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Competition Bureau

ENFORCEMENT GUIDELINES ON THE ABUSE OF DOMINANCE PROVISIONS

(Sections 78 and 79 of the Competition Act)

Canada



Competition Bureau

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ON THE ABUSE OF
DOMINANCE PROVISIONS**

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July 2001

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EXECUTIVE SUMMARY

Purpose and Scope of These Guidelines

As part of the Competition Bureau's ("the Bureau's") continuing efforts to ensure a transparent and predictable enforcement policy, these guidelines provide an outline of the Bureau's approach to enforcing the abuse of dominance provisions contained in sections 78 and 79 of the *Competition Act* ("the Act").

The guidelines are organized into five parts:

- Part 1 — overview of the abuse of dominance provisions;
- Part 2 — institutional framework for enforcement;
- Part 3 — key elements of section 79;
- Part 4 — anti-competitive acts; and
- Part 5 — remedies.

What Constitutes "Abuse of a Dominant Position"?

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. These provisions, contained in sections 78 and 79, establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that maintain, entrench or enhance their market power.

The Bureau's enforcement policy is to vigorously pursue cases that meet the elements of section 79. These guidelines make it clear, however, that section 79 is not intended to prohibit dominance or the presence of market power. Rather, the section seeks to address the abuse of a dominant market position to substantially prevent or lessen competition. While the ability to raise prices or maintain high prices usually indicates dominance or market power, high prices do not in themselves prohibit or constrain competition. These guidelines make it clear that in enforcing

these provisions the Bureau will not attempt to tilt the playing field in favour of any particular market participant, nor will it otherwise protect competitors from the challenges of legitimate competition.

Subsection 79(1) sets out three essential elements, all of which must be found to exist by the Competition Tribunal ("the Tribunal") for it to grant an order. The Tribunal must find that:

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- (b) that person or these persons have engaged 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.

How the Bureau Establishes Dominance

The first question, then, that the Bureau must answer when examining an allegation of abuse is: Does the person or firm substantially or completely control a "class or species of business"? For the purposes of enforcing section 79, the Bureau treats the element "class or species of business" as synonymous with the relevant product market. Likewise, it approaches the element of "throughout Canada or any area thereof" as synonymous with the relevant geographic market. In defining relevant markets, the Bureau employs a standard economic approach that takes into account a variety of factors, the most important of which are the availability of close substitutes, transportation costs and customer switching costs.

The Bureau considers the element of "substantially or completely control," or "dominance" as it is commonly referred to, to be synonymous with market power. The most straightforward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable

period of time. It is sometimes difficult to measure market power directly. Consequently, the Bureau collects evidence and assesses a number of qualitative and quantitative factors, including technological change, recent entry into or exit from the market, industry supply capacity, and countervailing market power on the part of customers and distributors. However, the Bureau places the greatest emphasis on the key factors of market share and barriers to entry.

The objective of this analysis is to determine the extent to which a firm or group of firms is constrained from pricing above competitive levels because of the presence of effective competition or the likelihood of competitive entry. In the case of entry barriers, the Bureau will assess not only whether entry is possible or likely, but also the time period required for an entrant to become a viable and effective competitor.

All other things being equal, the higher the market share held by a firm or group of firms acting together, the greater the likelihood they will possess market power. Given that the attempted exercise of market power may be mitigated by other factors, and that the dispersion of market shares among other competitors may be significant, there is not always a direct correlation between market share and dominance. However, the Bureau's general approach in evaluating allegations of abuse of dominance is as follows.

- A market share of less than 35 percent will generally not give rise to concerns of market power or dominance.
- A market share of 35 percent or more will generally prompt further examination.
- In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 60 percent will generally prompt further examination.

The reference to “one or more persons” in section 79 contemplates a situation where a group of firms, none of which on its own is dominant, may collectively possess market power. In assessing cases where joint dominance is alleged, the Bureau will consider:

- (a) whether the group of firms collectively accounts for a large share of the relevant market;
- (b) whether there is coordinated behaviour and whether such behaviour is anti-competitive;
- (c) barriers to entry into the group, as well as barriers to entry into the relevant market;
- (d) whether actions have been taken by members of the group to inhibit intra-group rivalry; and
- (e) whether customers can exercise countervailing market power to offset the attempted abuse.

“Practice of Anti-Competitive Acts”

Having defined a relevant product and geographic market, and determined sufficient conditions to give rise to a finding of dominance, the Bureau must establish as the second element required under section 79 that the firm or firms in question have engaged in a “practice of anti-competitive acts.” The word “practice” normally denotes more than an isolated act. Within the meaning of section 79 and as reflected in the jurisprudence, a “practice” can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together that have the effect of substantially preventing or lessening competition.

Section 78 provides a descriptive list of potentially anti-competitive acts. None of these acts, in and of itself, necessarily constitutes an abuse of dominance. Accordingly, for an act to be considered anti-competitive, there must be some element of anti-competitive design, purpose or object that is predatory, exclusionary or disciplinary.

The anti-competitive acts listed in section 78 are:

- (a) margin squeezing by a vertically integrated supplier against a customer-competitor;
- (b) acquisition by a supplier of a customer for the purpose of foreclosing a competitor;
- (c) freight equalization on a competitor's plant to impede or eliminate competition;
- (d) selective use of fighting brands to discipline or eliminate a competitor;

- (e) pre-emption of scarce facilities or resources required by a competitor;
- (f) buying up of products to prevent price erosion;
- (g) adoption of incompatible specifications to prevent entry or eliminate a competitor;
- (h) pressure on suppliers to sell only or primarily to certain customers;
- (i) sale of articles below acquisition costs to discipline or eliminate a competitor;
- (j) certain acts or conduct of a person operating a domestic air service; and
- (k) denial of access to or refusal to supply on reasonable commercial terms, by a person operating a domestic air service, facilities or services that are essential to the operation in a market of an air service.¹

The list of anti-competitive acts in section 78 is not exhaustive. In a number of cases, the Bureau has alleged, and the Tribunal has accepted, that practices not included in section 78 constituted anti-competitive acts that can be addressed under section 79. For example, contractual arrangements between suppliers and customers have been found to create exclusivity that forecloses market access to competitors. In addition to the discussion of anti-competitive acts that appears in [Part 4](#) of these guidelines, [Appendix III](#) deals specifically with anti-competitive margin squeezing by vertically integrated suppliers.

The jurisprudence under section 79 has held that the element of anti-competitive intent or purpose can be established either with direct evidence or by inference, based on the likely effect of a practice on competition in the particular circumstances of a case.

Unlike the merger provisions of the Act, section 79 does not provide for an explicit efficiency defence in assessing acts that are considered to be anti-competitive, but that may enhance efficiency. Accordingly, where a practice of anti-competitive acts has been determined to meet the threshold of

substantially lessening or preventing competition, the Bureau will attempt to resolve the competition issue with the party. If this is not possible, the Bureau will bring the matter before the Tribunal.

The Test of Substantial Prevention or Lessening of Competition

The meaning of “preventing or lessening competition substantially” is established in case law. The question is whether the anti-competitive acts engaged in by a firm or group of firms serve to preserve, entrench or enhance their market power. Focus is placed squarely on competition, rather than on individual competitors. In any given case, the degree of dominance, the nature and severity of the anti-competitive acts, and the degree of competition remaining in the market will all form part of the determination.

The Institutional Framework for Enforcement

The role of the Bureau is to carry out inquiries under the Act having regard to the public interest in competition. Under the Act, the Bureau does not have the authority to directly compel change in business behaviour. In order to do so, it must apply to the Tribunal and assume the role of litigant. In the case of section 79, the Bureau must provide evidence to satisfy the Tribunal that all of the elements of the section are met and that a remedial order is warranted.

During the course of an inquiry, the Bureau will usually present the parties with its concerns as to any contravention of the section. Parties whose conduct is the subject of inquiry are at liberty to propose an alternative means of dealing with the Bureau’s competition concerns that does not require an application to the Tribunal.

Where the Bureau has grounds for an application to the Tribunal, a number of options are available. The Bureau may litigate a contested application.

1. On July 5, 2000, amendments to the *Competition Act* related to the airline industry came into force; on August 23, 2000, new airline regulations also came into effect. On February 8, 2001, the Bureau released for consultation its draft *Enforcement Guidelines on: the Abuse of Dominance in the Airline Industry*.

Alternatively, cases may be resolved on a consent order basis, where the firm or firms whose conduct is in question and the Bureau agree on a remedy to be submitted to the Tribunal for its approval.

Remedies

The abuse of dominance provisions grant broad powers of remedy to the Tribunal. Where the Tribunal finds that the elements of section 79 are met, it may make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal concludes that a prohibition order may not be adequate to restore competition, it may make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Although the Tribunal has wide latitude to impose remedies under section 79, the section also contains a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner of Competition.

Conclusion

The Tribunal has, to date, rendered six decisions under the abuse of dominance provisions. These decisions provide jurisprudence on most of the key elements of section 79. However, there remain some areas, such as joint dominance and vertical squeezing, on which little or no jurisprudence exists.

Accordingly, the Bureau's approach in preparing these guidelines has been to both reflect the jurisprudence established under section 79 and to articulate the Bureau's enforcement position on aspects of the abuse of dominance provisions where there is no jurisprudence.

However, this document cannot provide guidance for every situation, and the circumstances of each case will ultimately determine how the Bureau will exercise its enforcement discretion. Pursuant to its Program of Advisory Opinions, the Bureau has historically provided its views on proposed actions by businesses. Consequently, anyone can seek advice on whether or not a proposed course of action would raise an issue under the Act.

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PART 1: INTRODUCTION

1.1 PURPOSE OF THE GUIDELINES

The provisions of the *Competition Act* (“the Act”) dealing with abuse of a dominant market position are, together with merger review and criminal conspiracy prohibitions, the cornerstones of Canadian competition policy legislation. These guidelines are intended to help the general public, business people, and their legal and economic advisors to better understand the intent of the abuse of dominance provisions and the general approach taken by the Competition Bureau (“the Bureau”) to enforce these provisions.

Since these provisions came into effect in 1986, there have been a number of decisions by the Competition Tribunal (“the Tribunal”). As a result, there is a body of jurisprudence from the Tribunal on the key elements of the abuse of dominance provisions. However, there remain certain aspects of the law that the Tribunal has not yet had an opportunity to address in any of its decisions. The Bureau has therefore developed an enforcement approach for those aspects of the provisions where there is no jurisprudence available.

1.2 ORGANIZATION OF THE GUIDELINES

These guidelines are organized into five parts and four appendixes as follows:

- **Part 1** provides an introduction and an overview of the evolution of the abuse of dominance provisions.
- **Part 2** sets out the institutional framework for enforcement of the provisions.
- **Part 3** draws on the jurisprudence of the Tribunal to provide a detailed discussion of the key elements of section 79.
- **Part 4** discusses the anti-competitive acts as set out in section 78.
- **Part 5** deals with remedies available to the Tribunal under section 79.
- **Appendix I** contains the text of sections 78 and 79 and of other sections of the Act dealing with abuse of a dominant market position.
- **Appendix II** provides an overview of the essential elements established in the case law.
- **Appendix III** discusses the Bureau’s approach to dealing with allegations of abuse of dominance in industries characterized by vertical integration and dual distribution.
- **Appendix IV** provides a brief summary of the cases that have been decided by the Tribunal.

1.3 PURPOSE OF THE ABUSE OF DOMINANCE PROVISIONS

The enactment of the Act in 1986 marked a significant change in the legislative treatment of monopolies and dominant firms. Prior to 1986, the *Combines Investigation Act* defined “monopoly” as a party or parties who substantially controlled a class or species of business and operated to the detriment or against the interest of the public. The *Combines Investigation Act* then created a “criminal offence of monopoly,” as it was defined in the legislation. No legislative guidance on the issue of detriment was provided. Without such guidance, establishing proof of detriment to a criminal standard of reasonable doubt was exceedingly difficult. Over time, it became clear that dealing with the issue of abusive exercise of market power under criminal law was inappropriate.

The 1986 legislation moved the review of the activities of dominant firms and monopolies into the realm of civil law. Section 79 also clarified Parliament’s intent that simply being

a dominant firm or even a monopoly, with the associated market power, is not in and of itself sufficient to warrant competition law intervention. Charging higher prices to customers, or offering lower levels of service and choice, than would be expected in a more competitive market does not in and of itself constitute an abuse of a dominant position.

Rather, the Tribunal has determined that an abuse occurs when a dominant firm or group of firms engages in conduct that constitutes exclusionary, disciplinary or predatory behaviour towards competitors or potential competitors, with the result that competition is prevented or lessened substantially.² This distinction is critical, as it is clear that the objective is to preserve competition within markets rather than to provide an umbrella of protection for individual competitors.

The objective of the abuse of dominance provisions is to create a market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete. Providing such a framework, however, does not mean establishing equality among competitors. Rather, the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favour of market participants who, for example, lack the ability to compete with more efficient or better-managed rivals.

Competition policy exists to encourage competition rather than to penalize efficient, well-managed firms that engage in aggressive but legitimate competitive behaviour. In all markets some businesses will be better positioned than others to compete. Some may have superior

products, more efficient distribution methods or greater marketing expertise. Firms may also employ different competitive strategies, including varying degrees of vertical integration. It is part of the normal competitive process that some firms will succeed while others will fail. The abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour in order to damage or eliminate competitors so as to maintain, entrench or enhance their market power.

To reach a determination regarding any alleged breach of the abuse of dominance provisions, the circumstances of the industry and the particular facts of each case must be investigated and carefully analysed. For example, anti-competitive acts employed by a firm with a relatively low market share in an industry with low or minimal barriers to entry would be unlikely to trigger an inquiry, or much less an application to the Tribunal. However, identical anti-competitive acts engaged in by a firm with a large share of the market in an industry with significant entry constraints could well trigger enforcement action by the Bureau. Therefore, in considering whether particular business conduct breaches the abuse of dominance provisions, it is necessary to evaluate the practices in question in the context of the structural and other characteristics specific to the market. In light of this, it is not possible in these guidelines to set hard and fast rules for all situations as to what would constitute an abuse of dominance. Nevertheless, the Bureau believes that, by drawing upon the existing jurisprudence and on the Bureau's experience in enforcing the abuse of dominance provisions, these guidelines will play a role in enhancing compliance with the Act and will further clarify how the Bureau will enforce the provisions.

2. *Canada (Director of Investigation and Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *NutraSweet*].

PART 2: INSTITUTIONAL FRAMEWORK FOR ENFORCEMENT

2.1 INVESTIGATION AND ADJUDICATION

The *Competition Act* and the *Competition Tribunal Act*³ create a clear separation between the functions of investigation and adjudication. The Commissioner of Competition⁴ is responsible for inquiries under the Act and is provided with significant powers with which to carry them out.⁵ The Competition Tribunal is responsible for adjudication of the civil provisions of the Act, including the abuse of dominance provisions.⁶

Only the Commissioner can make an application to the Tribunal for a remedial order. Likewise, the Tribunal can consider an issue under the Act only when it has received an application from the Commissioner. When an application has been filed with the Tribunal, the burden of proof is on the Commissioner to satisfy the Tribunal that all of the elements of section 79 are met and that an order of the Tribunal should be granted.⁷ In other words, the Commissioner cannot directly compel change in business behaviour. The Commissioner must take on the role of litigant before the Tribunal and must produce evidence and prove that there are grounds for the making of an order.

2.2 THE EXAMINATION/INQUIRY PROCESS

It is the duty of the Bureau to carry out inquiries on an impartial basis, having regard to the public interest in competition, as opposed to the effects on the private interests of market participants. Some complainants have misconstrued the purpose of the abuse of dominance provisions and attempted to seek protection from the impacts of legitimate market competition, or have otherwise attempted to assure their firm of a profitable position in the market. As indicated in [Section 1.3](#) of these guidelines, this is not what the section is intended to accomplish. The Bureau pursues those complaints that meet the elements of the section and that raise a substantive issue of prevention or lessening of competition.

An application by the Commissioner to the Tribunal is preceded by an investigation or inquiry by the Bureau. Examinations under the Act typically begin with the receipt of a complaint. In abuse of dominance cases, complaints may be received from firms alleging that competitors' activities are inhibiting their ability to enter or compete in a market.

On receiving a complaint, the Bureau undertakes a preliminary examination to establish a factual basis to determine (i) whether there is a possible issue under the Act; (ii) whether grounds exist to pursue a formal inquiry under

3. Both of these statutes came into force in June 1986.

4. Known prior to the amendments to the *Competition Act* in March 1999 as the Director of Investigation and Research.

5. The Commissioner of Competition is appointed by the Governor in Council and, as head of the Competition Bureau, is responsible for administering and enforcing the *Competition Act*.

6. The Competition Tribunal is composed of judges of the Federal Court of Canada Trial Division, one of whom is Chair of the Tribunal, as well as lay members with expertise in the fields of business and economics.

7. The standard of proof required under the civil reviewable matters is "on a balance of probabilities."

the Act; and (iii) under which provisions of the Act the inquiry should proceed. The Commissioner orders an inquiry where he or she has reason to believe that grounds exist under Part VIII of the Act, which contains the abuse of dominance provisions. Once the inquiry has begun, formal powers of investigation may be used.⁸

Often, allegations of abuse of dominance can also be examined under other more specific civil and criminal provisions. The Commissioner's inquiries can be broad enough to consider possible contravention of the Act under a number of sections.⁹ A final determination of which sections of the Act the Commissioner will proceed with will depend on the specific facts of the case. It should be noted, however, that a key feature of the abuse of dominance provisions is the breadth of possible remedies that can be obtained through an order by the Tribunal.

By using formal powers of investigation, the Commissioner may seek the authorization of the court to compel persons to provide the information required to complete the inquiry. Section 11 of the Act allows the Commissioner to obtain authorization from the court to compel the production of documents, written returns of information, and/or attendance of persons for an oral examination under oath. Section 15 provides for the search of premises and the seizure of evidence.

In the course of its inquiries, the Bureau will pursue various avenues of investigation to obtain all relevant information. This normally includes information in the possession of complainants, third party market participants, and the firm or firms that are the subject of the inquiry. This information is carefully analysed within the legal and economic framework of the legislation. Frequently, the Bureau will obtain specialized legal and economic advice or industry-specific expertise as part of its case assessment process. Where the evidence discloses that the Bureau has grounds for an application to the Tribunal, parties against whom an order would be sought are provided with a full opportunity to present information to the Bureau or to indicate what, if any, measures they may be prepared to undertake to address the competition concerns.

The inquiry process is governed by a number of safeguards, checks and balances. Subsection 10(3) of the Act requires that all inquiries be conducted in private. In addition, the Commissioner can only exercise formal powers of investigation by obtaining the prior authority of the courts to do so. The need to follow due process, the complexity of the issues, the volume of information and the degree of analysis required by the Bureau to make proper decisions on the disposition of inquiries combine to make the inquiry process both time-consuming and resource-intensive.

8. In addition to the authority of the Commissioner to commence an inquiry, section 9 of the *Competition Act* provides that six Canadian residents may apply to the Commissioner for an inquiry. Further, section 10 provides for the Minister of Industry to direct the Commissioner to cause an inquiry to be made. However, the vast majority of inquiries under the *Competition Act* are initiated by the Commissioner where a complaint and preliminary examination provide the requisite "reasonable grounds to believe" that a breach of the Act has occurred.

9. For example, an allegation of abuse may involve predatory conduct (also covered under subsection 50(1) of the criminal provisions); the refusal to supply a customer, which can be dealt with under section 75 or section 61; or exclusive dealing, which, along with market restrictions and tied selling, can be dealt with under section 77.

2.3 DISPOSITION OF EXAMINATIONS/INQUIRIES

The final disposition of an examination or an inquiry depends upon whether or not the evidence establishes that the elements of subsection 79(1) are present. **If the Commissioner concludes that the evidence does not establish the elements of 79(1), the inquiry is discontinued.** The Commissioner then produces a formal report for the Minister of Industry, indicating the information obtained and the reason for the discontinuance.¹⁰ Following this, the target of the examination as well as the complainant(s) are notified in writing of the status of the inquiry. Where the Commissioner has grounds to do so, an application can be made to the Tribunal. Part 5 of these guidelines discusses the remedies available under section 79, as well as alternative approaches to resolving competition concerns without resorting to litigation before the Tribunal.

2.4 THE COMPETITION TRIBUNAL PROCESS

Where the Commissioner concludes that grounds exist for an application to the Tribunal for a remedial order, an application may be filed on a consent basis.¹¹ This happens only when the respondent and the Commissioner agree to submit to the Tribunal a proposed remedy to address the competition problem. Where an agreement on a consent order has not been reached with the respondent, the Commissioner will file an application with the Tribunal. Whether cases come before the Tribunal on a consent or contested basis, the rules of the Tribunal provide for an open public hearing process in which affected third parties can apply for intervener status. Proceedings are governed by the Competition Tribunal Rules, which include procedures for the appearance of witnesses as well as the production of documentary evidence.

10. Section 22 governs discontinuances. In the case of inquiries commenced as a result of an application under section 9, the Commissioner is required to inform the "six resident applicants" of the discontinuance and the reasons for it.

11. Section 105 gives the Competition Tribunal the discretion to grant an order agreed to by the Commissioner and respondent firms without hearing the full evidence as it would in a contested proceeding. In proceedings commenced on a consent basis, the Tribunal will grant the remedial order only if it is satisfied that the order is adequate to alleviate the substantial lessening of competition alleged by the Commissioner.

PART 3: THE ELEMENTS OF SUBSECTION 79(1)

3.1 STATUTORY PROVISION

Subsection 79(1) of the Act provides:

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

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Thus, section 79 sets out the three essential elements. Paragraph 79(1)(a) clearly focusses the provisions on market power — the concern that a firm or group of firms may be able to enhance or entrench its market power. The Bureau considers market power to be the ability to profitably maintain prices above competitive levels (or similarly restrict non-price dimensions of competition) for a significant period of time, normally one year. The law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Tribunal. A dominant position from which a firm charges prices above the competitive level is not by itself grounds for an application under section 79. The abuse of dominance provisions are not intended to regulate prices, but rather to ensure that anti-competitive conduct is properly addressed.

Paragraph 79(1)(b) further qualifies that the provisions refer to behaviour that is anti-competitive. It is the abuse of a dominant position that gives rise to scrutiny under the Act. Examples of business practices that constitute anti-competitive acts are listed in section 78. The list, although broad, is non-exhaustive. Accordingly, the Tribunal has the latitude to address anti-competitive acts not defined in section 78 and has done so in a number of cases. In order to help differentiate between legitimate competitive activity and that which constitutes abuse within the meaning of section 79, the practices listed in section 78 all involve an element of purpose, object or design to undermine competition. [Part 4](#) of this document provides more detail on these anti-competitive acts.

Finally, paragraph 79(1)(c) imposes a requirement of proof that the business conduct has had, is having or is likely to have the effect of “preventing or lessening competition substantially.” This places the focus squarely on adverse effects on competition, rather than on individual competitors.

3.2 THE ELEMENTS

3.2.1 “One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business”

This paragraph of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of “control”; and (iii) the meaning of “one or more persons.”

3.2.1(a) “Class or species of business” — Product Market Definition

A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term “class or species of business” rather than the term “market” in the context of the control element. The Bureau approach is to consider defining a “class or species of business” as synonymous with defining a relevant product.¹² The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring. As in other areas of competition law, the examination then turns to determining whether competition from other product sources limits the ability of the firm(s) in question to exercise market power. The analysis focusses on whether there are close substitutes for the product(s) in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5 percent real price increase above competitive levels lasting one year is considered a significant and non-transitory amount.¹³

This approach was accepted by the Tribunal in *Laidlaw*,¹⁴ and later in *Nielsen*,¹⁵ where the Tribunal set its basic approach to product market definition:

Direct evidence of switching behaviour in response to small changes in relative price would provide proof of substitutability.

Where price and quantity changes are not in evidence, as was true in the instant case, it is necessary to answer the question less directly by examining the evidence of both buyers and suppliers regarding the characteristics, the intended use and the price of [the product market in question].¹⁶

Price increases are not the only indicator used to define product markets.¹⁷ The Bureau also looks at many qualitative factors when determining the appropriate product and geographic market definition under the abuse of dominance provisions. These include:

- **The views, strategies, behaviour and identity of buyers.** Whether buyers have substituted between products in the past and whether they plan on doing so in the future can indicate whether a price increase is sustainable.
- **Trade views, strategies and behaviour.** Third parties who know the industry in question may provide helpful information regarding past and likely future developments that help to define the relevant market.
- **End use.** Functional interchangeability is generally a necessary, but not a sufficient, condition that must be met for two products to warrant inclusion in the same relevant market.
- **Physical and technical characteristics.** In general, the greater the value that buyers place on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will be found to be in a distinct relevant market.

12. In *NutraSweet* the Tribunal concluded that delineating a “class or species of business” is equivalent to defining a relevant product market.

13. This is consistent with the approach to defining markets outlined in the Bureau’s *Merger Enforcement Guidelines*.

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

15. *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* [1995], 64 C.P.R. (3d) 216 (Comp. Trib.) [hereinafter *Nielsen*].

16. *Nielsen*, *ibid.* at 241.

17. A variety of quantitative techniques is available, including price correlation analysis, price elasticity analysis and diversion ratio analysis.

- **Switching costs.** The extent to which the transaction costs that buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures and so forth may be sufficient to make switching an unlikely response to a significant and non-transitory price increase.
- **Price relationships and relative price levels.** The absence of a strong correlation in price movements between two products over a significant period of time generally suggests that the products are not in the same relevant market. Similarly, if the prices of one firm have historically constrained the price movements of another, this is an indication that the two firms' products compete in the same market.

3.2.1(b) "Throughout Canada or any area thereof" — Geographic Market Definition

An analysis of the universe of existing competition also has a geographic dimension. The Bureau considers the determination of "throughout Canada or any area thereof" as equivalent to defining the relevant geographic market.¹⁸ This is consistent with the jurisprudence.¹⁹

In addition to drawing on some of the available quantitative techniques used in product market definition, the Bureau also considers certain qualitative factors when determining geographic market definition under the abuse of dominance provisions:

- **The views, strategies, behaviour and identity of buyers.** Considerations relating to convenience or the particular characteristics of

the product (e.g. fragility, perishability) may influence a buyer's choice of supplier in the event of prices rising above competitive levels.

- **Trade views, strategies and behaviour.** Third parties who know the industry in question may provide helpful information regarding past and likely future industry developments that help to define the relevant market.
- **Switching costs.** The extent to which the transaction costs that buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures and so forth may be sufficient to make switching an unlikely response to a significant and non-transitory price increase.
- **Transportation costs.** In general, where prices in a distant area have historically been higher than prices in the relevant geographic area by an amount that exceeds the transportation costs, this is usually an indication that the distant area is in a separate relevant market. However, this may not be conclusive, because the postulated significant and non-transitory price increase above competitive levels may elevate prices to a level above the distant price plus transportation costs. Where it is profitable for distant sellers to ship the product into the relevant market, it is generally assumed that the supplier would likely do so.
- **Price relationships and relative price levels.** The absence of a strong correlation in price movements between two geographic areas over a significant period of time generally suggests that the areas are not in the same relevant market. Similarly, if the prices of distant sellers have historically constrained the price movements of local sellers, this

18. Despite the reference to "throughout Canada or any area thereof," the relevant geographic market, from an antitrust perspective, may include territory outside of Canada.

19. In *NutraSweet*, the Tribunal stated that the relevant geographic market encompassed "an area [that] is sufficiently isolated from price pressures emanating from other areas so that its unique characteristics can result in prices differing significantly for any period of time from those in other areas." See *supra* note 2 at 20-21.

indicates that the distant and local sellers compete in the same market.

- **Shipment patterns.** Significant shipments from one region to another generally suggest that the two regions are in the same geographic market. However, past trading patterns can be a poor indicator of the extent to which sellers in one area constrain sellers in another area, particularly where there is an absence of shipping.
- **Foreign competition.** While the above-noted principles apply equally to domestic and international sources of competition, there may be other considerations when examining the influence of foreign-based suppliers, including tariffs, quotas, regulations, antidumping complaints or duties, government procurement policies, intellectual property laws, exchange rate fluctuations, and international product standardization.

3.2.1(c) *The Cellophane Fallacy*

In defining both product and geographic markets in the context of allegations of an abuse of dominance, the Bureau will assess the extent to which prices would likely be lower than prevailing prices in the absence of the alleged anti-competitive acts. **This means that the current price may not be the appropriate tool to use in defining the relevant market in which the alleged dominant firm competes.**

It is possible that some products that appear to be in the market would not be included in the market at price levels that would have existed in the absence of the anti-competitive practices. To include these products in a market definition would effectively overstate the product market from an antitrust perspective. This is because these products do not discipline the market but rather enter the market only at price levels that are higher than normal competitive levels. A similar situation occurs in defining

the geographic parameters of the market. If the market is defined in terms of price levels reflecting a dominant player, the geographic parameters of the market will be overstated, as they will include areas that could not be included if competitive price levels prevailed. This problem, associated with measuring markets where it is alleged that dominance prevails, was first identified in the context of a case in the United States involving the producers of cellophane. As a result, it is referred to as the “cellophane fallacy.”

Recognizing that market power exists, the Bureau will define the parameters of the product and geographic markets by first estimating what the approximate price level for the product would be in the absence of the alleged anti-competitive practices. With this estimate, the relevant markets can be defined more accurately.

3.2.1(d) *“Substantially or completely control” — Market Power*

Once the universe of existing competitors is delineated, it is necessary to assess the extent to which these rivals constrain any market power that the dominant firm(s) might otherwise possess. The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.²⁰ Market power may also be defined with respect to a material, non-transitory reduction in other factors of competition such as service, quality, variety, advertising and innovation. For ease of reference, market power is referred to here with respect to price increases but should be understood to also include non-price factors of competition. The Bureau normally regards a “considerable” period of time for the purposes

20. This approach was adopted by the Tribunal in *NutraSweet*, *supra* note 2, *Laidlaw*, *supra* note 14, and *Nielsen*, *supra* note 15.

of establishing market power to be one year. This does not mean that the Bureau will not pursue an abuse of dominance case where the exercise of market power has been in place for less than one year. In such instances, there is an analysis of the likelihood that this exercise of market power would continue if the Bureau did not intervene.

The Bureau recognizes that it is difficult to measure market power directly; consequently, a number of indicators — both qualitative and quantitative — of market power are normally relied upon. These indicators include, but are not necessarily limited to, the following:

- market share, including share stability and distribution;
- barriers to entry, including the conduct allegedly engaged in by the dominant firm(s); and
- other market characteristics, including extent of technological change, extent of excess capacity, and customer or supplier countervailing power.

Market Share

The case law indicates that one of the most important factors of market power, along with barriers to entry, is market share.²¹ There is not, however, a definitive numeric market share that implies that a firm has market power. The Bureau has adopted the view that high market share is usually a necessary, but not sufficient, condition to establish market power.

With the focus on control by a single firm or group of firms, the purpose of the market power analysis is to measure the extent to which existing competitors (identified in the market definition exercise described previously) and/or potential competitors (discussed in the following section on entry barriers) or any other relevant factors (such as countervailing customer power) are likely to constrain any exercise of market power. When evaluating joint control, the analysis must consider the factors surrounding the scope and the nature of the coordination of the group of firms that jointly controls the market.

All other things being equal, the larger the share of the market held by remaining competitors, the less likely it is that the firm or group of firms in question would have been, or would be, able to exercise market power. Where remaining competitors have a large market presence, customers could pursue several competitive alternatives if a firm or group of firms attempts to increase price. Defection of a significant fraction of a firm's customer base may be enough to make an increase in price above competitive levels unprofitable.²²

In the contested abuse of dominance cases heard to date,²³ the market shares of the dominant firms were very high, suggesting that in these instances customers had few alternatives to choose from in the event that the dominant firm increased price above competitive levels or otherwise substantially lessened competition.²⁴ In *Tele-Direct*, the Tribunal

21. In *NutraSweet*, *supra* note 2 at 28, the Tribunal states: "While this [the ability to set prices above the competitive level] is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control will vary from case to case."

22. The ability to defect may be mitigated by the speed and ease with which rival firms are able to accommodate increased demand for their products as the market price increases.

23. The cases are *NutraSweet*, *supra* note 2; *Laidlaw*, *supra* note 14; *Nielsen*, *supra* note 15; and *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* [1997], 73 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Tele-Direct*].

24. *NutraSweet* supplied 95 percent of the aspartame market in Canada. *Laidlaw* was found to have market shares between 87 percent and 100 percent in various commercial waste collection markets. *Nielsen* had a 100 percent share of the market for scanner-based market tracking services, providing a prima facie finding of market power, or control, that required evidence of the absence of barriers to entry for rebuttal.

stated that it would require evidence of “extenuating circumstances, in general, ease of entry” to overcome a prima facie determination of control based on market shares of 80 percent and higher in local telephone directory advertising markets. In *Laidlaw*, the Tribunal observed that a market share of less than 50 percent would not give rise to a prima facie finding of dominance, but this does not imply that market power could never be found below 50 percent.

The Bureau considers that a market share of less than 35 percent will normally not give rise to concerns that a firm has engaged, or is engaging in, a practice of anti-competitive acts that is preventing or lessening competition substantially in a market. If a firm has a 35 percent or higher market share, the Bureau will normally continue its investigation.

The two cases involving joint dominance²⁵ were dealt with under consent orders where the element of joint dominance was taken as a given. As a guide, the Bureau will continue its examination when the combined market share of the group of firms alleged to be jointly dominant is equal to or exceeds 60 percent.

In addition to the dominant firm’s market share, the distribution of the remaining market across competitors is also relevant. Other things being equal, a firm’s likelihood of being able to sustain prices above competitive levels increases with its market share, and as the disparity between its market share and the market shares of its competitors increases. Consider the position of a single firm that holds 55 percent of a relevant market. That firm’s ability to exercise market power may be

at a certain level when it faces one competitor with a 45 percent market share, but at a very different level when facing a disparate group of smaller rivals, no one of which has a share larger than 10 percent.

In summary, the Bureau’s general approach with regard to market share is as follows:

- A market share of less than 35 percent will generally not give rise to concerns of market power or dominance.
- A market share of 35 percent or more will generally prompt further examination.
- In the case of a group of firms alleged to be jointly dominant, a combined market share of 60 percent or more will generally prompt further examination.

Barriers to Entry

As noted above, high market share is not in itself sufficient to prove market power. Without barriers to entry, any attempt by a firm with high market share to exercise market power is likely to be met with entry or expansion of existing firms such that the firm with the high market share loses enough customers to its rivals that it is not profitable to attempt to raise prices above competitive levels. In general, entry is likely to be prevented by the presence of absolute cost differences between the incumbent and the entrant, or the need to make investments that are not likely to be recovered if entry is unsuccessful. These investments are referred to as “sunk costs.” As the Tribunal noted in *Laidlaw*, the term “barriers to entry” carries with it the connotation of sustainability.²⁶ An entrant must not only be able to enter, but be able to become a viable competitor.

25. *Canada (Director of Investigation and Research) v. Bank of Montreal* [1996], 68 C.P.R. (3d) 527 (Comp. Trib.) [hereinafter *Interac*] and *Canada (Director of Investigation and Research) v. AGT Director Ltd. et al.* [1994], C.C.T.D. No. 24 Trib. Dec. No CT9402/19 [hereinafter *CANYPS*].

26. *Laidlaw*, *supra* note 14 at 74.

As the market shares of the dominant firm(s) rise, the jurisprudence articulates a relationship between market shares and the standard of proof that will be used in assessing barriers to entry. The Tribunal notes this in both *Nielsen* and *Tele-Direct*. In *Tele-Direct*, where market shares were 80 percent or higher, the Tribunal stated that it would require evidence of “extenuating circumstances, in general, ease of entry” to overcome a prima facie determination of control.²⁷

Let us consider some examples of the issues of entry analysis examined in past Tribunal cases. In *NutraSweet*, the Tribunal found that barriers to entry into the aspartame market were high because of process patents associated with producing aspartame held by incumbents (the patent for aspartame has now expired in Canada), significant economies of scale and sunk costs, and a long start-up time of about two years. In *Laidlaw*, the Tribunal found that barriers to entry into the commercial waste collection industry were not generally high; however, Laidlaw’s various contracting practices had the effect of raising barriers to entry. In *Tele-Direct*, the Tribunal concluded that barriers to entry — aside from targeted “niche” entry — to the telephone directory market were significant, given the requirement of significant sunk costs and the reputation of the incumbent, as well as the incumbent’s affiliation with telephone companies.

3.2.1(e) “One or more persons” — Joint Dominance

The wording of the Act clearly contemplates cases where a group of unaffiliated firms may possess market power even if no single member of the group is dominant by itself. In joint

dominance cases, there are three sources of competition that can defeat the profitability of a price increase. These are competition from existing rivals outside the allegedly jointly dominant group; competition from potential rivals (i.e. entrants) outside the allegedly jointly dominant group; and competition from within the allegedly jointly dominant group. Given this, an additional element of proof is necessary to establish control, or market power, by more than one firm, as compared to the case of a single dominant firm.

The jurisprudence provides only limited insights into the additional evidence necessary to establish control by a group of firms. To date, there have been only two cases involving joint dominance under the Act.²⁸ In both instances, the fact that joint dominance existed was taken as a given and was supported by an explicit agreement.

A group of firms that collectively possesses market power may be able to coordinate its actions in a manner that allows the market price to be profitably increased above the non-coordinated price levels without the firms entering into an explicit agreement. Firms within an oligopoly normally base their decisions on how their rivals have behaved in the past. In addition, firms recognize that their current decisions may affect their rivals’ future reactions. The fact that firms recognize these interactions over a longer time period results in competitive response strategies becoming more complex. It is possible for firms to act in a “consciously parallel” fashion, thereby achieving higher profits than would be the case in a competitive environment.

27. *Tele-Direct*, *supra* note 23 at 83.

28. *Interac* and *CANYPS*, *supra* note 25.

The jurisprudence in respect of the criminal conspiracy provisions is clear in not condemning “conscious parallelism.”²⁹ The Bureau has adopted a similar position with respect to the abuse provisions, recognizing that something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities.

The ability of a group of firms to coordinate actions without entering into an explicit agreement can be addressed under the abuse provisions. To infer control by a group of firms, the Bureau will consider the following:

- (a) whether the group of firms collectively accounts for a large share of the relevant market;
- (b) any evidence that the alleged coordinated behaviour is intended to increase price or is for the purpose of engaging in some form of anti-competitive act;
- (c) any evidence of barriers to entry into the group, or barriers to entrants into the relevant market;
- (d) any evidence based on the particular facts of the case that members of the group have acted to inhibit intra-group rivalry;³⁰ and
- (e) any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

3.2.2 “Have engaged in or are engaging in a practice of anti-competitive acts”

The second element of the abuse of dominance provisions examines whether “that person or those persons have engaged in or are

engaged in a practice of anti-competitive acts.” As noted above, the law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Tribunal. Paragraph 79(1)(c) provides that substantial or complete control (assuming it has been shown to exist) raises competition issues only when it is used in a manner that lessens or prevents competition substantially. Thus, it is the abuse of a dominant position that gives rise to scrutiny under the Act.

Paragraph 79(1)(b) can be usefully divided into two parts. The first part involves showing that there is or has been “a practice.” The second part requires that it be shown that there is an anti-competitive act(s). In regard to the latter part of the element, illustrative examples of business practices that could constitute anti-competitive acts are provided in section 78 (see [Appendix I](#)).

3.2.2(a) Practice

The term “practice” was considered in the context of single firm dominance in the *NutraSweet* case, where the Tribunal adopted a broad view of the term and established that different individual anti-competitive acts, taken together, may constitute a practice.³¹

The Bureau considers 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. For example, a long-term exclusionary contract may effectively prevent or lessen competition even though the contract itself constitutes only one episode of an anti-competitive act. In joint abuse cases, an assessment of whether the anti-competitive act(s)

29. See *R. v. Canadian General Electric* [1974] 17 C.C.C. (2d) 433 and *R. v. Armco* [1974] 21 C.C.C. (2d) 129.

30. Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination.

31. *NutraSweet*, *supra* note 2 at 23.

is sustained and systemic, or has had a lasting impact on the state of competition, would need to consider the pattern of business conduct by several firms.

The wording of the statute clearly indicates that the negative effects on competition may be past, present or future effects. A remedial order may be sought in respect of past practices. However, under subsection 79(6), the Commissioner cannot bring an application before the Tribunal with regard to practices that have ceased for three years or more.

3.2.2(b) *Anti-Competitive Acts*

Section 78 of the Act provides a non-exhaustive list of anti-competitive acts. In addition to these acts, there is some jurisprudence on anti-competitive acts not listed in section 78. The acts in section 78 all lessen competition when engaged in by a dominant firm for an anti-competitive purpose. The Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary reason.³² The purpose or intent of the act may be proven by an inference or a conclusion to be drawn from the facts established in evidence. The verbal or written statements of the personnel of a company are likely to establish subjective intent. Consideration of the act itself may lead to an inferred purpose, because persons are assumed to intend the necessary and foreseeable consequences of their acts. As the Tribunal noted in *Nutrasweet*,³³ in most cases the purpose of the act will have to be inferred from the circumstances.

Section 79 does not, as section 96 of the merger provisions does, provide for an explicit efficiency defence in assessing acts that are considered to be anti-competitive. In situations where the Bureau is satisfied that an anti-competitive act has been established that meets the threshold of substantially lessening or preventing competition in a market, the Bureau will try to resolve the competition issue with the party. If this effort is unsuccessful, the Bureau will bring the matter before the Tribunal.

3.2.3 “The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”

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.”³⁴

The meaning of “lessening competition substantially” is established in the case law. The Tribunal in *NutraSweet* stated that “in essence, the question to be decided is whether the anti-competitive acts engaged in by NSC [NutraSweet] preserve or add to NSC’s market power.”³⁵

32. *NutraSweet*, *supra* note 2 at 34.

33. *NutraSweet*, *supra* note 2 at 35.

34. *Tele-Direct*, *supra* note 23 at 196.

35. *NutraSweet*, *supra* note 2 at 47.

3.2.4 Assessing the Impact of Anti-Competitive Acts

The preservation or enhancement of market power can be achieved in a number of ways. The Bureau follows a non-exhaustive approach in assessing the effect on competition of various types of anti-competitive acts.

A firm can maintain or enhance market power by erecting or strengthening barriers to entry,³⁶ thus inhibiting potential competitors from challenging the market power of the dominant firm. In examining anti-competitive acts that involve the creation or enhancement of barriers of this type, the Bureau will focus its analysis on

determining the state of competition in the market in the absence of these acts. If it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would emerge within a reasonable period of time to challenge the dominance of the firm(s), the Bureau will conclude that the acts in question constitute a substantial lessening or prevention of competition. In assessing the potential to provide effective competition with the removal of the anti-competitive acts, the Bureau considers a reasonable time period to be two years, consistent with the time frame considered acceptable for entry into a market.³⁷

36. In the *Laidlaw* case, the Tribunal concluded that Laidlaw's acquisition of 100 percent of the market in some instances, along with the exclusivity provisions and litigation threats that raised barriers to entry, lessened competition substantially. In *Nielsen*, the Tribunal noted that Nielsen's contracts with its customers were long term and came up for renewal on a staggered basis; an entrant could not obtain the access to a broad supply of data required for effective entry. The Tribunal found that the practices lessened competition substantially.

37. This two-year time frame is consistent with the approach to analysing barriers to entry adopted in the Bureau's *Merger Enforcement Guidelines*.

PART 4: ANTI-COMPETITIVE ACTS: SECTION 78

4.1 THE ECONOMICS OF ANTI-COMPETITIVE ACTS

The Tribunal has, in the NutraSweet decision, made it clear that anti-competitive acts involve actions that are predatory, exclusionary or disciplinary. The Bureau's approach in assessing potentially anti-competitive activities is consistent with the Tribunal's interpretation, but focusses on determining whether the activities in question fall into one or more of the following categories: (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 coordinated behaviour among firms (facilitating practices).

Many of the actions described in section 78 may be undertaken by a dominant firm without resulting in a substantial lessening of competition. For example, vertical acquisitions, discussed in paragraph 78(1)(b), can be pro-competitive because the newly integrated firm becomes a more efficient and effective competitor. Similarly, the introduction by a dominant firm of a new brand in response to entry, described in paragraph 78(1)(d), may well be a competitive response.³⁸ Therefore, in each abuse of dominance case, once the Bureau has established that a dominant firm has engaged in acts that fall under section 78, or in

other acts that are potentially anti-competitive, it will consider whether these acts will result in a substantial lessening of competition.

4.2 RAISING RIVALS' COSTS AND MARKET FORECLOSURE

A dominant firm may undertake a number of strategies that raise the costs of a rival, rendering the rival a less effective competitor. By increasing certain costs of a rival, the dominant firm can have the effect of inducing the rival to raise its prices, allowing the dominant firm to profitably increase its own prices. This strategy will be profitable provided the ultimate price increase raises the dominant firm's revenues sufficiently to offset the costs of the strategy. Similarly, the dominant firm may also undertake a number of strategies that have the effect of eliminating existing competitors from the market, or of deterring entry by excluding current or potential rivals from the inputs necessary to compete. This may involve raising a rival's costs to the point where the rival is unable to remain in the market, but may also include pre-empting key facilities to deter entry. Again, such a strategy will be profitable for the dominant firm, provided the costs of the strategy are offset by the ultimate increase in revenue, or by the prevention of lost revenues due to entry.

38. An example of the pro-competitive potential is found in the Tribunal's decision in *Tele-Direct*. The Commissioner had alleged that Tele-Direct had abused its dominant position by aggressively targeting rivals in markets where entry into the telephone directory services market had occurred. The Commissioner contended that Tele-Direct used its significant profits in other markets to subsidize intense, "near-predatory" competition in those markets involving entry. In rejecting this contention, the Tribunal stated that "targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not."

Section 78 describes various means by which a dominant firm can raise its rivals' costs or exclude a rival from inputs or facilities. Paragraph 78(1)(a) describes vertical margin squeezing, premised on the ability of the dominant firm(s), operating at two levels of the distribution system, to raise the price of an input to a competitor operating only at the downstream level. This is commonly known as a "price squeeze" and may increase rivals' costs. However, this is an enforcement concern only when it harms both competitors and competition. Vertically integrated firm(s) may be more efficient in distribution than non-integrated firms. As a result, it may be difficult for a non-integrated firm to compete with an integrated firm in the downstream market for reasons that have little to do with squeezing. For more discussion of this topic, refer to [Appendix III](#).

Paragraph 78(1)(b) describes the acquisition by a supplier of a customer that would otherwise be available to a competitor of the supplier, or the acquisition by a customer of a supplier that would otherwise be available to a competitor of the customer, for the purposes of impeding or preventing a competitor's entry or eliminating a competitor. Acquisition of a supplier by a dominant firm can allow the dominant firm to raise the price a rival must pay to obtain a key input. Alternatively, acquisition of a supplier can allow the dominant firm to deny access to the newly acquired supplier's products, requiring a rival to purchase inputs from other suppliers at a higher price. Acquisition of a supplier can, through raising a rival's costs, make it a weaker competitor, and may even exclude a rival from the market. Acquisition of a supplier can also have the effect of prohibiting entry, by denying entrants the inputs needed to compete. (Acquisition of a customer by a supplier is dealt with in [section 4.2.1](#).)

Paragraph 78(1)(e) identifies the pre-emption of scarce facilities or resources required by a competitor as an anti-competitive act. For example, the dominant firm(s) may be able to bid up the price of a scarce input to the point where entry is unprofitable. Such a strategy may be profitable to the dominant firm(s) despite the higher price it also pays for the input, because it avoids the dissipation of profits that entry would bring. Alternatively, the dominant firm(s) may raise its rival's costs by pre-empting low cost inputs, forcing the rival to use higher cost inputs. Even if this strategy did not result in the exit of the rival, it could be profitable for the dominant firm if it resulted in the rival being a less effective competitor, allowing the dominant firm to increase its own prices. Pre-emption could also take the form of acquisition or control of the supply of a necessary input in production, such as production sites or facilities that are not easily replicated.

Similarly, paragraph 78(1)(f) describes buying up a product to prevent the erosion of price levels. When applied to a wholesale or input market, such behaviour could have the result of raising a rival's costs by increasing or maintaining the prices at which the rival must purchase its inputs.

The same result can be obtained by the dominant firm requiring or inducing a supplier not to supply a rival, behaviour that is described in paragraph 78(1)(h). This can increase the price at which the rival purchases its inputs and may exclude the rival from the market completely. Effective exclusion may result from exclusive dealing contracts or from contractual practices that create exclusivity. The *Nielsen* case, for example, involved exclusive dealing. Retailers agreed to sell scanner-based data to Nielsen only, which, in combination with a number of other factors, foreclosed entrants from participating in the scanner-based tracking services market.

Other contractual practices that may effectively create exclusivity include requirements contracts, which set out that a party must purchase all its requirements from a particular vendor. A “meet-or-release” clause may also work to discourage a potential supplier from seeking to sell to a buyer, because the potential supplier anticipates that the current suppliers will match the price. A most-favoured-nation (MFN) clause, which requires the seller to give a buyer the best price it offers to any other customer, could also result in exclusivity.³⁹ Such contractual practices can also aid a dominant firm in excluding competitors, by keeping the dominant firm informed about attempted entry or any actions of its rivals.

Although not specifically listed in section 78, refusing to allow a competitor access to an incumbent’s facility, or imposing restrictive terms of access, can constitute an anti-competitive act.

4.2.1 Access to Consumers — Reducing Rivals’ Revenues

Besides excluding a rival from access to necessary inputs or facilities, a dominant firm can engage in activities that limit a rival’s or potential entrant’s ability to attract customers. A dominant firm can implement technology, contracts or other practices that make it costly for a customer to switch to an alternative supplier. By fostering such switching costs, a dominant

firm may be able to foreclose entry or limit the expansion of a competitor.

Paragraph 78(1)(g) describes a dominant firm that adopts product specifications that are incompatible with the products of a rival. Such incompatibility can have the effect of limiting the number of customers willing to purchase from the rival. Similarly, long-term contracts with automatic renewal provisions may create switching costs, thus foreclosing entry. An exclusive buying arrangement with even a subset of the consumers may foreclose entry if, as a result, not enough customers are available to an entrant to justify entering.⁴⁰ Alternatively, acquisition of a customer by a supplier, as described in paragraph 78(1)(b), may foreclose entry by excluding a potential competitor from sufficient customers to make entry profitable.

Abuse of judicial processes may create switching costs, decreasing a rival’s demand. In *Laidlaw*, Laidlaw apparently threatened both its customers and its rivals with litigation. Laidlaw on occasion told customers contemplating switching suppliers that it would sue them for breach of contract as it had done to other customers. In fact, there was no evidence that Laidlaw had ever brought suit. Rivals contemplating servicing Laidlaw’s customers were also threatened with actions for inducing breach of contract. The Tribunal found that this behaviour constituted a practice of anti-competitive acts.

39. For example, in *Nielsen*, sellers of retail scanner data agreed to an MFN clause, which effectively committed the sellers not to sell the data to any other buyer, since another firm (as a duopolist) would not have been able to pay as much for the data as Nielsen (as a monopolist).

40. In *NutraSweet*, the Commissioner alleged that NutraSweet had engaged in a practice of anti-competitive acts by using its U.S. patent on aspartame to exclude rivals from Canada. The Tribunal found that NutraSweet had persuaded a Canadian customer of aspartame to switch from a rival, Tosoh, to NutraSweet by offering rebates to the customer on the basis of aspartame used in products manufactured in the United States and imported into Canada. The rebate would depend on the difference between the U.S. and the Canadian prices. The Tribunal held, among other things, that the fact that NutraSweet was willing to offer the rebate regardless of the size of the U.S.–Canada price differential indicated an intention to limit the expansion of its competitors. It held that the use of the monopoly position conferred by the U.S. patent for anti-competitive purposes was an anti-competitive act. This illustrates how a rebate, which otherwise would be pro-competitive, would not be profitable but for the fact that it prevented the expansion of NutraSweet’s rivals. In *Tele-Direct*, the dominant supplier of business telephone directories, Tele-Direct, induced a supplier of a product called “audiotext” to withhold supply from competing directories. Audiotext was a service providing information, such as the news and weather, which competing directories had linked to their products. The Tribunal observed: “The only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which section 79 is meant to guard.”

4.3 PREDATORY CONDUCT

It is difficult to distinguish predatory pricing and competitive pricing since both, at least initially, involve lower prices. Predatory pricing by a dominant firm normally involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is characterized by high barriers to entry.

Predatory pricing is often described as selling at a price below some measure of cost in order to harm a competitor. Predatory pricing can be profitable to the dominant firm, and hence harmful to competition, if the dominant firm is able to maintain or enhance market power, giving it the ability to recoup the losses from the predatory campaign. This could be achieved by eliminating a rival, if entry barriers would prohibit or discourage potential entrants from constraining the dominant firm from increasing prices post-predation. In the absence of such barriers, predation may be profitable if it deters potential competitors from entering the market for fear of a repeated predatory episode. Such a reputation for predation may also deter entry into other markets in which the dominant firm operates, thus increasing the incentives to engage in predation.

Dominant firms can also engage in predation in order to discipline competitors that have undertaken to challenge the market power of the dominant firm. The intent of disciplinary actions is to convince the target of the actions to cease a particular practice, rather than to

eliminate or exclude the competitor from the market. The net result on competition can be the same as elimination of a rival, if the disciplining results in the elimination of the competitive threat of the target. Consider the example of a competitor seeking to obtain market share by lowering its prices. The dominant firm reacts by engaging in a predatory pricing strategy, aimed not at eliminating the competitor but rather at compelling the competitor to resume pricing at previous levels.

In the case of predatory behaviour by a dominant firm or group of firms, establishing dominance is sufficient to satisfy that market power exists and therefore recoupment is possible. The Bureau will also consider the extent to which the act of predation will deter entry through establishing a reputation for predation.

Having established dominance, the Bureau will consider whether the dominant firm is pricing below some measure of its costs. The Tribunal emphasized the importance of such a price-cost comparison in the *NutraSweet* case.⁴¹ In conducting such price-cost comparisons, the Bureau will include in its measure all costs that are avoidable. That is, the Bureau will consider any costs that could have been avoided by not offering the product or service in the relevant time frame.

Several of the acts listed in section 78 describe predatory behaviour. Paragraph 78(1)(i) refers to an anti-competitive act involving the dominant firm(s) selling “articles at a price lower than acquisition cost for the purpose of eliminating or disciplining a competitor.” While paragraph 78(1)(i) clearly describes a form of predatory pricing, it is limited by its reference

41. *NutraSweet*, *supra* note 2 at 43.

to “articles” and “acquisition cost.” In *NutraSweet*, the Director of Investigation and Research attempted to apply paragraph 78(1)(i) to a manufacturer that was selling its product below its manufacturing cost. The Tribunal rejected this argument as not applicable to manufacturing situations where there is no purchase and resale of articles.⁴² The Tribunal made it clear, however, that predatory pricing could generally be an anti-competitive act for the purpose of section 79.

A variant of predatory pricing may be found in paragraph 78(1)(c), which deals with freight equalization. In this form, predatory pricing occurs when a firm bases freight charges on the distance of a customer from the rival’s plant, as opposed to the distance from the dominant firm’s own plant. By using the rival’s plant as a base point, the dominant firm(s) effectively earns a lower margin on customers located near its rival as compared to customers located near its own plant. This could amount to selective price cutting, that is, price cutting to buyers most likely to deal with the dominant firm’s (firms’) rival(s), with predatory intent.

Paragraph 78(1)(d) indicates that the introduction of “fighting brands” is an anti-competitive act. Fighting brands are introduced by a firm to inflict harm on a rival, either to limit or eliminate the rival’s competitive significance, or to seek to temporarily punish a rival for competing too vigorously. Such brands are typically designed to be close competitors of the rival’s product or services. For example, a dominant firm may open the retail outlets of a fighting brand near the retail outlets of a rival. Similarly, a dominant firm may adopt product

specifications for a fighting brand that are similar to those of a rival. Because fighting brands are designed to provide a product or service that is similar to that provided by the rival, they can be especially effective when used as part of a predatory strategy. Fighting brands were central to the *Eddy Match* case, where *Eddy Match* was found to have introduced new brands of matches intending to eliminate entry to the wooden match market.⁴³

4.4 FACILITATING PRACTICES

Facilitating practices enhance the ability of firms to coordinate their behaviour in order to increase or maintain prices. Thus, a group of firms would employ facilitating practices to ensure cooperation of the group members, which is required to sustain the group’s joint dominance in the relevant market(s). Typically, such practices assist firms in monitoring each other to ensure that no one “cheats” on an arrangement, or allow firms to more effectively punish such deviations.

Examples of facilitating practices that allow firms to more effectively monitor members of the group include pre-announcing price increases and publicizing price lists. Delivered pricing can also be a facilitating practice. Delivered pricing can involve uniform delivered prices, by which firms charge the same delivered price to all customers regardless of location. Alternatively, firms can adopt the same base points from which transportation costs are added. Both forms of delivered pricing simplify price lists and result in customers facing the same price from each firm, thus making pricing more transparent to other firms and facilitating coordinated behaviour.

42. *NutraSweet*, *supra* note 2 at 43.

43. *R. v. Eddy Match Co. Ltd.* [1954], 20 C.P.R. 107 (Que. C.A.).

Contractual arrangements can also be used to enhance transparency and to allow for more effective punishments. “Meet-or-release” clauses can alert a firm to price cutting by other firms, thereby facilitating detection of deviations. Such clauses also allow for punishment by allowing the firm to match the offer, thus preventing the price cutter from making the sale. Similar practices incorporate stronger

punishments, such as a firm promising to beat any rival’s price by 10 percent. MFN clauses effectively commit a firm to punishing itself for offering a selective price cut to a particular customer, since that price cut would have to be offered to all customers with MFN clauses. Thus, MFN clauses can deter selective price cuts and stabilize interdependence among oligopolists.

PART 5: REMEDIES

5.1 ALTERNATIVE CASE RESOLUTIONS

If the Commissioner is satisfied that the evidence supports an application to the Tribunal, a number of options to remedy the situation are available. During the course of an examination or an inquiry, the Commissioner will present to the parties any preliminary concerns regarding the alleged contravention of the Act. The parties are afforded the opportunity to respond to the Commissioner's concerns and, at any time during the course of an examination or inquiry, can propose an alternative means of dealing with the Commissioner's concerns that does not necessitate an application to the Tribunal.

In most circumstances, the Commissioner's preference would be to have any proposed remedy agreed upon by the parties reviewed by the Tribunal pursuant to a consent order application. However, matters are dealt with on a case-by-case basis. Where a party whose conduct is the subject of an examination or inquiry voluntarily changes its business practices in a manner that addresses the Commissioner's concerns, the Commissioner may exercise discretion not to litigate the matter before the Tribunal. In appropriate circumstances, where a party has addressed the Commissioner's concerns, this may be sufficient for the Commissioner to discontinue the examination or inquiry.

In instances where an alternative (to litigation) course of action has been adopted to resolve the competition issues, the Commissioner will make the resolution public to ensure that the process remains transparent and that all interested parties have been informed of the fact that the matter has been resolved, and what means were used.

5.2 ORDERS OF THE COMPETITION TRIBUNAL

The abuse of dominance provisions provide broad powers of remedy to the Tribunal. Where, on application by the Commissioner, the Tribunal finds that the elements of section 79 are met, it may, pursuant to subsection 79(1), make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal finds that an order prohibiting the continuance of anti-competitive practices is not likely to restore competition in the affected market, the Tribunal may, pursuant to subsection 79(2), make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Section 66 of the Act sets out the penalties associated with failing to comply with an order issued by the Tribunal. Any person who contravenes or fails to comply with such an order is guilty of an offence and liable on conviction of an indictment to a fine in the discretion of the court, or to imprisonment for a term not exceeding five years, or to both; or on summary conviction, such a person is liable to a fine not to exceed \$25 000, or to imprisonment for a term not to exceed one year, or to both.

5.3 LIMITATIONS AND EXCEPTIONS

Although the Tribunal has wide latitude to impose remedies under subsection 79(2), subsections 79(3) to 79(7) contain a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner. These provisions are briefly described below.

5.3.1 Subsection 79(3) — “Rights of any person”

Subsection 79(3) places a limitation on the scope of an order under subsection 79(2) to provide for an additional safeguard that protects the rights of persons against whom an order is directed. The intent here is to have an order that is aimed at restoring competition, and not one that goes beyond achieving this objective. In other words, the order should be remedial and not punitive. Subsection 79(3) stipulates that the scope of the order should not interfere with the rights of a person against whom the order is sought more than is needed to restore competition. This restriction is intended to protect existing private contractual relationships between persons, and other proprietary property such as trade secrets, unless a breach of these contracts or secrets is absolutely necessary to restore competition.

5.3.2 Subsection 79(4) — “Superior competitive performance”

Subsection 79(4) is intended to compel the Tribunal to consider whether the lessening of competition is attributable to the superior competitive performance of the dominant firm or firms. It does not call upon the Tribunal to balance superior competitive performance against the effects of anti-competitive acts.⁴⁴ 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.

5.3.3 Subsection 79(5) — “Exercise of intellectual property rights”

Exclusive rights provided by intellectual property law do not of themselves constitute abusive conduct by a dominant firm. Subsection 79(5) is intended to ensure that the legitimate use of intellectual property rights does not constitute an anti-competitive act. However, abuse of those rights could result in a violation of section 79.

5.3.4 Subsection 79(6) — Three-Year Limitation

Subsection 79(6) clarifies the point that no action can be taken against an anti-competitive act by a dominant firm or group of firms three years after the practice has ceased.

5.3.5 Subsection 79(7) — Acts Where Proceedings Have Been Commenced Under Section 45 or Section 92

Subsection 79(7) requires the Commissioner to choose between the conspiracy, the merger or the abuse of dominance provisions when electing to proceed with either a recommendation to the Attorney General (alleging criminal conspiracy) or an application to the Tribunal (under the civil provisions). The subsection codifies for merger, conspiracy and abuse of dominance the principle in common law that no person is to be placed in jeopardy twice for the same or substantially the same cause. The choice of which provision to pursue will depend on the facts of each case and the nature of the remedy sought to alleviate the competition issue.⁴⁵

44. This is quite different from section 96 of the merger provisions, which calls for a balancing of efficiency gains with any substantial lessening or prevention of competition resulting from the merger.

45. Section 45 is the criminal conspiracy provision, and section 92 is the civil provision with respect to mergers.

APPENDIX I: THE ABUSE OF DOMINANCE PROVISIONS OF THE COMPETITION ACT (SECTIONS 78 AND 79)

78. (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:
- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;
 - (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
 - (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
 - (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
 - (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
 - (f) buying up of products to prevent the erosion of existing price levels;
 - (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
 - (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market;
 - (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
 - (j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and
 - (k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.⁴⁶
- (2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

46. See footnote 1.

- (a) specifying acts or conduct for the purpose of paragraph (1)(j); and
 - (b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).
- R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

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

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

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

(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.

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

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Industrial Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

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

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

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

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

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

APPENDIX II: OVERVIEW OF THE ESSENTIAL ELEMENTS ESTABLISHED BY THE CASE LAW

Control

“Control” means “market power” in the economic sense. (*NutraSweet, Laidlaw, Nielsen and Tele-Direct*)

“Market power” is “the ability to set prices above a competitive level for a considerable amount of time.” (*Laidlaw, Nielsen*)

High market share, together with barriers to entry, will typically be sufficient to support a finding of “market power.” (*NutraSweet, Laidlaw, Nielsen and Tele-Direct*)

High market share alone will give rise to a prima facie conclusion that a party is dominant. (*Laidlaw, Nielsen*)

In the absence of barriers to entry, firms with high market shares cannot exercise market power. (*Tele-Direct*)

The existence of sunk costs or economies of scale alone is insufficient to qualify as a barrier to entry. (*NutraSweet, Laidlaw, Nielsen*)

Class or Species of Business

“Class or species of business” is synonymous with “product market” in the economic sense. (*NutraSweet, Laidlaw, Nielsen and Tele-Direct*)

In Canada or an Area Thereof

The words “in Canada or an area thereof” are synonymous with “geographic market” in the economic sense. (*NutraSweet, Laidlaw, Nielsen and Tele-Direct*)

The same test used to define product market (i.e. substitutability) should be used to define geographic market. (*Laidlaw*)

The hypothetical monopolist test provided by the *Merger Enforcement Guidelines* (Competition Bureau, 2000) is inappropriate for defining geographic market in an abuse case, as the issue relates to an existing situation rather than the assessment of a prospective situation, as in a merger. (*Laidlaw*)

Practice of Anti-Competitive Acts

For a “practice” to exist, there must be more than an isolated act. Different anti-competitive acts, taken together, could constitute a “practice.” (*NutraSweet and Nielsen*)

Subjective intent is not required for the Tribunal to conclude that a given practice is anti-competitive. (*NutraSweet, Laidlaw and Tele-Direct*)

In determining whether an alleged anti-competitive act falls within section 78, the nature and purpose of the act and the effect it has had on relevant markets must be determined. The analysis will take into account the commercial interests of the parties and the resulting restriction on competition. (*Nielsen and Tele-Direct*)

In the absence of convincing evidence to the contrary, parties are deemed to intend the effects of their actions. (*Laidlaw and Nielsen*)

The existence or non-existence of legitimate efficiency arguments and business justification are important in determining whether an act is anti-competitive. However, the Tribunal has cautioned that the existence of some legitimate business purpose will not on its own be sufficient to justify the use of anti-competitive acts when a party enjoys substantial market power. (*Nielsen* and *Tele-Direct*)

Substantial Lessening or Prevention of Competition

In order to assess the anti-competitive effect, 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 market share. (*NutraSweet* and *Nielsen*)

The question of substantial lessening of competition can also be equated with the question of whether the anti-competitive acts engaged in “altered the prospects of economically feasible entry.” (*Nielsen*)

Where a firm has a high degree of market power in a market that is uncompetitive to begin with, even a small impact on a competitor will be considered substantial. (*Tele-Direct*)

APPENDIX III: EXCLUSIONARY VERTICAL SQUEEZING

Introduction

The first anti-competitive act listed in section 78 is “squeezing.” This practice is defined in the Act as follows:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market.

The practice described in section 78 is quite specific. It applies to sales by an upstream supplier to a downstream customer with whom that supplier also competes. Squeezing occurs when the supplier raises the wholesale price relative to the retail price, thus squeezing the margin between the wholesale and retail prices. It can also occur when the wholesale price remains the same but the supplier lowers the retail price, compelling his or her customer/competitor to follow suit.

From a competition policy perspective, the concept of squeezing is quite different from the notion of profit margin erosion, which results from the pressures of vigorous competition. If asked, most competitors will complain that their margins are inadequate and that cutthroat competition is to blame. The fact that margins are being squeezed may speak to the vigour of competition in the market concerned, and is not necessarily the result of predatory activity on the part of large firms in the market. Margins may be squeezed when a market is declining, overbuilt or requires rationalization in the face of changing consumer buying patterns. In this case, low margins are an appropriate signal for less efficient firms to exit the market.

The Theory of Anti-Competitive Forms of Squeezing

Section 79 is aimed at squeezing by a dominant firm or group of firms that engages in this practice *for the purpose of* excluding or predating competitors from the market, or disciplining competitors in the market who pose a competitive threat. The purpose of the squeeze is to deter or prevent entry into the downstream market, to confine downstream firms to small niches in the market, or to drive downstream competitors out of the market.

The consequence of an exclusionary squeeze is that downstream competition is lessened to the point that the firm responsible for the squeezing can exercise market power by increasing margins or lowering quality or service. The purpose of an exclusionary squeeze, therefore, is to earn excess profits. This is distinguishable from a normal loss-minimizing response to a lack of demand or changing buying patterns.

Structural Preconditions for Extending Market Power to Another Stage of Production

In assessing whether allegations of price squeezing raise an issue under section 79, the Bureau will examine the structural conditions of the market in question. In the absence of certain structural conditions, squeezing out a downstream competitor will not be a profitable strategy for a dominant integrated supplier. Certain structural conditions must be fulfilled in both the upstream and the downstream markets in order to make a vertical extension of market power a potentially profitable strategy. First, there must be secure and significant unilateral or joint market power upstream (i.e. in the wholesale market).

Otherwise, downstream customers can evade the squeeze by turning to other suppliers. Accordingly, a finding of dominance or joint dominance in the wholesale market is a necessary first step to establishing an anti-competitive price squeeze.

Where no single firm is dominant in the market, but a group of firms coordinates its activities to jointly abuse its collective market power, the coordination itself constitutes an anti-competitive act, as it artificially confers market power to members of a group that would otherwise have to compete with one another.

Establishing a Rationale for Anti-Competitive Squeezing

As previously indicated, the mere observation of margin squeezing or margin erosion is not sufficient to support a conclusion of anti-competitive conduct on the part of one or more large firms. Even where the firms in question may be in a dominant market position, it is necessary to closely analyse their pricing behaviour in order to distinguish conduct that provides grounds for an application to the Tribunal from otherwise legitimate market behaviour. As discussed in this section, the Bureau will contemplate a number of potential economic scenarios as part of its analysis.

In situations where it is established that one supplier (wholesaler) possesses the market power required to exercise control, and that this control has been acquired through means that do not contravene the Act, potential monopoly profits can be extracted simply by charging a monopoly price for the product at the wholesale level. This is not an abuse of market power. In these instances it is not in the supplier's interest to charge a price that would eliminate or discipline his or her customers, as he or she is already extracting the maximum return.

For extension of monopoly power to make sense, it must be shown that domination of one stage of production (e.g. the wholesale stage) is not sufficient; domination of two or more (e.g. the wholesale and retail) stages is necessary. There are several instances in which extension of market power to another stage of production could be profitable.

One such instance is known as the variable proportions case. If the input supplied by the upstream monopoly is not used by the downstream industry in fixed proportions, upstream monopoly power cannot be fully exploited simply by the setting of a monopoly price at wholesale, because the downstream users will substitute away from the monopolist's product as its price is increased. The monopolist would have to force the customer to use the input in higher proportions than would normally be the case.

Other instances in which the extension of market power from one stage to another could be profitable involve evasion of price regulation upstream or the exploitation of opportunities for price discrimination downstream.

When there is imperfect competition at both stages of production, integrated firms will always appear to be squeezing their non-integrated rivals. This is because a vertically integrated firm's markup under imperfectly competitive conditions is always less than the sum of the markups of a downstream firm and any unrelated upstream supplier. Economists refer to this as the double markup problem. Consider the example of a single dominant upstream firm supplying an input to two imperfectly competitive downstream firms that sell their product to consumers. If there is no vertical integration, the upstream firm sells its input to the downstream firms at a price in excess of marginal cost (the standard price in a perfectly competitive

market). The downstream firms charge an additional markup on their product when they sell it to consumers. This is the double markup — a markup at one stage piled on top of a markup at the previous stage.

Suppose that the upstream dominant firm integrates forward, merging with one of the downstream firms while continuing to supply the other non-integrated downstream firm(s). The upstream division of the vertically integrated firm now supplies the downstream division at marginal cost (no markup). The downstream division charges a markup on its sales to consumers. This single markup is less than the sum of the markups formerly charged by the upstream and downstream firms, so the vertically integrated firm's output expands, its price falls and its non-integrated downstream rival loses market share or is forced to lower its price and lose profits. Notwithstanding the loss in profits suffered by the non-integrated downstream rival, consumers and the economy benefit. With the lower combined markup of the integrated firm, non-integrated firms purchasing from integrated firms appear to be squeezed by the integrated firms. Yet this apparent squeezing need not have anything to do with any strategy of excluding them from the market, and would therefore not necessarily be considered an anti-competitive act.

Criteria for Determining Anti-Competitive Squeezing

Clearly, determining when squeezing is anti-competitive involves careful analysis. When presented with allegations of anti-competitive squeezing the Bureau will, once it has been established that the target of the complaint has control of the relevant market(s), consider whether the alleged squeezing has had the effect of substantially lessening competition. Establishing a substantial lessening of

competition will require a determination that the disciplinary, predatory or exclusionary effects of the squeezing result in maintaining or enhancing the market power of the dominant firm or firm engaged in the squeezing. If this can be established, the Bureau will proceed on the assumption that the squeezing is anti-competitive.

There are many different market situations in which one competitor may squeeze the margins of another. Most are consistent with vigorous competition and raise no issue under the Act. The form of squeezing that contravenes section 79 involves situations where a vertically integrated dominant firm or group of firms may find it profitable to squeeze a non-integrated downstream rival either for disciplinary or exclusionary purposes, and where this will ultimately result in higher prices for consumers. The characteristics of these situations are as follows:

- (1) The structural conditions for dominance or joint dominance at the relevant upstream (wholesale) stage of production must be satisfied. These criteria are set out in section 3.2.1(d) of these guidelines. The following conditions are necessary for inferring control by a group of firms:
 - (a) The group of firms collectively accounts for a large share of the relevant market. Because of the inherent difficulties of unaffiliated competitors coordinating in a manner that allows them to exercise market power, the collective market share threshold should be more onerous than in cases involving single-firm dominance.
 - (b) There is evidence that the effect of the action is to increase price or engage in some form of anti-competitive act.

- (c) There is evidence of barriers to entry into the group as well as barriers to entrants into the relevant market. A successful coordinated equilibrium, by definition, raises prices within the group above competitive levels and thus creates increased incentives for outside firms to enter the group. One example of evidence of barriers to entry is the use of exclusionary actions that pre-empt entry into the group. As a rule, establishing such coordination suffers from the same difficulties as establishing the coordinated activity in the first instance; thus there should be evidence of an ability to exclude outside firms (e.g. an asymmetry that provides the jointly dominant firms with a unique advantage over the alleged victim).
- (d) Even if coordinated activity is plausible, and there are sufficient barriers to entry into the group, the prospect of intra-group rivalry (i.e. so-called “cheating”) is often a powerful constraint on the ability of a group of firms to profitably coordinate. Thus there should be concrete evidence that actions have been taken by members of the group to inhibit intra-group rivalry.⁴⁷
- (e) Finally, there should be evidence that a significant number of customers does not have the ability to employ counter-strategies. Large customers have an incentive, and may often have an ability, to structure procurement activities to counter efforts by a group of firms to dampen intra-group rivalry (for example, by using competitive bidding, by arranging secret transactions with select sellers or by purchasing output in discrete volumes in order to undermine the implicit output-sharing rule that is necessary to maintain coordinated conduct).
- (2) It must be established that the elimination, or at least substantial reduction, of competition at the downstream (e.g. retail) stage of production is possible. This requirement can be met by showing that there are entry and re-entry barriers, that there are no close substitutes, and that the dominant firm or group already has a significant share of the relevant downstream market.
- (3) It must be demonstrated that an exclusionary price squeeze has occurred and that it has been sufficiently sustained and systematic to constitute a practice.
- (4) It must be established that the dominant firm has a profit motive for extending its market power to a subsequent stage of production. This requirement can be met by demonstrating that the dominant firm’s ability to exploit its market power at the stage of production it dominates is limited.

47. Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination. At the same time, however, such practices may be adopted for business reasons (such as providing price information to consumers or protecting incentives for relation-specific investments) that are unrelated to coordinated conduct. It is necessary to consider the rationale and likely effects of such practices before they are considered as evidence of joint control.

APPENDIX IV: SUMMARY OF COMPETITION TRIBUNAL DECISIONS

Introduction

This appendix provides a brief summary of the six decisions rendered by the Competition Tribunal since the abuse of dominance provisions were introduced in the *Competition Act* in 1986.⁴⁸ Four of these cases — *NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct* — involved contested applications. The other two cases, *Interac* and *CANYPS*, involved joint abuse and were resolved by way of consent orders. All six of these cases have resulted in an order by the Tribunal.

This summary of the decided cases illustrates the Tribunal's position on the key elements of section 79. It also provides specific examples of the type of conduct and the circumstances that the Tribunal has identified and defined as anti-competitive, and the scope and nature of remedies imposed under section 79.

NUTRASWEET

Key facts

Product market: the artificial sweetener
aspartame
Geographic market: Canada
Market share: 95 percent
Application filed: June 1989
Tribunal order: October 1990

Anti-competitive acts

- contract clauses imposed by NutraSweet requiring or inducing exclusivity:
 - clauses obligating customers to purchase all their aspartame from NutraSweet

- discounts and price allowances granted to customers for use of the NutraSweet logo and name
- promotional allowances awarded where only the NutraSweet product was used
- meet-or-release and most-favoured-nation clauses.

“Substantially lessening competition”

- high market share enjoyed by NutraSweet
- contracts covered 90 percent of the market
- contract exclusivity prevented the entry of competitors
- barriers to entry, including high customer switching costs, sunk costs, a two-year entry period and the economies of scale.

Order

- prohibited NutraSweet from enforcing the contractual terms requiring or inducing exclusivity
- prohibited NutraSweet from entering into future contracts containing these provisions.

Other issues

- The argument made that advantages due to the nonpayment of income taxes and predatory pricing were anti-competitive acts not accepted by the Tribunal.
- No order was made concerning allegations of selling below cost and rebates given to a party to take into account exchange differentials.
- The Tribunal rejected defences raised by NutraSweet of a superior competitive performance and a free rider (i.e. other parties taking advantage of NutraSweet's investment), as well as efficiency and business justifications.

48. *NutraSweet*, *supra* note 2; *Laidlaw*, *supra* note 14; *CANYPS*, *supra* note 25; *Nielsen*, *supra* note 15; *Interac*, *supra* note 25; *Tele-Direct*, *supra* note 23.

LAIDLAW

Key facts

Product market:	commercial waste services, collection and disposal
Geographic market:	four local communities on Vancouver Island
Market share:	87 percent
Application filed:	March 1991
Tribunal order:	January 1992

Anti-competitive acts

- acquisition of competitors
- lengthy non-compete clauses in purchase agreements of competitors
- contracting practices:
 - long-term customer contracts with automatic renewal
 - excessive liquidated damages
 - rights of first refusal
 - intimidation through litigation or its threat to inhibit customers from switching suppliers.

“Substantially lessening competition”

- existence of high prices and increases of these prices, indicating that Laidlaw possessed market power
- contracts between Laidlaw and its customers restricted competition
- high barriers to entry, including Laidlaw’s contracting practices, which erected barriers to the development of the necessary client base for new entrants
- acquisition of competitors created local monopoly.

Order

- Laidlaw barred from further acquisitions in three affected markets for three years
- amendments and deletions made to Laidlaw’s contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination
- customers no longer obligated to disclose bids by competitors
- initial and renewal terms of contracts reduced to one year

- contract termination possible on 30 days’ notice
- notification and information requirements imposed on Laidlaw:
 - customers to be advised that contract clauses subject to the order were no longer to be applied
 - Laidlaw required to explain any amendments of contracts to its customers
 - existence of the order to be made known to customers and managers
 - employees to be notified in writing that compliance with the Act was company policy
 - copies of existing and future contracts to be provided to the Bureau.

Other issues

- Laidlaw advanced economic and business justifications for several of the contractual clauses based upon its investments. The Tribunal found that these clauses could not be justified on the basis of efficiency or consumer benefit. The only effect of the clauses was to ensure that customers remained with Laidlaw, thus creating a barrier to entry.
- Laidlaw argued that the mergers were covered by section 91 of the Act and, as such, could not be anti-competitive under section 78. The Tribunal rejected this proposition.
- The Tribunal condemned the use of litigation or Laidlaw’s threats of litigation as reprehensible and anti-competitive conduct.

NIELSEN

Key facts

Product market:	scanner-based market tracking services
Geographic market:	Canada
Market share:	100 percent
Application filed:	October 1994
Tribunal order:	April 1995

Anti-competitive acts

- the use of exclusive contracts to deny competitors access to scanner data:
 - long-term contracts (three years or longer)
 - most-favoured-nation clause to ensure that no competitor is paid less for data than Nielsen

- strict conditions for termination, including lengthy notification requirements and monetary penalties for early termination
- renewals structured to occur at different times so as to limit the available sources of data, thus creating a barrier to entry
- payment for exclusive access to data, or financial penalties if a retailer supplied data to a competitor.

“Substantially lessening competition”

- 100 percent control by Nielsen, combined with the use of practices designed to bar entry, allowed it to maintain and increase its market power
- Nielsen’s practices raised barriers where they did not formerly exist
- nature of the industry did not permit entry over time, since the data needed for comparison was required from the outset.
- intent of the contracts and results of their operation were anti-competitive.

Order

- amendments imposed to the Nielsen contracts:
 - provisions preventing or limiting the supply of data to any party declared to be null and void
 - clauses promoting exclusivity of scanner data rendered unenforceable
 - inducements to limit the supply of data banned
 - use of the most-favoured-nation clause prohibited for 24 months after the issuance of the order
 - same term imposed on all future contracts signed within 18 months of the date of the order
 - long-term contracts for Nielsen’s services reduced
- Nielsen ordered to provide 15 months of data, calculated from the date requested by a new entrant competitor, Information Resources, Inc.

Other issues

- The Tribunal considered several arguments seeking to justify Nielsen’s practices, but concluded that the denial of access could not be justified on business or efficiency grounds.
- In finding that the acts were anti-competitive, the Tribunal ruled that the existence of a valid business ground did not mitigate the conduct.
- Nielsen argued that its contracts were necessary to prevent a competitor from “free riding” on its investment. This proposition was not accepted by the Tribunal.

TELE-DIRECT

Key facts

Product market: telephone directory advertising
 Geographic market: local markets across Canada
 Market share: 96 percent of advertising space
 25 percent of advertising services
 Application filed: December 1994
 Tribunal order: February 1997

Anti-competitive acts

- tied selling of space in Yellow Pages directories to sales services, including advice, design and administration
- discrimination against independent directory publishers, advertising agencies and consultants as to accounts and commissions
- targeted price reductions and other competitive strategies against competitive directories
- refusal to license trademarks.

“Substantially lessening competition”

- telephone directory advertising is a distinct market with no close substitutes
- Tele-Direct had an overwhelming share of the product market
- entry to the market was not easy.

Order

- Tele-Direct to cease the practice of tying space and services
- Tele-Direct to price space and services separately or offer an acceptable commission for the service function
- Tele-Direct to cease discrimination against consultants and customers who use consultants.

Other issues

- Allegations were dismissed with respect to:
 - targeted anti-competitive acts against publishers, which the Tribunal found to be legitimate competitive responses to entry
 - anti-competitive acts directed against advertising agencies, on the basis that Tele-Direct was not dominant in this sector of the market and there was no substantial prevention or lessening of competition
 - withholding of the Yellow Pages and Walking Fingers logos, which the Tribunal found to be a legitimate exercise of rights under the *Trade-Marks Act*.

INTERAC

Key facts

Product market: services associated with the electronic banking network, on which transactions are made through automated banking machines and debit cards

Geographic market: Canada

Market share: 100 percent

Application filed: December 1995

Tribunal order: June 1996

Anti-competitive acts

- prohibition of new members
- higher membership fees for competing financial services providers
- service fees charged to entities that had no direct connection to the system but were obligated to go through another member
- limitations on price competition and services.

“Substantially lessening competition”

- high barriers to entry and no alternative networks
- limited access to the main system
- limited service and price competition.

Consent order

- required the respondents to amend the by-laws of Interac in order to:
 - remove restrictions on membership by other financial institutions
 - allow indirect access by other commercial entities
 - modify the governance of Interac with respect to the composition of its board
 - modify pricing practices and procedures for approving new network services.

CANYPS (Canadian Yellow Pages Service)

Key facts

Product market: national Yellow Pages advertising

Geographic market: Canada

Market share: 90 percent

Application filed: September 1994

Tribunal order: November 1994

Anti-competitive acts

- restrictions, known as the “head office rule,” imposed on the sale of national advertising, requiring customers to arrange all national Yellow Pages advertising with the publisher serving the province where its head office was located.

“Substantially lessening competition”

- allegation by the Bureau that the arrangements among the members of CANYPS prevented competition between them and prevented the entry of independent sales agents into this market
- 90 percent of market controlled by respondents.

Consent order

- respondents prohibited from:
 - maintaining the head office rule
 - maintaining exclusive selling arrangements
 - refusing to deal with selling companies

- discriminating between selling companies
- refusing to license Yellow Pages trademarks to selling companies
- agreeing on commissions or account eligibility criteria for commissions
- denying selling companies access to rates and other data published by CANYPS
- respondents required to provide the Bureau with minutes of all CANYPS meetings until July 1998, and a standard licensing agreement for trademarks.