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Fundamentals of Reviewable Matters

by/par

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I Introduction

The so-called “reviewable matters”¹ are a collection of provisions in the *Competition Act*² (the “Act”) that allow the Competition Tribunal (the “Tribunal”) to order remedies for various situations that can harm competition. Although these provisions are quite disparate, they share some important characteristics.

First, they are all civil in nature. This means that civil, not criminal, burdens and standards of proof apply.

Second, none of the activities dealt with in the reviewable matters provisions are unlawful. Indeed, they can be pro-competitive and efficiency-enhancing. Before the Tribunal can order a remedy more is needed, generally, a substantial lessening of competition.³

Third, the reviewable matters provisions generally deal with situations where a firm that already has market power engages in a practice designed to maintain or enhance its market power. Usually, but not always, the firm with market power is acting alone. By contrast, the merger provisions are designed to prevent situations where the merger of two firms increases the market power of the merged firm, thus harming competition. The criminal conspiracy provisions also deal with market power differently: they deal with cases where two or more firms that should be competing instead act in concert, achieving sufficient market power to harm competition unduly.

Fourth, the Tribunal is the exclusive forum for all applications under the reviewable matters provisions. Only the Commissioner of Competition (the “Commissioner”) can bring applications to the Tribunal, except for applications under the refusal to deal and exclusive dealing/tied selling/market restriction provisions, where private applicants can apply for leave to commence an application.

Fifth, the only remedies available are injunctive in nature: generally, either orders that the respondent stop some anti-competitive conduct, or that the respondent take positive steps to restore competition. So-called “structural orders”

¹ This is the shorthand by which s. 75-84 of the Act are known. The term comes from the title of Part VIII of the Act: “Matters Reviewable by Tribunal”. These sections are also sometimes called “Civil Matters”.

² R.S.C. 1985, c. C-34.

³ The precise test varies.

breaking up a company are possible, but have never been ordered. Punitive orders such as fines or prison are not available.⁴ Nor are damages or restitutionary orders. In this way the reviewable matters provisions are distinct from the criminal provisions, where the remedies tend to be punitive,⁵ and from the merger provisions, where only structural remedies are available in contested cases.⁶

The most important of the reviewable matters provisions are:

- **Abuse of dominance (s. 78 & 79):** if a firm that controls a market engages in anti-competitive conduct, causing a substantial lessening or prevention of competition, the Tribunal can order the firm to stop the anti-competitive conduct or take positive measures to remedy the damage to competition. Anti-competitive conduct is basically conduct that is predatory, exclusionary or disciplinary. Section 78 contains a non-exhaustive list of examples of anti-competitive conduct. Anti-competitive conduct most frequently takes the form of exclusive contracting practices that shut other competitors out of the market.
- **Refusal to deal (s. 75):** if a person's business is substantially affected by an inability to obtain a product, and that inability is due to a lack of competition in that product market, and certain other requirements are met, the Tribunal can order a supplier of the product to accept that person as a customer on the usual trade terms.
- **Exclusive dealing, tied selling, and market restriction (s. 77):** the Tribunal can prohibit these restrictive distribution practices if they are causing a substantial lessening or prevention of competition. In practice, the Tribunal is most likely to order a remedy when these practices also amount to an abuse of dominant position.

The abuse of dominance provisions are by far the most important. However, now that the refusal to deal provisions have been opened up to private applications, they are being used more frequently.

This paper discusses the elements of each of the key reviewable matters and covers the contested cases and major interpretive issues raised by each. Although these provisions are approaching their twentieth anniversary, they have

⁴ There is one exception, discussed below: the airline specific abuse of dominance provisions, which allow the Tribunal to impose "administrative monetary penalties" (fines). There have also been proposals for administrative monetary penalties for all abuse cases.

⁵ Although injunctive relief in the form of prohibition orders is frequently ordered.

⁶ Behavioural orders are possible in merger cases that proceed on consent.

spawned relatively few decided cases. As a result, the interpretation of these provisions is still in its infancy.

II Abuse of dominant position

Sections 78 and 79 deal with situations where a company that is dominant in a particular market in Canada engages in anti-competitive conduct that market, or another market, in order to extend or maintain that dominant position.⁷

Section 79(1) defines the elements of abuse of dominant position. Section 78 lists examples of anti-competitive acts.⁸

The elements of abuse of dominance are three-fold:

1. Dominance;
2. Practice of anti-competitive acts; and
3. Substantial lessening or prevention of competition

1. Dominance

The Act defines dominance by the phrase “substantially or completely control”. This indicates that to be dominant, a firm must have market power.⁹ Testing for market power necessarily involves defining the relevant market. The phrase “throughout Canada or any area thereof” expresses the geographic aspect of market definition, and the phrase “class or species of business”, the product aspect.¹⁰

⁷ See *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8 at ¶539: “section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power”.

⁸ See Appendix A for the text of the reviewable matters provisions.

⁹ *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990) 32 C.P.R. (3d) 1 at 28-29; [1990] C.C.T.D. No. 17 (“*NutraSweet*”)

¹⁰ *NutraSweet*, at 31-33; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1991) 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (Comp. Trib.) (“*Laidlaw*”); *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* [1995] C.C.T.D. No. 20 (Comp. Trib.) (“*Nielsen*”). In *Nielsen*, McKeown J. wrestled with the problem that s. 79(1)(a) uses the phrase “class or species of business”, while s. 79(1)(c) uses the term “market”. The use of different terms normally gives rise to an interpretive presumption of different meaning, but the Tribunal in *NutraSweet* had pointed out that “the logic of the section is better if the product market is precisely defined in connection with question of control rather than being partially dealt with under para 79(1)(a) and then revisited in para 79(1)(c)”. McKeown J.

The definition of dominance contemplates that two or more firms might enjoy joint dominance over a market as a result of co-ordinated behaviour. However, most abuse of dominance cases involve one dominant firm.

The dominance element thus involves two questions:

1. What is the relevant market (both product and geographic)?
2. Does the firm have a substantial amount of market power over the relevant market (“substantially or completely control”)?

(a) Relevant market

Often the outcome of abuse of dominance as well as other competition cases turns on market definition. This is partly because market share is one of the most important indicators of the existence of market power. Paradoxically, market definition, whether product or geographic, is not a precise exercise, as the Tribunal has cautioned.¹¹

The relevant market is simply the products and places that compete with the product and place in question. It is the “universe of effective competition”¹² in both product and geographic space.

The purpose of defining the relevant market is to identify the possibility for the exercise market power.¹³ Market power is, in turn, defined as the ability of a firm or firms to maintain prices above the competitive level over a sustained period of time.¹⁴

(i) Product market

Substitutability

concluded the phrase “class or species of business” means “product market”. Parliament did not use “market” because “market” has a geographic dimension, and Parliament used “throughout Canada or any part thereof” to express the geographic dimension of the market, and to limit it to Canada.

¹¹ *Laidlaw*, 324; *Canada (Commissioner of Competition) v. Superior Propane Inc.* [2000] C.C.T.D. No. 15 (Comp. Trib.) (“*Propane I*”) at ¶48.

¹² *Laidlaw*, 316.

¹³ *Propane I*, ¶47; *Tele-Direct*, ¶225.

¹⁴ *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.) (“*Southam*”); *Tele-Direct*, ¶225.

“Substitutability” is the “fundamental test or ‘touchstone’ for determining the boundaries of the relevant product market”.¹⁵ Products that are close substitutes for one another are in the same market. Close substitutes are identified by looking at evidence that buyers are willing to switch from one product to the other in response to a relative change in price.

Direct evidence of substitutability

Evidence of substitutability can be both *direct* and *indirect*. Direct evidence of substitutability includes statistical evidence that buyers switch in response to small changes in price and anecdotal evidence of switching behaviour.¹⁶ Lack of evidence of buyers actually switching between products is a strong indication that they are not in the same market.¹⁷

Indirect evidence of substitutability

Often direct evidence of substitutability is not available and indirect evidence must be used. Indirect evidence of substitutability consists, broadly speaking, of evidence about the characteristics of the product and its buyers. Exactly which characteristics must be considered varies from case to case. Types of indirect evidence that have been considered include:

- **End use / functional interchangeability:** the question is whether the two products can be put to the same end use by a purchaser. If they can, they *might* be in the same market. Functional interchangeability has thus been described as a “preliminary filter”¹⁸ or a “necessary but not sufficient condition”¹⁹ for finding that two products are in the same market. Even defining the end use can raise issues. Defining it too broadly results in over-inclusion. In *Tele-Direct*, the Tribunal noted the danger of placing automobiles and bicycles in the same market just because both provide a means of transport.²⁰

¹⁵ *Tele-Direct*, ¶76; *Nielsen*, 241.

¹⁶ *Nielsen*, 241; *Tele-Direct*, ¶76; *Canada (Director of Investigation and Research) v. Southam Inc.* [1995] 3 F.C. 557 (C.A.).

¹⁷ The Tribunal highlighted the lack evidence of switching in *Tele-Direct*, ¶170; and the low cross-elasticities between aspartame and its supposed competitors in *Nutra-Sweet*.

¹⁸ *Tele-Direct*, ¶111.

¹⁹ *Enforcement Guidelines on the Abuse of Dominance Provisions*, Competition Bureau, 2001, §3.2.1(a) (“*Abuse Guidelines*”).

²⁰ *Tele-Direct*, ¶98.

- **Physical and technical characteristics:** a comparison of the physical and technical characteristics of the products can show whether one product is better or more valuable than another, or more suited to a particular end use.²¹
- **Views, strategies, behaviour and identity of buyers:** do buyers of the products consider them to be close substitutes, or competitors of one another?²²
- **Trade views, strategies and behaviour (inter-industry competition):** do industry participants, including the respondent, consider the products to be close substitutes or competitors of one another? Documents from the respondent are usually important sources of this evidence.
- **Switching costs:** the higher the cost of switching between two products, the less likely it is that they are in the same market.²³
- **Price relationships and relative price levels:** a lack of correlation between the price movements of two products over time suggests that they are not in the same market. Relative price levels between two products in two separate geographic markets can also indicate whether they are in the same market or not. In *NutraSweet*, the Tribunal found that the best way to determine whether other sweeteners constrained the price of aspartame was to compare the price of aspartame in markets where there was competition between different suppliers of aspartame with those where there was no such competition.²⁴

The hypothetical monopolist test

The test for market definition typically used in merger cases is the “hypothetical monopolist” test. This test works by provisionally adopting a market delineation and asking whether a hypothetical monopolist over that market

²¹ In *Nielsen*, the Tribunal found that scanner-based data was better than audit and warehouse shipment data. In *Tele-Direct*, an examination of the physical characteristics of Yellow Pages helped show that they served a completely different purpose from other media from an advertiser’s perspective. In *Nutra-Sweet*, the technical characteristics of aspartame were quite different from those of other sweeteners and helped define the market.

²² *Tele-Direct*, ¶126-172.

²³ This factor has not played an important role in any of the contested abuse cases, but the cost of switching from propane to other fuels was an important factor in determining the relevant market in *Propane I*.

²⁴ *NutraSweet*, at 19.

would impose a small but significant price increase (usually assumed to be 5%) and sustain it for one year. If the answer is yes, that is the market. If the answer is no, this means that other products would constrain this price increase; thus the market is expanded to include those other products.²⁵

The Tribunal has suggested that hypothetical monopolist test may not be appropriate in abuse of dominance cases. The question of whether a hypothetical monopolist can raise prices depends on the assumption that prices are at competitive levels. By contrast, abuse cases necessarily involve an allegation that the respondent firm has a dominant position already.²⁶ It is unsafe to assume prices are at competitive levels if the monopolist is not hypothetical, but real. The Tribunal has, however, applied the hypothetical monopolist test in a similar situation, where it found that pre-merger prices were not competitive, by defining the market with references to anticipated future, competitive prices.²⁷

The cellophane fallacy

A related problem is the so-called “cellophane fallacy”. Where a firm with a dominant position has already raised prices above competitive levels, evidence of apparent substitutes can be misleading. This is because supra-competitive prices can make purchasers switch to products they would not in fact choose if prices were at competitive levels, making the products appear to be substitutes for one another when they are not. In those cases it is not appropriate to use the supra-competitive prices to define the market. The “cellophane fallacy” is named after a case where the US Supreme Court is said to have fallen into this trap by finding that cellophane wrap and other flexible wraps such as wax paper were in the same market.²⁸

One way to avoid the cellophane fallacy is to use the likely future, or competitive, price (where future competition is expected to lower prices), as the Tribunal noted in *CWS*.²⁹ Another is to use other factors for delineating the market

²⁵ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, ¶69 (“*CWS*”). Note: *CWS* was a merger case. But because in that case the Tribunal found that the market was not competitive, and *CWS* enjoyed market power, *pre-merger*, the Tribunal’s analysis may also be useful for abuse of dominance cases.

²⁶ *Laidlaw*, at 320.

²⁷ *CWS*, at ¶90-91.

²⁸ *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

²⁹ *CWS* at 92; *Abuse Guidelines*, 3.2.1.

than price, as the Tribunal did in three abuse of dominance cases, *Laidlaw*, *Nielsen* and *Tele-Direct*.³⁰

(ii) Geographic market

The phrase “throughout Canada or any part thereof” in s. 79(1)(a) refers to geographic market.³¹ The process of delineating the geographic market is very similar to that of delineating the product market. The factors are essentially the same, except that they are applied in a geographic sense. Specifically geographic factors include evidence of foreign competition and imports, and transport costs.³²

(b) Market power

Economists define market power as the ability to set prices above competitive levels and to maintain them at that level for a significant period of time.³³ There are both direct and indirect indicators of market power.

(i) Direct indicators

Performance results and conduct are direct indicators of market power. If firm’s performance results (such as profits) or conduct (such as pricing policy) are more likely to be associated with firms that have market power, then they directly indicate that the firm has market power. Conversely, results or conduct similar to that of firms without market power indicates a lack of market power.³⁴

Performance results

On a practical level, evidence of high profits or high prices is evidence that prices are above competitive levels, and thus, that a firm has market power. In *Tele-Direct*, the Tribunal found that a margin of 38% indicated market power.³⁵

³⁰ *Laidlaw*, at 318-320; *Nielsen*, at 253 ; *Tele-Direct*, ¶130.

³¹ The choice of this phrase raises some interpretive difficulties. For instance, a firm that dominates the world market for a product but has a small market share in Canada would be beyond the reach of s. 79, even if it leveraged its dominance over the world market to increase its market power in Canada: *Nielsen*, at 230-231. It is also open to be argued that s. 79(1)(a) precludes the Tribunal from delineating a market larger than Canada for purposes of s. 79, even if the geographic market is in fact larger than Canada. This argument does not appear to have been made or accepted in past cases, however.

³² *Abuse Guidelines*, 3.2.1(b).

³³ See for instance *NutraSweet*, at 28. Virtually every Tribunal case recites this definition.

³⁴ *Tele-Direct*, at ¶226.

³⁵ *Tele-Direct*, at ¶285-286.

In *CWS*, the Tribunal appears to have relied in part on the high margins achieved by landfills as evidence of market power.³⁶ In *NutraSweet*, a comparison between the price for aspartame in markets where there was competition, and the price in Canada, where there was not, showed that the price in Canada was too high.³⁷ Laidlaw's ability to reduce its prices dramatically in response to entry was evidence that its prices had been above competitive levels in the first place.³⁸

Pricing practices

Among pricing practices that indicate market power, the most important is price discrimination. Price discrimination is the practice of charging different prices to different customers based on customer characteristics. For instance, in *Tele-Direct* charged higher prices to advertisers who were heavily reliant on Yellow Pages by charging more for extras like colour than could be justified based on costs.³⁹ In *CWS*, landfills price discriminated based on customer location⁴⁰. There also appears to have been evidence of price discrimination in *Laidlaw*, although the Tribunal did not comment on it.⁴¹

Other pricing practices have supported an inference of market power. Laidlaw kept imposing price increases on customers on various pretexts, sometimes without notice, and contrary to contractual terms.⁴² *Tele-Direct*'s "bureaucratic" approach to pricing, which ignored local market conditions, was evidence of market power.

(ii) Indirect indicators

Direct evidence of market power is frequently not available; normally one must consider indirect indicators of market power: market share and barriers to entry.⁴³ The Tribunal follows a two-step approach. First, it examines the market share of the respondent. Second, it considers other factors, principally whether there are barriers to entry, but also how many competitors there are in a market

³⁶ *CWS*, at ¶74-83.

³⁷ *NutraSweet*, at 19.

³⁸ *Laidlaw*, at 327-328.

³⁹ *Tele-Direct*, at 289-297.

⁴⁰ *CWS*, at ¶78.

⁴¹ *Laidlaw*, at 327-330.

⁴² *Laidlaw*, at 327-330.

⁴³ *Tele-Direct*, at ¶225.

and their respective market shares, and how much excess capacity firms in the market have.

Market shares

Very high market shares raise a presumption, or *prima facie* case, of dominance, absent evidence of easy entry into the market.⁴⁴ Exactly what market share is required to trigger this presumption is uncertain. The respondents' market shares were near monopoly levels in *NutraSweet* (95%), *Laidlaw* (87-100%), *Nielsen* (100%), and *Tele-Direct* (80-96%). The Tribunal commented in *Laidlaw* that a market share below 50% could not give rise to the presumption of dominance.⁴⁵

In the *Abuse Guidelines*, the Competition Bureau (the "Bureau") adopts a 35% threshold: market shares above 35% "prompt further examination"; those below do not.⁴⁶ The Bureau defends this on the basis that the Tribunal did not exclude the possibility that a firm with a market share below 50% could be dominant. However, s. 79(1)(a) requires a showing that the respondent *substantially or completely control* a class or species of business, not just a showing of some market power. The possibility that the Tribunal would conclude that a firm with a market share of less than 50% is dominant is remote.

The appropriate way to measure market shares is not always obvious. While the Tribunal most frequently compares revenues earned by each market participant, there are other possible measures. Most ways of measuring market share involve comparing respective revenue, output or capacity; but there can be a plethora of industry-specific statistics that could be used.⁴⁷ It is easy to imagine scenarios where using different measures would yield very different results. For instance, where an allegedly dominant firm's competitors have more surplus capacity than it does, the dominant firm's share of capacity will be less than its share of revenues.⁴⁸

Barriers to entry

Without the existence of barriers to entry, there can be no dominance, because any attempt to exercise market power would attract immediate entry:

⁴⁴ *Tele-Direct*, at ¶18, 231; *Laidlaw*, at 325; *Nielsen*, at 254.

⁴⁵ *Laidlaw*, at 317.

⁴⁶ *Abuse Guidelines*, 3.2.1(d). In the case of joint dominance, the Bureau's threshold is 60%.

⁴⁷ For example, in *Laidlaw*, the Tribunal discussed using: weight of refuse dumped, number of containers, and number of collection trucks.

⁴⁸ This occurred in *Laidlaw*.

In the absence of barriers to entry, even a single seller cannot exercise market power. Any attempt by the incumbent to price above the competitive level will attract immediate entry by competing sellers.⁴⁹

The question is: how easy – or hard – is it for a firm to start doing business in the relevant market and establish itself as a viable competitor on a sustainable basis.⁵⁰ So-called “hit-and-run” entry,⁵¹ where firms quickly enter a market and are forced out, does not count.

Factors considered by the Tribunal in assessing barriers to entry in abuse of dominance cases include:

- **Observed entry and exit:** evidence of sustained entry of new competitors tends to demonstrate that entry is easy. However, the nature the entry is important: entry into niche sub-markets does not rebut a presumption of dominance of the larger market.⁵² Similarly, lack of entry, or evidence that entrants quickly leave, is evidence of high barriers to entry.
- **Sunk costs:** there is a debate about sunk costs as a barrier to entry. In *Southam*, the Tribunal said that sunk costs alone are not enough; there must also be economies of scale. In *Tele-Direct*, the Tribunal added that sunk costs in combination with a likely response by the incumbent created a significant barrier to entry. Since incumbents can usually be expected to respond, this amounts to a finding that sunk costs are a barrier to entry when the entrant faces a dominant incumbent.⁵³
- **Economies of scale:** large economies of scale mean that an entrant must enter on a large scale in order to achieve costs similar to an incumbent. This increases sunk costs and raises barriers to entry.⁵⁴

⁴⁹ *Tele-Direct*, ¶232.

⁵⁰ *Laidlaw*, at 330-331.

⁵¹ *NutraSweet*, at 51.

⁵² *Tele-Direct*, ¶243.

⁵³ *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 281-82, *Tele-Direct*, at ¶246-253. It might be objected that the *Tele-Direct*'s response was particularly aggressive. However, the Tribunal later declined to find that *Tele-Direct*'s competitive responses were predatory or anti-competitive.

⁵⁴ *NutraSweet*, at 27; *Southam*, at 281-282.

- **Patents or other intellectual property:** entry often requires access to technology protected by patents or other intellectual property; difficulties in obtaining this access raise barriers to entry.⁵⁵
- **Incumbent advantages:** the incumbent may have certain advantages derived from its position in the market. For instance, Tele-Direct had access to listings, an established reputation, and a valuable trademark, all of which raised barriers to entry.⁵⁶
- **Conduct by the incumbent:** the incumbent's anti-competitive conduct can itself create barriers to entry. In *Laidlaw* and *Nielsen*, exclusive contracting practices locked up the market, raising barriers to entry.⁵⁷
- **Industry-specific barriers:** there are often industry specific barriers in any given industry, including regulatory barriers.

Market concentration and excess capacity

In *Laidlaw*, the Tribunal noted that the number of other competitors in the market and their respective market shares is relevant. In merger cases, evidence that a market is highly concentrated, that is, that a few large competitors control the bulk of the market, suggests that the merger will lessen competition.⁵⁸ The Tribunal has not discussed market concentration extensively in the four contested abuse of dominance cases. In each of those cases, the market was concentrated in the hands of the one dominant firm; the few competitors had low market shares.

Excess capacity in the hands of competitors of the allegedly dominant firm weighs against a finding of dominance. These competitors could in theory expand their production and thus their market share. It is easier for an existing competitor with excess capacity to expand production than for a new competitor to enter the market. However, these competitors might have excess capacity because the anti-competitive conduct of the dominant firm has prevented them from expanding output.⁵⁹

⁵⁵ *NutraSweet*, at 27.

⁵⁶ *Tele-Direct*, at ¶254-267.

⁵⁷ *Laidlaw*, at 331; *Nielsen*, at 254-255, 259-266, 277.

⁵⁸ *Canada (Director of Investigation and Research) v. Hilldown Holdings (Canada) Ltd.* (1992) 41 C.P.R. (3d) 289 (Comp. Trib.).

⁵⁹ *Laidlaw*, at 327.

2. Practice of anti-competitive acts

(a) The test for identifying anti-competitive acts

Section 78 provides a non-exhaustive list of anti-competitive acts. Other conduct can be – and has been – found to be anti-competitive because it has characteristics in common with the conduct listed in s. 78. In *NutraSweet*, the Tribunal discerned a common thread running through the list in s.78:

A number of the acts share common features but, as recognized by the Director and the respondent, only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.⁶⁰

In *Tele-Direct*, the Tribunal explained that it must determine the “purpose” of the act. However, “purpose” is to be understood in an objective sense; it is more akin to the “overall character of the act”.⁶¹ The question is:

whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, “exclusionary, predatory or disciplinary”.⁶²

Relevant factors include:

- **Effects of the act:** The Tribunal typically looks at the effects of the allegedly anti-competitive act on competitors and potential entrants.
- **Business justification:** The presence of a legitimate “business justification” can provide evidence that an act is not anti-competitive, but only if it is a “credible efficiency or pro-competitive” business justification.⁶³ Attempting to retain or obtain a dominant position in order to defend against another firm becoming dominant, is not a legitimate business justification.⁶⁴ As well, even legitimate business

⁶⁰ *NutraSweet*, at 34.

⁶¹ *Tele-Direct*, at ¶541.

⁶² *Tele-Direct*, at ¶542.

⁶³ *Tele-Direct*, at ¶542; *Nielsen*, at 261.

⁶⁴ *Nielsen*, at 261.

justifications do not automatically lead to a finding that there is no anti-competitive act; they must be weighed against their anti-competitive effects.⁶⁵ In *Tele-Direct*, the costs associated with doing business with consultants justified Tele-Direct's refusal to deal with them.⁶⁶

Clients considering a business practice that may constitute an anti-competitive act should be encouraged to document their reasons for the practice (assuming they are legitimate!).

- **Subjective intent:** It is not necessary to show subjective intent to show that an act is anti-competitive. The respondent is deemed to intend the effects of its actions.⁶⁷ Evidence of a subjective anti-competitive intent is certainly helpful however, and has been used by the Tribunal.⁶⁸ That being said, a subjective anti-competitive intent would not make an otherwise appropriate competitive response anti-competitive.⁶⁹

The difficulty in applying these factors is that competitors are supposed to compete vigorously. Distinguishing anti-competitive acts from tough competition can be difficult, as the Tribunal noted in *Tele-Direct*:

It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even “tough” competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.⁷⁰

Despite the difficulties inherent in identifying anti-competitive acts, it is important that dominant firms be able to know whether a given response is anti-competitive. An objective test must be possible for any proposed new anti-

⁶⁵ *Nielsen*, at 262, 265; *Tele-Direct*, at ¶542.

⁶⁶ *Tele-Direct*, at ¶733.

⁶⁷ *Nielsen*, at 257; *Laidlaw*, at 342-343; *Tele-Direct*, at ¶540.

⁶⁸ See for instance: *Tele-Direct*, at ¶602-605; *NutraSweet*, at 40; *Nielsen*, at 260, 264.

⁶⁹ In *Tele-Direct*, subjective evidence of anti-competitive intention was not enough to persuade the Tribunal that “overwhelming intensity of competitive response” was an anti-competitive act.

⁷⁰ *Tele-Direct*, at ¶539.

competitive act.⁷¹ Moreover, even dominant firms are expected to respond to entry. Thus the Tribunal rejected “targeting” as an anti-competitive act.⁷² Equally however, there is no defence of “objectively competitive conduct”, that is, things that a non-dominant firm would have done in similar circumstances.⁷³

(b) Examples of anti-competitive acts

As noted above, s. 78 contains a non-exhaustive list of anti-competitive acts. This section discusses the types of conduct identified by the Tribunal as anti-competitive.

(i) Exclusive contracting practices

A variety of contracting practices that tend to prevent expansion or entry of competitors and thus raise barriers to entry have been found to be anti-competitive acts. These include:

- **Exclusive contracts**, particularly long-term exclusive contracts that renew automatically (so-called “ever-green” clauses).⁷⁴ Long term exclusive contracts can permit a dominant firm to lock up the market and prevent entry or expansion.
- **Long term contracts with punitive termination provisions:** provisions that make it difficult for customers to terminate contracts and switch to a competitor raise entry barriers.⁷⁵
- **Staggered contractual renewals:** staggering renewal dates of long-term exclusive contracts can make it even more difficult for a competitor.⁷⁶
- **Meet or release, right of first refusal, or right to compete clauses.** These clauses can be anti-competitive because they provide the dominant firm with information about its competitors’ identities,

⁷¹ *Tele-Direct*, at ¶610. This was among the Tribunal’s reasons for rejecting “overwhelming intensity” of response as an anti-competitive act.

⁷² *Tele-Direct*, at ¶593.

⁷³ *Tele-Direct*, at ¶543.

⁷⁴ *Laidlaw*, *Nielsen*, *NutraSweet* all involved exclusive contracts.

⁷⁵ *Laidlaw*, at 331, 305-314; *Commissioner of Competition v. Enbridge Services Inc. – Statement of Grounds and Material Facts*, Competition Tribunal File No. 2001-008 (available on the Tribunal website: www.ct-tc.gc.ca).

⁷⁶ *Nielsen*, at 260.

pricing, and other terms.⁷⁷ They allow the dominant firm to lower prices to particular customers instead of generally, reducing the cost of predatory or disciplinary pricing. Finally, they prevent secret price cutting by competitors.⁷⁸ These clauses also make exclusivity more acceptable to customers.⁷⁹

- **Most-favoured-nation clauses:** these clauses operate as an inducement to exclusive dealing.⁸⁰
- **Negative option pricing clauses.** These can lead to monopoly pricing.⁸¹
- **Financial and other inducements to exclusivity,** such as promotional allowances, use of trademarks or logos, and the like.⁸²

(ii) Other anti-competitive acts

Other anti-competitive acts identified by the Tribunal include:

- **Sham litigation:** Threatened or actual sham litigation against customers to prevent them from switching to competitors, or against competitors, to drive them out of business, is predatory behaviour and an anti-competitive act.⁸³ In *Laidlaw*, the Tribunal approved of R.H. Bork's statement that "As a technique for predation, sham litigation is theoretically one of the most promising".⁸⁴
- **Anti-competitive acquisitions:** A pattern of acquisitions of competitors designed to acquire a monopoly position and eliminate competitors can be an anti-competitive act. Factors indicating an anti-competitive intent in *Laidlaw* included: the acquisitions occurred within a very short time; Laidlaw representatives threatened competitors that if they did not sell out, Laidlaw would put them out of

⁷⁷ *NutraSweet*, at 42.

⁷⁸ *Laidlaw*, at 307.

⁷⁹ *NutraSweet*, at 42.

⁸⁰ *NutraSweet*, at 42.

⁸¹ *Laidlaw*, at 341.

⁸² *NutraSweet; Nielsen*.

⁸³ *Laidlaw*, at 343-344, 309-314. Laidlaw's use of this tactic in enforcing its exclusive contracts attracted the Tribunal's outrage.

⁸⁴ R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, Inc., 1978) at 347, as cited by *Laidlaw* at 344.

business; Laidlaw's analyses for the acquisitions assumed it would face no competition; and the acquisition agreements contained overly restrictive non-competition covenants.⁸⁵

- **Predatory pricing:** Predatory pricing, that is, pricing below cost, is an anti-competitive act.⁸⁶
- **Refusal to deal:** refusal to deal by a vertically-integrated firm with other distribution channels may be an anti-competitive act.⁸⁷
- **Leveraging intellectual property to foreclose competition in other markets:** intellectual property confers a lawful monopoly in the market to which it applies; but attempts to leverage that monopoly to obtain a competitive advantage in another market is anti-competitive.⁸⁸
- **Excluding competitors from networks, marketplaces or associations:** rules or practices excluding competitors from electronic networks or marketplaces (such as B2B systems) or from trade associations, could be an anti-competitive act, if membership in the network, marketplace or trade association were important for the competitor to compete effectively. In the Interac case, members of Interac had excluded many potential participants in the Interac network through its by-laws and fees.⁸⁹
- **Leveraging dominance in one market to achieve market power in another:** a firm that has market power in one market can use that power to obtain or increase market power in another. For instance, Tele-Direct used its control over telephone directory space to increase its market power over telephone directory advertising services through

⁸⁵ *Laidlaw*, at 331-339.

⁸⁶ *NutraSweet*, at 43-44. Predatory pricing has been shown in one abuse case: *Canada (Commissioner of Competition) v. Air Canada*. Although this case was brought under airline-specific provisions, the Tribunal's approach to the cost standard may inform future cases alleging predatory pricing as an anti-competitive act.

⁸⁷ Tele-Direct's refusal to deal with consultants who competed with Tele-Direct's own distribution channel escaped a finding that it was anti-competitive only because the costs Tele-Direct would incur in dealing with them justified its refusal: *Tele-Direct*, ¶717-733.

⁸⁸ *NutraSweet*, at 45-46.

⁸⁹ *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.). Note: as these were consent proceedings, the Tribunal presumed that the anti-competitive acts identified in the application were anti-competitive; it did not do its own analysis. The decision is thus of less precedential value in identifying anti-competitive acts than are the decisions in contested cases.

tied selling and discriminatory practices.⁹⁰ Xerox refused to sell parts to “independent service organizations” to eliminate competition in the market for servicing photocopiers.⁹¹

There remain some open questions about potential anti-competitive acts. Perhaps most importantly, it is unknown whether the Tribunal would adopt the “essential facilities doctrine”. Under this doctrine, it is an anti-competitive act to deny access to an essential facility. An example of an essential facility might be a railway line. Section 78(1)(k) recognizes this doctrine, but only in the airline context. Section 78(1)(e) speaks of “pre-emption of scarce facilities or resources required by a competitor for the operation of a business”. But this suggests a situation where a dominant firm buys up facilities or resources in order to exclude competitors, not where the dominant firm already owns the facility. It is difficult to see how a mere refusal to grant a license to use an essential facility by a dominant firm who had not engaged in any other anti-competitive conduct could be considered “predatory, exclusionary or disciplinary”.

(c) Industry specific anti-competitive acts

(i) Airlines

Airline-specific provisions were added to s. 78 following Air Canada’s take over of ailing Canadian Airlines in late 1999. These provisions allow the government to define anti-competitive acts by regulation, which it did. Among the anti-competitive acts defined in the *Airline Regulations* is operating or expanding capacity at fares that do not cover the avoidable costs of providing the service. The Commissioner commenced an application against Air Canada under these provisions in March 2001, claiming that Air Canada operated and increased capacity below its avoidable costs in response to entry by low-cost competitors in eastern Canada. The proceeding was split into two phases. In the first phase, the Tribunal defined the concept of “avoidable costs” and found that Air Canada engaged in anti-competitive acts on two routes. The second phase has not yet been heard as the proceeding was stayed to accommodate Air Canada’s reorganization under the *Companies Creditors Arrangements Act*.

⁹⁰ Tele-Direct’s practice of tied selling was dealt with under the tied selling provisions. See below.

⁹¹ *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.). Although this case was brought under the refusal to deal provisions, it could have been framed as an abuse of dominance case, given Xerox’s market power in high and medium volume segments of the photocopier market (at 96).

(ii) Groceries

The Bureau has published an interpretation bulletin outlining how it will apply the abuse of dominance provisions to the grocery sector.⁹² This interpretation bulletin deals with special problems with defining relevant markets that involve multi-product retailers, and lists some particular anti-competitive acts that participants at all levels in the sector might engage in.

(d) “Practice”

The word “practice” suggests a pattern of conduct. The Tribunal has held that its meaning is broad: “a practice may exist where there is more than an ‘isolated act or acts’”.⁹³ Similarly, several different anti-competitive acts taken together can be a “practice”.⁹⁴ In the result, the “practice” threshold will only exclude cases involving a few isolated anti-competitive acts.

3. Substantial lessening or prevention of competition

The final element is whether the practice of anti-competitive acts substantially lessens or prevents competition. The test is whether the practice of anti-competitive effects preserves or adds to the dominant firm’s market power.⁹⁵ Many of the same factors that are relevant to determining whether the acts are anti-competitive are also relevant to the question of whether they substantially lessen or prevent competition. Consequently, in practice, once dominance and a practice of anti-competitive acts are shown, a finding of substantial lessening or prevention of competition is likely to follow.

The market which experiences the substantial lessening or prevention of competition does not need to be the same as the market which the dominant firm controls. A firm that is dominant in one market can leverage this dominance to achieve market power in another.

Section 79(4) directs the Tribunal to consider whether the *practice is a result of superior competitive performance* in determining whether a practice of anti-competitive effects substantially lessens or prevents competition.

⁹² Competition Bureau, *Interpretation Bulletin: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector*, November 2002.

⁹³ *NutraSweet*, at 35.

⁹⁴ *NutraSweet*, at 35.

⁹⁵ *NutraSweet*, at 47; *Nielsen*, at 266.

It is unclear what, exactly, s. 79(4) means. It has yet to be commented on by the Tribunal. The *Abuse Guidelines* suggest that s. 79(4) might be engaged where a firm exploits legitimate competitive advantages such as lower costs, better distribution or production techniques, or a broader array of product offerings.⁹⁶ This provides little assistance: offering a product at a better price, or a better product at the same price, because of lower costs, or better distribution or production techniques *cannot* be anti-competitive in the first place. Moreover, if the conduct itself is efficiency-enhancing, then it will likely not be identified as an anti-competitive act.

4. Remedies

Under s. 79, the Tribunal can make orders designed to *remedy* the substantial lessening or prevention of competition caused by the practice of anti-competitive acts. The Tribunal cannot award damages, and cannot make *punitive* orders.⁹⁷ The Tribunal's approach in choosing a remedy is "only to go as far as it considers necessary in order to restore competition in the relevant markets".⁹⁸ In *Southam*, the Supreme Court enunciated a similar principle, noting that in a merger case, the test is whether the remedy eliminates the substantial lessening of competition, not whether it restores the pre-merger competitive situation. The least intrusive of the possible effective remedies should be preferred.⁹⁹

The Tribunal to make three kinds of remedial orders under s. 79:

1. It can order the respondents to stop the practice of anti-competitive acts;
2. It can order the respondents to take positive action to overcome the effects of the practice of anti-competitive acts;
3. It can order the sale of assets or shares.

Section 79 envisages that the main remedy will be an order that the respondent stop the anti-competitive conduct (option 1). The Tribunal can only make a mandatory or structural order (options 2 and 3) if an order prohibiting the

⁹⁶ *Abuse Guidelines*, §5.3.2.

⁹⁷ Except in the case of dominant airlines: s. 79(3.1) - (3.3) allow the Tribunal to impose "administrative monetary penalties" ("AMP") of up to \$15 million on a dominant airline that it finds has engaged in a practice of anti-competitive acts. There have been proposals to make AMPs generally available in abuse cases.

⁹⁸ *Laidlaw*, at 351.

⁹⁹ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] S.C.R. 748 at ¶83-89.

practice of anti-competitive acts is insufficient. There is an additional limitation on the mandatory or structural orders in s. 79(3): the Tribunal can interfere with the rights of the person against whom the order is made (or the rights of any other person affected by the order) only to the extent necessary to achieve the purpose of the order.

The first two of the three remedial possibilities are “behavioural” remedies; that is, they enjoin or mandate particular behaviour. The third is “structural”, that is, it effects a change in the structure of the market by, basically, breaking the dominant competitor up.¹⁰⁰ The Act’s preference for behavioural remedies in abuse of dominance cases can be contrasted with its preference for structural remedies in merger cases.¹⁰¹

The distinction between an order prohibiting a person from engaging in an anti-competitive act, and an order mandating positive acts, is not always clear. For example, in *Tele-Direct*, the anti-competitive act was discriminating against consultants and customers who use consultants. The Tribunal prohibited Tele-Direct from rejecting orders submitted through consultants. This, of course, amounts to a requirement that Tele-Direct *accept* such orders.¹⁰²

While an order breaking up a dominant company is possible, the Tribunal has never ordered the sale of assets or shares in an abuse of dominance case.

Orders under s. 79 will frequently interfere with the rights and obligations of third parties. The Tribunal can declare restrictive or exclusive contractual provisions null and void, and even change contractual terms. Invariably such orders will affect third parties who are not before the Tribunal.¹⁰³

Examples of remedies ordered by the Tribunal in contested abuse of dominance cases include:

- prohibition on entering into contracts with exclusivity provisions, or certain inducements to exclusivity (*Laidlaw, NutraSweet*)

¹⁰⁰ Section 79(2) lists an order for the sale of assets or shares part of the broader class of mandatory orders. I have listed it separately because structural orders are different in nature from behaviour orders.

¹⁰¹ Compare s. 79 with s. 92. Section 92 limits the Tribunal to the “blunt instrument” of divestiture or dissolution (*Director of Investigation and Research v. Air Canada* (1993), 49 C.P.R. (3d) 417 at 432), except on consent of the parties.

¹⁰² *Tele-Direct*, at ¶761-763.

¹⁰³ *Laidlaw*, at 352, 354. The Tribunal changed renewal terms for existing contracts in *Laidlaw*.

- prohibition on enforcing exclusivity provisions in existing contracts (*NutraSweet, Laidlaw*)
- prohibition on discriminating against certain customers (i.e., requirement to accept certain customers) (*Tele-Direct*)
- prohibition on future acquisitions (*Laidlaw*)
- reporting requirements to the Commissioner (*Laidlaw*)
- requirement to notify customers of the order (*Laidlaw*)

A question that remains open is how long an order under s. 79 can remain in effect. Some of the terms ordered by the Tribunal in contested cases were time-limited, but many were not. It is virtually certain that, eventually, the market will change to the point where the order is no longer required. If that happens, the respondent can apply under s. 106 for rescission or variation of the order.

One consequence of an order under s. 79 is an asymmetry in the market. That is, the dominant firm will be prohibited from doing things that its competitors can continue doing. For example, Laidlaw was prohibited from entering into exclusive contracts; but its competitors were free to do so. This, the Tribunal noted, is a consequence of the fact that orders can only be made against the dominant firm.¹⁰⁴ In *Nielsen*, the Tribunal noted Nielsen's competitor entered into an undertaking not to enter into exclusive arrangements in Nielsen was prohibited from doing so.¹⁰⁵

The presence of intervenors raises a procedural question at the remedy stage: can the intervenor request that certain terms be included in the order? In *NutraSweet*, the Tribunal held that it must confine itself to the kind of orders sought by the Commissioner, and could not consider remedies proposed by intervenors. However, in *Nielsen*, the Tribunal considered (and adopted) a proposal from the intervenor because it related to matters in issue; it declined to consider some other proposals that went beyond the matters in issue.¹⁰⁶

¹⁰⁴ *Laidlaw*, at 355.

¹⁰⁵ *Nielsen*, at 279-280.

¹⁰⁶ *Nielsen*, at 285.

5. Defences and limitations

(a) Intellectual property

Section 79(5) states that “an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under” intellectual property legislation is not an anti-competitive act.

However, the *Abuse Guidelines* warn that *abuse* of intellectual property rights could constitute an anti-competitive act.¹⁰⁷ Not surprisingly, the difficulty is distinguishing between mere exercise of an intellectual property right, and anti-competitive abuse of an intellectual property right. The Bureau’s approach to intellectual property and the Act is set out in the *Intellectual Property Enforcement Guidelines*.¹⁰⁸ The Bureau considers that intellectual property should be treated like other kinds of property for competition purposes. It provides hypothetical examples of how the Bureau might address situations involving intellectual property.

In *Tele-Direct*, the Tribunal refused to qualify Tele-Direct’s refusal to license its trade-marks (such as the well-known “walking fingers” logo) to competitors as an anti-competitive act. The Tribunal stated:

¶ 66 The respondents’ refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents’ trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.¹⁰⁹

¹⁰⁷ *Abuse Guidelines*, §5.3.3.

¹⁰⁸ Competition Bureau, *Intellectual Property Enforcement Guidelines*, 2000, available on the Bureau’s website: www.cb-bc.gc.ca.

¹⁰⁹ *Tele-Direct*, ¶66.

The Tribunal went on to hold that Tele-Direct's right to refuse to license its trade-marks, even selectively, is protected by s. 79(5).¹¹⁰

However, in *NutraSweet*, NutraSweet's use of the monopoly it had under US patents to foreclose competition in Canada was an anti-competitive act. NutraSweet did this in two ways. First, it used the US patent to negotiate for exclusive contracts in Canada. Second, because it had a monopoly in the US, it was able to offer volume rebates that included the Canadian market that competitors could not meet.¹¹¹

(b) Limitation period

Section 79(6) establishes a three-year limitation period. It prohibits applications once three years has passed "after the practice has ceased". The key word is "ceased": if the practice is an ongoing one, the entire course of conduct can be the subject of an application, even if the practice began more than three years before the application.¹¹²

(c) Anti-double jeopardy provision

Section 79(7) contains an anti-double jeopardy provision. It prevents the Commissioner from bringing an application under s. 79 against a person if proceedings have been brought against that person in respect of the same conduct under either s. 45 or s. 92.

III Refusal to deal

Section 75 allows the Tribunal to intervene where a person's business is suffering because of an inability to obtain a supply of a product needed for that business. There have been only three applications under s. 75 by the Commissioner, the last being in 1997. However, now that private applications are allowed under s. 75, this provision is assuming greater importance. At the time of

¹¹⁰ *Tele-Direct*, ¶70.

¹¹¹ *NutraSweet*, at 45-46.

¹¹² This is clear from the Tribunal's discussion in *Tele-Direct*, ¶36-44.

writing, eight applications for leave to commence a private application under s. 75 had been filed; leave had been granted in four and denied in one.¹¹³

The elements that must be shown before the Tribunal can intervene are:

- **inadequate supply:** a person is unable to obtain adequate supplies of a **product in a market** on usual trade terms;
- **business substantially affected:** this refusal to supply affects this person's business substantially;
- **insufficient competition among suppliers of the product;**
- the person is willing and able to meet the **usual trade terms** of the supplier of the product;
- **the product is in ample supply;**
- the refusal to deal is having or is likely to have an **adverse effect on competition in a market.**

1. Inadequate supply of a product in a market

The first step, as always, is market definition. Market definition will essentially determine the question of whether the complainant is able to obtain an adequate supply of a product in a market. The broader the product or geographic market, the more likely there are alternative sources of supply.

It should not, therefore, be surprising that the two cases in which the Tribunal ordered a remedy are cases where the product market was limited to the particular product that the complainant was unable to obtain: genuine Chrysler parts in *Chrysler*¹¹⁴ and Xerox parts in *Xerox*.¹¹⁵

Broadly speaking, the same approach to market definition is taken under s. 75 as under s. 79. The difficult question faced by the Tribunal in both *Chrysler* and *Xerox* was whether it could define "intermediate" proprietary replacement parts such as "Chrysler parts" or "Xerox parts" as the product market when

¹¹³ For a list of private applications, see the List of Cases Filed by Type on the Tribunal's website (www.ct-tc.gc.ca).

¹¹⁴ *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. 1 (Comp. Trib.).

¹¹⁵ *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

Chrysler and Xerox both competed against other manufacturers in the final auto and photocopier markets. The Tribunal held that it could.¹¹⁶

2. Business substantially affected

This requirement raises two questions: first, what is the relevant business – does the business that is “substantially affected” refer to the “specific line or product” whose supply has been refused; or does it refer to the *entire* business of the complainant? Second, how substantially must the complainant’s business be affected.

In *Chrysler*, the Tribunal answered the first question as follows:

the effect on the entire activity of which the refused supplies are a part should be used.¹¹⁷

This is less than the *entire* business of the complainant; it would exclude different lines of business; but it is more than just the sales of the product whose supply has been refused.

The Tribunal then posed four questions that assist in answering both questions:

- (a) Does the product in issue account for a large percentage of the over-all business?
- (b) Is the product easily replaced by other products sold by the business?
- (c) Does the sale of the product use up capacity that could be devoted to other activities?
- (d) Is the product used or sold in conjunction with other products and services so that the effect on the over-all results of the business may be much greater than indicated by the volume of the product purchased?¹¹⁸

In *Chrysler*, the Tribunal initially agreed with Chrysler that the relevant business was the complainant’s business of exporting auto parts, not his business of exporting Chrysler Canada auto parts.¹¹⁹ But the Tribunal then found that the

¹¹⁶ See in particular the Tribunal’s discussion of this point in *Xerox* at 108-112.

¹¹⁷ *Chrysler*, at 18.

¹¹⁸ *Chrysler*, at 18.

¹¹⁹ *Chrysler*, at 18.

complainant's sales of other products was totally unrelated to his sales of Chrysler parts.¹²⁰ Effectively the sales of Chrysler parts were a discrete business. Thus it did not matter that his sales and profits increased in the years after Chrysler cut him off. In *Xerox*, the complainant's business had three aspects, but all involved Xerox copiers and required Xerox parts.

The business that is substantially affected must be an existing business; it is unlikely that s. 75 would apply where someone wanted to enter a new business but was prevented from doing so by a failure to obtain adequate supplies of some product.

3. Because of inadequate competition

Section 75(1)(b) requires that the complainant's inability to obtain adequate supplies of the product be *because of insufficient competition among suppliers*. This imports two requirements: first, at the time of the refusal to supply, a "particular market situation must exist"¹²¹, namely, "insufficient competition among suppliers". A market of many suppliers acting independently would not involve insufficient competition; a market with a monopoly supplier would.¹²²

The second requirement is that the insufficient competition must be the cause of the complainant's inability to obtain adequate supplies; that is, "the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market".¹²³

This causation requirement opens the door to a legitimate business justification defence. For example, if the refusal to supply is motivated by a manufacturer's changes to its distribution system, then the requirement may not be met.¹²⁴ However, a change to a distribution system whose goal is to thwart competition, will not be a legitimate business justification.

¹²⁰ *Chrysler*, at 19.

¹²¹ *Xerox*, at 116.

¹²² *Xerox*, at 116-117. Xerox argued that the use of the plural "suppliers" in s. 75(1)(b) meant that a single supplier market was not caught by the section. This was really a variation on its argument that the market was the final market for photocopiers. The Tribunal rejected this contention, holding that the plural "suppliers" includes the singular.

¹²³ *Xerox*, at 116.

¹²⁴ *Xerox*, at 119; *Chrysler*, at 26-27. Chrysler argued that it was making overall changes to its distribution system, but it failed to lead sufficient evidence. The Tribunal also noted that Chrysler would not be disadvantaged by an order to supply the complainant.

The conduct of the complainant may also trigger a legitimate business justification. If the complainant was obtaining product in violation of the manufacturer's existing distribution policies, or was violating the terms under which it acquired the product by, for instance selling the product in markets it was not authorized to sell it in, then the manufacturer may be justified in cutting the complainant off.¹²⁵ Similarly, if what the complainant was doing was illegal, the manufacturer may be justified in cutting the complainant off.¹²⁶

Indeed, enforcement of existing contracts or distribution policies will likely to be treated more sympathetically by the Tribunal than changes to distribution policies. Changes to distribution policies by a dominant supplier are more likely to raise suspicions that they are designed to reduce competition; and even if they are not, the supplier will always be met with the argument that grandfathering the complainant would not harm it.¹²⁷

4. Pre-conditions to relief: usual trade terms and ample supply

Sections 75(1)(c) and (d) establish two preconditions to the complainant's obtaining any relief. The complainant must be "willing and able to meet the usual trade terms of the supplier or suppliers of the product", and the product must be in ample supply. There is no jurisprudence on these requirements; they were not in dispute in either *Chrysler* or *Xerox*.

¹²⁵ *Xerox*, at 114-115; *Chrysler*, at 24-26. Xerox alleged that the complainant obtained parts by subterfuge, but the evidence did not establish this. Chrysler cited concerns about diversion, or grey-marketing of its parts, but the evidence did not support this. The Tribunal expressed some sympathy with Chrysler not wanting to compete with the complainant to supply its own dealers with its parts (at 26).

¹²⁶ In March 2003, the Bureau announced it was not proceeding against GlaxoSmithKline for cutting off pharmacies that were exporting its prescription drug products from Canada to the US. The Bureau stated: "The US Food and Drug Administration has informed the Competition Bureau that these exports contravene US law. The civil provisions of Canadian competition law pertaining to refusal to supply and market restrictions generally recognize that suppliers may set the terms and conditions of sales to businesses provided that they have reasonable business justification. From the Bureau's perspective, the fact that these cross-border sales violate US law supports the position that GSK has a reasonable business justification for blocking the exports, while continuing to supply the Canadian market." See: Competition Bureau Press Release, "Competition Bureau Responds to Complaints Regarding Supply of Canadian-Based Internet Pharmacies", March 31, 2003, available on the Bureau's website. The actions of pharmaceutical companies in cutting off pharmacies that were exporting their products to the US have resulted in several applications for leave to commence a private application under s. 75.

¹²⁷ *Chrysler*, at 26-27.

5. Adverse effect on competition

Section 75(1)(e) requires that the refusal to deal “is having or is likely to have an adverse effect on competition in a market”. This requirement was enacted after *Chrysler* and *Xerox* were decided; it was introduced in 2002 along with amendments allowing private applications.

The phrase “adverse effect on competition” suggests that something less than a substantial lessening or prevention of competition is required. Merely some lessening or prevention of competition ought to suffice. The adverse effect on competition may be felt in a different market from the market that includes the product that the complainant is unable to obtain. Xerox’s goal in restricting the supply of parts was preventing competition in the market for servicing photocopiers.¹²⁸

The adverse effect on competition must, however, be felt in Canada. The Act does not protect competition outside of Canada, other than indirectly. *Chrysler* would likely have been decided differently had this requirement been in force, since the business of the complainant that was impacted consisted entirely of *exports*.

6. Tribunal’s residual discretion

In *Chrysler*, the Tribunal discussed its discretion to refuse an order even though all of the statutory requirements are met. However, most of the factors it discussed under this heading relate to whether Chrysler had a legitimate business justification for refusing to supply the complainant.¹²⁹ These factors should more properly be considered in connection with the causation requirement in s. 75(1)(b).

The language of s. 75 does suggest the existence of some discretion to refuse an order: it says the Tribunal “may” order a supplier to accept the complainant as a customer. However, this discretion must be very narrow, given that most of the relevant considerations will already have been canvassed in determining whether the elements of s. 75 are met.

The Act’s purpose clause may be relevant to any exercise of discretion. In *Xerox*, the Tribunal noted that one of the purposes of the Act is “to ensure that

¹²⁸ *Xerox*, at 97. Although *Xerox* was decided before the “adverse effect on competition” requirement was added, it is clear from the decision that Xerox’s practice was having an adverse effect on competition.

¹²⁹ *Chrysler*, at 24-27.

small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy”¹³⁰

7. Remedy

The remedy available under s. 75 is narrow: the Tribunal can order any supplier of the product (not necessarily the one that cut the complainant off)¹³¹ to accept the complainant as a customer on usual trade terms.

The usual trade terms requirement is important. An order requiring a supplier to supply a product that does not set out the terms of supply will likely be ineffective; the supplier could frustrate it by imposing unattractive terms. But any other terms other than the supplier’s usual trade terms is unfair to the supplier.

“Trade terms” is defined narrowly in s. 75(3) as “terms in respect of payment, units of purchase and reasonable technical and servicing requirements”. This means that usual trade terms would not include any other conditions attached to the sale of the product, even if those conditions are imposed on all buyers. For example, restrictions on where or to whom the buyer can re-sell the product would not be usual trade terms. Nor would it include the terms imposed on the complainant before it was cut off. Thus, in *Chrysler*, before he was cut off, the complainant bought parts under the condition that he not divert them back to North America. In making its order the Tribunal was unable to impose this condition on him, with the result that he obtained the right to buy the parts on less restrictive terms than the terms he had accepted previously.¹³²

The definition of “trade terms” leaves open the question of timing: are the usual trade terms that the complainant must meet the terms in effect at the time the order is made, or at the time its supply was cut off? The language of s. 75 suggests that it is the usual trade terms at the time the order is made that are relevant. This is because the order can be made against any supplier, not just the supplier that cut off the complainant. Also, the purpose of s. 75 is not to freeze suppliers’ trade terms. But *Chrysler* was ordered to accept the complainant as a customer on the trade terms that existed *before* it cut him off.¹³³ The Tribunal, perhaps inadvertently, prevented *Chrysler* from ever changing the usual trade terms for the sale of its parts to the complainant.

¹³⁰ *Competition Act*, s. 1.1; *Xerox*, at 119.

¹³¹ The Tribunal has never ordered a supplier other than the one that cut off the complainant to supply the complainant.

¹³² The Tribunal expressed frustration with its inability to do so, at 28.

¹³³ *Chrysler*, at 28.

Moreover, the Tribunal is unable to impose a time limit on its order under s. 75.¹³⁴ An application under s. 106 is the only way to vary or terminate an order under s. 75.

The rigidity of the remedies available under s. 75 should provide a strong inducement to suppliers to negotiate a resolution with the complainant.

8. Intellectual property

Section 75 does not contain any express provisions dealing with intellectual property.

“Product” is a defined term in the Act. It includes a “article” and a “service”, both of which are also defined terms. “Article” means every kind of real and personal property; “service” includes every kind of service. Intellectual property is a kind of personal property, and thus, an “article” and therefore a “product”.

But, the Tribunal held in *Warner Music*, copyright licences are not a “products”.¹³⁵ The explanation of the Tribunal’s decision may lie in the fact that licences to intellectual property are not things that sit on a shelf. Until a contract creating a licence is entered into, there is no licence, and thus no property (other than the intellectual property itself), article or product. Thus, licensing intellectual property is not akin to selling a product; it is akin to *making* it.

Nevertheless, the Tribunal’s decision presents some difficulties. There is, arguably a difference between a company that *uses* intellectual property in its business, and a company whose business it is to *license* intellectual property. For instance, most people would conceive of software, musical recordings, or movies on DVD as “products” that they can buy in the store. However, what is for sale is in fact only a licence to use the software, musical recording, or movie. This issue was actually present in *Warner Music*. In that case, Warner Music Canada Ltd. refused to grant BMG, a mail-order record club, licences to make sound recordings from its master recordings. Warner Music did grant such licences to Columbia House, a mail-order record club of which it owned half.

The *Xerox* case also had the potential to raise intellectual property issues. The policy Xerox implemented in Canada was developed in the US. This policy spawned litigation there. In early 2000, the US Court of Appeals for the Federal

¹³⁴ *Chrysler*, at 28.

¹³⁵ *Canada (Director of Investigation and Research) v. Warner Music* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.).

Circuit dismissed an action by ISOs, holding that Xerox was entitled to refuse to supply the parts to the ISOs because they were covered by patents.¹³⁶ This issue was not raised in the Canadian case.¹³⁷

IV Exclusive dealing, tied selling and market restriction

Section 77 groups together three forms of restrictive practices that suppliers can impose on their customers: exclusive dealing, tied selling, and market restriction.

The basic rule is that the Tribunal can prohibit these practices if:

1. they are engaged in by a major supplier of a product in a market *or* are widespread in a market;
2. in the case of exclusive dealing and tied selling, they are likely to have exclusionary effects such as impeding entry or expansion; and
3. as a result, are likely to lessen or prevent competition substantially.

There have been only two decided cases under s. 77. Both were primarily abuse of dominance cases where s. 77 was also pleaded: *NutraSweet*, which involved exclusive dealing and tied selling, and *Tele-Direct*, which involved tied selling. The fact that these two cases are primarily abuse of dominance cases is probably no accident: cases where exclusive dealing, tied selling or market restrictions raise issues are likely to be cases where the supplier is dominant and these practices amount to anti-competitive acts.

Indeed, exclusive dealing, tied selling and market restriction are not always bad. They can be pro-competitive and efficiency-enhancing.

1. Tied selling

(a) Definition of tied selling

Tied selling, as traditionally defined, occurs when a supplier sells one product only on condition that the customer also buy a second product. The first product (the one the customer wants to buy) is called the “tying product”. The

¹³⁶ *In re Independent Service Organizations antitrust litigation*, 203 F.3d 1322 (Fed. Cir., 2000)

¹³⁷ It may be that differences between Canadian and US patent régimes explain this.

second (the one the customer is forced to buy) is called the “tied product”.¹³⁸ The definition in s. 77(1) is somewhat broader. It reads as follows:

“tied selling” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the “tying” product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) 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, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Under the statutory definition, tied selling can be both positive or negative. Positive tied selling is where the customer is required to purchase the tied product along with the tying product. It involves the *supplier bundling* two products. Negative tied selling is where the customer is prohibited using or distributing certain products *in conjunction with the tying product*. It involves the supplier telling the *customer it cannot bundle* two products.

The definition also has two branches. Under the first, in paragraph (a), the tied selling is a condition of supply. Under the second, in paragraph (b), it is enough that the supplier induced the customer to accept the tie. In *Tele-Direct*, the Tribunal interpreted the word “condition” broadly; the question is whether the customer is effectively forced to buy the two products:

¶ 519 We see no reason to conclude that the references in the section to “conditions” or even “terms and conditions” require that these be embodied in an explicit contractual document. As we understand this requirement, it is to determine that customers are effectively forced or coerced to take the two products, which have been determined

¹³⁸ *Tele-Direct*, at ¶304.

to be separate products, from the supplier of the tying product rather than acquiring only the tying product from that source and getting the tied product from someone else. This obviously can occur where there is an explicit contractual requirement to that effect. It may, however, also be equally present where there is a discount or other advantage that constitutes an inducement to acquire the two from the same source. The “conditions” or coercion referred to in the section mean more than contractual terms; they may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement.¹³⁹

(b) Two products requirement

A fundamental requirement of tied selling is that there be two products.¹⁴⁰ The tying product and tied product must be two distinct products. If they are not, then there is really one product, and no tied selling. Determining whether there is one product or two is an exercise in market definition. In *Tele-Direct*, the Tribunal adopted the “single product test” from the US Supreme Court’s decision in *Jefferson Parish Hospital District No. 2 v. Hyde*:

... Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.¹⁴¹

This test involves two questions: first, is there a demand for the products as separate products? Second, is it efficient to separate the products?¹⁴² This

¹³⁹ *Tele-Direct*, at ¶519. This must be taken as overruling the Tribunal’s interpretation in *NutraSweet* of the same words in the definition of exclusive dealing as requiring that the supplier must have actually refused to supply or threatened to refuse to supply unless the buyer agrees to the tie. The Tribunal relied on *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 822 F.Supp. 145 (S.D.N.Y., 1993): “There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has” (at 157).

¹⁴⁰ *Tele-Direct*, at ¶337.

¹⁴¹ 466 U.S. 2, at 21-22, as quoted in *Tele-Direct* at ¶351.

¹⁴² *Tele-Direct*, at ¶353.

second question creates an implied efficiency defence. Even if there is a demand for separate products, if efficiency is the reason they are bundled, there is one product, not two.¹⁴³

2. Exclusive dealing

The statutory definition of exclusive dealing is as follows:

“exclusive dealing” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

Exclusive dealing similar to tied selling. It too has a positive and negative sense. The positive form occurs where the supplier tells the customer it must deal exclusively or primarily in the supplier’s products if it wants any of them. The negative form occurs where the supplier tells the customer that if it wants any of the supplier’s products, the customer must not deal with certain other products.

Exclusive dealing also has two branches, like tied selling: where the exclusivity is a condition of supply (paragraph (a)), and where the supplier induces exclusivity (paragraph (b)). The discussion above about the meaning of “condition” in the definition of tied selling applies to exclusive dealing.

In abuse of dominance cases, the Tribunal has discussed a number of “inducements to exclusivity”, including financial and other inducements to exclusivity;¹⁴⁴ meet or release, right of first refusal, or right to compete clauses;¹⁴⁵ and most-favoured-nation clauses.¹⁴⁶

¹⁴³ *Tele-Direct*, at ¶337.

¹⁴⁴ *NutraSweet; Nielsen*.

3. Market restriction

The statutory definition of market restriction is as follows:

“market restriction” means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

Market restrictions most often take the form of exclusive geographic areas where a distributor, dealer or retailer can operate. Such exclusive geographic areas are attractive, because the customer will not face competition from other suppliers of the same brand (so-called “inter-brand” competition). The flip side of exclusive territories is a prohibition on selling outside the defined territory. Market restrictions do not usually raise problems, because there is sufficient inter-brand competition. Where, however, there is insufficient inter-brand competition, because one brand, or supplier, is dominant in a market, market restrictions by that supplier might well substantially lessen or prevent competition.

There have been no cases challenging market restrictions.

V Other reviewable matters

The Act contains four other reviewable matters:

- Consignment selling;
- Delivered pricing;
- Foreign judgments and laws;
- Refusal to supply by foreign supplier

None of these reviewable matters have been the subject of a case before the Tribunal, whether contested or on consent.

¹⁴⁵ *NutraSweet*, at 42-43.

¹⁴⁶ *NutraSweet*, at 42-43.

1. Consignment selling

Section 76 provides that the Tribunal can prohibit consignment selling by a supplier who uses the practice to control the price at which a dealer resells the product, or to discriminate between consignees or dealers.

2. Delivered pricing

Sections 81 allows the Tribunal to order a supplier to stop using delivered pricing where:

- The supplier is a major supplier of an *article* in a market, *or* the practice is widespread in a market; and
- A customer or prospective customer is denied an advantage that would otherwise be available to it.

The definition of delivered pricing in s. 80 is contorted. It is phrased in the negative, and very narrowly. For delivered pricing to exist, the supplier must already have a practice of delivering an article to a customer – “A” – at a certain place. Another customer – “B” – must ask the supplier to deliver the same article to it, at the same place as it delivers to customer B. If the supplier refuses to deliver to customer A at this place on the same terms as it delivers to customer A, then it is “delivered pricing”. If B wants the article delivered to a different place, it will not be price discrimination, even if the price is discriminatory once transport costs are netted out. In practice, “delivered pricing” is only likely where the customers take delivery at the supplier’s place of business.

What this definition really appears to be describing geographic price discrimination, that is, the practice of discriminating between customers based on where they are located. Suppliers can do this where transport costs are high; they can “price up” to what it would cost their customers to buy products from more distant suppliers.¹⁴⁷

3. Foreign judgments and laws

Sections 82 and 83 contain provisions intended to defend the Canadian economy from foreign judgments or laws that adversely affect the Canadian economy. The Tribunal can order that such judgments or laws not be implemented in Canada.

¹⁴⁷ See *CWS*, where the Tribunal found that landfills price in this way.

4. Refusal to supply by foreign supplier

Section 84 provides that where a supplier outside of Canada refuses to supply, or discriminates against a customer (customer “B”), at the behest of another customer in Canada (customer “A”), the Tribunal can order customer A to supply customer B with the product, or to cease dealing in the product.

VI Interim orders

The Act contains three provisions allowing for interim orders in reviewable matters cases:

- **Interim orders after filing of an application:** Section 104 allows the Tribunal to grant interim orders “having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief”. This imports the well-known threefold test of: (1) serious issue; (2) irreparable harm; (3) balance of convenience. Section 104(1) is not available until after an application has been filed. It is available to both the Commissioner and private applicants.
- **Interim orders before filing of an application:** Section 103.3 allows the Tribunal to grant interim orders on *ex parte* application by the Commissioner pending the completion of an inquiry. The relief the Tribunal can order is limited to injunctions prohibiting conduct that could be the subject of an order under one of the reviewable matters provisions. The Commissioner must show irreparable harm to competition or a competitor.
- **Temporary orders (airlines only):** Section 104.1 allows the Commissioner to issue temporary orders against airlines that are suspected of anti-competitive conduct. This provision was added to the Act in 2000 after the merger of Air Canada and Canadian. It has been used once, against Air Canada. The Quebec Court of Appeal struck s. 104.1 down in 2003.¹⁴⁸ At time of writing, this decision is under appeal to the Supreme Court.

¹⁴⁸ *Air Canada v Canada (Attorney General)* (2003), 23 C.P.R. (4th) 129 (Que. C.A.)

VII Enforcement

1. The Bureau

The Bureau's "Civil Matters Branch" enforces the reviewable matters provisions of the Act.

Despite the civil character of the reviewable matters provisions, the same investigative powers are available to the Commissioner as in criminal cases: s. 11 orders for production of documents, oral examinations, and written returns; and search warrants. Wiretaps are not available to the Commissioner in civil cases.¹⁴⁹ However, the overlap between the criminal and civil provisions of the Act, makes it possible that the Commissioner could investigate conduct under a criminal investigation but ultimately choose to bring an application in the Tribunal.

Only the Commissioner can commence applications under the reviewable matters provisions, except for s. 75 and 77, where private applications are possible.

Although this paper focuses on contested cases (because they develop the law), many, if not most, reviewable matters cases are resolved well short of litigation. In its *Conformity Continuum Information Bulletin*, the Bureau describes a three-fold approach to instances of "non-conformity": suasion, consent instruments, and adversarial proceedings.¹⁵⁰

"Suasion" is an informal resolution that can take the form of warnings, or where the target of the investigation makes voluntary changes to its conduct that satisfy the Bureau. The Bureau has closed inquiries following such changes without requiring any formalities.¹⁵¹

Consent instruments most frequently take the form of consent orders or registered consent agreements.¹⁵² However, the Bureau has accepted undertakings in the past.¹⁵³

¹⁴⁹ This is because the Commissioner must obtain wiretaps under s. 184.2 of the *Criminal Code*.

¹⁵⁰ Competition Bureau, *Conformity Continuum Information Bulletin*, pp. 9-12 ("*Conformity Continuum*").

¹⁵¹ See for instance, "IKO Industries Ltd. Modifies its Loyalty Program Following Competition Bureau Investigation", Competition Bureau Press Release, March 31, 2003.

¹⁵² In 2002, a new s. 105 was enacted allowing consent agreements to be registered. Consent agreements do not need the Tribunal's approval. Under the former s. 105, the Tribunal had to approve consent orders.

¹⁵³ See: "Heinz Canada signs undertaking regarding jarred baby food and infant cereal", Competition Bureau Press Release, August 1, 2000.

In the *Conformity Continuum*, the Bureau lists some of the factors it considers in choosing between these different enforcement tools are:

- The seriousness and deliberateness of the behaviour
- The economic impact caused by the behaviour
- Whether the practice is widespread, and there is a need to send a signal to the industry
- The degree of assistance provided by the party to the Bureau in its investigation
- Whether the party voluntarily changes its conduct
- Prior history of contravention of the Act by the party

The last few of these factors really amount to whether the Bureau believes the information given to it by the party, and trusts any promises the party may have made. For this reason it is often (but not always) in the interests of parties to be completely co-operative and open with the Bureau.

2. Private enforcement

There is only limited private enforcement of the reviewable matters provisions available. In 2002, amendments to the Act permitted applications for leave to commence a private application under s. 75 (refusal to deal) and 77 (exclusive dealing, tied selling, and market restriction).

Several applications for leave have been filed, all seeking leave to commence a private application under s. 75.

The threshold for obtaining leave set out in s. 103(7) is a low one. The applicant is merely required to “advance sufficient credible evidence ... that there is reasonable possibility” that (1) its business has been directly and substantially affected and (2) the practice in question could be the subject of an order under s. 75 or 77.¹⁵⁴ This is similar to the “serious issue to be tried” test.

Moreover, in *Barcode* Lemieux J. held that in assessing whether the practice “could be subject to an order” under s. 75 or 77, the Tribunal is not required to have reason to believe that the practice has or is likely to have an

¹⁵⁴ *Barcode Systems Inc. v. Symbol Technologies Canada ULC* (2004), 29 C.P.R. (4th) 554 (Comp. Trib.) at 557-558; *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Comp. Trib.) at ¶14.

adverse effect on competition in a market.¹⁵⁵ Lemieux J. did not elaborate on how he reached this conclusion.

There are two ways of reading the phrase “...by any practice referred to in one of those sections that could be subject to an order under that section” in s. 103.1(7). Either it is simply a shorthand way of designating the kinds of practices that can be the subject of orders under s. 75 or 77, or it directs the Tribunal to consider whether a serious issue has been raised that *all* of the elements necessary to the making of an order under s. 75 or 77 are met. This author prefers the second interpretation; but both are reasonable, given the language of s. 103.1(7). Lemieux J.’s decision in *Barcode* is under appeal at the time of writing.

Litigants in private lawsuits occasionally try to raise a “breach” of the reviewable matters provisions to invalidate a contract or otherwise attack the conduct of the other party. The reviewable matters provisions cannot be used in this way. The practices described in these provisions are *not* illegal. Unlike criminal provisions, which forbid certain conduct, the reviewable matters provisions simply allow the Tribunal to make an order when certain practices are having anti-competitive effects. The reviewable matters provisions do not forbid anything. It only becomes illegal for a particular person to engage in these practices if the Tribunal orders him or her to stop the practice.

3. The Competition Tribunal

The Tribunal is a special court that deals with competition matters. Established by the *Competition Tribunal Act*,¹⁵⁶ the Tribunal has exclusive jurisdiction over reviewable matters and mergers, and shares jurisdiction with the Federal Court and provincial superior courts over deceptive marketing practices.

The Tribunal is composed of judges from the Federal Court and lay members. The lay members are usually economists, accountants, or business people. As a result, the Tribunal has expertise in economics and commerce (and is entitled to deference on appeal).¹⁵⁷

The Tribunal is technically an administrative tribunal, and s. 9(2) of the *Competition Tribunal Act* directs that all proceedings before it be dealt with “informally and expeditiously”. In practice, however, preparing for and conducting a Tribunal hearing is very similar to preparing for and conducting a

¹⁵⁵ *Barcode*, at 556-557.

¹⁵⁶ R.S.C. 1985, c. 19 (2nd Supp.).

¹⁵⁷ *Canada (Dir. Of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, (S.C.C.).

complex commercial trial. There are of course, differences. Chief among them are:

- Tribunal cases progress much faster than civil cases in superior courts.
- The presence of expert economists and others on the Tribunal means that experts (and other witnesses) can expect more active bench that asks probing and sometimes technical questions.
- The Tribunal is open to novel ways of presenting evidence. For instance, in *Air Canada*, some witnesses testified in panels. The Tribunal rules provide for panels of opposing experts to testify together.¹⁵⁸
- Tribunal rules that apply to reviewable matters cases limit the Commissioner's disclosure obligations. Examinations for discovery are available only with leave of the Tribunal. The same rules also require parties to file "disclosure" statements shortly after delivering their pleadings setting out the documents on which they intend to rely, will-say statements, and the economic theory relied on. Effectively, the applicant must be ready to go to trial before filing the application.¹⁵⁹
- The Tribunal has a strong preference for "electronic hearings" where all documents are projected onto computer screens. This makes preparing for and conducting the hearing more efficient.
- The Tribunal staff is easily reachable and very helpful.

¹⁵⁸ *Competition Tribunal Rules*, SOR/94-290, r. 48.1-48.2.

¹⁵⁹ R. 4.1,4.2, 5.1, 5.2, 13.1, 21(2)(d.1).

Appendix A - Reviewable Matters Provisions

PART VIII - MATTERS REVIEWABLE BY TRIBUNAL

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

Consignment Selling

Consignment selling

76. Where, on application by the Commissioner, the Tribunal finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale, for the purpose of

(a) controlling the price at which a dealer in the product supplies the product, or

(b) discriminating between consignees or between dealers to whom he sells the product for resale and consignees,

the Tribunal may order the supplier to cease to carry on the practice of consignment selling of the product.

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77. (1) For the purposes of this section,

“*exclusive dealing*” «*exclusivité*»

“exclusive dealing” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

“*market restriction*” «*limitation du marché*»

“market restriction” means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

“*tied selling*” «*ventes liées*»

“tied selling” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the “tying” product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) 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, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is

necessary to restore or stimulate competition in relation to the product.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3.

Abuse of Dominant Position

Definition of “anti-competitive act”

78. (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:

(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 part 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;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to

facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(j); and

(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than \$15 million.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

- (a) the frequency and duration of the practice;
- (b) the vulnerability of the class of persons adversely affected by the practice;
- (c) injury to competition in the relevant market;
- (d) the history of compliance with this Act by the entity; and
- (e) any other relevant factor.

Purpose of order

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of

any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45 or 92

(7) No application may be made under this section against a person

- (a) against whom proceedings have been commenced under section 45, or
- (b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

2002, c. 16, s. 11.5.

Delivered Pricing

Definition of “delivered pricing”

80. (1) For the purposes of section 81, “delivered pricing” means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier’s customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of “trade terms”

(2) For the purposes of subsection (1), the expression “trade terms” means terms in respect

of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Delivered pricing

81. (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

Exception where trade-mark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trade-mark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign Judgments and Laws

Foreign judgments, etc.

82. Where, on application by the Commissioner, the Tribunal finds that

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign laws and directives

83. (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(a) as a result of

(i) a law in force in a country other than Canada, or

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a country other than Canada,

and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 82(b)(i) to (iv), or

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,

the Tribunal may, by order, direct that

(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(d) in a case described in paragraph (a), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs 82(b)(i) to (iv).

Limitation

(2) No application may be made by the Commissioner for an order under this section against a particular company where proceedings have been commenced under section 46 against that company based on the same or substantially the same facts as would be alleged in the application.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign Suppliers

Refusal to supply by foreign supplier

84. Where, on application by the Commissioner, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the “first” person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the “second” person) by whom or on whose behalf or for whose benefit the buying power was exerted

(a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or

(b) not to deal or to cease to deal, in Canada, in that product of the supplier.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

General

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) makes an application under section 75 or 77, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

Extension or revocation of order

(5) The Tribunal may, on application by the Commissioner on 48 hours notice to each person against whom the interim order is directed,

(a) extend the interim order once or twice for additional periods of 35 days each; or

(b) rescind the order.

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 35-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(b) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1)(a) or (b).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), an interim order has effect until the Tribunal makes an order under that subsection.

Confirming or setting aside interim order

(7) A person against whom the Tribunal has made an interim order may apply to the Tribunal in the first 10 days during which the order has effect to have it varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the situations set out in paragraphs (2)(a) to (c) existed or are likely to exist, make an order confirming the interim order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fix the effective period of that order for a maximum of 70 days, beginning on the day on which the order confirming the interim order is made; and

(b) if it is not satisfied that any of the situations set out in paragraphs (2)(a) to (c) existed or is likely to exist, make an order setting aside the interim order.

Notice

(8) A person who makes an application under subsection (7) shall give the Commissioner 48 hours written notice of the application.

Representations

(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

2002, c. 16, s. 12.

Interim order

104. (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may

issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13.

Temporary order

104.1 (1) The Commissioner may make a temporary order prohibiting a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act or requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person if

(a) the Commissioner has commenced an inquiry under subsection 10(1) in regard to whether the person has engaged in conduct that is reviewable under section 79; and

(b) the Commissioner considers that in the absence of a temporary order

(i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, or

(ii) a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue or suffer other harm that cannot be adequately remedied by the Tribunal.

Notice not required

(2) The Commissioner is not obliged to give notice to or receive representations from any person before making a temporary order.

Notice to persons affected

(3) On making a temporary order, the Commissioner shall promptly give written notice of the order, together with the grounds for it, to every person against whom it was made or who is directly affected by it.

Duration of temporary order

(4) Subject to subsections (5) and (6), a temporary order has effect for 20 days.

Extension and revocation

(5) The Commissioner may extend the 20-day period for one or two periods of 30 days each or may revoke a temporary order. The Commissioner shall promptly give written notice of the extension or revocation to every person to whom notice was given under subsection (3).

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 30-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the temporary order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the temporary order is made.

Extension of temporary order

(5.3) The Tribunal may order that the effective period of the temporary order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(b) the information was requested within the initial period that the temporary order had effect, within the first 30 days after an order extending the temporary order under subsection (5) had effect, or within the first 30 days after an order extending the temporary

order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under section 79.

Terms

(5.4) An order extending a temporary order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Effect of application

(5.5) If an application is made under subsection (5.1), the temporary order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), the temporary order has effect until the Tribunal makes an order under that subsection.

Confirmation

(7) A person against whom the Commissioner has made a temporary order may, within the period referred to in subsection (4), apply to the Tribunal to have the temporary order varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order confirming the temporary order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fixing the effective period of its order for a maximum of 60 days after the day on which it is made; and

(b) if it is not satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order setting aside the temporary order.

Notice

(8) The applicant shall give written notice of the application to every person to whom notice was given under subsection (3).

Commissioner is respondent

(9) In the event of an application under subsection (7), the Commissioner is the respondent.

Representations

(10) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the temporary order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Prohibition of extraordinary relief

(11) Except as provided for by subsection (7),

(a) a temporary order made by the Commissioner shall not be questioned or reviewed in any court; and

(b) no order shall be made, process entered or proceedings taken in any court, whether by way of injunction, *certiorari*, *mandamus*, prohibition, *quo warranto*, declaratory judgment or otherwise, to question, review, prohibit or restrain the Commissioner in the exercise of the jurisdiction granted by this section.

Powers and duties not affected by order

(12) The making of a temporary order does not in any way limit, restrict or qualify the powers, duties or responsibilities of the Commissioner under this Act, including the Commissioner's power to conduct inquiries and to make applications to the Tribunal in regard to conduct that is the subject of the temporary order.

Registration of orders

(13) The Commissioner shall file each temporary order with the Registry of the Tribunal. Once registered, the order is enforceable in the same manner as an order of the Tribunal.

Duty of Commissioner

(14) When a temporary order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the

investigation arising out of the conduct in respect of which the temporary order was made.

Immunity

(15) No action lies against Her Majesty in right of Canada, the Minister, the Commissioner, any Deputy Commissioner, any person employed in the public service of Canada or any person acting under the direction of the Commissioner for anything done or omitted to be done in good faith under this section.

2000, c. 15, s. 15; 2002, c. 16, s. 13.1.

Consent agreement

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3 or a temporary order under section 104.1, may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the

application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.

Consent agreement -- parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75 or 77 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

2002, c. 16, s. 14.

Evidence

107. In determining whether or not to make an order under this Part, the Tribunal shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the Tribunal under this Act.

R.S., 1985, c. 19 (2nd Supp.), s. 45.