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The Dust Has Settled (For Now): Reviewing the Recent Amendments to the *Canadian Competition Act*

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I. Introduction

After an active few years involving various proposals for reform, public consultations, bills debated in Parliament and, finally, three sets of amendments to the *Competition Act* (the "Act") and *Competition Tribunal Act*, the remaking of Canadian competition law seems to be complete for the time being.[2] The last of these bills, Bill C-59, cleared Parliament and received Royal Assent on June 20, 2024.[3] There is currently no indication that the government has further changes on its agenda.

Taken together, the reforms represent the most important changes to Canadian competition law since the first version of the *Competition Act* became law in 1986.[4] The reforms are broad in scope, covering virtually all major sections of the Act: mergers, abuse of dominance, anti-competitive agreements, and consumer protection.

Perhaps not surprisingly for a set of changes so broad, there were a variety of reasons driving this reform.[5] For example:

i. There has been a developing concern in Canada and elsewhere about rising levels of concentration as a potential cause of increasing margins – including a focus on the possible role of an overly lax competition policy, due in part to weaknesses built into the Act;[6]

ii. There has also been growing concern in Canada and elsewhere about the rising power of tech firms and worries that the

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[2] Competition Act, R.S.C. 1985, c. C-34 (Can.); Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.) (Can.).

[3] Fall Economic Statement Implementation Act, 2023, S.C. 2024, c 15 (Can.) (hereinafter "Bill C-59"). The other two bills were Budget Implementation Act, 2022, No. 1, S.C. 2022, c 10 (Can.) (hereinafter "Bill C-19") which received Royal Assent on June 23, 2022 and Affordable Housing and Groceries Act, S.C. 2023, c 31 (Can.) (hereinafter "Bill C-56") which received Royal Assent on December 15, 2023. As their titles suggest, all of these bills contained provisions not related to Canadian competition policy – and this combining of competition policy reform efforts with other legislative efforts in the same bills could be (and was by some) questioned as not providing for focused Parliamentary oversight. Some of the provisions in these bills were to take effect only one year after Royal Assent (to give those affected some period of time to adjust business practices to align with the new rules.)

[4] Canada's first competition law was passed in 1889, though enforcement was severely limited for many years due to poor drafting and the lack of a proper enforcement body. For more on the history of Canadian competition policy, see MICHAEL TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY 3–36 (2002) and JOHN S. TYHURST, CANADIAN COMPETITION LAW AND POLICY (2021) ch. 2-3.

[5] For more on the forces behind the push to update Canadian competition law, see, for example, Thomas W. Ross, *Canada Looks at Revising its Competition Act*, CPI US & CANADA COLUMNS (Apr. 3, 2022) (hereinafter "Ross 2022a"), https://www.pymnts.com/cpi-posts/canada-looks-at-revising-its-competition-act; Thomas W. Ross, *Proposals for Amending the Competition Act*, 35 CAN. COMPETITION L. REV. 1, 1–45 (2022) (hereinafter "Ross 2022b") and Thomas W. Ross, *Canada's Competition Act: The Reform Process Continues*, CPI US & CANADA COLUMNS (Nov. 2023), https://www.pymnts.com/cpi-posts/canadas-competition-act-the-reform-process-continues.

[6] For a discussion of the U.S. evidence and its antitrust implications – together with references to many of the key papers – see Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018) and, in particular – and more recently – Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?*, J. POL. ECON. MICROECONOMICS (forthcoming). Some evidence of increasing concentration in Canadian markets can be found in Ray Bawania & Yelena Larkin, *Are Industries Becoming More Concentrated? The Canadian Perspective* (manuscript at 9) (Mar. 20, 2019), https://ssrn.com/abstract=3357041. Debates about a need for more vigorous competition policy enforcement were also aired in popular media. *See, e.g.*, *The Growing Demand for More Vigorous Antitrust Action*, THE ECONOMIST (Jan. 15, 2022), https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action. In October 2023, the Canadian Competition Bureau released its own study on concentration and competition in the Canadian economy, finding among other things that concentration was rising in the most concentrated industries in Canada and that the entry of new firms has slowed. COMPETITION BUREAU CANADA, COMPETITION IN CANADA FROM 2000 TO 2020: AN ECONOMY AT A CROSSROADS (Oct. 19, 2023), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competition-canada-2000-2020-economy-crossroads.

Canadian competition law system is not up to the task of controlling them;[7]

iii. A number of alleged "gaps" had appeared, the product of judicial decisions or, in some instances, brought to our attention by particular cases;[8] and

iv. More recently, post pandemic inflation drew interest from various groups looking to control price increases and from political parties wanting to be seen to be doing something about inflation. Rightly or wrongly, some of this inflation was alleged to be due to a lack of competition in certain sectors.[9]

All of these pressures suggested that Canada needed a more muscular competition policy (at least in some areas) – with more enforcement powers and resources. A significant increase in the budget of the Competition Bureau ("Bureau") was approved in 2021, a step that might now be seen to have kicked off the reform process.[10] This process included calls for reform from, among others, the Commissioner of Competition ("Commissioner"); an informal consultation led by Senator Howard Wetston; and, finally, a formal consultation directed by the Innovation, Science and Economic Development Canada, the government department in which the Bureau resides.

Contributing to proponents' success at securing major changes to the law was the fact that it was not a partisan effort – all three major parties supported moves to strengthen Canada's competition law. In fact, both major opposition parties submitted their own bills that were, to a considerable extent, incorporated into the amendments eventually passed into law.

Each of the government's bills was broadly aimed. C-19 (passed into law in 2022) provided changes to price fixing, abuse of dominance, mergers, and consumer protection, among others. C-56 (2023) provided changes to mergers, competitor collaborations, abuse of dominance, and market studies. Finally, C-59 (2024) provided changes to the scope and level of fines, to merger review, to the scope allowed for private enforcement (including a disgorgement-type remedy), on refusals to deal, and related to consumer protection. In the end, the most significant – and perhaps controversial – amendments probably involve merger review and the expanded role provided for private enforcement of the Act.

The remainder of this column will review the most significant changes brought about via these amendments and provide some discussion about the most important changes made – and those that were not made.[11]

II. Important Changes by Area

It is possible to classify the changes made in a number of ways – one would be according to their motivations and objectives.

Fixes: In a number of cases, the amendments sought to fix widely recognized problems ("gaps") that had become apparent in particular cases or through certain judgements. For example, expanding the definition of abuse of a dominant position to include harm to

[7] See, for example, the high profile reports issued by groups in the United States, Europe, and the United Kingdom: STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E; JACQUES CRÉMER ET AL., COMPETITION POLICY FOR THE DIGITAL ERA (2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en; and UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (2019), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

[8] These gaps are described in Ross 2022a, *supra* note 5.

[9] Tellingly, Bill C-56 is also officially referred to as the "Affordable Housing and Groceries Act."

[10] *Competition Bureau Gets a Budget Boost, but Is It Enough to Make Companies Think Twice?*, FIN. POST (May 3, 2021), https://financialpost.com/news/economy/competition-bureau-gets-a-budget-boost-but-is-it-enough-to-make-companies-think-twice. This represents a very significant increase: the Bureau's budget in 2020-21 was $52.1 million (CDN). COMPETITION BUREAU CANADA, CHAMPIONING COMPETITION IN UNCERTAIN TIMES: ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2021 (Dec. 7, 2021), https://competition-bureau.canada.ca/championing-competition-uncertain-times.

[11] The column will not distinguish between changes that have current effect and those that will take effect after the statutory waiting period (typically one year) provided for in the legislation.

competition and not just harm to competitors;[12] treating wage-fixing and no-poaching symmetrically to sell-side price fixing, relaxing the leave requirements to allow private parties to get hearings before the Competition Tribunal (the "Tribunal"), and counting sales into Canada by foreign sellers for the purposes of triggering merger notification thresholds.

Fleshing out existing law: In some cases, language was added to clarify that certain practices were covered by the Act, even when (to most observers, at least) they were probably already covered. For example, provisions on drip pricing were added to the consumer protection section, as were greenwashing prohibitions.[13] Additionally, language was added indicating that, in merger review, the Tribunal may consider labor market effects. In each of these examples, a case could be made that they were already covered by the general provisions. Of course, by adding them to the statute, they save the Bureau from the need to argue that they are covered.

Expanded private enforcement: Several amendments have contributed to a law that will be friendlier to private enforcement. For example, the leave requirements have been relaxed, as noted, but also private access to the Tribunal has been allowed for cases of abuse of a dominant position, competitor collaborations, and deceptive marketing. In addition, the Tribunal has been given the power to grant leave to private parties on "public interest" grounds. It has also been allowed additional remedies, including a remedy that appears to be disgorgement of defendants' ill-gotten profits to victims.

Stronger powers in some areas:[14] In some existing areas, the Bureau's powers were enhanced (and, in some, defendants' powers were reduced). For example, the efficiency defense that merging parties could previously claim has now been removed. For mergers below the notification thresholds, the Bureau now has three years (post-closing) to conduct a review. And, significantly, rebuttable structural presumptions for mergers have been added to the Act itself.[15] Finally, maximum financial penalties have been increased throughout the Act and financial penalties have been added in some places where they were not permitted before (e.g., competitor collaborations).

Nods to tech: While not creating a whole new regulatory regime for the tech sector, there are a number of places in the amendments where language was added to point to considerations relevant to that sector. For example, the list of factors the Tribunal may consider when it evaluates mergers or competitor collaborations has been expanded to include network effects, non-price competition (e.g., privacy), and entrenchment of a dominant position.

New areas: Finally, the Act was expanded to include some new elements, such as adding the imposition of unfair or excessive pricing to the list of anticompetitive acts under abuse of dominance, market studies powers, a limited "right to repair" provision in the refusal to deal section, "greenwashing" provisions in the deceptive marketing section, and the competitor collaborations provisions were expanded to include anticompetitive agreements between firms that were not competitors (i.e. in vertical or conglomerate-type relationships).

A. Collusion

The *Competition Act* of 1986 ("1986 Act") updated Canada's approach to much of competition law, with the notable exception of the provisions regarding price-fixing. That

[12] Essentially this was an overruling of the Federal Court of Appeal's decision in the *Canada Pipe* case. *Canada v. Canada Pipe Company Ltd.*, 2006 F.C.R. 233.

[13] As discussed below, however, the particular form of the greenwashing amendment adopted would not have been available under the existing law.

[14] The term "powers" here is intended broadly to include cases in which the Bureau was given added authority and cases in which hurdles it had to overcome to pursue a matter were lowered.

[15] This change and some others can also be seen as ways to simplify enforcement. Other amendments with this kind of effect: (i) changes in the abuse provisions that allow for the Bureau to seek an order (but not other remedies) based only on intent and not effects; and (ii) the reverse onus provisions added to some deceptive marketing practices. Related, is the enforcement cost-reducing amendment to the *Competition Tribunal Act* s. 8.1(3) that prevents the Tribunal from (with some qualifications) awarding costs against the Crown. From Bill C-59.

section, S. 45 in the 1986 Act, continued to make it a criminal offense to enter into agreements to "unduly" restrain competition. The requirement to establish that any lessening of competition was undue meant that, contrary to the law in many other jurisdictions, price-fixing was not *per se* illegal in Canada.

Eventually, challenges in enforcing these provisions, together with the growing international consensus on making price fixing a *per se* offence, led to amendments effective in 2010 that created two tracks for agreements between competitors. If they were essentially simple or naked price-fixing (including market allocation), those agreements were to be considered *per se* illegal. There is no "unduly" test on this track. However, if price-fixing elements of the agreement were merely ancillary to (and necessary for) a larger agreement that itself was not anticompetitive, those agreements could be reviewed by the Tribunal on a civil, effects-focused basis, with many elements of that review mirroring those from merger reviews.[16]

An important piece of this 2010 amendment, not much discussed at the time, was the removal of agreements among buyers from S. 45's coverage. While the older law had, in principle, covered any agreement with the potential to lessen competition, the revised version covered only agreements for the production or supply of a product. Agreements between buyers, for example in labor markets, could still be considered under the new civil section, but without the power of a criminal *per se* law. While it is not clear why the buy-side was removed from S. 45, there has been considerable speculation that it had to do with a concern that a *per se* rule on the buying side could catch small buying groups which previously would have been protected by the "unduly" test.

Whatever the reason for this change, the fact that a gap had been created became clear when competition challenges in certain labor markets appeared. Allegations of wage fixing and no-poaching agreements between certain firms attracted a great deal of public attention and, when the Bureau made it clear that its powers to deal with such agreements were limited by the language of the statute, there was a call for reform.

As a result, the first of the three amendments bills targeted the buy-side of labor markets, adding a new subsection to S. 45 which made clear that wage fixing and no-poaching agreements between employers were also *per se* criminal offenses with the same maximum penalties.[17] Interestingly, this buy-side expansion only covers labor markets, hence other agreements among buyers will be covered only by the civil provisions.

Two other changes to the price-fixing provisions are noted here. First, maximum fines were increased from $25 million to a fine set at the discretion of the court.[18] Second, as a partial response to arguments that competition policy should keep in mind other public goals, Bill C-59 provided the Bureau with the power to review agreements between competitors that are for the purpose of protecting the environment and gave the Commissioner the power to issue certificates to the parties if he/she believes the agreement is not likely to prevent or lessen competition substantially. If a certificate is so issued, the agreement is exempted from several sections of the Act – including price-fixing (S. 45), bid-rigging (S. 47), and the civil agreements provisions (S. 90.1).[19] Interestingly, in a submission to the House of Commons and Senate Committees on Finance, the Commissioner argued for the removal of this element of the bill, indicating that he was not sure it was necessary and that it could be difficult to implement.[20]

B. Competitor Collaborations

[16] This new civil section was S. 90.1.

[17] This came in Bill C-19. The new subsection is S. 45 (1.1).

[18] Also from Bill C-19.

[19] This is from Bill C-59. The relevant new subsections of the Act are S. 124.3 to 124.7.

[20] Letter from Matthew Boswell, Commissioner of Competition, to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance (Mar. 1, 2024), https://www.ourcommons.ca/Content/Committee/441/FINA/Brief/BR12944851/br-external/CompetitionBureauCanada-e.pdf. Importantly, the provision empowers

Several important changes were made to the section (S. 90.1) devoted to agreements between competitors that do not fit under the *per se* provisions of S. 45 but which prevent or lessen competition substantially. As it turned out, S. 90.1 had been very little used, for a number of reasons.[21] First, the only authority the Tribunal had under this section was to issue an order terminating the agreement – there were no provisions for other remedies, fines or damages to injured parties. Second, the law only applied to agreements currently in effect so parties could always evade Bureau action by terminating the agreement (or possibly changing it) upon an investigation. Finally, there was no ability for private parties to bring cases to the Tribunal.

While it is possible that S. 90.1 might have come up more often in discussions about certain matters, it was likely that other provisions of the Act would be invoked should the Bureau decide to move forward – sections such as those on mergers, abuse of a dominant position or even the *per se* price-fixing provision if it could be argued that any anticompetitive elements were not necessary for the achievement of the larger agreement's purpose.

The amendments to this section have the potential to make it a much more powerful piece of the Bureau's arsenal.[22] Some addressed the limitations just discussed. For example, the Tribunal is now empowered to impose a wider set of remedies including orders to others to take actions (including potentially divestitures) to overcome the effects of the agreement, and administrative monetary penalties. Secondly, agreements can now be reviewed up to three years from their termination.

Third, private access to the Tribunal for parties that want to challenge these kinds of agreements is now allowed, with the Tribunal empowered to order the parties to the agreement to pay an amount "not exceeding the value of the benefit derived from the conduct…" to the private "applicant and any other person affected by the conduct."[23] While this disgorgement-style penalty may be welcomed by those supporting a stronger role for private enforcement of the Act,[24] there will be questions about how private actions for damages will be managed by the Tribunal, and whether, for example, the jurisprudence and process developed through the private enforcement of the price-fixing provisions will be relevant. A concern that has been raised is whether a private party wishing to challenge mergers (e.g., of some of its competitors) could label a merger as an agreement coming under this section and seek to block it. As the provisions specifically directed at mergers have not ever provided for private enforcement, this would not seem to have been the government's or Parliament's intent.[25]

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the Commissioner to issue the certificates only if he or she is satisfied that the agreement is for the "purpose of protecting the environment" and that it is "not likely to prevent or lessen competition." Hence, agreements that prevent or lessen competition cannot be saved with a certificate – there is no trading off harm to competition and gains to the environment, unlike in some other jurisdictions. *See, e.g.*, McCarthy Tétrault LLP, *Greener On The Other Side: Environmental Amendments to the Competition Act* (June 24, 2024), https://www.mccarthy.ca/en/insights/articles/greener-other-side-environmental-amendments-competition-act (particularly Section 3).

[21] There are references to the section in two consent agreements: (i) the Air Canada/United/Continental alliance agreement; and (ii) the e-books case. *See, e.g.*, Competition Bureau Settles with Air Canada & Continental in Contested Canadian Merger and Joint Venture Case, CAN. COMPETITION L. BLOG, https://www.ipvancouverblog.com/2012/10/competitionbureausettlesaircanadacontinentalmergercase; Competition Bureau Canada, *Federal Court Rules in Favour of the Competition Bureau in E-books Case* (Feb. 1, 2018), https://www.canada.ca/en/competition-bureau/news/2018/01/federal_court_rulesinfavourofthecompetitionbureauine-bookscase.html.

[22] These changes, unless otherwise indicated, are from Bill C-59.

[23] In new S. 90.1 (10.1).

[24] Those supporting an expanded role for private enforcement would include the Competition Bureau. *See* COMPETITION BUREAU CANADA, THE FUTURE OF COMPETITION POLICY IN CANADA (Mar. 15, 2023), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada (outlining proposed expansions to the role of competition law, such as the suggestion to add private enforcement and damages in recommendation 5.5.2).

[25] This concern was raised, for example, in: *Commercial Agreements: A New Legal Framework*, OSLER (June 28, 2024), https://www.osler.com/en/insights/reports/commercial-agreements-a-new-legal-framework. In a posted memorandum on Bill C-59, the Canadian Bar Association recommended clarity here – specifically that administrative monetary penalties or private

Another important amendment to this section expanded its scope to include non-horizontal agreements (for example, vertical and conglomerate agreements). Born out of a concern that such arrangements, just like vertical and conglomerate mergers, can have negative effects on competition, this amendment brings the Canadian law closer to the laws of many jurisdictions that prohibit any anticompetitive agreements.[26] The language of the new provision is a bit unclear, however. It indicates that S. 90.1 can be applied even when the parties to the agreement are not competitors if a "significant purpose" of the agreement is to prevent or lessen competition.[27] There is no mention of effects here. However, Section 90.1 (1) as applied to agreements among competitors clearly contemplates an effects (not a purpose) test. It is therefore unclear whether the new subsection contemplates a purpose-only test or a purpose-plus-effects test for non-horizontal agreements.[28]

When the original S. 90.1 was adopted, it contemplated a review process for agreements between competitors very similar to the kind of reviews that would be undertaken were the parties to propose a merger. This process included allowing for an "efficiency exception" under which defendants could argue that the efficiency benefits of the agreement outweighed any anticompetitive effects. As will be discussed below, this efficiency exception – particularly in mergers – drew a lot of criticism, from the Bureau itself and others.[29] The recent amendments then removed the efficiency defense from both this section and from merger review.[30]

Finally, as noted above, a variety of smaller amendments seemed to be included to clarify that the Act could be applied to the digital/technology sectors. To this end, a new set of "factors" were added for consideration by the Tribunal when it is evaluating a particular agreement. These factors include network effects, whether the agreement would contribute to the entrenchment of the market position of leading incumbents, and any effects of the agreement on price or non-price competition, including quality, choice, or consumer privacy[31] Arguably, these factors could all have been considered in any case, however their inclusion in the non-exhaustive list does provide a clear message that Parliament sees these as significant concerns, likely because of their importance in the context of rapidly evolving digital and platform markets.

C. Mergers

Probably the most consequential and headline-grabbing amendments had to do with merger review. As mentioned, the efficiency exception (typically referred to as the "efficiency defense") was removed.[32] The efficiency defense, introduced back in the original Act in 1986, instructed that the Tribunal could not issue an order against a merger when the efficiencies

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disgorgement remedies were not to be available to agreements that are reviewable as mergers under S. 92 of the Act. Canadian Bar Association, *Taking the Time to Study Proposed Amendments to the* Competition Act, at Recommendation 4 (Mar. 26, 2024), https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2024/April/Taking-the-time-to-study-proposed-amendments-to-th.

[26] For example, Article 101 of the Consolidated Version of the Treaty on the Functioning of the European Union [TFEU], May 9, 2008, 2008 O.J. (C 115) 47; U.S. Sherman Act Section 1, 15 U.S.C. § 1; and UK Competition Act 1998, Chapter 1, Section 2.

[27] This change came in Bill C-56; the new subsection is S.90.1 (1.1).

[28] In its submission on Bill C56, the Canadian Bar Association asked for clarity here too with suggested amendments indicating that, if the significant purpose is established, the other elements of S. 90.1 (1) (including an effects test) must still be established. CANADIAN BAR ASSOCIATION, BILL C-56 – AFFORDABLE HOUSING AND GROCERIES ACT, at Recommendation 16 (Nov. 2023), https://www.cba.org/CMSPages/GetFile.aspx?guid=3af1c736-8eea-41ba-9c8a-add6c5b6f1e3.

[29] See COMPETITION BUREAU CANADA, *supra* note 24, at Recommendation 1.8. See also the comments of a former Commissioner of Competition, John Pecman, *Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau*, 31 CAN. COMPETITION L. REV. 5 (2018).

[30] The efficiency exception was removed in Bill C-56. Many who supported the removal of the efficiency exemption for mergers argued that it should be replaced by a provision allowing for efficiencies to be considered as a "factor" in a Tribunal's review. However, in fact, the efficiency exception was removed and not replaced by any other language supporting a consideration of efficiencies to any extent. More on this below.

[31] These were introduced in Bill C-19. They are now contained in S. 93 of the Act.

[32] This was done in Bill C-56.

attributable to the merger would be "greater than" and would "offset" any harm to competition. Over time, and through some jurisprudence, this was interpreted to mean that Canada was applying something similar to a "total surplus" test to mergers, in contrast to the consumer welfare standard common in many other jurisdictions.[33] Among others arguing for the removal of this defense was the Bureau, which argued: "It permits anti-competitive mergers that are harmful to Canadians. It is inconsistent with international best practices. It is difficult – if not impossible – to properly implement."[34] That the defense would be removed did not come as a great surprise, though the fact that it was not replaced with any other language about efficiencies that would let them be considered was a surprise – and contrary to the advice of the Bureau.[35] For example, a section could have been added instructing the Tribunal to consider the extent to which merger-specific efficiencies would benefit consumers.

It is hard to imagine a proper merger review process that does not consider efficiencies and, indeed, the Minister indicated while speaking to Parliament that the Tribunal will be able to consider efficiencies.[36] This interpretation would seem possible given that existing subsection 93(h) of the Act permits the Tribunal to consider "any other factor that is relevant to competition…." However, this could limit the consideration of efficiencies to only those cases in which they affect the level of competition. In some cases, merger efficiencies can indeed make markets more competitive (for example, when they strengthen weaker competitors and enable them to be more aggressive). But there will be other cases in which the efficiencies will not affect the level of competition; though, by affecting costs, they may benefit consumers.[37] And one might ask about the amount of weight the Tribunal should put on efficiencies when Parliament has removed the efficiency defense and ignored suggestions to add other language allowing it to consider efficiencies (at least to some lesser extent).

The second of the headline-grabbing amendments in merger review involved the establishment of rebuttable structural presumptions.[38] In contrast to other jurisdictions, such as the United States, where structural presumptions are contained in agency guidelines, these new conditions are now contained directly in the Canadian legislation.[39] There were three pieces to this change. First, the Tribunal is instructed to find that a merger will lessen or prevent competition substantially if it concludes that the merger will lead to a significant increase in concentration or market share, unless the contrary is proved on a balance of probabilities by the merging parties.[40]

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[33] However, the standard is not exactly a total surplus standard. *See, e.g.*, Thomas W. Ross & Ralph A. Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 ANTITRUST L.J. 471 (2005). The various decisions described there suggested a potentially complex and uncertain weighing of the effects on consumers and producers.

[34] COMPETITION BUREAU CANADA, *supra* note 24, at Section 1.8.

[35] COMPETITION BUREAU CANADA, *supra* note 24, Recommendation 1.8 proposed that the efficiency defense be repealed but that efficiencies be included in a list of factors the Tribunal may consider in evaluating a merger. Similarly, the Canadian Bar Association, suggested, if the full defense were to be removed, that "the extent to which efficiencies are likely to benefit competition" be added to the list of "factors" that the Tribunal may consider in merger review. CANADIAN BAR ASSOCIATION, *supra* note 28, at Recommendation 17.

[36] Minister Champagne speaking in support of the bill in Parliament said, "Of course, if a proposed merger creates efficiencies that strengthen competition in a sector, the tribunal would be able to consider them in its deliberations." This would seem consistent with the S. 93(h) path. *See* Can. 44th Parliament, House of Commons 1st Session, Debates of the Legislative Assembly (Hansard) Vol. 151, No. 223 (Sept. 25, 2023), at 1624 (statement of Hon F. Champagne), https://www.ourcommons.ca/Content/House/441/Debates/223/HAN223-E.PDF.

[37] As an extreme case, imagine a merger to monopoly that generates such extreme efficiencies that prices would fall post-merger. Allowing such a merger would seem to be in the interest of both producers and consumers, but may no longer be permitted if efficiencies can only enter the process via S. 93 (h) since they did not affect competition.

[38] These were introduced in Bill C-59.

[39] U.S. Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* (Dec. 18, 2023), https://www.justice.gov/atr/merger-guidelines. The structural presumptions thresholds are contained in Section 2.1.

[40] New S. 92(2).

Second, the amendment defines what is a significant increase in concentration or market share and borrows from the recently updated U.S. merger guidelines: there will be a significant increase in concentration or market share if the HHI is likely to increase by more than 100 and either (a) the HHI is likely to be more than 1,800; or (b) the market share of the parties is likely to be more than 30%. [41] Third, consistent with this new emphasis on structural indicators, the old Section 92(2) was removed. This section had instructed the Tribunal that it could not find that a merger lessens or prevents competition substantially "solely on the basis of evidence of concentration or market share."

It is almost universally agreed that potential merging parties value some guidance using structural indicators or thresholds, which explains why merger guidelines from many jurisdictions include "likely challenge" and/or "safe harbour" thresholds based on market shares or concentration measures such as the HHI. This is particularly so when these thresholds are generally accepted by adjudicatory bodies as informative. To actually put structural presumptions into legislation – even rebuttable ones – is a bigger step however and is likely to be problematic. A detailed discussion on this point is beyond the scope of this column, but two challenges come immediately to mind. First of all, there is the question of what shares are to be used in a particular case – for example, will they be shares of revenues, unit sales or capacity? And will they be shares from one year or perhaps averaged over the last several years (if shares are volatile)? To the extent that some revenues are recurring by contracts, should the shares be calculated based on new customer acquisitions? Though these challenges exist even where the presumptions are in guidelines, they take on a much more serious role when their answers can move presumptions from one side to the other.

Second, by putting the thresholds in the law, do we simply invite protracted and expensive fights about market definition? Those battles could be quite distracting since they are not about the key issue, which is the merger's potential effect on competition. It is worth noting, as well, that in recent years there has been some movement by many competition specialists away from market definition exercises – because of the challenges mentioned – where they can be replaced by other kinds of evidence.[42]

There were a number of other changes made to the merger provisions of the Act, that – though less dramatic – should still prove to be important. I list some here very briefly.[43]

(i) The Bureau now has up to three years (increased from one year) to bring an application to block a merger of firms that were small enough so as to not reach the thresholds for advanced notification.[44]

(ii) Consistent with amendments to the price fixing provisions relating to labor markets, the Tribunal is now explicitly directed to consider the effects of a merger on labor, though this was likely permissible in any case. The language used to make this change is a bit challenging, however. This was done by adding "including labour" in these two parts of S. 92.1 (as underlined here for emphasis)

> ***92 (1)*** *Where, on application by the Commissioner, the Tribunal finds that a*

[41] S. 92(3). The amendment actually refers to the "concentration index" but defines it to be what is known as the Herfindahl-Hirschman Index (HHI): the sum of the squares of all market shares in the market; The amendments (at new S. 92(5)) provide that these numerical thresholds may be adjusted by regulation (as opposed to requiring amending legislation).

[42] On the criticisms of efforts to define markets, see, for example, Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013) and more recently (with particular reference to the new U.S. Guidelines), Louis Kaplow, *The 2023 Merger Guidelines and Market Definition: Doubling Down or Folding?*, 65 REV. IND. ORGAN. 7 (2024). On the wisdom of enshrining structural presumptions into law, rather than posting them in guidelines, see, for example, Nikiforos Iatrou, Michael Caldecott & Gideon Kwinter, *Contagious Presumptions: Will U.S. Antitrust Transform Canadian Merger Review?*, *in* COMPETITION POLICY INTERNATIONAL, ANTITRUST CHRONICLE: CANADA AND MEXICO (Sept. 3, 2024).

[43] These are all found in Bill C-59.

[44] The original law in 1986, subsequently amended, had provided for three years, so this is partially a return to that original limit. If a merger's size falls below the levels required for notification but the merging parties apply to the Bureau for an Advanced Ruling Certificate (indicating that the Commissioner is satisfied there will be no harm to competition), the one-year limitation still applies.

merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) *in a trade, industry or profession,*

(b) *among the sources from which a trade, industry or profession obtains a product, <u>including labour</u>,*

(c) *among the outlets through which a trade, industry or profession disposes of a product, <u>including labour</u>, or*

(d) *otherwise than as described in paragraphs (a) to (c),*

the Tribunal may, subject to sections 94 and 95 (….. make orders…)

It is not clear how to read this. For example, in (b) is "labour" being added to the list of "sources", to the list of trade/industry/profession, or is it being added to "product"? (A similar confusion relates to the language in (c).) If it is added to the list of sources, it seems to be aimed at a loss of competition among laborers themselves (not among purchasers of labor). Since labor does not "obtain a product," it would not make sense to add it to the trade/industry/profession list. And the sources from which the trade/industry/profession obtains labor (as opposed to a product) would be what – employment agencies? This would not appear to have been the intended effect of the change. Further, the addition in (c) might seem to suggest labor as an example of an "outlet" through which firms dispose of products. If the concern was to instruct the Tribunal to consider the effects on labor, one would think there would be clearer ways to do that. [45, 46]

(iii) Merger remedies must now restore competition to the level that would be observed without the transaction. It is no longer enough (as previous jurisprudence had determined[47]) that the remedies lower the harm to competition to just below the "substantial" level.

(iv) It will now be automatic for the Bureau to get an injunction to prevent the parties from going ahead with a merger once the Commissioner files an application for an interim order to block a pending transaction. The prohibition on closing will apply until the application is disposed of.

One set of changes that were probably more of a clarification, or perhaps a statement of emphasis, included an expansion to the list of factors the Tribunal "may" consider when reviewing a merger. Some of these factors are clearly directed at conditions in digital markets: (i) network effects, (ii) whether the merger would contribute to the entrenchment of the market position of leading incumbents, and (iii) any effect of the merger on price or non-price competition "including quality, choice or consumer privacy."[48] In alignment with the more structural approach taken to mergers described above, other factors were added to this section instructing the Tribunal that it may also consider

[45] Support for the view that the government simply wanted the effects on labor to be considered in merger review can be found in the "Labour Effects of Mergers" section of the report ISED released: GOVERNMENT OF CANADA, FUTURE OF CANADA'S COMPETITION POLICY CONSULTATION – WHAT WE HEARD REPORT (2023), 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#a7.

[46] There may have been a missed opportunity here to simplify the language of this section by simply ending the first paragraph of 92(1) with "in a market" and deleting (a) through (d), for example: (1) *Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may, subject to….* Specific language to make it very clear that "market" includes labor markets could be added, if deemed necessary.

[47] The important case here was *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] S.C.R. 748 (Can.).

[48] In Bill C-19, these are now S. 93 (g.1) through (g.3). Interestingly, these were all elements alleged relevant in the complaint filed in the United States by the Federal Trade Commission against Facebook. *FTC v. Facebook Inc.*, No. 1:20-cv-03590-JEB, Substituted Amended Complaint for Injunctive and Other Equitable Relief (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf. I am grateful to John Tyhurst for bringing this to my attention. Arguably, all of these factors could have been – and in some cases have been – considered on the basis of the pre-existing legislation. For non-price effects, see, for example, Andy Baziliauskas & Margaret Sanderson, *Should Canada Overhaul the SLPC Test for Mergers?*, 36 CAN. COMPETITION L. REV. 128, 145–47 (2023).

(iv) the change in market share or concentration the merger may generate and (v) the likelihood the merger will result in "express or tacit coordination between competitors in a market."[49]

Taken together, this set of amendments to the merger provisions of the Act should give the Bureau a greatly enhanced ability to challenge mergers that threaten competition. The Bureau will more easily be able to halt the progress of a transaction until its review is complete. It will benefit from structural presumptions shifting burdens of proof to the merging parties. It will not have to respond to defendants making efficiency defense claims – a process that has proven to be expensive and time consuming. And it now has support in the Act for taking strong positions on merger remedies.[50]

D. Abuse of Dominance

The amendments made to the sections related to the abuse of a dominant position are certainly important, if less dramatic (to some observers, at least) than those to merger review. Two groups of changes will be discussed here. A third significant amendment, providing for private enforcement of the abuse provisions, will be discussed in the section devoted to private enforcement more broadly.

Prior to these amendments, judicial interpretations in two important cases, *NutraSweet*[51] and *Canada Pipe*,[52] had opened a gap in the Canadian law on abuse of a dominant position. The prior rules on abuse required that the Bureau demonstrate that a defendant was in a dominant position in a relevant market, that it had engaged in a practice of anti-competitive acts (examples of such acts were listed[53]), and that the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. As a result of decisions in the *NutraSweet* and *Canada Pipe* cases, to be an anticompetitive act, a defendant's actions had to be intended to have an exclusionary, predatory or disciplinary effect on a competitor. Hence, both "intent" and "effects" were required to find an abuse[54] – and, importantly, the effects that mattered were those on competitors and not on competition – an approach that is inconsistent with modern competition economics. For example, this would remove the abuse provisions from application in cases of actions that harm competition by encouraging tacitly collusive behavior – as might happen though the adoption of facilitating practices, for example.[55] It would also risk labelling practices as "anticompetitive" if they hurt competitors but nonetheless benefited competition.

The amendments changed this significantly.[56] Anti-competitive acts are now defined to be those that are intended to have a predatory, exclusionary effect on a competitor or to have an adverse effect on competition. Thus, the definition focuses on intent and includes an intent to harm competition. A defendant can be found to have abused a dominant position now if (after it is established to be dominant) it

[49] In Bill C-59. These are in sections 93 (g.4) and (g.5) of the Act.

[50] There were some other changes to merger review not described above, including (i) some loopholes in the merger notification regime closed in Bill C-19; (ii) sales into Canada by foreign target firms now included for notification thresholds (Bill C-59); and (iii) penalties for failure to notify were established and set at $10,000 per day (Bill C-59).

[51] *Canada v. NutraSweet Co*., [1990] 32 C.P.R.3d 1 (Comp. Trib.).

[52] *Canada v. Canada Pipe Company Ltd.*, 2006 F.C.R. 233.

[53] This list included, and still includes, squeezing (by a vertically integrated supplier), vertical acquisitions that would lead to foreclosure of competitors, use of fighting brands, and adoption of product standards incompatible with products produced by competitors – in each case with an object of preventing entry or eliminating a competitor. S. 78(1).

[54] In a number of decisions, however, the Tribunal indicated that in some cases "intent" may be inferred from "effects." This was supported by the Federal Court of Appeal, for example in Canada (Commissioner of Competition) v. Toronto Real Estate Board, [2017] F.C.A. 236, ¶ 56. That decision also walked back, somewhat, the requirement that a direct competitor must be harmed, allowing for negative effects on other firms to support a finding of anticompetitive acts.

[55] On the gap opened up by these decisions, see, for example, Ralph A. Winter, *The Gap in Canadian Competition Law Following* Canada Pipe, 27 CAN. COMPETITION L. REV. 293 (2014). The classic reference on facilitating practices is Steven C. Salop, *Practices That (Credibly) Facilitate Oligopoly Coordination*, *in* NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265 (Joseph E. Stiglitz & G. Frank Mathewson, eds., 1986). These practices can, for example, include the use of "most favored customer" and "meeting competition" clauses.

[56] Some changes came in Bill C-19, the rest in Bill C-56.

engages in a practice of anti-competitive acts or conduct that is having or is likely to have the effect of substantially preventing or lessening competition.[57] Hence, an abuse can be found via intent or effects now. However, if a finding of abuse is based solely on the intent branch, the Tribunal can only order that the defendant stop taking the anti-competitive actions.[58] If a finding of abuse is based on the effects branch, the Tribunal can apply additional remedies, including even divestitures, administrative monetary penalties, and awards of compensation to victims.

The amendments also introduced two new examples of anti-competitive acts. The first was "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market."[59] This new provision is potentially problematic given that good, honest competition may require an incumbent respond strongly to an entry threat, particularly if the entrant is targeting customers of that incumbent more than customers of other firms. This addition might be less of a concern if the Bureau was a gatekeeper with respect to all abuse cases, but given that private parties may now seek leave to make applications to the Tribunal under this section, the potential for the strategic use of competition laws by firms claiming to be victims seems real.

The second addition to the list of anti-competitive acts is more striking: "directly or indirectly imposing excessive and unfair selling prices."[60] This was not an amendment the Bureau was looking for, given its potential to impose duties of price regulation that are rather inconsistent with the Bureau's broader mission. High prices may be viewed as the exploitation of market power in some cases, to be sure, but exploitation is not traditionally thought of as an abuse. Of course, a number of other jurisdictions have excessive pricing provisions so this is not totally new, but wherever such clauses exist, they test enforcement agencies' and courts' abilities to define excessive and unfair. And again, the fact that private parties may now seek leave to make an application to the Tribunal under the abuse provisions means that we cannot count on the Bureau's enforcement discretion to save us from bad cases.[61]

The placement of this provision in this list of anti-competitive acts may limit its use, however. Along the intent branch, it could be challenging to show that setting high prices showed intent to harm competitors or competition. It exploits a lack of competition and, if anything, it will typically help competitors. Similarly, along the effects branch, it is hard to see how setting high prices will often have the effect of harming competition. Possibly cases could arise if the higher prices were seen to be affecting competition downstream, perhaps through a "raising rivals' costs" mechanism – but this was not the basis of most of the recent arguments for regulations on excessive pricing. And such cases could likely have been reached through the dominance provisions as they already existed.

E. Consumer Protection

Though the amendments were largely focused on competition policy issues, the consumer protection provisions of the Act did receive some attention and respond to concerns that had arisen in recent years.

First, the practice of "drip pricing" was defined to be a misleading representation banned by both criminal and civil consumer protection

[57] However, if any lessening of competition by this conduct is merely the result of "superior competitive performance," it will not be found to be an abuse of a dominant position. S. 79(1)(b)(iii).

[58] As an abuse may now be found based on intent, without establishing effects, there is a concern that the "anti-competitive acts" in the list provided in S. 78(1) could become almost *per se* violations if the Tribunal comes to view them as "by object" type offenses.

[59] This is the new S. 78 (1)(j) introduced in Bill C-19.

[60] This is the new S. 78(1)(k) introduced in Bill C-56.

[61] As noted above, some of the pressure to reform the Act came as a result of concerns over rising prices in some markets, notably housing and groceries. The inclusion of this clause then may be viewed as a response to those concerns – though it is not at all clear the new provision will be helpful in those particular markets.

provisions.[62] As the Bureau explained in its 2022 submission to Senator Wetston's consultation, while it had been able to take successful enforcement action against drip pricing as a false or misleading representation (under S. 74.01 of the Act), the actions were made unnecessarily difficult due to the need to establish in every case why drip pricing is deceptive.[63] The Bureau then recommended the inclusion of explicit language about drip pricing.[64]

Second, new civil provisions were added to address "greenwashing" actions by firms making claims about: (i) their products' environmental benefits that are not based on an "adequate and proper test"; and/or (ii) the environmental benefits of their business or business activities that are not substantiated according to "internationally recognized methodology."[65] This amendment has not come without its critics. Claims such as those in (i) could likely have already been reached by the pre-existing general "misrepresentations" and so do not break new ground or raise particular concerns. However, some have pointed out the vagueness of the second branch (ii) and expressed concern, in particular, with its delegation of the setting of standards to some undefined "internationally recognized methodology."[66]

Third, while the substantive elements of the ordinary selling price provisions of the Act[67] – under which a seller cannot claim to be selling at a discount from an "ordinary selling price" when in fact the higher ordinary selling price is a fiction – an amendment did shift the burden to the party making the claims to show that the ordinary selling price is in fact what the seller claims it to be.[68]

F. Market Studies

Under the 1986 Act, the Commissioner had very limited powers to conduct market studies. Importantly, he or she could not compel stakeholders to cooperate by providing information or appearing to answer the Bureau's questions.[69] Many observers pointed out that this made Canada an outlier in the international competition policy community, with several advocating that stronger market study powers be given to the Bureau.[70]

The amendments did then provide for the Bureau to have formal powers to conduct market studies outside the context of an investigation into alleged illegal activity.[71] The provision allows the Commissioner, after consulting with the Minister, to conduct an inquiry into the state of competition in a market or industry, if the Commissioner believes it to be in the public interest. Importantly, the Minister can also direct the Commissioner to conduct a

[62] This was introduced in Bill C-19. Drip pricing is defined as "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province." in both S. 52(1.3) (the criminal provision) and S. 74.01(1.1) (the civil provision).

[63] Competition Bureau Canada, *Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau* (Feb. 8, 2022), at § 6.1, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

[64] *Id.* at Recommendation 6.1.

[65] Bill C-59. (i) is found in new subsection S 74.01(1) (b.1); and (ii) is found in S. 74.01(1)(b.2). On the case for actions related to greenwashing (published before these amendments), see, for example, Robin Spillette, Huy Do & Antonio Di Domenico, *Greenwashing: What It Is and Why It Matters,* 35 CAN. COMPETITION L. REV. 83 (2022).

[66] *See, e.g.*, Grant Bishop, *Ottawa's New Greenwashing Rule Infringes Freedom of Expression*, C.D. HOWE INSTITUTE (July 24, 2024). https://www.cdhowe.org/intelligence-memos/grant-bishop-ottawas-new-greenwashing-rule-infringes-freedom-expression.

[67] S. 74.01(2); S. 74.01(3).

[68] Bill C-59's revision of S.74.01(3).

[69] The power to compel participation in such studies did exist and resided with the Restrictive Trade Practices Commission until that Commission, and those powers, were removed in the 1986 Act.

[70] For example, the Bureau itself argued for formal market studies powers. COMPETITION BUREAU CANADA, *supra* note 24, at Recommendation 5.2. This argument was also advanced by former Commissioner of Competition John Pecman, *supra* note 29, at 38–39. The Organization for Economic Cooperation and Development (OECD), in its review of Canada's competition policy, pointed out how limited the Bureau's study powers were compared to other advanced competition agencies and also supported reform. *See OECD Economic Surveys: Canada 2021*, OECD, at 47 (Mar. 2021), https://www.oecd.org/en/publications/oecd-economic-surveys-canada-2021_16e4abc0-en.html.

[71] This was provided in Bill C-56 and is contained in new S. 10.1.

study, but the Minister must first consult with the Commissioner as to a study's feasibility and cost. After it has been agreed that a study will be undertaken, the Commissioner must publish draft terms of reference and invite comments from the public. After receiving these comments, the Commissioner must submit the final terms of reference for approval by the Minister.[72]

While the stronger, formal powers to conduct these studies is welcome, there are at least two potential weaknesses in the new provisions. First, the significant role for the Minister could threaten the perceived and actual independence of the Bureau. For example, should the Commissioner seek to study an industry that has an important – perhaps regulatory – relationship with other parts of the Minister's portfolio, could the Minister block the study by refusing to approve the terms of reference?[73]

Second, recognizing that many impediments to competition in Canada derive from government policies such as foreign ownership restrictions, licensing requirements and supply management programs, it would have been valuable to include a requirement that when government policies are implicated in competition problems, the relevant government actors should be compelled to respond to Bureau recommendations. This was, in fact, part of the Bureau's proposal on market studies.[74]

It has not taken the Bureau long to seize on this new authority. On May 27, 2024, it posted a draft notice for a study into the market for domestic air passenger services and on July 29, 2024, the study was officially launched after the Minister had approved the final terms of reference.[75]

G. Private Access

The various amendment bills taken together have greatly expanded the scope and potential bite of private enforcement of the Act. Many of the elements here have been referred to above, so this listing will be brief.

(i) The inclusion of wage-fixing and no-poaching agreements in the criminal price-fixing section, S. 45, means that victims of such agreements may now launch actions for damages as they have been able to for other price-fixing since 2010.[76]

(ii) With respect to harms resulting from actions contrary to the civil provisions of the Act, the bar for the Tribunal to grant leave to private parties seeking to make an application will now be lower. Since 2002 private parties have been permitted to apply to the Tribunal to make application under S. 75 (refusal to supply), S. 77 (exclusive dealing market restriction, tied selling), and, since 2009, S. 76 (resale price maintenance). The largest number of applications for leave have related to refusals to supply, but to be granted leave the plaintiff had to demonstrate that the refusal directly and substantially affected his or her entire

[72] Ministerial oversight of this sort was likely included to provide guardrails and assuage concerns that studies could become protracted and expensive "fishing expeditions."

[73] For example, this Minister has responsibility for telecommunications and broadcasting and oversees the Canadian Radio-Television Telecommunications Commission. The Minister might also experience pressure from other parts of government wanting the Minister to block the Commissioner's investigations into other areas of the economy.

[74] COMPETITION BUREAU CANADA, *supra* note 24, Recommendation 5.2, which in part says: "Wherever possible, regulators and other implicated government bodies should be required to respond to Bureau recommendations within a reasonable period of time." The Canadian Bar Association also recommended that the Minister be compelled to publish a response to the Bureau's market study report (within 60 days). CANADIAN BAR ASSOCIATION, *supra* note 28, at Recommendation 14.

[75] Competition Bureau Canada, *Competition Bureau Officially Launches Study of Competition in Canada's Airlines Industry* (July 29, 2024), https://www.canada.ca/en/competition-bureau/news/2024/07/competition-bureau-officially-launches-study-of-competition-in-canadas-airlines-industry.html. The Bureau expects to publish a report of its findings by June 30, 2025.

[76] Again, this amendment was part of Bill C-19. The right to sue for damages arising from actions or agreements violating the criminal provisions of the Act is provided for in S. 36 of the Act. Private rights to damages for price fixing in input markets existed, in principle, prior to the 2010 amendments though without the *per se* standard for determining the illegality of the agreement. The 2010 amendments removed buy-side agreements from the criminal provisions and, in so doing, removed the private right to sue for damages.

business.[77] These provisions were not frequently used, in part because demonstrating such a large effect was difficult (particularly for new or emerging competitors) – and many cases failed as a result.[78] The recent amendments addressed this, in part, by providing that the private party need only show that it has been directly and substantially affected in "whole or in part" of its business.[79] Leave may also now be granted, not because the private party has been injured, but if the Tribunal sees granting it to be in the public interest.[80]

(iii) Private access to make application to the Tribunal has also now been expanded to include matters related to abuse of dominance;[81] false and misleading claims and competitor collaborations.[82]

(iv) Remedies for private parties from the Tribunal – previously very limited – were expanded to include provisions for damages (if perhaps not in an entirely clear way). The Tribunal is now authorized, when it makes an order under the refusal to deal, resale price maintenance, exclusive dealing, tied selling, market restriction, abuse of dominance or competitor collaboration provisions, to also order the defendants to "pay an amount, not exceeding the value of the benefit derived from the conduct… to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate." [83] While many have applauded the expanded right to damages for victims of anticompetitive conduct, this disgorgement type provision lacks a certain clarity. Could this be setting the stage for class-action proceedings before the Tribunal and, if so, what rules for such actions will apply? For example, would such actions be "opt-out" or "opt-in" actions? Also, could distinct sets of victims, perhaps having suffered different harms, launch separate actions related to the same conduct? [84] Finally, until we learn more about the procedures to be applied, it is not clear that the contingency fee arrangements that have underpinned so many private class-action price-fixing damage actions will be feasible.

III. Discussion

Taken together, the set of amendments in bills C-19, C-56, and C-59 should considerably broaden the scope of antitrust enforcement in Canada and provide both public and private enforcers with more powerful means to attack anticompetitive conduct and agreements. Bringing at least the labor market buy-side into the conspiracy provisions and expanding private access are potentially both big wins for enforcement. The added market study powers could provide the Bureau with the tools to expose any number of barriers to competition, particularly those introduced by other government policies. They could also be useful as the Bureau – like competition agencies around the world – tries to understand and manage the challenges posed by the recently emerged tech titans.

The changes to merger review – though less obviously positive from a market efficiency standpoint – should certainly make it easier for

[77] *See, e.g.*, James Musgrove, *Deal Me Out: Clarifying the Leave Test for Leave in Competition Act Refusal to Deal Cases*, MCMILLAN INSIGHTS (Jan. 2016), https://mcmillan.ca/insights/deal-me-out-clarifying-the-test-for-leave-in-competition-act-refusal-to-deal-cases.

[78] See TYHURST, *supra* note 4, at 62.

[79] This was introduced in Bill C-59. It is the new S. 103.1(7).

[80] A party applying to the Tribunal using public interest arguments does not have to have been itself hurt by the (alleged) anticompetitive actions, opening the door to applications from pubic interest organizations, for example consumer groups.

[81] In Bill C-19.

[82] In Bill C-59.

[83] This is from new subsections S. 75 (1.2), S. 76 (11.1), S. 77 (3.1), S. 79 (4.1), and S. 90.1 (10.1).

[84] For more on concerns related to how this remedy might work and the need for more clarity, see *The Dramatic Expansion of Private Enforcement of Canada's Competition Laws*, OSLER (June 28, 2024), https://www.osler.com/en/insights/reports/the-dramatic-expansion-of-private-enforcement-of-canadas-competition-laws.

the Bureau to block mergers it sees as threatening a substantial lessening or prevention of competition. It is unfortunate that merger efficiencies have been completely written out of the statute, but we can hope that consideration of efficiencies will nonetheless make its way into merger review, as has been suggested by both the Minister and the Commissioner.

While it is unfortunate that excessive and unfair pricing made its way into the Act as an example of an abuse of dominance, we might expect the provision to be little used – particularly by the Bureau, which did not ask for the change. Finally, while the boost to private enforcement brought by the various amendments could be substantial, much will depend on how the judicial system interprets and manages the new disgorgement authorities granted.

A. What Was Not Done?

While the changes are remarkable in their coverage, there were areas of potential reform – in some cases with strong supporters – that were not touched. For example, there were no changes to the fundamental institutions of competition policy in the country. Calls to provide the Bureau with greater independence from the rest of government were not heeded.[85] Similarly, commentary suggesting that the current Bureau and Tribunal model is not working very well did not provoke any change either.[86]

Though there had been some call for the law to embrace a wider set of objectives beyond simply competition (or efficiency), new objectives were not added to the law. However, for sectors that some felt needed more attention, there was some paid: labor gets more attention in price fixing and mergers, the tech sector is recognized through the inclusion of new factors in merger and collaborator agreement sections, and environmental concerns make an appearance through greenwashing provisions and environmental certificates.

Another idea that was not taken up was to create a civil branch for *per se* agreements between competitors. Currently, if firms engage in classic collusive strategies the only law that applies are the criminal provisions. While providing the threat of severe punishments for those convicted, they do also require a higher standard of proof. In some cases, however, there might be advantages to allowing the Bureau to pursue a price-fixing matter on a civil basis, as can be done in many other countries.[87] This could be particularly helpful when establishing the existence of an anticompetitive "agreement" to the criminal standard might be challenging even if it is reasonable to infer the existence of such an agreement. Some information sharing cases might fall into this category, for example, as might cases involving collusion via algorithms. With slightly expanded language, it could also serve as a mechanism for reaching anticompetitive "concerted practices" which are covered similarly to agreements in some other countries' laws, but not in the Act. A civil approach might be more suitable with small and relatively unsophisticated defendants, as well. Finally, given that the Commissioner cedes authority for criminal prosecutions to the Director of Public Prosecutions, and that the two officers may not always agree on enforcement priorities, allowing the Commissioner to proceed on a non-criminal

[85] For example, some have noted that it is not appropriate for the Bureau to be housed in the same government department that regulates some industries and provides subsidies to others. See, for example, Pecman, *supra* note 29, at 31–37, who suggests some alternative models to provide the Bureau with more independence and autonomy.

[86] *See, e.g.*, Michael Trebilcock & Francesco Ducci, *The Evolution of Canadian Competition Policy: A Retrospective*, 60 CAN. BUSINESS L.J. 171 (2018), particularly at Section IV.

[87] These countries include, for example, the United States, Australia, New Zealand, the United Kingdom, Japan, South Korea, and Chile. *See* Thomas W. Ross, *Proposals for Amending the Competition Act*, 35 CAN. COMPETITION L. REV. 1, 9 (2022).

basis allows him or her to fight for competition and develop case law.[88, 89]

IV. Looking Ahead

Competition policy in Canada has gone through an exciting period of consultation, debate, and reform. It cannot be denied that the resulting changes are truly substantial. We now enter an implementation phase, which will involve the Bureau exercising its new powers and, importantly, private plaintiffs testing theirs. Perhaps the two biggest unknowns to be faced in the coming period will be how efficiencies will be treated in merger review and how the Tribunal will deal with private claims for compensation for competition harms. New guidelines will help inform us on the Bureau's approach to the former, and we can hope that the Tribunal will receive some cases so that it may issue some guidance of its own on the latter.[90]

Looking beyond the revised Act and its enforcement, there are calls for a broader examination of competition across the Canadian economy: the so-called "holistic approach" to competition. This would explore a number of impediments to competition arising from government policies that are untouchable under the existing Act, for example: interprovincial barriers to trade, foreign ownership restrictions in many industries, supply management programs and state-owned companies that dominate a number of markets.[91] This is likely the next big step competition policy will need to take in Canada.

[88] On this proposal, see Ross 2022b, supra note 5, at 9-11 and Pecman, *supra* note 29, at 40-41. In fact, private parties do have the right to launch civil actions for damages against firms they accuse of price-fixing (under S. 36), however unless they can rely on a prior conviction or guilty plea, they carry the burden of investigating and proving the illegal conduct.

[89] An additional idea not taken up – also related to price fixing – would be to add a (likely criminal) provision on "attempts" to collude. Currently, the sections on agreements between competitors (S. 45 and S. 90.1) apply only once an agreement has been reached – efforts by one firm to organize competitors into a cartel, if unsuccessful, are not reachable.

[90] We can expect new guidelines from the Bureau in many areas including merger review, competitor collaborations (which are now not just between competitors), and abuse of a dominant position. The Bureau has already issued new guidelines related to the amendments on wage-fixing and no poaching. Competition Bureau Canada, *Enforcement Guidelines on Wage-Fixing and No-Poaching Agreements* (May 30, 2023), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements.

[91] *See, e.g.*, John Pecman, Huy Do & Robin Spillette, Amendments to the Competition Act Only One Step Towards a Truly Competitive Economy, *in* COMPETITION POLICY INTERNATIONAL, ANTITRUST CHRONICLE: CANADA AND MEXICO (Sept. 3, 2024).