UPDATED GUIDE TO THE

FAR REACHING AND SUBSTANTIVE CHANGES

TO THE COMPETITION ACT

PURSUANT TO

BILL C-19, BILL C-56 AND BILL C-59*

If you have any questions about national security reviews or foreign investment in Canada generally, please reach out to any member of our Competition and Foreign Investment Group.

Burnet, Duckworth & Palmer LLP

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Updated Guide to the Far Reaching and Substantive Changes to the Competition Act[1]

Pursuant to Bill C-19, Bill C-56 And Bill C-59

By Alicia Quesnel, Brittney LaBranche and Peter Ciechanowski[2]

In the last two years, most recently June 20, 2024, significant and substantial changes have been made to the *Competition Act* (Canada) (**Act**) pursuant to *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures* (**Bill C-19**), which received Royal Assent on June 23, 2022, *An Act to amend the Excise Tax Act and the Competition Act* (**Bill C-56**), which received Royal Assent on December 15, 2023 and *Fall Economic Statement Implementation Act, 2023* (**Bill C-59**), which received Royal Assent on June 20, 2024.[3]

The content of this article is intended to provide a general guide to the amendments. Specialist advice should be sought about any specific circumstances.

Criminal Offenses

Unlawful Agreements Between Employers

Effective as of June 23, 2023, it is criminally illegal under the new section 45(1.1) for unaffiliated employers to enter into agreements or arrangements with one another to fix, maintain, decrease or control salaries, wages or terms and conditions of employment, or to not solicit or hire each other's employees, even if the employers are not in the same business. Importantly, employers are entitled to rely on the ancillary restraints defence as is available to criminal conspiracies generally. As such, employers cannot be convicted of an offense under section 45(1.1) if they establish, on a balance of probabilities, that: (a) the agreement or arrangement: (i) is ancillary to a broader and separate agreement or arrangement that includes the same parties; and (ii) is directly related to, and reasonably necessary for giving effect to the objectives of the broader agreement; and (b) the broader agreement itself does not contravene section 45(1.1). For example, a non-solicitation clause in a purchase and sale agreement would very likely meet these requirements.

In its release of the Employer Conspiracy Guidelines on May 30, 2023,[4] the Competition Bureau ("**Bureau**") defines "employers" to include directors, officers, agents or employees, such as human resource professionals. The Employer Conspiracy Guidelines further note that an agreement between an officer of a corporation and an officer or director of another corporation is considered to be an agreement between employers. In these circumstances, both the corporation as well as the individuals who enter into an agreement (whether or not the corporation is charged) may be subject to prosecution.

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[1] This is an update to our Guide published on January 9, 2024, including our updates on amendments made to Bill C-59 prior to royal assent. Bill C-59 received royal assent on June 20, 2024. This Guide now reflects Bill C-59 having come into force.

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[3] Unless otherwise stated, all provisions refer to the Act.

[4] Competition Bureau, *Enforcement Guidelines on Wage Fixing and No-Poaching Agreements* (30 May 2023), online: https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements [**Employer Conspiracy Guidelines**].

Fines at the Discretion of the Court

Violations of the criminal conspiracy provisions in section 45(1) and 45(1.1) are indictable offenses and offenders are liable on conviction to imprisonment for a term not exceeding 14 years or to a fine (or both). Prior to June 23, 2023, the fine could not exceed $25,000,000. Effective as of June 23, 2023, the fine is at the discretion of the court.

False or Misleading Representations – Drip Pricing

Section 52 was amended under Bill C-19, effective June 23, 2022, to make it clear that "drip pricing" constitutes a false or misleading representation. Drip pricing is defined as a representation of a price that is not attainable due to fixed obligatory charges or fees, other than amounts imposed under an Act of Parliament or the legislature of a province (for example, sales tax).

While this was clarified with respect to the person making the false or misleading representation, it was not clarified with respect to the false or misleading representations sent or caused to be sent in sender information or subject matter information of an electronic message or sent or caused to be sent in an electronic message, or in a locator, which are covered by section 52.01. Bill C-59 rectifies this so that it will be clear that drip pricing representations imposed on a purchaser of the product constitute false or misleading representations for the purposes of section 52.01.

Deceptive Marketing Practices

Drip Pricing

A person that makes a false and misleading representation could be charged criminally under Part VI of the Act, or the matter could be dealt with by the Commissioner of Competition (**Commissioner**) under the civil deceptive marketing provisions of the Act. Matters that are advanced under the civil deceptive marking provisions are reviewable by the Commissioner and the Competition Tribunal (**Tribunal**) and are not criminal offenses. On June 23, 2022, Bill C-19 clarified that drip pricing constitutes a false or misleading representation for the purposes of section 74.01. Bill C-59 further amends section 74.01 so that drip pricing must be imposed on a purchaser of the product. A seller who engages in reviewable conduct now has the onus under section 74.01(3) of proving its ordinary price by either: (a) selling a substantial volume of the product at that price or a higher price; or (b) offering the product at that price or a higher price in good faith for a substantial period of time.

Bill C-59 also amends section 74.011 to include drip pricing as false or misleading representations sent or caused to be sent in sender information or subject matter information of an electronic message or sent or caused to be sent in an electronic message, or in a locator, that are imposed on a purchaser of the product.

Environmental Claims

The deceptive marketing provisions of the Act have been amended under Bill C-59 to include two new deceptive marketing practices related to environmental claims.

The new provisions of the Act target: (i) environmental claims that promote the environmental, social and ecological benefits of using or supplying a product if the claim is not based on an adequate and proper test (Section 74.01(1)(b.1)); and (ii) more broadly, environmental claims that promote the environmental and ecological benefits of a business or business activity that are not based on adequate and proper substantiation in accordance with internationally recognized methodology (Section 74.01(1)(b.2)).

While the facts cited in the environmental claim must be appropriately tested or substantiated, that may not be enough. If the over-all impression of the claim to an average person implies a broader meaning, the implied broader meaning must also be tested or substantiated. Both sections place the burden of proof on the entity making the environmental claim to demonstrate compliance with the provision.

There is fairly clear case law on what is required to qualify as an "adequate and proper test". The test must be fit and suitable having regard for the risk or harm the product in question intends to prevent and must be conducted in controlled conditions that exclude external variables. When feasible, multiple independent samples should be used, and the results must reasonably show the product's significant effect. This test must be completed before making any related statements, warranties, or guarantees.

There is currently no case law on what is required to satisfy "adequate and proper substantiation in accordance with internationally recognized methodology". The term "internationally recognized methodology" is undefined in the Act. Various international, national, and sub-national standards exist, with some being voluntary and others being mandatory. As a result, the scope and meaning of Section 74.01(1)(b.2) are unclear.

Until the Bureau provides further guidance, every company that makes public representations and warranties with respect to the environment and/or climate change, will need to review the same (with the assistance of outside experts) and prepare to substantiate and/or amend them. While undertaking this review, the following should be considered:

- it is important to understand how the "over-all impression" test is applied since testing or substantiating facts alone may not be enough;
- the use of words and phrases, particularly by oil and gas companies, such as "clean", "sustainable", "green", "low-carbon", "climate leader", "carbon neutral", "climate friendly" and "net-zero" are fairly broad and vague terms that are open to various interpretations by the public. The use of such terms will likely be problematic and will invite greater scrutiny as the meaning they imply or portray will be difficult to substantiate;
- if your calculation of GHG emissions and emissions intensity are not verified by third party verifiers, consider doing so; and
- greater care will need to be taken by companies that wish to disclose their future plans and targets. Referred to as "forward looking statements", these statements are particularly vulnerable to attack unless the plan is detailed, clear and actionable, appropriate baseline measures and methodologies are in place to measure progress, the resources and technologies are effective and commercially available today, and there is evidence of action being taken and monitored.

AMPs

Administrative monetary penalties (**AMPs**) for violations of the deceptive marketing practices provisions of the Act were increased under Bill C-19 to provide for a monetary penalty that is intended to make conduct that contravenes the Act unprofitable. While there is a minimum penalty, the penalties have been revised as follows:

(a) for individuals, the greater of: (i) $750,000 for the first order, and $1,000,000 for any subsequent orders; and (ii) 3x the value of the benefit derived from the deceptive conduct if the amount can reasonably be determined; and

(b) for corporations, the greater of: (i) $10,000,000 for the first order, and $15,000,000 for any subsequent order; and (ii) 3x the value of the benefit derived from the deceptive conduct or, if that amount cannot reasonably be determined, 3% of the corporation's annual worldwide gross revenues.

Private Rights of Actions

As of June 20, 2025 (the first anniversary of the day Bill C-59 came into force), private persons will be entitled to apply to the Tribunal for leave to bring a private action against a person for their deceptive marketing practices.

See "**Private Rights of Actions**" below.

Refusal to Deal, Price Maintenance, Exclusive Dealing, Tied Selling and Market Restrictions

Section 75 (Refusal to Deal)

Bill C-59 amends the refusal to deal provisions under section 75 in two material respects. First, the amendments will make it easier to establish that the impugned conduct has occurred. The impugned conduct is established if a person is substantially affected in either the whole **or part** of their business by another person's refusal to deal.

Second, a refusal to provide "diagnosis or repair" services is now conduct captured by section 75. A "means of diagnosis or repair" is defined to include diagnostic, maintenance repair and calibration information, technical updates, diagnostic tools and any related documentation and service parts. The Tribunal has the power to order a supplier of a product that is a means of diagnosis or repair to make the means of diagnosis or repair available to a person, and to accept a person as a customer on usual trade terms if the means of diagnosis or repair can be readily supplied.

Private Rights of Actions

Private rights of action are already applicable to sections 75 (Refusal to Deal), 76 (Price Maintenance) and 77 (Exclusive Dealing, Tied Selling and Market Restrictions).

As of June 20, 2025 (the first anniversary of the date Bill C-59 came into force), private persons will be entitled to apply to the Tribunal for additional remedies that will come into force at that time.

See "**Private Rights of Actions**" below.

Abuse of Dominance

The abuse of dominance provisions of the Act (sections 78 and 79) have undergone significant changes under Bill C-19 and Bill C-56.

Anti-Competitive Acts

Bill C-19 first amended section 78 to clarify that an anti-competitive act (for the purpose of the abuse of dominance provisions of the Act) is an act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition. It also amended the illustrative list of anti-competitive acts to include the act of "a selective or discriminatory response to an actual or potential competitors for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market". Bill C-56 further added to this illustrative list including any act of "directly or indirectly imposing excessive and unfair selling prices".

Test for Abuse of Dominance

Bill C-56 significantly expanded the scope of what constitutes abuse of dominance. Prior to Bill C-56 coming into force, a party that substantially or completely controlled a class or species of business in any area of Canada had to be engaged in a 'practice of anti-competitive acts' in order to violate the abuse of dominance provisions. This is no longer the case. A person that substantially or completely controls a class or species of business in any area of Canada can be subject to an order of the Tribunal for abuse of dominance if the person is engaged in either:

(a) a practice of anti-competitive acts; or

(b) conduct: (i) that had, is having or is likely to have a substantial prevention or lessening of competition; and (ii) the effect is not the result of superior competitive performance.

From Bill C-19 introducing several new factors under section 79(4) to additional changes by Bill C-56, the Tribunal can consider the following additional factors when assessing conduct for abuse of dominance: (a) the effect of the conduct on barriers to entry, including network effects; (b) the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy; (c) the nature and extent of change and innovation in a relevant market; and (d) any other factor that is relevant to competition in the market that is or would be affected by the conduct.

AMPs and Other Actions, Including Divestiture

The bifurcation of the test for abuse of dominance has also resulted in a bifurcation of the AMPs and other remedies available to the Tribunal. The penalties are higher and more substantial if the impugned conduct involves a practice of anti-competitive acts that has had or is having a substantial prevention or lessening of competition in a market.

If the impugned conduct **involves a practice of anti-competitive acts** and the Tribunal finds that: (a) the practice has had or is having a substantial prevention or lessening of competition in a market where the person has a 'plausible competitive interest'; and (b) an order prohibiting that conduct is not likely to restore competition in that market, the Tribunal may:

(a) in addition to, or in lieu of a prohibition order, make an order directing the person to take such actions as are reasonably and necessary to overcome the effects of the practice in the market, including the divestiture of assets or shares; and

(b) order them to pay an AMP in an amount not exceeding the greater of: (i) $25,000,000 and, for each subsequent order, an amount not exceeding $35,000,000; and (ii) 3x the value of the benefit derived from the conduct or, if that amount cannot reasonably be determined, 3% of the corporation's annual worldwide gross revenues.

If the impugned conduct **does not involve a practice of anti-competitive acts**, the Tribunal can order the person to pay an AMP in an amount not exceeding the greater of: (i) $10,000,000 and, for each subsequent order, an amount not exceeding $15,000,000; and (ii) 3x the value of the benefit derived from the conduct or, if that amount cannot reasonably be determined, 3% of the corporation's annual worldwide gross revenues.

Limitation on Action

As a result of the amendments included in Bill C-56, no action may be taken under section 79 in respect of a practice of anti-competitive acts or conduct more than 3 years after the practice or conduct has ceased.

Private Rights of Action

Bill C-19 extended private rights of action to abuse of dominance conduct.

As of June 20, 2025 (the first anniversary of the day Bill C-59 came into force), private persons will be entitled to apply to the Tribunal for additional remedies that will come into force at that time.

See "**Private Rights of Actions**" and "*Disgorgement Remedy*" below.

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Arrangements Between Competitors and Others

Significant changes have been made to section 90.1. Known as the 'competitor collaboration' or 'strategic alliance' provisions, these provisions were originally designed to provide a civil remedy to the Commissioner to address agreements or arrangements between competitors that did not rise to the level of a criminal conspiracy, but which nonetheless had, were having, or were likely to have, a substantial prevention or lessening of competition in a market.

Expanded Scope of Application

Under the Act, a "competitor" is defined to include a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement. On December 15, 2024, Bill C-56 will widen the scope of section 90.1 to include agreements and arrangements between persons, **even if they are not competitors**, if the Tribunal finds that a *significant* purpose of the agreement or arrangement, or any part of it, is to substantially prevent or lessen competition in a market. These revisions will capture agreements or arrangements between parties that have a vertical relationship, such as between a supplier and a customer.

Bill C-19 introduced several new factors for the Tribunal to consider when assessing agreements or arrangements between competitors and others, including: (a) network effects within a market; (b) whether the agreement or arrangement would contribute to the entrenchment of the market position of leading incumbents; and (c) any effect of the agreement or arrangement on price or non-price competition, including quality, choice or consumer privacy.

Repeal of the Efficiencies Defence

On December 15, 2024, Bill C-56 will repeal the "Efficiencies Defence" provision under section 90.1. The Efficiencies Defence precludes the Tribunal from making an order under section 90.1 if the Tribunal finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset the effects of, any prevention or lessening of competition. Gains in efficiency are now only a factor for consideration.

Limitation on Action

Effective as of December 15, 2023, no application can be made under section 90.1 in respect of an agreement or arrangement that has been terminated for more than 3 years.

AMPs and Other Actions, Including Divestiture

As of June 20, 2025 (one year after Bill C-59 came into force), parties subject to orders under section 90.1(1) may also be subject to a potential divestiture remedy under section 90.1(1.1), AMPs or both. If the Tribunal finds that an agreement or arrangement (or a proposed agreement or arrangement) has had, or is having a substantial prevention or lessening of competition in a market, the Tribunal may:

(a) if the Tribunal determines that an order prohibiting that conduct is not likely to restore competition in that market, in addition to, or in lieu of a prohibition order, make an order directing the person to take such actions as are reasonable and necessary to overcome the effects of the practice in the market, including the **divestiture of assets or shares**; and

(b) order them to pay an AMP in an amount not exceeding the greater of: (i) $10,000,000 and, for each subsequent order, an amount not exceeding $15,000,000; and (ii) 3x the value of the benefit derived from the conduct or, if that amount cannot reasonably be determined, 3% of the corporation's annual worldwide gross revenues.

In considering the amount of the AMP, the Tribunal is required to take into account evidence of: (a) the effect on competition in the relevant market; (b) the gross revenues from sales affected by the agreement or arrangement; (c) any actual or anticipated profits affected by the agreement or arrangement; (d) the financial position of the person against whom the order is made; (e) the history of compliance with the Act; and (f) any other relevant factor.

Private Rights of Action

As of June 20, 2025 (one year after Bill C-59 came into force), Bill C-59 will extend private rights of action to agreements or arrangements impugned under section 90.1(1).

See "**Private Rights of Actions**" below.

Review of Agreements and Arrangements with Competitors and Others

Prior to these forthcoming amendments, the Tribunal's only remedy is, without the consent of the parties against which an order is being made, to prohibit the parties from undertaking any activities under the agreement, or with the consent of the parties, to undertake other actions. These very significant changes to section 90.1 will not come into effect until June 20, 2025.

Given the new potential penalties available to the Commissioner, as well as the extension of private rights of action to such agreements or arrangements, companies should begin reviewing and assessing whether changes should be made to any of their arrangements and agreements.

Mergers

Significant changes have been made to the merger provisions of the Act.

Scope of Application

With Bill C-59, consideration of the impact of a proposed merger on the sources from which a trade, industry or a profession obtains a product, or from which a trade, industry or a profession disposes of a product, is expanded to include labour.

The following additional factors are introduced by Bill C-19 and Bill C-59 for the Tribunal to consider when determining whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially: (a) network effects within the market; (b) contribution to the entrenchment of the market position of leading incumbents; (c) any effect on price or non-price competition, including quality, choice or consumer privacy; (d) the change in concentration or market share that is brought about or is likely to bring about; and (e) any likelihood in express or tacit coordination between competitors in a market.

Prior to Bill C-59 coming into force, section 92(2) prohibited the Tribunal from finding that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially **solely on the basis of evidence of concentration or market share**. This is now repealed. In addition, the Act now provides that market concentration and change in market concentration are significant factors for consideration of the impact of the merger on competition. Bill C-59 has also introduced, as a factor for consideration, any likelihood that the merger or proposed merger will or would result in express or tacit coordination between competitors in a market.

Repeal of the Efficiencies Defence

Bill C-56 repealed the Efficiencies Defence as it applies to mergers, such that any gains in efficiency are now only a factor for consideration.

Limitation on Action

The Act previously provided that no application can be made under section 92 in respect of a merger more than one year after the merger has been substantially completed. However, with Bill C-59 coming into effect, if the merger was subject to notification, the one-year period will continue to apply. For mergers that are not subject to notification, the

Commissioner will now have 3 years to review the merger transaction under the merger provisions of the Act. Smaller transactions that have potential anti-competitive impacts will remain subject to review and potentially, divestiture requirements, for a longer period of time.

Size of Transaction Test

Prior to Bill C-59 coming into effect, a proposed merger was notifiable if it met the financial thresholds required under the '*size of parties*' test as well as the '*size of transaction*' test. The '*size of transaction*' test was based on the value of assets in Canada of an entity (and entities controlled by that entity) or the value of revenues from sales in or from Canada from assets in Canada of an entity (and entities controlled by that entity). Revenues generated by sales made into Canada from assets outside of Canada were not included.

The revenue portion of the '*size of transaction*' test has now been revised to account for the value of revenues generated in, from or **into** Canada by the entity and entities controlled by that entity, or as applicable, all of the assets being acquired, including assets located outside of Canada.

This change is anticipated to significantly expand the number of mergers that are subject to notification under the Act, particularly mergers of non-Canadian entities that have sales into Canada.

Presumption and Reverse Onus

In order to exercise remedies in respect of a merger or proposed merger, the Tribunal must make a determination that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. Prior to Bill C-59 coming into effect, the onus was on the Commissioner, in all cases, to satisfy the Tribunal that this test was met. This is no longer the case.

As a result of Bill C-59, if the Tribunal finds that a merger or proposed merger results in or is likely to result in a significant increase in concentration or market share, the Tribunal **must** also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, unless the contrary is proved on a balance of probabilities by the merging parties. In other words, the onus of proof shifts to the merging parties to prove to the Tribunal that the merger or proposed merger does not or will not prevent or lessen, or does not, or is not likely to prevent or lessen, competition substantially. The reverse onus will make the Bureau's job of challenging a merger much easier but will require the merging parties to provide more evidence (which may include a more routine use of expert evidence from economists), thereby potentially making merger filings slower and more costly.

Concentration Index

For the purposes of determining whether the presumption applies (i.e., the merger would result in a significant increase in concentration or market share), the amendments adopt the Herfindahl-Hirschman Index (**HHI**). The HHI is not legislated in the United States, but rather is a concentration measure used by the U.S. Department of Justice & Federal Trade Commission in the Merger Guidelines § 2.1 (2023). A market with an HHI of less than 1,500 is considered a competitive marketplace, one with an HHI of 1,500 to 2,500 is considered moderately concentrated, and a market with an HHI of 2,500 or more is considered highly concentrated.

The concentration index or HHI in a relevant market is defined as "the sum of the squares of the market shares of the suppliers or customers". Under the proposed revisions:

> "A merger or proposed merger results or is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger or proposed merger,
>
> (a) the concentration index increases or is likely to increase by more than 100; and

(b) either

(i) the concentration index is or is likely to be more than 1800, or

(ii) the market share of the parties to the merger or proposed merger is or is likely to be more than 30%."

The amendments authorize the Governor in Council to prescribe different values than those set out in the Act. This provision provides flexibility to amend the thresholds without requiring further legislative action.

While the HHI provides relative simplicity to the determination of market concentration, it does so at the expense of certainty and specificity. If the specific market is ill-defined or is not defined in a proper or realistic manner, the HHI will not be an appropriate indicator of market concentration. In addition, market concentration should not be used as a proxy for market power, which is a function of the structure of the market. HHI does not account for the complexities of either market structure or firm behaviour, and so should not be used to imply the presence of market power. The presumption of market power that the legislation contemplates will require parties to a merger or proposed merger to dedicate more resources (time and money) to challenging the Bureau's definition of the relevant market(s) and to establishing the elements of the market structure and firm behaviour that rebut the presumption of market power.

In addition, section 93(g.4) has been added so that any change in concentration or market share resulting from a merger or proposed merger can be considered in determining whether a merger is anti-competitive.

Remedies to Restore Competition to Pre-Merger Levels

To exercise remedies in respect of a merger or proposed merger, the Tribunal must determine that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In case of such a finding, the Tribunal is empowered to prohibit a person from doing any act or thing the Tribunal "determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially".

In addition if a merger or proposed merger is found to prevent or lessen, or to be likely to prevent or lessen, competition substantially in a market, the Tribunal is required to make an order that will " restore competition to the level that would have prevailed but for the merger" and is empowered to prohibit a person from doing any act or thing the Tribunal "determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition." (Note the absence of the word "substantially").

The objective of restoring competition to pre-merger levels and ensuring a merger does not prevent or lessen competition at all is a far different objective than ensuring a merger does not prevent or lessen competition substantially. These changes will provide the Tribunal with the power to address any anti-competitive impacts of a merger (whether or not substantial).

Anti-Avoidance

Bill C-19 introduced a general "anti-avoidance" provision to the Act, which specifies that if a transaction is designed to avoid the application of Part IX, the merger notification provisions will nonetheless apply to the substance of the proposed transaction.

Pursuant to Bill C-59, the Act now clarifies that if a transaction includes both the acquisition of assets and the acquisition of shares, the value of the assets for both the asset transaction and the share transaction, and the value of the revenues for the asset transaction and the share transaction, must be aggregated.

Private Rights of Actions

Scope of Application

Prior to Bill C-56 coming into effect, private parties were entitled to apply for leave to bring an application against another person for a violation of sections 75 (*Refusal to Deal*), 76 (*Price Maintenance*) and 77 (*Exclusive Dealing, Tied Selling and Market Restrictions*). With Bill C-56, the private right of action was extended to section 79 (*Abuse of Dominance*).

Effective June 20, 2025 (one year after Bill C-59 came into force), the private right of action will be extended to section 74.1 (*Deceptive Marketing Practices*) as well as section 90.1(1) (*Agreements or Arrangements between Competitors*).

In all cases, the Tribunal may not grant leave if the matter: (a) is the subject of an ongoing inquiry by the Commissioner; or (b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person.

Subject to the foregoing, the Tribunal will have significantly more discretion to grant leave to a person to make an application under:

(a) section 74.1 (*Deceptive Marketing Practices*) if it is satisfied that it is in the public interest to do so;

(b) section 75 (*Refusal to Deal*), 77 (*Exclusive Dealing, Tied Selling and Market Restrictions*), 79 (*Abuse of Dominance*) and section 90.1 (*Agreements or Arrangements between Competitors*) if:

  (i) it has reason to believe that the applicant is **directly and substantially affected in the whole or part of the applicant's business by any conduct** referred to in one of those sections that could be subject to an order under that section; or

  (ii) it is satisfied that it is in the public interest to do so.

Bill C-59 also expands the threshold for granting leave by now considering a direct and substantial affect in the "whole or part" of a business and replaced the former phrase "by any practice" with "by any conduct". Notably, the Tribunal can consider the public interest when determining whether to grant applications for leave.

Limitations of Action

The right to make an application for leave under these private rights of action provisions cannot be made more than 1 year after the impugned practice or conduct has ceased.

Disgorgement Remedy

As of June 20, 2025 (one year after Bill C-59 came into force), private parties granted leave to apply to the Tribunal under certain sections of the Act (being sections 74.1 (*Deceptive Marketing Practices*), 75 (*Refusal to Deal*), 76 (*Price Maintenance*), 77 (*Exclusive Dealing, Tied Selling and Market Restrictions*), 79 (*Abuse of Dominance*) and 90.1 (*Agreements or Arrangements between Competitors*)) will also be entitled to apply to the Tribunal for a "*disgorgement*" remedy, which is designed to prevent unjust enrichment and make conduct that violates the Act unprofitable.

The disgorgement remedy allows the Tribunal to order the impugned party to pay an amount, not exceeding the benefit derived from the conduct, to be distributed among the applicant and any other persons affected by the conduct in any manner the Tribunal considers appropriate. Such terms include: (a) specifying how the payment is to be administered; (b) appointing an administrator; (c) specifying how the administrator will be paid; (d) notification to claimants; (e) time and manner for making claims; (f) conditions for eligibility; and (g) the manner of payment and dealing with

undistributed amounts.

If the application is made by the Commissioner, the Tribunal is not authorized to impose this remedy; It is only available if an order is made as a result of an application by a person granted leave to bring the application. The Commissioner, by contrast, can request the imposition of an AMP that could be as high as 3x the value of the benefit derived from the conduct. The AMP, however, will not be distributed to persons affected by the conduct.

Consent Agreements

A matter that is subject to the private right of action can be resolved through a consent agreement between the parties that is registered and filed with the Tribunal, although the Commissioner can apply to have the registered consent agreement varied or rescinded if it finds the consent agreement does not conform with the purposes of the Act.

Settlement Agreements

A party granted leave to bring an action is also entitled to discontinue the action if it reaches a settlement agreement with the party whose conduct is subject to the order. A copy of the settlement agreement must be provided to the Commissioner within 10 days and the Tribunal, on application of the Commissioner, may vary or rescind the settlement agreement if it finds that:

(a) in case of a settlement agreement applicable to conduct under section 74.1, it is not in conformity with the purposes of the deceptive marketing practices provisions of the Act; and

(b) in case of a settlement agreement applicable to any other private right of action, the agreement has or is likely to have, anti-competitive effects.

Parties to a settlement agreement must provide the Commissioner with a copy of the settlement agreement within 10 days, failing which, the Tribunal may, on application of the Commissioner, order the person to pay an AMP not exceeding $10,000 for each day they fail to apply.

Interim Orders and AMPs

Interim Orders to Prevent Closing of a Merger

Bill C-59 amends the Act to permit the Commissioner to apply for an interim order to prevent a proposed merger from closing before the Commissioner has completed his review, whether or not he has applied to the Tribunal for an order challenging the merger under section 92. These applications can be made by the Commissioner quickly and efficiently on an *ex parte* basis. Under the new provisions, once the Commissioner makes an application for an interim order, the parties to the proposed merger are not entitled to close until the matter has been heard and disposed of by the Tribunal.

As of June 20, 2025 (the first anniversary of the day Bill C-59 came into force), private persons will be entitled to apply to the Tribunal for an interim order on the same basis.

AMPs

As of June 20, 2025 (the first anniversary of the date Bill C-59 came into force), if a court, on application of the Commissioner, determines that a person has failed to comply with or is likely to fail to comply with, a registered consent agreement entered into by the Commissioner and that person, the court may, among other things, order the person to pay an AMP not exceeding $10,000 for each day they fail to comply.

Reprisal Actions

The Act contains new provisions to deal with "reprisal actions". These are defined as actions taken to penalize, punish, discipline, harass or disadvantage another person because of that person's communications with the Commissioner or because that person has cooperated, testified or assisted, or has expressed an intention to cooperate, testify or assist in an investigation or proceeding under the Act.

The new provisions allow a court, on application of the Commissioner, to make an order prohibiting a person from engaging in reprisal actions and ordering them to pay an AMP not exceeding: (a) in the case of an individual, $750,000 for the first order and $1,000,000 for each subsequent order; and (b) in the case of a corporation, $10,000,000 for the first order and $15,000,000 for each subsequent order.

Environmental Certificate

The Act now includes the right of parties to an agreement or arrangement that is for the purpose of protecting the environment and that is not likely to prevent or lessen competition substantially in a market, to apply to the Commissioner for a certificate (**Environmental Certificate**). If the Commissioner approves the application, he must issue the Environmental Certificate and register it with the Tribunal. Once registered, sections 45, 46, 47, 49 and 90.1 will not apply to an agreement or arrangement that is the subject of an Environmental Certificate.

The Tribunal may rescind or vary an Environmental Certificate, on application by: (i) the Commissioner; (ii) the parties to the agreement or arrangement; or (iii) any person directly and substantially affected in the whole or part of their business by the agreement or arrangement, if the Tribunal finds that:

(a) the parties have terminated the agreement without giving notice to the Commissioner;

(b) the parties have agreed, with the Commissioner's consent, to vary the agreement;

(c) the agreement or arrangement is not being implemented in accordance with the description of the Environmental Certificate;

(d) the parties have failed to comply with the terms specified in the Environmental Certificate; or

(e) the agreement or arrangement prevents or lessens or is likely to prevent or lessen, competition substantially in a market.

It is not entirely clear what this new provision is attempting to achieve, or what "ill" it is attempting to address, though it may be attractive to some companies that desire to market themselves as champions of the environment.

Market Inquiries

Pursuant to Bill C-56, either the Commissioner, following consultation with the Minister of Innovation, Science and Technology (**Minister**), or the Minister, may cause a formal market inquiry to be undertaken if they consider it in the public interest. While the Commissioner typically undertakes informal market inquiries, these powers, previously only available to the Commissioner in respect of an inquiry into a person's conduct or alleged breach of the Act, will allow the Commissioner to apply to court to require a person to answer questions, in person or in writing, or to produce documents relevant to the market inquiry.

The time and cost of compliance will depend upon how expansive the request for information is. If the request for records and data is as expansive as a supplementary information request, a party required to respond to the request will need to engage a third party to conduct the relevant searches of their electronic systems, as well as legal counsel to assist in the process. Both the time commitment as well as the internal and third party costs of compliance could be significant.