A Strengthened Regime for Canada's Civil Anti-Competitive Agreements Provisions

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Introduction

The last two years have seen significant changes to the civil anti-competitive agreement provisions under Section 90.1 of Canada's Competition Act.[1] Following a series of amendments, the scope of Section 90.1 is now broader, encompassing agreements between noncompetitors in addition to those among competitors; its potential consequences are more severe, with substantial monetary penalties now available; and it is enforceable by both public and private actors, including with a form of collective recovery available for private applicants. Taken together, the refashioning of Section 90.1 has the potential to drastically increase enforcement activity under a historically rarely utilized provision of the Act.

The amendments offer opportunities for more effective redress in the face of anti-competitive conduct; however, the cumulative impact of Section 90.1's recalibration also risks inadvertently chilling pro-competitive or competitively benign conduct. As these amendments are operationalized through enforcement guidance and judicial interpretation, care must be taken to facilitate the former while minimizing the latter.

A Brief History of the Ineffectual Original Section 90.1

Section 90.1 falls within Part VIII of the Act, which addresses matters that are civilly reviewable by the Competition Tribunal (Tribunal), Canada's specialized competition law court. Part VIII serves as a complement to Part VI of the Act, which creates a set of criminal antitrust offenses, including a criminal cartel offense under Section 45 of the Act.

The bifurcation of the collusion provisions between a criminal and civil regime is a relatively recent advent in Canada. After a number of false starts at reform, in 2009, a two-track approach to anti-competitive agreements was enacted as part of a broader overhaul of the Act. The criminal cartel provision was amended to take the form of a per se offense limited to certain sell-side conduct (price-fixing, market allocation, output control, and bid-rigging)[2] and a civil provision was introduced, as Section 90.1, to address a broader range of competitor agreements where they result in a substantial lessening or prevention of competition (akin to the rule of reason in the United States). The original Section 90.1 language read as follows:

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1 Competition Act, R.S.C. 1985, c. C-34 (Can.).

2 As part of the recent wave of amendments, Canada's criminal cartel provisions were expanded to also capture wage-fixing and no-poach agreements among employers.

> **90.1 (1)** If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement—whether existing or proposed—between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
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> (a) prohibiting any person—whether or not a party to the agreement or arrangement—from doing anything under the agreement or arrangement; or
>
> (b) requiring any person—whether or not a party to the agreement or arrangement—with the consent of that person and the Commissioner, to take any other action.

Under the civil anti-competitive collaboration provisions introduced as Section 90.1, on application by the Commissioner of Competition (Commissioner), the Tribunal could make an order against an existing or proposed agreement or arrangement, to which two or more of the parties are competitors and which is, or is likely to, result in a substantial lessening or prevention of competition in a market.[3]

As initially enacted (and as in force until the recent amendments described below), only the Commissioner had the power to bring an action before the Tribunal under Section 90.1, and the only available remedy that could be imposed was a prohibition order. As a result, this provision was widely regarded as ineffective and not much of a deterrent. First, the enforcer, the Competition Bureau, had to find out about conduct. Then it had to care enough to devote resources to investigate. Then it needed to build a case that included robust economic analysis to establish competitive effects. Then it had to care to litigate or threaten to, and only then could it unlock its only available remedy of compelling the alleged wrongdoer to stop.

Over the 15 years that followed the establishment of the dual-track approach, the civil arm in Section 90.1 of the Act was rarely invoked, with only two applications being brought to the Tribunal.

Over the 15 years that followed the establishment of the dual-track approach, the civil arm in Section 90.1 of the Act was rarely invoked, with only two applications being brought to the Tribunal.[4] This led to calls from the Competition Bureau for further reform of the civil anti-competitive collaboration provisions,[5] with the hope of increased enforcement in this area and, as a result, a greater deterrence mechanism.

Adding Tools to the Toolbox: Recent Amendments to Section 90.1

Since 2022, the Act has been subject to three rounds of amendments. While the first amending bill, enacted in June 2022 (Bill C-19),[6] made only modest adjustments to Section 90.1,[7] the following

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[3] Competition Act, R.S.C. 1985, c. C-34, s. 90.1(1) (Can.).

[4] Since 2009, only two applications have been brought under Section 90.1, with both applications resolved by consent agreement. In 2011, the Competition Bureau entered into a consent agreement with Air Canada, United Continental, and United Airlines in connection with their establishment of a trans-border metal neutral joint venture; the Competition Bureau had challenged the joint venture under both s. 90.1 and the Act's merger provisions. In 2018, the Competition Bureau entered into a consent agreement with HarperCollins, settling allegations that HarperCollins's agreements with six other publishers to switch their distribution models for e-books from wholesale to agency would result in a substantial lessening of competition (prior to bringing its application against HarperCollins, the Competition Bureau had entered into consent agreements with three other publishers to resolve similar concerns).

[5] Competition Bureau Canada, Future of Competition Pol'y in Canada at s. 3.1 (2023), https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-3-1.

[6] Budget Implementation Act, S.C. 2022 c. 10 (Can.) (assented to June 23, 2022) [hereinafter Bill C-19].

[7] Together with introducing more material amendments to other parts of the Act, Bill C-19's only change to Section 90.1 was to add the following three items to the explicitly inexhaustive list of factors the Tribunal can consider as part of its competitive effects assessment: (1) network effects within the market; (2) whether the agreement or arrangement would contribute to the entrenchment of the market position of leading incumbents; and (3) any effect of the agreement or arrangement on price or non-price competition, including quality, choice, or consumer privacy.

two rounds of amendments, enacted in December 2023 (Bill C-56)[8] and June 2024 (Bill C-59),[9] carried more substantial changes.

Expanded Scope to Include Noncompetitors. Bill C-56 expanded Section 90.1 to apply to agreements between noncompetitors in addition to agreements between competitors. As a result, the new language in Subsections 90.1(1) and (1.01) reads as follows:

> 90.1 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that an agreement or arrangement or a proposed agreement or arrangement between persons of whom two or more are competitors prevents or lessens, has prevented or lessened or is likely to prevent or lessen competition substantially in a market, the Tribunal may make an order
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> (a) prohibiting any person—whether or not a party to the agreement or arrangement—from doing anything under the agreement or arrangement; or
>
> (b) requiring any person—whether or not a party to the agreement or arrangement—with the consent of that person and the Commissioner, to take any other action.
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> (1.01) If the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market, it may make an order under subsection (1) even if none of the persons referred to in that subsection are competitors.[10]

For the Tribunal to make an order under the revised Section 90.1, it is not necessary that any of the parties to the agreement are competitors so long as a "significant purpose" of the agreement is to "prevent or lessen competition in any market."[11] Stated differently, under Section 90.1 (as amended), the Tribunal can make an order with respect to an agreement that results, or is likely to result, in a substantial lessening or prevention of competition, if either (a) at least two of the parties to the agreement are competitors or (b) the parties to the agreement are not competitors but a significant purpose of the agreement is to prevent or lessen competition.

Bill C-56 was titled as the Affordable Housing and Groceries Act. There has been significant focus on the application of this change to property controls (e.g., exclusivity clauses and restrictive covenants) in commercial leases and, in particular, in the retail grocery sector. However, while facilitating retail grocery competition may have been a motivating factor behind this amendment, the provision is one of general application. As such, a very broad range of agreements (entirely unrelated to the grocery sector or property controls) are now subject to potential civil review under Section 90.1. Preliminary guidance from the Competition Bureau, alongside discussing property controls, also provides examples of other noncompetitor arrangements that may attract scrutiny.[12] For example, an agreement between a retailer and a supplier requiring the supplier to pay the retailer to allow the retailer to match if a competing retailer undercuts the first retailer on price may attract scrutiny under the new Section 90.1 provision. A potential anti-competitive effect is that this agreement could cause the supplier to increase its prices to other retailers or impose

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[8] Affordable Housing & Groceries Act, S.C. 2023, c. 31 (Can.), 1st sess. (assented to Dec. 15, 2023) [hereinafter Bill C-56].

[9] Fall Economic Statement Implementation Act, S.C. 2023 c. 15, 1st sess. (assented to June 20, 2024) [hereinafter Bill C-59].

[10] Competition Act, R.S.C. 1985, c. C-34, s. 90.1(1)(1.01) (Can.). This language reflects amendments under Bill C-59 that will come into force as of June 20, 2025.

[11] *Id.*

[12] Competition Bureau Canada, Changes to the Provisions on Mergers and Restrictive Trade Practices in the Competition Act (7 November 2024), https://competition-bureau.canada.ca/mergers-and-acquisitions/changes-provisions-mergers-and-restrictive-trade-practices-competition-act#sec02-3.

minimum resale pricing on other retailers in order to avoid having to pay the first retailer for such price matching discounts. Other types of vertical agreements that could attract scrutiny under the expanded Section 90.1 include exclusive distribution agreements, intellectual property licensing agreements, and preferred pricing arrangements.[13]

As such, there is not yet an established enforcement practice or judicial precedent with respect to Section 90.1's application to agreements between noncompetitors.

Although Bill C-56 was adopted in December 2023, this amendment came into force only in December 2024. As such, there is not yet an established enforcement practice or judicial precedent with respect to Section 90.1's application to agreements between noncompetitors. In particular, there is uncertainty as to what constitutes a "significant purpose" of an agreement. The Parliamentary debates surrounding Bill C-56 shed little light on the matter, simply indicating that the amendment sought to target all agreements "aimed at reducing competition," even where the parties are not competitors.[14] Jurisprudence developed in connection with the abuse of dominance provisions may be instructive. Canada's abuse of dominance provisions include the concept of an "anti-competitive act", which is an act intended to have an anti-competitive purpose. Tribunal jurisprudence has established that where there is a "legitimate business justification" underpinning an impugned course of conduct, the conduct cannot be considered to be an "anti-competitive act."[15] Arguably, a similar analytical framework could be applied to Section 90.1, such that a legitimate business justification for an impugned agreement (i.e., a demonstrable primary rationale for the agreement that is unrelated to inhibiting competition) may preclude a finding that a significant purpose of the agreement was to prevent or lessen competition.

Removal of the Efficiencies Defense. The recent amendments have provided for a more limited and less clear role for efficiencies under Section 90.1. Prior to the Bill C-56 amendments, under Subsection 90.1(4), the Tribunal could not make an order even against an anti-competitive agreement where the agreement brought about, or was likely to bring about, gains in efficiency that would be greater than, and offset, the effects of any prevention or lessening of competition.[16] Bill C-56 repealed Subsection 90.1(4), and the amendments have not otherwise provided any explicit role for efficiencies in Section 90.1. As such, the role of efficiencies is now unclear.

While, plainly, efficiencies are no longer a determinative consideration, there is still scope for efficiencies to be considered as part of the Section 90.1 analysis. Preliminary guidance from the Competition Bureau notes that "in certain cases, agreements may have benefits that are pro-competitive and increase rivalry, and examining these could help us assess whether the agreement harms competition substantially."[17] Similarly, the Tribunal has discretion to take such considerations into account, with Subsection 90.1(2) of the Act providing that the Tribunal can consider any factor relevant to competition in the market at issue as part of its competitive effects assessment.[18]

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[13] While certain restrictive trade practices are separately addressed under specific civil provisions, including exclusive dealing in Section 77 and price maintenance in Section 76, those provisions are less flexible in their application and do not provide for the same range of remedies as the amended Section 90.1.

[14] Bill C-56 at 1300 (Alexis Brunelle Duceppe).

[15] Competition Bureau Canada, Abuse of Dominance: Enforcement Guidelines at 25-27 (2019), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines.

[16] The Act's merger provisions contained a corresponding defense under Section 96, which was similarly repealed through Bill C-56.

[17] Competition Bureau Canada, Changes to the Provisions on Mergers and Restrictive Trade Prac. in the Competition Act (2024), https://competition-bureau.canada.ca/mergers-and-acquisitions/changes-provisions-mergers-and-restrictive-trade-practices-competition-act#sec02-3.

[18] Competition Act, R.S.C. 1985, c. C-34, s. 90.1(2) (Can.).

So, although efficiencies no longer amount to a full defense to a potential Section 90.1 violation, they will remain relevant to the analysis.

Increased Penalties and Broader Remedial Options. The potential cost of noncompliance with Section 90.1 of the Act has increased significantly for parties to an impugned agreement. Prior to the amendments, the Tribunal could only grant prohibition orders and, with consent, make prescriptive orders for anti-competitive conduct under Section 90.1 of the Act.[19] Now, the Tribunal is empowered to also make conduct orders, including requiring divestitures,[20] and/or impose substantial administrative monetary penalties (AMPs).[21] These new AMPs can result in penalties of up to the greater of C$10 million (or C$15 million for subsequent infringements) and three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot reasonably be determined, up to 3 percent of annual worldwide gross revenues.[22] Moreover, as described below, in addition to AMPs, in the case of a private action, parties may also be subject to a disgorgement order.

Review of Past Agreements. Prior to the Bill C-59 amendments, Section 90.1 of the Act applied only to "existing or proposed" agreements or arrangements, which raised the possibility of a party terminating an agreement if it came under scrutiny. In advocating for Section 90.1 to apply to past agreements, the Competition Bureau highlighted the enforcement risk raised by limiting Section 90.1 to existing and proposed agreements: in order to evade sanction, parties could simply terminate an agreement, potentially even reinstating it later, effectively trapping the Competition Bureau in a game of whack-a-mole. Bill C-59 expanded the scope of Section 90.1 to also include past agreements or arrangements, subject to a three year-limitation period (i.e., an application cannot be brought with respect to an agreement or arrangement more than three years after it has been terminated).[23] There is some ambiguity as to whether this lookback period could apply to agreements that were terminated in the three years prior to Bill C-59's adoption on June 20, 2024; however, rules of statutory interpretation suggest that it is likely this provision will be found to not apply retroactively.[24]

Further guidance from the Competition Bureau as to the retroactive application of the lookback period will be useful. However, this will ultimately be a matter for the Tribunal and the courts to determine. In any event, this is unlikely to be an enforcement priority for the Competition Bureau. The risk for historic agreements, instead, would come primarily from the new private right of access, which is further discussed below.

New Private Application Regime and Disgorgement Orders. Presently, only the Commissioner can challenge conduct under Section 90.1 of the Act. Bill C-59 has opened the door to private enforcement, allowing private parties to bring actions with leave of the Tribunal and to recover a disgorgement remedy (the relevant amendments will come into force as of June 20, 2025, until which time the Commissioner remains the only party with standing under Section 90.1).

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[19] *Id.* at s. 90.1(1).

[20] *Id.* at s. 90.1(1.1).

[21] *Id.* at s. 90.1(1.3).

[22] *Id.*

[23] *Id.* at s. 90.1(9.1).

[24] It is clear that conduct that ceased after Bill C-59's adoption on June 20, 2024 would be captured by the "past agreements" language in Section 90.1 of the Act. The uncertainty pertains to whether Section 90.1's expansion to past agreements applies to conduct that ceased prior to June 20, 2024.

The new private right of action for Section 90.1 builds on an existing private access regime, which is already applicable to other civil provisions of the Act.[25] However, in addition to expanding the private access regime to include Section 90.1, the recent amendments have modified the regime to encourage private actions in two significant respects.

First, a more flexible test for leave has been established. Prior to the amendments, for the Tribunal to grant leave for a private application, it needed to be satisfied that the applicant "is directly and substantially affected in the applicant's business" by the impugned conduct.[26] In connection with leave applications under certain civil provisions of the Act (for which private access was previously available), this test had been interpreted to require that the applicant's entire business be affected.[27] In contrast, under the Bill C-59 amendments, the Tribunal will have the power to grant leave "if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business" by the impugned conduct or "if it is satisfied that it is in the public interest to do so."[28] While it is clear that this new leave test is more expansive, its precise contours remain untested and uncertain, in particular with respect to the framework the Tribunal will apply for the public interest branch of the test.

While it is clear that this new leave test is more expansive, its precise contours remain untested and uncertain, in particular with respect to the framework the Tribunal will apply for the public interest branch of the test.

Second, private litigants have been provided with a financial incentive to bring cases. Where an action is brought under Section 90.1 by a private party, the Tribunal will be able to order disgorgement in an amount not exceeding the value of the benefit derived from the conduct that is the subject of the order, with the amount to be distributed among the applicant and any other person affected by the impugned agreement.[29] The amendments introduced under Bill C-59 represent the first time that private parties can recover a monetary reward under Part VIII of the Act (through the amendments, disgorgement remedies have been made available for Section 90.1 and for other civil provisions of the Act, such as abuse of dominance).

The Implications of a New Regime

Taken together, the recent amendments to Section 90.1 have resulted in an almost complete overhaul of the Section 90.1 enforcement landscape. Key implications of these changes for companies doing business in Canada include:

Greater—and Potentially Excessive—Compliance Risk. As described above, through the series of recent amendments, the substantive and temporal scopes of Section 90.1 have been materially expanded, the available remedies have been substantially strengthened, and the opportunities for enforcement have been increased through the addition of private access.[30] The

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[25] The private access regime is already applicable to Sections 75, 76, 77 and 79 of the Act. *See* Competition Act, R.S.C. 1985, c. C-34, s. 103.1(1) (Can.).

[26] *Id.* at s. 103.1(7).

[27] In a recent decision, the Tribunal held that, in the context of abuse of dominance under Section 79, the applicant's business can be affected in whole or in part for leave to be granted. *See* JAMP Pharma Corporation v. Janssen Inc., 2024 Comp Trib 8 (Can.).

[28] Bill C-59 at cl. 254(7).

[29] *Id.* at 248(7).

[30] In keeping with the far ranging effects of the amendments, it is arguable that Section 90.1 creates a "backdoor" for private parties to challenge mergers (e.g., where a merger is an agreement between competitors and it results in a substantial lessening or prevention of competition). Although there are strong arguments that, as a matter of statutory interpretation, leave under Section 90.1 is not available to private parties to challenge mergers (specifically addressed under a separate section of the Act (Section 92) for which there is no private access right), there is sufficient ambiguity that private parties may be motivated to "test" the scope of Section 90.1. This is particularly true in connection with transactions for which there is strategic value in delay even if the merger is ultimately completed.

sum result is that Section 90.1 compliance must be considered in a much broader range of circumstances and greater risk will attach to noncompliance.

Although the enforcement of Section 90.1 for the first 15 years of its life was anemic, thus suggesting that the provision was in need for reform, there is risk that the amendments may chill pro-competitive, or at least competitively benign, conduct. As described above, Section 90.1 was created as an alternative to Canada's criminal antitrust regime, which was seen as an inappropriate tool for the broad swath of commercial agreements and arrangements that are not unambiguously harmful but may, on a case-by-case basis, raise antitrust concerns. Section 90.1, as a civil provision, provided greater flexibility to remedy antitrust concerns without interfering with pro-competitive or competitively benign market conduct.

The pendulum now having swung in the opposite direction, firms are placed in a difficult position, requiring them to determine whether to enter into agreements with competitors. It can be, for example, difficult for a firm to know whether a course of action it plans to take may result in a substantial lessening or prevention of competition. And the results of getting that calculation wrong are now potentially more significant. By pairing the difficulty (and often inherent ex-ante uncertainty) of determining whether an arrangement or agreement may result in anti-competitive effects with very significant sanctions (including, potentially, divestiture orders and/or a financial penalty of up to three percent of global revenues), the amended Section 90.1 may disincentivize firms from undertaking beneficial or competitively benign commercial conduct. It will be important for firms to conduct an upfront analysis of commercial arrangements that may have material competitive effects to identify risks and deploy effective risk mitigation strategies.

Greater Division of Enforcement Labor. As a result of the expansion of the private access regime to Section 90.1 of the Act, there is likely to be increased reliance on private enforcement by the Competition Bureau. The Competition Bureau must make choices about how to use its limited resources to protect competition, and it has indicated that it "views private access to the Tribunal as a complement that works together with [its] enforcement of the Act."[31] As the Competition Bureau weighs how to allocate resources most effectively, it will likely leave it up to private parties to pursue certain cases. Indeed, since the expansion of private rights of access for abuse of dominance cases, one question that complainants to the Competition Bureau frequently face is whether they have considered bringing a private application instead of relying on the Competition Bureau to investigate.

There are specific scenarios where it is more likely that private parties, rather than the Competition Bureau, may lead the enforcement charge. First, private parties are more likely to bring an application where the conduct at issue is not broadly felt or applied across a market and instead implicates just one party's ability to do business. For example, in the first private abuse of dominance application, Apotex Inc. alleged abusive conduct by Paladin Labs Inc. for refusing to supply a sample of a certain drug, blocking Apotex from obtaining rapid regulatory approval for its generic alternative.[32] The conduct at issue was narrow in scope and directly affected only one party, Apotex, and therefore was unlikely to be an enforcement priority for the Competition Bureau; it was better pursued privately. Private commercial disputes, which historically have not

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[31] Competition Bureau Canada, Changes to the Provisions on Mergers & Restrictive Trade Prac. in the Competition Act (2024), https://competition-bureau.canada.ca/mergers-and-acquisitions/changes-provisions-mergers-and-restrictive-trade-practices-competition-act#sec02-3.

[32] Apotex Inc. v. Paladin Labs Inc., Notice of Application for Leave Pursuant to Section 103.1 of the Competition Act, CT-2023-007 (Sept. 29, 2023), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/521216/1/document.do.

successfully been brought before the Tribunal, are now likely to become more prevalent there, especially if the private applicant is able to frame the conduct at issue as having broader effects in a market.

Second, private parties are more likely to pursue conduct where they are looking to achieve short-term changes in industry conduct or where they are ultimately looking for settlement. In this way, private parties may use the threat of competition litigation to achieve certain outcomes, behavioral or monetary. For example, in the Apotex case discussed above, Apotex withdrew its application only two weeks after it was commenced as it is said to have received the desired sample from Paladin. This series of events suggests that it was unlikely that Apotex was intending to litigate its case before the Tribunal. Instead, it was likely looking for leverage to force Paladin's hand and obtain its desired samples.

Third, private parties are more likely to pursue conduct where the Competition Bureau has already taken successful enforcement action against the most significant actors for a given type of reviewable conduct, setting a precedent for private parties to follow. For example, the Competition Bureau has shown a clear interest in and has begun taking preliminary enforcement steps with respect to commercial property controls, especially within the grocery sector. However, property controls are a widespread practice. Accordingly, it is unlikely that the Competition Bureau will pursue or closely investigate every possible case. If the Competition Bureau is able to develop effective enforcement precedents, it is likely that it may then take a step back, leaving it open to private litigants to bring smaller scale applications.

The Act's private access regime is structured as an alternative to public enforcement; it does not allow for parallel private and public actions with respect to the same conduct.

Finally, with the expansion of the private application regime to Section 90.1 of the Act, we will likely see private parties, specifically public interest groups, pursuing conduct in areas where they have a significant interest. We have already seen this in recent years through environmental organizations bringing complaints to the Competition Bureau for greenwashing conduct.[33] In a similar vein, we expect to see public interest associations using the broad ambit of Section 90.1 to pursue conduct that directly affects them and their members. For example, we could see environmental groups bring private applications under Section 90.1 alleging the use of environmental standard setting as a mechanism for preventing competition on sustainability parameters.

While private actions can represent a valuable adjunct to the Competition Bureau's own enforcement capabilities, there is also the potential for conflict. The Act's private access regime is structured as an alternative to public enforcement; it does not allow for parallel private and public actions with respect to the same conduct. The Tribunal will not consider a private leave application with respect to conduct for which the Competition Bureau has already started an inquiry, made an application to the Tribunal, or discontinued a previous inquiry due to settlement with the alleged offending party. Similarly, the Competition Bureau cannot make an application to the Tribunal if a private party has been granted leave on the same facts (although the Commissioner is entitled to intervene in any private action). Accordingly, the enforcement choices of the Competition Bureau and private parties directly impact one another. Private parties eager to obtain control over

[33] Specifically, public interest groups have been making use of the Act's "six-resident complaint" mechanism, which requires the Commissioner to undertake an inquiry in response to an application from six resident Canadians alleging a contravention under the Act.

litigation and/or to benefit from a disgorgement remedy may need to act fast or risk being sidelined by the Competition Bureau.[34]

Collective Redress. The combination of private Section 90.1 cases and the potential for disgorgement (which would be distributed among all impacted persons) suggests that a collective action regime is likely to develop.[35] In particular, the leave stage will likely become a focal point of private litigation, with such leave hearings playing a role similar to the class certification process. As a corollary to the frequent settlement of class actions following their successful certification, we are likely to see private applications regularly settle in those cases where leave is granted.

Overall, these amendments move Canada more in line with a U.S.-style private antitrust litigation framework. However, Canada has not followed the lead of the United States in allowing for treble damages. The more restricted basis on which applicants can recover damages is likely to be a significant factor in the degree to which private applications are incentivized in Canada as compared to the United States. While the monetary opportunity offered by a disgorgement remedy may be somewhat constrained (and may, in certain circumstances, not allow applicants to be made whole), the potential for substantial AMPs (which, as noted above, could be as high as 3 percent of global revenues) may further empower private parties, although such penalties are payable to the Canadian government (irrespective of whether the application is brought by the Commissioner or a private party). Specifically, the threat of a significant AMP, in addition to a disgorgement order, may provide private parties with material leverage for purposes of reaching a negotiated settlement.

Conclusion

With the expanded scope of conduct that is potentially reviewable under Section 90.1 of the Act, firms must reconsider their commercial arrangements and the effect that they may have on the market. Additional Competition Bureau guidance as to its enforcement priorities in this area as well as the development of case law at the Tribunal level will be important as businesses recalibrate their competition law compliance practices and policies to suit the new environment. However, the expanded opportunities for private applications will inherently increase the uncertainty in assessing enforcement risk and will be an important factor to consider as the dust on the new 90.1 regime begins to settle. ●

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[34] Regardless of the expansion of the private application regime, private parties will continue to have the option of bringing conduct to the Competition Bureau's attention, either informally or through a six-resident complaint. As a result, parties will need to weigh their available options. Bringing a matter to the Competition Bureau saves the private parties costs but excludes the possibility of recovering disgorgement. Alternatively, commencing a private application for leave provides the parties more control and the possibility of disgorgement (as well as other remedies through settlement) but requires greater cost and effort. The route private parties choose to take will be highly fact dependent.

[35] Under the Act, private damages can be sought in connection with a loss suffered as a result of conduct contrary to the Act's criminal provisions. As such, while antitrust class actions are already common in Canada, the conduct with respect to which actions can be brought is limited and does not extend to the full ambit of Section 90.1. (There is some overlap in the scope of Canada's criminal cartel provision and Section 90.1, as described above, and class actions can and regularly are brought in connection with the former).