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Private right of access for relief from anti-competitive harm now in force in Canada

JUNE 24, 2025 10 MIN READ

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The new private right of access under the *Competition Act* (the Act) came into force on June 20, 2025. Under this new provision, private parties will have significantly expanded access to the Competition Tribunal (the Tribunal) to seek behavioural and monetary relief in respect of a range of reviewable conduct under the Act. This new right of access is available to individuals and businesses (including competitive rivals), as well as public-interest organizations. A private party must still obtain "leave" (i.e., judicial permission) from the Tribunal to bring a proceeding, but Parliament has liberalized the existing test for leave to encourage more private enforcement of the Act.

On the same day, the Competition Bureau issued proposed guidance that sets out the Bureau's views in respect of this new private right of access, and the Bureau's role in respect of applications for private access.

Our Osler team has previously published a comprehensive Update in respect of the significant amendments of the Act that were adopted last year in Bill C-59 and prior bills that cover the full spectrum of competition law in Canada, including merger enforcement, abuse of dominance and deceptive marketing practices, including new provisions relating to "greenwashing". In this Osler Update, we have summarized the nature, scope and implications of the new private right of access, including the scope of reviewable conduct covered by the right of private access, the new test for "leave" for access to the Tribunal, and the forms of behavioural and monetary relief that can be sought by applicants. This includes the new regime of collective relief that may open up the Tribunal to the equivalent of modern class proceedings.

Private enforcement under the Competition Act

While Canada was one of the first industrialized nations to adopt antitrust legislation in 1889, it has historically relied on public enforcement of the Act, and there were no private rights of action or access in Canada for almost a century. In 1976, Parliament enacted a limited private action remedy for damages under section 36. However, a private party could only invoke this provision before the courts to pursue actual damages arising from criminal conduct under the Act, particularly for price-fixing offences under section 45, and criminal deceptive marketing practices under section 52.

In 2002, Parliament adopted a limited right of private access to the Tribunal for certain types of reviewable and non-criminal conduct, including refusal to deal (section 75), price maintenance (section 76), as well exclusive dealing, tied selling and market restriction (section 77). In June 2022, Parliament expanded this right of access to include abuse of dominance (section 79). Under these provisions, private parties could seek "leave" or permission from the Tribunal to bring an application to pursue the enforcement of these civil reviewable practices. But even if leave was granted, private parties were limited in the scope of relief that they could pursue, and they had no ability to seek any form of damages or monetary relief from the Tribunal. Given the limits of this remedy and the high threshold for obtaining for leave, over the past 20 years, the Tribunal has only granted leave in a limited number of cases, and most of these have been either dismissed or resolved through settlement.

The new private right of access

In passing Bill C-59 in 2024, Parliament adopted a dramatic expansion of private enforcement of Canada's competition laws. Under the new amendments to the Actthat came into force on June 20, 2025, private parties can now seek access to the Tribunal to pursue a range of behavioural and/or monetary relief in respect of the following forms of conduct under the Act:

- Refusal to deal (section 75)
- Price maintenance (section 76)
- Exclusive dealing, tied selling and market restriction (section 77)
- Abuse of dominant position (section 79)
- Agreements that harm competition (section 90.1)
- Deceptive marketing practices (section 74.1) (no new monetary relief, but there is new access to the existing restitutionary remedy under the Act)

The most significant change is that private parties may now seek access to the Tribunal and pursue relief in respect of deceptive market practices under the civil provisions of the Act (including drip pricing, greenwashing and ordinary selling price claims), anti-competitive agreements (including horizontal and vertical agreements), as well as abuse of dominance.

The new test for leave

Under this new regime, Parliament has significantly lowered the threshold that a private party must meet to obtain "leave" to pursue a proceeding before the Tribunal.

Historically, private parties seeking access to the Tribunal had to demonstrate that they were "directly and substantially affected" in their business by the alleged anti-competitive conduct. However, under these new provisions, the test for leave has been lowered for most reviewable practices, with the result that a private party will only be required to show that it has been "directly and substantially affected" in "whole or part" of its business. For the reviewable practices of refusal to deal (section 75), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79) and agreements that harm competition (section 90.1), a private party may obtain leave by advancing evidence that gives rise to a *bona fide* belief that the party may have been directly and substantially affected in "whole or part" of its business. In addition to these grounds, in an expansive change to existing law, a private party may also seek leave to bring a proceeding before the Tribunal in respect of these reviewable practices if the Tribunal is "satisfied that it is in the public interest to do so".

However, it is important to note that a private party seeking private access in respect of a deceptive marketing practice (section 74.1) — including a drip pricing or greenwashing claim — may only seek leave on the basis of the public-interest test. This restriction is significant. Parliament appears to have been alive to the risk of tactical litigation by a competitive rival that claims that it was harmed in its business as a result of marketing claims, but it nonetheless extended a right of access to rivals and potentially public interest organizations that were not harmed to seek private access on public interest grounds.

The new test for leave, however, remains clouded in uncertainty. The liberalized test that only requires a showing of a limited impact in respect of part of the applicant's business, or a claimed "public interest", has no precedent in the long history of Canada's competition laws or the Tribunal's case law. Parliament has declined to further define these tests, and the Competition Bureau has similarly declined to take a position in respect of these tests. The threshold to establish a public interest is even more clouded, given that the test would only apply in circumstances where the Competition Bureau, as the public enforcer of Canada's competition laws, has declined to commence an inquiry or pursue its own enforcement action. But given the scope of potential remedies — and Parliament's interest in expanding private enforcement of the Act — there will be strong incentives for private parties to test the scope of this threshold test for leave.

Expanded monetary remedies for private parties

Under this new right of private access, private parties now have the ability to pursue monetary relief from the Tribunal.

Prior to these amendments, private parties had no ability to pursue monetary relief from the Tribunal for any reviewable practice. Under these new provisions, if a private party obtains leave to pursue a proceeding before the Tribunal and is successful on the merits of its application in respect of certain practices, the private party may seek a form of monetary relief that is dependent on the nature of the practice.

For applications that involve a claim in respect of a refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of dominance (section 79) and anti-competitive agreements (section 90.1), a private party may seek an order from the Tribunal for the payment of "an amount, not exceeding the value of the benefit derived from the conduct [...] to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate". On the face of this statutory provision, there is no express language that appears to tie the remedy to actual loss or compensatory damages. There is a live debate as to whether this remedy should be limited to actual damages, restitutionary damages, actual disgorgement, or some other amount to ensure compliance with the Act.

For applications that involve a claim in respect of a deceptive marketing practice that falls under the Act's general deceptive marketing provision (s. 74.01(1)(a), i.e., a representation to the public that is false or misleading in a material respect), a private party may now access the existing restitutionary provisions of the Act — namely, the party can seek "an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in [i.e., the party that engaged in a deceptive marketing practice], to be distributed among the persons to whom the products were sold [...] in any manner that the court considers appropriate". This restitutionary provision was adopted by Parliament in 2009 but, up to now, only the Commissioner of Competition could invoke this relief from the Tribunal. With these amendments, a private party may now access this powerful restitutionary remedy.

Creation of regime of collective relief

Under this new right of private access, private parties may also seek relief on behalf of themselves and any other person "affected by the conduct" or to "whom the products were sold". The scope of this remedy has raised the question of whether Parliament has contemplated a form of class proceedings before the Tribunal. A number of members of the plaintiffs' bar have advocated for the development of the equivalent of a class actions regime before the Tribunal. However, in contrast to the rigorous provisions of provincial class proceedings legislation, these new provisions offer little guidance in respect of process or substance for this regime of collective relief.

On their face, the amendments only address potential distribution and claims administration issues at the highest level of generality, and do not provide any meaningful guidance as to how a proceeding for collective relief would actually be litigated before the Tribunal. Perhaps most importantly, the amendments include no statutory authority for the Tribunal to issue orders that bind the interests of "absent class members" (i.e., interested parties, competitors or purchasers who are not before the Tribunal) or any mechanism for "absent class members" to opt out or object to the Tribunal's proceedings.

The Competition Bureau's guidance

On June 20, 2025, the Bureau issued an information bulletin for consultation that set out the Bureau's views on its role in respect of applications for private access before the Tribunal. Under the new regime, the Bureau has a continuing role as the lead public enforcer of the Act, since a private party may not pursue an application for private access where the Bureau has certified or confirmed that (i) there is an existing inquiry under the Act in respect of the same matter (ii) the Bureau has discontinued an inquiry in respect of the same matter as a result of a settlement or (iii) there is a pending or discontinued application before the Tribunal in respect of the same matter.

In its guidance, the Bureau declined to take a public position in respect of the test for leave, the meaning of "public interest", or the scope of monetary relief or collective proceedings under the Act. However, the Bureau has provided helpful procedural guidance to private applicants in respect of the service of applications and the delivery of its certification to the Tribunal in respect of the absence of any ongoing inquiry. In addition, the Bureau outlined the circumstances where it may make representations in respect of an application for leave, and where it may intervene in a private access application. The Bureau also noted that there will be rare cases where the Bureau may commence its own inquiry after being prompted by an application for leave.

The Bureau's information bulletin remains subject to consultation, and the Bureau has requested feedback by August 19, 2025.

Conclusion

In summary, this new right of access represents the broadest expansion of private enforcement of Canada's competition laws in a generation.

Parliament's adoption of a lowered test for leave, new monetary remedies, and a mechanism of collective relief, coupled with surrounding substantive amendments that have changed the test for abuse of dominance and civil anti-competitive agreements, and that have adopted new reviewable practices (such as greenwashing), will create strong incentives for

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consumers, businesses, public-interest organizations and class action plaintiffs to pursue proceedings before the Tribunal. Domestic and foreign companies in Canada are now exposed to significant new litigation risks in Canada, and will need to assess their competitive practices and exposure risks going forward.