DENTONS

Is the sky about to fall for Canadian business in 2024?

A closer look at the recent *Competition Act* reforms

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Over the past 18 months, Canada has witnessed three successive waves of amendments to its *Competition Act* (**Act**) — certainly the most concerted effort to reform the statute in a generation. The backdrop for these changes has been more aggressive antitrust enforcement in the US and Europe, competition concerns tied to the rise of the digital economy and an affordability crisis in Canada, which have together focused public attention on industry concentration levels and perceived abuses. The Competition Bureau (**Bureau**) and Matthew Boswell, the Commissioner of Competition (**Commissioner**) who leads the Bureau, have also vociferously advocated for the Act's modernization both to enhance the Bureau's own enforcement powers and broaden many of the Act's cornerstone provisions.

The first wave of amendments, passed in June 2022, criminally prohibited wage-fixing and no-poach agreements between employers (which came into force in June 2023), expanded what is considered an "anti-competitive act" by dominant businesses, gave private parties a path to advance abuse of dominance cases in the Competition Tribunal (**Tribunal**) (which only the Commissioner could initiate previously), and specifically identified "drip pricing"[1] as a deceptive marketing practice. An anti-avoidance provision was also added to the Act's pre-merger notification regime.

In September and November 2023, the Trudeau government tabled second and third waves of proposed amendments to the Act, respectively, within Bill C-56 (the *Affordable Housing and Groceries Act*), and Bill C-59 (the *Fall Economic Statement Implementation Act*). Bill C-56 received royal assent on December 15, while Bill C-59 had reached second reading in the House of Commons by the end of 2023. If Bill C-59 is enacted as proposed, these amendments will have major implications for businesses operating in Canada, including in the following areas:

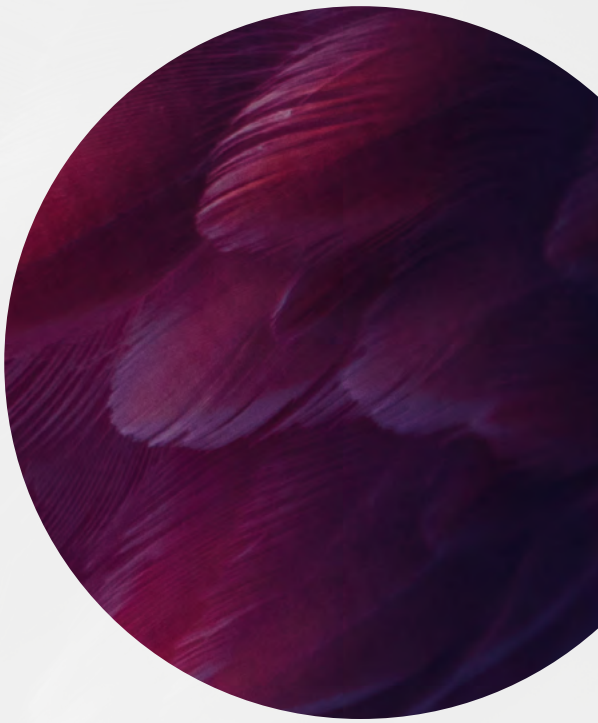
- **Increased private litigation risk and potential for monetary disgorgement for non-criminal conduct in class action-type proceedings** – Bill C-59 would provide the Tribunal with broad powers to order remedies that include disgorgement of the benefits derived from anti-competitive conduct to private applicants and other affected persons, with class action–style features. The leave test would also be lowered. Additionally, private parties would have the ability to apply to the Tribunal to challenge agreements between competitors that substantially lessen or prevent competition, similar to their existing access under the abuse of dominance and reviewable practice provisions.
- **M&A** – More transactions could be subject to pre-merger notification as a result of revised financial thresholds that more comprehensively include the target's Canadian revenues. Non-notifiable transactions could be challenged for three years after closing, rather than one year currently. The efficiencies defence to otherwise anti-competitive mergers has been repealed. Parties would be automatically prohibited from closing where the Bureau applies for an interim injunction, pending the Tribunal's decision on that application.

1 "Drip pricing" refers to a pricing practice whereby a product or service is offered for a price that does not include additional charges or fees that are only revealed later in the buying process.

- **Abuse of dominance and competitor collaboration** – The Act's test for abuse of dominance has been restructured to be substantially less onerous, while potential monetary penalties have increased. "Excessive and unfair" pricing—a fundamentally uncertain category of conduct—now constitutes an "anti-competitive act" for the purposes of the abuse provisions. Together with recently enacted changes broadening the scope of the competitor collaboration provision to include certain vertical arrangements starting in December 2024, Bill C-59's changes, if passed, would also introduce financial penalties to the collaboration provision while extending its application to past conduct, including some terminated agreements.
- **The environment in focus** – Proposed changes to the deceptive marketing provisions target "greenwashing" by underscoring the importance of substantiating environmental claims about a product with proper and adequate testing. The amendments would also introduce a new environmental certificate procedure to allow competitors to seek Bureau clearance to collaborate on environmental protection initiatives.
- **A more "muscular" Bureau** – Supported by a significant injection of new federal funding and with plans to hire dozens of new personnel, the Bureau of the 2020s looks markedly stronger than a decade ago. The amendments further empower the Bureau by granting it many of the changes Commissioner Matthew Boswell publicly advocated for in recent years, including formal market inquiry powers, the repeal of the efficiencies defence, which are already in force, and automatic injunctions before the Tribunal to prevent transacting parties from closing in the face of a Bureau challenge, which, as noted above, is currently proposed in Bill C-59.

Some of the changes appear radical. Ultimately, only case law developed through the courts and the Tribunal, as well as anticipated guidance from the Bureau, will determine whether the antitrust risk landscape substantially changes for businesses operating in Canada.

What is clear, however, is that each wave of amendments broadly expands the Act's potential reach over business conduct, embraces a more prominent role for private litigation and implements procedural changes that look certain to increase the competition compliance burden that businesses operating in Canada will need to grapple with going forward. While it is premature to conclude that the "sky is falling" for Canadian business in 2024, companies—particularly those with higher shares and in sectors that have been targeted by the Bureau in the past—must assess how the Act's recent and forthcoming changes could impact the competition risks faced by their operations.



Introduction of monetary remedies for non-criminal conduct and liberalizing private access to the Tribunal

Following on the heels of the 2022 amendments that enabled private parties to initiate abuse of dominance proceedings before the Tribunal, Bill C-59's proposed amendments would go even further to expand private parties' role within the Act's enforcement framework. The most striking of its amendments would allow the Tribunal to order parties subject to a civil order to pay private applicants (or other affected persons) amounts up to the value of the benefits obtained from the conduct.

Proposed new monetary relief

For proceedings regarding non-criminal reviewable conduct in the Tribunal initiated by a private party, Bill C-59 would provide the Tribunal the power to award monetary relief for "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 applicants and any other person affected by the conduct, in any manner that the Tribunal considers appropriate." This remedy is similar to the equitable remedy of "disgorgement" as opposed to the "damages" suffered by a complainant, which is the norm in most civil litigation including under the statutory damages provision of the Act covering criminal conduct. However, disgorgement can still result in extensive sums of money being required to be paid by challenged businesses to applicants—creating significant new incentives for plaintiffs and counsel to bring disputes before the Tribunal.

Some of Bill C-59's proposed amendments even suggest the establishment of a class action–type scheme that provides the Tribunal the power to establish processes to specify how payment is to be administered, to appoint an administrator to administer the payment, to notify potential claimants, to specify how to make claims and to deal with unclaimed portions of the payment. While the amendments do not include a formal class certification process, the leave requirement continues to provide a preliminary opportunity for the Tribunal to screen cases at an early stage.

Private party access to the Tribunal

Private rights of access to the Tribunal are currently available for the refusal to deal, resale price maintenance, exclusive dealing, tied selling and market restriction and abuse of dominance provisions of the Act. If enacted as proposed, Bill C-59 would extend private access to proceedings under the Act's civil provisions governing anti-competitive agreements and deceptive marketing—provisions that are themselves proposed to be significantly expanded in the bill.

Proposed changes to leave test

Currently, the Tribunal may grant leave to a private applicant if it has reason to believe that the applicant is directly and substantially affected with respect to the *entirety* of its business. This has been an obstacle to success in many leave applications. The new leave test will require an applicant to show only that it is directly and substantially affected in relation to a *part* of its business. Bill C-59 would also allow the Tribunal to grant leave, "where it is satisfied that it is in the public interest to do so." The scope of this public interest test is uncertain.

Requirement to notify settlements of private competition litigation

Bill C-59 would require private parties who have applied to the Tribunal to notify the Commissioner under the key non-criminal provisions of the Act (including refusal to deal, resale price maintenance, abuse of dominance and anticompetitive competitor agreements) of any settlement reached. The proposed amendment would allow the Commissioner to challenge such settlement before the Tribunal. The Tribunal may vary or rescind the agreement if it finds that agreement has or is likely to have anti-competitive effects. Significant penalties would apply for a failure to provide notice to the Commissioner.

Even if Bill C-59 is not further amended during the Parliamentary process, the impact of the bill will depend on how the amended provisions are ultimately interpreted by the Tribunal and courts. However, it is clear that the significantly expanded scope for private enforcement proposed by the government, combined with the risk of orders requiring potential payment of large sums of money—both to private applicants and broader categories of affected persons—represent changes that businesses operating in Canada must account for by identifying business practices that may expose them to competition risk and undertaking measures to address that risk.

Amendments to the merger review framework

Bills C-56 and C-59 (if passed in its current form) change the merger review process both from a substantive and procedural perspective. Efficiencies can no longer be relied upon to avoid a remedy in a transaction that results in anti-competitive effects. Further, the pre-merger notification threshold calculations will change to account for a wider range of revenues—potentially increasing the number of transactions that are required to be notified to the Bureau before closing—and closing is prohibited on an interim basis if the Bureau simply applies to the Tribunal for an injunction. This is a significant shift of procedural leverage in favour of the Bureau.

Efficiencies defence repealed

Bill C-56 repealed the "efficiencies defence" from the Act. This provision had provided that the Tribunal could not make a remedial order regarding a merger in which the gains in efficiency outweighed and offset the substantial lessening or prevention of competition resulting from the transaction.

Although efficiencies can no longer save an anti-competitive merger, they might still be considered in the analysis of anti-competitive effects. Further, "efficiency and adaptability of the Canadian economy" remains a key part of the Act's purpose clause.

While Canada's approach was unique among its key trading partners for placing efficiencies above anti-competitive effects in merger review considerations, it was rarely successfully invoked. In only a handful of litigated cases and merger reviews in which the Bureau publicly disclosed its position have the courts or the Bureau accepted the efficiencies defence to save a merger that was determined to result in a substantial lessening or prevention of competition.

Proposed change to size-of-transaction threshold

Bill C-59 proposes to include revenues from imports to Canada in the "size-of-transaction" calculation used in determining whether a transaction is required to be notified to the Bureau before closing, potentially expanding the number of transactions subject to the Act's merger review process.

Two thresholds determine whether notification is required for a given transaction. The first is the size-of-transaction threshold that measures the size of the transaction itself. This threshold usually varies from year to year based on Canada's GDP. At present the size-of-transaction threshold is CA$93 million. It is exceeded if the assets in Canada of the target or the gross revenues from sales in or from Canada generated by the assets in Canada of the target exceed CA$93 million. Bill C-59 will expand which revenues are counted to include revenues from sales **into Canada** from outside of Canada, resulting in more transactions potentially exceeding the threshold.

Further, in transactions that have asset acquisition and share acquisition components, the amendments would require the aggregation of assets and revenues associated with each component, whereas currently each component would be assessed separately.

A second notification threshold that must also be met for a transaction to be notifiable to the Bureau is a CA$400 million "size-of-parties" threshold, which is exceeded if the parties to the transaction have combined assets in Canada or combined revenues in, from or into Canada that exceed CA$400 million. The size of parties threshold is not affected by Bill C-59.

Proposed extension of limitation periods for non-notifiable transactions

At present, the Bureau can challenge any transaction—whether subject to pre-merger notification or not—within one year of closing. Bill C-59 proposes to maintain that one-year limitation period for transactions that have been notified to the Bureau, but would extend the limitation period to three years for transactions that have not been notified. This change will lengthen the time available to the Bureau to detect that a non-notifiable merger has taken place and any resulting anti-competitive effects. To avoid the uncertainty of a three-year limitation period, merging parties could voluntarily notify their transaction to the Bureau.

Proposed prohibition on closing where Tribunal injunction requested

Following the statutory waiting periods associated with pre-merger notification, parties are currently free to close their transactions unless, and until, the Bureau obtains an injunction from the Tribunal enjoining closing. Bill C-59 will prohibit parties from closing at the point at which an application for an injunction is made, effectively prohibiting closing as a result of the Bureau merely requesting that relief. This amendment will strengthen the Bureau's hand in transactions where material (and perhaps not-so material) concerns arise to prevent attempts to close quickly after the termination of the waiting periods and will encourage the negotiation of timing agreements.

Proposed changes to competitive effects assessment

Bill C-59 would expressly include labour market impacts within the Act's list of ways that the Tribunal may find that a merger substantially prevents or lessens competition. Given that the effect of a merger on suppliers of inputs is already included in this list, it is unclear whether this change will have a material impact on merger review.

Further, Bill C-59 would eliminate the provision in the Act that prevents the Tribunal from finding that a substantial lessening or prevention of competition exists "solely on the basis of evidence of concentration or market share[s]." Instead, increased concentration or market shares are explicitly permitted to be considered when considering anti-competitive effects. Additionally, the amendments provide that the likelihood that a merger would result in "express or tacit coordination" in a market may be considered.

Market shares already play an important role in triaging substantive risk emanating from mergers, given the Bureau's longstanding use of "safe harbour" thresholds predicated on post-closing shares. These amendments may serve to further accentuate the importance of post-closing shares and market definition to the substantive analysis. Further, parties would need to more proactively consider effects on labour going forward and consider the extent to which employees' views are addressed in advocacy with the Bureau.

Amendments to the abuse of dominance provisions

Bill C-59's proposed amendments, together with Bill C-56 which is already in force, would radically alter the abuse of dominance provision by allowing for significantly more aggressive enforcement against dominant businesses and by covering a broader range of conduct, including the vague practice of "excessive pricing" (as discussed further below).

These 2023-tabled amendments follow important 2022 amendments to the abuse provision that provided private parties with the ability to seek the Tribunal's leave (permission) to challenge conduct falling under the abuse of dominance provision, increased the monetary penalties associated with such conduct and defined an "anti-competitive act" as an act that is "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition," broadening that term's established meaning.[2] The Tribunal has not yet considered any of these amendments; while the first private leave application for abuse was filed in September 2023, it was discontinued on the parties' consent days later.[3]

Less onerous test for abuse of dominance

Bill C-56's most significant amendment is a less onerous legal standard for an applicant (the Bureau or a private party) to meet when bringing an abuse case. Previously, there were three elements that needed to be demonstrated: dominance, a practice of anti-competitive acts **and** a likely substantial prevention or lessening of competition (**SPLC**).

Under the current version of the provision (which includes the Bill C-56 amendments), only two elements of the historical three-pronged test need to be met to obtain a prohibition order. Once a firm has been determined to be dominant (or firms jointly dominant), a prohibition order may be made if **either** (a) it engages in a practice of acts intended to harm a competitor or competition, or (b) it engages in conduct that results in anti-competitive effects (a substantial lessening or prevention of competition or "SLPC") in a market in which it has a plausible competitive interest and the effect is not a result of "superior competitive performance." In other words, even if a dominant firm has no anti-competitive purpose but engages in conduct that lessens competition substantially (provided such conduct is not the result of superior competitive performance), it can be prohibited from continuing such conduct. The scope of the exception for "superior competitive performance" is not clear at this time and will have to be developed through case law and Bureau guidance on this point might also be expected. We would anticipate that "superior competitive performance" would include developing a better product, offering better pricing (e.g., because of cost efficiencies achieved through scale), service, or more choice. Similarly, if a dominant firm intends to exclude a competitor or soften competition, even if its behaviour is unlikely to harm competition, it can still be prohibited from engaging in such conduct.

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2 In particular, while Canadian competition law has long recognized an anti-competitive act as involving an intended "predatory, exclusionary or disciplinary" effect on a competitor, the new definition's "adverse effect on competition" language was introduced to capture, for example, behaviour that "softens" competition without necessarily having a negative impact on competitors.

3 See *Apotex Inc. v Paladin Labs Inc. et al*, Comp Trib Case No. CT-2023-007, online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521224/index.do>.

The upshot of these amendments is that dominant firms will have to assess their conduct much more carefully. Distinguishing between aggressive competition and abusive conduct will become more difficult for companies and may well chill pro-competitive market behaviour, unless the Bureau (or the Tribunal) clarifies what it considers to be the outer boundaries of these concepts.

Although this is a very significant change in the law governing abuse, the only remedy available if either—but not both—intent or effects is established is a prohibition order. By contrast, if the Tribunal finds that a practice of anti-competitive acts is likely to result in an SPLC and a prohibition order is not likely to restore competition, it can order the dominant firm or to take actions (for example, to divest assets or shares) that are reasonable and necessary to overcome the effects of the practice. In these circumstances, the Tribunal can also order the dominant firm to pay administrative monetary penalties (**AMPs**). As such, the highest degree of risk continues to arise where all three elements are present: (1) dominance; (2) a practice of anti-competitive acts; and (3) SLPC effects.

Increased administrative monetary penalties

The 2022 amendments increased the CA$10 million maximum AMP available for a first Tribunal order to the higher of (a) CA$10 million and (b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues. Bill C-56 has since increased the CA$10 million amount for a first order to $25 million (and the $15 million for a second order to CA$35 million). These monetary increases were copied from the NDP's own private member's bill (Bill C-352), although the NDP proposal to increase the AMP percentage of worldwide revenues to 10% was not added.

Introduction of monetary disgorgement of benefits for private litigants

Importantly, if enacted, Bill C-59 would give the Tribunal the power to order the dominant firm to pay a private litigant and "any other person affected by the conduct" an amount not exceeding the value of the benefit derived from the conduct. (Note that the Tribunal must first find dominance, anti-competitive intent and a likely SPLC.) This amendment essentially permits the Tribunal to order disgorgement against the dominant firms in a quasi-class action-type proceeding. Private claimants are still required to obtain leave to bring an application under abuse of dominance (and other reviewable conduct provisions), but the burden to obtain leave is proposed to be lowered. See discussion regarding new litigation risk above.

Excessive and unfair selling prices now an "anti-competitive act"

Bill C-56 borrowed from the NDP bill to expressly include "directly or indirectly imposing excessive and unfair selling prices" as an anti-competitive act under the abuse provision. Depending on how the Tribunal interprets this phrase, this addition could radically alter the nature of abuse claims. Generally, anti-competitive conduct in the reviewable practices provisions of the Act has focused on the maintenance of a competitive process rather than the outcome of a dominant firm's exercise of market power. This type of "exploitative" abuse has not existed in Canada at the federal level, although provincial consumer protection laws do address "unconscionable" pricing (sometimes referred to as "price gouging").

Amendments to the civil competitor collaborations provision

Another significant area of reform in the Act's latest round of amendments concerns the competitor collaborations provision under section 90.1. This provision was originally introduced in 2009 as a civil enforcement track that enabled the Bureau to challenge agreements or arrangements among competitors that, while potentially resulting in anti-competitive effects, fell short of the "hard core" cartel conduct prohibited outright under the criminal conspiracy provision. While the competitor collaboration provision allowed the Tribunal to prohibit parties from doing anything under an agreement, the Tribunal had no jurisdiction to impose financial penalties, consider past agreements, provide relief to third parties or hear challenges to agreements not brought by the Commissioner.

Amendments recently enacted in Bill C-56 and proposed in Bill C-59 upend the more "soft-touch" model of horizontal enforcement reflected in the original version of the competitor collaboration provision, transforming it into a far more potentially invasive tool for policing business collaborations in four key respects outlined below. Bill C-59 does, however, propose a clearance mechanism for parties to agreements or arrangements among competitors with environmental protection aims.

Extension of the provision to agreements among non-competitors

First, Bill C-56's changes to the competitor collaboration provision, which will come into force on December 15, 2024 (a year following passage), will extend the provision's application to an agreement among *non*-competitors where the Tribunal finds that a "significant purpose" of the agreement is to prevent or lessen competition. Public statements from the federal government[4] suggest that this change may have been intended to target grocers' practice of preventing competing stores from entering an area through restrictive covenants or lease terms, a topic addressed by the Bureau in its recent retail grocery sector market study.[5] As drafted, however, the amendments would make this provision applicable to a broad range of vertical agreements—such as distribution, franchising or licensing agreements—that may feature competitive restrictions for legitimate business reasons.

Proposed new monetary penalties and other civil remedies

Bill C-59 would allow the Tribunal to order monetary penalties against a party up to the higher of CA$10 million (or CA$15 million for a subsequent order), three times the value of the benefit derived from the agreement or, if the value of that benefit cannot be reasonably determined, 3% of the party's annual worldwide revenues. Where the Tribunal finds a

4 See e.g. Prime Minister of Canada, "Fighting for the middle class" (14 September 2023), online: <https://www.pm.gc.ca/en/news/news-releases/2023/09/14/fighting-for-the-middle-class > ("... empower the Bureau to take action against collaborations that stifle competition and consumer choice, in particular situations where large grocers prevent smaller competitors from establishing operations nearby").

5 See Competition Bureau Canada, *Canada Needs More Grocery Competition: Competition Bureau Retail Grocery Market Sector Report* (27 June 2023), "Property Controls," online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/canada-needs-more-grocery-competition#sec09>.

prohibition order insufficient to restore competition, the bill would allow it to order parties to take any actions "that are reasonable and as are necessary" to overcome an agreement's competitive effects, including divestitures of assets or shares. While these new remedies would broadly mirror those currently available under abuse of dominance,[6] they represent a substantial departure from the more limited remedies historically available under this provision.

As discussed further above, Bill C-59 would also allow private parties to seek leave to bring Tribunal proceedings under the provision. In such cases, the Tribunal could also order the payment of an amount up to the value of the benefit derived from the challenged conduct to the private applicant and any other person affected by the conduct. The risk of both this disgorgement remedy and monetary penalties being ordered further raises the stakes for parties whose agreements or arrangements are challenged at the Tribunal.[7]

Proposed application of the collaborations provision to terminated agreements and past effects

As originally worded, the competitor collaboration provision only allowed the Tribunal to consider an application by the Bureau challenging an "existing or proposed" agreement that results or is likely to result in an SLPC. This gives parties the option—at least in theory—to simply walk away from their agreement to escape risk. Bill C-59 closes this gap by granting the Tribunal the jurisdiction to make orders with respect to a past agreement that "has" prevented or lessened competition substantially in a market, provided an application is filed within three years of its termination.

Proposed environmental certificate clearance procedure

Notwithstanding the risk that the amendments deter pro-competitive collaborations, Bill C-59 does offer a new clearance procedure in one such area. Specifically, parties can request the Commissioner to certify that an agreement or arrangement "is for the purpose of protecting the environment and that it is not likely to prevent or lessen competition substantially in a market."

Any such Commissioner certificate must describe the relevant parties, the agreement and any terms applicable to it. Upon being registered with the Tribunal, the certificate serves to exempt the agreement from the relevant provisions of the Act for up to 10 years (including the criminal conspiracy provision), subject to renewal by the Commissioner at the parties' request. The Tribunal retains a power to rescind or vary the certificate on application by the Commissioner, the parties or "a person directly and substantially affected in the whole or part of their business by the agreement or arrangement" in various circumstances, including the agreement's termination, the agreement not being implemented as described, non-compliance with the certificate's terms or after finding that the agreement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

Removal of efficiencies defence

As with the mergers provisions described above, Bill C-56 repealed the efficiencies defence for this provision as of December 15, 2024.

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6 The monetary penalties available under the abuse of dominance provisions were recently increased to $25 million for a first order and $35 million for a second order under Bill C-56, as discussed above. It is unclear whether further amendment of Bill C-59 may lead to section 90.1's proposed penalties being harmonized with those now in force under section 79.

7 While the Tribunal is required to consider disgorgement amounts ordered to be paid to a private applicant and other parties when determining the amount of any separate monetary penalty it orders, the proposed amendments do not restrict both financial remedies from being ordered against the same respondent.

Amendments to the deceptive marketing provisions

Historically, false and misleading environmental claims, otherwise referred to as "greenwashing," were investigated by the Bureau under a general provision of the Act designating **any** false and misleading representation as reviewable conduct. Most notably in the Keurig Consent Agreement,[8] the Bureau concluded that Keurig's recyclability claims in relation to its K-Cups were false and misleading under this provision.

In the course of its investigation, however, the Bureau archived its 2008 environmental claims guidelines, stating that they "may not reflect the Bureau's current policies or practices, nor does the Commissioner consider that it reflects the latest standards and evolving environmental concerns."[9] In the wake of the landmark *Keurig* settlement, industry was left with uncertainty regarding the litmus test for appropriate environmental claims in relation to products and packaging—all in a climate ripe for enforcement and litigation in relation to greenwashing practices.

Under Bill C-59, the government proposes to introduce a distinct deceptive marketing practice where any person who "makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change that is not based on an adequate and proper test" is engaging in reviewable conduct. While greenwashing has long been within the Bureau's purview, the explicit proposed prohibition on false and misleading environmental claims in relation to products confirms this to be a priority under the amended Act's enforcement framework. Industry should be mindful of the following key takeaways.

Proposed standard for all product-related environmental claims

Any environmental claim made in relation to a product, including any environmental benefit of its packaging (for example, recyclability), should be based on an "adequate and proper" test. In the absence of updated guidance on environmental claims, it is not fully clear what would constitute an adequate and proper test for these products.

Absence of standard for non-product-related environmental claims

The proposed explicit prohibition specifically relates to claims about a "product," which is defined to include services. This means that claims about a company's overall environmental/climate performance may not be subject to the "adequate and proper test" requirement. However, businesses should ensure any such claims are consistent with climate risk reporting requirements, which are also proposed to be introduced under Bill C-59.

Rules for "recyclability claims" in flux

Since the Keurig Consent Agreement, the Bureau has not released any updated rules regarding how and when recyclability claims are appropriate. Rather, under the purview of the *Canadian Environmental Protection Act* (CEPA), the Minister of the Environment proposed to introduce new regulations dictating prescriptive rules for when recyclability claims could be made, which appear to be on hold in light of the Federal Court's recent decision[10] impugning the designation of plastics as a toxic substance under CEPA. It remains to be seen where the current standard will land.

Private party access to the Tribunal extended to civil deceptive marketing provisions

As mentioned above, if enacted as proposed, Bill C-59 would extend private access to proceedings under the Act's civil provisions governing deceptive marketing practices. This change would open the door to a new forum in which parties could challenge greenwashing claims.

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8 See *The Commissioner of Competition v Keurig Canada Inc.*, Comp Trib File No CT-2022-001, Consent Agreement (6 January 2022), online: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/518827/index.do>.

9 Competition Bureau Canada, "Environmental claims and greenwashing" (2 December 2021), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing>.

10 Dentons Canada LLP, "Stick a (plastic) fork in it: Canadian federal plastics legislation declared unlawful" (24 November 2023), online: <https://www.dentons.com/en/insights/articles/2023/november/24/stick-a-plastic-fork-in-it-canadian-federal-plastics-designation-declared-unlawful?utm_source=email&utm_medium=email&utm_campaign=vuture>.

Amendments to the refusal to deal provision

The Act's refusal to deal provision, which allows the Tribunal to order a supplier to accept a person as a customer within a certain time or on usual trade terms, has fallen into relative disuse over the years. This recent inactivity follows Tribunal interpretation that a party seeking such an order, in meeting the Act's requirement that it show that it "is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms," demonstrate that its business *as a whole* would be so affected.[11] Bill C-59 would legislatively override his interpretation and instead refer to the person being substantially affected "in the whole or part or their business." This change—particularly in concert with a lower standard for Tribunal leave under the Act's private access provisions, as discussed below—could encourage more private applicants to rely on the refusal to deal provision to resolve supply disputes.

Another amendment of interest would introduce a limited "right to repair" as a component of the provision. Various jurisdictions around the world have embraced laws to facilitate the ability of independent repairers outside of a manufacturer's repair network to repair devices and equipment, particularly as products become more technologically complex. The Bureau has previously advocated for repair rights as a means of promoting competition while acknowledging the need to respect competing interests, such as security interests or intellectual property rights.[12]

In this regard, Bill C-59 proposes to expand the Act's refusal to deal provision (section 75) to expressly include "a means of diagnosis or repair" among the "products" with respect to which the Tribunal may order a supplier to accept a person as a customer within a specified time or on usual trade terms. The bill defines "a means or diagnosis or repair" to include "diagnostic and repair information, technical updates, diagnostic software or tools and any related documentation and service parts."

Similar to the supply of other products captured by the amended refusal to deal provision, such an order would only be available if the Tribunal were to find that a person is "substantially affected in the whole or part of their business or is precluded from carrying on business" due to an inability to obtain a means of diagnosis or repair anywhere in the market on usual trade terms; that inability being due to "insufficient competition among suppliers"; the person being willing and able to meet the supplier's usual trade terms; the ability of the means of diagnosis and repair to be "readily supplied"; and the refusal to deal having or likely to have an "adverse effect on competition in a market." Suppliers are not, however, required to provide a means of diagnosis and repair if doing so requires the disclosure of trade secrets.

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11 For example, the Tribunal has found a refusal to deal affecting nearly a quarter of an applicant's revenues not to be sufficiently "substantial" under this standard: *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28.

12 See e.g. Competition Bureau, "Summary of the brief presented to the Office of Consumer Protection on the durability and repairability of goods" (20 January 2022), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/summary-brief-presented-office-consumer-protection-durability-and-reparability-goods>; Competition Bureau, "Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things" (28 September 2021), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/competition-bureau-submission-consultation-modern-copyright-framework-artificial-intelligence-and>.

Amendments targeting "reprisal actions" against persons cooperating with the Bureau

Bill C-59 would also establish legislative protections targeting "reprisal actions" that "penalize, punish, discipline harass or disadvantage" a person for communicating with the Commissioner, for cooperating, testifying or assisting in an investigation or proceeding under the Act or expressing the intent to do so. The bill would allow the Commissioner or a person "directly and substantially affected by" reprisal actions to seek a Federal Court or provincial superior court order prohibiting those actions. The court may also order monetary penalties of up to CA$750,000 for individuals and CA$10 million for corporations engaged in the conduct at issue (or CA$1 million and CA$15 million for subsequent orders). These amendments would be in addition to existing provisions of the Act establishing confidential treatment of whistleblower information on suspected competition offences and prohibitions on certain retaliatory actions of employers against employees or contractors.

Amendments providing formal powers for Bureau market inquiries

Another significant change now in force following Bill C-56's December 2023 enactment is the introduction of formal powers in the Act for the Commissioner to carry out market inquiries—a longstanding item on the Bureau's "wish list" for reforms to the Act. Before the latest changes, the Bureau was largely restricted to voluntary information gathering to support its recent market studies, including those on the retail grocery sector, fintech and digital health care. These powers proved controversial, however, in light of stakeholder concerns around the potential for overreach and "politically motivated fishing expeditions" against businesses otherwise compliant with the Act.[13]

Section 10.1 now permits the Commissioner to initiate a market study if, after consulting with the Minister of Innovation, Science and Industry (**Minister**), the Commissioner is of the opinion that it is in the public interest to do so. The Minister can also direct the Commissioner to initiate such an inquiry after consulting the Commissioner on its feasibility. The as-enacted provision significantly expands the Commissioner's authority over market inquiries relative to the initially tabled version of Bill C-56, which had only referenced the Minister's powers to initiate inquiries.

Once an inquiry is commenced, the Act requires the Commissioner to prepare proposed terms of reference and hold a public consultation for at least 15 days. Once the terms are finalized and approved by the Minister, the Commissioner can use the mandatory information-gathering powers set out under section 11 of the Act—such as the court-ordered examinations and document production requests used by the Bureau to investigate suspected anti-competitive conduct—to compel information from any person who "has or is likely to have information that is relevant to the inquiry." The Commissioner has 18 months, subject to three-month extensions from the Minister, to carry out and report on an inquiry. Parties compelled to participate in the inquiry are only entitled to receive a draft report and provide their concerns around accuracy or confidentiality within three business days of receipt. The report's final version is made public.

It remains to be seen how aggressively the Commissioner or Minister make use of these new powers. However, the breadth of the final provisions—with few checks in favour of affected businesses—does little to assuage stakeholder concerns around the potential costs, business disruption and reputational risk these procedures could introduce for participants.

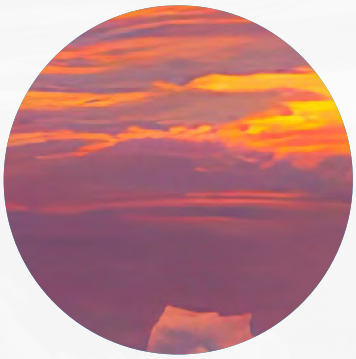
13 Innovation, Science and Economic Development Canada, "Future of Canada's Competition Policy Consultation – What We Heard Report" at s. 9, online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report>.

Conclusion

Starting with the June 2022 amendments to the Act and extending through to the tabling of Bill C-56 and Bill C-59 in late 2023, the *Competition Act* has attracted an unusual amount of attention from federal legislators in recent years—the product of a confluence of political and economic developments as well as the influence of a global trend toward antitrust reform and heightened enforcement. At least to date, the Bureau and Commissioner Matthew Boswell appear to have seized the opportunity to influence the latest round of amendments in their favour—from the repeal of the efficiencies defence to new information-gathering powers and automatic injunctions before the Tribunal in the context of acquisitions. Should the reform initiative culminate in Bill C-59's changes becoming law, Canadian competition law may well be poised for radical change.

Or will it be? It bears emphasizing that much remains unclear about the future direction of Canadian competition law. Significant parts of the revamped framework of the Act hinge on future interpretations in Bureau guidance as well as from the Tribunal and courts, including the further expansion of private access—which remains subject to a leave standard (albeit lowered)—or as-yet-untested concepts such as "unfair and excessive" pricing. Likewise, the efficiencies defence has provoked many spirited debates since its introduction nearly four decades ago, but the defence's importance to Canada's merger review process is perhaps belied by the overwhelming majority of cases—including dozens of Bureau consent resolutions—where it played no role in the result.

As such, while the latest amendments are far from favourable to Canadian business, it may be too early to conclude that the "sky is falling" for Canadian business. Nevertheless, for the time being, businesses operating in Canada must contend with the uncertainty introduced by the amendments following an extended period during which the Act saw few, if any, changes to its cornerstone provisions. Case law and guidance from the Bureau will be essential to avoid chilling legitimate, pro-competitive business activity that could result from the uncertainty arising from the more novel or open-ended provisions in Bills C-56 and C-59. In the interim, we would advise businesses to use the coming months to consider how these changes—whether proposed or already in effect—could require revisions to existing competition-related policies and procedures or a "second look" at business practices involving potential competition risks.



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