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Navigating the New Norm: Further Changes to Canada's *Competition Act* in Effect

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Parliament recently passed Bill C-59 (the *Fall Economic Statement Implementation Act, 2023*), which includes important changes to Canada's *Competition Act*, many of which are now in force. These amendments follow the already extensive changes to the *Competition Act* made in June 2022 and December 2023, and are the culmination of a three-year public debate amidst increasing political interest in competition law reform. As discussed in more detail below, these amendments likely foreshadow a more active competition enforcement landscape.

The bill has undergone significant changes since it was initially introduced, with parliamentarians importing most of the Commissioner of Competition's (Commissioner's) recommendations in his brief to the Senate on this bill. As passed, Bill C-59 amends the *Competition Act* in the following ways:

- Expands the merger notification requirements.
- Extends the limitation period for challenging non-notified mergers and expressly allows the Tribunal to consider the competitive impact of a merger on labour markets.
- Changes the merger review process by including rebuttal structural presumptions of unlawfulness, and revises the remedial standard for mergers
- Revises the interim injunction provisions to prohibit parties from closing a merger until the Competition Tribunal (Tribunal) has disposed of an interim injunction application by the Commissioner
- Adds two new civil provisions expressly prohibiting (i) claims of a product's benefits for protecting or restoring the environment or mitigating the causes or effects of climate change without a prior adequate and proper test, and (ii) representations to the public regarding the environmental benefits of a business unless these representations are based on adequate and proper substantiation in accordance with internationally recognized methodology.
- Creates a new clearance mechanism for environmental collaborations.
- Expands the scope of private litigation under the *Competition Act* to enable litigants (and other affected parties) to obtain compensation in respect of certain reviewable matters and to also permit private litigation in respect of the civil anti-competitive agreements and misleading advertising provisions.
- Introduces a power to prohibit a broader set of anti-competitive agreements (including, for example, vertical agreements), with monetary penalties for such conduct
- Makes other changes, which include (i) expanding and clarifying the scope of the refusal to deal provisions; (ii) prohibiting reprisal actions against individuals and entities who communicate or cooperate with the Commissioner; (iii) shifting the burden to sellers to prove that discounts on their own prices are genuine when representing a product's ordinary selling price; and (iv) further clarifying the drip-pricing provisions.

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Mergers: Expanding the Scope of Notifiable Transactions

The amendments revise the "size of transaction" threshold for mandatory merger notifications to include sales by a target company "into" Canada generated by foreign assets, in addition to sales "in or from" Canada generated by Canadian assets. This amendment is consistent with merger notification thresholds in many foreign jurisdictions, which are often based on "turnover," that is, sales, by customer location. That said, the Canadian threshold will still require export sales by a target company "from" Canada to be included in the calculation, and the Canadian threshold can still also be independently satisfied on the basis of the value of the target's assets in Canada.

While the "size of transaction" test (as well as the existing additional "size of parties" test) can now be met solely as a result of sales into Canada, it is notable that the merger notification provisions still apply only where the transaction involves an acquisition of an "operating business." An operating business is defined as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work." This may mean that for the merger notification obligations to apply, a target company must still have some operations in Canada beyond mere sales into Canada from foreign operations.

Mergers: Limitation Periods and Scope of Review

Bill C-59 extends the limitation period for challenging non-notified mergers to three years post-closing. However, the existing one-year limitation period is maintained for notified transactions, including transactions below the notification thresholds for which the parties voluntarily seek Competition Bureau clearance.

In addition, Bill C-59 explicitly permits the Tribunal to make a remedial order where it finds that a merger substantially lessens or prevents competition in labour markets. Whether this change will have any practical impact on merger review remains to be seen since the Tribunal was not previously restricted from considering impacts on labour markets. However, merging parties may face a new focus on labour market effects in the Bureau's merger reviews.

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Mergers: Increased Emphasis on Structural Factors Such as Market Shares in Merger Review

Prior to Bill C-59, Canada's competition legislation precluded the Tribunal from finding a substantial prevention or lessening of competition solely on the basis of concentration or market shares. Bill C-59 repeals this provision in the *Competition Act*, even though the Tribunal has repeatedly found that these two factors nonetheless help in assessing whether or not a merger or proposed merger is likely to result in a substantial lessening or prevention of competition.

In line with the Commissioner's recommendations, the bill as amended in Committee, introduces rebuttable structural presumptions for mergers, which are broadly aligned with the non-binding thresholds set out in the updated merger guidelines issued by the U.S. antitrust authorities in 2023. More specifically, mergers will be considered presumptively unlawful if they (i) combine firms with more than a 30% market share; or (ii) have a post-merger "concentration index" (determined by squaring the market shares of the participants in the relevant market) of more than 1,800, and result in an increase in the index of more than 100 from pre-merger levels.

It remains to be seen how significant these changes to the merger provisions will be in practice. While clearance of a merger that would significantly increase market concentration will be subject to certain rebuttable presumptions, U.S. courts have held that the quantum of evidence that defendants must produce to overcome such a presumption is relatively low, particularly if the plaintiff relies solely on a structural presumption.

The new concentration threshold presumptions would not apply to transactions that have already closed or had been notified to the Commissioner before June 20, 2024, when Bill C-59 came into effect.

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Mergers: Revised Remedial Standard

Where the Tribunal finds that a merger is likely to result in a substantial lessening or prevention of competition, the Act now provides that the Tribunal may make an order "to preserve the level of competition" that would prevail "but for the merger." Prior court decisions had established that the objective of an order under the merger provisions was to restore competition to the point at which it is no longer substantially less than it was before the merger.

The Commissioner has long advocated for this amendment with a view to reducing the burden for obtaining more extensive remedies or blocking altogether a merger found to prevent or lessen competition substantially. However, it remains to be seen how the Tribunal will approach its assessment of the "level of competition" in this context, and the Tribunal retains discretion with respect to the issuance of orders—even where a merger is found to result in a substantial prevention or lessening of competition.

This amendment and the resulting difference between the standard to block a merger (or an aspect thereof) and the remedy that is required may lead parties to restructure and then refile their transaction or propose remedies up front.

Mergers: Interim Injunctions

Where the Commissioner has decided to challenge a proposed merger, or needs more time to complete a review and closing could result in a situation that is difficult to reverse (and thus impact the ability of the Tribunal to order adequate relief), the Commissioner can seek an interim injunction to prevent parties from closing a transaction, pending the completion of the review or the outcome of a challenge. The process of obtaining such an injunction takes some time, and some parties have sought to quickly close before the Tribunal rules on the injunction application. Provisions included in Bill C-59 now foreclose the ability to complete the merger until the Tribunal has decided on the interim injunction. This change may make it more difficult for merging parties to close in the face of opposition from the Commissioner.

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Environmental Initiatives: New Restrictions on "Green" Claims

Bill C-59 creates a new provision prohibiting representations to the public in the form of statements, warranties or guarantees "of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" that are not based on an adequate and proper test.

The Commissioner had stated that many of the "greenwashing" complaints the Competition Bureau receives do not involve claims about specific products, but instead relate to a business or brand as a whole, such as claims about being net zero or carbon neutral. In light of this, Bill C-59 added another provision to the *Competition Act* that prohibits representations to the public relating to the "benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change" unless such claims are based on "adequate and proper substantiation in accordance with internationally recognized methodology." The potential scope of these provisions generated significant commentary and concern amongst stakeholders in the business community.

Among other concerns, the concept of "internationally recognized methodology" is not defined in the legislation. Nor was it proposed by the Commissioner in his submission to the Senate. Given the potential for conflicting methodologies in various countries, or the absence of "international" standards or methodologies in certain cases, guidance from the Bureau or the courts in due course may provide greater confidence to businesses seeking to publicize their environmental initiatives and compete on that basis in Canada. To this end, the Senate committee that studied the bill reinforced the importance of meaningful consultation by the Bureau and the need to set out clear guidelines in this area. In addition, although the Senate committee noted that internationally recognized methodology is required to substantiate such claims, it suggested that the substantiation should also include federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada. Regardless, given the reference to "adequate and proper" substantiation, we expect that interpretation of this provision may ultimately benefit from the existing jurisprudence under the *Competition Act* in respect of performance claims.

Environmental Initiatives: New Clearance Certificates for Environmental Collaborations

Bill C-59 also creates a new mechanism permitting the Commissioner to issue a certificate that confirms he is satisfied that a proposed agreement is (i) for the purpose of protecting the environment *and* (ii) not likely to prevent or lessen competition substantially in a market. Where such a clearance certificate is granted, the criminal conspiracy provisions (section 45 and related provisions) would not apply to the agreement. A clearance certificate would also immunize the proposed agreement from the civil anticompetitive agreement provisions in section 90.1 of the *Competition Act*.

Clearance certificates would be valid for 10 years (with the potential for extension on request). However, clearance certificates do not appear to be available for existing agreements; nor does the mechanism appear to assist with respect to agreements that prevent or lessen competition substantially but have significant environmental benefits that could be viewed as outweighing any anticompetitive effects. It remains to be seen whether parties will consider it worth the time and expense to seek such a certificate, given both the limitations of the provision and an obligation to provide any requested information to the Commissioner once the certificate is requested. Further, in the above-noted recommendations to the Senate, the Commissioner contended that the certificate provisions were unnecessary and unlikely to remove impediments to business collaborations. The Commissioner also expressed concerns about a perceived high bar for subsequently varying or revoking a certificate in the event of changed circumstances. The Commissioner's comments may indicate a general disinclination to issue certificates for anything other than agreements that so clearly comply with the *Competition Act* that the parties would likely be prepared to proceed without a certificate in any event.

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Expanded Private Rights of Action for Civil Reviewable Conduct

The 2022 amendments to the *Competition Act* extended private enforcement to the abuse of dominance provisions but did not change the standard for private parties to obtain leave to bring such actions before the Tribunal and did not enable private applicants to be seek monetary payments if successful. Bill C-59 took additional steps, that will significantly expand access and incentives for private parties to bring claims before the Tribunal, effective June 20, 2025.

Broader scope for private parties to obtain leave to bring an action. Currently, to obtain leave to bring a private action before the Tribunal, a private litigant is generally required to show that its business is directly and substantially affected by the alleged conduct. The amendments broaden the criteria to permit the Tribunal to grant leave where (i) only part of the applicant's business is substantially affected or (ii) the Tribunal is satisfied that it is in the public interest to grant leave. It remains to be seen how the Tribunal will interpret this legislative direction, including whether it may permit a broader range of private parties, including consumers, to commence such actions before the Tribunal.

Broader scope for private enforcement. Currently, private parties can bring claims under the *Competition Act*'s civil provisions only with leave of the Tribunal and only in respect of certain restrictive trade practices such as price maintenance, refusal to deal and abuse of dominance. The bill also enables private parties to bring such claims (with leave of the Tribunal) under the provisions of the Act regarding civil misleading advertising and civil anticompetitive agreements.

Enhanced remedies. Bill C-59 also creates new remedies for private applicants in respect of restrictive trade practices and the civil anticompetitive agreement provisions. Specifically, in addition to the same remedies available in an action commenced by the Commissioner, as of June 2025, the Tribunal will be empowered, to order disgorgement to private applicants and third parties affected by the conduct of the "benefit derived from the conduct" that is the subject of an order", in any manner that the Tribunal considers appropriate. It remains to be seen to what extent, if any, the availability of disgorgement payments may encourage class action type proceedings before the Tribunal.

In addition, out-of-court settlements in such private applications will be subject to notification requirements and, thus, potential challenge by the Commissioner. Currently, parties to a private action before the Tribunal can choose to settle their dispute through either a consent agreement registered with the Tribunal or an out-of-court agreement. A registered consent agreement has the same force and effect as an order of the Tribunal. The Commissioner can seek an order of the Tribunal to vary or rescind a consent agreement registered by private litigants if the Commissioner believes that the agreement has or is likely to have anticompetitive effects.

As of June 20, 2025, Bill C-59 will impose a new obligation on private litigants that come before the Tribunal and who reach an out-of-court settlement after leave has been granted to provide a copy of the settlement agreement to the Commissioner. The Commissioner can then apply to the Tribunal to vary or rescind the settlement agreement if the Tribunal finds "that the [settlement] agreement has or is likely to have anticompetitive effects." Particularly in the absence of "substantial" anti-competitive effects, it is unclear what grounds or ability the Commissioner or the Tribunal would have to rescind or vary such a settlement agreement. Nevertheless, the requirement to notify the Commissioner of an out-of-court settlement may incentivize parties to settle disputes prior to the Tribunal granting leave to bring the proceeding. Alternatively, to avoid subsequent challenge by the Commissioner, settling parties may seek to consult with the Commissioner before finalizing out-of-court settlements.

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Strengthening Civil Collaboration Provisions

New remedies. Section 90.1 of the *Competition Act* provides for challenges to competitor agreements that prevent or lessen competition substantially. Effective December 15, 2024, even non-competitor agreements under this provision can be challenged if preventing or lessening competition is a significant purpose (in addition to a likely substantial effect) of the agreement, or a part of the agreement. In addition to prohibition orders and other remedies currently available on consent for conduct contrary to section 90.1, Bill C-59 now gives the Tribunal the ability to

- impose monetary penalties of up to the greater of (i) $10 million for the first order (and $15 million for each subsequent order) and (ii) three times the value of the benefit derived from the agreement (or if that amount cannot be reasonably determined, 3% of the business's annual worldwide gross revenues);
- require respondents to take any other action, including divesting assets or shares, necessary to overcome the effects of the challenged agreement; and
- in private litigation, effective from June 20, 2025, order disgorgement in an amount up to the value of the benefit derived from the challenged agreement to be distributed to private applicants and others affected by the agreement.

Prior conduct can be challenged. Bill C-59 now permits agreements to be challenged and subjected to penalties and remedial orders under section 90.1 within three years of the termination of the agreement.

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Other Changes

Refusal to Deal Provisions Broadened

Bill C-59 expands and clarifies the scope of the *Competition Act*'s refusal to deal provision.

In order to make a refusal to deal claim, it must be established that a person is "substantially affected in their business" due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms. Bill C-59 revised this standard such that a substantial effect on part of the applicant's business is sufficient.

In keeping with the government's support of Canadians' "right to repair," the refusal to deal provision has also been amended to clarify that a "product" that can be subject to a refusal to deal claim includes "a means of diagnosis or repair."

Prohibition on Reprisal Actions

Prior to Bill C-59, the *Competition Act* already contained whistleblower protections that prohibited an employer from retaliating against an employee who reports potential criminal conduct to the Commissioner. Bill C-59 added new provisions to prohibit "reprisal actions" taken to punish, discipline, harass or disadvantage any person because of that person's communications or cooperation with the Commissioner, including with respect to non-criminal matters. An application can be brought by the Commissioner or by a person directly

and substantially affected by an alleged reprisal action. Remedies include prohibition orders to stop a party from continuing such conduct, as well as monetary penalties.

Ordinary Selling Price Provisions

The *Competition Act*'s ordinary selling price (OSP) provisions prohibit a supplier from making materially false or misleading representations to the public about the OSP of a product unless the supplier, or suppliers generally, have sold the product in substantial volumes or offered it for sale for a reasonable period of time, at the same or higher prices. Bill C-59 now shifts the burden from the Commissioner to sellers to establish that their OSP representations meet the Act's criteria in respect of volumes sold, or the time for which the product was offered at the OSP or higher prices.

Drip-Pricing Provisions

The June 2022 amendments to the *Competition Act* explicitly prohibited the practice of drip pricing (under both civil and criminal provisions) — that is, "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees" imposed by a seller.

Bill C-59 further clarifies that representing a price that is not attainable due to fixed obligatory charges or fees is false or misleading unless the obligatory charges or fees represent only an amount imposed on a purchaser of the product under federal or provincial legislation.

Implications

With the exception of the bill's provisions with respect to the expanded private rights of action, including disgorgement payments, which will come into force on June 20, 2025, the amendments discussed above are now in force.

The Competition Bureau has stated that it "will work with stakeholders to implement the amendments in the most open and effective way possible" and is expected to issue guidance on its approach to, and interpretation of, many of the new provisions. As noted in its most recent Annual Plan, the Competition Bureau is expected to increase proactive enforcement and leverage the recent amendments to the *Competition Act* with a view to better protecting Canadians from anti-competitive activity. Businesses in Canada would be well advised to take this proactive enforcement approach into consideration when engaging in business planning.

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