EFFECTIVELY REMEDYING ABUSIVE BEHAVIOUR: THE CANADIAN EXPERIENCE

James Musgrove & Sarah Stirling-Moffet

McMillan LLP

With the assistance of Kamal Azmy, Student-at-Law

2022 ICN Annual Conference
Berlin
May 4-6. 2022

I. INTRODUCTION – THE ISSUE

The subject of this brief note is the question of what remedies are available to address concerns related to abuse of dominance/monopolization under Canada's *Competition Act*[1]. As will be explored below, the statute allows for a range of remedies, from cease and desist orders on up. The vast majority of the orders made over the years have been of the cease and desist variety. Most orders going beyond cease and desist have been in the nature of mandatory injunctions. None have been purely structural, but one or two have had some quasi-structural elements. In this note we outline the statutory provisions, canvass some of the thinking which underlay the provision when established in 1986, summarize the remedies in cases to date, and sum up the current state of play.

In Canadian competition law, like most antitrust systems, there are three principal types of conduct subject to challenge: mergers; cartel agreements; and unilateral conduct/monopolization. The main concern of merger control is the formation of firms which would, through the merger, acquire or increase their market power to anti-competitive levels. The key remedy employed is structural – preventing the merger or breaking up the firm. At the other end of the spectrum, cartel conduct is not premised on market structure, but rather on agreements. The conduct can (and does) occur regardless of the market structure, although, of course, a more concentrated market structure may make cartel agreements easier to strike and maintain, and therefore more likely. The remedy in respect of cartel conduct is not structural – in addition to fines/penalties it is prohibition with respect to the conduct.[2]

Between mergers, which attract structural remedies – and cartels, which call for behavioural remedies/penalties, lies the third leg of the antitrust stool – unilateral conduct/monopolization. In the name "unilateral conduct" we get the two elements: "unilateral" implies market structure as the source of the issue, not agreement; "conduct" denotes the need for some specific action (in Canadian law defined as 'anti-competitive acts'). As has been regularly recognized, in US law[3] and as well in Canadian law[4], merely holding a dominant position – having market power – is not challengeable (as it would be, for instance in the merger

[1] RSC 1985, c C-34 ["*Competition Act*"].
[2] *Competition Act*, s 34.
[3] *Standard Oil Co of New Jersey v United States*, 221 US 1 at para 22 (1911).
[4] See, J.B. Musgrove (Editor), Fundamentals of Canadian Competition Law 3rd ed 2015, Canadian Bar Association, p. 241.

context). For a remedy to be granted with respect to abuse of dominance there must be dominance, but also anti-competitive conduct.

So, abuse of dominance falls on a spectrum between mergers (where acquiring market power alone leads to a remedy) and cartels (where conduct alone leads to a remedy). For unilateral conduct/monopolization/abuse of dominance, both market power and conduct is required. Consequently, one might expect some amalgam of structural and behavioural remedies to be employed. In this brief paper, we explore this issue under the Canadian *Competition Act*.

II. KEY STATUTORY PROVISIONS

Canada's principal unilateral conduct/monopolization rule – called abuse of dominant market position, but in many respects closer in substance to US monopolization law under Section 2 of the *Sherman Act*[5] than to the EU Abuse of Dominance Law under Section 102 of the EU Treaty[6] – is found in Section 78 and 79 of the *Competition Act*. Section 78 sets out an illustrative but not exhaustive list of anti-competitive acts.[7] Section 79(1) of the *Act*[8] establishes the heart of the abuse of dominance provision, laying out the three requirements for an order:

> (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,

Section 79(1) then goes on to establish the primary remedy:

[5] *Sherman Act*, ch 647, § 2, 26 Stat 209 (1890) (codified at 15 USC § 2 (1994)).
[6] EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/47, art 102.
[7] *Competition Act*, s 78(1).
[8] *Competition Act*, s 79(1).

> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice. (Emphasis added)

Subsections 79(2), (3) and (3.1) provide for the possibility of additional or ancillary orders:

> (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.
>
> (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.
>
> (3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

Thus, it is clear that the primary remedy for abuse of dominance is a prohibition order with respect to the challenged conduct: "that practice".

If, however, such order is not likely to restore competition, then the Tribunal may make additional orders – including requiring the divestiture of assets or shares – but may only do so if the primary injunctive relief is alone unlikely to succeed in

restoring competition, and then only in a way which interferes with the rights of persons affected to the minimum extent necessary.

As of 2009, Parliament created a new remedy – Administrative Monetary Penalties (AMPs) – up to $10M (Cdn), or $15M for repeated conduct. The provision with respect to AMPs does not contain a requirement that such remedy not be imposed unless necessary to achieve the purpose of the order in subsection 79(1). While the $10M AMP is only a decade old, and has never been imposed in a contested abuse of dominance case, nevertheless the Commissioner of Competition recently called for an increase in the maximum potential penalty.[9]

III. REMEDY EXPECTATIONS AT THE TIME THE ABUSE OF DOMINANCE PROVISIONS WERE ESTABLISHED

As outlined above, the original remedy for Abuse of Dominance was conceived of as a cease and desist order, with further orders contemplating positive obligations or structural remedies only as necessary if cease and desist orders were deemed likely to be ineffective. A monetary penalty provision was not included – and only added some 25 years later.

While a complete review of the original view of remedies respecting monopolization at the time of the enactment of the *Competition Act* in 1986 is beyond the scope of this paper, we observe that in his remarks to the press when the *Competition Act* was introduced in Parliament, the Minister of Consumer and Corporate Affairs noted, with respect to remedies for abuse of dominance that the "Tribunal can stop anti-competitive practices", with no reference to any other remedies.[10]

The fundamental work upon which the then "new" abuse of dominance provision was based, the *Dynamic Change Report*, included a strong bias in favour of prohibition orders over structural remedies. This was so for a variety of reasons, including the importance, which the authors of that report, and the drafter's of Canada's 1986 *Competition Act* generally, placed on the goal of achieving economic efficiency:

---

[9] See Matthew Boswell, Commissioner of Competition, "Canada needs more competition" (delivered at the Canadian Bar Association Competition Law Fall Conference, October 20, 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html; see also, Competition Bureau Canada, *Examining the Canadian Competition Act in the Digital Era* (February 8, 2022), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

[10] Consumer and Corporate Affairs Canada, *Remarks to the Press Regarding Competition Law Amendments*, The Honourable Michel Côté, Minister of Consumer and Corporate Affairs Canada (December 17, 1985).

> The basic concern of public policy in this area is to assure so far as possible that monopoly power is not used in such ways as to interfere with dynamic change and with the achievement of real-cost economies. Since the position of monopoly power is now in existence, the question may legitimately be raised as to whether public policy should not aim at the elimination of the base of that power. There may be situations that call for dissolution of a firm possessing a high level of market power (or, at least, the divestiture of some parts of it), as we do propose, but, for reasons that impress us as being conclusive, such a policy is of very limited value in the arsenal of policy measures.
>
> …
>
> Therefore, what we propose, in substance, is that dominant firms be prohibited from engaging in forms of conduct which constitute the abusive use of monopoly power. [11]

IV. MERGER & MONOPOLIZATION REMEDIES GUIDANCE

a. Merger Guidance

As noted, the primary remedy contemplated with respect to anti-competitive mergers, particularly horizontal mergers, is structural. In Canada, while the Commissioner of Competition and merging parties can negotiate more 'creative' solutions, the only statutory remedy permitted under Section 92 of the *Act*, without the consent of the parties, is a prohibition order if the merger is not yet consummated, or the disposition of assets or shares, or dissolution of the merger if it has already closed.[12] In its Information Bulletin on Merger Remedies[13] the Canadian Competition Bureau notes:

> Standalone behavioural remedies are seldom accepted by the Bureau. It is difficult to design a behavioural remedy that will adequately replicate the

[11] *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for amendment to Canada's Investment Act* (Ottawa: Bureau of Corporate Parties, 1981), pp 148-150.
[12] *Competition Act*, s 92.
[13] Competition Bureau Canada, *Information Bulletin on Merger Remedies in Canada* (September 22, 2006), online: https://bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/%20eng/03392.html.

outcomes of a competitive market. Even if such a remedy can be designed in clear and workable terms, it is likely to be less effective and more difficult to enforce than a structural remedy. Moreover, any attempt to provide for a standalone behavioural remedy usually imposes an ongoing burden on the Bureau and market participants, including the merged entity, rather than providing a permanent solution to a competition problem.

…

Structural remedies are typically more effective than behavioural remedies. For example, behavioural remedies may prevent the merged entity from efficiently responding to changing market conditions and may restrain potentially pro-competitive behaviour by the merged entity and/or other market participants. Furthermore, it is difficult to determine the appropriate duration of a behavioural remedy, since it is often difficult to gauge how long it will take for new entry or expansion to be established in the relevant market(s). Competition authorities and courts generally prefer structural remedies over behavioural remedies because the terms of such remedies are more clear and certain, less costly to administer, and readily enforceable. Disadvantages with respect to the costs associated with behavioural remedies include:

- The direct costs of monitoring the activities of the merged entity, and the merged entity's adherence to the terms of the remedy;

- The costs to other market participants, who must rely on arbitration proceedings arising from self-governing mechanisms; and

- The indirect costs associated with any efforts by the merged entity to circumvent the spirit of the remedy.[14]

The strong preference for structural remedies in the merger context is not limited to Canada. In fact, it is almost universal. For instance, the US Department of Justice Antitrust Division Merger Remedies Manual[15] provides that "Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clear, certain, effective, and avoid ongoing government entanglement in the market".[16] Likewise, the ICN's 2016 Merger Remedies Guidelines[17] note that "Competition authorities generally prefer structural relief in the form of a divestiture to remedy the anti-competitive effects of mergers, particularly horizontal mergers".[18]

b. Monopolization Guidance

While the remedy guidance with respect to mergers is largely unanimous that structural remedies are preferred, that is not the case with monopolization guidance. The Canadian Competition Bureau's Abuse of Dominance Enforcement Guidelines provide:

> Pursuant to subsection 79(1), the Tribunal may issue an order prohibiting a respondent from engaging in the impugned practice of anti-competitive acts. In addition or alternatively, if the Tribunal finds that an order prohibiting the practice is not likely to restore competition in the affected market, subsection 79(2) provides that the Tribunal may issue an order directing the respondent to take any such actions as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts, including the divestiture of assets or shares. Other actions may include, for instance, changes to contractual terms, or the establishment of a corporate compliance program. The Bureau typically views prohibition

[14] *Ibid* at paras 10 and 49.
[15] US Department of Justice Antitrust Division, *Merger Remedies Manual* (September 2020), online: https://www.justice.gov/atr/page/file/1312416/download.
[16] *Ibid* at 13. See also *United States v E.I. du Pont de Nemours & Co*., 366 US 316 at 331; *California v Am. Stores Co.*, 495 US 271 at 280-281.
[17] ICN Merger Working Group, "Merger Remedies Guide" (2016), online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.
[18] *Ibid* at para 3.2.1.

> and prescriptive orders as complementary and, where appropriate, may seek orders that both prohibit the anti-competitive conduct and direct the respondent to take positive steps or actions as are necessary to restore competition in the market.[19]

Thus, the guidance contemplates use of both cease and desist/prohibition injunctions and mandatory orders, but does not touch on structural remedies.

In the now withdrawn U.S. Department of Justice Section 2 Report[20] the Department of Justice noted the importance of an effective remedy in monopolization cases, observing that "[d]esigning and implementing effective remedies in unilateral conduct cases often is a daunting challenge"[21] because of the need to end the conduct and allow an opportunity for competition to occur, without chilling legitimate competition on the merits by the dominant firm.

The Section 2 Report noted:

> In the merger context, structural remedies generally are preferred over conduct remedies because they are 'relatively clean and certain, and generally avoid costly government entanglement in the market.'…
>
> These advantages usually are absent in the section 2 context, especially where the firm in question has not grown through acquisition. As a result, many panelists and commentators favor conduct remedies over structural relief in section 2 cases. …As two commentators summarize, 'Even if structural and conduct relief would be equally effective, a conduct remedy is nevertheless preferable if any higher administrative costs it entails are outweighed by lower costs of lost efficiencies and stifled innovation.'[22]

---

[19] Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: Innovation, Science and Economic Development Canada, 2019) at para 101.
[20] US Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (September 2008), online: https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf (withdrawn May 2009).
[21] *Ibid*, at 143.
[22] *Ibid*, at 149.

However, structural remedies are not ruled out. The Section 2 Report concludes its consideration of the issue as follows:

> The Department believes that structural remedies remain an important part of the remedies government's remedial arsenal. They may be appropriate if a section 2 violation has a clear, significant causal connection to a defendant's acquisition of monopoly power. Radical restructuring of a defendant, however, is appropriate only after a determination that alternative remedies would not satisfactorily achieve the remedial goals or would do so at an unacceptable cost and a determination that the structural remedy is likely to benefit consumers.[23]

V. CASE GUIDANCE

With that background, we turn to a review of the Canadian abuse of dominance cases and the remedies imposed, with some commentary, where applicable and appropriate, as to the efficacy of such remedies.

a. *NutraSweet*

The abuse of dominance case filed against The NutraSweet Company[24], which was a supplier of the high-intensity sweetener aspartame (which it trade marked "NutraSweet") to food and beverage manufacturers, was the first abuse of dominance case brought in Canada.

The Commissioner of Competition (then Director of Investigation and Research – for the remainder of the paper referred to as "Commissioner") alleged that the NutraSweet Company had engaged in a variety of practices, but essentially of two types – exclusivity inducing contractual provisions and predatory pricing – in order to maintain dominance in the supply of aspartame. The case was also brought under the Section 77 provision with respect to exclusive dealing and tied selling. The Tribunal dismissed the predatory pricing aspect of the case, but found for the Commissioner with respect to the contract terms, which he alleged induced exclusivity.

---

[23] *Ibid*, at 158.
[24] *Canada (Director of Investigation & Research) v NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.).

The remedy sought was a requirement that the Tribunal order the NutraSweet Company to cease the anti-competitive acts found, together with orders reasonable and necessary to overturn the effects of the anti-competitive conduct. Specifically, it sought to enjoin the use of the challenged contract terms inducing exclusivity and declare those already in agreements to be of no force and effect. No order was sought with respect to divestitures. The Tribunal ordered that contract terms, which required or induced exclusivity, not be entered into in the future nor enforced if currently in place.

The order in fact made relatively little impact with respect to purchasing policies of aspartame customers in Canada (primarily Coke and Pepsi) until, approximately one year after the decision, another high intensity sweetener, acesulfame-K, was approved for use in Canada. Then there was a significant change, as the blending of aspartame and acesulfame-K resulted in a more cost effective formulation to sweeten beverages.

b. *Laidlaw*

The *Laidlaw* case[25] involved a challenge to the practices of the "dominant" waste collection/disposal firm in certain communities on Vancouver Island. Laidlaw was alleged to have abused its dominant position by buying up competitors, using long term non-compete agreements in such purchase and sale agreements, and using a variety of contract terms which locked in customers (automatic renewals, onerous notice of termination provisions, "long" terms, rights of first refusal, rights to meet competitive offers and retain the business, requiring exclusivity at all customer locations, and early termination fees – amongst other terms).

The Tribunal found for the Commissioner and ordered the changes to the contract provisions that the Commissioner sought. Perhaps most interestingly, the Tribunal found that Laidlaw's serial acquisition of competitors was part of its practice of anti-competitive acts and ordered that Laidlaw not acquire competitors in the relevant market for a period of time, and as well it struck down the non-competition provisions in the existing purchase agreements. While the prohibition on acquiring competitors was not a divestiture order, it is in some respects a structural remedy. However, it was not granted for traditional structural reasons, but rather to avoid discouraging customers from signing agreements with competitors of Laidlaw for fear that their suppliers would simply be bought up.

[25] *Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.).

It is interesting to note that the upshot of this order appears to have been that other competitors, not constrained as to their contractual practices, essentially took over the relevant geographic market – and were themselves the subject of enforcement activity later – see Section V (l), below.

c. *Yellow Pages*

The *Yellow Pages*[26] case was a consent decision of the Competition Tribunal, involving the various Canadian landline telephone service providers, who were also the publishers of the various Yellow Pages directories across the country. The companies had put in place a formal agreement whereby they agreed that, for "national" advertising in Yellow Pages they would only deal directly with those advertisers whose head office was in that company's "territory", and would act as exclusive agents for the companies in their respective territories for the placement of advertisements in Yellow Pages directories outside of their territories.

The Tribunal's order prohibited the exclusive representation agreements but did not involve any structural components.

d. *Neilsen*

The *Neilsen* case[27] involved alleged abuse of dominance by a supplier of scanner based sales data to grocery product manufacturers/suppliers. Neilsen was alleged to have monopolized the market by entering into agreements with grocery retailers to obtain exclusive access to their sales data, and by using long term agreements with customers.

The Tribunal found against Neilsen, and ordered that it not enforce its exclusivity arrangements with retailers and that it open up its long-term supply contracts. Interestingly, the Tribunal found that in order to be competitive, any new entrant supplier would have to be able to offer some historical data. Consequently, the Tribunal ordered Neilsen to make historical data available to competitors, if they requested it. So, while not a divestiture *per se*, there was an order to provide assets – not to establish a stand-alone competitor, but to help facilitate the ability of competitors to enter and be effective. In that respect, it was a kind of attenuated structural relief – analogous to the kind of supports sometimes built into divestiture orders in merger cases.

[26] *Canada (Director of Investigation & Research) v AGT Directory Ltd*., 1994 CarswellNat 3198, [1994] C.C.T.D. No. 24 (Competition Trib.).
[27] *Canada (Director of Investigation & Research) v D & B Co. of Canada Ltd*. (1995), 64 C.P.R. (3d) 216.

In fact, despite the Tribunal order, retailers chose not to supply the data to other competitors, and there was no entry.

e. *Interac*

The *Interac* case[28] was another consent proceeding, although subject to significant challenge by objectors. It involved an effort to open access to the Interac Automated Banking Machine (ABM) network to a broader range of financial institutions. The order contained a complex set of rules to allow for access to the system on non-discriminatory terms by a significant number of smaller financial institutions. Interac was not, however, required to divest assets, and no attempt was made to split the network to create a competing ABM network.

f. *Tele-Direct*

The *Tele-Direct* case[29], somewhat oddly (although, as is apparent from a cursory review of this note, there are some markets/businesses which are repeat visitors to the Canadian Competition Tribunal in abuse of dominance cases), also involved Yellow Pages telephone directories. In this case, the complaint was that the largest publisher of such directories in Canada was monopolizing the business of providing advertising agency services to advertisers with respect to placement of directory advertising, by tying the supply of such services to the supply of advertising in the directories, and also by means of alleged anti-competitive discounting.

The relatively modest remedy granted in this case was an order that the publisher treat advertisers who chose to use other agencies in a non-discriminatory manner, and that it price advertising services and directory space as separate products so as to "untie" the supply of the two.

The remedy appears to have had relatively limited market impact, in part, perhaps, because of the inherent ambiguity in respect of an order not to discriminate, and in part because Yellow Page directories became a dying business not that long after the case concluded.

g. *Heinz*

[28] *Canada (Director of Investigation & Research) v Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Competition Trib.)
[29] *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.,* (1997), 73 C.P.R. (3d) 1 (Competition Trib.).

During the year 2000, the Competition Bureau concluded an investigation into the actions of *H.J. Heinz*[30], which was alleged to have abused a dominant position in the supply of jarred baby food through use of exclusive supply arrangements with retailers. The matter was resolved on the basis of undertakings given to the Commissioner to cease the exclusivity arrangements. However, there was not any material degree of visible entry into the market in subsequent years.

h. *Enbridge*

The *Enbridge* case[31] was a consent resolution respecting a local monopoly gas supplier's activities in relation to its ancillary water heater rental business. The essential allegation was that Enbridge made it difficult for existing customers to return rental water heaters, thereby discouraging new entrants. The resolution was an order containing various mechanical provisions to make cancelling rental contracts/returning water heaters easier for customers or their agents.

i. *Air Canada*

The *Air Canada* case[32] involved a complex challenge to Air Canada's conduct in respect of a number of routes to and within Atlantic Canada. The case turned essentially on allegations of predatory conduct, and sought remedies requiring the charging of fares in excess of "avoidable cost", and prohibiting the addition of capacity on routes which were operating with revenues below avoidable cost. No structural remedy was sought.

The case was ultimately discontinued by the government before a final decision, as it concluded that the events of September 11, 2001 resulted in such changes to the airline industry that the premise upon which the case was based was no longer applicable.

j. *IKO*

In this case[33] the largest supplier of roofing shingles in Canada agreed with the Competition Bureau to cease providing loyalty rebates to distributors. Instead, it

[30] *Commissioner of Competition v H.J. Heinz Company of Canada Ltd.* (August 2000). Undertaking; as described in Organisation for Economic Co-operation and Development, "Annual Reports by Competition Agencies on recent developments, Canada 2000", online <,https://www.oecd.org/Canada/39553880.pdf.>.
[31] *Canada (Commissioner of Competition) v Enbridge Services Inc*. 2002 Comp. Trib. 9 (Competition Trib.).
[32] *Canada (Commissioner of Competition) v Air Canada (2003),* 26 C.P.R. (4th) 476 (Competition Trib.) (completed in part and then discontinued).
[33] Canada, Competition Bureau News Release, "IKO Industries Ltd. Modifies its Loyalty Program Following Competition Bureau Investigation" (31 March 2003).

agreed to give customers a choice between loyalty rebates and volume-based rebates.

k. *Canada Pipe*

The *Canada Pipe* case[34] was a hard-fought matter, which ultimately settled after a Tribunal decision and an appeal to the Federal Court of Appeal. The Commissioner alleged that Canada Pipe was monopolizing the cast iron pipe market by imposing or inducing, via discounts, exclusivity or quasi-exclusivity provisions in its arrangements with distributors. The Commissioner sought to enjoin those contractual terms.

The case ultimately settled on the basis of an agreement to a revised rebate policy which did not contain express exclusivity requirements.

l. *Waste Services*

This case[35] involved a consent resolution of a joint dominance case – the first and so far only joint dominance case which did not involve an explicit agreement between the respondents. The conduct in issue involved contractual arrangements similar to those which Laidlaw had used, and in the same geographic market on Vancouver Island in which Laidlaw had been the subject of a proceeding some fifteen years before. (See Section V (b), above.)

The remedy agreed was also similar to that in *Laidlaw* – shorter term contracts and short term renewals, no rights of first refusal, no need to divulge other offers, limited liquidated damages, and similar changes so as to permit customers to switch suppliers more easily.

m. *CREA*

In this case[36] the Commissioner challenged rules established by the Canadian Real Estate Association (CREA), owner of the "Realtor" and "Multiple Listing Service/MLS" trademarks. It sought an order that CREA not condition the licencing of its marks on rules which essentially required the purchase of a full

[34] *Canada (Commissioner of Competition) v Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Competition Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.) (eventually settled by consent agreement).
[35] *Canada (Commissioner of Competition) v Waste Services (CA) Inc.,* 2009 CarswellNat 4796 (Competition Trib.); Canada Competition Bureau News Release, "Competition Bureau Cracks Down on Joint Abuse of Dominance by Waste Companies" (16 June 2009), online: <www.competitionbureau.ca>.
[36] *Commissioner of Competition v Canadian Real Estate Association*, 2010 Comp. Trib., 12 (Competition Trib.) (eventually settled by consent agreement).

suite of broker representative services by clients. CREA settled the case on that basis.

n. *Direct Energy & Reliance Home Comfort*

These cases[37] were brought against two water heater rental companies. The conduct the Commissioner challenged, like in the *Enbridge* case noted above (Section V (h)), focused on tying customers into long-term rental contracts and making it difficult to switch suppliers. The remedy sought (and achieved by settlement against Reliance) was similar to those in the *Enbridge* case, although more detailed. There was also a $5M Administrative Monetary Penalty (AMP).

Direct Energy had sold its water heater business after the proceeding was launched. Consequently the agreed resolution with Direct involved a payment of a $1M AMP, as well as conditions which would apply if it were to re-enter the water heater rental business.

o. *TREB*

In the *Toronto Real Estate Board (TREB)* case[38] the allegation was that TREB had used control over the MLS trademarks and system to restrict the type of online services which brokers could offer consumers. In that regard, it was similar in some respects to the type of restriction challenged in the *CREA* case (see Section V (m)).

The Commissioner sought an order that TREB remove the rules which prevented brokers from offering Virtual Office Website (VOW). That is, essentially providing less expensive/extensive services through websites. It also sought an order that TREB provide information to brokers necessary for them to provide such VOW services.

After making its decision on liability, the Tribunal convened a separate hearing to address the appropriate remedy. Ultimately, the Tribunal prohibited the rules which restricted the operation of VOWs, and ordered that TREB had a positive obligation to supply data necessary for such website offerings.

p. *Softvoyage*

---

[37] *Canada (Commissioner of Competition) v Direct Energy Marketing Limited* (2012), CT-2012-003 (Competition Trib.); *Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership* (2012), CT-2012-002.
[38] *Canada (Commissioner of Competition) v Toronto Real Estate Board,* 2013 (Competition Trib.), reversed 2014 FCA 29 (F.C.A.), leave to appeal refused 2014 CarswellNat 2755 (S.C.C.), reconsidered in 2016 Comp. Trib. 7 (Competition Trib.), affirmed 2017 FCA 236 (F.C.A.), leave to appeal refused 2018 CarswellNat 4555 (S.C.C.).

This case[39] involved restrictions employed by a supplier of packaged holiday software, which allegedly locked tour operators and travel agents in to use of its software and prevented them from using software supplied by others. It was also alleged to have tied the use of its tour operator/compilation software to its travel booking software.

The parties settled the proceeding by agreeing to eliminate exclusivity provisions andagreeing to a positive obligation to facilitate connection with software provided by others.

q. *Vancouver Airport Authority*

The case[40] involved a challenge to the authority which owned and operated the Vancouver International Airport (VAA), alleging that its policy of permitting only two catering services to operate at the airport led to a substantial lessening or prevention of competition, and sought to compel it to allow additional firms to operate catering services at the airport, or supply airline meals to airlines using the airport.

The Tribunal concluded that the Commissioner had not proven his case, so no order was made.

VI. CONCLUSIONS

As we have outlined, there have been no truly structural remedies ordered since the Canadian *Competition Act* introduced the abuse of dominance prohibition in 1986 – although in a few cases positive supply obligations have been required. In at least two cases, *Neilsen* and *TREB*, that supply obligation was explicitly in support of encouraging entry – although the exercise was unsuccessful in the *Neilsen* case, and the jury is out on the more recent *TREB* matter.

As has long been recognized, a key challenge with structural remedies, whether in the merger context or with respect to monopolization, is the danger of undermining efficiency. As well, in the monopolization context, to a greater degree than with respect to mergers, there may be difficulties in it and costly design challenges, as a unified firm has to be split, rather than simply prohibiting a merger which has not yet occurred.

[39] *Canada (Commissioner of Competition) and Softvoyage Inc*. Re 2017 CarswellNat 7884 (Competition Trib.).
[40] *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp. Trib. 6 (Competition Trib.), reversed 2018 FCA 24 (F.C.A.).

As noted at the outset, the primary remedy for abuse of dominance contemplated by the drafters of the *Competition Act* was a cease and desist order. That is clear both from the provisions of the statute and from the discussion surrounding the enactment of Canadian abuse of dominance law. And, particularly with a statute which has an explicit concern for efficiency, that may not be surprising. The question is, however, notwithstanding these genuine challenges, have structural remedies been under-utilized to date, and is it likely we will see more use of the remedy in the future?

It is probably worth noting that during the 35 year period in which the Canadian provision has existed, the US has not ordered any firms broken up under Section 2 of the *Sherman Act*. And it is fair to observe that enforcers, and Tribunals, are constrained by the type of cases which present themselves. With the possible exception of the *Interac* and *Canada Pipe* cases, it is not obvious that a structural remedy would have been even arguably appropriate in most of the cases that have come before the Tribunal to date.

In our view, structural remedies, while possible under the Canadian *Competition Act*, are likely to remain rare. Nevertheless, advisors need to be aware of the possibility when counselling firms, as the tool does exist if the correct factual scenario presents itself. These will inevitably be rare remedies, but they are possible under the Canadian *Competition Act* and, perhaps one day, we may see one. Maybe.