Canadian Competition Law Outlook: What Businesses Need to Know

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Blakes Means Business

About Blakes

As one of Canada's top business law firms, Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. We focus on building long-term relationships with clients. We do this by providing unparalleled client service and the highest standard of legal advice, always informed by the business context.

Canadian Competition Law in Transition: Adapting Your Business to the New Normal

A series of amendments to the *Competition Act* (Act), beginning in 2022, have significantly altered the competition law landscape in Canada and represent the most significant overhaul of Canadian competition law in a generation. The amendments have primarily been directed at facilitating more effective enforcement under the Act by both the Competition Bureau (Bureau) and private parties and enhancing consumer protection. We expect the trend toward greater enforcement to continue in 2025, including through continued expansion of the private access regime under the Act. At the same time, however, recent political developments suggest that Canadian competition law enforcement may be entering a period of uncertainty as policymakers seek to balance multiple goals of consumer welfare and protection while also seeking to address lagging productivity in Canada. Key drivers of this uncertainty include a 2025 federal election in Canada and the threat of tariffs from the new administration in the United States, combined with ever-growing remonstrations regarding declining productivity in Canada. Regardless, 2025 will be a year of ongoing transition from the prior competition law regime to a brave new world of competition law with numerous practical implications for businesses in Canada. Here are some examples:

- **Increased Regulatory Complexity and Enforcement Risk.** Recent amendments to the Act have increased the stakes for non-compliance by broadening the scope of conduct captured in the Act, lowering thresholds for the Bureau and private parties to pursue enforcement action and increasing penalties for non-compliance. Companies should reassess their conduct and existing agreements in light of the new rules.

- **Updating Competition Compliance Policies.** The recent spate of amendments to the Act implicates both substantive and procedural changes to its provisions, impacting a broad array of business practices. Compliance policies should be reviewed and updated to reflect current laws and practices.

- **Increased Likelihood of Private Enforcement.** With the continued expansion of the Act's private access regime, including monetary compensation for civil breaches of the Act, the likelihood of private litigation has significantly increased. Companies should closely consider complaints from competitors, customers and suppliers and the potential for strategic litigation under the Act.

Private Access: Broadening the Net and Increasing the Stakes

The Act has long permitted private parties to seek leave from the Competition Tribunal (Tribunal) to bring an application under certain provisions of the Act relating to restrictive trade practices, such as the refusal to deal, resale price maintenance, exclusive dealing, tied selling and market restriction. Notwithstanding this ability, few of these applications have been brought, and leave has been granted only in a small number of cases. However, the Act's private access provisions have been significantly revised since 2022, and the private access regime will be substantially broadened starting in June 2025. Notable changes are outlined below:

- **Expansion of the Private Access Regime.** In 2022, the Act's private access regime was expanded to include the abuse of dominance provisions. In 2025, the regime will become available for claims under the Act's civil deceptive marketing and civil competitor collaboration provisions. Notably, this includes claims under the new greenwashing provisions, which have been the subject of significant attention since coming into effect in 2024.

- **Lower Bar for Leave.** The test for a private applicant to obtain leave to bring a claim will be lowered starting in June 2025. An applicant will only have to demonstrate that the alleged conduct affected its business 'in whole or in part' or that granting leave would be in the public interest. This is a lower threshold than the previous standard, which, in most cases, required that the conduct substantially and directly affected an applicant's entire business. This change will open the door for applicants to bring claims relating only to certain segments of their business or claims seeking to rely on the public-interest branch of the test.

- **Monetary Remedies.** Currently, private applicants cannot obtain any compensation under the Act's private access regime. Starting in June 2025, private parties who successfully bring an application for refusal to deal, resale price maintenance, exclusive dealing or tied selling, abuse of dominance or civil competitor collaborations will be able to benefit from a disgorgement remedy. The remedy may be in an amount up to the value of the benefit derived by the alleged conduct and is to be distributed among the applicant and any other persons affected by the conduct in a manner determined by the Tribunal. While private plaintiffs in civil misleading advertising cases, including greenwashing

allegations, will not have a disgorgement remedy, they may be able to obtain restitution if they prove that the defendant made representations that are 'false or misleading in a material respect.'

- **Potential Class-Like Proceedings.** The introduction of monetary awards creates the possibility for class-action-type applications, whereby a private applicant can seek leave to bring an application, including in the public interest, and have disgorged funds or restitution paid out to a large group of affected parties. At this time, the procedural mechanisms for such actions are unclear, as many of the tools contained in class-action legislation are not present in the Act or the Tribunal's rules. The Tribunal is expected to provide practice directions or guidance on how its rules may be amended to manage these new private access applications starting in June 2025.

Key Takeaways for Business

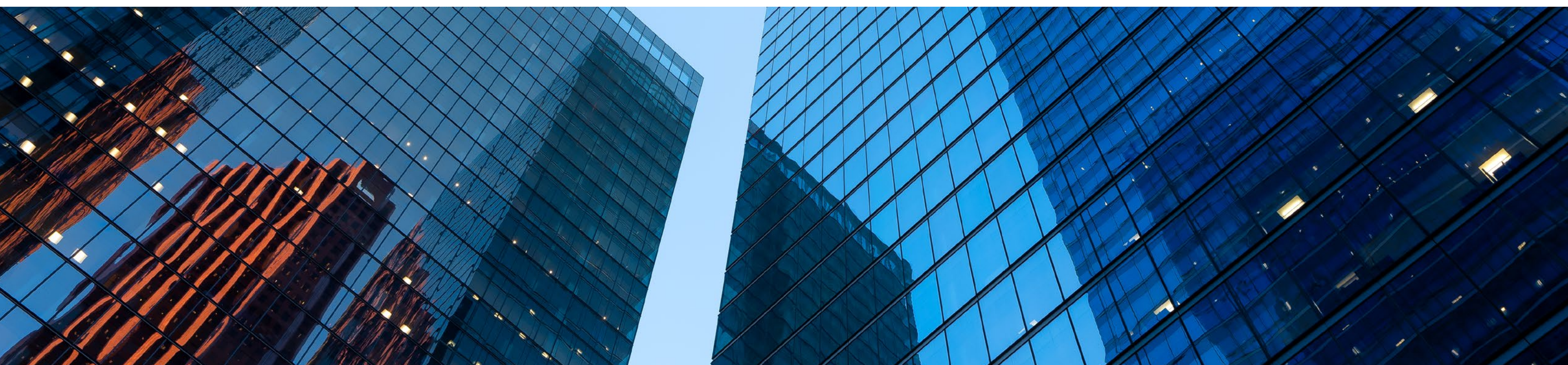
- **Increase in Private Litigation.** The introduction of disgorgement remedies and the reduction of barriers to private access will likely spur an increase in private litigation beginning in June 2025, with the potential for quasi-class proceedings.
- **Potential for Strategic Litigation.** An expanded private access regime also presents increased opportunities for private parties to use the system to further their commercial goals.

Mergers Reviews: Are You Ready for the Paradigm Shifts?

The Bureau is seeking to utilize new tools obtained through recent legislative amendments. It is expected to take a more aggressive enforcement approach by undertaking more in-depth merger reviews and opposing more deals it views as anti-competitive. This includes enforcement for non-notifiable mergers, many of which it identifies through reviewing public sources, such as press releases and news coverage. Notable changes include the following:

- **Expanding the Universe of Mergers Subject to Review.** Two important changes will result in a greater number of transactions reviewed by the Bureau. First, the value of sales 'into' Canada is now included in determining whether the 'size of transaction threshold' for mergers has been met, increasing the number of transactions requiring pre-merger notification. Second, the period for the Bureau to challenge a merger that it has not been notified about has been extended from one year to three years, enhancing the Bureau's ability to review completed mergers. Mergers notified to the Bureau may only be challenged for up to one year post-closing.
- **Hurdles for Clearance.** The prohibition against the Tribunal finding that a merger is anti-competitive solely based on market share or concentration has been replaced with a rebuttable structural presumption that a merger is anti-competitive based solely on concentration and market share thresholds unless the merging parties can prove otherwise.
    - Under the structural presumption, a merger is presumptively anti-competitive if it increases the 'concentration index' by more than 100 and either (i) the post-merger concentration index is more than 1,800 or (ii) the parties' post-merger market share exceeds 30%. The concentration index is the sum of the squares of the participants' market shares in the relevant market.
- **New Substantive Factors.** The factors to be considered in assessing the effects of a merger have been broadened to expressly include labour market effects, effects from increases in market share or concentration, and the likelihood that a proposed transaction will result in express or tacit coordination.
- **Raising the Bar for Remedies.** Where merger remedies are required, they must now restore competition to the level that would have prevailed but for the merger. This is a higher threshold than the previous remedy standard, which required that the prevention or lessening of competition resulting from a merger merely be reduced to a level that was no longer substantial.
- **Automatic Prohibition on Closing.** Merging parties now face an automatic bar to closing their merger once the Bureau files an application with the Tribunal for an injunction to seek more time to complete its inquiry or block closing pending a challenge on the merits. The bar would remain in place until the Tribunal has disposed of the Bureau's application.

The recent changes to the merger provisions of the Act represent a sea change, which is likely to require adjustments to the Bureau's enforcement approach. In November 2024, the Bureau commenced a public consultation regarding updates to its *Merger Enforcement Guidelines*, which were last updated in 2011. The Bureau is expected to publish updated guidelines in 2025 reflecting the recent amendments to the Act and the Bureau's current practices in merger reviews.



Key Takeaways for Businesses:

- **More Advanced Merger Planning.** While most transactions will continue to be reviewed quickly, an increasing number of transactions will take longer for the Bureau to review, requiring more planning, including with respect to the negotiation of appropriate covenants and conditions in transaction documents. Parties to non-notifiable transactions need to carefully consider the implications of the extended three-year limitation period, including when negotiating risk allocation and deciding whether to notify the Bureau voluntarily to obtain the benefit of the one-year limitation period.

- **More Sophisticated Analysis.** With the new structural presumption, market definition will play an increasingly central role in merger analysis, necessitating more sophisticated, data-based analyses. The Bureau is likely to increasingly utilize court orders to obtain data from third parties to facilitate the determination of market definition and calculation of market shares and concentration changes. This will lead to an increase in the asymmetry of information between the merging parties and the Bureau. Internal documents, such as board presentations and strategic planning materials, will be a key consideration in merger reviews, providing insight into competitive dynamics, market definition, market shares and deal rationale.

- **Increased Focus on Remedies.** The new, more stringent remedy standard will necessitate a more rigorous approach to remedies, including increased upfront planning and closer scrutiny of remedy buyers to ensure remedies will restore competition. Remedy considerations should form part of transaction planning and negotiations, including adopting proactive solutions such as 'fix-it-first' remedies and extended outside dates to facilitate remedy negotiations.

Market Studies: Minding Your Own Business

In 2024, the Bureau first utilized its new powers to launch a market study into the Canadian airline industry. The Bureau is expected to continue to flex its market study powers with a focus on industries of importance to Canadians, particularly those that impact the cost of living. The new market study powers expose businesses, especially those in consumer-facing industries, to the potential risk of being compelled to produce significant volumes of internal documents and data to the Bureau without the need for any enforcement investigation. Key features of the new market study powers include:

- **Broader Information-Gathering Powers.** In the past, the Bureau conducted market studies based on voluntary compliance, but it can now compel relevant information from industry participants via court order. In October 2024, the Bureau obtained court orders requiring airline industry participants to produce records and answer questions relevant to its ongoing market study.
- **Government-Initiated Inquiries.** With the new amendments, either the Bureau or the Minister of Innovation, Science and Industry (Minister) can initiate a market study after consulting with each other. The Minister's ability to initiate a market study increases the potential for that study to be commenced for political rather than competition reasons.

Key Takeaways for Businesses

- **Resource Implications.** Businesses will likely incur significant financial costs when diverting resources to collect, review and produce relevant documents, records and data in response to a market study. Timelines for responding to a court order to produce information are tight, and the internal efforts required to respond can be burdensome. Market studies may take as long as 18 months from the final terms of reference to the publication of a report and may be extended by the Minister in three-month increments.
- **Business Implications.** Both the terms of reference for the market study and the Bureau's report on its findings must be made public. The conclusions from a market study may have important reputational impacts or lead to governmental policy changes with significant implications for businesses in the affected industry.
- **Enforcement Risk.** Market studies are not an enforcement tool — they are intended to inform policy changes and increase the Bureau's knowledge of how competition works within key sectors of the Canadian economy. However, if the Bureau uncovers evidence from a market study that suggests a party may have contravened the Act, it can initiate an investigation and potentially take enforcement action.
- **Document Creation Considerations.** Given the Bureau's ability to obtain orders compelling the production of all documents, including emails, handwritten notes, spreadsheets and presentations, and data relevant to its study, companies should take care in creating documents, as they can be misunderstood or mischaracterized without the proper context.

Deceptive Marketing: Can You Prove What You Say?

Deceptive marketing will remain a key enforcement area for the Bureau in 2025, including a continued focus on drip pricing, environmental claims and other forms of misleading advertising. In addition, with the expansion of the Act's private access regime in June 2025 to include civil deceptive marketing claims, 2025 is likely to witness an increase in private enforcement. Recent changes setting the stage for more expansive enforcement of misleading advertising under the Act include the following:

- **New Express Greenwashing Provisions.** In 2024, the Act was amended to expressly address environmental claims regarding (i) a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological effects of climate change or (ii) the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change. Importantly, these new greenwashing provisions include a reverse onus requiring the business making the claim to ensure the claim is based on adequate and proper testing or adequate and proper substantiation in accordance with an internationally recognized methodology.
  - Given significant uncertainty regarding the scope and interpretation of these new greenwashing provisions, in July 2024, the Bureau announced that it would develop guidance on the provisions on an accelerated basis. In July 2024, the Bureau launched a public consultation seeking input from Canadians to assist it in developing guidance, and in December 2024, the Bureau released draft guidance for public review and feedback. The Bureau is expected to issue final guidance before the new private access provisions come into effect on June 20, 2025.
- **New Private Right of Access.** As of June 20, 2025, private parties will obtain the right to seek leave from the Tribunal to bring an application for misleading advertising if they can establish it is in the public interest to do so. Combined with enhanced administrative monetary penalties (AMPs) introduced in 2022, this change is likely to herald a new era of private enforcement. The maximum AMP is up to the greater of C$10-million (C$15-million for a subsequent contravention) and three times the value of the benefit derived from the deceptive conduct, or if that amount cannot be determined, 3% of annual worldwide revenues.
- **Clarification of Drip Pricing.** Drip pricing is when an advertised price is not attainable due to mandatory fees, other than government-imposed fees (e.g., taxes). Amendments to the Act in 2022 introduced drip pricing into the general misleading advertising provisions. Drip pricing continues to be an area of focus for the Bureau, and the Act was further amended in 2024 to stipulate that drip pricing in online and electronic communications is false or misleading and to clarify that the exemption for government-imposed fees is restricted to those fees imposed on purchasers.
- **Reverse Onus for Ordinary Selling Price Claims.** The provision that requires advertised discounts to be genuine compared to the ordinary selling price has been amended to require advertisers to demonstrate they have followed the rules. Previously, the Bureau was required to show that the advertised discounts were not genuine.

Key Takeaways for Business

- **Carefully Consider Environmental Claims.** Businesses must carefully review all environmental claims and consider the general impression that the claims convey. They must ensure claims about a product's environmental benefits are supported by adequate and proper testing. They must also ensure claims about the environmental benefits of a business or business activity are supported by adequate and proper substantiation in accordance with internationally recognized methodology. All testing and substantiation must be undertaken before any claims are made.
- **Update Pricing Policies.** Advertisers should review and update their pricing policies and compliance programs to avoid engaging in drip pricing and ensure ordinary selling -price claims are supported.
- **Prepare for the New Era of Private Enforcement.** The private access regime is expanding to include civil deceptive marketing. This will allow private parties, including consumer advocacy groups, environmental groups and others, to challenge allegedly misleading claims directly with the Tribunal rather than through the Bureau. If they are successful, these plaintiffs could obtain restitution as a remedy.

Abuse of Dominance: Is Big Bad?

The abuse of dominance provisions are the only provisions of the Act to be amended in each of the three waves of amendments since 2022. First, the maximum AMPs for abuse of dominance was significantly increased, the scope of conduct constituting abuse of dominance was broadened and a private right of access was introduced in 2022. Second, the abuse of dominance regime was substantially overhauled in 2023 by modifying the test for establishing abuse of dominance and further expanding the scope of conduct constituting abuse of dominance. Finally, amendments to the Act's private access regime were adopted in 2024 that, starting in June 2025, will allow private parties to obtain disgorgement for successfully pursuing an abuse of dominance application. Key elements of these amendments are outlined below:

- **Abuse of Dominance Test Relaxed.** Previously, establishing abuse of dominance required the Tribunal to find that a party was dominant, that it had engaged in a practice of anti-competitive acts and that the practice resulted in a likely substantial lessening or prevention of competition. Since December 2023, that threshold has been lowered, and the Tribunal can issue a prohibition order based only on a finding of dominance, together with either a practice of anti-competitive acts or a likely substantial lessening or prevention of competition. However, all three elements must still be met for a mandatory order (e.g., a divestiture) or an AMP to be issued.

- **Scope of Anti-competitive Acts Expanded.** The definition of an 'anti-competitive act' has been expanded to include any conduct intended to 'have an adverse effect on competition,' in addition to those intended to have a 'predatory, exclusionary or disciplinary negative effect on a competitor.' Further, the Act has long included a non-exhaustive list of specific acts that constitute anti-competitive acts, which has been updated to include 'a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market' and 'directly or indirectly imposing excessive and unfair selling prices.'

- **Increased Financial Penalties.** The maximum AMPs for abuse of dominance have been significantly increased to the greater of C$25-million (C$35-million for repeat conduct) and three times the value of the benefit (or, if that cannot be reasonably determined, 3% of worldwide revenues). Starting in June 2025, private parties will also be able to obtain a disgorgement remedy of up to the value of the benefit derived from the alleged anti-competitive conduct if they successfully bring an abuse case before the Tribunal.

These recent amendments to the abuse of dominance provisions of the Act are expected to significantly impact the Bureau's enforcement approach. In October 2023, the Bureau published its Bulletin on Amendments to the Abuse of Dominance Provisions, describing the Bureau's preliminary guidance on its approach to the 2022 amendments to the abuse of dominance provisions. The Bureau is expected to further update its guidance to reflect changes to the abuse of dominance provisions enacted in 2023 and 2024, anticipated to be published later in 2025.

Key Takeaways for Business

- **Expect Heightened Enforcement.** The relaxed legal test for abuse of dominance, together with increased financial penalties, including the potential for a disgorgement remedy to be awarded to private plaintiffs, will incentivize the Bureau and private parties to pursue abuse of dominance applications before the Tribunal.

- **Review Business Practices to Ensure Compliance.** Businesses that may be dominant or alleged to be dominant should review their conduct to ensure they are not breaching the Act. This is particularly important since the amendments make it easier to prove abuse of dominance, and there are significantly increased penalties and consequences for engaging in abuse of dominance.

Competitor Collaborations: Be Careful Who You Deal With, and How

The Act criminalizes cartels and bid-rigging and has civil enforcement mechanisms for other competitor collaborations if they prevent or lessen competition substantially. While cartels have frequently been challenged under the Act's criminal provisions, enforcement under the civil provisions has been much more limited. Recent amendments to the Act are paving the way for this trend to change by making it easier to seek civil penalties for anti-competitive collaborations, including between non-competitors, increasing the penalties for contravening the civil provisions and, starting in June 2025, expanding the private access regime to encompass the civil competitor collaboration provisions. Notable recent changes to the competitor collaboration provisions of the Act include the following:

- **Criminalization of Wage-Fixing and No-Poach Agreements.** Since June 2023, it has been a criminal offence for employers to coordinate on wages or terms of employment and to enter into agreements not to solicit each other's employees. This is a significant change, as buy-side competitor collaborations had been decriminalized in 2010.
- **No Cap for Cartel Fines.** Amendments to the Act in 2022 eliminated the C$25-million cap on fines for a breach of the Act's criminal conspiracy provision. As a result, there is now no maximum fine; the quantum is solely at the court's discretion. This amendment aligns with the uncapped fines for bid-rigging.
- **Potential Liability for Collaborations Between Non-Competitors.** Amendments to the Act that came into force in December 2024 enable the Tribunal to make an order with respect to a collaboration between non-competitors if a significant purpose of all or part of the agreement was to prevent or lessen competition.
  - One area of focus related to this amendment is the Bureau's focus on exclusivity clauses and restrictive covenants in commercial real estate agreements, particularly in the retail sector, where such provisions may limit what a property may be used for. In August 2024, the Bureau requested comments on its preliminary enforcement guidance for such property controls, with final guidance expected to be issued in 2025.
- **Increased Civil Enforcement Risk.** Previously, the only remedy under the civil competitor collaborations provisions was an order preventing the parties from engaging in the impugned activity. Recent amendments have created new penalties for anti-competitive collaborations, including divestiture orders, AMPs and, as of June 2025, the ability for private parties to obtain a disgorgement remedy if they are successful in an application before the Tribunal. In addition, the civil competitor collaboration provisions have been broadened to apply to not only existing or proposed agreements but also prior agreements for up to three years after they have been terminated. The efficiencies defence for collaborations has also been eliminated, potentially creating liability for ongoing agreements that were compliant with the Act before the amendments were adopted.

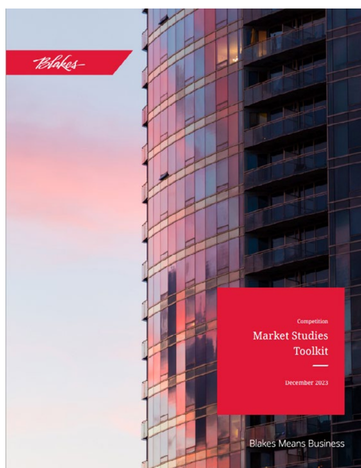
Key Takeaways for Business

- **Review of Practices to Ensure Ongoing Compliance.** Businesses should review existing collaboration agreements, including those with non-competitors, to ensure they remain compliant with the Act. In particular, restrictive covenants or other agreements that impose conditions on the parties' ability to do business with third parties, such as property controls in leasing agreements, are likely to be the focus of Bureau enforcement action.
- **New Risk of Private Enforcement.** Previously, private parties had to rely on the Bureau to bring civil competitor collaboration cases. Starting in June 2025, they can seek to bring such claims themselves, with the potential for a disgorgement remedy and a remedial order if successful. This means businesses must seriously consider whether their collaborations might impact other stakeholders.
- **Continued Criminal Enforcement.** In line with its historical approach, the Bureau will continue to focus on criminal agreements between competitors. If the Bureau dedicates additional resources to criminal enforcement, we may see more complex criminal cases brought before Canadian courts.

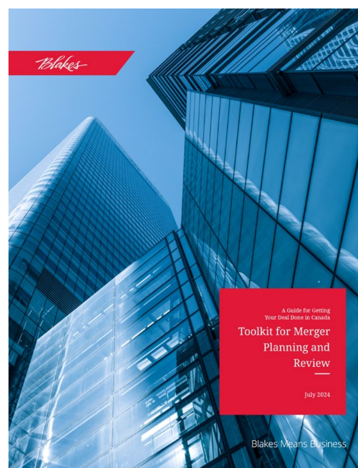
Blakes Resources

Blakes has a number of client resources designed to help businesses navigate the complex and evolving Canadian competition law landscape. If you are interested in receiving a copy of these resources, please contact any member of the Competition, Antitrust & Foreign Investment group visit www.blakes.com/insights.

Market Studies Toolkit



Toolkit for Merger Planning and Review: A Guide to Getting Your Deal Done in Canada



Competition Law Investigations and Compliance: A Toolkit for Managing Risk

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