Round One: Canada Takes a Big Swing at its Competition Act, With More To Come

By Alysha Manji-Knight and Joshua Hollenberg

In a budget implementation bill passed into law on June 23, 2022, the Canadian government made significant changes to Canada's Competition Act[1] (Act). Perhaps the most extensive and consequential amendments are those relating to the abuse of dominance provisions. Notably, the government expanded the scope of the abuse of dominance provisions, added a new private right of access for abuse of dominance, and significantly increased administrative monetary penalties for contravention of the provisions.

Changes to the Abuse of Dominance Provisions

Specifically with respect to abuse of dominance, the amendments have broadened the substantive scope of these provisions by expanding the types of actions that can be considered abuse of dominance, and introduced a private right of application for persons (including competitors) that allege they have been harmed by such conduct to bring such cases before the Competition Tribunal (Tribunal). Previously, only the Commissioner of Competition (Commissioner) could apply to the Tribunal to enforce the abuse of dominance provisions.

A New Definition of Anti-Competitive Acts. The amendments expanded the definition of an anti-competitive act in section 78(1) to include "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition"[2] in addition to the already existing non-exhaustive list in the Act.

This amendment was a response, in part, to arguments that the previous definition was under-inclusive due to its focus on the impact on competitors to the exclusion of acts that are harmful to competition but not competitors. As an example, the Competition Bureau (Bureau), in its submission to a recent consultation examining the Act in the digital era conducted by Senator Howard Wetston, argued that "the courts have interpreted elements of the abuse of dominance provision in a narrow manner that may fail to capture harmful forms of anti-competitive conduct" including a focus on "the intent of that conduct in relation to a competitor, rather than in relation to the *competitive process*."[3]

Alysha Manji-Knight *is a Partner, and* ***Joshua Hollenberg*** *is an Associate, in the Competition, Antitrust and Foreign Investment Practice at Davies Ward Phillips & Vineberg LLP.*

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

[2] Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures, 1st Sess, 44th Parl, 2022 (assented to 23 June 2022) at 261

[3] Competition Bureau Canada, Examining the Canadian Competition Act in the Digital Era (2022), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html, at Section 3.1

For context, abuse of dominance is made out when the three part test in section 79(1) of the Act is met:

> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Some commentators have expressed concern that the new definition may be an over-correction, as it may capture competition on the merits by larger firms in an industry that results in unintended consequences on various aspects of the Canadian economy, including competition, innovation and dynamism.

As noted above, the Act sets out in section 78(1) a non-exhaustive list of acts which can constitute an anti-competitive act for the purposes of section 79(1)(b). This element of the test was also judicially interpreted in *Canada (Commissioner of Competition) v. Canada Pipe Co.*[4], where the court stated that to be anti-competitive, "an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor"[5] in a market that the dominant firm substantially or completely controls, although the competitor and dominant entity need not necessarily be in the same market.

Some commentators have expressed concern that the new definition may be an over-correction, as it may capture competition on the merits by larger firms in an industry that results in unintended consequences on various aspects of the Canadian economy, including competition, innovation and dynamism.[6] For example, selective responses to actual or potential competitors attempting to expand into new markets, or a competitor attempting to take market share from an incumbent, may be considered to have a negative impact on competition, because it could prevent or limit the range of options available to consumers without having a clear negative impact on a given competitor.[7]

Regulators have already acknowledged that the line between aggressive competition and abuse of dominance can be difficult to identify. For example, in its Abuse of Dominance Enforcement Guidelines, the Bureau states that "it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market."[8]

This narrow distinction could be further complicated by the new private right of access, discussed below, which will allow private parties—such as smaller competitors of an aggressive market leader—to seek leave from the Tribunal to bring abuse of dominance claims. Commentators have warned that this could have a chilling impact on competition in Canada and negative outcomes for innovation and dynamism for Canadian markets.[9] For example, the acquisition of start-up companies with complementary service offerings by incumbent technology firms could be a net positive for both companies, but construed as a killer acquisition and therefore constituting an anti-competitive act under the new definition. By contrast, the Bureau's submission to the

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4 *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.A. 233 (Can.).

5 *Id.* at para 68.

6 C.D. Howe Institute Competition Policy Council, Undue Haste: Rushed Competition Act Reforms Warrant Further Examination, 23rd Report (2022), https://www.cdhowe.org/sites/default/files/2022-06/For%20release%20Communique_2022_0609_CPC_0.pdf.

7 *Id.* at 3.

8 Competition Bureau Canada, Abuse of Dominance Enforcement Guidelines (2019), at para ix.

9 CD Howe Report, *supra* note 6 at 3.

Wetston consultation argues that private access to the Tribunal for abuse of dominance matters "serves as a complement to public enforcement by the Commissioner" and "will serve to more rapidly expand valuable case law" for the abuse of dominance provisions.[10]

A New Private Right of Access. As noted above, prior to the recent amendments, only the Commissioner could bring an abuse of dominance case before the Tribunal. A private right of access existed for certain other provisions of the Act, specifically, Sections 75 (Refusal to Deal), 76 (Price Maintenance), and 77 (Exclusive Dealing), whereby any person could apply for leave to bring an application, obligating the Tribunal to provide written reasons for its decision to grant or refuse leave.

Following the amendments, this private right of access has been extended to abuse of dominance cases. This could lead to an influx of cases before the Tribunal with, as noted above, competitors seeking to resort to the Tribunal to reduce the competitive intensity of larger firms.

Whereas the previous existing private rights of access did not provide the applicant the right to any form of monetary compensation, or the ability to request or impose penalties on the respondent, the amendments would permit the Tribunal to impose an administrative monetary penalty—payable to the federal government, not the applicant—in response to a private application. This would be the first context in Canadian law in which public penalties could be privately enforced.[11] The Act still does not grant a direct right for private parties to recover damages for conduct within the scope of the abuse of dominance provisions in the same way that it does for conduct contrary to the criminal offences, such as price fixing among competitors. The primary benefit of the public penalties for abuse of dominance cases, whether at the request of the Commissioner or a private party, is the same: to deter businesses, including larger businesses, from engaging in anti-competitive conduct. In the event that a private party was successful in obtaining an order prohibiting the continuation of a challenged practice, the violation of said order would give rise to a right to recover damages under Section 36 of the Act. Finally, while a private litigant could seek costs if they were successful in bringing an abuse of dominance challenge before the Tribunal, costs are generally granted on a partial indemnity basis and more rarely on a substantial indemnity basis, such that while the award defrays the cost of ligation it would not make the plaintiff whole.

The Tribunal's approach to the private right of access to date for other reviewable matters suggests that strategic use of the abuse of dominance provisions may be limited, however. The Tribunal has very rarely granted leave to parties seeking to bring cases. In the first six years following the introduction of a private right of access for sections 75, 76 and 77, nineteen applications were made, of which thirteen were dismissed. Of the remaining six, four were never heard by the Tribunal: two settled, one was withdrawn, and one had the leave rescinded. Only two proceeded to a full hearing.[12]

When seeking leave, private applicants must meet a two-part test: they must be "directly and substantially affected" by the practice, and the practice in question must be one "that could be subject to an order" under one of the sections which permits a private right of access.[13] The

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[10] Competition Bureau Canada, Examining the Canadian Competition Act, *supra* note 3 at Section 3.4.

[11] CD Howe Report, *supra* note 6 at 3-4.

[12] Paul-Erik Veel, *Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment*, 18 Dalhousie J.L. Stud. 1, 4 (2009).

[13] Bill C-19, *supra* note 2, at Section 103.1(7).

The test for a direct effect is also meaningful, as can be seen from the Tribunal's denial of a trade association's efforts to bring a case on behalf of affected members, as the association itself was not directly affected. Unsurprisingly, due to this high threshold, the large majority of the Tribunal's rejections of private applications were grounded in the lack of a direct and substantial effect on the applicant.

threshold for "substantially affected" has been set very high.[14] Evidence of a direct and substantial effect which has been accepted by the Tribunal includes:

- the loss of approximately 48 percent of the applicant's current supply of live chickens, reducing the applicant's operations to approximately 40 percent of capacity;[15]
- a 50 percent reduction of the applicant's revenues;[16]
- a substantial loss of revenues which, if continued, would force the applicant out of business;[17]
- the loss of more than 50% of the applicant's net income;[18] and
- evidence of an inability to find a replacement brand resulting in the loss of customers.[19]

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Whether this trend of high barriers to private actions being heard by the Tribunal continues in the context of the extended scope of the abuse of dominance will be determined as test cases are inevitably brought forward in the months or years to come.

A New Focus on Big Tech Conduct. The abuse of dominance provisions have also been amended to introduce language that permits the Bureau to target actions common to the innovation center when bringing cases before the Tribunal.

Specifically, the Act provides factors that the Tribunal may consider to determine "whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market"[22] as part of its assessment. Prior to the amendments, the only specified factor was "whether the practice is a result of superior competitive performance."[23] The recent amendments add the following:

> (a) the effect of the practice on barriers to entry in the market, including network effects;
>
> (b) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;
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> (c) the nature and extent of change and innovation in a relevant market; and
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> (d) any other factor that is relevant to competition in the market that is or would be affected by the practice.[24]

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[14] Veel, *supra* note 12, at 10.

[15] *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.* 48 B.L.R. (4th) 294 (Can. Comp. Trib.).

[16] *B-Filer Inc. v. The Bank of Nova Scotia* 2005 Comp. Trib. 38 (Can.).

[17] *Barcode Systems Inc. v. Symbol Technologies Canada ULC* 2004 Comp. Trib. 1 (Can.)

[18] *Used Car Dealers Assn of Ontario v Insurance Bureau of Canada*, 2011 Comp. Trib. 10 (Can.)

[19] *Allan Morgan & Sons Ltd v La-Z-Boy Canada Ltd*, 2004 Comp. Trib. 4

[20] Veel, *supra* note 12, at n.20, citing *Canadian Standard Travel Agency Registry v. International Air Transport Association*, 2008 Comp. Trib. 14 (Can.).

[21] *Id.* at 8.

[22] Competition Act, *supra* note 1 at Section 79(4).

[23] *Id.*

[24] Bill C-19, *supra* note 2, at Section 262(3).

These factors feed into the Tribunal's determination of whether the three-part abuse of dominance test has been met. Where the Tribunal finds that "a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market", it may make orders, including prohibition of the practice or divestiture of assets or shares, as reasonable and necessary "to overcome the effects of the practice in that market."[25]

The amendments are notable for at least two reasons:

First, these factors may gravitate toward a finding of abuse of dominance. Prior to the amendments, the Tribunal was only required to consider whether the practice was a result of superior competitive performance, which arguably allowed the Tribunal to conclude that an otherwise abusive practice was not in contravention of the Act.

Second, the addition of these factors is a clear response to concerns that dominant behavior of big tech firms was escaping scrutiny by the Bureau because it did not fit squarely within the parameters of the Act. The dominant market positions in Canada of big tech firms have been the source of considerable and ongoing criticism from the Commissioner and other commentators.[26] These amendments will give legislative support to the Bureau's efforts to expand its purview into privacy, consumer choice, and quality concerns in relation to conduct of big tech firms. The amendments add factors addressing network effects; the entrenchment of incumbents; and non-price factors such as quality, choice, and privacy as considerations for the assessment of non-criminal agreements between competitors and mergers.[27]

Canada's efforts to address the dominance of big tech firms follows similar legislative efforts in a number of other jurisdictions, including the United States and the European Union. In the United States, the proposed Competition and Antitrust Law Enforcement Reform Act, introduced by Senator Amy Klobuchar, would introduce a new provision prohibiting exclusionary conduct—that is, conduct which materially disadvantages or forecloses the ability to compete of an actual or potential competitor.[28] This bill would also amend the standard of proof, shift the burden of proof in merger challenges to the merging parties in certain cases, and expand market study powers,[29] all of which have been advocated by the Commissioner.[30] As of the time of writing, the Competition and Antitrust Law Enforcement Reform Act was awaiting a vote in the Senate.[31]

The European Union has likewise recently introduced significant antitrust legislation aimed at big tech companies in the form of the Digital Markets Act, which is anticipated to be adopted in Fall 2022.[32] The legislation is even more explicit by identifying "gatekeeper" companies based on, among other things, the dominant role these firms play in the market. Tellingly, the examples given of "core platform services" for which gatekeepers are identified include "online search engines,

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[25] Competition Act, *supra* note 1, at Section 79(2).

[26] See, e.g., Competition Bureau Canada, Highlights from the Competition Bureau's Data Forum: Discussing competition policy in the digital era (August 30, 2019) https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04492.html.

[27] Bill C-19, *supra* note 2,. at Sections. 263-64.

[28] Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021).

[29] Press Release, Senator Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (February 4, 2021) https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

[30] See Bureau Submission, *supra* note 3.

[31] American Innovation and Choice Online Act, S.2992, 117th Cong. (2021), which similarly addresses antitrust concerns in big tech, has been introduced in, but not passed by, the Senate.

[32] Eur. Comm'n, Digital Markets Act (DMA), https://competition-policy.ec.europa.eu/sectors/ict/dma_en.

social networking services, app stores, certain messaging services, virtual assistants, web browsers, operating systems and online intermediation services."[33] The United Kingdom is also moving in this direction, with the Competition and Markets Authority publishing its Mobile Ecosystems Market Study Final Report on June 10, 2022[34] and the Queen's Speech of May 2022 including reference to a new Digital Markets Competition and Consumer Bill to enhance the CMA's powers.[35] The legislation had not been introduced as of the time of writing.

Increased Thresholds for Financial Penalties. The amendments include substantial increases to the maximum administrative monetary penalties that the Tribunal may order against a person in an abuse of dominance case. The Act previously included a maximum administrative monetary penalty of $15 million. The amendments now provide for an alternative maximum administrative monetary penalty of "three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3 percent of the person's annual worldwide gross revenues."[36]

This is consistent with the global trend towards basing antitrust penalties on the global revenues of entities. The European Union's General Data Protection Regulation, for example, includes fines of up to 4 percent of global revenue.[37] A more aggressive approach can be seen in the European Union's Digital Markets Act, which would permit fines of up to 20 percent of global revenues.[38] The amendments to the Act also introduce new maximum administrative monetary penalties based on revenues for civil misleading advertising abuses and the newly-introduced drip pricing provision.[39] Similarly, significant fines have also been proposed as part of Canadian legislation in other contexts. For example, the federal government introduced a privacy bill earlier in 2022 which includes penalties between 2 percent and 5 percent of the person's or organization's gross global revenue for contravention of various provisions.[40]

The size and scope of the new administrative monetary penalties have raised questions of whether these penalties are significant enough to constitute a criminal penalty rather than an administrative penalty based on "whether the objectives of the proceedings, examined in their full legislative context, have a regulatory or a penal purpose."[41] This was the distinction identified by

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[33] Eur. Comm'n, *Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets*, (April 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349.

[34] Paolo Palmigiano, Taylor Wessing, *How is the UK Government Proposing to Reform the UK Competition Law Framework?* (July 28, 2022), https://www.taylorwessing.com/en/interface/2022/the-eus-digital-markets-act/how-is-the-uk-government-proposing-to-reform-the-uk-competition-law-framework.

[35] United Kingdom Competition and Markets Authority, Mobile ecosystems market study final report (June 10, 2022), https://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report.

[36] Bill C-19, *supra* note 2, at Section 262(2).

[37] Council Regulation No. 679/2016, 2003 O.J. (L 119) 1, 83(5).

[38] European Parliament, *Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users*, (March 24, 2022), https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

[39] Bill C-19, *supra* note 2, at Section 260.

[40] Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2022 (first reading 16 June 2022) (Can.) at Sections 2(95(4)), 2(128), 38(30(3)), 39(40).

[41] *Id.* at para 53.

the Supreme Court of Canada in *Guindon v Canada*[42], where a lawyer challenged an administrative penalty levied under the Income Tax Act.

If found to be the former, the party subject to the administrative monetary penalty would be entitled to the procedural safeguards provided by section 11 of the Canadian Charter of Rights and Freedoms, including a higher burden of proof than is provided for in section 79. As an example, Amazon had global net sales of $469.8 billion in fiscal 2021. A 3 percent administrative monetary penalty would be $14.1 billion. For context, this would be over 5 percent of Amazon's $279.8 billion in North American net sales, which includes the United States and Mexico in addition to Canada, or nearly the same as all of Amazon's $17.1 billion in global net sales from physical stores.[43]

A criminal proceeding can be determined by its nature and the existence of a true penal consequence. As stated by the Court, "a proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity".[44] A true penal consequence includes "a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity."[45]

While "[t]he magnitude of the sanction on its own is not determinative", an administrative monetary penalty that is disproportionate to what is "required to achieve regulatory purposes" suggests that the fine may constitute a penal purpose and "attract the protection of s.11 of the *Charter*."[46] While the question of magnitude does not rest on whether fine is based on domestic or international sales, the use of world-wide revenues has attracted criticism for discriminating against foreign-based firms and for lacking a "rationale or policy basis".[47] Connecting an administrative monetary penalty for abuse of dominance within Canada to revenues or benefits received outside of Canada, it is argued, would shift the administrative monetary penalty to a punitive fine intended to redress a societal wrong, or punish the allegedly abusive behavior.

The introduction of administrative monetary penalties calculated as a percentage of revenues is a recent development in Canada, and has not been judicially tested before the Tribunal or elsewhere. Whether such a monetary penalty would be compatible with its stated administrative nature, i.e., intended to maintain compliance with the regulations, remains to be determined. Even in the absence of a constitutional challenge, it is unclear how the Tribunal will approach this new and largely untested administrative monetary penalty provision.

Other Substantive Changes. While the changes to the abuse of dominance provisions have garnered considerable attention, they are by no means the only significant amendments introduced. Other notable changes to the Act included:

(i) **Wage-Fixing and No-Poach Agreements.** Similar to other jurisdictions such as the United States, the amendments add wage-fixing and no-poach agreements between employers to the Act's criminal

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[42] *Guindon v. Canada*, 2015 SCC 41 (Can.).

[43] Amazon 2021 Annual Report p. 23, https://s2.q4cdn.com/299287126/files/doc_financials/2022/ar/Amazon-2021-Annual-Report.pdf.

[44] *Guindon*, *supra* note 42, at para 45, citing *Martineau v MNR*, 2004 SCC 81 (Can.) at paras 21-22 and *R. v. Wigglesworth*, [1987] 2 SCR 541 (Can.) at 560.

[45] *Id.* at para 46, citing Martineau, *supra* note 44, at para 557 and Wigglesworth, *supra* note 44, at 561.

[46] *Id.* at para 77.

[47] See Letter from Omar Wakil and Valerie Dixon, Canadian Bar Association, to Joël Lightbound, M.P. *Bill C-19, Part 5, Division 15: Budget Implementation Act, Competition Act amendments*, May 18, 2022 at 3, https://www.cba.org/CMSPages/GetFile.aspx?guid=7403b5b6-2fdb-4a31-acd5-8cba874f814d.

conspiracy provision and remove the cap on potential criminal fines for prohibited conspiracies. This provision will come into force on June 23, 2023, one year from the legislation's royal assent. Significant questions remain about the scope and enforceability of these provisions, including whether they in fact constitute employment legislation and are therefore *ultra vires* of the federal government.[48]

(ii) **Drip Pricing.** While the Bureau has successfully litigated cases on drip pricing—the advertising of prices that are not obtainable due to mandatory fees required later in the purchasing process—the amendments formally added drip pricing to the Act's civil and criminal misleading advertising provisions.

(iii) **Increased Administrative Monetary Penalties.** In addition to the increased administrative monetary penalties for abuse of dominance, discussed above, the amendments also increased penalties for misleading representations to the public to a maximum of 3 percent of global revenue, up from a previous maximum of $15 million.

(iv) **Anti-Avoidance of Merger Notification.** The amendments introduced an anti-avoidance provision to the Act's pre-merger notification regime. This amendment appears to be intended to adopt an anti-avoidance rule similar to the regime set out in Rule 801.90 of the Hart-Scott-Rodino Antitrust Improvements Act Regulations,[49] which prohibits parties from intentionally avoiding HSR Act requirements by structuring their transaction solely to avoid compliance or by using a device to avoid compliance, such as purposefully undervaluing an acquisition.

(v) **Section 11 Orders.** Section 11 of the Act authorizes the Commissioner to apply for court orders to compel the production of records and information as part of their inquiries. The Act previously limited applications for records outside of Canada to orders against Canadian companies for records in the possession of foreign affiliates. The amendments clarify that orders may be made against persons outside Canada who carry on business or sell products into Canada. This provision has been controversial in previous cases, and it is unclear how the amended section will interact with laws in other jurisdictions, including the United States' *Stored Communications Act*, which prohibits the provision of certain information without a search warrant.[50]

While the above noted amendments are significant, their potential substantive implications are not necessarily apparent on their face. Still, they could have considerable impact on large Canadian businesses and multi-national businesses doing business in Canada.

Looking Forward. The amendments discussed above have been characterized as "a preliminary step"[51] in a larger review of the Act with the goal of "fixing loopholes; tackling practices harmful to workers and consumers; modernizing access to justice and penalties; and adapting the law to today's digital reality."[52]

One of the overarching goals of the recent amendments is addressing the role of big tech firms in Canada's economy. The cumulative effect of the changes discussed in this article is to increase the number and range of cases which can be brought before the Tribunal, the range of actions which can be considered anti-competitive, and the penalties which can be levied against such big tech firms.

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[48] In Canada, legislative power is constitutionally divided between the Parliament of Canada and the provincial legislatures. Labor relations and the terms of employment contracts have been determined to be in among the provincial heads of power. See *The Toronto Electric Commissioners (Appeal No. 99 of 1924) v Colin G. Snider and others (Ontario)*, [1925] UKPC 2 (U.K.); and *Northern Telecom v. Communications Workers*, [1979] 1 SCR 115 (Can.).

[49] 16 C.F.R. § 801.90 (2019).

[50] 18 U.S.C. § 2703.

[51] Department of Finance Canada, Budget 2022: A Plan to Grow Our Economy and Make Life More Affordable (2022), at 72.

[52] *Id.*

Regardless of the intent, the practical effect of these changes remains to be seen. As noted above, previous introductions of a right of private action have not yielded significant numbers of cases before the Tribunal. Similarly, the Tribunal's willingness to rely on the new factors to expand its ambit has not been tested.

The recently enacted amendments represent only a first wave of anticipated changes to the Act. The Canadian government has said that it is committed to a further "comprehensive review" of Canadian competition law, with more far-reaching reforms likely to be introduced as a result.[53] A second round of amendments is anticipated to commence in Fall 2022 with consultations and hearings leading to a stand-alone legislation with a more substantive set of changes to the Act. These could include additional measures that the Bureau has previously asserted to be necessary to address abuse of dominance concerns, such as amending the standard from the substantial lessening or prevention of competition to one that includes prevention in order to capture conduct targeting emerging competitors in the digital economy, granting the Bureau the power to conduct market studies and amendment or removal of the efficiencies defense for mergers.[54] There is some concern that the recently enacted abuse of dominance amendments, together with some of the suggestions by the Bureau, could signal a shift towards a 'big is bad' presumption in the Bureau's approach to market oversight and competition law enforcement. ●

[53] Christine Dobby, Toronto Star, Ottawa announces review of Canada's competition law, with focus on wage fixing, deceptive pricing and 'anti-consumer practices' (February 7, 2022), https://www.thestar.com/business/2022/02/07/in-an-exclusive-interview-innovation-minister-says-ottawa-to-consider-changes-to-competition-law-launch-comprehensive-review.html.

[54] Bureau Submission, *supra* note 3 at Section 3.2.