

Black Letter Competition Law: The Tribunal Confirms the Rules

James Musgrove, McMillan LLP
With the Assistance of Devin Anderson

Introduction

Competition or antitrust law can be a frustrating thing. It is frustrating for a number of reasons, but lack of certainty is high on the list. For one, it seems to contain inherent tensions and contradictions. It is designed to promote aggressive competition. Collaboration when you ought to compete can constitute a serious criminal offence. On the other hand, competing too aggressively and successfully can also be sanctioned. That is challenging.

Secondly, competition law is highly situational. What is perfectly proper conduct for a firm in one circumstance may be impermissible for the same firm in different circumstance. “It depends”, and “I need to know more facts” are not entirely satisfactory answers for business people wanting to understand and comply with the law. Nevertheless, that is the inevitable reality of a law which ultimately derives its relevance from economic rules. It really does depend whether or not you have market power. It really does matter what circumstances firms face in a market. These are the frustrating but inevitable challenges of competition law.

Added to these challenges – which apply anywhere in the world – are a couple of additional Canadian specific challenges. One is the 2009/10 amendments.¹ Many of the core concepts which had been part of Canada’s law for decades – and in some cases more than a century – were fundamentally altered, with the inevitable impact on certainty and probability. As well, Canada lacks a rich competition law jurisprudence. Many statutory provisions have had no or very limited judicial consideration. That is true of even those that survived the 2009/10 amendments. Provisions amended at that time have received virtually no meaningful interpretation in the few intervening years.

Given that situation, certainty is a rare commodity. It is also (and, as the economists would remind us, as a consequence) valuable – both to businesses seeking to comply with the law, and to government enforcers, who necessarily depend on voluntary compliance as the principal method to enforce these laws. A particular focus of the work of the Commissioner of Competition has therefore been to promote certainty. Compliance with law requires that the law be known – or knowable. Over the years the Commissioner has promoted certainty, through a significant series of guidelines, bulletins, speeches and other interpretative aids.

¹ *Budget Implementation Act, 2009, S.C. 2009, c. 2.*

However in a couple of recent cases, the Commissioner has sought expansive and novel interpretations of provisions of the *Competition Act*. Over the last few months the Competition Tribunal rejected these approaches, thereby providing the Canadian business community with what in these instances the Commissioner did not – a modicum of certainty and predictability. A bit of black letter competition law.

The Toronto Real Estate Board Case

The abuse of dominant market position provisions emerged largely unchanged from the recent amendment – as only AMPs were above². While cases have subsequently been filed seeking these Administrative Monetary Penalties³, they were not sought in the case of the *Toronto Real Estate Board (TREB)*⁴. While the *TREB* case did not involve issues related to statutory amendments, it did involve an attempted novel interpretation of the abuse of dominance provisions.

The essential requirements for a finding of abuse of dominant market position are three fold. First, a firm has to be found to completely or substantially control the business⁵. This has been equated by the Tribunal, in a long line of cases, to having market power in a relevant product and geographic market⁶. Secondly, the conduct challenged must be found to lead to a substantial prevention or lessening of competition⁷. In a string of cases this has been found to mean that the conduct has led to increase or preservation or entrenchment of the firm's market power⁸. The third requirement is that the firm has engaged in a practice of anti-competitive acts⁹. While the statute contains an illustrative list of such acts¹⁰ the list is expressly not comprehensive, and the Tribunal has so found¹¹. What the Tribunal has said, in a number of cases, however, is that anti-competitive acts have to be engaged in for an anti-competitive

² *Competition Act*, R.S.C., 1985, c. C-34 [*Competition Act*], ss. 78 and 79.

³ *The Commissioner of Competition v. Direct Energy Marketing Limited*, CT-2012-003; *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, CT-2012-002.

⁴ *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003, Notice of Application.

⁵ *Competition Act*, s. 79(1)(a).

⁶ M. Katz, "Abuse of Dominance" in James Musgrove, ed., *Fundamentals of Canadian Competition Law* (Toronto: Thomson Carswell, 2007) [*Fundamentals of Canadian Competition Law*] at pp. 151-154; see also e.g. *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32, C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*] at paras. 69-82; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) at paras. 96-98 and *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) [*Tele-Direct*] at paras. 224-225.

⁷ *Competition Act*, s. 79(1)(c).

⁸ *Fundamentals of Canadian Competition Law* at pp. 157-160; see also *NutraSweet* at paras. 137-156; *Tele-Direct* at para. 523.

⁹ *Competition Act*, s. 79(1)(b).

¹⁰ *Competition Act*, s. 78.

¹¹ See e.g. *Laidlaw* at para. 121.

purpose which is conduct aimed at a competitor which is disciplinary, exclusionary or predatory¹². Those have been the three long standing requirements for a finding of abuse of dominant market position.

In September of 2012, about a year after the then Commissioner filed her case against the Toronto Real Estate Board (and six months after issuing Draft Guidelines,¹³ which were similar in many respects to the Final Guidelines) the Commissioner of Competition issued revised Enforcement Guidelines¹⁴ with respect to the abuse of dominance provisions of the *Competition Act*. These Guidelines formally replaced the previous Guidelines¹⁵ issued 11 years earlier, and also replaced extensive Draft Guidelines¹⁶ which had been promulgated in 2009 but never finalized. The Guidelines, both in draft and final form were the subject of considerable commentary. One of the concerns expressed was that they contained considerably less detail than those which they replaced¹⁷. The comments also noted that the Guidelines signalled a shift in the Bureau's enforcement approach to joint abuse of dominance, and in particular the question of whether conscious parallelism can be sufficient to constitute a joint abuse of dominance¹⁸. Most relevant for the *TREB* case, however, was the question of the necessary intent to constitute an anti-competitive act. As noted, the jurisprudence determined that to constitute an anti-competitive act the conduct has to be undertaken with the goal of having a negative effect on a competitor which is predatory, exclusionary or disciplinary¹⁹.

This limiting principle – that an anti-competitive act has to be undertaken for a purpose aimed at a competitor – has been determined to exist in virtually all cases of abuse of

¹² See e.g. *NutraSweet* at para. 90; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 64.

¹³ Competition Bureau, *Draft Enforcement Guidelines on the Abuse of Dominance Provisions* (Sections 78 and 79 of the *Competition Act*) (Ottawa: March 22, 2012).

¹⁴ Competition Bureau, *Enforcement Guidelines on The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (Ottawa: September 20, 2012), available online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html> [2012 Guidelines].

¹⁵ Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (Ottawa: July 2001).

¹⁶ Competition Bureau, *Draft Enforcement Guidelines on the Abuse of Dominance Provisions* (Sections 78 and 79 of the *Competition Act*) (Ottawa: January 16, 2009).

¹⁷ Canadian Bar Association, *Enforcement Guidelines: Abuse of Dominance (Competition Act sections 78 and 79)* (May 2012), available online: www.cba.org/cba/submissions/pdf/12-34-eng.pdf; American Bar Association, *Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Canadian Competition Bureau's Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (May 22, 2012), available online: http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_7879_201205.pdf; J. Musgrove, N. Campbell, J Meng, *New Abuse of Dominance Guidelines* (September 2012), available online: <http://www.mcmillan.ca/new-abuse-of-dominance-enforcement-guidelines>.

¹⁸ *Ibid.*

¹⁹ The focus on a competitor is, in some respects unfortunate, in that the primary focus with respect to competition law generally should be on competition, not competitors. Nevertheless, some limiting principle which restricts the range of conduct to which the abuse of dominance provisions apply is necessary if firms with significant market share which compete aggressively and successfully are inevitably not to be subject to challenge.

dominance decided by the Competition Tribunal, and affirmed by the Federal Court of Appeal in the *Canada Pipe*²⁰ case. Nevertheless in the 2012 Guidelines the Bureau stated that: “[W]hile many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose.”²¹ As was noted at the time²², if that approach were accepted it would greatly expand the scope for finding that conduct constitutes abuse of dominance, because it removes the key limiting principle. Any activity by a firm with a meaningful market share and which has the effect of making it harder for others to compete with it could be successfully challenged as abuse of dominant market position²³.

This issue, and this revised approach to the interpretation of the abuse of dominance provisions, articulated after the Commissioner filed her case against TREB, played a key role in the determination of the *Toronto Real Estate Board* case. The case followed on a settlement which the Commissioner had reached the previous year with the Canadian Real Estate Association (CREA)²⁴. In the *CREA* case the Commissioner alleged that multiple listing service rules imposed by CREA constituted an abuse of CREA’s dominant position in the provision of residential real estate services,²⁵ and sought an order prohibiting CREA from adopting, maintaining or enforcing any rules that discriminate against brokers who choose to provide only listing services on MLS or fee-for-service arrangements. Ultimately, CREA consented to the relief sought by the Commissioner and an order was entered that provided that real estate agents could offer more flexible service and pricing options to customers.

In the *TREB* case the Commissioner alleged that TREB and its members substantially or completely controlled the market for the supply of residential real estate brokerage services in the greater Toronto area, and that TREB used its control of its electronic

²⁰ *Canada Pipe* at para. 68.

²¹ *2012 Guidelines*, s. 3.2.

²² *Supra* note 18.

²³ This is not the first time that the Commissioner has sought to amend or change established interpretations while a case is before the Tribunal or the courts. In the *Superior Propane* case, the Commissioner challenged the acquisition by Superior Propane Inc. of ICG Propane Inc.; the Tribunal dismissed the challenge, even though it found that the acquisition would likely substantially lessen and prevent competition, on the basis that the efficiencies generated by the transaction would outweigh its anti-competitive effects (the “efficiencies defence”). At the time the Commissioner’s application was filed, the Bureau’s *Merger Enforcement Guidelines* highlighted the Commissioner’s reliance on the total surplus standard as the methodology used in assessing efficiencies. After the application was filed, speeches by senior Bureau officials articulated a significant deviation from the *Merger Enforcement Guidelines*, noting that “total surplus may not be an all-inclusive measure of the anticompetitive effects that are likely to arise from the merger” and that “it is more appropriate for the Competition Tribunal to determine whether the merger increases aggregate welfare or not” (“The treatment of Efficiencies in Merger Analysis”: remarks given by Gwilym Allen, Assistant Deputy Commissioner of Competition, Economics and International Affairs at the “Meet the Competition Bureau” conference, Toronto, 3 May 1999). The Tribunal was understandably critical of what appeared to some to be a suspiciously timed change in position. See *e.g. Commissioner of Competition v. Superior Propane Inc.*, CT-1998-002, Reasons And Order at paras. 395-397.

²⁴ *The Commissioner of Competition v. The Canadian Real Estate Association*, CT-2010-002, Registered Consent Agreement.

²⁵ *The Commissioner of Competition v. The Canadian Real Estate Association*, CT-2010-002, Notice of Application.

database multiple listing service to enact and interpret rules, policies, agreements excluding competition from involved brokerage firms, and in particular rules prohibiting brokerages from offering a Virtual Office Website (VOW) operation. The Commissioner's concern was that certain brokers sought to provide residential real estate services over the internet through a VOW. VOWs are lower cost than a traditional brokerage operations and the Commissioner alleged that TREB enacted rules to prohibit a brokerage from operating VOWs in order to protect the traditional delivery model.

The Commissioner's application alleged that TREB's substantial or complete control of the supply of residential real estate brokerage services in the greater Toronto area flowed from its ability to enact, interpret and enforce rules, policies and agreements that govern the use of access to the MLS system. She further alleged that the MLS restrictions enacted by TREB constituted a practice of anti-competitive acts the purpose of which was to discipline and exclude innovative brokers who offered VOW services.

On April 15, 2013 the Competition Tribunal dismissed the Commissioner's application, with costs, in an uncharacteristically brief 8 page decision²⁶. In it the Tribunal concluded that the Commissioner failed to meet all three of the requirements of Section 79 of the *Act* – although all essentially for the same reason – that TREB did not compete in the market for residential real estate brokerage services, did not have competitors in that market, and therefore could not have had market power in the market for residential real estate services. The Tribunal found that TREB had not engaged in a practice of anti-competitive acts – for reasons explored in a moment – and consequently the Tribunal found that a practice of anti-competitive acts had not led to the substantial lessening of competition.

The key issue, as noted, was whether or not TREB's policies, particularly with respect to virtual office websites, constituted a practice of anti-competitive acts. The Tribunal noted that the Federal Court of Appeal had determined in the *Canada Pipe* case that for the purposes of Section 79(1)(b) the alleged dominant firm must compete with the firms harmed by the dominant firms practice of anti-competitive acts²⁷. It noted that there were a series of Competition Tribunal cases which affirmed that the purpose common to all anti-competitive acts found in Section 78 is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. In the *TREB* case it was admitted that TREB did not compete with its members, and thus the restrictions on Virtual Office Websites could have negative effect on the competitor required by the provision.

The Tribunal noted the amended Abuse of Dominance Guidelines, and the fact that “the Guidelines also suggest that the Commissioner is not happy with the decision in *Canada Pipe* to the extent that it limits anti-competitive acts to those intended to harm a competitor.”²⁸

²⁶ *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003, Reasons for Order and Order.

²⁷ *Ibid.* at para. 12; *Canada Pipe* at para. 64-65.

²⁸ *TREB* at para. 20.

However, the Tribunal noted that though the Guidelines do not state that the alleged dominant participant need not compete in the relevant market. Consequently, the Tribunal concluded that even on the Commissioner's own Guidelines, which sought to broaden the definition of anti-competitive acts from those defined by the Tribunal or Court, the TREB situation did not fit.

As a result of the foregoing the Commissioner's application was rejected and the traditional rule, that to constitute an anti-competitive act the conduct must be undertaken for an anti-competitive purpose, being a disciplinary, predatory or exclusionary purpose aimed at a competitor, was affirmed. This remains a limiting principle on findings of abuse of dominance. Not any action by a dominant firm which has the effect of reducing competition constitutes abuse of dominance.

The Commissioner, on May 14, 2013, announced an intention to appeal the decision.

The Credit Card Case

Unlike the *Toronto Real Estate Board* case, which was decided based on law which was essentially unchanged from the 2009/10 amendments to the *Competition Act*, the credit card case involved interpretation of a price maintenance provision, which had been until 2009 a criminal offence, but which was re-enacted as a reviewable practice in the amendments²⁹.

In 2009 the law was expressly decriminalized, in response to work which had been done over many years by academics and others³⁰ suggesting that it was illogical to have one criminal vertical practices provision – resale price maintenance – whereas other vertical practices such as tied selling and exclusive dealing were civil and reviewable in nature. This call was reinforced by the Wilson Report³¹. In 2009 Parliament responded to these calls and essentially re-enacted resale price maintenance as a reviewable provision, with largely the same definition of the conduct, but instead of an absolute prohibition it provided that the conduct could be prohibited if the Competition Tribunal found that it led to an adverse effect on competition.

In December, 2010 the Commissioner of Competition filed a case before the Competition Tribunal, relying on this new reviewable price maintenance provision, and alleging that certain rules established by Visa and MasterCard, and in particular the honour all cards and

²⁹ *Competition Act*, s. 76.

³⁰ See e.g. J.A. Van Duzer & G. Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (October 22, 1999).

³¹ Industry Canada, *Compete to Win – Final Report* (Ottawa: June 2008), available online: [http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf).

no surcharge rules established by those systems, constituted price maintenance³². After a full trial lasting some 7 weeks, the Competition Tribunal rejected the Commissioner's position and found that price maintenance laws were not so broad as to comprehend these rules of MasterCard and Visa³³. It also found that even if it was wrong in that regard it would exercise its discretion not to make an order, given the potential for significant unintended consequences of such an order. It also found that in its view the rules did create an adverse effect on competition, but that because the conduct did not constitute price maintenance and because it would exercise the discretion to make an order in any case, no order should be made³⁴.

When the credit card case was launched there was considerable surprise that the Commissioner had chosen to challenge Visa and MasterCard rules pursuant to the price maintenance provision³⁵. The conduct simply did not seem to conform with the generally understood parameters of price maintenance which, in its simplest form, is understood to be directed towards suppliers seeking to dictate resale prices to their distributors. The honour all cards rule and the no surcharge rule say nothing whatsoever about the price merchants charge their customers, and nothing about the price that Acquirers charge merchants. They simply say that if you accept one type of Visa or MasterCard credit card you must accept all such cards, and that if you choose to accept the cards you cannot add a surcharge to consumers who decide to pay with a card.

The Commissioner's theory, was in essence, that the Visa and MasterCard rules softened competition between Visa and MasterCard, which constituted an adverse effect on competition, and that that adverse effect on competition influenced upward discouraged the reduction of prices they charged – or perhaps of interchange they set. The Tribunal considered but rejected this theory. It noted there was nothing in the statutory history or approach to the provision which would suggest this reverse interpretation to the provision. It further determined that requirement to influence upward prices must mean something other than the consequences that flow from the companies exercising market power, otherwise the price maintenance provision would turn into an open ended provision with respect to the exercise of market power and there is nothing in the legislative history, other decisions or commentary supporting such interpretation³⁶. The Tribunal also noted that the Commissioner may have chosen not to bring an application under the abuse of dominance provisions because pursuant to those provisions, as discussed above in relation to the *TREB* case, there must be an intended predatory, exclusionary

³²*The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al*, CT-2010-010, Notice of Application. Note, the author represented MasterCard in the case before the Canadian Competition Tribunal.

³³ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al*, CT-2010-010, Reasons for Order and Order [*MasterCard*].

³⁴ *MasterCard*, para. 393-401.

³⁵ See e.g. B. Zalmanowitz, S. Walker, J. Matsalla, *Visa and MasterCard rules challenged by the Competition Bureau*, Lexology (December 20, 2010), available online: <http://www.lexology.com/library/detail.aspx?g=0db65aa2-2d85-486b-a8d9-b8cbf3734b37>.

³⁶ *MasterCard*, para. 162.

or disciplinary negative effect on a competitor³⁷. However, the Tribunal noted that any gap in the abuse of dominance provision did not justify an overreaching interpretation of Section 76.

In addition to the open ended approach to interpretation of price maintenance which the Commissioner advanced, and which the Tribunal rejected, the Tribunal also found that price maintenance requires that there be a resale of a product for the provision to apply – and it found that in this case credit card systems there was no resale of a product³⁸. Visa and MasterCard provide certain services to transaction acquirers and transaction acquirers provide other services to merchants, but there is no resale of a product between products supplied by MasterCard and Visa to acquirers. For that reason as well the price maintenance provision did not apply.

As noted above, the Tribunal specifically indicated that even if it were wrong in the interpretation of Section 76 it would exercise discretion not to make an order. It noted that an order would be “a blunt instrument and there will be technical hitches, unforeseen consequences, a need for ongoing adjustment and stakeholder consultation.”³⁹ It further noted that the experience in jurisdictions such as Australia and the United Kingdom has shown that concerns will be raised with consumers regarding surcharging and possible gouging⁴⁰. It further noted that changes in one part of the credit card system were likely to have significant unintended consequences in other parts⁴¹. The Tribunal concluded that it was uncertain that a supposed “cure” would not be worse than the “disease”⁴².

In addition to the analysis of the decision set out above, the Competition Tribunal spent considerable time determining whether or not the Visa and MasterCard network rules had resulted in an adverse effect on competition, and it concluded that they had. While we take serious issue that conclusion, given the fact that the decision at the time of writing is subject to appeal we specifically refrain from commenting on that aspect of the case other than to note that it is highly controversial.

Conclusion

The Competition Tribunal, in both the *TREB* and credit card cases, rejected the invitation to give expansive and novel interpretations to the relevant provisions of the *Competition Act*, and instead chose to confirm the traditional interpretations of the abuse of dominance and price maintenance provisions. In this regard, while both decisions were, at the

³⁷ *MasterCard*, para. 138.

³⁸ *MasterCard*, paras. 115-116 and 141-157.

³⁹ *MasterCard*, para. 395.

⁴⁰ *Ibid.*

⁴¹ *MasterCard*, para. 398.

⁴² *Ibid.*

time of writing either subject to appeal or under appeal, and therefore the Court of Appeal or even perhaps the Supreme Court may be ultimate arbiter of the question, the interpretations provided by the Tribunal give guidance and some level of certainty to the business community – although these issues are inherently complex and to some degree uncertain. Nevertheless the Tribunal’s confirmation that to constitute abuse of dominance conduct must be aimed at excluding, deterring or in some way injuring a competitor, and that for price maintenance there must be a resale product and that the adverse effect on competition must flow from the price maintenance, and not the reverse, are important decisions which will be of guidance to the business community as to how lawfully organize ones affairs.

This approach also, it is submitted, provides some good news for those who believe in the importance of competition law enforcement. Competition law is not an open ended mechanism to attack any economic activities which is out of favour: credit card fees, real estate commissions and cell phone charges today; gasoline prices yesterday; who knows what tomorrow. It is, rather, a coherent doctrine which seeks to promote both consumer welfare and efficiency – recognizing the inherent tension in that statement – within a reasonably well defined set of rules and principles. Unmoored from those rules and principles the doctrine risks becoming something for everyone, and ultimately perhaps nothing for anyone⁴³. It, like Oakland, may cease to have a there there⁴⁴. That would be a shame.

⁴³ J. Musgrove, D. Edmondstone, J. MacNeil, “Rules of Specific and General Application: Is that Old Time Antitrust Religion Becoming A ‘Something for Everyone’ Cult”, *Competition Issues in Difficult Times, Atlas Information* (November 12, 2002).

⁴⁴ Attributed to Gertrude Stein.