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Trends to Watch

2025 Competition/Antitrust & Foreign Investment Outlook

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This publication reviews key developments in Canada during 2024, and reflects on their potential significance for 2025 and beyond.

Prepared by McCarthy Tétrault's Competition/Antitrust & Foreign Investment Group.

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INTRODUCTION: GENERATIONAL CHANGE IN CANADIAN COMPETITION AND FOREIGN INVESTMENT LAW

2024 was a watershed year for Canadian competition and foreign investment law reform. After incremental legislative and regulatory changes to the *Competition Act* and *Investment Canada Act* in 2022 and 2023, 2024 delivered passage of the most significant amendments to both statutes in more than a decade. Now, in 2025, the rubber is ready to hit the road. As we turn the page from legislative reform to law enforcement, time will tell whether we are entering a new epoch of emboldened enforcement or whether the amendments will reveal themselves to be a Potemkin village. The year ahead will serve as an important marker as the practical implications of the new legislative environment begin to crystallize.

Matthew Boswell, the Commissioner of Competition ("Commissioner"), has advocated passionately for competition law reform and can claim a number of significant victories. The *Competition Act* has been amended to provide powerful new enforcement tools (many on the specific recommendation of the Commissioner), including, to name just a few, the adoption of a *per se* wage-fixing cartel offence, a structural presumption for mergers, a less demanding test for abuse of dominance and substantial penalties for civil anti-competitive agreements. In order to put these tools to use, the Competition Bureau ("Bureau") has been handed a larger budget and the gate has been opened wide for private actions. In the wake of these changes, the Commissioner has heralded a new era of competition law enforcement. He has promised more enforcement, quicker action and stronger remedies.

New competition laws do not, however, necessarily translate into more robust enforcement. When the *Competition Act* was last meaningfully amended in 2009, following earlier Bureau recommendations, new civil competitor collaboration provisions were added to serve as a flexible complement to the criminal cartel offence; in the roughly 15 years since the adoption of those provisions, they have gone largely unutilized. So far, at least, history has repeated itself. The first year of criminalized wage-fixing and no-poach agreements has passed without a case being brought, and the repeal of the merger efficiencies defence (perhaps the Bureau's most hard-fought legislative change) has not precipitated an increase in merger remedies. However, the Bureau has flexed its new power to compel information through market studies and has announced investigations that are poised to leverage recent changes to the *Competition Act's* abuse of dominance and civil anti-competitive agreement provisions. These steps set the stage for more vigorous enforcement in the year ahead.

On the foreign investment side, the Canadian government's national security enforcement posture has stiffened markedly in recent years. In the first 10 years after the *Investment Canada Act's* national security review regime was introduced in 2009, the provisions were invoked only 28 times; over the last five years, the national security review process has been initiated 115 times (26 of which were in the last year alone). 2025 is set to see expanded compliance obligations for foreign investors as new mandatory filing regimes, including for minority investments, come into force. The Canadian government has already demonstrated its willingness and ability to intervene in minority investments it considers injurious to Canada's national security. It is to be seen whether the new filing obligations fuel an even more robust enforcement posture.

Our *2025 Outlook* seeks to tackle the uncertainty of Canada's new competition and foreign investment law enforcement landscapes. As the dust settles after years of frenzied legislative action, we set our sights on whether the objectives of the push for reform are likely to be achieved, and the risks and opportunities these new enforcement paradigms create.

Investment Canada Act: How Will the Government Use Its New Powers?

NEW MINISTERIAL POWERS ARE NOW IN-FORCE

This last year has seen considerable changes to the Canadian foreign investment law landscape; most notably the passage of Bill C-34, *An Act to Amend the Investment Canada Act* ("Bill C-34"), which represents the most significant update to the *Investment Canada Act* ("ICA") since 2009.

Certain of the amendments introduced through Bill C-34 came into force on September 3, 2024. They contain a host of new Ministerial powers including, in the context of national security reviews, authority for the Minister of Innovation, Science and Industry ("Minister") to impose interim conditions, extend national security reviews of investments without an order of Cabinet, accept undertakings to mitigate national security risk and disclose privileged case-specific information to allies. The in-force amendments also include changes to the closed material proceeding rules used in judicial reviews, clarification surrounding the consideration of intellectual property rights as a factor in "net benefit" reviews (a separate ICA regime to the national security review process), and a requirement for the Minister to report accepted national security undertakings and Cabinet orders to other Canadian agencies.

These changes were accompanied by two administrative notes providing insight regarding the Minister's new powers to impose interim conditions and to accept undertakings, including detailed procedures for the use of these new Ministerial powers as well as a non-exhaustive list of the types of interim conditions that may be imposed and the categories of undertakings that may be accepted.

The remaining amendments set out in Bill C-34 are expected to come into force in 2025, the most notable being the new mandatory pre-closing filing requirement for acquisitions of control and minority investments in sensitive sectors. Taken together, the currently in-force and pending amendments to the ICA are likely to significantly impact both procedural norms and substantive strategies followed by foreign investors potentially subject to the ICA's national security regime in the coming year. Investors and their counsel will need to take note of both potential new requirements to file pre-closing, as well as the Minister's new power to extract concessions from investors to achieve clearance and interfere with post-closing integration, when developing their strategy.

> **Taken together, the currently in-force and pending amendments to the ICA are likely to significantly impact both procedural norms and substantive strategies followed by foreign investors potentially subject to the ICA's national security regime in the coming year**

AN INCREASINGLY POLITICAL STATUTE

The ICA is a creature of politics, as the last year has made even clearer. In 2024, we saw particular industries come to the political forefront, with the ICA positioned as a critical government tool to address growing concerns. This was particularly apparent in government consultations on electric vehicles, economic security and unfair Chinese trade practices commenced in 2024, each of which sought input on the use of foreign investment regulation to address these issues. Nonetheless, these consultations have also provided increased transparency by highlighting key areas of concern for the Federal Government, including electric vehicles, batteries, battery parts, semiconductors, solar products, critical minerals and interactive digital media. This level of transparency is expected to continue into 2025 as the Federal Government works – in part through public consultation – to identify critical sectors that will be subject to its new mandatory, pre-closing filing regime.

> **The ICA is a creature of politics, as the last year has made even clearer**

The impact of a Federal election, which must occur by no later than October 2025, further underscores the political nature of the ICA. Foreign investment reviews are likely to be extended where they raise politically sensitive issues, and approvals are likely to be "on hold" between the date the election writ is dropped and the date the new Cabinet is formed, pursuant to the traditional "caretaker" convention. Moreover, a change in the Federal Government would likely have a significant impact on ICA enforcement priorities, specifically in the national security context, although sensitivity to Chinese investment and investment in key resource sectors such as critical minerals is likely to continue.

In recent years, the enforcement of the ICA has been heavily influenced by political priorities in the United States, with close cooperation observed by security agencies on either side of the border. The election of President Donald Trump and associated shifts in the U.S. national security and foreign investment landscape are also likely to directly impact the types of transactions that will be reviewed under the national security provisions in Canada.

CONTINUED EMPHASIS ON NATIONAL SECURITY ENFORCEMENT

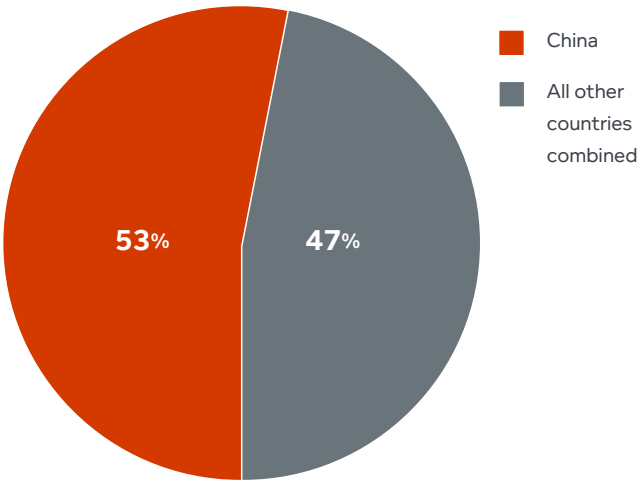
The Foreign Investment Review and Economic Security (FIRES) Branch's significant national security enforcement activity maintained its course in 2024, a trend we expect to continue into 2025. For the fiscal year ended March 31, 2024, 26 investments were subject to national security review, approximately on a par with the record 32 in 2022–2023. Of those 26 reviews, 15 received an order for full review, which was seven fewer than the year prior. Of those 15 full reviews, six investors withdrew their application and terminated their investments, two were ordered to divest their investments entirely (i.e., a divestiture or prohibition order), and seven reviews were cleared by the government (officially, unconditionally). It is likely that at least some of the reviews reported as unconditional clearance were

subject to informal mitigation. We expect that the number of reviews cleared (officially) unconditionally will decrease in 2025 as the Minister exercises his new power to statutorily accept undertakings, leading to more conditionally cleared investments. Moreover, three of the 11 reviews that concluded without requiring a full review involved investors terminating their transactions, suggesting that the government had identified national security concerns in those cases as well.

> **The Foreign Investment Review and Economic Security Branch's significant national security enforcement activity maintained its course in 2024, a trend we expect to continue into 2025**

Despite the continued emphasis on national security reviews, only 26 of the 1,201 investments (about 2%) for which notifications and applications were made were subject to a national security review. In this respect, investors can take some comfort from the fact that very few foreign investments into Canada are subject to, let alone blocked by, national security reviews. However, with the likely implementation of the new mandatory filing regime for certain investments in 2025, this number is expected to increase (potentially to a large degree).

Extended National Security Reviews by Investor Origin



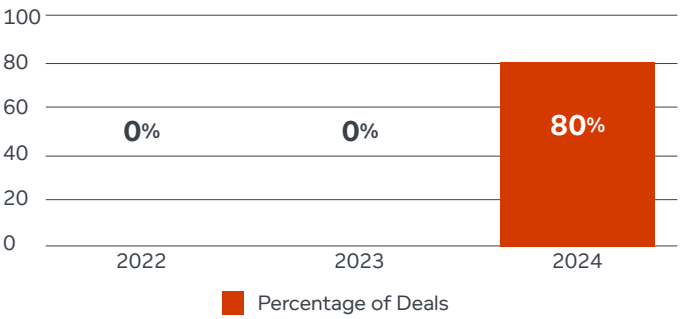
This chart compares the number of orders for a full national security review by investor country of origin.

The origin of the investor continues to be a critical national security consideration. As in prior years, investments by Chinese investors made up a disproportionate number of investigations. Of the 15 full reviews ordered, 8 related to investments by Chinese-controlled purchasers, of which all but one were either withdrawn and terminated or subject to a prohibition. Nevertheless, the majority of investments from China (over 79% in 2023–2024) received no national security intervention. Accordingly, while Chinese investors continue to be more likely to attract scrutiny than investors from other jurisdictions, Canada is still open to Chinese investment, and a case-specific national security risk assessment is imperative in the deal planning stage. Interventions relating to investments from a range of other countries – including the U.S., UK and Germany, shows that national security concerns can arise even where an investor is ultimately controlled in an allied country. Notably, however, six of these seven non-Chinese investments were officially cleared on an unconditional basis.

STRONGER NATIONAL SECURITY RISK ALLOCATION IN TRANSACTION AGREEMENTS

Our annual review of the 30 largest negotiated deals involving Canadian publicly listed entities between January and December 1, 2024 ("Canadian M&A Deal Study") indicates that the manner in which the ICA is incorporated in transaction agreements is subtly changing. Whereas there was a decrease in the number of 2024 transactions featuring a representation on the purchaser's status as a World Trade Organization or trade agreement investor (designations which dictate the applicable ICA review threshold), there was a further increase in the number of agreements containing a representation that the purchaser was not a state-owned enterprise for ICA purposes, reaching 35% in 2024 compared to 27% and 23% in 2023 and 2022, respectively. This is a clear market-driven response to the additional enforcement risk associated with state-owned enterprise purchasers under the ICA.

Percentage of deals including a covenant regarding filing timelines for net benefit review applications which also require purchaser to file net benefit undertakings.



However, the ICA is not only impacting representations and warranties in transaction agreements – it remains pertinent to deal timing. Of the six deals in 2024 that included a covenant regarding filing timelines for net benefit review applications, five required that the foreign purchaser file undertakings. This further underlines that merging parties are being much more prescriptive in how they covenant regarding the anticipated review process under the ICA. Additionally, of the 26 deals with a foreign-controlled buyer, 19% included national security clearance under Part IV.1 of the ICA as a closing condition (which typically includes either the expiry of the time period after filing a notice in which a national security review can be initiated by the Minister, or clearance if a review is commenced), compared to 27% and 5% in the previous two years, respectively. More prescriptive conditions regarding filing timelines and remedies and break fees with respect to national security remain relatively unusual, but are likely to become more commonplace as the national security landscape continues to shift. More specifically, as the mandatory filing regime enters into force in 2025, it is likely that those deals falling under the to-be-determined definition of "prescribed businesses" may consider stronger conditions relating to foreign investment approval, including lengthier outside dates for any high-profile or politically sensitive transactions to ensure sufficient risk allocation between the parties as a result of the new pre-closing filing requirements.

> **As the mandatory filing regime enters into force in 2025, it is likely that those deals falling under the to-be-determined definition of "prescribed businesses" may consider stronger conditions relating to foreign investment approval**

Merger Review: A Change in the Toolkit and a Change in Emphasis?

Following a series of piecemeal changes over the past 15 years, comprehensive amendments to the merger control regime of the *Competition Act* came into effect in 2024 with the passage of Bill C-59. These amendments have facilitated a shift in the Bureau's enforcement approach, foreshadowing a few key trends for Canadian merger review in 2025 and beyond.

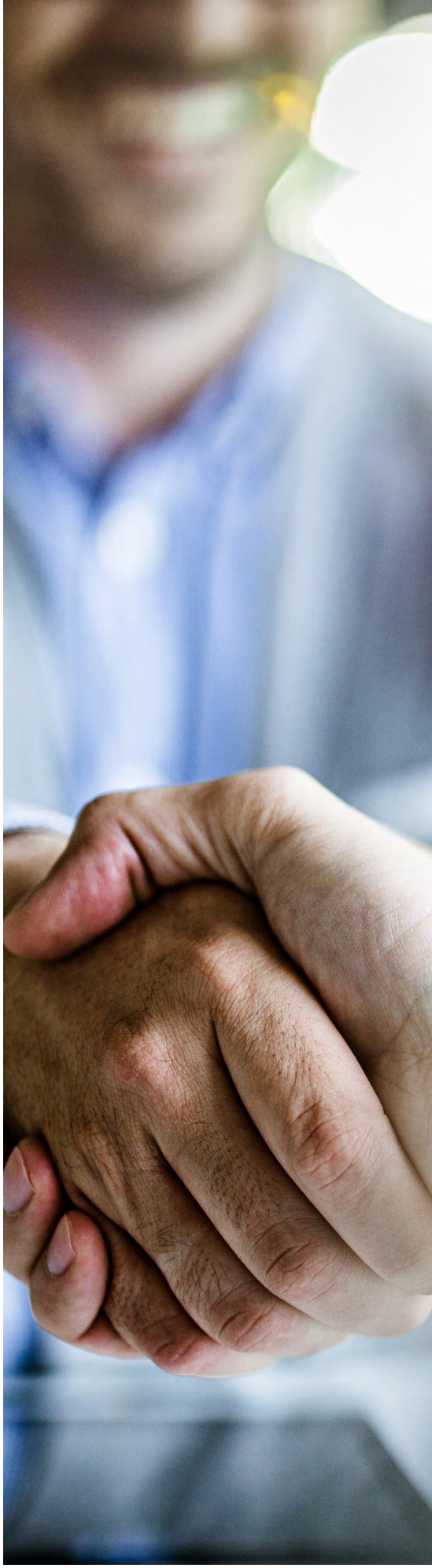
TRANSACTIONS INVOLVING A TARGET WITH SIGNIFICANT IMPORT SALES ARE NOW MORE LIKELY TO BE NOTIFIABLE

For the first time since 2019, more than 50% of the transactions considered as part of our Canadian M&A Deal Study have included a *Competition Act* closing condition.[1] While the Canadian M&A Deal Study focuses on transactions involving publicly listed Canadian entities, we expect to see an increase in the number of transactions involving non-Canadian entities that will require *Competition Act* approval as a result of a key change to the merger notification thresholds under the *Competition Act*.

Transactions involving the acquisition of an operating business[2] in Canada are subject to a mandatory pre-merger filing where two monetary thresholds are exceeded (additional criteria and exemptions may also apply). The Size of Parties threshold, which requires parties to a transaction (together with their affiliates) to have a combined aggregate book value of assets in Canada, or combined annual gross revenues from sales in, from and into Canada, exceeding C$400 million, remains unchanged.

However, the Size of Transaction threshold, which previously only considered the target's assets in Canada and the revenues they generate (i.e., sales in and from Canada), now requires that the target's assets in Canada or its revenues generated from sales in, from or into Canada from all of the assets being acquired exceed C$93 million (the monetary value of this threshold can be adjusted annually based on gross domestic product growth). As such, merger notification analysis now requires consideration of sales from Canadian assets within and outside of Canada as well as sales from non-Canadian assets into Canada.

The inclusion of import sales in the Size of Transaction threshold means that transactions involving a target with cross-border business are more likely to be notifiable to the Bureau. For example, the acquisition of a manufacturer with a distribution centre in Canada (i.e., an operating business) that made significant sales (i.e., >C$93 million) to Canadian customers exclusively and directly from non-Canadian manufacturing facilities was not previously notifiable, as



1 As described in the previous chapter, the Canadian M&A Deal Study involves an annual review of the 30 largest negotiated deals involving Canadian publicly listed entities between January and December 1, 2024. Of the 30 transaction agreements reviewed, 17 agreements included a *Competition Act* closing condition.

2 An operating business is defined in the *Competition Act* as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work."

these cross-border sales were not considered under the Size of Transaction threshold. Under the revised threshold, these cross-border sales would be caught as sales "into Canada" and, assuming the Size of Parties threshold is also exceeded, the transaction would be notifiable to the Bureau. Firms contemplating the acquisition of a foreign-domiciled company that doesn't have a material manufacturing or sales presence in Canada will nonetheless now need to consider whether the company's sales "into" Canada require the transaction to be pre-merger notified under the *Competition Act*.

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PARTIES TO COMPLEX TRANSACTIONS CAN EXPECT LENGTHIER REVIEWS

Arguably the most significant change to the *Competition Act* is the introduction of a structural presumption, whereby a transaction that results in, or is likely to result in, market shares in excess of 30% or concentration beyond prescribed thresholds, together in either case with an incremental increase in concentration above a prescribed level, is presumed to be anti-competitive, unless the merging parties can prove otherwise on a balance of probabilities. While the new structural presumption closely mirrors the structural presumption in the **U.S. DOJ's 2023 Merger Guidelines**, the U.S. guidelines can be revoked or amended at any time and can be applied on a discretionary basis, whereas this new structural presumption is enshrined in law, creating a much more permanent feature with arguably more limited scope for enforcement discretion.

> **Over the past few years, the Bureau has advocated for a structural presumption, which is expected to be at the centre of its merger enforcement approach going forward**

Over the past few years, the Bureau has advocated for a structural presumption, which is expected to be at the centre of its merger enforcement approach going forward. While it is too early to predict whether the structural presumption is likely to result in a material increase in the number of mergers being blocked, it will result in a lengthier and more complex review process for a larger set of transactions, and may well have a chilling effect on transactions that exceed the presumptive thresholds. In particular, parties to a transaction that would result in a market share or concentration in excess of prescribed thresholds in any relevant market are now more likely to receive a Supplementary Information Request (akin to a second request under the Hart-Scott-Rodino process in the U.S.). This will allow the Bureau to obtain the records and data necessary to closely assess any arguments being made by the parties to rebut the structural presumption but will necessarily increase the costs and timelines associated with regulatory clearance.

SUBSTANTIAL REMEDY PACKAGES MAY BE REQUIRED TO CLEAR TRANSACTIONS

The Competition Tribunal ("Tribunal") can now make remedy orders that *restore* competition to pre-merger levels. This expands the scope of the Tribunal's remedial powers, which were previously limited to orders that restore competition to a point at which it can no longer be said to be *substantially* less than it was before the merger.

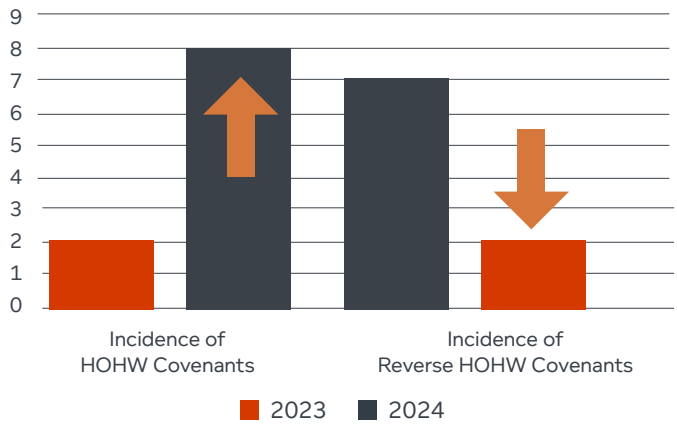
As a result, parties can expect more onerous, and potentially contentious, remedy negotiations with the Bureau. Additional enhancements to the Bureau's toolkit, such as an automatic prohibition on closing of a transaction pending disposition of the Bureau's application for an interim order to enjoin closing, will also incentivize the Bureau to take a more aggressive stance where parties attempt to close over the Bureau's objections.

> **In line with this regulatory enforcement shift, we expect to see a change in negotiation tactics between merging parties, as purchasers attempt to account for this higher remedial standard when negotiating regulatory efforts covenants in transaction agreements**

In line with this regulatory enforcement shift, we expect to see a change in negotiation tactics between merging parties, as purchasers attempt to account for this higher remedial standard when negotiating regulatory efforts covenants in transaction agreements. Purchasers will need

to be comfortable that, going forward, a hell-or-high-water ("HOHW") covenant (i.e., a commitment to agree to any remedy required to obtain clearance) may require the purchaser to offer or agree to a more substantial divestiture package than in previous transactions. Based on our Canadian M&A Deal Study, we are already seeing an increase in the use of HOHW covenants (eight in 2024 as compared to only two in 2023) and a sharp decline in the use of reverse-HOHW covenants (two in 2024 as compared to seven in 2023), the latter of which provide that the purchaser is not required to give any remedy to obtain clearance. Of the eight HOHW covenants, five were HOHW covenants containing enunciated exclusions, whereby the purchaser imposed some limit upon its divestiture obligation, usually providing that the purchaser need not agree to a divestiture that would constitute a "material adverse effect." Going forward, we expect to see purchasers increasingly advocating for the inclusion of such limited HOHW covenants to provide the purchaser with added flexibility in the face of a higher remedial threshold. In addition, parties to complex transactions, particularly ones that exceed the structural presumption thresholds, will need to account for the added time of an in-depth review and protracted remedy negotiations through longer outside dates or built-in extensions specifically for regulatory approvals. Based on our Canadian M&A Deal Study, parties are already adopting longer outside dates, with 59% of agreements that included a *Competition Act* closing condition providing for an outside date of at least six months.

More Deal Terms Providing for Substantial Remedy Packages



"HEALTHY SKEPTICISM" – THE BUREAU'S NEW APPROACH TO MERGER REVIEW

The Bureau has made clear that these amendments mark the beginning of a shift towards stricter merger enforcement in Canada. In a recent speech titled ***The new era of competition enforcement in Canada***, the Commissioner stated "you can expect much more healthy skepticism about proposed mergers in concentrated sectors… This puts an end to what was—in my view—an overly permissive approach to mergers or, as one of my predecessors described it, 'the weakest merger law among all of our peer countries.'"

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The Bureau also believes that these amendments will enable "faster enforcement that is far less technocratic." Recent amendments to the *Competition Act* – such as the repeal of the efficiencies defence, extension of the look-back period for non-notifiable transactions from one year to three years post-closing and introduction of the automatic stay on closing pending disposition of the Bureau's application for an interim order – have simplified the burden that the Bureau has to overcome to challenge a transaction. However, the structural presumption has simply shifted (rather than simplified) the analytical burden from the Bureau to the parties, as clearance will continue to require that the Bureau conclude that the transaction does not result in a substantial lessening or prevention of competition, notwithstanding that presumptive thresholds are exceeded. Given the complex nature of antitrust analysis, including the use of expert econometric evidence, the Bureau will likely want to verify any analysis being presented by the parties, resulting in, potentially, delays to obtain clearance.

The Bureau's revised *Merger Enforcement Guidelines*, which are currently undergoing a comprehensive review, are expected to be published later in 2025. These guidelines and the year ahead will be telling as to how the Bureau plans to use its reinforced toolkit in administering the *Competition Act*'s merger control regime.

Cartels and Anti-Competitive Collaborations: The Bureau Re-Enters the Fray

Commissioner Matthew Boswell ended his remarks at the Canadian Bar Association's 2024 Competition Law Fall Conference with two words: "buckle up."[3] The Commissioner's "new era of competition enforcement in Canada," builds on earlier commitments to ensure the Bureau is litigation-ready. Going forward, we expect the Bureau to keep its promise of vigorous enforcement with respect to cartels and anti-competitive collaborations. Statistics from the Bureau's 2023–2024 reporting period evidence a sustained increase in criminal enforcement activity, which we believe will remain the norm. The Bureau continues taking various enforcement initiatives, including monitoring activities without immunity or leniency applicants, and updated its *Immunity and Leniency Programs* to reflect the new wage-fixing and no-poach criminal prohibitions. Further, the Bureau is pursuing cutting edge civil investigations in the artificial intelligence ("AI") industry.

CARTEL ENFORCEMENT: BACK IN ACTION

A Flurry of Enforcement Activity

In 2025, we expect that the Commissioner's recent promise will result in greater cartel and anti-competitive collaborations enforcement. Statistics from the Bureau's 2023–2024 reporting period (April 1, 2023 – March 31, 2024) indicate a continued rise in cartel enforcement activity:

Enforcement Metric	2023–2024	2022–2023	2021–2022	2020–2021
Individuals charged	6	5	2	3
Total fines imposed on companies	C$51,960,000	C$0	C$761,967	C$0
Search warrants issued[4]	1	0	2	0
New cartel investigations	22	30	14	14
Ongoing cartel investigations	34	47	39	36
Immunity markers granted	3	1	2	4

These statistics demonstrate that the Bureau has re-entered the fray, opening a large number of new cartel cases (22 additions in 2023–2024 alone, supported by three new immunity markers). During this same period, the Bureau also conducted one dawn raid, and, since that time, we are aware of the Bureau executing warrants

3 Competition Bureau, Address by Matthew Boswell, Commissioner of Competition at the Canadian Bar Association Competition Law Fall Conference, "The new era of competition enforcement in Canada" (September 26, 2024), online: https://www.canada.ca/en/competition-bureau/news/2024/09/the-new-era-of-competition-enforcement-in-canada.html.

4 Includes multiple warrants for a single investigation.

in another investigation in the late spring of 2024, which fell outside the statistical reporting summarized here.

> **In cartel enforcement, the Bureau's most notable results vconcern fines imposed and charges laid. The agency secured its largest ever fine for price fixing C$50 million) in its bread cartel matter and charged six individuals with criminal offences in its 2023–2024 reporting period**

The Bureau's most notable results, however, concern fines imposed and charges laid. The agency secured its largest ever fine for price fixing (C$50 million) in its bread cartel matter and charged six individuals with criminal offences in its 2023–2024 reporting period. Since the end of its reporting period, the Bureau has also secured substantial non-monetary penalties against convicted individuals, with settlements imposing two separate conditional sentences (one for 14 months and another for 12 months).

Focus on "Ex Officio" Enforcement

One key Bureau priority has been, like enforcers in other countries, expanded *ex officio* enforcement, or enforcement on the Bureau's own initiative, absent immunity or leniency applications. With added resources and increased budget, the Bureau has increased proactive monitoring of suspected cartel activity. In 2024, the Bureau twice made public announcements about examinations into retail motor fuel on a regional basis. Going forward, market participants can expect a dynamic, proactive cartels directorate.

The Bureau also capitalized on broader international enforcement trends by coordinating enforcement across borders. In particular, it partnered with the U.S. Department of Justice and Mexican Federal Economic Competition Commission and launched a tipline dedicated to reporting cartel activity relating to the 2026 FIFA World Cup (to be held across cities in Canada, Mexico and the United States) to protect the integrity of procurement contracts. We expect that proactive monitoring in partnership with international agencies, who are also increasingly focused on *ex officio* enforcement, will be a continued trend into 2025.

The Bureau Readies Its Immunity and Leniency Programs for New Cases

The Bureau has revised its *Immunity and Leniency Programs* ("Programs") to provide guidance to potential applicants for recently criminalized agreements or arrangements to fix wages or refrain from poaching each others' employees, and to capture the latest developments in cartel practice.

The revised Programs contain substantive updates, equipping market participants with the information they need to consider and apply for immunity or leniency with respect to criminal wage-fixing or no-poaching agreements, which were criminalized in Canada as of June 2023. While we are unaware of any public wage-fixing or no-poaching cases to date, the addition of detailed guidance concerning how the Bureau will consider these cases, including the information one must provide the Bureau when seeking immunity and how reduced fines and leniency benefits will be assessed, should facilitate cooperation for future Bureau investigations for these new labour-related criminal offences.

Procedurally, the Programs have also been updated to reflect the Bureau's recent practice of requesting an affidavit under the *Canada Evidence Act* to ask to authenticate any records produced to the Bureau (concerning their origin or their handling). Seeking these affidavits, which serve to authenticate records produced at trial, reflects the Bureau's reinforced commitment to seeing investigations through to trial.

CUTTING EDGE CIVIL INVESTIGATIONS INTO AI

The Bureau's increasingly active posture with respect to cartels is matched by cutting-edge work in civil collaborations enforcement.

In March 2024, the Bureau foreshadowed a focus on AI and "algorithmic collusion" in its discussion paper, *Artificial intelligence and competition*. That paper noted that concerns may arise "if multiple competitors purchase or use the same AI technology from a third-party supplier" as a "supplier of AI may leverage the technology to facilitate a cartel agreement amongst horizontal competitors."[5]

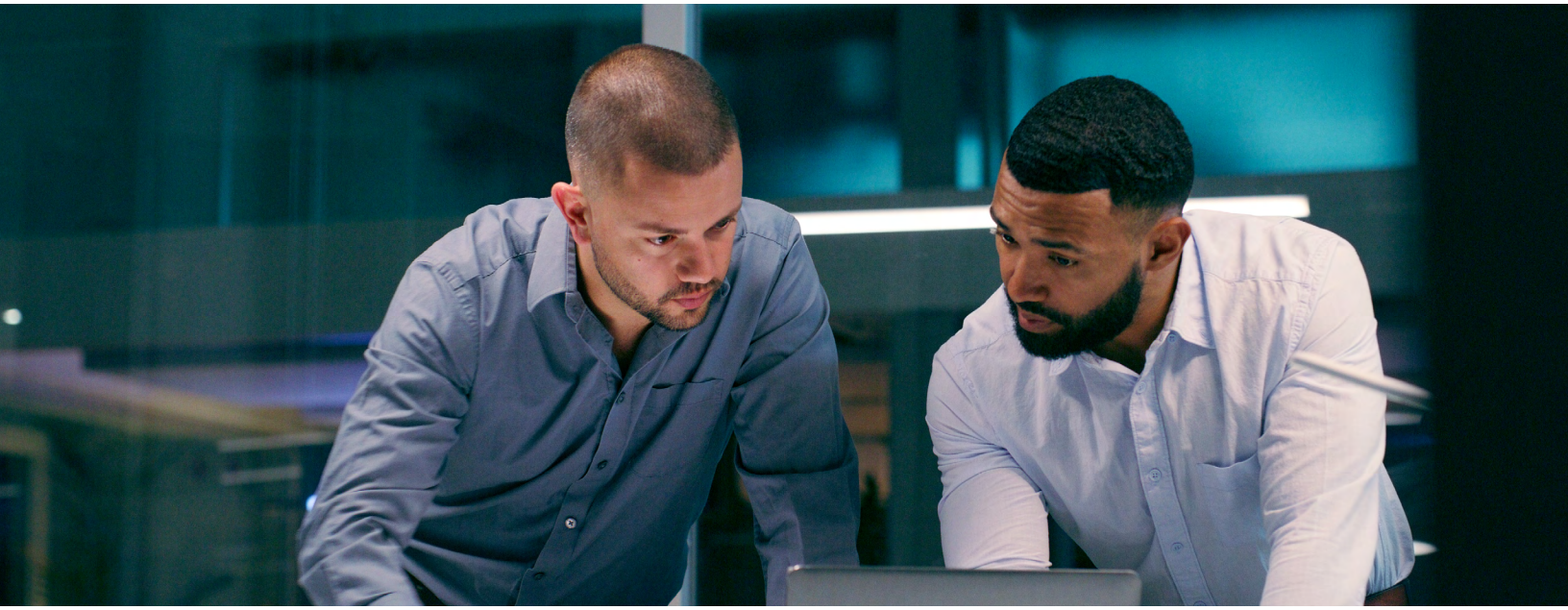
> **Just a few months later, the Bureau pursued court-ordered disclosure premised on precisely the theory of harm set out in its prior discussion paper, demonstrating the agency's commitment to its stated enforcement priorities in the AI space**

Just a few months later, the Bureau pursued court-ordered disclosure premised on precisely the theory of harm set out in its prior discussion paper, demonstrating the agency's commitment to its stated enforcement priorities in the AI space. In July 2024, the Bureau sought court-ordered disclosure against a provider of data and pricing services to motor fuel retailers. The Bureau's inquiry seeks to determine whether the "arrangements with gas stations are, in effect, agreements or arrangements between [...] competitors, that prevents or lessens, or is likely to prevent or lessen, competition substantially in markets throughout Canada."[6] While it is unclear how the independent adoption by multiple competitors of the same AI technology can, on its own, constitute an "agreement or arrangement," the Bureau's investigation demonstrates its commitment to staying abreast of the latest technological developments, and considering how existing legal frameworks can be applied to cases involving generative AI. This case also highlights the potential for overlap in AI enforcement as between different provisions of the *Competition Act*. While the Bureau's case has focused on conduct suggestive of coordination between different firms, the Bureau has also advanced a novel theory relating to abuse of dominance, which is discussed further in **A New Chapter for Reviewable Conduct or Just Pages From Another Regulator's Playbook?**.

Further, amendments to the civil collaborations provisions (which took effect on December 15, 2024) expand those provisions to capture agreements or arrangements between non-competitors (provided a "significant purpose" of the agreement is to prevent or lessen competition). We expect cases like the AI retail gas matter – involving key vertical relationships – will become more common moving forward. The Bureau's priorities in this regard have also been reinforced by the Minister of Innovation, Science and Industry of Canada, who has called for investigations into other pricing technology platforms.

5 Competition Bureau, *Artificial intelligence and competition* (March 20, 2024), online: **https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/artificial-intelligence-and-competition**.

6 Commissioner of Competition, Application Record, Affidavit of Alexander Jokic, File T-1778-24 (July 11, 2024), para 37.



A New Chapter for Reviewable Conduct or Just Pages From Another Regulator's Playbook?

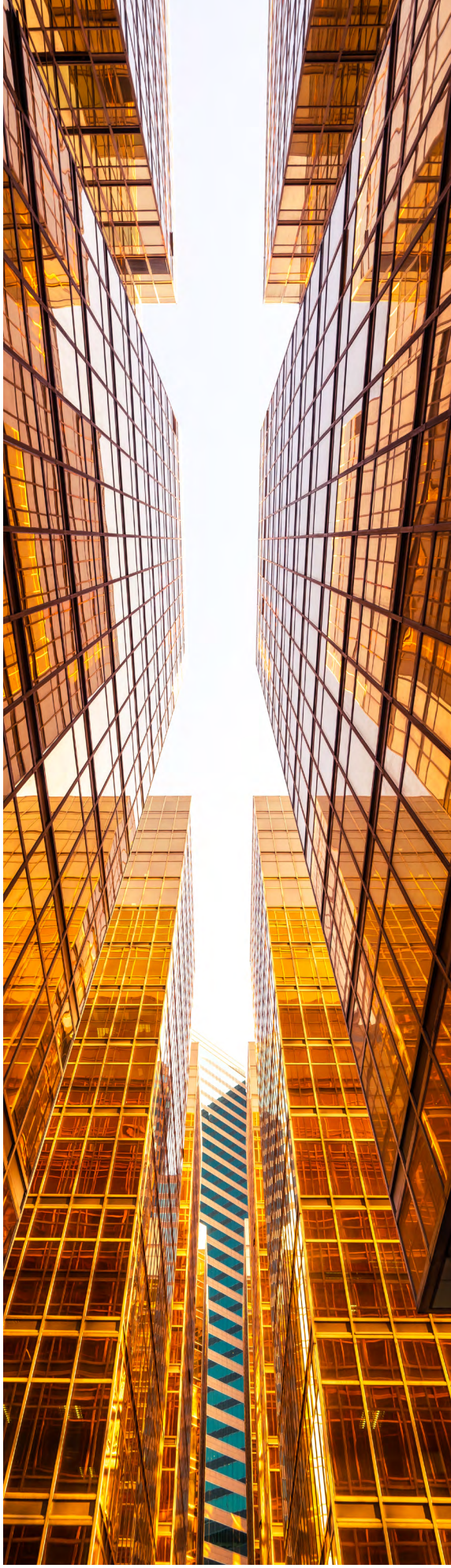
The last few years have seen a significant overhaul of the abuse of dominance provisions in the *Competition Act*. With at least six publicly announced investigations into abusive conduct commenced in 2024, as well as groundbreaking litigation against Google's ad tech business,[7] it is likely that enforcement action will only increase in this area in 2025 and beyond. Accordingly, the Bureau is likely to look south of the border as well as to the European Union ("EU") and other jurisdictions for inspiration on which industries to target, which may include the grocery sector, real estate, big tech and, for private parties, pharmaceuticals.

With at least six publicly announced investigations into abusive conduct commenced in 2024[7], as well as groundbreaking litigation against Google's ad tech business, it is likely that enforcement action will only increase in this area in 2025 and beyond

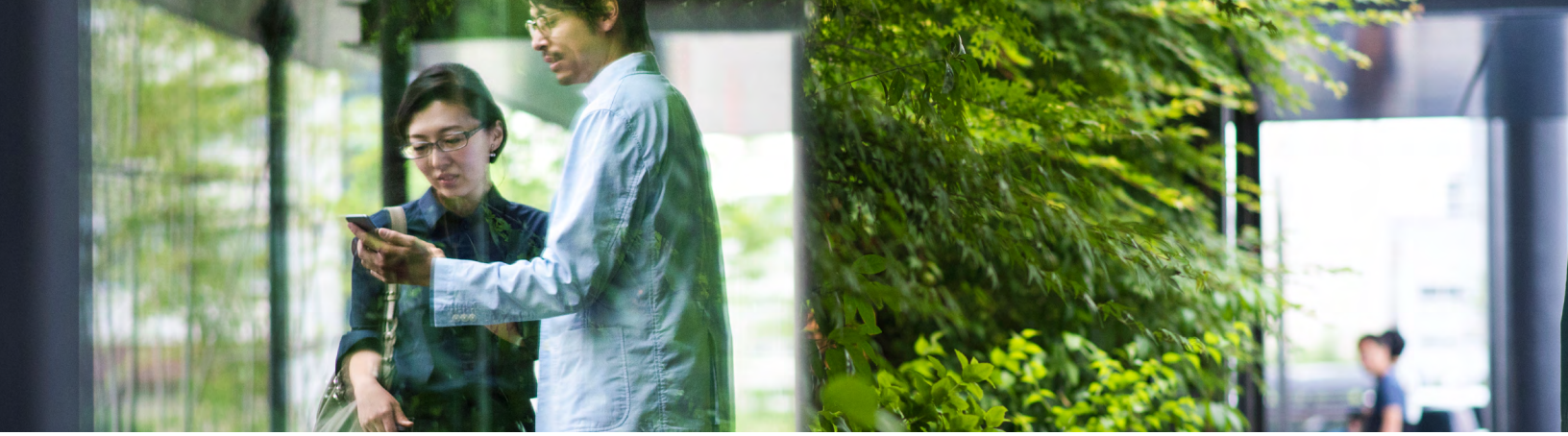
A NEW LEASE ON LIFE: INCREASED FOCUS ON PROPERTY CONTROLS IN THE GROCERY SECTOR

Following the publication of the Bureau's *Retail Grocery Market Study*, the end of 2023 was marked by a greater emphasis on combatting the rising cost of living and, in particular, grocery prices. One of the Bureau's key concerns in this sector is allegedly anti-competitive property controls (also known as restrictive covenants), a practice that has been investigated previously in the United Kingdom, Australia and New Zealand. In August 2024, the Bureau issued draft guidance for comment on the use of property controls in commercial real estate, in which it emphasized that it considers there to be only limited circumstances where property controls may increase overall competition and therefore escape potential enforcement action. The Bureau's draft guidance also provides for property controls to be enforced under the new section 90.1, in addition to abuse of dominance.

The consultation period for this draft guidance recently ended, and finalized guidance is expected in early 2025. Once in place, given that the Bureau has placed significant emphasis on this alleged conduct in the past year, it is anticipated that property controls may be a major enforcement priority for the Bureau in 2025, likely expanding beyond the grocery sector.



7 These investigations include alleged conduct by Dye & Durham, the Canadian Real Estate Association, the Ottawa Real Estate Board, Kalibrate, the Yukon Real Estate Association and the Northwest Territories Association of Realtors.



AN OPEN HOUSE ON REVIEWABLE CONDUCT IN THE REAL ESTATE INDUSTRY

Following in the footsteps of similar cases in the U.S., the Bureau has not only made property controls in the commercial real estate market an enforcement priority, but also allegedly anti-competitive conduct by real estate firms more generally. In March 2024, the National Association of REALTORS in the U.S. announced that it agreed to pay US$418 million to settle a lawsuit brought on behalf of home sellers relating to long-standing fixed broker commissions. As a result of the settlement, home buyers and sellers in the U.S. are now able to negotiate fees with their agents upfront instead of paying a fixed commission fee.

In a similar vein, in October 2024, the Bureau opened an inquiry into alleged anti-competitive conduct by the Canadian Real Estate Association ("CREA") relating to its rules surrounding commissions. Among other things, the investigation will review whether CREA's commission rules discourage buyers' realtors from competing to offer lower commission rates, which could result in less competition and higher costs for both buyers and sellers. An investigation was also recently opened into the Ottawa Real Estate Board for similar conduct. The Bureau also appears to be aggressively advancing its ongoing inquiry into the real estate market in Québec. As these investigations continue to evolve, it is likely that the real estate market will continue to be under a microscope in 2025. There is also potential for the Bureau's enforcement priorities to shift towards the use of AI in the real estate industry to engage in forms of alleged collusive conduct, such as the AI software used by RealPage Inc., the subject of a lawsuit in the U.S.[8] and widespread media attention in Canada, as well as a potential market study by the Bureau. As these investigations develop, it will be interesting to see how the Bureau utilizes both the abuse of dominance and civil collaboration provisions of the *Competition Act* to advance its enforcement efforts.

AI: THE BUREAU'S NEW FAVOURITE LETTERS?

The Bureau has consistently emphasized the importance of tackling competitive issues in the digital sector and in 2022, it began sharpening its tools to combat them through amendments that expanded the list of factors used to determine whether conduct substantially lessens or prevents competition. These additional factors include the consideration of network effects, effects on price and non-price competition (i.e., consumer privacy and choice), and the nature and the extent of innovation in the market. Until very recently, the Bureau has been hesitant to go after large tech giants under the unilateral conduct provisions of the *Competition Act*, often awaiting signals from the U.S. and Europe as to the likelihood of successful enforcement.

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In another sign of the Bureau's growing assertiveness, this trend fell apart in December 2024 when the Bureau commenced litigation to break up Google's alleged dominant position in ad tech services (by forced divestitures of certain proprietary software tools used by publishers and advertisers). While the theory of harm underpinning this litigation closely mirrors enforcement action taken by antitrust regulators in the U.S. and European Union, the Bureau has sought divestitures of two of Google's flagship ad tech tools, which have the potential to be more onerous remedies than those imposed in other jurisdictions if the Bureau's case prevails before the Tribunal. Additional

8 The U.S. Department of Justice and several state attorneys filed an antitrust suit against RealPage Inc. in August 2024, alleging the real estate software company engaged in a complex collusive scheme with landlords that resulted in higher prices for renters across the country.

cases against Google outside of Canada, such as the U.S. Department of Justice seeking an order forcing the sale of its Chrome browser, could pave the way for further Bureau enforcement action in the near future.

> **The Bureau has also signaled an intent to pursue allegedly abusive conduct in the AI industry**

The Bureau has also signaled an intent to pursue allegedly abusive conduct in the AI industry, to complement its work on the potential for AI to be used to facilitate algorithmic collusion, which is described in **Cartels and Anti-Competitive Collaborations: The Bureau Re-Enters the Fray**. Having published a discussion paper in March 2024 that examined unilateral theories of harm, the Bureau's first significant foray into enforcement in the AI sector contemplated an investigation under both the collaborations and unilateral conduct provisions of the *Competition Act*. In July 2024, the Bureau obtained a court order to advance its ongoing investigation into allegedly anti-competitive conduct by Kalibrate, contending that it collects pricing, cost and output information from Canadian gas stations and then uses AI, machine learning and algorithms to offer "pricing guidance" to operators to allegedly raise prices. Accordingly, the digital marketplace, and, in particular, AI, appears to be an area where many aspects of the regime collide as the Bureau advances its activity in this evolving space.

PUBLIC HEALTHCARE, PRIVATE ENFORCEMENT: A LENS FOCUSED ON THE HEALTHCARE INDUSTRY

With the expansion of the private application regime to abuse of dominance in 2022, the Bureau is no longer the only source of litigation risk for dominant players. Indeed, the past two years have seen the first private applications for abusive conduct, all in the pharmaceutical and homecare industries. In September 2023, Apotex Inc. brought an application to the Tribunal alleging abusive conduct by Paladin Labs Inc. for refusing to supply a sample of Paladin's already approved ponatinib-based drug, blocking Apotex from obtaining rapid regulatory approval for its generic drug. The application was discontinued only two weeks after filing as Apotex obtained a sample after starting the litigation.

> **With the expansion of the private application regime to abuse of dominance in 2022, the Bureau is no longer the only source of litigation risk for dominant players**

Two new applications were also commenced in the second half of 2024. First, JAMP Pharma alleged that Janssen Inc. engaged in numerous anti-competitive acts to prevent competitors from developing biosimilar products to its ustekinumab drug, resulting in no biosimilar drug being launched from 2021 to 2024. In November 2024, the Tribunal dismissed the application for leave, concluding that JAMP Pharma's evidence did not give rise to a bona fide belief that its business was directly and substantially affected as a result of the impugned conduct. Second, Goshen Professional Care Inc. alleges that the Saskatchewan Health Authority abused its dominance by prematurely terminating its agreement with Goshen to supply care home contracts and residents from its public waiting list to Goshen's Emmanuel Villa care facility.

These applications signal the *Competition Act*'s growing role in commercial and intellectual property disputes. With the amended lower leave test and disgorgement remedies coming into force in 2025 (further details are provided below in **Competition Litigation: Action All Round**) , as well as increased awareness of the *Competition Act* following these highly politicized amendments, we expect the number of private applications to increase significantly in 2025. Additionally, as the Bureau has stated that it does not intend to make enforcement of the new excessive pricing provisions a priority, this may be another area where private applications flourish in the future, specifically within the pharmaceutical industry, which has housed the majority of the excessive pricing cases in other jurisdictions, including the U.S. and the EU.

Deceptive Marketing: Bureau Emboldened by Legislative Reform and Tribunal Victory

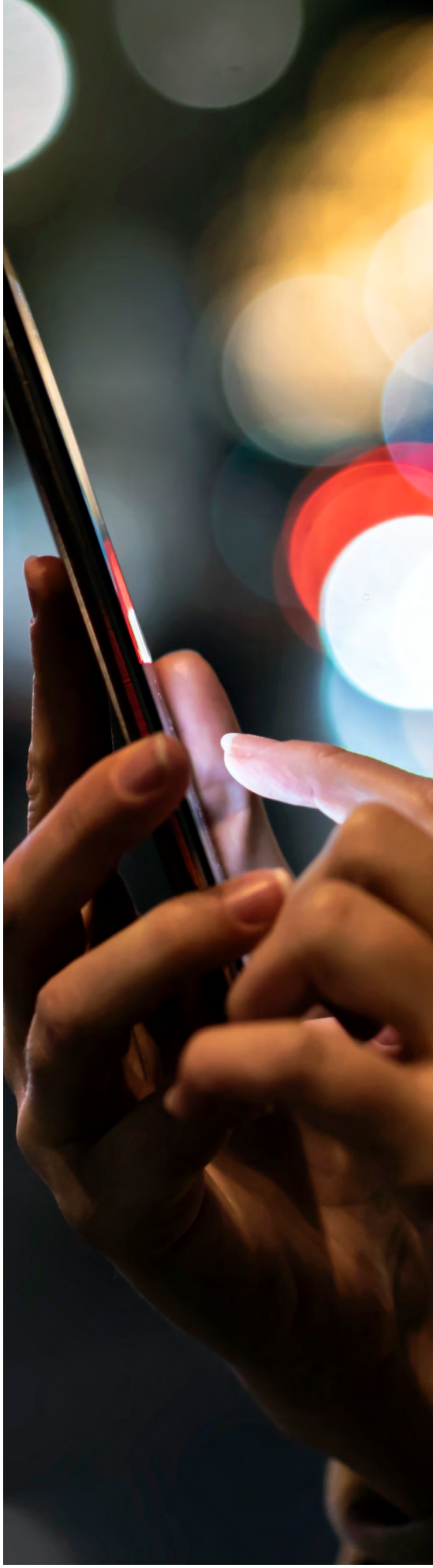
As we look ahead to 2025, several developments regarding deceptive marketing practices are poised to drive the Bureau's increased enforcement activity, and fuel potential complaints from consumers and public interest groups. Particularly, the amendments to the *Competition Act* introduced through Bill C-59 in 2024, building on those introduced in 2022, have enhanced the Bureau's authority to address certain deceptive marketing practices, such as misleading environmental claims, drip pricing and ordinary selling price claims.

> **Several developments regarding deceptive marketing practices are poised to drive the Bureau's increased enforcement activity, and fuel potential complaints from consumers and public interest groups**

The amendments also create new litigation avenues for private and public interest litigants (discussed further in **Competition Litigation: Action All Round**). With the Bureau's announced intention to safeguard consumers from deceptive marketing in key sectors of the economy, including online marketing, and with public awareness of sustainability issues continuing to rise, companies should prepare for stricter scrutiny and revisit their compliance policies to avoid potential penalties and litigation.

UNDER THE (GREEN) LENS: BUILDING ON MUCH ANTICIPATED GREENWASHING GUIDANCE

The amendments to the *Competition Act* targeted greenwashing and imposed a duty on businesses, when making environmental claims about a business – and not just about a specific product or service – to substantiate such claims in accordance with "internationally recognized methodologies", recognized, which draft Bureau guidance has indicated means a methodology "recognized in two or more countries", although not necessarily by the governments of those countries. While the Bureau has sought to accelerate publication of guidance on how companies should apply the amendments to their activities, the draft guidelines released in December 2024 suggest that the Bureau will not provide a detailed roadmap to enable companies to self-assess their environmental claims. As such, these amendments have created uncertainty and heightened risk of complaints, enforcement action and potential reputational and financial consequences (including monetary penalties of up to 3% of worldwide revenues). Following publication of the Bureau's final guidance on the new environmental claims provisions of the *Competition Act* sometime in 2025, we anticipate that the Bureau will dedicate significant resources to environment-related investigations, a number of which are already ongoing, to leverage these new tools. Helpfully, the Bureau's draft guidance confirms that environmental claims made before the amendments came into effect in June 2024 will not be a target for enforcement action.



Following publication of the Bureau's final guidance on the new environmental claims provisions of the *Competition Act* sometime in 2025, we anticipate that the Bureau will dedicate significant resources to environment-related investigations

Nevertheless, environmental and social justice groups are also likely to continue submitting six-resident complaints – a mechanism under the *Competition Act* whereby six residents of Canada can file a complaint to compel the Bureau to begin an inquiry – related to environmental issues. Indeed, recent investigations, which remain ongoing, have been opened under this mechanism in the retail, banking, energy and forestry industries. Further, as of June 2025, environmental groups and other private litigants will be able to bring private applications to the Tribunal to challenge environmental and other deceptive marketing claims, where the Tribunal is satisfied that it is in the public interest to do so. While the scope of "public interest" is currently unknown, the Tribunal will have to strike a balance between ensuring that the bar to leave is low enough to broaden the scope of potential litigants but not so low as to open the floodgates.

FEE-LING THE PRESSURE: DRIP PRICING AS A CONTINUED ENFORCEMENT PRIORITY

The Tribunal imposed an administrative monetary penalty of nearly C$39 million – the highest administrative monetary penalty under the *Competition Act* to date – representing the amount of online booking fees Cineplex had collected from consumers since the introduction of such so-called "hidden" or "junk" fees

Drip pricing will continue to be an enforcement priority for the Bureau in 2025, with the Bureau expected to draw on legislative amendments introducing an express prohibition on drip pricing, as well as its significant victory in 2024 against Cineplex, a major operator of movie theatres. "Drip pricing" refers to the practice of advertising a product or a service at a stated price, but then adding one or more additional unavoidable fixed fees to that price so the consumer has to pay more than the originally advertised amount to purchase the product or service. In September 2024, the Tribunal ruled in favour of the Bureau and imposed an administrative monetary penalty of nearly C$39 million – the highest ordered under the *Competition Act* to date – representing the amount of online booking fees Cineplex had collected from consumers since the introduction of such so-called "hidden" or "junk" fees. This was the first contested case to apply the new express provision targeting "drip pricing." The Tribunal ruled that the ticket prices Cineplex represented on its website and mobile application were not attainable due to the requirement to pay an online booking fee, and confirmed that this constituted drip pricing conduct. Cineplex filed an appeal of the Tribunal's decision before the Federal Court of Appeal. Businesses should also be aware that, as of June 2025, private parties will be permitted to bring civil deceptive marketing cases directly to the Tribunal, including drip pricing cases.

SALE OR SCAM? SHIFTING THE BURDEN

We expect the newly introduced shift of the evidentiary burden with respect to ordinary selling price claims to embolden the Bureau to investigate and potentially litigate more cases under the ordinary price provisions of the *Competition Act*

We expect the newly introduced shift of the evidentiary burden with respect to ordinary selling price claims to embolden the Bureau to investigate and potentially litigate more cases under the ordinary price provisions of the *Competition Act*. The provision prohibits any person from promoting a discount when, in fact, the advertised "ordinary price" is inflated. Prior to the introduction of Bill C-59, the Bureau had the burden to establish that a claim violated the ordinary price provision of the *Competition Act*. The Bureau had submitted that this burden was too "hefty," as it requires obtaining all the data from the business making the claim and running the numbers to verify whether the claim was truthful. The Bureau argued that businesses were best positioned to carry this burden, considering they are the ones making the savings claim on the basis of their own sales history. The Bureau's comments were incorporated into the amendments and, since June 2024, the burden is now on the company to substantiate an advertised discount by establishing that either: (i) they have sold a substantial volume of the product at the advertised ordinary price or a higher price within a reasonable period of time before or after the making of the representation; or (ii) they have offered the product at the advertised ordinary

price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the discount representation. Moving forward, companies should thus ensure, when making a discount claim, that they have supporting data to substantiate their claims.

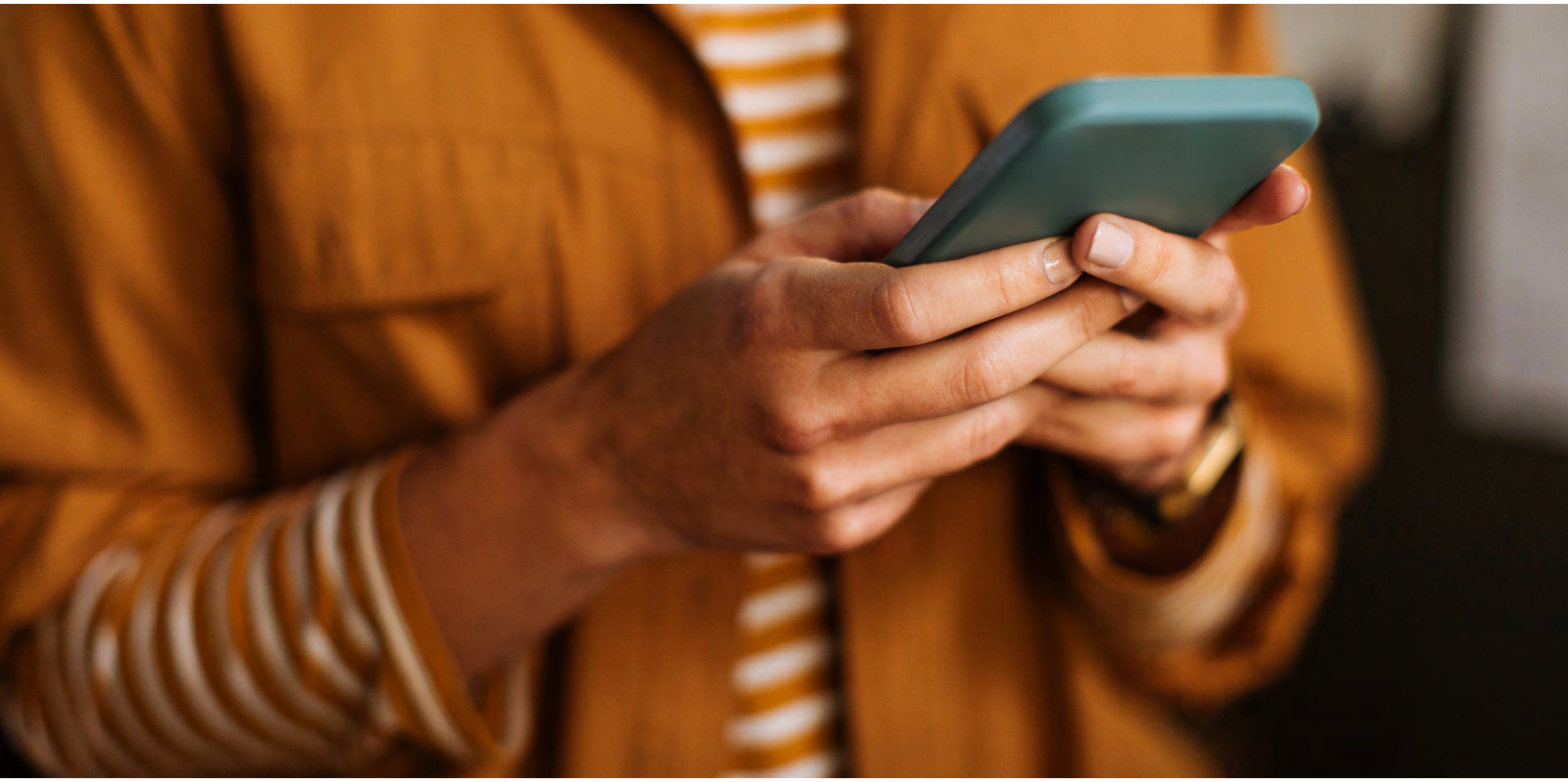
BUREAU'S CONTINUED BATTLE AGAINST ASTROTURFING

The Bureau has repeatedly stated its commitment to cracking down on "astroturfing," the practice of creating commercial representations that are presented as the authentic experiences and opinions of impartial consumers, such as fake consumer reviews and testimonials.

While the Bureau has expressed concern about these practices for some time now, recent enforcement action highlights the Bureau's determination to combat these practices moving forward. In December 2023, the Bureau reached an agreement with a company offering a mobile application synchronizing devices to amplify the sound of music. The consent agreement addressed the Bureau's concern with respect to the purchase of positive reviews from third parties, which the Bureau believed to have influenced the application's ranking and overall rating on Apple's App Store. In the same vein, in January 2024, the Bureau warned businesses over reviews posted by employees, noting that it "will not hesitate to vigorously pursue enforcement action against problematic reviews." The Bureau insisted that any connections with the business (including an employment relationship, or the fact that compensation was provided by the business, whether in the form of payment, free product or otherwise) must be disclosed. In June 2024, the Bureau announced that it was advancing an investigation into claims by Amazon that may be influenced by reviews and ratings. The Bureau believed that such claims may affect how products are ranked and displayed on the website and mobile application, and obtained a court order to gather information from Amazon.

> **The Bureau warned businesses that it "will not hesitate to vigorously pursue enforcement action against problematic reviews"**

In August 2024, the U.S. Federal Trade Commission ("FTC") also announced the adoption of a final rule that will combat "fake reviews and testimonials" – including AI-generated reviews – by prohibiting their sale or purchase and allowing the agency to seek civil penalties. As is often the case, we can expect the Bureau to align with the FTC's approach and increase its efforts to combat these practices.



Competition Litigation: Action All Round

In last year's *Outlook*, we reported on several decisions where Canadian courts continued to closely scrutinize private claims that failed to adequately plead anti-competitive conduct under the Canadian *Competition Act*. In 2024, we welcomed significant changes to the *Competition Act*, impacting all areas of the competition/antitrust practice, including class actions and private claims to the Tribunal.

BILL C-59: EXPANDING PRIVATE ENFORCEMENT

Historically, due to limited private access rights under the *Competition Act*, the enforcement of Canadian competition law has been primarily carried out by the Commissioner. The enactment of Bill C-59 marks an important shift in the *Competition Act*'s enforcement model, with private litigation anticipated to play a more prominent role. Prior to Bill C-59's amendments, while private parties could seek damages for breach of the *Competition Act*'s criminal provisions (including through class action claims), for private applications to the Tribunal alleging conduct contrary to the civil provisions – refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling or market restriction (section 77), and abuse of dominance (section 79) – remedies were limited to corrective behavioural orders and did not allow private litigants any financial recovery. Bill C-59 has extended private access to the civil agreements (section 90.1) and deceptive marketing (section 74.01) provisions of the *Competition Act*, lowered the leave test for applicants, and introduced a disgorgement remedy for private litigants.

> **The enactment of Bill C-59 marks an important shift in the *Competition Act*'s enforcement model, with private litigation anticipated to play a more prominent role**

The notable private litigation amendments to the *Competition Act* include:

— **New Rights of Action:** Pursuant to Bill C-59, private applicants may now seek leave to pursue a claim before the Tribunal for agreements or arrangements that prevent or lessen competition substantially (section 90.1), and deceptive marketing practices (section 74.01). The only significant civil provision for which private access remains unavailable is merger review. As it stands, the Commissioner has sole authority to review and challenge mergers under section 92 of the *Competition Act*. (Even here, mergers could conceivably be caught by the civil collaboration provision in section 90.1 given that a merger constitutes an "agreement or arrangement.")

— **Lower Leave Test:** Private applications to the Tribunal are subject to a leave test. While Bill C-59 does not eliminate the leave requirement, it significantly eases the burden applicants must satisfy to obtain leave. Previously, leave could be granted where the Tribunal found that an applicant's *entire* business was substantially and directly affected by the conduct at issue. As result of Bill C-59 – for refusal to deal, price maintenance, exclusive dealing, tied selling and

market restriction, abuse of dominance and civil collaborations – as of June 2025 when this amendment comes into force, leave may now be granted even if only *part of* the applicant's business is substantially and directly affected by the impugned conduct; or, if the Tribunal determines that it is in the "public interest" to grant leave. For deceptive marketing practices, leave may be granted where the Tribunal is satisfied that it is in the public interest to do so. It remains unclear how the public interest standard will apply in practice. On the one hand, the Commissioner has a public interest mandate and accordingly, if the Commissioner decides not to pursue a claim, it could be considered sufficient evidence that a private action is not in the public interest. Conversely, it may be argued that the expansion of the types of litigants who can advance claims under the *Competition Act* protects the public interest, widens the scope of enforcement and alleviates some of the Bureau's administration and financial burden. Whether the new public interest standard will truly lower the leave threshold will ultimately depend on the Tribunal's interpretation.

Private applications to the Tribunal are subject to a leave test. While Bill C-59 does not eliminate the leave requirement, it significantly eases the burden applicants must satisfy to obtain leave

— **Disgorgement Remedy:** Previously, a private application brought under the *Competition Act*'s civil regime could only result in a behavioural order (for abuse of dominance) or an order to pay administrative monetary penalties, which are paid to the government. Following Bill C-59, private applicants can now seek disgorgement of the value of the benefit derived from the anti-competitive conduct contrary to sections 75, 76, 77, 79 or 90.1. Bill C-59 provides that disgorgement awards are to be distributed among the applicant and any other person affected by the conduct. In parallel, the Tribunal will be permitted (among other things) to specify how the payment is administered, appoint an administrator to facilitate payment, order the person against whom the order is made to pay administrative costs and the administrator's fees, set the conditions for the eligibility of claimants and establish a process for unclaimed amounts.

With the possibility of a disgorgement award and a lower leave test, along with an expansion of the conduct captured under the civil collaboration and abuse of dominance provisions, the Bill C-59 amendments are likely to result in increased private antitrust enforcement and litigation risks for businesses across Canada.

AMENDMENTS IN MOTION

Private Abuse of Dominance Cases: A New Tool for Commercial Negotiations?

The new private access regime will not only allow private parties to recoup losses arising from anti-competitive conduct but, as illustrated by the abuse of dominance cases brought since the *Competition Act* was amended to allow private abuse of dominance applications

(see **A New Chapter for Reviewable Conduct or Just Pages From Another Regulator's Playbook?**), may also provide leverage to obtain commercial concessions. The applications by Apotex and JAMP Pharma, although both have been settled or dismissed, suggest that parties could increasingly rely on the *Competition Act*'s new private enforcement to influence commercial negotiations. The potential risk for a disgorgement award represents an additional source of leverage for applicants, and will likely encourage settlements outside of the Tribunal process.

Checking In on *Qualcomm*

> **It is comforting that *Qualcomm* has yet to represent a material deviation from the courts' approach. A plaintiff's claim will still be largely a pleadings driven analysis with the necessary scrutiny of the courts**

In last year's *Outlook*, we reported on *Barroqueiro v. Qualcomm Incorporated*,[9] a class certification decision where the motion judge found the plaintiff's allegations were not vague enough to preclude the claim from certification, representing a stark contrast from the approach Canadian courts have adopted in the past three years (which have more closely scrutinized putative class actions involving atypical cartel allegations). This decision has had limited application since its publication, and appears to continue to be an outlier. Recently, in *Latifi v. The TDL Group Corp.*[10] the Supreme Court of British Columbia considered *Qualcomm* but only for the general proposition that the plaintiff has the burden to prove an actual "agreement" amongst conspirators, and not merely knowledge or approval of the impugned conduct. The B.C. court granted summary judgment and dismissed the plaintiff's claim. Notwithstanding that *Latifi* was decided on the heels of parallel actions in other Canadian jurisdictions – all of which also dismissed the plaintiffs' claims – it is comforting that *Qualcomm* has yet to represent a material deviation from the courts' approach. A plaintiff's claim will still be largely a pleadings driven analysis with the necessary scrutiny of the courts.

Class Action Procedure Update: Dismissing Third-Party Funding Motions

In February 2024, the Federal Court dismissed two separate motions where class counsel sought court approval of third-party funding agreements on behalf of their putative class members. In the first case, *Breckon v. Cermaq Canada Ltd.*,[11] class counsel sought third-party funding approval simultaneously with their motion for settlement approval.[12] In the second case, *Ingarra v. Dye & Durham Limited*,[13] class counsel sought approval of their third-party funding agreement prior to certification.

In both cases, the motion judge found that the rate of return to the litigation funder was "unreasonable and exorbitant" considering the level of financial risk and chance of success of the claim, finding both to amount to "loan shark agreement[s]." This was primarily due to the scale of potential proceeds and its impact on the funder's share of recovery. The motion judge found that the funding agreement provided a significantly lower recovery to the class when compared to the fees of a litigation funding agreement governed by other funding options, principally the Ontario CP Fund.

These two cases build on *Difederico v. Amazon.Com Inc.*,[14] which established a "presumptive range of validity" of 30–35% of the recovery proceeds for a combined return to the litigation funder and class counsel. If class counsel and the third-party funder recover amounts far lower than their best outcome, funding agreements with sliding scales of this nature could result in a return to the funder of even 61%, resulting in a champertous agreement.

Going forward, we can expect to see continued scrutiny of third-party funding agreements, calling into question the true benefits they provide to putative class members across Canada.

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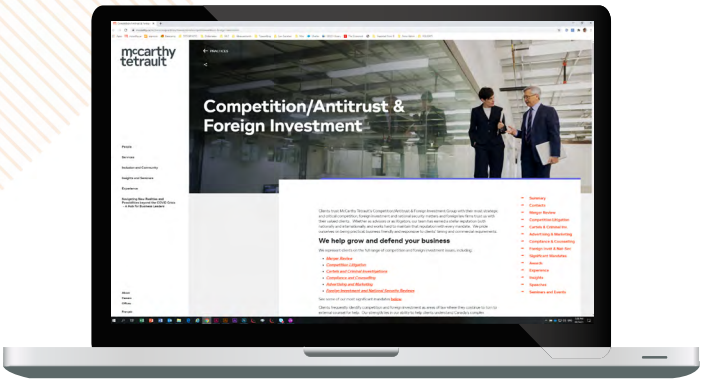
9 **2023 BCSC 1662** ["*Qualcomm*"].
10 **2024 BCSC 832** ["*Latifi*"].
11 **2024 FC 225** (Gascon J.), decided February 9, 2024.
12 Notably, the settlement approval motion was granted, while the third-party funding agreement approval motion was dismissed.
13 **2024 FC 152** (Gascon J.), decided February 7, 2024.
14 **2021 FC 311** (Crampton C.J.), decided April 15, 2021.

Conclusion: A Year of Transition Ahead

With legislative reform in 2023 and 2024 reshaping many pillars of Canada's competition and foreign investment law architecture, the next 12 months promise to be a period of potentially significant change in enforcement norms and priorities, as well as a period of transition as the Bureau and FIRES come to terms with their new powers, recalibrate their public guidance documents and strategize on how best to give effect to the will of Parliament within the scope of their existing resources. This transitional period will create uncertainty for companies, investors and other stakeholders subject to the *Competition Act* and the *Investment Canada Act*. With time, however, we anticipate that new enforcement paradigms will emerge. Early indications suggest that these Canadian regulatory processes – and associated strategic considerations – will become more complex as the Canadian government embraces a more enforcement-ready posture.

FOR MORE INFORMATION, PLEASE CONTACT McCARTHY TÉTRAULT'S COMPETITION/ANTITRUST & FOREIGN INVESTMENT GROUP



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