

Dominance

The regulation of dominant firm conduct
in 35 jurisdictions worldwide

2011

Consulting editors: Thomas Janssens and Thomas Wessely



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Canada

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The Competition Act, RSC 1985, c C-34 (the Act), a federal statute, is the primary legislation applicable to the behaviour of dominant firms. Section 79 permits the Competition Tribunal, a special-purpose federal tribunal (the Tribunal), on application from the commissioner of competition (the commissioner) – who heads the enforcement agency, the Competition Bureau (the Bureau) – to issue an order where it finds that:

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

A non-exhaustive list of anti-competitive acts appears in section 78, paragraph 1:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Other relevant provisions of the Act include section 75 (refusal to deal), section 76 (resale price maintenance), section 77 (exclusive dealing, tied selling and market restriction) and section 81 (delivered pricing).

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The Bureau has released enforcement guidelines on the abuse of dominance provisions (the guidelines), which state that sections 78 and 79 are concerned not only with the enhancement, but with the creation or entrenchment of market power by means of a practice of anti-competitive acts. Updated draft guidelines were issued in January 2009, which reiterate this point.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The Act contains a purpose clause in section 1.1 which includes several objects in addition to the encouragement of competition and promotion of efficiency. In particular, the Act is designed to expand opportunities for Canadian participation in world markets, recognise the role of foreign competition, ensure that small and medium-sized businesses can participate in the economy, and promote consumer welfare. Though the Bureau and the Tribunal had historically put the most emphasis on economic efficiency, in the merger case *Canada (Commissioner of Competition) v Superior Propane Inc*, the then-commissioner argued that the other purposes must be given effect as well, and this argument was upheld at the Federal Court of Appeal. (Revisions to the guidelines for merger enforcement in 2004 reflect this point of view.) As section 1.1 applies to the entire Act, these diverse purposes cover the abuse of dominance provisions as well. That said, the guidelines and the case law reflect a largely economic approach to Bureau enforcement, based on the need to prove that a substantial lessening or prevention of competition has been or is likely to be caused by the anti-competitive behaviour.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Generally speaking, the answer is no. Section 79 specifically requires a finding of dominance. More specific provisions related to unilateral conduct (eg, exclusive dealing, tied selling and market restriction (section 77), and the delivered pricing provision (section 81)) do not use the word 'dominant', but apply to the activities of 'a major supplier'. This phrase has been interpreted by the Tribunal (in *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co*) in a substantially similar way to dominance,

in that a ‘major supplier’ is one ‘whose actions are taken to have an appreciable or significant impact on the markets where it sells’. Likewise, while the Act’s refusal-to-deal provision (section 75) and price maintenance provision (section 76) do not mention dominance, their requirement that the conduct have or be likely to have an ‘adverse effect on competition in a market’ makes some form of market power a precondition to their application. The March 2009 amendments to the Competition Act, among other things, revoked the criminal pricing provisions (formerly, sections 50, 51 and 61), thus making the formerly per se criminal predatory pricing and price discrimination amenable to sanction only if undertaken by a dominant firm.

Though not strictly matters of competition law, the Act also contains both criminal and civil provisions addressing unilateral conduct in the form of deceptive advertising and telemarketing practices, none of which is tied to dominance.

5 Sector-specific control

Is dominance regulated according to sector?

Provisions seeking to control abusive behaviour by dominant domestic airlines were repealed in March 2009. Administrative monetary penalties (AMPs), which had been applied only to domestic airlines (as discussed in further detail in question 34), now apply to all sectors of the economy.

Certain federal sectors with their own regulators and statutes are subject to unilateral conduct provisions under statutes other than the Competition Act. For instance, the Telecommunications Act forbids the granting of ‘an undue or unreasonable preference’ by a common carrier to any entity, including itself. The National Energy Board Act, meanwhile, proscribes pipeline companies’ ‘discrimination in tolls, service or facilities against any person or locality’. The Canada Transportation Act contains similar provisions with respect to certain transport services.

Certain business activities fall under the jurisdiction of the provinces where they occur, and these too often have regulating mechanisms for unilateral conduct. For instance, the various empowering laws of the Ontario Energy Board mandate that body to ensure fair competition and non-discriminatory access in the province’s energy markets.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The Bureau presumes the abuse of dominance provisions to apply to all businesses unless the activity in question is mandated or authorised pursuant to other valid legislation. The Bureau acknowledges the existence of a judge-made ‘regulated conduct doctrine’, which may serve as a justification for actions reviewable under the Act, and in 2006 released a technical bulletin on ‘regulated’ conduct. Among other things, this bulletin provides that when presented with two apparently conflicting laws, the Bureau will not pursue a matter where there is evidence of a legislative intention to substitute competition law enforcement with a different regulatory regime, replete with a regulator exercising sufficient authority to proceed contrary to the Act. In the absence of legislative conflict or permission, however, sector-specific legislation and the Act are complementary.

7 Enforcement record

How frequently is the legislation used in practice?

Abuse of dominance matters have come before the Tribunal sparingly: since the Act was enacted in 1986, only 10 cases have been brought before the Tribunal (of which four were contested proceedings, four resulted in consent orders, one was settled by consent order following an appeal after the Tribunal’s ruling, and one was settled after a partial decision). Nevertheless, the Bureau’s recent annual

reports reveal that it investigates approximately three to seven section 79 matters per year. The Bureau is arguably not as proactive as its European counterparts – perhaps due, in part, to the lack of monetary penalties (until now – see question 34), but also due to the arguably more stringent approach in Canada to proof of an anti-competitive effect.

The legislation’s practical impact is difficult to gauge, although it presumably discourages the most blatant abuses of dominance. Notably, the Act makes no provision for the award of damages and provides only limited scope for private parties to seek behavioural orders from the Tribunal, thus limiting the practical impact of the law. That said, Bill C-10 was enacted in March 2009, containing the most significant amendments to the Act since 1986. The amendments broadened both the breadth of practices to be addressed under section 79 and the remedies available in respect of breaches thereof. The breadth of section 79 was extended, in effect, by repeal of the criminal provisions for predatory pricing, price discrimination and promotional allowances, leaving such practices to be dealt with exclusively as an abuse of dominance (although such conduct already had the potential to be addressed under section 79).

As to remedies, administrative monetary penalties (AMPs), which previously only applied to domestic airlines, are now applicable in the context of all industries and may be ordered by the Tribunal for abuse of dominance in amounts up to C\$10 million for a first order and C\$15 million for each subsequent order. Whether the expanded scope and remedies under section 79 will result in more abuse of dominance cases being brought before the Tribunal or, as some in the Bureau had hoped, more consensual remedies, remains to be seen. That said, the Bureau announced in the summer of 2009 that two waste companies had consented to rewrite their contracts for commercial waste disposal services. Its most recent case, against the Canadian Real Estate Association, also recently settled after the association agreed to loosen the rules applicable to use of its trademarked Multiple Listing Service (MLS). The prospect of monetary penalties may well be having the desired (from the Bureau’s perspective) effect.

8 Economics

What is the role of economics in the application of the dominance provisions?

Economics play a central role in analyses under section 79, and expert economists are used as a matter of course in investigations and proceedings, as proof of ‘substantially lessening or preventing competition in a market’ is largely economic.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The entire Act is one of general application to the Canadian marketplace, and section 2.1 explicitly applies the Act to competitive activities of public entities ‘to the extent that it would apply if the agent were not an agent of Her Majesty’.

10 Definition of dominance

How is dominance defined?

According to the 2009 updated draft ‘abuse’ guidelines, dominance is seen as synonymous with market power, as indicated by ‘the ability [...] to profitably maintain prices above the competitive level for a significant period of time’. Generally, a 5 per cent real price increase above the price level that would prevail in the absence of the anti-competitive acts, sustained for one year, is considered to meet this definition (although non-price aspects of competition are also considered). The Supreme Court of Canada, in *R v Nova Scotia Pharmaceutical Society*, also provided a definition of market power as ‘the ability to behave relatively independently of the market’. The

2009 updated draft guidelines state that the Bureau, in analysing dominance, will consider a number of qualitative and quantitative factors in an effort to determine the ‘extent to which a firm or group of firms is constrained from raising prices because of the presence of effective competition or the likelihood of competitive entry’.

11 Market definition

What is the test for market definition?

Both product and geographic markets are defined for each individual case that the Bureau examines; there is no predetermined reference point for any given product. The 2009 updated draft guidelines substantially changed the discussion regarding how the Bureau approaches the task of defining the relevant antitrust market. While the hypothetical monopolist test was expressly rejected in the original guidelines as being inappropriate for use in abuse cases, noting that ‘the issue relates to an existing situation rather than an assessment of a prospective situation, as in a merger’, the 2009 updated draft guidelines now specifically embrace the use of the hypothetical monopolist test, albeit not necessarily with regard to the current price level, as that price may already reflect the results of the anti-competitive conduct in question (the so-called Cellophane Fallacy).

According to the 2009 updated draft guidelines:

[T]he smallest candidate [product] market considered is the allegedly abusive firm’s product. If a hypothetical monopolist controlling that product would not impose a price increase of five percent or more above the benchmark, the candidate relevant market is expanded to include the next-best substitute. The next-best substitute could include the products of firms that continue to sell in the presence of the alleged anti-competitive acts, as well as the products of firms that have been identified as likely to have been excluded. The smallest set of products in which the price increase [above benchmark levels] would be sustained is defined as the relevant product market.

The 2009 updated draft guidelines refer to the case of *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* as well as that of *Canada (Director of Investigation and Research) v The D&B Companies of Canada Ltd*, in confirming that, although direct evidence of buyer substitution in response to price changes is ideal, in its absence resort may be had to indirect evidence such as the characteristics of the product, the intended use and price of the products in question, etc. Consistent with the merger enforcement guidelines, the updated draft abuse guidelines now also make it clear that only buyer substitution responses will be considered relevant to the definition of a relevant antitrust market, the role of potential supply responses being confined to assessing the potential for market power.

The task of defining a relevant geographic market is undertaken in largely the same manner. The Bureau examines the dimensions of buyer switching, by location, in response to a small but significant and non-transitory increase in price (SSNIP), applying the hypothetical monopolist test as described above. Transport costs and buying patterns are useful evidence in this regard.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

In the *Laidlaw* case, the Tribunal ruled that a 50 per cent market share would lead to a prima facie presumption of dominance, but that a share below this mark did not constitute a ‘safe harbour’ from scrutiny, which the guidelines place at 35 per cent for a unilateral actor. In practice, all litigated cases have involved shares well in excess of 50 per cent. The 2009 updated draft guidelines state that joint dominance is unlikely to be found at less than a combined market share of 65 per cent. The Tribunal has not considered a contested joint dominance case.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

One of the preconditions for a Tribunal order under section 79 is that ‘one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business’. The inclusion of ‘one or more’ clearly allows for collective dominance, and the Bureau has stated in the updated 2009 guidelines that a combined market share of 65 per cent will prompt further investigation from the Bureau as to the possibility of coordinated, anti-competitive action, where multiple actors are involved (such actions falling short of an ‘agreement’, as agreements are dealt with under either the criminal prohibition of section 45, which makes it illegal for competitors to fix prices; allocate sales, territories, customers or markets; fix, maintain, control, prevent, lessen or eliminate the production or supply of a product; or the new civil provision (section 90.1) under which the Tribunal is given the power to deal with anti-competitive agreements that do not fall under the criminal prohibition or which are subject to the ‘ancillary and necessary’ defence applicable to section 45).

Although no contested joint dominance cases have been decided by the Tribunal, two have been resolved consensually. The Interac Association agreed to the issuance of an order by the Tribunal on consent in 1995, requiring the founding financial institution members to loosen rules for participating in Canada’s ubiquitous point-of-sale debit card and electronic banking machine system (see *Canada (Director of Investigation and Research) v Bank of Montreal*). See also *Canada (Director of Investigation and Research) v GT Director Ltd et al*; and *The Commissioner of Competition and Waste Services (CA) Inc and Waste Management of Canada Corporation* in which, as mentioned above, the Bureau announced in June 2009 that it had reached an agreement with Waste Services (CA) Inc and Waste Management of Canada Corporation to stop abusing their jointly dominant position in commercial waste collection services in central Vancouver Island. According to the Bureau, the two firms had been foreclosing competition by using long-term contracts that locked in customers and included similar, and highly restrictive, terms such as automatic renewal clauses, liquidated damages (significant penalties for early termination) and rights of first refusal. The two companies agreed to rewrite their contracts under a consent agreement with a term of seven years.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The commissioner has never prosecuted a case on the basis of monopsony or oligopsony (the purchaser’s equivalent to monopoly and oligopoly) alone. However, the market power of buyers has surfaced in matters of merger control and in at least one abuse of dominance case. In *Director of Investigation and Research v D&B Companies of Canada Ltd* (better known as the *AC Nielsen* case), a firm’s dominance of both upstream and downstream markets was considered, although ultimately only the downstream analysis proved relevant to the outcome.

There is no reason to think that dominant purchasers could not be scrutinized under the Act. In its bulletin ‘The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector’, the Bureau has stated that ‘market dominance can arise in situations where one or more firms have buying (monopsony) power, that is, the ability to profitably maintain prices below competitive levels for a non-transitory period of time’.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

By the letter of the law in Canada, abuse of dominance can only be proscribed in the context of a negative effect on competition, in that there is no per se prohibited conduct for a dominant firm. That said, the Tribunal has endorsed the view in several cases that an act is 'anti-competitive' if its 'overall character' and intent is 'exclusionary, predatory or disciplinary' with regard to competitors (for example, by raising rivals' costs, or contractually limiting access to customers). Indeed, the commissioner's factum in her appeal of *Commissioner of Competition v Canada Pipe Company Ltd* did break new ground in suggesting that certain conduct can be deemed exclusionary by its very nature, in a sense advocating the existence of a form-based definition of some anti-competitive acts. No order will be issued under section 79, however, unless the practice of anti-competitive acts is found to have caused or be likely to cause a substantial lessening or prevention of competition. Thus, there can be no per se prohibited conduct under the abuse provisions, even for dominant firms.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

There is no concept of 'exploitative pricing' in the Act. The 2009 updated draft guidelines state clearly that: 'section 79 is not intended to prohibit dominance itself or the mere presence of market power [...] While the ability to raise prices or maintain high prices usually indicates market power or dominance, high prices do not in themselves raise issues under the Act, and the Bureau's role is not to function as a price regulator.'

Rather, the enumerated anti-competitive acts listed in section 78 largely fit under the 'exclusionary' concept in European terms. While this list is not exhaustive, and certainly the Tribunal has deemed conduct anti-competitive even where it does not clearly fall under one of the enumerated paragraphs of section 78, the guidelines do note (citing the *NutraSweet* decision) that the 'Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary reason' against a competitor. All factors, including evidence of subjective intent as well as the foreseeable results of the conduct and any relevant business justification, are considered. The Federal Court confirmed the view that section 79 covers only exclusionary conduct in the *Canada Pipe* case, despite the presence of paragraph 78(f), which defines the 'buying up of products to prevent the erosion of existing price levels' (an act that is not exclusionary, but exploitative) as an anti-competitive act. The updated draft guidelines contain extensive discussion of both exclusionary and predatory abuses.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

As noted above (see question 1), three elements must be proved: dominance, a practice of anti-competitive acts, and a substantial lessening or prevention of competition. The need for a causal link between anti-competitive conduct and a substantial lessening or prevention of competition was underscored at the Federal Court of Appeal in the *Canada Pipe* case, where the court accepted that in analysing the effect of allegedly abusive conduct, the relevant comparison is what the state of competition in a market would be or would have been in the presence and in the absence of the conduct in question.

According to the 2009 updated draft guidelines, 'the Bureau analyses a potential substantial lessening or prevention of competition using a 'but for' test: asking whether, 'but for' the practice

in question, there would be substantially greater competition in the past, present or future?'

That said, the anti-competitive effects need not be felt in the same market as that in which the firm is dominant. The tied selling provision of the Act, in section 77, is an example where conduct in one market can be reviewable owing to a substantial lessening of competition in a different market (although it should be noted that the impact on the adjacent market must be significant enough to create, preserve or enhance market power in the affected market).

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Subsection 79(4) of the Act requires the Tribunal to consider whether the impact on competition is the result of 'superior competitive performance'.

The draft revised guidelines state that:

Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.

In addition, the Tribunal does consider mitigating circumstances to allegedly anti-competitive conduct. To the extent that a firm has a valid reason for engaging in potentially exclusionary or predatory conduct, however, the Bureau will consider this not as a defence, but will consider it in the context of determining whether the overall purpose of the conduct is anti-competitive. The Federal Court ruled in *Canada Pipe* that 'a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts'. The 2009 updated draft guidelines state the Bureau's view that, generally speaking, a 'credible efficiency or pro-competitive rationale' will comprise activities that improve a firm's product, service or some other aspect of its business, or that minimise costs of production or operation, independent of the elimination of a rival. The Tribunal noted in the case of *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (the *AC Nielsen* case) that neither pure self-interest nor retaining or obtaining a dominant position in order to guard against another firm doing the same, would disprove anti-competitive intent.

In addition, conduct engaged in pursuant only to the exercise of a right or interest derived under Canada's intellectual and industrial property (IP) statutes is not an anti-competitive act (that said, the choice of licensee and the terms of a licence are not deemed to constitute the mere exercise of IP rights, and actions such as a refusal to license, which do fall squarely under the heading of the mere exercise of IP rights, can nonetheless be challenged under section 32 of the Competition Act). See question 28.

Specific forms of abuse

19 Price and non-price discrimination

As a result of the 2009 amendments, the criminal offence of price discrimination (formerly in section 50 of the Act) was repealed, leaving such conduct to be addressed exclusively under section 79, the civil abuse of dominance provision. Under the Act's price maintenance provision (section 76), which was converted from a criminal offence to a civilly reviewable practice by the 2009 amendments, the Tribunal, on application by the commissioner, may prohibit a person from discriminating against another person due to the latter's low pricing policy or order the supplier to accept the person as a customer, if

the discrimination is having or is likely to have an adverse effect on competition. The Tribunal may also grant leave under section 76 to a private party to bring an application before the Tribunal if there is reason to believe that the applicant is directly affected by the allegedly discriminatory conduct. In addition to the non-discrimination provisions in some of the sector-specific areas addressed in question 5, it is also worth noting that the Bureau's 'Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry', released in 2008, states that the Bureau will investigate claims of discriminatory access to non-regulated telecommunications facilities. The commissioner filed her first case under the newly civil price maintenance provisions, against Visa and MasterCard, on 15 December 2010.

20 Exploitative prices or terms of supply

The Act has no exploitative pricing provisions, as exist in Europe. The Act covers only complete refusals to supply in certain circumstances, rather than agreements to supply under exploitative terms (see question 24). However, see question 19 regarding discrimination and question 23 regarding price squeezes.

21 Rebate schemes

Rebates are not addressed explicitly in the Act, although if a rebate scheme could be characterised as inducing a customer to purchase only specific products designated by the supplier, then it can be reviewed as an abuse of dominance (section 79) or as an example of exclusive dealing (section 77), or both. Rebate schemes will generally be analysed under the general rubric of 'predatory pricing', as one method by which prices may be reduced below cost (see question 22).

22 Predatory pricing

'[S]elling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor' is one of the enumerated examples of anti-competitive acts listed in section 78 of the Act. The Bureau's guidelines on predatory pricing, as well as the 2009 updated draft abuse guidelines, espouse the 'avoidable cost' standard for unreasonably low pricing (prices lower than the costs that would have been avoided by not selling the product or service in question during the time the price was in effect), and make it clear that both a price-cost screen and recoupment are applied by the Bureau, in order to avoid dulling legitimate price competition.

23 Price squeezes

One of the enumerated anti-competitive acts in section 78 of the Act is 'squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market'. The 2009 updated draft guidelines state that where price squeezes involve lowering retail prices only, the Bureau will examine it under a predatory standard. By contrast, the 2009 updated draft guidelines state that when the alleged margin squeeze involves raising wholesale prices, the Bureau will examine the extent to which the allegedly squeezing firm can exclude rivals by raising their costs.

24 Refusals to deal and access to essential facilities

Refusal to supply a customer when insufficient competition exists in a market, and certain other preconditions are met, is reviewable under section 75 of the Act on application by the commissioner (rare) or, with leave, private parties. For the Tribunal to order the resumption of supply, the complainant must be unable to obtain an adequate supply anywhere in a market, owing to a lack of competition, despite

being willing and able to pay on usual trade terms and the product being in ample supply. The complainant must also be substantially affected in its overall business, and the refusal must have an adverse effect on competition. Of note, refusal to supply on the basis of a person's low pricing policy is a civilly reviewable practice under section 76 (price maintenance), even if only one of the reasons for refusing supply is the customer's low pricing policy.

The 'pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market' is an enumerated class of anti-competitive act in section 78. Furthermore, the Bureau's 'Information Bulletin on the Abuse of Dominance provisions as applied to the Telecommunications Industry' discusses the provision of essential facilities, noting that denying access to non-regulated facilities is an example of market foreclosure.

Appendix IV of the updated 2009 abuse guidelines contains a detailed discussion of essential facilities.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing by a major supplier is reviewable by the Tribunal on application by the commissioner or, with leave, a private party, where it causes or is likely to cause a substantial anti-competitive effect in a market. It has also been found to constitute part of a practice of anti-competitive acts in several abuse cases such as *Nutrasweet* and *Canada Pipe*.

In the *Laidlaw* case, the Tribunal condemned as anti-competitive a number of Laidlaw's contractual practices in acquisition agreements, including lengthy non-competition covenants. Such agreements also hold the potential to attract criminal sanction under section 45 of the Act (conspiracy) if they can be construed as agreements to allocate sales, territories, customers or markets; or to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product that are not 'ancillary and necessary' to the main purchase contract – although the commissioner has publicly stated several times that non-competition covenants that are not mere shams for cartel behaviour will be examined under the new civil section 90.1 to determine if they are likely to substantially lessen or prevent competition.

Although the European term 'single branding' is not part of Canadian competition nomenclature, the Act does include in its definition of tied selling (see question 26) any practice whereby a seller requires or induces a customer to 'refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee'. Moreover, in the *NutraSweet* case, the Tribunal stated that 'both the clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impede "toehold entry" into the market'.

26 Tying and leveraging

Tied selling is reviewable under section 77 of the Act. Tied selling is defined in section 77 as any practice whereby a seller requires or induces a customer to 'acquire any other product from the supplier or the supplier's nominee' or 'refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee'. It may be prohibited by the Tribunal, on application by the commissioner or, with leave, a private party if it is engaged in by a major supplier or is widespread in an industry and has resulted in or is likely to result in a substantial lessening of competition. Tied selling can also form part of a practice of anti-competitive acts for purposes of an abuse of dominance case by the commissioner under section 79 of the Act. In its 2010 application against the Canadian Real Estate Association (CREA), the Bureau alleged that the minimum service obligations imposed on brokers for access to the trademarked Multiple Listing Service (MLS), through which the vast majority of homes in

Canada are sold, substantially lessened and prevented competition to full-service brokers from emerging.

27 Limiting production, markets or technical development

Agreements between competitors to limit production, or allocate customers or markets were made, effective as of March 2010, per se criminally illegal under section 45 of the Act (ie, the Crown does not need to prove anti-competitive effect). If parties to such an agreement can prove the agreement was ‘ancillary and necessary’ to a broader or different agreement that is not proscribed under the new section 45, then the agreement may nonetheless be challenged under the new civil section 90.1, applicable to agreements that substantially lessen or prevent competition. The new section 90.1 would also be applicable to agreements to limit technical development. Unilateral behaviour of a dominant firm (or independent yet coordinated conduct of jointly dominant firms) that limits production, markets or technical development could still be actionable under the civil abuse of dominance provisions of sections 78 and 79 of the Act, but only if it can be shown to be undertaken with exclusionary, predatory or disciplinary intent against competitors, and to be likely substantially to lessen or prevent competition in a market.

28 Abuse of intellectual property rights

Under section 32 of the Act, where holders of exclusive intellectual and industrial property (IP) rights use those rights for four enumerated purposes, including an undue prevention or lessening of competition, the Federal Court may make certain remedial orders, including to void or limit a licence or other arrangement, to direct the granting of a licence, or even to amend or expunge a trademark from the register.

Moreover, while section 79(5) of the Act provides that ‘an act engaged in pursuant only to the exercise of any right or enjoyment of any interest’ derived under an IP statute is deemed not to be anti-competitive; the word ‘only’ has been given full effect to ensure that IP rights are not abused. The Bureau’s intellectual property enforcement guidelines (IPEGs) confirm that the ‘simple’ exercise of an IP right cannot be abusive under the Act, but that uses of such a right that do not stem strictly from the relevant IP statutes – such as when ‘IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights’ – are subject to the general provisions of the Act.

Judicial interpretation has also leaned toward a heavy constraint on the application of the section 79(5) exemption for abuse of IP rights. As the licensing of an IP right arguably stems from statute – for example, the Patent Act explicitly provides for the licensing of a patent – one could conceivably argue that the IPEGs are overly ambitious in purporting not to exempt licensing arrangements. However, the Federal Court of Appeal in *Eli Lilly and Co v Apotex Inc*, ruled that a notionally similar exemption did not apply to a licensing arrangement deemed to be a conspiracy under the Act, as the Patent Act merely authorises, rather than compels, the assignment of a patent. Accordingly, for all but the unilateral exercise of the exclusive right to work a patent, to reproduce copyrighted works, or to use a trademark (eg, refusal to license), anti-competitive acts involving IP rights can be actionable under the abuse of dominance provisions of the Act. The terms attached to licences to use its trademarked Multiple Listing Service by the Canadian Real Estate Association, for example, were challenged by the commissioner under the abuse of dominance provisions in 2010 (settled on consent). (See question 26.)

29 Abuse of government process

Abuse of government process does not factor explicitly into the Act, but in the *Laidlaw* case, the Tribunal condemned Laidlaw’s use and threatened use of groundless litigation as predatory, and an

‘oppressive use of the legal system’. As regards patent claims, given that the IPEGs (see question 28) take care not to extend the protective umbrella of IP rights any broader than it need be, the Bureau would likely similarly frown upon an overuse of IP-related litigation, even though the underlying rights are derived from IP statutes. Legitimate anti-dumping cases may proceed, however, as may legitimate patent claims and other cases, even though the effect may be the substantial lessening or prevention of competition.

There are also mechanisms that indirectly prevent abuse of process, thanks to the interaction of the Bureau with other regulatory regimes. For instance, anti-dumping cases must first pass through preliminary inquiries by both the Canadian International Trade Tribunal and the Canada Border Services Agency, to ensure the record reveals a legitimate basis for proceeding. Moreover, the commissioner has a statutory right under section 125 of the Act to intervene in proceedings before any federal ‘board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before’ such body, and may seek leave under section 126 to participate before provincial regulatory bodies in the same manner.

30 ‘Structural abuses’ – mergers and acquisitions as exclusionary practices

Although merger approval is dealt with under a different part of the Act, the Tribunal did deal with a situation where acquisitions themselves formed part of the practice of anti-competitive acts, in the *Laidlaw* case. The Tribunal found that Laidlaw’s practice of buying up competitors was ‘clearly’ anti-competitive, and issued an order prohibiting the company, among other things, from acquiring any competitor for a period of three years.

31 Other types of abuse

Given the non-exhaustive nature of the examples of anti-competitive acts listed in section 78 and the ‘predatory, exclusionary or disciplinary’ categories of abuse offered by the *NutraSweet* case and confirmed in *Canada Pipe*, virtually any conduct engaged in by a dominant firm that is intended to harm rivals, increase their costs or raise barriers to entry is potentially reviewable under the Canadian abuse of dominance provision.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Reference is often made in Canadian competition law to the ‘reviewable practice’ provisions, including those related to abuse of dominance, refusal to deal, tied selling, exclusive dealing, price maintenance and market restriction, because conduct falling into these categories is not prohibited, but may be reviewed by the Tribunal and prohibited on a going-forward basis only if such conduct is found to have the requisite anti-competitive effect. Potentially abusive practices are not prohibited, as such, but may be reviewed to determine if in fact they do or are likely to lessen or prevent competition substantially.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The commissioner heads the Bureau, and is responsible for the administration and enforcement of the Act. The commissioner can, on her own initiative, where she believes that grounds exist for the making of an order under section 79, or on application by any six

Update and trends

The recent prosecutions against CREA and against Visa and MasterCard indicate that the Bureau will continue to focus on abuse cases with a high degree of impact on the consuming public, or those which stand to clarify significant legal aspects, or both. The CREA case involved allegations that competition in residential real estate brokerage services was being stifled by rules imposed by CREA for access to its trademarked Multiple Listing Service (MLS), which enabled would-be homebuyers to view offerings from all member-brokers at once. The significant reduction in search costs made possible by the MLS ensured that the vast majority of Canadian

homes listed for sale with a broker were listed on the MLS. Although CREA voluntarily clarified its rules before the matter was heard at the Tribunal, and the matter settled before a decision, the case highlights the Bureau's willingness to bring strategic abuse cases to the Tribunal. While not an 'abuse' case, the commissioner also filed a civil case against the Visa and MasterCard associations in December 2010, alleging that rules imposed on merchants constitute price maintenance, with a consequent adverse impact on competition.

That said, the emphasis in enforcement remains on voluntary compliance.

adults in Canada, commence an inquiry into a potential abuse of dominance. As part of this process, she can make an ex parte application to a judge for an order to subpoena those likely to have relevant information, or to have them produce documentation, or for a search warrant.

If the commissioner finds evidence of an abuse of dominance, she will normally attempt to resolve the issue directly with the party or parties under investigation. When a consensual arrangement cannot be reached, however, she can apply to the Tribunal for a remedial order which may be behavioural or structural, and which may now include fines (see question 34).

34 Sanctions and remedies

What sanctions and remedies may they impose?

The Tribunal has broad remedial powers under section 79 of the Act where it finds that a practice of anti-competitive acts has had, is having, or is likely to have the effect of preventing or substantially lessening competition in a market. Both behavioural remedies – such as prohibiting a certain anti-competitive act – as well as structural remedies (such as a divestment of shares or assets) – can be ordered, the latter (in section 79(2)) where the Tribunal finds that a prohibition order is not likely to restore competition in the market where it has been prevented or lessened. Section 79(2) more generally allows the Tribunal to order a person 'to take such actions [...] as are reasonable and as are necessary to overcome the effects' of the practice of anti-competitive acts in question.

Since March 2009, where an order is made against a person in respect of abuse of dominance, an 'administrative monetary penalty' of up to C\$10 million for a first order and C\$15 million for each subsequent order can be levied. A list of aggravating and mitigating factors is supplied in the Act for the Tribunal's consideration in selecting an amount, while another subsection states that the purpose of any such order should be remedial, not punitive. To date, no such fines have been levied under the 'abuse' provisions.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Unless necessary in order to restore competition, the Tribunal does not have the power to void a contract ab initio, although the breadth of its order-making power under section 79(2) includes the ability to order parties to terminate a given contract. It should be borne in mind that section 79(3), however, also requires the Tribunal to interfere as little as possible with the person's or a third party's rights in making an order.

The powers of the Federal Court to amend or void IP-related agreements are discussed in question 28.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Section 79 (abuse of dominance) can only be enforced by the commissioner. However, section 103.1 allows a private party, with leave of the Tribunal, to bring an application to the Tribunal under section 75 (refusal to deal), 76 (price maintenance) and section 77 (exclusive dealing, tied selling and market restriction). Several parties have sought leave to bring 'refusal to deal' cases under section 75 (for example, B-Filer Inc (B-Filer Inc doing business as GPay Guaranteed Payment) and *NPay Inc v Bank of Nova Scotia*). If necessary, in order to restore competition, the Tribunal can issue both behavioural and structural orders. As such, orders to provide access to infrastructure, or to supply goods or services or conclude a contract could be issued (and in the case of refusal to deal cases, have been issued).

Bill C-454, a private member's bill, if passed, would have broadened section 103.1 to include section 79 as one of the bases for a private party to apply to the Tribunal with leave. As the bill died on the order paper, sections 75, 76 and 77 remain the sole bases for a private suit in respect of abusive conduct (as mentioned, private actions for damages incurred as a result of a criminal violation are also possible). It is notable that private parties cannot sue for damages in respect of abuse of dominance or the above-noted civilly reviewable practices.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

The Act does not currently allow those affected by abusive conduct to seek damages. Bill C-454 (see question 36), were it to have been passed, would have introduced the potential for an award of damages to private applicants granted leave to apply for an order under section 75 (refusal to deal), section 77 (exclusive dealing, tied selling and market restriction) or section 79 (abuse of dominance). Notably, the 2009 amendments did not provide for private claims for damages, opting instead for providing the Tribunal with the ability to impose administrative monetary penalties on abusive, dominant firms.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most recent abuse case involved allegations by the commissioner that the Canadian Real Estate Association (CREA) imposed certain rules on the use of its Multiple Listing Service (MLS) trademarks that substantially lessened or prevented competition in the market for the supply of residential real estate brokerage services in Canada. In particular, the commissioner alleged that CREA's MLS rules reduced the variety of brokerage service packages available to homesellers, and forced consumers to use a so-called full-service real estate broker if they wanted to list their homes on the MLS system.

The commissioner's application against CREA was the first contested abuse of dominance case heard by the Tribunal since the *Canada Pipe* case was decided in 2005. The matter was settled on consent in October 2010, following voluntary amendments to the CREA MLS listing rules earlier in the year. While not an 'abuse' case, the commissioner filed a case against the Visa and MasterCard associations in December 2010, alleging that rules imposed on merchants constitute price maintenance, with an adverse effect on competition.

Also noteworthy is the refusal of the commissioner to modify a consent order issued in 1996 against the Interac Association, an organisation that develops and operates a national payment network allowing Canadians to access their funds through automated banking machines and point-of-sale terminals. The consent order

was issued under the abuse of dominance provision of the Act in 1996 against Interac and the leading Canadian banks who were its founding members. At the time, the Tribunal deemed that the structure and rules regarding membership and services were inhibiting competition in financial services and payments innovation. Among other requirements, the order made required Interac to be managed on a not-for-profit basis. In 2009, Interac requested that the commissioner consent to vary the 13-year-old order to allow Interac to restructure to a for-profit model. While the commissioner was prepared to accept some changes to Interac's board structure, she did not agree that removing restrictions against for-profit activities would be pro-competitive or that such a modification was necessary to allow Interac to remain competitive.

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