TRANSFORMATIVE CHANGE: YOUR GUIDE TO CANADA'S BREATHTAKING *COMPETITION ACT* CHANGES

Posted on December 5, 2023

Categories: Insights, Publications

Competition and antitrust law the world over appears to be in a period of transformation — but Canada is now a serious contender for the most statutory change in the shortest period of time. Just as it is hard to tell the players without a program, it is hard to keep up with the latest amendments, so we are providing a summary of how the 2022 amendments to the *Competition Act* are being eclipsed by amendments introduced to Bill C-56 and a massive further package introduced in Bill C-59, the *Fall Economic Statement Implementation Act, 2023*.[1] While we apologize for giving away the conclusion up front, in our view many of these amendments are ill-considered, and are likely to pose significant challenges for Canadian businesses and the Canadian economy. We also apologize for the unusual length of this bulletin – but there is a lot going on at the moment, as Taylor Swift might say. The **bolded text** may help readers focus on issues of greatest interest.

I. 2022 Amendments

Bill C-19, Canada's 2022 budget implementation statute, made four significant changes to Act, all of which are now in force:

1. It introduced a new provision deeming "**drip pricing**" to constitute a false or misleading representation;
2. It allowed persons directly and substantially affected to seek leave to bring a **private abuse of dominance proceeding** before the Competition Tribunal;
3. It expanded the substantive test for abuse of dominance by revising the definition of "anti-competitive act" to mean an act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or intended to have an **adverse effect on competition**; and
4. It introduced a new criminal prohibition on **no-poach and wage-fixing agreements** between employers (even if they are not competitors in the products or services that they offer).[2]

II. Bill C-56 – The Grocery Prices Bill

On September 21, 2023, as a stated response to grocery price inflation, the Government of Canada introduced Bill C-56 and simultaneously summoned the heads of Canada's five largest grocery retailers to Ottawa for a pre-Thanksgiving dressing down.[3] In addition to using the Ottawa meetings to extract undertakings from the

executives to "do something" about grocery prices[4], the Government introduced Bill C-56 containing three substantive amendments to the Act:

1. It would create a framework for **market studies** and gives the Competition Bureau compulsory evidence-gathering powers;
2. It would repeal the **mergers efficiencies defence**; and
3. It would amend **section 90.1 of the Act** — the non-criminal provision governing competitor agreements — to include agreements and arrangements that are not between competitors where a "significant purpose" is to prevent or lessen competition substantially.[5]

On November 30, 2023, the Finance Committee finished considering Bill C-56 and issued its report, recommending a number of additional amendments:

1. **Exploitative Abuse:** The list of anti-competitive acts in the abuse of dominance provision will be expanded to include directly or indirectly imposing "excessive and unfair selling prices".

2. **More Routes to Abuse of Dominance:** The current abuse of dominance test requires both a finding of "a practice of anti-competitive acts" (essentially referring to acts with anti-competitive intent)[6] and a finding of an effect or likely effect of "substantial prevention or lessening of competition". The proposed changes to Bill C-56 will make either intent or effects sufficient. Both tests continue to require a finding that one or more persons "substantially or completely control" a market (typically requiring at least 50% market share for one person or at least 65% market share for multiple persons). In addition, the new proposed provision requires one of the following:

    a. The first new test will require an additional finding that the person or persons have engaged in a "practice of anti-competitive acts". This differs from the current provision because it no longer requires a finding that the practice has prevented or lessened competition substantially;

    b. The second, alternate, new test will require a finding that the persons or persons have engaged in conduct that (i) is having the effect (or likely to have the effect) of substantial prevention or lessening of competition in a market in which such person or persons have a plausible competitive interest; and (ii) that the anti-competitive effect is not the result of superior competitive performance. This differs from the current provision in that it no longer requires a finding that the person or persons have engaged in "a practice of anti-competitive acts".

3. **Increased Fines for Abuse of Dominance:** The potential administrative monetary penalties for abuse of dominance will be increased to C$25 million in the first instance and up to C$35 million for subsequent orders. In addition, the Tribunal will retain its ability to issue an administrative monetary penalty of up to

three times the value of the benefit derived from the anti-competitive practice, or if that cannot be determined, 3% of the person's annual worldwide revenue, where that exceeds the C$25M or C$35M amount.[7]

4. **Commissioner Can Commence Market Studies:** Bill C-56 envisioned market studies being launched solely by the Minister of Industry. The Committee's amendments would allow for either the Minister or the Commissioner of Competition to launch such studies.

5. **Efficiency Defence for Section 90.1:** While Bill C-56 focused on the repeal of the efficiency defense for mergers, the Committee proposes to also remove the virtually identical efficiencies defence from the section 90.1 civil provision.

Except as noted,[8] these amendments will come into force once Bill C-56 receives royal assent. This could occur soon since it is expected to be approved by the House of Commons and sent to the Senate in December.

III. Bill C-59 – The Fall Economic Statement Implementation Act, 2023

That whirlwind summary of recent statutory amendments brings us to the main attraction of this update, the *Fall Economic Statement Implementation Act*, 2023, brought forward as Bill C-59 on November 30, 2023. Bill C-59 contains 30 pages of amendments to the Act, some of which will be pivotal and transformative. Our goal in this bulletin is to provide a high-level catalogue of the most notable amendments.

1) Civil Anti-Competitive Agreements and Arrangements: Administrative Monetary Penalties, Payments to those "Injured" and Structural Remedies will be Available

Bill C-59 will allow the imposition of administrative monetary penalties as a potential remedy for agreements and arrangements that contravene section 90.1 of the Act (in addition to the primary remedy of a prohibition order). Where the Tribunal finds that two or more persons have entered into an anti-competitive agreement or arrangement that substantially prevents or lessens competition, the Tribunal may order that the parties to the agreement/arrangement pay an administrative monetary penalty in an amount not exceeding the greater of:

i. C$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding C$15,000,000; and
ii. three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Additionally, two new statutory remedies have been added to section 90.1 by Bill C□59. First, as discussed in more detail below, the Tribunal will now have the ability to order parties found to have engaged in anti-competitive conduct to **pay an amount, not exceeding the value of the benefit derived from the conduct,**

to be distributed to a private applicant together with any other person who was adversely affected by the conduct, in any manner that the Tribunal considers appropriate. While this does not precisely mimic class action procedures, it may prove to be similar in practical respects. Second, if the Tribunal believes that an order not to implement the agreement will not be sufficient to restore competition to the market, the Tribunal may order, in addition or in place of any order not to implement the agreement, that **the parties take any actions that are reasonable and necessary to restore competition**, which could include divesting assets or shares.

With the expanded remedies available for sections 78/79 and 90.1 in the Bill C-59 amendments and in light of the Bureau's recent updated guidance on how it plans to enforce the 2022 expansion to the abuse of dominance provisions, the Bureau and private parties will have three options for challenging alleged anti-competitive agreements between competitors, and potentially two options to challenge agreements between persons who are not competitors. All these options carry with them the possibility not only of cease and desist orders, but also very substantial administrative monetary penalties and damages/compensation payments.

- First, the Bureau will typically challenge price-fixing, bid-rigging and other cartel-like conduct under the criminal conspiracy and bid-rigging provisions (sections 45 and 47), and private parties can bring individual claims and class actions to recover damages incurred.
- Second, for agreements and arrangements that do not represent naked restraints on competition, the Bureau, and private parties, may elect to challenge the conduct under the modified abuse of dominance provisions (sections 78-79). Administrative monetary penalties and compensation to those adversely affected will be available.
- Third, anti-competitive actions may also be challenged under the newly amended anti-competitive agreements provision (section 90.1). Private parties will be able to seek leave to bring a proceeding. Again, available remedies will include administrative monetary penalties and compensation to those adversely affected.

2) Updates to the Merger Review Regime

a) Increased Relevance of Structural Issues – Market Shares and Concentration

The merger provisions enacted in 1986 prevented the Tribunal from making a finding that a merger prevents or lessens competition substantially "solely on the basis of" evidence of concentration levels or market shares. This represented an explicit rejection of structuralist economic thinking. The Bill C-59 amendments will repeal that provision, and for greater clarity add that the Tribunal may specifically consider the effects of changes in concentration or market shares caused by a merger when determining whether a merger substantially prevents or lessens competition.

Similarly, the Bill C-59 amendments explicitly add that the Tribunal can consider whether a merger is likely to result in express or tacit coordination between competitors when determining whether a merger substantially prevents or lessens competition.

b) More Mergers will Require Notification under the Act

Bill C-59 proposes two major changes that will increase the number of mergers subject to mandatory notification.

The most significant change is the **addition of "sales into Canada" as part of the calculation of the "size of target" monetary threshold** for merger reviews under the Act. This change may result in filings being triggered where a foreign target business makes significant exports to Canada. We note that the operating business in Canada requirement is retained, meaning that the target must still have a business on the ground in Canada, and consequently sales into Canada alone will not be sufficient to trigger filings. The approach of counting all sales to Canadian customers is consistent with the predominant international practice for measuring revenues, but the asymmetric requirement that export sales from Canada also be counted has not been removed from the Act.

Second, the updated notification rules now require the **aggregation of assets or revenues when a single transaction involves both a share acquisition and an asset acquisition component**. Under the existing rules, such aggregation was not required, meaning that some transactions could be structured to avoid mandatory notification.

c) Extended Review Period for Mergers Not Notified to the Bureau

The Commissioner currently may challenge any merger prior to closing or within one year following closing. Bill C-59 revises this limitation period in respect of any mergers that are not formally notified to the Bureau. While the Commissioner will still only have one year post-closing to challenge mergers where the Bureau received either the formal statutory filings or a request for an advance ruling certificate, all other **mergers will be challengeable up to three years after closing**.

d) Injunction Applications Stop Mergers from Closing until the Injunction is Heard

Bill C-59 will put an end to midnight closings in the face of injunctions. It provides that merging parties will not be permitted to close their merger in the face of a pending injunction application by the Commissioner until the Tribunal issues its ruling on the requested injunction.[9]

e) Expanded Role of Labour in Analyzing Mergers

Bill C-59 explicitly expands the scope of merger reviews to include labour considerations. In particular, the

amendments require the Tribunal (and hence, the Bureau, as part of is assessment of a merger) to consider whether a merger or proposed merger is likely to substantially prevent or lessen competition in labour markets.

3) Expansion of Private Party Claims

a) Availability of "Disgorgement Payments"

Currently, even where private parties may apply for leave from the Tribunal to challenge reviewable practices, there is no ability to obtain compensation from the party engaged in the reviewable practice.

Bill C-59 will grant the Tribunal the authority to order the party engaging in anti-competitive conduct to **pay an amount not exceeding the value of the benefit derived from the conduct. The amount is to be distributed to the party who initiated the proceeding, along with any other persons who were adversely affected by the conduct**, in any manner that the Tribunal considers appropriate.[10] This is a sea-change, and together with lower hurdles to obtain leave to initiate a private Tribunal proceeding, the expanded list of reviewable practices that could be subject to private challenges, and the easier test for proving abuse of dominance under the revised Bill C-56, has the potential to privatize substantial portions of Canadian competition law enforcement, and make a much broader set of conduct challengeable, by government as well as private parties. This is likely to have significant effects on business conduct.

b) Expanded Scope of Conduct that Private Parties can Challenge

The Act currently permits private parties to sue for damages (including via class actions) for breaches of the criminal provisions of the Act, and to apply for leave to bring applications before the Tribunal (without the possibility of monetary compensation) for various reviewable practices, including refusals to deal, price maintenance, exclusive dealing, tied selling, market restriction and abuse of dominance.

Bill C-59 will allow private parties to seek leave in respect of two additional types of anticompetitive conduct: civil deceptive marketing practices (section 74.1)[11] and anti-competitive agreements (section 90.1).

c) Increased Ease for Private Parties to Bring Tribunal Proceedings

Currently, private parties seeking leave to bring an application must demonstrate that they are "directly and substantially affected" in their business by the practice being challenged. Bill C-59 will significantly lower the test for granting leave in two ways. For the majority of applications for reviewable practices (sections 75, 77, 79, and 90.1), applicants will be able to obtain leave by showing either that:

i. they are directly and substantially affected in "the whole **or part** of" their business by the conduct; or
ii. they are able to satisfy the Tribunal that it is in the **public interest** to grant leave.

Under the first prong, multi-line businesses may now be able to avail themselves of these remedies if only part of their overall business is substantially affected. Under the second prong, an applicant could make a public interest case as to why leave should be granted. This public interest ground does not require the private party to have been affected by the alleged conduct, **which may facilitate public interest organizations challenging allegedly anti-competitive conduct before the Tribunal**.

For applications based on civil deceptive marketing practices (section 74.1), only the second prong applies. Being directly or substantially affected will not be a basis for private parties to be granted leave to challenge civil deceptive marketing practices. The applicant must convince the Tribunal that it is in the public interest.

d) Reduced Standard Regarding Refusals to Deal

In addition to making it easier for private parties to challenge refusals to deal by relaxing the leave test, the substantive test for refusals to deal has also been expanded. Specifically, prior to Bill C-59, to make out a refusal to deal case, the Commissioner or a person granted leave would have to show that a person's business has been substantially affected by the alleged refusal to deal. The proposed amendments will allow refusal to deal cases to be made out when the "whole or part" of a person's business is substantially affected by the alleged conduct.

4) Other Significant Amendments

a) Access to Repair and Diagnostic Services

Bill C-59 will expand the refusal to deal provision (section 75) to include the refusal by a party to diagnose or repair. Such conduct may be challenged by the Commissioner or by a person harmed by the refusal. If such a case is made out, the Tribunal may order a supplier to provide the means to diagnose or repair a product. In the Government's Fall Economic Statement, this amendment was described as being added in "support of Canadians' right to repair", although, on its own, these changes do not introduce a general right to repair into Canadian federal law.[12]

b) Greenwashing

Bill C-59 will add a new civil misleading advertising provision relating to misleading environmental claims. Where a representation to the public about a product's benefits in protecting the environment or a product's effects on mitigating environmental or ecological damage caused by climate change is not based on adequate and proper testing, it can be challenged in the same way that other civil misleading performance claims can be challenged. This mimics the existing requirement that performance claims be based on an adequate and proper test.

c) Environmental Certification Program

Bill C-59 will empower the Commissioner to issue certificates declaring that an agreement or arrangement which is for the purpose of protecting the environment is not likely to prevent or lessen competition substantially. Such certificates will be valid for a term that is not to exceed 10 years, which can be extended for up to one additional period of up to 10 years. An agreement or arrangement that has received an environmental certificate cannot be challenged by the Commissioner or private parties under sections 45-47, 49 or 90.1 of the Act. However, unless there are further revisions to the proposed amendments, it would appear that such an agreement or arrangement would be open to challenge under the abuse of dominance provisions (sections 78-79).

d) Increased Penalties for Violating Consent Agreements

Bill C-59 will provide the Tribunal with the authority to issue administrative monetary penalties of amounts not exceeding C$10,000 per day against parties who fail to comply with a consent agreement for each day in which a consent agreement is violated, including for consent agreements in force prior to Bill C-59. This is in addition to the Tribunal's inherent contempt powers that are available when an order of the Tribunal is breached.

e) Limited Cost Awards Against the Commissioner

Bill C-59 will prevent the Tribunal from awarding costs against the Commissioner unless the Tribunal is satisfied either that:

i. a costs award is necessary to maintain confidence in the administration of justice; or
ii. the absence of a costs award would have a substantial adverse effect on the other party's ability to carry on business. [13]

f) Prohibition against "Reprisal Actions"

Section 66.2 of the Act is a whistleblower protection provision that protects employees from employers who might seek to dismiss, suspend, demote, discipline, harass or otherwise disadvantage them or who might deny them employment benefits in response to employees either reporting potential anti-competitive conduct to the Competition Bureau or refusing to take actions that contravene the Act.

Bill C-59 extends potential whistleblower protections and introduces the concept of a "reprisal action", which is an action taken by a person to punish, discipline, harass or disadvantage another person because of that other person's communications with the Commissioner or because of that other person has testified, assisted, or cooperated with the Commissioner or has expressed an intention to do so. Reprisal actions could be taken against employees or against any other person.

The Commissioner or a person substantially affected by an alleged reprisal action may apply to a court for an order against a person alleged to have taken a reprisal action. If the court finds that there has been a reprisal action, the court can order the payment of an administrative monetary penalty of up to C$750,000 against an individual (or up to C$1,000,000 for subsequent offences) and up to C$10,000,000 against a corporation (or up to C$15,000,000 for subsequent offences).

IV. When in Force?

Except as noted,[14] the Bill C-59 amendments discussed above will come into force upon the Bill's receipt of royal assent. Given that these amendments form part of an omnibus bill containing measures proposed in the Fall Economic Statement, it is anticipated that Bill C-59 will likely receive royal assent early in 2024.

V. Conclusion

The Bill C-59 amendments, when considered in combination with the Bill C-56 amendments and the 2022 amendments in Bill C-19, represent massive changes to Canada's competition law regime — far and away the most significant changes since the "Stage Two Amendments" in 1986. We expect it may take years for the implications of these amendments to be fully realized.

Please reach out to McMillan's Competition and Antitrust Group for any questions about proposed changes to Canada's competition law regime and to discuss any other questions you may have about competition law in Canada.

[1] The proposed *Competition Act* amendments are found at Division 6 of Bill C-59.
[2] Bill C-19 made several other less consequential changes. For a more complete description of the Bill C-19 amendments, see our bulletin of June 27, 2022, available here.
[3] Each of the minority federal Conservative party and the minority New Democratic Party of Canada (NDP) also introduced proposed amendments to the *Competition Act* in 2023 via private members bills, though neither are likely to pass given subsequent events:
· Bill C-339, brought forward on June 8, 2023 by the minority federal Conservative party, proposed the repeal of the efficiencies defence in merger reviews.
· Much of the ambitious substance of Bill C-352, which was introduced by the minority federal NDP on September 18, 2023, has been subsumed in the *Fall Economic Statement Implementation Act*, 2023 – described below. Accordingly, while Bill C-352 is still in progress in the House of Commons, we expect it to be withdrawn.
[4] See Government of Canada, "Minister Champagne calls on Canada's five largest grocery chains to take action to stabilize retail prices for consumers" (September 18, 2023), available here.
[5] More details with respect Bill C-56 can be found in our bulletin of September 26, 2023, available here.

[6] An "anti-competitive act" is defined in the Act as an act "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or [intended] to have an adverse effect on competition".
[7] The Bill C-56 amendments to the abuse of dominance regime should be considered in combination with the 2022 Amendments, which, as noted above, introduced the ability of private parties to bring proceedings to challenge alleged abusive conduct and expanded the substantive test for finding abuse to include acts intended to have "an adverse effect on competition".
[8] The repeal of the efficiency defence will only apply to new mergers notified to the Bureau after Bill C-56 receives royal assent. Additionally, the expansion of the section 90.1 provision respecting civil anti-competitive agreements/arrangements to include agreements not between competitors and the repeal of the efficiencies defence from this provision will not take effect until one year after Bill C-56 receives royal assent.
[9] This amendment comes in light of the recent events that occurred in the Secure/Tervita matter. In particular, on June 30, 2021, the Commissioner brought an emergency injunction application to prevent Secure Energy Services Inc. from closing its acquisition of Tervita Corporation while the Commissioner concurrently sought to challenge the substance of the merger and seek an injunction to prevent closing under section 104 of the Act. The emergency injunction application failed as the Tribunal determined that it did not have the power to grant temporary relief while it waited to hear and decide the section 104 injunction application. Minutes after the statutory waiting period expired at midnight on July 2, 2021, Secure and Tervita closed their transaction in the face of the Commissioner's ongoing merger review. While the Tribunal's decision concluding it did not have the power to grant this temporary relief was ultimately overturned on appeal, the new amendment will make this episode moot going forward, available here.
[10] This remedy was already available in the Act for civil deceptive marketing practices cases, but prior to Bill C-59 only the Commissioner could bring such cases. As noted below, Bill C-59 introduces the ability of private parties to be granted leave in these cases. As a related point, civil deceptive marketing practices cases will be the only cases where the Commissioner can bring an application seeking this disgorgement remedy. In the Bill C-59 amendments that add this remedy for other conduct, only private parties can apply to the Tribunal for this disgorgement remedy.
[11] Private parties can currently obtain damages in respect of misleading or deceptive representations if the conduct meets the test for the criminal misleading advertising offence, though doing so requires demonstrating the *mens rea* element of the offence.
[12] Government of Canada, "2023 Fall Economic Statement" (November 21, 2023) on page 37, available here.
[13] This proposed amendment regarding costs orders will bring significant change to the current law in which all parties are on equal footing for seeking cost awards. This amendment presumably arises in response to recent large cost award that was found by the Tribunal against the Commissioner. On August 28, 2023, the Commissioner was ordered to pay nearly C$13 million to Rogers Communications Inc. and Shaw

Communications after the Tribunal held that the Commissioner's approach to blocking the proposed merger between Rogers and Shaw was "unreasonable" and "intransigent". See *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 03 (August 28, 2023), available here.

This amendment will result in asymmetry between the Commissioner and others, as the Commissioner will still be permitted to seek cost awards against parties without the above limitations.

[14] The following amendments will go into force one-year following Bill C-59 receiving royal assent:

· Private parties' ability to obtain leave for civil misleading advertising matters and section 90.1 anti-competitive agreements and arrangements; and

· Compensation to private parties for refusal to deal, price maintenance, exclusive dealing, tied selling, market restriction, abuse of dominance, and section 90.1 civil anti-competitive agreements.

Additionally, existing mergers already notified to the Bureau will continue to be governed by the previous rule that the Tribunal cannot consider market shares or concentration alone when determining whether a merger substantially prevents or lessens competition. Similarly, existing proceedings before the Tribunal are still subject to the prior legislation regarding cost awards against the Commissioner. The increased penalties for breach of a consent agreement, however, will apply to pre-existing consent agreements.

by McMillan's Competition & Antitrust Group

A Cautionary Note