READY FOR CHANGE? BILL C-59 REWRITES THE COMPETITION PLAYBOOK

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Categories: Insights, Publications

On June 20, 2024, the Canadian federal government enacted Bill C-59,[1] the third transformative piece of competition law reform in the last two years.[2] These laws have significantly transformed the merger review, abuse of dominance, non-merger collaboration and deceptive marketing sections of the *Competition Act*, added new rules relating to market studies and altered certain procedural rules under the *Competition Tribunal Act*.

We summarize the changes below and, for those amendments not yet in effect, we note when they will come into force. In a series of bulletins to come, we plan to outline how these changes can affect your business in the future.

- ***Significant Changes to Canada's Merger Review Regime*** **(in force except as noted)**
  - The *Competition Act* allows companies to merge some or all of their operations unless their merger faces opposition before the Competition Tribunal. While the legal standard for challenging a merger remains unchanged, the law now provides that mergers that increase market shares or market concentration above designated levels will be presumed to prevent or lessen competition substantially – contrary to the *Competition Act*. These presumptions are triggered when (a) the concentration index (which is defined to mirror the definition of the Herfindahl-Hirschman Index (HHI) used by US and other international antitrust authorities)[3] increases (or is likely to increase) by more than 100; and (b) either the HHI is (or is likely to be) over 1,800, or the market share of the merging parties is (or is likely to be) over 30%. The burden then shifts to the merging parties to show why the merger is unlikely to prevent or lessen competition substantially. This change applies to any merger not yet notified to the Competition Bureau or not yet completed by June 20, 2024.
  - For mergers going forward, if the Competition Tribunal finds that the merger is likely to prevent or lessen competition substantially, the Tribunal may make an order restoring competition to pre-merger levels as opposed to reducing the impact so that it is no longer "substantially" impacting competition.
  - Since December 15, 2023, merging parties can no longer rely on the efficiencies defence.

- Mergers not formally notified to the Bureau by June 20, 2024 can be challenged for up to three years after closing instead of the previous one-year limitation period.
- The Competition Tribunal must now account for new factors in its merger assessment including the impact on labour.
- Where the Tribunal is considering an application for an interim injunction to prevent closing, merging parties may no longer close their mergers until the Tribunal disposes of the application.
- The target-size threshold for merger notification now includes sales into Canada, where previously only sales from and in Canada were included. This threshold is currently set at $93 million. This change will increase the number of mergers subject to mandatory notification.

- ***Expansion of Scope of Abuse of Dominance*** **(in force except as noted)**
  - Dominant companies (or jointly dominant companies) now face possible prohibition orders if they engage in conduct that is anti-competitive or if their conduct is likely to prevent or lessen competition substantially. Remedies beyond prohibition orders (including alternative orders needed to restore competition, administrative monetary penalties and monetary awards to persons affected) will continue to require, in addition to dominance, that the dominant firm(s) engaged in both a practice of anti-competitive acts (intent) and that the conduct results in a substantial prevention or lessening of competition (effects).
  - This conduct now includes selling goods or services at excessive and unfair selling prices.
  - Bill C-19, the earlier *Competition Act* amending bill that received royal assent on June 23, 2022, already made a number of significant changes to the *Act*'s abuse of dominance regime:
    - The definition of "anti-competitive act" was updated to include "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Previous to that change, case law had held that a practice of anti-competitive acts included acts intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, but the inclusion of acts intended to have an adverse effect on competition expanded the scope of activities that meet this definition.
    - The non-exhaustive list of "anti-competitive acts" was updated to include a "selective or discriminatory response" to a competitor for the purpose of impeding or preventing market entry, or for the purpose of eliminating a competitor from the market.
    - New potential maximum values of administrative monetary penalties were added. Historically, the maximum penalty was $10 million for the first offence and $15 million for subsequent offences. Bill C-119 introduced a new alternative maximum penalty threshold of three times the financial benefit derived from the conduct in question or up to 3% of annual worldwide gross revenues if the Tribunal cannot reasonably determine the value of the

financial benefit.
    - Private parties were granted the ability to commence abuse of dominance proceedings before the Competition Tribunal, but to obtain leave they needed to demonstrate that they are directly and substantially affected by the abuse of dominance and no compensation could be ordered for the benefit of such parties.[4]
    - In determining whether a practice of anti-competitive acts is preventing or lessening competition substantially, the Tribunal may consider:
        - the effect of the practice on barriers to entry in the market, including network effects;
        - the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;
        - the nature and extent of change and innovation in a relevant market; and
        - any other factor that is relevant to competition in the market that is or would be affected by the practice.
  - Following Bill C-19, the maximum administrative monetary penalty for an abuse of dominance was the greater of either (a) $10 million for a first violation or $15 million for subsequent offences or (b) up to three times the value of the benefit derived from the anti-competitive practice or up to 3% of annual worldwide gross revenues if the Tribunal cannot reasonably determine the value of the financial benefit. The penalties under branch (a) have been increased to $25 million for a first violation and up to $35 million for subsequent offences.
  - If a firm is found to have abused its dominant position, the Tribunal may grant monetary awards to persons affected in an amount not exceeding the value of the benefit derived by the dominant firm (i.e., disgorgement) (in force on June 20, 2025).

- ***Expansion of Scope of Anti-Competitive Agreements (Section 90.1)*** **(in force except as noted)**
  - The prohibition against anti-competitive agreements not covered by the criminal provision (section 45) is no longer restricted to agreements between competitors. Section 90.1 now applies to agreements even if the parties are not competitors, as long as a "significant purpose" of the agreement or a part of the agreement is to prevent or lessen competition substantially (in force on December 15, 2024).
  - The Tribunal may also order the parties to take any actions that are reasonable and necessary to restore competition.
  - Violations may also result in administrative monetary penalties of up to $10 million for initial orders and $15 million for subsequent orders, or three times the financial benefit derived from the conduct in question or up to 3% of annual worldwide gross revenues if the Tribunal cannot reasonably determine the value of the financial benefit.

- As with abuse of dominance, private parties will be able to bring claims and seek similar relief (in force on June 20, 2025).

- ***New Market Studies Power*** **(in force)**
  - Starting last year, the Commissioner or the Minister of Innovation, Science and Industry obtained the power to conduct market studies. With that power, the Commissioner can apply for court orders requiring the production of records by market participants.
  - The Commissioner recently launched the first market study conducted under this new regime of the airline industry. The terms of reference are expected to be released shortly.[5]

- ***Expansion of Private Party Claims*** **(effective on June 20, 2025)**
  - Private parties are now able to apply for leave to challenge anti-competitive agreements pursuant to section 90.1 and to challenge deceptive marketing practices pursuant to section 74.1. Previously, private party challenges were not available for these two provisions. As noted above, private parties were given the right to challenge abuse of dominance in 2022; in 2023 the first such application was filed.[6]
  - Bill C-59 relaxes the leave test for private parties for most applications regarding reviewable practices. Private parties challenging refusal to deal, price maintenance, exclusive dealings, tied selling, market restriction, abuse of dominance and anti-competitive agreements will be able to obtain leave by showing either that (i) their business is directly or substantially affected in whole *or* in part; or (ii) the Tribunal is satisfied that it is in the public interest to grant leave. The *Act* currently requires private parties to demonstrate that their entire business is impacted, which has often proven challenging, and does not include a public interest benefit.
  - Private parties seeking leave from the Tribunal to bring a claim for deceptive marketing practices will be required to show that granting such leave is in the public interest.
  - As noted above, the Tribunal may also grant monetary awards to private parties – or others affected – in an amount not exceeding the value of the benefit derived from the conduct (i.e., disgorgement).

- ***Updates to the Prohibition on Drip Pricing*** **(in force)**
  - In 2022, the *Act* was amended to introduce a provision that deemed drip pricing to constitute a false or misleading representation unless such charges or fees represented amounts imposed by or under an Act of Parliament of the legislature of a province. Bill C-59 amended the drip pricing provision slightly, by narrowing the exception to specify that only fees directly imposed on purchasers of the product at issue by federal or provincial laws (e.g., sales taxes) are exempt from the drip pricing provisions. In other words, the amendments clarified that suppliers cannot pass on

charges or fees they had to pay to the government that were not directly related to the sale itself.
    - Bill C-59 also deems drip pricing in electronic messages to be false or misleading.

- ***Misleading Environmental Representations*** **(in force)**
    - Any claims regarding a product's benefits for "protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" must be validated by adequate and proper testing.
    - Representations to the public about the environmental benefits of a business or its activities must be "based on adequate and proper substantiation in accordance with *internationally* recognized methodology."

- ***Increased Penalties for Violating Consent Agreements*** **(in force except as noted)**
    - Parties failing to comply with consent agreements may be fined up to $10,000 per day of non-compliance.
    - Similar penalties will apply to violations involving third-party consent agreements (effective on June 20, 2025).

- ***Right to Repair*** **(in force)**
    - Bill C-59 expands the refusal to deal provision to include instances where a party refuses to diagnose a repair, which refusal is likely to have an adverse effect on competition in the market.
    - The Competition Tribunal has the authority to order a supplier "to make the means of diagnosis or repair available to a person, within a specified period and on the terms the Tribunal considers appropriate."

- ***New Environmental Certification Program*** **(in force)**
    - The amendments contain a voluntary certification process for agreements related to environmental protection. Through this process, private parties can apply for a certificate from the Commissioner. In reviewing such requests, the Commissioner can issue a certificate confirming that a proposed collaboration is for the purpose of protecting the environment and is not likely to prevent or lessen competition substantially, which exempts the collaboration from scrutiny under several (but not all) provisions of the *Competition Act* for ten years and any subsequent renewals.
    - Once certified, private parties or the Commissioner cannot challenge the agreement under the *Act*'s criminal or civil competitor collaboration provisions (i.e., sections 45-47, 49, and 90.1). However, section 79, the abuse of dominance provision, is excluded, meaning that these arrangements may still be challenged as a joint abuse of dominance between firms by the Commissioner or by private parties.

- ***Prohibition Against Reprisal Actions*** **(in force)**
  - The amendments include a prohibition on reprisal actions, which refers to actions taken to "penalize, punish, discipline, harass, or disadvantage" persons for their cooperation with the Bureau during an investigation or proceeding.
  - In addition to prohibition orders, administrative monetary penalties may be ordered against those found to be engaged in reprisal actions, of up to $750,000 for a first reprisal and up to $1,000,000 for a subsequent reprisal in the case of individuals and up to $10,000,000 for a first reprisal and up to $15,000,000 for a subsequent reprisal in the case of corporations.

- ***Limited Costs Awards Against the Commissioner*** **(in force except as noted)**
  - The *Competition Tribunal Act* has been amended to prohibit the Tribunal from awarding costs against the Commissioner unless (i) such an award is necessary to maintain confidence in the administration of justice, or (ii) the absence of a cost award would substantially affect the other party's ability to carry on business. This change applies to any proceedings not yet before the Tribunal as of June 20, 2024.

We will continue to provide updates regarding Canada's changing competition law landscape. Please reach out to McMillan's Competition and Antitrust Group if you have any questions about the *Competition Act*.

By: McMillan's Competition and Antitrust Group[7]

[1] *The Fall Economic Statement Implementation Act (2023).*
[2] Please see our prior bulletins discussing these amendments: McMillan LLP, Significant Changes Coming to Canada's Competition Act (May 3, 2022); McMillan LLP, Competition Act Amendments Introduce New Criminal Offence Against Wage Fixing and No Poach Agreements (May 3, 2022); McMillan LLP, Round One of Competition Act Amendments Passed; National Security Review Regime Amended (June 27, 2022); McMillan LLP, Competition Act Amendments on a Rocket Docket (September 26, 2023); McMillan LLP, Transformative Change: Your Guide to Canada's Breathtaking Competition Act Changes (December 5, 2023); McMillan LLP, Competition Act Amendments Proceed at Pace (December 27, 2023); McMillan LLP, Storm Clouds Looming the Impact of Competition Act Changes on Leasing (March 4, 2024).
[3] In any relevant market, the "concentration index" refers to the "sum of the squares of the market shares of the suppliers or customers". This corresponds with the US DOJ's definition of HHI as "calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers."
[4] See *Apotex Inc. v. Paladin Labs Inc., Endo Pharmaceuticals Inc., Takeda Canada Inc., and Takeda Pharmaceuticals U.S.A. Inc.*, CT-2023-007 (September 29, 2023).
[5] Competition Bureau Canada, Draft Market Study Notice: Competition in Canada's Airline Industry (May 27,

2024).

[6] See *Apotex Inc. v. Paladin Labs Inc., Endo Pharmaceuticals Inc., Takeda Canada Inc., and Takeda Pharmaceuticals U.S.A. Inc.*, CT-2023-007 (September 29, 2023).

[7] McMillan's Competition & Antitrust Group thanks Mikayla Castagna (Summer Student) for her contributions to this bulletin.