

FUNDAMENTALS OF REVIEWABLE MATTERS UNDER THE COMPETITION ACT

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by
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INTRODUCTION

The *Competition Act* (the “Act”)² contains a mixture of criminal offences, so-called reviewable matters (also called reviewable practices) and private actions. The reviewable matters provisions are found in Parts VII.1 and VIII of the Act.

Reviewable matters are types of business conduct that may be reviewed by and subject of a remedial order (e.g., prohibition) of the Competition Tribunal (“Tribunal”). Examples include abuse of dominant position, refusal to supply, exclusive dealing, market restriction, tied selling, consignment selling, mergers and certain types of misleading advertising.³ Unlike criminal offences, the conduct underlying reviewable matters is not illegal – the conduct is perfectly lawful unless the Tribunal orders otherwise.

Until very recently, only the Commissioner of Competition (“Commissioner”) had jurisdiction to initiate Tribunal proceedings in respect of a reviewable matter. However, with enactment of Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*,⁴ private parties may now seek leave of the Tribunal to initiate proceedings in respect of refusals to supply, exclusive dealing, tied selling and market restriction. The reviewable matters (other than misleading advertising and mergers, which are dealt with elsewhere at this conference) are discussed below.

¹ Partner, McMillan Binch. The assistance of Andrea Long (McMillan Binch summer law student) with preparation of this paper is greatly appreciated.

² R.S.C. 1985, c. C-34.

³ Note that the Act contains both a criminal offence of misleading advertising and a reviewable practice.

⁴ Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 49-50 Eliz. II, 2002 (Can.), received Royal Assent on June 4, 2002.

ABUSE OF DOMINANT POSITION

1. Introduction

The reviewable practice of abuse of dominant position was introduced into the Act in 1986 to replace the criminal monopoly provision that had proven largely ineffective. Section 79 authorizes the Commissioner to apply to the Tribunal for a remedial order to restore competition in affected markets in circumstances where a dominant market participant has engaged in “anti-competitive conduct”.⁵ Section 79, arguably the broadest provision in the Act, has been successfully invoked in a number of cases. The Competition Bureau’s (“Bureau”) approach to enforcing Section 79 (and its companion, Section 78) is set out in the Commissioner’s 2001 *Enforcement Guidelines on the Abuse of Dominance Provisions* (the “ADEGs”)⁶

2. Substantive Elements

Under Section 79, if the Tribunal finds that:

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- the practice has had, is having, or is likely to have the effect of 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. In addition, if the Tribunal determines that a prohibition order is not likely to restore competition in the market, the Tribunal may, in addition to or in lieu of making the prohibition

⁵ Because Section 79 does not create an offence, private actions for damages cannot be brought against the party who has committed the abuse, as such actions must be based upon conduct that is illegal pursuant to the criminal provisions of the Act. Section 78 contains a non-exhaustive list of “anti-competitive acts.”

⁶ Competition Bureau (Ottawa: Industry Canada, 2001); <http://strategis.ic.gc.ca/SSG/ct02209e.html>.

order, 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 necessary to overcome the effects of the practice in that market.⁷

Each element of the reviewable practice of abuse of dominant position is discussed below.

A. Control of a Class or Species of Business

“Control of a class or species of business” is synonymous with market power. The first step in determining whether a firm has market power is to define the relevant geographic and product markets.

(a) Product Markets

When defining the relevant product market, the Bureau (and the Tribunal) focuses on the extent to which the dominant firm’s product can be substituted with other products.⁸ A number of indicia of substitutability will be considered. For example, in *Canada (Director of Investigation and Research) v. D&B Companies of Canada*,⁹ the Tribunal considered whether small changes in relative price caused buyers to switch from one product to another, often referred to as substitutability.¹⁰ If direct evidence of switching behaviour is not available, other evidence (from both buyers and suppliers) regarding product end uses, physical/technical characteristics, switching costs, price relationships and relative price levels, regulatory barriers affecting substitutability (for example, health regulations), and whether a distinct group of users use one product and not a related product (or service) will be considered.¹¹ In its investigation,

⁷ Competition Act s.79(1) – (2)

⁸ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, 73 C.P.R. (3d) 1 at 34 (Comp. Trib.) [hereinafter *Tele-Direct*]. See also ADEGs, s.3.21(a).

⁹ 64 C.P.R. (3d) 216 (Comp. Trib.) [hereinafter *Nielsen*].

¹⁰ *Nielsen* at 241.

¹¹ *Nielsen* at 241 and *Canada (Director of Investigation and Research) v. NutraSweet Co.*, 32 C.P.R. (3d) 1 at 10-15 (Comp. Trib.) [hereinafter *NutraSweet*] and ADEGs s.3.2.1(a); and *cf.* MEGs, s.3.2. The Bureau has also provided some guidance as to its views on market definition for transactions or conduct involving intellectual property: see Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: Industry Canada, 2000) (the “IPEGs”), s.5.1. In such cases, the Bureau is likely to define the market around one or more of the following: the intangible knowledge of know-

the Bureau will consider whether buyers would turn to substitutes if prices were raised above competitive levels by a significant amount (generally 5%) for a non-transitory period of time (normally one year).¹²

(b) Geographic Markets

In *NutraSweet*, the Tribunal described identification of the geographic market as “an attempt to determine the extent of the territory where there is competition and in which prices for a product tend to uniformity.”¹³ An area’s inclusion in the relevant geographic market depends chiefly upon whether it is “sufficiently insulated from price pressures emanating from other areas, so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.”¹⁴ In *NutraSweet*, the Tribunal considered that six to 13 percent differences in average prices in different countries supported the determination that these countries should not be included in the same relevant geographic market as *NutraSweet*.¹⁵

The Bureau will also utilize some of the quantitative techniques used in product market definition when determining the appropriate geographic market.¹⁶ The following factors may be considered: transportation costs, switching costs, price relationships, related price levels and shipment patterns.¹⁷ Irregular provision of service is not sufficient.¹⁸ Non-tariff regulatory barriers and foreign competition may also be significant in defining market boundaries.¹⁹

how that constitutes the IP, processes that are based on the IP rights, or the final intermediate goods resulting from, or incorporating the IP. The Bureau prefers to concentrate on price or output effects and therefore generally does not define markets based on R & D activity or innovation efforts alone. However, it will examine the effects of marketplace conduct on non-price dimensions of competition including innovation where relevant.

¹² ADEGs, s.3.2.1(a). This approach was utilized by the Tribunal in both *Laidlaw* (see note 18) and *Nielsen*.

¹³ *NutraSweet* at 21.

¹⁴ *NutraSweet* at 20-21.

¹⁵ *NutraSweet* at 22.

¹⁶ ADEGs, s.3.2.1(b).

¹⁷ ADEGs, s.3.2.1(b). See also *NutraSweet* at 21.

¹⁸ *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems* (1992), 40 C.P.R. (3d) 289 at 320 (Comp. Trib.) at 324 [hereinafter *Laidlaw*].

¹⁹ For example, in *Laidlaw*, municipal bylaws that restricted the transfer of solid waste into certain landfill sites were cited in support of a narrower market definition. See ADEGs, s.3.2.1(b); and *cf.* MEGs s.3.3.

(c) The Cellophane Trap

It is important to note that the Bureau's approach to relevant market analysis in abuse of dominance cases is distinct from the hypothetical monopolist approach adopted by the Bureau in the *Merger Enforcement Guidelines* (the "MEGs")²⁰. Since the allegedly dominant firm may be pricing at levels higher than would be the case in a competitive market, the Bureau will consider whether there are competing suppliers that appear to be part of the product or geographic market that would not be included if lower, competitive prices prevailed. Such products or areas will be removed from the defined market in order to avoid the famous "cellophane trap"²¹ of the hypothetical monopolist test²². According to the Bureau, a more appropriate benchmark for determining market boundaries is the price that would likely exist in the absence of the anti-competitive conduct.²³

(d) Market Power

In *NutraSweet*, the Tribunal equated "control" or market power as the ability to set prices above competitive levels for a considerable period.²⁴ Essentially, market power exists when a firm (or group of firms) is not constrained from pricing above competitive levels (or reducing non-price dimensions of competition below competitive levels) due to the presence of effective competition or the likelihood of competitive entry.²⁵ The Bureau considers market

²⁰ Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: Industry Canada, 1991).

²¹ *United States v. E.I. Dupont de Nemours & Co.* (1956), 351 U.S.377. The "trap" occurs because if the dominant entity prices its product at a level where demand is elastic, a product will appear to have more substitutes than it would were prices set at a competitive level. As a consequence, the hypothetical monopolist test defines the market too broadly.

²² In merger analysis, the Bureau employs a hypothetical monopolist test, which identifies the boundaries of a relevant product and geographic market on the basis of the smallest group of products and the smallest geographic area within which a monopolist could sustain a significant, non-transitory price increase. Because the potential dominant position and the increase in dominance of a firm are not at issue in abuse of dominance cases, in *Laidlaw* the Tribunal has rejected this approach, noting that "[t]he market definition issue relates to an existing situation rather than a prospective one."

²³ ADEGs, s.3.2.1(c).

²⁴ *NutraSweet* at 28; see also *Laidlaw* and *Nielsen*.

²⁵ See *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 (S.C.C.); as well as ADEGs, s.3.2.1(d) and Appendix II, including Tribunal jurisprudence cited therein.

power to exist when prices profitably can be maintained above competitive levels for at least one year without being eroded by new entry.²⁶

(e) Market Shares

The most important factors in determining market power are market shares and barriers to entry. All else being equal, the larger the market share of the remaining competitors, the less likely it is that the firm could exercise market power.²⁷

The Tribunal has stated “[a] *prima facie* determination as to whether a firm is likely to have market power can be made by considering the share of the relevant market held by that firm. If that share is very large the firm will very likely have market power.”²⁸ However, current jurisprudence is not helpful, as all Section 79 decisions to date concerned respondents that held more than 80% of relevant markets.

In the ADEGs, the Commissioner indicates the Bureau will utilize market shares both as “safe harbours” and as indicators of likely market power.²⁹ Market shares of less than 35% (or 60% in a joint dominance case) will generally be considered as indicating the absence of market power or dominance, while market shares above this level will normally prompt further examination.³⁰ In addition, a single firm market share in excess of 50% will *prima facie* be

²⁶ ADEGs, s.3.2.1(d). Interestingly, the ADEGs do not mention the 5% price standard normally employed in merger cases. Also the use of a time standard of one year is notable given the two-year time frame used to assess entry: ADEGs, s.3.2.4. (Historically, the Bureau has used the same two-year time frame for market power analysis as for entry: see MEGs, s.4.6.2; and Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1992), s.2.2.1.)

²⁷ ADEG, s.3.2.1(d).

²⁸ *Laidlaw* at 325.

²⁹ The ADEGs do not specify the manner in which market shares will be measured. However, the Bureau generally can be expected to employ the same flexible approach used in the MEGs, s.4.2.2. They contemplate that market shares can be measured in terms of dollar sales, unit sales, production output, and capacity or, in certain natural resource industries, reserves. Usually the measurement approach is determined by the most readily available data and industry practices. Overall market concentration is typically measured using a simple four-firm concentration ratio (“CR₄”). The HHI measure used in the United States is occasionally looked at by the Bureau, but is not its primary method for analysing concentration issues.

³⁰ ADEGs, s.3.2.1(d). When analysing the risk of interdependent behaviour in merger cases, the Bureau considers a CR₄ of less than 65% to be unproblematic: see MEGs, s.4.2.1. There is no obvious reason for adopting a different standard for joint abuse of dominance cases.

regarded as dominant (a presumption that is precluded by statute in merger cases³¹). The Bureau also will consider factors such as technological change, recent entry or exit, industry excess capacity and countervailing market power of customers and distributors to determine whether market power exists.³²

(f) Barriers to Entry

Barriers to entry are accepted by the Tribunal and the Bureau as an essential pre-requisite in determining whether market power exists.³³ Where entry barriers are low, even firms with large market shares may not control the relevant market since potential entrants serve to discipline any attempt to exercise market power.

In considering barriers to entry, the Bureau will focus on whether entry is likely to be delayed or hindered by the presence of absolute cost differences between the incumbent and the new entrant as well as whether there are sunk costs involved in entering (*i.e.*, the need to make investments which likely would not be recovered if entry is unsuccessful).³⁴ The Tribunal has considered such entry barriers as IP rights, significant economies of scale, sunk costs and time lag before other producers could begin production.³⁵

B. Practice of Anti-Competitive Acts

(a) Practice

Section 79(1)(b) requires the Tribunal to find that the dominant firm has engaged in a “practice” of anti-competitive acts. Given the gamut of acts that may be considered anti-

³¹ See Competition Act, s.92(2). This approach is consistent with prior approaches taken by the Tribunal – see, for example, *Laidlaw* at 317.

³² ADEGs, s.3.2.1(d). The Tribunal in, for instance, *Laidlaw* at 325 considers similar factors.

³³ See ADEGs, s.3.2.1(d).

³⁴ ADEGs, s.3.2.1(d) and MEGs, s.4.6.

³⁵ *NutraSweet* at 27. Examples of barriers to entry found in abuse of dominance cases to date include the existence of process patents, scale economies and long lead times (e.g. *NutraSweet* – artificial sweeteners), network effects and regulatory impediments (*Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (“*Interac*”)- debit cards and related financial services), reputational effects and the vertical relationship of an incumbent firm to related companies (*Tele-Direct*- yellow pages directory advertising), and the contracting practices of the incumbent firm. *Laidlaw* – waste disposal; and *Nielsen* – scanner data); see the summaries in ADEGs, Appendix IV. See also *Canada (Director of Investigation and Research) v. Southam*, 43 C.P.R. (3d) 161 (Comp. Trib.).

competitive, the Tribunal has interpreted the term “practice” flexibly. According to the Tribunal, a practice may exist “where there is more than an ‘isolated act or acts,’ or where different individual anti-competitive acts are taken together.”³⁶ The Bureau has stated that while a practice is normally more than an isolated act, it may also constitute one occurrence that is sustained and systemic or that has had a lasting impact on the state of competition.³⁷

(b) Anti-Competitive Acts

A list of so-called “anti-competitive” acts is provided in Section 78. The list includes acquisition of a competitor’s supplier; pre-emption of scarce facilities; 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. The list is not exhaustive and has been expanded through case law. Examples of conduct found to be anti-competitive by the Tribunal include exclusive supply contracts³⁸, the acquisition of a competitor³⁹, meet-the-competition and most-favoured-customer clauses⁴⁰, vexatious litigation⁴¹ and differentiated responses to competitors.⁴² Essentially, any conduct that has a

³⁶ *NutraSweet* at 35.

³⁷ The Bureau cites a long-term exclusionary contract as an example of when a single episode could constitute an anti-competitive act. See ADEGs s.3.2.2(a).

³⁸ Long-term exclusive supply contracts can foreclose the possibility of entry or expansion by other firms in the market. In *NutraSweet*, significant logo display and promotion allowances (40 percent), applicable only if the customer purchased 100 percent of its requirements from *NutraSweet*, reinforced exclusivity. Since *NutraSweet*’s products were too expensive without the discounts, customers had no choice but to buy all their supplies from a supplier that was not well known.

³⁹ In *Laidlaw*, acquisition of competitors was judged to be an anti-competitive act. By acquiring its competitors, Laidlaw had, at times, achieved almost 100 percent share of the local geographic markets in which it operated. Laidlaw harassed its competitors, threatening to eliminate them. Laidlaw also effected mergers over short periods of time within local geographic markets (three in one year in one market, two in one day in another) and included in its acquisition agreements non-compete clauses that were overly broad in geographic scope. The Tribunal also considered Laidlaw’s assertion that it would take the necessary steps to eliminate competitors. The Tribunal found no legitimate business justification for the acquisitions.

⁴⁰ The Tribunal has judged that meet-the-competition or meet and release clauses may be anti-competitive because they increase price transparency, and thereby prevent secret price-cutting, “which is widely recognized to be an important means of maintaining competitive markets.” By requiring a customer to provide information about bids from other companies, the dominant firm can selectively lower its price to customers that its rivals hope to acquire, rather than become more competitive generally. According to s.4.2 ADEGs, the other concern with such contractual provisions is that they can aid a dominant firm by providing information on attempted entry or the actions of rivals.

⁴¹ In *Laidlaw* threatening litigation to intimidate customers into remaining with a dominant firm was found to constitute an anti-competitive act.

predatory/disciplinary or exclusionary/entry-detering purpose or effect may constitute an anti-competitive act.⁴³ As the Tribunal observed in *NutraSweet*, all of the acts enumerated in Section 78 share a common feature: “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 in Section 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.”⁴⁴

The Tribunal has accepted that the purpose of an act can be inferred through evidence of subjective intent, consideration of the act itself (for example, a corporation can be taken to intend the necessary, foreseeable consequences of its acts), and, generally, through inferences from the surrounding circumstances.⁴⁵

C. Substantial Lessening Of Competition

Once market dominance and the occurrence of anti-competitive acts have been established, it must be shown that the practice has resulted in (or is likely to result in) a substantial lessening of competition. Here, the Tribunal will focus on the degree to which the anti-competitive acts enhance or preserve barriers to entry and, more generally, enhance or preserve the market power of the dominant firm.⁴⁶

The Tribunal has set a sliding standard to measure the substantiality of a prevention or lessening of competition in abuse cases. The requisite effect on competition varies with the pre-existing level of market power:

Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on

⁴² According to the Tribunal, selectively targeting different competitors is, of itself, a “decidedly normal competitive reaction and thus not anti-competitive.”(*Tele-Direct* at 194) Offering a superior product or lower prices is also not exclusionary because consumers benefit (*Tele-Direct* at 204 - 205).

⁴³ See ADEGs, s.4.1 and Appendix 2, including references therein to Tribunal jurisprudence. The Bureau’s approach in assessing potentially anti-competitive acts focuses on: (i) acts that raise rivals’ costs (or reduce rivals’ revenues) or that foreclose existing or potential rivals from key inputs or facilities; (ii) predatory conduct; and (iii) acts intended to facilitate co-ordinated behaviour among firms (facilitating practices): ADEGs, s.4.1.

⁴⁴ *NutraSweet* at 34.

⁴⁵ *NutraSweet* at 35; ADEGs, s.3.2.2(6).

⁴⁶ ADEGs, s. 3.2.3 and s.3.2.4.

competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with.⁴⁷

In accordance with this approach, the Tribunal has ruled that the attainment of monopoly or near monopoly levels constitutes “at least a *prima facie* lessening of competition which is substantial.”⁴⁸

In determining whether a prevention or lessening of competition is substantial, the Tribunal primarily considers the degree to which the practice of anti-competitive acts has foreclosed entry or expansion by competitors by erecting entry barriers. In *NutraSweet* and *Nielsen*, for example, exclusive contracts with customers and suppliers, respectively, effectively constrained the competitors from gaining a toehold in the relevant markets.

The ADEGs contain a very valuable recognition of the Bureau’s role in differentiating between strategically motivated complaints reflecting the private interests of other marketplace participants and situations where the public interest in competition is threatened:

The requirement of “preventing or lessening competition substantially in a market” puts the focus on the impact on competition rather than on competitors. As the Tribunal noted in *Tele-Direct*, “seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the market are made better off.”⁴⁹

D. Joint Dominance

Section 79 of the Act applies to situations where a single person or a number of persons jointly hold a dominant position. The Act does not specify the nature of the relationship required to exist between jointly dominant firms, and it potentially covers the gamut from express agreements to parallel conduct without an explicit agreement.⁵⁰ The jurisprudence is not very helpful on this point as there have only been two cases where joint dominance was alleged:

⁴⁷ *Tele-Direct* at 247.

⁴⁸ *Laidlaw* at 345.

⁴⁹ ADEGs, s.3.2.3, quoting *Tele-Direct*.

⁵⁰ See Industry Canada, Competition Bureau, “Strategic Alliances Bulletin,” available at <http://strategis.go.ca/SSG/ct01250e.html>, mentions Section 79.

Interac and *AGT directory*⁵¹. Each case was resolved on consent and in both the fact of joint dominance was not disputed.

An express agreement among the joint control group is not required to establish joint dominance, and the ADEGs indicate that a group of unaffiliated firms may jointly possess market power even if no single member of the group is dominant by itself.⁵² The ADEGs also indicate that the Bureau does not view “conscious parallelism” alone as sufficient to constitute a co-ordinated practice of anti-competitive acts;⁵³ something more is needed. In the absence of an agreement amongst the firms, the Bureau will consider factors such as:

- whether the group of firms collectively account for a large share of the relevant market;
- evidence that the alleged co-ordinated behaviour is intended to increase price or is for the purpose of engaging in some form of anti-competitive act;
- evidence of barriers to entry into the group, or barriers to enter into the relevant market;
- evidence that members of the group have acted to inhibit intra-group rivalry; and
- evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.⁵⁴

3. Defences and Limitations

A. Superior Competitive Performance

Pursuant to Section 79(4), the Tribunal must consider whether an anti-competitive practice is the result of superior competitive performance. The section does not provide an

⁵¹ *Canada (Director of Investigation and Research) v. AGT Directory Ltd.* [1994], C.C.T.D. No. 24 (QL).

⁵² ADEGs, s.3.2.1(e).

⁵³ ADEGs, s.3.2.1(e).

⁵⁴ ADEGs, s.3.2.1(e).

efficiency defence as such⁵⁵; rather, it compels the Tribunal to consider the possibility that the challenged acts, along with their exclusionary effects, really are the result of the dominant firm's superior performance.

Section 79(4) is somewhat ambiguous, and could be interpreted in a number of ways. The ADEGs provide some clarification of the Bureau's position:

Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.⁵⁶

In deciding whether to prohibit a practice of anti-competitive acts, the Tribunal has weighed business justifications (including efficiency) against the anti-competitive effects, to judge the overriding objective of the firm's conduct.⁵⁷ In so doing, the Tribunal has stated that proving some legitimate business purpose, alone, is not sufficient to preclude a finding that an anti-competitive act has resulted in a substantial prevention or lessening of competition.⁵⁸

B. Exercise of an Intellectual Property Right

Under Section 79(5), any act "engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act* . . . is not an anti-competitive act." Respecting trade-marks in particular, the Tribunal noted in *Tele-Direct*:

⁵⁵ Act, s.79(4).

⁵⁶ ADEGs, s.5.3.2.

⁵⁷ *Nielsen* at 261-262.

⁵⁸ See *NutraSweet* in which the Tribunal rejected NutraSweet's argument that its exclusive supply arrangements with its customers resulted in lower costs in holding inventory. The Tribunal stated that any sole supplier arrangement could make the same claim. According to the Tribunal, unless an industry had special characteristics making such cost savings important, the Tribunal would attach no weight to such savings.

Something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be finding of misuse of a trade-mark. . . . 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; selectively licensing is fundamental to the rationale behind trade-marks.⁵⁹

The Tribunal considered irrelevant the fact that Tele-Direct was motivated in part by competitive concerns when it refused to license its trade-mark.

In the *Intellectual Property Enforcement Guidelines* (the "IPEGs"), the Commissioner takes the position that the Section 79(5) defence only protects the core rights related to intellectual property (*e.g.* the ability to decide whether, when, to whom and on what terms to license such rights). An attempt by the IP owner to extend or leverage its rights beyond their statutory scope or into larger or different markets could be challenged as an anti-competitive act under the abuse of dominance provisions.⁶⁰ Although there is little jurisprudence on Section 79(5), case law from other jurisdictions reveals the difficulty in clearly distinguishing between the valid use of an intellectual property right and its abuse under competition laws.

C. The Airline Industry

Concerns about abuse by Air Canada of its dominant position in the airline industry has initiated much legislative reform over the past few years.

In 2000, Section 79 was amended to permit the adoption of regulations to identify specific acts or conduct which, if carried on by a domestic airline, would be an anti-competitive act under Section 78.⁶¹ The Airline Regulations⁶² identify predatory conduct including selling below cost or use of a low cost 'fighting' brand carrier to eliminate competitors or to increase

⁵⁹ *Tele-Direct* at 32.

⁶⁰ IPEGs, s.4.2. See also ADEGs, s.5.3.3.

⁶¹ S.C. 2000, c. 15, s. 13 (in force July 5, 2000).

⁶² Regulations Respecting Anti-competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 (the "Airline Regulations"), in force as of August 23, 2000. This regulation was enacted by the federal government in response to the restructuring of Canada's airline industry.

barriers to entry as anti-competitive acts. The Regulations also identify as an anti-competitive act the strategic use of frequent flyer programs and marketing and other practices designed to lessen competition or exclude competitors – e.g. refusing to supply essential services or access to facilities on reasonable commercial terms where there is no other viable option or obstructing airport services or facilities required by other competing carriers.⁶³

In addition to the Airline Regulations, the Bureau released Draft Guidelines on Abuse of Dominance in the Airline Industry in February 2001.⁶⁴ These guidelines, which are not yet finalized, are intended to set out the Bureau’s approach to investigating and enforcing the abuse of dominance provision in the airline industry.

With Bill C-23, additional airline-specific provisions have been incorporated into the Act. Those amendments empower the Tribunal to require a dominant airline that engages in anti-competitive acts to pay an “administrative monetary penalty” of up to \$15 million.⁶⁵ The stated purpose of an administrative monetary penalty is to “promote practices that are in conformity with [Section 79], not to punish”,⁶⁶ but it remains to be seen whether that in fact will be the case. These amendments are remarkable because they are the first in which the Tribunal has been authorized to make a monetary awards in respect of a reviewable matter.

D. Limitation Period

The Commissioner may not apply to the Tribunal regarding an alleged abuse of dominant position more than three years after the practice of anti-competitive acts has ceased.

⁶³ In 2001, the Commissioner brought an action against Air Canada under Section 79 of the Act. The Notice of Application of Application alleges that Air Canada substantially or completely controls the supply of passenger airline service in Canada; the practices of Air Canada fall under the enumerated list of anti-competitive practices found in Section 78; and if Air Canada persists in anti-competitive acts, they are likely to eliminate or discipline low cost carriers. The case is to be heard by the Tribunal later this year. The Notice of Application for an Order Pursuant to Section 79 of the *Competition Act*, can be found on the Competition Tribunals website at <http://www.ct-tc.gc.ca/english/cases/ct-2001-002/air-canada.html>

⁶⁴ Competition Bureau, Industry Canada, “Enforcement Guidelines on the Abuse of Dominance in the Airline Industry” (Consultation Draft, February 2001).

⁶⁵ s.79(3.1).

⁶⁶ s.79(3.3).

4. Remedies

If the Tribunal finds that there has been an abuse of a dominant position, it may make an order preventing the respondent firm(s) from engaging in the practice of anti-competitive acts. In addition, if the Tribunal concludes that such an order is not likely to restore competition in the affected market, it may make a broader order directing any actions (including the divestiture of assets or shares) that are reasonable and necessary to overcome the effects of the anti-competitive acts. However, the Act requires the Tribunal to make such an order on terms that will interfere with the rights of any person against whom the order is directed or any other person only to the extent necessary to restore competition.⁶⁷ In other words, such orders are to be remedial and not punitive.⁶⁸

There are no fines or other penalties for abuse of dominant position or other reviewable practices, with the exception of the recently enacted administrative monetary penalty provisions. There are also no private rights of action to recover damages until after a Tribunal order is made and breached.⁶⁹ The focus is on preventing the continuation or emergence of anti-competitive conduct.

REFUSAL TO SUPPLY

1. Introduction

Section 75 sets out a distinct reviewable practice of refusal to supply. The provision was first enacted in 1976, and subsequently amended in 1986 and in 2002 by Bill C-23.

⁶⁷ Act, s.79(2) and (3). Tied selling and exclusive dealing are subject to similar remedial regimes: prohibition orders are the norm, but other remedial orders may be made if necessary to restore competition under s.77(2). Non-price-related refusals to deal are normally remedied by a mandatory order to supply on ordinary trade terms: Act, s.75(1).

⁶⁸ Once a prohibition or other remedial order is made by the Tribunal, failure to comply is an offence punishable on indictment by a fine in the discretion of the court and / or imprisonment for up to five years, and a private right of action is available to injured parties: see Act, s.66 and 36(1)(b).

⁶⁹ See Act, s.36(1)(b). (There is a private right of action in respect of criminal offences such as predatory pricing and price maintenance, irrespective of whether there has been a government prosecution: see Competition Act, s.36(1)(a).)

2. Substantive Elements

If a supplier refuses to supply products to a customer (or potential customer), the Tribunal may make an order if it determines the following factors exist:

- 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,
- the affected person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- the affected person is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- the product is in ample supply, and
- the refusal to deal is having or is likely to have an adverse effect on competition in a market.

Each of these elements is discussed below.

(a) Person “Substantially” Affected or Precluded from Carrying on a “Business”

In the *Chrysler*⁷⁰ case, the Tribunal determined that the term “business” should not be confined to mean the customer’s business of the product the supply of which has been refused. Rather, it is the entire business of the customer that is relevant for purposes of Section 75. In assessing whether the customer’s business is substantially affected or precluded, the Tribunal will consider:

- the percentage of the overall business the product accounts for;

⁷⁰ *Dir. of Investigation and Research v. Chrysler Can. Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), [hereinafter “*Chrysler*”].

- how easily the product is replaced by other products sold by the business;
- if the sale of the product uses up capacity that could be devoted to other activities; and
- if the product is used or sold in conjunction with other products so that the overall effect on the business is greater than indicated by the volume purchased.⁷¹

Generally, the effect must be more than *de minimus*⁷², although the impact should be “important”.

(b) Inability to obtain a “Product” in a “Market”

Critical to all refusal to supply cases is the definition of the relevant product and geographic markets. In *Chrysler*, the Tribunal ruled that “the starting point for the definition of product under Section 75 is the buyer’s customers.”⁷³ Applying this approach, the Tribunal concluded that the branded proprietary parts of a single original equipment manufacturer constituted the relevant product market. A similar conclusion was reached in the *Xerox* case a year later.⁷⁴ Notably, the Act contains the following specific provision concerning market definition for branded products:

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 articles so differentiated.⁷⁵

The Tribunal interpreted this awkwardly worded section literally in its *Chrysler* decision, noting that the section does not provide a complete framework for assessing whether a

⁷¹ *Chrysler*, at 18.

⁷² *Chrysler*, at 23.

⁷³ *Chrysler*, at 10.

⁷⁴ *Canada (Director of Investigation & Research) v. Xerox Canada Inc.*, 33 C.P.R. (3d) 83 (Comp.Trib.).

⁷⁵ Act, s.75(2).

branded item constitutes a distinct relevant product market, but merely describes the limited conditions under which such a finding can be based solely on the existence of the trade-mark or proprietary name.⁷⁶

In *Warner Music*⁷⁷, the Tribunal decisively ruled that the term “product” as used in Section 75 does not extend to intellectual property rights, and thus cannot be used to compel a copyright holder to grant a licence.

(c) Insufficient Competition Among Suppliers

The inability to obtain the refused product must result from “insufficient competition amongst suppliers of the product in the market”. The definition of relevant product and geographic markets obviously has a significant impact on the assessment of the extent to which competition exists. For example, in *Chrysler* and *Xerox* once branded proprietary branded parts were identified as the relevant product market, virtually no effective competition was found.

(d) Willing and Able to Meet the Usual “Trade Terms”

“Trade terms” are defined in Section 75(3) to mean “in respect of payment, units purchased and reasonable technical and servicing requirements.” An often cited problem with this definition is that it does not take into account the moral, ethical, aesthetic and other psychological factors forming part of the judgment-making process of a supplier in choosing its customers or distributors.

(e) Product In Ample Supply

A supplier may legitimately refuse to supply when its product is not in ample supply in order to preserve inventory or to properly manage limited supplies. This is sensible, since a supplier should not be compelled to expand capacity to supply would-be customers.

⁷⁶ *Chrysler*, at 10-11.

⁷⁷ *Canada (Director of Investigation & Research) v. Warner Music*, 78 C.P.R. (3d) 321 (Comp. Trib.)

(f) “Adverse Effect” on Competition

The final element of a refusal to supply case, a finding that the refusal is likely to have an “adverse effect on competition in a market”, was added to the Act by Bill C-23. The amendment was made at the last minute by the House of Commons Industry Committee to counter concerns expressed about the Bill C-23 amendments permitting private parties to seek leave to bring cases for refusal to supply under Section 75. Before these amendments, the Commissioner alone had standing to initiate proceedings under Section 75 and he acted as a significant “gate-keeper” to keep out of the Tribunal cases that did not have competitive merit, notwithstanding the fact the Section did not require that the refusal to supply have an anti-competitive affect. Thus the requirement for a finding of an adverse effect on competition was added to ensure that any private action brought under Section 75 is grounded on some notion of competitive harm, and not just disgruntlement by a customer who cannot obtain the volume of products that it desires.

The term “adverse effect on competition” is not used elsewhere in the Act, and it remains to be seen how it will be interpreted by the Tribunal. Presumably it is something less than a substantial prevention or lessening of competition, which is the standard used for all other reviewable matters.

3. Remedies

The sole remedy available to the Tribunal under Section 75 is to order a supplier to supply the relevant product to the customer on usual trade terms. When considering whether to make an order, the Tribunal will consider factors such as:

- the reasons behind the supplier’s decision to discontinue supplying the customer;
- the market position of the supplier;
- the length of time and nature of the association between the supplier and the customer; and

- the manner in which the cut-off was implemented.⁷⁸

EXCLUSIVE DEALING, TIED SELLING AND MARKET RESTRICTION

“Exclusive dealing”, “tied selling” and “market restriction” are three contractual practices that can be reviewed and prohibited by the Tribunal. Each is measured against a test of substantial prevention or lessening of competition (discussed above). They all have in common a requirement that the behaviour be engaged in as a “practice”⁷⁹, a broad affiliate defence and a common remedy. The fundamental antitrust concern about exclusive dealing, tied selling and market restriction is that the practice might foreclose opportunities for competitors of the supplier which engages in the practice to enter into or expand in a downstream market.

Prior to enactment of Bill C-23, only the Commissioner had jurisdiction to commence Tribunal proceedings in respect of exclusive dealing, tied-selling or market restriction. Bill C-23 has amended the Act to permit private parties to seek leave of the Tribunal to commence those proceedings. This is a significant change to the law, and creates opportunities for private litigants to take aggressive action against suppliers and, in some instances, engage in strategic litigation.

1. Exclusive Dealing

A. Introduction

Exclusive dealing occurs when a supplier of a product requires, as a condition of supplying the product, that its purchaser:

- deal only or primarily in products supplied by or designated by the supplier or its nominee⁸⁰, or

⁷⁸ *Chrysler*, at 24.

⁷⁹ In *NutraSweet*, the Tribunal determined that the definition of practice must constitute “something more than an isolated act,” not a single act, but a pattern of behaviour. *NutraSweet*, at 54.

⁸⁰ Use of the word “nominee” in s.77(1)(a)(i) covers the potential loophole of a supplier requiring exclusivity of dealing with products of an affiliate or other supplier with whom it has a relationship.

- refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee.⁸¹

Exclusive dealing may also occur if a supplier induces a customer to meet one of those conditions by offering to supply the product to the customer on more favourable terms if the customer agrees to meet one of the conditions.

It is important to note that the focus of exclusive dealing is on the supplier, which must require or induce the customer to agree to exclusivity. Thus, voluntary undertakings of exclusivity by customers are not reviewable notwithstanding that exclusionary effects on competition may be the same.

B. Substantive Requirements

In addition to finding that the activity in question is a “practice” within the definition of “exclusive dealing”, the practice can be subject of an order of the Tribunal only if it is engaged in by a “major supplier” of a product in a market or because it is widespread in a market, and is likely to:

- impede entry into or expansion of a firm in a market,
- impede introduction of a product into or expansion of sales of a product in a market, or
- have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially.

Thus, the Tribunal cannot make an order in respect of exclusive dealing unless it determines that two causation elements have been proven. First, it must be shown that entry or expansion is impeded by the supplier’s exclusive dealing arrangement. This necessitates an inquiry into distribution alternatives not foreclosed by existing contractual restraints. Second,

⁸¹ Act, s.77(1)

the exclusionary effects must result in a substantial lessening of competition. In *NutraSweet*, the Tribunal held that the test to determine whether there has been a substantial lessening of competition is essentially the same for Section 77 (i.e., exclusive dealing, tied selling and market restriction) as for Section 79 (abuse of dominant position) of the Act. Accordingly, a substantial lessening of competition will generally be proved if the alleged exclusive dealing preserves or enhances market power of the supplier.

C. Defences

Exclusive dealing may be undertaken for a reasonable period of time to facilitate the entry of a new supplier or product in a market.⁸² The word “new” and the absence of any reference to expansion suggests that this defence may cover only true *de novo* entry initiatives. Exclusive dealing among affiliates also is not subject to review.⁸³

2. Market Restriction

A. Introduction

Market restriction is defined in Section 77(1) as a practice whereby a supplier, as a condition of supplying a product to a customer, requires its customer to supply the product only in defined markets, or extracts a penalty if the customer supplies the product outside of the market. The most common forms of market restriction are contractual provisions that limit the geographic territory in which, or the class of customers to which, a purchaser can re-sell products.

⁸² Acts s.77(4)(a); the same defence is available for market restriction but not tied selling.

⁸³ Act s.77(6).

B. Substantive Elements

The Tribunal may make an order in respect of a market restriction that it determines, 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.⁸⁴

C. Defences

The general affiliate defence applicable to other vertical contractual practices (i.e. exclusive dealing and tied-selling) is available in respect of market restriction. In addition, the market restriction provision employs an expanded definition of affiliate. For the purposes of market restriction, two firms are deemed affiliated where one supplies ingredients to the other, who further processes those ingredients into food or drink, then sells in association with the first firm's trade-mark.⁸⁵

The new entry defence (discussed above with respect to exclusive dealing) applies equally to proceedings relating to market restriction.

3. Tied Selling

A. Introduction

Tied selling is any practice whereby a supplier:

- as a condition of supplying a product (the “tying” product) to a customer, requires that customer to
 - acquire any other product from the supplier or the supplier's nominee, or
 - refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, or

⁸⁴ Act, s.77(3).

⁸⁵ Act, s.77(6).

- induces a customer to meet a condition set out above by offering to supply the tying product to the customer on more favorable terms if the customer agrees to meet one of the conditions.⁸⁶

B. Substantive Requirements

The substantive requirements that must be proven before the Tribunal may make an order in respect of tied-selling arrangements are the same as those with respect to exclusive dealing, which are discussed more fully above. In addition, a threshold issue that must be considered in every tied-selling case, is whether there are one or two products. In *Tele-Direct*, the Tribunal stated:

[a] fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider demand for separate products and efficiency of the bundling are the two “flip-sides” of the question of separate products. Assuming demand for separate products, if efficiency is proven, to be the reason for the bundling there is one product. If not, there are two products.⁸⁷

Thus, the Tribunal will consider:

- Separate Demand – Whether there is a significant number of consumers who actually want the product separated, the burden of proof is on the Commissioner to show this⁸⁸; and
- Efficiency – Separate demand will not govern if providing the products separately would result in higher costs that outweigh the benefits to those who want them

⁸⁶ Act, s.77(1).

⁸⁷ *Tele-Direct*, at 115.

⁸⁸ *NutraSweet*, at 119-120

separately. If the Commissioner establishes separate demand, the *burden shifts* to the respondent to prove efficiency of bundling.⁸⁹

4. Remedies

Potential remedies in respect of exclusive dealing, tied-selling and market restriction are similar. If the substantive elements of one of the practices are proven, the Tribunal may make an order prohibiting the supplier from engaging in the practice and “containing any other requirement that, in [the Tribunal’s] opinion, is necessary to restore or stimulate competition in relation to the product”.⁹⁰

Section 77(4) precludes the Tribunal from making an order where, in its opinion, the exclusive dealing arrangement is only temporary (i.e., only for a “reasonable period of time”) and has the purpose of aiding the entry into a market of a new supplier. In the instance of tied selling, an order cannot be made if the practice is reasonable vis-à-vis the technical relationship between the tied products or if the practice was “engaged in by a person in the business of lending money is for the purpose of better securing loans made by him and is reasonably necessary for that purpose”.⁹¹

CONSIGNMENT SELLING

Business distribution arrangements typically consist of suppliers selling their products to retailers, who in turn sell to customers. Title to the products passes at each stage of the distribution chain. Consignment selling involves the transfer of possession of the products from suppliers to their customers with no concurrent passing of title to the customer. Title remains with the supplier and the customer acts as an agent for the supplier when selling the product. The agency arrangement and lack of sale between the supplier and customer ensures that neither the price discrimination provision in Section 50 of the *Act* nor the price maintenance offence in Section 61 will apply.

⁸⁹ *Tele-Direct*, at 119.

⁹⁰ Act, s.77(2), in respect of exclusive dealing and tied-selling, and s.77(3), in respect of market restriction.

⁹¹ Act, s. 77(4).

1. Substantive Elements

Section 76 contains a reviewable practice relating to consignment selling that is meant to address concerns that suppliers may use consignment selling to circumvent the application of the Act's criminal pricing provisions. Under this Section, the Tribunal is granted the authority to order a supplier to cease consignment selling where it is being used to mask functional price discrimination and price maintenance. Section 76 states:

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

2. Remedies

Ordering cessation of the consignment selling arrangement is the only remedy available; there are not additional penalties.

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