scheme, and are not properly considered under the Baker inquiry.

<sup>57</sup> Prior ICA, s 25.6; New ICA, s 25.6.

<sup>58</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 838. Note that *Baker* also emphasizes the significance of the fact that “the decision is determinative of the issue and further requests cannot be submitted”. This is also certainly true of the Final Referral and Final Order.

<sup>59</sup> *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#).

<sup>60</sup> *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at paras 1-3.

<sup>61</sup> *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 83.

<sup>62</sup> *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 84.

<sup>63</sup> *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 84.

<sup>64</sup> Prior ICA, s 25.2(1); New ICA, s. 25.2(1).

<sup>65</sup> The Five Eyes comprise: Australia, Canada, New Zealand, the United Kingdom, and the United States of America.

<sup>66</sup> Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>.

<sup>67</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at 838.

<sup>68</sup> Prior ICA, s 25.3(4); New ICA, s 25.3(4).

<sup>69</sup> Note that even purely investigative decisions—which this is not—still attract a duty of fairness, albeit a diminished one. See for instance: *Masters v Ontario* (1994), [115 D.L.R. \(4th\) 319](#).

<sup>70</sup> Prior ICA, s 25.2(1), 25.3(1), 25.3(6); New ICA, s 25.2(1), 25.3(1), 25.3(6)

<sup>71</sup> *Council of Canadians with Disabilities v VIA Rail Canada Inc et al*, [2007 SCC](#)

15 at para 231 citing *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at 840.

<sup>72</sup> Prior ICA, s 25.3(4); New ICA, s 25.3(4).

<sup>73</sup> The Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)*, for example, took a dim view of the potential for uninformed representations to act as a bulwark against unfairness, reasoning: “Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her.” *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 122.

<sup>74</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 122, 126.

<sup>75</sup> Arguably public interest privilege may also apply, though section 38 is the government’s default where both national security and public interest privilege may apply as per the Public Prosecution Service’s Deskbook. “4.2 Protecting Confidential Information under Section 38 of the *Canada Evidence Act*” (March 1, 2014), *Public Prosecution Services of Canada*, accessible at: <[https://www.ppsc-ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p4/ch02.html#section\\_5](https://www.ppsc-ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p4/ch02.html#section_5)>.

<sup>76</sup> *Canada Evidence Act*, RSC 1985, c. C-5, ss 38-38.17.

<sup>77</sup> *Canada Evidence Act*, RSC 1985, c. C-5, s 39.

<sup>78</sup> *Canada Evidence Act*, RSC 1985, c. C-5, s 38.06.

<sup>79</sup> New ICA, s 25.7(1).

<sup>80</sup> The particular categories that are especially relevant are set out in subsections 39(2)(a) (a memorandum the purpose of which is to present proposals or recommendations to Council), 39(2)(d) (a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy), and 39(2)(e) (a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d)). *Canada Evidence Act*, RSC 1985, c. C-5, s 39(2)(a), (d), (e).

<sup>81</sup> Theoretically, subsection 39(2)(d) (a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy), could apply to any document used in furtherance of the Minister’s decision-making under the ICA, as the Minister consults with the Minister of Public Safety throughout the process. Note, however, that the application of this broad interpretation by the government previously resulted in a withering concurrence from the Federal Court of Appeal, calling its use in that manner a “gross abuse of executive power”, and, in our view, would be highly suspect. See: *Canadian Assn of Regulated Importers v Canada (Attorney-General)*, 1991 CanLII 13564 at 140 (FCA).

<sup>82</sup> *Al Yamani v Canada (Solicitor General) (TD)*, [1996] 1 FC 174.

<sup>83</sup> *Al Yamani v Canada (Solicitor General) (TD)*, [1996] 1 FC 174.

<sup>84</sup> One limited possible exception is, in cases where the Minister makes a Final Referral because they were unable to determine whether the investment poses a national security risk, and where Cabinet imposes conditions, it may be possible to question the alignment between the distinct decisions of each decision-maker (i.e., could the reasons to refer be the same as the reasons to make an order).

<sup>85</sup> *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#) at paras 106.

<sup>86</sup> *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#) at paras 117-120.

<sup>87</sup> 758 F (3d) 296 at 319 (DC Cir 2014): “We conclude that the Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law. As the preceding discussion makes plain, due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”

<sup>88</sup> [2019 SCC 65](#).

<sup>89</sup> *Okojie v Canada (Citizenship and Immigration)*, [2020 FC 948](#) at para 23.

<sup>90</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at para 138.

<sup>91</sup> This example also illustrates the opportunity for reasons earlier in the process (detailing the case to be met) to remedy procedural problems before they escalate. For example, a special advocate (counsel with security clearance—an approach which is commonly leveraged in immigration matters) could be deployed to negotiate mitigation to resolve proximity concerns in a manner that does not alert the investor to the precise rationale.

<sup>92</sup> “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).

<sup>93</sup> New ICA, s 25.3(1.1).

<sup>94</sup> Paul Daly “Vavilov and the Culture of Justification in Contemporary Administrative Law” (2021) 100:13 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 279 at 299.

<sup>95</sup> Paul Daly “Vavilov and the Culture of Justification in Contemporary Administrative Law” (2021) 100:13 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 279 at 305-306.

<sup>96</sup> Innovation, Science and Economic Development Canada, “Government of Canada orders the divestiture of investments by foreign companies in Canadian critical minerals companies” (November 2, 2022), online: *Government of Canada* <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html>>. On May 24, 2024, the Minister announced dissolution of two Canadian businesses after a national security review under the ICA. See “Government of Canada orders the dissolution of Canadian businesses following a national security review under the Investment Canada Act” (May 24, 2024), online: <<https://www.canada.ca/en/innovation-science-economic-development/news/2024/05/>

[government-of-canada-orders-the-dissolution-of-canadian-businesses-following-a-national-security-review-under-the-investment-canada-act.html](https://www.government-of-canada-orders-the-dissolution-of-canadian-businesses-following-a-national-security-review-under-the-investment-canada-act.html)>. On November 6, 2024, the Minister disclosed that he had ordered the wind-up of TikTok Technology Canada, Inc. after a review under the national security provisions of the ICA. See “Government of Canada orders the wind up of TikTok Technology Canada, Inc. following a national security review under the Investment Canada Act” (November 6, 2024), *online*: <<https://www.canada.ca/en/innovation-science-economic-development/news/2024/11/government-of-canada-orders-the-wind-up-of-tiktok-technology-canada-inc-following-a-national-security-review-under-the-investment-canada-act.html>>.

<sup>97</sup> New ICA, s. 38.1(2).

<sup>98</sup> “The National Security Transparency Advisory Group (NS-TAG)” (last modified May 23, 2023), *online*: *Government of Canada* <<https://www.canada.ca/en/services/defence/nationalsecurity/national-security-transparency-commitment/national-security-transparency-advisory-group.html>>.

<sup>99</sup> Prior ICA, s 2; New ICA, s 2.

<sup>100</sup> Prior ICA, s 25.4(1); New ICA, s 25.3(6).

<sup>101</sup> Innovation, Science and Economic Development Canada, “Annual report on the administration of the *Investment Canada Act* 2016-17” (2017), *online*: *Government of Canada* <<https://ised-isde.canada.ca/site/investment-canada-act/en/node/855#p3>>.

<sup>102</sup> Committee on Foreign Investment in the United States, “Annual Report to Congress” (2022) at 19, 44, *online* (pdf): *treasury.gov* <[https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022\\_0.pdf](https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf)>.

<sup>103</sup> New ICA, s 25.3(6).

<sup>104</sup> By way of example, in testimony before Parliament, Innovation, Science and Economic Development Canada officials confirmed that the acquisition of Resolute Forest Products by Domtar was subject to national security review, but not an economic “net benefit” review under the ICA. CBC, “Pulp giant’s purchase didn’t go through a net benefit review, federal officials say,” (Jun. 2, 2023), available at: <<https://www.cbc.ca/news/politics/paper-excellence-government-review-1.6864399>>. In separate testimony before Parliament regarding the Proposed Amendments, Minister Champagne indicated in respect of the same transaction “I would nevertheless tell you that in the analysis of national security, we were able to do a number of things to protect the country’s economic interests. One example is the Paper Excellence Group, in which you are keenly interested, where we were able to obtain undertakings to protect the economic interests of Quebec and Canada.” <<https://www.ourcommons.ca/DocumentViewer/en/44-1/INDU/meeting-69/evidence>>. Such cases are typically classified in government statistics as having resulted in “no further action under the ICA” following a 25.3 order.

## EDITOR'S NOTES FOR SCHOLARS PANEL 2025

### SCHOLARS PANEL: HOW TO CALCULATE THE “BENEFIT DERIVED” FROM ANTICOMPETITIVE CONDUCT?

#### Introduction

Dimitri Dimitropoulos, Editor

*Canadian Competition Law Review*

The recent amendments to the *Competition Act* have expanded rights of private access to the Competition Tribunal, including creating a new right for private parties to seek monetary relief in respect of civilly reviewable practices. Notably, compensation will be made, not based on the losses suffered by parties harmed by the anti-competitive conduct (i.e., damages), but rather based on “the value of the benefit derived from the conduct that is the subject of the order”, (i.e., disgorgement), and the amount is “to be distributed among the applicant and any other person affected by the conduct”.<sup>1</sup>

At the CBA Competition Law Fall Conference in September 2024, a panel of experts discussed how the “benefit derived” from anticompetitive conduct could, should or will be calculated, and provided commentary on issues they anticipate under the *Act*’s “benefit derived” framework. The panelists included David Vaillancourt, Gideon Kwinter, Linda Visser, Robert Topel, and Yoram Beck. To go along with their panel presentations, the *Canadian Competition Law Review* has invited panelists to author papers on the topic of the “benefit derived” framework, which we are pleased to publish here. These include:

- David Vaillancourt and Alex Sokolov, “Abuse of Dominance and Competitor Losses—The ‘Benefit Derived’ Regime is not Fit for Purpose”
- Linda Visser and Charles Wright, “The New Abuse of Dominance Regime in Canada—An Opportunity for Greater Enforcement and Access to Justice”
- Gideon Kwinter, “Deriving Benefit from Recent Reforms: A Confined Role for the Benefit Derived Remedial Standard”

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<sup>1</sup> 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*, at subsections 244(2); 245(2); 246; 247(2); 248(7).

- Robert Topel, “On Recent Amendments to the Canadian Competition Act: Benefit Derived and the Determination of Monetary Penalties for Antitrust Infringements”

## NOTES DE LA RÉDACTION POUR LA TABLE RONDE DES CHERCHEURS 2025

### TABLE RONDE DES CHERCHEURS : COMMENT CALCULER L'« AVANTAGE DÉRIVÉ » D'UN COMPORTEMENT ANTICONCURRENTIEL?

#### Introduction

Dimitri Dimitropoulos, rédacteur

*Revue canadienne du droit de la concurrence*

La modification récente de la *Loi sur la concurrence* a élargi les droits d'accès au Tribunal de la concurrence des parties privées en leur donnant, entre autres, le droit de demander une réparation monétaire pour les pratiques susceptibles d'examen au civil. Plus précisément, l'indemnité ne reposera pas sur les pertes subies par les parties lésées par le comportement anticoncurrentiel (dommages-intérêts), mais plutôt sur « la valeur du bénéfice tiré du comportement visé par l'ordonnance » (versements de bénéfices indus). La somme sera « répartie [...] entre le demandeur et toute autre personne touchée par le comportement »<sup>1</sup>.

À la Conférence d'automne de l'ABC sur le droit de la concurrence en septembre 2024, un groupe de spécialistes s'est exprimé sur la façon dont l'« avantage dérivé » d'un comportement anticoncurrentiel pourrait, devrait ou serait calculé, et commenté les problèmes qu'il anticipe par rapport au cadre de cet avantage prévu dans la Loi. Faisaient partie du groupe David Vaillancourt, Gideon Kwinter, Linda Visser, Robert Topel et Yoram Beck. Pour pousser plus loin les présentations de ces personnes, la *Revue canadienne du droit de la concurrence* les a invitées à rédiger des articles sur le cadre de l'avantage dérivé, articles que vous trouverez ici, notamment :

- David Vaillancourt et Alex Sokolov : « Abus de position dominante et pertes du concurrent : le régime d'avantage dérivé n'est pas adapté aux besoins »

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<sup>1</sup> Projet de loi C-59, *Loi portant exécution de certaines dispositions de l'énoncé économique de l'automne déposé au Parlement le 21 novembre 2023 et de certaines dispositions du budget déposé au Parlement le 28 mars 2023*, aux paragraphes 244(2), 245(2), 247(2) et 248(7) et à l'article 246.

- Linda Visser et Charles Wright : « Le nouveau régime d'abus de position dominante au Canada : une occasion d'améliorer l'application de la loi et l'accès à la justice »
- Gideon Kwinter : « Profiter des récentes réformes : utilité restreinte de la norme de réparation pour l'avantage dérivé »
- Robert Topel : « Modification récente de la *Loi sur la concurrence* : avantage dérivé et détermination des sanctions pécuniaires en cas de contravention à la législation antitrust »

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

David Vaillancourt and Alex Sokolov<sup>1</sup>

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

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

## I. Introduction

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

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

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

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

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

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

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

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

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

## II. History and Path to Amendment

### Historical Background

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

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

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

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

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

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

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

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

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

## Origins of the “benefit derived” concept

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

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

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

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

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

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

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

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

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

- i) \$10,000,000;
- ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;
- iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turn-over period**) of 12 months ending at the end of the month in which the act or omission occurred.<sup>23</sup>

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

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

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

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

**79(4.1) Additional order—person granted leave**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. Challenges Posed By The “Benefit Derived” Regime

#### Fairness in Quantifying the Benefit Derived

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Fairness in Sharing the Benefit Derived<sup>42</sup>**

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

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

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

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

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

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

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

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

### **Fairness in Procedural Matters**

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

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

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

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

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

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

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

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

### **Challenges Will Undermine Enforcement**

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

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

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

## **IV. Conclusion**

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

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

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

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

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

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

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

## ENDNOTES

- <sup>1</sup> David Vaillancourt is a Partner, and Alex Sokolov a Student-at-Law at Affleck Greene McMurtry LLP
- <sup>2</sup> *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 247(2).
- <sup>3</sup> John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 360.
- <sup>4</sup> *Ibid.* R v *KC Irving, Ltd et al*, 1976 CanLII 146 (SCC).
- <sup>5</sup> John S Tyhurst, *supra* note 3; *R v Eddy Match Company Limited*, [1953] QJ No 8 (CA), 18 C.R. 357.
- <sup>6</sup> John S Tyhurst, *supra* note 3 at 362
- <sup>7</sup> *Ibid.*
- <sup>8</sup> Michael Trebilcock & Francesco Ducci, “The Evolution of Canadian Competition Policy: A Retrospective” (2018) 60:2 Can Bus LJ 171 at 173, online (pdf): <<https://utoronto.scholaris.ca/server/api/core/bitstreams/59db5a6b-a704-492f-ba02-98e76eda8f7f/content>>.
- <sup>9</sup> John S Tyhurst, *supra* note 3 at 363.
- <sup>10</sup> Antonio Di Domenico, *Competition Enforcement and Litigation in Canada* (Toronto: Emond Montgomery Publications, 2019) at 469-470.
- <sup>11</sup> Julie Rosenthal, Adil Abdulla and Arash Rouhi, “Optimal Enforcement of Abuse of Dominance: The Case for a Private Cause of Action” (2023) 36:2 Can Competition L Rev 34; Saro Turner and Andrea Roulet, “Empowering Private Attorneys General Under Bill C-59: Disequilibrium Persists in Canadian Competition Law” (2024) 37:1 Can Competition L Rev 40.
- <sup>12</sup> See the following decisions: *Canada (Director of Investigation and Research) v NutraSweet Co*, [1990] C.C.T.D. No. 17, 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, [1992] C.C.T.D. No. 1, 40 CPR (3d) 289 (Comp Trib); *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd*, 1995 CanLII 8 (CT); *Commissioner of Competition v Canada Pipe Co*, 2005 Comp Trib 3; *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7; *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6. See also: *The Commissioner of Competition v The Canadian Real Estate Association*, CT-2010-002 (Consent Agreement), online (pdf): <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463512/1/document.do>>; *Canada (Commissioner of Competition) v Direct Energy Marketing Limited*, CT-2012-003 (Consent Agreement), online (pdf): <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463069/1/document.do>>; *Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership*, CT-2012-002 (Consent Agreement), online (pdf): <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463069/1/document.do>>.
- <sup>13</sup> Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (2022) at 53, online (pdf): <[https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng\\_0.pdf](https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf)> [ISED Future of Competition]; Competition Bureau Canada, “The Future of

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

<sup>14</sup> *Budget Implementation Act, 2022, No 1*, SC 2022, c 10, s 262.

<sup>15</sup> ISED Future of Competition, *supra* note 13 at 52-53.

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

<sup>17</sup> *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 247(2).

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

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

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

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

<sup>22</sup> *Ibid.*

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

<sup>24</sup> SC 2022, c 10, s 262.

<sup>25</sup> SC 2023, c 31, s 7.2(2).

<sup>26</sup> *Competition Act*, RSC 1985, c C-34, s 79(3.1).

<sup>27</sup> *Fall Economic Statement Implementation Act, 2023*, *supra* note 2.

<sup>28</sup> *Competition Act*, *supra* note 26.

<sup>29</sup> CB Digital Era, *supra* note 21.

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

<sup>31</sup> *Ibid.*

<sup>32</sup> ISED Future of Competition, *supra* note 13.

<sup>33</sup> *Ibid* at 53.

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

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

<sup>36</sup> *Ibid.*

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

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

<sup>39</sup> *Competition Act*, *supra* note 26.

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

<sup>41</sup> *Public Service Alliance of Canada v. Canada (Department of National Defence)*, 1996 CanLII 4067 (FCA) at para 44.

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

<sup>43</sup> *Fall Economic Statement Implementation Act, 2023*, *supra* note 2.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* at s 244(2).

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

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

<sup>48</sup> Edward M Iacobucci, *supra* note 19 at 24; CB Future of Competition, *supra* note 13 at s 5.5.

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

<sup>50</sup> Michael Trebilcock & Francesco Ducci, *supra* note 8 at 180.

<sup>51</sup> *Ibid* at 184.

## 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

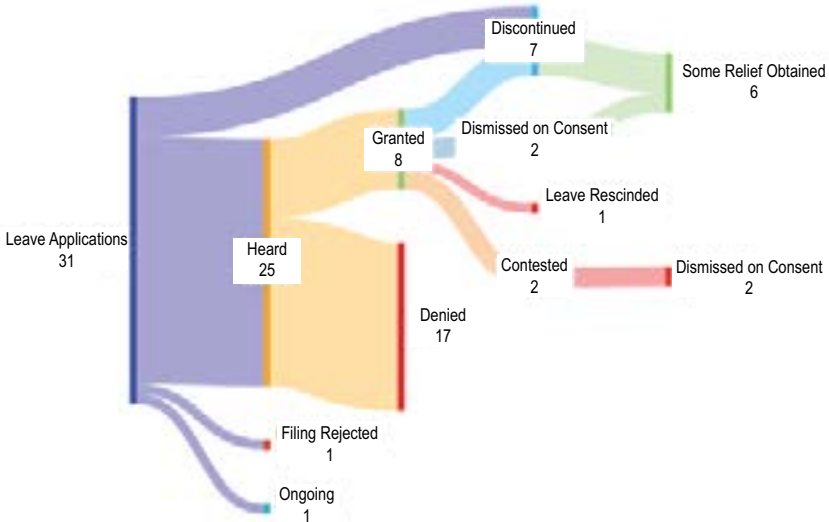
the applicant’s entire business, rather than a segment of its business, such as a product line.<sup>43</sup>

- 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](https://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/](https://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](https://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](https://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](https://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](https://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](https://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](https://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).

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

Gideon Kwinter<sup>1</sup>

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

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

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

## 1. Introduction

For the past few years, competition law has been basking in the glow of renewed interest among Canadian policy makers.<sup>2</sup> Since 2022, Canada's *Competition Act* has been the subject of three separate amending bills, which have cumulatively ushered in the most significant transformation to Canada's competition law landscape since at least 2009.<sup>3</sup> As has been championed by the proponents of these reforms, competition law and policy can play an important and beneficial role in fostering a fair, efficient and dynamic economy. However, as lawmakers enact new tools to correct for what the Competition Bureau (the "**Bureau**") has described as an "outdated, weak, complex, slow, and out of touch" framework,<sup>4</sup> it is important to guard against an overcorrection. As businesses, consumers, lawyers, the Bureau and the Competition Tribunal (the "**Tribunal**") navigate through the operationalization of Canada's amended competition laws, the determination of monetary orders under the civilly reviewable conduct provisions in Part VIII of the *Competition Act* represents one important area for ensuring moderation as the pendulum swings towards stronger competition law enforcement.

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

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

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

## 2. The Long Journey to a Second Track

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

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

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

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

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

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

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

...

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

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

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

### 3. Diminished Civility on the Civil Track

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

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

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

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

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

**Figure 1: Evolution of Part VIII Financial Penalties**

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

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

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

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

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

- **Agreements Between Non-Competitors:** Section 90.1 has historically applied only to agreements or arrangements between persons of whom two or more are competitors that prevents or lessens competition substantially. The amendments have expanded this provision to also capture agreements between parties that are not competitors where a significant purpose of the agreement is to lessen or prevent competition.<sup>24</sup>
- **Repeal of the Efficiencies Defence:** Since the introduction of the civil anti-competitive agreement track, the provisions have provided for an efficiencies defence, barring the Tribunal from making an order in respect of an agreement for which the gains in efficiency are greater than and offset any anti-competitive effects (where such efficiencies would not have been attained if an order were made). This provision has been repealed, such that efficiencies no longer play an explicit role in the analysis under section 90.1.<sup>25</sup>
- **Simplified Abuse of Dominance:** Prior to the recent wave of amendments, an order for abuse of dominance required that a three-part test be satisfied: (a) a firm must be dominant, (b) be engaged in a practice of anti-competitive acts and (c) such conduct must be likely to result in a substantial lessening or prevention of competition. The latter two requirements have now, in effect, become disjunctive. The Tribunal can make an order where it finds that a dominant firm is engaged in either (a) a practice of anti-competitive acts or (b) conduct that substantially lessens or prevents competition, where the effect is not a result of superior competitive performance.<sup>26</sup>

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

#### 4. Modulating the Pendulum's Swing

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

##### A. The Questionable Role of Financial Penalties in Part VIII

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

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

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

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

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

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

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

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

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

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

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

### C. Application of the Recent Amendments

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

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

## 5. Conclusion

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

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

## ENDNOTES

<sup>1</sup> Partner, Competition / Antitrust & Foreign Investment—McCarthy Tétrault LLP.

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

<sup>3</sup> See Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (assented to on 23 June 2022) [Bill C-19]; Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to on 15 December 2023) [Bill C-56]; and Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023, and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2024 (assented to on 20 June 2024) [Bill C-59].

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

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

<sup>6</sup> Economic Council of Canada, “Interim Report on Competition Policy” (July 1969), online (pdf): <[https://publications.gc.ca/collections/collection\\_2018/ecc/EC22-12-1969-eng.pdf](https://publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf)> at 109.

<sup>7</sup> Trebilcock, *supra* note 5 at 172.

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

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

<sup>10</sup> Competition Policy Review Panel, “Compete to Win, Final Report” (June 2008), online (pdf): <[https://publications.gc.ca/collections/collection\\_2008/ic/Iu173-1-2008E.pdf](https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf)> at 58-59.

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

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

<sup>29</sup> Innovation Science and Economic Development, “Future of Canada’s Competition Policy Consultation—What We Heard Report” (20 Sep 2023), online: <<https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report#s72>>.

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

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

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

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

<sup>34</sup> *Ibid* at para 439.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Competition Act*, s 74.1(3).

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

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

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

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

## ON RECENT AMENDMENTS TO THE CANADIAN COMPETITION ACT: BENEFIT DERIVED AND THE DETERMINATION OF MONETARY PENALTIES

Robert Topel<sup>1</sup>

“It would not appear possible in practice for a competition authority or a court, even with the help of the best experts trained in econometrics, to measure or estimate reliably this theoretically correct minimum fine for a given antitrust violation.”

Wouter Wils (2007)<sup>2</sup>

*Recent amendments to the Canadian Competition Act have expanded the set of antitrust enforcement tools available to the Competition Bureau and Tribunal, while also allowing private parties to apply for damages. This paper focuses on the greatly expanded range of deterrent fines that the Tribunal may impose on violators. These fines may be imposed up to three times the value of the benefit derived from the illegal conduct or, if that concept cannot be “reasonably determined”, up to three percent of a violating firm’s global revenues. The Tribunal may also award damages to injured parties that may not exceed the violator’s benefit derived from the illegal conduct. I argue that antitrust cases where benefit derived can be reasonably determined will be rare, so that fines will be set by other, less objective and transparent means, in which case damages may not be available. These conclusions are consistent with the history of fines set by the European Commission, which for over 25 years has been empowered to set fines based on gains improperly made—a synonym for benefit derived—when it is “possible” to do so, yet there are no documented cases of fines being based on that concept. Overall, my view is the amendments will move Canadian antitrust policy much closer to that of the European Union, which is a source of concern.*

*Les modifications récentes de la Loi sur la concurrence ont élargi la trousse d’outils d’application des mesures antitrust à la disposition du Bureau de la concurrence et du Tribunal de la concurrence, tout en permettant aux parties privées de demander des dommages-intérêts. L’auteur de cet article porte un regard sur la gamme considérablement renforcée d’amendes dissuasives que le Tribunal peut imposer aux contrevenants. Ces amendes peuvent représenter jusqu’à trois fois la valeur de l’avantage dérivé du comportement illégal ou, si cette valeur ne peut être « déterminée raisonnablement », jusqu’à 3 pour cent des recettes mondiales brutes de l’entreprise contrevenante. Le Tribunal peut aussi accorder aux parties lésées des dommages-intérêts ne pouvant excéder l’avantage dérivé du comportement illégal. L’auteur maintient que les*

*poursuites pour violation des lois antitrust dans le cadre desquelles l'avantage dérivé pourra être déterminé raisonnablement seront rares, donc les amendes seront établies par d'autres moyens moins objectifs et transparents, ce qui pourrait éliminer les dommages-intérêts. Ces conclusions cadrent avec les amendes imposées par la Commission européenne qui, depuis plus de 25 ans, est habilitée à infliger des amendes en fonction des gains illicites réalisés – un synonyme d'avantage dérivé – lorsqu'il était « possible » de le faire, même s'il n'existe aucun cas documenté de ce fait. Dans l'ensemble, l'auteur est d'avis que cette modification de la Loi rapprochera vraiment la politique antitrust canadienne de ce que fait l'Union européenne, ce qui le préoccupe*

## I. Introduction and Summary

### a. Background

Successive amendments to the Canadian *Competition Act* (Act) in 2022, 2023, and 2024 have expanded the set of antitrust enforcement tools available to the Competition Tribunal and Competition Bureau, while also allowing private parties to petition for monetary relief (damages) from the Tribunal. Broadly, the amendments: (1) reduce specific thresholds for finding antitrust liability in cases involving “abuse of dominance” and add categories of reviewable conduct; (2) greatly increase the range and basis of Administrative Monetary Penalties (AMPs) that the Tribunal may impose when liability is found; (3) at the discretion of the Tribunal, allow private parties harmed by anticompetitive conduct to collect damages in certain circumstances; (4) repeal the “efficiency defense” in reviewing the competitive impact of mergers; and (5) create a rebuttable presumption that a merger is anticompetitive if it significantly increases market concentration.

In this article I focus on amendments affecting the determination of AMPs and damages for civil infringements, which apply to “abuse of dominance” (section 79), “agreements that prevent or lessen competition” (section 90.1), and, for damages, unilateral business practices under sections 75-78 of the Act. Prior to the amendments, AMPs were capped at relatively low levels, and parties harmed by the conduct could receive injunctive and other forms of relief but not monetary damages. The new amendments greatly expand the range of AMPs available to the Tribunal while also creating opportunities for harmed parties to collect damages. Notably for much of what follows, both AMPs and damages are to be based on a measure of a violator’s “benefit derived” from the illegal conduct. Specifically:

- In cases where the Tribunal finds intentional abuse of dominance (section 79), the Act specifies AMPs to be no greater than the higher of: (i) \$25 million; or (ii) three times the value of the *benefit derived* from the conduct or, if that benefit cannot be “reasonably determined”, three percent of the violator’s worldwide gross revenues.<sup>3</sup> The same formula applies to non-criminal agreements that restrain trade (section 90.1) with the exception that the limit in condition (i) is \$10 million.<sup>4</sup>
- In cases where the Tribunal finds that abuse of dominant position has occurred, the Tribunal’s power to impose AMPs is limited to cases where both anticompetitive impact and anticompetitive “intent” are established.<sup>5</sup>
- For private litigants harmed by anticompetitive conduct and who obtain leave to bring applications to the Tribunal, the Tribunal “may also” order the infringing party to pay damages “not exceeding the value of the *benefit derived* from the conduct...to be distributed among [those affected] in any way the Tribunal considers appropriate.” The set of infringements eligible for damages includes those that may trigger AMPs—abuse of dominance (section 79) and agreements that restrain trade (section 90.1)—plus other reviewable unilateral business practices that do not trigger AMPs.<sup>6</sup> Unlike for AMPs, the amendments do not specify if or how damages are to be determined when the violator’s benefit derived “cannot be reasonably determined.”<sup>7</sup>

Given the prominence of the new concept “benefit derived” (BD) in crafting forms of punishment and compensation, one might expect Parliament to provide a definition of it. Yet a definition of BD is conspicuous by its absence—the amendments are silent on what BD might mean generally, or in specific contexts where it might be calculated. One can only assume that this omission was purposeful, leaving BD to be defined by the Bureau and Tribunal in different cases and contexts. Parliament effectively delegated the authority to define a major new concept and enforcement tool in the Act, and how to calculate it, to agents in the Bureau and Tribunal on a case-by-case basis. As in many legislative-regulatory contexts this delegation has the advantage of relying on agents with presumably greater expertise in antitrust matters. There are also disadvantages that I discuss below.

In order to apply BD the Bureau and Tribunal will need a general definition, at least as a starting point. To an economist, the most plausible

definition is that BD measures a violator's gain in actual or expected future profits caused by its illegal conduct; that is, its incremental profits compared to a "but-for" world in which that conduct did not occur.<sup>8</sup> I will take this as a working definition in what follows, while recognizing that the language of the Act may confer some flexibility to the Bureau and Tribunal.

However it might be defined, a key feature of BD is that it occurs on the violator's side of the market—it is intended to represent what the violator gained from its illegal conduct rather than the harm caused by that conduct. This distinction adds a new layer to Canadian antitrust enforcement. In Canada, as in the US, with the exception of *per-se* violations such as price-fixing, a threshold condition for determining antitrust liability is that the challenged conduct can be shown to cause actual or prospective harm to consumer welfare by lessening competition. No consideration of the violator's BD is necessary for determining liability, though there is a strong presumption that something must have been gained from the conduct or it wouldn't have occurred. As I read the amendments, the imposition of AMPs now requires the Bureau and Tribunal to make a good faith effort to provide a monetary estimate of a violator's BD, or to explain why BD cannot be reasonably determined. BD is also the essential concept underlying anti-trust damages, so damages are disgorgement of the violator's estimated actual or expected illegal gains, even in cases that are not eligible for AMPs (sections 75-77). The Act is oddly silent on how damages might be calculated when BD cannot be "reasonably determined", which I expect to be the typical case.

These features stand in sharp contrast with US law, where monetary penalties are tort claims based on the estimated harm (damage) done to victims of anticompetitive conduct, which are then trebled. For some anticompetitive acts, such as an agreement among competitors that raises prices (section 90.1), damage to consumers and the anticompetitive profits of violators might be roughly equal and concomitant. Consumers pay an overcharge (damages) and the colluding firms receive it (BD), and it is sometimes possible to obtain a rough estimate of the overcharge. But in other cases, including abuse of dominance and the other categories of unilateral conduct listed in sections 75-78 of the Act, the two may be quite different, especially when the alleged harm to competition and violator's gain and/or consumer harm are merely possible or prospective rather than actual, as is often the case. Then the reliance in US law on provable damages in forming monetary penalties may yield little or no deterrence because no calculable damage to consumers has yet occurred. The Act's new emphasis on BD and a much greater range of possible fines might be interpreted as reflecting this difference, giving

greater weight to the deterrence of anticompetitive acts than to compensation of harm.

Reliance on BD in determining AMPs and damages appears to place important analytical limits on the Bureau's and Tribunal's discretion. I argue below that this appearance is deceiving—especially in unilateral conduct cases where a “reasonably determined” measure of a violator's gain will rarely be available. Evidence from the EU supports this pessimism. There, guidelines for setting AMPs by the European Commission (EC) have included for over 25 years an infringer's “gains improperly made” as a factor to be used in setting AMPs, if it is “possible” to measure those gains. The close similarity of the language in the EC's guidelines to that in the Act is striking, yet there are no documented instances of the EC using a measure of improper gains in setting AMPs, which are often extraordinarily large. As an economic matter, the absence of documented cases is significant because reliance on an objective measure of a violator's gains in setting fines would provide clear and analytically correct deterrence of anticompetitive conduct, while also making imposed fines more defensible. Whether one calls the concept “benefit derived” or “gains improperly made”, this fact and the analytical difficulties in properly defining a violator's BD, much less calculating it, suggest that the Canadian experience is likely to be similar.<sup>9</sup>

The conceptual challenge is that while determining that a form of conduct is anticompetitive is typically difficult and uncertain, identifying and calculating what a violator *gained*, or might gain, from the conduct is often far more uncertain and speculative. This is why I expect that the large majority of AMPs will be set by other means, with great reliance on the Tribunal's discretion and expanded powers. A related concern is the Act's requirement that damages paid to harmed parties can be no larger than the infringer's BD, which as I read the Act, means that a reliable measure of BD is a prerequisite for awarding damages. Then if the Tribunal concludes that damages are warranted it may strain to create a justifying measure of BD, no matter how uncertain and speculative it might be.

The evaluation of business practices that fall within the unilateral conduct and civil agreements provisions of the Act typically involve an imprecise balancing of procompetitive and anticompetitive effects. Prior to the recent amendments a finding of infringement could result in behavioural remedies that enjoin or modify the offending conduct, and fines that were relatively modest—the upper limit on AMPs for abuse of dominance was only \$10 million. The Bureau argued that such limits were inadequate to deter conduct by large firms and were out of step with the very large fines

imposed in other jurisdictions.<sup>10</sup> The amendments greatly expand the range of deterrent AMPs that can be wielded by the Tribunal, which may enhance deterrence. Yet if, as I expect, reliable estimates of BD are rare, and the concept itself is rarely used, the added uncertainty of financial penalties set by other means risks muddying the waters for businesses, who cannot be confident of exactly what conduct might be deemed anticompetitive and what metric will be used in determining penalties if liability is found. If so, the new powers in the Act could dampen competition. Magnifying this concern, these new powers give broad discretion for antitrust authorities and bureaucrats to define BD in ways that align with their own preferences or with alternative political goals, which shift over time.<sup>11</sup> As experience in the EU demonstrates, there are few constraints.

The rest of the paper is organized as follows. Section II lays some groundwork by reviewing the purpose and design of effective antitrust penalties. I compare the methods of determining monetary penalties and damages specified in the Act's amendments to methods that have evolved in the United States and the European Union, with particular attention to the reasons why Canadian penalties were designed as they are and the relative advantages, and disadvantages, of Canadian law. Section III then turns to a rather pessimistic analysis of how the Canadian concept of BD might be applied in practice. Section IV concludes.

## II. The Purpose and Design of Antitrust Penalties

As an economist, my instinct is to evaluate the operation and effectiveness of public policies by asking "Compared to what alternatives?" The largest Western economies subject to sophisticated antitrust enforcement are the US and the EU, so a high-level comparison of institutions and financial penalties in Canada, the US, and the EU is instructive.

Broadly speaking, enforcement agencies in these jurisdictions agree on their missions, each stating that the purpose of their activities is to protect the "competitive process". For example, the Canadian Competition Bureau states that its "advocacy and enforcement work focuses on protecting the *competitive process* rather than enforcing a particular market outcome"<sup>12</sup>. Similarly, the European Commission "focuses on preventing harm to the *competitive process*"<sup>13</sup>, while the US Department of Justice and Federal Trade Commission will intervene to "prevent those mergers that would...harm the *competitive process*."<sup>14</sup> Missing from these statements, and from any supporting documents I have found, is a clear definition of the very thing being

protected—the *competitive process*. I believe a clear definition is important, so here is one that I think is useful and covers the necessary ground.

I use the term “competitive process” to refer to unilateral (i.e., non-collusive) acts by sellers of goods and services that are meant to attract and retain the business of customers, such as pricing, product design, innovation, and advertising.<sup>15</sup> Implicit in this definition is that such acts enhance the gains from trade between a firm and its customers; they are generally welfare enhancing.<sup>16</sup> “Anticompetitive conduct” refers to acts by business firms that seek profits by illegally interfering with or hindering the competitive process in ways that reduce the gains from trade. With this definition, I treat the phrases “protecting the competitive process” and “protecting competition” as synonymous.

An implicit tenet of antitrust enforcement is that rational individuals engage in anticompetitive acts because they benefit, in some way, from doing so. Behavioural remedies—such as enjoining conduct that is found to harm competition—are interventions that prevent harmful conduct from occurring or continuing, while monetary penalties are meant to dissuade such acts by making them costly and perhaps also to repair the harm such acts have done to victims.

Monetary penalties in antitrust serve two broad and closely related purposes:

- *Deterrence and disgorgement*: To be effective deterrents, monetary penalties must be strong enough that the expected gains from engaging in anticompetitive acts are offset by expected penalties. Monetary penalties should also account for the probabilities that the illegal acts are both discovered and successfully prosecuted, which in many circumstances might be low. Penalties large enough to deter anticompetitive conduct must then be larger, perhaps much larger, than violators’ expected gains, in which case disgorgement is achieved.
- *Compensation of those harmed and creation of private incentives to detect anticompetitive conduct*: The victims of anticompetitive conduct should be compensated for harm caused by the conduct. In addition, payment of damages effectively deputizes and incentivizes victims (and their agent lawyers) as private antitrust enforcers.

These purposes are best served when there is clarity of both the nature of conduct that is illegal and the penalties that will be imposed. Canada’s amendments to the Act certainly increase the range of possible AMPs and

so they appear to strengthen deterrence—perhaps by too much, as discussed below. They also create new opportunities for compensation of injured parties. In multiple ways the amendments create a sort of hybrid of US enforcement, penalties, and compensation, which are relatively clear, and those in the EU, which are not. Table 1 shows the basic structure of financial penalties and compensation of harm for antitrust violations in Canada, the US, and the EU.

**Table 1**

**Antitrust Monetary Penalties and Damages in Canada, the United States, and the European Union**

	<b>Canada</b>	<b>United States</b>	<b>European Union</b>
<b>Monetary Penalties: Criminal Conspiracy</b>	<ul style="list-style-type: none"> <li>• Criminal offence prosecuted by the PPSC</li> <li>• Imprisonment, and/or fine at discretion of the Court</li> <li>• Paid to Canadian Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• Criminal offence prosecuted by DOJ</li> <li>• Imprisonment and/or fine of up to 20% of affected commerce</li> <li>• Paid to US Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• Non-criminal offence treated as civil violation</li> </ul>
<b>Monetary Penalties: Civil Violations</b>	<ul style="list-style-type: none"> <li>• Determined by Tribunal for:               <ol style="list-style-type: none"> <li>(1) intentional abuse of dominance</li> <li>(2) agreements restraining trade</li> </ol> </li> <li>• AMP of up to the greater of:               <ol style="list-style-type: none"> <li>(1) \$25M (abuse) or \$10M (agreements)</li> <li>(2) Three times the benefit derived from the conduct, or 3% of global revenue</li> </ol> </li> <li>• Paid to Canadian Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• DOJ &amp; FTC may seek civil fines for breach of a consent decree or a procedural violation</li> </ul>	<ul style="list-style-type: none"> <li>• Determined by European Commission for:               <ol style="list-style-type: none"> <li>(1) Conspiracy</li> <li>(2) abuse of dominance</li> <li>(3) agreements restraining trade</li> </ol> </li> <li>• Guidelines, but no fixed methods or metrics; base fine is adjusted up or down at Commission discretion</li> <li>• Capped at 10% of global revenue</li> <li>• Paid to EU Treasury</li> </ul>

	Canada	United States	European Union
<b>Damages</b>	<ul style="list-style-type: none"> <li>• Determined by civil courts for actions under section 36(1) based on criminal violations, paid to plaintiffs</li> <li>• Under Part VIII, determined by Tribunal for:                             <ol style="list-style-type: none"> <li>(1) Acts that trigger AMPs</li> <li>(2) Certain unilateral vertical</li> </ol> </li> <li>• Distributed by Tribunal as it deems appropriate</li> </ul>	<ul style="list-style-type: none"> <li>• Determined in private litigation</li> <li>• Three times damages suffered by plaintiffs</li> <li>• Methods have evolved through litigation</li> <li>• Paid to plaintiffs</li> </ul>	<ul style="list-style-type: none"> <li>• Plaintiffs may recover damages in courts of member states</li> </ul>

### Financial Penalties and Damages in Canada versus the US

In the US, the government agencies tasked with enforcing antitrust law are the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Their powers in antitrust enforcement are broadly similar, though only the DOJ can deal with criminal violations. In civil cases including unilateral business conduct under Section 2 of the Sherman Act or the Clayton Act—acts that would include “abuse of dominance” in the language of the Act—their powers are effectively limited to investigating conduct and seeking behavioural or structural remedies via consent decrees or litigation.<sup>17</sup> Substantial monetary penalties for non-criminal matters arise via private litigation, including class actions, which may follow agency investigations and actions or arise independently. These private suits are torts that allow harmed parties to collect damages equal to three times the estimated monetary harm caused by the illegal conduct (“treble damages”). In other words, in the US both deterrence/disgorgement and compensation of victims are based on the same measure, damages.

A showing of consumer harm, or the dangerous probability of future harm, is a threshold requirement for establishing liability. In a nutshell, this is the US version of the “consumer welfare standard” for protecting the competitive process. For cases involving the Canadian concept of abuse of dominance by a single firm, where the illegal acts may also have harmed competitors, those competitors may sue for damages in the form of lost profits. The consumer welfare standard still applies as the threshold test, however, because competitor claims for damages typically require a prior showing of harm to consumer welfare.<sup>18</sup>

The widely accepted rationale for trebling is that acts in restraint of trade are not always detected, so penalties for detected acts should be substantially larger than the damages they cause if they are to achieve deterrence, which also strengthens incentives for private litigants to discover them. Why trebling is the appropriate multiple is not obvious, though it has stood the test of time—Congress has declined proposals to change it—and expert review.<sup>19</sup> And note that trebling of BD has been adopted in the Canadian Act for setting AMPs.

The detection rationale for a multiple greater than one is most obvious for conspiracies, which are by nature secret. Some have argued that trebling is excessive in matters of unilateral conduct because the business practices at issue, such as exclusive dealing or loyalty discounts, are directly observable, so the multiple should be just one. But observing a business practice and uncovering its purpose are different things. For example, in the Act fines for abuse of dominance require a showing of both anticompetitive impact and intent. Putting aside how “intent” might be defined, like conspiracy it can be disguised and difficult to prove, and it is more likely to be disguised when intent is a criterion for finding liability and setting fines.<sup>20</sup> Then multiples greater than one are justified. Note that trebling is a hard rule under US law but an upper bound in the Act; the Tribunal can impose smaller AMPs at its discretion.

The American system has several virtues. One is that courts have historically accepted a set of more-or-less plausible methods for determining liability and calculating damages that are grounded in economic theory. Another is that the damage metric and methods that are the basis for monetary penalties are relatively clear, so business firms are broadly aware of the consequences of illegal acts while private litigants—including the plaintiffs’ bar—are aware of the rewards for detecting those acts and successfully prosecuting them. The rules of the game are relatively clear and stable. Related to this point, the damage metric and accepted methods for estimating it are reviewable constraints on financial penalties that limit the discretion of lower-court judges and juries.

A third virtue is the delegation of a large share of enforcement and penalties to private litigation, which both saves government resources and is beyond the reach of government power. Then monetary penalties are not a revenue source for the government that writes and enforces the laws, and a large part of antitrust enforcement is unconnected to the preferences and career concerns of agency bureaucrats, or to political considerations that shift with changes in administrations.

The prominent role of private litigation in the US also has important disadvantages. In litigation both liability and penalties are decided by judges—who may rarely oversee an antitrust case and typically have little or no expertise in the area—and juries composed of several citizens with no antitrust or economics background at all. Related, the availability of treble damages creates powerful incentives to bring questionable cases, and equally powerful incentives to settle, avoiding a trial. Settlements often have little connection to the original allegations, but they are, by definition, acceptable to both sides. Experts might do better. As I interpret the Act and its recent amendments, Canada has opted for the benefits of experts' knowledge and discretion in enforcement and the setting fines over the resource savings, constraints, and diffusion of power of the US system.

The treble *damages* metric applied in the US differs from the Canada's BD metric in several important ways.

First, in the US, the monetary metric underlying penalties and deterrence is the quantifiable harm that anticompetitive conduct does to *consumers*.<sup>21</sup> In the US, it is widely (though not universally) accepted that the purpose of antitrust law is the promotion of consumer welfare, which is best accomplished by protecting the competitive process, as defined above. The implicit assumption of US law is that deterrence is most effective when penalties are explicitly and formulaically tied to the harm caused by anticompetitive acts.

In contrast, the amendments to the Act are primarily concerned with enhancing deterrence; restitution appears to be a secondary goal and the Act does not mention any measure of harm as a factor to be considered in setting AMPs.<sup>22</sup> The deterrence metric comes from the *violinist's* side. Putting aside until later how BD might be measured and applied, Parliament's choice of BD rather than consumer harm as a deterrent is very significant, with important implications discussed below. It suggests that the amendments' authors believe that an infringing act's harm to consumers and competition versus its benefit to a violator can be very different, and that the higher deterrent purpose of enforcement is better tied to some measure of BD than to the American concept of damages.

Second, while deterrent AMPs in the Act may be imposed up to three times the BD, damages, when they are allowed, cannot exceed the violator's BD; there is no multiple applied, no alternative based on the violator's revenue or the act's severity, and no consideration of whether the violator's BD is an appropriate metric for compensation. So while the enhanced right of access marks a significant increase in the Act's reliance on private

enforcement incentives, a multiple of one (or less, as the Tribunal may decide) compared to three in the US continues the Act's greater reliance on public enforcement and also perhaps "the perceived excesses of private enforcement in the United States."<sup>23</sup> Note as well that in cases of unilateral conduct where "intent" is not established but where the Tribunal finds that damages should be awarded, payment of damages is an implicit AMP capped by the violator's BD. This unitary multiple is consistent with the idea that, absent a finding of intent, a challenged business practice such as exclusive dealing or tying is publicly observable; a larger deterrent is not economically justified.

In cases where both an AMP and damages are to be paid the Act is ambiguous regarding whether the damage amount is to be paid by the violator in addition to the AMP, resulting in an effective fine of up to four times the BD, or whether it is to be paid out of the AMP. The phrase "may also" defining this Tribunal power suggests the former. Nor does the Act indicate how or if damages are to be determined if the violator's BD cannot be "reasonably determined"—a strict reading suggests there can be no damage award in this case, but perhaps it's up to the Tribunal to come up with something.<sup>24</sup> But the more important question is: In cases where BD and measurable consumer harm are conceptually different, which appears to be the presumption underlying BD, why are damages based on what the violator(s) gained rather than an independent measure of the actual harm to victims, which might be more easily and accurately determined? If the goal of paying damages is to compensate those harmed, then damages should be based on a measure of that harm when such a measure can be "reasonably determined".

Third, because US monetary penalties are determined in private litigation, they are paid to those who were allegedly harmed, not the government. The US government does not have standing to collect damages unless it was itself harmed as a purchaser of goods and services. Under the Act, AMPs will be determined by the Bureau and Tribunal—government agencies populated with political appointees—and will be paid to the Canadian Treasury. This feature is similar to the structure of EU fines, to which I now turn.

### **Financial Penalties and Damages in Canada versus the EU**

The US and Canada each base deterrence and restitution on a single metric; damages for the US and BD for Canada. The EU separates the two. As in Canada, EU monetary penalties are imposed by an agency, the European Commission, within very broad guidelines that leave more room for

the Commission's discretion than the Act grants the Bureau and Tribunal.<sup>25</sup> There is no fixed methodology or even a stated metric for setting fines, but it is clear that the major goal is deterrence, however achieved. A "symbolic fine" may also be imposed.<sup>26</sup>

After a long list of factors to be considered in setting a fine, close similarity to the Canadian Act and its new use of BD arises in Paragraphs 31 and 32 of the EC Guidelines for determining financial penalties, which read:

"The Commission will also take into account the need to increase the fine in order to exceed the amount of *gains improperly made as a result of the infringement where it is possible to estimate that amount* ... . The final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the [violating entity]."<sup>27</sup>

So, in the EU a synonym for "benefit derived" may be taken into account, if possible, but unlike in Canada it is not the central concept in setting AMPs; it is a factor among many, though the Guidelines state that it "will" be taken into account when "possible". As in the Act, beyond mentioning "gains improperly made" the EU Guidelines provide no guidance as to what those gains might be or how they might be calculated for any particular type of conduct. Those are left to the Commission. And notice that 10 percent of a violator's worldwide revenue is in play if measurement of improper gains is not possible.<sup>28</sup> Canada's three percent limit is modest by comparison.

Perhaps ominously for how the BD concept might be applied in Canada, from the 1998 inclusion of "improper gains" in the EC Guidelines up through 2021—a 23 year window—"the Commission does not seem to have ever justified an increase of an antitrust infringement sanction based specifically on improper gains."<sup>29</sup> Nor have I found any recent cases where the concept of "improper gains" has been applied. This suggests that the Act's "reasonably determined" condition for using BD to set monetary penalties might rarely be satisfied. And without a reasonably determined BD there would seem to be no opportunity for damages under the Act's amendments.<sup>30</sup>

In contrast to both Canada and the US, in the EU the distinction between deterrent AMPs and compensating damages is explicit. Since 2014 those harmed by anticompetitive acts have been able to sue for damages in the courts of Member States and, in stark contrast to the vague guidelines on penalties, the EC describes in some detail a variety of acceptable methods for calculating damages in various circumstances.<sup>31</sup> Based on my experience these are the same methods that are commonly used to calculate damages

in US litigation. In Canada, when the Tribunal grants leave to petition for damages the upper bound that can be disbursed is the Tribunal's estimate of the *violator's* BD; there is no requirement that actual damage to consumers or others be calculated, even in matters where damages are more easily determined than a violator's BD.

Finally, as in Canada but unlike in the US, monetary penalties for anti-trust infringements flow to the general EU budget.<sup>32</sup> The EC, which like the Canadian Tribunal determines liability and imposes fines, explicitly regards these fines as a government revenue source that substitutes for taxation:

“This money is not earmarked for particular expenses, but Member States' contributions to the EU budget for the following year are reduced accordingly. The fines therefore help to finance the EU and reduce the burden for taxpayers.”<sup>33</sup>

Recent cases demonstrate that these fines can be very large and the reasoning behind them opaque.<sup>34</sup> For example, in 2018 the EC fined Google €4.3 billion for abuse of dominance related to its Android operating system, and fined Qualcomm €1 billion for exclusionary payments to Apple. Those two fines alone amounted to 3.7 percent of the EU budget for that year. In 2017 Google was fined €2.7 billion for abuse related to its search engine, and Scania was fined €0.9 billion for participating in a cartel, accounting for 2.6 percent of the EU budget.<sup>35</sup>

In two recent abuse of dominance decisions the EC's findings of liability and large fines have been overturned, marking an important change in EU law on abuse of dominance. In yet another major case involving Google, the EC initiated an investigation of Google's online advertising business in 2016. In 2019 the EC found Google's conduct exclusionary, imposing a fine of €1.5 billion. On appeal the Commission's findings and fine were annulled in their entirety by the EU General Court in September 2024.<sup>36</sup> Similarly, in 2009 the EC fined Intel €1.1 billion for abuse of dominance related to loyalty discounts in procurement contracts with certain computer manufacturers. After 15 years of appeals by Intel and counter-appeals by the EC, in October 2024 the European Court of Justice overturned the EC's findings in their entirety.<sup>37</sup> In both cases the EC had found the challenged contracts *per-se* illegal, arguing that evidence of anticompetitive impact was not necessary. The courts' new standard recognizes that the practices at issue generally have pro-competitive rationales, so that quantitative evidence of impact is required. These decisions appear to end the EC's *per se* standard in dominance cases, which is a step closer to the balancing considerations applied in the US and Canada.

In requiring quantitative evidence of anticompetitive impact the EU courts' decisions are particularly relevant for the possibility of measuring BD in unilateral conduct cases. Specifically, in its *Intel* appeal the EC included a quantitative analysis of the extent to which Intel's loyalty contracts could exclude competition from its main rival, Advanced Micro Devices, as a backup in case the court denied its *per-se* arguments. The court rejected the EC's analysis as unreliable. As I explain in more detail below, a reliable analysis of exclusionary impact in such cases is only a first step toward a "reasonable" measure a violator's BD. Because loyalty discounts and other forms of unilateral conduct are generally procompetitive, it is not sufficient to show that the extent and form of existing contracts can illegally exclude. It is also necessary to specify the form of less restrictive or extensive "but-for" contracts that would have been legal, and to offer a "reasonably determined" analysis of how competition, prices, and profits would have played out in that but-for world.

A common feature of EC fines is the absence of a transparent methodology for determining them; they reflect the EC's judgement (or assumption) of the severity of the infringement and the size of fine that would be a sufficient deterrent. Importantly for thinking about the new deterrent powers in the Act, none of the EC fines mentioned above involved a calculation of the infringer's "improper gains", or any detailed explanation of how the fine was constructed. Then an obvious concern is that the Commission is being true to its acknowledgment that fines are a source of government revenue, so that antitrust policy may be politically distorted toward raising revenue, or to other goals such as protecting competitors rather than protecting competition and consumer welfare. The Canadian Act's rules for finding liability and setting AMPs for anticompetitive conduct are more constrained and specific, and in my view more economically literate than in the EU, which are clear comparative benefits. Even so, the fact that BD is not a well-defined or easily determined metric suggest that it will be rarely used, so that BD will not define or constrain AMPs sought by the Bureau or imposed by the Tribunal.<sup>38</sup> I view that and the fact that imposed fines flow to the Canadian Treasury as sources of concern.

### **III. How, and How Often, Might Benefit Derived Be Applied?**

With the new amendments to the Act, it would appear that BD will be the key metric determining deterrent monetary penalties for antitrust infringements. In the abstract, basing AMPs on BD makes economic sense—a penalty at least as large as a rational infringer's BD, adjusted upward to account for uncertain detection and prosecution, would be an effective and

clear deterrent. Appearances are deceiving because the Act properly recognizes that there will be circumstances where an infringer's BD "cannot be reasonably determined", in which case the authorities may seek and impose fines up to three percent of a firm's worldwide gross annual revenue. This raises two crucial questions about how AMPs and damages will be determined:

First, how often and in what circumstances will there be a reliable estimate of a violator's BD?

Second, when no reliable measure of BD exists, what rules and methods will the authorities use to establish AMPs within the vast range "up to" three percent of a firm's worldwide revenue?

The Act amendments and recent legal commentary on them are silent on these crucial questions.

Evidence from the EU and the US is not encouraging. Regarding the first question, the answer appears to be "rarely, if ever". The EC's guidelines on setting fines have included a violator's "gains improperly made"—surely a synonym for BD—as a factor since they were first published in 1998, including clarifying revisions published in 2006. As in the Act, the stated rationale for this factor is deterrence. Yet as noted above the EC has not used this factor as justification for a fine, nor has it indicated how one might calculate it. Given the strong theoretical argument for basing deterrence on BD, one would expect EC authorities to use it if they could. The fact that they do not indicates that "reasonably determined" (Canada) or "possible" (EU) estimates of BD will be very rare, and that AMPs will have to be set by other, less specific, means, bounded only by three percent of worldwide revenue. Hence the pessimistic quote from Wils (2007) that opened this paper.<sup>39</sup>

Evidence from the US is similar. Though most monetary penalties for US antitrust violations are settlements or damage estimates from private litigation, the DOJ seeks monetary fines for criminal conspiracies using criteria spelled out in the US Sentencing Commission's guidelines on antitrust fines.<sup>40</sup> Notably, these policies resemble the EC's guidelines applied to all antitrust offences, though they are more specific and they apply only to criminal conspiracies. As a matter of basic economics, in collusion cases there is at least some degree of theoretical correspondence between damages to consumers, who pay an elevated price, and the "benefit derived" by conspirators who receive the higher price. Yet like the EC, the Sentencing Commission considers the volume of commerce to be a "more readily measurable substitute" for the severity of an offence than "the damage caused or profit made by the

defendant.” “Because damages are difficult and time consuming to determine...the volume of commerce...serves as the basis for the offense level enhancements [to fines].” Again, this reliance on “volume of commerce” rather than some measure of anticompetitive gains suggests that reasonable or reliable measures of BD will in practice be rare.

Rarity raises an additional problem mentioned above. When harmed parties petition the Tribunal for damages, the Act specifies that they may collect up to the value of the violator’s BD—an estimate of their actual damages might play some unstated role in determining what they get, but it is bounded by the violator’s BD even when BD and damages are very different. As I read the amendments, the very opportunity to collect damages depends on the existence of a reasonably measured BD, so in cases where the Tribunal finds that there is no such measure the parties harmed by anti-competitive conduct would have no claim to damages. There is no defined amount “to be distributed among [those affected] in any way the Tribunal considers appropriate”<sup>41</sup> and no clearly-stated discretion of the Tribunal to create one.

As I noted above, the fact that the “reasonably determined” criterion for applying BD is directly mentioned in sections of the Act dealing with AMPs but not in sections dealing with damages might allow the Tribunal to finesse these issues, say by using a “reliable” lower bound for BD to pay damages or simply defining BD to *be* damages at the Tribunal’s discretion. But these possibilities don’t solve the fundamental contradiction that the violator’s actual BD and the damage to those harmed are often conceptually different. An economically coherent and clear solution would be to fix the Act, basing deterrent AMPs on a “reasonable” measure of BD and basing compensation on an (also reasonable) measure of damages.

Regarding the second question above, the Act is silent on specific methods to be applied in setting AMPs when a reasonable measure of BD is not available. The previous cap on AMPs was \$10 million, which the Bureau properly regarded as too small to deter violations by even mid-sized businesses, and perhaps irrelevant to large multinational firms. Under the amended Act the only formal constraint is that a fine may not exceed three percent of the violator’s annual worldwide revenue, which represents a massive increase in the Tribunal’s deterrent powers. This cap is not limited to the revenues generated by a particular product or line of business affected by the violating conduct, nor is it limited to affected revenues generated in Canada.

For example, suppose the Tribunal concludes that Apple's "closed garden" App Store model illegally excludes competition for iPhone applications, harming Canadian consumers and app producers, but that a reasonable measure of Apple's BD from the violating practices cannot be constructed. Prior to the recent amendments, the maximum fine available to the Tribunal was \$10 million. Now it is three percent of Apple's worldwide revenue, inclusive of all its business activities. Apple's 2024 worldwide revenue was roughly US \$390 billion<sup>42</sup>, so the upper bound on an AMP is \$11.7 billion, which is over 1000 times higher than before. It might be obvious that the Tribunal would not go that far, but neither is it clear what it would do—the amendments offer no clearly-stated rules or other constraints. The power and discretion of the Bureau-Tribunal looks very much like that of the European Commission.

### **Why is "Benefit Derived" Difficult to Measure? An Illustrative Example**

In practice, the antitrust authorities in the EU and US largely eschew attempts to measure anything similar to BD even in collusion cases where anticompetitive gains take the form of an elevated price, which is in principle observable if gains have actually occurred.<sup>43</sup> This is especially relevant because possible applications of BD under the new amendments will mainly apply to matters of unilateral conduct, including not only abuse of dominance where BD determines AMPs and possibly damages, but also in matters of "reviewable" conduct where AMPs are not imposed but damages can be awarded. In these categories the alleged anticompetitive effects and profits are often vague or prospective, and may merely have a "dangerous probability" of occurring in the future. They haven't happened yet, and they might not happen at all. Further complicating matters, as the Act recognizes the business practices that might trigger antitrust liability—such as exclusive dealing, loyalty discounts, and price maintenance—almost always have procompetitive rationales that must be weighed against possible anticompetitive impact, while the threshold requirement of "intent" for AMPs in matters of abuse of dominance is difficult to discern or to distinguish from aggressive competition on the merits.

"Predatory pricing" is an exclusionary tactic that provides a stark example of these points.<sup>44</sup> Although convincingly documented cases of predation are in short supply and critiques of the theory are not, the alleged conduct is simple. An incumbent firm with monopoly power faces competition from a (typically smaller) rival, which may be a new entrant. To drive its rival out or impede entry the incumbent reduces price below incremental cost,

willingly losing money in the short run. This imposes losses on the rival as well, which the rival is less able to sustain. The rival eventually leaves the market, or does not enter, never to return. The predator then raises price to the monopoly level, recouping its investment. The successful predator's BD relevant for deterrence is the expected present value of *future* profits that accrue after driving the rival (or rivals) from the market, perhaps reduced by its losses during the predation period, *compared to the profits it would have earned from its best legal strategy.*

In this example consumers benefit from low prices during the period of predation, but will be harmed in the future after the strategy (we assume) succeeds. Assuming the conduct is challenged by the authorities while it is occurring, which is the typical case, the observed facts are that consumers are benefitting from low prices while the alleged predator is losing money. The rival is also losing current profits, which is typically the source of complaint to the authorities and of claims for damages.

Assuming that the conduct is found to be illegal, what would be a “reasonably determined” measure of the predator's BD that would serve the deterrent purpose of an AMP? Any effort to calculate it would require the Bureau/Tribunal to predict what the predator's future prices and profits would be compared to a but-for world where the illegal elements of the conduct did not occur, adjusted for the impact of the conduct on future entry and for the likelihood the strategy succeeds. Crucially, what is the predator's “but-for” legal conduct, which is essential for constructing a measure of BD? Reducing price in the face of entry is a pro-competitive act—it is the very essence of competition—that the law should protect. Then a “reasonably determined” estimate of BD would require calibration of just how large a price cut would have been acceptable for meeting competition, and how that price cut would have affected the outcomes listed above. Good luck trying to determine that value.

These considerations mean that any estimate of the predator's BD would be speculative and likely implausible—it would almost surely fail any “reasonable” version of the “reasonably determined” test. Again, I refer to the quote from Wils (2007) that opened this paper.

Then what? The constraints that BD places on Bureau/Tribunal discretion are gone, and an AMP must be determined by less objective criteria—as in the EC—bounded only by three percent of a firm's worldwide revenue. I don't think we can know what those criteria will be, or how they will be

applied. Nor can businesses that are busy competing with rivals, so the result may be a dampening of competition that harms buyers.

Finally, assuming the conduct is found illegal, the only parties that have been clearly harmed in this example are rivals, who have lost current profits. But as I read the Act amendments the harmed rivals have no damage claim before the Tribunal if there is no reliable or reasonable measure of BD.<sup>45</sup> Moreover, even if the Tribunal did construct a measure of the predator's *future* BD from the conduct, it would have no obvious relation to rivals' *current* lost profits. If harmed rivals' claims of lost profits are to be taken seriously and compensated, then there should be an independent estimate of their damages relative to a but-for world of legal conduct. Alternatively, the Tribunal might interpret the violator's BD as not its future gain, but instead the current losses it imposes on its rivals. Then BD would really be a "damage-to-competitors" calculation and the resulting AMP would be roughly equivalent to the US model of treble damages. Whether such an interpretation is plausible to lawyers and Canadian courts is beyond my expertise, but as an economist I think it a rather large stretch.

### **Difficulties in Measuring Benefit Derived: Unilateral Conduct**

Legal cases alleging naked predation are rare, but it has many close cousins among allegedly exclusionary unilateral contracting practices, and cases involving these practices are not rare. I will discuss two Canadian abuse of dominance cases, but my concerns are general.

Many of the challenges in determining a reliable measure of BD arise in matters involving so-called "loyalty discount" contracts, which are a form of exclusive dealing. These are vertical procurement agreements in which the seller conditions price discounts or rebates on a specified share of a product line that a buyer commits to purchase from the seller. Such contracts were a central issue in EC's recently-overturned case against Intel—discussed above—and in the parallel private suit against Intel brought by Advanced Micro Devices Inc. (AMD) in the US.<sup>46</sup> In Canada, the 2005 Canada Pipe (CP) case involved loyalty discounts and rebates that CP offered to distributors who agreed to purchase all of their cast iron drain, waste, and vent (DWV) requirements from CP—the contracted share was 100 percent, so the contracts were exclusive.<sup>47</sup> Because the large majority of distributors were covered by CP's exclusive contracts, the Competition Bureau alleged that the contracts abused CP's dominant position by preventing other manufacturers of cast iron DWV products from selling through enough distributors, so they could not compete effectively in the marketplace.<sup>48</sup>

As demonstrated in Snyder, Murphy, and Topel (2014), in situations like the CP case loyalty discount contracts always have a pro-competitive rationale.<sup>49</sup> Yet they can have anticompetitive exclusionary effects under certain conditions. For example, like the Bureau's reasoning in CP, assume that a dominant seller enters into such contracts with a large share of buyers, which can reduce the sales opportunities for a rival. If the production technology has important economies of scale, then the rival's remaining opportunities to sell may be too small to support it as an effective competitor. The resulting market outcome may raise prices *relative to a legal situation in which the dominant seller's contracts were less restrictive or extensive*. For example, the contracts might specify a minimum share of 75 percent rather than 100, leaving sufficient headroom for rivals to compete, or the dominant seller might contract with fewer buyers, so rivals can compete for the remaining buyers.

Assume for the sake of argument that the Tribunal finds that these conditions held and that the contracts are illegal. How might the Tribunal measure the dominant seller's BD, either as an input to creating an AMP under section 79 or as a damage amount under section 77?

As with price cuts in the face of entry when evaluating predatory pricing, loyalty discount contracts are a natural outcome of the competitive process. Then a but-for-world that eliminates the offending conduct is not one where loyalty contracts are prohibited; it is one where the contracts are less extensive or restrictive than the actual ones, so that rivals might be more formidable competitors or entry is more likely. It is one thing for the Tribunal to conclude that contracts were exclusionary. It is quite another to specify the features of contracts that would have been legal, and then to simulate how market competition would have played in that but-for-world. That effort would be loosely informed speculation. But that speculative exercise is precisely what is required in order to measure of a violator's BD and a deterrent AMP.

Since 2005 the Competition Bureau has challenged nine unilateral business practices as anticompetitive. Of these, three resulted in a finding that the conduct was not illegal and five, including Canada Pipe, were settled with an agreed modification of the practice but no admission that the conduct was anticompetitive.<sup>50</sup>

The only case resulting in a finding of liability was *Toronto Real Estate Board* (TREB 2016).<sup>51</sup> The Tribunal found that TREB's restrictive rules on the use of certain multiple listing service (MLS) information impeded

potential competition from operators of “virtual online websites”, which could result in higher consumer prices and prevent the emergence of innovative new services. The Tribunal also found that the exclusionary conduct was intentional, so under the amended Act this case would seem to qualify for imposition of an AMP based on BD rather than just a conduct remedy. Though the Tribunal enjoined the challenged rules and required other measures to restore competition<sup>52</sup>, we can still ask if and how a deterrent fine might be determined under the amended Act, and whether BD is a useful tool for doing so.

The TREB is a non-profit platform serving thousands of dues-paying member realtors in the greater Toronto area. It is not a direct beneficiary of the challenged conduct—any anticompetitive gains would be enjoyed by its members, and it seems implausible to assign exclusionary “intent” and a fine to each of them. That point aside, how could the members’ aggregate BD from the challenged rules be determined?

Similar to the issues in *US v. Microsoft* (2001)<sup>53</sup> and many other unilateral conduct cases, the competition excluded by the TREB’s challenged rules was largely “nascent”—innovative new services and providers that might evolve in the absence of the rules, and their emergence might improve quality and reduce prices. As in the case of loyalty discounts, construction of a reasonably determined BD would require the Tribunal to predict how this potential competition would have played out in the absence of the conduct, including what “innovative new services” would have evolved and how they would have impacted prices and welfare. As the Court of Appeals in *Microsoft* framed a very similar problem:

“[N]either plaintiffs nor the court can confidently reconstruct a product’s hypothetical technological development in a world absent the defendant’s exclusionary conduct... . [The question is] whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s monopoly power.”<sup>54</sup>

In other words, the court was able to conclude that certain of Microsoft’s practices were meant to illegally hamper potential competition, but it also concluded that attempting to simulate how the market might evolve in either the recent past or in the future in the absence of the illegal conduct is a fool’s errand. And it is precisely the latter task that would be involved in calculating a deterrent BD, either in *Microsoft*, *TREB*, or in other matters alleging exclusion of potential competition and innovation. I expect that in the vast majority of such matters the Tribunal will, like the European

Commission, determine AMPs by other, more subjective, standards, and that damages may not be available at all. Constructing deterrent AMPs will be more art and guesswork than science.

### **Difficulties in Measuring Benefit Derived: Agreements that Restrain Trade**

Section 90.1 of the Act prohibits “agreements or arrangements” that substantially lessen, or are likely to lessen, competition in a relevant market. As with the unilateral practices discussed above, the amendments to the Act allow the Tribunal to impose AMPs and pay damages in these matters. My understanding is that the Bureau has acted on very few section 90.1 cases and, of the two relatively recent cases it did bring, both were resolved by consent agreements before reaching the Tribunal.

The first case, in 2011, involved an arrangement between Air Canada and United Airlines. In the consent decree the two parties agreed to refrain from coordinating prices, the number of available seats at each price, and from sharing sensitive information.<sup>55</sup> In the second “e-books” case, from 2017, HarperCollins had agreed with other book publishers to switch their distribution models from wholesaler (arm’s length) transactions to agency, in which retailers would not control the prices of the e-books they sold. The Bureau and HarperCollins entered a consent agreement that allowed retailers to discount e-book prices.<sup>56</sup>

Though the cases ended in consent agreements, one can imagine nearly identical scenarios in which the agreements existed for some substantial period and were found to have an actual, rather than potential anticompetitive impact. For example, in the Air Canada-United Airlines case the Bureau might have shown that after the agreement was implemented, airfares on routes covered by the agreement increased relative to fares on comparable routes that were not covered. Similarly, in the HarperCollins case, the Bureau might have shown that the switch from a wholesaler to an agency distribution model resulted in an increase in the retail prices of agency-sold e-books compared to the retail prices in other markets where the agency model was not adopted. Other “agreement” matters under section 90.1 may have this general character.

The facts and anticompetitive findings in the previous paragraph assumed the existence of a well-defined and observable but-for world in which the illegal conduct did not occur. The comparator market outcome allowed a “natural experiment” that measures BD as the elevation of the actual over the but-for price—the price impact of the conduct—times the number of

units the violator sells at the elevated price. Conveniently, in these examples the higher price received by the violator is also the elevated price paid by buyers, so a damage payment equal to BD is also reasonable. More generally, because damages and anticompetitive profits are in theory roughly the same in matters of horizontal agreements, the “before and after” or “unaffected market” methods of constructing a but-for benchmark can be directly applied to measure the violators’ BD. These methods are developed and well-known.<sup>57</sup>

Real world cases are rarely, if ever, so clean as these examples might suggest. For most matters that would fall under section 90.1 a convincing and observable “but-for” world will not exist. As an example, consider the recent US lawsuits that challenged the contractual agreements among 35 Blue Cross and Blue Shield (BCBS) health insurance companies in the US, together forming the BCBS Association.<sup>58</sup> Simplifying a bit, the agreements specified that each BCBS entity operated in an “exclusive service area” (ESA), which might be a state or combination of states. Then, for example, BCBS of Alabama is the only Blue-branded company that can sell health insurance to customers in the Alabama ESA. Among other things, the lawsuits challenged the ESAs as illegal restrictions on competition, so that all Blue entities should be able to compete for customers throughout the US.

Putting aside the merits of these complaints, just as above a measure of the BCBS system’s “benefit derived” from its agreements requires a “reasonably determined” specification of the but-for world in which the agreements would not have existed—including, in particular, the prices and market shares of all sellers that would have occurred in that presumably “more competitive” world. Further complicating things, the “market” is “two-sided” and subject to network effects<sup>59</sup>—to compete effectively a seller of health insurance to final customers (and employers) must also negotiate medical service provider prices with multitudes of local hospitals, systems, and clinics in each regional market where it operates. In this case, the challenged agreements and market structure have been in place for decades, so a “before-and-after” experiment is implausible. And there is no parallel market outcome that reliably mimics how competition would play out among 35 Blue competitors plus the other national insurance companies that now exist. I doubt that the Canadian Bureau would even attempt the task of calculating and defending a measure of BD in this situation, nor would the Tribunal accept such a measure. Any AMP would be constructed by other, more subjective and speculative methods. I believe matters such as this one will be by far the most common.

## IV. Summary and Conclusions

Prior to recent amendments to the *Competition Act*, administrative monetary penalties for antitrust and other violations of the Act were capped at low levels (\$10 million), while parties harmed by the conduct could receive injunctive and other forms of relief but not monetary damages. Regarding AMPs, the Competition Bureau persuasively argued that the range of fines that could be applied was far too low to form effective deterrents, especially for violations committed by very large businesses. The amendments vastly increase the range of possible AMPs, while allowing the Tribunal to award damages to harmed parties.

The important new concept underlying these powers is a violator's "benefit derived" from its illegal acts. From the language of the amendments it would seem that consideration of the violator's BD is a threshold requirement in all matters where fines and/or damages are contemplated. That is, the authorities must either construct and defend a "reasonably determined" measure of BD or explain why it isn't feasible to do so, in which case AMPs, at least, can be set by other means. I expect "other means" to be the method in the large majority of cases; at least the economically most important ones. Then the only statutory limit on AMPs is three percent of a firm's world-wide revenue, which can be huge.

Oddly, in my view, the amendments specify that damages are also to be based on the violator's BD. What the Tribunal may do regarding damages in situations where a reliable measure of BD is not available is not clear, but a strict reading suggests that damages cannot be awarded in those cases. This, and the fact that damages caused by illegal conduct and a violator's gains are typically different, seem to me clear shortcomings of the amended Act that can, and should, be corrected.

The amendments to the Act bring the tools available to the Bureau and the Tribunal much closer those of the European Commission. This fact is concerning for two reasons. First, the EC Guidelines on setting fines have long included the equivalent of BD as a factor that should be used, when "possible", in setting antitrust fines, yet there is no evidence that the EC has ever done so. I regard this as empirical evidence from a highly similar institutional setting, indicating that a measure of "benefit derived" will rarely constrain AMPs. Second, absent the analytical and objective constraint of a credible BD measure, the Bureau and Tribunal have wide berth to impose discretionary AMPs, much like the powers of the EC that I regard as excessive and harmful to competition.

The *Competition Act* is admirably clear, consistent, specific, and economically literate regarding the types of business practices that can trigger antitrust liability. In this sense the Act is more constraining, in positive way, than the structures of US and EU enforcement. Under the new amendments, the same cannot be said about the determination of monetary penalties. Some further explicit rules and constraints—such as lower caps on AMPs, restricting penalties to reflect the amount of Canadian commerce affected, and specifying particular methods to be followed when “benefit derived” cannot be measured—would allay many concerns.

## ENDNOTES

- <sup>1</sup> Isidore and Gladys Brown Distinguished Service Professor of Economics, Emeritus, Booth School of Business, The University of Chicago, and Senior Consultant, Charles River Associates. I have benefitted from comments by the Editors on an earlier draft, and from discussions with other authors in this volume. I also gratefully acknowledge useful discussions with Kevin M. Murphy and James Herbison.
- <sup>2</sup> Woulter Wils, “The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis”, (14 February 2007) at 19, online: <[ssrn.com/abstract=962654](https://ssrn.com/abstract=962654)>. This paper is also available at (2007) 30:2 World Competition 197.
- <sup>3</sup> *Competition Act*, RSC 1985, c C-34, s 79(3.1) [Act]. The \$25 million maximum increases to \$35 million for subsequent orders made against the respondent under this section.
- <sup>4</sup> *Ibid.*, ss 90.1(1.3), 74.1(1)(c). The \$10 million threshold increases to \$15 million for subsequent orders made against the respondent under the respective sections.
- <sup>5</sup> “A broader range of remedies, including administrative monetary penalties, are available for instances where all three elements, i.e., dominance, anticompetitive intent and effects, are present.” See Canada, Competition Bureau, “Guide to the December 2023 amendments to the Competition Act” (18 December 2023), online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act)>.
- <sup>6</sup> In the Act, *supra* note 3, the practices are abuse of dominance (s 79(4.1)), agreements in restraint of trade (s 90.1(10.1)), deceptive marketing (s 74.1), and the unilateral business practices specified in s 75 (Refusal to Deal), s 76 (Price Maintenance), and s 77 (Exclusive Dealing and Tied Selling).
- <sup>7</sup> In cases of reviewable matters of deceptive marketing, the Tribunal may award damages to buyers “not exceeding the total of the amounts paid to [the violator]”: Act, *supra* note 3, s 74.1(1)(d). So for these acts damages are bounded by the amount paid, while AMPs are bounded by benefit derived.
- <sup>8</sup> This definition of BD aligns with early proposals to amend the Act’s sections dealing with AMPs. See House of Commons, *A Plan to Modernize Canada’s Competition Regime: Report of the Standing Committee on Industry, Science, and Technology* (April 2002) (Chair: Walt Lastewka) at 49, which argues that “the penalty [AMP] must be greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct”.
- <sup>9</sup> In 2022 Australia amended the AMP provisions of its Treasury Law in ways that are roughly equivalent to Canada’s. Australian authorities may impose AMPs bounded by the larger of: (i) A\$50 million; or (ii) three times the “value of the benefits that have been obtained” from the conduct or, if that benefit cannot be determined by the Court, thirty percent of the violator’s Australian revenues during the breach period: *Competition and Consumer Act 2010* (Commonwealth), 1974/51, s 76(1B) (Austl) [emphasis added].
- <sup>10</sup> Canada, Competition Bureau, *Examining the Canadian Competition Act*

in the *Digital Era* (Submission) (8 February 2022), s 3.3, online: <[competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era](https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era)>. For example, in 2020 the Bureau and Facebook settled an investigation of Facebook’s privacy practices for \$9 million: Canada, Competition Bureau, News Release, “Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims” (19 May 2020), online: <[canada.ca/en/competition-bureau/news/2020/05/](https://canada.ca/en/competition-bureau/news/2020/05/)>. The US FTC challenged the same conduct and reached a settlement with Facebook for \$5 billion, which some observers regarded as inadequate: Rohit Chopra, “Lessons from the FTC’s Facebook Saga” (27 September 2022), online: <[theregreview.org/2022/09/27/chopra-lessons-from-the-ftcs-facebook-saga/](https://theregreview.org/2022/09/27/chopra-lessons-from-the-ftcs-facebook-saga/)>.

<sup>11</sup> For example, during the Republican George W Bush administration, with the *Antitrust Modernization Commission Act of 2002*, Pub L No 107–273, 116 Stat 1856, Congress created the Antitrust Modernization Commission, which submitted its report in 2007: US, Antitrust Modernization Commission, *Report and Recommendations* (2 April 2007) [Antitrust Modernization Commission Report]. In September 2008 the DOJ adopted its recommendations regarding unilateral conduct under the *Sherman Antitrust Act of 1890*, 15 USC § 1 at 2 [Sherman Act]. A Democratic administration under Barack Obama took office in 2009. In April 2009 the new head of antitrust at the DOJ withdrew the Report, stating that it “no longer represents the policy of the Department of Justice”: Christine A Varney, “Vigorous Antitrust Enforcement In This Challenging Era” (Address to the United States Chamber of Commerce, 12 May 2009) [unpublished] at 8, online: <[justice.gov/d9/atr/speeches/attachments/2015/06/25/245777.pdf](https://justice.gov/d9/atr/speeches/attachments/2015/06/25/245777.pdf)> (remarks by the Assistant Attorney General—Antitrust Division).

<sup>12</sup> Canada, Competition Bureau, Competition Bureau Submission to the OECD on Excessive Pricing in Pharmaceuticals (Regulatory Advice/Interventions) (5 November 2018), s 3, online: <[competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/competition-bureau-submission-oecd-excessive-pricing-pharmaceuticals](https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/competition-bureau-submission-oecd-excessive-pricing-pharmaceuticals)>.

<sup>13</sup> Alexander Iken et al, “Non-Price Competition: EU Merger Control Framework and Case Practice” (2024) 1 Competition Pol’y Brief 1 at 1, online: <[competition-policy.ec.europa.eu/document/download/b0042baf-a258-4c31-b31a-6331cb8d54a2\\_en?filename=kdak24001enn\\_competition\\_policy\\_brief\\_non-price\\_merger-control.pdf](https://competition-policy.ec.europa.eu/document/download/b0042baf-a258-4c31-b31a-6331cb8d54a2_en?filename=kdak24001enn_competition_policy_brief_non-price_merger-control.pdf)>.

<sup>14</sup> US Department of Justice, *Merger Guidelines: U.S. Department of Justice and the Federal Trade Commission* (18 December 2023), at 18.

<sup>15</sup> For simplicity, here and throughout the paper I refer to the acts of sellers and the exercise of monopoly power. My discussion applies equally to acts of buyers who might exercise monopsony power over sellers.

<sup>16</sup> The modifier “generally” is important. For example, unilateral acts that fall within my definition of the competitive process, such as loyalty discounts and

other vertical restraints, may nevertheless be welfare reducing when they exclude or weaken competitors. As discussed below, the Act's amendments limiting AMPs for "abuse of dominance" absent exclusionary intent appear to recognize this distinction.

<sup>17</sup> In criminal cases the DOJ may seek fines up to 20 percent of the commerce affected by the illegal acts. The magnitude of fines depends on the severity of the infringement. In civil matters, the DOJ and FTC may only seek fines for "breach of a consent decree or for a procedural violation": Antitrust Modernization Commission Report, *supra* note 11 at 286. Prior to 2021, on rare occasions the FTC had sought retrospective fines in the form of disgorgement or restitution under the *Federal Trade Commission Act*, 38 Stat 717, § 13(b) (codified as amended at 15 USC § 41-58). In *AMG Capital Management, LLC v FTC*, 141 S Ct 1341 (2021), the Supreme Court ruled that the FTC is not authorized to obtain monetary remedies or disgorgement. This decision likely constrains the DOJ as well.

<sup>18</sup> See e.g. Herbert Hovenkamp, "A Primer on Antitrust Damages" (2011) University of Pennsylvania, All Faculty Scholarship No 1846, online: <[scholarship.law.upenn.edu/faculty\\_scholarship/1846](http://scholarship.law.upenn.edu/faculty_scholarship/1846)>.

<sup>19</sup> See Antitrust Modernization Commission Report, *supra* note 11.

<sup>20</sup> Allegations of concealment have recently been raised against Google. See e.g. David Streitfeld, "How Google Spent 15 Years Creating a Culture of Concealment", *The New York Times* (21 November 2024), online: <[nytimes.com/2024/11/20/technology/google-antitrust-employee-messages.html](https://www.nytimes.com/2024/11/20/technology/google-antitrust-employee-messages.html)>.

<sup>21</sup> In the case of monopsony, the harm would be to sellers. For simplicity my discussion deals with acts by sellers that harm consumers. My discussion throughout applies equally to cases of monopsony.

<sup>22</sup> As established by the US Supreme Court in *Illinois Brick Co v Illinois*, 431 US 720 (1977), indirect purchasers harmed by anticompetitive conduct do not have standing to sue for damages. Direct purchasers such as wholesalers can sue for and collect the full amount of an anticompetitive overcharge, even if they pass it on to their buyers. In this sense the main goal of US law is also deterrence rather than restitution—direct purchasers have stronger incentives to identify and litigate illegal acts than the diffuse buyers to whom they sell, and the important thing for deterrence is that the violator pay the total amount of damages, not who receives those damages.

<sup>23</sup> Shuli Rodal et al, *The Amended Canadian Competition Act: What Businesses Need to Know* (Toronto: Osler, Hoskin & Harcourt, LLP, 2024), online: <[osler.com/wp-content/uploads/2024/07/The-amended-Canadian-Competition-Act\\_v5.pdf](https://www.osler.com/wp-content/uploads/2024/07/The-amended-Canadian-Competition-Act_v5.pdf)> at 27.

<sup>24</sup> The Tribunal might note that the "reasonably determined" requirement for estimating BD appears in the parts of the Act that apply to AMPs, but not in the parts dealing with damages. This omission could allow the Tribunal to fashion a BD-based damage estimate without satisfying the "reasonably determined" criterion, while the AMP imposed on the violator is determined by other criteria. Or, as discussed below, in matters involving exclusionary

conduct that harms a competitor, the Tribunal might define the violator's "benefit" to be the reduction in profits that the exclusionary act imposes on the competitor.

<sup>25</sup> EU, *Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003*, [2006] OJ, C 210/02 [Guidelines].

<sup>26</sup> *Ibid* at para 36.

<sup>27</sup> *Ibid* at paras 31-32 [emphasis added].

<sup>28</sup> The Commission's decision in *Pioneer Hi-Fi Equipment* established that the revenue ceiling is worldwide, not simply the amount of commerce affected by the conduct or the amount in the EU. See EC, *Decision of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 – Pioneer Hi-Fi Equipment)*, [1980] OJ, L 60/21.

<sup>29</sup> Francesca Gentile, Raphael Reims & Petar Petrov, "Setting Fines in Antitrust Cases—A Review of the Application of the 2006 Guidelines", *Competition Policy International* (25 April 2021), online: <pymnts.com/cpi-posts/setting-fines-in-antitrust-cases-a-review-of-the-application-of-the-2006-guidelines>.

<sup>30</sup> An alternative interpretation is that "improper gains" could be reasonably determined in most cases, but that the EC (invariably) chose to use other criteria in setting fines—an option that is more constrained in the Canadian Act. I regard this interpretation as unlikely—the Guidelines, *supra* note 26, indicate that the EC "will" take into account that a fine should exceed a measure of "gains improperly made" when doing so is "possible", yet the record provides no documentation that it has ever done so.

<sup>31</sup> 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 and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union" (14 December 2020), online: <[competition-policy.ec.europa.eu/document/download/05c4fe49-1ba7-40f9-80da-dd42e578ba7d\\_en?filename=2020\\_ec\\_report\\_on\\_damages\\_directive.pdf](https://competition-policy.ec.europa.eu/document/download/05c4fe49-1ba7-40f9-80da-dd42e578ba7d_en?filename=2020_ec_report_on_damages_directive.pdf)> [Implementation Report].

<sup>32</sup> Only US criminal fines for collusion under section 1 of the Sherman Act, *supra* note 11, are paid to the government. US Sentencing Commission guidelines for determining criminal fines resemble the EU guidelines applied to all antitrust offenses, though they are more specific. See United States Sentencing Commission Office of the General Counsel, "Primer on Antitrust Offences" (2023), online: <[www.ussc.gov/sites/default/files/pdf/training/primers/2023\\_Primer\\_Antitrust.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Antitrust.pdf)>.

<sup>33</sup> European Commission, "Competition Policy, Fines" (accessed 6 January 2024), online: <[competition-policy.ec.europa.eu/index/fines\\_en](https://competition-policy.ec.europa.eu/index/fines_en)>.

<sup>34</sup> Yun Chee Foo, "Highest ever fines", *Reuters Graphics* (accessed 6 January 2024), online: <[fingfx.thomsonreuters.com/gfx/editorcharts/EU-GOOGLE-ANTITRUST/0H0012Y9L1DV/index.html](https://fingfx.thomsonreuters.com/gfx/editorcharts/EU-GOOGLE-ANTITRUST/0H0012Y9L1DV/index.html)>.

<sup>35</sup> In the case involving Scania, Iveco, Daimler, Volvo/Renault, and DAF settled with the EC in 2016, paying a combined fine of €2.9 billion. See Ann-Christin

Richter & Christopher Unseld, “The Scania judgment of the EU General Court” (28 February 2022), online: <<https://www.hausfeld.com/fr-be/what-we-think/competition-bulletin/the-scania-judgment-of-the-eu-general-court/>>.

<sup>36</sup> Court of Justice of the European Union, “Press Release No 143/24” (18 September 2024), online: <[curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240143en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240143en.pdf)>.

<sup>37</sup> *European Union v Intel Corporation Inc*, C-240/22 P, ECLI:EU:C:2024:915 [Intel].

<sup>38</sup> Section 79(3.2) of the Act, *supra* note 3, lists “aggravating or mitigating factors” that the Tribunal “shall take into account” in setting an AMP for abuse of dominance. In addition to “the effect on competition” and “gross revenue from sales affected by the practice”, the list ends with “any other relevant factor”. This language indicates that the Tribunal has very broad discretion—especially when BD is not available as an upper bound.

<sup>39</sup> *Supra* note 2. Wils also notes “the theoretical relevance of the amount of the illicit gain for setting the optimal fine as well as the practical impossibility in most cases to estimate this amount with sufficient precision and at a reasonable administrative cost . . . . This should however not exclude that, in those rather unlikely circumstances in which the Commission has a reliable estimate of the illicit gains available, it could take this amount into account, at least to ensure that the fine exceeds it”: *Ibid* at 38.

<sup>40</sup> United States Sentencing Commission Office of the General Counsel, *supra* note 33.

<sup>41</sup> Act, *supra* note 3, ss 79(4.1), 75(1.2).

<sup>42</sup> Federica Laricchia, “Apple revenue worldwide 2004-2024” (5 November 2024), online: <[www.statista.com/statistics/265125/total-net-sales-of-apple-since-2004](https://www.statista.com/statistics/265125/total-net-sales-of-apple-since-2004)>.

<sup>43</sup> Even in this case the supra-competitive profits of the colluding firms—their BD—is smaller than the damages suffered by consumers because the collusive agreement reduces consumption below the competitive level.

<sup>44</sup> E.g. Act, *supra* note 3, s 78(1)(g). The classic and highly-criticized case in the US is *Utah Pie Co v Continental Baking Co*, 386 US 685 (1967).

<sup>45</sup> As with other unilateral practices, the Tribunal might conclude that “intent” to exclude was not proven. Then the Tribunal can impose remedies but not an AMP. But under the Act the damage claims of harmed rivals require a measure of BD.

<sup>46</sup> See *Intel*, *supra* note 38 and Steve Lohr & James Kanter, “A.M.D.-Intel Settlement Won’t End Their Woes”, *The New York Times* (12 November 2009), online: <[nytimes.com/2009/11/13/technology/companies/13chip.html](https://nytimes.com/2009/11/13/technology/companies/13chip.html)> (discussing settlement of the Intel-AMD litigation).

<sup>47</sup> *Canada (Commissioner of Competition) v Canada Pipe*, 2005 CanLII 94635 (CACT).

<sup>48</sup> A detailed summary of the case appears in Corinne Xu, “Loyalty Discounts and Rebates: A Commentary on Canada Pipe and Abuse of Dominance in Canada” (2018) 31:1 CCLR 100.

<sup>49</sup> Kevin M Murphy, Edward A Snyder & Robert H Topel, “Competitive

Discounts and Antitrust Policy”, in Roger D Blair & D Daniel Sokol, eds, *The Oxford Handbook of International Antitrust Economics* (New York: Oxford University Press, 2015), 89.

<sup>50</sup> Cases where the conduct was not found illegal: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CanLII 132624 (CACT); *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 CACT 10; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 CACT 42. Cases that resulted in a settlement agreement with no admission of a violation: *The Commissioner of Competition v Canada Pipe Company Ltd* (19 December 2007), CT-2002-006 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463783/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463783/index.do)>; *The Commissioner of Competition v The Canadian Real Estate Association* (25 October 2010), CT-2010-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463512/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463512/index.do)>; *The Commissioner of Competition v Direct Energy Marketing Limited* (30 October 2015), CT-2012-003 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463069/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463069/index.do)>; *The Commissioner of Competition v Waste Services (CA) Inc and Waste Management of Canada Corp* (16 June 2009), CT-2009-003 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463621/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463621/index.do)>; *The Commissioner of Competition v Reliance Comfort Limited Partnership* (5 November 2024), CT-2012-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463165/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463165/index.do)>.

<sup>51</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7.

<sup>52</sup> See Canada, Competition Bureau, “Summary of reasons in ruling in Toronto Real Estate Board case” (10 May 2016), online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/news-releases/summary-reasons-ruling-toronto-real-estate-board-case](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/news-releases/summary-reasons-ruling-toronto-real-estate-board-case)>.

<sup>53</sup> 253 F 3d 34 (DC Cir 2001).

<sup>54</sup> *Ibid* at 79.

<sup>55</sup> *The Commissioner of Competition v Air Canada et al* (24 October 2012), CT-2012-001 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/463302/1/document.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463302/1/document.do)>.

<sup>56</sup> *The Commissioner of Competition v Harper Collins Canada Limited* (9 January 2018), CT-2017-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462808/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462808/index.do)>.

<sup>57</sup> See Hovenkamp, *supra* note 19; and Implementation Report, *supra* note 32.

<sup>58</sup> *In re: Blue Cross Blue Shield Antitrust Litigation*, No 2:13-cv-20000-RDP (ND Ala), online: <[alnd.uscourts.gov/blue-cross-blue-shield-mdl-2406](https://alnd.uscourts.gov/blue-cross-blue-shield-mdl-2406)> (records of the case before the District Court). I was an expert in a different case involving similar allegations.

<sup>59</sup> That is, buyers of health insurance services prefer a seller with a large provider network of hospitals and doctors, while providers prefer to deal with insurance companies with many customers.