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Canadians Behaving Dominantly: The Recent Transformation of Abuse of Dominance Under the Canadian Competition Act

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This symposium edition of the *Source* is dedicated to an exploration of the recent fundamental transformation of Canadian competition law. This transformation has been ongoing for the past three years and will (probably) be complete—for the moment at least—when the final round of amendments comes into force on June 20, 2025. While many aspects of Canada's Competition Act, R.S.C., 1985, c. C-34 (Can.) (the "Act" or "Competition Act") have been subject to root-and-branch change over this period, as outlined in the other articles in this symposium, the Abuse of Dominance provisions are one of the key areas of this transformation.

One of the central features of the Act is the bifurcation between criminal conduct, on the one hand, and civilly reviewable conduct on the other hand. Conduct treated as criminal (such as price fixing and bid rigging) is regarded under the Act as unambiguously harmful. This criminal conduct can be prosecuted without the need to demonstrate competitive harm and can be the basis of damages actions for those who suffer harm, including class actions, under section 36 of the Act.

By contrast, conduct treated as civilly reviewable under the Act, such as Abuse of Dominance, is conduct that can injure competition, but can also be competitively neutral, procompetitive, or efficiency-enhancing, depending on the circumstances. Such civilly reviewable conduct was originally determined by the Act's drafters to be appropriately subject only to challenge by the government rather than private parties. Because the ambiguous economic impact of civilly reviewable conduct did not merit condemnation without detailed factual examination, such conduct was subject to the principal remedy of prohibition or cease-and-desist orders, rather than penalties or damages awards. The potential consequences of challenges to civilly reviewable conduct were designed not to deter such conduct prior to an inquiry into its economic impact.

The bifurcated structure of the Act was recently confirmed by the Federal Court of Canada:

> The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions. . . . Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects. . . . These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal (Tribunal) can order the conduct to cease.[1]

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[1] Jensen v. Samsung Electronics Co. Ltd., [2021] F.C. 1185, ¶ 90 (Can.).

The bifurcation of the Act, and of the applicable remedies, was a conscious choice by the statute's drafters.[2] On the one hand, conduct that is always or almost always economically damaging is treated as criminal, and need not be subject to detailed economic analysis before challenge, nor need there be a concern about chilling such conduct. Likewise, there was limited concern about private parties bringing actions strategically since discouraging such conduct does not damage the economy. On the other hand, civilly reviewable conduct required a detailed factual and economic examination, did not attract penalties and damages, and was not subject to challenge by private lawsuits.

The amendments to the Competition Act over the years since 1986, but in particular the result of the recent changes in the last three years, have largely eliminated this original dichotomy between criminal conduct and civilly reviewable conduct. This article outlines the Abuse of Dominance provisions as originally structured, provides an overview of the recent changes, and offers some preliminary thoughts on the implications of the changes.

The Original Abuse Of Dominance Provisions

The Abuse of Dominance provisions entered Canadian law on June 19, 1986, as sections 50 and 51 of the Competition Act (now sections 78 and 79). These provisions replaced the prior criminal monopolization provision,[3] which was essentially a dead letter due in large part to the difficulty of meeting the criminal "beyond a reasonable doubt" standard of proof. The new provision was seen to be both more economically literate, designed to consider the relevant economic and market facts and not to condemn non-problematic conduct without such consideration; and was also seen as likely to result in more effective enforcement activity where the conduct, as examined, was found to be problematic, since the criminal burden of proof did not apply.[4]

The Competition Act, unlike its U.S. counterpart, constitutes a relatively detailed code.

The Competition Act, unlike its U.S. counterpart, constitutes a relatively detailed code. Sections 78 and 79 of the Act contain, by our count, some 1,376 words, as compared with the 82 words of Section 2 of the Sherman Act. This difference underlines a key distinction from U.S. law in a few respects. First, insofar as Canadian Abuse of Dominance law is defined primarily by statutory language, rather than primarily through general principles and evolving interpretation, change can be fundamental and rapid when the legislature acts, as it has recently done. Secondly, this code-like approach has resulted in the focus of the law of Abuse of Dominance (and competition law in general) in Canada, to a significant degree, being an exercise of statutory interpretation, rather than exploration by courts of the concepts of monopolization and the relevant economics, as in the U.S.

The structure of the original 1986 Abuse of Dominance provision required three elements for the Competition Tribunal to find an Abuse of Dominance and impose a remedy: (a) dominance; (b) a practice of anticompetitive acts; and (c) a likely substantial prevention or lessening of competition. As indicated above, the primary remedy originally available under the provision was of a cease-and-desist nature: "the Tribunal may make an order prohibiting all or any of the persons

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[2] *House of Commons Debates,* 33-1, vol 10 (5 June 1986) at 14026 (Mr. Bill Domm, Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post); see also, Dr Lawrence A Skeoch & Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Canada: Department of Consumer and Corporate Affairs, 1976) at 281-283, 316-333.

[3] Combines Investigation Act, R.S.C. 1970, c. C-23, s. 33.

[4] *See* Donald Thompson, *Monopolization and Abuse of Dominant Position: The Unanswered Questions, in* Canadian Competition Policy at the Centenary, 315 (R.S. Khemani and W.T. Stanbury, 1991).

from engaging in [the challenged] practice."[5] As a secondary remedy, the Act provides that where a prohibition order was not likely to restore competition, "the Tribunal may in addition or in lieu of making a [prohibition] order make an order directing respondents to take actions, including the divestiture of assets or shares, as in reasonable and necessary to overcome the effects of the challenged practice."[6] There was neither a provision for damages or penalties, nor for private enforcement.

When the Abuse of Dominance provisions were originally established, a key goal of the Competition Act, as reflected elsewhere in this symposium, was to support the efficiency of the Canadian economy, particularly with respect to mergers. It was recognized that transactions to achieve economies of scale and scope in the relatively small Canadian economy might give rise to anticompetitive effects in some cases.[7] The Abuse of Dominance provisions were seen as a partial offset to a somewhat more permissive merger regime, by providing a mechanism to address some anticompetitive issues which might arise through merger consolidations, via use of the Abuse of Dominance provisions.[8]

It was also thought, when the Abuse of Dominance provisions were enacted, that their enforcement would be relatively common.[9] That has not been the case. Indeed, as of this writing, since 1986, there have been only eight contested cases and 13 cases resolved by settlement, plus one case currently pending. There are also three applications very recently brought by private parties seeking leave from the Competition Tribunal to bring a case, which is required under a recent amendment.

The Previous Statutory Structure of Sections 78-79

While there had been some relatively minor changes, and one of significance, to the Abuse of Dominance provision prior to the changes of the last few years, the provision was very stable for more than thirty-five years. Under that regime, to make a finding of Abuse of Dominance, three primary requirements had to be met.

Dominance: "Compete or Substantial Control." The Act required—and still requires—that the first step in proving an Abuse of Dominance case is showing dominance or, in the statutory language "that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business."[10] The Competition Tribunal and the courts have equated "class or species of business" to a product market and equated an area of Canada to a geographic market.[11] Control has been interpreted to mean that the firm has substantial market power in the relevant market.[12] While, technically, it is not necessary to precisely define a product

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5 Competition Act, R.S.C., 1985, c. C-34, § 79(1).

6 Competition Act, R.S.C., 1985, c. C-34, § 79(2).

7 *See for example,* R.S. Khemani, *Merger Policy in Small vs Large Economies, in* Canadian Competition Policy at the Centenary, 315 (R.S. Khemani and W.T. Stanbury, 1991)

8 *See* Bruce C. McDonald, *Abuse of the Dominant Position: A New Monopoly Law for Canada,* 32 Antitrust Bulletin 795, 796 (1987).

9 *See* Donald Thompson, *Monopolization and Abuse of Dominant Position: The Unanswered Questions, in* Canadian Competition Policy at the Centenary, 315 (R.S. Khemani and W.T. Stanbury., 1991).

10 Competition Act, R.S.C., 1985, c. C-34, § 79(1).

11 Canada (Director of Investigation and Research) v. NutraSweet Co., [1990] 32 C.P.R. 3d 1, at 9, 20, 31-33.

12 Toronto Real Estate Board v. Canada (Commissioner of Competition), [2017] F.C.A. 236, ¶¶ 11-12; Nutrasweet Co., [1990] 32 C.P.R. 3d 1, at 28-31; *see also* Competition Bureau, Abuse of Dominance Enforcement Guidelines (2019), ¶¶ 5-17 (hereinafter "Abuse of Dominance Enforcement Guidelines").

or geographic market to prove a case,[13] the Commissioner of Competition normally does define a market and seeks to demonstrate the allegedly dominant firm's significant market share as well as barriers to entry to prove the existence of market power.[14]

As to the requisite market share required to show control, the Bureau is generally of the view that high market share is usually a necessary, but not sufficient, condition to establish the existence of substantial market power.[15] The larger the market share held by competitors, the less likely it is that the firm in question would be capable of exercising a substantial degree of market power.[16] The Tribunal has suggested that a *prima facie* finding of substantial control of a market will be made with a large market share exceeding 50%.[17] In contested Abuse of Dominance cases, market shares of those firms found to have abused their dominant position were very high.[18]

[T]he Tribunal has recognized that firms with relatively low market shares may possess some degree of market power.

However, the Tribunal has recognized that firms with relatively low market shares may possess some degree of market power. For example, the Tribunal has found a firm to possess market power with a share as low as 33%,[19] but it is not clear whether market shares at this level would be sufficient for a finding of dominance.

Abuse: "Practice of Anti-Competitive Acts." The second requirement to establish Abuse of Dominance under the prior regime was the showing of a "practice of anti-competitive acts" by the allegedly dominant firm(s).[20] The Competition Tribunal has held that the "practice" requirement may be satisfied by a single sustained act, or, alternatively, a series of different acts.[21] Since the "practice" element is relatively easily met, the focus in the cases has tended to be on the nature of the conduct, rather than whether it rises to the level of a "practice".

The practice of anticompetitive acts requirement had been interpreted as requiring conduct that is intended to be "predatory, exclusionary, or disciplinary" and that is aimed at a competitor. This interpretation arose in the very first Abuse of Dominance case, against *NutraSweet*,[22] and was confirmed in the *Canada Pipe* case.[23] This interpretation was inspired by the list of illustrative (but not exhaustive) anticompetitive acts in section 78 of the Act, all but one of which refer (or, prior to the

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[13] NutraSweet Co., [1990] 32 C.P.R. 3d 1, at 12-13, 30; Canada (Commissioner of Competition) v. The Toronto Real Estate Board, 2016 Comp. Trib. 7, ¶ 132 (Can.).

[14] *See generally* Abuse of Dominance Enforcement Guidelines, *supra* note 12, ¶¶ 5-45.

[15] Abuse of Dominance Enforcement Guidelines, *supra* note 12, ¶¶ 29.

[16] Abuse of Dominance Enforcement Guidelines, *supra* note 12, ¶¶ 30.

[17] Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd., [1992] 40 C.P.R. 3d 289, 317, 325; The D&B Companies of Canada Ltd., [1996] 64 C.P.R. (3d) 216, at 254-255; Canada (Commissioner of Competition) v. Canada Pipe Co., [2005] Comp. Trib. 3 ¶ 138 (Can.).

[18] Abuse of Dominance Enforcement Guidelines, *supra* note 12, ¶ 33; Laidlaw Waste Systems Ltd., [1992] 40 C.P.R. 3d 289, at 326-327; Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc., [1997] 73 C.P.R. 3d 1, at 85. In *Laidlaw Waste Systems,* Laidlaw's market share was in excess of 87%, in *Tele-Direct (Publications) Inc.,* Tele-Direct had market shares above 80% in all relevant markets.

[19] Canada (Commissioner of Competition) v. Visa Canada Corporation and MasterCard International Incorporated, 2013 Comp Trib 10 (Can.) ¶ 267; *see also* Abuse of Dominance Enforcement Guidelines, *supra* note 12, n.22.

[20] Competition Act, R.S.C., 1985, c. C-34, § 79(l)(a). Alleged anticompetitive acts may overlap in some cases with conduct covered by other provisions of the Competition Act. For example, refusal to deal (section 75), price maintenance (section 76), and exclusive dealing and tied selling (section 77), each discussed briefly below, may constitute anticompetitive acts. As a result, Abuse of Dominance applications are often coupled with applications brought under these other provisions based on substantially the same facts. This occurred, for example, in NutraSweet Co., [1990] 32 C.P.R. 3d 1, Tele-Direct (Publications) Inc., [1997] 73 C.P.R. 3d 1, and Canada Pipe Co., 2005 Comp. Trib. 3.

[21] NutraSweet Co., [1990] 32 C.P.R. 3d 1, at 34-35.

[22] NutraSweet Co., [1990] 32 C.P.R. 3d 1, at 34.

[23] Canada Pipe Co. 2005 Comp. Trib. 3, ¶¶ 177-83.

recent amendments, did refer) to conduct aimed at a competitor. As it happens, many if not most of the Competition Tribunal's findings of anticompetitive acts have in fact been conduct not specifically listed in section 78, such as tied selling in *Nutrasweet*[24] or exclusive dealing in *Nielson*.[25]

As noted above, except for the one statutory anticompetitive act of buying up products to avoid the erosion of price levels,[26] all of the examples of anticompetitive acts involve conduct aimed at harming current or potential competitors. As a result, the Federal Court of Appeal determined in the *Canada Pipe* case that for conduct to constitute an anticompetitive act, it was essential to determine whether the dominant firm had an anticompetitive purpose: intentional predatory, exclusionary, or disciplinary conduct that is targeted at a competitor or potential competitor is an anticompetitive act.[27]

[T]he dominant firm must demonstrate a credible efficiency or procompetitive rationale to establish a valid business justification for conduct that would otherwise be characterized as an anticompetitive act.

However, the finding in *Canada Pipe* that anticompetitive acts have to be aimed at a competitor was effectively "repealed" in the *Toronto Real Estate Board ("TREB")* case, where the Federal Court of Appeal concluded that it was sufficient if the conduct was aimed at *any* competitor in the marketplace, not necessarily a competitor of the dominant firm[28]—effectively reading out substantive meaning from the word "competitor," which of course was itself a judicial creation in the *Nutra-Sweet* and *Canada Pipe* cases.

Another key finding from the cases is that to constitute an anticompetitive act, there must be an anticompetitive purpose. The Tribunal will assess and weigh all relevant factors, including evidence of subjective intent as well as the "reasonably foreseeable or expected objective effects" of the conduct, in attempting to discern the "overall character" of the conduct.[29] A dominant firm will be deemed to have intended the effects of its actions.[30]

The jurisprudence has established that it may be possible to show that there is no anticompetitive purpose if there is a "valid business justification" for the conduct. If the purpose of the dominant firm's conduct was not to injure or exclude a competitor, but instead to benefit its own business (e.g., by offering a better, more efficient product, for example), then the firm's intention will not be anticompetitive—even if it may have exclusionary effects.[31] But the dominant firm must demonstrate a credible efficiency or procompetitive rationale to establish a valid business justification for conduct that would otherwise be characterized as an anticompetitive act.[32]

Another key aspect of the *TREB* case, also reflected in the subsequent *Vancouver Airport Authority* case, was the finding that one can "control" a market even if the alleged dominant firm is

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[24] NutraSweet Co. (1990), 32 C.PR. (3d) 1.

[25] The D&B Companies of Canada Ltd. (1996), 64 C.P.R. (3d) 216.

[26] Competition Act, R.S.C., 1985, c. C-34, § 78(1)(f).

[27] Canada (Commissioner of Competition) v. Canada Pipe Co., [2007] 2 F.C.R. 3, ¶ 68; Canada Pipe Co., 2005 Comp. Trib. 3, ¶¶ 178-79. The Abuse of Dominance Enforcement Guidelines reiterate that an anticompetitive act is defined by reference to its purpose, and the requisite anticompetitive purpose is an intended negative effect on a competitor that is "predatory, exclusionary or disciplinary." Abuse of Dominance Enforcement Guidelines, *supra* note 12, ¶ 53. Further, the purpose of an act, its overall character, and its motivation for the conduct should be assessed.

[28] Toronto Real Estate Board, [2014] F.C.A. 29, ¶¶ 17-20. Toronto Real Estate Board, [2017] F.C.A. 236, ¶¶ 54-55.

[29] Canada Pipe Co., 2007 2 F.C.R. 3, ¶ 67; Toronto Real Estate Board, 2016 Comp. Trib. 7, ¶ 267; Canada (Commissioner of Competition) v. Vancouver Airport Authority, 2019 Comp Trib 6, ¶ 515 (Can.).

[30] Toronto Real Estate Board, 2016 Comp. Trib. 7, ¶ 274; The D&B Companies of Canada Ltd.,1996 64 C.P.R. (3d) 216, at 257; Laidlaw Waste Systems Ltd., [1992] 40 C.P.R. 3d 289, at 342-343.

[31] Canada Pipe Co., [2007] F.C.R. 3, ¶¶ 73, 87-88; Vancouver Airport Authority, 2019 Comp Trib 6, ¶¶ 536, 620-29.

[32] Canada Pipe Co., [2007] F.C.R. 3, ¶¶ 67, 73, 87-88; Vancouver Airport Authority, 2019 Comp Trib 6, ¶¶ 536, 620-29.

Where a firm allegedly controlling a market does not directly compete in that market, the Tribunal will consider whether the firm has a "plausible competitive interest" in that market.

not active in that market—such as by controlling a key input to the market. Where a firm allegedly controlling a market does not directly compete in that market, the Tribunal will consider whether the firm has a "plausible competitive interest" in that market. Absent a plausible competitive interest, a presumption arises that the dominant firm does not have the requisite anticompetitive purpose for its conduct to support a finding of Abuse of Dominance.[33] In *Vancouver Airport Authority*, the Tribunal was at some pains to distinguish a plausible competitive interest from the interest of "a typical upstream supplier who would suffer from a less competitive downstream market" and suggested that it was Vancouver Airport Authority's financial interest plus its ability to exclude new entrants that gave it the plausible competitive interest needed in that case.[34] This approach has obvious implications for the concept of "gatekeepers" and bottlenecks, which are of particular significance in some tech markets.

Anticompetitive Effects: "Substantial Prevention or Lessening of Competition. " The third requirement for a finding of Abuse of Dominance was that there be a likely substantial prevention or lessening of competition. Even conduct involving a practice of anticompetitive acts by a dominant firm was not problematic under the prior provision unless the conduct caused or was likely to cause injury to competition.[35] Such injury is to be assessed using a "but for" analysis: absent the challenged conduct, would there likely be a substantially more competitive market?[36]

[H]as focused on whether the conduct has or would enhance, preserve, or entrench the dominant firm's market power . . .

In practice, this element of Abuse of Dominance has focused on whether the conduct has or would enhance, preserve, or entrench the dominant firm's market power by, for instance, increasing barriers to entry or expansion, or reducing the scope for effective competition. Where the anticompetitive allegations involve the lessening of competition, the focus will be on possible increases in market power. Where the allegations involve the prevention of competition, the focus will be on whether the dominant firm's market power will be preserved.[37] In either case, the injury must be expected to endure for a significant amount of time—generally considered to be at least a two-year period.[38] The applicant must also demonstrate that the enhanced market power would be likely to translate into meaningful price or non-price effects, including impacts on innovation—although the magnitude of effects that are required to be shown are not clear.[39]

The Amendments

Amendments before 2022. From their initial enactment in 1986 until the recent amendments commencing in 2022, the Abuse of Dominance provisions of the Competition Act were remarkably stable. There were minor adjustments with respect to intellectual property exemptions, as well as the introduction and then repeal of airline-specific provisions, but the only consequential change was the introduction of Administrative Monetary Penalties (AMPs), as a possible remedy under the Abuse of Dominance provisions. This possible remedy was first only for domestic airlines in

[33] Toronto Real Estate Board, 2016 Comp Trib 7, ¶¶ 279-281; Vancouver Airport Authority, 2019 Comp Trib 6, ¶ 457.

[34] Vancouver Airport Authority, 2019 Comp Trib 6, ¶¶ 478-510.

[35] Competition Act, R.S.C. 1985, c C-34, § 79(l)(c) (Can.).

[36] Canada Pipe Co., 2007, [F.C.R.] 3, ¶¶ 33, 41.

[37] Vancouver Airport Authority, 2019 Comp Trib 6, ¶¶ 635-37.

[38] Toronto Real Estate Board, 2016 Comp Trib 7, ¶ 465.

[39] *Id.*, ¶¶ 460-67.

2002[40] and then broadened to apply to all industries in 2009.[41] While that was a consequential change—as it made a significant change to the bifurcated aspect of the Act discussed above—the practical impact has been limited, as only two cases have thus far awarded AMPs, and both involved settlements.

The Recent Amendments. The recent amendments to the Abuse of Dominance provisions came in three rounds: first as part of Bill C-19, which was passed in June 2022 and came into force on June 23, 2023;[42] second as part of C-56, which was passed in December 2023 and came into force on December 15, 2024;[43] and the last as part of Bill C-59, which was passed in June 2024 and will come into force on June 20, 2025.[44]

Addition of "Adverse Effect on Competition" Component of Section 78. Bill C-19 codified "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor" as the first branch of the definition of an "anti-competitive act," which was originally established judicially in *NutraSweet*[45] and *Canada Pipe*.[46]

Bill C-19 also added a second branch to the "anti-competitive act" definition, being acts intended to have "an adverse effect on competition."[47] The second branch of the "anti-competitive act" definition broadens anticompetitive acts to include conduct intended to harm competition in a way that is not necessarily predatory, exclusionary, or disciplinary.

Addition of Two Illustrative Examples. Bill C-19 added a new illustrative example of an anticompetitive act to section 78: "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."[48]

Bill C-56 further added a further new illustrative example of an anti-competitive act to section 78: "directly or indirectly imposing excessive and unfair selling prices."[49]

Switch to Only Two of Three Elements Required. As discussed above, since the inception of the Abuse of Dominance provision until the recent amendments, a finding of Abuse of Dominance required proof of three elements: dominance, a practice of anticompetitive acts, and a substantial prevention or lessening of competition.

Bill C-56 has made a structural change to the Abuse of Dominance provision, by changing its three-part framework to a two-part framework. While it remains necessary to prove dominance, it is now sufficient to find an Abuse of Dominance if either the dominant firm (a) engaged in a practice of anticompetitive acts, or (b) engaged in conduct that is likely to substantially prevent or lessen competition in market in which the person or persons compete directly or have a plausible competitive interest.[50]

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[40] An Act to amend the Competition Act and the Competition Tribunal Act, S.C. 2002, c. 16 (Can.)

[41] Bill C-10, Budget Implementation Act, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures, 2009, S.C., c. 10 (Can.)

[42] Budget Implementation Act, No. 1, 2022, S.C., c. 10 (Can.).

[43] Affordable Housing and Groceries Act, 2023, S.C., c. 31 (Can.).

[44] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15.

[45] NutraSweet Co., [1990] 32 C.P.R. 3d 1, at 34.

[46] Canada Pipe Co., 2005 Comp. Trib. 3, ¶¶ 177-83.

[47] Budget Implementation Act, No. 1, 2022, S.C., c. 10 (Can.).

[48] Competition Act, R.S.C. 1985, c. C-34, § 78(j) (Can.).

[49] Competition Act, R.S.C. 1985, c. C-34, § 78(k) (Can.).

[50] Affordable Housing and Groceries Act, 2023, S.C., c. 31 (Can.).

It is now also possible to find Abuse of Dominance if a dominant firm engages in conduct that will likely result in a substantial prevention or lessening of competition, even if there was no intent to harm competition.

The codification of the "plausible competitive interest" concept from *TREB* means that the amended Abuse of Dominance provision now expressly contemplates that competitive harm can occur in a market in which the dominant firm does not compete. Thus, it is possible to find an Abuse of Dominance if a dominant firm engages in a practice of anticompetitive acts, assessed based on its intended harm to competition, even if the conduct does not result in a likely substantial prevention or lessening of competition. It is now also possible to find Abuse of Dominance if a dominant firm engages in conduct that will likely result in a substantial prevention or lessening of competition, even if there was no intent to harm competition. Either scenario is now sufficient to result in a cease-and-desist order.

Increase in AMPs. Bill C-56 increases the maximum AMPs that the Tribunal may order after finding an Abuse of Dominance. The Tribunal may now order the dominant firm to pay an AMP up to the greater of (a) C$25 million for the first order and up to C$35 million for any subsequent orders, and (b) three times the value of the benefit derived from the anticompetitive practice, or if that cannot be determined, 3% of the firm's annual worldwide revenue.[51]

Notwithstanding the structural change to the Abuse of Dominance provision, to order AMPs, the Tribunal must still find both a practice of anticompetitive acts and a likely substantial prevention or lessening of competition.[52]

Private Access (and Lower Threshold). The right of private parties to seek remedies for civil reviewable practices, when it was first introduced to the Competition Act in 2002, then only applied to refusals to deal, exclusive dealing agreements, and tied selling.[53] And under that regime, before a private party can bring an application, it needs to first obtain leave from the Competition Tribunal by showing that it is directly and substantially affected in its business by the alleged conduct and that the conduct could be subject to an order under the relevant section of the Act.[54]

Bill C-56 broadened the scope for private actions to include Abuse of Dominance, but the test for obtaining leave remained the same.

Subsequently, however, Bill C-59 amended the leave test. Once the new leave test comes into force in June 2025, there will be two possible ways to obtain leave. First, the private party could show that it is directly and substantially affected "in whole or in part of" its business by the alleged conduct and that the conduct could be subject to an order under the relevant provision of the Act. Second, the private party could show that it would be in the public interest for the Tribunal to grant leave.[55]

Disgorgement Provision. As part of the expansion of the private access provisions, Bill C-59 created a new remedy that may be available to private applicants who succeed in proving an Abuse of Dominance. If a private applicant proves that a dominant firm (a) is engaging in a practice of anticompetitive acts and (b) that conduct has resulted in a likely substantial lessening or prevention of competition, the Tribunal may order the dominant firm "to pay an amount, not exceeding the value of the benefit derived from the conduct" and that amount is "to be distributed

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[51] Affordable Housing and Groceries Act, 2023, S.C., c. 31 (Can.); Competition Act, R.S.C., 1985, c. C-34 § 79(3.1)(a-b) (Can.)

[52] Competition Act, R.S.C., 1985, c. C-34, §79(3.1) (Can.)

[53] Competition Act, R.S.C., 1985, c. C-34, §§ 75, 77.

[54] Competition Act, R.S.C., 1985, c. C-34, § 103.1.

[55] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15 § 254(4); Competition Act, R.S.C., 1985, c. C-34, § 103.1(7).

among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate."[56]

This remedy is not a traditional damages remedy, where proof of the applicant's loss as a result of the dominant firm's conduct is necessary. Rather, this is more akin to an accounting of profit remedy, whereby it is the dominant firm's gains as a result of the conduct that is the focus of the analysis. In addition, this remedy not only allows the applicant to receive a payment, but also other people affected by the conduct.

Implications of the Recent Changes

Restructuring to Require Only Two of Three Elements. The changes to the Abuse of Dominance provision are significant—although until some jurisprudence develops, it will not be clear how significant. The most obvious difference is the structural amendment, which now allows a finding of Abuse of Dominance with only proof of dominance plus a substantial prevention or lessening of competition, without the need for a practice of anticompetitive acts; or, alternatively, with only proof of dominance plus a practice of anticompetitive acts, without the need for a substantial prevention or lessening of competition.

This amendment permits the finding of a kind of "no fault" dominance, which, in an extreme case, could result in an order against a dominant firm that competes aggressively and successfully on the merits, and as a result drives out competitors or deters their entry. Alternatively, it could lead to Competition Tribunal orders even in cases where there is no likelihood of a substantial prevention or lessening of competition. While both of these outcomes are possible—and indeed, are even possible where a respondent does not alone have dominance in a case of joint dominance (which we understand is not a feature of US antitrust law)—the preliminary guidance from the Competition Bureau suggests that it may not focus its efforts on cases that rest on only two of the three legs of the Abuse of Dominance construct.[57] The Competition Bureau notes, however, that where a cease-and-desist order to stop the dominant firm's conduct may be an appropriate and effective remedy, it may pursue such an order and that only having to prove two of three elements may allow it to act more quickly.[58] It further notes that its main goal will continue to be protection of the competitive process and that it is not significantly changing its enforcement approach.[59]

A further comfort for those worried about chilling procompetitive conduct as a result of Abuse of Dominance enforcement not requiring proof of all the traditional elements is that without proof of all three elements, only cease-and-desist remedies are available,[60] so the chilling effect will likely be limited as a result of the remedy structure. This is also true because private challenges are less likely where money payments are not available.

Anticompetitive Acts—Impact on Competitors vs. Impact on Competition. As noted, one of the recent amendments has been to statutorily "reverse" the decision in *NutraSweet* and *Canada Pipe* that, to constitute an anticompetitive act, there had to be an intended negative effect on the dominant firm's competitor. The revised provision specifies that to constitute an anticompetitive act the intended negative effect can be on a competitor or on competition. However, as

[56] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15 § 247(2); Competition Act, R.S.C., 1985, c. C-34, § 79(4.1).

[57] Competition Bureau of Canada, *Changes to the Provisions on Mergers and Restrictive Trade Practices in the Competition Act* ¶ 2.2.1.2 (2024).

[58] *Id.*

[59] *Id.*

[60] Competition Act, R.S.C., 1985, c. C-34, §79(1) (Can.)

earlier noted, this change was largely achieved judicially in the *TREB* case, where the Federal Court of Appeal determined that the intended negative effect need not be on the dominant firm's competitor(s), but rather, on any competitor in a market.[61] To us, the *TREB* test seems largely indistinguishable from an intentional negative effect on competition. Consequently, while this change may prove to be relevant in some limited subset of cases, we suspect that it is likely to have limited impact overall.

In its "preliminary guidance," the Competition Bureau has given the new "anti-competitive act" definition a very broad interpretation, stating that "conduct intended to harm competition includes any form of conduct that has the purpose of negatively affecting the competitive process. In particular, this may include conduct that softens competition, benefitting one or more competitors."[62] The Bureau noted four specific types of conduct that may fall into the new "anti-competitive act" definition: (1) agreements among competitors may limit their ability or incentive to compete; (2) sharing of competitively sensitive information increasing the risk of conscious parallelism; (3) contracts that include terms referencing competitors in some way (such as most-favored nation clauses), which reduce incentives for competitors to compete as vigorously as they otherwise would; and (4) serial acquisitions by dominant firms.[63] Insofar as some forms of competitor collaboration or coordination are included as anticompetitive acts, the Competition Bureau's "preliminary guidance" appears to create significant overlaps between the Abuse of Dominance provision and the civil competitor collaboration provision in section 90.1 of the Act, which is the subject of another article in this symposium.

New Examples of Anticompetitive Acts: Discriminatory Response and Excessive and Unfair Pricing. The amendments provide two new examples to the list of exemplary anticompetitive acts found in section 78 of the Act—one involving discriminatory responses to competitors, and the other involving excessive pricing.[64] Neither of these additions came with a clearly articulated *raison d'etre*, although the one addressing excessive and unfair prices was part of Bill C-56 entitled Affordable Housing and Groceries Act, so that may be a hint.

The new "discriminatory response" example is interesting in that it appears on its face to be almost exactly contrary to an aspect of an early decision of the Competition Tribunal in *Tele-Direct*, which expressly recognized that targeting or differentiated response to competitors is a normal competitive reaction.[65] It will be interesting to see how this new statutory provision will live with the language, and more importantly with the logic, of that decision. It may simply statutorily reverse the Tribunal's conclusion in *Tele-Direct*, although there is no evidence that Parliament was aware of the *Tele-Direct* decision when it made the change. More fundamentally, however, the logic of the Tribunal's decision in *Tele-Direct*, is that the essence of competition to respond to a new or more vigorous competitor with a pro-competitive response, such as lowering prices. The Tribunal will have to consider how to interpret the provision without undermining pro-competitive responses.

The excessive and unfair pricing amendment is perhaps more interesting, in that it hints at importing the concept of "exploitative abuse,", i.e., practices that directly harm customers or other trading partners by exploiting market power, which Canadian competition law has never previously

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[61] Toronto Real Estate Board, [2014] F.C.A. 29, ¶¶ 17-20. Toronto Real Estate Board, [2017] F.C.A. 236, ¶¶ 54-55.

[62] Competition Bureau of Canada, *Bulletin on Amendments to the Abuse of Dominance Provisions* ¶ 18 (2023).

[63] *Id.*

[64] Competition Act, R.S.C., 1985, c. C-34, §78(1)(j, k) (Can.)

[65] Tele-Direct (Publications) Inc., [1997] 73 C.P.R. 3d 1, at 194.

In the 18 months since private challenges were permitted for Abuse of Dominance, three private cases have been launched, suggesting that this may be an active area.

embraced. The amendment was not sought by the Competition Bureau, which has been at some preliminary pains to suggest that it will not employ the provision unless it can be shown that there is an intent to harm competition or that it has resulted in harm to competition, separate simply from high prices.[66] Nevertheless, it will be interesting to see if the Competition Bureau's enforcement stance varies over time, or if private party applications to the Tribunal give unexpected life to this provision. While the provision does not on its face provide any insight as to what amounts to excessive and unfair pricing, we expect that European jurisprudence regarding unfair pricing under EU competition law may become important guidance for the Tribunal in its approach to this provision.

Private Remedies. As noted, the possibility of private enforcement is another significant change to the Abuse of Dominance provisions. In the 18 months since private challenges were permitted for Abuse of Dominance, three private cases have been launched, suggesting that this may be an active area.

A key consideration for private challenges, of course, is that private parties will not be governed or restrained by the same focus on public policy goals as is the government. However, private parties seeking remedies beyond cease-and-desist orders will, like the government when pursuing such challenges, be required to demonstrate all three of the traditional elements of the Abuse of Dominance provision.[67] There may be some private litigation undertaken to seek a limited cease-and-desist remedy. However, over the past 20-plus years during which a cease-and-desist remedy has been available in respect of reviewable conduct matters other than Abuse of Dominance—such as refusal to deal, exclusive dealings and tied selling, for instance, there has not been a flood of private litigation seeking such a remedy.

As for private parties seeking leave to bring cases before the Competition Tribunal, historically, it has not proven to be a simple matter to obtain leave by showing the alleged conduct has caused a direct and substantial effect on the applicant's business.[68] We expect that the amendment to the leave test will make it easier for private applicants to obtain leave to bring Abuse of Dominance cases, as the bar for obtaining leave is being lowered in two ways. First, firms may obtain leave if only a part of its business is directly and substantially affected. Second, leave may now be granted if it is in the "public interest" to do so.[69]

When the Tribunal will find it to be in the public interest to grant leave is a novel question in Canadian competition law, so it is difficult to predict where the Tribunal will look for guidance. One question may be whether the Competition Bureau decided not to bring a case itself—and why—if that information is available. Another question may be the number of Canadians affected by the issues in the case—and how significant that effect is likely to be. However, depending on the case—and given the competitively ambiguous nature of much of the conduct subject to challenges under the Abuse of Dominance provisions—the public interest test may prove to be a two-edged sword in many cases.

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[66] Regarding excessive or unfair pricing, the Competition Bureau has stated that "such a practice must be intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Competition Bureau, *Guide to the December 2023 Amendments to the Competition Act* (2023); *see also* Competition Bureau, *Changes to the Provisions on Mergers and Restrictive Trade Practices in the Competition Act*, ¶ 2.2.2.2 (2024) ("Simply charging high prices to consumers is not usually an Abuse of Dominance regardless of how high those prices are.").

[67] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15 § 247(2). Competition Act, R.S.C., 1985, c. C-34, § 79(4.1).

[68] Dany H. Assaf and Zirjan Derwa, "*Private Applications to the Competition Tribunal*," Fundamentals of Canadian Competition Law, 4th Edition (2022).

[69] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15 § 254(4); Competition Act, R.S.C., 1985, c. C-34, § 103.1(7).

The second change to the leave test is that now only "a part" of the applicant's business need be directly and substantially affected in order for leave to be granted. This would appear to be a much more clear-cut lowering of the bar. Prior jurisprudence held that the direct and substantial effect needed to be shown with respect to the entirety of the private party's business.[70] That said, in a very recent decision of the Competition Tribunal in a private action brought by JAMP against Janssen, in which it decided not to grant leave under the prior test, the Tribunal stated: "I find that in applications for leave to commence a proceeding under section 79, an application is not required under subsection 103.1(7) to show that the applicant is directly and substantially affected in its entire business by the practice."[71] Consequently, it is not clear how significant the move to allowing applications in respect of conduct having impacts on only parts of the applicant's business will prove to be.

Another consideration in applying the new impact on "part" of a business test will turn on how the Competition Tribunal implements it—that is, what degree of partition of the application's business the Tribunal looks to in order to determine whether there is a separate "part." The *JAMP* case dealt with the impact of Janssen's conduct on JAMP's business for biologics containing ustekinumab, which was a clearly delineated segment of business. The precise delineation of what part of the Sears' department store business, for example, should be considered affected is not so obvious.

Having explored the new leave test, the other key change—beyond permitting private parties to bring applications related to Abuse of Dominance at all—is the issue of remedies. As noted above, if an applicant only demonstrates two of the three traditional elements of Abuse and Dominance then only the cease-and-desist remedy will be available. But if all three elements are demonstrated, the available remedies have been very materially expanded. In addition to cease-and-desist orders, private applicants can now: (1) obtain orders for AMPs—a fine by another name—which go to the government rather than the applicants;[72] (2) seek other remedial orders, including orders for structural relief; [73] and, likely of most significance (3) seek orders for money to be paid to them and others affected.[74]

Canada is likely to see a meaningful volume of Abuse of Dominance cases seeking money remedies . . .

While the mechanism for awarding such payments, and especially the mechanisms for distributing funds to a large group of those affected (presumably pursuant to some sort of quasi-class action procedure), is not yet known, this access to money payment remedies is likely to be significant. Canada has enjoyed a healthy volume of class actions concerning the criminal cartel provisions of the Act. Some of the cases brought under the cartel provision have sought to shoehorn into that provision cases that are, in substance, allegations of Abuse of Dominance.[75] Consequently, we imagine that—particularly once the procedural issues are determined—Canada is likely to see a meaningful volume of Abuse of Dominance cases seeking money remedies, or at least applications for leave to file such cases. How liberal the Competition Tribunal will be in granting leave in these cases, and whether the Tribunal develops a mechanism to dispose of unmeritorious cases through some sort of motion to dismiss or summary judgment mechanism, will be significant. In the United States, we understand that class-action litigation under Section 2 of

[70] Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd, 2007 Comp Trib 6, at para 21.

[71] JAMP Pharma Corporation v Janssen Inc., 2024 Comp Trib 8, ¶ 31 (Can.).

[72] Competition Act, R.S.C., 1985, c. C-34, § 79(3.1).

[73] Competition Act, R.S.C., 1985, c. C-34, § 79(2).

[74] Fall Economic Statement Implementation Act, 2023, 2024, S.C., c. 15 § 254(4); Competition Act, R.S.C., 1985, c. C-34, § 103.1(7).

[75] For example, Hazan c. Micron Technology Inc., 2023 QCCA 132

the Sherman Act is relatively uncommon, given the courts' willingness to dismiss cases at an early stage, where appropriate. How the Competition Tribunal handles this issue will be significant for the volume of cases the Tribunal faces and, more importantly, for the impact on conduct which the litigation environment engenders. This is probably the single most significant practical aspect of the amendments affecting the Abuse of Dominance provisions, and the result is entirely unknown at this stage.

Concluding Thoughts

In brief summary, the various changes to the substance of the Abuse of Dominance provisions of the Act, the changes in remedies and procedure as to who can challenge the conduct, and how easy it will be to bring such private party challenges—all taken together—are likely to be significant. The Abuse of Dominance provision itself has been fundamentally restructured, requiring proof of only two of the three traditional elements. Additionally, new examples of anticompetitive conduct—one of which has the potential to import concepts of exploitative abuse—have been added, and the test with respect to the required intent has been broadened from an intended impact only on a competitor to also include an intended negative impact on competition. Additionally, the right of private parties to challenge Abuse of Dominance conduct, particularly if the test for leave to bring applications is significantly lowered—and particularly if the Competition Tribunal develops a viable class action-like procedure—will likely be the change with the most significant impact on Canadian Abuse of Dominance law, and therefore on the conduct of firms in the marketplace generally, for good or for ill. As we have suggested, the Competition Tribunal may temper some of these potential impacts by taking a page from the American courts' response to Section 2 challenges and conducting a robust review of such cases at a preliminary stage.

For all of these reasons, and no doubt more which we have failed to foresee, these are interesting times in Canadian Abuse of Dominance law. ●